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FOREWORD

By its resolution 1814 (XVII) of 18 December 1962, the General Assembly requested the Secretary-General to publish a *Juridical Yearbook* which would include certain documentary materials of a legal character concerning the United Nations and related intergovernmental organizations, and by its resolution 3006 (XXVII) of 18 December 1972, the General Assembly made certain changes in the outline of the *Yearbook*.

Chapters I and II of the present volume—the thirty-ninth of the series—contain legislative texts and treaty provisions relating to the legal status of the United Nations and related intergovernmental organizations. With a few exceptions, the legislative texts and treaty provisions which are included in these two chapters entered into force in 2001. Decisions given in 2001 by international and national tribunals relating to the legal status of the various organizations are found in chapters VII and VIII.

Chapter III contains a general review of the legal activities of the United Nations and related intergovernmental organizations. Each organization has prepared the section which relates to it.

Chapter IV is devoted to treaties concerning international law concluded under the auspices of the organizations concerned during the year in question, whether or not they entered into force in that year. This criterion has been used in order to reduce in some measure the difficulty created by the sometimes considerable time lag between the conclusion of treaties and their publication in the United Nations *Treaty Series* following upon their entry into force. In the case of treaties too voluminous to fit into the format of the *Yearbook*, an easily accessible source is provided.

Finally, the bibliography, which is prepared under the responsibility of the Office of Legal Affairs by the Dag Hammarskjöld Library, lists works and articles of a legal character published in 2001.

All documents published in the *Juridical Yearbook* were supplied by the organizations concerned, with the exception of the legislative texts and judicial decisions in chapters I and VIII, which, unless otherwise indicated, were communicated by Governments at the request of the Secretary-General.

ECA	Economic Commission for Africa
ECE	Economic Commission for Europe
ECLAC	Economic Commission for Latin America and the Caribbean
ESCAP	Economic and Social Commission for Asia and the Pacific
FAO	Food and Agriculture Organization of the United Nations
IAEA	International Atomic Energy Agency
IBRD	International Bank for Reconstruction and Development
ICAO	International Civil Aviation Organization
ICJ	International Court of Justice
ICSID	International Centre for Settlement of Investment Disputes
IDA	International Development Association
IFAD	International Fund for Agricultural Development
IFC	International Finance Corporation
ILC	International Law Commission
ILO	International Labour Organization
IMF	International Monetary Fund
IMO	International Maritime Organization
IPU	Inter-Parliamentary Union
ITU	International Telecommunication Union
JAB	Joint Appeals Board
JDC	Joint Disciplinary Committee
MIGA	Multilateral Investment Guarantee Agency
UNCHS	United Nations Centre for Human Settlements (Habitat)
UNCITRAL	United Nations Commission on International Trade Law
UNCTAD	United Nations Conference on Trade and Development
UNDP	United Nations Development Programme
UNEP	United Nations Environment Programme
UNESCO	United Nations Educational, Scientific and Cultural Organization
UNFPA	United Nations Population Fund
UNHCR	Office of the United Nations High Commissioner for Refugees
UNICEF	United Nations Children's Fund
UNIDO	United Nations Industrial Development Organization
UNITAR	United Nations Institute for Training and Research
UNJSPF	United Nations Joint Staff Pension Fund
UNOPS	United Nations Office for Project Services
UNRWA	United Nations Relief and Works Agency for Palestine Refugees in the Near East
UNU	United Nations University
UPU	Universal Postal Union
WHO	World Health Organization
WIPO	World Intellectual Property Organization
WMO	World Meteorological Organization
WTO	World Trade Organization

Part One

LEGAL STATUS OF THE UNITED NATIONS AND RELATED INTERGOVERNMENTAL ORGANIZATIONS

Chapter I

LEGISLATIVE TEXTS CONCERNING THE LEGAL STATUS OF THE UNITED NATIONS AND RELATED INTERGOVERNMENTAL ORGANIZATIONS

Austria

FEDERAL GOVERNMENT REGULATIONS ON THE EXEMPTION FROM ADVERTISING TAX OF INTERNATIONAL ORGANIZATIONS HAVING THEIR HEADQUARTERS IN AUSTRIA[1]

On the basis of article 1, paragraphs 1 and 2, of the Federal Act on the Granting of Privileges and Immunities to International Organizations, BGB1. No. 677/1977 as amended, and in agreement with the Main Committee of the National Council, the following regulations are issued:

Article 1

Advertising services provided to an international organization having its headquarters in Austria, as referred to in article 1, paragraph 7, of the Federal Act on the Granting of Privileges and Immunities to International Organizations, shall, on submission of a certificate from the Federal Minister for Foreign Affairs (article 2), be exempt from advertising tax in the sense of the Advertising Tax Act, BGB1 I No. 29/2000, as amended.

Article 2

At the request of an eligible international organization, the Federal Minister for Foreign Affairs shall certify that it is an organization having its headquarters in Austria, as referred to in article 1, paragraphs 7 and 8, of the Federal Act on the Granting of Privileges and Immunities to International Organizations.

Article 3

The taxpayer shall include in his records, as referred to in article 5 of the 2000 Advertising Tax Act, the certificate from the Federal Minister for Foreign Affairs (article 2) transmitted to him by the international organization.

NOTES

[1] Transmitted by the Permanent Mission of Austria to the United Nations on 19 August 2002.

Chapter II

TREATY PROVISIONS CONCERNING THE LEGAL STATUS OF THE UNITED NATIONS AND RELATED INTERGOVERNMENTAL ORGANIZATIONS

A. Treaty provisions concerning the legal status of the United Nations

1. CONVENTION ON THE PRIVILEGES AND IMMUNITIES OF THE UNITED NATIONS.[1] APPROVED BY THE GENERAL ASSEMBLY OF THE UNITED NATIONS ON 13 FEBRUARY 1946

As at 31 December 2001, there were 145 States parties to the Convention.[2]

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2. AGREEMENTS RELATING TO INSTALLATIONS AND MEETINGS

(*a*) Agreement between the United Nations and Ethiopia concerning the status of the United Nations Mission in Ethiopia and Eritrea. Signed at New York on 23 March 2001[3]

I. DEFINITIONS

1. For the purpose of the present Agreement the following definitions shall apply:

(*a*) "UNMEE" means the United Nations Mission in Ethiopia and Eritrea established in accordance with Security Council resolution 1312 (2000) and resolution 1320 (2000) with the mandate described in the above-mentioned resolutions.

UNMEE shall consist of:

(i) The "Special Representative" appointed by the Secretary-General of the United Nations with the consent of the Security Council. Any reference to the Special Representative in this Agreement shall, except in paragraph 26, include any member of UNMEE to whom he delegates a specified function or authority;

(ii) A "civilian component" consisting of United Nations officials and of other persons assigned by the Secretary-General to assist the Special Representative or made available by participating States to serve as part of UNMEE;

(iii) A "military component" consisting of military and civilian personnel made available to UNMEE by participating States at the request of the Secretary-General;

(*b*) a "member of UNMEE" means the Special Representative of the Secretary-General and any member of the civilian or military components;

(*c*) "the Government" means the Government of Ethiopia;

(*d*) "the territory" means the territory of Ethiopia;

(*e*) A "participating State" means a State providing personnel, services, equipment, provisions, supplies, material and other goods to any of the above-mentioned components of UNMEE;

(*f*) "the Convention" means the Convention on the Privileges and Immunities of the United Nations adopted by the General Assembly of the United Nations on 13 February 1946;

(*g*) "contractors" means persons, other than members of UNMEE, engaged by the United Nations, including juridical as well as natural persons and their employees and subcontractors, to perform services and/or supply equipment, provisions, supplies, materials and other goods in support of UNMEE activities. Such contractors shall not be considered third-party beneficiaries to this Agreement;

(*h*) "vehicles" means civilian and military vehicles in use by the United Nations and operated by members of UNMEE, participating States and contractors in support of UNMEE activities;

(*i*) "aircraft" means civilian and military aircraft in use by the United Nations and operated by members of UNMEE, participating States and contractors, in support of UNMEE activities;

(*j*) "temporary security zone" means the zone of separation between the Ethiopian and Eritrean forces as defined in paragraph 5 of the report of the Secretary-General of the United Nations to the Security Council of 30 June 2000[4]

II. Application of the present Agreement

2. Unless specifically provided otherwise, the provisions of the present Agreement and any obligation undertaken by the Government or any privilege, immunity, facility or concession granted to UNMEE or any member thereof or to contractors applies in Ethiopia only.

III. Application of the Convention

3. UNMEE, its property, funds and assets, and its members, including the Special Representative, shall enjoy the privileges and immunities specified in the present Agreement as well as those provided for in the Convention, to which Ethiopia is a party.

4. Article II of the Convention, which applies to UNMEE, shall also apply to the property funds and assets of participating States used in connection with UNMEE.

IV. Status of UNMEE

5. UNMEE and its members shall refrain from any action or activity incompatible with the impartial and international nature of their duties or which is inconsistent with the spirit of the present arrangements. UNMEE and its members shall respect all local laws and regulations. The Special Representative shall take all appropriate measures to ensure the observance of those obligations.

6. Without prejudice to the mandate of UNMEE and its international status:

(*a*) The United Nations shall ensure that UNMEE shall conduct its operation in Ethiopia with full respect for the principles and rules of the international conventions applicable to the conduct of military personnel. These international conventions include the four Geneva Conventions of 12 August 1949 and their Additional Protocols of 8 June 1977 and the UNESCO Convention of 14 May 1954 on the Protection of Cultural Property in the event of armed conflict;

(*b*) The Government undertakes to treat at all times the military personnel of UNMEE with full respect for the principles and rules of the international conventions applicable to the treatment of military personnel. These international conventions include the four Geneva Conventions of 12 April 1949 and their Additional Protocols of 8 June 1977. UNMEE and the Government shall therefore ensure that members of their respective military personnel are fully acquainted with the principles and rules of the above-mentioned international instruments.

7. The Government undertakes to respect the exclusively international nature of UNMEE.

United Nations flag, markings and identification

8. The Government recognizes the right of UNMEE to display within Ethiopia the United Nations flag on its headquarters, camps or other premises, vehicles, vessels and otherwise as decided by the Special Representative. Other flags or pennants may be displayed only in exceptional cases. In these cases, UNMEE shall give sympathetic consideration to observations or requests of the Government of Ethiopia.

9. Vehicles, vessels and aircraft of UNMEE shall carry a distinctive United Nations identification, which shall be notified to the Government.

Communications

10. UNMEE shall enjoy the facilities in respect to communications provided in article III of the Convention and shall, in coordination with the Government, use such facilities as may be required for the performance of its task. Issues with respect to communications which may arise and which are not specifically provided for in the present Agreement shall be dealt with pursuant to the relevant provisions of the Convention.

11. Subject to the provisions of paragraph 10:

(*a*) UNMEE shall have the right to install, in consultation with the Government, and operate United Nations radio stations to disseminate information relating to its mandate. UNMEE shall also have the right to install and operate radio sending and receiving stations as well as satellite systems to connect appropriate points within the territory of Ethiopia with each other and with United Nations offices in other countries, and to exchange telephonic, voice, facsimile and other electronic data with the United Nations global telecommunications network. The United Nations radio stations and telecommunication services shall be operated in accordance with the Constitution and Convention of the International Telecommunication Union and its Regulations and the relevant frequencies on which any such station may be operated shall be decided upon in cooperation with the Government.

(*b*) UNMEE shall enjoy, within the territory of Ethiopia, the right to unrestricted communication by radio (including satellite, mobile and hand-held radio), telephone, electronic mail, facsimile or any other means, and of establishing the necessary facilities for maintaining such communications within and between premises of UNMEE, including the laying of cables and land lines and the establishment of fixed and mobile radio sending, receiving and repeater stations. The frequencies on which the radio will operate shall be decided upon in cooperation with the Government. It is understood that connections with the local system of telephone, facsimile and other electronic data may be made only after consultation and in accordance with arrangements with the Government, it being further understood that the use of the local system of telephone, facsimile and other electronic data will be charged at the most favourable rate.

(*c*) UNMEE may make arrangements through its own facilities for the processing and transport of private mail addressed to or emanating from members of UNMEE. The Government shall be informed of the nature of such arrangements and shall not interfere with or apply censorship to the mail of UNMEE or its members. In the event that postal arrangements applying to private mail of members of UNMEE are extended to transfer of currency or the transport of packages and parcels, the conditions under which such operations are conducted shall be agreed with the Government.

(*d*) It is further understood that UNMEE will enjoy the above-mentioned facilities with respect to communications in Ethiopia without the payment of licence or permit fees or any other taxes.

Travel and transport

12. UNMEE and its members as well as contractors shall enjoy, together with vehicles, including vehicles of contractors used exclusively in the performance of their services for UNMEE, vessels, aircraft and equipment, freedom of movement without delay within Ethiopia. That freedom shall, with respect to large movements of personnel, stores, vehicles or aircraft through airports or on railways or roads used for general traffic within Ethiopia, be coordinated with the Government. The Government undertakes to supply UNMEE, where necessary, with maps and other information, including locations of mine fields and other dangers and impediments, which may be useful in facilitating its movements. Freedom of movement shall also include free and direct land and air passage across the lines of the temporary security zone both north and south, for UNMEE and all its members. Free and direct air passage across the lines of the temporary security zone shall be in coordination with the Government.

13. Vehicles shall not be subject to registration or licensing by the Government, provided that all such vehicles shall carry third-party insurance.

14. UNMEE and its members as well as contractors, together with their vehicles, including vehicles of contractors used exclusively in the performance of their services for UNMEE, as well as aircraft, may use roads, bridges, canals and other waters, port facilities, airfields and airspace without the payment of dues, tolls, landing fees, parking fees, overflight fees or charges, including wharfage charges. However, UNMEE will not claim exemption from charges which are in fact charges for services rendered, it being understood that such charges for services rendered will be charged at the most favourable rates.

Privileges and immunities of UNMEE

15. UNMEE, as a subsidiary organ of the United Nations, enjoys the status, privileges and immunities of the United Nations in accordance with the Convention. The provisions of article II of the Convention which apply to UNMEE shall also apply to the property, funds and assets of participating States used in Ethiopia in connection with the national contingents serving in UNMEE, as provided for in paragraph 4 of the present Agreement. The Government recognizes the right of UNMEE in particular:

(*a*) To import, free of duty or other restrictions, equipment, provisions, supplies, fuel and other goods which are for the exclusive and official use of UNMEE or for resale in the commissaries provided for hereinafter;

(*b*) To establish, maintain and operate commissaries at its headquarters, camps and posts for the benefit of the members of UNMEE, but not of locally recruited personnel. Such commissaries may provide goods of a consumable nature and other articles to be specified in advance. The Special Representative shall take all necessary measures to prevent abuse of such commissaries and the sale or resale of such goods to persons other than members of UNMEE, and he shall give sympathetic consideration to observations or requests of the Government concerning the operation of the commissaries;

(*c*) To clear ex customs and excise warehouse, free of duty or other restrictions, equipment, provisions, supplies, fuel and other goods which are for the exclusive and official use of UNMEE or for resale in the commissaries provided for above;

(*d*) To re-export or otherwise dispose of such equipment, as far as it is still usable, all unconsumed provisions, supplies, fuel and other goods so imported or cleared ex customs and excise warehouse which are not transferred, or otherwise disposed of, on terms and conditions to be agreed upon, to the competent local authorities of Ethiopia or to an entity nominated by them.

To the end that such importation, clearances, transfer or exportation may be effected with the least possible delay, a mutually satisfactory procedure, including documentation, shall be agreed between UNMEE and the Government at the earliest possible date.

V. FACILITIES FOR UNMEE AND ITS CONTRACTORS

Premises required for conducting the operational and administrative activities of UNMEE and for accommodating its members

16. The Government shall to the extent possible provide at no cost to the United Nations and in agreement with the Special Representative, such areas for headquarters, camps or other premises as may be necessary for the conduct of the operational and administrative activities of UNMEE. Without prejudice to the fact that all such premises remain Ethiopian territory, they shall be inviolable and subject to the exclusive control and authority of the United Nations. The Government shall guarantee unimpeded access to such United Nations premises. Where United Nations troops are co-located with military personnel of the host country, a permanent, direct and immediate access by UNMEE to those premises shall be guaranteed.

17. The Government undertakes to assist UNMEE as far as possible in obtaining and making available, where applicable, water, electricity and other facilities

free of charge or, where this is not possible, at the most favourable rate, and in the case of interruption or threatened interruption of service, to give as far as is within its powers the same priority to the needs of UNMEE as to essential government services. Where such utilities or facilities are not provided free of charge, payment shall be made by UNMEE on terms to be agreed with the competent authority. UNMEE shall be responsible for the maintenance and upkeep of facilities so provided.

18. UNMEE shall have the right, where necessary, to generate, within its premises, electricity for its use and to transmit and distribute such electricity.

19. The United Nations alone may consent to the entry of any government officials or of any other person who is not a member of UNMEE to such premises.

Provisions, supplies and services, and sanitary arrangements

20. The Government agrees to grant expeditiously all necessary authorizations, permits and licences required for the importation and exportation of equipment, provisions, supplies, fuel, materials and other goods exclusively used in support of UNMEE, including in respect of importation and exportation by contractors, free of any restrictions and without the payment of duties, charges or taxes including value-added tax.

21. The Government undertakes to assist UNMEE as far as possible in obtaining equipment, provisions, supplies, fuel, materials and other goods exclusively used and services from local sources required for its subsistence and operations. In respect of equipment, provisions, supplies, materials and other goods purchased locally by UNMEE or by contractors for the official and exclusive use of UNMEE, the Government shall whenever possible make appropriate administrative arrangements for the remission or return of any excise or tax payable as part of the price. Accordingly, as far as bulk purchases of equipment, provisions, supplies, materials and other goods purchased locally by UNMEE or by contractors for the official and exclusive use of UNMEE are concerned, the Government shall make appropriate administrative arrangements for the remission or return of any excise or tax payable as part of the price. In respect of all other purchases of equipment, provisions, supplies, materials and other goods purchased locally by UNMEE or by contractors for the official and exclusive use of UNMEE, the Government shall undertake to put in place the necessary implementation mechanisms to ensure the remission or return of any excise or tax payable as part of the price.

22. For the proper performance of the services provided by contractors, other than Ethiopian nationals, in support of UNMEE, the Government agrees to provide contractors with facilities concerning their entry into and departure from Ethiopia as well as their repatriation in time of crisis. For this purpose, the Government shall promptly issue to contractors, free of charge and without any restrictions, all necessary visas, licences or permits. Contractors other than Ethiopian nationals shall be accorded exemption from taxes in Ethiopia on the services provided to UNMEE, including corporate, income, social security and other similar taxes arising directly from the provision of such services.

23. UNMEE and the Government shall cooperate with respect to sanitary services and shall extend to each other the fullest cooperation in matters concerning health, particularly with respect to the control of communicable diseases, in accordance with international conventions.

Recruitment of local personnel

24. UNMEE may recruit locally such personnel as it requires. Upon the request of the Special Representative, the Government undertakes to facilitate the recruitment of qualified local staff by UNMEE and to accelerate the process of such recruitment.

Currency

25. The Government undertakes to make available to UNMEE, against reimbursement in mutually acceptable currency, (local) currency required for the use of UNMEE, including the pay of its members, at the rate of exchange most favourable to UNMEE.

VI. Status of the members of UNMEE

Privileges and immunities

26. The Special Representative, the Commander of the military component of UNMEE and such high-ranking members of the Special Representative's staff as may be agreed upon with the Government shall have the status specified in sections 19 and 27 of the Convention, provided that the privileges and immunities therein referred to shall be those accorded to diplomatic envoys by international law.

27. Officials of the United Nations assigned to the civilian component to serve with UNMEE, as well as United Nations Volunteers who shall be assimilated thereto, remain officials of the United Nations entitled to the privileges and immunities of articles V and VII of the Convention.

28. Military observers and civilian personnel other than United Nations officials whose names are for this purpose notified to the Government by the Special Representative shall be considered as experts on mission within the meaning of article VI of the Convention.

29. Military personnel of national contingents assigned to the military component of UNMEE shall have the privileges and immunities specifically provided for in the present Agreement.

30. Unless otherwise specified in the present Agreement, locally recruited personnel of UNMEE shall enjoy the immunities concerning official acts and exemption from taxation and national service obligations provided for in sections 18 (*a*), (*b*) and (*c*) of the Convention.

31. Members of UNMEE shall be exempt from taxation on the pay and emoluments received from the United Nations or from a participating State and any income received from outside Ethiopia. They shall also be exempt from all other direct taxes, except municipal rates for services enjoyed, and from all registration fees and charges.

32. Members of UNMEE shall have the right to import free of duty their personal effects in connection with their arrival in Ethiopia. They shall be subject to the laws and regulations of Ethiopia governing customs and foreign exchange with respect to personal property not required by them by reason of their presence in Ethiopia with UNMEE. Special facilities will be granted by the Government for the speedy processing of entry and exit formalities for all members of UNMEE, including the military component, upon prior written notification. On departure from

Ethiopia, members of UNMEE may, notwithstanding the above-mentioned exchange regulations, take with them such funds as the Special Representative certifies were received in pay and emoluments from the United Nations or from a participating State and are a reasonable residue thereof. Special arrangements shall be made for the implementation of the present provisions in the interests of the Government and the members of UNMEE.

33. The Special Representative shall cooperate with the Government and shall render all assistance within his power in ensuring the observance of the customs and fiscal laws and regulations of Ethiopia by the members of UNMEE, in accordance with the present Agreement.

Entry, residence and departure

34. The Special Representative and members of UNMEE shall, whenever so required by the Special Representative, have the right to enter into, reside in and depart from Ethiopia.

35. The Government of Ethiopia undertakes to facilitate the entry into and departure from Ethiopia of the Special Representative and members of UNMEE and shall be kept informed of such movement. For that purpose, the Special Representative and members of UNMEE shall be exempt from passport and visa regulations and immigration inspection and restrictions as well as payment of any fees or charges on entering into or departing from Ethiopia. They shall also be exempt from any regulations governing the residence of aliens in Ethiopia, including registration, but shall not be considered as acquiring any right to permanent residence or domicile in Ethiopia.

36. For the purpose of such entry or departure, members of UNMEE shall only be required to have: (*a*) an individual or collective movement order issued by or under the authority of the Special Representative or any appropriate authority of a participating State; and (*b*) a personal identity card issued in accordance with paragraph 37 of the present Agreement, except in the case of first entry, when the United Nations laissez passer, national passport or personal identity card issued by the United Nations or appropriate authorities of a participating State shall be accepted in lieu of the said identity card.

Identification

37. The Special Representative shall issue to each member of UNMEE before or as soon as possible after such member's first entry into Ethiopia, as well as to all locally recruited personnel and contractors, a numbered identity card, showing the bearer's name and photograph. Except as provided for in paragraph 36 of the present Agreement, such identity card shall be the only document required of a member of UNMEE.

38. Members of UNMEE as well as locally recruited personnel and contractors shall be required to present, but not to surrender, their UNMEE identity cards upon demand of an appropriate official of the Government.

Uniforms and arms

39. Military members of UNMEE shall wear, while performing official duties, the national military or police uniform of their respective States with standard United Nations accoutrements. United Nations Security Officers and Field Service

Officers may wear the United Nations uniform. The wearing of civilian dress by the above-mentioned members of UNMEE may be authorized by the Special Representative at other times. Military members of UNMEE and United Nations Security Officers designated by the Special Representative may possess and carry arms while on duty in accordance with their orders.

Permits and licences

40. The Government agrees to accept as valid, without tax or fee, a permit or licence issued by the Special Representative for the operation by any member of UNMEE, including locally recruited personnel, of any UNMEE vehicles and for the practice of any profession or occupation in connection with the functioning of UNMEE, provided that no permit to drive a vehicle shall be issued to any person who is not already in possession of an appropriate and valid licence.

41. The Government agrees to accept as valid, and where necessary to validate, free of charge and without any restrictions, licences and certificates already issued by appropriate authorities in other States in respect of aircraft and vessels, including those operated by contractors exclusively for UNMEE. Without prejudice to the foregoing, the Government further agrees to grant expeditiously, free of charge and without any restrictions, necessary authorizations, licences and certificates, where required, for the acquisition, use, operation and maintenance of aircraft and vessels.

42. Without prejudice to the provisions of paragraph 39, the Government further agrees to accept as valid, without tax or fee, a permit or licence issued by the Special Representative to a member of UNMEE for the carrying or use of firearms or ammunition in connection with the functioning of UNMEE.

Military police, arrest and transfer of custody, and mutual assistance

43. The Special Representative shall take all appropriate measures to ensure the maintenance of discipline and good order among members of UNMEE, as well as locally recruited personnel. To this end, personnel designated by the Special Representative shall police the premises of UNMEE and such areas where its members are deployed. Elsewhere such personnel shall be employed only subject to arrangements with the Government and in liaison with it in so far as such deployment is necessary to maintain discipline and order among members of UNMEE.

44. The military police of UNMEE shall have the power of arrest over the military members of UNMEE. Military personnel placed under arrest outside their own contingent areas shall be transferred to their contingent Commander for appropriate disciplinary action. The personnel mentioned in paragraph 43 above may take into custody any other person on the premises of UNMEE. Such other person shall be delivered immediately to the nearest appropriate official of the Government for the purpose of dealing with any offence or disturbance on such premises.

45. Subject to the provisions of paragraphs 26 and 28, officials of the Government may take into custody any member of UNMEE:

(*a*) When so requested by the Special Representative; or

(*b*) When such a member of UNMEE is apprehended in the commission or attempted commission of a criminal offence. Such person shall be delivered immediately, together with any weapons or other item seized, to the nearest appropriate

representative of UNMEE, whereafter the provisions of paragraph 51 shall apply mutatis mutandis.

46. When a person is taken into custody under paragraph 44 or paragraph 45 (*b*), UNMEE or the Government, as the case may be, may make a preliminary interrogation but may not delay the transfer of custody. Following such transfer, the arresting authority shall be given access to the person concerned for further interrogation upon request.

47. UNMEE and the Government shall assist each other in carrying out all necessary investigations into offences in respect of which either or both have an interest, in the production of witnesses and in the collection and production of evidence, including the seizure of and, if appropriate, the handing over of items connected with an offence. The handing over of any such items may be made subject to their return within the terms specified by the authority delivering them. Each shall notify the other of the disposition of any case in the outcome of which the other may have an interest or in which there has been a transfer of custody under the provisions of paragraphs 44 to 46.

48. The Government shall take all appropriate measures to ensure the safety and security of UNMEE and its members. Upon the request of the Special Representative of the Secretary-General, the Government shall provide such security as necessary to protect UNMEE, its property and members during the exercise of their functions.

49. The Government shall ensure the prosecution of persons subject to its criminal jurisdiction who are accused of acts in relation to UNMEE or its members, which, if committed in relation to the forces of the Government or against the local civilian population, would have rendered such acts liable to prosecution.

Jurisdiction

50. All members of UNMEE including locally recruited personnel shall be immune from legal process in respect of words spoken or written and all acts performed by them in their official capacity. Such immunity shall continue even after they cease to be members of or employed by UNMEE and after the expiration of the other provisions of the present Agreement.

51. Should the Government consider that any member of UNMEE has committed a criminal offence, it shall promptly inform the Special Representative and present to him any evidence available to it. Subject to the provisions of paragraph 26:

(*a*) If the accused person is a member of the civilian component or a civilian member of the military component, the Special Representative shall conduct any necessary supplementary inquiry and then agree with the Government whether or not criminal proceedings should be instituted. Failing such agreement the question shall be resolved as provided in paragraph 57 of the present Agreement;

(*b*) Military members of the military component of UNMEE shall be subject to the exclusive jurisdiction of their respective participating States in respect of any criminal offences which may be committed by them in Ethiopia.

52. If any civil proceeding is instituted against a member of UNMEE before any court of Ethiopia, the Special Representative shall be notified immediately, and he shall certify to the court whether or not the proceeding is related to the official duties of such member:

(*a*) If the Special Representative certifies that the proceeding is related to official duties, such proceeding shall be discontinued and the provisions of paragraph 55 of the present Agreement shall apply;

(*b*) If the Special Representative certifies that the proceeding is not related to official duties, the proceeding may continue. If the Special Representative certifies that a member of UNMEE is unable because of official duties or authorized absence to protect his interests in the proceeding, the court shall at the defendant's request suspend the proceeding until the elimination of the disability, but for no more than ninety days. Property of a member of UNMEE that is certified by the Special Representative to be needed by the defendant for the fulfilment of his official duties shall be free from seizure for the satisfaction of a judgement, decision or order. The personal liberty of a member of UNMEE shall not be restricted in a civil proceeding, whether to enforce a judgement, decision or order, to compel an oath or for any other reason.

Deceased members

53. The Special Representative shall have the right to take charge of and dispose of the body of a member of UNMEE who dies in Ethiopia, as well as that member's personal property located within Ethiopia, in accordance with United Nations procedures.

VII. Limitation of liability of the United Nations

54. Third-party claims for property loss or damage and for personal injury, illness or death arising from or directly attributed to it, except for those arising from operational necessity, and which cannot be settled through the internal procedures of the United Nations, shall be settled by the United Nations in the manner provided for in article 55 of the present Agreement, provided that the claim is submitted within six months following the occurrence of the loss, damage or injury, or, if the claimant did not know or could not have reasonably known of such loss or injury, within six months from the time he/she had discovered the loss or injury, but in any event not later than one year after the termination of the mandate of the operation. Upon determination of liability as provided in this Agreement, the United Nations shall pay compensation within such financial limitations as are approved by the General Assembly in its resolution 52/247 of 26 June 1998.

VIII. Settlement of disputes

55. Except as provided in paragraph 57, any dispute or claim of a private law character not resulting from the operational necessity of UNMEE to which UNMEE or any member thereof is a party and over which the courts of Ethiopia do not have jurisdiction because of any provision of the present Agreement shall be settled by a standing claims commission to be established for that purpose. One member of the commission shall be appointed by the Secretary-General of the United Nations, one member by the Government and a chairman jointly by the Secretary-General and the Government. If no agreement as to the chairman is reached within thirty days of the appointment of the first member of the commission, the President of the International Court of Justice may, at the request of either the Secretary-General of the United Nations or the Government, appoint

the chairman. Any vacancy on the commission shall be filled by the same method prescribed for the original appointment, provided that the thirty-day period there prescribed shall start as soon as there is a vacancy in the chairmanship. The commission shall determine its own procedures, provided that any two members shall constitute a quorum for all purposes (except for a period of thirty days after the creation of a vacancy) and all decisions shall require the approval of any two members. The awards of the commission shall be final. The awards of the commission shall be notified to the parties and, if against a member of UNMEE, the Special Representative or the Secretary-General of the United Nations shall use his best endeavours to ensure compliance.

56. Disputes concerning the terms of employment and conditions of service of locally recruited personnel shall be settled by the administrative procedures to be established by the Special Representative.

57. All other disputes between UNMEE and the Government concerning the interpretation or application of the present Agreement shall, unless otherwise agreed by the parties, be submitted to a tribunal of three arbitrators. The provisions relating to the establishment and procedures of the claims commission shall apply, mutatis mutandis, to the establishment and procedures of the tribunal. The decisions of the tribunal shall be final and binding on both parties.

58. All differences between the United Nations and the Government of Ethiopia arising out of the interpretation or application of the present arrangements which involve a question of principle concerning the Convention shall be dealt with in accordance with the procedure of section 30 of the Convention.

IX. Supplemental arrangements

59. The Special Representative and the Government may conclude supplemental arrangements to the present Agreement.

X. Liaison

60. The Special Representative/Commander and the Government shall take appropriate measures to ensure close and reciprocal liaison at every appropriate level.

XI. Miscellaneous provisions

61. Wherever the present Agreement refers to privileges, immunities and rights of UNMEE and to the facilities Ethiopia undertakes to provide to UNMEE, the Government shall have the ultimate responsibility for the implementation and fulfilment of such privileges, immunities, rights and facilities by the appropriate local authorities.

62. The present Agreement shall enter into force upon signature by or for the Secretary-General of the United Nations and the Government.

63. The present Agreement shall remain in force until the departure of the final element of UNMEE from Ethiopia, except that:

(*a*) The provisions of paragraphs 50 and 57 and 58 shall remain in force.

IN WITNESS WHEREOF, the undersigned, being the duly authorized plenipotentiary of the Government and the duly appointed representative of the United Nations, have on behalf of the Parties signed the present Agreement.

DONE at New York on the 23rd day of March 2001.

For the United Nations:
[*Signature*]
Mr. Michael SHEEHAN
Assistant Secretary-General
In Charge of the Department of
Peacekeeping Operations

For the Government of Ethiopia:
[*Signature*]
H. E. Abdul Mejid HUSSEIN
Permanent Representative of Ethiopia
to the United Nations

(*b*) Memorandum of Understanding between the United Nations and the Government of New Zealand contributing resources to the United Nations in East Timor. Signed at New York on 27 April 2001[5]

Whereas, the United Nations Transitional Administration in East Timor (UNTAET) was established pursuant to United Nations Security Council resolution 1272 (1999);

Whereas, at the request of the United Nations, the Government of New Zealand (hereinafter referred to as the "Government") has agreed to contribute personnel, equipment and services for an Aviation Unit to assist the United Nations Transitional Administration in East Timor (UNTAET) to carry out its mandate;

Whereas, the United Nations and the Government wish to establish the terms and conditions of the contribution;

Now therefore, the United Nations and the Government (hereinafter collectively referred to as "the Parties") agree as follows:

Article 1

DEFINITIONS

1. For the purpose of this Memorandum of Understanding, the definitions listed in annex F shall apply.

Article 2

DOCUMENTS CONSTITUTING THE MEMORANDUM OF UNDERSTANDING

2.1. This document, including all of its annexes, constitutes the entire Memorandum of Understanding (hereinafter referred to as "the Memorandum") between the Parties for the provision of personnel, equipment and services in support of UNTAET.

2.2. Annexes:

Annex A. Personnel
1. Requirements
2. Reimbursement
3. General conditions for personnel

Annex B. Major equipment provided by the Government
1. Requirements and reimbursement rates

Article 3

PURPOSE

3. The purpose of this Memorandum is to establish the administrative, logistics and financial terms and conditions to govern the contribution of personnel, equipment and services provided by the Government in support of UNTAET.

Article 4

APPLICATION

4. The present Memorandum shall be applied in conjunction with the Guidelines for Troop Contributors which is annexed hereto as annex G.

Article 5

CONTRIBUTION OF THE GOVERNMENT

5.1. The Government shall contribute to UNTAET the personnel listed in annex A. Any personnel above the level indicated in this Memorandum shall be a national responsibility and thus not subject to reimbursement or other kind of support by the United Nations.

5.2. The Government shall contribute to UNTAET the major equipment listed in annex B. The Government shall ensure that the major equipment and related minor equipment meet the performance standards set out in annex D for the duration of the deployment of such equipment to UNTAET. Any equipment above the level indicated in this Memorandum shall be a national responsibility and thus not subject to reimbursement or other kind of support by the United Nations.

5.3. The Government shall contribute to UNTAET the minor equipment and consumables related to self-sustainment as listed in annex C. The Government shall ensure that the minor equipment and consumables meet the performance standards set out in annex E for the duration of the deployment of such equipment to UNTAET. Any equipment above the level indicated in this Memorandum shall be a national responsibility and thus not subject to reimbursement or other kind of support by the United Nations.

Article 6

REIMBURSEMENT AND SUPPORT FROM THE UNITED NATIONS

6.1. The United Nations shall reimburse the Government in respect of the personnel provided under this Memorandum at the rates stated in annex A, article 2.

6.2. The United Nations shall reimburse the Government for the major equipment provided as listed in annex B. The reimbursement rates for the major equipment shall be reduced proportionately in the event that such equipment does not meet the required performance standards set out in annex D or in the event that the equipment listing is reduced.

6.3. The United Nations shall reimburse the Government for the provision of self-sustainment goods and services at the rates and levels stated in annex C. The reimbursement rates for the self-sustainment shall be reduced proportionately in the event that the contingent does not meet the required performance standards set out in annex E, or in the event that the level of self-sustainment is reduced.

6.4. The payment of the troop costs, the lease and self-sustainment rates will be calculated from the date of arrival of personnel or equipment in the mission area and will remain in effect until the date the personnel and/or equipment ceases to be employed in the mission area as determined by the Organization.

Article 7

GENERAL CONDITIONS

7. The Parties agree that the contribution of the Government as well as the support from the United Nations shall be governed by the general conditions set out in the relevant annexes.

Article 8

SPECIFIC CONDITIONS

8.1. *Environmental condition factor*: 1.0%

8.2. *Intensity of operations factor*: 1.0%

8.3. *Hostile action/forced abandonment factor*: 0.0%

8.4. *Incremental transportation factor*:

The distance between the port of embarkation in the home country and the port of entry in the mission area is estimated at 6,505 kilometres. The factor is set at 1.75% of the reimbursement rates.

8.5. The following locations are the agreed originating location and ports of entry and exit for the purpose of transportation arrangements for the movement of troops and equipment of the main party:

Troops:

Airport of entry/exit: Auckland

Airport of entry/exit (in the area of operations): Dili/Suai

Equipment:

Originating location: Auckland

Port of embarkation/disembarkation: Auckland

Port of embarkation/disembarkation (in the area of operations): Dili/Suai

Article 9

CLAIMS BY THIRD PARTIES

9. The United Nations will be responsible for dealing with any claims by third parties where loss of or damage to their property or death or personal injury, was caused by the personnel or equipment provided by the Government in the performance of services or any other activity or operation under this Memorandum. However, if the loss, damage, death or injury arose from gross negligence or wilful misconduct of the personnel provided by the Government, the Government will be liable for such claims.

Article 10

RECOVERY

10. The Government will reimburse the United Nations for loss of or damage to United Nations-owned equipment and property caused by the personnel or equipment provided by the Government if such loss or damage (*a*) occurred outside the performance of services or any other activity or operation under this Memorandum or (*b*) arose or resulted from gross negligence or wilful misconduct by the personnel of the Government.

Article 11

SUPPLEMENTARY ARRANGEMENTS

11. The Parties may conclude written supplementary arrangements to the present Memorandum.

Article 12

AMENDMENTS

12. Either of the Parties may initiate a review of the level of contribution subject to reimbursement by the United Nations or to the level of national support to ensure compatibility with the operational requirements of the mission and of the Government. The present Memorandum may only be amended by written agreement of the Government and the United Nations.

Article 13

SETTLEMENT OF DISPUTES

13.1. UNTAET shall establish a mechanism within the mission to discuss and resolve amicably by negotiation in a spirit of cooperation differences arising from the application of this Memorandum.

13.2. Disputes that have not been resolved as provided in paragraph 13.1 above shall be referred by the Head of Mission to the United Nations Under-Secretary-General for Peacekeeping Operations. Upon receipt of such notice, the Under-Secretary-General shall institute discussions and consultations with representatives of the Government with a view to reaching an amicable resolution of the dispute.

13.3. Disputes that have not been resolved as provided in paragraph 13.2 above may be submitted to a mutually agreed conciliator or mediator appointed by the President of the International Court of Justice, failing which the dispute may be submitted to arbitration at the request of either Party. Each Party shall appoint one arbitrator, and the two arbitrators so appointed shall appoint a third, who shall be the chairman. If within thirty days of the request for arbitration either Party has not appointed an arbitrator or if within thirty days of the appointment of two arbitrators the third arbitrator has not been appointed, either Party may request the President of the International Court of Justice to appoint an arbitrator. The procedures for the arbitration shall be fixed by the arbitrators, and each Party shall bear its own expenses. The arbitral award shall contain a statement of reasons on which it is based and shall be accepted by the Parties as the final adjudication of the dispute.

Article 14

ENTRY INTO FORCE

14. The present Memorandum shall become effective on 21 February 2000. The financial obligations of the United Nations with respect to reimbursement of personnel, major equipment and self-sustainment rates start from the date of arrival of personnel or serviceable equipment in the mission area, and will remain in effect until the date personnel and/or equipment ceases to be employed in the mission area as determined by the Organization.

Article 15

TERMINATION

15. The modalities for termination shall be as agreed to by the Parties following consultations between the Parties.

IN WITNESS WHEREOF, the United Nations and the Government of New Zealand have signed this Memorandum.

SIGNED in New York on 27 April 2001 in two originals in the English language.

For the United Nations:
[*Signature*]
Mr. Michael SHEEHAN
Assistant Secretary-General
for Logistics, Management and Mine Action
Department of Peacekeeping Operations

For the Government of New Zealand:
[*Signature*]
H.E. Mr. Don MACKAY
Ambassador Extraordinary and
Plenipotentiary
Permanent Representative
of New Zealand

(*c*) Exchange of Letters constituting an agreement concerning arrangements between the United Nations and the Government of Estonia regarding the Joint ECE/Eurostat Work Session on Methodological Issues Involving the Integration of Statistics and Geography, to be held in Tallinn from 25 to 28 September 2001. Signed at Geneva on 21 May 2001 and 7 June 2001[6]

I

LETTER FROM THE UNITED NATIONS

21 May 2001

Sir,

I have the honour to give you below the text of arrangements between the United Nations and the Government of Estonia (hereinafter referred to as "the Government") in connection with the Joint ECE/Eurostat Work Session on Methodological Issues Involving the Integration of Statistics and Geography, of the Economic Commission for Europe, to be held, at the invitation of the Government, in Tallinn, from 25 to 28 September 2001.

Arrangements between the United Nations and the Government of Estonia regarding the Joint ECE/Eurostat Work Session on Methodological Issues Involving the Integration of Statistics and Geography, to be held in Tallinn, from 25 to 28 September 2001

1. Participants in the Work Session will be invited by the Executive Secretary of the United Nations Economic Commission for Europe in accordance with the rules of procedure of the Commission and its subsidiary organs.

2. In accordance with paragraph 17 of General Assembly resolution 47/202 A of 22 December 1992, the Government will assume responsibility for any supplementary expenses arising directly or indirectly from the Work Session, namely:

(*a*) To supply to all United Nations staff members who are to be brought to Tallinn, air tickets, economy class, Geneva-Tallinn-Geneva, to be used on the airlines that cover this itinerary;

(*b*) To supply vouchers for air freight and excess baggage for documents and records; and

(*c*) To pay to all staff, on their arrival in Estonia, according to United Nations rules and regulations, a subsistence allowance in local currency at the Organization's official daily rate applicable at the time of the Work Session, together with terminal expenses up to 108 United States dollars per traveller, in convertible currency, provided that the traveller submits proof of having incurred such expenses.

3. The Government will provide for the Work Session adequate facilities including personnel resources, space and office supplies as described in the attached annex.

4. The Government will be responsible for dealing with any action, claim or other demand against the United Nations arising out of (*a*) injury to person or damage to property in conference or office premises provided for the Work Session; (*b*) the transportation provided by the Government; and (*c*) the employment for the Work Session of personnel provided or arranged by the Government; and the Government shall hold the United Nations and its personnel harmless in respect of any such action, claim or other demand.

5. The Convention of 13 February 1946 on the Privileges and Immunities of the United Nations, to which Estonia is a party, shall be applicable to the Work Session, in particular:

(*a*) The participants shall enjoy the privileges and immunities accorded to experts on mission for the United Nations by article VI of the Convention. Officials of the United Nations participating in or performing functions in connection with the Work Session shall enjoy the privileges and immunities provided under articles V and VII of the Convention;

(*b*) Without prejudice to the provisions of the Convention on the Privileges and Immunities of the United Nations, all participants and persons performing functions in connection with the Work Session shall enjoy such privileges and immunities, facilities and courtesies as are necessary for the independent exercise of their functions in connection with the Work Session;

(*c*) Personnel provided by the Government pursuant to this Agreement shall enjoy immunity from legal process in respect of words spoken or written and any act performed by them in their official capacity in connection with the Work Session;

(*d*) All participants and all persons performing functions in connection with the Work Session shall have the right of unimpeded entry into and exit from Estonia. Visas and entry permits, where required, shall be granted promptly and free of charge.

6. The rooms, offices and related localities and facilities put at the disposal of the Work Session by the Government shall be the Work Session area which will constitute United Nations premises within the meaning of article II, section 3, of the Convention of 13 February 1946.

7. The Government shall notify the local authorities of the convening of the Work Session and request appropriate protection.

8. Any dispute concerning the interpretation or implementation of these arrangements, except for a dispute subject to the appropriate provisions of the Convention on the Privileges and Immunities of the United Nations or of any other applicable agreement, will, unless the parties agree otherwise, be submitted to a tribunal of three arbitrators, one of whom will be appointed by the Secretary-General of the United Nations, one by the Government and the third, who will be the Chairman, by the other two arbitrators. If either party does not appoint an arbitrator within three months of the other party having notified the name of its arbitrator or if the first two arbitrators do not, within three months of the appointment or nomination of the second one of them, appoint the Chairman, then such arbitrator will be nominated by the President of the International Court of Justice at the request of either party to the dispute. Except as otherwise agreed by the parties, the tribunal will adopt its own rules of procedure, provide for the reimbursement of its members and the distribution of expenses between the parties, and take all decisions by a two-thirds majority. Its decisions on all questions of procedure and substance will be final and, even if rendered in default of one of the parties, be binding on both of them.

* * *

I have the honour to propose that this letter and your affirmative answer shall constitute an agreement between the United Nations and the Government of Estonia which shall enter into force on the date of your reply and shall remain in force for the duration of the Work Session and for such additional period as is necessary for its preparation and winding up.

Accept, Sir, the assurances of my highest consideration.

(*Signed*) Vladimir PETROVSKY

II

LETTER FROM THE PERMANENT REPRESENTATIVE OF ESTONIA TO THE UNITED NATIONS OFFICE AT GENEVA

7 June 2001

[See letter I]

I have the honour to confirm on behalf of the Government of Estonia the foregoing arrangements and to agree that your letter and this letter shall be regarded as constituting an agreement between the United Nations and the Government of Estonia, which will enter into force on the date of this reply and shall remain in force for the duration of the Work Session and for such additional period as is necessary for its preparation and winding up.

I avail myself of this opportunity to extend to you assurances of my highest consideration.

(*Signed*) Clyde KULL
Ambassador
Permanent Representative of Estonia
to the United Nations Office and
other International Organizations at Geneva

(*d*) Agreement between the United Nations and the Government of the Republic of South Africa on the arrangements for the World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance. Signed at Geneva on 6 August 2001[7]

The Government of the Republic of South Africa, hereinafter referred to as "the Government"

and

The United Nations,

Considering that the General Assembly of the United Nations, in its resolution 54/154 of 17 December 1999. accepted the invitation of the Government to hold at the International Convention Centre in Durban, South Africa, the World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance, hereinafter referred to as "the Conference",

and

Considering that the General Assembly of the United Nations, in paragraph 17 of its resolution 47/202 A of 22 December 1992, reaffirmed that United Nations bodies may hold sessions away from their established headquarters when a Government, issuing an invitation for a session to be held within its territory, has agreed to defray the actual costs directly or indirectly involved, after consultation with the Secretary-General of the United Nations as to their nature and possible extent, and whereas the Government has agreed to do so,

Agree hereby on the following arrangements for the Conference:

Article I

PLACE AND DATE OF THE CONFERENCE

The Conference shall be held from 31 August to 7 September 2001 in the premises of the International Convention Centre, Durban, and may be preceded on 30 August 2001 by a one-day briefing of representatives of States or of the organizations referred to in paragraph 1 of article II, subject to a decision by the third Preparatory Committee session of the World Conference.

Article II

PARTICIPATION AND ATTENDANCE

1. The Conference shall be open to the participation of the following, upon invitation or designation of the Secretary-General of the Conference:

(*a*) States;

(*b*) Representatives of all regional organizations and regional commissions of the United Nations involved in the preparation of regional meetings, as well as associate members of the regional commissions;

(*c*) Representatives of the specialized and related agencies of the United Nations;

(*d*) Representatives of the United Nations organs, bodies and programmes;

(*e*) Representatives of organizations that have received a standing invitation from the General Assembly to participate in the capacity of observers in the sessions and the work of the Assembly and in all international conferences convened by it;

(*f*) Relevant intergovernmental organizations and other entities;

(*g*) National institutions for the promotion and protection of human rights;

(*h*) Non-governmental organizations in consultative status with the Economic and Social Council of the United Nations;

(*i*) Non-governmental organizations not in consultative status with the Economic and Social Council of the United Nations, accredited under resolution 1996/31 and indigenous organizations accredited under Council resolution 1995/32 authorized to participate;

(*j*) Officials of the United Nations Secretariat;

(*k*) Independent experts and special rapporteurs;

(*l*) Other persons invited by the United Nations.

2. The Secretary-General of the United Nations shall designate the staff members of the United Nations Secretariat to service the Conference and will provide the names of the staff members to the Government.

3. The public meetings of the Conference shall be open to representatives of the information media accredited by the United Nations at its discretion, after consultation with the Government.

4. The Secretary-General of the Conference shall furnish the Government with the lists of the names of the organizations and persons referred to in paragraph 1 of this article on a regular basis and forward this information in due time before the opening of the Conference.

Article III

PREMISES

1. The Government, at its expense, shall provide, appropriately furnish, and maintain in good working order the conference premises referred to in article I, in particular the conference rooms, offices, lounges, documents reproduction, storage and distribution areas, information, press and registration areas, and areas for telecommunications and technical services.

2. The Government shall ensure that the following are available on a commercial basis: banking facilities, post office, telephone, telefax, Internet access and other telecommunication facilities, catering facilities, travel agency, and a secretarial service centre for use by the persons referred to in article II.

3. The Government shall ensure that the premises, facilities and services referred to in paragraphs 1 and 2 above are adequately staffed without cost to the United Nations, and that they shall operate in accordance with the timetable established by the Secretary-General of the Conference. The Government shall ensure that the premises referred to in paragraph 1 above shall remain at the exclusive disposal of the United Nations continuously from 29 August to 9 September 2001.

4. The premises, facilities and services referred to in the above paragraphs of this article are specified in annex I, annex III and annex IV to this Agreement.

Article IV

EQUIPMENT AND SUPPLIES

1. The Government, at its expense, shall provide, install and maintain in good working order the equipment required for the Conference. Subject to availability, the United Nations may make available certain equipment for the Conference.

2. The United Nations shall normally provide, at its expense, the supplies required for the Conference. Where the Government provides any supplies at the request of the United Nations, the latter shall reimburse the former, provided that the amount reimbursed shall not exceed the cost to the United Nations of similar supplies in Geneva.

3. The Government shall bear the cost of transport and insurance, from any United Nations office to the Conference premises and return, in respect of the documents, equipment, supplies and any other items required for the Conference following consultations with the Government and made available by the United Nations. The United Nations, in consultation with the Government, shall determine the mode and route of shipment of such documents, supplies and other items as may be required for the Conference.

4. The equipment and list of supplies to be provided by the Government and the United Nations are described in annex V to this Agreement.

Article V

UTILITIES

The Government shall bear the cost of the utility services necessary for the effective functioning of the Conference premises referred to in article I and article III, such as water and electricity with reference to utilities provided to the Secretariat. The Government shall also bear the cost of communications by telephone made from the

Conference premises as well as the cost of telefax and electronic mail transmission, postage, diplomatic pouch, international communications by telephone between the Conference premises and Geneva or New York for the purpose of the Conference and authorized by or on behalf of the Secretary-General of the Conference.

Article VI

MEDICAL FACILITIES

The Government shall provide, at its expense, within the Conference premises medical facilities to ensure adequate first aid to the persons referred to in article II. The Government shall ensure immediate admission to hospital and transportation from the Conference premises to the hospital for emergency cases, provided that the Government shall not be liable for the cost of any hospital treatment.

Article VII

STAFF MEMBERS OF THE UNITED NATIONS

1. The Secretary-General of the United Nations shall assign a number of staff members to service the Conference. The categories and functions of the staff members are described in annex VI to this Agreement. A certain number of staff members shall be required to work at the International Convention Centre immediately before the opening and after the closing of the Conference.

2. The United Nations, in consultation with the Government, shall arrange the travel of its staff members assigned to plan for or to service the Conference, in accordance with its Rules and Regulations and administrative practices regarding the route, mode of travel, standard of travel, transit and excess baggage. The United Nations staff referred to in article II, paragraph 2, will be entitled to an appropriate class of travel in accordance with United Nations Rules and Regulations.

3. The Government shall bear the cost of travel of staff members referred to in paragraph 2 above, from the United Nations offices where they are stationed to the site for the Conference, which shall include the transportation expenses, transit expenses, terminal expenses and a baggage allowance of 10 kilograms, if required and in accordance with the Rules and Regulations of the United Nations.

4. The Government shall bear the cost of the daily subsistence allowance which the United Nations pays to its staff members assigned to plan for or to service the Conference. The United Nations shall establish the rate of the subsistence allowance to be paid to its staff members assigned to plan for or service the Conference in accordance with its Rules and Regulations and administrative practices and in the light of the cost of accommodation and the cost of living. The rate of the daily subsistence allowance to be paid to such staff members shall be the equivalent of the provisionally estimated amount of US$ 68 provided that for the ranks D-1 and D-2 an additional 15 per cent and for the ranks ASG and USG an additional 40 per cent shall be added to the said amount. Fifty per cent (50%) of the amount shall be paid as an allowance in United States dollars as a travel advance to each staff member. The remaining 50 per cent of the amount shall be used by the Government to pay for the provision of accommodation in accordance with article IX, paragraph 1.

5. The United Nations shall pay salaries and related allowances of its staff members assigned to plan for or to service the Conference in accordance with its Rules and Regulations and administrative practices.

Article VIII

SECRETARIAT AND LOCAL STAFF

1. The Government shall establish a secretariat for the Conference. The Head of the secretariat shall be responsible, in consultation with the Secretary-General of the Conference, for making and carrying out the local arrangements required for the effective functioning of the Conference in accordance with this Agreement.

2. The Government shall recruit and provide at its expense the local staff required for the Conference, in consultation with the Secretary-General of the Conference. The estimated number of local staff and their number in each category are specified in annex VII to this Agreement.

3. The local staff, employed under local employment regulations, shall, for the duration of the Conference, be under the supervision of the Secretary-General of the Conference and shall be required to work in accordance with the calendar and time schedule established by her, which may involve work at night and during weekends. A certain number of local staff shall be required to work before the opening and after the closure of the Conference.

Article IX

ACCOMMODATION AND LIAISON SERVICE

1. The Government shall provide at its cost (which shall include taxes) suitable hotel accommodation for the assigned staff members referred to in article VII, paragraph 1.

2. The Government shall ensure that suitable accommodation in hotels or residences is available at reasonable commercial rates for the persons referred to in article II and shall assist those concerned in obtaining such accommodation.

3. The Government shall provide a liaison service at the airport to facilitate the arrival and departure of the persons referred to in article II.

Article X

LOCAL TRANSPORT

1. The Government shall provide, at its expense, for persons referred to in article II transport from the airport to the designated hotels as well as a shuttle service between these hotels and the Conference premises, provided that hotel reservations are made through the conference organizer. Arrangements for the local transport of the international United Nations staff are specified in annex IV to the Agreement.

2. The Government shall provide, at its expense, an adequate number of vehicles with drivers for official use by the United Nations as specified in annex IV to the Agreement.

Article XI

FINANCIAL ARRANGEMENTS

1. The Government, in addition to the financial obligations provided for elsewhere in this Agreement, shall, in accordance with paragraph 17 of General Assembly resolution 47/202 A of 22 December 1992, bear the actual additional costs directly or indirectly involved in holding the Conference at the International

Convention Centre, Durban, rather than at Geneva. Such costs, which are provisionally estimated at US$ 1,224,530, shall include but not be restricted to the actual additional costs of return travel and the related entitlements as well as the daily subsistence allowance of the United Nations staff members assigned to plan for or to service the Conference, the cost of the planning missions, and the cost of shipping of documents, equipment and supplies from any United Nations office to the Conference premises and return. The estimates set out in annex VIII to this Agreement are tentative and subject to the provisions of this article.

2. The Government shall, not later than 30 days after the signing of this Agreement, deposit with the United Nations the sum of US$ 1,224,530 specified in annex VIII to the Agreement. If the full deposit does not cover the expenditure, the Government shall make further advances as requested by the United Nations so that the latter will not at any time have to finance temporarily from its cash resources the extra costs that are the responsibility of the Government.

3. The deposit and the advances required by paragraph 2 of this article shall be used only to pay the obligations of the United Nations as set out in this Agreement in respect of the Conference.

4. After the Conference, the United Nations shall give the Government a detailed set of accounts showing the actual additional costs incurred by the United Nations and to be borne by the Government pursuant to paragraph 1 of this article, as soon as possible and not later than 15 October 2001. These costs shall be expressed in United States dollars, using the United Nations official rate of exchange prevailing at the time the payments were made. The United Nations, on the basis of this detailed set of accounts, shall refund to the Government any funds unspent out of the deposit or the advances required by paragraph 2 of this article. Should the actual additional costs exceed the deposit, the Government shall remit the outstanding balance of the United States dollars within one month of the receipt of the detailed accounts. The final accounts shall be subject to audit as provided in the Financial Regulations and Rules of the United Nations, and the final adjustment of account shall be subject to any observations which may arise from the audit carried out by the Board of Auditors, whose determination shall be accepted as final by both the Government and the United Nations.

Article XII

POLICE PROTECTION

The Government shall furnish at its own expense such police protection as is required to ensure the efficient functioning of the Conference in an atmosphere of security and tranquillity free from interference of any kind. While such police services shall be under the direct supervision and control of a senior official designated by the Government, this officer shall work in close cooperation with a senior official designated by the Secretary-General of the Conference. Further specifications are contained in annex IX to this Agreement.

Article XIII

LIABILITY

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

(*a*) Death, injury to persons or damage to or loss of property in the Conference premises referred to in article I and article III that are provided by or are under the control of the Government;

(*b*) Death, injury to persons or damage to or loss of property caused by or in using, the transport services referred to in article X that are provided by or are under the control of the Government;

(*c*) The employment for the Conference of the local staff provided by the Government under article VIII.

2. The Government shall indemnify and hold harmless the United Nations and its officials, performing duties in their official capacity, in respect of any such action, claim or other demand contemplated in paragraph 1 of this article, except where the Government and the United Nations agree that such action, claim or other demand evolved from the gross negligence or wilful misconduct of an official of the United Nations.

3. The United Nations shall render reasonable assistance and shall exert its best efforts to make available to the Government relevant information, evidence and documents which are in the possession or under the control of the United Nations, to enable the Government to deal with any action, claim or other demand contemplated in paragraph 1 of this article.

Article XIV

PRIVILEGES AND IMMUNITIES

1. The Convention on the Privileges and Immunities of the United Nations, adopted by the General Assembly on 13 February 1946, shall be applicable, mutatis mutandis, in respect of the Conference. In particular, the representatives of States referred to in paragraph 1 (*a*) of article II above shall enjoy the privileges and immunities provided under article IV of the Convention; the officials of the United Nations performing functions in connection with the Conference, referred to in paragraph 1 (*j*) and paragraph 2 of article II, shall enjoy the privileges and immunities provided under articles V and VII of the Convention; and any experts on mission for the United Nations in connection with the Conference, referred to in paragraph 1 (*k*) of article II, shall enjoy the privileges and immunities provided under articles VI and VII of the Convention.

2. In carrying out their functions for the United Nations, the representatives or observers referred to in paragraph 1 (*b*), (*d*), (*e*), (*f*), (*g*), (*h*), (*i*) and (*l*) of article II shall enjoy immunity from legal process in carrying out their functions for the United Nations, in respect of words spoken or written and any act performed by them in connection with their participation in the Conference.

3. In carrying out their functions for the United Nations, the representatives or observers of the specialized agencies referred to in paragraph 1 (*c*) of article II shall enjoy the privileges and immunities provided under articles VI and VIII of the Convention on the Privileges and Immunities of the Specialized Agencies, approved by the General Assembly of the United Nations on 21 November 1947, which shall apply, mutatis mutandis, to the Conference.

4. In carrying out their functions for the United Nations, the local staff provided by the Government under article VIII above shall enjoy immunity from legal process in respect of words spoken or written and any act performed by them in their official capacity in connection with the Conference.

5. Without prejudice to the preceding paragraphs of this article, all persons performing functions in connection with the Conference, and all those invited to the Conference, shall enjoy the privileges, immunities and facilities necessary for the exercise of their functions in connection with the Conference.

6. All persons referred to in article II shall have the right of entry into and exit from South Africa, and no impediment shall be imposed on their transit to and from the Conference area. Visas and entry permits, where required, shall be granted to all those invited to the Conference free of charge, as speedily as possible and not later than two weeks before the date of the opening of the Conference.

7. For the purpose of the application of the Convention on the Privileges and Immunities of the United Nations, the Conference premises specified in article I and article III above shall be deemed to constitute premises of the United Nations in the sense of section 3 of the Convention, and access thereto shall be subject to the authority and control of the United Nations, which authorization shall not be withheld in cases of emergency. The premises shall be inviolable for the duration of the Conference, including the preparatory stage and the winding-up, from 29 August to 9 September 2001.

8. All persons referred to in article II shall have the right to take out of South Africa at the time of their departure, without any restrictions, any unexpended portions of the funds they brought into South Africa and to convert any such funds at the prevailing market rate.

9. The Government shall exempt from customs duties and prohibitions and restrictions on imports and exports in respect of articles imported and exported by the United Nations for its official use, including technical equipment accompanying representatives of information media referred to in article II. The Government shall issue without delay the necessary import/export for this purpose. It is understood, however, that articles imported under such exemption will not be sold in South Africa except under conditions agreed with the Government.

Article XV

SETTLEMENT OF DISPUTES

Any dispute between the Government and the United Nations concerning the interpretation or application of this Agreement that is not settled by negotiation or other agreed mode of settlement shall be referred at the request of either Party for final decision to a tribunal of three arbitrators, one to be appointed by the Government, one to be appointed by the Secretary-General of the United Nations, and the third, who shall be the chairman, to be chosen by the first two. If either Party fails to appoint an arbitrator within 90 days of the appointment by the other Party, or if these two arbitrators should fail to agree on the third arbitrator within 90 days of their appointment, the President of the International Court of Justice may make any necessary appointments at the request of either Party. Except as otherwise agreed by the Parties, the tribunal shall adopt its own rules of procedure, provide for the reimbursement of its members and the distribution of expenses between the Parties and take all decisions by a two-thirds majority. Its decisions on all questions of procedure and substance shall be final and, even if rendered in default of one of the Parties, be binding on both of them. However, any such dispute that involves a question regulated by the Convention on the Privileges and Immunities of the United Nations shall be dealt with in accordance with section 30 of the Convention.

Article XVI

FINAL PROVISION

1. This Agreement may be modified by written agreement between the Government and the United Nations.

2. This Agreement shall enter into force immediately upon signature and shall remain in force for the duration of the Conference and for such a period as is necessary for all matters relating to and of its provisions to be settled.

DONE at Geneva on 6 August 2001 in duplicate in the English language.

For the United Nations:
[*Signature*]
Mary ROBINSON
High Commissioner for Human Rights and Secretary-General of the World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance

For the Government of the Republic of South Africa:
[*Signature*]
NC DLAMINI-ZUMA
Minister of Foreign Affairs

(*e*) Agreement between the United Nations and the Government of the Republic of Nicaragua regarding the Third Meeting of the States Parties to the Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-personnel Mines and on Their Destruction. Signed at New York on 23 August 2001[8]

Whereas the Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-personnel Mines and on Their Destruction was concluded at Oslo on 18 September 1997 ("the Convention");

Whereas the Convention, pursuant to its article 17, paragraph 1, entered into force on 1 March 1999, i.e., the first day of the sixth month after the month in which the 40th instrument of ratification, acceptance, approval or accession had been deposited;

Whereas, in accordance with article 11, paragraph 2, of the Convention, the First Meeting of the States Parties was convened by the Secretary-General of the United Nations within one year after the entry into force of the Convention in Maputo, Mozambique, from 3 to 7 May 1999;

Whereas, in accordance with article 11, paragraph 2, of the Convention, subsequent meetings shall be convened by the Secretary-General of the United Nations annually until the first Review Conference;

Whereas the General Assembly of the United Nations, by its resolution 55/33 V of 20 November 2000, welcomed the generous offer of the Government of Nicaragua (hereinafter "the Government") to act as host for the Third Meeting of the States Parties ("Third Meeting");

Whereas the General Assembly, by the above-mentioned resolution, also requested the Secretary-General of the United Nations, in accordance with article 11, paragraph 2, of the Convention, to undertake the preparations necessary to convene the Third Meeting at Managua from 18 to 21 September 2001;

Whereas the General Assembly, by the same resolution, requested the Secretary-General, on behalf of States parties and in accordance with article 11, paragraph 4, of the Convention, to invite States not parties to the Convention, as well as the United Nations, other relevant international organizations or institutions, regional organizations, the International Committee of the Red Cross and relevant non-governmental organizations to attend the Meeting as observers in accordance with the agreed Rules of Procedure;

Whereas, pursuant to article 14, paragraph 1, of the Convention, the costs of the Third Meeting shall be borne by the States Parties and States not parties to the Convention participating therein, in accordance with the United Nations scale of assessments adjusted appropriately;

Now therefore, the United Nations and the Government hereby agree as follows:

Article I

Date and place of the Third Meeting

The Third Meeting shall be held at the Intercontinental Managua Hotel Conference Centre in Managua from 18 to 21 September 2001.

Article II

Attendance at the Third Meeting

1. In accordance with the provisions of the Convention, the Third Meeting shall be open to:

(*a*) Representatives of the States Parties to the Convention;

(*b*) Representatives of States not parties to the Convention;

(*c*) Representatives of the United Nations;

(*d*) Representatives of other relevant international organizations or institutions;

(*e*) Representatives of regional organizations;

(*f*) Representatives of the International Committee of the Red Cross;

(*g*) Representatives of relevant non-governmental organizations.

2. The public meetings of the Third Meeting shall be open to representatives of the information media accredited to the Third Meeting of the States Parties in consultation with the Government.

Article III

Premises, equipment, utilities and supplies

1. The Government shall make available such conference space and facilities as are necessary for the holding of the Third Meeting, including conference rooms for informal meetings, office and storage space, lounges and other related facilities as well as necessary space for registration areas and exhibition areas (press, television and radio) as specified in the annex to the present Agreement.

2. The premises referred to above shall remain at the disposal of the United Nations for the purposes of servicing the Third Meeting, 24 hours a day throughout the Third Meeting. Necessary parts of the premises shall be put at the disposition of the United Nations by the Government for such reasonable additional time in advance of the opening and after the closing of the Third Meeting as is agreed between the United Nations and the Government for the preparation and settlement of all matters connected with the Third Meeting but which in any case shall be no less than 8 days or greater than 10 days in advance of and no more than 2 days following the Third Meeting.

3. The conference rooms shall be equipped for simultaneous interpretation and sound recordings in the six languages of the Convention. Each interpretation booth shall have the capacity to switch to all seven channels (the "floor", i.e., the speaker, plus each channel). The Arabic and Chinese booths require a system whereby the interpreters can override either the English or French booth so that the Arabic and Chinese interpreters can work into those languages without physically moving to either booth.

4. The Government shall make available and maintain the equipment necessary for the conduct of the Third Meeting as described in the annex. The Government shall also arrange for the furnishing, equipping and maintenance in good repair of all premises and equipment in an adequate manner for the effective conduct of the Third Meeting.

5. The Government shall make available all stationery supplies as described in the annex for the adequate functioning of the Third Meeting.

6. The Government shall make available all necessary utility services such as water and electricity, as well as local telephone communications of the Third Meeting and communications by telex, telefax, electronic mail transmission as well as telephone with United Nations Headquarters in New York when such communications are authorized by the Executive Secretary of the Third Meeting or the persons delegated by him or her.

7. The Government shall ensure access at or within close proximity of, the Third Meeting on a commercial basis, to banking, postal (stamps and mail box only), telephone, telefax and other telecommunications facilities, catering facilities, travel agency and a secretarial service centre equipped in consultation with the United Nations, for use by the participants referred to in article II.

8. The Government shall install and make available press facilities for written coverage, film coverage, interviews and programme preparation, a press working area and a briefing room for correspondents.

9. Without prejudice to the present article, the Government and the United Nations can mutually agree to change the specifications detailed in the annex, in order to secure the most adequate usage of the premises and equipment of the Third Meeting.

Article IV

ACCOMMODATION

The Government shall ensure that adequate accommodation in hotels or residences is available upon reasonable notice at commercial rates for persons participating in or attending the Third Meeting. The Government shall ensure that, upon

reasonable notice, sufficient block bookings are made in appropriate hotels to accommodate United Nations staff.

Article V

MEDICAL FACILITIES

The Government shall make available, at its own cost, adequate medical facilities for first aid in emergencies within the Third Meeting area. As to immediate access and admission to hospital, they shall be assured by the Government whenever required, and the necessary transport shall be constantly available on call.

Article VI

TRANSPORT

1. The Government shall provide transport between the Managua International Airport and the conference area and principal hotels for the members of the United Nations Secretariat servicing the conference upon their arrival and departure, as well as transportation to and from the hotel and the Third Meeting premises for the duration of the Third Meeting and a reasonable time before and after for the preparation of and settlement of all matters related to the Third Meeting. The Government shall ensure that such official transportation is expeditiously provided as required for the appropriate servicing of the Third Meeting.

2. The Government shall ensure the availability of transport for all participants and those attending the conference between the Managua International Airport, the principal hotels and the conference area.

3. The Government shall make available at its own cost appropriate transportation for heads of delegations who are ministers, United Nations senior officials and senior officials of regional or international organizations to and from the airport as well as to and from the Third Meeting premises as required.

Article VII

POLICE PROTECTION

The Government shall make available such police protection as may be required to ensure the efficient functioning of the Third Meeting without interference of any kind. Such police service shall be under the direct supervision and control of a senior officer to be provided by the Government and shall work in close cooperation with the Security Liaison Officer designated by the United Nations for the purpose, so as to ensure a proper atmosphere of security and tranquillity. Equipment needs for the entire security arrangements shall be determined by the Government. As a minimum, a radio communication system and appropriate units for metal detecting shall be made available.

Article VIII

LOCAL PERSONNEL

1. The Government shall make available at its own cost an official who shall act as a liaison officer between the Government and the United Nations, and shall be responsible and have the requisite authority, in consultation with the United

Nations, for carrying out the administrative and personnel arrangements for the Third Meeting as required under this Agreement.

2. The Government shall make available at its own cost and place under the general supervision of the United Nations the local personnel required:

(*a*) To ensure the proper functioning of the equipment and facilities referred to in article III above;

(*b*) To reproduce and distribute the documents and press releases needed by the Third Meeting;

(*c*) To work as secretaries, typists, clerks, messengers, conference room ushers, drivers, telephone operators.

Detailed requirements for local personnel will be determined by the United Nations in consultation with the Government and are specified in the annex. The United Nations will advise the Government of the required duration for the engagement of locally engaged staff.

3. The Government shall make available at its own cost, at the request of the United Nations, such of the local staff referred to in this article as might be required by the United Nations, before the opening and after the closing of the Third Meeting, for a period of at least seven days in advance and five days following.

4. The Government shall make available at its own cost, at the request of the United Nations, adequate numbers of the local personnel referred to in paragraph 2 above to maintain such night services as may be required in connection with the Third Meeting.

Article IX

FINANCIAL ARRANGEMENTS

1. In accordance with article 14 of the Convention, all costs of the Third Meeting shall be borne by the States Parties and States not parties to the Convention participating therein, in accordance with the United Nations scale of assessments adjusted appropriately. Notwithstanding the above, the Government has agreed to bear, with the support of other Governments, costs associated with the provision of some services as provided for in the present Agreement.

2. In order to enable the Government to defray the costs of facilities, equipment, utilities, supplies and services which are to be made available by the Government pursuant to this Agreement otherwise than at its own cost, the United Nations shall arrange with the UNDP Resident Representative in Managua to provide the Government with assistance in procurement and financial administration based on the estimated costs for the host country requirements as approved by the States Parties and shall transfer the relevant funds to the UNDP Resident Representative in Managua for the disbursement of the host country requirements, specifically, conference facilities, interpretation system, computers and printers, telephone and Internet, fax machines, photocopiers, additional furnishings and supplies. All disbursements made by the UNDP Resident Representative in Managua shall be made in accordance with the Financial Regulations and Rules of the United Nations and upon presentation of appropriate receipts, purchase orders, vendor invoices and upon confirmation that goods or services have been received or performed.

3. The United Nations shall provide the States Parties with an accounting of all funds received and disbursed, including amounts disbursed through the UNDP

Resident Representative in Managua. The statement of accounts shall be subject to audit as provided in the Financial Regulations and Rules of the United Nations.

4. Actual costs shall be determined after the closure of the Meeting and all related expenditures have been reported and recorded in the accounts of the United Nations.

Article X

LIABILITY

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

(*a*) Injury to persons or damage to or loss of property in the premises referred to in article III that are provided by or under the control of the Government;

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

(*c*) The employment, for the Third Meeting, of the personnel referred to in article VIII.

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

Article XI

PRIVILEGES AND IMMUNITIES

1. The Convention on the Privileges and Immunities of the United Nations, adopted by the General Assembly on 13 February 1946, shall apply, as specified in the present Agreement, in respect to the Third Meeting. In particular, representatives of States shall enjoy the privileges and immunities provided under article IV of the Convention on the Privileges and Immunities of the United Nations. United Nations officials performing functions in connection with the Third Meeting shall enjoy the privileges and immunities provided under articles V and VII of the Convention on the Privileges and Immunities of the United Nations, and any experts on missions for the United Nations in connection with the Third Meeting shall enjoy the privileges and immunities provided under articles VI and VII of the Convention on the Privileges and Immunities of the United Nations.

2. The representatives of the specialized agencies and the International Atomic Energy Agency shall enjoy the privileges and immunities provided by the Convention on the Privileges and Immunities of the Specialized Agencies of 21 November 1947 or the Agreement on the Privileges and Immunities of the International Atomic Energy Agency of 1 July 1959, as appropriate, as specified in the present Agreement.

3. Representatives of international and regional organizations, non-governmental organizations and other institutions referred to in article II (*d*)-(*g*) shall enjoy immunity from legal process in respect of words spoken or written and any act performed by them in connection with their participation in the Third Meeting.

4. The personnel provided by the Government under article VIII above, shall enjoy immunity from legal process in respect of words spoken or written and any act performed by them in their official capacity in connection with the Third Meeting.

5. Without prejudice to the preceding paragraphs of the present article, all persons performing functions in connection with the Third Meeting, including those referred to in article VIII and all those invited to the Third Meeting, shall enjoy such privileges, immunities and facilities as are necessary for the independent exercise of their functions in connection with the Third Meeting. The representatives of the information media referred to in article II, paragraph 2, above shall be accorded the appropriate facilities necessary for the independent exercise of their functions relating to the Third Meeting.

6. All persons referred to in article II shall have the right of entry into and exit from Nicaragua, and no impediment shall be imposed on their transit to and from the Third Meeting premises. They shall be granted facilities for speedy travel. Visas and entry permits, where required, shall be granted free of charge and as speedily as possible. Arrangements shall also be made to ensure that visas for the duration of the Third Meeting are delivered at the point of arrival to those who were unable to obtain them prior to their arrival.

7. The Third Meeting premises and access thereto shall be subject to the authority and control of the United Nations, with assistance by the Government, as specified in article VII above. The premises shall be inviolable for the duration of the Third Meeting, as well as the preparatory stage and the winding-up period.

8. All persons referred to in article II above shall have the right to take out of Nicaragua, at the time of their departure, without any restriction, any unexpended portions of the funds they brought into Nicaragua in connection with the Third Meeting.

9. The Government shall allow, for use immediately prior to, after and during the Third Meeting, the temporary importation, tax-free and duty-free, of all equipment, including audio, video, photographic and other technical equipment accompanying representatives of information media accredited to the Third Meeting and for use in connection with the Third Meeting, and shall waive import duties and taxes on supplies necessary for the Third Meeting. It shall issue without delay any necessary import and export permits for this purpose, if necessary.

Article XII

Settlement of disputes

Any dispute between the United Nations and the Government concerning the interpretation or application of this Agreement that is not settled by negotiation or other agreed mode of settlement shall be referred at the request of any party for final decision to three arbitrators, one to be named by the Secretary-General of the United Nations, one to be named by the Government, and the third, who shall be the chair, to be chosen by the first two arbitrators. If any party fails to appoint an arbitrator within 60 days of the appointment by the other party or if these two arbitrators should fail to agree on the third arbitrator within 60 days of their appointment, the President of the International Court of Justice may make any necessary appointments at the request of any party. However, any such dispute that involves a question regulated by the Convention on the Privileges and Immunities of the United Nations shall be dealt with in accordance with section 30 of that Convention.

Article XIII

FINAL PROVISIONS

1. This Agreement may be modified by written agreement between the United Nations and the Government.

2. This Agreement shall enter into force on the date of the signature and shall remain in force for the duration of the Third Meeting and for a period thereafter as is necessary for all matters relating to any of its provision to be settled.

IN WITNESS WHEREOF, the undersigned being the duly authorized plenipotentiary of the Government and the duly appointed representative of the United Nations, have on behalf of the Parties signed the present Agreement in two copies in English and Spanish, both texts being equally authentic.

DONE in New York on this 23rd day of August Two Thousand and One.

For the United Nations:
[*Signature*]
Jayantha DHANAPALA
Under-Secretary-General for Disarmament Affairs

For the Government of Nicaragua:
[*Signature*]
Eduardo J. SEVILLA SOMOZA
Ambassador Extraordinary and Plenipotentiary
Permanent Representative to the United Nations

(*f*) Memorandum of Understanding between the United Nations Transitional Administration in East Timor and the Government of the Federative Republic of Brazil, in the field of educational cooperation. Signed at Dili on 24 August 2001[9]

The Government of the Federative Republic of Brazil

and

The United Nations Transitional Administration in East Timor (hereinafter referred to as "the Contracting Parties")

Acknowledging the importance of supporting efforts towards the reconstruction of East Timor in the field of education,

Acknowledging the importance of educational cooperation as a fundamental pillar for the consolidation of initiatives towards the social and economic recovery of East Timor,

Convinced of the necessity to create an everlasting foundation for the flourishing of a new democratic society in East Timor,

Have agreed as follows:

1. The Contracting Parties shall make efforts to promote educational cooperation through the development of activities in the following areas:

(*a*) Strengthening of educational and inter-university cooperation;

(*b*) Graduation and training of teachers and researchers;

(*c*) Exchange of information and experiences in the field of education.

2. The Contracting Parties shall endeavour to reach the objectives established in paragraph 1 by making efforts to promote the development of cooperation activities at the different levels and ways of teaching, by means of:

(*a*) The exchange of teachers and researchers to attend postgraduate courses at institutions of higher education;

(*b*) The exchange of technicians, experts and administrators with the purpose of deepening mutual knowledge of the respective systems of elementary, secondary and professional education, programmes and teaching methods;

(*c*) The exchange of students and teachers through programmes between secondary or professional education institutions;

(*d*) The exchange of university students in the different areas of knowledge;

(*e*) The exchange of documents and/or joint preparation of educational materials and information on methodology, product and evaluation;

(*f*) Technical support and advice in projects for the graduation and training of teachers.

3. The recognition and/or revalidation of academic diplomas and degrees awarded by institutions of higher learning of each of the Contracting Parties shall be subjected to national legislation. Nevertheless, with the sole purpose of admission to postgraduate courses, the Contracting Parties shall make efforts to recognize, without the need of being revalidated, diplomas issued by officially registered and recognized institutions of higher learning. To be effective, these diplomas must be duly translated and legalized by the competent consular authority.

4. The Contracting Parties, through their competent governmental authorities, shall endeavour to guarantee the recognition of the elementary and secondary level studies or their equivalent in the field of formal education, so that students from one Contracting Party may continue their studies in the other Party. To this effect, the certificates of conclusion of studies corresponding to the elementary and secondary levels shall be duly translated and legalized by the competent consular authority. School transcripts, such as "Histórico Escolar", in the case of Brazil, and the "Certificado de Estudos", in the case of East Timor, shall be accepted.

5. The admission of students of one Contracting Party to undergraduate and graduate courses of the other Party shall follow the same selective processes applied by the institutions of higher education in the receiving Party to their national students. The students who benefit from specific agreements or programmes shall be subjected to the selection rules and to the procedures established by those instruments.

6. The Contracting Parties will make efforts to establish grant systems and/or facilities to students and researchers with the purpose of academic and professional improvement.

7. The Contracting Parties shall define, by means of appropriate instruments and according to their national legislation, modalities of financing the activities established in this Memorandum.

8. The present Memorandum shall come into force on the date of its signature and shall have the same period of validity of the United Nations Security Council resolution 1338 (2001), which renews the mandate of the United Nations Transitional Administration in East Timor until 31 January 2002.

DONE in Dili, on 24 August 2001, in duplicate, in Portuguese and English, all texts being equally valid.

For the Government of the Federative Republic of Brazil:	For the United Nations Transitional Administration in East Timor:
[*Signature*]	[*Signature*]
Kywal DE OLIVEIRA	Sergio VIEIRA DE MELLO

(*g*) Memorandum of Understanding between the United Nations and the European Bank for Reconstruction and Development regarding coordination of security arrangements. Signed at New York on 10 October 2001[10]

Whereas the organizations of the United Nations system have agreed to pursue the policy of coordinated actions to ensure the security and safety of their personnel at all duty stations;

Whereas the organizations of the United Nations system have decided to this end to establish for each country or area where they undertake substantial activities a security plan describing the various security arrangements in emergency situations, in particular the actions to be taken and the sequence to be followed to ensure the security and safety of their personnel;

Whereas a senior United Nations official, appointed by the Secretary-General as Designated Officer for each such country or area, is the person who undertakes overall responsibility for the implementation of the security plan at that duty station;

Whereas the European Bank for Reconstruction and Development, hereinafter referred to as the Bank, is an international financial institution which is not a member of the United Nations system, but is a party to a number of bilateral agreements with organs of the United Nations, most notably the World Bank Group, such as the Financial Procedures Agreement between the Bank and the International Bank for Reconstruction and Development as Trustee of the Global Environment Facility Trust Fund dated 18 January 2001, applies for inclusion in the United Nations security arrangements at duty stations where international staff of the Bank are present;

Whereas the Bank, having its registered office at One Exchange Square, London, EC2A 2JN, United Kingdom of Great Britain and Northern Ireland, was established pursuant to a multilateral agreement signed on 29 May 1990 for the purpose of fostering the transition towards open market-orientated economics and to promote private and entrepreneurial initiative in the Central and Eastern European countries committed to and applying the principles of multiparty democracy, pluralism and market economics;

Now, therefore, the United Nations and the Bank have agreed on the following security coordination procedures and arrangements.

Article 1

GENERAL PROVISION

Subject to the provisions of the present Memorandum, the United Nations agrees to include international staff of the Bank in United Nations security arrangements at each duty station where Bank staff are present.

Article 2

GENERAL RESPONSIBILITIES OF THE UNITED NATIONS

At each duty station where international staff of the Bank are present, the United Nations undertakes to:

(*a*) Lend, to the extent possible, assistance for the protection of international staff of the Bank and extend to it in this regard the application of the security plan;

(*b*) Include relevant information regarding international staff of the Bank in the security plan for the duty station;

(*c*) Keep the Bank informed about the specific security measures taken at the duty station;

(*d*) In case of emergency, provide travel assistance to the Bank on a reimbursable basis in accordance with the provisions of article 5 of the present Memorandum;

(*e*) Include the Bank in the security alert notification procedures;

(*f*) Coordinate and consult with the Bank for the exchange of security-related information;

(*g*) When possible and to the extent feasible, represent the security concerns of the Bank to the respective authorities of the host country.

Article 3

GENERAL RESPONSIBILITIES OF THE EUROPEAN BANK FOR RECONSTRUCTION AND DEVELOPMENT

At each duty station where international staff of the Bank are present, the Bank undertakes to:

(*a*) Consult with and assist the Designated Official on all matters relating to security arrangements at the duty station;

(*b*) Fully follow the instructions of the Designated Official regarding security matters;

(*c*) Ensure that the Designated Official is provided on a regular basis with updated lists of names and addresses of international staff of the Bank;

(*d*) Ensure that the Designated Official is at all times informed of the whereabouts and movements at the duty station of international staff of the Bank;

(*e*) Report all incidents which have security implications to the Designated Official;

(*f*) Coordinate and consult with the Designated Official for the exchange of security-related information;

(*g*) Maintain in strict confidentiality sensitive information regarding the security plan;

(*h*) In case of emergency evacuation or relocation for security reasons to another country, assume the responsibility for obtaining visas and other travel documents for its international staff;

(*i*) Lend, when possible and to the extent feasible, on a reimbursable basis, travel assistance to personnel of the organizations of the United Nations system;

(*j*) Assume all risks and liabilities related to the security of its staff and maintain the necessary insurance in this regard;

(*k*) Deal with all claims as may be brought against the United Nations arising from the extension under the present Memorandum of the United Nations security arrangements to its international staff and hold the United Nations harmless in respect of such claims.

Article 4

FINANCIAL ARRANGEMENTS

The Bank undertakes to pay the additional administrative expenses of the Office of the United Nations Security Coordinator incurred by the Bank's inclusion in the security arrangements in the field. Such costs will be determined on an annual basis as follows: the total field cost of the Office of the United Nations Security Coordinator will be multiplied by the total number of Bank internationally recruited staff serving in the field and divided by the total number of staff of the organizations of the United Nations system serving in the field.

Article 5

RENDERING OF TRAVEL ASSISTANCE IN CASE OF EMERGENCY

5.1 In case of emergency, the United Nations undertakes to render at each duty station where international staff of the Bank are present, to the extent possible, travel assistance to international staff of the Bank. Such assistance will be provided on a reimbursable basis.

5.2 The Bank undertakes to:

(*a*) Reimburse the United Nations promptly and in any case no later than one month after receipt from the United Nations of the statement detailing the costs incurred by the United Nations in connection with such assistance;

(*b*) Assume all risks and liabilities during travel of its international staff and to deal with such claims as may be brought against the United Nations arising from such travel and to hold the United Nations harmless in respect of such claims or liabilities;

(*c*) Ensure that its employees, before boarding a United Nations chartered civilian aircraft, shall each sign the general release form which is attached to the present Memorandum.

Article 6

DURATION OF THE MEMORANDUM

This Memorandum shall remain in force until it is terminated by either Party by a three months' advance written notice to the other Party. Any amount due under articles 3, 4 or 5 shall not be affected by the termination of the Memorandum.

Article 7

ENTRY INTO FORCE

This Memorandum shall enter into force upon signature by both Parties.

IN WITNESS WHEREOF the undersigned have signed the present Agreement.

SIGNED this 10th day of October 2001 at the United Nations Headquarters in New York in two originals in the English language.

For the United Nations:
[*Signature*]
Benon V. SEVAN
United Nations
Security Coordinator

For the European Bank
for Reconstruction and Development:
[*Signature*]
Jean LEMIERRE
President
European Bank for Reconstruction and Development

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3. AGREEMENTS RELATING TO THE UNITED NATIONS CHILDREN'S FUND

Basic Cooperation Agreement between the United Nations Children's Fund and the Government of Liberia. Signed at Monrovia on 20 July 2001[11]

PREAMBLE

Whereas the United Nations Children's Fund (UNICEF) was established by the General Assembly of the United Nations by resolution 57 (I) of 11 December 1946 as an organ of the United Nations and, by that and subsequent resolutions, was charged with the responsibility of meeting, through the provision of financial support, supplies, training and advice, the emergency and long-range needs of children and their continuing needs and providing services in the fields of maternal and child health, nutrition, water supply, basic education and supporting services for women in developing countries, with a view to strengthening, where appropriate, activities and programmes of child survival, development and protection in countries with which UNICEF cooperates, and

Whereas UNICEF and the Government of Liberia wish to establish the terms and conditions under which UNICEF shall, in the framework of the operational activities of the United Nations and within its mandate, cooperate in programmes in Liberia,

Now, therefore, UNICEF and the Government, in a spirit of friendly cooperation, have entered into the present Agreement.

Article I

DEFINITIONS

For the purpose of the present Agreement, the following definitions shall apply:

(*a*) "Appropriate authorities" means central, local and other competent authorities under the law of the country;

(*b*) "Convention" means the Convention on the Privileges and Immunities of the United Nations adopted by the General Assembly of the United Nations on 13 February 1946;

(*c*) "Experts on mission" means experts coming within the scope of articles VI and VII of the Convention;

(*d*) "Government" means the Government of Liberia;

(*e*) "Greeting Card Operation" means the organizational entity established within UNICEF to generate public awareness, support and additional funding for UNICEF mainly through the production and marketing of greeting cards and other products;

(*f*) "Head of the office" means the official in charge of the UNICEF office;

(*g*) "Country" means the country where a UNICEF office is located or which receives programme support from a UNICEF office located elsewhere;

(*h*) "Parties" means UNICEF and the Government;

(*i*) "Persons performing services for UNICEF" means individual contractors, other than officials, engaged by UNICEF to perform services in the execution of programmes of cooperation;

(*j*) "Programmes of cooperation" means the programmes of the country in which UNICEF cooperates, as provided in article III below;

(*k*) "UNICEF" means the United Nations Children's Fund;

(*l*) "UNICEF office" means any organizational unit through which UNICEF cooperates in programmes; it may include the field offices established in the country;

(*m*) "UNICEF officials" means all members of the staff of UNICEF employed under the Staff Regulations and Rules of the United Nations, with the exception of persons who are recruited locally and assigned to hourly rates, as provided in General Assembly resolution 76 (I) of 7 December 1946.

Article II

SCOPE OF THE AGREEMENT

1. The present Agreement embodies the general terms and conditions under which UNICEF shall cooperate in programmes in the country.

2. UNICEF cooperation in programmes in the country shall be provided consistent with the relevant resolutions, decisions, regulations and rules and policies of the competent organs of the United Nations, including the Executive Board of UNICEF.

Article III

PROGRAMMES OF COOPERATION AND MASTER PLAN OF OPERATIONS

1. The programmes of cooperation agreed to between the Government and UNICEF shall be contained in a master plan of operations to be concluded between UNICEF, the Government and, as the case may be, other participating organizations.

2. The master plan of operations shall define the particulars of the programmes of cooperation, setting out the objectives of the activities to be carried out, the undertakings of UNICEF, the Government and the participating organizations and the estimated financial resources required to carry out the programmes of cooperation.

3. The Government shall permit UNICEF officials, experts on mission and persons performing services for UNICEF to observe and monitor all phases and aspects of the programmes of cooperation.

4. The Government shall keep such statistical records concerning the execution of the master plan of operations as the Parties may consider necessary and shall supply any of such records to UNICEF at its request.

5. The Government shall cooperate with UNICEF in providing the appropriate means necessary for adequately informing the public about the programmes of cooperation carried out under the present Agreement.

Article IV

UNICEF OFFICE

1. UNICEF may establish and maintain an office in the country, as the Parties may consider necessary to facilitate the implementation of the programmes of cooperation.

2. UNICEF may, with the agreement of the Government, establish and maintain a regional/area office in the country to provide programme support to other countries in the region/area.

3. In the event that UNICEF does not maintain an office in the country, it may, with the agreement of the Government, provide support for programmes of cooperation agreed to between UNICEF and the Government under the present Agreement through a UNICEF regional/area office established in another country.

Article V

ASSIGNMENT TO UNICEF OFFICE

1. UNICEF may assign to its office in the country officials, experts on mission and persons performing services for UNICEF, as is deemed necessary by UNICEF, to provide support to the programmes of cooperation in connection with:

(*a*) The preparation, review, monitoring and evaluation of the programmes of cooperation;

(*b*) The shipment, receipt, distribution or use of the supplies, equipment and other materials provided by UNICEF;

(*c*) Advising the Government regarding the progress of the programmes of cooperation;

(*d*) Any other matters relating to the application of the present Agreement.

2. UNICEF shall, from time to time, notify the Government of the names of UNICEF officials, experts on mission and persons performing services for UNICEF; UNICEF shall also notify the Government of any changes in their status.

Article VI

GOVERNMENT CONTRIBUTION

1. The Government shall provide to UNICEF as mutually agreed upon and to the extent possible:

(*a*) Appropriate office premises for the UNICEF office, alone or in conjunction with the United Nations system organizations;

(*b*) Costs of postage and telecommunications for official purposes;

(*c*) Costs of local services such as equipment, fixtures and maintenance of office premises;

(*d*) Transportation for UNICEF officials, experts on mission and persons performing services for UNICEF in the performance of their official functions in the country.

2. The Government shall also assist UNICEF:

(*a*) In the location and/or in the provision of suitable housing accommodation for internationally recruited UNICEF officials, experts on mission and persons performing services for UNICEF;

(*b*) In the installation and supply of utility services, such as water, electricity, sewerage, fire protection services and other services, for UNICEF office premises.

3. In the event that UNICEF does not maintain a UNICEF office in the country, the Government undertakes to contribute towards the expenses incurred by UNICEF in maintaining a UNICEF regional/area office elsewhere, from which support is provided to the programmes of cooperation in the country, up to a mutually agreed amount, taking into account contributions in kind, if any.

Article VII

UNICEF SUPPLIES, EQUIPMENT AND OTHER ASSISTANCE

1. UNICEF's contribution to programmes of cooperation may be made in the form of financial and other assistance. Supplies, equipment and other assistance intended for the programmes of cooperation under the present Agreement shall be transferred to the Government upon arrival in the country, unless otherwise provided in the master plan of operations.

2. UNICEF may place on the supplies, equipment and other materials intended for programmes of cooperation such markings as are deemed necessary to identify them as being provided by UNICEF.

3. The Government shall grant UNICEF all necessary permits and licences for the importation of the supplies, equipment and other materials under the present Agreement. It shall be responsible for, and shall meet the costs associated with, the clearance, receipt, unloading, storage, insurance, transportation and distribution of such supplies, equipment and other materials after their arrival in the country.

4. While paying due respect to the principles of international competitive bidding, UNICEF will attach high priority to the local procurement of supplies, equipment and other materials which meet UNICEF requirements in quality, price and delivery terms.

5. The Government shall exert its best efforts, and take the necessary measures, to ensure that the supplies, equipment and other materials, as well as financial and other assistance intended for programmes of cooperation, are utilized in conformity with the purposes stated in the master plan of operations and are employed in an equitable and efficient manner without any discrimination based on sex, race, creed, nationality or political opinion. No payment shall be required of any recipient

of supplies, equipment and other materials furnished by UNICEF unless, and only to such extent as, provided in the relevant master plan of operations.

6. No direct taxes, value-added tax, fees, tolls or duties shall be levied on the supplies, equipment and other materials intended for programmes of cooperation in accordance with the master plan of operations. In respect of supplies and equipment purchased locally for programmes of cooperation, the Government shall, in accordance with section 8 of the Convention, make appropriate administrative arrangements for the remission or return of any excise duty or tax payable as part of the price.

7. The Government shall, upon request by UNICEF, return to UNICEF any funds, supplies, equipment and other materials that have not been used in the programmes of cooperation.

8. The Government shall maintain proper accounts, records and documentation in respect of funds, supplies, equipment and other assistance under this Agreement. The form and content of the accounts, records and documentation required shall be as agreed upon by the Parties. Authorized officials of UNICEF shall have access to the relevant accounts, records and documentation concerning distribution of supplies, equipment and other materials, and disbursement of funds.

9. The Government shall, as soon as possible, but in any event within sixty (60) days after the end of each of the UNICEF financial years, submit to UNICEF progress reports on the programmes of cooperation and certified financial statements, audited in accordance with existing government rules and procedures.

Article VIII

INTELLECTUAL PROPERTY RIGHTS

1. The Parties agree to cooperate and exchange information on any discoveries, inventions or works resulting from programme activities undertaken under the present Agreement, with a view to ensuring their most efficient and effective use and exploitation by the Government and UNICEF under applicable law.

2. Patent rights, copyright rights and other similar intellectual property rights in any discoveries, inventions or works under paragraph 1 of this article resulting from programmes in which UNICEF cooperates may be made available by UNICEF free of royalties to other Governments with which UNICEF cooperates for their use and exploitation in programmes.

Article IX

APPLICABILITY OF THE CONVENTION

The Convention shall be applicable mutatis mutandis to UNICEF, its office, property, funds and assets and to its officials and experts on mission in the country.

Article X

LEGAL STATUS OF UNICEF OFFICE

1. UNICEF, its property, funds 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 understood, however, that no waiver of immunity shall extend to any measure of execution.

2. (*a*) The premises of the UNICEF office shall be inviolable. The property and assets of UNICEF, wherever located and by whomsoever held, shall be immune from search, requisition, confiscation, expropriation and any other form of interference, whether by executive, administrative, judicial or legislative action.

(*b*) The appropriate authorities shall not enter the office premises to perform any official duties, except with the express consent of the head of the office and under conditions agreed to by him or her.

3. The appropriate authorities shall exercise due diligence to ensure the security and protection of the UNICEF office, and to ensure that the tranquillity of the office is not disturbed by the unauthorized entry of persons or groups of persons from outside or by disturbances in its immediate vicinity.

4. The archives of UNICEF, and in general all documents belonging to it, wherever located and by whomsoever held, shall be inviolable.

Article XI

UNICEF FUNDS, ASSETS AND OTHER PROPERTY

1. Without being restricted by financial controls, regulations or moratoria of any kind:

(*a*) UNICEF may hold and use funds, gold or negotiable instruments of any kind and maintain and operate accounts in any currency and convert any currency held by it into any other currency;

(*b*) UNICEF shall be free to transfer its funds, gold or currency from one country to another or within any country, to other organizations or agencies of the United Nations system;

(*c*) UNICEF shall be accorded the most favourable, legally available rate of exchange for its financial activities.

2. UNICEF, its assets, income and other property shall:

(*a*) Be exempt from all direct taxes, value-added tax, fees, tolls or duties; it is understood, however, that UNICEF will not claim exemption from taxes which are, in fact, no more than charges for public utility services, rendered by the Government or by a corporation under government regulation, at a fixed rate according to the amount of services rendered and which can be specifically identified, described and itemized;

(*b*) Be exempt from customs duties and prohibitions and restrictions on imports and exports in respect of articles imported or exported by UNICEF for its official use. It is understood, however, that articles imported under such exemptions will not be sold in the country into which they were imported except under conditions agreed with the Government;

(*c*) Be exempt from customs duties and prohibitions and restrictions on imports and exports in respect of its publications.

Article XII

GREETING CARDS AND OTHER UNICEF PRODUCTS

Any materials imported or exported by UNICEF or by national bodies duly authorized by UNICEF to act on its behalf, in connection with the established purposes

and objectives of the UNICEF Greeting Card Operation, shall be exempt from all customs duties, prohibitions and restrictions, and the sale of such materials for the benefit of UNICEF shall be exempt from all national and local taxes.

Article XIII

UNICEF OFFICIALS

1. Officials of UNICEF shall:

(*a*) Be immune from legal process in respect of words spoken or written and all acts performed by them in their official capacity. Such immunity shall continue to be accorded after termination of employment with UNICEF;

(*b*) Be exempt from taxation on the salaries and emoluments paid to them by UNICEF;

(*c*) Be immune from national service obligations;

(*d*) Be immune, together with their spouses and relatives dependent on them, from immigration restrictions and alien registration;

(*e*) Be accorded the same privileges in respect of exchange facilities as are accorded to officials of comparable ranks forming part of diplomatic missions to the Government;

(*f*) Be given, together with their spouses and relatives dependent on them, the same repatriation facilities in time of international crisis as diplomatic envoys;

(*g*) Have the right to import free of duty their furniture, personal effects and all household appliances, at the time of first taking up their post in the host country.

2. The head of the UNICEF office and other senior officials, as may be agreed between UNICEF and the Government, shall enjoy the same privileges and immunities accorded by the Government to members of diplomatic missions of comparable ranks. For this purpose, the name of the head of the UNICEF office may be incorporated in the diplomatic list.

3. UNICEF officials shall also be entitled to the following facilities applicable to members of diplomatic missions of comparable ranks:

(*a*) To import free of customs and excise duties limited quantities of certain articles intended for personal consumption in accordance with existing government regulation;

(*b*) To import a motor vehicle free of customs and excise duties, including value-added tax, in accordance with existing government regulation.

Article XIV

EXPERTS ON MISSION

1. Experts on mission shall:

(*a*) Be granted the privileges and immunities specified in article VI, sections 22 and 23, of the Convention;

(*b*) Be given, together with their spouses and relatives dependent on them, the same repatriation facilities in time of international crisis as diplomatic envoys.

2. Experts on mission may be accorded such additional privileges, immunities and facilities as may be agreed upon between the Parties.

Article XV

PERSONS PERFORMING SERVICES FOR UNICEF

1. Persons performing services for UNICEF shall:

(*a*) Be immune from legal process in respect of words spoken or written and all acts performed by them in their official capacity. Such immunity shall continue to be accorded after termination of employment with UNICEF;

(*b*) Be given, together with their spouses and relatives dependent on them, the same repatriation facilities in time of international crisis as diplomatic envoys.

2. For the purpose of enabling them to discharge their functions independently and efficiently, persons performing services for UNICEF may be accorded such other privileges, immunities and facilities as specified in article XIII above, as may be agreed upon between the Parties.

Article XVI

ACCESS FACILITIES

UNICEF officials, experts on mission and persons performing services for UNICEF shall be entitled:

(*a*) To prompt clearance and issuance, free of charge, of visas, licences or permits, where required;

(*b*) To unimpeded access to or from the country, and within the country, to all sites of cooperation activities, to the extent necessary for the implementation of programmes of cooperation.

Article XVII

LOCALLY RECRUITED PERSONNEL
ASSIGNED TO HOURLY RATES

The terms and conditions of employment for persons recruited locally and assigned to hourly rates shall be in accordance with the relevant United Nations resolutions, decisions, regulations and rules and policies of the competent organs of the United Nations, including UNICEF. Locally recruited personnel shall be accorded all facilities necessary for the independent exercise of their functions for UNICEF.

Article XVIII

FACILITIES IN RESPECT
OF COMMUNICATIONS

1. UNICEF shall enjoy, in respect of its official communications, treatment not less favourable than that accorded by the Government to any diplomatic mission (or intergovernmental organization) in matters of establishment and operation, priorities, tariffs, charges on mail and cablegrams and on teleprinter, facsimile, telephone and other communications, as well as rates for information to the press and radio.

2. No official correspondence or other communication of UNICEF shall be subjected to censorship. Such immunity shall extend to printed matter, photographic and electronic data communications and other forms of communications as may

be agreed upon between the Parties. UNICEF shall be entitled to use codes and to dispatch and receive correspondence either by courier or in sealed pouches, all of which shall be inviolable and not subject to censorship.

3. UNICEF shall have the right to operate radio and other telecommunication equipment on United Nations registered frequencies and those allocated by the Government between its offices, within and outside the country, and in particular with UNICEF headquarters in New York.

4. UNICEF shall be entitled, in the establishment and operation of its official communications, to the benefits of the International Telecommunication Convention (Nairobi, 1982) and the regulations annexed thereto.

Article XIX

FACILITIES IN RESPECT OF MEANS OF TRANSPORTATION

The Government shall grant UNICEF necessary permits or licences for, and shall not impose undue restrictions on, the acquisition or use and maintenance by UNICEF of civil aeroplanes and other craft required for programme activities under the present Agreement.

Article XX

WAIVER OF PRIVILEGES AND IMMUNITIES

The privileges and immunities accorded under the present Agreement are granted in the interests of the United Nations, and not for the personal benefit of the persons concerned. The Secretary-General of the United Nations has the right and the duty to waive the immunity of any individual referred to in articles XIII, XIV or XV in any case where, in his opinion, such immunity impedes the course of justice and can be waived without prejudice to the interests of the United Nations and UNICEF.

Article XXI

CLAIMS AGAINST UNICEF

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

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

Article XXII

SETTLEMENT OF DISPUTES

Any dispute between UNICEF and the Government relating to the interpretation and application of the present Agreement which is not settled by negotiation

or other agreed mode of settlement shall be submitted to arbitration at the request of either Party. Each Party shall appoint one arbitrator, and the two arbitrators so appointed shall appoint a third, who shall be the chairman. If within thirty (30) days of the request for arbitration either Party has not appointed an arbitrator or if within fifteen (15) days of the appointment of two arbitrators the third arbitrator has not been appointed, either Party may request the President of the International Court of Justice to appoint an arbitrator. The procedure for the arbitration shall be fixed by the arbitrators, and the expenses of the arbitration shall be borne by the Parties as assessed by the arbitrators. The arbitral award shall contain a statement of the reasons on which it is based and shall be accepted by the Parties as the final adjudication of the dispute.

Article XXIII

ENTRY INTO FORCE

1. The present Agreement shall enter into force immediately upon signature by the Parties.

2. The present Agreement supersedes and replaces all previous Basic Agreements, including addenda thereto, between UNICEF and the Government.

Article XXIV

AMENDMENTS

The present Agreement may be modified or amended only by written agreement between the Parties hereto.

Article XXV

TERMINATION

The present Agreement shall cease to be in force six months after either of the Parties gives notice in writing to the other of its decision to terminate the Agreement. The Agreement shall, however, remain in force for such an additional period as might be necessary for the orderly cessation of UNICEF activities, and the resolution of any disputes between the Parties.

IN WITNESS WHEREOF, the undersigned, being the duly authorized plenipotentiary of the Government and the duly appointed representative of UNICEF, have on behalf of the Parties signed the present Agreement, in the English language, in two original copies.

DONE at Monrovia, this 20th day of July, two thousand and one.

For the United Nations Children's Fund:
[*Signature*]
Ms. Scholastica KIMARYO
UNICEF Representative to Liberia

For the Government:
[*Signature*]
Hon. Monie R. CAPTAN
Minister, Foreign Affairs R.L.

4. AGREEMENTS RELATING TO THE OFFICE OF THE UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES

Memorandum of Understanding between the United Nations High Commissioner for Refugees and the Economic Community of West African States. Signed at New York on 19 November 2001[12]

Memorandum of Understanding

between

The Economic Community of West African States, hereinafter referred to as "ECOWAS"

On one part,

and

The United Nations High Commissioner for Refugees, hereinafter referred to as "UNHCR"

On the other part,

PREAMBLE

1. *Recalling* General Assembly resolution 48/173 of 21 December 1993, which requires, inter alia, that the Secretary-General promote cooperation between the organs, organizations and bodies of the United Nations system and regional organizations and institutions;

2. *Considering* that the final objective of ECOWAS is to raise the standard of living of the people of West Africa and contribute towards the progress and development of the continent by achieving economic growth, promoting peace and security and evolving common political values as well as systems and institutions among the West African countries with a view to enhancing regional cooperation and integration;

3. *Noting* that ECOWAS has established a regional mechanism for promoting political stability, democracy, good governance, respect for the rule of law, protection of human and people's rights, regional security, stability and reinforcement of good-neighbourliness, as well as prevention, management and resolution of conflicts within the subregion of West Africa;

4. *Considering* that ECOWAS may enter into agreements with other international and regional organizations for the furtherance and achievement of its objectives, and that it recognizes peace-building issues and humanitarian principles as important elements in conflict prevention and management;

5. *Recalling* Article VIII of the 1969 Organization of African Unity Convention governing the specific aspects of refugee problems in Africa, whereby member States are requested to cooperate with UNHCR;

6. *Considering* that the mandate of UNHCR is to provide international protection and assistance to refugees, returnees and other persons of concern, including stateless persons and internally displaced populations, and to seek durable solutions for their problems and situations through local settlement, voluntary repatriation or resettlement;

7. *Considering* that, in order to attain these objectives, UNHCR accords primacy to activities performed in the areas of peace and security, democracy and political stability, respect for the rule of law and human rights as well as social and economic development;

8. *Bearing in mind* that the special protection and assistance needs of refugee women and children and unaccompanied minors, who, together, constitute the overwhelming majority of any refugee or internally displaced population, is central to the fulfilment of the mandate of UNHCR;

9. *Determined* that these issues should be resolved in a manner consistent with the relevant legal, humanitarian and human rights principles which take account of legitimate political, social and economic interests of all the countries and States members of ECOWAS;

10. *Convinced* that cooperation between the Parties hereto will serve their purposes and mutual interests more adequately and render their respective activities more beneficial to ECOWAS member States and UNHCR;

The two Contracting Parties have agreed as follows:

Article I

OBJECTIVE

The objective of this Agreement is to establish a framework for a multisectional cooperation between ECOWAS and UNHCR, in agreed areas, as well as to facilitate cooperation between UNHCR and Governments of ECOWAS member States in the same agreed areas.

Article II

AREAS OF COOPERATION

The parties shall cooperate in the following areas:

1. Refugees and asylum seekers, particularly refugee women and children and unaccompanied minors, forced population movements into and within the region, asylum and refugee protection principles, humanitarian and human rights law, i.e. refoulement, expulsion, arbitrary detention, education, freedom of movement, etc.;

2. Organized and spontaneous voluntary repatriation, as well as related rehabilitation and reintegration activities; local settlement and resettlement within ECOWAS countries;

3. Establishment and development of mechanisms for managing and addressing the root causes of refugee situations and issues related to security concerns in camps and areas hosting refugees, returnees and populations of concern to UNHCR;

4. Post-conflict recovery, prevention and early warning activities and measures;

5. Promotion of refugee law and legislation and status determination procedures within ECOWAS countries, i.e., harmonization of national legislations and procedures with the ECOWAS Treaty as regards freedom of movement, property, social welfare, etc.;

6. Funding for internally displaced persons, refugees and returnee-related activities to be carried out by ECOWAS and UNHCR together;

7. Joint training activities related to refugees, returnees, internally displaced persons or any other persons of concern to UNHCR.

Article III

INSTITUTIONAL ARRANGEMENT

1. The Executive Secretary, on behalf of ECOWAS, and the UNHCR Regional Director for the West And Central Africa Bureau, on behalf of UNHCR, shall be responsible for the implementation of this Memorandum of Understanding.

2. ECOWAS will undertake to inform all member States and relevant regional and international organizations of this Memorandum of Understanding.

3. UNHCR will undertake to inform all its representatives within ECOWAS member States and all relevant organizations and operational partners of this Memorandum of Understanding.

Article IV

FUNCTIONS OF THE COOPERATING INSTITUTIONS

ECOWAS and UNHCR shall:

1. In accordance with their respective mandates, address the social, economic, political and security issues in the subregion, particularly those which have a bearing on the root causes of forced population displacement, refugee protection, the provision of humanitarian assistance and the search for durable solutions;

2. Establish and or strengthen mechanisms, procedures and institutions at the national, regional and international levels, in order to create sustainable local capacity for the provision of protection and assistance to refugees, particularly refugee women and children and unaccompanied minors, returnees and other persons of concern to UNHCR and to give effect wherever necessary to the concept of burden-sharing;

3. Promote accession to international and regional instruments relating to refugees, particularly refugee women and children, unaccompanied minors, stateless persons and statelessness as well as other persons of concern to UNHCR, and encourage ECOWAS countries to enact or amend, as appropriate, their national refugee legislation in accordance with these instruments and human rights, and humanitarian principles foreseen within the ECOWAS Treaty;

4. Initiate and support academic research and studies on refugees, in particular refugee women and children, unaccompanied minors and persons of concern to UNHCR, as well as relevant training for government officials, non-governmental organization and staff members of other organizations, with a view to promoting awareness and respect of refugee law in particular, and humanitarian and human rights principles in general;

5. Promote public awareness and proper understanding of refugees and forced population movements, and the need for their protection and assistance, through

advocacy studies and promotion activities related to refugee law, human rights and humanitarian principles;

6. Have consultations and exchange of information and documentation in order to strengthen national and regional emergency preparedness mechanisms so as to respond effectively to humanitarian emergencies within the subregion;

7. Promote environmental rehabilitation and the development of respect for and protection of the natural environment among refugee populations as well as in refugee-affected areas;

8. Collaborate with non-governmental and other organizations at the national and regional levels to support the attainment of the objectives of this Memorandum of Understanding;

9. Cooperate on other humanitarian activities as may be agreed upon by the Contracting Parties.

Article V

OPERATING MODALITIES

1. The Contracting Parties shall establish such procedures and mechanisms, as appropriate, for the development and implementation of strategies, programmes and activities necessary to achieve the objectives of this Memorandum of Understanding.

2. ECOWAS and UNHCR shall exchange information, studies, reports, databases and documents on matters of mutual interest and shall collaborate in the collection, analysis and dissemination thereof, subject to such agreements as shall be necessary to safeguard the confidentiality and restricted character of such documents and information.

3. The Contracting Parties shall collaborate within any other operating modalities, including meetings, as shall be mutually agreed upon.

Article VI

FINANCIAL PROVISION

The Contracting Parties shall cooperate in mobilizing the necessary resources for implementing agreed programmes, projects and activities.

Article VII

SUPPLEMENTARY ARRANGEMENTS

ECOWAS and UNHCR shall enter into such supplementary arrangements or agreements within the scope of this Memorandum of Understanding as shall be mutually agreed upon.

Article VIII

SETTLEMENT OF DISPUTES

Any disputes arising from the interpretation or implementation of this Memorandum of Understanding shall be settled by mutual agreement between the Contracting Parties, with a view to ensuring successful realization of the objectives of this Memorandum of Understanding.

Article IX

AMENDMENT

This Memorandum of Understanding shall be amended by mutual written consent between the Contracting Parties.

Article X

ENTRY INTO FORCE AND TERMINATION

This Memorandum of Understanding shall enter into force on the date of its signature, and shall remain for an unlimited period of time, until terminated by mutual agreement, following one party giving three months' written notice of its intention to terminate this Memorandum of Understanding.

DONE at New York this 19th day of November 2001, in two originals in the English and French languages, both texts being equally authentic.

For the Economic Community of West African States:
[*Signature*]
Lansana KOUYATE

For the United Nations High Commissioner for Refugees:
[*Signature*]
Ruud LUBBERS

B. Treaty provisions concerning the legal status of intergovernmental organizations related to the United Nations

1. CONVENTION ON THE PRIVILEGES AND IMMUNITIES OF THE SPECIALIZED AGENCIES.[13] APPROVED BY THE GENERAL ASSEMBLY OF THE UNITED NATIONS ON 21 NOVEMBER 1947

In 2001, the following States acceded to the Convention or, if already parties, undertook by a subsequent notification to apply the provisions of the Convention in respect of the specialized agencies indicated below:

State	*Date of receipt of instrument of accession or notification*	*Specialized agencies*
Yugoslavia	12 March 2001	ILO FAO UNESCO WHO IBRD IDA IFC IMF UPU ITU WMO IMO WIPO IFAD
Argentina	27 September 2001	IFAD

As at 31 December 2001, 107 States were parties to the Convention.[14]

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2. UNITED NATIONS EDUCATIONAL, SCIENTIFIC AND CULTURAL ORGANIZATION

Agreements relating to conferences, seminars and other meetings—basic privileges and immunities provision

For the purpose of holding international conferences on the territory of member States, UNESCO concluded various agreements that contained the following provisions concerning the legal status of the organization:

"*Privileges and immunities*

"The Government of [name of the State] shall apply, in all matters relating to this meeting, the provisions of the Convention on the Privileges and Immunities of the Specialized Agencies of the United Nations as well as annex IV thereto to which it has been a party from [date].

"In particular, the Government shall not place any restriction on the entry into, sojourn in, and departure from the territory of [name of the State] of all persons, of whatever nationality, entitled to attend the meeting by virtue of a decision of the appropriate authorities of UNESCO and in accordance with the organization's relevant rules and regulations.

"*Damage and accidents*

"As long as the premises reserved for the meeting are at the disposal of UNESCO, the Government of [name of State] shall bear the risk of damage to the premises, facilities and furniture and shall assume and bear all responsibility and liability for accidents that may occur to persons present therein. The [name of State] authorities shall be entitled to adopt appropriate measures to ensure the protection of the participants, particularly against fire and other risks, of the above-mentioned premises, facilities and furniture. The Government of [name of State] may also claim from UNESCO compensation for any damage to persons and property caused by the fault of staff members or agents of the organization."

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3. UNITED NATIONS INDUSTRIAL DEVELOPMENT ORGANIZATION

Agreement between the United Nations Industrial Development Organization and the Government of Cameroon on the organization of the fifteenth meeting of the Conference of African Ministers of Industry (CAMI—XV). Signed on 12 September 2001

Privileges and immunities

1. The Convention on the Privileges and Immunities of the United Nations, adopted by the General Assembly on 13 February 1946, shall apply to the meeting. In particular, the representatives of the States members of the United Nations Industrial Development Organization (UNIDO), the Economic Commission for Africa (ECA) and the Organization of African Unity (OAU), who were referred to in paragraphs (*a*), (*b*) and (*d*) of article II, shall enjoy the privileges and immunities

set out in article IV of the Convention; officials of UNIDO, ECA and OAU attending the Conference shall enjoy the privileges and immunities set out in articles V and VII, and experts attending the meeting on mission for UNIDO, ECA and OAU shall enjoy the privileges and immunities provided for in article VI of the Convention.

. . .

5. Without prejudice to the preceding paragraphs of this article, all persons performing meeting-related functions and all persons invited to the Conference shall enjoy the privileges, immunities and facilities necessary for the free exercise of their functions in connection with the meetings.

6. All the persons referred to in article II of the Agreement, all United Nations officials holding a laissez-passer and assigned to the meetings, and all experts attending the meetings on mission for UNIDO, ECA and OAU shall have the right to enter and leave Cameroon without any impediments to their travel to or from the venue of the meetings. Such entry visas and authorizations as may be required shall be delivered free of charge, as promptly as possible and no later than two (2) weeks before the start of the Conference. Where an application for a visa is submitted less than two (2) and a half weeks before the opening of the Conference, the visa shall be delivered no later than three (3) days after the application is received.

. . .

8. For the purposes of the application of the Convention on the Privileges and Immunities of the United Nations, the premises on which the meetings are held shall be deemed to be the premises of the United Nations Industrial Development Organization within the meaning of section 3 of the Convention (property, funds and assets); access thereto shall be placed under the organization's authority and control. The premises shall be inviolable for the duration of the Conference, including the preparatory and final stages.

9. Participants in the Conference and representatives of the information organs referred to in article II of the Agreement, together with officials of UNIDO, ECA and OAU attending the meeting and experts attending the meeting on mission for UNIDO, ECA and OAU, shall have the right to take out of Cameroon upon their departure, without any restriction, any unspent portion of sums brought into Cameroon for the meetings, at the official United Nations rate of exchange applicable at the time that the sums were brought into the country.

10. The Government shall authorize the temporary importation free of duty of all equipment, including technical equipment brought by representatives of information organs, and shall exempt from import duties and taxes all supplies necessary for the meeting. It shall deliver promptly all import and export certificates required for this purpose.

11. The property of UNIDO, ECA and OAU and the baggage and personal effects of participants in the Conference shall not be subject to search, seizure or confiscation. The personal effects of participants shall normally carry markings that distinguish them from the baggage of other passengers in order to expedite the customs formalities. To this end, the Government shall designate customs and immigration officials from whom the authorized officials of the Joint Secretariat may request any necessary information, action or assistance.

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4. INTERNATIONAL ATOMIC ENERGY AGENCY

Protocol Additional to the Agreement between the People's Republic of Bangladesh and the International Atomic Energy Agency for the Application of Safeguards in connection with the Treaty on the Non-Proliferation of Nuclear Weapons. Signed at Vienna on 30 March 2001[15]

Whereas the People's Republic of Bangladesh (hereinafter referred to as "Bangladesh") and the International Atomic Energy Agency (hereinafter referred to as "the Agency") are parties to an Agreement for the Application of Safeguards in connection with the Treaty on the Non-Proliferation of Nuclear Weapons (hereinafter referred to as "the Safeguards Agreement"), which entered into force on 11 June 1982;

Aware of the desire of the international community to further enhance nuclear non-proliferation by strengthening the effectiveness and improving the efficiency of the Agency's safeguards system;

Recalling that the Agency must take into account in the implementation of safeguards the need to: avoid hampering the economic and technological development of Bangladesh or international cooperation in the field of peaceful nuclear activities; respect health, safety, physical protection and other security provisions in force and the rights of individuals; and take every precaution to protect commercial, technological and industrial secrets as well as other confidential information coming to its knowledge;

Whereas the frequency and intensity of activities described in this Protocol shall be kept to the minimum consistent with the objective of strengthening the effectiveness and improving the efficiency of Agency safeguards;

Now therefore Bangladesh and the Agency have agreed as follows:

RELATIONSHIP BETWEEN THE PROTOCOL AND THE SAFEGUARDS AGREEMENT

Article 1

The provisions of the Safeguards Agreement shall apply to this Protocol to the extent that they are relevant to and compatible with the provisions of this Protocol. In case of conflict between the provisions of the Safeguards Agreement and those of this Protocol, the provisions of this Protocol shall apply.

PROVISION OF INFORMATION

Article 2

(*a*) Bangladesh shall provide the Agency with a declaration containing:

(i) A general description of and information specifying the location of nuclear fuel cycle-related research and development activities not involving nuclear material carried out anywhere that are funded, specifically authorized or controlled by, or carried out on behalf of, Bangladesh;

(ii) Information identified by the Agency on the basis of expected gains in effectiveness or efficiency, and agreed to by Bangladesh, on operational

activities of safeguards relevance at facilities and at locations outside facilities where nuclear material is customarily used;

(iii) A general description of each building on each site, including its use and, if not apparent from that description, its contents. The description shall include a map of the site;

(iv) A description of the scale of operations for each location engaged in the activities specified in annex I to this Protocol;

(v) Information specifying the location, operational status and the estimated annual production capacity of uranium mines and concentration plants and thorium concentration plants, and the current annual production of such mines and concentration plants for Bangladesh as a whole. Bangladesh shall provide, upon request by the Agency, the current annual production of an individual mine or concentration plant. The provision of this information does not require detailed nuclear material accountancy;

(vi) Information regarding source material which has not reached the composition and purity suitable for fuel fabrication or for being isotopically enriched, as follows:

a. The quantities, the chemical composition, the use or intended use of such material, whether in nuclear or non-nuclear use, for each location in Bangladesh at which the material is present in quantities exceeding ten metric tons of uranium and/or twenty metric tons of thorium, and for other locations with quantities of more than one metric ton, the aggregate for Bangladesh as a whole if the aggregate exceeds ten metric tons of uranium or twenty metric tons of thorium. The provision of this information does not require detailed nuclear material accountancy;

b. The quantities, the chemical composition and the destination of each export out of Bangladesh of such material for specifically non-nuclear purposes in quantities exceeding:

(1) Ten metric tons of uranium, or for successive exports of uranium from Bangladesh to the same State, each of less than ten metric tons, but exceeding a total often metric tons for the year;

(2) Twenty metric tons of thorium, or for successive exports of thorium from Bangladesh to the same State, each of less than twenty metric tons, but exceeding a total of twenty metric tons for the year;

c. The quantities, chemical composition, current location and use or intended use of each import into Bangladesh of such material for specifically non-nuclear purposes in quantities exceeding:

(1) Ten metric tons of uranium or for successive imports of uranium into Bangladesh each of less than ten metric tons, but exceeding a total of ten metric tons for the year;

(2) Twenty metric tons of thorium, or for successive imports of thorium into Bangladesh each of less than twenty metric tons, but exceeding a total of twenty metric tons for the year,

it being understood that there is no requirement to provide information on such material intended for a non-nuclear use once it is in its non-nuclear end-use form;

(vii) *a*. Information regarding the quantities, uses and locations of nuclear material exempted from safeguards pursuant to article 37 of the Safeguards Agreement;

b. Information regarding the quantities (which may be in the form of estimates), and uses at each location, of nuclear material exempted from safeguards pursuant to article 36 (*b*) of the Safeguards Agreement but not yet in a non-nuclear end-use form, in quantities exceeding those set out in article 37 of the Safeguards Agreement. The provision of this information does not require detailed nuclear material accountancy;

(viii) Information regarding the location or further processing of intermediate or high-level waste containing plutonium, high enriched uranium or uranium-233 on which safeguards have been terminated pursuant to article 11 of the Safeguards Agreement. For the purpose of this paragraph, "further processing" does not include repackaging of the waste or its further conditioning not involving the separation of elements, for storage or disposal;

(ix) The following information regarding specified equipment and non-nuclear material listed in annex II:

a. For each export out of Bangladesh of such equipment and material: the identity, quantity, location of intended use in the receiving State and date or, as appropriate, expected date, of export;

b. Upon specific request by the Agency, confirmation by Bangladesh, as importing State, of information provided to the Agency by another State concerning the export of such equipment and material to Bangladesh;

(x) General plans for the succeeding ten-year period relevant to the development of the nuclear fuel cycle (including planned nuclear fuel cycle-related research and development activities) when approved by the appropriate authorities in Bangladesh.

(*b*) Bangladesh shall make every reasonable effort to provide the Agency with the following information:

(i) A general description of and information specifying the location of nuclear fuel cycle-related research and development activities not involving nuclear material which are specifically related to enrichment, reprocessing of nuclear fuel or the processing of intermediate or high-level waste containing plutonium, high enriched uranium or uranium-233 that are carried out anywhere in Bangladesh but which are not funded, specifically authorized or controlled by, or carried out on behalf of, Bangladesh. For the purpose of this paragraph, "processing" of intermediate or high-level waste does not include repackaging of the waste or its conditioning not involving the separation of elements, for storage or disposal;

(ii) A general description of activities and the identity of the person or entity carrying out such activities, at locations identified by the Agency outside

a site which the Agency considers might be functionally related to the activities of that site. The provision of this information is subject to a specific request by the Agency. It shall be provided in consultation with the Agency and in a timely fashion.

(*c*) Upon request by the Agency, Bangladesh shall provide amplifications or clarifications of any information it has provided under this article, in so far as relevant for the purpose of safeguards.

Article 3

(*a*) Bangladesh shall provide to the Agency the information identified in article 2(*a*)(i), (iii), (iv), (v), (vi)*a*, (vii) and (x) and article 2(*b*)(i) within 180 days of the entry into force of this Protocol.

(*b*) Bangladesh shall provide to the Agency, by 15 May of each year, updates of the information referred to in paragraph (*a*) above for the period covering the previous calendar year. If there has been no change to the information previously provided, Bangladesh shall so indicate.

(*c*) Bangladesh shall provide to the Agency, by 15 May of each year, the information identified in article 2(*a*)(vi)*b* and *c* for the period covering the previous calendar year.

(*d*) Bangladesh shall provide to the Agency on a quarterly basis the information identified in article 2(*a*)(ix)*a*. This information shall be provided within sixty days of the end of each quarter.

(*e*) Bangladesh shall provide to the Agency the information identified in article 2(*a*)(viii) 180 days before further processing is carried out and, by 15 May of each year, information on changes in location for the period covering the previous calendar year.

(*f*) Bangladesh and the Agency shall agree on the timing and frequency of the provision of the information identified in article 2(*a*)(ii).

(*g*) Bangladesh shall provide to the Agency the information in article 2(*a*)(ix)*b* within sixty days of the Agency's request.

COMPLEMENTARY ACCESS

Article 4

The following shall apply in connection with the implementation of complementary access under article 5 of this Protocol:

(*a*) The Agency shall not mechanistically or systematically seek to verify the information referred to in article 2; however, the Agency shall have access to:

(i) Any location referred to in article 5(*a*)(i) or (ii) on a selective basis in order to assure the absence of undeclared nuclear material and activities;

(ii) Any location referred to in article 5(*b*) or (*c*) to resolve a question relating to the correctness and completeness of the information provided pursuant to article 2 or to resolve an inconsistency relating to that information;

(iii) Any location referred to in article 5(*a*)(iii) to the extent necessary for the Agency to confirm, for safeguards purposes, Bangladesh's declaration of the decommissioned status of a facility or of a location outside facilities where nuclear material was customarily used.

(*b*) (i) Except as provided in subparagraph (ii) below, the Agency shall give Bangladesh advance notice of access of at least 24 hours;

(ii) For access to any place on a site that is sought in conjunction with design information verification visits or ad hoc or routine inspections on that site, the period of advance notice shall, if the Agency so requests, be at least two hours but, in exceptional circumstances, it may be less than two hours.

(*c*) Advance notice shall be in writing and shall specify the reasons for access and the activities to be carried out during such access.

(*d*) In the case of a question or inconsistency, the Agency shall provide Bangladesh with an opportunity to clarify and facilitate the resolution of the question or inconsistency. Such an opportunity will be provided before a request for access, unless the Agency considers that delay in access would prejudice the purpose for which the access is sought. In any event, the Agency shall not draw any conclusions about the question or inconsistency until Bangladesh has been provided with such an opportunity.

(*e*) Unless otherwise agreed to by Bangladesh, access shall only take place during regular working hours.

(*f*) Bangladesh shall have the right to have Agency inspectors accompanied during their access by representatives of Bangladesh, provided that the inspectors shall not thereby be delayed or otherwise impeded in the exercise of their functions.

Article 5

Bangladesh shall provide the Agency with access to:

(*a*) (i) Any place on a site;

(ii) Any location identified by Bangladesh under article 2(*a*)(v)-(viii);

(iii) Any decommissioned facility or decommissioned location outside facilities where nuclear material was customarily used;

(*b*) Any location identified by Bangladesh under article 2(*a*)(i), article 2(*a*)(iv), article 2(*a*)(ix)*b* or article 2(*b*), other than those referred to in paragraph (*a*)(i) above, provided that if Bangladesh is unable to provide such access, Bangladesh shall make every reasonable effort to satisfy Agency requirements, without delay, through other means;

(*c*) Any location specified by the Agency, other than locations referred to in paragraphs (*a*) and (*b*) above, to carry out location-specific environmental sampling, provided that if Bangladesh is unable to provide such access, Bangladesh shall make every reasonable effort to satisfy Agency requirements, without delay, at adjacent locations or through other means.

Article 6

When implementing article 5, the Agency may carry out the following activities:

(*a*) For access in accordance with article 5(*a*)(i) or (iii): visual observation; collection of environmental samples; utilization of radiation detection and measurement devices; application of seals and other identifying and tamper-indicating devices specified in Subsidiary Arrangements; and other objective measures which have been demonstrated to be technically feasible and the use of which has been agreed by the Board of Governors (hereinafter referred to as "the Board") and following consultations between the Agency and Bangladesh;

(*b*) For access in accordance with article 5(*a*)(ii): visual observation; item-counting of nuclear material; non-destructive measurements and sampling; utilization of radiation detection and measurement devices; examination of records relevant to the quantities, origin and disposition of the material; collection of environmental samples; and other objective measures which have been demonstrated to be technically feasible and the use of which has been agreed by the Board and following consultations between the Agency and Bangladesh;

(*c*) For access in accordance with article 5(*b*): visual observation; collection of environmental samples; utilization of radiation detection and measurement devices; examination of safeguards-relevant production and shipping records; and other objective measures which have been demonstrated to be technically feasible and the use of which has been agreed by the Board and following consultations between the Agency and Bangladesh;

(*d*) For access in accordance with article 5(*c*) collection of environmental samples and, in the event the results do not resolve the question or inconsistency at the location specified by the Agency pursuant to article 5(*c*), utilization at that location of visual observation, radiation detection and measurement devices and, as agreed by Bangladesh and the Agency, other objective measures.

Article 7

(*a*) Upon request by Bangladesh, the Agency and Bangladesh shall make arrangements for managed access under this Protocol in order to prevent the dissemination of proliferation-sensitive information, to meet safety or physical protection requirements or to protect proprietary or commercially sensitive information. Such arrangements shall not preclude the Agency from conducting activities necessary to provide credible assurance of the absence of undeclared nuclear material and activities at the location in question, including the resolution of a question relating to the correctness and completeness of the information referred to in article 2 or of an inconsistency relating to that information.

(*b*) Bangladesh may, when providing the information referred to in article 2, inform the Agency of the places at a site or location at which managed access may be applicable.

(*c*) Pending the entry into force of any necessary Subsidiary Arrangements, Bangladesh may have recourse to managed access consistent with the provisions of paragraph (*a*) above.

Article 8

Nothing in this Protocol shall preclude Bangladesh from offering the Agency access to locations in addition to those referred to in articles 5 and 9 or from requesting the Agency to conduct verification activities at a particular location The Agency shall, without delay, make every reasonable effort to act upon such a request.

Article 9

Bangladesh shall provide the Agency with access to locations specified by the Agency to carry out wide-area environmental sampling, provided that if Bangladesh is unable to provide such access it shall make every reasonable effort to satisfy Agency requirements at alternative locations. The Agency shall not seek such access until the use of wide-area environmental sampling and the procedural arrangements therefor have been approved by the Board and following consultations between the Agency and Bangladesh.

Article 10

The Agency shall inform Bangladesh of:

(*a*) The activities carried out under this Protocol, including those in respect of any questions or inconsistencies the Agency had brought to the attention of Bangladesh, within sixty days of the activities being carried out by the Agency;

(*b*) The results of activities in respect of any questions or inconsistencies the Agency had brought to the attention of Bangladesh, as soon as possible but in any case within thirty days of the results being established by the Agency;

(*c*) The conclusions it has drawn from its activities under this Protocol. The conclusions shall be provided annually.

DESIGNATION OF AGENCY INSPECTORS

Article 11

(*a*) (i) The Director General shall notify Bangladesh of the Board's approval of any Agency official as a safeguards inspector. Unless Bangladesh advises the Director General of its rejection of such an official as an inspector for Bangladesh within three months of receipt of notification of the Board's approval, the inspector so notified to Bangladesh shall be considered designated to Bangladesh.

(ii) The Director General, acting in response to a request by Bangladesh or on his own initiative, shall immediately inform Bangladesh of the withdrawal of the designation of any official as an inspector for Bangladesh.

(*b*) A notification referred to in paragraph (*a*) above shall be deemed to be received by Bangladesh seven days after the date of the transmission by registered mail of the notification by the Agency to Bangladesh.

VISAS

Article 12

Bangladesh shall, within one month of the receipt of a request therefor, provide the designated inspector specified in the request with appropriate multiple entry/exit and/or transit visas, where required, to enable the inspector to enter and remain on the territory of Bangladesh for the purpose of carrying out his/her functions. Any visas required shall be valid for at least one year and shall be renewed, as required, to cover the duration of the inspector's designation to Bangladesh.

Subsidiary Arrangements

Article 13

(*a*) Where Bangladesh or the Agency indicates that it is necessary to specify in Subsidiary Arrangements how measures laid down in this Protocol are to be applied, Bangladesh and the Agency shall agree on such Subsidiary Arrangements within ninety days of the entry into force of this Protocol or, where the indication of the need for such Subsidiary Arrangements is made after the entry into force of this Protocol, within ninety days of the date of such indication.

(*b*) Pending the entry into force of any necessary Subsidiary Arrangements, the Agency shall be entitled to apply the measures laid down in this Protocol.

Communications systems

Article 14

(*a*) Bangladesh shall permit and protect free communications by the Agency for official purposes between Agency inspectors in Bangladesh and Agency headquarters and/or regional offices, including attended and unattended transmission of information generated by Agency containment and/or surveillance or measurement devices. The Agency shall have, in consultation with Bangladesh, the right to make use of internationally established systems of direct communications, including satellite systems and other forms of telecommunication, not in use in Bangladesh. At the request of Bangladesh or the Agency, details of the implementation of this paragraph with respect to the attended or unattended transmission of information generated by Agency containment and/or surveillance or measurement devices shall be specified in the Subsidiary Arrangements.

(*b*) Communication and transmission of information as provided for in paragraph (*a*) above shall take due account of the need to protect proprietary or commercially sensitive information or design information which Bangladesh regards as being of particular sensitivity.

Protection of confidential information

Article 15

(*a*) The Agency shall maintain a stringent regime to ensure effective protection against disclosure of commercial, technological and industrial secrets and other confidential information coming to its knowledge, including such information coming to the Agency's knowledge in the implementation of this Protocol.

(*b*) The regime referred to in paragraph (*a*) above shall include, among others, provisions relating to:

(i) General principles and associated measures for the handling of confidential information;

(ii) Conditions of staff employment relating to the protection of confidential information;

(iii) Procedures in cases of breaches or alleged breaches of confidentiality.

(*c*) The regime referred to in paragraph (*a*) above shall be approved and periodically reviewed by the Board.

ANNEXES

Article 16

(*a*) The annexes to this Protocol shall be an integral part thereof. Except for the purposes of amendment of the annexes, the term "Protocol" as used in this instrument means the Protocol and the annexes together.

(*b*) The list of activities specified in annex I, and the list of equipment and material specified in annex II, may be amended by the Board upon the advice of an open-ended working group of experts established by the Board. Any such amendment shall take effect four months after its adoption by the Board.

ENTRY INTO FORCE

Article 17

(*a*) This Protocol shall enter into force upon signature by the representatives of Bangladesh and the Agency.

(*b*) Bangladesh may, at any date before this Protocol enters into force, declare that it will apply this Protocol provisionally.

(*c*) The Director General shall promptly inform all States members of the Agency of any declaration of provisional application of, and of the entry into force of, this Protocol.

DEFINITIONS

Article 18

For the purpose of this Protocol:

(*a*) *Nuclear fuel cycle-related research and development activities* means those activities which are specifically related to any process or system development aspect of any of the following:

—Conversion of nuclear material,

—Enrichment of nuclear material,

—Nuclear fuel fabrication,

—Reactors,

—Critical facilities,

—Reprocessing of nuclear fuel,

—Processing (not including repackaging or conditioning not involving the separation of elements, for storage or disposal) of intermediate or high-level waste containing plutonium, high enriched uranium or uranium-233,

but do not include activities related to theoretical or basic scientific research or to research and development on industrial radioisotope applications, medical, hydrological and agricultural applications, health and environmental effects and improved maintenance;

(*b*) *Site* means that area delimited by Bangladesh in the relevant design information for a facility, including a closed-down facility, and in the relevant information on a location outside facilities where nuclear material is customarily used, including a closed-down location outside facilities where nuclear material was customarily used (this is limited to locations with hot cells or where activities related to conversion, enrichment, fuel fabrication or reprocessing were carried out). It shall

also include all installations, co-located with the facility or location, for the provision or use of essential services, including: hot cells for processing irradiated materials not containing nuclear material; installations for the treatment, storage and disposal of waste; and buildings associated with specified activities identified by Bangladesh under article 2(*a*)(iv) above;

(*c*) *Decommissioned facility* or *decommissioned location outside facilities* means an installation or location at which residual structures and equipment essential for its use have been removed or rendered inoperable so that it is not used to store and can no longer be used to handle, process or utilize nuclear material;

(*d*) *Closed-down facility* or *closed-down location outside facilities* means an installation or location where operations have been stopped and the nuclear material removed but which has not been decommissioned;

(*e*) *High enriched uranium* means uranium containing 20 per cent or more of the isotope uranium-235;

(*f*) *Location-specific environmental sampling* means the collection of environmental samples (e.g., air, water, vegetation, soil, smears) at, and in the immediate vicinity of, a location specified by the Agency for the purpose of assisting the Agency in drawing conclusions about the absence of undeclared nuclear material or nuclear activities at the specified location;

(*g*) *Wide-area environmental sampling* means the collection of environmental samples (e.g., air, water, vegetation, soil, smears) at a set of locations specified by the Agency for the purpose of assisting the Agency in drawing conclusions about the absence of undeclared nuclear material or nuclear activities over a wide area;

(*h*) *Nuclear material* means any source or any special fissionable material as defined in article XX of the Statute. The term source material shall not be interpreted as applying to ore or ore residue. Any determination by the Board under article XX of the Statute of the Agency after the entry into force of this Protocol which adds to the materials considered to be source material or special fissionable material shall have effect under this Protocol only upon acceptance by Bangladesh;

(*i*) *Facility* means:

(i) A reactor, a critical facility, a conversion plant, a fabrication plant, a reprocessing plant, an isotope separation plant or a separate storage installation; or

(ii) Any location where nuclear material in amounts greater than one effective kilogram is customarily used;

(*j*) *Location outside facilities* means any installation or location, which is not a facility, where nuclear material is customarily used in amounts of one effective kilogram or less.

DONE at Vienna on the 30th day of March 2001 in duplicate in the English language.

For the People's Republic of Bangladesh:
[*Signature*]
Abdus Samad AZAD, MP
Foreign Minister

For the International Atomic Energy Agency:
[*Signature*]
Mohammed ELBARADEI
Director General

[1] United Nations, *Treaty Series*, vol. 1, p. 15, and vol. 90, p. 327 (corrigendum to vol. 1).

[2] For the list of those States, see *Multilateral Treaties Deposited with the Secretary-General of the United Nations: Status as at 31 October 2001* (United Nations publication, Sales No. E.02.V.4).

[3] Entered into force on 23 March 2001, by signature.

[4] S/2000/643.

[5] Entered into force on 21 February 2000.

[6] Entered into force on 7 June 2001.

[7] Entered into force on 6 August 2001, by signature.

[8] Entered into force on 23 August 2001, by signature.

[9] Entered into force on 24 August 2001, by signature.

[10] Entered into force on 10 October 2001, by signature.

[11] Entered into force on 20 July 2001, by signature.

[12] Entered into force on 19 November 2001, by signature.

[13] United Nations, *Treaty Series*, vol. 33, p. 261.

[14] For the list of those States, see *Multilateral Treaties Deposited with the Secretary-General of the United Nations: Status as at 31 December 2001* (United Nations publication, Sales No. E.02.V.4).

[15] Entered into force on 30 March 2001, by signature.

Part Two

LEGAL ACTIVITIES OF THE UNITED NATIONS AND RELATED INTERGOVERNMENTAL ORGANIZATIONS

Chapter III

GENERAL REVIEW OF THE LEGAL ACTIVITIES OF THE UNITED NATIONS AND RELATED INTERGOVERNMENTAL ORGANIZATIONS

A. General review of the legal activities of the United Nations

1. DISARMAMENT AND RELATED MATTERS[1]

(*a*) Nuclear disarmament and non-proliferation issues

The Conference on Disarmament, the single multilateral disarmament negotiating forum, had been unable to commence substantive work since 1998. Despite the Conference's inability in 2001 to establish a subsidiary body on nuclear disarmament, some progress was made on the issue, with both the Russian Federation and the United States of America, for the first time in 30 years, indicating a general willingness in the Conference on Disarmament, to establish an ad hoc committee on nuclear disarmament.

In December 2001, the United States announced its withdrawal from the 1972 Anti-Ballistic Missile Treaty,[2] stating that the Treaty hindered the Government's ability to develop ways to protect the country from future missile attacks from rogue States or terrorists. A formal notification was given to the Russian Federation pursuant to the Treaty, with the effective date of withdrawal being six months from the date of the announcement. At the same time, announcements were made by both the United States and the Russian Federation of their intentions to drastically reduce their nuclear arsenals.

A second Conference on Facilitating the Entry into Force of the Comprehensive Nuclear-Test-Ban Treaty of 1996,[3] which prohibits any nuclear-weapon-test explosion in any environment, was held in November 2001, at which the importance of the Treaty in the field of disarmament and non-proliferation was reaffirmed and the need for continued multilateral efforts to achieve its entry into force was stressed.

The 1997 Joint Convention on the Safety of Spent Fuel Management and on the Safety of Radioactive Waste Management,[4] which applies to spent fuel and radioactive waste from civilian nuclear programmes and military or defence programmes when these materials have been permanently transferred to civilian facilities, as well as to material that has been declared by a Contracting Party to the Convention and to managed releases of radioactive materials into the environment from regulated nuclear facilities, entered into force on 18 June 2001.

Consideration by the General Assembly

At its fifty-sixth session, the General Assembly, on the recommendation of the First Committee, took action on 12 draft resolutions and two draft decisions on

topics related to these issues. On 29 November 2001, the Assembly adopted decision 56/413, entitled "United Nations Conference to identify ways of eliminating nuclear dangers in the context of nuclear disarmament", which had been introduced by Mexico in the First Committee. The United Kingdom of Great Britain and Northern Ireland, explaining its negative vote, together with those of France, the United States of America and Germany against the draft resolution in committee, stated that the process established by the 1968 Treaty on the Non-Proliferation of Nuclear Weapons[5] was the cornerstone of nuclear non-proliferation and the essential foundation of nuclear disarmament; therefore, in those delegations' view, an international conference as a separate process would conflict with that approach to nuclear disarmament.

The General Assembly also adopted resolution 56/25 B entitled "Convention on the Prohibition of the Use of Nuclear Weapons", which had been introduced by India in the First Committee. During the deliberations, Pakistan had supported the draft, reaffirming its belief that the non-use or threat of use of nuclear weapons had its basis in the Charter of the United Nations. The United States had voted against the draft resolution, stating in explanation that the adoption of an international convention was not a practical approach to the ultimate goal of the total elimination of nuclear weapons, which could be achieved rather by a step-by-step process of bilateral, unilateral and multilateral measures.

Resolution 56/24 B, entitled "Missiles", also adopted on 29 November, had been introduced by the Islamic Republic of Iran in the First Committee. Five States had abstained in the vote on the draft, with comments ranging from expressions of strong support for the draft international code of conduct developed by the Missile Technology Control Regime to references to the contributions of the United Nations panel of governmental experts on missiles, as well as to their own efforts in that regard. The United States questioned the draft's overall thrust and political intent, wondering whether its purpose was to divert attention and resources away from ongoing missile non-proliferation, including the draft international code of conduct. The United States held that efforts to curb the spread of missiles and related technology were more productive when conducted on a regional basis with the active participation of concerned States, rather than the vague approach embodied in the draft. Belgium, speaking on behalf of the European Union and a large number of States, as well as Japan, the Republic of Korea and Australia voiced disappointment that the draft failed to address satisfactorily the key issue of missile proliferation and related technology.

The General Assembly also adopted resolution 56/24 L, entitled "Prohibition of the dumping of radioactive waste", which had been introduced by the Sudan in the First Committee, on behalf of the Group of African States.

(*b*) Biological and chemical weapons

Biological Weapons Convention[6]

Despite increased concerns over bioterrorism after the 11 September 2001 attacks and the anthrax-related incidents that followed, multilateral efforts to strengthen the 1972 Biological Weapons Convention suffered setbacks. The Ad Hoc Group of States parties to the Biological Weapons Convention entered into its seventh year of negotiations on a verification protocol to the Convention; however, the United States rejected the composite texts proposed by the Chairman of the Group and of

further negotiations on the protocol. The Group was therefore unable to complete the negotiations on the draft protocol. Furthermore, the Fifth Review Conference of the States Parties to the Biological Weapons Convention was held from 19 November to 7 December, but due to divergent views and positions among States parties with regard to certain key issues, particularly the work of the Ad Hoc Group, the Conference suspended the session and agreed to resume the session in 2002.

Chemical Weapons Convention[7]

In 2001, further progress was achieved in the implementation of the 1992 Chemical Weapons Convention on the destruction of chemical weapons, as well as the destruction or conversion of chemical weapons production facilities to peaceful purposes. The sixth session of the Conference of the States Parties to the Chemical Weapons Convention was held at The Hague in May, and preparations commenced for the first Review Conference, to be convened in 2003. As part of the international efforts to combat terrorism, the Organisation for the Prohibition of Chemical Weapons (OPCW) established a working group to formulate specific measures to prevent terrorist groups from acquiring and using chemical weapons.

United Nations Monitoring, Verification and Inspection Commission (UNMOVIC)[8]

The College of Commissioners held four meetings during 2001 to review the implementation of Security Council resolution 1284 (1999) and other relevant resolutions, as well as to provide political advice and guidance to the Executive Chairman, including guidance on significant policy decisions and on the quarterly reports of the Chairman submitted to the Security Council through the Secretary-General. In addition to the members of the College, representatives of IAEA and OPCW continued to attend the meetings as observers.

One of the main focuses of the work of the Commission remained the identification of "unresolved disarmament issues" in Iraq through the reinforced system of ongoing monitoring and verification called for by the Security Council. In 2001, the Commission completed its review of the criteria for the classification of inspection sites and facilities throughout Iraq and prepared common layouts and formats for the reporting of site inspections to allow greater consistency and a clear basis for analysis. Work was also completed on revision and updating of the lists of dual-use items and materials to which the export/import mechanism applied. The revised lists were forwarded to the Security Council on 1 June 2001.[9]

As concerns its non-inspection-related sources of information, UNMOVIC initiated a commercial satellite imagery contract and continued to analyse the imagery it was receiving through that arrangement, principally for infrastructure changes at sites in Iraq previously subject to monitoring. The Commission also received the results of an independent study it had commissioned on open-source information concerning Iraq's weapons of mass destruction capabilities in the period following the withdrawal of the former Special Commission inspectors from the country.[10] Much work was devoted to improving the UNMOVIC database and archive and making them more readily available sources of information.

Consideration by the General Assembly

During its fifty-sixth session, the General Assembly took action, pursuant to recommendations of the First Committee, on one draft resolution and one draft deci-

sion regarding these issues. Decision 56/414 on the Biological Weapons Convention had been introduced by Hungary in the Committee and was adopted by the Assembly on 29 November. During the deliberations on the draft, several States had expressed their disappointment that the Committee could only adopt a procedural decision instead of a substantive resolution that would have established a political basis for continuing the Ad Hoc Group's mandate.

Resolution 56/24 K, introduced by Canada, Poland and Uruguay in the First Committee, was also adopted on 29 November. During the deliberations on the draft, Egypt had reiterated its well-known position with regard to the Convention. Due to regional security concerns, Egypt would continue to decline signing the Chemical Weapons Convention until Israel joined the Treaty on the Non-Proliferation of Nuclear Weapons.

(*c*) United Nations Conference on the Illicit Trade in Small Arms and Light Weapons in All Its Aspects

The Conference was convened from 9 to 20 July 2001 in New York, and on 20 July the Conference adopted the Programme of Action. The participating States resolved, in the Programme of Action, to develop, strengthen and implement agreed norms and measures at all levels to prevent, combat and eradicate the illicit manufacture of and trade in small arms and light weapons.

Participating States were also committed to formulating or strengthening national legislation and administrative measures to exercise effective control over the manufacture, export, import, transmission and brokering of small arms and light weapons and criminalizing illicit activities; to applying unique markings on and maintaining accurate record-keeping of each weapon to enable its timely identification and tracing; to destroying illicit or surplus weapons as necessary; and to enhancing transparency in general.

Furthermore, in the Programme of Action, the United Nations and other international organizations were encouraged to undertake initiatives to promote its implementation. In particular, the Secretary-General, through the Department for Disarmament Affairs, was requested to collate and circulate data and information provided by States on a voluntary basis, including national reports on implementation of the Programme of Action.

The Group of Governmental Experts completed the study of brokering activity, particularly illicit activities relating to small arms and light weapons, requested by the Secretary-General in General Assembly resolution 54/54 V of 15 December 1999. In its report, the Group discussed the feasibility of restricting the manufacture and trade of small arms and light weapons to the manufacturers and dealers authorized by States, which would cover the brokering activities, particularly illicit activities, related to such weapons, including transportation agents and financial transactions. The Expert Group submitted its report to the Conference as a background document.[11]

Protocol against the Illicit Manufacturing of and Trafficking in Firearms, Their Parts and Components and Ammunition,[12] *supplementing the United Nations Convention against Transnational Crime*[13]

In December 1998, the General Assembly established an open-ended ad hoc committee to elaborate a comprehensive international convention against transnational organized crime and three protocols to supplement the convention, including

a draft protocol against the illicit manufacturing of and trafficking in firearms, their parts and components and ammunition. After more than two years of negotiations, the Firearms Protocol was concluded at the twelfth session of the Ad Hoc Committee in Vienna on 2 March.

The purpose of the new instrument is to strengthen cooperation among States parties in order to prevent, combat and eradicate illicit activities involving firearms and ammunition. The 21-article Protocol contains provisions on confiscation, seizure and disposal of illegal firearms; record-keeping; marking; deactivation; general requirements for export; import and transit licensing of authorization systems; security and preventive measures; exchange of information; training and technical assistance; brokering; and settlement of disputes. The Protocol criminalizes offences such as illicit manufacturing and trafficking in firearms, their parts, components and ammunition, and falsifying or altering the markings on firearms. Once it has entered into force, the Protocol will provide an international law-enforcement mechanism for crime prevention and the prosecution of traffickers.

Consideration by the General Assembly

On the recommendation of the First Committee, the General Assembly at its fifty-sixth session took action on three draft resolutions on the subject matter covered in this section, including the adoption of resolution 56/24 U on assistance to States for curbing the illicit traffic in small arms and collecting them.

(*d*) Other conventional weapons issues

The Review Conference of the Convention on Certain Conventional Weapons[14] (Geneva, 11-21 December 2001) successfully concluded its work by reaching agreement on the Final Declaration and adopting several decisions and follow-up measures to strengthen the Convention. The most significant achievement of the Conference was the agreement to amend article I of the Convention in order to expand the scope of its application to non-international armed conflicts. The States parties also agreed to establish an open-ended group of governmental experts to address the issues of explosive remnants of war and mines other than anti-personnel mines. In addition, the Conference welcomed the entry into force of the 1996 amended Protocol II on mines, booby-traps and other devices[15] and the 1995 additional Protocol IV on Blinding Laser Weapons.[16]

The Third Annual Conference of the States Parties to Amended Protocol II, to the Convention on Certain Conventional Weapons and the Third Meeting of the States Parties to the 1997 Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction (Mine-Ban Treaty)[17] reaffirmed the States parties' commitments to the objective of restricting the use of or outlawing altogether, anti-personnel landmines.

The two United Nations transparency instruments, the Register of Conventional Arms and the standardized instrument for international reporting of military expenditures, continued to contribute to building confidence among States in military matters. Although both instruments witnessed increases in the number of reporting States, differences among Member States continued, especially regarding the scope of the Register. Though the deliberations of the First Committee and the Conference on Disarmament highlighted these differences, the general trend continued in the direction of greater transparency in the interest of increased openness and confidence among States on military matters.

Consideration by the General Assembly

Pursuant to recommendations of the First Committee, the General Assembly at its fifty-sixth session took action on four draft resolutions and one draft decision dealing with the above subject matter. Resolution 56/24 Q, entitled "Transparency in armaments", the draft of which had been introduced by the Netherlands, was adopted on 29 November. During deliberations, in the First Committee the Libyan Arab Jamahiriya, speaking also on behalf of the members of the League of Arab States, had reiterated its support for transparency in armaments as a way of strengthening international peace and security and as a confidence-building measure, and expressed the belief that the scope of the Register should be broadened through the inclusion of information on sophisticated conventional weapons and weapons of mass destruction, specifically nuclear weapons. China, after expressing its view that the sale of arms by the United States to Taiwan Province of China constituted a grave infringement on China's sovereignty and interference in its internal affairs, stated that by reporting those sales in the Register, the United States had forced China to suspend its reporting to the Register since 1998, and China therefore could not support the draft decision.

(*e*) Regional disarmament

Efforts by Member States to address issues related to peace and security specific to their region or subregion continued throughout the year with varying urgency and success. While recognizing the contribution of different regional bodies to regional disarmament and arms control, the General Assembly, in its resolution on the topic, emphasized the role of the United Nations in promoting regional disarmament. The consolidation of the existing nuclear-weapon-free zones contributed to nuclear non-proliferation and security at the regional level. Efforts to finalize the treaty on a Central Asian nuclear-weapon-free zone were ongoing and the nuclear-weapon-free status of Mongolia was further strengthened.

Conventional weapons issues were addressed in a regional context in relation to the 2001 United Nations Conference on the Illicit Trade in Small Arms and Light Weapons in All Its Aspects and through enhancing transparency and other confidence-building measures. The Security Council continued to address ongoing conflicts in Africa, particularly in the intra-State ones. The Organization of African Unity (OAU) and subregional organizations addressed the security situation in a number of countries and undertook several initiatives to resolve armed conflicts in the region. A major development regarding existing regional organizations took place in Africa through the enactment of a series of decisions and measures to transform OAU into an African Union. The Economic Community of West African States moratorium, a pioneering subregional initiative to combat the proliferation of small arms in the region, was extended for another three years. In addition to dealing with broader issues of security, the Organization of American States continued its efforts to promote transparency in military matters and the implementation of the 1997 Mine-Ban Treaty and the 1997 Inter-American Convention against the Illicit Manufacturing of and Trafficking in Firearms, Ammunition, Explosives and Other Related Materials[18] in the region. In Europe, the integration process was further strengthened. The European Union, the North Atlantic Treaty Organization (NATO) and the Organization for Security and Cooperation in Europe successfully carried out a number of activities in the field of security and cooperation and thus enhanced

security and stability in Europe in general. They also addressed the continued violence in Kosovo and southern Serbia. In Asia, States member of the Association of South-East Asian Nations and other subregional organizations intensified their efforts to enhance regional and subregional security, especially through security and confidence-building measures. They also endeavoured to strengthened bilateral and multilateral cooperation in areas such as combating terrorism and curbing the illicit circulation of small arms and light weapons.

Consideration by the General Assembly

Pursuant to the recommendations of the First Committee, the General Assembly at its fifty-sixth session, on 29 November, took action on 14 draft resolutions and one decision dealing with regional disarmament issues. Resolution 56/21, entitled "Establishment of a nuclear-weapon-free zone in the region of the Middle East", had been introduced by Egypt in the First Committee. During the deliberations on the draft Pakistan had indicated its intention to support the draft resolution because it not only shared the concerns of the Arab countries in the region, but also supported the efforts towards creating a nuclear-weapon-free-zone in the Middle East. Israel for its part supported the establishment of a mutually verifiable nuclear-weapon-free-zone in the Middle East and advocated a practical step-by-step approach beginning with modest confidence-building measurers, followed by the establishment of peaceful relations, then reconciliation, and complemented by conventional and unconventional arms control measures, eventually leading to the establishment of a zone free of weapons of mass destruction. However, it continued to believe that threats against its very existence had a negative impact on the region's ability to establish such a zone.

Resolution 56/24 G, entitled "Nuclear-weapon-free southern hemisphere and adjacent areas", had been introduced by Brazil in the First Committee. France, also speaking on behalf of the United Kingdom and the United States, explained their negative vote, by noting that the draft intended to create a new zone that would cover certain international waters and, in their view, would contradict international law and would therefore be unacceptable for those delegations that were committed to the 1982 United Nations Convention on the Law of the Sea.[19]

Other resolutions adopted included resolution 56/25 A, entitled "Regional confidence-building measures: activities of the United Nations Standing Advisory Committee on Security Questions in Central Africa"; resolution 56/18, entitled "Maintenance of international security—good-neighbourliness, stability and development in South-Eastern Europe"; and resolutions 56/25 D, E and F on the United Nations regional centres for peace and disarmament in Africa, Latin America and the Caribbean, and Asia and the Pacific, respectively. Decision 56/412, entitled "Establishment of a nuclear-weapon-free zone in Central Asia", which had been introduced by Uzbekistan in the First Committee, was also adopted by the Assembly. And on 21 November, the General Assembly adopted, without reference to a Main Committee, resolution 56/7, entitled "Zone of peace and cooperation of the South Atlantic".

(*f*) Other issues

Terrorism and disarmament

The General Assembly took action on two draft resolutions on the matter, including resolution 56/24 T, entitled "Multilateral cooperation in the area of disarm-

ament and non-proliferation and global efforts against terrorism". In the discussions in the First Committee, the Sudan, speaking on behalf of the Group of African States; Jordan, speaking on behalf of the members of the League of Arab States; Belgium, on behalf of the European Union, as well as Cuba and Venezuela all supported the draft resolution. The Republic of Korea also added that both traditional and non-traditional approaches were needed in these efforts.

Information security

The subject has been dealt with by the General Assembly since 1998. At the current session, the delegation of the Russian Federation at the First Committee submitted the draft which was subsequently adopted on 29 November as resolution 56/19, entitled "Developments in the field of information and telecommunications in the context of international security".

Role of science and technology in the context of international security and disarmament

In recent years, major progress had been achieved in applying the latest advancements in science and technology, particularly information technologies and communications, to both the civilian and military sectors. Concerns had been expressed that military application of those advances could contribute significantly to the refinement and upgrading of advanced weapons systems, including weapons of mass destruction. In that regard, the Secretary-General's Advisory Board on Disarmament Matters considered the issue of the "revolution in military affairs" during its 2001 sessions. While recognizing the positive effect that the revolution in military affairs might have on disarmament and arms control in improving transparency, building confidence, promoting verification, deterring future wars and limiting civilian casualties, the Board also expressed its concern that the revolution might pose many potential dangers, including a rise in the frequency of wars. The challenge of the revolution in military affairs for future disarmament efforts was how to take advantage of the positive features of the revolution while minimizing the risks. The General Assembly dealt with the matter in its resolution 56/20 of 29 November 2001, entitled "Role of science and technology in the context of international security and disarmament", the draft of which had been introduced by India in the First Committee.

Depleted uranium

As a result of questions relating to the use of depleted uranium weapons raised by a number of international and regional organizations and by States in connection with the Gulf war and the military intervention by NATO in Yugoslavia, a UNEP mission was organized and samples were collected at various sites and analysed, and a final report issued.[20] Iraq had also introduced a draft resolution on the subject, which was narrowly adopted by the First Committee, but the General Assembly did not adopt it. The United States considered it redundant for the Assembly to deal with this item, since UNEP and other international organizations had already conducted their own studies. Moreover, both the United States and New Zealand did not agree with the draft's implication that depleted uranium was a weapon of mass destruction. New Zealand noted further that the United Nations Department for Disarmament Affairs was not the right body to carry out such a study, since technical bodies

such as IAEA, WHO and UNEP were better placed to perform such studies and in fact had already done so.

Relationship between disarmament and development

The question of the relationship between disarmament and development remained controversial. The General Assembly adopted resolution 56/24 E on the subject based on a draft introduced in the First Committee by South Africa, on behalf also of the members of the Movement of Non-Aligned Countries. During the deliberations, the United States had not joined in the consensus on the draft resolution because it believed that disarmament and development were two distinct issues that could not be linked. Although Belgium, speaking on behalf of a number of countries that had joined the consensus, recognized that considerable benefits could accrue from disarmament, it stated that there was nevertheless no simple automatic link between the European Union's deep commitments to cooperation for economic and social development and the savings that could accrue in other fields, including disarmament.

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2. OTHER POLITICAL AND SECURITY QUESTIONS

(*a*) Membership in the United Nations

During 2001, no State joined the United Nations. The number of Member States remained at 189.

(*b*) Legal aspects of peaceful uses of outer space

The Legal Subcommittee of the Committee on the Peaceful Uses of Outer Space held its fortieth session at the United Nations Office at Vienna from 2 to 12 April 2001.[21] During the session, the Chairman reported on the current status of the international treaties governing the use of outer space.[22] Moreover, various international organizations, e.g., UNESCO, ICAO, presented written or oral reports on their activities relating to space law.[23]

Regarding the agenda item entitled "Matters relating to the definition and delimitation of outer space and to the character and utilization of the geostationary orbit, including consideration of ways and means to ensure the rational and equitable use of the geostationary orbit without prejudice to the role of the International Telecommunication Union", the Working Group on the topic agreed that the questionnaire on aerospace objects and the analysis prepared by the United Nations Secretariat,[24] which could serve as a basis for future consideration of the subject, should be placed on the website of the United Nations Office for Outer Space Affairs and that a direct link to the documents should be established from its home page (www.oosa.unvienna.org).

The Subcommittee noted that the draft Unidroit Convention on international interests in mobile equipment, together with the draft protocol thereto on matters specific to aircraft equipment, was scheduled to be presented for adoption by a diplomatic conference to be held in South Africa in October/November 2001. The Subcommittee agreed to the establishment of an ad hoc consultative mechanism to review the issues relating to this item, in accordance with a proposal by Belgium.

In connection with the item on the review of the concept of the "launching State", as contained in the Liability Convention and the Registration Convention as applied by States and international organizations, the representative of Australia presented an overview of the policy of the Government of Australia aimed at facilitating commercial space programmes consistent with Australia's obligations under the five United Nations treaties on outer space. Additional presentations were made within the Working Group on the item.[25]

The Committee on the Peaceful Uses of Outer Space, at its forty-fourth session, held at Vienna from 6 to 15 June 2001,[26] took note of the report of the Legal Subcommittee, which indicated a revitalization of the work of that body following the revision of its agenda structure in 1999. The Committee further agreed upon the draft provisional agenda for the forty-first session of the Legal Subcommittee.

During the session, the Committee's attention was drawn to the fact that 2001 marked the fifteenth anniversary of the adoption of the Principles Relating to Remote Sensing of the Earth from Outer Space and the fifth anniversary of the adoption of the Declaration on International Cooperation in the Exploration and Use of Outer Space for the Benefit and in the Interest of All States, Taking into Particular Account the Needs of Developing Countries.[27] Moreover, the Committee was informed that the 1998 Intergovernmental Agreement for the International Space Station (ISS)[28] had entered into force on 27 March, in accordance with article 25 of the Agreement. In addition, as called for in the Agreement, the ISS partner States had agreed to a crew code of conduct, which covered such topics as the chain of command on-orbit, the relationship between ground and on-orbit management, standards for work and activities in space, and the authority of the commander.

Consideration by the General Assembly

At its fifty-sixth session, the General Assembly, on the recommendation of the Special Political and Decolonization Committee (Fourth Committee), adopted without a vote resolution 56/51 of 10 December 2001, entitled "International cooperation in the peaceful uses of outer space", in which it noted that the Legal Subcommittee, at its forty-first session, would submit its proposals to the Committee for new items to be considered by the Subcommittee at its forty-second session in 2003. The Assembly further noted that the Committee on the Peaceful Uses of Outer Space would invite interested member States to designate experts to identify which aspects of the report on the ethics of space policy of the World Commission on the Ethics of Scientific Knowledge and Technology of UNESCO might need to be studied by the Committee and to draft a report, in consultation with other international organizations and in close liaison with the World Commission, with a view to making a presentation on the matter at the forty-second session of the Legal Subcommittee, under the agenda item entitled "Information on the activities of international organizations relating to space law".

(*c*) Comprehensive review of the whole question of peacekeeping operations in all their aspects

The General Assembly, at its fifty-sixth session, on the recommendation of the Special Political and Decolonization Committee (Fourth Committee), adopted, without a vote, resolution 56/225 of 24 December 2001, in which it welcomed the

report of the Special Committee on Peacekeeping Operations[29] and endorsed the proposals, recommendations and conclusions of the Special Committee, as contained in paragraphs 33 to 136 of its report.

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3. ENVIRONMENTAL, ECONOMIC, SOCIAL, HUMANITARIAN AND CULTURAL QUESTIONS

(*a*) Twenty-first session of the Governing Council of the United Nations Environment Programme/Global Ministerial Environment Forum[30]

The session was held at UNEP headquarters, Nairobi, from 5 to 9 February 2001. The Governing Council adopted a number of decisions, including decision 21/2, "Enhancing the role of the United Nations Environment Programme on forest-related issues"; decision 21/3, "Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade"; decision 21/4, "Convention for implementing international action on certain persistent organic pollutants"; decision 21/5, "Mercury assessment"; decision 21/8, "Biosafety"; decision 21/12, "Coral reefs"; decision 21/23, "The Programme for the Development and Periodic Review of Environmental Law for the First Decade of the Twenty-first Century"; decision 21/26, "Status of international conventions and protocols in the field of the environment"; and decision 21/27, "Compliance with and enforcement of multilateral environmental agreements".

Consideration by the General Assembly

At its fifty-sixth session, the General Assembly, on 21 December 2001, adopted a number of resolutions and decisions on the recommendation of the Second Committee. Among them was resolution 56/192, adopted without a vote, on the status of preparations for the International Year of Freshwater, 2003, in which the Assembly took note of the report of the Secretary-General.[31]

The General Assembly also adopted resolution 56/196 on implementation of the 1994 United Nations Convention to Combat Desertification in those Countries Experiencing Serious Drought and/or Desertification, particularly in Africa,[32] in which the Assembly took note of the report of the Secretary-General;[33] resolution 56/197 on the 1992 Convention on Biological Diversity,[34] in which the Assembly took note of the report of the Executive Secretary of the Convention, as submitted by the Secretary-General to the General Assembly at its fifty-sixth session[35] and called upon parties to the Convention to become parties to the Cartagena Protocol on Biosafety;[36] and resolution 56/199, entitled "Protection of global climate for present and future generations of mankind", in which the Assembly recalled the United Nations Millennium Declaration,[37] in which heads of State and Government had resolved to make every effort to ensure the entry into force of the 1997 Kyoto Protocol[38] to the 1992 United Nations Framework Convention on Climate Change,[39] and took note of the Marrakesh Accords,[40] adopted by the Conference of the Parties to the Climate Change and Convention complementing the Bonn Agreements[41] on the implementation of the Buenos Aires Plan of Action,[42] paving the way for the timely entry into force of the Kyoto Protocol.

Also adopted was resolution 56/200, entitled "Promotion of new and renewable sources of energy, including the implementation of the World Solar Programme 1996-2005", in which the General Assembly took note with appreciation of the report of the Secretary-General concerning concrete action being taken to implement General Assembly resolutions 53/7, 54/215 and 55/205,[43] and welcomed, in particular, the attempt therein to analyse and discuss the obstacles and constraints impeding the promotion of new and renewable sources of energy and options for action to overcome them. The Assembly also adopted decision 56/439, entitled "Environment and sustainable development", in which it took note of the report of the Second Committee;[44] as well as decision 56/440, in which it took note of the report of the Secretary-General on products harmful to health and the environment.[45]

(*b*) Economic issues

On the recommendation of the Second Committee, the General Assembly adopted a number of resolutions and decisions on economic issues, including resolution 56/178, entitled "International trade and development"; resolution 56/179, entitled "Unilateral economic measures as a means of political and economic coercion against developing countries"; resolution 56/181, entitled "Towards a strengthened and stable international financial architecture responsive to the priorities of growth and development, especially in developing countries, and to the promotion of economic and social equity"; resolution 56/185, entitled "Business and development"; resolution 56/187, entitled "Second Industrial Development Decade for Africa (1993-2002)"; resolution 56/188, entitled "Women in development"; resolution 56/202, entitled "Economic and technical cooperation among developing countries"; and resolution 56/207, entitled "Implementation of the first United Nations Decade for the Eradication of Poverty (1997-2006), including the proposal to establish a world solidarity fund for poverty eradication". The Assembly also adopted resolution 56/212, entitled "Global Code of Ethics for Tourism", in which it took note with interest of the Global Code of Ethics for Tourism adopted at the thirteenth session of the General Assembly of the World Tourism Organization,[46] outlining principles to guide tourism development and to serve as a frame of reference for the different stakeholders in the tourism sector, with the objective of minimizing the negative impact of tourism on environment and on cultural heritage while maximizing the benefits of tourism in promoting sustainable development and poverty alleviation as well as understanding among nations. Furthermore, the Assembly adopted decision 56/435 on macroeconomic policy questions, taking note of the report of the Second Committee,[47] and decision 56/436 on sustainable development and international economic cooperation, also taking note of the report of the Second Committee.[48]

(*c*) Crime prevention

At its fifty-sixth session, on 12 September 2001, the General Assembly, without reference to a Main Committee, adopted without a vote resolution 56/1, entitled "Condemnation of terrorist attacks in the United States of America", in which it strongly condemned the heinous acts of terrorism which had caused enormous loss of human life, destruction and damage in the cities of New York, host city of the United Nations, and Washington, D.C., and in Pennsylvania, and urgently called for international cooperation to bring to justice the perpetrators, organizers and sponsors of the outrages of 11 September 2001. The Assembly also urgently called for international cooperation to prevent and eradicate acts of terrorism, and stressed that

those responsible for aiding, supporting or harbouring the perpetrators, organizers and sponsors of such acts would be held accountable.

On the recommendation of the Second Committee, the General Assembly, on 21 December 2001, adopted without a vote resolution 56/186, entitled "Preventing and combating corrupt practices and transfer of funds of illicit origin and returning such funds to the countries of origin", in which it took note of the report of the Secretary-General.[49]

On the recommendation of the Third Committee, the General Assembly on 19 December adopted a number of resolutions on crime prevention, including resolution 56/119, entitled "Role, function, periodicity and duration of the United Nations congresses on the prevention of crime and the treatment of offenders"; resolution 56/120, entitled "Action against transnational organized crime: assistance to States in capacity-building with a view to facilitating the implementation of the 2000 United Nations Convention against Transnational Organized Crime and the Protocols thereto";[50] resolution 56/121, entitled "Combating the criminal misuse of information technologies"; resolution 56/122, entitled "United Nations African Institute for the Prevention of Crime and the Treatment of Offenders"; and resolution 56/123, entitled "Strengthening the United Nations Crime Prevention and Criminal Justice Programme, in particular its technical cooperation capacity".

(*d*) International cooperation against the world drug problem

On 19 December 2001, the General Assembly, on the recommendation of the Third Committee, adopted without a vote resolution 56/124, entitled "International cooperation against the world drug problem", in which it reaffirmed that countering the world drug problem was a common and shared responsibility which must be addressed in a multilateral setting, requiring an integrated and balanced approach, and must be carried out in full conformity with the purposes and principles of the Charter of the United Nations and international law, and in particular with full respect for the sovereignty and territorial integrity of States, the principle of non-intervention in the internal affairs of States and all human rights and fundamental freedoms; emphasized the role of the Commission on Narcotic Drugs as the principal United Nations policy-making body on drug control issues and as the governing body of the United Nations International Drug Control Programme; and welcomed the efforts of the United Nations International Drug Control Programme to implement its mandate within the framework of the international drug control treaties,[51] the Comprehensive Multidisciplinary Outline of Future Activities in Drug Abuse Control,[52] the Global Programme of Action,[53] and the outcome of the special session of the General Assembly devoted to countering the world drug problem.

(*e*) Human rights issues

Status and implementation of international instruments

In 2001, three more States became party to the 1966 International Covenant on Economic, Social and Cultural Rights,[54] bringing the total number of States parties to 145; one more State became a party to the 1966 International Covenant on Civil and Political Rights,[55] bringing the total number of States parties to 147; three more States became party to the 1966 Optional Protocol to the International Covenant on Civil and Political Rights,[56] bringing the total number of States parties to 102; and two more States became party to the 1989 Second Optional Protocol to the International

Covenant on Civil and Political Rights, aiming at the abolition of the death penalty,[57] bringing the total number of States parties to 46.

At its fifty-sixth session, on 19 December 2001, the General Assembly, on the recommendation of the Third Committee, adopted without a vote resolution 56/144, entitled "International Covenants on Human Rights", in which it took note with appreciation of the annual reports of the Human Rights Committee submitted to it at its fifty-fifth and fifty-sixth sessions.[58] In the same resolution, the Assembly encouraged States parties to consider limiting the extent of any reservations that they lodged to the International Covenants, to formulate any reservations as precisely and narrowly as possible and to ensure that no reservation was incompatible with the object and purpose of the relevant treaty; and also urged States parties to fulfil in good time such reporting obligations under the International Covenants as might be requested and to make use in their reports of gender-disaggregated data, and stressed the importance of taking fully into account a gender perspective in the implementation of the Covenants at the national level.

On the same date, also on the recommendation of the Third Committee, the General Assembly adopted decision 56/431, entitled "Report of the United Nations High Commissioner for Human Rights", in which it took note of the related report of the Third Committee.[59]

International Convention on the Elimination of All Forms of Racial Discrimination of 1966[60]

During 2001, five more States became party to the Convention, bringing the total number of States parties to 162. Two more States became party to the 1992 Amendment to article 8 of the Convention,[61] bringing the total number of States parties to 32.

Convention on the Elimination of All Forms of Discrimination against Women of 1979[62]

During 2001, three more States became party to the Convention, bringing the total number of States parties to 168. Two more States became party to the 1995 Amendment to article 20, paragraph 1 of the Convention,[63] bringing the total number of States parties to 26. And 13 additional States became party to the 1999 Optional Protocol to the Convention,[64] bringing the total number of States parties to 28.

At its fifty-sixth session, on 24 December 2001, the General Assembly, on the recommendation of the Third Committee, adopted without a vote resolution 56/229, entitled "Convention on the Elimination of All Forms of Discrimination against Women". In the resolution, the Assembly, having considered the report of the Committee on the Elimination of Discrimination against Women on its twenty-fourth and twenty-fifty sessions,[65] welcomed the report of the Secretary-General on the status of the Convention;[66] expressed disappointment that universal ratification of the Convention had not been achieved by 2000; and emphasized the importance of full compliance by States parties with their obligations under the Convention and the Optional Protocol thereto.

Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of 1984[67]

In 2001, five more States became party to the Convention, bringing the total number of States parties to 127. The number of States parties to the 1992 Amendments to articles 17(7) and 18(5) of the Convention[68] remained at 23.

At its fifty-sixth session, on 19 December, the General Assembly, on the recommendation of the Third Committee, adopted without a vote resolution 56/143, entitled "Torture and other cruel, inhuman or degrading treatment or punishment", in which the Assembly recalled the Principles on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment[69] and strongly encouraged Governments to reflect upon the Principles as a useful tool in efforts to combat torture; welcomed the work of the Committee against Torture and took note of the report of the Committee,[70] submitted in accordance with article 24 of the Convention; and took note with appreciation of the interim report of the Special Rapporteur of the Commission on Human Rights on the question of torture.[71]

Convention on the Rights of the Child of 1989[72]

In 2001, one more State became a party to the Convention, bringing the total number of States parties to 191. Sixteen more States became party to the 1995 Amendment to article 43(2) of the Convention,[73] bringing the total number of States parties to 113. Ten more States became party to the 2000 Optional Protocol to the Convention on the involvement of children in armed conflict,[74] bringing the total number of States parties to 13. And 15 additional States became party to the 2000 Optional Protocol to the Convention on the sale of children, child prostitution and child pornography,[75] bringing the total number of States parties to 16.

At its fifty-sixth session, on 19 December 2001, the General Assembly, on the recommendation of the Third Committee, adopted without a vote resolution 56/138, entitled "The rights of the child", in which it took note with appreciation of the report of the Secretary-General entitled "We the children: end-decade review of the follow-up to the World Summit for Children"[76] and the reports of the Secretary-General on the status of the Convention[77] and on children and armed conflict,[78] as well as the report of the Special Representative of the Secretary-General for Children and Armed Conflict.[79] In the same resolution, the Assembly welcomed the convening of the Second World Congress against Commercial Sexual Exploitation of Children at Yokohama, Japan, from 17 to 20 December 2001, and the regional consultative meetings for its preparation, and invited Member States and observers to ensure their participation in the Congress at a high political level. On the same date, also on the recommendation of the Third Committee, the Assembly adopted without a vote resolution 56/139 entitled "The girl child", in which it stressed the need for full and urgent implementation of the rights of the girl child as guaranteed to her under all human rights instruments, including the Convention on the Rights of the Child and the Convention on the Elimination of All Forms of Discrimination against Women, and welcomed the United Nations Girls' Education Initiative launched by the Secretary-General at the World Education Forum held at Dakar in April 2000.

International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families of 1990[80]

In 2001, two more States became party to the Convention, bringing the total number of States parties to 17.

At its fifty-sixth session, on 19 December 2001, the General Assembly, on the recommendation of the Third Committee, adopted resolution 56/145 on the Convention. In the resolution, the Assembly requested the Secretary-General to provide all the facilities and assistance necessary for the promotion of the Convention through

the World Public Information Campaign on Human Rights and the programme of advisory services in the field of human rights, and took note of the report of the Secretary-General.[81] On the same date, also on the recommendation of the Third Committee, the Assembly adopted without a vote resolution 56/131, entitled "Violence against women migrant workers", in which it took note of the report of the Secretary-General,[82] as well as of the reports of the Special Rapporteur of the Commission on Human Rights on the human rights of migrants[83] and of the Special Rapporteur of the Commission on Human Rights on violence against women, its causes and consequences,[84] with regard to violence against women migrant workers, and encouraged them to continue to address the issue of violence against women migrant workers and their human rights, in particular the problem of gender-based violence and of discrimination, and trafficking in women.

Other human rights issues

The General Assembly, on the recommendation of the Third Committee, adopted a number of other resolutions and decisions in the area of human rights at its fifty-sixth session, all of them on 19 December. Among these was resolution 56/141, adopted without a vote, in which the Assembly reaffirmed that the universal realization of the right of all peoples, including those under colonial, foreign and alien domination, to self-determination was a fundamental condition for the effective guarantee and observance of human rights and for the preservation and promotion of such rights, and requested the Commission on Human Rights to continue to give special attention to the violation of human rights, especially the right to self-determination, resulting from foreign military intervention, aggression or occupation. In its resolution 56/146, which it adopted by a recorded vote of 113 to 47, with 5 abstentions, the Assembly encouraged States parties to the United Nations human rights instruments to establish quota distribution systems by geographical region for the election of the members of the treaty bodies.

Furthermore, the General Assembly adopted by a recorded vote of 99 to 10, with 59 abstentions, resolution 56/154, entitled "Respect for the principles of national sovereignty and non-interference in the internal affairs of States in electoral processes as an important element for the promotion and protection of human rights", in which it reaffirmed that all peoples had the right to self-determination, by virtue of which they freely determined their political status and freely pursued their economic, social and cultural development, and that every State had the duty to respect that right, in accordance with the provisions of the Charter of the United Nations; reiterated that periodic, fair and free elections were important elements for the promotion and protection of human rights; reaffirmed the right of peoples to determine methods and to establish institutions regarding electoral processes and that, consequently, States should ensure the necessary mechanisms and means to facilitate full and effective popular participation in those processes; and also reaffirmed that United Nations electoral assistance was provided at the specific request of the Member State concerned. In addition, the Assembly adopted by a recorded vote of 162 to none, with 8 abstentions, resolution 56/159, entitled "Strengthening the role of the United Nations in enhancing the effectiveness of the principle of periodic and genuine elections and the promotion of democratization", in which, recalling the Universal Declaration of Human Rights,[85] and taking note with interest of Commission of Human Rights resolutions 2001/41 of 23 April 2001 and 2001/72 of 25 April 2001,[86] the Assembly welcomed the report of the Secretary-General,[87] and commended the electoral assistance provided upon

request to Member States by the United Nations, and requested that such assistance continue on a case-by-case basis in accordance with the evolving needs of requesting countries to develop, improve and refine their electoral institutions and processes, recognizing that the fundamental responsibility of organizing free and fair elections lay with Governments.

The General Assembly also adopted, by a recorded vote of 102 to none, with 69 abstentions, resolution 56/160, entitled "Human rights and terrorism", in which it welcomed the report of the Secretary-General.[88] The Assembly furthermore adopted without a vote resolution 56/161, entitled; "Human rights in the administration of justice", in which it reaffirmed the importance of the full and effective implementation of all United Nations standards on human rights in the administration of justice.

(*f*) Refugee issues

Status of international instruments

During 2001, two more States became parties to the 1951 Convention Relating to the Status of Refugees,[89] bringing the total number of States parties to 138; two more States became parties to the 1967 Protocol Relating to the Status of Refugees,[90] bringing the total number of States parties to 138; two more States became party to the 1954 Convention relating to the Status of Stateless Persons,[91] bringing the total number of States parties to 54; and three more States became parties to the 1961 Convention on the Reduction of Statelessness,[92] bringing the total number of States parties to 26.

Consideration by the General Assembly

At its fifty-sixth session, on 19 December 2001, the General Assembly, on the recommendation of the Third Committee, adopted without a vote resolution 56/136, entitled "Assistance to unaccompanied refugee minors", in which it took note of the report of the Secretary-General,[93] and expressed its deep concern at the continuing plight of unaccompanied refugee minors and emphasized once again the urgent need for their early identification and for timely, detailed and accurate information on their number and whereabouts. And in its resolution 56/137 of the same date, entitled "Office of the United Nations High Commissioner for Refugees", the Assembly endorsed the report of the Executive Committee of the Programme of the High Commissioner on the work of its fifty-second session.[94]

(*g*) Ad hoc Tribunals for the Former Yugoslavia and for Rwanda

On 26 November 2001, the General Assembly, without reference to a Main Committee, adopted decisions 56/408 and 56/409, by which it took note, respectively, of the eighth annual report of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991[95] and the sixth annual report of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for

Genocide and Other Such Violations Committed in the Territory of Neighbouring States between 1 January and 31 December 1994.[96]

(*h*) Cultural issues

On 21 November 2001, the General Assembly, without reference to a Main Committee, adopted without a vote resolution 56/8, in which it proclaimed 2002 as the United Nations Year for Cultural Heritage and invited UNESCO to serve as the lead agency for the year. In its resolution 56/97 of 14 December 2001, adopted also without reference to a Main Committee and also without a vote, the Assembly welcomed the report of the Secretary-General submitted in cooperation with the Director-General of UNESCO[97] and commended UNESCO and the Intergovernmental Committee for Promoting the Return of Cultural Property to its Countries of Origin or its Restitution in Case of Illicit Appropriation on the work they had accomplished, in particular through the promotion of bilateral negotiations, for the return or restitution of cultural property, the preparation of inventories of movable cultural property and the implementation of the Object-ID standard related thereto, as well as for the reduction of illicit traffic in cultural property and the dissemination of information to the public. The Assembly also reaffirmed the importance of the provisions of the 1954 Convention for the Protection of Cultural Property in the Event of Armed Conflict.[98]

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4. LAW OF THE SEA

Status of international instruments

In 2001, two more States became party to the 1982 United Nations Convention on the Law of the Sea,[99] bringing the total number of States parties to 139. Three more States became party to the 1994 Agreement relating to the implementation of Part XI of the Convention,[100] bringing the total number of States parties to 103. Four more States became party to the 1995 Agreement for the implementation of the provisions of the Law of the Sea Convention relating to the conservation and management of straddling fish stocks and highly migratory fish stocks,[101] bringing the total number of States parties to 31. Six additional States became party to the 1997 Agreement on the Privileges and Immunities of the International Tribunal for the Law of the Sea,[102] bringing the total number of States parties to 10. And three further States became parties to the 1998 Protocol on the Privileges and Immunities of the International Seabed Authority,[103] bringing the total number of States parties to 6.

Report of the Secretary-General[104]

The extensive report covered many aspects of the oceans and the law of the sea during 2001. In an effort to make information on the quality of ships and their operators more accessible, the Commission of the European Communities and the maritime authorities of a number of countries in 2001 had inaugurated an information system known as EQUASIS, with the aim of collecting existing safety-related information from both public and private sources and making it available on the Internet. A given ship's history as presented on the EQUASIS

website contained information on its registry, classification and Protection and Indemnity (P&I) cover, port State control details and any deficiencies discovered, as well as manning information.

The report also covered criminal activities at sea, including piracy and armed robbery against ships, terrorism, smuggling of migrants, and illicit traffic in persons, narcotic drugs and small arms, all of which are reported as on the rise. Crimes might also include violations of international rules dealing with the environment, such as illegal dumping, illegal discharge of pollutants from vessels or the violation of rules regulating the exploitation of the living marine resources, such as illegal fishing. Recommended actions to prevent such crimes were included in the report.

It was further noted in the report that under Part XV, section 1, of the 1982 United Nations Convention on the Law of the Sea States parties were required to settle their disputes concerning the interpretation or application of the Convention by peaceful means, in accordance with Article 2, paragraph 3, of the Charter of the United Nations. However, when States parties involved in a dispute had not reached a settlement by peaceful means of their own choice, they were obliged to resort to the compulsory dispute settlement procedures provided for under the Convention (Part XV, section 2). Details of the cases relating to law of the sea issues can be found at the website of the Division for Ocean Affairs and the Law of the Sea of the Office of Legal Affairs of the United Nations Secretariat: www.un.org/Depts/los.

Consideration by the General Assembly

At its fifty-sixth session, on 28 November 2001, the General Assembly, without reference to a Main Committee, adopted by a recorded vote of 121 to 1, with 4 abstentions, resolution 56/12, entitled "Oceans and the law of the sea". In the resolution, the Assembly called upon all States that had not done so to become parties to the 1982 Convention and the 1994 Agreement relating to the implementation of Part XI of the Convention, providing the regime to be applied to the Area (the international seabed area) and its resources as defined in the Convention. The Assembly also noted with satisfaction the continued contribution of the International Tribunal for the Law of the Sea to the peaceful settlement of disputes in accordance with Part XV of the Convention, underlined its important role and authority concerning the interpretation or application of the Convention and the Agreement, encouraged States parties to the Convention to consider making a written declaration choosing from the means set out in article 287 for the settlement of disputes concerning the interpretation or application of the Convention and the Agreement, and invited States to note the provisions of annexes V, VI, VII and VIII to the Convention concerning, respectively, conciliation, the Tribunal, arbitration and special arbitration. The Assembly furthermore noted with satisfaction the ongoing work of the International Seabed Authority, including the issuance of contracts for exploration in accordance with the Convention, the Agreement and the Regulations on Prospecting and Exploration for Polymetallic Nodules in the Area. Moreover, the Assembly urged all States and relevant international bodies to prevent and combat piracy and armed robbery at sea by adopting measures, including assisting with capacity-building, for prevention, for reporting and investigating incidents, and for bringing the alleged perpetrators to justice, in accordance with international law, in particular through training seafarers, port staff and enforcement personnel, providing enforcement vessels and equipment and guarding against fraudulent ship registration.

On the same date, also without reference to a Main Committee, the General Assembly adopted without a vote a separate resolution, 56/13, on the 1995 Agreement for the implementation of the provisions of the Convention relating to the conservation and management of straddling fish stocks and highly migratory fish stocks.

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5. INTERNATIONAL COURT OF JUSTICE[105]

Cases before the Court[106]

Contentious cases before the full Court

1. *Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar* v. *Bahrain)*

At a public sitting held on 16 March 2001, the Court delivered its judgment, a summary of which is given below, followed by the text of the operative paragraph:

History of the proceedings and submissions of the Parties (paras. 1-34)

The Court first recalls the history of the proceedings and the submissions of the Parties as set out hereabove. (For the delimitation lines proposed by each of the Parties, see sketch-map No. 2 of the judgment, reproduced below.)

Geographical setting (para. 35)

The Court notes that the State of Qatar and the State of Bahrain are both located in the southern part of the Arabian/Persian Gulf (hereinafter referred to as "the Gulf"), almost halfway between the mouth of the Shatt al Arab, to the north-west, and the Strait of Hormuz, at the Gulf's eastern end to the north of Oman. The mainland to the west and south of the main island of Bahrain and to the south of the Qatar peninsula is part of the Kingdom of Saudi Arabia. The mainland on the northern shore of the Gulf is part of Iran.

The Qatar peninsula projects northward into the Gulf, on the west from the bay called Dawhat Salwah, and on the east from the region lying to the south of Khor al-Udaid. The capital of the State of Qatar, Doha, is situated on the eastern coast of the peninsula.

Bahrain is composed of a number of islands, islets and shoals situated off the eastern and western coasts of its main island, which is also called al-Awal Island. The capital of the State of Bahrain, Manama, is situated in the north-eastern part of al-Awal Island.

Zubarah is located on the north-west coast of the Qatar peninsula, opposite the main island of Bahrain.

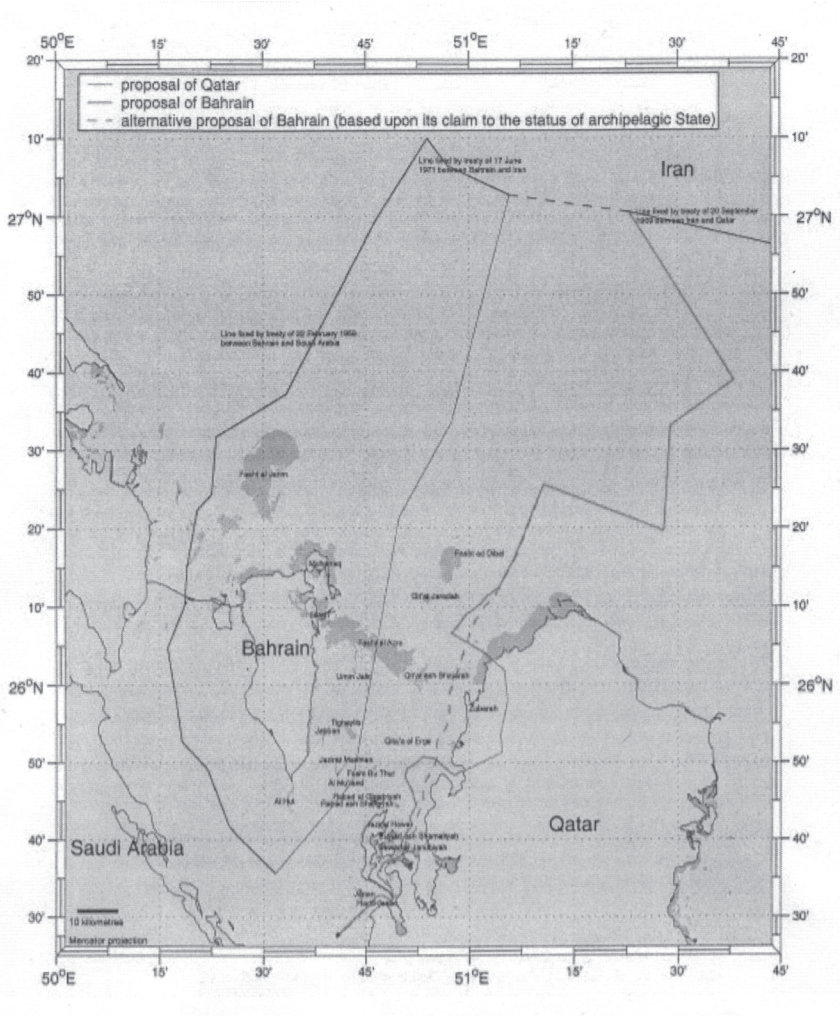
The Hawar Islands are located in the immediate vicinity of the central part of the west coast of the Qatar peninsula, to the south-east of the main island of Bahrain and at a distance of approximately 10 nautical miles from the latter.

Janan is located off the south-western tip of Hawar Island proper.

Fasht ad Dibal and Qit'at Jaradah are two maritime features located off the north-western coast of the Qatar peninsula and to the north-east of the main island of Bahrain.

Sketch-map No. 2

LINES PROPOSED BY QATAR AND BAHRAIN



This sketch-map, on which maritime features are shown in simplified form, has been prepared for illustrative purposes only. It is without prejudice to the nature of certain of these features.

Sources: Submissions of the Parties; Memorial of Qatar, vol. 17, map 24; Memorial of Bahrain, vol. 17, maps 10, 11, 13 and 15.

Historical context (paras. 36-69)

The Court then gives a brief account of the complex history which forms the background to the dispute between the Parties (only parts of which are referred to below).

Navigation in the Gulf was traditionally in the hands of the inhabitants of the region. From the beginning of the sixteenth century, European Powers began to show interest in the area, which lay along one of the trading routes with India. Portugal's virtual monopoly of trade was not challenged until the beginning of the seventeenth century. Great Britain was then anxious to consolidate its presence in the Gulf to protect the growing commercial interests of the East India Company.

Between 1797 and 1819 Great Britain dispatched numerous punitive expeditions in response to acts of plunder and piracy by Arab tribes led by the Qawasim against British and local ships. In 1819, Great Britain took control of Ras al Khaimah, headquarters of the Qawasim, and signed separate agreements with the various sheikhs of the region. These sheikhs undertook to enter into a General Treaty of Peace. By this Treaty, signed in January 1820, these sheikhs and chiefs undertook on behalf of themselves and their subjects, inter alia, to abstain for the future from plunder and piracy. It was only towards the end of the nineteenth century that Great Britain would adopt a general policy of protection in the Gulf, concluding "exclusive agreements" with most sheikhdoms, including those of Bahrain, Abu Dhabi, Sharjah and Dubai. Representation of British interests in the region was entrusted to a British Political Resident in the Gulf, installed in Bushire (Persia), to whom British Political Agents were subsequently subordinated in various sheikhdoms with which Great Britain had concluded agreements.

On 31 May 1861, the British Government signed a "Perpetual treaty of peace and friendship" with Sheikh Mahomed bin Khalifah, referred to in the treaty as independent Ruler of Bahrain. Under this treaty, Bahrain undertook, inter alia, to refrain from all maritime aggression of every description, while Great Britain undertook to provide Bahrain with the necessary support in the maintenance of security of its possessions against aggression. There was no provision in this treaty defining the extent of these possessions.

Following hostilities on the Qatar peninsula in 1867, the British Political Resident in the Gulf approached Sheikh Ali bin Khalifah, Chief of Bahrain, and Sheikh Mohamed Al-Thani, Chief of Qatar, and, on 6 and 12 September 1868 respectively, occasioned each to sign an agreement with Great Britain. By those agreements, the Chief of Bahrain recognized, inter alia, that certain acts of piracy had been committed by Mahomed bin Khalifah, his predecessor, and, "in view of preserving the peace, at sea, and precluding the occurrence of further disturbance and in order to keep the Political Resident informed of what happens", he promised to appoint an agent with the Political Resident; for his part, the Chief of Qatar undertook, inter alia, to return to and reside peacefully in Doha, not to put to sea with hostile intention, and, in the event of disputes or misunderstanding arising, invariably to refer to the Political Resident. According to Bahrain, the "events of 1867-1868" demonstrate that Qatar was not independent from Bahrain. According to Qatar, on the contrary, the 1868 Agreements formally recognized for the first time the separate identity of Qatar.

While Great Britain had become the dominant maritime Power in the Gulf by that time, the Ottoman Empire, for its part, had re-established its authority over extensive areas of the land on the southern side of the Gulf. In the years following the

arrival of the Ottomans on the Qatar peninsula. Great Britain further increased its influence over Bahrain. On 29 July 1913, an Anglo-Ottoman "Convention relating to the Persian Gulf and surrounding territories" was signed, but it was never ratified. Section II of the Convention dealt with Qatar. Article 11 described the course of the line which, according to the agreement between the parties, was to separate the Ottoman *Sanjak* of Nejd from the "peninsula of al-Qatar". Qatar points out that the Ottomans and the British had also signed, on 9 March 1914, a treaty concerning the frontiers of Aden, which was ratified that same year and whose article III provided that the line separating Qatar from the *Sanjak* of Nejd would be "in accordance with article 11 of the Anglo-Ottoman Convention of 29 July 1913 relating to the Persian Gulf and the surrounding territories". Under a treaty concluded on 3 November 1916 between Great Britain and the Sheikh of Qatar, the Sheikh of Qatar bound himself, inter alia, not to "have relations nor correspond with, nor receive the agent of, any other Power without the consent of the High British Government"; nor, without such consent, to cede to any other Power or its subjects, land; nor, without such consent, to grant any monopolies or concessions. In return, the British Government undertook to protect the Sheikh of Qatar and to grant its "good offices" should the Sheikh or his subjects be assailed by land within the territories of Qatar. There was no provision in this treaty defining the extent of those territories.

On 29 April 1936, the representative of Petroleum Concessions Ltd. wrote to the British India Office, which had responsibility for relations with the protected States in the Gulf, drawing its attention to a Qatar oil concession of 17 May 1935, and, observing that the Ruler of Bahrain, in his negotiations with Petroleum Concessions Ltd., had laid claim to Hawar, he accordingly enquired to which of the two Sheikhdoms (Bahrain or Qatar) Hawar belonged. On 14 July 1936, Petroleum Concessions Ltd. was informed by the India Office that it appeared to the British Government that Hawar belonged to the Sheikh of Bahrain. The content of those communications was not conveyed to the Sheikh of Qatar.

In 1937, Qatar attempted to impose taxation on the Naim tribe inhabiting the Zubarah region; Bahrain opposed this as it claimed rights over the region. Relations between Qatar and Bahrain deteriorated. Negotiations between the two States started in spring of 1937 and were broken off in July of that year.

Qatar alleges that Bahrain clandestinely and illegally occupied the Hawar Islands in 1937. Bahrain maintains that its Ruler was simply performing legitimate acts of continuing administration in his own territory. By a letter dated 10 May 1938, the Ruler of Qatar protested to the British Government against what he called "the irregular action taken by Bahrain against Qatar", to which he had already referred in February 1938 in a conversation in Doha with the British Political Agent in Bahrain. On 20 May 1938, the latter wrote to the Ruler of Qatar, inviting him to state his case on Hawar at the earliest possible moment. The Ruler of Qatar responded by a letter dated 27 May 1938. Some months later, on 3 January 1939, Bahrain submitted a counterclaim. In a letter of 30 March 1939, the Ruler of Qatar presented his comments on Bahrain's counterclaim to the British Political Agent in Bahrain. The Rulers of Qatar and Bahrain were informed on 11 July 1939 that the British Government had decided that the Hawar Islands belonged to Bahrain.

In May 1946, the Bahrain Petroleum Company Ltd. sought permission to drill in certain areas of the continental shelf, some of which the British considered might belong to Qatar. The British Government decided that such permission could not be granted until there had been a division of the seabed between Bahrain and Qatar. It

studied the matter and, on 23 December 1947, the British Political Agent in Bahrain sent the Rulers of Qatar and Bahrain two letters, in the same terms, showing the line which the British Government considered divided "in accordance with equitable principles the seabed aforesaid". The letter indicated further that the Sheikh of Bahrain had sovereign rights in the areas of the Dibal and Jaradah shoals (which should not be considered to be islands having territorial waters), as well as over the islands Hawar group while noting that Janan Island was not regarded as being included in the islands of the Hawar group.

In 1971, Qatar and Bahrain ceased to be British protected States. On 21 September 1971, they were both admitted to the United Nations.

Beginning in 1976, mediation, also referred to as "good offices", was conducted by the King of Saudi Arabia with the agreement of the Amirs of Bahrain and Qatar. The good offices of King Fahd did not lead to the desired outcome and, on 8 July 1991, Qatar instituted proceedings before the Court against Bahrain.

Sovereignty over Zubarah (paras. 70-97)

The Court notes that both Parties agree that the Al-Khalifah occupied Zubarah in the 1760s and that, some years later, they settled in Bahrain, but that they disagree as to the legal situation which prevailed thereafter and which culminated in the events of 1937. In the Court's view, the terms of the 1868 Agreement between Great Britain and the Sheikh of Bahrain (see above) show that any attempt by Bahrain to pursue its claims to Zubarah through military action at sea would not be tolerated by the British. The Court finds that thereafter the new rulers of Bahrain were never in a position to engage in direct acts of authority in Zubarah. Bahrain maintains, however, that the Al-Khalifah continued to exercise control over Zubarah through a Naim-led tribal confederation loyal to them, notwithstanding that at the end of the eighteenth century they had moved the seat of their government to the islands of Bahrain. The Court does not accept this contention.

The Court considers that, in view of the role played by Great Britain and the Ottoman Empire in the region, it is significant to note article 11 of the Anglo-Ottoman Convention signed on 29 July 1913, which states, inter alia: "it is agreed between the two Governments that the said peninsula will, as in the past, be governed by the Sheikh Jasim-bin-Sani and his successors". Thus Great Britain and the Ottoman Empire did not recognize Bahrain's sovereignty over the peninsula, including Zubarah. In their opinion the whole Qatar peninsula would continue to be governed by Sheikh Jassim Al-Thani, who had formerly been nominated *kaimakam* by the Ottomans, and by his successors. Both parties agree that the 1913 Anglo-Ottoman Convention was never ratified; they differ on the other hand as to its value as evidence of Qatar's sovereignty over the peninsula. The Court observes that signed but unratified treaties may constitute an accurate expression of the understanding of the parties at the time of signature. In the circumstances of the present case the Court has come to the conclusion that the Anglo-Ottoman Convention does represent evidence of the views of Great Britain and the Ottoman Empire as to the factual extent of the authority of the Al-Thani Ruler in Qatar up to 1913. The Court also observes that article 11 of the 1913 Convention is referred to by article III of the subsequent Anglo-Ottoman treaty of 9 March 1914, duly ratified that same year. The parties to that treaty therefore did not contemplate any authority over the peninsula other than that of Qatar.

The Court then examines certain events which took place in Zubarah in 1937, after the Sheikh of Qatar had attempted to impose taxation on the Naim. It notes, inter alia, that on 5 May 1937, the Political Resident reported on those incidents to the Secretary of State for India, stating that he was "personally, therefore, . . . of the opinion that juridically the Bahrain claim to Zubarah must fail". In a telegram of 15 July 1937 to the Political Resident, the British Secretary of State indicated that the Sheikh of Bahrain should be informed that the British Government regretted that it was "not prepared to intervene between Sheikh of Qatar and Naim tribe".

In view of the foregoing, the Court finds that it cannot accept Bahrain's contention that Great Britain had always regarded Zubarah as belonging to Bahrain. The terms of the 1868 agreement between the British Government and the Sheikh of Bahrain, of the 1913 and 1914 conventions and of the letters in 1937 from the British Political Resident to the Secretary of State for India, and from the Secretary of State to the Political Resident, all show otherwise. In effect, in 1937 the British Government did not consider that Bahrain had sovereignty over Zubarah; it is for this reason that it refused to provide Bahrain with the assistance which it requested on the basis of the agreements in force between the two countries. In the period after 1868, the authority of the Sheikh of Qatar over the territory of Zubarah was gradually consolidated; it was acknowledged in the 1913 Anglo-Ottoman Convention and was definitively established in 1937. The actions of the Sheikh of Qatar in Zubarah that year were an exercise of his authority on his territory and, contrary to what Bahrain has alleged, were not an unlawful use of force against Bahrain. For all these reasons, the Court concludes that the first submission made by Bahrain cannot be upheld and that Qatar has sovereignty over Zubarah.

Sovereignty over the Hawar Islands (paras. 98-148)

The Court then turns to the question of sovereignty over the Hawar Islands, leaving aside the question of Janan for the moment.

The Court observes that the Parties' lengthy arguments on the issue of sovereignty over the Hawar Islands raise several legal issues: the nature and validity of the 1939 decision by Great Britain; the existence of an original title; *effectivités*; and the applicability of the principle of *uti possidetis juris* to the present case. The Court begins by considering the nature and validity of the 1939 British decision. Bahrain maintains that the British decision of 1939 must be considered primarily as an arbitral award, which is *res judicata*. It claims that the Court does not have jurisdiction to review the award of another tribunal, basing its proposition on decisions of the Permanent Court of International Justice and the present Court. Qatar denies the relevance of the judgments cited by Bahrain. It contends that:

> "[N]one of them are in the slightest degree relevant to the issue which the Court has to determine in the present case, namely, whether the procedures followed by the British Government in 1938 and 1939 amounted to a process of arbitration which could result in an arbitral award binding upon the parties."

The Court first considers the question whether the 1939 British decision must be deemed to constitute an arbitral award. It observes in this respect that the word arbitration, for purposes of public international law, usually refers to "the settlement of differences between States by judges of their own choice, and on the basis of respect for law" and that this wording was reaffirmed in the work of the International Law Commission, which reserved the case where the parties might have decided that the requested decision should be taken *ex æquo et bono*. The Court observes that

in the present case no agreement existed between the Parties to submit their case to an arbitral tribunal made up of judges chosen by them, who would rule either on the basis of law or *ex æquo et bono*. The Parties had only agreed that the issue would be decided by "His Majesty's Government", but left it to the latter to determine how that decision would be arrived at, and by which officials. It follows that the decision whereby, in 1939, the British Government held that the Hawar Islands belonged to Bahrain, did not constitute an international arbitral award. The Court finds that it does not therefore need to consider Bahrain's argument concerning the Court's jurisdiction to examine the validity of arbitral awards.

The Court observes, however, that the fact that a decision is not an arbitral award does not mean that the decision is devoid of legal effect. In order to determine the legal effect of the 1939 British decision, it then recalls the events which preceded and immediately followed its adoption. Having done so, the Court considers Qatar's argument challenging the validity of the 1939 British decision.

Qatar first contends that it never gave its consent to have the question of the Hawar Islands decided by the British Government.

The Court observes, however, that following the Exchange of Letters of 10 and 20 May 1938, the Ruler of Qatar consented on 27 May 1938 to entrust decision of the Hawar Islands question to the British Government. On that day he had submitted his complaint to the British Political Agent. Finally, like the Ruler of Bahrain, he had consented to participate in the proceedings that were to lead to the 1939 decision. The jurisdiction of the British Government to take the decision concerning the Hawar Islands derived from these two consents; the Court therefore has no need to examine whether, in the absence of such consent, the British Government would have had the authority to do so under the treaties making Bahrain and Qatar protected States of Great Britain.

Qatar maintains in the second place that the British officials responsible for the Hawar Islands question were biased and had prejudged the matter. The procedure followed is accordingly alleged to have violated "the rule which prohibits bias in a decision maker on the international plane". It is also claimed that the parties were not given an equal and fair opportunity to present their arguments and that the decision was not reasoned.

The Court begins by recalling that the 1939 decision is not an arbitral award made upon completion of arbitral proceedings. This does not, however, mean that it was devoid of all legal effect. Quite to the contrary, the pleadings, and in particular the Exchange of Letters referred to above, shows that Bahrain and Qatar consented to the British Government settling their dispute over the Hawar Islands. The 1939 decision must therefore be regarded as a decision that was binding from the outset on both States and continued to be binding on those same States after 1971, when they ceased to be British protected States. The Court further observes that while it is true that the competent British officials proceeded on the premise that Bahrain possessed prima facie title to the islands and that the burden of proving the opposite lay on the Ruler of Qatar, Qatar cannot maintain that it was contrary to justice to proceed on the basis of this premise when Qatar had been informed before agreeing to the procedure that this would occur and had consented to the proceedings being conducted on that basis. During those proceedings the two Rulers were able to present their arguments and each of them was afforded an amount of time which the Court considers was sufficient for this purpose; Qatar's contention that it was subjected to unequal treatment therefore cannot be upheld. The Court also notes that, while

the reasoning supporting the 1939 decision was not communicated to the Rulers of Bahrain and Qatar, this lack of reasons has no influence on the validity of the decision taken, because no obligation to state reasons had been imposed on the British Government when it was entrusted with the settlement of the matter. Therefore, Qatar's contention that the 1939 British decision is invalid for lack of reasons cannot be upheld. Finally, the fact that the Sheikh of Qatar had protested on several occasions against the content of the British decision of 1939 after he had been informed of it is not such as to render the decision unopposable to him, contrary to what Qatar maintains. The Court accordingly concludes that the decision taken by the British Government on 11 July 1939 is binding on the parties. For all of these reasons, the Court concludes that Bahrain has sovereignty over the Hawar Islands, and that the submissions of Qatar on this question cannot be upheld. The Court finally observes that the conclusion thus reached by it on the basis of the British decision of 1939 makes it unnecessary for the Court to rule on the arguments of the Parties based on the existence of an original title, *effectivités*, and the applicability of the principle of *uti possidetis juris* to the present case.

Sovereignty over Janan Island (paras. 149-165)

The Court then considers the Parties' claims to Janan Island. It begins by observing that Qatar and Bahrain have differing ideas of what should be understood by the expression "Janan Island". According to Qatar, "Janan is an island approximately 700 metres long and 175 metres wide situated off the south-western tip of the main Hawar island". For Bahrain, the term covers "two islands, situated between one and two nautical miles off the southern coast of Jazirat Hawar, which merge into a single island at low tide". After examination of the arguments of the Parties, the Court considers itself entitled to treat Janan and Hadd Janan as one island.

The Court then, as it has done in regard to the Parties' claims to the Hawar Islands, begins by considering the effects of the British decision of 1939 on the question of sovereignty over Janan Island. As has already been stated, in that decision the British Government concluded that the Hawar Islands "belong[ed] to the State of Bahrain and not to the State of Qatar". No mention was made of Janan Island. Nor was it specified what was to be understood by the expression "Hawar Islands". The Parties have accordingly debated at length over the issue of whether Janan fell to be regarded as part of the Hawar Islands and whether, as a result, it pertained to Bahrain's sovereignty by virtue of the 1939 decision or whether, on the contrary, it was not covered by that decision.

In support of their respective arguments, Qatar and Bahrain have each cited documents both anterior and posterior to the British decision of 1939. Qatar has in particular relied on a "decision" by the British Government in 1947 relating to the seabed delimitation between the two States. Bahrain recalled that it had submitted four lists to the British Government—in April 1936, August 1937, May 1938 and July 1946—with regard to the composition of the Hawar Islands.

The Court notes that the three lists submitted prior to 1939 by Bahrain to the British Government with regard to the composition of the Hawar group are not identical. In particular, Janan Island appears by name in only one of those three lists. As to the fourth list, which is different from the three previous ones, it does make express reference to Janan Island, but it was submitted to the British Government only in 1946, several years after the adoption of the 1939 decision. Thus, no definite conclusion may be drawn from these various lists.

The Court then considers the letters sent on 23 December 1947 by the British Political Agent in Bahrain to the Rulers of Qatar and Bahrain. By those letters the Political Agent acting on behalf of the British Government informed the two States of the delimitation of their seabeds effected by the British Government. This Government, which had been responsible for the 1939 decision on the Hawar Islands, sought, in the last sentence of subparagraph 4 (ii) of these letters, to make it clear that "Janan Island is not regarded as being included in the islands of the Hawar group". The British Government accordingly did not "recognize" the Sheikh of Bahrain as having "sovereign rights" over that island and, in determining the points fixed in paragraph 5 of those letters, as well as in drawing the map enclosed with those letters, it regarded Janan as belonging to Qatar. The Court considers that the British Government, in thus proceeding, provided an authoritative interpretation of the 1939 decision and of the situation resulting from it. Having regard to all of the foregoing, the Court does not accept Bahrain's argument that in 1939 the British Government recognized "Bahrain's sovereignty over Janan as part of the Hawars". It finds that Qatar has sovereignty over Janan Island including Hadd Janan, on the basis of the decision taken by the British Government in 1939, as interpreted in 1947.

Maritime delimitation (paras. 166-250)

The Court then turns to the question of the maritime delimitation.

It begins by taking note that the Parties are in agreement that the Court should render its decision on the maritime delimitation in accordance with international law. Neither Bahrain nor Qatar is party to the Geneva Conventions on the Law of the Sea of 29 April 1958; Bahrain has ratified the United Nations Convention on the Law of the Sea of 10 December 1982 but Qatar is only a signatory to it. The Court indicates that customary international law, therefore, is the applicable law. Both Parties, however, agree that most of the provisions of the 1982 Convention which are relevant for the present case reflect customary law.

A single maritime boundary (paras. 168-173)

The Court notes that, under the terms of the "Bahraini formula", the Parties requested the Court, in December 1990, "to draw a single maritime boundary between their respective maritime areas of seabed, subsoil and superjacent waters".

The Court observes that it should be kept in mind, that the concept of "single maritime boundary" may encompass a number of functions. In the present case the single maritime boundary will be the result of the delimitation of various jurisdictions. In the southern part of the delimitation area, which is situated where the coasts of the Parties are opposite to each other, the distance between these coasts is nowhere more than 24 nautical miles. The boundary the Court is expected to draw will, therefore, delimit exclusively their territorial seas and, consequently, an area over which they enjoy territorial sovereignty. More to the north, however, where the coasts of the two States are no longer opposite to each other but are rather comparable to adjacent coasts, the delimitation to be carried out will be one between the continental shelf and exclusive economic zone belonging to each of the Parties, areas in which States have only sovereign rights and functional jurisdiction. Thus both Parties have differentiated between a southern and a northern sector.

The Court further observes that the concept of a single maritime boundary does not stem from multilateral treaty law but from State practice, and that it finds its

explanation in the wish of States to establish one uninterrupted boundary line delimiting the various—partially coincident—zones of maritime jurisdiction appertaining to them. In the case of coincident jurisdictional zones, the determination of a single boundary for the different objects of delimitation

> "can only be carried out by the application of a criterion or combination of criteria, which does not give preferential treatment to one of these . . . objects to the detriment of the other and at the same time is such as to be equally suitable to the division of either of them",

as was stated by the Chamber of the Court in the *Gulf of Maine* case. In that case, the Chamber was asked to draw a single line which would delimit both the continental shelf and the superjacent water column.

Delimitation of the territorial sea (paras. 174-223)

Delimitation of territorial seas does not present comparable problems, since the rights of the coastal State in the area concerned are not functional but territorial, and entail sovereignty over the seabed and the superjacent waters and air column. Therefore, when carrying out that part of its task, the Court has to apply in the present case first and foremost the principles and rules of international customary law which refer to the delimitation of the territorial sea, while taking into account that its ultimate task is to draw a single maritime boundary that serves other purposes as well. The Parties agree that the provisions of article 15 of the 1982 Convention on the Law of the Sea, headed "Delimitation of the territorial sea between States with opposite or adjacent coasts", are part of customary law. This Article provides:

> "Where the coasts of two States are opposite or adjacent to each other, neither of the two States is entitled, failing agreement between them to the contrary, to extend its territorial sea beyond the median line every point of which is equidistant from the nearest point on the baselines from which the breadth of the territorial seas of each of the two States is measured. The above provision does not apply, however, where it is necessary by reason of historic title or other special circumstances to delimit the territorial seas of the two States in a way which is at variance therewith."

The Court notes that article 15 of the 1982 Convention is virtually identical to article 12, paragraph 1, of the 1958 Convention on the Territorial Sea and the Contiguous Zone, and is to be regarded as having a customary character. It is often referred to as the "equidistance/special circumstances" rule. The most logical and widely practised approach is first to draw provisionally an equidistance line and then to consider whether that line must be adjusted in the light of the existence of special circumstances. The Court explains that once it has delimited the territorial seas belonging to the Parties, it will determine the rules and principles of customary law to be applied to the delimitation of the Parties' continental shelves and their exclusive economic zones or fishery zones. The Court will further decide whether the method to be chosen for this delimitation differs from or is similar to the approach just outlined.

The equidistance line (paras. 177-216)

The Court begins by noting that the equidistance line is the line every point of which is equidistant from the nearest points on the baselines from which the breadth of the territorial seas of each of the two States is measured. This line can only be

drawn when the baselines are known. Neither of the Parties has as yet specified the baselines which are to be used for the determination of the breadth of the territorial sea, nor have they produced official maps or charts which reflect such baselines. Only during the present proceedings have they provided the Court with approximate basepoints which in their view could be used by the Court for the determination of the maritime boundary.

The relevant coasts (paras. 178-216)

The Court indicates that it will therefore first determine the relevant coasts of the Parties, from which will be determined the location of the baselines, and the pertinent basepoints from which enable the equidistance line to be measured.

Qatar has argued that, for purposes of this delimitation, it is the mainland-to-mainland method which should be applied in order to construct the equidistance line. It claims that the notion of "mainland" applies both to the Qatar peninsula, which should be understood as including the main Hawar island, and to Bahrain, of which the islands to be taken into consideration are al-Awal (also called Bahrain Island), together with al-Muharraq and Sitrah. For Qatar, application of the mainland-to-mainland method has two main consequences. First, it takes no account of the islands (except for the above-mentioned islands, Hawar on the Qatar side and al-Awal, al-Muharraq and Sitrah on the Bahrain side), islets, rocks, reefs or low-tide elevations lying in the relevant area. Second, in Qatar's view, application of the mainland-to-mainland method of calculation would also mean that the equidistance line has to be constructed by reference to the high-water line.

Bahrain contends that it is a de facto archipelago or multiple-island State, characterized by a variety of maritime features of diverse character and size. All these features are closely interlinked and together they constitute the State of Bahrain; reducing that State to a limited number of so-called "principal" islands would be a distortion of reality and a refashioning of geography. Since it is the land which determines maritime rights, the relevant basepoints are situated on all those maritime features over which Bahrain has sovereignty. Bahrain further contends that, according to conventional and customary international law, it is the low-water line which is determinative for the breadth of the territorial sea and for the delimitation of overlapping territorial waters. Finally, Bahrain has stated that, as a de facto archipelagic State, it is entitled to declare itself an archipelagic State under Part IV of the 1982 Law of the Sea Convention and to draw the permissive baselines of article 47 of that Convention, i.e., "straight archipelagic baselines joining the outermost points of the outermost islands and drying reefs of the archipelago". Qatar has contested Bahrain's claim that it is entitled to declare itself an archipelagic State under Part IV of the 1982 Convention.

With regard to Bahrain's claim, the Court observes that Bahrain has not made this claim one of its formal submissions and that the Court is therefore not requested to take a position on the issue. What the Court, however, is called upon to do is to draw a single maritime boundary in accordance with international law. The Court can carry out this delimitation only by applying those rules and principles of customary law which are pertinent under the prevailing circumstances. It emphasizes that its decision will have binding force between the Parties, in accordance with Article 59 of the Statute of the Court, and consequently could not be put in issue by the unilateral action of either of the Parties, and in particular, by any decision of Bahrain to declare itself an archipelagic State.

The Court, therefore, turns to the determination of the relevant coasts from which the breadth of the territorial seas of the Parties is measured. In this respect the Court recalls that under the applicable rules of international law the normal baseline for measuring this breadth is the low-water line along the coast (art. 5, 1982 Convention on the Law of the Sea).

In previous cases the Court has made clear that maritime rights derive from the coastal State's sovereignty over the land, a principle which can be summarized as "the land dominates the sea". It is thus the terrestrial territorial situation that must be taken as starting point for the determination of the maritime rights of a coastal State. In order to determine what constitutes Bahrain's relevant coasts and what are the relevant baselines on the Bahraini side, the Court must first establish which islands come under Bahraini sovereignty. The Court recalls that it has concluded that the Hawar Islands belong to Bahrain and that Janan belongs to Qatar. It observes that other islands which can be identified in the delimitation area which are relevant for delimitation purposes in the southern sector are Jazirat Mashtan and Umm Jalid, islands which are at high tide very small in size, but at low tide have a surface which is considerably larger. Bahrain claims to have sovereignty over these islands, a claim which is not contested by Qatar.

Fasht al Azm (paras. 188-190)

However, the Parties are divided on the issue of whether Fasht al Azm must be deemed to be part of the island of Sitrah or whether it is a low-tide elevation which is not naturally connected to Sitrah Island. In 1982, Bahrain undertook reclamation works for the construction of a petrochemical plant, during which an artificial channel was dredged connecting the. waters on both sides of Fasht al Azm. After careful analysis of the various reports, documents and charts submitted by the Parties, the Court has been unable to establish whether a permanent passage separating Sitrah Island from Fasht al Azm existed before the reclamation works of 1982 were undertaken. For the reasons explained below, the Court is nonetheless able to undertake the requested delimitation in this sector without determining the question whether Fasht al Azm is to be regarded as part of the island of Sitrah or as a low-tide elevation.

Qit'at Jaradah (paras. 191-198)

Another issue on which the Parties have totally opposing views is whether Qit'at Jaradah is an island or a low-tide elevation. The Court recalls that the legal definition of an island is "a naturally formed area of land, surrounded by water, which is above water at high tide" (1958 Convention on the Territorial Sea and Contiguous Zone, art. 10, para. 1; 1982 Convention on the Law of the Sea, art. 121, para. 1). The Court has carefully analysed the evidence submitted by the Parties and weighed the conclusions of the experts referred to above, in particular the fact that the experts appointed by Qatar did not themselves maintain that it was scientifically proven that Qit'at Jaradah is a low-tide elevation. On these bases, the Court concludes that the maritime feature of Qit'at Jaradah satisfies the above-mentioned criteria and that it is an island which should as such be taken into consideration for the drawing of the equidistance line. In the present case, taking into account the size of Qit'at Jaradah, the activities carried out by Bahrain on that island must be considered sufficient to support Bahrain's claim that it has sovereignty over it.

Fasht ad Dibal (paras. 199-209)

Both Parties agree that Fasht ad Dibal is a low-tide elevation. Whereas Qatar maintains—just as it did with regard to Qit'at Jaradah—that Fasht ad Dibal as a low-tide elevation cannot be appropriated, Bahrain contends that low-tide elevations by their very nature are territory, and therefore can be appropriated in accordance with the criteria which pertain to the acquisition of territory. "Whatever their location, low-tide elevations are always subject to the law which governs the acquisition and preservation of territorial sovereignty, with its subtle dialectic of title and *effectivités*."

The Court observes that according to the relevant provisions of the Conventions on the Law of the Sea, which reflect customary international law, a low-tide elevation is a naturally formed area of land which is surrounded by and above water at low tide but submerged at high tide (1958 Convention on the Territorial Sea and the Contiguous Zone, art. 11, para. 1; 1982 Convention on the Law of the Sea, art. 13, para. 1). When a low-tide elevation is situated in the overlapping area of the territorial sea of two States, whether with opposite or with adjacent coasts, both States in principle are entitled to use its low-water line for the measuring of the breadth of their territorial sea. The same low-tide elevation then forms part of the coastal configuration of the two States. That is so even if the low-tide elevation is nearer to the coast of one State than that of the other, or nearer to an island belonging to one party than it is to the mainland coast of the other. For delimitation purposes the competing rights derived by both coastal States from the relevant provisions of the law of the sea would by necessity seem to neutralize each other. In Bahrain's view, however, it depends upon the *effectivités* presented by the two coastal States which of them has a superior title to the low-tide elevation in question and is therefore entitled to exercise the right attributed by the relevant provisions of the law of the sea, just as in the case of islands which are situated within the limits of the breadth of the territorial sea of more than one State. In the view of the Court the decisive question for the present case is whether a State can acquire sovereignty by appropriation over a low-tide elevation situated within the breadth of its territorial sea when that same low-tide elevation lies also within the breadth of the territorial sea of another State. International treaty law is silent on the question whether low-tide elevations can be considered to be "territory". Nor is the Court aware of a uniform and widespread State practice which might have given rise to a customary rule which unequivocally permits or excludes appropriation of low-tide elevations. It is only in the context of the law of the sea that a number of permissive rules have been established with regard to low-tide elevations which are situated at a relatively short distance from a coast. The few existing rules do not justify a general assumption that low-tide elevations are territory in the same sense as islands. It has never been disputed that islands constitute terra firma, and are subject to the rules and principles of territorial acquisition; the difference in effects which the law of the sea attributes to islands and low-tide elevations is considerable. It is thus not established that in the absence of other rules and legal principles, low-tide elevations can, from the viewpoint of the acquisition of sovereignty, be fully assimilated with islands or other land territory. In this respect the Court recalls the rule that a low-tide elevation which is situated beyond the limits of the territorial sea does not have a territorial sea of its own. A low-tide elevation, therefore, as such does not generate the same rights as islands or other territory. The Court, consequently, is of the view that in the present case there is no ground for recognizing the right of Bahrain to use as a baseline the low-water line of those

low-tide elevations which are situated in the zone of overlapping claims, or for recognizing Qatar as having such a right. The Court accordingly concludes that for the purposes of drawing the equidistance line, such low-tide elevations must be disregarded.

Method of straight baselines (paras. 210-216)

The Court further observes that the method of straight baselines, which Bahrain applied in its reasoning and in the maps provided to the Court, is an exception to the normal rules for the determination of baselines and may only be applied if a number of conditions are met. This method must be applied restrictively. Such conditions are primarily that either the coastline is deeply indented and cut into, or that there is a fringe of islands along the coast in its immediate vicinity. The fact that a State considers itself a multiple-island State or a de facto archipelagic State does not allow it to deviate from the normal rules for the determination of baselines unless the relevant conditions are met. The coasts of Bahrain's main islands do not form a deeply indented coast, nor does Bahrain claim this. It contends, however, that the maritime features off the coast of the main islands may be assimilated to a fringe of islands which constitute a whole with the mainland. The Court does not deny that the maritime features east of Bahrain's main islands are part of the overall geographical configuration; it would be going too far, however, to qualify them as a fringe of islands along the coast. The Court, therefore, concludes that Bahrain is not entitled to apply the method of straight baselines. Thus each maritime feature has its own effect for the determination of the baselines, on the understanding that, on the grounds set out before, the low-tide elevations situated in the overlapping zone of territorial seas will be disregarded. It is on this basis that the equidistance line must be drawn. The Court notes, however, that Fasht al Azm requires special mention. If this feature were to be regarded as part of the island of Sitrah, the basepoints for the purposes of determining the equidistance line would be situated on Fasht al Azm's eastern low-water line. If it were not to be regarded as part of the island of Sitrah, Fasht al Azm could not provide such basepoints. As the Court has not determined whether this feature does form part of the island of Sitrah, it has drawn two equidistance lines reflecting each of these hypotheses.

Special circumstances (paras. 217-223)

The Court then turns to the question of whether there are special circumstances which make it necessary to adjust the equidistance line as provisionally drawn in order to obtain an equitable result in relation to this part of the single maritime boundary to be fixed.

With regard to the question of Fasht al Azm, the Court considers that on either of the above-mentioned hypotheses there are special circumstances which justify choosing a delimitation line passing between Fasht al Azm and Qit'at ash Shajarah. With regard to the question of Qit'at Jaradah. the Court observes that it is a very small island, uninhabited and without any vegetation. This tiny island, which—as the Court has determined—comes under Bahraini sovereignty, is situated about midway between the main island of Bahrain and the Qatar peninsula. Consequently, if its low-water line were to be used for determining a basepoint in the construction of the equidistance line, and this line taken as the delimitation line, a disproportionate effect would be given to an insignificant maritime feature. The Court thus finds that there is a special circumstance in this case warranting the choice of a delimitation line passing immediately to the east of Qit'at Jaradah.

The Court observed earlier that, since it did not determine whether Fasht al Azm is part of Sitrah island or a separate low-tide elevation, it is necessary to draw provisionally two equidistance lines. If no effect is given to Qit'at Jaradah and in the event that Fasht al Azm is considered to be part of Sitrah island, the equidistance line thus adjusted cuts through Fasht ad Dibal leaving the greater part of it on the Qatari side. If, however, Fasht al Azm is seen as a low-tide elevation, the adjusted equidistance line runs west of Fasht ad Dibal. In view of the fact that under both hypotheses, Fasht ad Dibal is largely or totally on the Qatari side of the adjusted equidistance line, the Court considers it appropriate to draw the boundary line between Qit'at Jaradah and Fasht ad Dibal. As Fasht ad Dibal thus is situated in the territorial sea of Qatar, it falls under the sovereignty of that State.

On these considerations the Court finds that it is in a position to determine the course of that part of the single maritime boundary which will delimit the territorial seas of the Parties. Before doing so the Court notes, however, that it cannot fix the boundary's southern-most point, since its definitive location is dependent upon the limits of the respective maritime zones of Saudi Arabia and of the Parties. The Court also considers it appropriate, in accordance with common practice, to simplify what would otherwise be a very complex delimitation line in the region of the Hawar Islands.

Taking account of all of the foregoing, the Court decides that, from the point of intersection of the respective maritime limits of Saudi Arabia on the one hand and of Bahrain and Qatar on the other, which cannot be fixed, the boundary will follow a north-easterly direction, then immediately turn in an easterly direction, after which it will pass between Jazirat Hawar and Janan; it will subsequently turn to the north and pass between the Hawar Islands and the Qatar peninsula and continue in a northerly direction, leaving the low-tide elevation of Fasht Bu Thur, and Fasht al Azm, on the Bahraini side, and the low-tide elevations of Qita'a el Erge and Qit'at ash Shajarah on the Qatari side; finally it will pass between Qit'at Jaradah and Fasht ad Dibal, leaving Qit'at Jaradah on the Bahraini side and Fasht ad Dibal on the Qatari side.

With reference to the question of navigation, the Court notes that the channel connecting Qatar's maritime zones situated to the south of the Hawar Islands and those situated to the north of those islands, is narrow and shallow, and little suited to navigation. It emphasizes that the waters lying between the Hawar Islands and the other Bahraini islands are not internal waters of Bahrain, but the territorial sea of that State. Consequently, Qatari vessels, like those of all other States, shall enjoy in these waters the right of innocent passage accorded by customary international law. In the same way, Bahraini vessels, like those of all other States, enjoy the same right of innocent passage in the territorial sea of Qatar.

Delimitation of the continental shelf and exclusive economic zone (paras. 224-249)

The Court then deals with the drawing of the single maritime boundary in that part of the delimitation area which covers both the continental shelf and the exclusive economic zone. Referring to its earlier case-law on the drawing of a single maritime boundary the Court observes that it will follow the same approach in the present case. For the delimitation of the maritime zones beyond the 12-mile zone it will first provisionally draw an equidistance line and then consider whether there are circumstances which must lead to an adjustment of that line. The Court further notes that the equidistance/special circumstances rule, which is applicable in particular to the delimitation of the territorial sea, and the equitable principles/relevant circumstances rule, as it has been developed

since 1958 in case-law and State practice with regard to the delimitation of the continental shelf and the exclusive economic zone, are closely interrelated.

The Court then examines whether there are circumstances which might make it necessary to adjust the equidistance line in order to achieve an equitable result. With regard to Bahrain's claim concerning the pearling industry, the Court first takes note of the fact that that industry effectively ceased to exist a considerable time ago. It further observes that, from the evidence submitted to it, it is clear that pearl diving in the Gulf area traditionally was considered as a right which was common to the coastal population. The Court, therefore, does not consider the existence of pearling banks, though predominantly exploited in the past by Bahraini fishermen, as forming a circumstance which would justify an eastward shifting of the equidistance line as requested by Bahrain.

The Court also considers that it does not need to determine the legal character of the "decision" contained in the letters of 23 December 1947 of the British Political Agent to the Rulers of Bahrain and Qatar with respect to the division of the seabed, which Qatar claims as a special circumstance. It suffices for it to note that neither of the Parties has accepted it as a binding decision and that they have invoked only parts of it to support their arguments.

Taking into account the fact that it has decided that Bahrain has sovereignty over the Hawar Islands, the Court finds that the disparity in length of the coastal fronts of the Parties cannot, as Qatar claims, be considered such as to necessitate an adjustment of the equidistance line.

The Court finally recalls that in the northern sector the coasts of the Parties are comparable to adjacent coasts abutting on the same maritime areas extending seawards into the Gulf. The northern coasts of the territories belonging to the Parties are not markedly different in character or extent; both are flat and have a very gentle slope. The only noticeable element is Fasht al Jarim as a remote projection of Bahrain's coastline in the Gulf area, which, if given full effect, would "distort the boundary and have disproportionate effects". In the view of the Court, such a distortion, due to a maritime feature located well out to sea and of which at most a minute part is above water at high tide, would not lead to an equitable solution which would be in accord with all other relevant factors referred to above. In the circumstances of the case considerations of equity require that Fasht al Jarim should have no effect in determining the boundary line in the northern sector.

The Court accordingly decides that the single maritime boundary in this sector shall be formed in the first place by a line which, from a point situated to the north-west of Fasht ad Dibal, shall meet the equidistance line as adjusted to take account of the absence of effect given to Fasht al Jarim. The boundary shall then follow this adjusted equidistance line until it meets the delimitation line between the respective maritime zones of Iran on the one hand and of Bahrain and Qatar on the other.

*

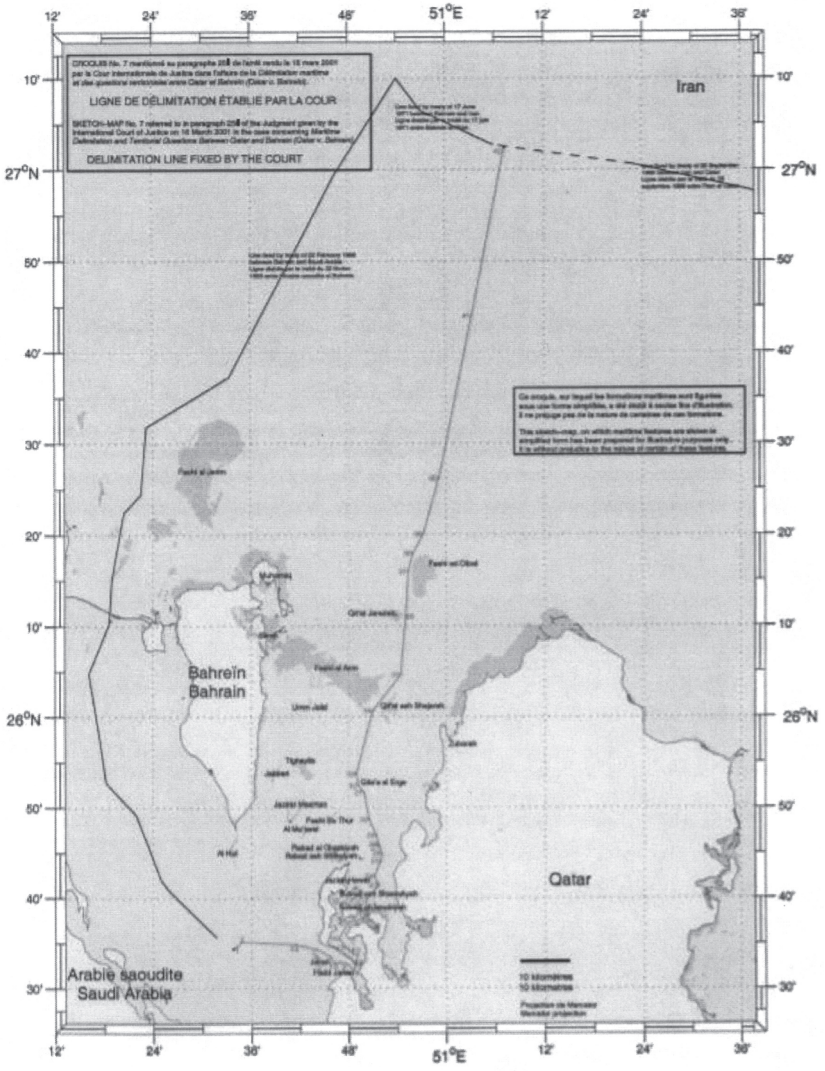
The Court concludes from all of the foregoing that the single maritime boundary that divides the various maritime zones of the State of Qatar and the State of Bahrain shall be formed by a series of geodesic lines joining, in the order specified, the points with the following coordinates:

Point	*Longitude North*	*Longitude East*
1	25°34'34"	50°34'3"
2	25°35'10"	50°34'48"
3	25°34'53"	50°41'22"
4	25°34'50"	50°41'35"
5	25°34'21"	50°44'5"
6	25°33'29"	50°45'49"
7	25°32'49"	50°46'11"
8	25°32'55"	50°46'48"
9	25°32'43"	50°47'46"
10	25°32'6"	50°48'36"
11	25°32'40"	50°48'54"
12	25°32'55"	50°48'48"
13	25°33'44"	50°49'4"
14	25°33'49"	50°48'32"
15	25°34'33"	50°47'37"
16	25°35'33"	50°46'49"
17	25°37'21"	50°47'54"
18	25°37'45"	50°49'44"
19	25°38'19"	50°50'22"
20	25°38'43"	50°50'26"
21	25°39'31"	50°50'6"
22	25°40'10"	50°50'30"
23	25°41'27"	50°51'43"
24	25°42'27"	50°51'9"
25	25°44'7"	50°51'58"
26	25°44'58"	50°52'5"
27	25°45'35"	50°51''53"
28	25°46'0"	50°51'40"
29	25°46'57"	50°51'23"
30	25°48'43"	50°50'32"
31	25°51'40"	50°49'53"
32	25°52'26"	50°49'12"
33	25°53'42"	50°48'57"
34	26°0'40"	50°51'00"
35	26°4'38"	50°54'27"
36	26°11'2"	50°55'3"
37	26°15'55"	50°55'22"
38	26°17'58"	50°55'58"
39	26°20'2"	50°57'16"
40	26°26'11"	50°59'12"
41	26°43'58"	51°3'16"
42	27°2'0"	51°7'11"

Below point 1, the single maritime boundary shall follow, in a south-westerly direction, a loxodrome having an azimuth of 234°16'53", until it meets the delimitation line between the respective maritime zones of Saudi Arabia on the one hand and of Bahrain and Qatar on the other. Beyond point 42, the single maritime boundary shall follow, in a north-north-easterly direction, a loxodrome having an azimuth of 12°15'12", until it meets the delimitation line between the respective maritime zones of Iran on the one hand and of Bahrain and Qatar on the other.

The course of this boundary has been indicated, for illustrative purposes only, on sketch-map No. 7 attached to the judgment, reproduced below.

Sketch-map No. 7



Operative paragraph (para. 251):

"For these reasons.

THE COURT,

(1) Unanimously,

Finds that the State of Qatar has sovereignty over Zubarah;

(2) (*a*) By twelve votes to five,

Finds that the State of Bahrain has sovereignty over the Hawar Islands:

IN FAVOUR: *President* Guillaume, *Vice-President* Shi; *Judges*, Oda, Herczegh, Fleischhauer, Higgins, Parra-Aranguren, Kooijmans, Rezek, Al-Khasawneh, Buergenthal; *Judge ad hoc* Fortier;

AGAINST: *Judges* Bedjaoui, Ranjeva, Koroma, Vereshchetin; *Judge ad hoc* Torres Bernárdez;

(*b*) Unanimously,

Recalls that vessels of the State of Qatar enjoy in the territorial sea of Bahrain separating the Hawar Islands from the other Bahraini islands the right of innocent passage accorded by customary international law;

(3) By thirteen votes to four,

Finds that the State of Qatar has sovereignty over Janan Island, including Hadd Janan;

IN FAVOUR: *President* Guillaume; *Vice-President* Shi; *Judges* Bedjaoui, Ranjeva, Herczegh, Fleischhauer, Koroma, Vereshchetin, Parra-Aranguren, Rezek, Al-Khasawneh, Buergenthal; *Judge ad hoc* Torres Bernárdez;

AGAINST: *Judges* Oda, Higgins, Kooijmans; *Judge ad hoc* Fortier;

(4) By twelve votes to five,

Finds that the State of Bahrain has sovereignty over the island of Qit'at Jaradah;

IN FAVOUR: *President* Guillaume; *Vice-President* Shi; *Judges* Oda, Herczegh, Fleischhauer, Higgins, Parra-Aranguren, Kooijmans, Rezek, Al-Khasawneh, Buergenthal; *Judge ad hoc* Fortier;

AGAINST: *Judges* Bedjaoui, Ranjeva, Koroma, Vereshchetin; *Judge ad hoc* Torres Bernárdez;

(5) Unanimously,

Finds that the low-tide elevation of Fasht ad Dibal falls under the sovereignty of the State of Qatar;

(6) By thirteen votes to four,

Decides that the single maritime boundary that divides the various maritime zones of the State of Qatar and the State of Bahrain shall be drawn as indicated in paragraph 250 of the present Judgment;

IN FAVOUR: *President* Guillaume; *Vice-President* Shi; *Judges* Oda, Herczegh, Fleischhauer, Vereshchetin, Higgins, Parra-Aranguren, Kooijmans, Rezek, Al-Khasawneh, Buergenthal; *Judge ad hoc* Fortier;

AGAINST: *Judges* Bedjaoui, Ranjeva. Koroma; *Judge ad hoc* Torres Bernárdez."

*

Judge Oda appended a separate opinion to the Judgment; Judges Bedjaoui, Ranjeva and Koroma a joint dissenting opinion; Judges Herczegh, Vereshchetin and Higgins declarations; Judges Parra-Aranguren, Kooijmans and Al-Khasawneh separate opinions; Judge ad hoc Torres Bernárdez a dissenting opinion, and Judge ad hoc Fortier a separate opinion.

2, 3. *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya* v. *United Kingdom) (Libyan Arab Jamahiriya* v. *United States of America)*

By Orders of 6 September 2000 (*I.C.J. Reports 2000*, pp. 140 and 143), the President of the Court, taking account of the views of the Parties, fixed 3 August 2001 as the time limit for the filing of the Rejoinder of the United Kingdom and the United States respectively. The Rejoinders were filed within the prescribed time limits.

4. *Oil Platforms (Islamic Republic of Iran* v. *United States of America)*

By an Order of 26 May 1998 (*I.C.J. Reports 1998*, p. 269), the Vice-President of the Court, Acting President, extended, at the request of Iran and taking into account the views expressed by the United States, the time limits for Iran's Reply and the United States Rejoinder to 10 December 1998 and 23 May 2000 respectively. By an Order of 8 December 1998 (*I.C.J. Reports 1998*, p. 740) the Court further extended those time limits to 10 March 1999 for Iran's Reply and 23 November 2000 for the United States Rejoinder. Iran's Reply was filed within the time limit thus extended. By an Order of 4 September 2000 (*I.C.J. Reports 2000*, p. 137), the President of the Court extended, at the request of the United States and taking into account the agreement between the Parties, the time limit for the filing of the United States Rejoinder from November 2000 to 23 March 2001. The Rejoinder was filed within the time limit thus extended.

By an Order of 28 August 2001 (*I.C.J. Reports 2001*, p. 568), the Vice-President of the Court, taking account of the agreement of the Parties, authorized the submission by Iran of an additional pleading relating solely to the counterclaim submitted by the United States and fixed 24 September 2001 as the time limit for the filing of that pleading. The additional pleading was filed by Iran within the prescribed time limit.

5. *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Yugoslavia)*

By an Order of 10 September 2001 (*I.C.J. Reports 2001*, p. 572), the President of the Court placed on record the withdrawal by Yugoslavia of the counterclaims submitted by that State in its Counter-Memorial. The Order was made after Yugoslavia had informed the Court that it intended to withdraw its counterclaims and Bosnia and Herzegovina had indicated to the latter that it had no objection to that withdrawal.

6. *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon* v. *Nigeria: Equatorial Guinea intervening)*

By an Order of 21 October 1999 (*I.C J. Reports 1999*, p. 1029), the Court permitted Equatorial Guinea to intervene in the case, pursuant to Article 62 of the

Statute, to the extent, in the manner and for the purposes set out in its Application for permission to intervene, and fixed 4 April 2001 as the time limit for the filing of the written statement of the Republic of Equatorial Guinea and 4 July 2001 for the written observations of the Republic of Cameroon and of the Federal Republic of Nigeria. Equatorial Guinea's written statement was filed within the prescribed time limit.

By an Order of 20 February 2001 (*I.C.J. Reports 2001*, p. 9) the Court, at the request of Cameroon and taking into account the agreement of the Parties, authorized the submission by Cameroon of an additional pleading, relating solely to the counterclaims submitted by Nigeria and fixed 4 July 2001 as the time limit for the filing of that pleading.

Following the filing of the various pleadings which were due to be lodged on 4 July 2001, public sittings to hear the oral arguments of the Parties were held from 18 February to 21 March 2002.

At the conclusion of those hearings Cameroon requested the Court, to adjudge and declare:

"(*a*) That the land boundary between Cameroon and Nigeria takes the following course:

— from the point designated by the coordinates 13°05' N and 14°05' E, the boundary follows a straight line as far as the mouth of the Ebeji, situated at the point located at the coordinates 12°13'7" N and 14°12'12" E, as defined within the framework of the LCBC and constituting an authoritative interpretation of the Milner-Simon Declaration of 10 July 1919 and the Thomson-Marchand Declarations of 29 December 1929 and 31 January 1930, as confirmed by the Exchange of Letters of 9 January 1931; in the alternative, the mouth of the Ebeji is situated at the point located at the coordinates 12°31'12" N and 14°11'48" E;

— from that point it follows the course fixed by those instruments as far as the 'very prominent peak' described in paragraph 60 of the Thomson-Marchand Declaration and called by the usual name of 'Mount Kombon';

— from 'Mount Kombon' the boundary then runs to 'Pillar 64' mentioned in paragraph 12 of the Anglo-German Agreement of Obokum of 12 April 1913 and follows, in that sector, the course described in section 6 (1) of the British Nigeria (Protectorate and Cameroons) Order in Council of 2 August 1946;

— from Pillar 64 it follows the course described in paragraphs 13 to 21 of the Obokum Agreement of 12 April 1913 as far as Pillar 114 on the Cross River;

— thence, as far as the intersection of the straight line from Bakassi Point to King Point with the centre of the navigable channel of the Akwayafe, the boundary is determined by paragraphs XVI to XXI of the Anglo-German Agreement of 11 March 1913.

(*b*) That, in consequence, inter alia, sovereignty over the peninsula of Bakassi and over the disputed parcel occupied by Nigeria in the area of Lake Chad, in particular over Darak and its region, is Cameroonian.

(*c*) That the boundary of the maritime areas appertaining respectively to the Republic of Cameroon and to the Federal Republic of Nigeria takes the following course:

— from the intersection of the straight line from Bakassi Point to King Point with the centre of the navigable channel of the Akwayafe to point '12', that boundary is confirmed by the 'compromise line' entered on British Admiralty Chart No. 3433 by the Heads of State of the two countries on 4 April 1971 (Yaoundé II Declaration) and, from that point 12 to point 'G', by the Declaration signed at Maroua on 1 June 1975;

— from point G the equitable line follows the direction indicated by points G, H (coordinates 8°21'16" E and 4°17' N), I (7°55'40" E and 3°46' N), J (7°12'08" E and 3°12'35" N), K (6°45'22" E and 3°01'05" N), and continues from K up to the outer limit of the maritime zones which international law places under the respective jurisdiction of the two Parties.

(*d*) That in attempting to modify unilaterally and by force the courses of the boundary defined above under (*a*) and (*c*). the Federal Republic of Nigeria has violated and is violating the fundamental principle of respect for frontiers inherited from colonization (*uti possidetis juris*), as well as its legal obligations concerning the land and maritime delimitation.

(*e*) That by using force against the Republic of Cameroon and, in particular, by militarily occupying parcels of Cameroonian territory in the area of Lake Chad and the Cameroonian peninsula of Bakassi, and by making repeated incursions throughout the length of the boundary between the two countries, the Federal Republic of Nigeria has violated and is violating its obligations under international treaty law and customary law.

(*f*) That the Federal Republic of Nigeria has the express duty of putting an end to its administrative and military presence in Cameroonian territory and, in particular, of effecting an immediate and unconditional evacuation of its troops from the occupied area of Lake Chad and from the Cameroonian peninsula of Bakassi and of refraining from such acts in the future.

(*g*) That in failing to comply with the Order for the indication of provisional measures rendered by the Court on 15 March 1996 the Federal Republic of Nigeria has been in breach of its international obligations.

(*h*) That the internationally wrongful acts referred to above and described in detail in the written pleadings and oral argument of the Republic of Cameroon engage the responsibility of the Federal Republic of Nigeria.

(*i*) That, consequently, on account of the material and moral injury suffered by the Republic of Cameroon reparation in a form to be determined by the Court is due from the Federal Republic of Nigeria to the Republic of Cameroon."

Cameroon further requested that the Court permit it, at a subsequent stage of the proceedings, to present an assessment of the amount of compensation due to it as reparation for the injury suffered by it as a result of the internationally wrongful acts attributable to the Federal Republic of Nigeria. The Republic of Cameroon also asked the Court to declare that the counterclaims of the Federal Republic of Nigeria are "unfounded both in fact and in law, and to reject them".

The final submissions of Nigeria read as follows:

"The Federal Republic of Nigeria respectfully requests that the Court should

1. as to the Bakassi Peninsula, *adjudge and declare*:

(*a*) that sovereignty over the Peninsula is vested in the Federal Republic of Nigeria;

(*b*) that Nigeria's sovereignty over Bakassi extends up to the boundary with Cameroon described in chapter 11 of Nigeria's Counter-Memorial.

2. as to Lake Chad, *adjudge and declare*:

(*a*) that the proposed delimitation and demarcation under the auspices of the Lake Chad Basin Commission, not having been accepted by Nigeria, is not binding upon it;

(*b*) that sovereignty over the areas in Lake Chad defined in paragraph 5.9 of Nigeria's Rejoinder and depicted in figs. 5.2 and 5.3 facing page 242 (and including the Nigerian settlements identified in paragraph 4.1 of Nigeria's Rejoinder) is vested in the Federal Republic of Nigeria;

(*c*) that in any event the process which has taken place within the framework of the Lake Chad Basin Commission, and which was intended to lead to an overall delimitation and demarcation of boundaries on Lake Chad, is legally without prejudice to the title to particular areas of the Lake Chad region inhering in Nigeria as a consequence of the historical consolidation of title and the acquiescence of Cameroon.

3. as to the central sectors of the land boundary, *adjudge and declare*:

(*a*) that the Court's jurisdiction extends to the definitive specification of the land boundary between Lake Chad and the sea;

(*b*) that the mouth of the Ebeji, marking the beginning of the land boundary, is located at the point where the north-east channel of the Ebeji flows into the feature marked 'Pond' on the Map shown as figure 7.1 of Nigeria's Rejoinder, which location is at latitude 12°31'45" N, longitude 14°13'00" E (Adindan Datum);

(*c*) that subject to the interpretations proposed in chapter 7 of Nigeria's Rejoinder, the land boundary between the mouth of the Ebeji and the point on the thalweg of the Akpa Yafe which is opposite the mid-point of the mouth of Archibong Creek is delimited by the terms of the relevant boundary instruments, namely:

(i) paragraphs 2-61 of the Thomson-Marchand Declaration, confirmed by the Exchange of Letters of 9 January 1931;

(ii) the Nigeria (Protectorate and Cameroons) Order in Council of 2 August 1946, (section 6(1) and the Second Schedule thereto);

(iii) paragraphs 13-21 of the Anglo-German Demarcation Agreement of 12 April 1913; and

(iv) articles XV to XVII of the Anglo-German Treaty of 11 March 1913; and

(*d*) that the interpretations proposed in chapter 7 of Nigeria's Rejoinder, and the associated action there identified in respect of each of the locations where the delimitation in the relevant boundary instruments is defective or uncertain, are confirmed.

4. as to the maritime boundary, *adjudge and declare*:

(*a*) that the Court lacks jurisdiction over Cameroon's maritime claim from the point at which its claim line enters waters claimed against Cameroon

by Equatorial Guinea or alternatively that Cameroon's claim is inadmissible to that extent;

(*b*) that Cameroon's claim to a maritime boundary based on the global division of maritime zones in the Gulf of Guinea is inadmissible, and that the parties are under an obligation, pursuant to articles 74 and 83 of the United Nations Law of the Sea Convention, to negotiate in good faith with a view to agreeing on an equitable delimitation of their respective maritime zones, such delimitation to take into account, in particular, the need to respect existing rights to explore and exploit the mineral resources of the continental shelf, granted by either party prior to 29 March 1994 without written protest from the other, and the need to respect the reasonable maritime claims of third States;

(*c*) the alternative, that Cameroon's claim to a maritime boundary based on the global division of maritime zones in the Gulf of Guinea is unfounded in law and is rejected;

(*d*) that, to the extent that Cameroon's claim to a maritime boundary may be held admissible in the present proceedings, Cameroon's claim to a maritime boundary to the west and south of the area of overlapping licences, as shown in figure 10.2 of Nigeria's Rejoinder, is rejected;

(*e*) that the respective territorial waters of the two States are divided by a median line boundary within the Rio del Rey;

(*f*) that, beyond the Rio del Rey, the respective maritime zones of the parties are to be delimited by a line drawn in accordance with the principle of equidistance, until the approximate point where that line meets the median line boundary with Equatorial Guinea, i.e., at approximately 4°6' N, 8°30' E.

5. as to Cameroon's claims of State responsibility, *adjudge and declare*:

that, to the extent to which any such claims are still maintained by Cameroon, and are admissible, those claims are unfounded in fact and law; and

6. as to Nigeria's counterclaims as specified in part VI of Nigeria's Counter-Memorial and in chapter 18 of Nigeria's Rejoinder, *adjudge and declare*:

that Cameroon bears responsibility to Nigeria in respect of each of those claims, the amount of reparation due therefore, if not agreed between the parties within six months of the date of judgment, to be determined by the Court in a further judgment."

Pursuant to the Court's Order of 12 October 1999, permitting Equatorial Guinea to intervene in the case, that State presented its observations to the Court during the course of the hearings.

7. *Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia/Malaysia)*

The precise object of the intervention (paras. 84-93)

In respect of the "the precise object of the intervention" which the Philippines states, the Court first quotes the three objects cited above.

As regards the first of the three objects stated in the Application of the Philippines, the Court notes that similar formulations have been employed in other applications for permission to intervene, and have not been found by the Court to present a legal obstacle to intervention.

So far as the second listed object of the Philippines is concerned, the Court, in its Order of 21 October 1999 in the case concerning the *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon* v. *Nigeria)*, *Application to Intervene*, recently reaffirmed a statement of a Chamber that:

> "[s]o far as the object of [a State's] intervention is 'to inform the Court of the nature of the legal rights [of that State] which are in issue in the dispute', it cannot be said that this object is not a proper one: it seems indeed to accord with the function of intervention" (*I.C.J. Reports 1999*, p. 1034, para. 14).

As to the third object listed in its Application, the Court observes that very occasional mention was made of it during the oral pleadings. But the Philippines did not develop it nor did it contend that it could suffice alone as an "object" within the meaning of Article 81 of the Rules. The Court therefore rejects the relevance under the Statute and Rules of the third listed object.

The Court concludes that notwithstanding that the first two of the objects indicated by the Philippines for its intervention are appropriate, the Philippines has not discharged its obligation to convince the Court that specified legal interests may be affected in the particular circumstances of this case.

*

Operative paragraph (para. 95):

> "For these reasons,
>
> THE COURT,
>
> By fourteen votes to one,
>
> *Finds* that the Application of the Republic of the Philippines, filed in the Registry of the Court on 13 March 2001, for permission to intervene in the proceedings under Article 62 of the Statute of the Court, cannot be granted.
>
> IN FAVOUR: *President* Guillaume; *Vice-President* Shi; *Judges* Ranjeva, Fleischhauer, Koroma, Vereshchetin, Higgins, Parra-Aranguren, Kooijmans, Rezek, Al-Khasawneh, Buergenthal; *Judges ad hoc* Weeramantry, Franck;
>
> AGAINST: *Judge* Oda."

*

Judge Oda appended a dissenting opinion to the judgment; Judge Koroma a separate opinion; Judges Parra-Aranguren and Kooijmans declarations; Judges ad hoc Weeramantry and Franck separate opinions.

8. *Ahmadou Sadio Diallo (Republic of Guinea* v. *Democratic Republic of the Congo)*

By an Order of 25 November 1999 (*I.C.J. Reports 1999*, p. 1042), the Court, taking into account the agreement of the Parties, fixed 11 September 2000 as the time limit for the filing of a Memorial by Guinea and 11 September 2001 for the filing of a Counter-Memorial by the Democratic Republic of the Congo.

By an Order of 8 September 2000 (*I.C.J. Reports 2000*, p. 146), the President of the Court, at the request of Guinea and after the views of the other Party had been ascertained, extended to 23 March 2001 and 4 October 2002 the respective time limits for that Memorial and Counter-Memorial. The Memorial was filed within the time limit thus extended.

9. *LaGrand (Germany* v. *United States of America)*

At a public sitting held on 27 June 2001, the Court delivered its judgment, a summary of which is given below, followed by the text of the operative paragraph:

History of the proceedings and submissions of the Parties (paras. 1-12)

The Court first recalls the history of the proceedings and the submissions of the Parties as set out hereabove.

History of the dispute (paras. 13-34)

The Court recalls that the brothers Karl and Walter LaGrand—German nationals who had been permanently residing in the United States since childhood—were arrested in 1982 in Arizona for their involvement in an attempted bank robbery, in the course of which the bank manager was murdered and another bank employee seriously injured. In 1984, an Arizona court convicted both of murder in the first degree and other crimes, and sentenced them to death. The LaGrands being German nationals, the Vienna Convention on Consular Relations required the competent authorities of the United States to inform them without delay of their right to communicate with the consulate of Germany. The United States acknowledged that this did not occur. In fact, the consulate was only made aware of the case in 1992 by the LaGrands themselves, who had learned of their rights from other sources. By that stage, the LaGrands were precluded because of the doctrine of "procedural default" in United States law from challenging their convictions and sentences by claiming that their rights under the Vienna Convention had been violated. Karl LaGrand was executed on 24 February 1999. On 2 March 1999, the day before the scheduled date of execution of Walter LaGrand, Germany brought the case to the International Court of Justice. On 3 March 1999, the Court made an Order indicating provisional measures (a kind of interim injunction), stating, inter alia, that the United States should take all measures at its disposal to ensure that Walter LaGrand was not executed pending a final decision of the Court. On that same day, Walter LaGrand was executed.

Jurisdiction of the Court (paras. 36-48)

The Court observes that the United States, without having raised preliminary objections under Article 79 of the Rules of Court, nevertheless presented certain objections to the jurisdiction of the Court. Germany based the jurisdiction of the Court on article I of the Optional Protocol to the Vienna Convention on Consular Relations concerning the Compulsory Settlement of Disputes of 24 April 1963, which reads as follows:

> "Disputes arising out of the interpretation or application of the Convention shall lie within the compulsory jurisdiction of the International Court of Justice and may accordingly be brought before the Court by an application made by any party to the dispute being a Party to the present Protocol."

With regard to Germany's first submission (paras. 37-42)

The Court first examines the question of its jurisdiction with respect to the first submission of Germany. Germany relies on paragraph 1 of article 36 of the Vienna Convention, which provides:

> "With a view to facilitating the exercise of consular functions relating to nationals of the sending State:

(*a*) consular officers shall be free to communicate with nationals of the sending State and to have access to them. Nationals of the sending State shall have the same freedom with respect to communication with and access to consular officers of the sending State;

(*b*) if he so requests, the competent authorities of the receiving State shall, without delay, inform the consular post of the sending State if, within its consular district, a national of that State is arrested or committed to prison or to custody pending trial or is detained in any other manner. Any communication addressed to the consular post by the person arrested, in prison, custody or detention shall be forwarded by the said authorities without delay. The said authorities shall inform the person concerned without delay of his rights under this subparagraph;

(*c*) consular officers shall have the right to visit a national of the sending State who is in prison, custody or detention, to converse and correspond with him and to arrange for his legal representation. They shall also have the right to visit any national of the sending State who is in prison, custody or detention in their district in pursuance of a judgement. Nevertheless, consular officers shall refrain from taking action on behalf of a national who is in prison, custody or detention if he expressly opposes such action."

Germany alleges that the failure of the United States to inform the LaGrand brothers of their right to contact the German authorities "prevented Germany from exercising its rights under article 36 (1) (*a*) and (*c*) of the Convention" and violated "the various rights conferred upon the sending State vis-à-vis its nationals in prison, custody or detention as provided for in article 36 (1) (*b*) of the Convention". Germany further alleges that by breaching its obligations to inform, the United States also violated individual rights conferred on the detainees by article 36, paragraph 1 (*a*), second sentence, and by article 36, paragraph 1 (*b*). Germany accordingly claims that it "was injured in the person of its two nationals", a claim which Germany raises "as a matter of diplomatic protection on behalf of Walter and Karl LaGrand". The United States acknowledges that violation of article 36, paragraph 1 (*b*), has given rise to a dispute between the two States and recognizes that the Court has jurisdiction under the Optional Protocol to hear this dispute in so far as it concerns Germany's own rights. Concerning Germany's claims of violation of article 36, paragraph 1 (*a*) and (*c*), the United States however calls these claims "particularly misplaced" on the grounds that the "underlying conduct complained of is the same" as the claim of the violation of article 36, paragraph 1 (*b*). It contends, moreover, that "to the extent that this claim by Germany is based on the general law of diplomatic protection, it is not within the Court's jurisdiction" under the Optional Protocol because it "does not concern the interpretation or application of the Vienna Convention".

The Court does not accept the United States objections. The dispute between the Parties as to whether article 36, paragraph 1 (*a*) and (*c*), of the Vienna Convention have been violated in this case in consequence of the breach of paragraph 1 (*b*) does relate to the interpretation and application of the Convention. This is also true of the dispute as to whether paragraph 1 (*b*) creates individual rights and whether Germany has standing to assert those rights on behalf of its nationals. These are consequently disputes within the meaning of article I of the Optional Protocol. Moreover, the Court cannot accept the contention of the United States that Germany's claim based on the individual rights of the LaGrand brothers is beyond the Court's jurisdiction because diplomatic protection

is a concept of customary international law. This fact does not prevent a State party to a treaty, which creates individual rights, from taking up the case of one of its nationals and instituting international judicial proceedings on behalf of that national, on the basis of a general jurisdictional clause in such a treaty. Therefore the Court concludes that it has jurisdiction with respect to the whole of Germany's first submission.

With regard to Germany's second and third submissions (paras. 43-45)

Although the United States does not challenge the Court's jurisdiction in regard to Germany's second and third submissions, the Court observes that the third submission of Germany concerns issues that arise directly out of the dispute between the Parties before the Court over which the Court has already held that it has jurisdiction, and which are thus covered by article I of the Optional Protocol. The Court reaffirms, in this connection, what it said in its judgment in the *Fisheries Jurisdiction* case, where it declared that in order to consider the dispute in all its aspects, it might also deal with a submission that "is one based on facts subsequent to the filing of the Application, but arising directly out of the question which is the subject matter of that Application. As such it falls within the scope of the Court's jurisdiction" *(Fisheries Jurisdiction (Federal Republic of Germany* v. *Iceland), Merits, Judgment, I.C.J. Reports 1974*, p. 203, para. 72). Where the Court has jurisdiction to decide a case, it also has jurisdiction to deal with submissions requesting it to determine that an order indicating measures which seeks to preserve the rights of the Parties to this dispute has not been, complied with.

With regard to Germany's fourth submission (paras. 46-48)

The United States objects to the jurisdiction of the Court over the fourth submission in so far as it concerns a request for assurances and guarantees of non-repetition. It contends that Germany's fourth submission

> "goes beyond any remedy that the Court can or should grant, and should be rejected. The Court's power to decide cases . . . does not extend to the power to order a State to provide any 'guarantee' intended to confer additional legal rights on the Applicant State . . . The United States does not believe that it can be the role of the Court . . . to impose any obligations that are additional to or that differ in character from those to which the United States consented when it ratified the Vienna Convention."

The Court considers that a dispute regarding the appropriate remedies for the violation of the Convention alleged by Germany is a dispute that arises out of the interpretation or application of the Convention and thus is within the Court's jurisdiction. Where jurisdiction exists over a dispute on a particular matter, no separate basis for jurisdiction is required by the Court to consider the remedies a party has requested for the breach of the obligation (*Factory at Chorzów, P.C.I.J., Series A, No. 9*, p. 22). Consequently, the Court has jurisdiction in the present case with respect to the fourth submission of Germany.

Admissibility of Germany's submissions (paras. 49-63)

The United States objects to the admissibility of Germany's submissions on various grounds. First, the United States argues that Germany's second, third and fourth submissions are inadmissible because Germany seeks to have the Court "play the role of ultimate court of appeal in national criminal proceedings", a role which it

is not empowered to perform. The United States maintains that many of Germany's arguments, in particular those regarding the rule of "procedural default", ask the Court "to address and correct . . . asserted violations of United States law and errors of judgment by United States judges" in criminal proceedings in national courts.

The Court does not agree with this argument. It observes that, in the second submission, Germany asks the Court to interpret the scope of article 36, paragraph 2, of the Vienna Convention; the third submission seeks a finding that the United States violated an Order issued by this Court pursuant to Article 41 of its Statute; and in Germany's fourth submission, the Court is asked to determine the applicable remedies for the alleged violations of the Convention. Although Germany deals extensively with the practice of American courts as it bears on the application of the Convention, all three submissions seek to require the Court to do no more than apply the relevant rules of international law to the issues in dispute between the Parties to this case. The exercise of this function, expressly mandated by Article 38 of its Statute, does not convert the Court into a court of appeal of national criminal proceedings.

The United States also argues that Germany's third submission is inadmissible because of the manner in which these proceedings were brought before the Court by Germany. It notes that German consular officials became aware of the LaGrands' case in 1992, but that the issue of the absence of consular notification was not raised by Germany until 22 February 1999, two days before the date scheduled for Karl LaGrand's execution. Germany then filed the Application instituting these proceedings, together with a request for provisional measures, after normal business hours in the Registry in the evening of 2 March 1999, some 27 hours before the execution of Walter LaGrand. Germany acknowledges that delay on the part of a claimant State may render an application inadmissible, but maintains that international law does not lay down any specific time limit in that regard. It contends that it was only seven days before it filed its Application that it became aware of all the relevant facts underlying its claim, in particular, the fact that the authorities of Arizona knew of the German nationality of the LaGrands since 1982.

The Court recognizes that Germany may be criticized for the manner in which these proceedings were filed and for their timing. The Court recalls, however, that notwithstanding its awareness of the consequences of Germany's filing at such a late date, it nevertheless considered it appropriate to enter the Order of 3 March 1999, given that an irreparable prejudice appeared to be imminent. In view of these considerations, the Court considers that Germany is now entitled to challenge the alleged failure of the United States to comply with the Order. Accordingly, the Court finds that Germany's third submission is admissible.

The United States argues further that Germany's first submission, as far as it concerns its right to exercise diplomatic protection with respect to its nationals, is inadmissible on the ground that the LaGrands did not exhaust local remedies. The United States maintains that the alleged breach concerned the duty to inform the LaGrands of their right to consular access, and that such a breach could have been remedied at the trial stage, provided it was raised in a timely fashion.

The Court notes that it is not disputed that the LaGrands sought to plead the Vienna Convention in United States courts after they learned in 1992 of their rights under the Convention; it is also not disputed that by that date the procedural default rule barred the LaGrands from obtaining any remedy in respect of the violation of those rights. Counsel assigned to the LaGrands failed to raise this point earlier in a

timely fashion. However, the Court finds that the United States may not now rely on this fact in order to preclude the admissibility of Germany's first submission, as it was the United States itself which had failed to carry out its obligation under the Convention to inform the LaGrand brothers.

The United States also contends that Germany's submissions are inadmissible on the ground that Germany seeks to have a standard applied to the United States that is different from its own practice.

The Court considers that it does not need to decide whether this argument of the United States, if true, would result in the inadmissibility of Germany's submissions. It finds that the evidence adduced by the United States does not justify the conclusion that Germany's own practice fails to conform to the standards it demands from the United States in this litigation. The cases referred to entailed relatively light criminal penalties and are not evidence as to German practice where an arrested person, who has not been informed without delay of his or her rights, is facing a severe penalty as in the present case. The Court considers that the remedies for a violation of article 36 of the Vienna Convention are not necessarily identical in all situations. While an apology may be an appropriate remedy in some cases, it may in others be insufficient. The Court accordingly finds that this claim of inadmissibility must be rejected.

Merits of Germany's submissions (paras. 64-127)

Having determined that it has jurisdiction, and that the submissions of Germany are admissible, the Court then turns to the merits of each of these four submissions.

Germany's first submission (paras. 65-78)

The Court begins by quoting Germany's first submission and observes that the United States acknowledges, and does not contest Germany's basic claim, that there was a breach of its obligation under article 36, paragraph 1 (*b*), of the Convention "promptly to inform the LaGrand brothers that they could ask that a German consular post be notified of their arrest and detention".

Germany also claims that the violation by the United States of article 36, paragraph 1 (*b*), led to consequential violations of article 36, paragraph 1 (*a*) and (*c*). It points out that, when the obligation to inform the arrested person without delay of his or her right to contact the consulate is disregarded, "the other rights contained in article 36, paragraph 1, become in practice irrelevant, indeed meaningless". The United States argues that the underlying conduct complained of by Germany is one and the same, namely, the failure to inform the LaGrand brothers as required by article 36, paragraph 1 (*b*). Therefore, it disputes any other basis for Germany's claims that other provisions, such as subparagraphs (*a*) and (*c*) of article 36, paragraph 1, of the Convention, were also violated. The United States asserts that Germany's claims regarding article 36, paragraph 1 (*a*) and (*c*), are "particularly misplaced" in that the LaGrands were able to and did communicate freely with consular officials after 1992. In response, Germany asserts that it is "commonplace that one and the same conduct may result in several violations of distinct obligations". Germany further contends that there is a causal relationship between the breach of article 36 and the ultimate execution of the LaGrand brothers. It is claimed that, had Germany been properly afforded its rights under the Vienna Convention, it would have been able to intervene in time and present a "persuasive mitigation case" which "likely would have saved" the lives of the brothers. Moreover, Germany argues that, due to

the doctrine of procedural default and the high post-conviction threshold for proving ineffective counsel under United States law, Germany's intervention at a stage later than the trial phase could not "remedy the extreme prejudice created by the counsel appointed to represent the LaGrands". According to the United States, these German arguments "rest on speculation" and do not withstand analysis.

The Court observes that the violation of paragraph 1 (*b*) of article 36 will not necessarily always result in the breach of the other provisions of this article, but that the circumstances of this case compel the opposite conclusion, for the reasons indicated below, article 36, paragraph 1, the Court notes, establishes an interrelated regime designed to facilitate the implementation of the system of consular protection. It begins with the basic principle governing consular protection: the right of communication and access (art. 36, para. 1 (*a*)). This clause is followed by the provision which spells out the modalities of consular notification (art. 36, para. 1 (*b*)). Finally article 36, paragraph 1 (*c*), sets out the measures consular officers may take in rendering consular assistance to their nationals in the custody of the receiving State. It follows that when the sending State is unaware of the detention of its nationals due to the failure of the receiving State to provide the requisite consular notification without delay, which was true in the present case during the period between 1982 and 1992, the sending State has been prevented for all practical purposes from exercising its rights under article 36, paragraph 1.

Germany further contends that "the breach of article 36 by the United States did not only infringe upon the rights of Germany as a State party to the [Vienna] Convention but also entailed a violation of the individual rights of the LaGrand brothers". Invoking its right of diplomatic protection, Germany also seeks relief against the United States on this ground. The United States questions what this additional claim of diplomatic protection contributes to the case and argues that there are no parallels between the present case and cases of diplomatic protection involving the espousal by a State of economic claims of its nationals. The United States contends, furthermore, that rights of consular notification and access under the Vienna Convention are rights of States, and not of individuals, even though these rights may benefit individuals by permitting States to offer them consular assistance. It maintains that the treatment due to individuals under the Convention is inextricably linked to and derived from the right of the State, acting through its consular officer, to communicate with its nationals, and does not constitute a fundamental right or a human right.

On the basis of the text of the provisions of article 36, paragraph 1, the Court concludes that article 36, paragraph 1, creates individual rights, which, by virtue of article I of the Optional Protocol, may be invoked in the Court by the national State of the detained person. These rights were violated in the present case.

Germany's second submission (paras. 79-91)

The Court then quotes the second of Germany's submissions.

Germany argues that, under article 36, paragraph 2, of the Vienna Convention

"the United States is under an obligation to ensure that its municipal 'laws and regulations . . . enable full effect to be given to the purposes for which the rights accorded under this article are intended' [and that it] is in breach of this obligation by upholding rules of domestic law which make it impossible to

successfully raise a violation of the right to consular notification in proceedings subsequent to a conviction of a defendant by a jury".

Germany emphasizes that it is not the "procedural default" rule as such that is at issue in the present proceedings, but the manner in which it was applied in that it "deprived the brothers of the possibility to raise the violations of their right to consular notification in United States criminal proceedings". In the view of the United States: "[t]he Vienna Convention does not require States Party to create a national law remedy permitting individuals to assert claims involving the Convention in criminal proceedings"; and "[i]f there is no obligation under the Convention to create such individual remedies in criminal proceedings, the rule of procedural default—requiring that claims seeking such remedies be asserted at an appropriately early stage—cannot violate the Convention".

The Court quotes article 36, paragraph 2, of the Vienna Convention which reads as follows:

> "The rights referred to in paragraph 1 of this article shall be exercised in conformity with the laws and regulations of the receiving State, subject to the proviso, however, that the said laws and regulations must enable full effect to be given to the purposes for which the rights accorded to under this article are intended."

It finds that it cannot accept the argument of the United States which proceeds, in part, on the assumption that paragraph 2 of article 36 applies only to the rights of the sending State and not also to those of the detained individual. The Court determines that article 36, paragraph 1, creates individual rights for the detained person in addition to the rights accorded to the sending State, and consequently the reference to "rights" in paragraph 2 must be read as applying not only to the rights of the sending State, but also to the rights of the detained individual. The Court emphasizes that, in itself, the "procedural default" rule does not violate article 36 of the Vienna Convention. The problem arises when the procedural default rule does not allow the detained individual to challenge a conviction and sentence by claiming, in reliance on article 36, paragraph 1, of the Convention, that the competent national authorities failed to comply with their obligation to provide the requisite consular information "without delay", thus preventing the person from seeking and obtaining consular assistance from the sending State. The Court finds that under the circumstances of the present case the procedural default rule had the effect of preventing "full effect [from being] given to the purposes for which the rights accorded under this article are intended", and thus violated paragraph 2 of article 36.

Germany's third submission (paras. 92-116)

The Court then quotes the third of Germany's submissions and observes that, in its Memorial, Germany contended that "[p]rovisional [m]easures indicated by the International Court of Justice [were] binding by virtue of the law of the United Nations Charter and the Statute of the Court". It observes that in support of its position, Germany developed a number of arguments in which it referred to the "principle of effectiveness", to the "procedural prerequisites" for the adoption of provisional measures, to the binding nature of provisional measures as a "necessary consequence of the bindingness of the final decision", to "Article 94 (1), of the United Nations Charter", to "Article 41 (1), of the Statute of the Court" and to the "practice of the Court". The United States argues that it "did what was called for by the Court's 3 March Order, given the extraordinary and unprecedented circum-

stances in which it was forced to act". It further states that "[t]wo central factors constrained the United States ability to act. The first was the extraordinarily short time between issuance of the Court's Order and the time set for the execution of Walter LaGrand . . . The second constraining factor was the character of the United States of America as a federal republic of divided powers." The United States also alleges that the "terms of the Court's 3 March Order did not create legal obligations binding on [it]". It argues in this respect that "[t]he language used by the Court in the key portions of its Order is not the language used to create binding legal obligations" and that "the Court does not need here to decide the difficult and controversial legal question of whether its orders indicating provisional measures would be capable of creating international legal obligations if worded in mandatory . . . terms". It nevertheless maintains that those orders cannot have such effects and, in support of that view, develops arguments concerning "the language and history of Article 41 (1) of the Court's Statute and Article 94 of the Charter of the United Nations", the "Court's and State practice under these provisions", and the "weight of publicists' commentary". Lastly, the United States states that in any case, "[b]ecause of the press of time stemming from Germany's last-minute filing of the case, basic principles fundamental to the judicial process were not observed in connection with the Court's 3 March Order" and that "[t]hus, whatever one might conclude regarding a general rule for provisional measures, it would be anomalous—to say the least—for the Court to construe this Order as a source of binding legal obligations".

The Court observes that the dispute which exists between the Parties with regard to this point essentially concerns the interpretation of Article 41, which has been the subject of extensive controversy in the literature. It therefore proceeds to the interpretation of that Article. It does so in accordance with customary international law, reflected in article 31 of the 1969 Vienna Convention on the Law of Treaties. According to paragraph 1 of article 31, a treaty must be interpreted in good faith in accordance with the ordinary meaning to be given to its terms in their context and in the light of the treaty's object and purpose.

The French text of Article 41 reads as follows:

> "1. La Cour a le pouvoir *d'indiquer*, si elle estime que les circonstances l'exigent, quelles mesures conservatoires du droit de chacun *doivent* être prises à titre provisoire.
>
> 2. En attendant l'arrêt définitif, *l'indication* de ces mesures est immédiatement notifiée aux parties et au Conseil de sécurité." (emphasis added)

The Court notes that in this text, the terms "indiquer" and "l'indication" may be deemed to be neutral as to the mandatory character of the measure concerned; by contrast the words "doivent être prises" have an imperative character.

For its part, the English version of Article 41 reads as follows:

> "1. The Court shall have the power to *indicate*, if it considers that circumstances so require, any provisional measures which *ought* to be taken to preserve the respective rights of either party.
>
> 2. Pending the final decision, notice of the measures *suggested* shall forthwith be given to the parties and to the Security Council." (emphasis added)

According to the United States, the use in the English version of "indicate" instead of "order", of "ought" instead of "must" or "shall", and of "suggested" instead of "ordered" is to be understood as implying that decisions under Article 41 lack mandatory effect. It might however be argued, having regard to the fact that in 1920

the French text was the original version, that such terms as "indicate" and "ought" have a meaning equivalent to "order" and "must" or "shall".

Finding itself faced with two texts which are not in total harmony, the Court first of all notes that according to Article 92 of the Charter, the Statute "forms an integral part of the present Charter". Under Article 111 of the Charter, the French and English texts of the latter are "equally authentic". The same is equally true of the Statute.

In cases of divergence between the equally authentic versions of the Statute, neither it nor the Charter indicates how to proceed. In the absence of agreement between the parties in this respect, it is appropriate to refer to paragraph 4 of article 33 of the Vienna Convention on the Law of Treaties, which in the view of the Court again reflects customary international law. This provision reads "when a comparison of the authentic texts discloses a difference of meaning which the application of articles 31 and 32 does not remove the meaning which best reconciles the texts, having regard to the object and purpose of the treaty, shall be adopted". The Court therefore goes on to consider the object and purpose of the Statute together with the context of Article 41.

The object and purpose of the Statute is to enable the Court to fulfil the functions provided for therein, and in particular, the basic function of judicial settlement of international disputes by binding decisions in accordance with Article 59 of the Statute. It follows from that object and purpose, as well as from the terms of Article 41 when read in their context, that the power to indicate provisional measures entails that such measures should be binding, inasmuch as the power in question is based on the necessity, when the circumstances call for it, to safeguard, and to avoid prejudice to, the rights of the parties as determined by the final judgment of the Court. The contention that provisional measures indicated under Article 41 might not be binding would be contrary to the object and purpose of that Article. A related reason which points to the binding character of orders made under Article 41 and to which the Court attaches importance, is the existence of a principle which has already been recognized by the Permanent Court of International Justice when it spoke of

> "the principle universally accepted by international tribunals and likewise laid down in many conventions . . . to the effect that the parties to a case must abstain from any measure capable of exercising a prejudicial effect in regard to the execution of the decision to be given, and, in general, not allow any step of any kind to be taken which might aggravate or extend the dispute" (*Electricity Company of Sofia and Bulgaria, Order of 5 December 1939, P.C.I.J., Series A/B, No. 79*, p. 199).

The Court does not consider it necessary to resort to the preparatory work of the Statute which, as it nevertheless points out, does not preclude the conclusion that orders under Article 41 have binding force.

The Court finally considers whether Article 94 of the United Nations Charter precludes attributing binding effect to orders indicating provisional measures. That Article reads as follows:

> "1. Each Member of the United Nations undertakes to comply with the decision of the International Court of Justice in any case to which it is a party.
>
> "2. If any party to a case fails to perform the obligations incumbent upon it under a judgment rendered by the Court, the other party may have recourse

to the Security Council, which may, if it deems necessary, make recommendations or decide upon measures to be taken to give effect to the judgment."

The Court notes that the question arises as to the meaning to be attributed to the words "the decision of the International Court of Justice" in paragraph 1 of this Article; it observes that this wording could be understood as referring not merely to the Court's judgments but to any decision rendered by it, thus including orders indicating provisional measures. It could also be interpreted to mean only judgments rendered by the Court as provided in paragraph 2 of Article 94. In this regard, the fact that in Articles 56 to 60 of the Court's Statute, both the word "decision" and the word "judgment" are used does little to clarify the matter. Under the first interpretation of paragraph 1 of Article 94, the text of the paragraph would confirm the binding nature of provisional measures; whereas the second interpretation would in no way preclude their being accorded binding force under Article 41 of the Statute. The Court accordingly concludes that Article 94 of the Charter does not prevent orders made under Article 41 from having a binding character. In short, it is clear that none of the sources of interpretation referred to in the relevant Articles of the Vienna Convention on the Law of Treaties, including the preparatory work, contradict the conclusions drawn from the terms of Article 41 read in their context and in the light of the object and purpose of the Statute. Thus, the Court reaches the conclusion that orders on provisional measures under Article 41 have binding effect.

The Court then considers the question whether the United States has complied with the obligation incumbent upon it as a result of the Order of 3 March 1999.

After reviewing the steps taken by the authorities of the United States (the State Department, the United States Solicitor General, the Governor of Arizona and the United States Supreme Court) with regard to the Order of 3 March 1999, the Court concludes that the various competent United States authorities failed to take all the steps they could have taken to give effect to the Order.

The Court observes finally that in the third submission Germany requests the Court to adjudge and declare only that the United States violated its international legal obligation to comply with the Order of 3 March 1999; it contains no other request regarding that violation. Moreover, the Court points out that the United States was under great time pressure in this case, due to the circumstances in which Germany had instituted the proceedings. The Court notes moreover that at the time when the United States authorities took their decision the question of the binding character of orders indicating provisional measures had been extensively discussed in the literature, but had not been settled by its jurisprudence. The Court would have taken these factors into consideration had Germany's submission included a claim for indemnification.

Germany's fourth submission (paras. 117-127)

Finally, the Court considers the fourth of Germany's submissions and observes that Germany points out that its fourth submission has been so worded "as to . . . leave the choice of means by which to implement the remedy [it seeks] to the United States".

In reply, the United States argues as follows:

"Germany's fourth submission is clearly of a wholly different nature than its first three submissions. Each of the first three submissions seeks a judgment

and declaration by the Court that a violation of a stated international legal obligation has occurred. Such judgments are at the core of the Court's function, as an aspect of reparation. In contrast, however, to the character of the relief sought in the first three submissions, the requirement of assurances of non-repetition sought in the fourth submission has no precedent in the jurisprudence of this Court and would exceed the Court's jurisdiction and authority in this case. It is exceptional even as a non-legal undertaking in State practice, and it would be entirely inappropriate for the Court to require such assurances with respect to the duty to inform undertaken in the Consular Convention in the circumstances of this case."

It points out that "United States authorities are working energetically to strengthen the regime of consular notification at the state and local level throughout the United States, in order to reduce the chances of cases such as this recurring". The United States further observes that:

> "[e]ven if this Court were to agree that, as a result of the application of procedural default with respect to the claims of the LaGrands, the United States committed a second internationally wrongful act, it should limit that judgment to the application of that law in the particular case of the LaGrands. It should resist the invitation to require an absolute assurance as to the application of United States domestic law in all such future cases. The imposition of such an additional obligation on the United States would . . . be unprecedented in international jurisprudence and would exceed the Court's authority and jurisdiction."

The Court observes that in its fourth submission Germany seeks several assurances. First it seeks a straightforward assurance that the United States will not repeat its unlawful acts. This request does not specify the means by which non-repetition is to be assured. Additionally, Germany seeks from the United States that "in any future cases of detention of or criminal proceedings against German nationals, the United States will ensure in law and practice the effective exercise of the rights under article 36 of the Vienna Convention on Consular Relations". The Court notes that this request goes further, for, by referring to the law of the United States, it appears to require specific measures as a means of preventing recurrence. Germany finally requests that "[i]n particular in cases involving the death penalty, this requires the United States to provide effective review of and remedies for criminal convictions impaired by a violation of the rights under article 36", the Court observes that this request goes even further, since it is directed entirely towards securing specific measures in cases involving the death penalty.

In relation to the general demand for an assurance of non-repetition, the Court observes that it has been informed by the United States of the "substantial measures [which it is taking] aimed at preventing any recurrence" of the breach of article 36, paragraph 1 (*b*).

The Court notes that the United States has acknowledged that, in the case of the LaGrand brothers, it did not comply with its obligations to give consular notification. The United States has presented an apology to Germany for this breach. The Court considers however that an apology is not sufficient in this case, as it would not be in other cases where foreign nationals have not been advised without delay of their rights under article 36, paragraph 1, of the Vienna Convention and have been subjected to prolonged detention or sentenced to severe penalties. In this respect, the Court has taken note of the fact that the United States repeated in all phases of these

proceedings that it is carrying out a vast and detailed programme in order to ensure compliance by its competent authorities at the federal as well as at the state and local levels with its obligation under article 36 of the Vienna Convention. The United States has provided the Court with information, which it considers important, on its programme. If a State, in proceedings before this Court, repeatedly refers as did the United States to substantial activities which it is carrying out in order to achieve compliance with certain obligations under a treaty, then this expresses a commitment to follow through with the efforts in this regard. The programme in question certainly cannot provide an assurance that there will never again be a failure by the United States to observe the obligation of notification under article 36 of the Vienna Convention. But no State could give such a guarantee and Germany does not seek it. The Court considers that the commitment expressed by the United States to ensure implementation of the specific measures adopted in performance of its obligations under article 36, paragraph 1 (*b*), must be regarded as meeting Germany's request for a general assurance of non-repetition.

The Court then examines the other assurances sought by Germany in its fourth submission. The Court observes in this regard that it can determine the existence of a violation of an international obligation. If necessary, it can also hold that a domestic law has been the cause of this violation. In the present case the Court has made its findings of violations of the obligations under article 36 of the Vienna Convention when it dealt with the first and the second submission of Germany. But it has not found that a United States law, whether substantive or procedural in character, is inherently inconsistent with the obligations undertaken by the United States in the Vienna Convention. In the present case the violation of article 36, paragraph 2, was caused by the circumstances in which the procedural default rule was applied, and not by the rule as such. However, the Court considers in this respect that if the United States, notwithstanding its commitment referred to above, should fail in its obligation of consular notification to the detriment of German nationals, an apology would not suffice in cases where the individuals concerned have been subjected to prolonged detention or convicted and sentenced to severe penalties. In the case of such a conviction and sentence, it would be incumbent upon the United States to allow the review and reconsideration of the conviction and sentence by taking account of the violation of the rights set forth in the Convention. This obligation can be carried out in various ways. The choice of means must be left to the United States.

*

Operative paragraph (para. 128):

"For these reasons,

THE COURT,

(1) By fourteen votes to one,

Finds that it has jurisdiction, on the basis of article I of the Optional Protocol concerning the Compulsory Settlement of Disputes to the Vienna Convention on Consular Relations of 24 April 1963, to entertain the Application filed by the Federal Republic of Germany on 2 March 1999;

IN FAVOUR: *President* Guillaume; *Vice-President* Shi; *Judges* Oda, Bedjaoui, Ranjeva, Herczegh, Fleischhauer, Koroma, Vereshchetin, Higgins, Kooijmans, Rezek, Al-Khasawneh, Buergenthal;

AGAINST: *Judge* Parra-Aranguren;

(2) (*a*) By thirteen votes to two,

Finds that the first submission of the Federal Republic of Germany is admissible;

IN FAVOUR: *President* Guillaume; *Vice-President* Shi; *Judges* Bedjaoui, Ranjeva, Herczegh, Fleischhauer, Koroma, Vereshchetin, Higgins, Kooijmans, Rezek, Al-Khasawneh, Buergenthal;

AGAINST: *Judges* Oda, Parra-Aranguren;

(*b*) By fourteen votes to one,

Finds that the second submission of the Federal Republic of Germany is admissible;

IN FAVOUR: *President* Guillaume; *Vice-President* Shi; *Judges* Bedjaoui, Ranjeva, Herczegh, Fleischhauer, Koroma, Vereshchetin, Higgins, Parra-Aranguren, Kooijmans, Rezek, Al-Khasawneh, Buergenthal;

AGAINST: *Judge* Oda;

(*c*) By twelve votes to three,

Finds that the third submission of the Federal Republic of Germany is admissible;

IN FAVOUR: *President* Guillaume; *Vice-President* Shi; *Judges* Bedjaoui, Ranjeva, Herczegh, Fleischhauer, Koroma, Vereshchetin, Higgins, Kooijmans, Rezek, Al-Khasawneh;

AGAINST: *Judges* Oda, Parra-Aranguren, Buergenthal;

(*d*) By fourteen votes to one.

Finds that the fourth submission of the Federal Republic of Germany is admissible;

IN FAVOUR: *President* Guillaume; *Vice-President* Shi; *Judges* Bedjaoui, Ranjeva, Herczegh. Fleischhauer, Koroma, Vereshchetin, Higgins, Parra-Aranguren, Kooijmans, Rezek, Al-Khasawneh, Buergenthal;

AGAINST: *Judge* Oda;

(3) By fourteen votes to one,

Finds that, by not informing Karl and Walter LaGrand without delay following their arrest of their rights under article 36, paragraph 1 (*b*), of the Convention, and by thereby depriving the Federal Republic of Germany of the possibility, in a timely fashion, to render the assistance provided for by the Convention to the individuals concerned, the United States of America breached its obligations to the Federal Republic of Germany and to the LaGrand brothers under article 36, paragraph 1;

IN FAVOUR: *President* Guillaume; *Vice-President* Shi; *Judges* Bedjaoui, Ranjeva, Herczegh, Fleischhauer, Koroma, Vereshchetin, Higgins, Parra-Aranguren, Kooijmans, Rezek, Al-Khasawneh, Buergenthal;

AGAINST: *Judge* Oda;

(4) By fourteen votes to one,

Finds that, by not permitting the review and reconsideration, in the light of the rights set forth in the Convention, of the convictions and sentences of the LaGrand brothers after the violations referred to in paragraph (3) above had

been established, the United States of America breached its obligation to the Federal Republic of Germany and to the LaGrand brothers under article 36, paragraph 2, of the Convention;

IN FAVOUR: *President* Guillaume; *Vice-President* Shi; *Judges* Bedjaoui, Ranjeva, Herczegh, Fleischhauer, Koroma, Vereshchetin, Higgins, Parra-Aranguren, Kooijmans, Rezek, Al-Khasawneh, Buergenthal;

AGAINST: *Judge* Oda;

(5) By thirteen votes to two,

Finds that, by failing to take all measures at its disposal to ensure that Walter LaGrand was not executed pending the final decision of the International Court of Justice in the case, the United States of America breached the obligation incumbent upon it under the Order indicating provisional measures issued by the Court on 3 March 1999;

IN FAVOUR: *President* Guillaume; *Vice-President* Shi; *Judges* Bedjaoui, Ranjeva, Herczegh, Fleischhauer, Koroma, Vereshchetin, Higgins, Kooijmans, Rezek, Al-Khasawneh, Buergenthal;

AGAINST: *Judges* Oda, Parra-Aranguren;

(6) Unanimously,

Takes note of the commitment undertaken by the United States of America to ensure implementation of the specific measures adopted in performance of its obligations under article 36, paragraph 1 (*b*), of the Convention; and *finds* that this commitment must be regarded as meeting the Federal Republic of Germany's request for a general assurance of non-repetition;

(7) By fourteen votes to one,

Finds that, should nationals of the Federal Republic of Germany nonetheless be sentenced to severe penalties, without their rights under article 36, paragraph 1 (*b*), of the Convention having been respected, the United States of America, by means of its own choosing, shall allow the review and reconsideration of the conviction and sentence by taking account of the violation of the rights set forth in that Convention.

IN FAVOUR: *President* Guillaume; *Vice-President* Shi; *Judges* Bedjaoui, Ranjeva, Herczegh, Fleischhauer, Koroma, Vereshchetin, Higgins, Parra-Aranguren, Kooijmans, Rezek, Al-Khasawneh, Buergenthal;

AGAINST: *Judge* Oda."

*

President Guillaume appended a declaration to the judgment; Vice-President Shi a separate opinion; Judge Oda a dissenting opinion; Judges Koroma and Parra-Aranguren separate opinions; and Judge Buergenthal a dissenting opinion.

10-17. *Legality of Use of Force (Yugoslavia* v. *Belgium) (Yugoslavia* v. *Canada) (Yugoslavia* v. *France) (Yugoslavia* v. *Germany) (Yugoslavia* v. *Italy) (Yugoslavia* v. *Netherlands) (Yugoslavia* v. *Portugal) (Yugoslavia* v. *United Kingdom)*

By Orders of 8 September 2000 (*I.C.J. Reports 2000*, pp. 149, 152, 155, 158, 161, 164, 167 and 170), the Vice-President of the Court, Acting President, taking

account of the views of the Parties and the special circumstances of the cases, fixed 5 April 2001 as the time limit for the filing, in each of the cases, of a written statement by Yugoslavia on the preliminary objections raised by the Respondent State concerned.

By Orders of 21 February 2001 (*I.C.J. Reports 2001*, pp. 13, 16, 19, 22, 25, 28, 31 and 34) and 20 March 2002 (*I.C.J. Reports 2002*, pp. 192, 195, 198, 201, 204, 207, 210 and 213), the Court, in each of the cases, taking account of the agreement of the Parties and of the circumstances of the case, extended that time limit to 5 April 2002 and 7 April 2003 respectively.

18. *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo* v. *Uganda)*[107]

In each of the two cases concerning *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo* v. *Burundi) (Democratic Republic of the Congo* v. *Rwanda)*, the Democratic Republic of the Congo, by letters dated 15 January 2001, notified the Court that it wished to discontinue the proceedings and stated that it "reserve[d] the right to invoke subsequently new grounds of jurisdiction of the Court".

After, in each of the two cases, the respondent Party had informed the Court that it concurred in the Democratic Republic of the Congo's discontinuance, the President of the Court, in Orders of 30 January 2001 (*I.C.J. Reports 2001*, pp. 3, 6), placed the discontinuance by the Democratic Republic of the Congo on record and ordered the removal of the cases from the List.

In the case concerning *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo* v. *Uganda)*, the Court, taking into account the agreement of the Parties as expressed at a meeting held with them by the President of the Court on 19 October 1999, fixed, by an Order of 21 October 1999 (*I.C.J. Reports 1999*, p. 1022), 21 July 2000 as the time limit for the filing of a Memorial by the Congo and 21 April 2001 for the filing of a Counter-Memorial by Uganda. The Memorial of the Democratic Republic of the Congo was filed within the prescribed time limit.

On 19 June 2000, the Congo, in the same case against Uganda, filed a request for the indication of provisional measures, stating that "since 5 June last, the resumption of fighting between the armed troops of . . . Uganda and another foreign army has caused considerable damage to the Congo and to its population" while "these tactics have been unanimously condemned, in particular by the United Nations Security Council".

In the request the Democratic Republic of the Congo maintained that "despite promises and declarations of principle . . . Uganda has pursued its policy of aggression, brutal armed attacks of oppression and looting" and that "this is moreover the third Kisangani war, coming after those of August 1999 and May 2000 and having been instigated by the Republic of Uganda". The Congo observed that these acts "represent just one further episode constituting evidence of the military and paramilitary intervention, and of occupation, commenced by the Republic of Uganda in August 1998". It further stated that "each passing day causes to the Democratic Republic of the Congo and its inhabitants grave and irreparable prejudice" and that "it is urgent that the rights of the Democratic Republic of the Congo be safeguarded".

The Democratic Republic of the Congo requested the Court to indicate the following provisional measures:

"(1) the Government of the Republic of Uganda must order its army to withdraw immediately and completely from Kisangani;

(2) the Government of the Republic of Uganda must order its army to cease forthwith all fighting or military activity on the territory of the Democratic Republic of the Congo and to withdraw immediately and completely from that territory, and must forthwith desist from providing any direct or indirect support to any State, group, organization, movement or individual engaged or planning to engage in military activities on the territory of the Democratic Republic of the Congo;

(3) the Government of the Republic of Uganda must take all measures in its power to ensure that any units, forces or agents are or could be under its authority or which enjoy or could enjoy its support, together with organizations or persons which could be under its control, authority or influence, desist forthwith from committing or inciting the commission of war crimes or any other oppressive or unlawful act against all persons on the territory of the Democratic Republic of the Congo;

(4) the Government of the Republic of Uganda must forthwith discontinue any act having the aim or effect of disrupting, interfering with or hampering actions intended to give the population of the occupied zones the benefit of their fundamental human rights, and in particular their rights to health and education;

(5) the Government of the Republic of Uganda must cease forthwith all illegal exploitation of the natural resources of the Democratic Republic of the Congo and any illegal transfer of assets, equipment or persons to its territory;

(6) the Government of the Republic of Uganda must henceforth respect in full the right of the Democratic Republic of the Congo to sovereignty, political independence and territorial integrity, and the fundamental rights and freedoms of all persons on the territory of the Democratic Republic of the Congo."

By letters of the same date, 19 June 2000, the President of the Court, Judge Gilbert Guillaume, acting in conformity with Article 74, paragraph 4, of the Rules of Court, drew "the attention of both Parties to the need to act in such a way as to enable any Order the Court will make on the request for provisional measures to have its appropriate effects".

Public sittings to hear the oral observations of the Parties on the request for the indication of provisional measures were held on 26 and 28 June 2000. At a public sitting, held on 1 July 2000, the Court rendered its Order on the request for provisional measures made by the Democratic Republic of the Congo, by which it indicated that both Parties should, forthwith, prevent and refrain from any action, and in particular any armed action, which might prejudice the rights of the other Party in respect of whatever judgment the Court might render in the case or which might aggravate or extend the dispute before the Court or make it more difficult to resolve; that both Parties should, forthwith, take all measures necessary to comply with all of their obligations under international law, in particular those under the Charter of the United Nations and the Charter of the Organization of African Unity, and with United Nations Security Council resolution 1304 (2000) of 16 June 2000; and that both Parties should, forthwith, take all measures necessary to ensure full respect within the zone of conflict for fundamental human rights and for the applicable provisions of humanitarian law.

Judges Oda and Koroma appended declarations to the Order of the Court.

The Democratic Republic of the Congo chose Mr. Joe Verhoeven and Uganda Mr. James L. Kateka to sit as judges ad hoc.

Within the time limit of 21 April 2001 fixed by the Court's Order of 21 October 1999 (*I.C.J. Reports 1999*, p. 1022), Uganda filed its Counter-Memorial. The Counter-Memorial contained counterclaims.

By an Order of 29 November 2001 (*I.C.J. Reports 2001*, p. 660), the Court found that two of the counterclaims submitted by Uganda against the Democratic Republic of the Congo were "admissible as such and [formed] part of the current proceedings", but that the third was not. In view of these conclusions, the Court considered it necessary for the Democratic Republic of the Congo to file a Reply and Uganda a Rejoinder, addressing the claims of both Parties, and fixed 29 May 2002 as the time limit for the filing of the Reply and 29 November 2002 for the Rejoinder. Further, in order to ensure strict equality between the Parties, the Court reserved the right of the Democratic Republic of the Congo to present its views in writing a second time on the Uganda counterclaims, in an additional pleading to be the subject of a subsequent Order. Judge ad hoc Verhoeven appended a declaration to the Order. The Reply was filed within the time limit thus fixed.

19. *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia* v. *Yugoslavia)*

By an Order of 10 March 2000 (*I.C.J. Reports 2000*, p. 3), the President of the Court, at the request of Croatia and taking into account the views expressed by Yugoslavia, extended the time limits to 14 September 2000 for the Memorial and 14 September 2001 for the Counter-Memorial.

By an Order of 27 June 2000 (*I.C.J. Reports 2000*, p. 108), the Court, at the request of Croatia and taking into account the views expressed by Yugoslavia, again extended the time limits, to 14 March 2001 for the Memorial of Croatia and to 16 September 2002 for the Counter-Memorial of Yugoslavia. The Memorial of Croatia was filed within the time limit thus extended.

Croatia chose Mr. Budislav Vukas to sit as judge ad hoc.

20. *Maritime Delimitation between Nicaragua and Honduras in the Caribbean Sea (Nicaragua* v. *Honduras)*

By an Order of 21 March 2000 (*I.C.J. Reports 2000*, p. 6), the Court, taking into account the agreement of the Parties, fixed 21 March 2001 as the time limit for the filing of the Memorial of Nicaragua and 21 March 2002 for the filing of the Counter-Memorial by Honduras. The Memorial of Nicaragua was filed within the prescribed time limit.

Copies of the pleadings and documents annexed have been made available to the Government of Colombia, at its request.

21. *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo* v. *Belgium)*

By an Order of 13 December 2000 (*I.C.J. Reports 2000*, p. 235), the President of the Court, taking account of the agreement of the Parties, fixed 15 March 2001 and 31 May 2001 as the time limits for the filing of the Memorial of the Democratic Republic of the Congo and the Counter-Memorial of Belgium respectively.

By an Order of 14 March 2001 (*I.C.J. Reports 2001*, p. 37), the Court, at the request of the Democratic Republic of the Congo and taking account of the reasons given by it and of the agreement of the Parties, extended those time limits to 17 April 2001 and 31 July 2001 respectively.

By an Order of 12 April 2001 (*I.C.J. Reports 2001*, p. 463), the President of the Court, at the request of the Democratic Republic of the Congo and taking account of the reasons given by it and of the agreement of the Parties, further extended those time limits to 17 May 2001 for the Memorial of the Democratic Republic of the Congo and 17 September 2001 for Belgium's Counter-Memorial. The Memorial of the Democratic Republic of the Congo was filed within the time limit thus extended.

By an Order of 27 June 2001 (*I.C.J. Reports 2001*, p. 559), the Court rejected a request by Belgium seeking to derogate from the agreed procedure in the case and extended to 28 September 2001 the time limit for the filing by the latter of a Counter-Memorial addressing both questions of jurisdiction and admissibility and the merits of the dispute. It further fixed 15 October 2001 as the date for the opening of the hearings. The Counter-Memorial of Belgium was filed within the prescribed time limit.

Public sittings to hear the oral arguments of the Parties were held from 15 to 19 October 2001.

At the conclusion of those hearings the Democratic Republic of the Congo requested that the Court adjudge and declare that:

> "1. by issuing and internationally circulating the arrest warrant of 11 April 2000 against Mr. Abdulaye Yerodia Ndombasi, Belgium committed a violation in regard to the Democratic Republic of the Congo of the rule of customary international law concerning the absolute inviolability and immunity from criminal process of incumbent foreign ministers; in so doing, it violated the principle of sovereign equality among States;
>
> 2. a formal finding by the Court of the unlawfulness of that act constitutes an appropriate form of satisfaction, providing reparation for the consequent moral injury to the Democratic Republic of the Congo;
>
> 3. the violations of international law underlying the issue and international circulation of the arrest warrant of 11 April 2000 preclude any State, including Belgium, from executing it;
>
> 4. Belgium shall be required to recall and cancel the arrest warrant of 11 April 2000 and to inform the foreign authorities to whom the warrant was circulated that Belgium renounces its request for their cooperation in executing the unlawful warrant."

The final submissions of Belgium read as follows:

> "For the reasons stated in the Counter-Memorial of Belgium and in its oral submissions, Belgium requests the Court, as a preliminary matter, to adjudge and declare that the Court lacks jurisdiction in this case and/or that the Application by the Democratic Republic of the Congo against Belgium is inadmissible.
>
> If, contrary to the submissions of Belgium with regard to the Court's jurisdiction and the admissibility of the Application, the Court concludes that it does have jurisdiction in this case and that the Application by the Democratic Republic of the Congo is admissible, Belgium requests the Court to reject the submissions of the Democratic Republic of the Congo on the merits of the case and to dismiss the Application."

At a public sitting of 14 February 2002, the Court delivered its judgment (*I.C.J. Reports 2002*, p. 3), a summary of which is given below, followed by the text of the operative paragraph.

History of the proceedings and submissions of the Parties (paras. 1-12)

The Court first recalls the history of the proceedings and the submissions of the Parties as set out hereabove.

Background to the case (paras. 13-21)

On 11 April 2000 an investigating judge of the Brussels *Tribunal de première instance* issued "an international arrest warrant in absentia" against Mr. Abdulaye Yerodia Ndombasi, charging him, as perpetrator or co-perpetrator, with offences constituting grave breaches of the Geneva Conventions of 1949 and of the Additional Protocols thereto, and with crimes against humanity. The arrest warrant was circulated internationally through Interpol.

At the time when the arrest warrant was issued Mr. Yerodia was the Minister for Foreign Affairs of the Congo.

The crimes with which Mr. Yerodia was charged were punishable in Belgium under the Law of 16 June 1993 "concerning the Punishment of Grave Breaches of the International Geneva Conventions of 12 August 1949 and of Protocols I and II of 8 June 1977 Additional Thereto", as amended by the Law of 19 February 1999 "concerning the Punishment of Serious Violations of International Humanitarian Law" (hereinafter referred to as the "Belgian Law").

On 17 October 2000, the Congo instituted proceedings before the International Court of Justice, requesting the Court "to declare that the Kingdom of Belgium shall annul the international arrest warrant issued on 11 April 2000". After the proceedings were instituted, Mr. Yerodia ceased to hold office as Minister for Foreign Affairs, and subsequently ceased to hold any ministerial office.

In its Application instituting proceedings, the Congo relied on two separate legal grounds. First, it claimed that "[t]he *universal jurisdiction* that the Belgian State attributes to itself under Article 7 of the Law in question" constituted a "[v]iolation of the principle that a State may not exercise its authority on the territory of another State and of the principle of sovereign equality among all Members of the United Nations". Secondly, it claimed that "[t]he non-recognition, on the basis of article 5 . . . of the Belgian Law, of the immunity of a Minister for Foreign Affairs in office" constituted a "[v]iolation of the diplomatic immunity of the Minister for Foreign Affairs of a sovereign State". However, the Congo's Memorial and its final submissions refer only to a violation "in regard to the . . . Congo of the rule of customary international law concerning the absolute inviolability and immunity from criminal process of incumbent foreign ministers".

Objections of Belgium relating to jurisdiction, mootness and admissibility (paras. 22-44)

Belgium's first objection (paras. 23-28)

The Court begins by considering the first objection presented by Belgium, which reads as follows:

"That, in the light of the fact that Mr. Yerodia Ndombasi is no longer either Minister for Foreign Affairs of the [Congo] or a minister occupying any other position in the . . . Government [of the Congo], there is no longer a 'legal dispute' between the Parties within the meaning of this term in the Optional Clause Declarations of the Parties and that the Court accordingly lacks jurisdiction in this case."

The Court recalls that, according to its settled jurisprudence, its jurisdiction must be determined at the time that the act instituting proceedings was filed. Thus, if the Court has jurisdiction on the date the case is referred to it, it continues to do so regardless of subsequent events. Such events might lead to a finding that an application has subsequently become moot and to a decision not to proceed to judgment on the merits, but they cannot deprive the Court of jurisdiction.

The Court then finds that, on the date that the Congo's Application instituting these proceeding was filed, each of the Parties was bound by a declaration of acceptance of compulsory jurisdiction, filed in accordance with Article 36, paragraph 2, of the Statute of the Court: Belgium by a declaration of 17 June 1958 and the Congo by a declaration of 8 February 1989. Those declarations contained no reservation applicable to the present case. The Court further observes that it is, moreover, not contested by the Parties that at the material time there was a legal dispute between them concerning the international lawfulness of the arrest warrant of 11 April 2000 and the consequences to be drawn if the warrant was unlawful. The Court accordingly concludes that at the time that it was seized of the case it had jurisdiction to deal with it, and that it still has such jurisdiction, and that Belgium's first objection must therefore be rejected.

Belgium's second objection (paras. 29-32)

The second objection presented by Belgium is the following:

"That in the light of the fact that Mr. Yerodia Ndombasi is no longer either Minister for Foreign Affairs of the [Congo] or a minister occupying any other position in the . . . Government [of the Congo], the case is now without object and the Court should accordingly decline to proceed to judgment on the merits of the case."

The Court notes that it has already affirmed on a number of occasions that events occurring subsequent to the filing of an application may render the application without object such that the Court is not called upon to give a decision thereon. However, the Court considers that this is not such a case. It finds that the change which has occurred in the situation of Mr. Yerodia has not in fact put an end to the dispute between the Parties and has not deprived the Application of its object. The Congo argues that the arrest warrant issued by the Belgian judicial authorities against Mr. Yerodia was and remains unlawful. It asks the Court to hold that the warrant is unlawful, thus providing redress for the moral injury which the warrant allegedly caused to it. The Congo also continues to seek the cancellation of the warrant. For its part, Belgium contends that it did not act in violation of international law and it disputes the Congo's submissions. In the view of the Court, it follows from the foregoing that the Application of the Congo is not now without object and that accordingly the case is not moot. Belgium's second objection is accordingly rejected.

Belgium's third objection (paras. 33-36)

The third Belgian objection is put as follows:

"That the case as it now stands is materially different to that set out in the [Congo]'s Application instituting proceedings and that the Court accordingly lacks jurisdiction in the case and/or that the application is inadmissible."

The Court notes that, in accordance with settled jurisprudence, it "cannot, in principle, allow a dispute brought before it by application to be transformed by amendments in the submissions into another dispute which is different in character". However, the Court considers that in the present case the facts underlying the Application have not changed in a way that produced such a transformation in the dispute brought before it. The question submitted to the Court for decision remains whether the issue and circulation of the arrest warrant by the Belgian judicial authorities against a person who was at that time the Minister for Foreign Affairs of the Congo were contrary to international law. The Congo's final submissions arise "directly out of the question which is the subject matter of that Application". In these circumstances, the Court considers that Belgium cannot validly maintain that the dispute brought before the Court was transformed in a way that affected its ability to prepare its defence or that the requirements of the sound administration of justice were infringed. Belgium's third objection is accordingly rejected.

Belgium's fourth objection (paras. 37-40)

The fourth Belgian objection reads as follows:

"That, in the light of the new circumstances concerning Mr. Yerodia Ndombasi, the case has assumed the character of an action of diplomatic protection but one in which the individual being protected has failed to exhaust local remedies, and that the Court accordingly lacks jurisdiction in the case and/or that the application is inadmissible."

The Court notes that the Congo has never sought to invoke before it Mr. Yerodia's personal rights. It considers that, despite the change in professional situation of Mr. Yerodia, the character of the dispute submitted to the Court by means of the Application has not changed: the dispute still concerns the lawfulness of the arrest warrant issued on 11 April 2000 against a person who was at the time Minister for Foreign Affairs of the Congo, and the question whether the rights of the Congo have or have not been violated by that warrant. The Court finds that, as the Congo is not acting in the context of protection of one of its nationals, Belgium cannot rely upon the rules relating to the exhaustion of local remedies.

In any event, the Court recalls that an objection based on non-exhaustion of local remedies relates to the admissibility of the application. Under settled jurisprudence, the critical date for determining the admissibility of an application is the date on which it is filed. Belgium accepts that, on the date on which the Congo filed the Application instituting proceedings, the Congo had a direct legal interest in the matter, and was asserting a claim in its own name. Belgium's fourth objection is accordingly rejected.

Belgium's subsidiary argument concerning the non ultra petita *rule* (paras. 41-43)

As a subsidiary argument, Belgium further contends that "[i]n the event that the Court decides that it does have jurisdiction in this case and that the application is admissible, . . . the *non ultra petita* rule operates to limit the jurisdiction of the Court to those issues that are the subject of the [Congo]'s final submissions".

Belgium points out that the Congo initially advanced a twofold argument, based, on the one hand, on the Belgian judge's lack of jurisdiction and, on the other, on the immunity from jurisdiction enjoyed by its Minister for Foreign Affairs. According to Belgium, the Congo now confines itself to arguing the latter point, and the Court consequently cannot rule on the issue of universal jurisdiction in any decision it renders on the merits of the case.

The Court recalls the well-established principle that "it is the duty of the Court not only to reply to the questions as stated in the final submissions of the parties, but also to abstain from deciding points not included in those submissions". The Court observes that, while it is thus not entitled to decide upon questions not asked of it, the *non ultra petita* rule nonetheless cannot preclude the Court from addressing certain legal points in its reasoning. Thus in the present case the Court may not rule, in the operative part of its judgment, on the question whether the disputed arrest warrant, issued by the Belgian investigating judge in exercise of his purported universal jurisdiction, complied in that regard with the rules and principles of international law governing the jurisdiction of national courts. This does not mean, however, that the Court may not deal with certain aspects of that question in the reasoning of its judgment, should it deem this necessary or desirable.

Merits of the case (paras. 45-71)

As indicated above, in its Application instituting these proceedings, the Congo originally challenged the legality of the arrest warrant of 11 April 2000 on two separate grounds: on the one hand, Belgium's claim to exercise a universal jurisdiction and, on the other, the alleged violation of the immunities of the Minister for Foreign Affairs of the Congo then in office. However, in its submissions in its Memorial, and in its final submissions at the close of the oral proceedings, the Congo invokes only the latter ground.

The Court observes that, as a matter of logic, the second ground should be addressed only once there has been a determination in respect of the first, since it is only where a State has jurisdiction under international law in relation to a particular matter that there can be any question of immunities in regard to the exercise of that jurisdiction. However, in the present case, and in view of the final form of the Congo's submissions, the Court first addresses the question whether, assuming that it had jurisdiction under international law to issue and circulate the arrest warrant of 11 April 2000, Belgium in so doing violated the immunities of the then Minister for Foreign Affairs of the Congo.

Immunity and inviolability of an incumbent Foreign Minister in general (paras. 47-55)

The Court observes at the outset that in international law it is firmly established that, as also diplomatic and consular agents, certain holders of high-ranking office in a State, such as the Head of State, Head of Government and Minister for Foreign Affairs, enjoy immunities from jurisdiction in other States, both civil and criminal. For the purposes of the present case, it is only the immunity from criminal jurisdiction and the inviolability of an incumbent Minister for Foreign Affairs that fall for the Court to consider.

The Court notes that a certain number of treaty instruments were cited by the Parties in this regard, including the Vienna Convention on Diplomatic Relations of 18 April 1961 and the New York Convention on Special Missions of 8 December

1969. The Court finds that these conventions provide useful guidance on certain aspects of the question of immunities, but that they do not contain any provision specifically defining the immunities enjoyed by Ministers for Foreign Affairs. It is consequently on the basis of customary international law that the Court must decide the questions relating to the immunities of such Ministers raised in the present case.

In customary international law, the immunities accorded to Ministers for Foreign Affairs are not granted for their personal benefit, but to ensure the effective performance of their functions on behalf of their respective States. In order to determine the extent of these immunities, the Court must therefore first consider the nature of the functions exercised by a Minister for Foreign Affairs. After an examination of those functions, the Court concludes that they are such that, throughout the duration of his or her office, a Minister for Foreign Affairs when abroad enjoys full immunity from criminal jurisdiction and inviolability. That immunity and that inviolability protect the individual concerned against any act of authority of another State which would hinder him or her in the performance of his or her duties.

The Court finds that in this respect no distinction can be drawn between acts performed by a Minister for Foreign Affairs in an "official" capacity and those claimed to have been performed in a "private capacity", or, for that matter, between acts performed before the person concerned assumed office as Minister for Foreign Affairs and acts committed during the period of office. Thus, if a Minister for Foreign Affairs is arrested in another State on a criminal charge, he or she is clearly thereby prevented from exercising the functions of his or her office. Furthermore, even the mere risk that by travelling to or transiting another State, a Minister for Foreign Affairs might be exposing himself or herself to legal proceedings could deter the Minister from travelling internationally when required to do so for the purposes of the performance of his or her official functions.

The Court then addresses Belgium's argument that immunities accorded to incumbent Ministers for Foreign Affairs can in no case protect them where they are suspected of having committed war crimes or crimes against humanity.

The Court states that it has carefully examined State practice, including national legislation and those few decisions of national higher courts, such as the House of Lords in the United Kingdom or the French Court of Cassation, and that it has been unable to deduce from this practice that there exists under customary international law any form of exception to the rule according immunity from criminal jurisdiction and inviolability to incumbent Ministers for Foreign Affairs, where they are suspected of having committed war crimes or crimes against humanity. The Court adds that it has also examined the rules concerning the immunity or criminal responsibility of persons having an official capacity contained in the legal instruments creating international criminal tribunals, and which are specifically applicable to the latter (see Charter of the International Military Tribunal of Nuremberg, art. 7; Charter of the International Military Tribunal of Tokyo, art. 6; Statute of the International Criminal Tribunal for the Former Yugoslavia, art. 7, para. 2; Statute of the International Criminal Tribunal for Rwanda, art. 6, para. 2; Statute of the International Criminal Court, art. 27), and that it finds that these rules likewise do not enable it to conclude that any such exception exists in customary international law in regard to national courts. Finally, the Court observes that none of the decisions of the Nuremberg and Tokyo international military tribunals, or of the International Criminal Tribunal for the Former Yugoslavia, cited by Belgium deal with the question of the immunities of incumbent Ministers for Foreign Affairs before national

courts where they are accused of having committed war crimes or crimes against humanity. The Court accordingly notes that those decisions are in no way at variance with the findings it has reached above. The Court accordingly does not accept Belgium's argument in this regard.

It further notes that the rules governing the jurisdiction of national courts must be carefully distinguished from those governing jurisdictional immunities: jurisdiction does not imply absence of immunity, while absence of immunity does not imply jurisdiction. Thus, although various international conventions on the prevention and punishment of certain serious crimes impose on States obligations of prosecution or extradition, thereby requiring them to extend their criminal jurisdiction, such extension of jurisdiction in no way affects immunities under customary international law, including those of Ministers for Foreign Affairs. The Court emphasizes, however, that the *immunity* from jurisdiction enjoyed by incumbent Ministers for Foreign Affairs does not mean that they enjoy *impunity* in respect of any crimes they might have committed, irrespective of their gravity. Jurisdictional immunity may well bar prosecution for a certain period or for certain offences; it cannot exonerate the person to whom it applies from all criminal responsibility. Accordingly, the immunities enjoyed under international law by an incumbent or former Minister for Foreign Affairs do not represent a bar to criminal prosecution in certain circumstances. The Court refers to circumstances where such persons are tried in their own countries, where the State which they represent or have represented decides to waive that immunity, where such persons no longer enjoy all of the immunities accorded by international law in other States after ceasing to hold the office of Minister for Foreign Affairs, and where such persons are subject to criminal proceedings before certain international criminal courts, where they have jurisdiction.

The issue and circulation of the arrest warrant of 11 April 2000 (paras. 62-71)

Given the conclusions it has reached above concerning the nature and scope of the rules governing the immunity from criminal jurisdiction enjoyed by incumbent Ministers for Foreign Affairs, the Court then considers whether in the present case the issue of the arrest warrant of 11 April 2000 and its international circulation violated those rules. The Court recalls in this regard that the Congo requests it, in its first final submission, to adjudge and declare that:

> "[B]y issuing and internationally circulating the arrest warrant of 11 April 2000 against Mr. Abdulaye Yerodia Ndombasi, Belgium committed a violation in regard to the Democratic Republic of the Congo of the rule of customary international law concerning the absolute inviolability and immunity from criminal process of incumbent foreign ministers; in so doing, it violated the principle of sovereign equality among States."

After examining the terms of the arrest warrant, the Court notes that its *issuance*, as such, represents an act by the Belgian judicial authorities intended to enable the arrest on Belgian territory of an incumbent Minister for Foreign Affairs on charges of war crimes and crimes against humanity. The fact that the warrant is enforceable is clearly apparent from the order given in it to "all bailiffs and agents of public authority . . . to execute this arrest warrant" and from the assertion in the warrant that "the position of Minister for Foreign Affairs currently held by the accused does not entail immunity from jurisdiction and enforcement". The Court notes that the warrant did admittedly make an exception for the case of an official visit by Mr. Yerodia to Belgium, and that Mr. Yerodia never suffered arrest in Belgium. The

Court considers itself bound, however, to find that, given the nature and purpose of the warrant, its mere issue violated the immunity which Mr. Yerodia enjoyed as the Congo's incumbent Minister for Foreign Affairs. The Court accordingly concludes that the issue of the warrant constituted a violation of an obligation of Belgium towards the Congo, in that it failed to respect the immunity of that Minister and, more particularly, infringed the immunity from criminal jurisdiction and the inviolability then enjoyed by him under international law.

The Court also notes that Belgium admits that the purpose of the international *circulation* of the disputed arrest warrant was "to establish a legal basis for the arrest of Mr. Yerodia . . . abroad and his subsequent extradition to Belgium". The Court finds that, as in the case of the warrant's issue, its international circulation from June 2000 by the Belgian authorities, given its nature and purpose, effectively infringed Mr. Yerodia's immunity as the Congo's incumbent Minister for Foreign Affairs and was furthermore liable to affect the Congo's conduct of its international relations. The Court concludes that the circulation of the warrant, whether or not it significantly interfered with Mr. Yerodia's diplomatic activity, constituted a violation of an obligation of Belgium towards the Congo, in that it failed to respect the immunity of the incumbent Minister for Foreign Affairs of the Congo and. more particularly, infringed the immunity from criminal jurisdiction and inviolability then enjoyed by him under international law.

Remedies (paras. 72-77)

The Court then addresses the issue of the remedies sought by the Congo on account of Belgium's violation of the above-mentioned rules of international law. (Cf. the second, third and fourth submissions of the Congo reproduced above.)

The Court observes that it has already concluded that the issue and circulation of the arrest warrant of 11 April 2000 by the Belgian authorities failed to respect the immunity of the incumbent Minister for Foreign Affairs of the Congo and. more particularly, infringed the immunity from criminal jurisdiction and the inviolability then enjoyed by Mr. Yerodia under international law. Those acts engaged Belgium's international responsibility. The Court considers that the findings so reached by it constitute a form of satisfaction which will make good the moral injury complained of by the Congo.

However, the Court goes on to observe that, as the Permanent Court of International Justice stated in its judgment of 13 September 1928 in the case concerning the *Factory at Chorzów*:

> "[t]he essential principle contained in the actual notion of an illegal act—a principle which seems to be established by international practice and in particular by the decisions of arbitral tribunals—is that reparation must, as far as possible, wipe out all the consequences of the illegal act and reestablish the situation which would, in all probability, have existed if that act had not been committed" (*P.C.I.J., Series A, No. 17*, p. 47).

The Court finds that, in the present case, "the situation which would, in all probability, have existed if [the illegal act] had not been committed" cannot be reestablished merely by a finding by the Court that the arrest warrant was unlawful under international law. The warrant is still extant, and remains unlawful, notwithstanding the fact that Mr. Yerodia has ceased to be Minister for Foreign Affairs. The

Court accordingly considers that Belgium must, by means of its own choosing, cancel the warrant in question and so inform the authorities to whom it was circulated.

The Court sees no need for any further remedy: in particular, the Court points out that it cannot, in a judgment ruling on a dispute between the Congo and Belgium, indicate what that judgment's implications might be for third States, and the Court finds that it cannot therefore accept the Congo's submissions on this point.

*

Operative paragraph (para. 78):

"For these reasons,

The Court,

(1) (A) By fifteen votes to one,

Rejects the objections of the Kingdom of Belgium relating to jurisdiction, mootness and admissibility;

IN FAVOUR: *President* Guillaume; *Vice-President* Shi; *Judges* Ranjeva, Herczegh, Fleischhauer, Koroma, Vereshchetin, Higgins, Parra-Aranguren, Kooijmans, Rezek, Al-Khasawneh, Buergenthal; *Judges ad hoc* Bula-Bula, Van den Wyngaert;

AGAINST: *Judge* Oda;

(B) By fifteen votes to one.

Finds that it has jurisdiction to entertain the Application filed by the Democratic Republic of the Congo on 17 October 2000;

IN FAVOUR: *President* Guillaume; *Vice-President* Shi; *Judges* Ranjeva, Herczegh, Fleischhauer, Koroma, Vereshchetin, Higgins, Parra-Aranguren, Kooijmans, Rezek, Al-Khasawneh, Buergenthal; *Judges ad hoc* Bula-Bula, Van den Wyngaert;

AGAINST: *Judge* Oda;

(C) By fifteen votes to one,

Finds that the Application of the Democratic Republic of the Congo is not without object and that accordingly the case is not moot;

IN FAVOUR: *President* Guillaume; *Vice-President* Shi; *Judges* Ranjeva, Herczegh, Fleischhauer, Koroma, Vereshchetin, Higgins, Parra-Aranguren, Kooijmans, Rezek, Al-Khasawneh, Buergenthal; *Judges ad hoc* Bula-Bula, Van den Wyngaert;

AGAINST: *Judge* Oda;

(D) By fifteen votes to one,

Finds that the Application of the Democratic Republic of the Congo is admissible;

IN FAVOUR: *President* Guillaume; *Vice-President* Shi; *Judges* Ranjeva, Herczegh, Fleischhauer, Koroma, Vereshchetin, Higgins, Parra-Aranguren, Kooijmans, Rezek, Al-Khasawneh, Buergenthal; *Judges ad hoc* Bula-Bula, Van den Wyngaert;

AGAINST: *Judge* Oda;

(2) By thirteen votes to three,

Finds that the issue against Mr. Abdulaye Yerodia Ndombasi of the arrest warrant of 11 April 2000, and its international circulation, constituted violations of a legal obligation of the Kingdom of Belgium towards the Democratic Republic of the Congo, in that they failed to respect the immunity from criminal jurisdiction and the inviolability which the incumbent Minister for Foreign Affairs of the Democratic Republic of the Congo enjoyed under international law;

IN FAVOUR: *President* Guillaume; *Vice-President* Shi; *Judges* Ranjeva, Herczegh, Fleischhauer, Koroma, Vereshchetin, Higgins, Parra-Aranguren, Kooijmans, Rezek, Buergenthal; *Judge ad hoc* Bula-Bula;

AGAINST: *Judges* Oda, Al-Khasawneh; *Judge ad hoc* Van den Wyngaert;

(3) By ten votes to six,

Finds that the Kingdom of Belgium must, by means of its own choosing, cancel the arrest warrant of 11 April 2000 and so inform the authorities to whom that warrant was circulated;

IN FAVOUR: *President* Guillaume; *Vice-President* Shi; *Judges* Ranjeva, Herczegh, Fleischhauer, Koroma, Vereshchetin, Parra-Aranguren, Rezek; *Judge ad hoc* Bula-Bula;

AGAINST: *Judges* Oda, Higgins, Kooijmans, Al-Khasawneh, Buergenthal; *Judge ad hoc* Van den Wyngaert."

*

President Guillaume appended a separate opinion to the Judgment of the Court; Judge Oda a dissenting opinion; Judge Ranjeva a declaration; Judge Koroma a separate opinion; Judges Higgins, Kooijmans and Buergenthal a joint separate opinion; Judge Rezek a separate opinion; Judge Al-Khasawneh a dissenting opinion; Judge ad hoc Bula-Bula a separate opinion; and Judge ad hoc Van den Wyngaert a dissenting opinion.

22. *Application for Revision of the Judgment of 11 July 1996 in the Case concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Yugoslavia), Preliminary Objections (Yugoslavia* v. *Bosnia and Herzegovina)*

On 24 April 2001, the Federal Republic of Yugoslavia filed in the Registry of the Court an Application for revision of the judgment delivered by the Court on 11 July 1996 in the case concerning the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Yugoslavia), Preliminary Objections*.

In that judgment, the Court rejected the preliminary objections raised by Yugoslavia and found that it had jurisdiction to deal with the case on the basis of article IX of the Convention on the Prevention and Punishment of the Crime of Genocide, dismissing the additional bases of jurisdiction invoked by Bosnia and Herzegovina. The Court further found that the Application filed by Bosnia and Herzegovina was admissible.

Yugoslavia contends that a revision of the judgment is necessary now that it has become clear that, before 1 November 2000 (the date on which it was admitted as a new Member of the United Nations), Yugoslavia did not continue the interna-

tional legal and political personality of the Socialist Federal Republic of Yugoslavia, was not a Member of the United Nations, was not a State party to the Statute of the Court, and was not a State party to the Genocide Convention (which is only open to United Nations Member States or to non-member States to which an invitation to sign or accede has been addressed by the General Assembly).

Yugoslavia bases its Application for revision on Article 61 of the Statute of the Court, which provides in its first paragraph that:

> "an application for revision of a judgment may be made only when it is based upon the discovery of some fact of such a nature as to be a decisive factor, which fact was, when the judgment was given, unknown to the Court and also to the party claiming revision, always provided that such ignorance was not due to negligence."

Yugoslavia states that its admission to the United Nations as a new Member on 1 November 2000 constitutes "a new fact", which was "obviously unknown to both the Court and to [Yugoslavia] at the time of the 1996 judgment". It adds that:

> "since membership in the United Nations, combined with the status of a party to the Statute [of the Court] and to the Genocide Convention represent the only basis on which jurisdiction over the Federal Republic of Yugoslavia was assumed, and could be assumed, the disappearance of this assumption . . . [is] clearly of such a nature [as] to be a decisive factor."

Yugoslavia asserts that no alternative basis for the Court's jurisdiction existed or could have existed in the case. Yugoslavia further notes that, while on 8 March 2001 it submitted to the United Nations Secretary-General a notification seeking accession to the Genocide Convention, that instrument includes a reservation to article IX. Moreover, according to Yugoslavia,

> "accession has no retroactive effect. Even if it had [retroactive effect] this cannot possibly encompass the compromissory clause in article IX of the Genocide Convention, because the Federal Republic of Yugoslavia never accepted article IX and the Federal Republic of Yugoslavia's accession [to the Convention] did not encompass article IX."

For all these reasons, Yugoslavia requested the Court to declare that "there is a new fact of such a character as to lay the case open to revision under Article 61 of the Statute of the Court". It further asked the Court to "suspend proceedings regarding the merits of the Case until a decision on this Application is rendered".

Copies of the pleadings have been made available to the Government of Croatia, at its request.

On 3 December 2001, within the time limit fixed by the President of the Court at a meeting with the representatives of the Parties, Bosnia and Herzegovina filed written observations regarding the admissibility of Yugoslavia's Application, in accordance with Article 99, paragraph 2, of the Rules of Court.

23. *Certain Property (Liechtenstein* v. *Germany)*

On 1 June 2001, Liechtenstein filed in the Registry of the Court an Application instituting proceedings against Germany concerning

> "decisions of Germany . . . to treat certain property of Liechtenstein nationals as German assets . . . seized for the purposes of reparation or restitution as a consequence of World War II . . . without ensuring any compensation."

In the Application, Liechtenstein alleges the following facts. In 1945, Czechoslovakia—during the Second World War an allied country and a belligerent against Germany—through a series of decrees (the Beneš decrees) seized German and Hungarian property located on its territory. Czechoslovakia applied those decrees not only to German and Hungarian nationals, but also to other persons allegedly of German or Hungarian origin or ethnicity. For this purpose it treated the nationals of Liechtenstein as German nationals. The property of those Liechtenstein nationals seized under these decrees (the "Liechtenstein property") has never been returned to its owners nor has compensation been offered or paid. The application of the Beneš decrees to the Liechtenstein property remained an unresolved issue between Liechtenstein and Czechoslovakia until the dissolution of the latter, and it continues to be an unresolved issue as between Liechtenstein and the Czech Republic, on whose territory the vast majority of Liechtenstein property is located.

Liechtenstein further refers to the Convention on the Settlement of Matters arising out of the War and the Occupation, signed at Bonn on 26 May 1952 ("the Settlement Convention"). The Application states that by article 3, paragraph 1, of that Convention, Germany agreed, inter alia, that it would "in the future raise no objections against the measures which have been or will be, carried out with regard to German external assets or other property, seized for the purpose of reparation or restitution or as a result of the state of war". The Application alleges that the Settlement Convention was only concerned with German property so called, i.e., property of the German State or of its nationals, and that under international law, having regard to Liechtenstein's neutrality and the absence of whatsoever links between Liechtenstein and the conduct of the war by Germany, any Liechtenstein property that may have been affected by measures of an Allied Power could not be considered as "seized for the purpose of reparation or restitution or as a result of the state of war". Liechtenstein maintains that subsequent to the conclusion of the Settlement Convention, it was accordingly understood between Germany and itself that the Liechtenstein property did not fall within the regime of the Convention, and that, as a corollary, Germany maintained the position that property falling outside the scope of the Convention was unlawfully seized, and that the German courts were not barred from considering claims affecting such property.

Liechtenstein alleges that in 1998 the position of the Federal Republic of Germany changed, however, as a result of a decision of the Federal Constitutional Court of 28 January 1998. The decision concerned a painting which was among the Liechtenstein property seized in 1945, and which was in possession of the Historic Monument Offices in Brno, Czech Republic, a State entity of the Czech Republic. It was brought to Germany for the purposes of an exhibition, and thus came into possession of the Municipality of Cologne. At the request of the Reigning Prince, Prince Hans Adam II, acting in his private capacity, the painting was attached pending determination of the claim by the German courts. Eventually, however, the claim failed. The Federal Constitutional Court held that the German courts were required by article 3 of the Settlement Convention to treat the painting as German property in the sense of the Convention. Accordingly the painting was released and returned to the Czech Republic. The Application of Liechtenstein claims that the decision of the Federal Constitutional Court is unappealable, and is attributable to Germany as a matter of international law and is binding upon Germany.

Liechtenstein states that it protested to Germany that the latter was treating as German assets which belonged to nationals of Liechtenstein, to their detriment and the detriment of Liechtenstein itself. It states further that Germany rejected this pro-

test and that in subsequent consultations it became clear that Germany now adheres to the position that Liechtenstein assets as a whole were "seized for the purpose of reparation or restitution or as a result of the state of war" within the meaning of the Convention, even though the decision of the Federal Constitutional Court only concerned a single item. According to the Application of Liechtenstein, in taking this position Germany remains faithful to the decision of its highest court in the matter; but at the same time it ignores and undermines the rights of Liechtenstein and its nationals in respect of the Liechtenstein property. Liechtenstein claims that:

> "(*a*) by its conduct with respect to the Liechtenstein property, in and since 1998, Germany failed to respect the rights of Liechtenstein with respect to that property;
>
> (*b*) by its failure to make compensation for losses suffered by Liechtenstein and/or its nationals. Germany is in breach of the rules of international law."

Liechtenstein accordingly requests the Court "to adjudge and declare that Germany has incurred international legal responsibility and is bound to make appropriate reparation to Liechtenstein for the damage and prejudice suffered". Liechtenstein further requests "that the nature and amount of such reparation should, in the absence of agreement between the Parties, be assessed and determined by the Court, if necessary, in a separate phase of the proceedings".

As a basis for the Court's jurisdiction, Liechtenstein invokes article 1 of the European Convention for the Peaceful Settlement of Disputes, signed at Strasbourg on 29 April 1957.

By an Order of 28 June 2001, the Court, taking account of the agreement of the Parties, fixed 28 March 2002 as the time limit for the filing of a Memorial by Liechtenstein and 27 December 2002 as the time limit for the filing of a Counter-Memorial by Germany.

24. *Territorial and Maritime Dispute (Nicaragua* v. *Colombia)*

On 6 December 2001, Nicaragua instituted proceedings against Colombia in respect of a dispute concerning "a group of related legal issues subsisting" between the two States "concerning title to territory and maritime delimitation".

In its Application, Nicaragua inter alia claimed that:

> "the islands and keys of San Andrés and Providencia pertain to those groups of islands and keys that in 1821 [date of independence from Spain] became part of the newly formed Federation of Central American States and, after the dissolution of the Federation in 1838, . . . came to be part of the sovereign territory of Nicaragua".

It considered in that connection that the Barcenas-Esguerra Treaty of 24 March 1928 "lacks legal validity and consequently cannot provide a basis of Colombian title with respect to the Archipelago of San Andrés". Nicaragua added that, in any case, that treaty was "not . . . a treaty of delimitation".

Nicaragua recalled that its Constitution as early as 1948 affirmed that the national territory included the continental platforms on both the Atlantic and Pacific oceans and that by decrees of 1958 it had made it clear that the resources of the continental shelf belonged to it. In 1965, it moreover declared a national fishing zone of 200 nautical miles. Nicaragua went on to state that, by claiming sovereignty over the islands of Providencia and San Andrés and keys which, according to it, "have a total of land area of 44 square kilometres and an overall

coastal length that is under 20 kilometres, Colombia claims dominion over more than 50,000 square kilometres of maritime space that appertain to Nicaragua", which represented "more than half" the maritime spaces of Nicaragua in the Caribbean Sea. It contended that the current situation was "seriously imperilling the livelihood of the Nicaraguan people, particularly those of the Caribbean coast that traditionally have had a great dependence on natural resources of the sea" and observed that the Colombian navy had been intercepting and capturing a number of fishing vessels "in areas as close as 70 miles off the Nicaraguan coast", east of the 82 meridian. Nicaragua finally maintained that diplomatic negotiations had failed.

Nicaragua therefore requested the Court to:

> "adjudge and declare:
>
> "*First*, that . . . Nicaragua has sovereignty over the islands of Providencia, San Andrés and Santa Catalina and all the appurtenant islands and keys, and also over the Roncador, Serrana, Serranilla and Quitasueño keys (in so far as they are capable of appropriation);
>
> "*Second*, in the light of the determinations concerning title requested above, the Court is asked further to determine the course of the single maritime boundary between the areas of continental shelf and exclusive economic zone appertaining respectively to Nicaragua and Colombia, in accordance with equitable principles and relevant circumstances recognized by general international law as applicable to such a delimitation of a single maritime boundary."

Nicaragua further indicated that "it reserves the right to claim compensation for elements of unjust enrichment consequent upon Colombian possession of the Islands of San Andrés and Providencia as well as the keys and maritime spaces up to the 82 meridian, in the absence of lawful title", as well as "the right to claim compensation for interference with fishing vessels of Nicaraguan nationality or vessels licensed by Nicaragua".

As a basis for the Court's jurisdiction, Nicaragua invoked article XXXI of the American Treaty on Pacific Settlement (officially known as the "Pact of Bogotá"), signed on 30 April 1948, to which both Nicaragua and Colombia are parties. Nicaragua also refers to the declarations under Article 36 of the Statute of the Court, by which Nicaragua and Colombia accepted the compulsory jurisdiction of the Court, in 1929 and 1937 respectively.

* * *

Consideration by the General Assembly

In its decision 56/407, adopted on 30 October 2001 without reference to a Main Committee, the General Assembly took note of the report of the International Court of Justice.[108]

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6. INTERNATIONAL LAW COMMISSION[109]

Fifty-third session of the Commission[110]

The International Law Commission (ILC) held the first part of its fifty-third session from 23 April to 1 June and the second part from 2 July to 10 August 2001 at its seat at the United Nations Office at Geneva.

Regarding the topic of State responsibility, the Commission had before it comments and observations received from Governments on the draft articles provisionally adopted by the Drafting Committee at its fifty-second session[111] and the fourth report of the Special Rapporteur.[112] The Commission decided to change the name of the topic to "Responsibility of States for internationally wrongful acts" in order to better distinguish the topic from the responsibility of the State under internal law. The Commission further decided to recommend to the General Assembly that it take note of the draft articles in a resolution, and that it annex the draft articles to the resolution. The Commission recommended that the General Assembly consider, at a later stage, the possibility of convening an international conference of plenipotentiaries to examine the draft articles with a view to concluding a convention on the topic.

Concerning the topic "International liability for injurious consequences arising out of acts not prohibited by international law (prevention of transboundary harm from hazardous activities)", the Commission considered the report of the Drafting Committee[113] and subsequently, adopted the final text of a draft preamble and a set of 19 draft articles on prevention of transboundary harm from hazardous activities, as well as the commentaries to the draft articles. Furthermore, the Commission submitted the draft preamble and draft articles to the General Assembly and recommended the elaboration of a convention by the Assembly on the basis of the draft articles.

For the topic "Reservations to treaties", the Commission initially had before it the second part of the fifth report[114] relating to questions of procedure regarding reservations and interpretative declarations, as well as the sixth report of the Special Rapporteur[115] relating to the modalities of formulating reservations and interpretative declarations and to publicity of reservations and interpretative declarations. The Commission considered both reports.[116]

Regarding the topic "Diplomatic protection", the Commission had before it the remainder of the Special Rapporteur's first report[117] as well as his second report.[118] The Commission decided to refer draft articles 9, 10 and 11 to the Drafting Committee, and to establish an open-ended informal consultation on article 9. And concerning the topic "Unilateral acts of States", the Commission had before it the fourth report of the Special Rapporteur,[119] which the Commission considered at the session. Furthermore, an open-ended working group was established, which subsequently recommended that the Commission request the United Nations Secretariat to circulate a questionnaire to Governments inviting them to provide further information regarding their practice of formulating and interpreting unilateral acts.

Consideration by the General Assembly

The General Assembly, on 12 December 2001, on the recommendation of the Sixth Committee, adopted without a vote resolution 56/78, entitled "Convention on jurisdictional immunities of States and their property", in which the Assembly decided that the Ad Hoc Committee on Jurisdictional Immunities of States and Their Property should meet from 4 to 15 February 2002. On the same date, the Assembly adopted resolution 56/82 entitled, "Report of the International Law Commission on the work of its fifty-third session", in which the Assembly took note of the report of ILC and requested the Commission, taking into account the comments and observations of Governments, whether in writing or expressed orally in debates in the General Assembly, to continue its work on the topics in its current programme. The Assembly also adopted resolution 56/83, of the same date, in which it welcomed the conclusion of the work of ILC on responsibility of States for internationally wrongful acts and its adoption of the draft articles and a detailed commentary on

the subject. The Assembly further commended the draft articles to the attention of Governments without prejudice to the question of their future adoption or other appropriate action.

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7. UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW[120]

The United Nations Commission on International Trade Law (UNCITRAL) held its thirty-fourth session in Vienna from 25 June to 13 July 2001.

During the session, UNCITRAL completed its work on the draft Convention on Assignment of Receivables in International Trade and recommended it to the General Assembly for consideration at its fifty-sixth session.

Also during the session, UNCITRAL completed its work on the draft UNCITRAL Model Law on Electronic Signatures, adopting the Model Law and transmitting the text, together with the Guide to Enactment of the Model Law, to Governments and other interested parties. The Commission also recommended that all States give favourable consideration to the newly adopted Model Law, together with the UNCITRAL Model Law on Electronic Commerce adopted in 1996 and complemented in 1998, when they enacted or revised their laws, in view of the need for uniformity of the law applicable to alternatives to paper-based forms of communication, storage and authentication of information.

Concerning the topic of insolvency law, the Commission took note with satisfaction of the report and commended the work accomplished so far, in particular the holding on the Global Insolvency Colloquium (Vienna, December 2000)[121] and the efforts of coordination with the work carried out by other international organizations in the area of insolvency law. The Commission discussed the recommendations of the Colloquium, in particular with respect to the form that future work might take and interpretation of the mandate given to the Working Group by the Commission at its thirty-third session. The Commission confirmed that the mandate given to the Working Group should be widely interpreted to ensure an appropriately flexible work product, which should take the form of a legislative guide.

Regarding the topic of settlement of commercial disputes, the Commission took note of the reports of the Working Group on Arbitration on the work of its thirty-third and thirty-fourth sessions.[122] The Commission commended the Working Group for the progress accomplished so far regarding the three main issues under discussion on the topic, namely, the requirement of the written form for the arbitration agreement, the issues of interim measures of protection and the preparation of a model law on conciliation.

The Commission also discussed the topic of transport law at the current session, and had before it the report of the Secretary-General.[123] After discussion, the Commission decided to establish a working group to consider issues as outlined in the report on possible future work, including issues of liability. The Commission also decided that the considerations in the working group should initially cover port-to-port transport operations; however, the working group would be free to study the desirability and feasibility of dealing also with door-to-door transport operations or certain aspects of those operations, and, depending on the results of those studies, recommend to the Commission an appropriate extension of the work group's mandate.

During the thirty-fourth session, the Commission established a working group with the mandate to develop an efficient legal regime for security rights in goods involved in a commercial activity, including inventory, to identify the issues to be addressed, such as the form of the instrument, the exact scope of the assets that can serve as collateral, the perfection of security, the degree of formalities to be complied with, the need for an efficient and well-balanced enforcement regime, the scope of the debt that may be secured, means of publicizing the existence of security rights, limitations, if any, on the creditors entitled to the security right, the effects of bankruptcy on the enforcement of security right and the certainty and predictability of the creditor's priority over competing interests.

The Commission also established a working group entrusted with the task of drafting core model legislative provisions in the field of privately financed infrastructure projects.

During the session, the Commission noted with appreciation the ongoing work under the system that had been established for the collection and dissemination of case law on UNCITRAL texts (CLOUT), and further noted that CLOUT was a most important means of promoting the uniform interpretation and application of UNCITRAL texts by enabling interested persons, such as judges, arbitrators, lawyers or parties to commercial transactions to take into account decisions and awards of other jurisdictions when rendering their own judgements or opinions or adjusting their actions to the prevailing interpretation of those texts.

Also during the session, on the basis of a note by the Secretariat,[124] the Commission considered the status of the conventions and model laws emanating from its work, as well as the status of the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention). These legal instruments include:

1974 Convention on the Limitation Period in the International Sale of Goods, as amended by the 1980 Protocol: 17 States parties

[Unamended] 1974 Convention on the Limitation Period in the International Sale of Goods: 24 States parties

1978 United Nations Convention on the Carriage of Goods by Sea (Hamburg Rules): 28 States parties

1980 United Nations Convention on Contracts for the International Sale of Goods: 59 States parties

1988 United Nations Convention on International Bills of Exchange and International Promissory Notes: not yet in force

1991 United Nations Convention on the Liability of Operators of Transport Terminals in International Trade: not yet in force

1995 United Nations Convention on Independent Guarantees and Stand-by Letters of Credit: 5 States parties

1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards: 126 States parties

1985 UNCITRAL Model Law on International Commercial Arbitration: Belarus, Greece, Madagascar and Republic of Korea have enacted legislation based on the Model Law

1992 UNCITRAL Model Law on International Credit Transfers

1994 UNCITRAL Model Law on Procurement of Goods, Construction and Services

1996 UNCITRAL Model Law on Electronic Commerce: Ireland, Philippines, Slovenia and States of Jersey (Crown Dependency of the United Kingdom of Great Britain and Northern Ireland) have enacted legislation based on the Model Law

1997 UNCITRAL Model Law on Cross-Border Insolvency: South Africa has enacted legislation based on the Model Law

Consideration by the General Assembly

At its fifty-sixth session, the General Assembly, on the recommendations of the Sixth Committee, adopted several resolutions and a decision on international trade law on 12 December 2001. By its resolution 56/79, adopted without a vote, the Assembly took note with appreciation of the report of the United Nations Commission on International Trade Law and took note of the progress made in the work of the Commission on arbitration and insolvency law and of its decision to commence work on electronic contracting, privately financed infrastructure projects, security interests and transport law. The Assembly also expressed its appreciation to the secretariat of the Commission for the publication and distribution of the *Legislative Guide on Privately Financed Infrastructure Projects*.[125]

In its resolution 56/80, the General Assembly expressed its appreciation to UNCITRAL for completing and adopting the Model Law on Electronic Signatures, which was contained in the annex to the resolution, and reads as follows:

Model Law on Electronic Signatures of the United Nations Commission on International Trade Law

Article 1

SPHERE OF APPLICATION

This Law applies where electronic signatures are used in the context[a] of commercial[b] activities. It does not override any rule of law intended for the protection of consumers.

Article 2

DEFINITIONS

For the purposes of this Law:

(*a*) "Electronic signature" means data in electronic form in, affixed to or logically associated with, a data message, which may be used to identify the signatory in relation to the data message and to indicate the signatory's approval of the information contained in the data message;

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[a] The Commission suggests the following text for States that might wish to extend the applicability of this Law:

"This Law applies where electronic signatures are used, except in the following situations: [. . .]."

[b] The term "commercial" should be given a wide interpretation so as to cover matters arising from all relationships of a commercial nature, whether contractual or not. Relationships of a commercial nature include, but are not limited to, the following transactions: any trade transaction for the supply or exchange of goods or services; distribution agreement; commercial representation or agency; factoring; leasing; construction of works; consulting; engineering; licensing; investment; financing; banking, insurance; exploitation agreement or concession; joint venture and other forms of industrial or business cooperation; carriage of goods or passengers by air, sea, rail or road.

(*b*) "Certificate" means a data message or other record confirming the link between a signatory and signature creation data;

(*c*) "Data message" means information generated, sent, received or stored by electronic, optical or similar means including, but not limited to, electronic data interchange (EDI), electronic mail, telegram, telex or telecopy;

(*d*) "Signatory" means a person that holds signature creation data and acts either on its own behalf or on behalf of the person it represents;

(*e*) "Certification service provider" means a person that issues certificates and may provide other services related to electronic signatures;

(*f*) "Relying party" means a person that may act on the basis of a certificate or an electronic signature.

Article 3

EQUAL TREATMENT OF SIGNATURE TECHNOLOGIES

Nothing in this Law, except article 5, shall be applied so as to exclude, restrict or deprive of legal effect any method of creating an electronic signature that satisfies the requirements referred to in article 6, paragraph 1, or otherwise meets the requirements of applicable law.

Article 4

INTERPRETATION

1. In the interpretation of this Law, regard is to be had to its international origin and to the need to promote uniformity in its application and the observance of good faith.

2. Questions concerning matters governed by this Law which are not expressly settled in it are to be settled in conformity with the general principles on which this Law is based.

Article 5

VARIATION BY AGREEMENT

The provisions of this Law may be derogated from or their effect may be varied by agreement, unless that agreement would not be valid or effective under applicable law.

Article 6

COMPLIANCE WITH A REQUIREMENT FOR A SIGNATURE

1. Where the law requires a signature of a person, that requirement is met in relation to a data message if an electronic signature is used that is as reliable as was appropriate for the purpose for which the data message was generated or communicated, in the light of all the circumstances, including any relevant agreement.

2. Paragraph 1 applies whether the requirement referred to therein is in the form of an obligation or whether the law simply provides consequences for the absence of a signature.

3. An electronic signature is considered to be reliable for the purpose of satisfying the requirement referred to in paragraph 1 if:

(*a*) The signature creation data are, within the context in which they are used, linked to the signatory and to no other person;

(*b*) The signature creation data were, at the time of signing, under the control of the signatory and of no other person;

(*c*) Any alteration to the electronic signature, made after the time of signing, is detectable; and

(*d*) Where a purpose of the legal requirement for a signature is to provide assurance as to the integrity of the information to which it relates, any alteration made to that information after the time of signing is detectable.

4. Paragraph 3 does not limit the ability of any person:

(*a*) To establish in any other way, for the purpose of satisfying the requirement referred to in paragraph 1, the reliability of an electronic signature; or

(*b*) To adduce evidence of the non-reliability of an electronic signature.

5. The provisions of this article do not apply to the following:

[. . .].

Article 7

SATISFACTION OF ARTICLE 6

1. [*Any person organ or authority, whether public or private, specified by the enacting State as competent*] may determine which electronic signatures satisfy the provisions of article 6 of this Law.

2. Any determination made under paragraph 1 shall be consistent with recognized international standards.

3. Nothing in this article affects the operation of the rules of private international law.

Article 8

CONDUCT OF THE SIGNATORY

1. Where signature creation data can be used to create a signature that has legal effect, each signatory shall:

(*a*) Exercise reasonable care to avoid unauthorized use of its signature creation data;

(*b*) Without undue delay, utilize means made available by the certification service provider pursuant to article 9 of this Law or otherwise use reasonable efforts, to notify any person that may reasonably be expected by the signatory to rely on or to provide services in support of the electronic signature if:

(i) The signatory knows that the signature creation data have been compromised; or

(ii) The circumstances known to the signatory give rise to a substantial risk that the signature creation data may have been compromised;

(*c*) Where a certificate is used to support the electronic signature, exercise reasonable care to ensure the accuracy and completeness of all material representations made by the signatory that are relevant to the certificate throughout its life cycle or that are to be included in the certificate.

2. A signatory shall bear the legal consequences of its failure to satisfy the requirements of paragraph 1.

Article 9

CONDUCT OF THE CERTIFICATION SERVICE PROVIDER

1. Where a certification service provider provides services to support an electronic signature that may be used for legal effect as a signature, that certification service provider shall:

(*a*) Act in accordance with representations made by it with respect to its policies and practices;

(*b*) Exercise reasonable care to ensure the accuracy and completeness of all material representations made by it that are relevant to the certificate throughout its life cycle or that are included in the certificate;

(*c*) Provide reasonably accessible means that enable a relying party to ascertain from the certificate:

(i) The identity of the certification service provider;

(ii) That the signatory that is identified in the certificate had control of the signature creation data at the time when the certificate was issued;

(iii) That signature creation data were valid at or before the time when the certificate was issued;

(*d*) Provide reasonably accessible means that enable a relying party to ascertain, where relevant, from the certificate or otherwise:

(i) The method used to identify the signatory;

(ii) Any limitation on the purpose or value for which the signature creation data or the certificate may be used;

(iii) That the signature creation data are valid and have not been compromised;

(iv) Any limitation on the scope or extent of liability stipulated by the certification service provider;

(v) Whether means exist for the signatory to give notice pursuant to article 8, paragraph 1 (*b*), of this Law;

(vi) Whether a timely revocation service is offered;

(*e*) Where services under subparagraph (*d*) (v) are offered, provide a means for a signatory to give notice pursuant to article 8, paragraph 1 (*b*), of this Law and, where services under subparagraph (*d*) (vi) are offered, ensure the availability of a timely revocation service;

(*f*) Utilize trustworthy systems, procedures and human resources in performing its services.

2. A certification service provider shall bear the legal consequences of its failure to satisfy the requirements of paragraph 1.

Article 10

TRUSTWORTHINESS

For the purposes of article 9, paragraph 1 (*f*), of this Law in determining whether, or to what extent, any systems, procedures and human resources utilized by a certification service provider are trustworthy, regard may be had to the following factors:

(*a*) Financial and human resources, including existence of assets;

(*b*) Quality of hardware and software systems;

(*c*) Procedures for processing of certificates and applications for certificates and retention of records;

(*d*) Availability of information to signatories identified in certificates and to potential relying parties;

(*e*) Regularity and extent of audit by an independent body;

(*f*) The existence of a declaration by the State, an accreditation body or the certification service provider regarding compliance with or existence of the foregoing; or

(*g*) Any other relevant factor.

Article 11

CONDUCT OF THE RELYING PARTY

A relying party shall bear the legal consequences of its failure:

(*a*) To take reasonable steps to verify the reliability of an electronic signature; or

(*b*) Where an electronic signature is supported by a certificate, to take reasonable steps:

(i) To verify the validity, suspension or revocation of the certificate; and

(ii) To observe any limitation with respect to the certificate.

Article 12

RECOGNITION OF FOREIGN CERTIFICATES AND ELECTRONIC SIGNATURES

1. In determining whether, or to what extent, a certificate or an electronic signature is legally effective, no regard shall be had:

(*a*) To the geographic location where the certificate is issued or the electronic signature created or used; or

(*b*) To the geographic location of the place of business of the issuer or signatory.

2. A certificate issued outside [*the enacting State*] shall have the same legal effect in [*the enacting State*] as a certificate issued in [*the enacting State*] if it offers a substantially equivalent level of reliability.

3. An electronic signature created or used outside [*the enacting State*] shall have the same legal effect in [*the enacting State*] as an electronic signature created or used in [*the enacting State*] if it offers a substantially equivalent level of reliability.

4. In determining whether a certificate or an electronic signature offers a substantially equivalent level of reliability for the purposes of paragraph 2 or 3, regard shall be had to recognized international standards and to any other relevant factors.

5. Where, notwithstanding paragraphs 2, 3 and 4, parties agree, as between themselves, to the use of certain types of electronic signatures or certificates, that agreement shall be recognized as sufficient for the purposes of cross-border recognition, unless that agreement would not be valid or effective under applicable law.

With its resolution 56/81, the Assembly adopted and opened for signature or accession the United Nations Convention on the Assignment of Receivables in International Trade.[126] The General Assembly also adopted decision 56/422, by which it decided to defer further consideration of and a decision on the enlargement of the membership of the United Nations Commission on International Trade Law until its fifty-seventh session.

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8. LEGAL QUESTIONS DEALT WITH BY THE SIXTH COMMITTEE OF THE GENERAL ASSEMBLY AND BY AD HOC LEGAL BODIES

In addition to the matters concerning the International Law Commission and international trade law, culminating in the resolutions discussed in the above sections, the Sixth Committee also considered additional items and submitted its recommendations thereon to the General Assembly at its fifty-sixth session.

On 12 December 2001, the General Assembly adopted without a vote resolution 56/77, entitled "United Nations Programme of Assistance in the Teaching, Study, Dissemination and Wider Appreciation of International Law", in which it approved the guidelines and recommendations contained in section III of the report of the Secretary-General[127] and adopted by the Advisory Committee on the United Nations Programme of Assistance.

In its resolution 56/84 of the same date, the General assembly endorsed the recommendations and conclusions of the Committee on Relations with the Host Country contained in paragraph 37 of its report,[128] and expressed its appreciation for the efforts made by the host country, the United States of America, and hoped that the issues raised at the meetings of the Committee would continue to be resolved in a spirit of cooperation and in accordance with international law.

In its resolution 56/85 of the same date, entitled "Establishment of the International Criminal Court", the General Assembly reiterated the historic significance of the adoption of the Rome Statute of the International Criminal Court,[129] and re-

quested the Secretary-General to reconvene the Preparatory Commission for the International Criminal Court, in accordance with resolution F adopted by the Conference, from 8 to 19 April and from 1 to 12 July 2002, to continue to carry out the mandate of that resolution and, in that connection, to discuss the ways to enhance the effectiveness and acceptance of the Court.

In its resolution 56/86, the General Assembly took note of the report of the Special Committee on the Charter of the United Nations and on the Strengthening of the Role of the Organization,[130] and decided that the Special Committee shall hold its next session from 18 to 28 March 2002. And in its resolution 56/87, entitled "Implementation of the provisions of the Charter of the United Nations related to assistance to third States affected by the application of sanctions", the General Assembly renewed its invitation to the Security Council to consider the establishment of further mechanisms or procedures, as appropriate, for consultations as early as possible under Article 50 of the Charter of the United Nations with third States which were or might be confronted with special economic problems arising from the carrying out of preventive or enforcement measures imposed by the Council under Chapter VII of the Charter, with regard to a solution of those problems, including appropriate ways and means for increasing the effectiveness of its methods and procedures applied in the consideration of requests by the affected States for assistance. By the same resolution, the Assembly welcomed the measures taken by the Security Council since the adoption of General Assembly resolution 50/51, most recently the note by the President of the Security Council of 17 April 2000,[131] whereby the members of the Security Council had decided to establish an informal working group of the Council to develop general recommendations on how to improve the effectiveness of United Nations sanctions, and welcomed the report of the Secretary-General containing a summary of the deliberations and main findings of the ad hoc expert group meeting on developing a methodology for assessing the consequences incurred by third States as a result of preventive or enforcement measures and on exploring innovative and practical measures of international assistance to the affected third States.[132]

On the topic of international terrorism, the General Assembly adopted resolution 56/88, wherein, having examined the report of the Secretary-General,[133] the report of the Ad Hoc Committee established by General Assembly resolution 51/210 of 17 December 1996[134] and the report of the Working Group of the Sixth Committee established pursuant to General Assembly resolution 55/158 of 12 December 2000,[135] urged all States that had not yet done so to consider, as a matter of priority, and in accordance with Security Council resolution 1373 (2001), becoming parties to relevant conventions and protocols as referred to in paragraph 6 of General Assembly resolution 51/210, as well as the International Convention for the Suppression of Terrorist Bombings[136] and the International Convention for the Suppression of the Financing of Terrorism,[137] and called upon all States to enact, as appropriate, domestic legislation necessary to implement the provisions of those conventions and protocols, to ensure that the jurisdiction of their courts enabled them to bring to trial the perpetrators of terrorist acts, and to cooperate with and provide support and assistance to other States and relevant international and regional organizations to that end.

With regard to the item entitled "Scope of legal protection under the 1994 Convention on the Safety of United Nations and Associated Personnel",[138] the General Assembly adopted resolution 56/89, in which it expressed its appreciation to the

Secretary-General for his report[139] on the scope of legal protection under the Convention on the Safety of United Nations and Associated Personnel and took note of the recommendations contained therein. The Assembly also took note of the report of the Special Committee on Peacekeeping Operations with regard to the safety and security of United Nations and associated personnel and the scope of existing legal protection and its recommendations,[140] and recommended that the Secretary-General continue to seek the inclusion of relevant provisions of the Convention in the status-of-forces or status-of-mission agreements concluded by the United Nations.

In its resolution 56/93 of 12 December 2001, entitled "International Convention against the reproductive cloning of human beings", the General Assembly, bearing in mind Commission on Human Rights resolution 2001/71 of 25 April 2001, entitled "Human Rights and bioethics",[141] and noting the resolution on bioethics adopted by the General Conference of UNESCO on 2 November 2001,[142] decided to establish an Ad Hoc Committee, open to all States Members of the United Nations or members of the specialized agencies or of the International Atomic Energy Agency, for the purpose of considering the elaboration of an international convention against the reproductive cloning of human beings, and decided also that the Ad Hoc Committee should meet from 25 February to 1 March 2002 to consider the elaboration of a mandate for the negotiation of such an international convention.

The General Assembly also adopted several resolutions and decisions granting observer status to: International Development Law Institute (resolution 56/90); International Hydrographic Organization (resolution 56/91); Community of Sahelo-Saharan States (resolution 56/92); International Institute for Democracy and Electoral Assistance (decision 56/423); Partners in Population and Development (decision 56/424); and Inter-Parliamentary Union (decision 56/425).

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9. UNITED NATIONS INSTITUTE FOR TRAINING AND RESEARCH

During 2001, UNITAR carried out its extensive training programmes, including those in preventive diplomacy, international law, international civil service and international affairs management.[143] Funds were received to support a programme on training peacekeepers on the special needs of women and children in conflict, as well as for the development of the programme on law and cyberspace. Also during the year, efforts were intensified to attract experts from developing countries and countries with economies in transition for the preparation of relevant training materials for the programmes and activities of the Institute.

At its fifty-sixth session, the General Assembly, on 21 December 2001, on the recommendation of the Second Committee, adopted without a vote resolution 56/208, in which it reaffirmed the importance of a coordinated, United Nations system-wide approach to research and training based on an effective coherent strategy and an effective division of labour among the relevant institutions and bodies.

B. General review of the legal activities of intergovernmental organizations related to the United Nations*

1. INTERNATIONAL LABOUR ORGANIZATION

1. The International Labour Conference (ILC), which held its 89th session in Geneva from 5 to 21 June 2001, adopted the Safety and Heath in Agriculture Convention and Recommendation, 2001.[144]

2. The Committee on the Application of Standards of ILC held a special sitting concerning the application by Myanmar of the Forced Labour Convention, 1930 (No. 29), in application of the resolution adopted by the International Labour Conference at its 88th session (June 2000).[145]

3. The Committee of Experts on the Application of Conventions and Recommendations met in Geneva from 22 November to 7 December 2001 to adopt its report[146] to the 90th session of the International Labour Conference (2002).

4. Representations lodged under article 24 of the Constitution of the International Labour Organization alleging non-observance by Ecuador[147] and Chile[148] of the Discrimination (Employment and Occupation) Convention (No. 111), 1958; by Mexico of the Indigenous and Tribal Peoples Convention, 1989 (No. 169);[149] and by Guatemala of the Tripartite Consultation (International Labour Standards) Convention (No. 144), 1976,[150] were examined by the Governing Body of the International Labour Office.

5. The Governing Body of ILO considered and adopted the following reports of its Committee on Freedom of Association: the 324th report[151] (280th session, March 2001); the 325th report[152] (281st session, June 2001); and the 326th report[153] (282nd session, November 2001).

6. The Working Party on the Social Dimensions of Globalization, established by the Governing Body, held two meetings in 2001 during the 280th (March 2001)[154] and 282nd (November 2001)[155] sessions of the Governing Body.

7. The Working Party on Policy regarding the Revision of Standards of the Committee on Legal Issues and International Labour Standards of the Governing Body held meetings in 2001 during the 280th (March 2001)[156] and 282nd (November 2001)[157] sessions of the Governing Body.

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* The order of the organizations reflects the chronological order, from earlier to most recent, of the effective date the United Nations entered into a relationship with the Organization. All the organizations listed here are United Nations specialized agencies, except for IAEA and WTO, which are autonomous intergovernmental organizations that work in cooperation with the United Nations, and are listed last.

2. UNITED NATIONS EDUCATIONAL, SCIENTIFIC AND CULTURAL ORGANIZATION

(*a*) Constitutional amendments

At its 31st session (15 October-3 November 2001) the General Conference of UNESCO adopted the following amendments to its Constitution:

(i) *Amendment to article VI, paragraph 2, of the Constitution*

"*The General Conference*,

"*Having examined* document 31 C/20 and taken note of the sixth report of the Legal Committee (31 C/76),

"*Decides* to replace the text in article VI, paragraph 2, of the Constitution by the following text:

"'The Director-General shall be nominated by the Executive Board and appointed by the General Conference for a period of *four* years, under such conditions as the Conference may approve. The Director-General may be appointed for a further period of *four* years but shall not be eligible for reappointment to a subsequent term. The Director-General shall be the Chief Administrative Officer of the Organization.'"

(ii) *Amendment to article II of the Constitution*

"*The General Conference*,

"*Having examined* document 31 C/45 and *taken note* of the tenth report of the Legal Committee (31 C/80),

"*Decides* to insert, in article II of the Constitution, after paragraph 6 of this article, the following text:

"'7. Each member State is entitled to appoint a Permanent Delegate to the Organization.

"'8. The Permanent Delegate of the member State shall present his credentials to the Director-General of the Organization, and shall officially assume his duties from the day of presentation of his credentials.'"

(*b*) International regulations

At its 31st session (15 October-3 November 2001) the General Conference of UNESCO adopted the following three standard-setting instruments:

—Convention concerning the Protection of the Underwater Cultural Heritage

—Revised Recommendation concerning Technical and Vocational Education

—Universal Declaration on Cultural Diversity

(*c*) Human rights

Examination of cases and questions concerning the exercise of human rights coming within the UNESCO fields of competence

The Committee on Conventions and Recommendations met in private session at UNESCO headquarters from 22 to 24 May and from 27 to 29 September 2001 in

order to examine communications which had been transmitted to it in accordance with decision 104 EX/3.3 of the Executive Board.

At its May 2001 session, the Committee examined 30 communications, of which 7 were examined with a view to determining their admissibility or otherwise, 16 were examined as to their substance and 7 were examined for the first time. Four communications were declared inadmissible and five were struck from the list because they were considered as having been settled or did not, after examination of their merits, appear to warrant further action. The examination of the 21 was deferred. The Committee presented its report to the Executive Board at its 161st session.

At its September 2001 session, the Committee examined 22 communications, of which 5 were examined with a view to determining their admissibility, 16 were examined as to their substance and 1 new communication was submitted to the Committee. One communication was declared inadmissible and three were struck from the list because they were considered as having been settled or did not, after examination of their merits, appear to warrant further action. The examination of the 18 was deferred. The Committee presented its report to the Executive Board at its 162nd session.

(*d*) Copyright activities

In 2001, the activities of UNESCO in the field of copyright were mainly concentrated on:

(i) *Organization of statutory meetings*

- Organization of the 12th ordinary session of the Intergovernmental Committee of the Universal Copyright Convention (adopted under the aegis of UNESCO in 1952 and revised in 1971), 18-22 June 2001, at UNESCO headquarters. The Committee studied the following legal issues on the protection of copyright in the digital environment:
  - The role of service and access providers in digital transmission and their responsibility regarding copyright (document IGC(1971)/XII/4)
  - International experience in regard to procedures for settling conflicts relating to copyright in the digital environment (document IGC(1971)/XII/5)
  - Practical aspects of the exercise of the "droit de suite", including in the digital environment, and its effects on developments in the international art market and on the improvement of the protection of visual artists (document IGC(1971)/XII/6)
- Organization of the 18th ordinary session of the Intergovernmental Committee of the Rome Convention (27-28 June 2001) jointly with ILO and WIPO. The Committee had extensive discussions on the analysis of a "comparative study of various international instruments concerning neighbouring rights"
- Participation in international discussions on copyright and neighbouring rights problems, particularly conferences held by the International Organization of la Francophonie, the European Union (EU) and WIPO (Diplomatic Conference on the Protection of Audiovisual Performances, Standing Committee on Copyright and Related Rights, Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore)

(ii) *Legal assistance to member States*

- Elaboration of a first draft of Model Provisions for the Protection of Traditional and Popular Culture in the Pacific States, with extensive commentary, to assist the States in the formulation of their national laws and management of the rights in this matter
- Organization of workshops on copyright and neighbouring rights in the framework of festivals organized in Burundi and the Congo

(iii) *Collective administration of authors' rights*

- The French and English versions of a special Guide to the Collective Administration of Authors' Rights was widely distributed to the Governments and to the groups concerned, mainly in developing countries and countries in transition. The Russian version of the guide was published at the end of 2001 with the support of the EU TACIS programme for technical assistance to the independent States of the former Soviet Union and Mongolia

(iv) *Information for specialists and sensitizing the public*

- Publication of the electronic version of the UNESCO *Copyright Bulletin* (in English, French, and Spanish) and of the printed version (quarterly in Chinese and Russian), containing theoretical doctrines, articles, information on national laws (new laws, revisions, updating), UNESCO activities in the field (meetings reports, résumés of the actions undertaken, etc.), participation of the States in various conventions and new specialized books recently published throughout the world. During 2001, the *Copyright Bulletin* was mainly dedicated to the search for a solution to the copyright problems raised by digital technology and problems of access to information and knowledge in the digital environment
- Drafting of the updated supplement of the Manual on Copyright and Neighbouring Rights and translation of the first version into Arabic and Russian
- Training of qualified specialists to work in all infrastructures concerned with copyright (governmental bodies, judicial system, legal services, etc.) through the creation of specialized UNESCO Chairs (in Jordan, Algeria, China and Georgia). Improvement of the pedagogical capacities of six UNESCO Chairs and the network of UNESCO Chairs in Latin America—RAMLEDA—(eight Chairs) by assistance in the training of possible future UNESCO Chair holders, and support for the purchase of legal literature and subscriptions to foreign specialized journals

(v) *Global Alliance for Cultural Diversity*

- Launching by the 31st session of the General Conference of this new project to strengthen cultural industries in developing countries and countries in transition by means of new partnerships between public, private and civil society sectors. One important component is to promote respect for international copyright regulations and develop effective mechanisms to prevent piracy. The Global Alliance for Cultural Diversity contributes to the implementation of the UNESCO Universal Declaration on Cultural Diversity adopted by the General Conference at the same session

3. WORLD HEALTH ORGANIZATION

(*a*) Constitutional and legal developments

In 2001, no new member State joined the World Health Organization. Thus at the end of 2001, there were 191 member States and two Associate Members of WHO.

The amendments to articles 24 and 25 of the Constitution, adopted in 1998 by the fifty-first World Health Assembly to increase membership of the Executive Board from 32 to 34, had been accepted by 77 member States as of 31 December 2001. The amendment to article 7 of the Constitution, adopted in 1965 by the eighteenth World Health Assembly to suspend certain rights of member States practising racial discrimination, had been accepted by 75 of the member States as of December 2001. The amendment to article 74 of the Constitution, adopted in 1978 by the thirty-first World Health Assembly to establish Arabic as one of the authentic languages of the Constitution, had been accepted by 66 member States as of 31 December 2001. Acceptance by two thirds of member States is required for the amendments to enter into force.

On 25 October 2001, the International Labour Organization became the eighth co-sponsoring organization of the Joint United Nations Programme on HIV/AIDS (UNAIDS).

On 8 March 2001, WHO and the Government of the Federal Republic of Germany signed an Agreement for the establishment of the European Centre for Environment and Health in Bonn.

An Agreement based on the standard Basic Agreement for the Establishment of Technical Advisory Cooperation was concluded in 2001 with the Government of East Timor.

(*b*) Health legislation

(i) *Framework Convention on Tobacco Control*

By its resolution WHA52.18 of 24 May 1999, the fifty-second World Health Assembly established a Working Group and an Intergovernmental Negotiating Body to draft and negotiate a Framework Convention on Tobacco Control and possible related protocols. The fifty-third World Health Assembly, in May 2000, considered the second report of the Working Group, containing draft elements for a WHO Framework Convention on Tobacco Control, and formally launched the negotiation of the Convention by the Intergovernmental Negotiating Body. The main output of the first session of the Intergovernmental Negotiating Body, which was held from 16 to 21 October 2000, was that the Chairman would prepare a Chair's text of the Convention based on proposals made during the session.

During the second session of the Intergovernmental Negotiating Body (30 April-5 May 2001), the Chair's text was discussed. Three working groups divided up the work of reviewing the Chair's text and the Co-Chairs of the working groups developed a compendium of all the textual proposals on the Chair's text submitted by member States. The Co-Chairs' working papers in effect constituted a rolling text of the draft Framework Convention and provided a basis for initiating the third round of the negotiations. The fifty-fourth World Health Assembly, in May 2001,

considered the report of the second session of the Intergovernmental Negotiating Body and discussed progress towards the Framework Convention.

During the third session of the Intergovernmental Negotiating Body (22-28 November 2001), 168 out of 191 member States attended the session and significant progress was made in advancing the negotiations. Two Co-Chairs' texts of the second and third working groups were elaborated and accepted as a sound basis for resuming negotiations at the fourth session of the Intergovernmental Negotiating Body. Regarding the first working group, because of the complexity of the task assigned to it, there was not sufficient time to complete a final negotiable text and it was decided that the redrafting of the Co-Chairs' texts, based on the proposals submitted during the final meeting of the working group, would be completed between the third and the fourth sessions. Several delegations favoured an early protocol on illicit trade, and the United States of America offered to host an intergovernmental meeting on the topic.

WHO organized and supported a number of regional and subregional intersessional meetings related to the negotiation of the draft Framework Convention, such as the meeting of the African region in Johannesburg, South Africa, on 14 May 2001 or the consultation of Latin American countries in Brazil from 5 to 8 November 2001.

(ii) *International Code of Marketing of Breast-milk Substitutes*

By December 2001, 162 of the 191 member States (85 per cent) had reported to WHO on action to give effect to the principles and aims of the International Code of Marketing of Breast-milk Substitutes, adopted by the World Health Assembly in 1981. This includes adoption of new—or revision or strengthening of existing—legislation, regulations, national codes, guidelines for health workers and distributors, agreements with manufacturers, and monitoring and reporting mechanisms. In 2001, Cambodia, France and Nigeria provided information on new and revised action, while WHO responded to requests for related technical support from Australia, Cambodia, New Zealand and Pakistan. A comprehensive global strategy for infant and young child feeding was developed during the period 1999-2001 for discussion and expected endorsement by the WHO governing bodies in 2002.

(iii) *Technical cooperation*

During 2001, the headquarters and regional offices of WHO provided technical cooperation to a number of member States in connection with the development, assessment or review of various areas of health legislation. For example, the Regional Office for South-East Asia provided assistance of a legal nature to East Timor during the transitional year of 2001. The Regional Office for the Eastern Mediterranean has developed a draft version of a Manual entitled "The development of food legislation for countries of the Eastern Mediterranean", to be finalized in 2002. The Regional Office for the Western Pacific advised Cambodia in the establishment of the Cambodian Medical Council to regulate health professionals, and the Cook Islands, Kiribati, the Lao People's Democratic Republic and Vanuatu on the drafting of health legislation in the field of public health, drug policy, mental health, food and tobacco control.

4. WORLD BANK

Loan, Credit, Guarantee and related Agreements of the International Bank for Reconstruction and Development (IBRD) and the International Development Association (IDA) that became effective during 2001 were notified and forwarded for registration to the United Nations Office of Legal Affairs, Treaty Section, by separate communications during 2001 and 2002.

During 2001, the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the ICSID Convention) was signed by one country (Saint Vincent and the Grenadines) and ratified by another (Bulgaria). At the end of the year, the number of signatory States was 149 and the number of Contracting States 134.

Disputes before the Centre

During 2001, arbitration proceedings under the ICSID Convention were instituted in 14 new cases. These cases were:

Impregilo, S.p.A. and Rizzani De Eccher S.p.A. v. *United Arab Emirates* (Case No. ARB/01/1)

Antoine Goetz and others v. *Republic of Burundi* (Case No. ARB/01/2)

Enron Corporation and Ponderosa Assets, L.P. v. *Argentine Republic* (Case No. ARB/01/3)

AES Summit Generation Limited v. *Republic of Hungary* (Case No. ARB/01/4)

Société d'Exploitation des Mines d'Or de Sadiola S.A. v. *Republic of Mali* (Case No. ARB/01/5)

AIG Capital Partners, Inc. and CJSC Tema Real Estate Company v. *Republic of Kazakhstan* (Case No. ARB/01/6)

MTD Equity Sdn. Bhd. and MTD Chile S.A. v. *Chile* (Case No. ARB/01/7)

CMS Gas Transmission Company v. *Argentine Republic* (Case No. ARB/01/8)

Booker plc v. *Cooperative Republic of Guyana* (Case No. ARB/01/9)

Repsol YPF Ecuador S.A. v. *Empresa Estatal Petróleos del Ecuador (Petroecuador)* (Case No. ARB/01/10)

Noble Ventures, Inc. v. *Republic of Romania* (Case No. ARB/01/11)

Azurix Corp. v. *Argentine Republic* (Case No. ARB/01/12)

SGS Société Générate de Surveillance S.A. v. *Islamic Republic of Pakistan* (Case No. ARB/01/13)

F-W Oil Interests, Inc. v. *Republic of Trinidad and Tobago* (Case No. ARB/01/14)

Five proceedings were discontinued. These were:

Misima Mines Pty. Ltd. v. *Independent State of Papua New Guinea* (Case No. ARB/96/2)

Compagnie Minière Internationale Or S.A. v. *Republic of Peru* (Case No. ARB/98/6)

Empresa Nacional de Electricidad S.A. v. *Argentine Republic* (Case No. ARB/99/4)

Alimenta S.A. v. *Republic of The Gambia* (Case No. ARB/99/5)

Impregilo, S.p.A. and Rizzani De Eccher S.p.A. v. *United Arab Emirates* (Case No. ARB/01/1).

In addition, three proceedings were closed following the rendition of awards. These cases were:

Houston Industries Energy, Inc. and others v. *Argentine Republic* (Case No. ARB/98/1)

Eduardo A. Olguín v. *Republic of Paraguay* (Case No. ARB/98/5)

Tanzania Electric Supply Company Limited v. *Independent Power Tanzania Limited* (Case No. ARB/98/8)

Finally, two applications for annulment were registered in respect of awards rendered in two proceedings (*Compañía de Aguas del Aconquija S.A. and Vivendi Universal* v. *Argentine Republic* (Case No. ARB/97/3) and *Wena Hotels Limited* v. *Arab Republic of Egypt* (Case No. ARB/98/4)) as well as one application for supplementary decision and rectification proceeding (*Alex Genin and others* v. *Republic of Estonia* (Case No. ARB/99/2)).

As of 31 December 2001, 21 other cases were pending before the Centre. These were:

Ceskoslovenska obchodni banka, a.s. v. *Slovak Republic* (Case No. ARB/97/4)

Victor Pey Casado and President Allende Foundation v. *Republic of Chile* (Case No. ARB/98/2)

International Trust Company of Liberia v. *Republic of Liberia* (Case No. ARB/98/3)

The Loewen Group, Inc. and Raymond L. Loewen v. *United States of America* (Case No. ARB(AF)/98/3)

Philippe Gruslin v. *Malaysia* (Case No. ARB/99/3)

Marvin Roy Feldman Karpa v. *United Mexican States* (Case No. ARB(AF)/99/1)

Mondev International Ltd. v. *United States of America* (Case No. ARB(AF)/99/2)

Middle East Cement Shipping and Handling Co. S.A. v. *Arab Republic of Egypt* (Case No. ARB/99/6)

Patrick Mitchell v. *Democratic Republic of the Congo* (Case No. ARB/99/7)

Zhinvali Development Ltd. v. *Republic of Georgia* (Case No. ARB/00/1)

Mihaly International Corporation v. *Democratic Socialist Republic of Sri Lanka* (Case No. ARB/00/2)

GRAD Associates, P.A. v. *Bolivarian Republic of Venezuela* (Case No. ARB/00/3)

Salini Costruttori S.p.A. and Italstrade S.p.A. v. *Kingdom of Morocco* (Case No. ARB/00/4)

Autopista Concesionada de Venezuela, C.A. v. *Bolivarian Republic of Venezuela* (Case No. ARB/00/5)

Consortium R.F.C.C. v. *Kingdom of Morocco* (Case No. ARB/00/6)

World Duty Free Company Limited v. *Republic of Kenya* (Case No. ARB/00/7)

Ridgepointe Overseas Developments, Ltd. v. *Democratic Republic of the Congo* (Case No. ARB/00/8)

ADF Group Inc. v. *United States of America* (Case No. ARB(AF)/00/1)

Técnicas Medioambientales Tecmed, S.A. v. *United Mexican States* (Case No. ARB(AF)/00/2)

Waste Management, Inc. v. *United Mexican States* (Case No. ARB(AF)/00/3)

Generation Ukraine Inc. v. *Ukraine* (Case No. ARB/00/9)

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5. INTERNATIONAL CIVIL AVIATION ORGANIZATION

(*a*) Membership

On 26 January, Andorra deposited with the Government of the United States its notification of adherence to the Convention on International Civil Aviation. The adherence took effect on 25 February, bringing the number of member States of the organization to 187.

(*b*) Conventions/Agreements

The ICAO Assembly at its 33rd session decided that ICAO should formally confirm the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations (1986) and authorized the President of the Council to sign on behalf of ICAO an act of its formal confirmation. The act was deposited with the United Nations on 24 December.

A Diplomatic Conference to Adopt a Mobile Equipment Convention and an Aircraft Protocol was held in Cape Town, South Africa, from 29 October to 16 November. The Conference was attended by delegates from 68 Contracting States and observers from 14 international organizations. Following the conclusion of its deliberations, the Conference adopted the Convention on International Interests in Mobile Equipment and the Protocol to the Convention on International Interests in Mobile Equipment on Matters specific to Aircraft Equipment. Both the Convention and the Protocol were signed on site by 20 States. One other State signed during the week following the adoption of the instruments. The Conference further adopted, inter alia, a resolution approving a consolidated text of the Convention and the Protocol as a text of convenience.

(*c*) Other major legal developments

(i) *Work programme of the Legal Committee and legal meetings*

Pursuant to a decision of the Council at its 161st session, and confirmed at its 164th session and by the Assembly at its 33rd session, the general work programme of the Legal Committee is as follows:

(1) Consideration, with regard to communication, navigation and surveillance/air traffic management (CNS/ATM) systems, including global navigation satellite systems (GNSS), of the establishment of a legal framework;

(2) Acts or offences of concern to the international aviation community and not covered by existing air law instruments;

(3) International interests in mobile equipment (aircraft equipment);

(4) Consideration of the modernization of the Convention on Damage Caused by Foreign Aircraft to Third Parties on the Surface, signed at Rome on 7 October 1952;

(5) Review of the question of the ratification of international air law instruments;

(6) United Nations Convention on the Law of the Sea—implications, if any, for the application of the Convention on International Civil Aviation, its annexes and other international air law instruments.

Regarding item (1), the Secretariat Study Group on Legal Aspects of CNS/ATM systems held its 5th meeting in Montreal from 22 to 24 March. With respect to the legal framework for GNSS, the Group decided to explore the approach of a contractual framework. It also identified a number of common elements to be included in the framework, some of them relating to liability. The Group further indicated that the liability relating to communications and the issue of unlawful interference with CNS/ATM systems were two important issues requiring further study. It was decided at the 33rd session of the Assembly that further work should be carried out in that respect.

Regarding item (2), the Secretariat Study Group on Unruly Passengers held its 5th meeting from 19 to 20 April. The Group finalized its work on the draft Model Legislation on Certain Offences Committed On Board Civil Aircraft and completed the review of the guidance material accompanying the draft model legislation. The model legislation was adopted by the Assembly at its 33rd session in its resolution A33-4.

Regarding item (3), the Council, at the 11th meeting of its 162nd session, on 13 March, took a final decision to convene a Diplomatic Conference in Cape Town, South Africa, from 29 October to 16 November under the joint auspices of ICAO and the International Institute for the Unification of Private Law (UNIDROIT), at the invitation of the Government of South Africa, with a view to adopting a convention on international interests in mobile equipment and a protocol thereto on matters specific to aircraft equipment. An ad hoc task force, entrusted with preparatory work for the establishment and operation of an International Registry for international interests in aircraft equipment, met in Dublin from 16 to 18 January and in Washington, D.C., from 13 to 15 February, and prepared a package of documentation which, by decision of the Council, was circulated to Contracting States for information and comments prior to the Diplomatic Conference.

As stated above, the Conference adopted the Convention on International Interests in Mobile Equipment and a related Protocol.

(ii) *Settlement of differences*

Regarding the settlement of differences between the United States and 15 European States (2000) relating to the European "Hushkits" Regulation No. 925/1999,

the Parties, as invited by the Council and as agreed in January, continued direct negotiations, through the good offices of the President of the Council as Conciliator. The President of the Council, as Conciliator, presented progress reports to the Council in June during its 163rd session and in December during its 164th session. It was reported that the Parties were able to reach a consensus on the proposed principles of settlement, taking into account ICAO Assembly resolution A33-7, entitled "Consolidated statement of continuing ICAO policies and practices related to environmental protection", in particular appendices C, D and E, adopted on 5 October by consensus at the 33rd session of the ICAO Assembly. Both Parties expressed satisfaction with the new multilateral framework, which they felt represented a significant step towards settlement of the article 84 dispute between the Parties.

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6. UNIVERSAL POSTAL UNION

1. The 2001 Council of Administration (CA) approved the final report of the High Level Group. It may be recalled that the 1999 Beijing Congress constituted the High Level Group to examine the strategic issues concerning the functioning of the Universal Postal Union in the overall context of the challenges facing the postal sector in the next century and their implications for the role and functioning of the Union in a rapidly changing environment. The Group's mandate was to consider the future mission, structure constituency, financing and decision-making of UPU, with special emphasis on the development needs of postal services in developing countries and the need to more clearly define and distinguish between the governmental and operational role and responsibilities of the bodies of the Union with respect to the provision of international postal services.

The 2001 CA approved the High Level Group recommendations:

- That UPU would continue to remain an intergovernmental organization composed of member countries, but its structure would be based on three circles of interest (government/regulator interests, operator interests), in accordance with UPU agreements and the wide sector;
- That Congress would remain the supreme body of the Union and the duties of the Council of Administration and the Postal Operations Council should be more clearly defined (particularly through continuation of the recasting of the Acts) to reflect the respective government/regulatory and operational interests;
- That the Advisory Group would evolve into a Consultative Committee reflecting wider section interests and with a key role in effecting the broadest possible participation in the work of UPU, including UPU technical cooperation activities. Members of the Council of Administration and the Postal Operations Council should continue to be represented in the Consultative Committee to ensure that the Advisory Group would remain cognizant of the concerns of developing countries;
- That the interval between Congresses should be reduced from five to four years;
- That a new mission statement should be developed.

2. The International Bureau had submitted to the 1988 session of the Executive Council the question of UPU accession to the 1986 Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations. However, the 1988 Executive Council had decided at the time that there was no urgency to accede to the treaty. The International Bureau resubmitted the question to the 2001 CA, which postponed a decision until the 2002 CA, to allow member countries that had not yet consulted their ministries of foreign affairs to do so.

3. An ad hoc group in the High Level Group had made a recast of the Acts mainly with the aim of simplifying the Universal Postal Convention by transferring provisions to the Regulations. The draft Convention was sent to all Union member countries for their views and the 68 countries were satisfied with the draft recast of the Convention. The 2001 CA approved the draft Convention and Final Protocol to be submitted to Congress and instructed the International Bureau to send it to all Union member countries with the draft Regulations prepared by the Postal Operations Council, requesting postal administrations to make their proposals on the basis of the draft Convention.

4. In pursuance of resolution C 107/1999, the International Bureau carried out a study on the regulatory bodies, with respect to mission, functions and relationships with operators working in the postal sector. The study was based on the information available, particularly in the publication "Status and structures of postal administrations". The trend towards a separation of regulatory and operational functions is clear in all of the five geographical groups. The 2001 CA noted the results of the study.

5. The CA Acts of the Union Project Team was constituted. The main tasks assigned to it included questions about reservations to the Acts, continuation of the recasting through substantive proposals designed to harmonize expressions or clarify provisions, and introducing definitions and liaison with the Terminal Dues Action Group, the Liability Project Team and the Transit Systems Project Team to harmonize the texts in their fields with the recast Convention in the other fields.

6. In line with the objectives outlined in Beijing Congress resolution C 18/1999, the CA Universal Postal Service Project Team has started a new study, designing a system to help member countries to measure application of the criteria and standards in the main areas of the Universal Postal Service, on an annual basis. In that regard, a questionnaire was sent to Union member countries, asking them questions about the application of standards in the five main areas of the Universal Postal Service, namely access to services, user/customer satisfaction, speed and reliability, security, and liability and treatment of inquiries. Replies were received from 84 member countries. The International Bureau analysed the replies to the questionnaire and sent them to the United Kingdom of Great Britain and Northern Ireland, which has been nominated as the lead country for the study.

The United Kingdom presented a draft monitoring/measurement system for the application of standards in the main areas of the Universal Postal Service, based on the summary of the replies to the questionnaire prepared by the International Bureau. The document contains questions for internal monitoring, with a view to helping member countries measure their standards. It also suggests recommended methods for applying standards and gathering data. The International Bureau prepared a questionnaire to follow up the monitoring/measurement system. The objective of the questionnaire is to collect the data from the questions asked by the moni-

toring system in order to analyse the extent to which the Universal Postal Service is measured in all UPU member countries. Subject to the supply of the results of the accomplishment of standards by member countries, the International Bureau would publish results worldwide on an annual basis.

The CA endorsed the following decision of the Project Team:

- To give more time to its members to examine the draft monitoring/measurement system and the draft questionnaire;
- To organize a seminar during the 2002 Postal Operations Council meeting at which field experts of member countries will examine the draft monitoring/measurement system and the draft questionnaire;
- To incorporate the monitoring/measurement system into the binder containing the Universal Postal Service Obligations;
- To invite three countries to present papers on Universal Postal Service management, during the symposium to be organized during the next Postal Operations Council meeting.

7. The Project Team on CA Relations with WTO was created to enhance awareness among UPU members, of WTO affairs through circular letters and a web page on the UPU site. The International Bureau keeps the Project Team up to date as regards the negotiations mandated by the General Agreement on Trade in Services (GATS) which had started in February 2000. Furthermore, the International Bureau provides member countries with additional documentation on the GATS and its implications for postal services, including the arguments on different sides of the issues that would aid postal operators and regulators in discussions with their trade representatives. In that regard, the International Bureau issued circular letter 3600(DER.PAR)1588 of 11 September 2001, informing member countries of the progress of negotiations, of the results of a survey on postal participation in the negotiations and of the lack of progress on the signing of a Memorandum of Understanding between WTO and UPU. Following the publication of the letter, Mercosur (States parties, through the *pro tempore* chairmanship of Uruguay) and Bolivia presented a proposal to WTO. The authors wished to modify the current system of classification to include "courier services" and "postal services" as members could not perceive any difference between operators of postal services and operators of courier services in terms of service provision. Mercosur and Bolivia also recommended closer cooperation between WTO and UPU, especially the reciprocal granting of observer status. Switzerland submitted a proposal to WTO regarding the postal sector. It supported the classification proposal by the European Communities; proposed that WTO members should undertake full market access and national treatment commitments with respect to cross-supply of services, consumption abroad and commercial presence for non-reserved services; stressed the importance of the adoption of regulatory disciplines in schedules of specific commitments to protect against distortion in liberalized markets; and proposed to include air transport more comprehensively to promote the liberalization of postal services.

8. The 1998 CA had received a request from one member country to consider the question of postal administrations establishing extraterritorial offices of exchange, that is, setting up exchange offices in the territory of another country. The problem has to be examined within the scope of national legislation to determine whether items dispatched from these offices of exchange may be:

- Accompanied by UPU forms

- Accorded International Air Transport Association (IATA)/UPU air conveyance conditions and rates
- Cleared through customs following postal procedures
- Subject to UPU terminal dues

Various objections/questions were raised by the different entities. IATA first requested a definition of operators that are authorized to tender mail on UPU forms. The International Express Carriers Conference explained that some private companies appeared to have access to UPU terminal dues rates because of arrangements with postal administrations, while other private companies did not enjoy equal access. One member country requested an urgent study of the issue, in part because of the emergence of developing country exchange offices established in industrialized countries to attract traffic that could benefit from the lower terminal dues rates offered for mail dispatched by developing countries.

The initial phase of the study will attempt to determine:

(*a*) Legal issues raised in connection with extraterritorial offices of exchange and items dispatched from them in different member countries;

(*b*) Current practice regarding extraterritorial offices of exchange.

The CA will be asked to determine how to deal with regulatory issues raised by extraterritorial offices of exchange, for example:

(*a*) Whether they are included under the concept of the "single postal territory";

(*b*) Whether it is necessary to clarify the issue in the Convention;

(*c*) Whether the status of items exchanged by these offices should continue to be a matter determined by each country's national legislation;

(*d*) Whether article 43 may be applied to items received from these offices.

The International Bureau presented the results of its initial survey of Union member countries to the 2001 CA. It also presented a resolution, which was approved by the CA. In the resolution, the Council of Administration, among other things, allowed provisionally the administrations accepting dispatches from extraterritorial offices of exchange to apply the provisions of the Universal Postal Convention to such dispatches. Concerning remuneration in such cases, the dispatch of items via an extraterritorial office of exchange should not result in a decrease of remuneration (including, where applicable, the payment of the Quality of Service Fund provided for in article 50.1.1.1 of the Convention) that the destination country would receive for the delivery of items. The approval of the resolution was not meant to require an administration to accept items from an extraterritorial office of exchange as mail under the UPU Acts. The above arrangement is valid, at the latest, until the entry into force of the decisions of the 2004 Congress. The 2001 CA further requested the Postal Operations Council to continue studying the marketing and operational aspects of the issue of extraterritorial offices of exchange.

7. INTERNATIONAL MARITIME ORGANIZATION

(*a*) Membership of the organization

During 2001 the Comoros, Saint Kitts and Nevis and the Republic of Moldova became members of the organization. Membership of the organization now stands at 161. There are also two associate members.

(*b*) Review of the legal activities of IMO

During the spring of 2001, a Diplomatic Conference was convened to adopt the draft Convention on Civil Liability for Bunker Oil Pollution Damage. Consequently, there was no meeting of the Legal Committee in the spring. The Committee, however, held its eighty-third session in October.[158]

Provision of financial security

(i) *Amendments to the Athens Convention*

The Committee discussed the remaining outstanding issues, and among other things decided:

(*a*) To maintain the present burden of proof which requires the claimant, in case of a non-shipping incident, to prove that the incident occurred through the fault or neglect of the carrier;

(*b*) To apply a "per incident" (vice "per carriage") limitation of liability for personal injuries and death;

(*c*) To apply a "per passenger" (vice "per ship") limitation of the insurance cover;

(*d*) To allow the insurer to use the wilful misconduct of the carrier as a defence against any claim;

(*e*) To revise the provision concerning suspension of the time by which a claim must be submitted when the claimant is unaware of the damage.

The specific limitation amounts were left to be decided by the Diplomatic Conference.

The Committee decided to retain in square brackets a proposal for the inclusion of an article which would allow an "economic integration organization" to become party to the Protocol. It introduced further amendments of a drafting/editorial kind to the draft Protocol.

The Committee also endorsed its previous decision to recommend to the Council that a Diplomatic Conference to consider the draft Protocol be convened during the next biennium back-to-back with a session of the Legal Committee. In so doing it noted that the draft text had good prospects for adoption at the Conference and good prospects for subsequent implementation by States.

(ii) *Report of the Joint IMO/ILO Ad Hoc Expert Working Group on Liability and Compensation regarding Claims for Death, Personal Injury and Abandonment of Seafarers at its second and third sessions*

The Committee took note of the report on the deliberations of the Joint IMO/ILO Ad Hoc Expert Working Group to consider the subject of liability and compen-

sation regarding claims for death, personal injury and abandonment of seafarers at its second and third sessions.

The Committee approved the text of two draft Assembly resolutions, namely, the draft resolution and related guidelines on provision of financial security in case of abandonment of seafarers and the draft resolution and related guidelines on shipowners' responsibilities in respect of contractual claims for personal injury to or death of seafarers. The Committee recommended to the Council that the draft Assembly resolutions be submitted to the Assembly for consideration and adoption.

The Committee approved the continuation of the Joint Working Group and decided that the task of keeping the prospective guidelines under review and amending them as necessary should be added to its proposed terms of reference.

The IMO Assembly at its twenty-second session (November 2001) adopted the draft resolutions and related guidelines by resolutions A.930(22) and A.931(22), respectively, both of 29 November 2001. The resolutions and guidelines were also adopted by the Governing Body of the International Labour Office (ILO) at its 282nd session (6 November 2001) (GB.282/10 and GB.282/STM/5). Both guidelines took effect on 1 January 2002.

Draft convention on wreck removal

The Legal Committee continued its work on this agenda item as one of its priority items and agreed that substantive discussions be held on this agenda item at its eighty-fourth session. The Committee also restated its aim to approve a draft convention in time to be considered by a diplomatic conference during the 2004-2005 biennium.

Monitoring the implementation of the HNS Convention

The Committee approved a draft Assembly resolution on implementation of the HNS Convention prepared by the Correspondence Group established at its eightieth session. The draft was approved by the Assembly at its twenty-second session in November 2001, by resolution A.932(22).

Work programme and meeting dates for 2002

The Committee approved its work programme for the year 2002 as follows:

(*a*) Consideration of a draft convention on wreck removal;

(*b*) Consideration of a draft protocol to amend the 1992 Fund Convention;

(*c*) Monitoring the implementation of the HNS Convention;

(*d*) Provision of financial security: Joint IMO/ILO Ad Hoc Expert Working Group on Liability and Compensation regarding Claims for Death, Personal Injury and Abandonment of Seafarers;

(*e*) Review of the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation, 1988, and the Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf, 1988 (SUA Convention and Protocol);

(*f*) Places of refuge;

(*g*) Matters arising from the work of the Council and the Assembly.

The Committee noted that there was currently no compelling need to adopt a treaty on offshore mobile craft and agreed to delete the subject from its work programme for the year 2002.

The Committee agreed upon the following meeting dates for the year 2002:

84th session 22 to 26 April 2002

85th session 21 to 25 October 2002

Review of the status of conventions and other treaty instruments adopted as a result of the work of the Legal Committee

The Committee took note of the information provided by the Secretariat and by member States on the status of conventions and other treaty instruments adopted as a result of the work of the Legal Committee.

Technical cooperation: subprogramme for maritime legislation

The Committee noted the progress report on the implementation of the subprogramme from July 2000 to June 2001.

Matters arising from the eighty-fifth and eighty-sixth sessions of the Council

The Legal Committee agreed that its long-term work plan should include the following items:

Specific subjects

(*a*) Completion of preparatory work on a convention on wreck removal;

(*b*) Monitoring the work of the Joint IMO/ILO Ad Hoc Expert Working Group on Liability and Compensation regarding Claims for Death, Personal Injury and Abandonment of Seafarers;

(*c*) Revision of the SUA Convention and Protocol;

(*d*) Follow-up action regarding the question of places of refuge;

(*e*) Possible comprehensive revision of the Civil Liability and Fund Conventions on liability and compensation for oil pollution damage;

(*f*) Monitoring the implementation of the HNS Convention.

General subjects

(*a*) Possible revision of maritime law conventions in the light of proven need and subject to the directives in resolution A.500(XII) and resolution A.900(21);

(*b*) Monitoring the implementation of conventions adopted as a result of the work of the Legal Committee;

(*c*) Examination of issues relating to the role of the organization under the United Nations Convention on the Law of the Sea;

(*d*) Promotion of the IMO technical cooperation subprogramme in the field of maritime legislation;

(*e*) Legal issues arising in other IMO bodies and referred to the Legal Committee;

(*f*) Coordination and cooperation with the United Nations and other United Nations specialized agencies in legal matters of common interest;

(*g*) Examination of maritime law initiatives undertaken by member States or non-governmental bodies.

The Committee stated its readiness to include the consideration of a draft protocol to the 1992 Fund Convention as a priority item in its work programme for the next biennium.

With respect to applications for consultative status, the Committee recommended that consultative status should be granted to World LP Gas Association. The Committee further agreed to maintain the provisional consultative status of the International Ship Suppliers Association.

Other matters

Other matters dealt with by the Committee included:

(*a*) Welcoming the adoption of the International Convention on Civil Liability for Bunker Oil Pollution Damage, 2001 and urging States to give early consideration with a view to signing and ratifying the new instrument;

(*b*) Approving a draft Assembly resolution on uniform wording for referencing IMO instruments, which was subsequently adopted by the Assembly at its twenty-second session in November 2001 by resolution A.911(22);

(*c*) Noting the intentions of the Comité Martitime International (CMI) regarding its future work, in particular its plan to assist Governments in developing legislation for the interpretation of IMO-sponsored international conventions in a consistent and coherent manner;

(*d*) Noting the information provided by CMI concerning the manner in which the 1976 Convention on Limitation of Liability for Maritime Claims (LLMC Convention) has been implemented by States and the way in which its provisions have been interpreted and applied;

(*e*) Deciding to include the question of places of refuge in its work programme for the next biennium. In order to prepare for this task, the Committee also decided to give a mandate to the Secretariat to make a study of the relevant legal issues, which included both public law and private law questions. The Committee accepted the offer of CMI to collaborate with the Secretariat on this project;

(*f*) Considering and supporting the request made by the Secretary-General that priority be given in the work programme for the next biennium to the question of a review of the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation, 1988, and the Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf, 1988 (the SUA treaties).

(*c*) Treaties

During 2001, two treaties[159] concerning international law were concluded under the auspices of the International Maritime Organization, as follows:

(i) *International Convention on Civil Liability for Bunker Oil Pollution Damage, 2001*

The International Conference on Liability and Compensation for Bunker Oil Pollution Damage, held in London from 19 to 23 March 2001, adopted the Inter-

national Convention on Civil Liability for Bunker Oil Pollution Damage, 2001, on 23 March 2001. The Convention was adopted to ensure that adequate, prompt and effective compensation is available to persons who suffer damage caused by spills of oil when carried as fuel in ships' bunkers.

(ii) *International Convention on the Control of Harmful Anti-Fouling Systems on Ships, 2001*

The International Conference on the Control of Harmful Anti-Fouling Systems for Ships, held in London from 1 to 5 October 2001, adopted the International Convention on the Control of Harmful Anti-Fouling Substances on Ships, 2001, on 5 October 2001. The Convention prohibits the use of harmful organotins in anti-fouling paints used on ships and establishes a mechanism to prevent the potential future use of other harmful substances in anti-fouling systems. Under the terms of the Convention, parties are required to prohibit and/or restrict the use of harmful anti-fouling systems on ships flying their flag, as well as ships not entitled to fly their flag but which operate under their authority and all ships that enter a port, shipyard or offshore terminal of a party.

(*d*) Amendments to treaties

2001 (Annex I) amendments to the Protocol of 1978 relating to the International Convention for the Prevention of Pollution from Ships, 1973

These amendments were adopted by the Marine Environment Protection Committee on 27 April 2001 by resolution MEPC.95(46). At the time of their adoption, the Committee determined that the amendments shall be deemed to have been accepted on 1 March 2002, and shall enter into force on 1 September 2002, unless, prior to 1 March 2002, not less than one third of the parties or parties the combined merchant fleets of which constitute not less than 50 per cent of the gross tonnage of the world's merchant fleet have communicated to the organization their objection to the amendments. No notifications of objection have been received to date.

2001 amendments to the International Convention for the Safety of Life at Sea, 1974

These amendments were adopted by the Maritime Safety Committee on 6 June 2001 by resolution MSC.117(74). At the time of their adoption, the Committee determined that the amendments shall be deemed to have been accepted on 1 July 2002, and shall enter into force on 1 January 2003, unless, prior to 1 July 2002, not less than one third of the Contracting Governments to the Convention, or Contracting Governments the combined merchant fleets of which constitute not less than 50 per cent of the gross tonnage of the world's merchant fleet have notified their objections to the amendments.

2001 amendments to the International Code for the Safe Carriage of Packaged Irradiated Nuclear Fuel, Plutonium and High-Level Radioactive Wastes on Board Ships (INF Code)

These amendments were adopted by the Maritime Safety Committee on 6 June 2001 by resolution MSC.118(74). At the time of their adoption, the Committee de-

termined that the amendments shall be deemed to have been accepted on 1 July 2002, and shall enter into force on 1 January 2003, unless, prior to 1 July 2002, not less than one third of the Contracting Governments to the Convention or Contracting Governments the combined merchant fleets of which constitute not less than 50 per cent of the gross tonnage of the world's merchant fleet have notified their objections to the amendments.

2001 amendments to the International Code of Safety for High-Speed Craft (HSC Code)

These amendments were adopted by the Maritime Safety Committee on 6 June 2001 by resolution MSC.119(74). At the time of their adoption, the Committee determined that the amendments shall be deemed to have been accepted on 1 July 2002, and shall enter into force on 1 January 2003, unless, prior to 1 July 2002, not less that one third of the Contracting Governments to the Convention, or Contracting Government the combined merchant fleets of which constitute not less than 50 per cent of the gross tonnage of the world's merchant fleet have notified their objections to the amendments.

2001 amendments to the International Regulations for Preventing Collisions at Sea, 1972

These amendments were adopted by the Assembly on 29 November 2001 by resolution A.910(22). At the time of their adoption, the Assembly decided, in accordance with paragraph 4, article VI, of the Convention on the International Regulations for Preventing Collisions at Sea, 1972, that the amendments shall be deemed to have been accepted on 29 May 2002, and shall enter into force on 29 November 2003, unless, prior to 29 May 2002, not less than one third of the Contracting Parties have notified their objection to the amendments. As at 28 February 2002, no notification of objection had been received.

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8. WORLD INTELLECTUAL PROPERTY ORGANIZATION

Introduction

1. In 2001, WIPO concentrated on the implementation of substantive work programmes through three sectors: cooperation with member States, the international registration of intellectual property titles, and intellectual property treaty formulation and normative development. WIPO also continued focusing resources and expanding the scope of the programmes on traditional knowledge, genetic resources, folklore and electronic commerce.

Cooperation for Development activities

2. In 2001, the Cooperation for Development programme sharpened its focus on assisting developing countries in optimizing their use of the intellectual property system for their economic, social and cultural benefit. Efforts aimed at building strong administrative infrastructures, training, and the preparation and implementation of laws reached a new level of efficiency with the introduction of a Cooperation for Development web site in 2001.

3. The second session of the Permanent Committee on Cooperation for Development Related to Intellectual Property was held in 2001, bringing together representatives from 84 countries and 19 intergovernmental and non-governmental organizations. Participants held discussions on recent developments in intellectual property-related issues and considered their impact on further cooperation activities.

4. By the end of 2001, 56 nationally (or regionally) focused action plans were being implemented. Such country- or region-specific action plans established jointly between the individual Governments and WIPO are aimed at helping national Governments to establish a more efficient management system and use of the national intellectual property system. Each plan identifies the immediate priorities necessary to achieve these objectives.

5. In 2001, WIPO provided 28 draft laws for 14 developing countries or regional organizations, and written comments on another 46 draft laws received from 30 countries.

6. At the end of 2001, 1,915 documents were available on the Collection of Laws for Electronic Access (CLEA) database covering 65 countries, compared with 35 countries represented at the end of 2000. The success of CLEA in disseminating intellectual property laws has grown as well: in 2001, the number of hits increased by 57 per cent to some 4 million.

7. In 2001, the WIPO Worldwide Academy trained some 4,344 men and women, an increase of 86 per cent over the previous year.

Norm-setting activities

8. One of the principal tasks of WIPO is to promote the harmonization of intellectual property laws, standards and practices among its member States. This is achieved through the progressive development of international approaches in the protection, administration and enforcement of intellectual property rights.

9. Accelerating the growth of international common principles and rules governing intellectual property requires extensive consultations. Three WIPO Standing Committees on legal matters—one dealing with copyright and related rights, one dealing with patents, and one dealing with trademarks, industrial designs and geographical indications—help member States coordinate efforts in these areas and establish priorities.

Standing Committee on the Law of Patents

10. In 2001, the Standing Committee on the Law of Patents began discussions on the harmonization of substantive patent law, with the objective of reaching common worldwide standards for the examination of patent applications and the grant of patents.

Standing Committee on Trademarks

11. WIPO member States adopted a set of provisions aimed at providing a clear, harmonized and simplified legal framework for the trademark community. Indeed, provisions concerning the protection of marks and other industrial property rights in signs on the Internet were adopted by the WIPO Assemblies as a joint recommendation.

Standing Committee on Copyright and Related Rights

12. In 2001, the Standing Committee on Copyright and Related Rights continued to consider the enhancement of protection for broadcasting organizations and of non-original databases.

Standing Committee on Information Technologies

13. In 2001, the Standing Committee on Information Technology approved reforms to increase the role of member States in the monitoring of WIPO information technology activities and to place more emphasis on electronic communication in order to accelerate decision-making. The restructuring created two new working groups to replace the Committee plenary's existing subsidiary structure: the Standards and Documentation Working Group and the Information Technology Projects Working Group.

International registration activities

14. In 2001, the WIPO global protection systems generated a total gross revenue of about 221 million Swiss francs, the equivalent of about 85 per cent of the organization's total income for 2001.

Patents

15. The Patent Cooperation Treaty (PCT) continued its steady growth throughout 2001. By the end of the year, the total number of international patent applications had reached 103,947, an increase of 14.3 per cent over 2000. The number of countries participating in the PCT system had risen as well, to 115.

16. In September, the PCT member States decided on a fee decrease in respect of the designation fees. This fee decrease is equivalent to a reduction of 7.1 per cent in PCT fees for those PCT applicants who make over five country designations per application (about two thirds of applicants).

17. In May, WIPO launched practical work involving member States, international searching and preliminary examining authorities, and intergovernmental and non-governmental organizations, with the aim of reforming the PCT system.

PCT electronic filing

18. Some 35 per cent of all applications in 2001 used PCT-EASY (Electronic Application System) software. The total number of registered users for PCT-EASY reached 7,500 in 2001.

Marks

19. The number of international trademark registrations recorded in 2001 was almost 24,000, an increase of 4.4 per cent over the previous year.

20. Over the course of the year, six States became bound by the Madrid Protocol, bringing the total to 55 and the total membership of the Madrid Union to 70.

Industrial designs

21. The number of international deposits recorded in 2001 decreased by 3.5 per cent to 4,183, largely attributable to a general worldwide economic slowdown.

22. The Hague Assembly approved a proposal to reduce the publication fee for international deposits by 10 per cent and to simplify its calculation.

23. WIPO received the first three instruments of ratification or accession to the Geneva Act of the Hague Agreement in 2001.

Appellations of origin

24. The Lisbon Assembly adopted new Regulations for the application of the Lisbon Agreement. The new Regulations, which clarify the procedures relating to the international protection of appellations of origin, will come into force in 2002.

Electronic commerce; Internet domain names

25. WIPO organized the Second International Conference on Electronic Commerce and Intellectual Property in Geneva from 19 to 21 September 2001. The Conference addressed the latest developments in electronic commerce and intellectual property—legal, technical and policy-oriented—and was attended by some 500 professionals and senior policy makers in government, law, business and the technical sectors concerned with the Internet, electronic commerce and intellectual property rights.

26. WIPO published in September 2001 the final report of the Second WIPO Internet Domain Name Process, entitled "The Recognition of Rights and the Use of Names in the Internet Domain Name System", and submitted it to the member States and the Internet community. WIPO member States decided in September to subject the report to a comprehensive analysis by the Standing Committee on the Law of Trademarks, Industrial Designs and Geographical Indications, in two special sessions convened for the purpose. The first special session was held in November and December 2001 and the second would be held in May 2002.

WIPO Arbitration and Mediation Centre

27. In 2001, the Arbitration and Mediation Centre expanded its position as the pre-eminent provider of services for domain name and other intellectual property issues. The Centre received 3,192 domain name cases during the year.

28. The Centre expanded its service to include disputes concerning names registered in new domains, such as the *.biz* and *.info* domains.

29. The Centre's web site, which by the end of the year was receiving over 1.4 million hits per month, was expanded with a range of new services. Daily notifications of the most recently posted Uniform Domain Name Dispute Resolution Policy decisions were also made available by electronic mail.

Intellectual property and global issues

30. The first two sessions of the Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore were held in 2001 and made significant progress in clarifying the issues and developing practical solutions. Some 400 representatives of States, intergovernmental agencies and organizations, and NGOs attended each session.

31. WIPO published in 2001 the final report on the fact-finding missions on traditional knowledge conducted in 28 countries in 1998 and 1999.

32. Throughout the year, national workshops were held in Jamaica and Suriname, as well as a regional workshop for the South Pacific in Australia. In addition, a WIPO Asia Pacific Regional Symposium on Intellectual Property Rights, Traditional Knowledge and Related Issues in Yogyakarta, Indonesia, was attended by participants from 21 countries in the Asia and the Pacific region.

Online services

33. The organization continued to expand its online presence, using the latest information technology to reach the widest possible audience worldwide. A Russian-language version of the WIPO web site went online in September 2001, and work started on a Chinese language version, with a launch planned for late 2002.

New members and new accessions

34. Highlights in 2001 include: (*a*) the deposit of the 30th instrument of accession by Gabon to the WIPO Copyright Treaty, which paved the way for its entry into force in March 2002; (*b*) an increase in WIPO membership to 178; (*c*) an increase in membership of the PCT Union to 115.

35. In 2001, WIPO received and processed 64 instruments of ratification or accession to WIPO-administered treaties. The following figures show the new adherences to treaties that are in force, with the second figure in brackets being the total number of States party to the corresponding treaty by the end of 2001:

- Convention Establishing the World Intellectual Property Organization: 3 (178)
- Paris Convention for the Protection of Industrial Property: 2 (162)
- Patent Cooperation Treaty: 6 (115)
- Protocol relating to the Madrid Agreement concerning the International Registration of Marks: 6 (55)
- Patent Law Treaty: 1 (1)
- Madrid Agreement for the Repression of False or Deceptive Indications of Source of Goods: 1 (33)
- Nice Agreement concerning the International Classification of Goods and Services for the Purposes of the Registration of Marks: 3 (68)
- Lisbon Agreement for the Protection of Appellations of Origin and their International Registration: 1 (20)
- Locarno Agreement Establishing an International Classification for Industrial Designs: 1 (40)
- Strasbourg Agreement concerning the International Patent Classification: 4 (51)
- Vienna Agreement Establishing an International Classification of the Figurative Elements of Marks: 2 (19)
- Budapest Treaty on the International Recognition of the Deposit of Microorganisms for the Purposes of Patent Procedure: 4 (53)
- Berne Convention for the Protection of Literary and Artistic Works: 1 (148)

- Geneva Convention for the Protection of Producers of Phonograms against Unauthorized Duplication of Their Phonograms: 3 (67).

36. Furthermore, the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty (the WIPO ''Internet Treaties") received, respectively, 9 and 10 new adherences, bringing the total to, respectively, 30 and 28 at the end of 2001.

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9. UNITED NATIONS INDUSTRIAL DEVELOPMENT ORGANIZATION

UNIDO concluded the following agreements and memoranda of understanding:

(*a*) Agreements with Governments

(i) Exchange of Letters between the Chargé d'affaires ad interim of the Permanent Mission of Japan to the United Nations Industrial Development Organization and the Director-General of the United Nations Industrial Development Organization concerning the contribution of the Government of Japan for the UNIDO Service for the Promotion of Industrial Investment in Developing Countries from 1 September 2001 to 31 December 2004. Signed on 28 August;

(ii) Memorandum of Understanding on the Arrangement between the Netherlands Minister for Development Cooperation and the United Nations Industrial Development Organization concerning the Netherlands Junior Professional Officers/Associate Experts Programme. Signed on 27 August and 8 September, respectively;

(iii) Agreement between the United Nations Industrial Development Organization and the Government of Cameroon regarding the organization of the 15th meeting of the Conference of African Ministers of Industry (CAMI—XV). Signed on 12 September;

(iv) Memorandum of Understanding between the United Nations Industrial Development Organization and the Secretariat for Industry of the Republic of Argentina. Signed on 3 October;

(v) Cooperation Agreement between the United Nations Industrial Development Organization and the Bolivarian Republic of Venezuela. Signed on 17 October;

(vi) Joint communiqué between the Permanent Representative of Italy to the United Nations Industrial Development Organization and the Director-General of the United Nations Industrial Development Organization. Signed on 29 November;

(vii) Memorandum of Understanding between the United Nations Industrial Development Organization and the Government of Mongolia on the establishment of a framework for cooperation in sustainable industrial development. Signed on 4 December;

(viii) Agreement between the United Nations Industrial Development Organization and the Government of the Federal Republic of Nigeria regarding the establishment of a UNIDO regional industrial development centre (regional office) in the Federal Republic of Nigeria. Signed on 4 December;

(ix) Memorandum of Understanding between the Republic of Peru and the United Nations Industrial Development Organization. Signed on 7 December;

(*b*) Agreements with the United Nations and specialized agencies

(i) Memorandum of Understanding between the International Atomic Energy Agency, the United Nations Office at Vienna, the United Nations Industrial Development Organization and the Preparatory Commission for the Comprehensive Nuclear Test-Ban Treaty Organization concerning the construction and operation of the new VIC Child Care Facility. Signed on 23 November and 20 December 2000, and 2 and 8 January 2001, respectively;

(ii) Memorandum of Understanding between the secretariats of the United Nations Industrial Development Organization and the United Nations Economic Commission for Europe. Signed on 27 April;

(iii) Cooperation Agreement between the United Nations Industrial Development Organization and the International Trade Centre (UNCTAD/WTO). Signed on 24 August;

(iv) Joint communiqué between the Director-General of the United Nations Industrial Development Organization and the Executive Secretary of the United Nations Economic and Social Commission for Western Asia. Signed on 28 September;

(*c*) Agreements with other intergovernmental, governmental, non-governmental and other organizations and entities

(i) Memorandum of Understanding between the United Nations Industrial Development Organization and the Centre National de la Recherche Scientifique. Signed on 24 January;

(ii) Memorandum of Understanding between the United Nations Industrial Development Organization, the International Organization for Standardization and the International Laboratory Accreditation Cooperation in the field of laboratory accreditation. Signed on 30 October 2000 and 1 February 2001, respectively;

(iii) Agreement between the United Nations Industrial Development Organization and the State Government of Pernambuco, Brazil, on the establishment of a UNIDO Investment and Technology Promotion Office in Recife. Signed on 21 March;

(iv) Memorandum of Understanding on scientific and technological cooperation between the United Nations Industrial Development Organization and the Commission on Science and Technology for Sustainable Development in the South. Signed on 25 April;

(v) Letter Agreement attaching a Memorandum of Understanding between the United Nations Industrial Development Organization and the GEF Secretariat on project preparation and development facility grants and expedited enabling activity grants related to the Stockholm Convention on Persistent Organic Pollutants. Signed on 12 July;

(vi) Financial procedures agreement between the United Nations Industrial Development Organization and the International Bank for Reconstruction and Development, as Trustee of the Global Environment Facility Trust Fund. Signed on 12 July;

(vii) Memorandum of Understanding on technical cooperation between the United Nations Industrial Development Organization and the Small and Medium Enterprise Development Authority of the Government of Pakistan. Signed in July;

(viii) Cooperation Agreement between the United Nations Industrial Development Organization and the Western African Economic and Monetary Union. Signed on 17 September;

(ix) Memorandum of Understanding between the United Nations Industrial Development Organization and the African Capital Alliance (ACA) on a UNIDO-ACA Partnership for SME [small and medium-sized enterprises] Development. Signed on 4 December;

(x) Memorandum of Understanding between the United Nations Industrial Development Organization and the Lagos Business School (LBS) on a UNIDO-LBS Partnership for SME Development. Signed on 4 December;

(xi) Cooperation Agreement between the Economic and Social Development Bank of Venezuela and the United Nations Industrial Development Organization. Signed on 11 December.

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10. INTERNATIONAL ATOMIC ENERGY AGENCY

Convention on the Physical Protection of Nuclear Material[160]

In 2001, Trinidad and Tobago adhered to the Convention. By the end of the year, there were 69 parties.

Convention on Early Notification of a Nuclear Accident[161]

In 2001, Saint Vincent and the Grenadines adhered to the Convention. By the end of the year, there were 87 parties.

Convention on Assistance in the Case of a Nuclear Accident or Radiological Emergency[162]

In 2001, Saint Vincent and the Grenadines adhered to the Convention. By the end of the year, there were 83 parties.

Vienna Convention on Civil Liability for Nuclear Damage, 1963[163]

In 2001, Saint Vincent and the Grenadines adhered to the Convention. By the end of the year, there were 33 parties.

Optional Protocol concerning the Compulsory Settlement of Disputes[164]

In 2001, the status of the Protocol remained unchanged, with two parties.

Joint Protocol relating to the Application of the Vienna Convention and the Paris Convention[165]

In 2001, Germany, Greece and Saint Vincent and the Grenadines adhered to the Protocol. By the end of the year, there were 24 parties.

Convention on Nuclear Safety[166]

In 2001, the status of the Convention remained unchanged, with 53 parties.

Joint Convention on the Safety of Spent Fuel Management and on the Safety of Radioactive Waste Management[167]

In 2001, Austria, Ireland, Luxembourg and the United Kingdom of Great Britain and Northern Ireland adhered to the Convention. By the end of the year, there were 27 parties. The Convention, pursuant to article 40.1, entered into force on 18 June 2001, i.e. on the ninetieth day after the day of deposit with the depositary of the twenty-fifth instrument of ratification, acceptance or approval, including the instruments of 15 States each having an operational nuclear power plant.

Protocol to Amend the Vienna Convention on Civil Liability for Nuclear Damage[168]

In 2001, Latvia signed the Protocol and adhered to it. By the end of the year, there were 4 Contracting States and 15 signatories.

Convention on Supplementary Compensation for Nuclear Damage[169]

In 2001, the status of the Convention remained unchanged, with 3 Contracting States and 13 signatories.

African Regional Cooperative Agreement for Research, Development and Training Related to Nuclear Science and Technology[170] *(AFRA) (Second Extension)*

In 2001, Sierra Leone and the Sudan adhered to the Agreement. By the end of the year, there were 22 parties.

Second Agreement to Extend the 1987 Regional Cooperative Agreement for Research, Development and Training Related to Nuclear Science and Technology[171] *(RCA)*

In 2001, the status of the Agreement remained unchanged, with 17 parties.

Cooperation Agreement for the Promotion of Nuclear Science and Technology in Latin America and the Caribbean (ARCAL)[172]

In 2001, El Salvador, Nicaragua and Panama signed the Agreement and Costa Rica, Ecuador, El Salvador and Peru adhered to it. By the end of the year, there were 5 Contracting States and 17 signatories.

Revised Supplementary Agreement concerning the Provision of Technical Assistance by IAEA (RSA)

In 2001, Burkina Faso, Estonia and Georgia concluded the Agreement. By the end of the year, there were 95 States that had concluded the RSA Agreement.

IAEA legislative assistance activities

As part of its technical cooperation programme for 2001-2002, IAEA provided legislative assistance to a number of member States from various regions through both bilateral meetings and regional workshops. Legislative assistance was given to 15 countries by means of written comments or advice on specific national legislation submitted to the Agency for review.

In addition, the legislative assistance activities of IAEA in 2001 included:

— A regional workshop for English-speaking countries of the Africa region on the establishment of a legal framework governing radiation protection, the safety of radiation sources and the safe management of radioactive waste, held in Addis Ababa, from 23 to 27 April 2001;

— A regional workshop for countries of the Europe and West Asia regions on the effective implementation of national nuclear legislation, held in Valletta from 26 to 30 November 2001;

— A regional workshop for the Latin America region on the establishment of a legal framework governing radiation protection, the safety of radiation sources and the safe management of radioactive waste, held at the IAEA headquarters in Vienna from 29 October to 2 November 2001.

Convention on the Physical Protection of Nuclear Facilities

The issue of the amendment of the Convention on the Physical Protection of Nuclear Material continued to be addressed during 2001.

In May 2001, the expert meeting, in its final report to the Director General, concluded that there was "a clear need to strengthen the international physical protection regime" and that a spectrum of measures should be employed, including the drafting of a well-defined amendment to strengthen the Convention, to be reviewed by States parties with a view to determining if it should be submitted to an amendment conference in accordance with article 20 of the Convention. The well-defined amendment should address the following subjects: extension of the scope to cover, in addition to nuclear material in international nuclear transport, nuclear material in domestic use, storage and transport, as well as protection of nuclear material and facilities from sabotage; the importance of national responsibility for physical protection; the importance of protection of confidential information; the physical protection objectives and fundamental principles; and relevant definitions. The meeting recommended that other issues should not be included in the amendment of the Convention, namely, a requirement to submit reports to the international community on the implementation of physical protection; a peer review mechanism; a mandatory

application of INFCIRC/225, e.g. through direct reference and also through "due consideration"; mandatory international oversight of physical protection measures; and nuclear material and nuclear facilities for military use.

The Director General, in response to the recommendations of the expert meeting, convened an open-ended group of legal and technical experts to draft an amendment. The meeting, which was held in December and involved 43 States and the European Commission, achieved a complete and detailed review of the scope of the potential amendments to the Convention. The group would continue its work in 2002.

Convention on Nuclear Safety

The organizational meeting for the Second Review Meeting was held at the headquarters of the International Atomic Energy Agency in Vienna on 25 and 26 September 2001. Forty-one out of 53 parties participated.

The second Review Meeting pursuant to article 20 of the Convention would be held at the headquarters of the International Atomic Energy Agency, being the Secretariat under the Convention, from 15 to 26 April 2002.

Joint Convention on the Safety of Spent Fuel Management and on the Safety of Radioactive Waste Management

The Convention, pursuant to its article 40.1, entered into force on 18 June 2001.

The preparatory meeting, pursuant to article 29 of the Convention, was held at the headquarters of the International Atomic Energy Agency in Vienna from 10 to 12 December 2001. All 27 parties attended.

At the preparatory meeting, the parties adopted the rules of procedure and financial rules and established guidelines on the form and structure of national reports and on the process for reviewing the reports. The meeting also fixed the dates of the first Review Meeting (3-14 November 2003) and of the related organizational meeting (7-11 April 2003) as well as the deadline for submission of national reports (5 May 2003).

Safeguards Agreements

During 2001, a Safeguards Agreement pursuant to the Treaty on the Non-Proliferation of Nuclear Weapons entered into force with the Lao People's Democratic Republic.[173] Two Safeguards Agreements, pursuant to the Non-Proliferation Treaty, were signed with Andorra and Oman, and a Safeguards Agreement under the Non-Proliferation Treaty with the Niger was approved by the IAEA Board of Governors. These agreements have not yet entered into force.

Through an Exchange of Letters between Colombia and the Agency, it was confirmed that the Safeguards Agreement concluded between Colombia and IAEA satisfied the obligations of Colombia under the Non-Proliferation Treaty pursuant to the Treaty for the Prohibition of Nuclear Weapons in Latin America (Treaty of Tlatelolco) to conclude a comprehensive Safeguards Agreement.

Protocols additional to the Safeguards Agreements between IAEA and Bangladesh,[174] Ecuador[175] Latvia,[176] Panama,[177] Peru[178] and Turkey[179] entered into force. Protocols additional to Safeguards Agreements were signed by Andorra, Costa Rica, Guatemala, Mongolia and Nigeria but have not yet entered into force.

By the end of 2001, there were 225 Safeguards Agreements in force with 141 States (as well as Taiwan Province of China). Safeguards Agreements which satisfy the requirements of the Non-Proliferation Treaty were in force with 130 States. By the end of 2001, 61 States had signed an Additional Protocol. Of those 61, 24 had entered into force, and one was being implemented provisionally pending its entry into force.

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11. WORLD TRADE ORGANIZATION

The Director-General of WTO is:

- Right Honourable Mike Moore of New Zealand, until 31 August 2002,

to be followed by

- H.E. Dr. Supachai Panitchpakdi of Thailand, from 1 September 2002 to 31 August 2005.

(*a*) Membership

WTO membership is open to any State or customs territory having full autonomy in the conduct of its trade policies. Accession negotiations concern all aspects of the applicant's trade policies and practices, such as market access concessions and commitments on goods and services, legislation to enforce intellectual property rights, and all other measures which form a Government's commercial policies. Applications for WTO membership are the subject of individual working parties. Terms and conditions related to market access (such as tariff levels and commercial presence for foreign service suppliers) are the subject of bilateral negotiations. The following is a list of 27 Governments for which a working party has been established (still current as of 31 December 2001):

Algeria, Andorra, Armenia, Azerbaijan, Bahamas, Belarus, Bhutan, Bosnia and Herzegovina, Cambodia, Cape Verde, Kazakhstan, Lao People's Democratic Republic, Lebanon, Nepal, Russian Federation, Samoa, Saudi Arabia, Seychelles, Sudan, Tajikistan, the former Yugoslav Republic of Macedonia, Tonga, Ukraine, Uzbekistan, Vanuatu, Viet Nam, Yemen and Yugoslavia.

The Syrian Arab Republic and the Libyan Arab Jamahiriya have requested accession, but working parties have not yet been established.

As of 31 December 2001, there were 144 members of the WTO, accounting for more than 90 per cent of world trade. Many of the countries that remain outside the world trade system have requested accession to WTO and are at various stages of a process that has become more complex due to the organization's more expansive coverage relative to its predecessor, the General Agreement on Tariffs and Trade (GATT).

During 2001, WTO received the following new members:

- Lithuania (31 May 2001) by Protocol of Accession (8 December 2000, WT/ACC/LTU/54); Council decision WT/ACC/LTU/53
- Republic of Moldova (26 July 2001) by Protocol of Accession (8 May 2001, WT/ACC/MOL/40); Council decision WT/ACC/MOL/39
- China (11 December 2001) by Protocol of Accession (23 November 2001, WT/L/432); Council decision WT/L/432
- Chinese Taipei (also known as Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu) (1 January 2002) by Protocol of Accession (11 November 2001, WT/L/433); Council decision WT/L/433

Chinese Taipei became the 144th member of WTO 30 days after WTO received notification of the ratification of the agreement by the Chinese Taipei Parliament.

WTO members (*as of 31 December 2001*)

Albania
Angola
Antigua and Barbuda
Argentina
Australia
Austria
Bahrain
Bangladesh
Barbados
Belgium
Belize
Benin
Bolivia
Botswana
Brazil
Brunei Darussalam
Bulgaria
Burkina Faso
Burundi
Cameroon
Canada
Central African Republic
Chad
Chile
China
Chinese Taipei
Colombia
Congo
Costa Rica
Côte d'Ivoire
Croatia
Cuba
Cyprus
Czech Republic
Democratic Republic of the Congo
Denmark
Djibouti
Dominica
Dominican Republic
Ecuador
Egypt
El Salvador
Estonia
European Communities
Fiji
Finland
France
Gabon
Gambia
Georgia
Germany
Ghana
Greece
Grenada
Guatemala
Guinea
Guinea-Bissau
Guyana
Haiti
Honduras
Hong Kong, China
Hungary
Iceland
India
Indonesia
Ireland
Israel
Italy
Jamaica
Japan
Jordan
Kenya
Kuwait
Kyrgyzstan
Latvia
Lesotho
Liechtenstein
Lithuania
Luxembourg
Macao, China
Madagascar
Malawi
Malaysia
Maldives
Mali
Malta
Mauritania
Mauritius
Mexico
Mongolia
Morocco
Mozambique
Myanmar
Namibia
Netherlands
New Zealand
Nicaragua
Niger
Nigeria
Norway
Oman
Philippines
Pakistan
Panama
Papua New Guinea
Paraguay
Peru
Poland
Portugal
Qatar
Republic of Korea
Republic of Moldova
Romania
Rwanda
Saint Kitts and Nevis
Saint Lucia
Saint Vincent and the Grenadines
Senegal
Sri Lanka
Sierra Leone
Singapore
Slovakia
Slovenia
Solomon Islands
South Africa
Spain
Sweden
Suriname
Swaziland
Switzerland
Thailand
Togo
Trinidad and Tobago
Tunisia
Turkey
Uganda
United Arab Emirates
United Kingdom of Great Britain and Northern Ireland
United Republic of Tanzania
United States of America
Uruguay
Venezuela
Zambia
Zimbabwe

Waivers

In 2001, the Ministerial Conference/General Council granted a number of waivers from obligations under the WTO Agreements (listed below):

Waivers under article IX of the WTO Agreement

Member	*Type*	*Decision of*	*Expiry*	*Document*
Switzerland	Preferences for Albania and Bosnia and Herzegovina	18 July 2001	31 March 2004	WT/L/406
Madagascar	Agreement on the implementation of article VII of GATT 1994	18 July 2001	17 November 2003	WT/L/408
Thailand	Article 5.2 of the Agreement on Trade-related Investment Measures (TRIMs Agreement)	31 July 2001	31 December 2003	WT/L/410
Nicaragua	Implementation of harmonized system	31 October 2001	30 April 2002	WT/L/426
Sri Lanka	Implementation of harmonized system	31 October 2001	30 April 2002	WT/L/427
Zambia	Renegotiation of schedule	31 October 2001	30 April 2002	WT/L/428
European Communities (EC)	African, Caribbean and Pacific (ACP) States/EC Partnership Agreement—Preferential treatment to ACP	14 November 2001	31 December 2007	WT/L/436
Haiti	Customs Valuation Agreement	20 December 2001	30 January 2003	WT/L/439
Cuba	Article XV.6 of GATT 1994	20 December 2001	31 December 2006	WT/L/440
Colombia	Article 5.2 of the TRIMs Agreement	20 December 2001	31 December 2003	WT/L/441
Dominican Republic	Minimum values under the Customs Valuation Agreement	20 December 2001	1 July 2003	WT/L/442

(*b*) Resolution of trade conflicts under the WTO dispute settlement understanding (DSU)

Overview

The General Council convenes as the Dispute Settlement Body (DSB) to deal with disputes arising from any agreement contained in the Final Act of the Uruguay Round that is covered by the Understanding on Rules and procedures Governing the Settlement of Disputes (DSU). The DSB has the sole authority to establish dispute settlement panels, adopt panel and Appellate Body reports, maintain surveillance of implementation of rulings and recommendations, and

authorize the suspension of concessions in the event of non-implementation of recommendations.

Composition of the Appellate Body

On 25 September 2001, the DSB decided to appoint Mr. Baptista (Brazil), Mr. J. Lockhart (Australia) and Mr. G. Sacerdoti (European Communities) to serve on the Appellate Body to replace Mr. Ehlermann (European Communities), Mr. F. Feliciano (Philippines) and Mr. Lacarte-Muró (Uruguay) following the expiration of their terms of office.

Dispute settlement activity for 2001

In 2001, the DSB received 18 notifications from members of formal requests for consultations under the DSU. During this period, the DSB established panels to deal with 13 cases in 12 distinct matters and adopted panel and/or Appellate Body reports in 13 cases concerning 12 distinct matters. The DSB also received five notifications from members of a mutually agreed solution (settlement) of dispute.

The following section briefly describes the procedural history and the substantive outcome of the adopted panel and/or Appellate Body reports. It also provides the lists of active panels, requests for consultations and notifications of a mutually agreed solutions.

Appellate Body and/or panel reports adopted

Thailand—Anti-dumping duties on angles, shapes and sections of iron or non-alloy steel and H-beams from Poland, complaint by Poland (WT/DS122). The dispute concerns the imposition of final anti-dumping duties on imports of certain steel products from Poland. Poland contended that these actions by Thailand violated articles 2, 3, 5 and 6 of the Anti-Dumping Agreement (AD Agreement). At its meeting on 19 November 1999, the DSB established a panel. The European Communities, Japan and the United States reserved their third-party rights. The Panel found that Poland had failed to establish that Thailand's initiation of the anti-dumping investigation on imports of H-beams from Poland was inconsistent with the requirements of articles 5.2, 5.3 and 5.5 of the AD Agreement or article VI of the GATT 1994. The panel also concluded that Poland had failed to establish that Thailand had acted inconsistently with its obligations under article 2 of the AD Agreement or article VI of GATT 1994 in the calculation of the amount for profit in constructing normal value. However, the panel found that Thailand's imposition of the definitive anti-dumping measure on imports of H-beams from Poland was inconsistent with the requirements of article 3 of the AD Agreement. The Appellate Body, on appeal by Thailand, upheld the panel's conclusion that, with respect to the claims under articles 2, 3 and 5 of the AD Agreement, the request for the establishment of a panel submitted by Poland in this case was sufficient to meet the requirements of article 6.2 of the DSU. The Appellate Body reversed the finding of the panel that the AD Agreement required a panel reviewing the imposition of an anti-dumping duty to consider only the facts, evidence and reasoning that were disclosed to or discernible by, Polish firms at the time of the final determination of dumping. The Appellate Body was of the view that there was no basis for the panel's reasoning, either in article 3.1 of the AD Agreement, which lays down the obligations of members with respect to the determination

of injury or in article 17.6 of the AD Agreement, which sets out the standard of review for panels. Although the Appellate Body reversed the reasoning of the panel on this issue, it left undisturbed the panel's main findings of violation. The Appellate Body also upheld the panel's conclusions under article 3.4 of the AD Agreement. The Appellate Body agreed with the panel that article 3.4 required a mandatory evaluation of all the factors listed in that provision. Finally, the Appellate Body concluded that the panel had not erred in its application of the burden of proof or in the application of the standard of review under article 17.6(i) of the AD Agreement. The Appellate Body report was circulated to WTO members on 12 March 2001. The DSB adopted the Appellate Body report and the panel report, as modified by the Appellate Body report, on 5 April 2001.

European Communities—Measures affecting asbestos and asbestos-containing products, complaint by Canada (WT/DS135). The dispute concerns a French decree of 24 December 1996 imposing prohibitions on the manufacture, processing, sale, import, etc., of asbestos and products containing asbestos. The measure also includes certain temporary and limited exceptions to these prohibitions. Canada claimed that the decree violated articles 2 and 5 of the Agreement on the Application of Sanitary and Phytosanitary Measures (SPS Agreement), article 2 of the Agreement on Technical Barriers to Trade (TBT Agreement) and articles III and XI of GATT 1994. Canada also argued, under article XXIII.1(*b*), nullification and impairment of benefits accruing to it under the various agreements cited. Canada's claims related to the restrictions imposed on one type of asbestos, namely chrysotile (or white) asbestos, and products containing chrysotile. The DSB established a panel at its meeting of 25 November 1998. Brazil, the United States and Zimbabwe reserved their third-party rights. The panel found that the TBT Agreement applied to the exceptions, but not to the prohibitions, in the measure. The panel examined, and upheld, Canada's claim that the measure was inconsistent with article III.4 of GATT 1994. That provision prevents WTO members from treating imported products "less favourably" than "like" domestic products. The panel concluded that chrysotile asbestos fibres were "like" polyvinyl alcohol, cellulose and glass fibres ("PCG fibres") and also that cement-based products containing chrysotile asbestos fibres were "like" cement-based products containing PCG fibres. The panel also found that there had been less favourable treatment of imported products and, consequently, concluded that the measure was inconsistent with article III.4 of GATT 1994. However, since chrysotile asbestos was carcinogenic, the panel found that the measure was justified by the exception provided in article XX(*b*) of GATT 1994 as it was "necessary to protect human . . . life or health". On appeal by Canada, the Appellate Body ruled that the French decree prohibiting asbestos and asbestos-containing products had not been shown to be inconsistent with the European Communities' obligations under the WTO agreements. The Appellate Body reversed the panel's finding that the TBT Agreement did not apply to the prohibitions in the measure concerning asbestos and asbestos-containing products and found that the TBT Agreement applied to the measure viewed as an integrated whole. The Appellate Body concluded that it was unable to examine Canada's claims that the measure was inconsistent with the TBT Agreement. The Appellate Body reversed the panel's findings with respect to "like products" under article III.4 of GATT 1994. The Appellate Body ruled, in particular, that the panel had erred in excluding the health risks associated with asbestos from its examination of "likeness". The Appellate Body also reversed the panel's conclusion that the measure was inconsistent with article III.4 of GATT

1994. The Appellate Body itself examined Canada's claims under article III.4 of GATT 1994 and ruled that Canada had not satisfied its burden of proving the existence of "like products" under that provision. Finally, the Appellate Body upheld the panel's conclusion, under article XX(*b*) of GATT 1994, that the French decree was "necessary to protect human . . . life or health". In that appeal, the Appellate Body adopted an additional procedure "for the purposes of this appeal only" to deal with amicus curiae submissions. The Appellate Body received, and refused, 17 applications to file such a submission. The Appellate Body also refused to accept 14 unsolicited submissions from non-governmental organizations that had not been submitted under the additional procedure. At its meeting of 5 April 2001, the DSB adopted the Appellate Body report and the panel report, as modified by the Appellate Body report.

European Communities—Anti-dumping duties on imports of cotton-type bed linen, complaint by India (WT/DS141). The dispute concerns the imposition of anti-dumping duties by the European Communities on imports of cotton-type bed linen from India. India argued that EC had acted inconsistently with various obligations under articles 2, 3, 5, 6, 12 and 15 of the AD Agreement. Egypt, Japan and the United States reserved their third-party rights. The panel concluded that the EC had not acted inconsistently with its obligations under articles 2.2, 2.2.2, 3.1, 3.4, 3.5, 5.3, 5.4, and 12.2.2 of the AD Agreement. However, the panel did conclude that EC had acted inconsistently with its obligations under articles 2.4.2, 3.4, and 15 of the AD Agreement. On 1 December 2000, EC notified the DSB of its intention to appeal the finding that the EC practice of "zeroing" when establishing the margin of dumping was inconsistent with article 2.4.2 of the AD Agreement. In addition, India appealed the panel's findings regarding article 2.2.2(ii). The Appellate Body upheld the panel's finding that the EC practice of "zeroing" was inconsistent with article 2.4.2 of the AD Agreement. Article 2.4.2 states that "the existence of margins of dumping shall . . . be established on the basis of a comparison of weighted average normal value with the weighted average of prices of *all* comparable export transactions". (emphasis added). By "zeroing" the "*negative* dumping margins", the European Communities did *not* take fully into account the entirety of the prices of *some* export transactions, namely, those export transactions involving models of cotton-type bed linen where "*negative* dumping margins" were found. Thus, EC did *not* establish the existence of dumping for cotton-type bed linen on the basis of a comparison "with the weighted average of prices of *all* comparable export transactions" as required by article 2.4.2. The Appellate Body, however, reversed the panel's findings regarding article 2.2.2(ii) of the AD Agreement. The Appellate Body found that the method for calculating amounts for administrative, selling and general costs and profits set forth in article 2.2.2(ii) *could not* be applied where there was data on administrative, selling and general costs and profits for only *one* other exporter or producer. The Appellate Body also found that, in calculating amounts for profits, sales by other exporters or producers that were not made in the ordinary course of trade *might not* be excluded. In the light of those findings, the Appellate Body concluded that EC had acted inconsistently with article 2.2.2(ii) of the AD Agreement. The DSB adopted the Appellate Body report and the panel report, as modified by the Appellate Body report, on 12 March 2001.

Argentina—Measures on the export of bovine hides and the import of finished leather, complaint by the European Communities (WT/DS155). The dispute concerns certain measures taken by Argentina affecting the exportation of bovine hides and the importation of goods. EC alleged that a de facto export prohibition on raw

and semi-tanned bovine hides was being implemented, in part through the authorization granted by the Argentine authorities to the Argentine tanning industry to participate in customs control procedures of hides before export, in violation of GATT articles XI.1 (which prohibits export restrictions and measures of equivalent effect) and X.3(*a*) (which requires uniform and impartial administration of laws and regulations), to the extent that personnel of the Argentine Chamber for the tanning industry were authorized to assist Argentine customs authorities in the customs clearance process. EC also claimed that the "additional value-added tax" of 9 per cent on imports of products into Argentina, and the "advance turnover tax" of 3 per cent based on the price of imported goods imposed on operators when importing goods into Argentina, were in violation of article III.2 of GATT 1994 (prohibiting tax discrimination of foreign products which are like domestic products). At its meeting on 26 July 1999, the DSB established a panel. The panel found that Argentina was acting inconsistently with its obligations under GATT 1994 with respect to both the export measure and the import measures at issue in the dispute. However, Argentina prevailed with respect to one of the two EC claims regarding the export measure, namely that the export measure did not constitute a de facto export restriction contrary to article XI.1 of GATT 1994. The panel considered that EC had failed to show that the measure in question was the cause of the low export levels. EC asserted, inter alia, that the Argentine tanners were operating a cartel and thus were able to exert pressure on exporters of hides due to the fact that they could allegedly become aware of the identity of exporters by participating in the customs process. The panel rejected this claim as unproven. The report of the panel was circulated to WTO members on 19 December 2000. It was adopted by the DSB on 16 February 2001.

Republic of Korea—Measures affecting imports of fresh, chilled and frozen beef, complaints by the United States and Australia (WT/DS/161 and 169). The dispute concerns measures by the Government of the Republic of Korea affecting the distribution and sale of imported beef. The Republic of Korea had established in 1990 a "dual retail" system which required imported beef and domestic beef to be sold in separate stores or in the case of large stores or supermarkets, in separate display areas. Also, stores which sold imported beef were required to display a sign reading "Specialized Imported Beef Store". In addition, domestic beef benefited from price support provided by the Government. The United States argued that the measures were in violation of articles II, III, XI and XVII of GATT 1994; articles 3, 4, 6 and 7 of the Agreement on Agriculture; and articles 1 and 3 of the Import Licensing Agreement. At its meeting on 26 July 1999, the DSB also established a panel at the request of Australia. Canada, New Zealand and the United States reserved their third-party rights. At the request of the Republic of Korea, the DSB agreed that, pursuant to DSU article 9.1, the complaint would be examined by the same panel established at the request of the United States. The panel found first that a number of the contested Korean measures benefited, by virtue of a note in the Republic of Korea's Schedule of Concessions, from a transitional period until 1 January 2001, by which date they had to be eliminated or otherwise brought into conformity with the WTO Agreement. The panel found that the Republic of Korea had violated article 3.2 of the Agreement on Agriculture, since its total domestic support for agriculture ("Total AMS") for 1997 and 1998, when price support for domestic beef was included, had exceeded its Total AMS commitments for those years set out in the Schedule. The panel also found that the Republic of Korea had violated article III.4 of GATT 1994, principally by requiring a dual retail system

for the sale of imported and domestic beef. The report of the panel was circulated to WTO members on 31 July 2000. On 11 September 2000, the Republic of Korea notified its intention to appeal certain issues of law and legal interpretations developed by the panel. On 11 December 2000, the report of the Appellate Body was circulated. The Appellate Body upheld the panel's conclusion that the Republic of Korea's domestic support ("AMS") for beef provided in 1997 and 1998 had not been calculated in accordance with article 1(*a*)(ii) and annex 3 of the Agreement on Agriculture, but reversed the panel's findings that its total domestic support for agriculture ("Total AMS") provided in 1997 and 1998 had exceeded its commitments in its Schedule contrary to article 3.2 of the Agreement on Agriculture. The Appellate Body upheld the panel's conclusions that the Republic of Korea's dual retail system was inconsistent with the national treatment obligation in article III.4 of GATT 1994. The Appellate Body upheld the panel's conclusion that the measure could not be justified under article XX(*d*) of GATT 1994. At its meeting of 10 January 2001, the DSB adopted the Appellate Body report and the panel report, as modified by the Appellate Body report.

United States—Import measures on certain products, complaint by the European Communities (WT/DS165). The dispute concerns certain measures taken by the United States with respect to certain imports from EC in the context of the dispute *EC—Regime for the Importation, Distribution and Sale of Bananas* (WT/DS27). On 2 March 1999, the arbitrators charged with determining the level of suspension of concessions, requested by the United States in response to the failure by EC to implement the recommendations of the DSB in respect of the EC banana regime (DS27), had requested additional data from the parties and informed them that they were unable to issue their report within the 60-day period envisaged by the DSU. On 3 March 1999, the United States imposed increased bonding requirements on certain designated products from the European Communities in order, in its own words, "to preserve [the United States'] right to impose 100 per cent duties as of 3 March, pending the release of the Arbitrators' final decision". This was the "3 March measure" which is the subject of the present dispute. The arbitrators circulated their decision on 9 April 1999. On 19 April 1999, the DSB granted authorization to the United States to suspend concessions or other obligations with respect to the European Communities in the amount determined by the arbitrators. Subsequent to that authorization, the United States imposed 100 per cent duties on *some*, but not all of the designated products that had previously been subject to the increased bonding requirements. That decision is referred to as the "19 April action", and the United States applied it retroactively to 3 March 1999. EC contended that the 3 March 1999 measure was inconsistent with articles 3, 21, 22 and 23 of the DSU and articles I, II, VIII and XI of GATT 1994. EC also alleged nullification and impairment of benefits under GATT 1994, as well as the impediment of the objectives of the DSU and GATT 1994. At its meeting on 16 June 1999, the DSB established a panel. Dominica, Ecuador, India, Jamaica, Japan and Saint Lucia reserved their third-party rights. The panel found that when, on 3 March, the United States had increased bonding requirements to guarantee 100 per cent tariff duties on certain products from EC, it had effectively imposed unilateral retaliatory sanctions, contrary to article 23.1 of the DSU, requiring WTO members not to take unilateral action, but to have recourse to, and abide by, the rules and procedures of the DSU when seeking redress for alleged violations of WTO obligations. The panel found that, by putting into place the 3 March measure prior to the time authorized by the DSB, the United States had made a unilateral determination that the

revised EC bananas regime in respect of its bananas import, sales and distribution regime violated WTO rules, contrary to articles 23.2(*a*) and 21.5, first sentence, of the DSU. The panel further found that the United States had violated its obligations under articles I and II of GATT 1994 (one panellist dissented, considering that the bonding requirements rather violated article XI.1 of GATT 1994). In the light of those conclusions, the 3 March measure constituted a suspension of concessions or other obligations within the meaning of articles 3.7, 22.6 and 23.2(*c*) of the DSU imposed without DSB authorization and during the ongoing article 22.6 arbitration process. In suspending concessions in those circumstances, the United States did not abide by the DSU and thus violated article 23.1 together with articles 3.7, 22.6 and 23.2(*c*) of the DSU. The report of the panel was circulated to WTO members on 17 July 2000. Both the United States and EC appealed certain issues of law and legal interpretations developed by the panel. However, the panel's key conclusion that the United States had acted inconsistently with article 23.1 of the DSU was not appealed. The Appellate Body upheld the panel's findings that the measure at issue in the dispute was the 3 March measure, i.e., the increased bonding requirements, and that the 19 April action, i.e., the imposition of 100 per cent duties on certain designated products, was not within the terms of reference of the panel. The Appellate Body also upheld the panel's finding that the United States had acted inconsistently with article 21.5 of the DSU. The Appellate Body reversed the panel's findings of inconsistency with article 23.2(*a*) of the DSU as well as article II.1(*a*) and (*b*), first sentence, of the DSU. With regard to the panel's statements that the determination of whether measures taken to implement recommendations and rulings of the DSB were WTO-consistent could be made by arbitrators appointed under article 22.6 of the DSU, the Appellate Body found that the panel had erred in addressing the issue in the present case, and held that the panel's statement on the issue was therefore of no legal effect. The report of the Appellate Body was circulated to WTO members on 11 December 2000. At its meeting of 10 January 2001, the DSB adopted the Appellate Body report and the report of the panel, as modified by the Appellate Body report.

United States—Definitive safeguard measures on imports of wheat gluten, complaint by the European Communities (WT/DS166). The dispute concerns definitive safeguard measures imposed by the United States on imports of wheat gluten from EC. EC claimed that the measure was inconsistent with articles 2.1 and 4.2 of the Agreement on Safeguards because the United States "competent authorities", the International Trade Commission (the "USITC"), had not demonstrated that the conditions for imposing a safeguard measure were satisfied. In addition, EC claimed that the United States had not complied with the procedural requirements in articles 8.1, 12.1 and 12.3 of the Agreement on Safeguards. At its meeting on 26 July 1999, the DSB established a panel. Australia and New Zealand reserved their third-party rights. The report of the panel was circulated to WTO members on 31 July 2000. The panel found that: (*a*) the United States had not acted inconsistently with articles 2.1 and 4 of the Safeguards Agreement or with article XIX.1(*a*) of GATT 1994; (*b*) the definitive safeguard measure imposed by the United States on certain imports of wheat gluten based on the United States investigation and determination was inconsistent with articles 2.1 and 4 of the Safeguards Agreement; (*c*) the panel further concluded that the United States had failed to notify immediately the initiation of the investigation under article 12.1(*a*) and the finding of serious injury under article 12.1(*b*) of the Safeguards Agreement; (*d*) in notifying its decision to take the measure only after the measure was implemented, the United States had not made

timely notification under article 12.1(*c*). For the same reason, the United States had violated the obligation of article 12.3 to provide adequate opportunity for prior consultations on the measure; and (*e*) the United States therefore had also violated its obligation under article 8.1 of the Safeguards Agreement to endeavour to maintain a substantially equivalent level of concessions and other obligations to that existing under GATT 1994 between it and the exporting members which would be affected by such measures, in accordance with article 12.3 of the Safeguards Agreement. On 26 September 2000, the United States notified its decision to appeal to the Appellate Body certain issues of law and legal interpretation covered in the panel report and certain legal interpretations developed by the panel. The Appellate Body circulated its report on 22 December 2000. The Appellate Body upheld the panel's overall conclusion that the United States safeguard measure on imports of wheat gluten was inconsistent with articles 2.1 and 4.2 of the Agreement on Safeguards. However, in reaching that conclusion, the Appellate Body reversed certain of the panel's legal findings, in particular, the panel's interpretation of the legal standard for causation in article 4.2 of the Agreement on Safeguards. The DSB adopted the report of the Appellate Body, and the report of the panel, as modified by the Appellate Body report, on 19 January 2001.

United States—Safeguard measures on import of fresh, chilled or frozen lamb meat, complaints by New Zealand (WT/DS177) and Australia (WT/DS178). The dispute concerns a safeguard measure in the form of a tariff rate quota imposed by the United States in July 1999 on imports of fresh, chilled or frozen lamb meat, primarily from New Zealand and Australia, for a duration of three years. New Zealand and Australia raised a number of claims against the measure under articles 2, 3, 4, 5, 8, 11 and 12 of the Agreement on Safeguards and articles I, II and XIX of GATT 1994. The DSB established a panel on 19 November 1999. The panel found that article XIX.1(*a*) of GATT 1994, read in the context of article 3.1 of the Agreement on Safeguards, required that a member's competent authorities set out, in their findings, "reasoned conclusions" with respect to the existence of unforeseen developments. In examining the report of the United States International Trade Commission (USITC), the panel did not find such "reasoned conclusions". The panel also found that the United States had acted inconsistently with the Agreement on Safeguards because the USITC included, in the domestic lamb meat industry, producers of live lambs, even though those producers did not produce lamb meat. With respect to the "threat" of serious injury, the panel agreed with the Commission's "analytical approach" and that the USITC was correct to focus on the most recent data available from the end of the investigation period. However, the panel found that the data used was not sufficiently representative of the domestic industry, since the USITC had failed to obtain data on producers representing a major proportion of the total domestic production by the domestic industry. The panel also found that, under the Agreement on Safeguards, increased imports must be shown to be a necessary and sufficient cause of serious injury or threat thereof. The panel found that the USITC had not met this standard. The report of the panel was circulated to WTO members on 21 December 2000. On 31 January 2001, the United States notified its intention to appeal certain issues of law covered in the panel report and legal interpretations developed by the panel. The report upheld the panel's overall conclusion that the safeguard measure taken by the United States with respect to imported lamb meat was inconsistent with GATT 1994 and the Agreement on Safeguards. In particular, the Appellate Body upheld the panel's findings that, in taking safeguard action with respect to imported lamb, the United States had: (*a*) failed to demonstrate the existence of "unforeseen

developments"; (*b*) incorrectly defined the relevant "domestic industry"; (*c*) failed to make a determination of the state of the "domestic industry" on the basis of data that was sufficiently representative of that industry; (*d*) inadequately explained its determination of a threat of serious injury to the domestic industry; and (*e*) failed to ensure that injury caused to the domestic industry by factors other than increased imports was not attributed to those imports. The Appellate Body also found, however, that the panel had erred: (*a*) in its application of the standard of review under article 11 of the DSU; and (*b*) in interpreting the causation requirements in the Agreement on Safeguards. The DSB adopted the Appellate Body report and the panel report, as modified by the Appellate Body report, on 16 May 2001.

United States—Anti-dumping measures on stainless steel plate in coils and stainless sheet and strip, complaint by the Republic of Korea (WT/DS179). The dispute concerns preliminary and final determinations of the United States Department of Commerce on stainless steel plate in coils from the Republic of Korea dated 4 November 1998 and 31 March 1999 respectively, and stainless steel sheet and strip from the Republic of Korea dated 20 January 1999 and 8 June 1999 respectively. The Republic of Korea considered that several errors had been made by the United States in those determinations which resulted in erroneous findings and deficient conclusions as well as the imposition, calculation and collection of anti-dumping duties which were incompatible with the obligation of the United States under the provisions of the AD Agreement and article VI of GATT 1994 and in particular, but not necessarily exclusively, articles 2, 6 and 12 of the AD Agreement. At its meeting on 19 November 1999, the DSB established a panel. The European Communities and Japan reserved their third-party rights. The panel concluded that certain aspects of the calculation of the dumping margin by the United States in the two investigations concerned were not in accordance with the requirements of the AD Agreement. In particular, the panel found that: (*a*) in the case of the investigation on sheet and strip, the United States had made unnecessary currency conversions when determining normal value; (*b*) in both investigations, it had made adjustments to export prices for unpaid sales in a manner not foreseen by the AD Agreement; and (*c*) in both investigations, the United States had calculated the dumping margin through multiple weighted averages in circumstances not provided for in the AD Agreement. The panel, however, also concluded that the United States had acted consistently with its obligations under the AD Agreement when engaging in currency conversions for the purpose of determining normal value in the plate investigation. The panel recommended that the United States be required to bring the two anti-dumping measures at issue into conformity with their obligations under the Anti-Dumping Agreement, but declined the Republic of Korea's request suggesting that the United States revoke such measures. The report of the panel was circulated to WTO members on 22 December 2000. It was adopted by the DSB on 1 February 2001.

United States—Anti-dumping measures on certain hot-rolled steel products from Japan, complaint by Japan (WT/DS184). The dispute, dated 18 November 1999, concerns preliminary and final determinations of the United States Department of Commerce and the United States International Trade Commission (USITC) on the anti-dumping investigation of certain hot-rolled steel products from Japan issued on 25 and 30 November 1998 and 12 February, 28 April and 23 June 1999. Japan considered that those determinations were erroneous and based on deficient procedures under the United States Tariff Act of 1930 and related regulations. The Japanese complaint also concerned certain provisions of the Tariff Act of 1930 and related regulations. Japan claimed violations of articles VI

and X of GATT 1994 and articles 2, 3, 6 (including annex II), 9 and 10 of the AD Agreement. On 24 February 2000, Japan requested the establishment of a panel. At its meeting on 20 March 2000, the DSB established a panel. Brazil, Canada, Chile, EC and the Republic of Korea reserved their third-party rights in the proceedings. In its report, circulated on 28 February 2001, the panel, as a preliminary matter, concluded that certain of Japan's claims were limited to specific determinations in the underlying investigation, and did not encompass the United States "general practice" with respect to certain aspects of the conduct of anti-dumping investigations. The panel found that the United States had acted inconsistently with its obligations under the AD Agreement in the following respects when it imposed definitive anti-dumping duties on imports of certain hot-rolled steel products in June 1999: (*a*) the decision to rely on "facts available" in the determination of the dumping margin for all three Japanese exporters investigated was not m accordance with the requirements of the AD Agreement; (*b*) the exclusion of certain home sales and their replacement with downstream home market sales in the calculation of normal value was not in accordance with the requirements of the AD Agreement; and (*c*) the United States statute governing the calculation of a maximum dumping margin to be applied to imports from uninvestigated producers was (the "all others" dumping margin), on its face, inconsistent with the AD Agreement. However, the panel concluded that the United States had not acted inconsistently with its obligations under the AD Agreement in the following respects: (*a*) issuing a preliminary "critical circumstances" determination; (*b*) the examination and determination of injury and causation; (*c*) the requirement in the United States statute of a "primary focus" on financial performance and market share in the merchant, as opposed to the captive market in the examination of injury. Finally, the panel found that the United States had not acted inconsistently with article X.3 of GATT in conducting its investigation and making its determinations in the underlying investigations. On 25 April 2001, the United States notified its decision to appeal to the Appellate Body certain issues of law covered in the panel report and certain legal interpretations developed by the panel. The Appellate Body circulated its report on 24 July 2001. The Appellate Body upheld the panel's overall conclusion that the imposition by the United States of anti-dumping duties on imports of hot-rolled steel from Japan was inconsistent with the AD Agreement, as well as the panel's conclusion that a provision of the United States Tariff Act of 1930 was also inconsistent with that Agreement and with the WTO Agreement. However, it reversed the panel's finding regarding the inconsistency with article 2.1 of the AD Agreement of the United States methodology for calculating the normal value as regards the using of certain downstream sales made by an investigated exporter's affiliates to dependent purchasers. It found that there was insufficient factual record to allow completion of the analysis of Japan's claim under article 2.4 of the Anti-Dumping Agreement that the United States had not made a fair comparison in its use of downstream sales when calculating normal value. It reversed the panel's finding that the United States had not acted inconsistently with the AD Agreement in its application of the captive production provision in its determination of injury sustained by the United States hot-rolled steel industry. It also reversed the panel's finding that the USITC had demonstrated the existence of a causal relationship, under article 3.5 of the said Agreement, between dumped imports and material injury to that industry, but found that there was insufficient factual record to allow completion of the analysis of Japan's

claim on causation. The DSB adopted the Appellate Body report and the panel report, as modified by the Appellate Body report, on 23 August 2001.

Argentina—Definitive anti-dumping measures on imports of ceramic floor tiles from Italy, complaint by the European Communities (WT/DS189). The dispute concerns Argentina's definitive anti-dumping measures on imports of ceramic floor tiles from Italy imposed on 12 November 1999. EC claimed that the Argentine investigative authority without justification had disregarded all the information on normal value and on export prices provided by the exporters included in the sample; failed to calculate an individual dumping margin for each of the exporters included in the sample; failed to make due allowance for the differences in physical characteristics between the models exported to Argentina and those sold in Italy; and failed to inform the Italian exporters of the essential facts concerning the existence of dumping which formed the basis for the decision whether to apply definitive measures. EC considered that the anti-dumping measures in question were inconsistent with articles 2.4, 6.8 in conjunction with annex II, 6.9 and 6.10 of the Anti-Dumping Agreement. On 7 November 2000, EC requested the establishment of a panel. At its meeting on 17 November 2000, the DSB established a panel. Japan, Turkey and the United States reserved their third-party rights. The panel found that (*a*) Argentina had acted inconsistently with article 6.8 and annex II to the AD Agreement by disregarding in large part the information provided by the exporter for the determination of the normal value and export price, and this without informing the exporters of the reasons for such a rejection; (*b*) Argentina had acted inconsistently with article 6.10 of the AD Agreement by not determining an individual dumping margin for each sampled exporter; (*c*) Argentina had acted inconsistently with article 2.4 of the AD Agreement by failing to make due allowance for difference in physical characteristics affecting price comparability; and (*d*) Argentina had acted inconsistently with article 6.9 of the AD Agreement by not disclosing to the exporters the essential facts under consideration which formed the basis for the decision whether to apply definitive measures. At its meeting on 5 November 2001, the DSB adopted the panel report.

United States—Transitional safeguard measure on combed cotton yarn from Pakistan, complaint by Pakistan (WT/DS192). The dispute concerns a transitional safeguard measure applied by the United States, as of 17 March 1999, on combed cotton yarn (United States category 301) from Pakistan. In accordance with article 6.10 of the Agreement on Textiles and Clothing (ATC), the United States had notified the Textiles Monitory Body (TMB) on 5 March 1999 that it had decided to unilaterally impose a restraint, after consultations as to whether the situation called for a restraint had failed to produce a mutually satisfactory solution. In April 1999, the TMB examined the United States restraint pursuant to article 6.10 of the ATC and recommended that the United States restraint should be rescinded. On 28 May 1999, in accordance with article 8.10 of the ATC, the United States notified the TMB that it considered itself unable to conform to the recommendations issued by the TMB. Despite a further recommendation of the TMB pursuant to article 8.10 of the ATC that the United States reconsider its position, the United States continued to maintain its unilateral restraint and thus the matter remained unresolved. Pakistan was of the view that the transitional safeguards applied by the United States were inconsistent with the United States obligations under articles 2.4 of the ATC and not justified by article 6 of the ATC. Pakistan considered that the United States restraint did not meet the requirements for transitional safeguards set out in paragraphs 2, 3, 4 and 7 of article 6 of the ATC. At its meeting

on 19 June 2000, the DSB established a panel. India and the European Communities reserved their third-party rights. The panel circulated its report on 31 May 2001. The panel concluded that the transitional safeguard measure (quantitative restriction) imposed by the United States on imports of combed cotton yarn from Pakistan as of 17 March 1999, and extended as of 17 March 2000 for a further year was inconsistent with the provisions of article 6 of the ATC. Specifically, the panel found that: (*a*) inconsistently with its obligations under 6.2, the United States had excluded the production of combed cotton yarn by vertically integrated producers for their own use from the scope of the "domestic industry producing like and/or directly competitive products" with imported combed cotton yarn; (*b*) inconsistently with its obligations under article 6.4, the United States had not examined the effect of imports from Mexico (and possibly other appropriate members) individually; and (*c*) inconsistently with its obligations under articles 6.2 and 6.4, the United States had not demonstrated that the subject imports caused an "actual threat" of serious damage to the domestic industry. With respect to the other claims, the panel found that Pakistan had not established that the measure at issue was inconsistent with the United States obligations under article 6 of the ATC. Specifically, the panel found that: (*a*) Pakistan had not established that the United States determination of serious damage was not justified based on the data used by the United States investigating authority; (*b*) Pakistan had not established that the United States determination of serious damage was not justified regarding the evaluation by the United States investigating authority of establishments that ceased producing combed cotton yarn; (*c*) Pakistan had not established that the United States determinations of serious damage and causation thereof were not justified based upon an inappropriately chosen period of investigation and period of incidence of serious damage and causation thereof. On 9 July 2001, the United States, notified its decision to appeal to the Appellate Body certain issues of law covered in the panel report and certain legal interpretations developed by the panel. The Appellate Body circulated its report to members on 8 October 2001. The Appellate Body upheld the panel's overall conclusion that the transitional safeguard measure taken by the United States with respect to imports of combed cotton yarn ("yarn") from Pakistan was inconsistent with the ATC. In particular, the Appellate Body upheld the panel's findings that, in taking safeguard action with respect to imports of yarn from Pakistan, the United States had: (*a*) failed to define properly the relevant "domestic industry" producing yarn; and (*b*) failed to examine the effect of imports of yarn from other major supplier(s) individually when attributing serious damage to imports from Pakistan. Furthermore, the Appellate Body concluded that the panel should not have considered data which were not in existence at the time when the United States determined that serious damage had been caused to the domestic industry. It declined to rule on the broader issue of whether an importing member must attribute serious damage to all members whose exports contributed to that damage and concluded therefore that the panel's interpretation of this broader issue was of no legal effect. The DSB adopted the Appellate Body report and the panel report, as modified by the Appellate Body report, on 5 November 2001.

United States—Measures treating export restraints as subsidies, complaint by Canada (WT/DS194). The dispute concerns United States measures that treated a restraint on exports of a product as a subsidy to other products made using or incorporating the restricted product if the domestic price of the restricted product was affected by the restraint. The measures at issue included provisions of the

Statement of Administrative Action accompanying the Uruguay Round Agreements Act and the Explanation of the Final Rules, United States Department of Commerce, Countervailing Duties, Final Rule (25 November 1998) interpreting section 771(5) of the Tariff Act of 1930 (19 U.S.C. § 1677(5)), as amended by the Uruguay Round Agreements Act. Canada considered that these measures were inconsistent with United States obligations under articles 1.1, 10 (as well as articles 11, 17 and 19, as they related to the requirements of article 10) and 32.1 of the SCM Agreement because those measures provided that the United States would impose countervailing duties against practices that were not subsidies within the meaning of article 1.1 of the SCM Agreement. Canada also considered that the United States had failed to ensure that its laws, regulations and administrative procedures were in conformity with its WTO obligations as required by article 32.5 of the SCM Agreement and article XVI.4 of the WTO Agreement. At its meeting on 11 September 2000, the DSB established a panel. Australia, the European Communities and India reserved their third-party rights. The panel concluded that an export restraint as defined in the present dispute could not constitute government-entrusted or government-directed provision of goods in the sense of subparagraph (iv) and hence did not constitute a financial contribution in the sense of article 1.1(*a*) of the SCM Agreement. The panel also stated that section 771(5)(B)(iii) read in the light of the Statement of Administrative Action and the preamble to the United States Countervailing Duties Regulations was not inconsistent with article 1.1 of the SCM Agreement by "requir[ing] the imposition of countervailing duties against practices that are not subsidies within the meaning of article 1.1". With respect to those of Canada's claims not addressed above, the panel concluded that in the light of considerations of judicial economy, it was neither necessary nor appropriate to make findings thereon. The panel therefore made no recommendations with respect to the United States obligations under the SCM and WTO Agreements. The DSB adopted the panel report on 23 August 2001.

Active panels

The following table lists those panels that were still active as of 31 December 2001.

Dispute	*Complainant*	*Panel established*
Chile—Price band system and safeguard measures relating to certain agricultural products (WT/DS207)	Argentina	12 March 2001
Egypt—Definitive anti-dumping measures on steel rebar from Turkey (WT/DS211)	Turkey	20 June 2001
United States—Anti-dumping and countervailing measures on steel plate from India (WT/DS206)	India	24 July 2001
European Communities—Anti-dumping duties on malleable cast iron tube or pipe fittings from Brazil	Brazil	24 July 2001
European Communities—Trade description of sardines (WT/DS231)	Peru	24 July 2001

Dispute	*Complainant*	*Panel established*
United States—Section 129(*c*)(1) of the Uruguay Round Agreements Act (WT/DS221)	Canada	23 August 2001
United States—Definitive safeguard measures on imports of steel wire rod and circular welded carbon quality line pipe (WT/DS214)	European Communities	10 September 2001
United States—Countervailing measures concerning certain products from the European Communities (WT/DS212)	European Communities	10 September 2001
United States—Countervailing duties on certain corrosion-resistant carbon steel flat products from Germany (WT/DS213)	European Communities	10 September 2001
United States—Continued Dumping and Subsidy Offset Act of 2000 (WT/DS217)	Australia, Brazil, Chile, European Communities, India, Indonesia, Japan, Republic of Korea and Thailand	10 September 2001
United States—Continued Dumping and Subsidy Offset Act of 2000 (WT/DS234)	Canada and Mexico	10 September 2001
United States—Preliminary determinations with respect to certain softwood lumber from Canada (WT/DS236)	Canada	5 December 2001

Request for consultations

The following list does not include those disputes where a panel was either requested or established in 2001.

Dispute	*Complainant*	*Date of request*
Chile—Price band system and safeguard measures relating to certain agricultural products (WT/DS220)	Guatemala	5 January 2001
European Communities—Tariff-rate quota on corn gluten feed from the United States (WT/DS223)	United States	25 January 2001
United States—United States Patents Code (WT/DS224)	Brazil	31 January 2001
United States—Anti-dumping duties on seamless pipe from Italy (WT/DS225)	European Communities	5 February 2001

Dispute	*Complainant*	*Date of request*
Chile—Provisional safeguard measure on mixtures of edible oils (WT/DS226)	Argentina	19 February 2001
Brazil—Anti-dumping duties on jute bags from India (WT/DS229)	India	9 April 2001
Chile—Safeguard measures and modification of schedules regarding sugar (WT/DS230)	Colombia	17 April 2001
Mexico—Measures affecting the import of matches (WT/DS232)	Chile	17 May 2001
Argentina—Measures affecting the import of pharmaceutical products (WT/DS233)	India	25 May 2001
Turkey—Certain import procedures for fresh fruits (WT/DS237)	Ecuador	31 August 2001
United States—Anti-dumping duties on silicon metal from Brazil (WT/DS239)	Brazil	17 September 2001
Argentina—Definitive anti-dumping duties on poultry from Brazil (WT/DS241)	Brazil	7 November 2001
European Communities—Generalized System of Preferences (WT/DS242)	Thailand	7 December 2001

Notification of a mutually agreed solution

Dispute	*Complainant*	*Date settlement notified*
Denmark—Measures affecting the enforcement of intellectual property rights	United States	7 June 2001
European Communities—Enforcement of intellectual property rights for motion pictures and television programmes (WT/DS124)	United States	20 March 2001
Greece—Enforcement of intellectual property rights for motion pictures and television programmes (WT/DS125)	United States	20 March 2001
Brazil—Measures affecting patent protection (WT/DS199)	United States	5 July 2001
Romania—Measures on minimum import prices (WT/DS198)	United States	26 September 2001
Belgium—Administration of measures establishing customs duties for rice (WT/DS210)	United States	18 December 2001

Doha Ministerial Conference

At the Fourth Ministerial Conference, held at Doha, Qatar, in November 2001, the Ministerial Conference adopted a declaration which provides the mandate for negotiations on a range of subjects and other work, including issues concerning the implementation of the present agreements.[180] The negotiations include those on agriculture and services, which began in early 2000. A number of other issues have now been added. The Declaration sets 1 January 2005 as the date for completing all but two of the negotiations. Negotiations on the Dispute Settlement Understanding are to end in May 2003; those on a multilateral register of geographical indications for wines and spirits, by the next Ministerial Conference in 2003. Progress is to be reviewed at the Fifth Ministerial Conference in 2003, to be held in Mexico.

In Doha, the discussion on the implementation of the current WTO agreements focused on the problems of developing countries. First, Ministers agreed to adopt approximately 50 decisions clarifying the obligations of developing country member Governments with respect to issues including agriculture, subsidies, textiles and clothing, technical barriers to trade, trade-related investment measures, and rules of origin. Second, for many other implementation issues of concern to developing countries, the Ministers agreed on a future work programme for addressing these matters.

The Ministers established a two-track approach. Those issues for which there was an agreed negotiating mandate in the Declaration would be dealt with under the terms of that mandate. Those implementation issues where there was no mandate to negotiate would be taken up as a matter of priority by relevant WTO councils and committees. Those bodies were to report on their progress to the Trade Negotiations Committee by the end of 2002 for appropriate action.

The Doha Declaration emphasizes the importance of implementing and interpreting the Agreement on Trade-related Aspects of Intellectual Property Rights (TRIPS Agreement) in a way that supports public health, by promoting both access to existing medicines and the creation of new medicines. It refers to their separate declaration on this subject.

This separate declaration affirms Governments' right to use the Agreement's flexibilities in order to defend their right to protect public health. The separate declaration clarifies some of the forms of flexibility available, in particular compulsory licensing and parallel importing. The TRIPS Council has to find a solution to the problems countries may face in making use of compulsory licensing if they have too little or no pharmaceutical manufacturing capacity, reporting to the General Council on this by the end of 2002. The declaration also extends the deadline for least developed countries to apply provisions on pharmaceutical patents until 1 January 2016.

Finally, the Ministerial Conference decided to waive the preferential tariff treatment that the EC accorded to products originating in African, Caribbean and Pacific (ACP) countries through the ACP-EC Partnership Agreement (WT/L/436).

Observer status

At the Council meeting on 8 and 9 February 2001, following a request of Sao Tome and Principe for observer status, the Council adopted a decision (WT/GC/M/63) to accept the request. (No international intergovernmental organization requested or was given observer status in 2001. However, at the Doha Ministe-

rial Conference, about 57 intergovernmental organizations and around 400 non-governmental organizations were given observer status.)

(*c*) Legal activities in the councils and committees

(i) *General Council*

The General Council has held six meetings and four special sessions on implementation since the period covered by the report. The minutes of those meetings and special sessions are contained in documents WT/GC/M/63-64, 65 and Corr.1 and 2 and 66-72.

Committee on Balance-of-Payments Restrictions

The General Council adopted the reports of the Committee on Balance-of-Payments Restrictions concerning its consultations with Bangladesh (WT/BOP/R/57), which had focused on Bangladesh's plan to phase out the measures notified under article XVIII.B that the Committee had requested from Bangladesh and had been prepared with WTO technical assistance (WT/BOP/R/56-58).

Procedure for introduction of harmonized system 2002 changes to schedules of concessions

The General Council adopted a draft decision on a procedure for the introduction of harmonized system (HS) 2002 changes to schedules of concessions (G/C/W/271) which had been approved by the Council for Trade in Goods on 5 July 2001 and forwarded to the General Council for consideration and adoption (WT/L/407). The adopted procedure aims to further facilitate and simplify the introduction of HS 2002 changes to the WTO Schedule.

Detailed terms of reference for the inter-agency panel on financing normal levels of commercial imports of basic foodstuffs within the framework of the Marrakesh Decision on net-food-importing developing countries

The Committee on Agriculture approved the terms of reference established by an inter-agency panel of financial and commodity experts to explore ways and means for improving access by least developed and net-food-importing developing countries to multilateral programmes and facilities (G/AG/12). The terms of reference draw on the Marrakesh Decision on Measures Concerning the Possible Negative Effects of the Reform Programme on Least-Developed and Net-Food-Importing Developing Countries.

Rectification of technical error in the Agreement on Subsidies and Countervailing Measures

On 15 December 2000, the General Council decided to add Honduras to annex VII(*b*) to the SCM Agreement via a technical correction (WT/L/384). By the decision, Honduras was added to the list of developing countries which are WTO members subject to the provisions applicable to other developing country members according to article 27 of the SCM Agreement, when gross national product (GNP) per capita has reached US$ 1,000 per annum. On 20 January 2001, the final correction was circulated (WT/LET/371).

(ii) *Council for Trade in Goods*

During 2001, the Council for Trade in Goods met six times in formal session: 14 March, 18 April, 5 and 17 July, 27 and 31 July, 5 and 17 October, and 2 and 14 November 2001 (G/C/M/47-50, 53-55 and 57). The Council also met twice, on 27 September and 26 October, to conduct the major review of the implementation of the Agreement on Textiles and Clothing in the second stage of the integration process (G/C/M/52 and 56).

Legal activities of the committees

Committee on Agriculture

During 2001, the Committee on Agriculture held four regular meetings: on 29-30 March, 28-29 June, 27 September and 6 December 2001 (G/AG/R/26-29). In February 2000, the General Council had launched the negotiations to continue the process of reform of trade in agriculture which began in 1995. At the end of the first phase, the Committee adopted a programme for the second phase of the negotiations up to early 2002. The text on agriculture from the Doha Ministerial Declaration provided guidance for the further work, including a benchmark to establish modalities for the further commitments. Comprehensive draft schedules based on those modalities are to be submitted by participants by the opening of the Fifth Ministerial Conference, and the negotiations on agriculture are to be concluded as part and on the date of conclusion of the negotiating agenda as a whole (1 January 2005).

Committee on Sanitary and Phytosanitary Measures

The Committee held three regular meetings in 2001: on 14 and 15 March, 10 and 11 July and 31 October and 1 November (G/SPS/R/21-23). At each meeting, the Committee discussed specific trade concerns identified by members. The Committee also focused specifically on difficulties faced by developing countries, in particular regarding recognition of equivalence and the need for technical assistance. The Committee adopted a decision providing guidance on the recognition of the equivalence of sanitary measures providing a similar level of health protection (G/SPS/19).

Committee on Technical Barriers to Trade

During 2001, the Committee held three meetings: on 30 March, 29 June and 9 October (G/TBT/M/23-25). The Committee carried out its sixth annual review of the implementation and operation of the Agreement under article 15.3 as well as its sixth annual review of the Code of Good Practice for the Preparation, Adoption and Application of Standards (annex 3 of the Agreement) based on background documents G/TBT/10, WTO TBT Standards Code Directory (sixth edition), G/TBT/CS/1/Add.5 and G/TBT/CS/2/Rev.7.

Committee on Customs Valuation

During the period under review, the Committee held six formal meetings: on 9 March (G/VAL/M/19), 11 April (G/VAL/M/20), 24 July (G/VAL/M/21), 2 October (G/VAL/M/22), 24 October (G/VAL/M/23) and 21 November 2001 (G/VAL/M/24). The Committee adopted a decision granting a reservation under annex III.2 for Jamaica (G/VAL/40). The Committee also adopted the proposal by the European Communities for a work programme on technical assistance for

capacity-building as regards the implementation and administration of the WTO Agreement on Customs Valuation (G/VAL/W/82/Rev.1). The work programme was developed to improve customs valuation in developing countries and to promote cooperation between donors of technical assistance to developing countries. The work programme takes into account the new strategy for technical assistance currently being defined by the WTO Committee on Trade and Development (WT/COMTD/W/78).

(iii) *Council for Trade in Services*

In 2001, the Council for Trade in Services held five formal meetings (S/C/M/52-56). The Council has also held three special meetings devoted to the review of the Annex on Air Transport Services (S/C/M/50).

Revision of guidelines for the scheduling of specific commitments

The Council addressed the draft Revised Guidelines for the Scheduling of Specific Commitments (S/CSC/W/30) and a draft decision by the Council to adopt the revised guidelines (S/C/W/190). Upon the recommendation of the Committee on Specific Commitments, the Council adopted the text agreed by the Committee, which reflected the revision of the Guidelines for the Scheduling of Specific Commitments under the General Agreement on Trade Services (GATS) (S/L/92). The guidelines explain how specific commitments should be set out in schedules in order to assist in the preparation of offers, requests and national schedules of specific commitments.

Negotiations under article X of GATS on emergency safeguards

The Council adopted a proposal by the Chairperson of the Working Party on GATS Rules (S/L/90) to extend the deadline for the negotiations under article X of GATS on emergency safeguard measures (S/C/W/184). The new deadline was 15 March 2002 and the final date for the entry into effect of the results of the negotiations should be no later than the date of entry into force of the results of the services round.

(iv) *Council for Trade-related Aspects of Intellectual Property Rights*

In 2001, the Council for TRIPS held four formal meetings: from 2 to 5 April, 18 to 22 June, on 19 and 20 September and 27 and 28 November 2001 (IP/C/M/30-34).

Implementation of article 66.2

During the period under review, the Council continued to discuss the implementation of article 66.2, under which developed country members are required to provide incentives to enterprises and institutions in their territories for the purpose of promoting and encouraging technology transfer to least developed country members. The Council also agreed to invite UNCTAD to update it on the ongoing work in that organization relevant to the implementation of article 66.2, in particular as a result of the UNCTAD Expert Meeting on International Arrangements for Transfer of Technology in June 2001.

NOTES

[1] For detailed information, see *The United Nations Disarmament Yearbook*, vol. 26: 2001 (United Nations publication, Sales No. E.02.IX.1).

[2] Treaty on the Limitation of Anti-Ballistic Missile Systems. United Nations, *Treaty Series*, vol. 944, p. 13.

[3] A/50/1027, annex.

[4] IAEA document GOV/INF/821-GC(41)/INF/12.

[5] United Nations, *Treaty Series*, vol. 729, p. 159.

[6] Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on Their Destruction. General Assembly resolution 2826 (XXVI), annex.

[7] Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction; United Nations, *Treaty Series*, vol. 1974, p. 45.

[8] Successor of the United Nations Special Commission (UNSCOM).

[9] S/2001/560.

[10] S/2001/833, S/2001/1126.

[11] A/CONF.192/2.

[12] General Assembly resolution 55/255, annex.

[13] General Assembly resolution 55/25, annex I.

[14] Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects. United Nations, *Treaty Series*, vol. 1342, p. 137.

[15] Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices as amended on 3 May 1996 (Protocol II as amended on 3 May 1996), CCW/CONF.I/16 (Part I), annex B.

[16] Protocol on Blinding Laser Weapons (Protocol IV), ibid., annex A.

[17] United Nations, *Treaty Series*, vol. 2056, p. 211.

[18] United Nations, *Treaty Series*, vol. 2029, p. 55.

[19] Ibid., vol. 1833, p. 3.

[20] See UNEP press release, "UNEP finalizes field mission to six depleted uranium sites in Serbia and Montenegro", Belgrade, 4 November 2001.

[21] For the report of the Subcommittee, see A/AC.105/763.

[22] The treaties include: 1967 Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies (General Assembly resolution 2222 (XXI), annex); 1968 Agreement on the Rescue of Astronauts, the Return of Astronauts and the Return of Objects Launched into Outer Space (resolution 2345 (XXII), annex); 1972 Convention on International Liability for Damage Caused by Space Objects (resolution 2777 (XXVI), annex); 1975 Convention Registration of Objects Launched into Outer Space (resolution 3235 (XXIX), annex); and 1979 Agreement Governing the Activities of States on the Moon and Other Celestial Bodies (resolution 34/68, annex).

[23] See A/AC.105/C.2/L.223 and A/AC.105/C.2/2001/CRP.9.

[24] A/AC.105/635 and Add.1-5 and A/AC.105/C.2/L.204.

[25] See A/AC.105/763, annex II.

[26] For the report of the Committee, see *Official Records of the General Assembly, Fifty-sixth Session, Supplement No. 20* and corrigendum (A/56/20 and Corr.1).

[27] General Assembly resolution 51/122, annex.

[28] Agreement among the Government of Canada, Governments of Member States of the European Space Agency, the Government of Japan, the Government of the Russian Federation, and the Government of the United States of America concerning Cooperation in the Civil International Space Station.

[29] A/55/1024 and Corr.1.

[30] For the report of the session, see *Official Records of the General Assembly, Fifty-sixth Session, Supplement No. 25* (A/56/25).

[31] A/56/189.

[32] United Nations, *Treaty Series*, vol. 1954, p. 3.

[33] A/56/175.

[34] United Nations, *Treaty Series*, vol. 1760, p. 79.

[35] See A/56/126.

[36] See UNEP/CBD/ExCOP/1/3 and Corr.1, part two, annex.

[37] See General Assembly resolution 55/2.

[38] FCCC/CP/1997/7/Add.1, decision 1/CP.3.

[39] United Nations, *Treaty Series*, vol. 1771, p. 107.

[40] See FCCC/CP/2001/13/Add.1.

[41] FCCC/CP/2001/5, decision 5/CP.6.

[42] FCCC/CP/1998/16/Add.1, decision 1/CP.4.

[43] A/56/129.

[44] A/56/561.

[45] A/56/115-E/2001/92 and Corr.1.

[46] See E/2001/61, annex.

[47] A/56/558.

[48] A/56/560.

[49] A/56/403 and Add.1.

[50] For the texts of the Convention, of the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, and of the Protocol against the Smuggling of Migrants by Land, Sea and Air, see General Assembly resolution 55/25, annexes I, II and III respectively.

[51] The treaties include: 1961 Single Convention on Narcotic Drugs (United Nations, *Treaty Series*, vol. 520, p. 151); 1971 Convention on Psychotropic Substances (ibid., vol. 1019, p. 175); 1972 Protocol amending the Single Convention on Narcotic Drugs, 1961 (ibid., vol. 976, p. 3); 1975 Single Convention on Narcotic Drugs, 1961, as amended by the Protocol of 25 March 1972 amending the Single Convention on Narcotic Drugs, 1961 (ibid., p. 105); and 1988 United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (E/CONF.82/15 and Corr.2; issued as a United Nations publication (Sales No. E.91.XI.6)).

[52] See *Report of the International Conference on Drug Abuse and Illicit Trafficking, Vienna, 17-26 June 1987* (United Nations publication, Sales No. E.87.I.18), chap. I, sect. A.

[53] See General Assembly resolution S-17/2, annex.

[54] United Nations, *Treaty Series*, vol. 993, p. 3.

[55] Ibid., vol. 999, p. 171.

[56] Ibid.

[57] General Assembly resolution 44/128, annex.

[58] *Official Records of the General Assembly, Fifty-fifth Session, Supplement No. 40*; and ibid., *Fifty-sixth Session, Supplement No. 40*.

[59] A/56/583/Add.5.

[60] United Nations, *Treaty Series*, vol. 660, p. 195.

[61] See CERD/sp/45, annex.

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

[63] See CEDAW/SP/1995/2.

[64] General Assembly resolution 54/4, annex.

[65] *Official Records of the General Assembly, Fifty-sixth Session, Supplement No. 38* (A/56/38).

[66] A/56/328.

[67] United Nations, *Treaty Series*, vol. 1465, p. 85.

[68] CAT/sp/1992/L.1.

[69] General Assembly resolution 55/89, annex.

[70] *Official Records of the General Assembly, Fifty-sixth Session, Supplement No. 44* (A/56/44).

[71] See A/56/156.

[72] United Nations, *Treaty Series*, vol. 1577, p. 3.

[73] CRC/SP/1995/L.2/Rev.1.

[74] General Assembly resolution 54/263, annex I.

[75] Ibid., annex II.

[76] A/S-27/3.

[77] A/56/203.

[78] A/56/342-S/2001/852.

[79] See A/56/453.

[80] See General Assembly resolution 45/158.

[81] A/56/179.

[82] A/56/329.

[83] E/CN.4/2001/83 and Add.1.

[84] E/CN.4/2001/73 and Add.1 and 2.

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

[86] See *Official Records of the Economic and Social Council, 2001, Supplement No. 3* (E/2001/23), chap. II, sect. A.

[87] A/56/344.

[88] A/56/190.

[89] United Nations, *Treaty Series*, vol. 189, p. 137.

[90] Ibid., vol. 606, p. 267.

[91] Ibid., vol. 360, p. 117.

[92] Ibid., vol. 989, p. 175.

[93] A/56/333 and Corr.1.

[94] *Official Records of the General Assembly, Fifty-sixth Session, Supplement No. 12A* (A/56/12/Add.1).

[95] See A/56/352-S/2001/865.

[96] See A/56/351-S/2001/863 and Corr.1 and 2.

[97] See A/56/413.

[98] "United Nations, *Treaty Series*, vol. 249, p. 215.

[99] United Nations, *Treaty Series*, vol. 1833, p. 3.

[100] General Assembly resolution 48/263, annex.

[101] A/CONF.164/37.

[102] SPLOS/25.

[103] International Seabed Authority document ISBA/4/A/8, annex.

[104] A/56/58 and Add.1.

[105] For the composition of the Court, see *Official Records of the General Assembly, Fifty-sixth Session, Supplement No. 4* (A/56/4), chap. II, sect. A.

[106] For detailed information, see *I.C.J. Yearbook 2000-2001*, No. 55, and *I.C.J. Yearbook 2001-2002*, No. 56.

[107] The case was originally filed as: *Armed Activities on the Territory of the Congo* (*Democratic Republic of the Congo* v. *Burundi*) (*Democratic Republic of the Congo* v. *Uganda*) *(Democratic Republic of the Congo* v. *Rwanda)*.

[108] *Official Records of the General Assembly, Fifty-sixth Session, Supplement No. 4* (A/56/4).

[109] For the membership of the International Law Commission, see ibid., *Supplement No. 10* and corrigendum (A/56/10 and Corr.1), chap. I, sect. A.

[110] For detailed information, see *Official Records of the General Assembly, Fifty-sixth Session, Supplement No. 10* and corrigendum (A/56/10 and Corr.1).

[111] A/CN.4/515 and Add.1-3.

[112] A/CN.4/517 and Add.1.

[113] A/CN.4/L.601, Corr.1 and 2.

[114] A/CN.4/508/Add.3 and 4.

[115] A/CN.4/518 and Add.1-3.

[116] The text of the draft guidelines on reservations to treaties provisionally adopted so far by the Commission is contained in *Official Records of the General Assembly, Fifty-sixth Session, Supplement No. 10* (A/56/10), chap. VI, sect. C.

[117] A/CN.4/506/Add.1.

[118] A/CN.4/514 and Corr.1.

[119] A/CN.4/519.

[120] For the membership of UNCITRAL, see *Official Records of the General Assembly, Fifty-sixth Session, Supplement No. 17* (A/56/17), chap. II, sect. B.

[121] A/CN.9/495.

[122] A/CN.9/485 and A/CN.9/487.

[123] A/CN.9/497.

[124] A/CN.9/501 and Corr.1.

[125] United Nations publication, Sales No. E.01.V.4.

[126] For the text of the Convention, see chap. IV.A.4.

[127] A/56/484.

[128] *Official Records of the General Assembly, Fifty-sixth Session, Supplement No. 26* (A/56/26).

[129] *Official Records of the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Rome, 15 June-17 July 1998*, vol. I: *Final Documents* (United Nations publication, Sales No. E.02.I.5), sect. A.

[130] *Official Records of the General Assembly, Fifty-sixth Session, Supplement No. 33* (A/56/33).

[131] S/2000/319; see *Resolutions and Decisions of the Security Council, 2000*.

[132] A/53/312.

[133] A/56/160 and Corr.1 and Add.1.

[134] *Official Records of the General Assembly, Fifty-sixth Session, Supplement No. 37* (A/56/37).

[135] A/C.6/56/L.9.

[136] General Assembly resolution 52/164, annex.

[137] General Assembly resolution 54/109, annex.

[138] For the text of the Convention, see United Nations, *Treaty Series*, vol. 2051, p. 363.

[139] A/55/637.

[140] A/55/1024 and Corr.1, sect. III.F.

[141] See *Official Records of the Economic and Social Council, 2001, Supplement No. 3* (E/2001/23), chap. II, sect. A.

[142] UNESCO, *Records of the General Conference, Thirty-first Session*, vol. 1, *Resolutions*, resolution 22.

[143] For detailed information, see the report of the Secretary-General, A/56/615. See also the report of the Executive Director of UNITAR, which covers the period 1 July 2000 to 30 June 2002, *Official Records of the General Assembly, Fifty-seventh Session, Supplement No. 14* (A/57/14).

[144] ILO, *Official Bulletin*, vol. LXXXIV, 2001, Series A. No. 2. Information on the preparatory work for the adoption of these instruments is given in order to facilitate reference work. These instruments have been adopted using the *double discussion* procedure. *First discussion*: ILC, 88th session, Geneva, 2000, reports VI (1) and (2); ibid., *Record of Proceedings*,

No. 24; *Second discussion*: ILC, 89th session, Geneva, 2001, report IV (1) and reports IV (2A and 2B); ibid., *Record of Proceedings*, Nos. 15, 15A and 15B.

[145] ILC, 89th session, Geneva, 2001, *Record of Proceedings*, No. 19 (Part Three).

[146] The report has been published as report III (Part 1) to the 90th session of the Conference (2002) and comprises two volumes: vol. 1A, *General Report and Observations concerning particular countries* (report III (Part 1A)) and vol. 1B, *Dock Work: Social Repercussions of New Methods of Cargo Handling*, General Survey of the reports concerning the Dock Work Convention (No. 137) and Recommendation (No. 145) 1973 (report III (Part 1B)).

[147] GB.282/15/1.

[148] GB.282/15/2.

[149] GB.282/15/3 and GB.277/18/4.

[150] GB.282/15/6.

[151] ILO, *Official Bulletin*, vol. LXXXIV, 2001, Series B, No. 1.

[152] Ibid., No. 2.

[153] Ibid., No. 3.

[154] GB.280/WP/SDG/1 and 2 and Corr., GB.280/17.

[155] GB.282/WP/SDG/1-3 and Add.1, GB.282/12.

[156] GB.280/LILS/WP/PRS/1/1-3, GB.280/LILS/WP/PRS/2, GB.277/LILS/WP/PRS/2/2 and Corr., GB.280/LILS/WP/PRS/3, GB.280/LILS/5, GB.280/12/2.

[157] GB.282/LILS/WP/PRS/1-6, GB.282/8/2.

[158] LEG 83/14.

[159] For the text of the treaties, see chap IV.B of this volume.

[160] INFCIRC/274/Rev.1.

[161] INFCIRC/335.

[162] INFCIRC/336.

[163] INFCIRC/500.

[164] INFCIRC/500/Add.3.

[165] INFCIRC/402.

[166] INFCIRC/449.

[167] INFCIRC/546.

[168] INFCIRC/566.

[169] INFCIRC/567.

[170] INFCIRC/377.

[171] INFCIRC/167/Add.18.

[172] INFCIRC/582.

[173] INFCIRC/599.

[174] INFCIRC/301/Add.1.

[175] INFCIRC/231/Add.1.

[176] INFCIRC/434/Add.1.

[177] INFCIRC/316/Add.1.

[178] INFCIRC/273/Add.1.

[179] INFCIRC/295/Add.1.

[180] WT/MIN(01)/DEC/1. See also United Nations document A/C.2/56/7, annex.

Chapter IV

TREATIES CONCERNING INTERNATIONAL LAW CONCLUDED UNDER THE AUSPICES OF THE UNITED NATIONS AND RELATED INTERGOVERNMENTAL ORGANIZATIONS

A. Treaties concerning international law concluded under the auspices of the United Nations

1. STOCKHOLM CONVENTION ON PERSISTENT ORGANIC POLLUTANTS. DONE AT STOCKHOLM ON 22 MAY 2001[1]

Stockholm Convention on Persistent Organic Pollutants

The Parties to this Convention,

Recognizing that persistent organic pollutants possess toxic properties, resist degradation, bioaccumulate and are transported, through air, water and migratory species, across international boundaries and deposited far from their place of release, where they accumulate in terrestrial and aquatic ecosystems,

Aware of the health concerns, especially in developing countries, resulting from local exposure to persistent organic pollutants, in particular impacts upon women and, through them, upon future generations,

Acknowledging that the Arctic ecosystems and indigenous communities are particularly at risk because of the biomagnification of persistent organic pollutants and that contamination of their traditional foods is a public health issue,

Conscious of the need for global action on persistent organic pollutants,

Mindful of decision 19/13 C of 7 February 1997 of the Governing Council of the United Nations Environment Programme to initiate international action to protect human health and the environment through measures which will reduce and/or eliminate emissions and discharges of persistent organic pollutants,

Recalling the pertinent provisions of the relevant international environmental conventions, especially the Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade, and the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal, including the regional agreements developed within the framework of its article 11,

Recalling also the pertinent provisions of the Rio Declaration on Environment and Development and Agenda 21,

Acknowledging that precaution underlies the concerns of all the Parties and is embedded within this Convention,

Recognizing that this Convention and other international agreements in the field of trade and the environment are mutually supportive,

Reaffirming that States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental and developmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction,

Taking into account the circumstances and particular requirements of developing countries, in particular the least developed among them, and countries with economies in transition, especially the need to strengthen their national capabilities for the management of chemicals, including through the transfer of technology, the provision of financial and technical assistance and the promotion of cooperation among the Parties,

Taking full account of the Programme of Action for the Sustainable Development of Small Island Developing States, adopted in Barbados on 6 May 1994,

Noting the respective capabilities of developed and developing countries, as well as the common but differentiated responsibilities of States as set forth in principle 7 of the Rio Declaration on Environment and Development,

Recognizing the important contribution that the private sector and non-governmental organizations can make to achieving the reduction and/or elimination of emissions and discharges of persistent organic pollutants,

Underlining the importance of manufacturers of persistent organic pollutants taking responsibility for reducing adverse effects caused by their products and for providing information to users, Governments and the public on the hazardous properties of those chemicals,

Conscious of the need to take measures to prevent adverse effects caused by persistent organic pollutants at all stages of their life cycle,

Reaffirming principle 16 of the Rio Declaration on Environment and Development, which states that national authorities should endeavour to promote the internalization of environmental costs and the use of economic instruments, taking into account the approach that the polluter should, in principle, bear the cost of pollution, with due regard to the public interest and without distorting international trade and investment,

Encouraging Parties not having regulatory and assessment schemes for pesticides and industrial chemicals to develop such schemes,

Recognizing the importance of developing and using environmentally sound alternative processes and chemicals,

Determined to protect human health and the environment from the harmful impacts of persistent organic pollutants,

Have agreed as follows:

Article 1

OBJECTIVE

Mindful of the precautionary approach as set forth in Principle 15 of the Rio Declaration on Environment and Development, the objective of this Convention is to protect human health and the environment from persistent organic pollutants.

Article 2

DEFINITIONS

For the purposes of this Convention:

(*a*) "Party" means a State or regional economic integration organization that has consented to be bound by this Convention and for which the Convention is in force;

(*b*) "Regional economic integration organization" means an organization constituted by sovereign States of a given region to which its member States have transferred competence in respect of matters governed by this Convention and which has been duly authorized, in accordance with its internal procedures, to sign, ratify, accept, approve or accede to this Convention;

(*c*) "Parties present and voting" means Parties present and casting an affirmative or negative vote.

Article 3

MEASURES TO REDUCE OR ELIMINATE RELEASES FROM INTENTIONAL PRODUCTION AND USE

1. Each Party shall:

(*a*) Prohibit and/or take the legal and administrative measures necessary to eliminate:

(i) Its production and use of the chemicals listed in annex A subject to the provisions of that annex; and

(ii) Its import and export of the chemicals listed in annex A in accordance with the provisions of paragraph 2; and

(*b*) Restrict its production and use of the chemicals listed in annex B in accordance with the provisions of that annex.

2. Each Party shall take measures to ensure:

(*a*) That a chemical listed in annex A or annex B is imported only:

(i) For the purpose of environmentally sound disposal as set forth in paragraph 1 (*d*) of article 6; or

(ii) For a use or purpose which is permitted for that Party under annex A or annex B;

(*b*) That a chemical listed in annex A for which any production or use specific exemption is in effect or a chemical listed in annex B for which any production or use specific exemption or acceptable purpose is in effect, taking into account any relevant provisions in existing international prior informed consent instruments, is exported only:

(i) For the purpose of environmentally sound disposal as set forth in paragraph 1 (*d*) of article 6;

(ii) To a Party which is permitted to use that chemical under annex A or annex B; or

(iii) To a State not party to this Convention which has provided an annual certification to the exporting Party. Such certification shall specify the intended use of the chemical and include a statement that, with respect to that chemical, the importing State is committed to:

a. Protect human health and the environment by taking the necessary measures to minimize or prevent releases;

b. Comply with the provisions of paragraph 1 of article 6; and

c. Comply, where appropriate, with the provisions of paragraph 2 of part II of annex B.

The certification shall also include any appropriate supporting documentation, such as legislation, regulatory instruments or administrative or policy guidelines. The exporting Party shall transmit the certification to the Secretariat within sixty days of receipt;

(*c*) That a chemical listed in annex A, for which production and use specific exemptions are no longer in effect for any Party, is not exported from it except for the purpose of environmentally sound disposal as set forth in paragraph 1 (*d*) of article 6;

(*d*) For the purposes of this paragraph, the term "State not party to this Convention" shall include, with respect to a particular chemical, a State or regional economic integration organization that has not agreed to be bound by the Convention with respect to that chemical.

3. Each Party that has one or more regulatory and assessment schemes for new pesticides or new industrial chemicals shall take measures to regulate with the aim of preventing the production and use of new pesticides or new industrial chemicals which, taking into consideration the criteria in paragraph 1 of annex D, exhibit the characteristics of persistent organic pollutants.

4. Each Party that has one or more regulatory and assessment schemes for pesticides or industrial chemicals shall, where appropriate, take into consideration within these schemes the criteria in paragraph 1 of annex D when conducting assessments of pesticides or industrial chemicals currently in use.

5. Except as otherwise provided in this Convention, paragraphs 1 and 2 shall not apply to quantities of a chemical to be used for laboratory-scale research or as a reference standard.

6. Any Party that has a specific exemption in accordance with annex A or a specific exemption or an acceptable purpose in accordance with annex B shall take appropriate measures to ensure that any production or use under such exemption or purpose is carried out in a manner that prevents or minimizes human exposure and release into the environment. For exempted uses or acceptable purposes that involve intentional release into the environment under conditions of normal use, such release shall be to the minimum extent necessary, taking into account any applicable standards and guidelines.

Article 4

REGISTER OF SPECIFIC EXEMPTIONS

1. A Register is hereby established for the purpose of identifying the Parties that have specific exemptions listed in annex A or annex B. It shall not identify Parties that make use of the provisions in annex A or annex B that may be exercised by all Parties. The Register shall be maintained by the Secretariat and shall be available to the public.

2. The Register shall include:

(*a*) A list of the types of specific exemptions reproduced from annex A and annex B;

(*b*) A list of the Parties that have a specific exemption listed under annex A or annex B; and

(*c*) A list of the expiry dates for each registered specific exemption.

3. Any State may, on becoming a Party, by means of a notification in writing to the Secretariat, register for one or more types of specific exemptions listed in annex A or annex B.

4. Unless an earlier date is indicated in the Register by a Party or an extension is granted pursuant to paragraph 7, all registrations of specific exemptions shall expire five years after the date of entry into force of this Convention with respect to a particular chemical.

5. At its first meeting, the Conference of the Parties shall decide upon its review process for the entries in the Register.

6. Prior to a review of an entry in the Register, the Party concerned shall submit a report to the Secretariat justifying its continuing need for registration of that exemption. The report shall be circulated by the Secretariat to all Parties. The review of a registration shall be carried out on the basis of all available information. Thereupon, the Conference of the Parties may make such recommendations to the Party concerned as it deems appropriate.

7. The Conference of the Parties may, upon request from the Party concerned, decide to extend the expiry date of a specific exemption for a period of up to five years. In making its decision, the Conference of the Parties shall take due account of the special circumstances of the developing country Parties and Parties with economies in transition.

8. A Party may, at any time, withdraw an entry from the Register for a specific exemption upon written notification to the Secretariat. The withdrawal shall take effect on the date specified in the notification.

9. When there are no longer any Parties registered for a particular type of specific exemption, no new registrations may be made with respect to it.

Article 5

MEASURES TO REDUCE OR ELIMINATE RELEASES FROM UNINTENTIONAL PRODUCTION

Each Party shall at a minimum take the following measures to reduce the total releases derived from anthropogenic sources of each of the chemicals listed in annex C, with the goal of their continuing minimization and, where feasible, ultimate elimination:

(*a*) Develop an action plan or, where appropriate, a regional or subregional action plan within two years of the date of entry into force of this Convention for it, and subsequently implement it as part of its implementation plan specified in article 7, designed to identify, characterize and address the release of the chemicals listed in annex C and to facilitate implementation of subparagraphs (*b*) to (*e*). The action plan shall include the following elements:

(i) An evaluation of current and projected releases, including the development and maintenance of source inventories and release estimates, taking into consideration the source categories identified in annex C;

(ii) An evaluation of the efficacy of the laws and policies of the Party relating to the management of such releases;

(iii) Strategies to meet the obligations of this paragraph, taking into account the evaluations in (i) and (ii);

(iv) Steps to promote education and training with regard to, and awareness of, those strategies;

(v) A review every five years of those strategies and of their success in meeting the obligations of this paragraph; such reviews shall be included in reports submitted pursuant to article 15;

(vi) A schedule for implementation of the action plan, including for the strategies and measures identified therein;

(*b*) Promote the application of available, feasible and practical measures that can expeditiously achieve a realistic and meaningful level of release reduction or source elimination;

(*c*) Promote the development and, where it deems appropriate, require the use of substitute or modified materials, products and processes to prevent the formation and release of the chemicals listed in annex C, taking into consideration the general guidance on prevention and release reduction measures in annex C and guidelines to be adopted by decision of the Conference of the Parties;

(*d*) Promote and, in accordance with the implementation schedule of its action plan, require the use of best available techniques for new sources within source categories which a Party has identified as warranting such action in its action plan, with a particular initial focus on source categories identified in part II of annex C. In any case, the requirement to use best available techniques for new sources in the categories listed in part II of that annex shall be phased in as soon as practicable but no later than four years after the entry into force of the Convention for that Party. For the identified categories, Parties shall promote the use of best environmental practices. When applying best available techniques and best environmental practices, Parties should take into consideration the general guidance on prevention and release reduction measures in that annex and guidelines on best available techniques and best environmental practices to be adopted by decision of the Conference of the Parties;

(*e*) Promote, in accordance with its action plan, the use of best available techniques and best environmental practices:

(i) For existing sources, within the source categories listed in part II of annex C and within source categories such as those in part III of that annex; and

(ii) For new sources, within source categories such as those listed in part III of annex C which a Party has not addressed under subparagraph (*d*).

When applying best available techniques and best environmental practices, Parties should take into consideration the general guidance on prevention and release reduction measures in annex C and guidelines on best available techniques and best environmental practices to be adopted by decision of the Conference of the Parties;

(*f*) For the purposes of this paragraph and annex C:

(i) "Best available techniques" means the most effective and advanced stage in the development of activities and their methods of operation which indicate the practical suitability of particular techniques for providing in principle the basis for release limitations designed to prevent and, where that is not practicable, generally to reduce releases of chemicals listed in

part I of annex C and their impact on the environment as a whole. In this regard:

(ii) "Techniques" includes both the technology used and the way in which the installation is designed, built, maintained, operated and decommissioned;

(iii) "Available" techniques means those techniques that are accessible to the operator and that are developed on a scale that allows implementation in the relevant industrial sector, under economically and technically viable conditions, taking into consideration the costs and advantages; and

(iv) "Best" means most effective in achieving a high general level of protection of the environment as a whole;

(v) "Best environmental practices" means the application of the most appropriate combination of environmental control measures and strategies;

(vi) "New source" means any source of which the construction or substantial modification is commenced at least one year after the date of:

a. Entry into force of this Convention for the Party concerned; or

b. Entry into force for the Party concerned of an amendment to annex C where the source becomes subject to the provisions of this Convention only by virtue of that amendment;

(*g*) Release limit values or performance standards may be used by a Party to fulfil its commitments for best available techniques under this paragraph.

Article 6

MEASURES TO REDUCE OR ELIMINATE RELEASES FROM STOCKPILES AND WASTES

1. In order to ensure that stockpiles consisting of or containing chemicals listed either in annex A or annex B and wastes, including products and articles upon becoming wastes, consisting of, containing or contaminated with a chemical listed in annex A, B or C, are managed in a manner protective of human health and the environment, each Party shall:

(*a*) Develop appropriate strategies for identifying:

(i) Stockpiles consisting of or containing chemicals listed in either annex A or annex B; and

(ii) Products and articles in use and wastes consisting of, containing or contaminated with a chemical listed in annex A, B or C;

(*b*) Identify, to the extent practicable, stockpiles consisting of or containing chemicals listed in either annex A or annex B on the basis of the strategies referred to in subparagraph (*a*);

(*c*) Manage stockpiles, as appropriate, in a safe, efficient and environmentally sound manner. Stockpiles of chemicals listed in either annex A or annex B, after they are no longer allowed to be used according to any specific exemption specified in annex A or any specific exemption or acceptable purpose specified in annex B, except stockpiles which are allowed to be exported according to paragraph 2 of article 3, shall be deemed to be waste and shall be managed in accordance with subparagraph (*d*);

(*d*) Take appropriate measures so that such wastes, including products and articles upon becoming wastes, are:

(i) Handled, collected, transported and stored in an environmentally sound manner;

(ii) Disposed of in such a way that the persistent organic pollutant content is destroyed or irreversibly transformed so that they do not exhibit the characteristics of persistent organic pollutants or otherwise disposed of in an environmentally sound manner when destruction or irreversible transformation does not represent the environmentally preferable option or the persistent organic pollutant content is low, taking into account international rules, standards and guidelines, including those that may be developed pursuant to paragraph 2, and relevant global and regional regimes governing the management of hazardous wastes;

(iii) Not permitted to be subjected to disposal operations that may lead to recovery, recycling, reclamation, direct reuse or alternative uses of persistent organic pollutants; and

(iv) Not transported across international boundaries without taking into account relevant international rules, standards and guidelines;

(*e*) Endeavour to develop appropriate strategies for identifying sites contaminated by chemicals listed in annex A, B or C; if remediation of those sites is undertaken it shall be performed in an environmentally sound manner.

2. The Conference of the Parties shall cooperate closely with the appropriate bodies of the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal to, inter alia:

(*a*) Establish levels of destruction and irreversible transformation necessary to ensure that the characteristics of persistent organic pollutants as specified in paragraph 1 of annex D are not exhibited;

(*b*) Determine what they consider to be the methods that constitute environmentally sound disposal referred to above; and

(*c*) Work to establish, as appropriate, the concentration levels of the chemicals listed in annexes A, B and C in order to define the low persistent organic pollutant content referred to in paragraph 1 (*d*) (ii).

Article 7

IMPLEMENTATION PLANS

1. Each Party shall:

(*a*) Develop and endeavour to implement a plan for the implementation of its obligations under this Convention;

(*b*) Transmit its implementation plan to the Conference of the Parties within two years of the date on which this Convention enters into force for it; and

(*c*) Review and update, as appropriate, its implementation plan on a periodic basis and in a manner to be specified by a decision of the Conference of the Parties.

2. The Parties shall, where appropriate, cooperate directly or through global, regional and subregional organizations, and consult their national stakeholders, including women's groups and groups involved in the health of children, in order to facilitate the development, implementation and updating of their implementation plans.

3. The Parties shall endeavour to utilize and, where necessary, establish the means to integrate national implementation plans for persistent organic pollutants in their sustainable development strategies where appropriate.

Article 8

LISTING OF CHEMICALS IN ANNEXES A. B AND C

1. A Party may submit a proposal to the Secretariat for listing a chemical in annexes A, B and/or C. The proposal shall contain the information specified in annex D. In developing a proposal, a Party may be assisted by other Parties and/or by the Secretariat.

2. The Secretariat shall verify whether the proposal contains the information specified in annex D. If the Secretariat is satisfied that the proposal contains the information so specified, it shall forward the proposal to the Persistent Organic Pollutants Review Committee.

3. The Committee shall examine the proposal and apply the screening criteria specified in annex D in a flexible and transparent way, taking all information provided into account in an integrative and balanced manner.

4. If the Committee decides that:

(*a*) It is satisfied that the screening criteria have been fulfilled, it shall, through the Secretariat, make the proposal and the evaluation of the Committee available to all Parties and observers and invite them to submit the information specified in annex E; or

(*b*) It is not satisfied that the screening criteria have been fulfilled, it shall, through the Secretariat, inform all Parties and observers and make the proposal and the evaluation of the Committee available to all Parties and the proposal shall be set aside.

5. Any Party may resubmit a proposal to the Committee that has been set aside by the Committee pursuant to paragraph 4. The resubmission may include any concerns of the Party as well as a justification for additional consideration by the Committee. If, following this procedure, the Committee again sets the proposal aside, the Party may challenge the decision of the Committee and the Conference of the Parties shall consider the matter at its next session. The Conference of the Parties may decide, based on the screening criteria in annex D and taking into account the evaluation of the Committee and any additional information provided by any Party or observer, that the proposal should proceed.

6. Where the Committee has decided that the screening criteria have been fulfilled or the Conference of the Parties has decided that the proposal should proceed, the Committee shall further review the proposal, taking into account any relevant additional information received, and shall prepare a draft risk profile in accordance with annex E. It shall, through the Secretariat, make that draft available to all Parties and observers, collect technical comments from them and, taking those comments into account, complete the risk profile.

7. If, on the basis of the risk profile conducted in accordance with annex E, the Committee decides:

(*a*) That the chemical is likely as a result of its long-range environmental transport to lead to significant adverse human health and/or environmental effects such that global action is warranted, the proposal shall proceed. Lack of full scien-

tific certainty shall not prevent the proposal from proceeding. The Committee shall, through the Secretariat, invite information from all Parties and observers relating to the considerations specified in annex F. It shall then prepare a risk management evaluation that includes an analysis of possible control measures for the chemical in accordance with that annex; or

(*b*) That the proposal should not proceed, it shall, through the Secretariat, make the risk profile available to all Parties and observers and set the proposal aside.

8. For any proposal set aside pursuant to paragraph 7 (*b*), a Party may request the Conference of the Parties to consider instructing the Committee to invite additional information from the proposing Party and other Parties during a period not to exceed one year. After that period and on the basis of any information received, the Committee shall reconsider the proposal pursuant to paragraph 6 with a priority to be decided by the Conference of the Parties. If, following this procedure, the Committee again sets the proposal aside, the Party may challenge the decision of the Committee and the Conference of the Parties shall consider the matter at its next session. The Conference of the Parties may decide, based on the risk profile prepared in accordance with annex E and taking into account the evaluation of the Committee and any additional information provided by any Party or observer, that the proposal should proceed. If the Conference of the Parties decides that the proposal shall proceed, the Committee shall then prepare the risk management evaluation.

9. The Committee shall, based on the risk profile referred to in paragraph 6 and the risk management evaluation referred to in paragraph 7 (*a*) or paragraph 8, recommend whether the chemical should be considered by the Conference of the Parties for listing in annexes A, B and/or C. The Conference of the Parties, taking due account of the recommendations of the Committee, including any scientific uncertainty, shall decide, in a precautionary manner, whether to list the chemical, and specify its related control measures, in annexes A, B and/or C.

Article 9

Information exchange

1. Each Party shall facilitate or undertake the exchange of information relevant to:

(*a*) The reduction or elimination of the production, use and release of persistent organic pollutants; and

(*b*) Alternatives to persistent organic pollutants, including information relating to their risks as well as to their economic and social costs.

2. The Parties shall exchange the information referred to in paragraph 1 directly or through the Secretariat.

3. Each Party shall designate a national focal point for the exchange of such information.

4. The Secretariat shall serve as a clearing-house mechanism for information on persistent organic pollutants, including information provided by Parties, intergovernmental organizations and non-governmental organizations.

5. For the purposes of this Convention, information on health and safety of humans and the environment shall not be regarded as confidential. Parties that exchange other information pursuant to this Convention shall protect any confidential information as mutually agreed.

Article 10

PUBLIC INFORMATION, AWARENESS AND EDUCATION

1. Each Party shall, within its capabilities, promote and facilitate:

(*a*) Awareness among its policy and decision makers with regard to persistent organic pollutants;

(*b*) Provision to the public of all available information on persistent organic pollutants, taking into account paragraph 5 of article 9;

(*c*) Development and implementation, especially for women, children and the least educated, of educational and public awareness programmes on persistent organic pollutants, as well as on their health and environmental effects and on their alternatives;

(*d*) Public participation in addressing persistent organic pollutants and their health and environmental effects and in developing adequate responses, including opportunities for providing input at the national level regarding implementation of this Convention;

(*e*) Training of workers, scientists, educators and technical and managerial personnel;

(*f*) Development and exchange of educational and public awareness materials at the national and international levels; and

(*g*) Development and implementation of education and training programmes at the national and international levels.

2. Each Party shall, within its capabilities, ensure that the public has access to the public information referred to in paragraph 1 and that the information is kept up to date.

3. Each Party shall, within its capabilities, encourage industry and professional users to promote and facilitate the provision of the information referred to in paragraph 1 at the national level and, as appropriate, subregional, regional and global levels.

4. In providing information on persistent organic pollutants and their alternatives, Parties may use safety data sheets, reports, mass media and other means of communication, and may establish information centres at national and regional levels.

5. Each Party shall give sympathetic consideration to developing mechanisms, such as pollutant release and transfer registers, for the collection and dissemination of information on estimates of the annual quantities of the chemicals listed in annex A, B or C that are released or disposed of.

Article 11

RESEARCH, DEVELOPMENT AND MONITORING

1. The Parties shall, within their capabilities, at the national and international levels, encourage and/or undertake appropriate research, development, monitoring and cooperation pertaining to persistent organic pollutants and, where relevant, to their alternatives and to candidate persistent organic pollutants, including on their:

(*a*) Sources and releases into the environment;

(*b*) Presence, levels and trends in humans and the environment;

(*c*) Environmental transport, fate and transformation;

(*d*) Effects on human health and the environment;

(*e*) Socio-economic and cultural impacts;

(*f*) Release reduction and/or elimination; and

(*g*) Harmonized methodologies for making inventories of generating sources and analytical techniques for the measurement of releases.

2. In undertaking action under paragraph 1, the Parties shall, within their capabilities:

(*a*) Support and further develop, as appropriate, international programmes, networks and organizations aimed at defining, conducting, assessing and financing research, data collection and monitoring, taking into account the need to minimize duplication of effort;

(*b*) Support national and international efforts to strengthen national scientific and technical research capabilities, particularly in developing countries and countries with economies in transition, and to promote access to, and the exchange of, data and analyses;

(*c*) Take into account the concerns and needs, particularly in the field of financial and technical resources, of developing countries and countries with economies in transition and cooperate in improving their capability to participate in the efforts referred to in subparagraphs (*a*) and (*b*);

(*d*) Undertake research work geared towards alleviating the effects of persistent organic pollutants on reproductive health;

(*e*) Make the results of their research, development and monitoring activities referred to in this paragraph accessible to the public on a timely and regular basis; and

(*f*) Encourage and/or undertake cooperation with regard to storage and maintenance of information generated from research, development and monitoring.

Article 12

TECHNICAL ASSISTANCE

1. The Parties recognize that rendering of timely and appropriate technical assistance in response to requests from developing country Parties and Parties with economies in transition is essential to the successful implementation of this Convention.

2. The Parties shall cooperate to provide timely and appropriate technical assistance to developing country Parties and Parties with economies in transition, to assist them, taking into account their particular needs, to develop and strengthen their capacity to implement their obligations under this Convention.

3. In this regard, technical assistance to be provided by developed country Parties, and other Parties in accordance with their capabilities, shall include, as appropriate and as mutually agreed, technical assistance for capacity-building relating to implementation of the obligations under this Convention. Further guidance in this regard shall be provided by the Conference of the Parties.

4. The Parties shall establish, as appropriate, arrangements for the purpose of providing technical assistance and promoting the transfer of technology to de-

veloping country Parties and Parties with economies in transition relating to the implementation of this Convention. These arrangements shall include regional and subregional centres for capacity-building and transfer of technology to assist developing country Parties and Parties with economies in transition to fulfil their obligations under this Convention. Further guidance in this regard shall be provided by the Conference of the Parties.

5. The Parties shall, in the context of this article, take full account of the specific needs and special situation of least developed countries and small island developing States in their actions with regard to technical assistance.

Article 13

FINANCIAL RESOURCES AND MECHANISMS

1. Each Party undertakes to provide, within its capabilities, financial support and incentives in respect of those national activities that are intended to achieve the objective of this Convention in accordance with its national plans, priorities and programmes.

2. The developed country Parties shall provide new and additional financial resources to enable developing country Parties and Parties with economies in transition to meet the agreed full incremental costs of implementing measures which fulfil their obligations under this Convention as agreed between a recipient Party and an entity participating in the mechanism described in paragraph 6. Other Parties may also on a voluntary basis and in accordance with their capabilities provide such financial resources. Contributions from other sources should also be encouraged. The implementation of these commitments shall take into account the need for adequacy, predictability, the timely flow of funds and the importance of burden-sharing among the contributing Parties.

3. Developed country Parties, and other Parties in accordance with their capabilities and in accordance with their national plans, priorities and programmes, may also provide and developing country Parties and Parties with economies in transition avail themselves of financial resources to assist in their implementation of this Convention through other bilateral, regional and multilateral sources or channels.

4. The extent to which the developing country Parties will effectively implement their commitments under this Convention will depend on the effective implementation by developed country Parties of their commitments under this Convention relating to financial resources, technical assistance and technology transfer. The fact that sustainable economic and social development and eradication of poverty are the first and overriding priorities of the developing country Parties will be taken fully into account, giving due consideration to the need for the protection of human health and the environment.

5. The Parties shall take full account of the specific needs and special situation of the least developed countries and the small island developing States in their actions with regard to funding.

6. A mechanism for the provision of adequate and sustainable financial resources to developing country Parties and Parties with economies in transition on a grant or concessional basis to assist in their implementation of the Convention is hereby defined. The mechanism shall function under the authority, as appropriate, and guidance of, and be accountable to the Conference of the Parties for the pur-

poses of this Convention. Its operation shall be entrusted to one or more entities, including existing international entities, as may be decided upon by the Conference of the Parties. The mechanism may also include other entities providing multilateral, regional and bilateral financial and technical assistance. Contributions to the mechanism shall be additional to other financial transfers to developing country Parties and Parties with economies in transition as reflected in, and in accordance with, paragraph 2.

7. Pursuant to the objectives of this Convention and paragraph 6, the Conference of the Parties shall at its first meeting adopt appropriate guidance to be provided to the mechanism and shall agree with the entity or entities participating in the financial mechanism upon arrangements to give effect thereto. The guidance shall address, inter alia:

(*a*) The determination of the policy, strategy and programme priorities, as well as clear and detailed criteria and guidelines regarding eligibility for access to and utilization of financial resources including monitoring and evaluation on a regular basis of such utilization;

(*b*) The provision by the entity or entities of regular reports to the Conference of the Parties on adequacy and sustainability of funding for activities relevant to the implementation of this Convention;

(*c*) The promotion of multiple-source funding approaches, mechanisms and arrangements;

(*d*) The modalities for the determination in a predictable and identifiable manner of the amount of funding necessary and available for the implementation of this Convention, keeping in mind that the phasing out of persistent organic pollutants might require sustained funding, and the conditions under which that amount shall be periodically reviewed; and

(*e*) The modalities for the provision to interested Parties of assistance with needs assessment, information on available sources of funds and on funding patterns in order to facilitate coordination among them.

8. The Conference of the Parties shall review, not later than its second meeting and thereafter on a regular basis, the effectiveness of the mechanism established under this article, its ability to address the changing needs of the developing country Parties and Parties with economies in transition, the criteria and guidance referred to in paragraph 7, the level of funding as well as the effectiveness of the performance of the institutional entities entrusted to operate the financial mechanism. It shall, based on such review, take appropriate action, if necessary, to improve the effectiveness of the mechanism, including by means of recommendations and guidance on measures to ensure adequate and sustainable funding to meet the needs of the Parties.

Article 14

INTERIM FINANCIAL ARRANGEMENTS

The institutional structure of the Global Environment Facility, operated in accordance with the Instrument for the Establishment of the Restructured Global Environment Facility, shall, on an interim basis, be the principal entity entrusted with the operations of the financial mechanism referred to in article 13, for the period between the date of entry into force of this Convention and the first meeting of the Conference of the Parties or until such time as the Conference of the Parties decides

which institutional structure will be designated in accordance with article 13. The institutional structure of the Global Environment Facility should fulfil this function through operational measures related specifically to persistent organic pollutants taking into account that new arrangements for this area may be needed.

Article 15

REPORTING

1. Each Party shall report to the Conference of the Parties on the measures it has taken to implement the provisions of this Convention and on the effectiveness of such measures in meeting the objectives of the Convention.

2. Each Party shall provide to the Secretariat:

(*a*) Statistical data on its total quantities of production, import and export of each of the chemicals listed in annex A and annex B or a reasonable estimate of such data; and

(*b*) To the extent practicable, a list of the States from which it has imported each such substance and the States to which it has exported each such substance.

3. Such reporting shall be at periodic intervals and in a format to be decided by the Conference of the Parties at its first meeting.

Article 16

EFFECTIVENESS EVALUATION

1. Commencing four years after the date of entry into force of this Convention, and periodically thereafter at intervals to be decided by the Conference of the Parties, the Conference shall evaluate the effectiveness of this Convention.

2. In order to facilitate such evaluation, the Conference of the Parties shall, at its first meeting, initiate the establishment of arrangements to provide itself with comparable monitoring data on the presence of the chemicals listed in annexes A, B and C as well as their regional and global environmental transport. These arrangements:

(*a*) Should be implemented by the Parties on a regional basis when appropriate, in accordance with their technical and financial capabilities, using existing monitoring programmes and mechanisms to the extent possible and promoting harmonization of approaches;

(*b*) May be supplemented where necessary, taking into account the differences between regions and their capabilities to implement monitoring activities; and

(*c*) Shall include reports to the Conference of the Parties on the results of the monitoring activities on a regional and global basis at intervals to be specified by the Conference of the Parties.

3. The evaluation described in paragraph 1 shall be conducted on the basis of available scientific, environmental, technical and economic information, including:

(*a*) Reports and other monitoring information provided pursuant to paragraph 2;

(*b*) National reports submitted pursuant to article 15; and

(*c*) Non-compliance information provided pursuant to the procedures established under article 17.

Article 17

NON-COMPLIANCE

The Conference of the Patties shall, as soon as practicable, develop and approve procedures and institutional mechanisms for determining non-compliance with the provisions of this Convention and for the treatment of Parties found to be in non-compliance.

Article 18

SETTLEMENT OF DISPUTES

1. Parties shall settle any dispute between them concerning the interpretation or application of this Convention through negotiation or other peaceful means of their own choice.

2. When ratifying, accepting, approving or acceding to the Convention or at any time thereafter, a Party that is not a regional economic integration organization may declare in a written instrument submitted to the depositary that, with respect to any dispute concerning the interpretation or application of the Convention, it recognizes one or both of the following means of dispute settlement as compulsory in relation to any Party accepting the same obligation:

(*a*) Arbitration in accordance with procedures to be adopted by the Conference of the Parties in an annex as soon as practicable;

(*b*) Submission of the dispute to the International Court of Justice.

3. A Party that is a regional economic integration organization may make a declaration with like effect in relation to arbitration in accordance with the procedure referred to in paragraph 2 (*a*).

4. A declaration made pursuant to paragraph 2 or paragraph 3 shall remain in force until it expires in accordance with its terms or until three months after written notice of its revocation has been deposited with the depositary.

5. The expiry of a declaration, a notice of revocation or a new declaration shall not in any way affect proceedings pending before an arbitral tribunal or the International Court of Justice unless the parties to the dispute otherwise agree.

6. If the parties to a dispute have not accepted the same or any procedure pursuant to paragraph 2, and if they have not been able to settle their dispute within twelve months following notification by one party to another that a dispute exists between them, the dispute shall be submitted to a conciliation commission at the request of any party to the dispute. The conciliation commission shall render a report with recommendations. Additional procedures relating to the conciliation commission shall be included in an annex to be adopted by the Conference of the Parties no later than at its second meeting.

Article 19

CONFERENCE OF THE PARTIES

1. A Conference of the Parties is hereby established.

2. The first meeting of the Conference of the Parties shall be convened by the Executive Director of the United Nations Environment Programme no later than one year after the entry into force of this Convention. Thereafter ordinary meetings of the Conference of the Parties shall be held at regular intervals to be decided by the Conference.

3. Extraordinary meetings of the Conference of the Parties shall be held at such other times as may be deemed necessary by the Conference or at the written request of any Party provided that it is supported by at least one third of the Parties.

4. The Conference of the Parties shall by consensus agree upon and adopt at its first meeting rules of procedure and financial rules for itself and any subsidiary bodies, as well as financial provisions governing the functioning of the Secretariat.

5. The Conference of the Parties shall keep under continuous review and evaluation the implementation of this Convention. It shall perform the functions assigned to it by the Convention and, to this end, shall:

(*a*) Establish, further to the requirements of paragraph 6, such subsidiary bodies as it considers necessary for the implementation of the Convention;

(*b*) Cooperate, where appropriate, with competent international organizations and intergovernmental and non-governmental bodies; and

(*c*) Regularly review all information made available to the Parties pursuant to article 15, including consideration of the effectiveness of paragraph 2 (*b*) (iii) of article 3;

(*d*) Consider and undertake any additional action that may be required for the achievement of the objectives of the Convention.

6. The Conference of the Parties shall, at its first meeting, establish a subsidiary body to be called the Persistent Organic Pollutants Review Committee for the purposes of performing the functions assigned to that Committee by this Convention. In this regard:

(*a*) The members of the Persistent Organic Pollutants Review Committee shall be appointed by the Conference of the Parties. Membership of the Committee shall consist of government-designated experts in chemical assessment or management. The members of the Committee shall be appointed on the basis of equitable geographical distribution;

(*b*) The Conference of the Parties shall decide on the terms of reference organization and operation of the Committee; and

(*c*) The Committee shall make every effort to adopt its recommendations by consensus. If all efforts at consensus have been exhausted, and no consensus reached, such recommendation shall as a last resort be adopted by a two-thirds majority vote of the members present and voting.

7. The Conference of the Parties shall, at its third meeting, evaluate the continued need for the procedure contained in paragraph 2 (*b*) of article 3, including consideration of its effectiveness.

8. The United Nations, its specialized agencies and the International Atomic Energy Agency, as well as any State not party to this Convention, may be represented at meetings of the Conference of the Parties as observers. Any body or agency, whether national or international, governmental or non-governmental, qualified in matters covered by the Convention, and which has informed the Sec-

retariat of its wish to be represented at a meeting of the Conference of the Parties as an observer may be admitted unless at least one third of the Parties present object. The admission and participation of observers shall be subject to the rules of procedure adopted by the Conference of the Parties.

Article 20

SECRETARIAT

1. A Secretariat is hereby established.

2. The functions of the Secretariat shall be:

(*a*) To make arrangements for meetings of the Conference of the Parties and its subsidiary bodies and to provide them with services as required;

(*b*) To facilitate assistance to the Parties, particularly developing country Parties and Parties with economies in transition, on request, in the implementation of this Convention;

(*c*) To ensure the necessary coordination with the secretariats of other relevant international bodies;

(*d*) To prepare and make available to the Parties periodic reports based on information received pursuant to article 15 and other available information;

(*e*) To enter, under the overall guidance of the Conference of the Parties, into such administrative and contractual arrangements as may be required for the effective discharge of its functions; and

(*f*) To perform the other secretariat functions specified in this Convention and such other functions as may be determined by the Conference of the Parties.

3. The secretariat functions for this Convention shall be performed by the Executive Director of the United Nations Environment Programme, unless the Conference of the Parties decides, by a three-fourths majority of the Parties present and voting, to entrust the secretariat functions to one or more other international organizations.

Article 21

AMENDMENTS TO THE CONVENTION

1. Amendments to this Convention may be proposed by any Party.

2. Amendments to this Convention shall be adopted at a meeting of the Conference of the Parties. The text of any proposed amendment shall be communicated to the Parties by the Secretariat at least six months before the meeting at which it is proposed for adoption. The Secretariat shall also communicate proposed amendments to the signatories to this Convention and, for information, to the depositary.

3. The Parties shall make every effort to reach agreement on any proposed amendment to this Convention by consensus. If all efforts at consensus have been exhausted, and no agreement reached, the amendment shall as a last resort be adopted by a three-fourths majority vote of the Parties present and voting.

4. The amendment shall be communicated by the depositary to all Parties for ratification, acceptance or approval.

5. Ratification, acceptance or approval of an amendment shall be notified to the depositary in writing. An amendment adopted in accordance with paragraph 3 shall enter into force for the Parties having accepted it on the ninetieth day after the date of deposit of instruments of ratification, acceptance or approval by at least three fourths of the Parties. Thereafter, the amendment shall enter into force for any other Party on the ninetieth day after the date on which that Party deposits its instrument of ratification, acceptance or approval of the amendment.

Article 22

ADOPTION AND AMENDMENT OF ANNEXES

1. Annexes to this Convention shall form an integral part thereof and, unless expressly provided otherwise, a reference to this Convention constitutes at the same time a reference to any annexes thereto.

2. Any additional annexes shall be restricted to procedural, scientific, technical or administrative matters.

3. The following procedure shall apply to the proposal, adoption and entry into force of additional annexes to this Convention:

(*a*) Additional annexes shall be proposed and adopted according to the procedure laid down in paragraphs 1, 2 and 3 of article 21;

(*b*) Any Party that is unable to accept an additional annex shall so notify the depositary, in writing, within one year from the date of communication by the depositary of the adoption of the additional annex. The depositary shall without delay notify all Parties of any such notification received. A Party may at any time withdraw a previous notification of non-acceptance in respect of any additional annex, and the annex shall thereupon enter into force for that Party subject to subparagraph (*c*); and

(*c*) On the expiry of one year from the date of the communication by the depositary of the adoption of an additional annex, the annex shall enter into force for all Parties that have not submitted a notification in accordance with the provisions of subparagraph (*b*).

4. The proposal, adoption and entry into force of amendments to annex A, B or C shall be subject to the same procedures as for the proposal, adoption and entry into force of additional annexes to this Convention, except that an amendment to annex A, B or C shall not enter into force with respect to any Party that has made a declaration with respect to amendment to those annexes in accordance with paragraph 4 of article 25, in which case any such amendment shall enter into force for such a Party on the ninetieth day after the date of deposit with the depositary of its instrument of ratification, acceptance, approval or accession with respect to such amendment.

5. The following procedure shall apply to the proposal, adoption and entry into force of an amendment to annex D, E or F:

(*a*) Amendments shall be proposed according to the procedure in paragraphs 1 and 2 of article 21;

(*b*) The Parties shall take decisions on an amendment to annex D, E or F by consensus; and

(*c*) A decision to amend annex D, E or F shall forthwith be communicated to the Parties by the depositary. The amendment shall enter into force for all Parties on a date to be specified in the decision.

6. If an additional annex or an amendment to an annex is related to an amendment to this Convention, the additional annex or amendment shall not enter into force until such time as the amendment to the Convention enters into force.

Article 23

RIGHT TO VOTE

1. Each Party to this Convention shall have one vote, except as provided for in paragraph 2.

2. A regional economic integration organization, on matters within its competence, shall exercise its right to vote with a number of votes equal to the number of its member States that are Parties to this Convention. Such an organization shall not exercise its right to vote if any of its member States exercises its right to vote, and vice versa.

Article 24

SIGNATURE

This Convention shall be open for signature at Stockholm by all States and regional economic integration organizations on 23 May 2001, and at the United Nations Headquarters in New York from 24 May 2001 to 22 May 2002.

Article 25

RATIFICATION, ACCEPTANCE, APPROVAL OR ACCESSION

1. This Convention shall be subject to ratification, acceptance or approval by States and by regional economic integration organizations. It shall be open for accession by States and by regional economic integration organizations from the day after the date on which the Convention is closed for signature. Instruments of ratification, acceptance, approval or accession shall be deposited with the depositary.

2. Any regional economic integration organization that becomes a Party to this Convention without any of its member States being a Party shall be bound by all the obligations under the Convention. In the case of such organizations, one or more of whose member States is a Party to this Convention, the organization and its member States shall decide on their respective responsibilities for the performance of their obligations under the Convention. In such cases, the organization and the member States shall not be entitled to exercise rights under the Convention concurrently.

3. In its instrument of ratification, acceptance, approval or accession, a regional economic integration organization shall declare the extent of its competence in respect of the matters governed by this Convention. Any such organization shall also inform the depositary, who shall in turn inform the Parties, of any relevant modification in the extent of its competence.

4. In its instrument of ratification, acceptance, approval or accession, any Party may declare that, with respect to it, any amendment to annex A, B or C shall

enter into force only upon the deposit of its instrument of ratification, acceptance, approval or accession with respect thereto.

Article 26

ENTRY INTO FORCE

1. This Convention shall enter into force on the ninetieth day after the date of deposit of the fiftieth instrument of ratification, acceptance, approval or accession.

2. For each State or regional economic integration organization that ratifies, accepts or approves this Convention or accedes thereto after the deposit of the fiftieth instrument of ratification, acceptance, approval or accession, the Convention shall enter into force on the ninetieth day after the date of deposit by such State or regional economic integration organization of its instrument of ratification, acceptance, approval or accession.

3. For the purpose of paragraphs 1 and 2, any instrument deposited by a regional economic integration organization shall not be counted as additional to those deposited by States members of that organization.

Article 27

RESERVATIONS

No reservations may be made to this Convention.

Article 28

WITHDRAWAL

1. At any time after three years from the date on which this Convention has entered into force for a Party, that Party may withdraw from the Convention by giving written notification to the depositary.

2. Any such withdrawal shall take effect upon the expiry of one year from the date of receipt by the depositary of the notification of withdrawal or on such later date as may be specified in the notification of withdrawal.

Article 29

DEPOSITARY

The Secretary-General of the United Nations shall be the depositary of this Convention.

Article 30

AUTHENTIC TEXTS

The original of this Convention, of which the Arabic, Chinese, English, French, Russian and Spanish texts are equally authentic, shall be deposited with the Secretary-General of the United Nations.

IN WITNESS WHEREOF the undersigned, being duly authorized to that effect, have signed this Convention.

DONE at Stockholm on this twenty-second day of May, two thousand and one.

ANNEX A

Elimination

Part I

Chemical	*Activity*	*Specific exemption*
Aldrin*	Production	None
CAS No. 309-00-2	Use	Local ectoparasiticide
		Insecticide
Chlordane*	Production	As allowed for the Parties listed in the Register
CAS No. 57-74-9	Use	Local ectoparasiticide
		Insecticide
		Termiticide
		Termiticide in buildings and dams
		Termiticide in roads
		Additive in plywood adhesives
Dieldrin*	Production	None
CAS No. 60-57-1	Use	In agricultural operations
Endrin*	Production	None
CAS No. 72-20-8	Use	None
Heptachlor*	Production	None
CAS No. 76-44-8	Use	Termiticide
		Termiticide in structures of houses
		Termiticide (subterranean)
		Wood treatment
		In use in underground cable boxes
Hexachlorobenzene	Production	As allowed for the Parties listed in the Register
CAS No. 118-74-1	Use	Intermediate
		Solvent in pesticide
		Closed system site limited intermediate
Mirex*	Production	As allowed for the Parties listed in the Register
CAS No. 2385-85-5	Use	Termiticide
Toxaphene*	Production	None
CAS No. 8001-35-2	Use	None
Polychlorinated biphenyls (PCB)*	Production	None
	Use	Articles in use in accordance with the provisions of part II of this annex

(i) Except as otherwise specified in this Convention, quantities of a chemical occurring as unintentional trace contaminants in products and articles shall not be considered to be listed in this annex.

(ii) This note shall not be considered as a production and use specific exemption for purposes of paragraph 2 of article 3. Quantities of a chemical occurring as constituents of articles manufactured or already in use before or on the date of entry into force of the relevant obligation with respect to that chemical, shall not be considered as listed in this annex, provided that a Party has notified the Secretariat that a particular type of article remains in use within that Party. The Secretariat shall make such notifications publicly available.

(iii) This note, which does not apply to a chemical that has an asterisk following its name in the Chemical column in part I of this annex, shall not be considered as a production and use specific exemption for purposes of paragraph 2 of article 3. Given that no significant quantities of the chemical are expected to reach humans and the environment during the production and use of a closed-system site-limited intermediate, a Party, upon notification to the Secretariat, may allow the production and use of quantities of a chemical listed in this annex as a closed-system site-limited intermediate that is chemically transformed in the manufacture of other chemicals that, taking into consideration the criteria in paragraph 1 of annex D, do not exhibit the characteristics of persistent organic pollutants. This notification shall include information on total production and use of such chemical or a reasonable estimate of such information and information regarding the nature of the closed-system site-limited process including the amount of any non-transformed and unintentional trace contamination of the persistent organic pollutant-starting material in the final product. This procedure applies except as otherwise specified in this annex. The Secretariat shall make such notifications available to the Conference of the Parties and to the public. Such production or use shall not be considered a production or use specific exemption. Such production and use shall cease after a ten-year period, unless the Party concerned submits a new notification to the Secretariat, in which case the period will be extended for an additional ten years unless the Conference of the Parties, after a review of the production and use, decides otherwise. The notification procedure can be repeated.

(iv) All the specific exemptions in this annex may be exercised by Parties that have registered exemptions in respect of them in accordance with article 4, with the exception of the use of polychlorinated biphenyls in articles in use in accordance with the provisions of part II of this annex, which may be exercised by all Parties.

Part II

Polychlorinated biphenyls

Each Party shall:

(*a*) With regard to the elimination of the use of polychlorinated biphenyls in equipment (e.g. transformers, capacitors or other receptacles containing liquid stocks) by 2025, subject to review by the Conference of the Parties, take action in accordance with the following priorities:

(i) Make determined efforts to identify, label and remove from use equipment containing greater than 10 per cent polychlorinated biphenyls and volumes greater than 5 litres;

(ii) Make determined efforts to identify, label and remove from use equipment containing greater than 0.05 per cent polychlorinated biphenyls and volumes greater than 5 litres;

(iii) Endeavour to identify and remove from use equipment containing greater than 0.005 per cent polychlorinated biphenyls and volumes greater than 0.05 litres;

(*b*) Consistent with the priorities in subparagraph (*a*), promote the following measures to reduce exposures and risk to control the use of polychlorinated biphenyls:

(i) Use only in intact and non-leaking equipment and only in areas where the risk from environmental release can be minimized and quickly remedied;

(ii) Not use in equipment in areas associated with the production or processing of food or feed;

(iii) When used in populated areas, including schools and hospitals, all reasonable measures to protect from electrical failure which could result in a fire, and regular inspection of equipment for leaks;

(*c*) Notwithstanding paragraph 2 of article 3, ensure that equipment containing polychlorinated biphenyls, as described in subparagraph (*a*), shall not be exported or imported except for the purpose of environmentally sound waste management;

(*d*) Except for maintenance and servicing operations, not allow recovery for the purpose of reuse in other equipment of liquids with polychlorinated biphenyls content above 0.005 per cent;

(*e*) Make determined efforts designed to lead to environmentally sound waste management of liquids containing polychlorinated biphenyls and equipment contaminated with polychlorinated biphenyls having a polychlorinated biphenyls content above 0.005 per cent, in accordance with paragraph 1 of article 6, as soon as possible but no later than 2028, subject to review by the Conference of the Parties;

(*f*) In lieu of note (ii) in part I of this annex, endeavour to identify other articles containing more than 0.005 per cent polychlorinated biphenyls (e.g. cable-sheaths, cured caulk and painted objects) and manage them in accordance with paragraph 1 of article 6;

(*g*) Provide a report every five years on progress in eliminating polychlorinated biphenyls and submit it to the Conference of the Parties pursuant to article 15;

(*h*) The reports described in subparagraph (*g*) shall, as appropriate, be considered by the Conference of the Parties in its reviews relating to polychlorinated biphenyls. The Conference of the Parties shall review progress towards elimination of polychlorinated biphenyls at five-year intervals or other period, as appropriate, taking into account such reports.

ANNEX B

Restriction

Part I

Chemical	*Activity*	*Acceptable purpose or specific exemption*
DDT (1,1,1-trichloro-2,2-bis (4-chlorophenyl)ethane) CAS No. 50-29-3	Production	Acceptable purpose: Disease vector control use in accordance with part II of this annex Specific exemption: Intermediate in production of dicofol Intermediate
	Use	Acceptable purpose: Disease vector control in accordance with part II of this annex Specific exemption: Production of dicofol Intermediate

(i) Except as otherwise specified in this Convention, quantities of a chemical occurring as unintentional trace contaminants in products and articles shall not be considered to be listed in this annex.

(ii) This note shall not be considered as a production and use acceptable purpose or specific exemption for purposes of paragraph 2 of article 3. Quantities of a chemical occurring as constituents of articles manufactured or already in use before or on the date of entry into force of the relevant obligation with respect to that chemical, shall not be considered as listed in this annex, provided that a Party has notified the Secretariat that a particular type of article remains in use within that Party. The Secretariat shall make such notifications publicly available.

(iii) This note shall not be considered as a production and use specific exemption for purposes of paragraph 2 of article 3. Given that no significant quantities of the chemical are expected to reach humans and the environment during the production and use of a closed-system site-limited intermediate, a Party, upon notification to the Secretariat, may allow the production and use of quantities of a chemical listed in this annex as a closed-system site-limited intermediate that is chemically transformed in the manufacture of other chemicals that, taking into consideration the criteria in paragraph 1 of annex D, do not exhibit the characteristics of persistent organic pollutants. This notification shall include information on total production and use of such chemical or a reasonable estimate of such information and information regarding the nature of the closed-system site-limited process, including the amount of any non-transformed and unintentional trace contamination of the persistent organic pollutant-starting material in the final product. This procedure applies except as otherwise specified in this annex. The Secretariat shall make such notifications available to the Conference of the Parties and to the public. Such production or use shall not be considered a production or use specific exemption. Such production and use shall cease after a ten-year period, unless the Party concerned submits a new notification to the Secretariat, in which case the period will be extended for an additional ten years unless the Conference of the Parties, after a review of the production and use, decides otherwise. The notification procedure can be repeated.

(iv) All the specific exemptions in this annex may be exercised by Parties that have registered in respect of them in accordance with article 4.

Part II

DDT (1,1,1-trichloro-2,2-bis(4-chlorophenyl)ethane)

1. The production and use of DDT shall be eliminated except for Parties that have notified the Secretariat of their intention to produce and/or use it. A DDT Register is hereby established and shall be available to the public. The Secretariat shall maintain the DDT Register.

2. Each Party that produces and/or uses DDT shall restrict such production and/or use for disease vector control in accordance with the World Health Organization recommendations and guidelines on the use of DDT and when locally safe, effective and affordable alternatives are not available to the Party in question.

3. In the event that a Party not listed in the DDT Register determines that it requires DDT for disease vector control, it shall notify the Secretariat as soon as possible in order to have its name added forthwith to the DDT Register. It shall at the same time notify the World Health Organization.

4. Every three years, each Party that uses DDT shall provide to the Secretariat and the World Health Organization information on the amount used, the conditions of such use and its relevance to that Party's disease management strategy, in a format to be decided by the Conference of the Parties in consultation with the World Health Organization.

5. With the goal of reducing and ultimately eliminating the use of DDT, the Conference of the Parties shall encourage:

(*a*) Each Party using DDT to develop and implement an action plan as part of the implementation plan specified in article 7. That action plan shall include:

(i) Development of regulatory and other mechanisms to ensure that DDT use is restricted to disease vector control;

(ii) Implementation of suitable alternative products, methods and strategies, including resistance management strategies to ensure the continuing effectiveness of these alternatives;

(iii) Measures to strengthen health care and to reduce the incidence of the disease;

(*b*) The Parties, within their capabilities, to promote research and development of safe alternative chemical and non-chemical products, methods and strategies for Parties using DDT, relevant to the conditions of those countries and with the goal of decreasing the human and economic burden of disease. Factors to be promoted when considering alternatives or combinations of alternatives shall include the human health risks and environmental implications of such alternatives. Viable alternatives to DDT shall pose less risk to human health and the environment, be suitable for disease control based on conditions in the Parties in question and be supported with monitoring data.

6. Commencing at its first meeting, and at least every three years thereafter, the Conference of the Parties shall, in consultation with the World Health Organization, evaluate the continued need for DDT for disease vector control on the basis of available scientific, technical, environmental and economic information, including:

(*a*) The production and use of DDT and the conditions set out in paragraph 2;

(*b*) The availability, suitability and implementation of the alternatives to DDT; and

(*c*) Progress in strengthening the capacity of countries to transfer safely to reliance on such alternatives.

7. A Party may, at any time, withdraw its name from the DDT Registry upon written notification to the Secretariat. The withdrawal shall take effect on the date specified in the notification.

ANNEX C

Unintentional production

Part I. Persistent organic pollutants subject to the requirements of article 5

This annex applies to the following persistent organic pollutants when formed and released unintentionally from anthropogenic sources:

Chemical
Polychlorinated dibenzo-p-dioxins and dibenzofurans (PCDD/PCDF)
Hexachlorobenzene (HCB) (CAS No. 118-74-1)
Polychlorinated biphenyls (PCB)

Part II. Source categories

Polychlorinated dibenzo-p-dioxins and dibenzofurans, hexachlorobenzene and polychlorinated biphenyls are unintentionally formed and released from thermal processes involving organic matter and chlorine as a result of incomplete combustion or chemical reactions. The following industrial source categories have the potential for comparatively high formation and release of these chemicals to the environment:

(*a*) Waste incinerators, including co-incinerators of municipal, hazardous or medical waste or of sewage sludge;

(*b*) Cement kilns firing hazardous waste;

(*c*) Production of pulp using elemental chlorine or chemicals generating elemental chlorine for bleaching;

(*d*) The following thermal processes in the metallurgical industry:

(i) Secondary copper production;

(ii) Sinter plants in the iron and steel industry;

(iii) Secondary aluminium production;

(iv) Secondary zinc production.

Part III. Source categories

Polychlorinated dibenzo-p-dioxins and dibenzofurans, hexachlorobenzene and polychlorinated biphenyls may also be unintentionally formed and released from the following source categories, including:

(*a*) Open burning of waste, including burning of landfill sites;

(*b*) Thermal processes in the metallurgical industry not mentioned in part II;

(*c*) Residential combustion sources;

(*d*) Fossil fuel-fired utility and industrial boilers;

(*e*) Firing installations for wood and other biomass fuels;

(*f*) Specific chemical production processes releasing unintentionally formed persistent organic pollutants, especially production of chlorophenols and chloranil;

(*g*) Crematoria;

(*h*) Motor vehicles, particularly those burning leaded gasoline;

(*i*) Destruction of animal carcasses;

(*j*) Textile and leather dyeing (with chloranil) and finishing (with alkaline extraction);

(*k*) Shredder plants for the treatment of end of life vehicles;

(*l*) Smouldering of copper cables;

(*m*) Waste oil refineries.

Part IV. Definitions

1. For the purposes of this annex:

(*a*) "Polychlorinated biphenyls" means aromatic compounds formed in such a manner that the hydrogen atoms on the biphenyl molecule (two benzene rings bonded together by a single carbon-carbon bond) may be replaced by up to ten chlorine atoms; and

(*b*) "Polychlorinated dibenzo-p-dioxins" and "polychlorinated dibenzofurans" are tricyclic, aromatic compounds formed by two benzene rings connected by two oxygen atoms in polychlorinated dibenzo-p-dioxins and by one oxygen atom and one carbon-carbon bond in polychlorinated dibenzofurans and the hydrogen atoms of which may be replaced by up to eight chlorine atoms.

2. In this annex, the toxicity of polychlorinated dibenzo-p-dioxins and dibenzofurans is expressed using the concept of toxic equivalency which measures the relative dioxin-like toxic activity of different congeners of polychlorinated dibenzo-p-dioxins and dibenzofurans and coplanar polychlorinated biphenyls in comparison to 2,3,7,8-tetrachlorodibenzo-p-dioxin. The toxic equivalent factor values to be used for the purposes of this Convention shall be consistent with accepted international standards, commencing with the World Health Organization 1998 mammalian toxic equivalent factor values for polychlorinated dibenzo-p-dioxins and dibenzofurans and coplanar polychlorinated biphenyls. Concentrations are expressed in toxic equivalents.

Part V. General guidance on best available techniques and best environmental practices

This part provides general guidance to Parties on preventing or reducing releases of the chemicals listed in part I.

A. General prevention measures relating to both best available techniques and best environmental practices

Priority should be given to the consideration of approaches to prevent the formation and release of the chemicals listed in part I. Useful measures could include:

(*a*) The use of low-waste technology;

(*b*) The use of less hazardous substances;

(*c*) The promotion of the recovery and recycling of waste and of substances generated and used in a process;

(*d*) Replacement of feed materials which are persistent organic pollutants or where there is a direct link between the materials and releases of persistent organic pollutants from the source;

(*e*) Good housekeeping and preventive maintenance programmes;

(*f*) Improvements in waste management with the aim of the cessation of open and other uncontrolled burning of wastes, including the burning of landfill sites. When considering proposals to construct new waste disposal facilities, consideration should be given to alternatives such as activities to minimize the generation of municipal and medical waste, including resource recovery, reuse, recycling, waste separation and promoting products that generate less waste. Under this approach, public health concerns should be carefully considered;

(*g*) Minimization of these chemicals as contaminants in products;

(*h*) Avoiding elemental chlorine or chemicals generating elemental chlorine for bleaching.

B. Best available techniques

The concept of best available techniques is not aimed at the prescription of any specific technique or technology, but at taking into account the technical characteristics of the installation concerned, its geographical location and the local environmental conditions. Appropriate control techniques to reduce releases of the chemicals listed in part I are in general the same. In determining best available techniques, special consideration should be given, generally or in specific cases, to the following factors, bearing in mind the likely costs and benefits of a measure and consideration of precaution and prevention:

(*a*) General considerations:

(i) The nature, effects and mass of the releases concerned: techniques may vary depending on source size;

(ii) The commissioning dates for new or existing installations;

(iii) The time needed to introduce the best available technique;

(iv) The consumption and nature of raw materials used in the process and its energy efficiency;

(v) The need to prevent or reduce to a minimum the overall impact of the releases to the environment and the risks to it;

(vi) The need to prevent accidents and to minimize their consequences for the environment;

(vii) The need to ensure occupational health and safety at workplaces;

(viii) Comparable processes, facilities or methods of operation which have been tried with success on an industrial scale;

(ix) Technological advances and changes in scientific knowledge and understanding;

(*b*) General release reduction measures: When considering proposals to construct new facilities or significantly modify existing facilities using processes that release chemicals listed in this annex, priority consideration should be given to alternative processes, techniques or practices that have similar usefulness but which avoid the formation and release of such chemicals. In cases where such facilities will be constructed or significantly modified, in addition to the prevention measures outlined in section A of part V, the following reduction measures could also be considered in determining best available techniques:

(i) Use of improved methods for flue-gas cleaning such as thermal or catalytic oxidation, dust precipitation or adsorption;

(ii) Treatment of residuals, wastewater, wastes and sewage sludge by, for example, thermal treatment or rendering them inert or chemical processes that detoxify them;

(iii) Process changes that lead to the reduction or elimination of releases, such as moving to closed systems;

(iv) Modification of process designs to improve combustion and prevent formation of the chemicals listed in this annex, through the control of parameters such as incineration temperature or residence time.

C. Best environmental practices

The Conference of the Parties may develop guidance with regard to best environmental practices.

ANNEX D

Information requirements and screening criteria

1. A Party submitting a proposal to list a chemical in annexes A, B and/or C shall identify the chemical in the manner described in subparagraph (*a*) and provide the information on the chemical, and its transformation products where relevant, relating to the screening criteria set out in subparagraphs (*b*) to (*e*):

(*a*) *Chemical identity*:

(i) Names, including trade name or names, commercial name or names and synonyms, Chemical Abstracts Service (CAS) Registry number, International Union of Pure and Applied Chemistry (IUPAC) name; and

(ii) Structure, including specification of isomers, where applicable, and the structure of the chemical class;

(*b*) *Persistence*:

(i) Evidence that the half-life of the chemical in water is greater than two months or that its half-life in soil is greater than six months or that its half-life in sediment is greater than six months; or

(ii) Evidence that the chemical is otherwise sufficiently persistent to justify its consideration within the scope of this Convention;

(*c*) *Bio-accumulation*:

(i) Evidence that the bio-concentration factor or bio-accumulation factor in aquatic species for the chemical is greater than 5,000 or, in the absence of such data, that the log Kow is greater than 5;

(ii) Evidence that a chemical presents other reasons for concern, such as high bio-accumulation in other species, high toxicity or ecotoxicity; or

(iii) Monitoring data in biota indicating that the bio-accumulation potential of the chemical is sufficient to justify its consideration within the scope of this Convention;

(*d*) *Potential for long-range environmental transport*:

(i) Measured levels of the chemical in locations distant from the sources of its release that are of potential concern;

(ii) Monitoring data showing that long-range environmental transport of the chemical, with the potential for transfer to a receiving environment, may have occurred via air, water or migratory species; or

(iii) Environmental fate properties and/or model results that demonstrate that the chemical has a potential for long-range environmental transport through air, water or migratory species, with the potential for transfer to a receiving environment in locations distant from the sources of its release. For a chemical that migrates significantly through the air, its half-life in air should be greater than two days; and

(*e*) *Adverse effects*:

(i) Evidence of adverse effects to human health or to the environment that justifies consideration of the chemical within the scope of this Convention; or

(ii) Toxicity or ecotoxicity data that indicate the potential for damage to human health or to the environment.

2. The proposing Party shall provide a statement of the reasons for concern including, where possible, a comparison of toxicity or ecotoxicity data with detected or predicted levels of a chemical resulting or anticipated from its long-range environmental transport, and a short statement indicating the need for global control.

3. The proposing Party shall, to the extent possible and taking into account its capabilities, provide additional information to support the review of the proposal referred to in paragraph 6 of article 8. In developing such a proposal, a Party may draw on technical expertise from any source.

ANNEX E

Information requirements for the risk profile

The purpose of the review is to evaluate whether the chemical is likely, as a result of its long-range environmental transport, to lead to significant adverse human health and/or environmental effects, such that global action is warranted. For this purpose, a risk profile shall be developed that further elaborates on, and evaluates, the information referred to in annex D and includes, as far as possible, the following types of information:

(*a*) Sources, including as appropriate:

(i) Production data, including quantity and location;

(ii) Uses; and

(iii) Releases, such as discharges, losses and emissions;

(*b*) Hazard assessment for the endpoint or endpoints of concern, including a consideration of toxicological interactions involving multiple chemicals;

(*c*) Environmental fate, including data and information on the chemical and physical properties of a chemical as well as its persistence and how they are linked to its environmental transport, transfer within and between environmental compartments, degradation and transformation to other chemicals. A determination of the bio-concentration factor or bio-accumulation factor, based on measured values, shall be available, except when monitoring data are judged to meet this need;

(*d*) Monitoring data;

(*e*) Exposure in local areas and, in particular, as a result of long-range environmental transport, and including information regarding bio-availability;

(*f*) National and international risk evaluations, assessments or profiles and labelling information and hazard classifications, as available; and

(*g*) Status of the chemical under international conventions.

ANNEX F

Information on socio-economic considerations

An evaluation should be undertaken regarding possible control measures for chemicals under consideration for inclusion in this Convention, encompassing the full range of options, including management and elimination. For this purpose, relevant information should be provided relating to socio-economic considerations associated with possible control measures to enable a decision to be taken by the Conference of the Parties. Such information should reflect due regard for the differing capabilities and conditions among the Parties and should include consideration of the following indicative list of items:

(*a*) Efficacy and efficiency of possible control measures in meeting risk reduction goals:

(i) Technical feasibility; and

(ii) Costs, including environmental and health costs;

(*b*) Alternatives (products and processes):

(i) Technical feasibility;

(ii) Costs, including environmental and health costs;

(iii) Efficacy;

(iv) Risk;

(v) Availability; and

(vi) Accessibility;

(*c*) Positive and/or negative impacts on society of implementing possible control measures:

(i) Health, including public, environmental and occupational health;

(ii) Agriculture, including aquaculture and forestry;

(iii) Biota (biodiversity);

(iv) Economic aspects;

(v) Movement towards sustainable development; and

(vi) Social costs;

(*d*) Waste and disposal implications (in particular, obsolete stocks of pesticides and clean-up of contaminated sites):

(i) Technical feasibility; and

(ii) Cost;

(*e*) Access to information and public education;

(*f*) Status of control and monitoring capacity; and

(*g*) Any national or regional control actions taken, including information on alternatives, and other relevant risk management information.

2. PROTOCOL AGAINST THE ILLICIT MANUFACTURING OF AND TRAFFICKING IN FIREARMS, THEIR PARTS AND COMPONENTS AND AMMUNITION, SUPPLEMENTING THE UNITED NATIONS CONVENTION AGAINST TRANSNATIONAL ORGANIZED CRIME. DONE AT NEW YORK ON 31 MAY 2001[2]

Protocol against the Illicit Manufacturing of and Trafficking in Firearms, Their Parts and Components and Ammunition, supplementing the United Nations Convention against Transnational Organized Crime

PREAMBLE

The States Parties to this Protocol,

Aware of the urgent need to prevent, combat and eradicate the illicit manufacturing of and trafficking in firearms, their parts and components and ammunition, owing to the harmful effects of those activities on the security of each State, region and the world as a whole, endangering the well-being of peoples, their social and economic development and their right to live in peace,

Convinced, therefore, of the necessity for all States to take all appropriate measures to this end, including international cooperation and other measures at the regional and global levels,

Recalling General Assembly resolution 53/111 of 9 December 1998, in which the Assembly decided to establish an open-ended intergovernmental ad hoc committee for the purpose of elaborating a comprehensive international convention against transnational organized crime and of discussing the elaboration of, inter alia, an international instrument combating the illicit manufacturing of and trafficking in firearms, their parts and components and ammunition,

Bearing in mind the principle of equal rights and self-determination of peoples, as enshrined in the Charter of the United Nations and the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations,[3]

Convinced that supplementing the United Nations Convention against Transnational Organized Crime with an international instrument against the illicit manufacturing of and trafficking in firearms, their parts and components and ammunition will be useful in preventing and combating those crimes,

Have agreed as follows:

I. GENERAL PROVISIONS

Article 1

RELATION WITH THE UNITED NATIONS CONVENTION AGAINST TRANSNATIONAL ORGANIZED CRIME

1. This Protocol supplements the United Nations Convention against Transnational Organized Crime. It shall be interpreted together with the Convention.

2. The provisions of the Convention shall apply, mutatis mutandis, to this Protocol unless otherwise provided herein.

3. The offences established in accordance with article 5 of this Protocol shall be regarded as offences established in accordance with the Convention.

Article 2

STATEMENT OF PURPOSE

The purpose of this Protocol is to promote, facilitate and strengthen cooperation among States Parties in order to prevent, combat and eradicate the illicit manufacturing of and trafficking in firearms, their parts and components and ammunition.

Article 3

USE OF TERMS

For the purposes of this Protocol:

(*a*) "Firearm" shall mean any portable barrelled weapon that expels, is designed to expel or may be readily converted to expel a shot, bullet or projectile by the action of an explosive, excluding antique firearms or their replicas. Antique firearms and their replicas shall be defined in accordance with domestic law. In no case, however, shall antique firearms include firearms manufactured after 1899;

(*b*) "Parts and components" shall mean any element or replacement element specifically designed for a firearm and essential to its operation, including a barrel, frame or receiver, slide or cylinder, bolt or breech block, and any device designed or adapted to diminish the sound caused by firing a firearm;

(*c*) "Ammunition" shall mean the complete round or its components, including cartridge cases, primers, propellant powder, bullets or projectiles, that are used in a firearm, provided that those components are themselves subject to authorization in the respective State Party;

(*d*) "Illicit manufacturing" shall mean the manufacturing or assembly of firearms, their parts and components or ammunition:

(i) From parts and components illicitly trafficked;

(ii) Without a licence or authorization from a competent authority of the State Party where the manufacture or assembly takes place; or

(iii) Without marking the firearms at the time of manufacture, in accordance with article 8 of this Protocol;

Licensing or authorization of the manufacture of parts and components shall be in accordance with domestic law;

(*e*) "Illicit trafficking" shall mean the import, export, acquisition, sale, delivery, movement or transfer of firearms, their parts and components and ammunition from or across the territory of one State Party to that of another State Party if any one of the States Parties concerned does not authorize it in accordance with the terms of this Protocol or if the firearms are not marked in accordance with article 8 of this Protocol;

(*f*) "Tracing" shall mean the systematic tracking of firearms and, where possible, their parts and components and ammunition from manufacturer to purchaser for the purpose of assisting the competent authorities of States Parties in detecting, investigating and analysing illicit manufacturing and illicit trafficking.

Article 4

SCOPE OF APPLICATION

1. This Protocol shall apply, except as otherwise stated herein, to the prevention of illicit manufacturing of and trafficking in firearms, their parts and components and ammunition and to the investigation and prosecution of offences established in accordance with article 5 of this Protocol where those offences are transnational in nature and involve an organized criminal group.

2. This Protocol shall not apply to State-to-State transactions or to State transfers in cases where the application of the Protocol would prejudice the right of a State Party to take action in the interest of national security consistent with the Charter of the United Nations.

Article 5

CRIMINALIZATION

1. Each State Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences the following conduct, when committed intentionally:

(*a*) Illicit manufacturing of firearms, their parts and components and ammunition;

(*b*) Illicit trafficking in firearms, their parts and components and ammunition;

(*c*) Falsifying or illicitly obliterating, removing or altering the marking(s) on firearms required by article 8 of this Protocol.

2. Each State Party shall also adopt such legislative and other measures as may be necessary to establish as criminal offences the following conduct:

(*a*) Subject to the basic concepts of its legal system, attempting to commit or participating as an accomplice in an offence established in accordance with paragraph 1 of this article; and

(*b*) Organizing, directing, aiding, abetting, facilitating or counselling the commission of an offence established in accordance with paragraph 1 of this article.

Article 6

CONFISCATION, SEIZURE AND DISPOSAL

1. Without prejudice to article 12 of the Convention, States Parties shall adopt, to the greatest extent possible within their domestic legal systems, such measures as may be necessary to enable confiscation of firearms, their parts and components and ammunition that have been illicitly manufactured or trafficked.

2. States Parties shall adopt, within their domestic legal systems, such measures as may be necessary to prevent illicitly manufactured and trafficked firearms, parts and components and ammunition from falling into the hands of unauthorized persons by seizing and destroying such firearms, their parts and components and ammunition unless other disposal has been officially authorized, provided that the firearms have been marked and the methods of disposal of those firearms and ammunition have been recorded.

II. PREVENTION

Article 7

RECORD-KEEPING

Each State Party shall ensure the maintenance, for not less than ten years, of information in relation to firearms and, where appropriate and feasible, their parts and components and ammunition that is necessary to trace and identify those firearms and, where appropriate and feasible, their parts and components and ammunition which are illicitly manufactured or trafficked and to prevent and detect such activities. Such information shall include:

(*a*) The appropriate markings required by article 8 of this Protocol;

(*b*) In cases involving international transactions in firearms, their parts and components and ammunition, the issuance and expiration dates of the appropriate licences or authorizations, the country of export, the country of import, the transit countries, where appropriate, and the final recipient and the description and quantity of the articles.

Article 8

MARKING OF FIREARMS

1. For the purpose of identifying and tracing each firearm, States Parties shall:

(*a*) At the time of manufacture of each firearm, either require unique marking providing the name of the manufacturer, the country or place of manufacture and the serial number or maintain any alternative unique user-friendly marking with simple geometric symbols in combination with a numeric and/or alphanumeric code, permitting ready identification by all States of the country of manufacture;

(*b*) Require appropriate simple marking on each imported firearm, permitting identification of the country of import and, where possible, the year of import and enabling the competent authorities of that country to trace the firearm, and a unique marking, if the firearm does not bear such a marking. The requirements of this subparagraph need not be applied to temporary imports of firearms for verifiable lawful purposes;

(*c*) Ensure, at the time of transfer of a firearm from government stocks to permanent civilian use, the appropriate unique marking permitting identification by all States Parties of the transferring country.

2. States Parties shall encourage the firearms manufacturing industry to develop measures against the removal or alteration of markings.

Article 9

DEACTIVATION OF FIREARMS

A State Party that does not recognize a deactivated firearm as a firearm in accordance with its domestic law shall take the necessary measures, including the establishment of specific offences if appropriate, to prevent the illicit reactivation of deactivated firearms, consistent with the following general principles of deactivation:

(*a*) All essential parts of a deactivated firearm are to be rendered permanently inoperable and incapable of removal, replacement or modification in a manner that would permit the firearm to be reactivated in any way;

(*b*) Arrangements are to be made for deactivation measures to be verified, where appropriate, by a competent authority to ensure that the modifications made to a firearm render it permanently inoperable;

(*c*) Verification by a competent authority is to include a certificate or record attesting to the deactivation of the firearm or a clearly visible mark to that effect stamped on the firearm.

Article 10

GENERAL REQUIREMENTS FOR EXPORT, IMPORT AND TRANSIT LICENSING OR AUTHORIZATION SYSTEMS

1. Each State Party shall establish or maintain an effective system of export and import licensing or authorization, as well as of measures on international transit, for the transfer of firearms, their parts and components and ammunition.

2. Before issuing export licences or authorizations for shipments of firearms, their parts and components and ammunition, each State Party shall verify:

(*a*) That the importing States have issued import licences or authorizations; and

(*b*) That, without prejudice to bilateral or multilateral agreements or arrangements favouring landlocked States, the transit States have, at a minimum, given notice in writing, prior to shipment, that they have no objection to the transit.

3. The export and import licence or authorization and accompanying documentation together shall contain information that, at a minimum, shall include the place and the date of issuance, the date of expiration, the country of export, the country of import, the final recipient, a description and the quantity of the firearms, their parts and components and ammunition and, whenever there is transit, the countries of transit. The information contained in the import licence must be provided in advance to the transit States.

4. The importing State Party shall, upon request, inform the exporting State Party of the receipt of the dispatched shipment of firearms, their parts and components or ammunition.

5. Each State Party shall, within available means, take such measures as may be necessary to ensure that licensing or authorization procedures are secure and that the authenticity of licensing or authorization documents can be verified or validated.

6. States Parties may adopt simplified procedures for the temporary import and export and the transit of firearms, their parts and components and ammunition for verifiable lawful purposes such as hunting, sport shooting, evaluation, exhibitions or repairs.

Article 11

SECURITY AND PREVENTIVE MEASURES

In an effort to detect, prevent and eliminate the theft, loss or diversion of, as well as the illicit manufacturing of and trafficking in, firearms, their parts and components and ammunition, each State Party shall take appropriate measures:

(*a*) To require the security of firearms, their parts and components and ammunition at the time of manufacture, import, export and transit through its territory; and

(*b*) To increase the effectiveness of import, export and transit controls, including, where appropriate, border controls, and of police and customs transborder cooperation.

Article 12

INFORMATION

1. Without prejudice to articles 27 and 28 of the Convention, States Parties shall exchange among themselves, consistent with their respective domestic legal and administrative systems, relevant case-specific information on matters such as authorized producers, dealers, importers, exporters and, whenever possible, carriers of firearms, their parts and components and ammunition.

2. Without prejudice to articles 27 and 28 of the Convention, States Parties shall exchange among themselves, consistent with their respective domestic legal and administrative systems, relevant information on matters such as:

(*a*) Organized criminal groups known to take part or suspected of taking part in the illicit manufacturing of or trafficking in firearms, their parts and components and ammunition;

(*b*) The means of concealment used in the illicit manufacturing of or trafficking in firearms, their parts and components and ammunition and ways of detecting them;

(*c*) Methods and means, points of dispatch and destination and routes customarily used by organized criminal groups engaged in illicit trafficking in firearms, their parts and components and ammunition; and

(*d*) Legislative experiences and practices and measures to prevent, combat and eradicate the illicit manufacturing of and trafficking in firearms, their parts and components and ammunition.

3. States Parties shall provide to or share with each other, as appropriate, relevant scientific and technological information useful to law enforcement authorities in order to enhance each other's abilities to prevent, detect and investigate the illicit manufacturing of and trafficking in firearms, their parts and components and ammunition and to prosecute the persons involved in those illicit activities.

4. States Parties shall cooperate in the tracing of firearms, their parts and components and ammunition that may have been illicitly manufactured or trafficked. Such cooperation shall include the provision of prompt responses to requests for assistance in tracing such firearms, their parts and components and ammunition, within available means.

5. Subject to the basic concepts of its legal system or any international agreements, each State Party shall guarantee the confidentiality of and comply with any restrictions on the use of information that it receives from another State Party pursuant to this article, including proprietary information pertaining to commercial transactions, if requested to do so by the State Party providing the information. If such confidentiality cannot be maintained, the State Party that provided the information shall be notified prior to its disclosure.

Article 13

COOPERATION

1. States Parties shall cooperate at the bilateral, regional and international levels to prevent, combat and eradicate the illicit manufacturing of and trafficking in firearms, their parts and components and ammunition.

2. Without prejudice to article 18, paragraph 13, of the Convention, each State Party shall identify a national body or a single point of contact to act as liaison between it and other States Parties on matters relating to this Protocol.

3. States Parties shall seek the support and cooperation of manufacturers, dealers, importers, exporters, brokers and commercial carriers of firearms, their parts and components and ammunition to prevent and detect the illicit activities referred to in paragraph 1 of this article.

Article 14

TRAINING AND TECHNICAL ASSISTANCE

States Parties shall cooperate with each other and with relevant international organizations, as appropriate, so that States Parties may receive, upon request, the training and technical assistance necessary to enhance their ability to prevent, combat and eradicate the illicit manufacturing of and trafficking in firearms, their parts and components and ammunition, including technical, financial and material assistance in those matters identified in articles 29 and 30 of the Convention.

Article 15

BROKERS AND BROKERING

1. With a view to preventing and combating illicit manufacturing of and trafficking in firearms, their parts and components and ammunition, States Parties that have not yet done so shall consider establishing a system for regulating the activities of those who engage in brokering. Such a system could include one or more measures such as:

(*a*) Requiring registration of brokers operating within their territory;

(*b*) Requiring licensing or authorization of brokering; or

(*c*) Requiring disclosure on import and export licences or authorizations or accompanying documents, of the names and locations of brokers involved in the transaction.

2. States Parties that have established a system of authorization regarding brokering as set forth in paragraph 1 of this article are encouraged to include information on brokers and brokering in their exchanges of information under article 12 of this Protocol and to retain records regarding brokers and brokering in accordance with article 7 of this Protocol.

III. FINAL PROVISIONS

Article 16

SETTLEMENT OF DISPUTES

1. States Parties shall endeavour to settle disputes concerning the interpretation or application of this Protocol through negotiation.

2. Any dispute between two or more States Parties concerning the interpretation or application of this Protocol that cannot be settled through negotiation within a reasonable time shall, at the request of one of those States Parties, be submitted to arbitration. If, six months after the date of the request for arbitration, those States Parties are unable to agree on the organization of the arbitration, any one of those States Parties may refer the dispute to the International Court of Justice by request in accordance with the Statute of the Court.

3. Each State Party may, at the time of signature, ratification, acceptance or approval of or accession to this Protocol, declare that it does not consider itself bound by paragraph 2 of this article. The other States Parties shall not be bound by paragraph 2 of this article with respect to any State Party that has made such a reservation.

4. Any State Party that has made a reservation in accordance with paragraph 3 of this article may at any time withdraw that reservation by notification to the Secretary-General of the United Nations.

Article 17

SIGNATURE, RATIFICATION, ACCEPTANCE, APPROVAL AND ACCESSION

1. This Protocol shall be open to all States for signature at United Nations Headquarters in New York from the thirtieth day after its adoption by the General Assembly until 12 December 2002.

2. This Protocol shall also be open for signature by regional economic integration organizations provided that at least one member State of such organization has signed this Protocol in accordance with paragraph 1 of this article.

3. This Protocol is subject to ratification, acceptance or approval. Instruments of ratification, acceptance or approval shall be deposited with the Secretary-General of the United Nations. A regional economic integration organization may deposit its instrument of ratification, acceptance or approval if at least one of its member States has done likewise. In that instrument of ratification, acceptance or approval, such organization shall declare the extent of its competence with respect to the matters governed by this Protocol. Such organization shall also inform the depositary of any relevant modification in the extent of its competence.

4. This Protocol is open for accession by any State or any regional economic integration organization of which at least one member State is a Party to this Protocol. Instruments of accession shall be deposited with the Secretary-General of the United Nations. At the time of its accession, a regional economic integration organization shall declare the extent of its competence with respect to matters governed by this Protocol. Such organization shall also inform the depositary of any relevant modification in the extent of its competence.

Article 18

ENTRY INTO FORCE

1. This Protocol shall enter into force on the ninetieth day after the date of deposit of the fortieth instrument of ratification, acceptance, approval or accession, except that it shall not enter into force before the entry into force of the Convention. For the purpose of this paragraph, any instrument deposited by a regional economic integration organization shall not be counted as additional to those deposited by member States of such organization.

2. For each State or regional economic integration organization ratifying, accepting, approving or acceding to this Protocol after the deposit of the fortieth instrument of such action, this Protocol shall enter into force on the thirtieth day after the date of deposit by such State or organization of the relevant instrument or on the date this Protocol enters into force pursuant to paragraph 1 of this article, whichever is the later.

Article 19

AMENDMENT

1. After the expiry of five years from the entry into force of this Protocol, a State Party to the Protocol may propose an amendment and file it with the Secretary-General of the United Nations, who shall thereupon communicate the proposed amendment to the States Parties and to the Conference of the Parties to the Convention for the purpose of considering and deciding on the proposal. The States Parties to this Protocol meeting at the Conference of the Parties shall make every effort to achieve consensus on each amendment. If all efforts at consensus have been exhausted and no agreement has been reached, the amendment shall, as a last resort, require for its adoption a two-thirds majority vote of the States Parties to this Protocol present and voting at the meeting of the Conference of the Parties.

2. Regional economic integration organizations, in matters within their competence, shall exercise their right to vote under this article with a number of votes equal to the number of their member States that are Parties to this Protocol. Such organizations shall not exercise their right to vote if their member States exercise theirs and vice versa.

3. An amendment adopted in accordance with paragraph 1 of this article is subject to ratification, acceptance or approval by States Parties.

4. An amendment adopted in accordance with paragraph 1 of this article shall enter into force in respect of a State Party ninety days after the date of the deposit with the Secretary-General of the United Nations of an instrument of ratification, acceptance or approval of such amendment.

5. When an amendment enters into force, it shall be binding on those States Parties which have expressed their consent to be bound by it. Other States Parties shall still be bound by the provisions of this Protocol and any earlier amendments that they have ratified, accepted or approved.

Article 20

DENUNCIATION

1. A State Party may denounce this Protocol by written notification to the Secretary-General of the United Nations. Such denunciation shall become effective one year after the date of receipt of the notification by the Secretary-General.

2. A regional economic integration organization shall cease to be a Party to this Protocol when all of its member States have denounced it.

Article 21

DEPOSITARY AND LANGUAGES

1. The Secretary-General of the United Nations is designated depositary of this Protocol.

2. The original of this Protocol, of which the Arabic, Chinese, English, French, Russian and Spanish texts are equally authentic, shall be deposited with the Secretary-General of the United Nations.

IN WITNESS WHEREOF, the undersigned plenipotentiaries, being duly authorized thereto by their respective Governments, have signed this Protocol.

3. AGREEMENT ON SUCCESSION ISSUES. DONE AT VIENNA ON 29 JUNE 2001[4]

Agreement on Succession Issues

Bosnia and Herzegovina, the Republic of Croatia, the Republic of Macedonia, the Republic of Slovenia and the Federal Republic of Yugoslavia, being in sovereign equality the five successor States to the former Socialist Federal Republic of Yugoslavia,

Mindful of the need, in the interests of all successor States and their citizens and in the interests of stability in the region and their mutual good relations, to resolve questions of State succession arising upon the break-up of the former Socialist Federal Republic of Yugoslavia,

Having held discussions and negotiations under the auspices of the International Conference on the Former Yugoslavia and the High Representative with a view to identifying and determining the equitable distribution among themselves of rights, obligations, assets and liabilities of the former Socialist Federal Republic of Yugoslavia,

Acting within the framework of the mandate given to the High Representative by the Decision of the Peace Implementation Conference held in London on 8 and 9 December 1995, and in the light of agreements between the successor States and the declarations adopted by the Peace Implementation Council and its Steering Board,

Bearing in mind the acknowledgement by the Security Council in its resolution 1022 (1995) of the desirability of a consensual solution to outstanding succession issues,

Confirming the decision reached on 10 April 2001 concerning the distribution of the former Socialist Federal Republic of Yugoslavia assets held at the Bank for International Settlements (the text of which decision is appended to this Agreement),

Demonstrating their readiness to cooperate in resolving outstanding succession issues in accordance with international law,

Have agreed as follows:

Article 1

For the purposes of this Agreement "SFRY" means the former Socialist Federal Republic of Yugoslavia.

Article 2

Each successor State acknowledges the principle that it must at all times take the necessary measures to prevent loss, damage or destruction to State archives, State property and assets of the SFRY in which, in accordance with the provisions of this Agreement, one or more of the other successor States have an interest.

Article 3

The annexes listed below set out the terms on which the subject matter of each annex is settled:

Annex A: Movable and immovable property;

Annex B: Diplomatic and consular properties;

Annex C: Financial assets and liabilities (other than those dealt with in the appendix to this Agreement);

Annex D: Archives;

Annex E: Pensions;

Annex F: Other rights, interests, and liabilities;

Annex G: Private property and acquired rights.

Article 4

1. A Standing Joint Committee of senior representatives of each successor State, who may be assisted by experts, is hereby established.

2. This Committee shall have as its principal tasks the monitoring of the effective implementation of this Agreement and serving as a forum in which issues arising in the course of its implementation may be discussed. The Committee may as necessary make appropriate recommendations to the Governments of the successor States.

3. The first formal meeting of the Standing Joint Committee shall be convened, at the initiative of the Government of the Republic of Macedonia, within two months of the entry into force of this Agreement. The Committee may meet informally, and on a provisional basis, at any times convenient to the successor States after the signature of this Agreement.

4. The Committee shall establish its own rules of procedure.

Article 5

1. Differences which may arise over the interpretation and application of this Agreement shall, in the first place, be resolved in discussion among the States concerned.

2. If the differences cannot be resolved in such discussions within one month of the first communication in the discussion, the States concerned shall either:

(*a*) Refer the matter to an independent person of their choice, with a view to obtaining a speedy and authoritative determination of the matter which shall be respected and which may, as appropriate, indicate specific time limits for actions to be taken; or

(*b*) Refer the matter to the Standing Joint Committee established by article 4 of this Agreement for resolution.

3. Differences which may arise in practice over the interpretation of the terms used in this Agreement or in any subsequent agreement called for in implementation of the annexes to this Agreement may, additionally, be referred at the initiative of any State concerned to binding expert solution, conducted by a single expert (who shall not be a national of any party to this Agreement) to be appointed by agreement between the parties in dispute or, in the absence of agreement, by the President of the Court of Conciliation and Arbitration within the Organization for Security and Cooperation in Europe. The expert shall determine all questions of procedure, after consulting the parties seeking such expert solution if the expert considers it appropriate to do so, with the firm intention of securing a speedy and effective resolution of the difference.

4. The procedure provided for in paragraph 3 of this article shall be strictly limited to the interpretation of terms used in the agreements in question and shall in no circumstances permit the expert to determine the practical application of any of those agreements. In particular the procedure referred to shall not apply to:

(*a*) The appendix to this Agreement;

(*b*) Articles 1, 3 and 4 of annex B;

(*c*) Articles 4 and 5 (1) of annex C;

(*d*) Article 6 of annex D.

5. Nothing in the preceding paragraphs of this article shall affect the rights or obligations of the Parties to the present Agreement under any provision in force binding them with regard to the settlement of disputes.

Article 6

The annexes to this Agreement and the appendices to the Agreement and annexes are an integral part of the Agreement.

Article 7

This Agreement, together with any subsequent agreements called for in implementation of the annexes to this Agreement, finally settles the mutual rights and obligations of the successor States in respect of succession issues covered by this Agreement. The fact that it does not deal with certain other non-succession matters is without prejudice to the rights and obligations of the States Parties to this Agreement in relation to those other matters.

Article 8

Each successor State, on the basis of reciprocity, shall take the necessary measures in accordance with its internal law to ensure that the provisions of this Agreement are recognized and effective in its courts, administrative tribunals and agencies, and that the other successor States and their nationals have access to those courts, tribunals and agencies to secure the implementation of this Agreement.

Article 9

This Agreement shall be implemented by the successor States in good faith in conformity with the Charter of the United Nations and in accordance with international law.

Article 10

No reservations may be made to this Agreement.

Article 11

1. This Agreement shall be subject to ratification.

2. Instruments of ratification shall be lodged as soon as possible with the depositary identified in article 13 of this Agreement. The depositary shall inform the successor States and the Office of the High Representative of the date of deposit of each instrument of ratification.

Article 12

1. This Agreement shall enter into force thirty days after the deposit of the fifth instrument of ratification. The depositary shall notify the successor States and the Office of the High Representative of the date of entry into force.

2. Notwithstanding paragraph 1 of this article, article 4 (3) of this Agreement, article 5 of annex A, articles 1 and 5-6 of annex B, and article 6 of, and the appendix to, annex C, shall be provisionally applied after the date of signature of this Agreement, in accordance with their terms.

Article 13

1. One original copy of this Agreement shall be deposited by the High Representative with the Secretary-General of the United Nations, who shall act as depositary.

2. The depositary shall, upon entry into force of this Agreement, ensure its registration in accordance with Article 102 of the Charter of the United Nations.

DONE at Vienna on 29 June 2001 in seven originals in the English language, one to be retained by each successor State, one by the Office of the High Representative, and one to be deposited with the depositary.

For Bosnia and Herzegovina:
[*Signature*]
Zlatko LAGUMDZIJA

For the Republic of Croatia:
[*Signature*]
Tonino PICULA

For the Republic of Macedonia:
[*Signature*]
Ilija FILIPOVSKI

For the Republic of Slovenia:
[*Signature*]
Dimitrij RUPEL

For the Federal Republic of Yugoslavia:
[*Signature*]
Goran SLIVANOVIC

APPENDIX TO AGREEMENT ON SUCCESSION ISSUES

BIS assets

1. The five delegations participating as equal successor States in the negotiations to resolve issues of succession arising upon the break-up of the SFRY have agreed (further to arrangements previously made on behalf of the National Banks of the successor States) that the former SFRY's assets (gold and other reserves, and shares) held at the Bank for International Settlements shall be divided between them in the following proportions:

Bosnia and Herzegovina	13.20%
Croatia	28.49%
Macedonia	5.40%
Slovenia	16.39%
Federal Republic of Yugoslavia	36.52%

2. The agreement of the five delegations to the foregoing distribution is given on the basis of the understandings reached at the meetings held on 21-23 February and 9-10 April 2001 and is entirely without prejudice to what may be agreed as regards the distribution of any other assets.

Brussels, 10 April 2001

ANNEX A

Movable and immovable property

Article 1

1. In order to achieve an equitable solution, the movable and immovable State property of the federation constituted as the SFRY ("State property") shall pass to the successor States in accordance with the provisions of the following articles of this annex.

2. Other proprietary rights and interests of the SFRY are covered by annex F to this Agreement.

3. Private property and acquired rights of citizens and other legal persons of the SFRY are covered by annex G to this Agreement.

Article 2

1. Immovable State property of the SFRY which was located within the territory of the SFRY shall pass to the successor State on whose territory that property is situated.

2. The successor States shall use their best endeavours to assist each other with the exercise of their diplomatic and consular activities by the provision of suitable properties in their respective territories.

Article 3

1. Tangible movable State property of the SFRY which was located within the territory of the SFRY shall pass to the successor State on whose territory that property was situated on the date on which it proclaimed independence.

2. Paragraph 1 of this article does not apply to tangible movable State property of great importance to the cultural heritage of one of the successor States and which originated from the territory of that State, such as: works of art; manuscripts, books and other objects of artistic, historical or archaeological interest to that State; and scientific collections and important collections of books or archives which shall pass to that State. Such property shall be identified by the successor State concerned as soon as possible, but not later than two years after the entry into force of this Agreement.

3. If SFRY State tangible movable property (other than military property) which has passed to one of the successor States in accordance with paragraph 1of this article has been removed without authorization from its territory by another successor State, the latter State shall ensure its return as soon as possible or pay full compensation for such removal.

Article 4

1. Notwithstanding paragraph 1 of article 3 of this annex, tangible movable State property of the SFRY which formed part of the military property of that State shall be the subject of special arrangements to be agreed among the successor States concerned.

2. In relation to tangible movable and immovable property of the former Yugoslav National Army used for civilian purposes, the arrangements referred to in paragraph 1 of this article will acknowledge the relevance of articles 2 (1) and 3 (1) of this annex.

Article 5

1. A Joint Committee on Succession to Movable and Immovable Property shall be established by the successor States, which shall ensure the proper implementation of the provisions of this annex applicable to tangible movable and immovable property (other than military property) and the resolution of any problems which might arise in the course of their application.

2. The Joint Committee shall commence its work within three months of the signature of this Agreement.

Article 6

It shall be for the successor State on whose territory immovable and tangible movable property is situated to determine, for the purposes of this annex, whether that property was State property of the SFRY in accordance with international law.

Article 7

Where pursuant to this annex property passes to one of the successor States, its title to and rights in respect of that property shall be treated as having arisen on the date on which it proclaimed independence, and any other successor State's title to and rights in respect of the property shall be treated as extinguished from that date.

Article 8

1. Where tangible movable and immovable State property of the SFRY passes to a successor State in accordance with articles 1 to 3 of this annex, that property shall not be subject to valuation for the purposes of this Agreement, and no compensation shall be payable in respect of the passing of that property to the successor State in question.

2. However, should any successor State consider that the application of articles 1 to 3 of this annex results in a significantly unequal distribution of SFRY State property (other than military property) among the successor States, that State may raise the matter in the Joint Committee established pursuant to article 5 of this annex. The Joint Committee, acting unanimously, may take such action as it considers appropriate in the circumstances.

Article 9

The provisions of this annex are without prejudice to the provisions of annexes B and D concerning diplomatic and consular properties, and archives.

ANNEX B

Diplomatic and consular properties

Article 1

1. As an interim and partial distribution of SFRY diplomatic and consular properties, the successor States have selected the following properties for allocation to each of them:

Bosnia and Herzegovina	London (Embassy)
Croatia	Paris (Embassy)
Macedonia	Paris (Consulate General)
Slovenia	Washington (Embassy)
Federal Republic of Yugoslavia	Paris (Residence)

2. Any action which may be necessary to enable each successor State to enter into possession of the property allocated to it shall be completed within six months of the date of signature of this Agreement.

Article 2

1. SFRY diplomatic and consular properties shall be distributed in kind (i.e. as properties) rather than by way of monetary payments.

2. In that distribution, Bosnia and Herzegovina and Macedonia are receiving a greater share than they would receive under the International Monetary Fund key, or any other more favourable criterion for Bosnia and Herzegovina and Macedonia for the distribution of such properties.

Article 3

Diplomatic and consular properties other than those acquired by States in accordance with article 1 of this annex shall be distributed in such a way that the total and final distribution in kind of diplomatic and consular properties (including those acquired in accordance with article 1) reflects as closely as possible the following proportions by value for each State:

Bosnia and Herzegovina	15%
Croatia	23.5%
Macedonia	8%
Slovenia	14%
Federal Republic of Yugoslavia	39.5%

Article 4

1. SFRY diplomatic and consular properties are set out in the list appended to this annex. That list groups properties according to their geographical regions. Each successor State shall, within each geographical region, be entitled to its proportionate share as set out in article 3.

2. The distribution of properties shall be by agreement between the five States. To the extent that agreement on the distribution of properties cannot be reached, the successor States shall adopt a procedure whereby any property selected by only one State will be acquired by that State, and where two or more States have selected the same property, those States will consult together as to which of them will acquire that property.

3. The basis for the proportionate distribution of properties is the valuation in the "Report dated 31 December 1992 on the valuation of the assets and liabilities of the former Socialist Federal Republic of Yugoslavia as at 31 December 1990".

4. Movable State property of the SFRY which forms part of the contents of diplomatic or consular properties shall pass to whichever successor State acquires the diplomatic or consular properties in question.

5. Movable State property of the SFRY which forms part of the contents of diplomatic and consular properties and which is of great importance to the cultural heritage of one of the successor States shall pass to that State.

Article 5

The successor States shall establish a Joint Committee composed of an equal number of representatives from each State to ensure the effective implementation of articles 3 and 4 of this annex. The functions of the Joint Committee shall include:

(*a*) Verifying and as necessary amending the list referred to in article 4 (1);

(*b*) Assessing the legal status of each property, its physical condition, and any financial liabilities attaching to it; and

(*c*) Considering the valuation of property as the need arises.

Article 6

The Joint Committee shall commence its work on a provisional basis within three months of the date of signature of this Agreement.

Article 7

Whichever successor State is in a position to maintain and keep under repair any diplomatic or consular properties of the SFRY shall take the necessary steps to that end, bearing in mind in particular

(*a*) The principle that it must at all times take the necessary measures to prevent loss or damage to or destruction of such properties, and

(*b*) The requirement to pay compensation for any loss, damage or destruction resulting from failure to take such action.

APPENDIX TO ANNEX B

OECD

No.	*State*	*Type of facility*	*Address*	*Total area in sq. m.*	*Floor area in sq. m.*	*Facility valued at*	*Land valued at*	*Comment*	*Legal status*
1	AUSTRALIA	Embassy	11 Nuyts Street P.O. Box 3161 MANUKA, A.C.T. 2603 CANBERRA, Australia	1 205	545	$1.6		99-year lease from 14 September 1965	Ownership
2	AUSTRALIA	Consulate General	CONSULATE GENERAL OF THE FR OF YUGOSLAVIA 12, Trelawney Street Woolahra N.S.W. 201 SYDNEY, Australia	2 040	616	$3.3			Ownership
3	AUSTRALIA	Residence	31 Fishburn Street Red Hill A.C.T. 2603 CANBERRA, Australia	1 416	516	$1.3		99-year lease from 14 September 1965	Ownership
4	AUSTRALIA	Land	31 Fishburn Street Red Hill A.C.T. 2603 CANBERRA, Australia	1 416			$0.8	99-year lease from 14 September 1965	Ownership
5	AUSTRIA	Embassy	BOTSCHAFT DER BR JUGOSLAWIEN Renveg 3 1030 WIEN III, Osterrich	500	1 300	$2.7			Ownership
6	AUSTRIA	Consulate General	Radetzkystrasse 26 9020 CELOVEC, Osterrich	1 088	744	$0.8		Possessed by Slovenia	Ownership

OECD

No.	State	Type of facility	Address	Total area in sq. m.	Floor area in sq. m.	Facility valued at	Land valued at	Comment	Legal status
7	AUSTRIA	Residence	Heuberggasse 10 1170 WIEN XVII, Osterrich	3 715	523	$1.8		Possessed by Croatia	Ownership
8	BELGIQUE	Embassy	AMBASSADE DE LA RF DE YOUGOSLAVIE 11, Avenue Emile de Mot 1050 BRUXELLES, Belgique	678	1 560	$3.5			Ownership
9	CZECH Republic	Embassy	AMBASSADE DE LA RF DE YUGOSLAVIE Mostecka 15 11800 PRAGUE 1	1 038	2 722	$2.6			Ownership
10	DENMARK	Embassy	EMBASSY OF THE FR OF YUGOSLAVIA Svanevaeget 36 2100 COPENHAGEN, Danemark	3 421	306	$0.6			Ownership
11	FINLAND	Embassy	EMBASSY OF THE FR OF YUGOSLAVIA Kulosaarentie 36 00570 HELSINKI 57, Finland	1 200	540	$1.3			Ownership
12	FINLAND	Residence	Bomansonintie 13 00570 HELSINKI 57, Finland	1 040	322	$0.4			Ownership

13	FRANCE	Embassy	AMBASSADE DE LA RF DE YUGOSLAVIE 54, Rue de la Faisanderie 75116 PARIS, France	260	1 658	$14.1		Ownership
14	FRANCE	Consulate	5, Rue de la Faisanderie 75116 PARIS, France	384	809	$6.5		Ownership
15	FRANCE	Residence	1, Boulevard Delessert 75116 PARIS, France	1 493	2 740	$11.4		Ownership
16	GREECE	Embassy/ Residence and Consu-late	AMBASSADE DE LA RF DE YOUGOSLAVIE 106 Vassilissis Sofias ATHENES, Greece	3 525	1 688	$4.8		Ownership
17	GREECE	Consulate General	CONSULAT GENERAL DE LA RF DE YUGOSLAVIE Komnino 4 THESALONIKI, Greece	273	400	$0.9	Kingdom of Serbia	Ownership
18	ITALY	Embassy	AMBASCIATA DELLA RF Dl JUGOSLAVIA Via dei Monti Parioli 20 00197 ROMA, Italia	2 817	2 035	$6.9		Ownership
19	ITALY	Consulate General	CONSOLATO DELLA RF DI JUGOSLAVIA Via Matilde Serao 1 20144 MILANO, Italia	1 661	1 000	$4.7		Ownership
20	ITALY	Residence	Via dei Monti Parioli 22-24 00197 ROMA, Italia	1 950	2 004	$8.8		Ownership
21	ITALY	Apartment	Via A. Ximenes 8 ROMA, Italia		323	$0.6		Ownership

No.	State	Type of facility	Address	Total area in sq. m.	Floor area in sq. m.	Facility valued at	Land valued at	Comment	Legal status
22	ITALY	Apartment	Via Archimeda 104 ROMA, Italia		215	$0.4		Possessed by Slovenia	Ownership
23	ITALY	Apartment	Viale Corsica 5 MILANO, Italia		61	$0.2			Ownership
24	ITALY	Apartment	Via Cordaroli 7/I TRIESTE, Italia		107	$0.4			Ownership
25	ITALY	Apartment	Viale D'Anunzio 27/I TRIESTE, Italia		131	$0.5		Possessed by Slovenia	Ownership
26	ITALY	Apartment	Via Bassegio 75/IV TRIESTE, Italia		72	$0.3			Ownership
27	ITALY	Apartment	Via Bassegio 69/I TRIESTE, Italia		49	$0.2			Ownership
28	ITALY	Apartment	Via Bassegio 69/II TRIESTE, Italia		52	$0.2			Ownership
29	JAPAN	Embassy/ Residence	EMBASSY OF THE FR OF YUGOSLAVIA 7-24, 4-chome, Kitashinagawa Shinagawa-ku TOKYO, Japan	938	1 726	$16.0			Ownership
30	KANADA (Canada)	Embassy	EMBASSY OF THE FR OF YUGOSLAVIA 17, Blackburn Avenue OTTAWA, Ontario, K1N 8A2, Canada	1 071	965	$2.5			Ownership

31	KANADA (Canada)	Consulate General	CONSULATE GENERAL OF THE FR OF YUGOSLAVIA 377, Spadina Road TORONTO Ontario M5P 2V7, Canada	1 091	556	$1.3	Ownership
32	KANADA (Canada)	Residence	21, Blackburn Avenue OTTAWA Ontario, K1N 8A2, Canada	2 623	805	$3.5	Ownership
33	MADJARSKA (Hungary)	Embassy	AMBASSADE DE LA RF DE YOUGOSLAVIE Dozsa Gyorgy ut 92/b 1068 BUDAPEST VI, Hongrie	949	1 247	$1.7	Ownership
34	MADJARSKA (Hungary)	Residence	Borbolya utca 4 1023 BUDAPEST, Hongrie	1 066	484	$0.6	Ownership
35	MADJARSKA (Hungary)	House of Consul	Dozsa Gyorgy ut 92/a 1068 BUDAPEST VI, Hongrie	829	1 539	$2.3	Ownership
36	MEXICO	Embassy	EMBAJADA DE LA RF DE YUGOSLAVIA Av. Montanas Rocallosas No. 515 Apartado Postal 10-701 Lomas de Chapultepec 11000 MEXICO, Mexico	1 472	996	$2.3	Ownership
37	NETHERLANDS	Embassy	EMBASSY OF THE FR OF YUGOSLAVIA Groot Hertoginnelaan 30 2517 THE HAGUE, Netherlands	616	485	$0.7	Ownership

No.	State	Type of facility	Address	Total area in sq. m.	Floor area in sq. m.	Facility valued at	Land valued at	Comment	Legal status
38	NEW ZEALAND	Embassy	24, Hatton Street WELLINGTON-5, New Zealand	1 962	281	$0.5		Taken over by the Government of New Zealand since 1992	Ownership
39	NEW ZEALAND	Residence	33, Rama Crescent WELLINGTON, New Zealand	542	207	$0.3		Taken over by the Government of New Zealand since 1992	Ownership
40	NORWAY	Embassy	EMBASSY OF THE FR OF YUGOSLAVIA Drammensveien 105, OSLO 2, Norway	984	732	$1.7			Ownership
41	NORWAY	Residence	Heyerdahls vei 9 OSLO, Norway	3 082	380	$1.4			Ownership
42	POLAND	Embassy	AMBASSADE DE LA RF DE YOUGOSLAVIE Al. Ujazdowskie 23/25 VARSOVIE, Pologne	3 251	1 799	$2.1		100-year lease from 1947	Ownership
43	POLAND	Residence	Al. Ujazdowskie 23/25 VARSOVIE, Pologne		512	$0.5		100-year lease from 1947	Ownership
44	POLAND	House	Alea Ru 5 VARSOVIE, Pologne	815	1 408	$1.3		80-year lease from 1 January 1950	Ownership

45	PORTUGAL	Embassy	EMBAIXADA DA RF DA IUGOSLAVIA Av. Das Descobertas 12—Restelo 1400 LISBOA, Portugal	1 995	704	$1.5		Ownership
46	PORTUGAL	Residence	Rua Alcolena 11 Restelo 1400 LISBOA, Portugal	1 168	302	$0.8		Ownership
47	SAD (United States)	Embassy	EMBASSY OF THE FR OF YUGOSLAVIA 2410 California Str. N.W. WASHINGTON D.C. 20008, USA	1 436	1 820	$7.3	Reciprocity land	Ownership
48	SAD (United States)	Permanent Mission to the United Nations	PERMANENT MISSION OF THE FR OF YUGOSLAVIA TO THE UNITED NATIONS 854 Fifth Avenue NEW YORK N.Y. 10017, USA	339	1 679	$11.8		Ownership
49	SAD (United States)	Residence	2221 R. Street, N.W. WASHINGTON D.C., USA	960	900	$2.2		Ownership
50	SAD (United States)	Residence	730 Park Avenue NEW YORK N.Y. 10021, USA		216	$1.8		Ownership
51	SAD (United States)	House	1907 Quincy Street N.W. WASHINGTON D.C., USA	1 052	495	$1.2		Ownership
52	SPAIN	Embassy	EMBAJADA DE LA RF DE YUGOSLAVIA Calle de Velasqez 162 MADRID 28002, Espana	684	1 200	$3.2		Ownership
53	SPAIN	Residence	Ronda de Abubilla 34 Parq Conde de Orgaz MADRID 28043, Espana	1 480	413	$1.0		Ownership

No.	State	Type of facility	Address	Total area in sq. m.	Floor area in sq. m.	Facility valued at	Land valued at	Comment	Legal status
54	SR NEMAČKA (Germany)	Embassy	BOTSCHAFT DER BR JUGOSLAWIEN Schlossallee 5 5300 BONN 2, Bundesrepublik Deutschland	3 079	2 392	$5.4			Ownership
55	SR NEMAČKA (Germany)	Consulate General	GENERALKONSULAT DER BR JUGOSLAWIEN Thueringer Strasse 3 6000 FRANKFURT AM MAIN Bundesrepublik Deutschland	492	1 020	$4.1			Ownership
56	SR NEMAČKA (Germany)	Military mission	BOTSCHAFT DER BR JUGOSLAWIEN BURO IN BERLIN Taubenstrasse 18 1 BERLIN 33—GRUNEWALD	6 474	1 500	$4.5			Ownership
57	SWEDEN	Embassy	EMBASSY OF THE FR OF YUGOSLAVIA Valhallavagen 70 11427 STOCKHOLM, Sweden	424	815	$5.3			Ownership
58	SWEDEN	Residence	Tyrgaten 6 11427 STOCKHOLM, Sweden	315	981	$4.8			Ownership
59	SWITZERLAND	Embassy/ Residence	AMBASSADE DE LA RF DE YOUGOSLAVIE Seminarstrasse 5 3006 BERN, Suisse	1 760	1 758	$7.7			Ownership

60	SWITZERLAND	Permanent Mission to the United Nations	MISSION PERMANENTE DE LA RF DE YOUGOSLAVIE AUPRES DES NATIONS UNIES 5, Chemin Thury GENEVE, Suisse	3 403	519	$1.5			Ownership
61	SWITZERLAND	Consulate General	Eidmattstrasse 33 8032 ZURICH, Suisse	195	435	$1.5			Ownership
62	TURKEY	Embassy	AMBASSADE DE LA RF DE YOUGOSLAVIE Paris Caddesi No. 47, Kavaklidere P.K. 28—Kavaklidere ANKARA, Turquie	8 899	617	$0.9			Ownership
63	TURKEY	Residence	Ataturk Bulevard No. 132-134 ANKARA, Turquie		1 201	$0.8			Ownership
64	TURKEY	House	Paris Caddesi No. 47, Kavaklidere ANKARA, Turquie		240	$0.2			Ownership
65	TURKEY	Land	Istanbul	3 840			$0.3	Kingdom of Serbia	Ownership
66	VELIKA BRITANIJA (United Kingdom)	Embassy	EMBASSY OF THE FR OF YUGOSLAVIA 5-7 Lexham Gardens LONDON, W8 5JU Great Britain	463	1 308	$10.9			Ownership
67	VELIKA BRITANIJA (United Kingdom)	Residence	25 Hyde Park Gate LONDON, SW7.5DJ Great Britain	365	490	$2.0			Ownership
					TOTAL:	$201.00			

REST OF EUROPE

No.	*State*	*Type of facility*	*Address*	*Total area in sq. m.*	*Floor area in sq. m.*	*Facility valued at*	*Land valued at*	*Comment*	*Legal status*
68	BULGARIA	Embassy	AMBASSADE DE LA RF YUGOSLAVIE Veliko Trnovo 3, Rue G. Geueorguiou-Dej SOFIA, Bulgaria	3 062	1 574	$1.9		Kingdom of Serbia	Ownership
69	CYPRUS	Embassy/ Residence	EMBASSY OF THE FR OF YUGOSLAVIA Vasilassias Olgas Street 2 P.O. Box 1968 NICOSIA, Cyprus	1 391	695	$1.0			Ownership
70	ROMANIA	Embassy	AMBASSADE DE LA RF YOUGOSLAVIE Calea Dorobanilor Nr. 34 BUCAREST, Roumanie	1 671	722	$1.2		Kingdom of Serbia	Ownership
71	SSSR (Russia)	Embassy	POSOLSTVO SR JUGOSLAVII Mosfiljmovskaja 46 MOSKVA, Rossia	14 746	5 484	$15.4		Reciprocity land	Ownership
72	SSSR (Russia)	Residence	Mosfiljmovskaja 46 MOSKVA, Rossia		591	$1.2		Reciprocity land	Ownership
73	SSSR (Russia)	Garage	Mosfiljmovskaja 46 MOSKVA, Rossia		874	$0.2		Reciprocity land	Ownership
				TOTAL:		$20.9			

No.	*State*	*Type of facility*	*Address*	*Total area in sq. m.*	*Floor area in sq. m.*	*Facility valued at*	*Land valued at*	*Comment*	*Legal status*
74	ARGENTINA	Embassy	EMBAJADA DE LA RF DE YUGOSLAVIA Marcelo T. de Alvear 1705 1060 BUENOS AIRES, Argentina	238	818	$1.7			Ownership
75	BOLIVIA	Embassy/ Residence	Calle Benito Joarez 315 Florida, LA PAZ	3 088	481	$0.8			Ownership
76	BRAZIL	Embassy	Avenida das Nacoes lote 15 Caixa Postal 1240 70000 BRASILIA D.F., Brazil	25 000	2 070	$4.0			Ownership
77	BRAZIL	Residence	Avenida das Nacoes, lote 15 Caixa Postal 1240 70000 BRASILIA D.F., Brazil		1 646				Ownership
78	BRAZIL	Consulate General	Rua Am. Pereira Guimaraes 258 01250 SAO PAULO, Brazil	605	521	$0.6			Ownership
79	BRAZIL	House	Avenida das Nacoes lote 15 Caixa Postal 1240 70000 BRASILIA D.F., Brazil		433	$0.4			Ownership
80	BRAZIL	Villa	Brasilia, Villa by the Lake	776	319	$0.4			Ownership
81	CHILE	Consulate	EMBAJADA DE LA RF DE YUGOSLAVIA Calle Exequias Alliende 2370 Casilla Postale 1659 SANTIAGO DE CHILE, Chile	450	381	$0.4			Ownership

No.	State	Type of facility	Address	Total area in sq. m.	Floor area in sq. m.	Facility valued at	Land valued at	Comment	Legal status
82	GUYANA	Embassy	72, Brickdam P.O. Box 10408 GEORGETOWN	521	480	$0.5			Ownership
83	PERU	Embassy	EMBAJADA DE LA RF DE YUGOSLAVIA Calle Carlos Porras Osores 360 San Isidor Casilla 18-0392 LIMA, Peru	1 359	610	$0.7			Ownership
84	PERU	Residence	Calle a Cibeles 110 San Isidor LIMA, Peru	1 052	901	$0.5			Ownership
85	URUGUAY	Embassy/ Residence	Bulevard Espana 2697 MONTEVIDEO, Urugvai	920	528	$0.6			Ownership
86	VENEZUELA	Embassy	EMBAJADA DE LA RF DE YUGOSLAVIA Apartado 68011 Altamira Cuarta Avenida de Campo Alegre No. 13 Chacao CARACAS 1060, Venezuela	2 210	600	$0.8			Ownership
				TOTAL:		$11.4			

No.	State	Type of facility	Address	Total area in sq. m.	Floor area in sq. m.	Facility valued at	Land valued at	Comment	Legal status
87	INDIA	Embassy	EMBASSY OF THE FR OF YUGOSLAVIA 3/50 G. Niti Marg, Chanakyapuri 110021 NEW DELHI, India	24 862	2 037	$4.5		Land perpetual lease from 11 November 1961	Ownership
88	INDIA	Residence	3/50 G. Chantipath, Chanakyapuri 110021 NEW DELHI, India		1 358	$1.4		Land perpetual lease from 11 November 1961	Ownership
89	INDIA	Servants quarters	3/50 G. Niti Marg, Chanakyapuri 110021 NEW DELHI, India		897	$0.2		Land perpetual lease from 11 November 1961	Ownership
90	INDONESIA	Embassy	EMBASSY OF THE FR OF YUGOSLAVIA H.O.S. Cokroaminoto No. 109 JAKARTA PUSAT, Indonesia	563	833	$0.5			Ownership
91	KAMPUCHIA (Cambodia)	Residence	129-131 Vithei Preah Bat Nordom PNOM PEN, Cambodia	1 120	653	$0.3			Ownership
92	LEBANON	Land	Beirut	1 974			$0.6		Ownership
93	PAKISTAN	Land	Islamabad	16 452			$1.6		Ownership
				TOTAL:		$9.1			

No.	State	Type of facility	Address	Total area in sq. m.	Floor area in sq. m.	Facility valued at	Land valued at	Comment	Legal status
94	ALGERIA	Embassy	AMBASSADE DE LA RF DE YUGOSLAVIE 7, Rue des Freres Benhafid—Hydra B.P. 632 ALGER, Algerie	641	540	$0.6			Ownership
95	EGYPT	Embassy/ Residence/ Consulate	EMBASSY OF THE FR OF YUGOSLAVIA 33, El Monsour Mohamed Street Zamalek CAIRO, Arab Republic of Egypt	2 678	1 948	$2.3			Ownership
96	EGYPT	Garage	33, El Monsour Mohamed Street Zamalek CAIRO Arab Republic of Egypt		77	$0.1			Ownership
97	MOROCCO	Embassy/ Residence	23, Avenue Ben I Znassen, Souissi B.P. 5014 RABAT, Maroc	1 758	592	$0.8			Ownership
98	TUNISIE	Embassy	AMBASSADE DE LA RF DE YUGOSLAVIE 4, Rue de Liberia TUNIS, Tunisie	378	373	$0.4			Ownership
99	TUNISIE	Residence	23, Avenue de la Republique Carthage TUNIS, Tunisie	856	400	$0.5		Not to be included in succession	Reciprocity
				TOTAL:		$4.7			

No.	*State*	*Type of facility*	*Address*	*Total area in sq. m.*	*Floor area in sq. m.*	*Facility valued at*	*Land valued at*	*Comment*	*Legal status*
100	CENTRAL AFRICAN REPUBLIC	Embassy	AMBASSADE DE LA RF DE YOUGOSLAVIE Avenue Leopold Sedar Senghor B.P. 1049, BANGUI	2 009	432	$0.6			Ownership
101	CENTRAL AFRICAN REPUBLIC	Residence	Avenue Leopold Sedar Senghor B.P. 1049, BANGUI		360	$0.3			Ownership
102	ETHIOPIA	Embassy/ Residence	EMBASSY OF THE FR OF YUGOSLAVIA P.O. Box 1341 ADDIS ABABA, Ethiopia	11 000	2 490	$3.6			Ownership
103	GUINEA	Residence	Domaine Public Maritime a Camayenne CONAKRY II Republique de Guinee	625	243	$0.3			Ownership
104	KENYA	Embassy	EMBASSY OF THE FR OF YUGOSLAVIA State House Avenue P.O. Box 30504 NAIROBI, Kenya	8 784	698	$1.6		Land-lease until 1 July 2064	Ownership
105	KENYA	Residence	Lower Kabete Road NAIROBI, Kenya	7 187	315	$1.0			Ownership

No.	*State*	*Type of facility*	*Address*	*Total area in sq. m.*	*Floor area in sq. m.*	*Facility valued at*	*Land valued at*	*Comment*	*Legal status*
106	KONGO (Congo)	Embassy	AMBASSADE DE LA RF DE YOUGOSLAVIE Rue Lucien Fourneau P.O. Box 2062 BRAZZAVILLE	1 535	337	$0.5			Ownership
107	KONGO (Congo)	Residence	Avenue General de Gaulle BRAZZAVILLE	2 890	498	$0.8			Ownership
108	KONGO (Congo)	Apartment	Sodafe Mfoa IV BRAZZAVILLE		107	$0.1			Ownership
109	MADAGASCAR	Residence	Route de Fort Ducheane ANTANANARIVO Madagascar	4 223	322	$0.7			Ownership
110	MALI	Residence	Rue Braseire Quartier Fleuve BAMAKO, Mali	832	204	$0.3			Ownership
111	SUDAN	Embassy	1 Street 31, 79-A P.O. Box 1180 KHARTOUM, Sudan	1 855	427	$0.6			Ownership
112	SUDAN	Residence	Sagiat Hamad 35 Plot 12 KHARTOUM-North, Sudan	3 851	455	$0.8			Ownership

113	TANZANIA, UNITED REPUBLIC OF	Embassy	EMBASSY OF THE FR OF YUGOSLAVIA Plot No. 36, Upanga Road P.O. Box 2838 DAR ES SALAAM, Tanzania	3 459	882	$1.2		Land-lease until 6 September 2048	Ownership
114	TANZANIA, UNITED REPUBLIC OF	Residence	46, Ghuba Road DAR ES SALAAM Tanzania	5 090	378	$0.5			Ownership
115	UGANDA	Embassy	11, George Street P.O. Box 4370 KAMPALA, Uganda	2 279	457	$0.9		99-year lease from 18 December 1969	Ownership
116	UGANDA	Land	Kolo Hill Drive	2 780			$0.3	99-year lease from 14 November 1969	Ownership
117	ZAIRE	Embassy/ Residence	AMBASSADE DE LA RF YOUGOSLAVIE Q.U.E. l'etoile 112 B.P. 619 KINSHASA I, Republique du Zaire	503	681	$0.7			Ownership
118	ZAMBIA	Embassy	EMBASSY OF THE FR OF YUGOSLAVIA P.O. Box 31180 Diplomatic triangle. Plot No. 5216 LUSAKA, Zambia	13 425	601	$1.9		100-year lease from 20 July 1971	Ownership

No.	*State*	*Type of facility*	*Address*	*Total area in sq. m.*	*Floor area in sq. m.*	*Facility valued at*	*Land valued at*	*Comment*	*Legal status*
119	ZAMBIA	Residence	Lukulu Road, Plot No. 5216 LUSAKA, Zambia	2 331	280	$0.3		99-year lease from 31 December 1964	Ownership
120	ZAMBIA	House	5018 Rhodes Park LUSAKA, Zambia	2 498	117	$0.4		99-year lease from 30 August 1967	Ownership
121	ZIMBABWE	Embassy	EMBASSY OF THE FR OF YUGOSLAVIA 1, Lanark Road, Belgravia P.O. Box 3420 HARARE, Zimbabwe	3 475	410	$0.9			Ownership
122	ZIMBABWE	Residence	41, Argyle Drive, Highlands HARARE, Zimbabwe	6 265	230	$0.9			Ownership
123	ZIMBABWE	House	1, Lanark Road, Belgravia HARARE, Zimbabwe		100	$0.1			Ownership
				TOTAL:		$19.3			

ANNEX C

Financial assets and liabilities

Article 1

The SFRY's financial assets comprised all financial assets of the SFRY (such as cash, gold and other precious metals, deposit accounts and securities), including in particular:

(*a*) Accounts and other financial assets in the name of the SFRY Federal Government departments and agencies;

(*b*) Accounts and other financial assets in the name of the National Bank of Yugoslavia;

(*c*) Foreign currency assets, including holdings of gold and other precious metals, of the SFRY or the National Bank of Yugoslavia;

(*d*) Sums due to the National Bank of Yugoslavia from banks in other countries resulting from uncompleted inter-bank clearing arrangements; such countries include, but are not limited to, those listed in appendix 2 to this annex;

(*e*) Financial quotas and drawing rights of the SFRY, the National Bank of Yugoslavia or other federal organs or institutions in international financial organizations, as well as financial assets held with such organizations;

(*f*) Other assets of the SFRY, including amounts due to the National Bank of Yugoslavia or the SFRY from obligors other than those included in (*a*) to (*e*) above.

Article 2

1. (*a*) The SFRY's financial liabilities comprised (subject to paragraphs 2 and 3 of this article) the debts of the SFRY, debts guaranteed by the SFRY and financial claims against SFRY, and consisted principally of:

(i) The external debt of the SFRY to official creditors and the international financial institutions;

(ii) The external debt of the SFRY to commercial creditors;

(iii) Sums payable by the National Bank of Yugoslavia to banks in other countries resulting from uncompleted inter-bank clearing arrangements. Such countries include, but are not limited to, those listed in appendix 2 to this annex;

(iv) External debt of the SFRY to creditors other than those listed in (i) to (iii), above.

(*b*) External debt in (i) to (iv) above is described as allocated debt if the final beneficiary of the debt is located on the territory of a specific successor State or group of successor States. Allocated debt is not subject to succession and shall be accepted by the successor State on the territory of which the final beneficiary is located.

(*c*) Liabilities of the SFRY, the National Bank of Yugoslavia or other federal institutions towards international financial organizations are included under the external debt of the SFRY.

2. The financial liabilities to be taken into account pursuant to paragraph 1 of this article do not include the financial liabilities of the SFRY under the Agreement concluded between the SFRY and Italy on 18 February 1983 on the Final Settlement of Reciprocal Obligations.

3. Other financial liabilities include:

(*a*) Guarantees by the SFRY or its National Bank of Yugoslavia of hard-currency savings deposited in a commercial bank and any of its branches in any successor State before the date on which it proclaimed independence; and

(*b*) Guarantees by the SFRY of savings deposited before certain dates with the Post Office Savings Bank at its branches in any of the Republics of the SFRY.

Article 3

1. A major portion of the assets and liabilities of the SFRY have already in practice been distributed on the basis of agreements between the successor States or agreements between them individually and the institutions concerned, namely:

(*a*) The SFRY's share of the assets and liabilities of the International Monetary Fund;

(*b*) Shares of the World Bank and its affiliated institutions held by the SFRY;

(*c*) Liabilities of the SFRY to the World Bank;

(*d*) Shares of the European Bank for Reconstruction and Development, the African Development Bank and the Inter-American Development Bank held by the SFRY;

(*e*) The SFRY's debts to the European Investment Bank;

(*f*) The gold and other reserves and shares of the Bank for International Settlements, Basel, held by the SFRY;

(*g*) Guarantees by the SFRY of savings deposited before certain dates with the Post Office Savings Bank and its branches;

(*h*) That part of the SFRY's external official debt to members of the so-called "Paris Club" which has been assumed by certain of the successor States in proportions fixed in agreements between each of them and "Paris Club" members;

(*i*) That part of the SFRY's external commercial debt to banks (the so-called "London Club") under the New Financial Agreement 1988 which has been assumed by certain of the successor States in proportions fixed in agreements between each of them and the "London Club" members.

2. In regard to subparagraphs (*h*) and (*i*) of paragraph 1 above, four of the five successor States have concluded agreements with the "Paris Club" and "London Club" creditors. The remaining successor State, the Federal Republic of Yugoslavia, will assume responsibility for all of its allocated debt to "Paris Club" and "London Club" creditors and its share of the unallocated debt to such creditors. This is expected to resolve the remaining "Paris Club" and "London Club" claims against the SFRY. It is impossible to predict the outcome of this resolution at the present time, but the resolution of "Paris Club" and "London Club" claims by the Federal Republic of Yugoslavia will, as between the successor States, conclude the resolution of their obligations to the "Paris Club" and the "London Club". The successor States shall terminate any existing legal proceedings or financial claims against each other in relation to "Paris Club" and "London Club" obligations upon the signature of this Agreement, and shall not institute any other such legal proceedings or financial claims in the future, whatever the outcome of the resolution by the Federal Republic of Yugoslavia of "Paris Club" and "London Club" claims.

3. The distributions referred to in paragraph 1 of this article are final and shall not be reopened by any of the successor States in the context of succession issues.

Article 4

Distributions of assets on a net basis include:

(*a*) The SFRY's ownership of a 27 per cent share of the capital of the Yugoslav Bank for International Economic Cooperation, as it existed prior to its conversion to a commercial bank, which shall be distributed among the States according to the proportions agreed to in article 5 (2); and

(*b*) The net amount due to the National Bank of Yugoslavia from banks in other countries resulting from uncompleted inter-bank clearing arrangements, which shall be tabulated and distributed according to the proportions agreed to in article 5 (2). Such countries include, but are not limited to, those listed in appendix 2 to this annex.

Article 5

1. Foreign financial assets (such as cash, gold and other precious metals, deposit accounts and securities), whether held by the SFRY or the National Bank of Yugoslavia directly

or with foreign banks, Yugoslav joint venture banks and agencies of Yugoslav banks abroad include the following:

(i) Monetary gold (271,642.769 oz.) valued on 31 March 2001 at $70.18 million;

(ii) Foreign exchange accounts held at foreign commercial banks and valued on 31 March 2001 at $307.61 million;

(iii) Foreign exchange accounts held at SFRY joint venture banks abroad and valued on 31 March 2001 at $645.55 million; and

(iv) Gold (1,209.78 oz.) formerly held by the France-UK-USA Gold Commission, valued on 22 May 2001 at $343.76 thousand.

2. The available foreign financial assets identified in paragraph 1 of this article shall be distributed according to the following proportions, which shall be applied to items (i), (ii), (iii) and (iv) separately:

Bosnia and Herzegovina	15.50%
Croatia	23.00%
Macedonia	7.50%
Slovenia	16.00%
Federal Republic of Yugoslavia	38.00%

3. If currently unknown foreign financial assets are found to exist within five years, they shall be distributed as soon as possible on the proportionate basis set out in paragraph 2 of this article, and using the mechanism described in article 6.

Article 6

Each successor State shall appoint a representative of the Central Bank or another authorized representative to form a committee, which shall meet within 30 days of the signature of this Agreement to arrange the modalities for the initial distributions identified in article 5 of this annex. Their objective will be to effect any distributions of assets as quickly as possible. In addition they will arrange jointly to verify, settle and effect distributions under article 4 of this annex. They will also make arrangements to distribute to the extent possible assets under article 1 (*f*) and liabilities under article 2 (1) (*a*) (iv) of this annex according to the proportions agreed to in article 5 (2). The Committee will also prepare a definitive list of all SFRY external debt.

Article 7

Guarantees by the SFRY or its National Bank of Yugoslavia of hard-currency savings deposited in a commercial bank and any of its branches in any successor State before the date on which it proclaimed its independence shall be negotiated without delay taking into account in particular the necessity of protecting the hard-currency savings of individuals. This negotiation shall take place under the auspices of the Bank for International Settlements.

Article 8

1. The return to successor States of their contributions to the Federal Fund for development of the less developed Republics and Kosovo, the payment of outstanding contributions due by successor States to the Fund, and the repayment of credits given to those States by the Fund, are cancelled.

2. The financial liabilities of the SFRY under the Agreement concluded between the SFRY and Italy on 18 February 1983 on the Final Settlement of Reciprocal Obligations shall be distributed to the successor States that are beneficiaries of this Agreement. Pursuant to the Agreement with Italy, concluded in 1955 between the SFRY and the Republic of Italy, about local commerce between the areas Gorizia-Udine and Sezana-Nova Gorica-Tolmin (Gorica Agreement) as well as between the SFRY and the Republic of Italy for the border areas of Trieste on one side and Buje, Koper, Sezana on the other side (Trieste Agreement), together with

the related payment arrangements, are excluded from the provisions of this paragraph. The issues related to the Trieste Agreement will be dealt with by Croatia and Slovenia. The issues related to the Gorica Agreement will be dealt with by the Republic of Slovenia only.

Article 9

In connection with the distributions agreed in the preceding articles of this annex, the successor States have concluded the Disclosure Authorization appended to this annex, and shall to the extent that they have not already done so:

(*a*) Allow free access to and provide copies of such records and data requested by any successor State as are in its possession and relate to the SFRY's financial assets and liabilities. Accounts of the National Bank of Yugoslavia opened after the date on which United Nations sanctions were first imposed are not subject to this disclosure requirement;

(*b*) Exchange information on those accounts and financial assets held by banks in third States and belonging to connected persons (as defined by the authorities which in those States regulate the banking business).

Article 10

Each successor State has introduced a new currency and established its monetary independence. As such, no successor State shall pursue financial claims or legal proceedings against any other successor State related to the introduction of its new currency or the establishment of its monetary independence.

APPENDIX 1 TO ANNEX C

Disclosure Authorization to Central Banks and/or responsible Ministries regarding data on financial and other assets of the SFRY held by third-country central banks and/or other financial institutions

The five delegations participating in the discussions and negotiations to resolve issues of succession arising upon the break-up of the SFRY, and working towards the prompt distribution of the assets of the SFRY among the successor States within the framework of the Agreement concluded between them in Vienna on 25 May 2001, have agreed that data on bank deposits, holdings of securities or other types of financial assets of the National Bank of Yugoslavia, as well as other assets of the SFRY referred to in United Nations Security Council resolution 1022 (1995) (collectively, the Frozen Accounts), held by foreign banks, foreign financial institutions or other foreign entities as they stood on 31 May 2001 should be made available to each of the successor States. To that end they hereby authorize Central Banks, responsible Ministries and/or other financial institutions to provide financial data in regard to Frozen Accounts to the Central Bank and Ministry of Finance of each successor State upon receipt of a request for such data made by the Central Bank of any successor State. Such data may include, but is not limited to, details regarding the composition and value of Frozen Deposit accounts in banks, financial institutions and other entities on their territory or subject to their regulation, control or administration.

In addition to supplying information for 31 May 2001, banks are requested to comply with subsequent requests for information on SFRY Frozen Accounts from any of the undersigned successor States.

If necessary to secure release of financial data in regard to Frozen Accounts, the National Bank of Yugoslavia shall issue the authorizations necessary to permit disclosure of this information to the Central Banks and Ministries of Finance of the successor States. If required, such authorization shall include the name and address of the foreign bank, the account number and any other information needed to identify the account.

No legal proceedings will be commenced by any successor State on the basis of financial data disclosed as a result of the foregoing arrangements.

This authorization takes effect on today's date, and is witnessed by the Special Negotiator for Succession Issues of the SFRY in the Office of the High Representative, Sir Arthur Watts.

Signed by the Heads of the delegations:

Bosnia and Herzegovina:
[*Signature*]
Milos TRIFKOVIC

Republic of Croatia:
[*Signature*]
Bozo MARENDIC

Republic of Macedonia:
[*Signature*]
Nikola TODORCEVSKI

Republic of Slovenia:
[*Signature*]
Miran MEJAK

Federal Republic of Yugoslavia:
[*Signature*]
Dobrosav MITROVIC

Witnessed by:
[*Signature*]
Sir Arthur WATTS
Special Negotiator for Succession Issues

Vienna, 25 May 2001

APPENDIX 2 TO ANNEX C

Country	*Currency*
Albania	XAL
Cambodia	XKH
Mongolia	KMN
Egypt	XEG
Guinea	XGN
CSSR	XCS
GDR	XDD
USSR	XSU
USSR—Credit 555 mil.	
Brazil	XBR
Algeria	XDZ
USSR—clearing ruble	XEE
India	XIN
Bulgaria	LEV
Ghana	USD
Mexico	USD

ANNEX D

Archives

Article 1

(*a*) For the purposes of this annex, "SFRY State archives" means all documents, of whatever date or kind and wherever located, which were produced or received by the SFRY (or by any previous constitutional structure of the Yugoslav State since 1 December 1918) in the exercise of its functions and which, on 30 June 1991, belonged to the SFRY in accordance with its internal law and were, pursuant to the federal law on the regulation of federal archives, preserved by it directly or under its control as archives for whatever purpose.

(*b*) For the purposes of this annex, "Republic or other archives" refers to the archives of any of the States in their former capacities as constituent Republics of the SFRY, or of

their territorial or administrative units, and means all documents, of whatever date or kind and wherever located, which were produced or received by any of those Republics or territorial or administrative units in the exercise of their functions and which, on 30 June 1991, belonged to them in accordance with the applicable law and were, pursuant to the law on the regulation of archives of each of the Republics, preserved by them directly or under their control as archives for whatever purpose.

(*c*) "Documents" in the preceding subparagraphs includes film, audio and video tapes and other recordings, as well as any form of computerized records, and includes documents which constitute cultural property.

Article 2

If Republic or other archives were displaced from the Republic to which they belonged or if SFRY State archives were displaced from their proper location, they shall, subject to the provisions of this annex and in accordance with international principles of provenance, be restored respectively to the Republic to which they belonged or their proper location as soon as possible by the State which currently has control of them.

Article 3

The part of the SFRY State archives (administrative, current and archival records) necessary for the normal administration of the territory of one or more of the States shall, in accordance with the principle of functional pertinence, pass to those States, irrespective of where those archives are actually located.

Article 4

(*a*) The part of the SFRY State archives which constitutes a group which:

(i) Relates directly to the territory of one or more of the States, or

(ii) Was produced or received in the territory of one or more of the States, or

(iii) Consists of treaties of which the SFRY was the depositary and which relates only to matters concerning the territory of, or to institutions having their headquarters in the territory of, one or more of the States,

shall pass to those States, irrespective of where those archives are actually located.

(*b*) Pending the apportionment of SFRY State archives under this article,

(i) The original of the Treaty on Water Economy Problems between the SFRY and Greece signed in 1959 (Official Gazette of the SFRY No. 20 of 4 June 1960) and of the Treaty on the Preservation and Renewal of Frontier Signs on the Yugoslav-Greece Frontier for the Protection, Prevention and the Solution on Frontier Incidents (Official Gazette of the SFRY No. 20 of 26 February 1959) shall be transferred forthwith to the Republic of Macedonia;

(ii) The original text or certified copies of the Treaty of Osimo and the Osimo Agreement of 1975, and any related agreements, archives and *travaux préparatoires* concerning their negotiation and implementation, shall be made available forthwith to Croatia and Slovenia in order to enable them, in full possession of the relevant material, to negotiate with Italy over the consequences of those treaties for their respective States.

Article 5

If pursuant to articles 3 or 4 archives are to pass to more than one State, those States shall agree which of them will receive the original and enable the others to make copies.

Article 6

(*a*) In relation to SFRY State archives other than those referred to in articles 3 and 4, the States shall, by agreement to be reached within six months of the entry into force of this Agreement, determine their equitable distribution among themselves or their

retention as common heritage of the States which shall have free and unhindered access to them. If no such agreement is reached, the archives shall become common heritage. In either event, each State may make copies of the archives in question on an equitable cost-sharing basis.

(*b*) The agreement referred to in paragraph (*a*) shall take account of all relevant circumstances which include the observance as far as possible of the principle of respect for the integrity of groups of SFRY State archives so as to facilitate full access to and research in those groups of archives. Respect for the integrity of groups of archives is without prejudice to the question where any particular group of archives should be preserved. The Ministries or Departments responsible for archives in each of the States shall within 24 months of the date on which this Agreement enters into force identify, and circulate to each other, lists of groups of archives to which this principle should apply, and shall thereafter seek to agree on a single such list within a further period of three months. They shall also identify, and circulate to each other, within 24 months of the date on which this Agreement enters into force, lists of archives to which articles 3 and 4 apply.

Article 7

Pending implementation of this Agreement there shall be immediate free and unhindered access by representatives of the interested States to SFRY State archives dated on or before 30 June 1991. This access also applies to Republic and other archives (other than current archives) now held in the States concerned.

Article 8

Republic or other archives are the property of the corresponding State and are not subject to the provisions of this annex, other than articles 1, 2 and 7.

Article 9

Private archives are not subject to the other provisions of this article. Those which were taken from their owners after 1 December 1918 shall be returned to where they had been produced or to their owners, according to international principles of provenance, without any compensation or other conditions.

Article 10

Where SFRY bilateral treaties concerning the restitution of archives were in force on 30 June 1991 and those treaties have not yet been fully performed, the States with an interest in those archives are ready to assume the rights and obligations formerly held by the SFRY in relation to the performance of those treaties.

Article 11

(*a*) The current possessor of the original of any archive which is to be transferred pursuant to this annex may make copies thereof.

(*b*) The cost of making copies pursuant to articles 5 and 11 (*a*) above shall be subject to further agreement between the States concerned.

(*c*) The cost of transporting archives which pass pursuant to this annex shall be borne by the recipient.

(*d*) The current possessor of archives which are to be transported or which may be copied pursuant to this annex shall assist in reducing the related costs as far as possible.

(*e*) Any State making archives available for copying shall provide the best available document to copy and provide free and equal access to all States making copies.

(*f*) The State in possession of original documents forming part of the SFRY State Archives shall provide access to them for purposes of obtaining a certified copy for use as evidence upon the request of the interested user, should the copy available in another State not be usable for his legitimate needs.

Article 12

Within three months of the date on which this Agreement enters into force, representatives of the Ministries or Departments responsible for archives in each of the States shall meet together to give effect to this annex, and to take such immediate action as may be possible. Arrangements for that meeting, and for the initial general supervision of the implementation of this annex, shall be made by the Standing Joint Committee established under article 4 of this Agreement.

ANNEX E

Pensions

Article 1

Each State shall assume responsibility for and regularly pay legally grounded pensions funded by that State in its former capacity as a constituent Republic of the SFRY, irrespective of the nationality, citizenship, residence or domicile of the beneficiary.

Article 2

Each State shall assume responsibility for and regularly pay pensions which are due to its citizens who were civil or military servants of the SFRY irrespective of where they are resident or domiciled, if those pensions were funded from the federal budget or other federal resources of the SFRY; provided that in the case of a person who is a citizen of more than one State:

(i) If that person is domiciled in one of those States, payment of the pension shall be made by that State, and

(ii) If that person is not domiciled in any State of which such person is a citizen, payment of the pension shall be made by the State in the territory of which that person was resident on 1 June 1991.

Article 3

The States shall, if necessary, conclude bilateral arrangements for ensuring the payment of pensions pursuant to articles 1 and 2 above to persons located in a State other than that which is paying the pensions of those persons, for transferring the necessary funds to ensure payment of those pensions, and for the payment of pensions proportionally to the payment of contributions. Where appropriate, the conclusion of such definitive bilateral arrangements may be preceded by the conclusion of interim arrangements for ensuring the payment of pensions pursuant to article 2. Any bilateral agreements concluded between any two of the States shall prevail over the provisions of this annex and shall resolve the issue of mutual claims between the pension funds of the States relating to payments of pensions made before such agreements entered into force.

ANNEX F

Other rights, interests and liabilities

Article 1

All rights and interests which belonged to the SFRY and which are not otherwise covered by this Agreement (including, but not limited to, patents, trademarks, copyrights, royalties, and claims of and debts due to the SFRY) shall be shared among the successor States, taking into account the proportion for division of SFRY financial assets in annex C of this Agreement. The division of such rights and interests shall proceed under the direction of the Standing Joint Committee established under article 4 of this Agreement.

Article 2

All claims against the SFRY which are not otherwise covered by this Agreement shall be considered by the Standing Joint Committee established under article 4 of this Agreement. The successor States shall inform one another of all such claims against the SFRY.

ANNEX G

Private property and acquired rights

Article 1

Private property and acquired rights of citizens and other legal persons of the SFRY shall be protected by successor States in accordance with the provisions of this annex.

Article 2

1. (*a*) The rights to movable and immovable property located in a successor State and to which citizens or other legal persons of the SFRY were entitled on 31 December 1990 shall be recognized, and protected and restored by that State in accordance with established standards and norms of international law and irrespective of the nationality, citizenship, residence or domicile of those persons. This shall include persons who, after 31 December 1990, acquired the citizenship of or established domicile or residence in a State other than a successor State. Persons unable to realize such rights shall be entitled to compensation in accordance with civil and international legal norms.

(*b*) Any purported transfer of rights to movable or immovable property made after 31 December 1990 and concluded under duress or contrary to subparagraph (*a*) of this article shall be null and void.

2. All contracts concluded by citizens or other legal persons of the SFRY as of 31 December 1990, including those concluded by public enterprises, shall be respected on a non-discriminatory basis. The successor States shall provide for the carrying out of obligations under such contracts, where the performance of such contracts was prevented by the break-up of the SFRY.

Article 3

The successor States shall respect and protect rights of all natural and juridical persons of the SFRY to intellectual property, including patents, trademarks, copyrights, and other allied rights (e.g., royalties), and shall comply with international conventions in that regard.

Article 4

The successor States shall take such action as may be required by general principles of law and otherwise appropriate to ensure the effective application of the principles set out in this annex, such as concluding bilateral agreements and notifying their courts and other competent authorities.

Article 5

Nothing in the foregoing provisions of this annex shall derogate from the provisions of bilateral agreements concluded on the same matter between successor States which, in particular areas, may be conclusive as between those States.

Article 6

Domestic legislation of each successor State concerning dwelling rights ("stanarsko pravo/stanovanjska pravica/станарско право") shall be applied equally to persons who were citizens of the SFRY and who had such rights, without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

Article 7

All natural and legal persons from each successor State shall, on the basis of reciprocity, have the same right of access to the courts, administrative tribunals and agencies of that State and of the other successor States for the purpose of realizing the protection of their rights.

Article 8

The foregoing provisions of this annex are without prejudice to any guarantees of non-discrimination related to private property and acquired rights that exist in the domestic legislation of the successor States.

4. UNITED NATIONS CONVENTION ON THE ASSIGNMENT OF RECEIVABLES IN INTERNATIONAL TRADE. DONE AT NEW YORK ON 12 DECEMBER 2001[5]

United Nations Convention on the Assignment of Receivables in International Trade

PREAMBLE

The Contracting States,

Reaffirming their conviction that international trade on the basis of equality and mutual benefit is an important element in the promotion of friendly relations among States,

Considering that problems created by uncertainties as to the content and the choice of legal regime applicable to the assignment of receivables constitute an obstacle to international trade,

Desiring to establish principles and to adopt rules relating to the assignment of receivables that would create certainty and transparency and promote the modernization of the law relating to assignments of receivables, while protecting existing assignment practices and facilitating the development of new practices,

Desiring also to ensure adequate protection of the interests of debtors in assignments of receivables,

Being of the opinion that the adoption of uniform rules governing the assignment of receivables would promote the availability of capital and credit at more affordable rates and thus facilitate the development of international trade,

Have agreed as follows:

CHAPTER I. SCOPE OF APPLICATION

Article 1

Scope of application

1. This Convention applies to:

(*a*) Assignments of international receivables and to international assignments of receivables as defined in this chapter, if, at the time of conclusion of the contract of assignment, the assignor is located in a Contracting State; and

(*b*) Subsequent assignments, provided that any prior assignment is governed by this Convention.

2. This Convention applies to subsequent assignments that satisfy the criteria set forth in paragraph 1 (*a*) of this article, even if it did not apply to any prior assignment of the same receivable.

3. This Convention does not affect the rights and obligations of the debtor unless, at the time of conclusion of the original contract, the debtor is located in a Contracting State or the law governing the original contract is the law of a Contracting State.

4. The provisions of chapter V apply to assignments of international receivables and to international assignments of receivables as defined in this chapter in-

dependently of paragraphs 1 to 3 of this article. However, those provisions do not apply if a State makes a declaration under article 39.

5. The provisions of the annex to this Convention apply as provided in article 42.

Article 2

Assignment of receivables

For the purposes of this Convention:

(*a*) "Assignment" means the transfer by agreement from one person ("assignor") to another person ("assignee") of all or part of or an undivided interest in the assignor's contractual right to payment of a monetary sum ("receivable") from a third person ("the debtor"). The creation of rights in receivables as security for indebtedness or other obligation is deemed to be a transfer;

(*b*) In the case of an assignment by the initial or any other assignee ("subsequent assignment"), the person who makes that assignment is the assignor and the person to whom that assignment is made is the assignee.

Article 3

Internationality

A receivable is international if, at the time of conclusion of the original contract, the assignor and the debtor are located in different States. An assignment is international if, at the time of conclusion of the contract of assignment, the assignor and the assignee are located in different States.

Article 4

Exclusions and other limitations

1. This Convention does not apply to assignments made:

(*a*) To an individual for his or her personal, family or household purposes;

(*b*) As part of the sale or change in the ownership or legal status of the business out of which the assigned receivables arose.

2. This Convention does not apply to assignments of receivables arising under or from:

(*a*) Transactions on a regulated exchange;

(*b*) Financial contracts governed by netting agreements, except a receivable owed on the termination of all outstanding transactions;

(*c*) Foreign exchange transactions;

(*d*) Inter-bank payment systems, inter-bank payment agreements or clearance and settlement systems relating to securities or other financial assets or instruments;

(*e*) The transfer of security rights in, sale, loan or holding of or agreement to repurchase securities or other financial assets or instruments held with an intermediary;

(*f*) Bank deposits;

(*g*) A letter of credit or independent guarantee.

3. Nothing in this Convention affects the rights and obligations of any person under the law governing negotiable instruments.

4. Nothing in this Convention affects the rights and obligations of the assignor and the debtor under special laws governing the protection of parties to transactions made for personal, family or household purposes.

5. Nothing in this Convention:

(*a*) Affects the application of the law of a State in which real property is situated to either:

(i) An interest in that real property to the extent that under that law the assignment of a receivable confers such an interest; or

(ii) The priority of a right in a receivable to the extent that under that law an interest in the real property confers such a right; or

(*b*) Makes lawful the acquisition of an interest in real property not permitted under the law of the State in which the real property is situated.

CHAPTER II. GENERAL PROVISIONS

Article 5

Definitions and rules of interpretation

For the purposes of this Convention:

(*a*) "Original contract" means the contract between the assignor and the debtor from which the assigned receivable arises;

(*b*) "Existing receivable" means a receivable that arises upon or before conclusion of the contract of assignment and "future receivable" means a receivable that arises after conclusion of the contract of assignment;

(*c*) "Writing" means any form of information that is accessible so as to be usable for subsequent reference. Where this Convention requires a writing to be signed, that requirement is met if, by generally accepted means or a procedure agreed to by the person whose signature is required, the writing identifies that person and indicates that person's approval of the information contained in the writing;

(*d*) "Notification of the assignment" means a communication in writing that reasonably identifies the assigned receivables and the assignee;

(*e*) "Insolvency administrator" means a person or body, including one appointed on an interim basis, authorized in an insolvency proceeding to administer the reorganization or liquidation of the assignor's assets or affairs;

(*f*) "Insolvency proceeding" means a collective judicial or administrative proceeding, including an interim proceeding, in which the assets and affairs of the assignor are subject to control or supervision by a court or other competent authority for the purpose of reorganization or liquidation;

(*g*) "Priority" means the right of a person in preference to the right of another person and, to the extent relevant for such purpose, includes the determination whether the right is a personal or a property right, whether or not it is a security right for indebtedness or other obligation and whether any requirements necessary to render the right effective against a competing claimant have been satisfied;

(*h*) A person is located in the State in which it has its place of business. If the assignor or the assignee has a place of business in more than one State, the place of business is that place where the central administration of the assignor or the assignee is exercised. If the debtor has a place of business in more than one State, the

place of business is that which has the closest relationship to the original contract. If a person does not have a place of business, reference is to be made to the habitual residence of that person;

(*i*) "Law" means the law in force in a State other than its rules of private international law;

(*j*) "Proceeds" means whatever is received in respect of an assigned receivable, whether in total or partial payment or other satisfaction of the receivable. The term includes whatever is received in respect of proceeds. The term does not include returned goods;

(*k*) "Financial contract" means any spot, forward, future, option or swap transaction involving interest rates, commodities, currencies, equities, bonds, indices or any other financial instrument, any repurchase or securities lending transaction, and any other transaction similar to any transaction referred to above entered into in financial markets and any combination of the transactions mentioned above;

(*l*) "Netting agreement" means an agreement between two or more parties that provides for one or more of the following:

(i) The net settlement of payments due in the same currency on the same date whether by novation or otherwise;

(ii) Upon the insolvency or other default by a party, the termination of all outstanding transactions at their replacement or fair market values, conversion of such sums into a single currency and netting into a single payment by one party to the other; or

(iii) The set-off of amounts calculated as set forth in subparagraph (*l*) (ii) of this article under two or more netting agreements;

(*m*) "Competing claimant" means:

(i) Another assignee of the same receivable from the same assignor, including a person who, by operation of law, claims a right in the assigned receivable as a result of its right in other property of the assignor, even if that receivable is not an international receivable and the assignment to that assignee is not an international assignment;

(ii) A creditor of the assignor; or

(iii) The insolvency administrator.

Article 6

Party autonomy

Subject to article 19, the assignor, the assignee and the debtor may derogate from or vary by agreement provisions of this Convention relating to their respective rights and obligations. Such an agreement does not affect the rights of any person who is not a party to the agreement.

Article 7

Principles of interpretation

1. In the interpretation of this Convention, regard is to be had to its object and purpose as set forth in the preamble, to its international character and to the need to promote uniformity in its application and the observance of good faith in international trade.

2. Questions concerning matters governed by this Convention that are not expressly settled in it are to be settled in conformity with the general principles on which it is based or, in the absence of such principles, in conformity with the law applicable by virtue of the rules of private international law.

CHAPTER III. EFFECTS OF ASSIGNMENT

Article 8

Effectiveness of assignments

1. An assignment is not ineffective as between the assignor and the assignee or as against the debtor or as against a competing claimant, and the right of an assignee may not be denied priority, on the ground that it is an assignment of more than one receivable, future receivables or parts of or undivided interests in receivables, provided that the receivables are described:

(*a*) Individually as receivables to which the assignment relates; or

(*b*) In any other manner, provided that they can, at the time of the assignment or, in the case of future receivables, at the time of conclusion of the original contract, be identified as receivables to which the assignment relates.

2. Unless otherwise agreed, an assignment of one or more future receivables is effective without a new act of transfer being required to assign each receivable.

3. Except as provided in paragraph 1 of this article, article 9 and article 10, paragraphs 2 and 3, this Convention does not affect any limitations on assignments arising from law.

Article 9

Contractual limitations on assignments

1. An assignment of a receivable is effective notwithstanding any agreement between the initial or any subsequent assignor and the debtor or any subsequent assignee limiting in any way the assignor's right to assign its receivables.

2. Nothing in this article affects any obligation or liability of the assignor for breach of such an agreement, but the other party to such agreement may not avoid the original contract or the assignment contract on the sole ground of that breach. A person who is not party to such an agreement is not liable on the sole ground that it had knowledge of the agreement.

3. This article applies only to assignments of receivables:

(*a*) Arising from an original contract that is a contract for the supply or lease of goods or services other than financial services, a construction contract or a contract for the sale or lease of real property;

(*b*) Arising from an original contract for the sale, lease or licence of industrial or other intellectual property or of proprietary information;

(*c*) Representing the payment obligation for a credit card transaction; or

(*d*) Owed to the assignor upon net settlement of payments due pursuant to a netting agreement involving more than two parties.

Article 10

Transfer of security rights

1. A personal or property right securing payment of the assigned receivable is transferred to the assignee without a new act of transfer. If such a right, under the law governing it, is transferable only with a new act of transfer, the assignor is obliged to transfer such right and any proceeds to the assignee.

2. A right securing payment of the assigned receivable is transferred under paragraph 1 of this article notwithstanding any agreement between the assignor and the debtor or other person granting that right, limiting in any way the assignor's right to assign the receivable or the right securing payment of the assigned receivable.

3. Nothing in this article affects any obligation or liability of the assignor for breach of any agreement under paragraph 2 of this article, but the other party to that agreement may not avoid the original contract or the assignment contract on the sole ground of that breach. A person who is not a party to such an agreement is not liable on the sole ground that it had knowledge of the agreement.

4. Paragraphs 2 and 3 of this article apply only to assignments of receivables:

(*a*) Arising from an original contract that is a contract for the supply or lease of goods or services other than financial services, a construction contract or a contract for the sale or lease of real property;

(*b*) Arising from an original contract for the sale, lease or licence of industrial or other intellectual property or of proprietary information;

(*c*) Representing the payment obligation for a credit card transaction; or

(*d*) Owed to the assignor upon net settlement of payments due pursuant to a netting agreement involving more than two parties.

5. The transfer of a possessory property right under paragraph 1 of this article does not affect any obligations of the assignor to the debtor or the person granting the property right with respect to the property transferred existing under the law governing that property right.

6. Paragraph 1 of this article does not affect any requirement under rules of law other than this Convention relating to the form or registration of the transfer of any rights securing payment of the assigned receivable.

CHAPTER IV. RIGHTS, OBLIGATIONS AND DEFENCES

SECTION I. ASSIGNOR AND ASSIGNEE

Article 11

Rights and obligations of the assignor and the assignee

1. The mutual rights and obligations of the assignor and the assignee arising from their agreement are determined by the terms and conditions set forth in that agreement, including any rules or general conditions referred to therein.

2. The assignor and the assignee are bound by any usage to which they have agreed and, unless otherwise agreed, by any practices they have established between themselves.

3. In an international assignment, the assignor and the assignee are considered, unless otherwise agreed, implicitly to have made applicable to the assignment a usage that in international trade is widely known to, and regularly observed by, parties to the particular type of assignment or to the assignment of the particular category of receivables.

Article 12

Representations of the assignor

1. Unless otherwise agreed between the assignor and the assignee, the assignor represents at the time of conclusion of the contract of assignment that:

(*a*) The assignor has the right to assign the receivable;

(*b*) The assignor has not previously assigned the receivable to another assignee; and

(*c*) The debtor does not and will not have any defences or rights of set-off.

2. Unless otherwise agreed between the assignor and the assignee, the assignor does not represent that the debtor has or will have, the ability to pay.

Article 13

Right to notify the debtor

1. Unless otherwise agreed between the assignor and the assignee, the assignor or the assignee or both may send the debtor notification of the assignment and a payment instruction, but after notification has been sent only the assignee may send such an instruction.

2. Notification of the assignment or a payment instruction sent in breach of any agreement referred to in paragraph 1 of this article is not ineffective for the purposes of article 17 by reason of such breach. However, nothing in this article affects any obligation or liability of the party in breach of such an agreement for any damages arising as a result of the breach.

Article 14

Right to payment

1. As between the assignor and the assignee, unless otherwise agreed and whether or not notification of the assignment has been sent:

(*a*) If payment in respect of the assigned receivable is made to the assignee, the assignee is entitled to retain the proceeds and goods returned in respect of the assigned receivable;

(*b*) If payment in respect of the assigned receivable is made to the assignor, the assignee is entitled to payment of the proceeds and also to goods returned to the assignor in respect of the assigned receivable; and

(*c*) If payment in respect of the assigned receivable is made to another person over whom the assignee has priority, the assignee is entitled to payment of the proceeds and also to goods returned to such person in respect of the assigned receivable.

2. The assignee may not retain more than the value of its right in the receivable.

SECTION II. DEBTOR

Article 15

Principle of debtor protection

1. Except as otherwise provided in this Convention, an assignment does not, without the consent of the debtor, affect the rights and obligations of the debtor, including the payment terms contained in the original contract.

2. A payment instruction may change the person, address or account to which the debtor is required to make payment, but may not change:

(*a*) The currency of payment specified in the original contract; or

(*b*) The State specified in the original contract in which payment is to be made to a State other than that in which the debtor is located.

Article 16

Notification of the debtor

1. Notification of the assignment or a payment instruction is effective when received by the debtor if it is in a language that is reasonably expected to inform the debtor about its contents. It is sufficient if notification of the assignment or a payment instruction is in the language of the original contract.

2. Notification of the assignment or a payment instruction may relate to receivables arising after notification.

3. Notification of a subsequent assignment constitutes notification of all prior assignments.

Article 17

Debtor's discharge by payment

1. Until the debtor receives notification of the assignment, the debtor is entitled to be discharged by paying in accordance with the original contract.

2. After the debtor receives notification of the assignment, subject to paragraphs 3 to 8 of this article, the debtor is discharged only by paying the assignee or, if otherwise instructed in the notification of the assignment or subsequently by the assignee in a writing received by the debtor, in accordance with such payment instruction.

3. If the debtor receives more than one payment instruction relating to a single assignment of the same receivable by the same assignor, the debtor is discharged by paying in accordance with the last payment instruction received from the assignee before payment.

4. If the debtor receives notification of more than one assignment of the same receivable made by the same assignor, the debtor is discharged by paying in accordance with the first notification received.

5. If the debtor receives notification of one or more subsequent assignments, the debtor is discharged by paying in accordance with the notification of the last of such subsequent assignments.

6. If the debtor receives notification of the assignment of a part of or an undivided interest in one or more receivables, the debtor is discharged by paying in accordance with the notification or in accordance with this article as if the debtor had not received the notification. If the debtor pays in accordance with the notification, the debtor is discharged only to the extent of the part or undivided interest paid.

7. If the debtor receives notification of the assignment from the assignee, the debtor is entitled to request the assignee to provide within a reasonable period of time adequate proof that the assignment from the initial assignor to the initial assignee and any intermediate assignment have been made and, unless the assignee does so, the debtor is discharged by paying in accordance with this article as if the notification from the assignee had not been received. Adequate proof of an assignment includes but is not limited to any writing emanating from the assignor and indicating that the assignment has taken place.

8. This article does not affect any other ground on which payment by the debtor to the person entitled to payment, to a competent judicial or other authority or to a public deposit fund discharges the debtor.

Article 18

Defences and rights of set-off of the debtor

1. In a claim by the assignee against the debtor for payment of the assigned receivable, the debtor may raise against the assignee all defences and rights of set-off arising from the original contract or any other contract that was part of the same transaction, of which the debtor could avail itself as if the assignment had not been made and such claim were made by the assignor.

2. The debtor may raise against the assignee any other right of set-off, provided that it was available to the debtor at the time notification of the assignment was received by the debtor.

3. Notwithstanding paragraphs 1 and 2 of this article, defences and rights of set-off that the debtor may raise pursuant to article 9 or 10 against the assignor for breach of an agreement limiting in any way the assignor's right to make the assignment are not available to the debtor against the assignee.

Article 19

Agreement not to raise defences or rights of set-off

1. The debtor may agree with the assignor in a writing signed by the debtor not to raise against the assignee the defences and rights of set-off that it could raise pursuant to article 18. Such an agreement precludes the debtor from raising against the assignee those defences and rights of set-off.

2. The debtor may not waive defences:

(*a*) Arising from fraudulent acts on the part of the assignee; or

(*b*) Based on the debtor's incapacity.

3. Such an agreement may be modified only by an agreement in a writing signed by the debtor. The effect of such a modification as against the assignee is determined by article 20, paragraph 2.

Article 20

Modification of the original contract

1. An agreement concluded before notification of the assignment between the assignor and the debtor that affects the assignee's rights is effective as against the assignee, and the assignee acquires corresponding rights.

2. An agreement concluded after notification of the assignment between the assignor and the debtor that affects the assignee's rights is ineffective as against the assignee unless:

(*a*) The assignee consents to it; or

(*b*) The receivable is not fully earned by performance and either the modification is provided for in the original contract or, in the context of the original contract, a reasonable assignee would consent to the modification.

3. Paragraphs 1 and 2 of this article do not affect any right of the assignor or the assignee arising from breach of an agreement between them.

Article 21

Recovery of payments

Failure of the assignor to perform the original contract does not entitle the debtor to recover from the assignee a sum paid by the debtor to the assignor or the assignee.

SECTION III. THIRD PARTIES

Article 22

Law applicable to competing rights

With the exception of matters that are settled elsewhere in this Convention and subject to articles 23 and 24, the law of the State in which the assignor is located governs the priority of the right of an assignee in the assigned receivable over the right of a competing claimant.

Article 23

Public policy and mandatory rules

1. The application of a provision of the law of the State in which the assignor is located may be refused only if the application of that provision is manifestly contrary to the public policy of the forum State.

2. The rules of the law of either the forum State or any other State that are mandatory irrespective of the law otherwise applicable may not prevent the application of a provision of the law of the State in which the assignor is located.

3. Notwithstanding paragraph 2 of this article, in an insolvency proceeding commenced in a State other than the State in which the assignor is located, any preferential right that arises, by operation of law, under the law of the forum State and is given priority over the rights of an assignee in insolvency proceedings under the law of that State may be given priority notwithstanding article 22. A State may deposit at any time a declaration identifying any such preferential right.

Article 24

Special rules on proceeds

1. If proceeds are received by the assignee, the assignee is entitled to retain those proceeds to the extent that the assignee's right in the assigned receivable had priority over the right of a competing claimant in the assigned receivable.

2. If proceeds are received by the assignor, the right of the assignee in those proceeds has priority over the right of a competing claimant in those proceeds to the same extent as the assignee's right had priority over the right in the assigned receivable of that claimant if:

(*a*) The assignor has received the proceeds under instructions from the assignee to hold the proceeds for the benefit of the assignee; and

(*b*) The proceeds are held by the assignor for the benefit of the assignee separately and are reasonably identifiable from the assets of the assignor, such as in the case of a separate deposit or securities account containing only proceeds consisting of cash or securities.

3. Nothing in paragraph 2 of this article affects the priority of a person having against the proceeds a right of set-off or a right created by agreement and not derived from a right in the receivable.

Article 25

Subordination

An assignee entitled to priority may at any time subordinate its priority unilaterally or by agreement in favour of any existing or future assignees.

CHAPTER V. AUTONOMOUS CONFLICT-OF-LAWS RULES

Article 26

Application of chapter V

The provisions of this chapter apply to matters that are:

(*a*) Within the scope of this Convention as provided in article 1, paragraph 4; and

(*b*) Otherwise within the scope of this Convention but not settled elsewhere in it.

Article 27

Form of a contract of assignment

1. A contract of assignment concluded between persons who are located in the same State is formally valid as between them if it satisfies the requirements of either the law which governs it or the law of the State in which it is concluded.

2. A contract of assignment concluded between persons who are located in different States is formally valid as between them if it satisfies the requirements of either the law which governs it or the law of one of those States.

Article 28

Law applicable to the mutual rights and obligations of the assignor and the assignee

1. The mutual rights and obligations of the assignor and the assignee arising from their agreement are governed by the law chosen by them.

2. In the absence of a choice of law by the assignor and the assignee, their mutual rights and obligations arising from their agreement are governed by the law of the State with which the contract of assignment is most closely connected.

Article 29

Law applicable to the rights and obligations of the assignee and the debtor

The law governing the original contract determines the effectiveness of contractual limitations on assignment as between the assignee and the debtor, the relationship between the assignee and the debtor, the conditions under which the assignment can be invoked against the debtor and whether the debtor's obligations have been discharged.

Article 30

Law applicable to priority

1. The law of the State in which the assignor is located governs the priority of the right of an assignee in the assigned receivable over the right of a competing claimant.

2. The rules of the law of either the forum State or any other State that are mandatory irrespective of the law otherwise applicable may not prevent the application of a provision of the law of the State in which the assignor is located.

3. Notwithstanding paragraph 2 of this article, in an insolvency proceeding commenced in a State other than the State in which the assignor is located, any preferential right that arises, by operation of law, under the law of the forum State and is given priority over the rights of an assignee in insolvency proceedings under the law of that State may be given priority notwithstanding paragraph 1 of this article.

Article 31

Mandatory rules

1. Nothing in articles 27 to 29 restricts the application of the rules of the law of the forum State in a situation where they are mandatory irrespective of the law otherwise applicable.

2. Nothing in articles 27 to 29 restricts the application of the mandatory rules of the law of another State with which the matters settled in those articles have a close connection if and insofar as, under the law of that other State, those rules must be applied irrespective of the law otherwise applicable.

Article 32

Public policy

With regard to matters settled in this chapter, the application of a provision of the law specified in this chapter may be refused only if the application of that provision is manifestly contrary to the public policy of the forum State.

CHAPTER VI. FINAL PROVISIONS

Article 33

Depositary

The Secretary-General of the United Nations is the depositary of this Convention.

Article 34

Signature, ratification, acceptance, approval, accession

1. This Convention is open for signature by all States at the Headquarters of the United Nations in New York until 31 December 2003.

2. This Convention is subject to ratification, acceptance or approval by the signatory States.

3. This Convention is open to accession by all States that are not signatory States as from the date it is open for signature.

4. Instruments of ratification, acceptance, approval and accession are to be deposited with the Secretary-General of the United Nations.

Article 35

Application to territorial units

1. If a State has two or more territorial units in which different systems of law are applicable in relation to the matters dealt with in this Convention, it may at any time declare that this Convention is to extend to all its territorial units or only one or more of them, and may at any time substitute another declaration for its earlier declaration.

2. Such declarations are to state expressly the territorial units to which this Convention extends.

3. If, by virtue of a declaration under this article, this Convention does not extend to all territorial units of a State and the assignor or the debtor is located in a territorial unit to which this Convention does not extend, this location is considered not to be in a Contracting State.

4. If, by virtue of a declaration under this article, this Convention does not extend to all territorial units of a State and the law governing the original contract is the law in force in a territorial unit to which this Convention does not extend, the law governing the original contract is considered not to be the law of a Contracting State.

5. If a State makes no declaration under paragraph 1 of this article, the Convention is to extend to all territorial units of that State.

Article 36

Location in a territorial unit

If a person is located in a State which has two or more territorial units, that person is located in the territorial unit in which it has its place of business. If the assignor or the assignee has a place of business in more than one territorial unit, the place of business is that place where the central administration of the assignor or the assignee is exercised. If the debtor has a place of business in more than one territorial unit, the place of business is that which has the closest relationship to the

original contract. If a person does not have a place of business, reference is to be made to the habitual residence of that person. A State with two or more territorial units may specify by declaration at any time other rules for determining the location of a person within that State.

Article 37

Applicable law in territorial units

Any reference in this Convention to the law of a State means, in the case of a State which has two or more territorial units, the law in force in the territorial unit. Such a State may specify by declaration at any time other rules for determining the applicable law, including rules that render applicable the law of another territorial unit of that State.

Article 38

Conflicts with other international agreements

1. This Convention does not prevail over any international agreement that has already been or may be entered into and that specifically governs a transaction otherwise governed by this Convention.

2. Notwithstanding paragraph 1 of this article, this Convention prevails over the Unidroit Convention on International Factoring ("the Ottawa Convention"). To the extent that this Convention does not apply to the rights and obligations of a debtor, it does not preclude the application of the Ottawa Convention with respect to the rights and obligations of that debtor.

Article 39

Declaration on application of chapter V

A State may declare at any time that it will not be bound by chapter V.

Article 40

Limitations relating to Governments and other public entities

A State may declare at any time that it will not be bound or the extent to which it will not be bound by articles 9 and 10 if the debtor or any person granting a personal or property right securing payment of the assigned receivable is located in that State at the time of conclusion of the original contract and is a Government, central or local, any subdivision thereof, or an entity constituted for a public purpose. If a State has made such a declaration, articles 9 and 10 do not affect the rights and obligations of that debtor or person. A State may list in a declaration the types of entity that are the subject of a declaration.

Article 41

Other exclusions

1. A State may declare at any time that it will not apply this Convention to specific types of assignment or to the assignment of specific categories of receivables clearly described in a declaration.

2. After a declaration under paragraph 1 of this article takes effect:

(*a*) This Convention does not apply to such types of assignment or to the assignment of such categories of receivables if the assignor is located at the time of conclusion of the contract of assignment in such a State; and

(*b*) The provisions of this Convention that affect the rights and obligations of the debtor do not apply if, at the time of conclusion of the original contract, the debtor is located in such a State or the law governing the original contract is the law of such a State.

3. This article does not apply to assignments of receivables listed in article 9, paragraph 3.

Article 42

Application of the annex

1. A State may at any time declare that it will be bound by:

(*a*) The priority rules set forth in section I of the annex and will participate in the international registration system established pursuant to section II of the annex;

(*b*) The priority rules set forth in section I of the annex and will effectuate such rules by use of a registration system that fulfils the purposes of such rules, in which case, for the purposes of section I of the annex, registration pursuant to such a system has the same effect as registration pursuant to section II of the annex;

(*c*) The priority rules set forth in section III of the annex;

(*d*) The priority rules set forth in section IV of the annex; or

(*e*) The priority rules set forth in articles 7 and 9 of the annex.

2. For the purposes of article 22:

(*a*) The law of a State that has made a declaration pursuant to paragraph 1 (*a*) or (*b*) of this article is the set of rules set forth in section I of the annex, as affected by any declaration made pursuant to paragraph 5 of this article;

(*b*) The law of a State that has made a declaration pursuant to paragraph 1 (*c*) of this article is the set of rules set forth in section III of the annex, as affected by any declaration made pursuant to paragraph 5 of this article;

(*c*) The law of a State that has made a declaration pursuant to paragraph 1 (*d*) of this article is the set of rules set forth in section IV of the annex, as affected by any declaration made pursuant to paragraph 5 of this article; and

(*d*) The law of a State that has made a declaration pursuant to paragraph 1 (*e*) of this article is the set of rules set forth in articles 7 and 9 of the annex, as affected by any declaration made pursuant to paragraph 5 of this article.

3. A State that has made a declaration pursuant to paragraph 1 of this article may establish rules pursuant to which contracts of assignment concluded before the declaration takes effect become subject to those rules within a reasonable time.

4. A State that has not made a declaration pursuant to paragraph 1 of this article may, in accordance with priority rules in force in that State, utilize the registration system established pursuant to section II of the annex.

5. At the time a State makes a declaration pursuant to paragraph 1 of this article or thereafter, it may declare that:

(*a*) It will not apply the priority rules chosen under paragraph 1 of this article to certain types of assignment or to the assignment of certain categories of receivables; or

(*b*) It will apply those priority rules with modifications specified in that declaration.

6. At the request of Contracting or Signatory States to this Convention comprising not less than one third of the Contracting and Signatory States, the depositary shall convene a conference of the Contracting and Signatory States to designate the supervising authority and the first registrar and to prepare or revise the regulations referred to in section II of the annex.

Article 43

Effect of declaration

1. Declarations made under articles 35, paragraph 1, 36, 37 or 39 to 42 at the time of signature are subject to confirmation upon ratification, acceptance or approval.

2. Declarations and confirmations of declarations are to be in writing and to be formally notified to the depositary.

3. A declaration takes effect simultaneously with the entry into force of this Convention in respect of the State concerned. However, a declaration of which the depositary receives formal notification after such entry into force takes effect on the first day of the month following the expiration of six months after the date of its receipt by the depositary.

4. A State that makes a declaration under articles 35, paragraph 1, 36, 37 or 39 to 42 may withdraw it at any time by a formal notification in writing addressed to the depositary. Such withdrawal takes effect on the first day of the month following the expiration of six months after the date of the receipt of the notification by the depositary.

5. In the case of a declaration under articles 35, paragraph 1, 36, 37 or 39 to 42 that takes effect after the entry into force of this Convention in respect of the State concerned or in the case of a withdrawal of any such declaration, the effect of which in either case is to cause a rule in this Convention, including any annex, to become applicable:

(*a*) Except as provided in paragraph 5 (*b*) of this article, that rule is applicable only to assignments for which the contract of assignment is concluded on or after the date when the declaration or withdrawal takes effect in respect of the Contracting State referred to in article 1, paragraph 1 (*a*);

(*b*) A rule that deals with the rights and obligations of the debtor applies only in respect of original contracts concluded on or after the date when the declaration or withdrawal takes effect in respect of the Contracting State referred to in article 1, paragraph 3.

6. In the case of a declaration under articles 35, paragraph 1, 36, 37 or 39 to 42 that takes effect after the entry into force of this Convention in respect of the State concerned or in the case of a withdrawal of any such declaration, the effect of which in either case is to cause a rule in this Convention, including any annex, to become inapplicable:

(*a*) Except as provided in paragraph 6 (*b*) of this article, that rule is inapplicable to assignments for which the contract of assignment is concluded on or after the date when the declaration or withdrawal takes effect in respect of the Contracting State referred to in article 1, paragraph 1 (*a*);

(*b*) A rule that deals with the rights and obligations of the debtor is inapplicable in respect of original contracts concluded on or after the date when the declaration or withdrawal takes effect in respect of the Contracting State referred to in article 1, paragraph 3.

7. If a rule rendered applicable or inapplicable as a result of a declaration or withdrawal referred to in paragraph 5 or 6 of this article is relevant to the determination of priority with respect to a receivable for which the contract of assignment is concluded before such declaration or withdrawal takes effect or with respect to its proceeds, the right of the assignee has priority over the right of a competing claimant to the extent that, under the law that would determine priority before such declaration or withdrawal takes effect, the right of the assignee would have priority.

Article 44

Reservations

No reservations are permitted except those expressly authorized in this Convention.

Article 45

Entry into force

1. This Convention enters into force on the first day of the month following the expiration of six months from the date of deposit of the fifth instrument of ratification, acceptance, approval or accession with the depositary.

2. For each State that becomes a Contracting State to this Convention after the date of deposit of the fifth instrument of ratification, acceptance, approval or accession, this Convention enters into force on the first day of the month following the expiration of six months after the date of deposit of the appropriate instrument on behalf of that State.

3. This Convention applies only to assignments if the contract of assignment is concluded on or after the date when this Convention enters into force in respect of the Contracting State referred to in article 1, paragraph 1 (*a*), provided that the provisions of this Convention that deal with the rights and obligations of the debtor apply only to assignments of receivables arising from original contracts concluded on or after the date when this Convention enters into force in respect of the Contracting State referred to in article 1, paragraph 3.

4. If a receivable is assigned pursuant to a contract of assignment concluded before the date when this Convention enters into force in respect of the Contracting State referred to in article 1, paragraph 1 (*a*), the right of the assignee has priority over the right of a competing claimant with respect to the receivable to the extent that, under the law that would determine priority in the absence of this Convention, the right of the assignee would have priority.

Article 46

Denunciation

1. A Contracting State may denounce this Convention at any time by written notification addressed to the depositary.

2. The denunciation takes effect on the first day of the month following the expiration of one year after the notification is received by the depositary. Where a longer period is specified in the notification, the denunciation takes effect upon the expiration of such longer period after the notification is received by the depositary.

3. This Convention remains applicable to assignments if the contract of assignment is concluded before the date when the denunciation takes effect in respect of the Contracting State referred to in article 1, paragraph 1 (*a*), provided that the provisions of this Convention that deal with the rights and obligations of the debtor remain applicable only to assignments of receivables arising from original contracts concluded before the date when the denunciation takes effect in respect of the Contracting State referred to in article 1, paragraph 3.

4. If a receivable is assigned pursuant to a contract of assignment concluded before the date when the denunciation takes effect in respect of the Contracting State referred to in article 1, paragraph 1 (*a*), the right of the assignee has priority over the right of a competing claimant with respect to the receivable to the extent that, under the law that would determine priority under this Convention, the right of the assignee would have priority.

Article 47

Revision and amendment

1. At the request of not less than one third of the Contracting States to this Convention, the depositary shall convene a conference of the Contracting States to revise or amend it.

2. Any instrument of ratification, acceptance, approval or accession deposited after the entry into force of an amendment to this Convention is deemed to apply to the Convention as amended.

ANNEX TO THE CONVENTION

SECTION I. PRIORITY RULES BASED ON REGISTRATION

Article 1

Priority among several assignees

As between assignees of the same receivable from the same assignor, the priority of the right of an assignee in the assigned receivable is determined by the order in which data about the assignment are registered under section II of this annex, regardless of the time of transfer of the receivable. If no such data are registered, priority is determined by the order of conclusion of the respective contracts of assignment.

Article 2

Priority between the assignee and the insolvency administrator or creditors of the assignor

The right of an assignee in an assigned receivable has priority over the right of an insolvency administrator and creditors who obtain a right in the assigned receivable by attachment, judicial act or similar act of a competent authority that gives rise to such right, if the receivable was assigned, and data about the assignment were registered under section II of this annex, before the commencement of such insolvency proceeding, attachment, judicial act or similar act.

SECTION II. REGISTRATION

Article 3

Establishment of a registration system

A registration system will be established for the registration of data about assignments, even if the relevant assignment or receivable is not international, pursuant to the regulations to be promulgated by the registrar and the supervising authority. Regulations promulgated by the registrar and the supervising authority under this annex shall be consistent with this annex. The regulations will prescribe in detail the manner in which the registration system will operate, as well as the procedure for resolving disputes relating to that operation.

Article 4

Registration

1. Any person may register data with regard to an assignment at the registry in accordance with this annex and the regulations. As provided in the regulations, the data registered shall be the identification of the assignor and the assignee and a brief description of the assigned receivables.

2. A single registration may cover one or more assignments by the assignor to the assignee of one or more existing or future receivables, irrespective of whether the receivables exist at the time of registration.

3. A registration may be made in advance of the assignment to which it relates. The regulations will establish the procedure for the cancellation of a registration in the event that the assignment is not made.

4. Registration or its amendment is effective from the time when the data set forth in paragraph 1 of this article are available to searchers. The registering party may specify, from options set forth in the regulations, a period of effectiveness for the registration. In the absence of such a specification, a registration is effective for a period of five years.

5. Regulations will specify the manner in which registration may be renewed, amended or cancelled and regulate such other matters as are necessary for the operation of the registration system.

6. Any defect, irregularity, omission or error with regard to the identification of the assignor that would result in data registered not being found upon a search based on a proper identification of the assignor renders the registration ineffective.

Article 5

Registry searches

1. Any person may search the records of the registry according to identification of the assignor, as set forth in the regulations, and obtain a search result in writing.

2. A search result in writing that purports to be issued by the registry is admissible as evidence and is, in the absence of evidence to the contrary, proof of the registration of the data to which the search relates, including the date and hour of registration.

Section III. Priority rules based on the time of the contract of assignment

Article 6

Priority among several assignees

As between assignees of the same receivable from the same assignor, the priority of the right of an assignee in the assigned receivable is determined by the order of conclusion of the respective contracts of assignment.

Article 7

Priority between the assignee and the insolvency administrator or creditors of the assignor

The right of an assignee in an assigned receivable has priority over the right of an insolvency administrator and creditors who obtain a right in the assigned receivable by attachment, judicial act or similar act of a competent authority that gives rise to such right, if the receivable was assigned before the commencement of such insolvency proceeding, attachment, judicial act or similar act.

Article 8

Proof of time of contract of assignment

The time of conclusion of a contract of assignment in respect of articles 6 and 7 of this annex may be proved by any means, including witnesses.

Section IV. Priority rules based on the time of notification of assignment

Article 9

Priority among several assignees

As between assignees of the same receivable from the same assignor, the priority of the right of an assignee in the assigned receivable is determined by the order in which notification of the respective assignments is received by the debtor. However, an assignee may not obtain priority over a prior assignment of which the assignee had knowledge at the time of conclusion of the contract of assignment to that assignee by notifying the debtor.

Article 10

Priority between the assignee and the insolvency administrator or creditors of the assignor

The right of an assignee in an assigned receivable has priority over the right of an insolvency administrator and creditors who obtain a right in the assigned receivable by attachment, judicial act or similar act of a competent authority that gives rise to such right, if the receivable was assigned and notification was received by the debtor before the commencement of such insolvency proceeding, attachment, judicial act or similar act.

Done at New York, this 12th day of December two thousand one, in a single original, of which the Arabic, Chinese, English, French, Russian and Spanish texts are equally authentic.

In witness whereof the undersigned plenipotentiaries, being duly authorized by their respective Governments, have signed the present Convention.

B. Treaties concerning international law concluded under the auspices of intergovernmental organizations related to the United Nations

INTERNATIONAL MARITIME ORGANIZATION

(*a*) International Convention on Civil Liability for Bunker Oil Pollution Damage. Done at London on 23 March 2001[6]

The States Parties to this Convention,

Recalling article 194 of the United Nations Convention on the Law of the Sea, 1982, which provides that States shall take all measures necessary to prevent, reduce and control pollution of the marine environment,

Recalling also article 235 of that Convention, which provides that, with the objective of assuring prompt and adequate compensation in respect of all damage caused by pollution of the marine environment, States shall cooperate in the further development of relevant rules of international law,

Noting the success of the International Convention on Civil Liability for Oil Pollution Damage, 1992 and the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage, 1992 in ensuring that compensation is available to persons who suffer damage caused by pollution resulting from the escape of discharge of oil carried in bulk at sea by ships,

Noting also the adoption of the International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea, 1996 in order to provide adequate, prompt and effective compensation for damage caused by incidents in connection with the carriage by sea of hazardous and noxious substances,

Recognizing the importance of establishing strict liability for all forms of oil pollution which is linked to an appropriate limitation of the level of that liability,

Considering that complementary measures are necessary to ensure the payment of adequate, prompt and effective compensation for damage caused by pollution resulting from the escape or discharge of bunker oil from ships,

Desiring to adopt uniform international rules and procedures for determining questions of liability and providing adequate compensation in such cases,

Have agreed as follows:

Article 1

DEFINITIONS

For the purposes of this Convention:

1. "Ship" means any seagoing vessel and seaborne craft, of any type whatsoever.

2. "Person" means any individual or partnership or any public or private body, whether corporate or not, including a State or any of its constituent subdivisions.

3. "Shipowner" means the owner, including the registered owner, bareboat charterer, manager and operator of the ship.

4. "Registered owner" means the person or persons registered as the owner of the ship or, in the absence of registration, the person or persons owning the ship. However, in the case of a ship owned by a State and operated by a company which in that State is registered as the ship's operator, "registered owner" shall mean such company.

5. "Bunker oil" means any hydrocarbon mineral oil, including lubricating oil, used or intended to be used for the operation or propulsion of the ship, and any residues of such oil.

6. "Civil Liability Convention" means the International Convention on Civil Liability for Oil Pollution Damage, 1992, as amended.

7. "Preventive measures" means any reasonable measures taken by any person after an incident has occurred to prevent or minimize pollution damage.

8. "Incident" means any occurrence or series of occurrences having the same origin, which causes pollution damage or creates a grave and imminent threat of causing such damage.

9. "Pollution damage" means:

(*a*) loss or damage caused outside the ship by contamination resulting from the escape or discharge of bunker oil from the ship, wherever such escape or discharge may occur, provided that compensation for impairment of the environment other than loss of profit from such impairment shall be limited to costs of reasonable measures of reinstatement actually undertaken or to be undertaken; and

(*b*) the costs of preventive measures and further loss or damage caused by preventive measures.

10. "State of the ship's registry" means, in relation to a registered ship, the State of registration of the ship and, in relation to an unregistered ship, the State whose flag the ship is entitled to fly.

11. "Gross tonnage" means gross tonnage calculated in accordance with the tonnage measurement regulations contained in annex 1 of the International Convention on Tonnage Measurement of Ships, 1969.

12. "Organization" means the International Maritime Organization.

13. "Secretary-General" means the Secretary-General of the Organization.

Article 2

SCOPE OF APPLICATION

This Convention shall apply exclusively:

(*a*) To pollution damage caused:

(i) In the territory, including the territorial sea, of a State Party, and

(ii) In the exclusive economic zone of a State Party, established in accordance with international law or, if a State Party has not established such a zone, in an area beyond and adjacent to the territorial sea of that State determined by that State in accordance with international law and extending not more than 200 nautical miles from the baselines from which the breadth of its territorial sea is measured;

(*b*) To preventive measures, wherever taken, to prevent or minimize such damage.

Article 3

LIABILITY OF THE SHIPOWNER

1. Except as provided in paragraphs 3 and 4, the shipowner at the time of an incident shall be liable for pollution damage caused by any bunker oil on board or originating from the ship, provided that, if an incident consists of a series of occurrences having the same origin, the liability shall attach to the shipowner at the time of the first of such occurrences.

2. Where more than one person is liable in accordance with paragraph 1, their liability shall be joint and several.

3. No liability for pollution damage shall attach to the shipowner if the shipowner proves that:

(*a*) The damage resulted from an act of war, hostilities, civil war, insurrection or a natural phenomenon of an exceptional, inevitable and irresistible character; or

(*b*) The damage was wholly caused by an act or omission done with the intent to cause damage by a third party; or

(*c*) The damage was wholly caused by the negligence or other wrongful act of any Government or other authority responsible for the maintenance of lights or other navigational aids in the exercise of that function.

4. If the shipowner proves that the pollution damage resulted wholly or partially either from an act or omission done with intent to cause damage by the person who suffered the damage or from the negligence of that person, the shipowner may be exonerated wholly or partially from liability to such person.

5. No claim for compensation for pollution damage shall be made against the shipowner otherwise than in accordance with this Convention.

6. Nothing in this Convention shall prejudice any right of recourse of the shipowner which exists independently of this Convention.

Article 4

EXCLUSIONS

1. This Convention shall not apply to pollution damage as defined in the Civil Liability Convention, whether or not compensation is payable in respect of it under that Convention.

2. Except as provided in paragraph 3, the provisions of this Convention shall not apply to warships, naval auxiliary or other ships owned or operated by a State and used, for the time being, only on Government non-commercial service.

3. A State Party may decide to apply this Convention to its warships or other ships described in paragraph 2, in which case it shall notify the Secretary-General thereof specifying the terms and conditions of such application.

4. With respect to ships owned by a State Party and used for commercial purposes, each State shall be subject to suit in the jurisdictions set forth in article 9 and shall waive all defences based on its status as a sovereign State.

Article 5

INCIDENTS INVOLVING TWO OR MORE SHIPS

When an incident involving two or more ships occurs and pollution damage results therefrom, the shipowners of all the ships concerned, unless exonerated under article 3, shall be jointly and severally liable for all such damage which is not reasonably separable.

Article 6

LIMITATION OF LIABILITY

Nothing in this Convention shall affect the right of the shipowner and the person or persons providing insurance or other financial security to limit liability under any applicable national or international regime, such as the Convention on Limitation of Liability for Maritime Claims, 1976, as amended.

Article 7

COMPULSORY INSURANCE OR FINANCIAL SECURITY

1. The registered owner of a ship having a gross tonnage greater than 1000 registered in a State Party shall be required to maintain insurance or other financial security, such as the guarantee of a bank or similar financial institution, to cover the liability of the registered owner for pollution damage in an amount equal to the limits of liability under the applicable national or international limitation regime, but in all cases not exceeding an amount calculated in accordance with the Convention on Limitation of Liability for Maritime Claims, 1976, as amended.

2. A certificate attesting that insurance or other financial security is in force in accordance with the provisions of this Convention shall be issued to each ship after the appropriate authority of a State Party has determined that the requirements of paragraph 1 have been complied with. With respect to a ship registered in a State Party such certificate shall be issued or certified by the appropriate authority of the State of the ship's registry; with respect to a ship not registered in a State Party it may be issued or certified by the appropriate authority of any State Party. This certificate shall be in the form of the model set out in the annex to this Convention and shall contain the following particulars:

(*a*) Name of ship, distinctive number or letters and port of registry;

(*b*) Name and principal place of business of the registered owner;

(*c*) IMO ship identification number;

(*d*) Type and duration of security;

(*e*) Name and principal place of business of insurer or other person giving security and, where appropriate, place of business where the insurance or security is established;

(*f*) Period of validity of the certificate, which shall not be longer than the period of validity of the insurance or other security.

3. (*a*) A State Party may authorize either an institution or an organization recognized by it to issue the certificate referred to in paragraph 2. Such institution or organization shall inform that State of the issue of each certificate. In all cases, the State Party shall fully guarantee the completeness and accuracy of the certificate

so issued and shall undertake to ensure the necessary arrangements to satisfy this obligation.

(*b*) A State Party shall notify the Secretary-General of:

(i) The specific responsibilities and conditions of the authority delegated to an institution or organization recognized by it;

(ii) The withdrawal of such authority; and

(iii) The date from which such authority or withdrawal of such authority takes effect.

An authority delegated shall not take effect prior to three months from the date on which notification to that effect was given to the Secretary-General.

(*c*) The institution or organization authorized to issue certificates in accordance with this paragraph shall, as a minimum, be authorized to withdraw these certificates if the conditions under which they have been issued are not maintained. In all cases the institution or organization shall report such withdrawal to the State on whose behalf the certificate was issued.

4. The certificate shall be in the official language or languages of the issuing State. If the language used is not English, French or Spanish, the text shall include a translation into one of these languages and, where the State so decides, the official language of the State may be omitted.

5. The certificate shall be carried on board the ship and a copy shall be deposited with the authorities who keep the record of the ship's registry or, if the ship is not registered in a State Party, with the authorities issuing or certifying the certificate.

6. An insurance or other financial security shall not satisfy the requirements of this article if it can cease, for reasons other than the expiry of the period of validity of the insurance or security specified in the certificate under paragraph 2 of this article, before three months have elapsed from the date on which notice of its termination is given to the authorities referred to in paragraph 5 of this article, unless the certificate has been surrendered to these authorities or a new certificate has been issued within the said period. The foregoing provisions shall similarly apply to any modification which results in the insurance or security no longer satisfying the requirements of this article.

7. The State of the ship's registry shall, subject to the provisions of this article, determine the conditions of issue and validity of the certificate.

8. Nothing in this Convention shall be construed as preventing a State Party from relying on information obtained from other States or the Organization or other international organizations relating to the financial standing of providers of insurance or financial security for the purposes of this Convention. In such cases, the State Party relying on such information is not relieved of its responsibility as a State issuing the certificate required by paragraph 2.

9. Certificates issued or certified under the authority of a State Party shall be accepted by other States Parties for the purposes of this Convention and shall be regarded by other States Parties as having the same force as certificates issued or certified by them even if issued or certified in respect of a ship not registered in a State Party. A State Party may at any time request consultation with the issuing or certifying State should it believe that the insurer or guarantor named in the insurance certificate is not financially capable of meeting the obligations imposed by this Convention.

10. Any claim for compensation for pollution damage may be brought directly against the insurer or other person providing financial security for the registered owner's liability for pollution damage. In such a case the defendant may invoke the defences (other than bankruptcy or winding up of the shipowner) which the shipowner would have been entitled to invoke, including limitation pursuant to article 6. Furthermore, even if the shipowner is not entitled to limitation of liability according to article 6, the defendant may limit liability to an amount equal to the amount of the insurance or other financial security required to be maintained in accordance with paragraph 1. Moreover, the defendant may invoke the defence that the pollution damage resulted from the wilful misconduct of the shipowner, but the defendant shall not invoke any other defence which the defendant might have been entitled to invoke in proceedings brought by the shipowner against the defendant. The defendant shall in any event have the right to require the shipowner to be joined in the proceedings.

11. A State Party shall not permit a ship under its flag to which this article applies to operate at any time, unless a certificate has been issued under paragraph 2 or 14.

12. Subject to the provisions of this article, each State Party shall ensure, under its national law, that insurance or other security, to the extent specified in paragraph 1, is in force in respect of any ship having a gross tonnage greater than 1000, wherever registered, entering or leaving a port in its territory or arriving at or leaving an offshore facility in its territorial sea.

13. Notwithstanding the provisions of paragraph 5, a State Party may notify the Secretary-General that, for the purposes of paragraph 12, ships are not required to carry on board or to produce the certificate required by paragraph 2, when entering or leaving ports or arriving at or leaving from offshore facilities in its territory, provided that the State Party which issues the certificate required by paragraph 2 has notified the Secretary-General that it maintains records in an electronic format, accessible to all States Parties, attesting the existence of the certificate and enabling States Parties to discharge their obligations under paragraph 12.

14. If insurance or other financial security is not maintained in respect of a ship owned by a State Party, the provisions of this article relating thereto shall not be applicable to such ship, but the ship shall carry a certificate issued by the appropriate authority of the State of the ship's registry stating that the ship is owned by that State and that the ship's liability is covered within the limit prescribed in accordance with paragraph 1. Such a certificate shall follow as closely as possible the model prescribed by paragraph 2.

15. A State may, at the time of ratification, acceptance, approval of or accession to this Convention or at any time thereafter, declare that this article does not apply to ships operating exclusively within the area of that State referred to in article 2 (*a*) (i).

Article 8

TIME LIMITS

Rights to compensation under this Convention shall be extinguished unless an action is brought thereunder within three years from the date when the damage occurred. However, in no case shall an action be brought more than six years from the date of the incident which caused the damage. Where the incident consists of a series of occurrences, the six years' period shall run from the date of the first such occurrence.

Article 9

JURISDICTION

1. Where an incident has caused pollution damage in the territory, including the territorial sea, or in an area referred to in article 2 (*a*) (ii) of one or more States Parties, or preventive measures have been taken to prevent or minimize pollution damage in such territory, including the territorial sea, or in such area, actions for compensation against the shipowner, insurer or other person providing security for the shipowner's liability may be brought only in the courts of any such States Parties.

2. Reasonable notice of any action taken under paragraph 1 shall be given to each defendant.

3. Each State Party shall ensure that its courts have jurisdiction to entertain actions for compensation under this Convention.

Article 10

RECOGNITION AND ENFORCEMENT

1. Any judgement given by a Court with jurisdiction in accordance with article 9 which is enforceable in the State of origin where it is no longer subject to ordinary forms of review, shall be recognized in any State Party, except:

(*a*) Where the judgement was obtained by fraud; or

(*b*) Where the defendant was not given reasonable notice and a fair opportunity to present his or her case.

2. A judgement recognized under paragraph 1 shall be enforceable in each State Party as soon as the formalities required in that State have been complied with. The formalities shall not permit the merits of the case to be reopened.

Article 11

SUPERSESSION CLAUSE

This Convention shall supersede any Convention in force or open for signature, ratification or accession at the date on which this Convention is opened for signature, but only to the extent that such Convention would be in conflict with it; however, nothing in this article shall affect the obligations of States Parties to States not party to this Convention arising under such Convention.

Article 12

SIGNATURE, RATIFICATION, ACCEPTANCE, APPROVAL AND ACCESSION

1. This Convention shall be open for signature at the headquarters of the Organization from 1 October 2001 until 30 September 2002 and shall thereafter remain open for accession.

2. States may express their consent to be bound by this Convention by:

(*a*) Signature without reservation as to ratification, acceptance or approval;

(*b*) Signature subject to ratification, acceptance or approval followed by ratification, acceptance or approval; or

(*c*) Accession.

3. Ratification, acceptance, approval or accession shall be effected by the deposit of an instrument to that effect with the Secretary-General.

4. Any instrument of ratification, acceptance, approval or accession deposited after the entry into force of an amendment to this Convention with respect to all existing State Parties, or after the completion of all measures required for the entry into force of the amendment with respect to those State Parties shall be deemed to apply to this Convention as modified by the amendment.

Article 13

STATES WITH MORE THAN ONE SYSTEM OF LAW

1. If a State has two or more territorial units in which different systems of law are applicable in relation to matters dealt with in this Convention, it may at the time of signature, ratification, acceptance, approval or accession declare that this Convention shall extend to all its territorial units or only to one or more of them and may modify this declaration by submitting another declaration at any time.

2. Any such declaration shall be notified to the Secretary-General and shall state expressly the territorial units to which this Convention applies.

3. In relation to a State Party which has made such a declaration:

(*a*) In the definition of "registered owner" in article 1 (4), references to a State shall be construed as references to such a territorial unit;

(*b*) References to the State of a ship's registry and, in relation to a compulsory insurance certificate, to the issuing or certifying State, shall be construed as referring to the territorial unit respectively in which the ship is registered and which issues or certifies the certificate;

(*c*) References in this Convention to the requirements of national law shall be construed as references to the requirements of the law of the relevant territorial unit; and

(*d*) References in articles 9 and 10 to courts, and to judgements which must be recognized in States Parties, shall be construed as references respectively to courts of, and to judgements which must be recognized in, the relevant territorial unit.

Article 14

ENTRY INTO FORCE

1. This Convention shall enter into force one year following the date on which eighteen States, including five States each with ships whose combined gross tonnage is not less than 1 million, have either signed it without reservation as to ratification, acceptance or approval or have deposited instruments of ratification, acceptance, approval or accession with the Secretary-General.

2. For any State which ratifies, accepts, approves or accedes to it after the conditions in paragraph 1 for entry into force have been met, this Convention shall enter into force three months after the date of deposit by such State of the appropriate instrument.

Article 15

DENUNCIATION

1. This Convention may be denounced by any State Party at any time after the date on which this Convention comes into force for that State.

2. Denunciation shall be effected by the deposit of an instrument with the Secretary-General.

3. A denunciation shall take effect one year, or such longer period as may be specified in the instrument of denunciation, after its deposit with the Secretary-General.

Article 16

REVISION OR AMENDMENT

1. A conference for the purpose of revising or amending this Convention may be convened by the Organization.

2. The Organization shall convene a conference of the States Parties for revising or amending this Convention at the request of not less than one third of the States Parties.

Article 17

DEPOSITARY

1. This Convention shall be deposited with the Secretary-General.

2. The Secretary-General shall:

(*a*) Inform all States which have signed or acceded to this Convention of:

(i) Each new signature or deposit of instrument together with the date thereof;

(ii) The date of entry into force of this Convention;

(iii) The deposit of any instrument of denunciation of this Convention together with the date of the deposit and the date on which the denunciation takes effect; and

(iv) Other declarations and notifications made under this Convention.

(*b*) Transmit certified true copies of this Convention to all signatory States and to all States which accede to this Convention.

Article 18

TRANSMISSION TO UNITED NATIONS

As soon as this Convention comes into force, the text shall be transmitted by the Secretary-General to the Secretariat of the United Nations for registration and publication in accordance with Article 102 of the Charter of the United Nations.

Article 19

LANGUAGES

This Convention is established in a single original in the Arabic, Chinese, English, French, Russian and Spanish languages, each text being equally authentic.

DONE AT LONDON this twenty-third day of March, two thousand and one.

IN WITNESS WHEREOF the undersigned being duly authorized by their respective Governments for that purpose have signed this Convention.

ANNEX

Certificate of insurance or other financial security in respect of civil liability for bunker oil pollution damage

Issued in accordance with the provisions of article 7 of the International Convention on Civil Liability for Bunker Oil Pollution Damage, 2001

Name of Ship	*Distinctive number or letters*	*IMO Ship Identification Number*	*Port of Registry*	*Name and full address of the principal place of business of the registered owner*

This is to certify that there is in force in respect of the above-named ship a policy of insurance or other financial security satisfying the requirements of article 7 of the International Convention on Civil Liability for Bunker Oil Pollution Damage, 2001.

Type of Security .....

Duration of Security .....

Name and address of the insurer(s) and/or guarantor(s) .....

.....

Name .....

Address .....

.....

This certificate is valid until .....

Issued or certified by the Government of .....

.....

(Full designation of the State)

OR

The following text should be used when a State Party avails itself of article 7 (3)

The present certificate is issued under the authority of the Government of

.....

.....

(full designation of the State) by .....

..... *(name of institution or organization)*

At ..... On .....

(Place) *(Date)*

.....

(Signature and Title of issuing or certifying official)

1. If desired, the designation of the State may include a reference to the competent public authority of the country where the Certificate is issued.

2. If the total amount of security has been furnished by more than one source, the amount of each of them should be indicated.

3. If security is furnished in several forms, these should be enumerated.

4. The entry "Duration of Security" must stipulate the date on which such security takes effect.

5. The entry "Address" of the insurer(s) and/or guarantor(s) must indicate the principal place of business of the insurer(s) and/or guarantor(s). If appropriate, the place of business where the insurance or other security is established shall be indicated.

(*b*) International Convention on the Control of Harmful Anti-Fouling Systems on Ships. Done at London on 5 October 2001[7]

The Parties to this Convention,

Noting that scientific studies and investigations by Governments and competent international organizations have shown that certain anti-fouling systems used on ships pose a substantial risk of toxicity and other chronic impacts to ecologically and economically important marine organisms and also that human health may be harmed as a result of the consumption of affected seafood,

Noting in particular the serious concern regarding anti-fouling systems that use organotin compounds as biocides, and being convinced that the introduction of such organotins into the environment must be phased out,

Recalling that chapter 17 of Agenda 21, adopted by the United Nations Conference on Environment and Development, 1992, calls upon States to take measures to reduce pollution caused by organotin compounds used in anti-fouling systems,

Recalling also that resolution A.895(21), adopted by the Assembly of the International Maritime Organization on 25 November 1999, urges the Organization's Marine Environment Protection Committee to work towards the expeditious development of a global legally binding instrument to address the harmful effects of anti-fouling systems as a matter of urgency,

Mindful of the precautionary approach set out in principle 15 of the Rio Declaration on Environment and Development and referred to in resolution MEPC.67(37) adopted by the Marine Environment Protection Committee on 15 September 1995,

Recognizing the importance of protecting the marine environment and human health from adverse effects of anti-fouling systems,

Recognizing also that the use of anti-fouling systems to prevent the build-up of organisms on the surface of ships is of critical importance to efficient commerce, shipping and impeding the spread of harmful aquatic organisms and pathogens,

Recognizing further the need to continue to develop anti-fouling systems which are effective and environmentally safe and to promote the substitution of harmful systems by less harmful systems or preferably harmless systems,

Have agreed as follows:

Article 1

GENERAL OBLIGATIONS

1. Each Party to this Convention undertakes to give full and complete effect to its provisions in order to reduce or eliminate adverse effects on the marine environment and human health caused by anti-fouling systems.

2. The annexes form an integral part of this Convention. Unless expressly provided otherwise, a reference to this Convention constitutes at the same time a reference to its annexes.

3. No provision of this Convention shall be interpreted as preventing a State from taking, individually or jointly, more stringent measures with respect to the reduction or elimination of adverse effects of anti-fouling systems on the environment, consistent with international law.

4. Parties shall endeavour to cooperate for the purpose of effective implementation, compliance and enforcement of this Convention.

5. The Parties undertake to encourage the continued development of anti-fouling systems that are effective and environmentally safe.

Article 2

DEFINITIONS

For the purposes of this Convention, unless expressly provided otherwise:

1. "Administration" means the Government of the State under whose authority the ship is operating. With respect to a ship entitled to fly a flag of a State, the Administration is the Government of that State. With respect to fixed or floating platforms engaged in exploration and exploitation of the seabed and subsoil thereof adjacent to the coast over which the coastal State exercises sovereign rights for the purposes of exploration and exploitation of their natural resources, the Administration is the Government of the coastal State concerned.

2. "Anti-fouling system" means a coating, paint, surface treatment, surface or device that is used on a ship to control or prevent attachment of unwanted organisms.

3. "Committee" means the Marine Environment Protection Committee of the Organization.

4. "Gross tonnage" means the gross tonnage calculated in accordance with the tonnage measurement regulations contained in annex 1 to the International Convention on Tonnage Measurement of Ships, 1969, or any successor Convention.

5. "International voyage" means a voyage by a ship entitled to fly the flag of one State to or from a port, shipyard or offshore terminal under the jurisdiction of another State.

6. "Length" means the length as defined in the International Convention on Load Lines, 1966, as modified by the Protocol of 1988 relating thereto or any successor Convention.

7. "Organization" means the International Maritime Organization.

8. "Secretary-General" means the Secretary-General of the Organization.

9. "Ship" means a vessel of any type whatsoever operating in the marine environment and includes hydrofoil boats, air-cushion vehicles, submersibles, floating craft, fixed or floating platforms, floating storage units (FSUs) and floating production storage and offloading units (FPSOs).

10. "Technical group" is a body comprised of representatives of the Parties, members of the Organization, the United Nations and its specialized agencies, intergovernmental organizations having agreements with the Organization, and non-governmental organizations in consultative status with the Organization, which should preferably include representatives of institutions and laboratories that engage in anti-fouling system analysis. These representatives shall have expertise in environmental fate and effects, toxicological effects, marine biology, human health, economic analysis, risk management, international shipping, anti-fouling systems coating technology or other fields of expertise necessary to objectively review the technical merits of a comprehensive proposal.

Article 3

APPLICATION

1. Unless otherwise specified in this Convention, this Convention shall apply to:

(*a*) Ships entitled to fly the flag of a Party;

(*b*) Ships not entitled to fly the flag of a Party, but which operate under the authority of a Party; and

(*c*) Ships that enter a port, shipyard or offshore terminal of a Party, but do not fall within subparagraph (*a*) or (*b*).

2 This Convention shall not apply to any warships, naval auxiliary or other ships owned or operated by a Party and used, for the time being, only on government non-commercial service. However, each Party shall ensure, by the adoption of appropriate measures not impairing operations or operational capabilities of such ships owned or operated by it, that such ships act in a manner consistent, so far as is reasonable and practicable, with this Convention.

3. With respect to the ships of non-parties to this Convention, Parties shall apply the requirements of this Convention as may be necessary to ensure that no more favourable treatment is given to such ships.

Article 4

CONTROLS ON ANTI-FOULING SYSTEMS

1. In accordance with the requirements specified in annex 1, each Party shall prohibit and/or restrict:

(*a*) The application, re-application, installation or use of harmful anti-fouling systems on ships referred to in article 3 (l) (*a*) or (*b*); and

(*b*) The application, re-application, installation or use of such systems, while in a Party's port, shipyard or offshore terminal, on ships referred to in article 3 (l) (*c*),

and shall take effective measures to ensure that such ships comply with those requirements.

2. Ships bearing an anti-fouling system which is controlled through an amendment to annex 1 following the entry into force of this Convention may retain that system until the next scheduled renewal of that system, but in no event for a period exceeding 60 months following application, unless the Committee decides that exceptional circumstances exist to warrant earlier implementation of the control.

Article 5

CONTROLS OF ANNEX 1 WASTE MATERIALS

Taking into account international rules, standards and requirements, a Party shall take appropriate measures in its territory to require that wastes from the application or removal of an anti-fouling system controlled in annex 1 are collected, handled, treated and disposed of in a safe and environmentally sound manner to protect human health and the environment

Article 6

PROCESS FOR PROPOSING AMENDMENTS TO CONTROLS ON ANTI-FOULING SYSTEMS

1. Any Party may propose an amendment to annex 1 in accordance with this article.

2. An initial proposal shall contain the information required in annex 2, and shall be submitted to the Organization. When the Organization receives a proposal, it shall bring the proposal to the attention of the Parties, members of the Organization, the United Nations and its specialized agencies, intergovernmental organizations having agreements with the Organization and non-governmental organizations in consultative status with the Organization and shall make it available to them.

3. The Committee shall decide whether the anti-fouling system in question warrants a more in-depth review based on the initial proposal. If the Committee decides that further review is warranted, it shall require the proposing Party to submit to the Committee a comprehensive proposal containing the information required in annex 3, except where the initial proposal also includes all the information required in annex 3. Where the Committee is of the view that there is a threat of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason to prevent a decision to proceed with the evaluation of the proposal. The Committee shall establish a technical group in accordance with article 7.

4. The technical group shall review the comprehensive proposal along with any additional data submitted by any interested entity and shall evaluate and report to the Committee whether the proposal has demonstrated a potential for unreasonable risk of adverse effects on non-target organisms or human health such that the amendment of annex 1 is warranted. In this regard:

(*a*) The technical group's review shall include:

(i) An evaluation of the association between the anti-fouling system in question and the related adverse effects observed either in the environment or on human health, including, but not limited to, the consumption of affected seafood or through controlled studies based on the data described in annex 3 and any other relevant data which come to light;

(ii) An evaluation of the potential risk reduction attributable to the proposed control measures and any other control measures that may be considered by the technical group;

(iii) Consideration of available information on the technical feasibility of control measures and the cost-effectiveness of the proposal;

(iv) Consideration of available information on other effects from the introduction of such control measures relating to:

—The environment (including, but not limited to, the cost of inaction and the impact on air quality);

—Shipyard health and safety concerns (i.e. effects on shipyard workers);

—The cost to international shipping and other relevant sectors; and

(v) Consideration of the availability of suitable alternatives, including a consideration of the potential risks of alternatives;

(*b*) The technical group's report shall be in writing and shall take into account each of the evaluations and considerations referred to in subparagraph (*a*), except that the technical group may decide not to proceed with the evaluations and considerations described in subparagraph (*a*) (ii) through (*a*) (v) if it determines after the evaluation in subparagraph (*a*) (i) that the proposal does not warrant further consideration;

(*c*) The technical group's report shall include, inter alia, a recommendation on whether international controls pursuant to this Convention are warranted on the anti-fouling system in question, on the suitability of the specific control measures suggested in the comprehensive proposal or on other control measures which it believes to be more suitable.

5. The technical group's report shall be circulated to the Parties, members of the Organization, the United Nations and its specialized agencies, intergovernmental organizations having agreements with the Organization and non-governmental organizations in consultative status with the Organization, prior to its consideration by the Committee. The Committee shall decide whether to approve any proposal to amend annex 1, and any modifications thereto, if appropriate, taking into account the technical group's report. If the report finds a threat of serious or irreversible damage, lack of full scientific certainty shall not, itself, be used as a reason to prevent a decision from being taken to list an anti-fouling system in annex 1. The proposed amendments to annex 1, if approved by the Committee, shall be circulated in accordance with article 16 (2) (*a*). A decision not to approve the proposal shall not preclude future submission of a new proposal with respect to a particular anti-fouling system if new information comes to light.

6. Only Parties may participate in decisions taken by the Committee described in paragraphs 3 and 5.

Article 7

TECHNICAL GROUPS

1. The Committee shall establish a technical group pursuant to article 6 when a comprehensive proposal is received. In circumstances where several proposals are received concurrently or sequentially, the Committee may establish one or more technical groups as needed.

2. Any Party may participate in the deliberations of a technical group, and should draw on the relevant expertise available to that Party.

3. The Committee shall decide on the terms of reference, organization and operation of the technical groups. Such terms shall provide for protection of any confidential information that may be submitted. Technical groups may hold such meetings as required, but shall endeavour to conduct their work through written or electronic correspondence or other media as appropriate.

4. Only the representatives of Parties may participate in formulating any recommendation to the Committee pursuant to article 6. A technical group shall endeavour to achieve unanimity among the representatives of the Parties. If unanimity is not possible, the technical group shall communicate any minority views of such representatives.

Article 8

SCIENTIFIC AND TECHNICAL RESEARCH AND MONITORING

1. The Parties shall take appropriate measures to promote and facilitate scientific and technical research on the effects of anti-fouling systems as well as monitoring of such effects. In particular, such research should include observation, measurement, sampling, evaluation and analysis of the effects of anti-fouling systems.

2. Each Party shall, to further the objectives of this Convention, promote the availability of relevant information to other Parties who request it on:

(*a*) Scientific and technical activities undertaken in accordance with this Convention;

(*b*) Marine scientific and technological programmes and their objectives; and

(*c*) The effects observed from any monitoring and assessment programmes relating to anti-fouling systems.

Article 9

COMMUNICATION AND EXCHANGE OF INFORMATION

1. Each Party undertakes to communicate to the Organization:

(*a*) A list of the nominated surveyors or recognized organizations which are authorized to act on behalf of that Party in the administration of matters relating to the control of anti-fouling systems in accordance with this Convention for circulation to the Parties for the information of their officers. The Administration shall therefore notify the Organization of the specific responsibilities and conditions of the authority delegated to nominated surveyors or recognized organizations; and

(*b*) On an annual basis, information regarding any anti-fouling systems approved, restricted or prohibited under its domestic law.

2. The Organization shall make available, through any appropriate means, information communicated to it under paragraph 1.

3. For those anti-fouling systems approved, registered or licensed by a Party, such Party shall either provide, or require the manufacturers of such anti-fouling systems to provide, to those Parties which request it, relevant information on which its decision was based, including information provided for in annex 3, or other information suitable for making an appropriate evaluation of the anti-fouling system. No information shall be provided that is protected by law.

Article 10

SURVEY AND CERTIFICATION

A Party shall ensure that ships entitled to fly its flag or operating under its authority are surveyed and certified in accordance with the regulations in annex 4.

Article 11

INSPECTIONS OF SHIPS AND DETECTION OF VIOLATIONS

1. A ship to which this Convention applies may, in any port, shipyard or offshore terminal of a Party, be inspected by officers authorized by that Party for the purpose of determining whether the ship is in compliance with this Convention. Unless there are clear grounds for believing that a ship is in violation of this Convention, any such inspection shall be limited to:

(*a*) Verifying that, where required, there is on board a valid International Anti-fouling System Certificate or a Declaration on Anti-fouling System; and/or

(*b*) A brief sampling of the ship's anti-fouling system that does not affect the integrity, structure or operation of the anti-fouling system taking into account guidelines developed by the Organization.[a] However, the time required to process the results of such sampling shall not be used as a basis for preventing the movement and departure of the ship.

2. If there are clear grounds to believe that the ship is in violation of this Convention, a thorough inspection may be carried out taking into account guidelines developed by the Organization.[a]

3. If the ship is detected to be in violation of this Convention, the Party carrying out the inspection may take steps to warn, detain, dismiss or exclude the ship from its ports. A Party taking such action against a ship for the reason that the ship does not comply with this Convention shall immediately inform the Administration of the ship concerned.

4. Parties shall cooperate in the detection of violations and the enforcement of this Convention. A Party may also inspect a ship when it enters the ports, shipyards or offshore terminals under its jurisdiction, if a request for an investigation is received from any Party, together with sufficient evidence that a ship is operating or has operated in violation of this Convention. The report of such investigation shall be sent to the Party requesting it and to the competent authority of the Administration of the ship concerned so that the appropriate action may be taken under this Convention.

Article 12

VIOLATIONS

1. Any violation of this Convention shall be prohibited and sanctions shall be established therefor under the law of the Administration of the ship concerned wherever the violation occurs. If the Administration is informed of such a violation, it shall investigate the matter and may request the reporting Party to furnish additional evidence of the alleged violation. If the Administration is satisfied that sufficient evidence is available to enable proceedings to be brought in respect of the alleged violation, it shall cause such proceedings to be taken as soon as possible, in accordance with its laws. The Administration shall promptly inform the Party that reported the alleged violation, as well as the Organization, of any action taken. If the Administration has not taken any action within one year after receiving the information, it shall so inform the Party which reported the alleged violation.

[a] Guidelines to be developed.

2. Any violation of this Convention within the jurisdiction of any Party shall be prohibited and sanctions shall be established therefor under the law of that Party. Whenever such a violation occurs, that Party shall either:

(*a*) Cause proceedings to be taken in accordance with its law; or

(*b*) Furnish to the Administration of the ship concerned such information and evidence as may be in its possession that a violation has occurred.

3. The sanctions established under the laws of a Party pursuant to this article shall be adequate in severity to discourage violations of this Convention wherever they occur.

Article 13

UNDUE DELAY OR DETENTION OF SHIPS

1. All possible efforts shall be made to avoid a ship being unduly detained or delayed under article 11 or 12.

2. When a ship is unduly detained or delayed under article 11 or 12, it shall be entitled to compensation for any loss or damage suffered.

Article 14

DISPUTE SETTLEMENT

Parties shall settle any dispute between them concerning the interpretation or application of this Convention by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements or other peaceful means of their own choice.

Article 15

RELATIONSHIP TO INTERNATIONAL LAW OF THE SEA

Nothing in this Convention shall prejudice the rights and obligations of any State under customary international law as reflected in the United Nations Convention on the Law of the Sea.

Article 16

AMENDMENTS

1. This Convention may be amended by either of the procedures specified in the following paragraphs.

2. Amendments after consideration within the Organization:

(*a*) Any Party may propose an amendment to this Convention. A proposed amendment shall be submitted to the Secretary-General, who shall then circulate it to the Parties and members of the Organization at least six months prior to its consideration. In the case of a proposal to amend annex 1, it shall be processed in accordance with article 6, prior to its consideration under this article.

(*b*) An amendment proposed and circulated as above shall be referred to the Committee for consideration. Parties, whether or not members of the Organization, shall be entitled to participate in the proceedings of the Committee for consideration and adoption of the amendment.

(*c*) Amendments shall be adopted by a two-thirds majority of the Parties present and voting in the Committee, on condition that at least one third of the Parties shall be present at the time of voting.

(*d*) Amendments adopted in accordance with subparagraph (*c*) shall be communicated by the Secretary-General to the Parties for acceptance.

(*e*) An amendment shall be deemed to have been accepted in the following circumstances:

(i) An amendment to an article of this Convention shall be deemed to have been accepted on the date on which two thirds of the Parties have notified the Secretary-General of their acceptance of it.

(ii) An amendment to an annex shall be deemed to have been accepted at the end of twelve months after the date of adoption or such other date as determined by the Committee. However, if by that date more than one third of the Parties notify the Secretary-General that they object to the amendment, it shall be deemed not to have been accepted.

(*f*) An amendment shall enter into force under the following conditions:

(i) An amendment to an article of this Convention shall enter into force for those Parties that have declared that they have accepted it six months after the date on which it is deemed to have been accepted in accordance with subparagraph (*e*) (i).

(ii) An amendment to annex 1 shall enter into force with respect to all Parties six months after the date on which it is deemed to have been accepted, except for any Party that has:

(1) Notified its objection to the amendment in accordance with subparagraph (*e*) (ii) and that has not withdrawn such objection;

(2) Notified the Secretary-General, prior to the entry into force of such amendment, that the amendment shall enter into force for it only after a subsequent notification of its acceptance; or

(3) Made a declaration at the time it deposits its instrument of ratification, acceptance or approval of or accession to, this Convention that amendments to annex 1 shall enter into force for it only after the notification to the Secretary-General of its acceptance with respect to such amendments.

(iii) An amendment to an annex other than annex 1 shall enter into force with respect to all Parties six months after the date on which it is deemed to have been accepted, except for those Parties that have notified their objection to the amendment in accordance with subparagraph (*e*) (ii) and that have not withdrawn such objection.

(*g*) (i) A Party that has notified an objection under subparagraph (*f*) (ii) (1) or (iii) may subsequently notify the Secretary-General that it accepts the amendment. Such amendment shall enter into force for such Party six months after the date of its notification of acceptance or the date on which the amendment enters into force, whichever is the later date.

(ii) If a Party that has made a notification or declaration referred to in subparagraph (*f*) (ii) (2) or (3), respectively, notifies the Secretary-General of its acceptance with respect to an amendment, such amendment shall

enter into force for such Party six months after the date of its notification of acceptance or the date on which the amendment enters into force, whichever is the later date.

3. Amendment by a Conference:

(*a*) Upon the request of a Party concurred in by at least one third of the Parties, the Organization shall convene a Conference of Parties to consider amendments to this Convention.

(*b*) An amendment adopted by such a Conference by a two-thirds majority of the Parties present and voting shall be communicated by the Secretary-General to all Parties for acceptance.

(*c*) Unless the Conference decides otherwise, the amendment shall be deemed to have been accepted and shall enter into force in accordance with the procedures specified in paragraphs 2 (*e*) and (*f*) respectively of this article.

4. Any Party that has declined to accept an amendment to an annex shall be treated as a non-party only for the purpose of application of that amendment.

5. An addition of a new annex shall be proposed and adopted and shall enter into force in accordance with the procedure applicable to an amendment to an article of this Convention.

6. Any notification or declaration under this article shall be made in writing to the Secretary-General.

7. The Secretary-General shall inform the Parties and members of the Organization of:

(*a*) Any amendment that enters into force and the date of its entry into force generally and for each Party; and

(*b*) Any notification or declaration made under this article.

Article 17

SIGNATURE, RATIFICATION, ACCEPTANCE, APPROVAL AND ACCESSION

1. This Convention shall be open for signature by any State at the headquarters of the Organization from 1 February 2002 to 31 December 2002 and shall thereafter remain open for accession by any State.

2. States may become Parties to this Convention by:

(*a*) Signature not subject to ratification, acceptance or approval; or

(*b*) Signature subject to ratification, acceptance or approval, followed by ratification, acceptance or approval; or

(*c*) Accession.

3. Ratification, acceptance, approval or accession shall be effected by the deposit of an instrument to that effect with the Secretary-General.

4. If a State comprises two or more territorial units in which different systems of law are applicable in relation to matters dealt with in this Convention, it may at the time of signature, ratification, acceptance, approval or accession declare that this Convention shall extend to all its territorial units or only to one or more of them and may modify this declaration by submitting another declaration at any time.

5. Any such declaration shall be notified to the Secretary-General and shall state expressly the territorial units to which this Convention applies.

Article 18

ENTRY INTO FORCE

1. This Convention shall enter into force twelve months after the date on which not less than twenty-five States, the combined merchant fleets of which constitute not less than twenty-five per cent of the gross tonnage of the world's merchant shipping, have either signed it without reservation as to ratification, acceptance or approval or have deposited the requisite instrument of ratification, acceptance, approval or accession in accordance with article 17.

2. For States which have deposited an instrument of ratification, acceptance, approval or accession in respect of this Convention after the requirements for entry into force thereof have been met, but prior to the date of entry in force, the ratification, acceptance, approval or accession shall take effect on the date of entry into force of this Convention or three months after the date of deposit of the instrument, whichever is the later date.

3. Any instrument of ratification, acceptance, approval or accession deposited after the date on which this Convention enters into force shall take effect three months after the date of deposit.

4. After the date on which an amendment to this Convention is deemed to have been accepted under article 16, any instrument of ratification, acceptance, approval or accession deposited shall apply to the Convention as amended.

Article 19

DENUNCIATION

1. This Convention may be denounced by any Parry at any time after the expiry of two years from the date on which this Convention enters into force for that Party.

2. Denunciation shall be effected by the deposit of written notification with the Secretary-General, to take effect one year after receipt or such longer period as may be specified in that notification.

Article 20

DEPOSITARY

1. This Convention shall be deposited with the Secretary-General, who shall transmit certified copies of this Convention to all States which have signed this Convention or acceded thereto.

2. In addition to the functions specified elsewhere in this Convention, the Secretary-General shall:

(*a*) Inform all States which have signed this Convention or acceded thereto of:

(i) Each new signature or deposit of an instrument of ratification, acceptance, approval or accession, together with the date thereof;

(ii) The date of entry into force of this Convention; and

(iii) The deposit of any instrument of denunciation of this Convention, together with the date on which it was received and the date on which the denunciation takes effect; and

(*b*) As soon as this Convention enters into force, transmit the text thereof to the Secretariat of the United Nations for registration and publication in accordance with Article 102 of the Charter of the United Nations.

Article 21

LANGUAGES

This Convention is established in a single original in the Arabic, Chinese, English, French, Russian and Spanish languages, each text being equally authentic.

IN WITNESS WHEREOF the undersigned being duly authorized by their respective Governments for that purpose have signed this Convention.

DONE AT LONDON, this fifth day of October, two thousand and one.

ANNEX 1

Controls on anti-fouling systems

Anti-fouling system	*Control measures*	*Application*	*Effective date*
Organotin compounds which act as biocides in anti-fouling systems	Ships shall not apply or re-apply such compounds	All ships	1 January 2003
Organotin compounds which act as biocides in anti-fouling systems	Ships either: (1) Shall not bear such compounds on their hulls or external parts or surfaces; or (2) Shall bear a coating that forms a barrier to such compounds leaching from the underlying non-compliant anti-fouling systems	All ships (except fixed and floating platforms, FSUs, and FPSOs that have been constructed prior to 1 January 2003 and that have not been in dry dock on or after 1 January 2003)	1 January 2008

ANNEX 2

Required elements for an initial proposal

1. An initial proposal shall include adequate documentation containing at least the following:

(*a*) Identification of the anti-fouling system addressed in the proposal: name of the anti-fouling system; name of active ingredients and Chemical Abstract Services Registry Number (CAS number), as applicable; or components of the system which are suspected of causing the adverse effects of concern;

(*b*) Characterization of the information which suggests that the anti-fouling system or its transformation products may pose a risk to human health or may cause adverse effects in non-target organisms at concentrations likely to be found in the environment (e.g., the results of toxicity studies on representative species or bioaccumulation data);

(*c*) Material supporting the potential of the toxic components in the anti-fouling system or its transformation products, to occur in the environment at concentrations which could result in adverse effects to non-target organisms, human health or water quality (e.g., data on persistence in the water column, sediments and biota; the release rate of toxic components from treated surfaces in studies or under actual use conditions; or monitoring data, if available);

(*d*) An analysis of the association between the anti-fouling system, the related adverse effects and the environmental concentrations observed or anticipated; and

(*e*) A preliminary recommendation on the type of restrictions that could be effective in reducing the risks associated with the anti-fouling system.

2. An initial proposal shall be submitted in accordance with rules and procedures of the Organization.

ANNEX 3

Required elements of a comprehensive proposal

1. A comprehensive proposal shall include adequate documentation containing the following:

(*a*) Developments in the data cited in the initial proposal;

(*b*) Findings from the categories of data set out in paragraphs 3 (*a*), (*b*) and (*c*), as applicable, depending on the subject of the proposal and the identification or description of the methodologies under which the data were developed;

(*c*) A summary of the results of studies conducted on the adverse effects of the anti-fouling system;

(*d*) If any monitoring has been conducted, a summary of the results of that monitoring, including information on ship traffic and a general description of the area monitored;

(*e*) A summary of the available data on environmental or ecological exposure and any estimates of environmental concentrations developed through the application of mathematical models, using all available environmental fate parameters, preferably those which were determined experimentally, along with an identification or description of the modelling methodology;

(*f*) An evaluation of the association between the anti-fouling system in question, the related adverse effects and the environmental concentrations, either observed or expected;

(*g*) A qualitative statement of the level of uncertainty in the evaluation referred to in subparagraph (*f*);

(*h*) A recommendation of specific control measures to reduce the risks associated with the anti-fouling system; and

(*i*) A summary of the results of any available studies on the potential effects of the recommended control measures relating to air quality, shipyard conditions, international shipping and other relevant sectors, as well as the availability of suitable alternatives.

2. A comprehensive proposal shall also include information on each of the following physical and chemical properties of the component(s) of concern, if applicable:

—melting point;

—boiling point;

—density (relative density);

—vapour pressure;

—water solubility/pH/dissociation constant (pKa);

—oxidation/reduction potential;

—molecular mass;

—molecular structure; and

—other physical and chemical properties identified in the initial proposal.

3. For the purposes of paragraph 1 (*b*) above, the categories of data are:

(*a*) Data on environmental fate and effect:

—modes of degradation/dissipation (e.g., hydrolysis/photodegradation/biodegradation);

—persistence in the relevant media (e.g., water column/sediments/biota);

—sediments/water partitioning;

—leaching rates of biocides or active ingredients;

—mass balance;

—bioaccumulation, partition coefficient, octanol/water coefficient; and

—any novel reactions on release or known interactive effects;

(*b*) Data on any unintended effects in aquatic plants, invertebrates, fish, seabirds, marine mammals, endangered species, other biota, water quality, the seabed or habitat of non-target organisms, including sensitive and representative organisms:

—acute toxicity;

—chronic toxicity;

—developmental and reproductive toxicity;

—endocrine disruption;

—sediment toxicity;

—bioavailability/biomagnification/bioconcentration;

—food web/population effects;

—observations of adverse effects in the field/fish kills/strandings/tissue analysis; and

—residues in seafood.

These data shall relate to one or more types of non-target organisms such as aquatic plants, invertebrates, fish, birds, mammals and endangered species;

(*c*) Data on the potential for human health effects (including, but not limited to, consumption of affected seafood);

4. A comprehensive proposal shall include a description of the methodologies used, as well as any relevant measures taken for quality assurance and any peer review conducted of the studies.

ANNEX 4

Surveys and certification requirements for anti-fouling systems

REGULATION 1

Surveys

1. Ships of 400 gross tonnage and above referred to in article 3 (1) (*a)* engaged in international voyages, excluding fixed or floating platforms, FSUs and FPSOs shall be subject to surveys specified below:

(*a*) An initial survey before the ship is put into service or before the International Anti-fouling System Certificate (Certificate) required under regulation 2 or 3 is issued for the first time; and

(*b*) A survey when the anti-fouling systems are changed or replaced. Such surveys shall be endorsed on the Certificate issued under regulation 2 or 3.

2. The survey shall be such as to ensure that the ship's anti-fouling system fully complies with this Convention.

3. The Administration shall establish appropriate measures for ships that are not subject to the provisions of paragraph 1 of this regulation in order to ensure that this Convention is complied with.

4. (*a*) As regards the enforcement of this Convention, surveys of ships shall be carried out by officers duly authorized by the Administration or as provided in regulation 3 (1), taking into account guidelines for surveys developed by the Organization.[a] Alternatively, the Administration may entrust surveys required by this Convention either to surveyors nominated for that purpose or to organizations recognized by it.

(*b*) An Administration nominating surveyors or recognizing organizations[b] to conduct surveys shall, as a minimum, empower any nominated surveyor or recognized organization to:

(i) Require a ship that it surveys to comply with the provisions of annex 1; and

(ii) Carry out surveys if requested by the appropriate authorities of a port State that is a Party to this Convention.

(*c*) When the Administration, a nominated surveyor or a recognized organization determines that the ship's anti-fouling system does not conform either to the particulars of a Certificate required under regulation 2 or 3 or to the requirements of this Convention, such Administration, surveyor or organization shall immediately ensure that corrective action is taken to bring the ship into compliance. A surveyor or organization shall also in due course notify the Administration of any such determination. If the required corrective action is not taken, the Administration shall be notified forthwith and it shall ensure that the Certificate is not issued or is withdrawn as appropriate.

(*d*) In the situation described in subparagraph (*c*), if the ship is in the port of another Party, the appropriate authorities of the port State shall be notified forthwith. When the Administration, a nominated surveyor or a recognized organization has notified the appropriate authorities of the port State, the Government of the port State concerned shall give such Administration, surveyor or organization any necessary assistance to carry out their obligations under this regulation, including any action described in article 11 or 12.

Regulation 2

Issue or endorsement of an International Anti-fouling System Certificate

1. The Administration shall require that a ship to which regulation 1 applies is issued with a Certificate after successful completion of a survey in accordance with regulation 1. A Certificate issued under the authority of a Party shall be accepted by the other Parties and regarded for all purposes covered by this Convention as having the same validity as a Certificate issued by them.

2. Certificates shall be issued or endorsed either by the Administration or by any person or organization duly authorized by it. In every case, the Administration assumes full responsibility for the Certificate.

3. For ships bearing an anti-fouling system controlled under annex 1 that was applied before the date of entry into force of a control for such a system, the Administration shall issue a Certificate in accordance with paragraphs 2 and 3 of this regulation not later than two years after entry into force of that control. This paragraph shall not affect any requirement for ships to comply with annex 1.

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[a] Guidelines to be developed.

[b] Refer to the guidelines adopted by the Organization by resolution A.739(18), as may be amended by the Organization, and the specifications adopted by the Organization by resolution A.789(19), as may be amended by the Organization.

4. The Certificate shall be drawn up in the form corresponding to the model given in appendix 1 to this annex and shall be written at least in English, French or Spanish. If an official language of the issuing State is also used, this shall prevail in the case of the dispute or discrepancy.

REGULATION 3

Issue or endorsement of an International Anti-fouling System Certificate by another Party

1. At the request of the Administration, another Party may cause a ship to be surveyed and, if satisfied that this Convention has been complied with, it shall issue or authorize the issue of a Certificate to the ship and, where appropriate, endorse or authorize the endorsement of that Certificate for the ship, in accordance with this Convention.

2. A copy of the Certificate and a copy of the survey report shall be transmitted as soon as possible to the requesting Administration.

3. A Certificate so issued shall contain a statement that it has been issued at the request of the Administration referred to in paragraph 1 and it shall have the same force and receive the same recognition as a Certificate issued by the Administration.

4. No Certificate shall be issued to a ship which is entitled to fly the flag of a State which is not a Party.

REGULATION 4

Validity of an International Anti-fouling System Certificate

1. A Certificate issued under regulation 2 or 3 shall cease to be valid in either of the following cases:

(*a*) If the anti-fouling system is changed or replaced and the Certificate is not endorsed in accordance with this Convention; and

(*b*) Upon transfer of the ship to the flag of another State. A new Certificate shall only be issued when the Party issuing the new Certificate is fully satisfied that the ship is in compliance with this Convention. In the case of a transfer between Parties, if requested within three months after the transfer has taken place, the Party whose flag the ship was formerly entitled to fly shall, as soon as possible, transmit to the Administration a copy of the Certificates carried by the ship before the transfer and, if available, a copy of the relevant survey reports.

2. The issue by a Party of a new Certificate to a ship transferred from another Parry may be based on a new survey or on a valid Certificate issued by the previous Party whose flag the ship was entitled to fly.

REGULATION 5

Declaration on anti-fouling system

1. The Administration shall require a ship of 24 metres or more in length, but less than 400 gross tonnage, engaged in international voyages and to which article 3 (1) (*a*) applies (excluding fixed or floating platforms, FSUs and FPSOs) to carry a Declaration signed by the owner or owner's authorized agent. Such Declaration shall be accompanied by appropriate documentation (such as a paint receipt or a contractor invoice) or contain appropriate endorsement.

2. The Declaration shall be drawn up in the form corresponding to the model given in appendix 2 to this annex and shall be written at least in English, French or Spanish. If an official language of the State whose flag the ship is entitled to fly is also used, this shall prevail in the case of a dispute or discrepancy.

APPENDIX 1 TO ANNEX 4

Model form of International Anti-fouling System Certificate

INTERNATIONAL ANTI-FOULING SYSTEM CERTIFICATE

(This certificate shall be supplemented by a Record of Anti-fouling Systems.)

(Official seal) *(State)*

Issued under the
International Convention on the Control of Harmful Anti-fouling Systems on Ships
under the authority of the Government of

.....

(name of the State)

by

.....

(person or organization authorized)

When a Certificate has been previously issued, this Certificate replaces the certificate dated

.....

Particulars of ship[a]

Name of ship .....

Distinctive number or letters .....

Port of registry .....

Gross tonnage .....

IMO number[b] .....

An anti-fouling system controlled under annex 1 has not been applied during or after construction of this ship .....□

An anti-fouling system controlled under annex 1 has been applied on this ship previously, but has been removed by ..... *(insert name of the facility)* on ..... *(date)* .....□

An anti-fouling system controlled under annex 1 has been applied on this ship previously, but has been covered with a sealer coat applied by .....

(insert name of the facility) on ..... *(date)* .....□

An anti-fouling system controlled under annex 1 was applied on this ship prior to ..... *(date)*,[c] but must be removed or covered with a sealer coat prior to ..... *(date)*[d]

---

[a] Alternatively, the particulars of the ship may be placed horizontally in boxes.

[b] In accordance with the IMO Ship Identification Number Scheme adopted by the Organization with Assembly resolution A.600(15).

[c] Date of entry into force of the control measure.

[d] Date of expiration of any implementation period specified in article 4 (2) or annex 1.

THIS IS TO CERTIFY THAT:

1. the ship has been surveyed in accordance with regulation 1 of annex 4 to the Convention; and

2. the survey shows that the anti-fouling system on the ship complies with the applicable requirements of annex 1 to the Convention.

Issued at .....

(Place of issue of Certificate)

.....

(Date of issue) *(Signature of authorized official issuing the Certificate)*

Date of completion of the survey
on which this certificate is issued: .....

Model form of record of anti-fouling systems

RECORD OF ANTI-FOULING SYSTEMS

(This Record shall be permanently attached to the International Anti-fouling System Certificate.)

Particulars of ship

Name of ship: .....

Distinctive number or letters: .....

IMO number: .....

Details of anti-fouling system(s) applied

Type(s) of anti-fouling system(s) used .....

.....

Date(s) of application of anti-fouling system(s) .....

Name(s) of company(ies) and facility(ies)/location(s) where applied .....

.....

Name(s) of anti-fouling system manufacturer(s) .....

Name(s) and colour(s) of anti-fouling system(s) .....

Active ingredient(s) and their Chemical Abstract Services Registry Number(s) (CAS number(s)) .....

.....

Type(s) of sealer coat, if applicable .....

.....

Name(s) and colour(s) of sealer coat applied, if applicable .....

.....

Date of application of sealer coat .....

THIS IS TO CERTIFY that this Record is correct in all respects.

Issued at .....
(Place of issue of Record)

....
(Date of issue) *(Signature of authorized official issuing the Record)*

Endorsement of the Records[e]

THIS IS TO CERTIFY that a survey required in accordance with regulation 1 (1) (*b*) of annex 4 to the Convention found that the ship was in compliance with the Convention.

Details of anti-fouling system(s) applied

Type(s) of anti-fouling system(s) used .....

.....

Date(s) of application of anti-fouling system(s) .....

Name(s) of company(ies) and facility(ies)/location(s) where applied .....

.....

Name(s) of anti-fouling system(s) manufacturer(s) .....

.....

Name(s) and colour(s) of anti-fouling system(s) .....

.....

Active ingredient(s) and their Chemical Abstract Services Registry Number(s) (CAS number(s)) .....

.....

Type(s) of sealer coat, if applicable .....

.....

Name(s) and colour(s) of sealer coat applied, if applicable .....

.....

Date of application of sealer coat .....

Signed: .....

(Signature of authorized official issuing the Record)

Place: .....

Date:[f] .....

(Seal or stamp of the authority)

[e] This page of the Record shall be reproduced and added to the Record as considered necessary by the Administration.

[f] Date of completion of the survey on which this endorsement is made.

APPENDIX 2 TO ANNEX 4

Model form of declaration on anti-fouling system

DECLARATION ON ANTI-FOULING SYSTEM

Drawn up under the

International Convention on the Control of Harmful Anti-fouling Systems on Ships

Name of ship .....

Distinctive number or letters .....

Port of registry .....

Length .....

Gross tonnage .....

IMO number (if applicable) .....

I declare that the anti-fouling system used on this ship complies with annex 1 of the Convention.

....

(Date) *(Signature of owner or owner's authorized agent)*

Endorsement of anti-fouling system(s) applied

Type(s) of anti-fouling system(s) used and date(s) of application .....

....

(Date) *(Signature of owner or owner's authorized agent)*

Type(s) of anti-fouling system(s) used and date(s) of application .....

.....

....

(Date) *(Signature of owner or owner's authorized agent)*

Type(s) of anti-fouling system(s) used and date(s) of application .....

....

(Date) *(Signature of owner or owner's authorized agent)*

[1] Not yet in force. For entry into force, see article 26.
[2] Not yet in force. For entry into force, see article 18.
[3] Resolution 2625 (XXV), annex.
[4] Not yet in force. For entry into force, see article 12.
[5] Not yet in force. For entry into force, see article 45.
[6] Not yet in force. For entry into force, see article 14.
[7] Not yet in force. For entry into force, see article 18.

Chapter V

DECISIONS OF ADMINISTRATIVE TRIBUNALS OF THE UNITED NATIONS AND RELATED INTERGOVERNMENTAL ORGANIZATIONS[1]

A. Decisions of the United Nations Administrative Tribunal[2]

1. JUDGEMENT NO. 1004 (26 JULY 2001): CAPOTE V. THE SECRETARY-GENERAL OF THE UNITED NATIONS[3]

Summary dismissal for serious misconduct—Question whether a personal matter fell within the disciplinary purview of UNICEF—Staff regulation 1.4—Issue of prima facie evidence of wrongdoing—Delays in JDC proceedings

The Applicant, who held a permanent appointment as a Budget Assistant at the G-6 level in the Division of Financial and Administrative Management, UNICEF, in August 1994 agreed to assist a friend and colleague during the latter's sudden posting to Rwanda. She was given a power of attorney that gave her access to her colleague's savings and checking accounts for the purpose of managing her financial affairs. The Tribunal noted that at the least the two agreed that the Applicant would pay her colleague's rent and other bills. Subsequently, the Applicant opened two joint credit card accounts, which became substantially in arrears, having her colleague as the primary cardholder but using the Applicant's address. The Tribunal further noted that the Applicant claimed that she had been given authorization by her colleague to open the accounts, but the colleague asserted that she had only learned of the accounts when she returned from Rwanda in September 1995, and only after being contacted concerning the arrearages.

On 13 December 1996, the colleague informed the Comptroller of UNICEF of her discoveries, making a notarized statement dated 20 December 1996. On the same day the Applicant was suspended with pay pending the results of an investigation. She replied to the charges on 12 February and, based on the preliminary conclusions of the investigation, she was summarily discharged on 27 February 1997 for serious misconduct, pursuant to staff regulation 1.4, i.e., applying for and opening the two credit cards without authorization and for making false certifications on the applications for the credit cards (giving her own telephone number instead of her colleague's and the incorrect maiden name of the colleague's mother).

However, in consideration of the matter, the Tribunal found that the circumstances of the case did not fall within the disciplinary purview of UNICEF. The Tribunal considered that staff regulation 1.4 required that staff "conduct themselves at all times in a manner befitting their status as international civil servants . . . They shall avoid any action . . . which may adversely reflect on their status or on the integrity, . . . required by that status . . .". And while a personal matter that reflected adversely on the Organization might be the subject of disciplinary proceedings, the United Nations Staff Regulations principally addressed conduct related to employment.

In the view of the Tribunal, this was purely an arrangement of some kind between colleagues regarding personal activities and personal funds. As explained by the Tribunal, the Administration was not responsible for the financial affairs of the Applicant's colleague, had no interest in her funds and could not affect the personal arrangement, and therefore could not be called on to use suspension with pay to oversee the personal affairs and relationships of its employees under the particular circumstances of the case, i.e., the colleague's allegations were in dispute and not "prima facie well founded" (Judgement No. 931, *Shamsi and Abboud*, para. V (1999)). The Tribunal also concluded that this was true of the summary dismissal of the Applicant and pointed out that, when she was suspended and subsequently summarily dismissed, there was an obvious recourse to the credit card companies or to the civil, or criminal, dispute resolution procedures provided by local law.

Furthermore, the Tribunal stated that, pursuant to staff regulation 1.4, the actions of the Applicant had not affected her status as an international civil servant or adversely reflected on her status or integrity to the extent that a suspension with pay (although not a disciplinary measure) was justified. It noted in that regard that the suspension had occurred after an unsupported allegation that fell far short of prima facie evidence of wrongdoing; the oral allegation was made on 13 December and the Applicant was suspended on 18 December 1996; and it was not until early the following year that the Respondent had any other evidence of the alleged false certification.

Regarding the issue of the summary dismissal, the Tribunal, while recognizing that UNICEF had properly referred the matter to an ad hoc Joint Disciplinary Committee (JDC), as provided for in the rules, considered that the delays in the proceedings could not be justified. The Applicant had requested on 30 April 1997 a review of her summary dismissal; she was informed on 11 December 1997 of the composition of the ad hoc JDC; and the report and recommendations were issued on 7 May 1998.

For the foregoing reasons, the Tribunal found in favour of the Applicant and ordered the rescission of the decision to summarily dismiss her for serious misconduct, but should the Secretary-General decide in the interest of the Organization that the Applicant be compensated without further action being taken in her case, the Tribunal fixed the compensation to be paid to her at two years of her net base salary. The Tribunal also ordered that the Respondent pay her six months of her net base salary as compensation for the moral injury suffered.

2. JUDGEMENT NO. 1009 (26 JULY 2001): MAKIL V. THE SECRETARY-GENERAL OF THE UNITED NATIONS[4]

*Non-consensual special leave with full pay six months before retirement—Findings of fact by United Nations bodies—Basis for the altering of facts by the Tribunal—Staff regulation 5.2 and staff rule 105.2(*a*)(i) on special leave—Proof of an ulterior, improper motive—Urgency of situation preventing an investigation or hearing—Right to express opposing views—Right to counsel—Question of a precipitous expulsion from one's office*

The Applicant, who had joined the International Trade Centre UNCTAD/WTO (ITC) on 12 August 1968 as an Economic Affairs Officer, was subsequently promoted, on 12 June 1994, to Deputy Executive Director of ITC, at the D-2 level. On 2 December 1996, the Applicant was placed on special leave with full pay through

31 May 1997, at which time he retired. During his United Nations service, the Applicant received four performance evaluations covering the period from August 1968 to April 1981, receiving overall ratings from "very good" to an "exceptionally competent staff member of unusual merit".

Sometime during the early fall of 1996, the Executive Director met privately with the Applicant and allegedly warned him that he needed to change his attitude towards the internal reform process instituted by the Executive Director. During the last week of October 1996, a team from the Office of Internal Oversight Services (OIOS) visited the offices of ITC in Geneva in order to review the Centre's programme of work and administrative practices and subsequently issued a report emphasizing the Centre's lack of delegation of authority, responsibility and accountability. By letter of 2 December 1996, the Executive Director informed the Applicant that his "lack of commitment and support in implementing the reform . . . and our increasingly divergent views and consequent difficulties to work as a management team have led me to conclude that your involvement in the process would constitute a serious impediment to the success of the overall exercise". The Executive Director further informed the Applicant in the letter that he was placing him on special leave with full pay immediately, until the date of his retirement. The Applicant was also informed that his access to documentation was limited to his official status file, and he was requested to vacate his office by noon the following day, 5 December 1996. The Executive Director sent a memorandum to all ITC staff informing them of his decision.

The Applicant had submitted that "the hearing of the present appeal before the Tribunal was de novo, the so-called findings of the Joint Appeals Board had no legal weight or priority". The Tribunal, disagreeing with that submission, observed that its statute did not envisage that findings of fact upon which it had reached a decision would ordinarily or usually be made following its own investigations or upon facts found by the Tribunal itself. Rather, matters before the Tribunal arrived almost invariably after a preliminary investigation by a Joint Disciplinary Committee (JDC) or a Joint Appeals Board (JAB) or like body that carried out investigations and made findings of fact and then reported thereon. As the Tribunal pointed out, the exception to this general rule arose when the parties had no dispute as to the facts and the matter could be referred to the Tribunal in the first instance on the basis of "agreed facts", in accordance with article 7 of the statute.

Accordingly, the Tribunal would ordinarily operate on the facts found by the JDC or JAB or other primary fact-finding body, unless the Tribunal expressed reasons for not doing so, such as identifying a failure or insufficiency of evidence to justify the finding of fact allegedly made or where it identified prejudice or perversity on the part of the said fact-finding body or found that it had been influenced in making that finding of fact by some extraneous or irrelevant matter. At the same time, the Tribunal stressed that the above principles were applicable to findings of primary facts and had no bearing on the question of interpretation of documents or the drawing of inferences from primary facts, i.e., secondary facts.

In consideration of the above, the Tribunal noted that there was an issue between the Applicant and the Executive Director of ITC as to whether the latter had, prior to December 1996, verbally warned the Applicant about his belief that the Applicant was not supporting the reforms planned, or remonstrated with the Applicant concerning his attitude and commitment towards those reforms and told him that his attitude and commitment would have to change. The Applicant denied

that he had received any prior warning or expression of dissatisfaction and, as the Tribunal pointed out, it was for the JAB to resolve the credibility issue and it had done so in favour of the Executive Director. In the proceedings before the Tribunal, the Applicant had sought to persuade the Tribunal that it should alter this finding of fact on the ground that the Executive Director's evidence was not credible and was unsupported either by reference to such a meeting in the letter of December 1996 sent to the Applicant, or by a "note for the file" or by other contemporaneous record. However, in the opinion of the Tribunal, this was an issue of fact pre-eminently and properly suitable for resolution by the JAB, having considered the evidence, and the Tribunal considered that it ought to stand, as the Applicant had failed to demonstrate either that the finding was not supported by evidence or that the evidence supporting it was false or was not worthy of belief.

The Respondent invoked staff regulation 5.2 and staff rule 105.2(*a*)(i) as authority for placing the Applicant on special leave without pay for a period of just six months before the date of his retirement. However, as the Tribunal pointed out, the staff regulation spoke of the Secretary-General being empowered to authorize special leave in exceptional circumstances, which meant that the Secretary-General might permit or allow special leave to be taken by a staff member who desired to take it, rather than empowering him to force it upon an unwilling staff member. The Tribunal considered that a very different interpretation arose in the case of the powers of the Secretary-General under staff rule 105.2(*a*)(i), which spoke of a staff member being placed on special leave with full pay in exceptional cases at the initiative of the Secretary-General. And in the view of the Tribunal, it was satisfied that there was cogent and credible evidence before the JAB such as allowed it to find that the Executive Director honestly believed that the Applicant was not properly supporting or progressing the implementation of the reforms, and to believe that their increasingly diverging views and consequent difficulties in working as a management team constituted an exceptional case which warranted placing the Applicant on special leave with full pay for the six months remaining until his retirement.

As the Tribunal observed, what was being alleged and decided against the Applicant was that he was resistant to change and did not support a programme of change or reform which ITC had decided should be implemented, and not misconduct, e.g., actively or wilfully being disobedient or seeking to sabotage the programme, which could have led to disciplinary measures being taken against the Applicant. The Applicant argued that the Executive Director had some ulterior motive for his decision, such as a desire to make him a scapegoat for criticisms which had been made or which the Executive Director believed would be made, in a report from OIOS, which was then investigating ITC. The Tribunal, on the other hand, while accepting that it was always difficult for anybody to find evidence supporting this type of allegation since those who conspired to commit unlawful and vengeful acts tried not to leave a trail of evidence, noted that the Applicant had failed to offer any evidence in support of his allegation. Moreover, the circumstances of this particular relationship appeared to the Tribunal to make this allegation unlikely, as the Executive Director appeared to have been historically well disposed towards the Applicant, and the JAB was entitled to reject the Applicant's contention and to find that the Executive Director had acted in a bona fide manner and not with a base or ulterior motive.

The Applicant complained that he had not been afforded due process prior to the making and implementation of the Executive Director's decision to place

him on special leave with full pay and to exclude him from his office, in that he ought to have been afforded details of the allegations made against him, a hearing thereon and an opportunity of responding to those allegations and making his case. While the Tribunal accepted that the Applicant would have enjoyed such rights had allegations of misconduct been lodged against him, it also accepted the fact that the Applicant occupied a crucial position within ITC and his cooperation and support were considered crucial in the implementation of the reform programme. And where the Executive Director was genuinely of the opinion that the Applicant's continuing occupation of the post would have stymied or handicapped the implementation of the reform programme, the Executive Director was entitled to consider that it was expedient, and in the interests of ITC, that the Applicant should be immediately placed on special leave and in consequence removed from his duties. Time would not have permitted an investigation or a hearing, and it was probable that the Applicant would have reached retirement age before such an investigation could have been concluded. Accordingly, the Tribunal considered that the decision to place him on special leave with full pay was warranted and appropriate in the circumstances.

The Applicant referred to the Code of Conduct for International Civil Servants, citing the provision therein that dealt with the entitlement of a staff member (in particular a junior one) to express his views, and in particular such views as might be opposed to the views of his superior officer(s), and encouraged due recognition to the merits of those views. In response, the Tribunal considered that if a staff member had a sincere or heartfelt view that a legitimate or lawful programme of reform was unwise, he was entitled to express his views, but if on the other hand the staff member's intention was to try to stymie or sabotage the implementation of a programme, then that ran counter to the Code.

The Applicant also claimed that he had been denied due process in that he had been denied the right to be represented in the JAB proceedings by qualified counsel of his own choosing, and that he had been restricted to representation from the category of persons identified by staff rule 111.2(*i*). In particular, the Tribunal rejected the notion that counsel who were, or had been, in the employ of the Organization were so besmirched or compromised that they should be deemed incapable of acting impartially and honestly. The Tribunal was satisfied that such category of persons was sufficiently wide that it would have permitted counsel not suffering from a conflict of interest to have been retained.

With reference to the Applicant's precipitous expulsion from his office, in the view of the Tribunal, such expulsion might well be an appropriate measure where the person suspended had been accused of dishonesty and the suspension had been ordered to prevent the staff member from removing or altering possibly incriminating documents, for example. As recalled by the Tribunal, no such activity and no act of misconduct had been alleged against the Applicant. However, the Tribunal considered that, in the light of the legitimate decision of the Executive Director not to inform fellow staff members as to the reason why the Applicant had been placed on special leave with full pay, to expel him from the premises in the manner in which it was done would likely cause people to believe that his honesty was being impugned. While nominal damages may be an appropriate measure of compensation where there has been a mere technical breach of a right where no actual damage has been inflicted, in the present case the Tribunal considered that the Applicant should be awarded $30,000 in compensation.

3. JUDGEMENT NO. 1011 (27 JULY 2001): IDDI V. THE SECRETARY-GENERAL OF THE UNITED NATIONS[5]

Summary dismissal for serious misconduct—Question of receivability—Determination of serious misconduct—Choice of penalty—Discretionary power versus arbitrary power/abuse of power—Exercise of quasi-jurisdictional power—Principle of equality of treatment of staff members

The Applicant entered the service of UNDP, Dar es Salaam, in December 1983, as a Telephone Operator/Receptionist at the G-3 level. The Applicant held a permanent appointment when she was summarily dismissed, effective 10 March 1998, for serious misconduct.

In September 1997, the Applicant had submitted for reimbursement of medical expenses a signed medical insurance programme (MIP) claims form with receipts attached from two local clinics in an amount of 250,00 Tanzanian shillings (approximately US$ 411). As other required documentation was not also submitted with the claim, an investigation was carried out which revealed discrepancies. On 7 October 1997, the Resident Representative in a letter to the Applicant informed her of the result of the investigation and reminded the Applicant that she had previously submitted an MIP form without proper documentation and had been admonished verbally by the Finance Officer for submitting unauthenticated claims. The Applicant denied any intention to cheat and denied having been warned previously.

After the Applicant was charged with serious misconduct, she submitted a written response, on 8 December 1997, admitting to a mistake or offence and requesting forgiveness since it was her first offence and because of her family situation and her age. The Applicant was dismissed from service, effective 10 March 1997, and was advised of her right to a request for a review of the decision by the Joint Disciplinary Committee (JDC). The Applicant requested a review of the decision by letter dated 14 April 1998 on the grounds that the penalty was too harsh, that she had a good previous record and that she had to support her three children. The panel convened to hear the matter unanimously concluded that the decision was justified and should be upheld, and the JDC adopted its report on 15 June 1998, and on 15 March 1999 the Administrator of UNDP transmitted to the Applicant a copy of the report and informed her that he had decided to maintain the decision of 12 February 1998 to dismiss her.

The Respondent requested the Tribunal to find the application not receivable because it was time-barred. The Tribunal, while noting that there was an unjustified year's delay between the date of the decision of the JDC and its notification to the Applicant, observed that the Applicant's final application had been sent to the Tribunal on 1 December 1999, so that it might have appeared to be time-barred. As explained by the Tribunal, the Applicant had, on 16 December 1998, sent a previous application contesting the decision to summarily dismiss her, even before the decision of the JDC had been formally notified to her, and the Tribunal regarded the first Application, even if imperfect, as having been submitted within the prescribed time limits and therefore considered the application receivable.

In consideration of the merits of the case, the Tribunal observed that the determination as to whether a staff member had met the required standard of conduct was left to the discretion of the Secretary-General (see Judgements No. 424, *Ying* (1988); No. 425, *Bruzual* (1988); No. 479, *Caine* (1990); No. 515, *Khan* (1991); and No. 542, *Pennacchi* (1991)). In particular, the discretionary power to determine when

conduct might be characterized as serious misconduct was vested in the Secretary-General (see Judgements No. 479, *Caine* (1990); No. 582, *Neuman* (1992); No. 815, *Calin* (1997); and No. 941, *Kiwanuka* (1999)).

The Tribunal further observed that the choice of penalty was also left to the discretion of the Secretary-General (see Judgements No. 424, *Ying* (1988); No. 425, *Bruzual* (1988); No. 429, *Beyele* (1988); No. 436, *Wiedl* (1988); and No. 641, *Farid* (1994)).

The Tribunal explained that discretionary power did not mean arbitrary power or abuse of power (see Judgement No. 707, *Belas-Gianou* (1995)). In that regard, the Tribunal was responsible for verifying that the facts were described correctly, as unsatisfactory conduct, misconduct or serious misconduct. The Tribunal also observed that where the United Nations administrator or a disciplinary committee took disciplinary measures, they were not only exercising their discretionary power, but also exercising a quasi-jurisdictional power, subject to the supervision of an administrative judge (see Judgements No. 897, *Jhuthi* (1998); No. 898, *Uggla* (1998); and No. 890, *Augustine* (1998)).

In the present case, the Tribunal considered that the facts were wrongly characterized as serious misconduct and that, accordingly, the summary dismissal, together with the loss of the benefits vested in the Applicant by 14 years of service with UNDP, was a disproportionate penalty. In that regard, the Tribunal noted that it had established a number of criteria that must be met in order for a disciplinary measure not to be arbitrary: (*a*) veracity of the facts; (*b*) appropriate legal description of the facts; (*c*) absence of substantive irregularity; (*d*) absence of procedural irregularity; (*e*) absence of abuse of discretion; (*f*) legality of the penalty; and (*g*) proportionality of the penalty. It was further pointed out by the Tribunal that if a single one of those criteria had not been met, the penalty was unjustified and should be remedied.

In the view of the Tribunal, misconduct had certainly occurred, i.e., attempted fraud by trying to obtain reimbursement for hospital bills which the Applicant had not paid, but the Tribunal was not convinced that the facts of the case allowed it to be described as serious misconduct. The Applicant stood accused of a single attempt at improper reimbursement of a sum of $411 in 14 years of unblemished service. The Tribunal concluded that the other incident mentioned by the Administration in 1997 was not an attempt to defraud, but was rather a procedural problem concerning the submission of documents.

The Tribunal further noted that even in cases of serious misconduct, the Administration did not always proceed to summary dismissal of its guilty employees, together with the loss of terminal benefits. In that regard, the Tribunal recalled the principle of equality of treatment which should be applied to all United Nations employees in conformity with the Staff Regulations and Rules and with previous decisions of the Tribunal, and that even in cases of attempted theft, there could be an evaluation of circumstances and a scale of penalties.

The Tribunal, having weighed all aspects of the case, believed that a summary dismissal together with the loss of the benefits to which the Applicant was entitled by virtue of 14 years of service with UNDP was a disproportionate penalty and the Administration's actions against her did not fall within the necessary margin of discretion afforded to the Administration in the exercise of its disciplinary power. Accordingly, the Tribunal awarded the Applicant nine months of her net base salary.

4. JUDGEMENT NO. 1014 (20 NOVEMBER 2001): AL ANSARI, ZARRA AND KHALIL, AND ABDULHADI ET AL. V. THE COMMISSIONER-GENERAL OF THE UNITED NATIONS RELIEF AND WORKS AGENCY FOR PALESTINE REFUGEES IN THE NEAR EAST[6]

Revision of judgement—Article 12 of the statute of the Tribunal—Disciplinary measures versus administrative measures—Revision criteria

The Applicants were all former staff members of UNRWA, and all sought revision of a judgement based on an alleged fact "of such a nature as to be a decisive factor" in relation to the document entitled "Notes of the Commissioner-General's Opening Remarks to the Cabinet Meeting". In that regard, the Tribunal recalled article 12 of its statute:

> "The Secretary-General or the applicant may apply to the Tribunal for a revision of a judgement on the basis of the discovery of some fact of such a nature as to be a decisive factor, which fact was, when the judgement was given, unknown to the Tribunal and also to the party claiming revision, always provided that such ignorance was not due to negligence. The application must be made within thirty days of the discovery of the fact and within one year of the date of the judgement. Clerical or arithmetical mistakes in judgements, or errors arising therein from any accidental slip or omission, may at any time be corrected by the Tribunal either of its own motion or on the application of any of the parties."

The Respondent raised issues concerning the authenticity, accuracy and provenance of the document. While the Respondent confirmed that according to the Agency's records the Commissioner-General had held a general cabinet meeting on or about 15 May 1996, a check of the Respondent's records did not find a record or document corresponding with that document relied upon by the Applicants.

The Tribunal recalled that, in April 1995, the Director of UNRWA Affairs, Syrian Arab Republic, had convened a Board of Inquiry, which had subsequently found that there had been serious misconduct on the part of many of the persons employed by UNRWA to administer and implement the scheme for distribution of rations to special hardship cases and that fraudulent practices such as a failure to keep proper records, the keeping of deceased special hardship cases on the rolls, the issuing of cards in respect of deceased persons and other acts of corruption had facilitated this fraud continuing on a massive scale. The Board had further found that such officials might be divided into two categories, (*a*) those who actively participated in such fraudulent practices, and (*b*) those who were aware of what was taking place and failed to seek to stop it, which facilitated its continuance. The Board of Inquiry concluded that each of the Applicants had variously participated in the fraudulent practices or in some instances had turned a blind eye to what was going on, and described their performance as having been negligent or grossly negligent.

Insofar as the Respondent had relied upon findings of neglect of duty or failure to perform one's duties as a ground for terminating the Applicants' appointments either for "misconduct" or "in the interest of the Agency", the Tribunal was satisfied that such findings as had been relied upon were findings of wilful or reckless failure to perform duties rather than findings of innate inefficiency or inability, so that it had been permissible or appropriate for the Respondent to have taken disciplinary action against them rather than administrative action appropriate to innate incapacity or inefficiency, which would have been appropriate had the neglect or failure to perform duties been of the less culpable kind. The Tribunal had further determined

that, in the case of each of the Applicants in the judgements in respect of which revision was sought in the present case, the Respondent had lawfully terminated their appointments, finding no evidence of bias, prejudice, improper motive or consideration of any extraneous matter.

In the present case, each Applicant essentially argued that the document in question confirmed their claims that there existed an "outside influential faction" which dominated or influenced the work of the Board of Inquiry and the Administration's decision-making process. By virtue of article 12 of the statute, for an application for revision of a judgement to be admissible, the Applicant must establish four things: (*a*) the existence of a fact; (*b*) that the "fact" was unknown to the Tribunal and the party claiming revision when the judgement was given; (*c*) that such ignorance was not due to negligence; and (*d*) that the "fact" was of such a nature as to be a decisive factor in the case.

The Tribunal considered that the document established (if its authenticity was acceptable for the purpose of the argument) that there existed within the UNRWA management structure "individual fiefdoms, each jealously guarded by its management", a seeming reference to cliques based upon management divisions, and not the "outside factions" relied upon by the Applicants. The Tribunal was further satisfied that, even accepting the authenticity of the document, the Tribunal could not consider it to be evidence of bias or prejudice on the part of the Board of Inquiry or on the part of the Respondent; such a document at face value did not purport to establish or confirm any mistake on the part of the Board of Inquiry or to indicate any matter which could have excused the various Applicants' conduct or failures as found by the Board of Inquiry.

The Tribunal was further doubtful if the said document should even be construed as disclosing "a new fact", let alone a fact of a decisive nature. Again conceding its authenticity for the purpose of the argument, on a proper construction thereof, it more properly recorded the Commissioner-General as having expressed his critical view in relation to a management problem rather than making an unqualified statement of fact.

In all of the circumstances, the Tribunal was satisfied that neither the Applicants nor any one of them had established a new fact of a potentially decisive nature or raised any new matter which would merit the original judgements being reviewed, and accordingly the applications were dismissed in their entirety.

5. Judgement No. 1018 (20 November 2001): Al-Fahoum v. the Secretary-General of the United Nations[7]

Non-renewal of fixed-term appointment—As a general rule no entitlement to renewal—An inaccurate performance report—Poor working relationship with Director—Necessity of objective performance evaluation—Sexual harassment charges

The Applicant joined UNRWA as a part-time teacher in October 1976, and after a short break in service joined UNEP in Nairobi on a one-year fixed-term appointment at the P-4 level as a Communications Officer. She was reassigned to the UNEP Regional Office in West Asia in Manama, Bahrain, effective 15 February 1994, and her functional title was changed to Regional Communication/Information Officer. Her appointment was extended for further fixed-term periods, the last appointment expiring on 31 March 1997.

The Applicant argued against the non-renewal of her appointment, claiming that she had been sexually harassed by her supervisor and that due to her rejection of his advances he carried a grudge against her and gave her a poor rating in her performance evaluation report.

In consideration of the case, the Tribunal recalled that the Administration had the discretionary power to terminate fixed-term contracts, pursuant to staff rules 104.12(*b*)(ii) and 109.7(*a*). The Tribunal also noted that while it was a general rule that there was no entitlement to the renewal of a fixed-term contract, even for exceptional employees, such entitlement was specifically conferred on deserving UNEP staff members by a memorandum dated 11 December 1996. According to the memorandum, the ratings "A", "B" and "C" conferred the right to renewal.

With regard to the contents of the Applicant's first evaluation by the new Regional Director, which in the view of the Tribunal had been carried out surprisingly, but not beyond the bounds of administrative instruction ST/AI/411 of 18 September 1995 on the performance appraisal system, soon after he arrived, the Tribunal noted that the report was completely and starkly at odds with the Applicant's previous evaluations and that she had challenged the ratings that she had been given. The Tribunal took particular note that the Applicant had submitted the ratings to the Panel on Discrimination and Other Grievances for review, and that the Administration had not awaited the Panel's report before terminating the Applicant's appointment.

Upon review of the Applicant's performance ratings, the Tribunal noted that all the ratings had been raised one level, with one notable exception: the "E" rating which was given in evaluation of the Applicant's effectiveness in maintaining harmonious work relationships with her colleagues had been upgraded by two levels, and in the view of the Tribunal this implied, at the very least, that the original evaluation was highly inaccurate. The Tribunal further noted that this point was of some importance, bearing in mind that the reason for the non-renewal of the Applicant's contract was precisely the fact that she could not work harmoniously with her supervisor.

On the basis of the corrected evaluation, the Tribunal considered that in December 1996 the Applicant was entitled to an additional year's contract, and did not accept the Joint Appeals Board's reasoning, and subsequently that of the Secretary-General, that the Applicant could not have had a "reasonable legal expectancy" that her contract would be renewed, despite the memorandum of 11 December, because she knew that her working relationship with the Regional Director was very poor. In the opinion of the Tribunal, the Administration had confused the objective entitlement to renewal of the contract, conferred by the memorandum, with the subjective fears of non-renewal that the Applicant might have felt owing to her difficult relationship with her new supervisor.

The Tribunal considered that the JAB and the Applicant were right in believing that the Administration had not shown satisfactorily that the decision not to renew the Applicant's contact was based on a rigorous and objective determination of the unsatisfactory nature of her services. The Tribunal observed that staff should be evaluated as objectively as possible and the Tribunal could not accept that, when the amended evaluation was entirely favourable and, moreover, followed on a long line of excellent evaluations before the arrival of the new supervisor, it was adequate for the Administration to invoke, without further ado, "the irreconcilable differences between you and the Regional Director" as a reason for refusing to

renew the Applicant's contract, to which the Applicant was entitled in view of the circumstances of the case.

Regarding the Applicant's allegation of sexual harassment, the Tribunal, while noting that the JAB had concluded that the accusations could not be corroborated, considered it unnecessary to determine whether or not sexual harassment had taken place, since it was always a difficult matter to prove—or to disprove—and the question was not material in deciding the case. Whether there had been incidents of sexual harassment or not, the reason given for the non-renewal of the Applicant's contract—that she did not get on with her supervisor—while she was entitled to such renewal, was not a sufficient reason if it was not founded upon observance of the established procedures.

In conclusion, the Tribunal considered that in December 1996 the Applicant had been entitled to a one-year renewal of her contract, and that it was due to improper implementation of procedures established to protect the staff that the decision not to renew her contract had been taken without waiting for the results of the review of the evaluation which prompted the decision, and that the grounds for the decision, namely, irreconcilable differences between the Applicant and her supervisor, were arbitrary. The Tribunal ordered the Respondent to pay the Applicant nine months of her net base salary.

6. JUDGEMENT NO. 1020 (20 NOVEMBER 2001): HAZAYYEN V. UNITED NATIONS RELIEF AND WORKS AGENCY FOR PALESTINE REFUGEES IN THE NEAR EAST[8]

Termination for misconduct—Establishment of misconduct—Staff member stealing from another staff member was of concern to the organization—Appropriateness of penalty

As the Tribunal pointed out, there was a large measure of agreement regarding the background facts of the application. On Saturday, 31 May 1997, the Applicant, employed at the time as a Secretary by UNRWA at Amman Training College, Education Department, took possession of an ATM card and a card bearing the PIN number required to operate same from the desk or handbag of a colleague. The Applicant took them without the knowledge or permission of the owner of these items, and by means of four transactions at a local bank withdrew the sum of 350 dinars from her colleague's account, thereby clearing it of its credit balance.

The Applicant submitted that her actions were a matter between herself and her colleague which ought not have legitimately concerned UNRWA and that her actions had not contravened any specific staff rule. The Applicant further argued that she had taken her colleague's card and PIN number "as a joke" and that she had withdrawn the money as a joke because the colleague had previously played a joke on the Applicant by hiding her handbag until the end of work one day. She maintained that she had further engaged in the exercise to give her colleague a practical demonstration or lesson as to her foolishness in leaving such items exposed on her desk, where they might be stolen. The colleague stated that it was only when she threatened to go to the police that the Applicant had admitted to such acts and promised to repay the money.

A Joint Appeals Board (JAB) was duly convened to investigate the matter, and it concluded that there was not sufficient evidence to establish fraudulent intent

on the part of the Applicant. The JAB categorized the Applicant's actions as "a mistake", and, at that, a mistake which did not justify termination for misconduct "because good intentions were the basis of her relationship with the staff member concerned". The Respondent disagreed with the JAB, claiming that the Applicant's actions could not reasonably be described as a joke. He pointed out that there had been four separate withdrawals so as to empty out the colleague's account. Observing that this had never been explained, the Respondent impliedly posed the question as to why this had been done since, if all the Applicant had intended was to perpetuate a joke or to give her colleague a salutary lesson as to the foolishness of keeping her PIN number alongside her ATM card, one withdrawal would have sufficed. The Respondent further pointed to the Applicant's failure to have volunteered her actions of the previous Saturday to her colleague when they met on the following Monday, and to the fact that it was her colleague who had confronted and accused the Applicant and threatened the police before the Applicant made the admission. In the view of the Respondent, had the Applicant truly intended her actions as a joke she would have announced her involvement before being accused and threatened with the police and she would have been then and there in sufficient funds to make immediate restitution.

The Tribunal, having carefully considered the record and submissions of both parties, was fully satisfied that the view on the facts taken by the Respondent when he determined that the Applicant's conduct amounted to misconduct was very fair, proper and reasonable. The decision was neither arbitrary, based on a mistake of fact, nor influenced by prejudice or bias. The Tribunal further rejected the JAB's observation that the matter was one between colleagues, therefore of little concern to an organization, particularly when not initiated by a complaint made by the colleague of her own initiative. Where it appeared to an organization that there was evidence which suggested that one staff member had stolen from another, it was clearly a matter properly meriting the interest of the employing organization, and if facts were found which established such theft, then a finding of misconduct was open to the Administration and termination could well be considered justifiable without the need for previous reprimands and warnings.

Although the issue was not raised by the Applicant, the Tribunal concluded that summary dismissal for the taking of 350 dinars was not disproportionate. In the circumstances all of the Applicant's claims were rejected and the application was dismissed in its entirety.

7. Judgement No. 1031 (21 November 2001): Klein v. the Secretary-General of the United Nations[9]

Non-selection to a higher-level post—Broad discretionary powers to promote qualified staff—Abuse of discretion—Staff regulation 4.2—ST/AI/412 (promoting gender balance)—Improper intervention in selection process

The Applicant entered the service of the Organization on 17 February 1975 as an Associate Officer at the P-2 level in the Division of Human Rights, United Nations Office at Geneva. Following a series of promotions, on 5 March 1985 the Applicant was reassigned to the P-4 level post of Human Rights Officer, International Instruments Unit, Centre for Human Rights. Following a restructuring exercise, on 1 April 1991 the Applicant was promoted to the P-5 level position

of Chief, International Instruments Section, Centre for Human Rights. In 1993, the International Instruments Section was given Branch status, with the Applicant retaining her position as Chief. On 3 May 1996, following another restructuring exercise, the Applicant assumed the functions of Chief, ad interim, Management Unit 2, Centre for Human Rights, a D-1 level position. The Unit was renamed Support Services Branch on 30 September 1996, with the Applicant continuing as Chief, a.i.

On 29 January 1997, the Applicant applied for the D-1 level position of Chief, Support Services Branch, Centre for Human Rights. The then High Commissioner included the Applicant in his shortlist of candidates, and after conducting interviews of the four shortlisted candidates, the Appointment and Promotion Board was advised that the interview panel had unanimously concluded that the Applicant was the most qualified candidate, with another internal candidate second. On 31 July 1997, the Appointment and Promotion Board recommended the Applicant for promotion to the post.

On 12 September 1997, a new High Commissioner took office, and on 16 September the Applicant was informed that the new High Commissioner had decided to re-advertise the post "in order to be able to consider qualified applicants from a broader range of countries than was possible in the first round". On 27 October 1997, the Applicant re-applied for the post. On 10 March 1998, the Applicant was informed that another candidate, an external male candidate, had been recommended by the Department, justifying the choice as being motivated by the need to achieve geographical balance in the Centre. The High Commissioner also stated that she did not believe that the Applicant possessed the skills needed to manage the Branch, or to take a lead role in the changed initiatives that the High Commissioner envisaged. However, the Appointment and Promotion Board stood behind its recommendation of the Applicant, when, on 4 June 1998, the Board reopened the case for further review. Subsequently, the Board recommended that the post be re-advertised a second time because it did not find the High Commissioner's candidate qualified for the post. On 29 June 1998, however, the Respondent appointed the candidate recommended by the High Commissioner. The Applicant lodged an appeal.

In the view of the Tribunal, although the powers of the Appointment and Promotion Board were advisory and non-binding, the Respondent had failed to address the Board's consistent rejection of the High Commissioner's candidate and its recommendation that he was not qualified, and, in the light of the impasse, the Board was correct in recommending that the post be re-advertised. Notwithstanding the Respondent's contentions that the letter dated 23 March 2000, addressed to the Applicant, stated that she had received full and fair consideration at every stage of the process including the final stage and that, therefore, her non-selection had not violated her rights, the JAB found nothing to indicate how the Respondent's final decision had been reached. The Tribunal found that the Respondent had asserted no valid grounds or line of reasoning when ultimately he had made his decision not to re-advertise the post and to appoint the other candidate. Accordingly, in the opinion of the Tribunal, the Respondent's decision-making process and final decision went against the principles of due process and violated the Applicant's right to full and fair consideration.

In addition, the Tribunal had consistently held that the Respondent's discretionary powers with respect to promotion were subject to staff regulation 4.2 and Article 101, paragraph 3, of the Charter of the United Nations, which states: "The paramount consideration in the employment of the staff and in the determination of the conditions of service shall be the necessity of securing the highest standards

of efficiency, competence and integrity . . .” (see Judgement No. 828, *Shamapande* (1997)). In order to achieve this purpose, “it is indispensable that ‘full and fair consideration’ should be given to all applicants for a post” and that “the Respondent bears the burden of proof with respect to this issue” (ibid., para. VI) and, in the view of the Tribunal, the Respondent had not fully met this burden.

The Applicant contended that the High Commissioner’s decision to appoint an external male candidate was in clear violation of the Regulation and Rules, specifically the provisions of administrative instruction ST/AI/412 of 5 January 1996, which attempted to promote gender balance in the Secretariat by having 35 per cent of all Professional posts encumbered by women by 1995; 25 per cent of posts at the D-1 level and above by June 1997; and 50-50 parity between men and women by the year 2000. In that regard, the Tribunal observed that the recommendation of the Appointment and Promotion Board highlighted the Applicant’s superior qualifications juxtaposed to those of the male candidate, stating that the Applicant was the best candidate for the post given her superior qualifications and considerably greater practical and more diverse experience, as well as her consistently excellent performance record. The Appointment and Promotion Board, while noting the male candidate’s excellent credentials, further stated that the Applicant had a higher-level law degree than the male candidate, was a skilful negotiator, possessed the relevant management skills and had performed very well as Chief, a.i., of the Branch for over 18 months. Moreover, it was not clear to the Tribunal that the High Commissioner was in a position to conclude that the Applicant did not possess the skills needed to manage the Branch. The Tribunal further noted that the High Commissioner’s evaluation was completely contrary to that of the former High Commissioner.

The Tribunal agreed with the JAB that there was a lack of transparency in the final stages of the decision-making procedure, that it was improper for the High Commissioner to intervene with the Appointment and Promotion Board and that such intervention amounted to a violation of due process (see Judgement No. 988, *Mezoui* (2000)). Accordingly, the Tribunal found that the Applicant was entitled to compensation and ordered the Respondent to pay the Applicant an amount equivalent to one year’s net base salary at the D-1, step VII, level.

8. Judgement No. 1032 (23 November 2001): Rahman v. the Secretary-General of the United Nations[10]

Separation on grounds of misconduct—UNDP policy on sexual harassment—Question of uncorroborated testimony—Issue of prejudice or bias—Question of adequate notice

The Applicant joined UNDP on a fixed-term appointment as a locally recruited Administrative Officer, UNDP Office, Pakistan, at the NO-B level, on 17 January 1993. Effective 1 January 1995, he was promoted to the NO-C level as Assistant Resident Representative for Administration, subsequently, for Operations. As of 9 May 1997, the Applicant assumed the responsibilities of Officer-in-Charge, Operations Division, which position he held until his separation from service, effective 12 August 1999.

On 22 December 1998, 10 UNDP female staff members lodged with the Resident Representative an official complaint of sexual harassment against the Applicant; on 11 March 1998, an eleventh staff member requested to be added to the

original complaint. The UNDP/UNFPA Grievance Panel on Sexual Harassment reviewed the complaint and, on 19 May 1998, the Panel presented its report, wherein it was found that in four of the 11 complaints there was sufficient evidence to conclude that "the sexual conduct of the Applicant created an intimidating, hostile or offensive work environment for the complaint as set forth in the Sexual Harassment Policy and Procedures for UNDP/UNFPA Staff".

The Applicant was placed on special leave with full pay for an initial period of three months, and the findings of the Grievance Panel were referred to the UNDP/UNFPA/UNOPS Disciplinary Committee (JDC). The JDC submitted its report on 13 July 1999, concluding that the charge of harassment, which included sexual harassment was supported by evidence; that the Applicant's pervasive and repeated acts of verbal harassment of a sexual nature against young female colleagues had created a hostile, intimidating and offensive work environment; and that therefore the Applicant's conduct was unbecoming of an international civil servant and incompatible with continued membership of the staff. The Committee further unanimously recommended that the Applicant be separated from the service of UNDP in accordance with staff rule 110.3(viii), without notice or compensation in lieu thereof. The UNDP Administrator accepted the recommendation and duly separated the Applicant, and the Applicant subsequently appealed the decision, on both substantive and procedural grounds.

In consideration of the case, the Tribunal noted that, in May 1993, UNDP had issued administrative instruction UNDP/ADM/93/26, a policy on sexual harassment, calling it "unacceptable behaviour". It defined the term to mean:

> "conduct of a sexual nature, when it interferes with work, is made a condition of employment or creates an intimidating, hostile or offensive work environment. It is particularly serious when behaviour of this kind is engaged in by an official who is in a position to influence the career or employment conditions (including hiring, assignment, contract renewal, performance evaluation, working conditions, promotion) of the recipient of such attentions."

Procedures were included in the policy, including the creation of a Grievance Panel, whose role was investigation and fact-finding, and the possibility of referral to a JDC.

The Tribunal noted that the actions complained of had occurred between late 1996 and October 1997, and included conversations in the Applicant's office about his unhappy situation at home and calling the women at their homes to talk about his unhappiness, while giving intimate details about himself and his wife. The complaint stated that the calls had occurred unnecessarily when it was time to renew contracts.

Regarding the Applicant's complaints about the procedure followed by the Grievance Panel and the JDC, that the charges against him were based on the uncorroborated testimony of the women and that there were contradictions in their statements, the Tribunal observed that the similarity of the women's experiences with the Applicant, the pattern of conduct they described in their statements and the ability of the Grievance Panel and the JDC to judge the credibility of the oral testimony of at least three of the women made it reasonable for the Panel and the JDC to conclude as they did regarding the sufficiency of the evidence.

The Applicant also claimed that the statements of the Resident Representative and the Deputy Resident Representative exculpated him but had been ignored. For example, the Resident Representative had stated that he was not aware of a hostile

work environment created by the Applicant and that the Applicant could neither approve a personal contract nor approve the reimbursement of claims for daily subsistence allowance. However, the Tribunal observed that it was unclear from the JDC report whether the Committee believed those statements, and even if the testimony were judged to be credible, it could not completely exculpate the Applicant, given the very broad definition of sexual harassment in the UNDP policy. Nor, in the view of the Tribunal, were those statements alone sufficient to undo the findings regarding hostile environment and conduct unbecoming a UNDP official.

The Applicant further claimed that there was management bias against him and a predetermined objective of punishing him to satisfy political expediencies. He cited, for example, extensions of time, the granting of counsel to the women to assist them in the preparation of their statements, the flow of confidential information from UNDP to the women, the long period of his special leave with full pay and the fact that the same person served first as counsel to the women then as counsel to UNDP, as well as local news reports about the case. While the Tribunal normally relied on the factual findings of a JDC, it would decline to accept those findings when there was evidence of prejudice or bias; however, in the present case, it did not find that the Applicant's claims had indicated a prejudice or bias against him.

The Tribunal also concluded that the record revealed that adequate notice had been provided to the Applicant, in keeping with Judgement No. 997, *Van der Graaf* (2001). The Tribunal observed that, after reviewing the complaints by the women and considering the evidence, the Grievance Panel in May 1998 had found elements constituting sexual harassment as defined in the UNDP policy; the June 1998 memorandum from the Director of the Office of Human Resources to the Applicant had provided additional notice of the scope of the issues; the Applicant had been asked to respond within approximately 30 days; and, subsequently, UNDP had notified the Applicant in February 1999 that it would refer the matter to a JDC. In the view of the Tribunal, the Applicant had clearly received adequate and timely notice, distinguishing the facts here from those in Judgement No. 744, *Eren* (1995).

For the foregoing reasons, the Tribunal rejected the Application in its entirety.

9. JUDGEMENT NO. 1040 (30 NOVEMBER 2001): USPENSKY V. THE SECRETARY-GENERAL OF THE UNITED NATIONS[11]

Non-conversion to a career appointment—Right of a staff member to be considered for a permanent post—Non-conversion based on financial position of the Organization—Discrimination based on source of funding for posts—Discrimination based on nationality—Practical remedy because of age

The Applicant joined the United Nations as a Statistician in the Statistical Office, Department of International Economic and Social Affairs, at the P-3 level, on a two-year fixed-term appointment, on 21 June 1984. The Applicant's appointment was renewed several times and, on 22 May 1992, after a break in service, he received a one-year fixed-term appointment as an Economic Affairs Officer, Department for Economic and Social Development. He continued to be renewed, serving in several different departments, with his current appointment due to expire on 31 August 2002. On 23 July 1997, the Applicant had requested to have his appointment converted to permanent status, but this was denied, and the Applicant filed an appeal.

The Applicant requested the Tribunal to award him damages and other relief on the ground that in 1994 he had not been given "every reasonable consideration for a career appointment", although he had 15 years of good service. He argued that this failure by the Respondent had violated his contractual rights and was a result of discrimination. He also asserted that the Respondent had failed to follow his own rules. The JAB agreed in part, and recommended that the Applicant "be given every reasonable consideration for granting of a career appointment" but declined to recommend an award of damages. The Respondent, on the other hand, was not in agreement with the JAB, claiming that the Applicant had been afforded reasonable consideration but had not been converted to permanent status for financial reasons.

In consideration of the case, the Tribunal observed that the right of the Applicant to be considered for a permanent post and the countervailing responsibilities of the Organization regarding staff matters were stated in several legal documents. Article 101, paragraph 1, of the Charter of the United Nations provided that "staff shall be appointed by the Secretary-General under regulations established by the General Assembly". The General Assembly in its resolution 37/126 of 17 December 1982 had decided that "staff members on fixed-term contracts upon completion of five years of continuing good service shall be given every reasonable consideration for a career appointment", and as a consequence this reasonable consideration was an implicit term in contracts of employment.

The Tribunal was of the opinion that the record showed that, at the decision-making level, the Respondent had given at best only an illusory consideration to the determination of the Applicant's eligibility and no consideration to the request for conversion. There was no evidence of a meaningful consideration of the Applicant's performance and length of service; the Respondent had denied the conversion because of the financial position of the Organization and nothing else had been considered.

The Respondent had asserted that, pursuant to General Assembly resolution 51/226 of 3 April 1997, the Assembly had decided that "five years of continuing service . . . do not confer the automatic right to a permanent appointment". It had also decided in the same resolution that "other considerations, such as outstanding performance, the operational realities of the organizations and the core functions of the post, should be duly taken into account". The Tribunal observed that while financial considerations had not been excluded, it was noteworthy that such an important factor was not expressly stated, whereas "operational" realities were listed.

The Respondent also cited Judgement No. 712, *Alba et al*. (1995), wherein the Tribunal had noted that the "financial constraints of the Organization may be one of the factors to be considered in the granting of career appointments". The Tribunal agreed that the financial situation of the Organization might be taken into account; however, there must be a serious and formal consideration of *all* the relevant factors in order to accord the reasonable consideration that was required.

The Tribunal also noted that, pursuant to *Alba et al*., the Administration could not discriminate against staff based on the source of funding for their posts. In *Alba et al*., the Tribunal had found it unfair to distinguish between staff members based on the underlying source of funding for their posts, since under such a practice "long-serving staff members, whose performance was satisfactory, might not even be considered for career appointments because they were serving on extrabudgetary posts, while other staff members with considerably shorter service would be considered for permanent posts after five years because their posts were funded from the regular budget".

The Tribunal further considered that there appeared to be some discrimination based on nationality. As the Tribunal recalled, in 1995, staff members from a country were transferred from overhead posts to established posts (i.e., were eligible for conversion) in disproportionate numbers, while many nationals of other nations were maintained in extrabudgetary posts. Since the number of available permanent posts was limited, the nationals from the other countries—like the Applicant—had been unfairly placed at a disadvantage and denied their right to be considered for career appointment. The Tribunal had found that, while the rationale for this policy was that it reduced the impact on the Tax Equalization Fund of having nationals of the first country paid from overhead accounts, the practice was extremely unfair for staff members of other nationalities.

The Tribunal agreed with the JAB that the Applicant had not, but should have, been given every reasonable consideration for a permanent post. And given the current age of the Applicant, the only practical relief available to the Tribunal was an award of compensation, because the provisions of staff rule 104.12(*b*)(iii) applied to staff members under the age of 53. Accordingly, the Tribunal awarded the Applicant $22,500 compensation in damages, because the Respondent had failed to accord him the required reasonable consideration, leading to a protracted period of uncertainty, and because of the discrimination against him.

10. Judgement No. 1041 (30 November 2001): Conde Estua v. the Secretary-General of the United Nations[12]

Request to be declared sole surviving spouse of deceased staff member—Payments under staff rule 109.10 only permit one surviving spouse—Choice of law—Exceptional case regarding award of costs to the losing party

The Tribunal noted that the case involved two women, both of whom claimed to be the surviving spouse of a United Nations staff member who had died intestate in 1995, with a view to receiving certain sums of money to be paid by the Organization following his death. The Applicant was the deceased staff member's second wife, whom the deceased had divorced, in her absence and without her being notified, by act of repudiation (*talaq*), and without paying her the stipulated monetary award. On the same day, 26 November 1989, the deceased had married the Intervener in the present case, a United States national residing in Geneva, who had converted to Islam, before the Cadi (religious judge) of Djibouti. There was no dispute as to the monies paid to his three children and the Intervener, pursuant to staff rule 112.5(*b*).

The Tribunal, while observing that the case did not involve those benefits paid by the United Nations Joint Staff Pension Fund and, in particular, the widow's benefit due to the "surviving spouse", considered that the issue before it was who should be considered to be the surviving spouse for the purposes of staff rule 109.10, regarding benefits to be paid to the dependent children and the surviving spouse, in order to avoid a sudden loss of income and other benefits upon the death of the staff member. As the deceased's two sons were no longer dependants, only his young adopted daughter and the "surviving spouse" were at issue. The sum in question was approximately $40,000. The Tribunal further noted that whereas the United Nations Joint Staff Pension Fund might recognize two widows, staff rule 109.10 permitted only one surviving spouse of a staff member.

The Tribunal, while noting that it was not within its competence to settle the complex issues of private international law raised in the case with respect to the determination of the validity of the Applicant's marriage and repudiation, as well as the Intervener's marriage, stated that the Organization's practice with regard to the law applicable to personal questions concerning a United Nations staff member was personal law, that is, the law of the State of which the staff member was a national, and that in the present case the law to be applied in considering the Applicant's replacement by the Intervener as the deceased's spouse in 1989 was Somali law.

The Tribunal considered that the Respondent had acted in good faith, taking note in 1989 of the Applicant's replacement by the Intervener as the deceased's spouse, referring to the certificates of repudiation and marriage issued by the authorities in Djibouti, which had been transmitted to the Respondent by the now deceased staff member. One of the determining factors, which in the Tribunal's view confirmed the correctness of the position taken by the Administration when it had treated the Intervener as the deceased's spouse from 1989 on, was that it had simultaneously treated the Applicant as the divorced spouse, and this had elicited no reaction on the Applicant's part. For example, the Applicant had lost her entitlement to the Organization's health insurance, and if she had considered at the time that she was still the deceased's official spouse, even though she knew that he was conjugally cohabiting with another woman, there was no doubt that she would have protested and insisted at that time on being considered the sole lawful spouse. The Tribunal therefore believed that there was no reason to call into question the treatment of the Intervener as the surviving spouse for the purposes of staff rule 109.10. It followed that the sums due pursuant to the staff rule should be paid to the surviving spouse who was living with the staff member at the time of his death, which was fully in keeping with the purpose of the provisions of the rule.

The Tribunal believed that, in view of the particular complexities of the case, it was appropriate to make an exception to its general practice of not granting reimbursement of legal and procedural costs, especially to the losing party, and awarded costs of $5,000 to the losing party (see Judgements No. 237, *Powell* (1979); No. 665, *Gonzales de German et al.* (1994)). The Tribunal further declared the Intervener to be the "surviving spouse" for the purposes of staff rule 109.10.

B. Decisions of the Administrative Tribunal of the International Labour Organization[13]

1. JUDGEMENT NO. 2046 (27 APRIL 2001): IN RE MULLER-ENGELMANN (NO. 12) V. EUROPEAN PATENT ORGANISATION[14]

Request for damages regarding unlawful determination of unauthorized absence from service—Stalemate in appointing third member of board

In 1996, as the complainant was nearing the maximum amount of sick leave allowable under article 62 of the Service Regulations, the European Patent Office (EPO) began the procedure to convene an Invalidity Committee. One physician was

nominated by the complainant and another by EPO, and since the parties could not agree on the nomination of the third physician on the Committee there was some delay. On 11 May 1998, EPO informed the complainant and the two members of the Committee of the designation of Dr. H., a psychiatrist and neurologist, as the third physician on the Committee, following the recommendation of the Medical Advisory Board of the State of Bavaria, which had been consulted by EPO. However, the complainant appealed to the President of the Office that the constitution of the Invalidity Committee was not in conformity with the Service Regulations and she thus refused to cooperate with the Committee.

Then, on 8 June 1998, EPO declared that the complainant's absence from work would be regarded as "unauthorized" within the meaning of article 63 of the Service Regulations until she had attended the required examination. Her salary was subsequently withheld and she was informed on 16 June that besides her own contributions to the social security schemes and pension scheme she would have to pay those normally paid on her behalf by the organization. The complainant requested the President to reconsider those decisions and also requested, inter alia, the payment of damages. The matter was referred to the Appeals Committee.

On 9 December 1998, EPO informed the complainant of the decision to reinstate her as a participant in the social security schemes with retroactive effect, and after the complainant informed EPO that she would attend an examination by Dr. H., EPO withdrew its decisions declaring the complainant's absence as unauthorized and withholding her salary. On 18 June 1999, the Appeals Committee unanimously recommended setting aside the decisions of 8 and 16 June 1998, as it found the statement of unauthorized absence from service unlawful. It also recommended that the complainant be paid arrears of salary including interest, as well as the sums representing the Office's contributions to the social security schemes and the pension scheme, and to refund the procedure-related costs including her legal costs, but to reject the claim for damages on the grounds that the complainant had caused the Office's reactions by her refusal to undergo an examination by Dr. H. On 17 August 1999, the President endorsed the recommendations of the Committee, and the complainant appealed the decision not to award her damages.

In consideration of the case, the Tribunal noted that the case had been mishandled by EPO. Its decisions to declare her absence as "unauthorized", to withhold her salary and to demand payment of contributions to the social security schemes had been declared unlawful by EPO itself, and it had taken the necessary measures to remedy the situation. However, in the opinion of the Tribunal, the complainant was not entirely blameless. The Tribunal observed that once it was clear that there was a stalemate in the process of appointing the third member of the Invalidity Committee, it was obvious that some solution had to be found.

In that regard, the Tribunal noted that although the Service Regulations were at the material time silent on the subject, virtually all codes of arbitration, both legislative and private, contained a procedure for having a court or other impartial third party appoint a third arbitrator in the case of deadlock. Thus, in the view of the Tribunal, it was entirely reasonable for EPO to proceed by analogy to such codes, and have a third member appointed.

In view of the foregoing, the Tribunal awarded the complainant 1,000 German marks for moral damages for the unlawful actions of EPO and costs at 500 euros.

2. Judgement No. 2052 (3 May 2001): In re Henrotte v. European Patent Organisation[15]

Complaint against not being allowed to spend sick leave elsewhere than at her place of residence—Discretionary decision is subjected to a limited review—Procedural error was not prejudicial—Question of substantial grounds being indicated for decision—Question of humanitarian circumstances

The complainant, who eventually was awarded an invalidity pension, in March 2001, impugned the decision of the European Patent Office (EPO) not to grant her permission to spend her sick leave elsewhere than at her place of residence in Munich.

In consideration of the case, the Tribunal observed that, pursuant to rule 6 (iv) of circular 22:

> ". . . The President may, after consulting a doctor appointed by the Office, authorize the person concerned to remove himself from his place of residence, as defined in article 23, in order to spend his sick leave elsewhere."

In that regard, the Tribunal noted that neither the President of the Office nor the Administration on his behalf had consulted "a doctor appointed by the Office", but instead had consulted the Invalidity Committee already dealing with the complainant's case and which was composed of three doctors, one of whom had been chosen by her.

The Tribunal further noted that the decision not to give such permission was clearly discretionary in nature, and it was well established by the case law that a discretionary decision was subjected to limited review. The Tribunal recalled that, in Judgement No. 1969, *in re Wacker* (2000), it had stated that "the Tribunal will quash such a decision only if it was taken without authority, or if it was tainted with a procedural or formal flaw or based on a mistake of fact or of law, or if essential facts were overlooked, or if there was abuse of authority, or if clearly mistaken conclusions were drawn from the evidence". Although the impugned decision might have been preceded by a procedural error in that the Administration had consulted, not "a doctor appointed by the Office", but the Invalidity Committee, that error, in the opinion of the Tribunal, was of no avail in the circumstances. One of the doctors sitting on the Invalidity Committee was in fact a doctor appointed by the Office, and there was no indication that the complainant was in any way prejudiced by the error.

The Tribunal recalled that the complainant's main criticism was that the decision had not stated the "grounds" upon which it was based, pursuant to article 106(1) of the Service Regulations. However, as the Tribunal pointed out, the decision had stated that "the majority on the Invalidity Committee found that the necessary treatment can, in principle, also be carried out in Munich", and since a reason was given for refusing the complainant's wish to receive treatment other than at her place of employment, in the Tribunal's view, there was no need for the decision to contain more elaborate reasons.

Furthermore, in the opinion of the Tribunal, there was nothing to suggest that the interests of the complainant were not weighed with those of EPO, and in that regard the Tribunal noted that the Invalidity Committee had issued nine distinct medical reports over the years and was obviously knowledgeable about the complainant's health and personal circumstances. And while it was true that there were humanitarian circumstances that played in favour of the complainant's position (her child, the fact that her friends, family and usual therapist were all in France), it

was also true that the organization had a genuine interest in having the complainant close by so that it might monitor properly whether she followed her treatment and progress was being made, as well as to be able to assess whether the treatment received was appropriate. It was the view of the Tribunal that the weighing of those respective considerations was properly a matter for the organization and that the complainant had not demonstrated that there was any basis upon which the Tribunal could interfere. The complaint was dismissed.

3. JUDGEMENT NO. 2092 (12 NOVEMBER 2001): IN RE SPAANS V. ORGANISATION FOR THE PROHIBITION OF CHEMICAL WEAPONS[16]

Non-renewal due to abolishment of post—Issue of changing reason for taking a decision—Test for abolishment of a post—Obligation of executive head to give a reason for rejection of appeal body's recommendation

The complainant was employed by the Preparatory Commission for the Organisation for the Prohibition of Chemical Weapons (OPCW) from May 1994 on a fixed-term appointment, as a travel clerk, at grade GS-4. Her contract was renewed several times, and in May 1997 she was granted a three-year appointment. On 25 June 1997, she was promoted to GS-6 as a travel assistant on a three-year contract that superseded the previous one. In a restructuring process in 1998, the branch she worked in became the Procurement and Support Services Branch and her title changed to Support Services Assistant. From October to December 1998, the complainant was on sick leave, and when she resumed work in January 1999, she worked part-time for several weeks, and in July she was transferred to the International Cooperation and Assistance Division. By letter dated 6 October 1999, the Director-General informed the complainant that her contract would not be renewed when it expired on 24 June 2000, because it was his "intention to abolish the position of Support Services Assistant in view of the restructuring of the Procurement and Support Services Branch".

The complainant was successful before the Appeals Council, which recommended her reinstatement, but the Director-General did not accept its recommendation, and she appealed that decision before the Tribunal.

In consideration of the case, the Tribunal recalled that it was elementary that where a reason was given for taking a decision which was adverse to the interests of the staff member the Organisation was held to that reason and could not later justify its action on other grounds. The Organisation later argued that the complainant's contract had not been renewed because her performance had been less than superlative.

The Tribunal was in agreement with the complainant that in fact her post had never been abolished. In that regard, the Tribunal noted that after she was transferred she had continued to perform a number of the duties which had previously been hers in the Procurement and Support Services Branch, and some of those functions remained in the Branch and were performed by Ms. V., who had been recruited from outside the Organisation on 28 September 1999 and started as a "Senior Support Services Clerk" at grade GS-5. In addition, other duties previously performed by the complainant had been temporarily distributed to staff of other departments but most had reabsorbed into the Branch in June 2000 after the complainant had left the Organisation. Moreover, as observed by the Tribunal, the Contract Renewal Board, upon whose advice the Organisation said the Director-General had relied in decid-

ing to abolish the complainant's post, far from recommending its abolition, instead had suggested that someone with different qualifications should be appointed to it in these terms:

> "In order to better serve the needs of the Organisation and to fully meet the requirements for this post in the future, skills and knowledge other than those possessed by the incumbent are needed. Renewal of the contract should therefore not be offered."

As pointed out by the Tribunal, one of the tests which it had developed over the years to determine whether or not a post had truly been abolished was to ask whether or not the "abolition" had resulted in a reduction of the number of staff in the affected department (see, for example, Judgement No. 139, *in re Chuinard* (1969)). If it had not, the presumption was that all that had taken place was a redistribution of functions among existing posts, a normal incident of good management, and not the abolition of one or more posts, which would usually result in the loss of employment for one or more staff members. In the present case, the complainant had argued that the restructuring had led to an increased number of staff members, and the Organisation had stated that while the functions in the travel section had been distributed among a greater number of staff involving other branches, the Procurement and Support Services Branch had retained the same number of budgeted posts.

In the view of the Tribunal, since the reason given by the Director-General for the decision not to renew the complainant's contract was not true, the impugned decision was based on an obvious mistake of fact and could not stand and must be set aside.

The Tribunal also noted that when the executive head of an organization accepted and adopted the recommendations of an internal appeal body he was under no obligation to give any further reasons than those given by the appeal body itself. Where, however, as in the present case, he rejected those recommendations, his duty to give reasons was not fulfilled by simply stating that he did not agree with the appeal body.

As to a remedy, the Tribunal considered that where no abolition of post had in fact taken place the complainant could not have expected renewal for more than two years (beyond 24 June 2000), and instead of ordering reinstatement ordered a payment equal to all remuneration (salary and allowances) and all other benefits to which the complainant would have been entitled if her contract had been renewed to 24 June 2002, subject to her accounting for any net earnings from outside employment to the date of delivery of the judgement. She was entitled to an award of 10,000 euros in damages and to 5,000 euros in costs.

4. Judgement No. 2096 (2 November 2001): In re Bruce v. Organisation for the Prohibition of Chemical Weapons[17]

Non-renewal of contract—Limited power of review of decision—Question of proper constitution of Contract Renewal Board—Obligation to complete performance reports—Question of remedy

The complainant, who was employed by the Organisation for the Prohibition of Chemical Weapons (OPCW) as Head of Laboratory at grade P-4, had a three-year fixed-term contract as from 24 May 1997.

In an information circular of 23 April 1998, the Director-General informed staff members with fixed-term contracts of his intention to extend their appointments, initially granted for three years, by a further two years provided that they had fully demonstrated that they met the high standards of efficiency, competence and integrity required. On 24 August 1999, the complainant was informed orally that the Director-General was not satisfied with the performance of the laboratory, that she would be replaced by a staff member at grade P-5, and that her contract would not be renewed; she would have the choice of two posts until her contract expired. The Director-General also informed management on 31 August of the decisions he had taken for the reorganization of the laboratory. The complainant transferred, on 8 September, to the External Relations Division, mainly to coordinate the OPCW web site.

On 20 September, the Contract Renewal Board recommended that her contract should not be renewed on the grounds that her performance was below the standard required, and the Director-General accepted this recommendation. On 14 January 2000, the complainant lodged an appeal with the Appeals Council, wherein the majority recommended that she be awarded one year's salary, on the basis that OPCW had failed to give her a clear warning to allow her time to improve and that it had given her legitimate expectations that her contract would be renewed. The one dissenting member considered that OPCW could have decided to reinstate her and that the financial compensation to be granted should be equivalent to two years' salary. By a letter of 24 July 2000, the Director-General informed the complainant that he rejected the panel's recommendation and was upholding his decision not to renew her contract, and the complainant appealed to the Tribunal.

The Tribunal recalled that consistent precedent had it that an international organization had broad discretion in deciding not to renew a fixed-term contract, and that the Tribunal might exercise only a limited power of review over such a decision and would quash it only if it showed a mistake of fact or law, or a formal or procedural flaw, or if some essential fact was overlooked, or if a clearly mistaken conclusion was drawn from the evidence, or if there was abuse of authority or lack of authority by the person taking the decision (see Judgement No. 2007, *in re Diouf* (2001)).

As noted by the Tribunal, the complainant, producing the minutes of the Contract Renewal Board's meeting, had argued that the Board had not been properly constituted, in that the Director of her new division had not been present during the examination of her case, and he was the person best placed to give an appraisal of her performance. OPCW stated that her new Director had been present during the discussion of her case, and his signature did not appear on the minutes only because it was the permanent members of the Board who signed the minutes, not those who appeared during the examination of the cases of staff members under their authority. However, the Tribunal observed that that distinction had not been made in the relevant administrative directive of 20 September 1999 regarding the establishment of the Contract Renewal Board, and that OPCW, which bore the burden of proof, had not produced evidence that the Director of the division to which the complainant belonged was present during the examination of her case. The Tribunal therefore agreed with the complainant that there was a procedural flaw, as OPCW had provided no proof that the Contract Renewal Board had been properly constituted.

The complainant also claimed that the rules set out in the administrative directive of 20 September 1999 had not been met, first, because the Contract Renewal Board had not taken into account her performance appraisal report for 1999, which should have been prepared with a view to the examination of her case by the Board, and

secondly, because a recommendation by the Director of her division was not among the documents submitted to the Board. Regarding the appraisal reports, OPCW contended, inter alia, that even if the complainant's performance appraisal report for 1999 had been available to the Board, the outcome of its examination for her case would not have changed. The appraisal of the complainant's overall performance, which was rated as "good" in that report, was in line with the ratings "good" and "very good" in the reports for the years 1994 to 1998, but according to OPCW the determining factor when examining the possibility of renewing the complainant's contract was not her performance appraisal reports, but the malfunctioning of the laboratory, of which the Director-General had been informed by an independent source. Again, the Tribunal agreed with the complainant. In the opinion of the Tribunal, the Board was under the obligation to take into account performance appraisal reports, and failure to complete a report on her performance for 1999 and take it into account before the Board made a decision not to renew a contract was a procedural flaw (see, in particular, Judgement No. 1525, *in re Bardi Cevallos* (1996)).

The Tribunal therefore concluded that the decision was tainted by procedural flaws and must be set aside. While the complainant sought her reinstatement, the Tribunal noted that that remedy was inappropriate, particularly since the post that she had held had been abolished. It therefore awarded compensation for the material and moral prejudice arising out of the unlawful decision not to renew her fixed-term contract, and taking into consideration that the complainant was not entitled to the automatic renewal of her contract, the Tribunal awarded US$ 40,000 to the complainant and 6,000 euros in costs.

5. JUDGEMENT NO. 2102 (6 NOVEMBER 2001): IN RE JAZAYERI V. INTERNATIONAL FUND FOR AGRICULTURAL DEVELOPMENT[18]

Request to withdraw criminal complaint filed by organization—Competency of Tribunal to hear case—Question of receivability—Disciplinary safeguards do not apply to criminal proceedings—Question of protection of staff member's dignity and good name

On 18 June 1997, the complainant, who at the time served IFAD as project controller for Central and West Africa, applied for special leave without pay. IFAD having refused it on 30 October 1997, he submitted his resignation on 6 November 1997, and IFAD accepted it on the same day and the complainant left the Fund on 31 December 1997. Earlier, on 30 May 1997, the complainant had set up, in association with his wife, a company which was registered in London under the name "Financial Services Associates (FSA) International Limited", whose main purpose was to provide assistance to African countries. The complainant had admitted that he should have waited until he left the Fund before registering the company, but further pointed out that it was after he had set up the company that he applied for special leave, and that he had never used his job at IFAD or any of the latter's funds to further the company's interests. The complainant claimed that he had begun consultancy work in the company in the first quarter of 1998.

In 1997, a firm of auditors brought in by IFAD found irregularities in procurement procedures, some of which were found in projects in the complainant's charge. The Fund accordingly opened an internal inquiry which, it said, revealed that three external consultants recruited by the complainant had credited large sums of money

to accounts belonging to the complainant and his wife in Jersey and Guernsey. In September 1998, IFAD filed a criminal complaint with the Italian courts accusing the complainant of abuse of office and, in particular, of having threatened to terminate contracts that some external consultants had with IFAD unless they paid him, with the result that they credited large sums of money to bank accounts in his name in tax havens. Eventually, the complainant was extradited to Italy on 10 March 2000, and on 27 April 2000, he was released under a procedure known in Italy as "*pattegiamento*", wherein he agreed to a suspended prison sentence on the charges brought in exchange for closure of the case with no criminal record.

In a letter of 12 May 1999, the complainant had requested a review of the President's decision to do everything "within [his] authority and influence to have [the complainant] imprisoned". He had asked the President to withdraw the criminal complaint, to give him all the assistance he needed to recover his liberty and to grant him compensation for all the injury he had suffered. On 4 June 1999, the President had rejected his request on the grounds that it did not concern the terms and conditions of his employment and was unfounded besides. The complainant therefore appealed to the Joint Appeals Board (JAB) on 14 July 1999, reiterating his arguments and claiming payment of costs he had incurred in obtaining legal assistance, but later concluded that the Board was unlikely to take a decision within a reasonable period of time, particularly as civil proceedings to recover amounts due were pending against him in the High Court of Justice in the United Kingdom of Great Britain and Northern Ireland, and brought the matter directly to the Tribunal, filing his complaint on 8 December 2000.

In rebuttal, IFAD argued that the Tribunal was not competent to hear the complaint and that his claims were irreceivable. Regarding the competency of the Tribunal, IFAD submitted that the dispute was not about the terms and conditions of the complainant's appointment or IFAD's rules and regulations, and that the charges against its former employee were a matter for the national courts alone. The Tribunal observed that the argument was not without weight, particularly as the complainant had ceased being a member of the Fund's staff as from the date on which his resignation had taken effect, which was prior to the proceedings in the Italian courts; it recalled, however, that the duty placed on international organizations to treat their staff with due consideration and not to impair their dignity might extend beyond the term of their appointment. In charging a staff member with misconduct in the performance of duty, an organization, in the opinion of the Tribunal, must observe due process; otherwise it might be held liable even after its contractual or statutory ties with the official had ceased, and the Tribunal would entertain such matters.

As to receivability, the Tribunal pointed out that evidence showed that the JAB had postponed hearing the complainant's case on the grounds that it needed further information which the parties had apparently not submitted, and in the particular circumstances of the case, the complainant had good grounds for believing that there would be no decision within a reasonable time. In the opinion of the Tribunal, there was therefore nothing unlawful about his coming to the Tribunal without waiting for the JAB to rule.

On the merits, the Tribunal, while noting that civil servants enjoyed certain safeguards, those safeguards did not apply where criminal charges were brought against a former official for acts committed prior to the termination of his service. In the present case, the Tribunal considered that the material rules were those of the applicable code of penal procedure and not the rules on disciplinary proceedings,

and the Fund had not initiated such proceedings and could no longer do so because the complainant had resigned. Furthermore, in the view of the Tribunal, there was nothing in the evidence to support the complainant's assertion that the President had used his prerogatives for purposes other than the general interests and that he was guilty of abuse of authority because "the Italian legal authorities [were] particularly considerate towards him".

As pointed out by the Tribunal, the complainant's dignity and good name had undoubtedly been affected by the criminal complaint against him and the judicial proceedings that ensued, but once the nature of the offences had come to light, the Fund was bound to hand the matter over to the appropriate authorities and so might not be taken to task for causing its former employee undue and unnecessary injury. Consequently, the Tribunal dismissed the complaint.

6. JUDGEMENT NO. 2103 (6 NOVEMBER 2001): IN RE JAZAYERI (NO. 2) V. INTERNATIONAL FUND FOR AGRICULTURAL DEVELOPMENT[19]

Complaint against the withholding of entitlements (including pension entitlements)—Competency of Tribunal to hear case—Question of receivability—Settlement of a staff member's indebtedness to the organization—Question of the organization refusing to send forms to UNJSPF—Question of withholding repatriation allowance

The facts that prompted this complaint are set out in the Judgement No. 2102 above. In the present case, IFAD rebutted the complainant's claim to pension entitlements on the ground that the Tribunal was not competent to hear the complaint. It pointed out that the staff of IFAD were affiliated to the United Nations Joint Staff Pension Fund (UNJSPF) and that article 48 of the latter's Regulations conferred on the Tribunal competence for complaints concerning pension entitlements.

The Tribunal observed that the dispute was not about the scope of his pension entitlements but, as the complainant himself stated, about the Fund's decision not to send to UNJSPF documents enabling it to consider and, if appropriate, settle the claim. As explained by the Tribunal, it was of course not competent to rule on the complainant's pension entitlements, but only whether the Fund had discharged its obligations to its former employee. The fact that UNJSPF had not been given the requisite documents was immaterial to the present case, and therefore the Tribunal was competent to hear it.

IFAD contended that the complaint as a whole was in any event irreceivable because the complainant had failed to exhaust all the available internal means of redress. Its explanation for the delay in the internal procedure was that the case was an exceptional one: IFAD had been unable to defend itself openly because Italian criminal law bound it to secrecy. Moreover, the complainant had contributed to the delay by repeatedly filing appeals in Italy and the Netherlands in order to avoid imprisonment and extradition. He had also failed to provide the Joint Appeals Board with the information it had requested, and in any event IFAD stated that "there was no doubt that the Board would come to a final decision".

On receivability, the Tribunal saw no evidence that a prompt response could be expected from the Board to an appeal which had been before it since 24 November 1998. The dispute was not so exceptional as to preclude consideration within a reasonable period, and the failure by IFAD to hear the internal appeal could be justified

neither by the secrecy required during the investigation nor by the court proceedings, past or present. The Tribunal therefore concluded that the complainant had acted lawfully in coming to the Tribunal without awaiting the outcome of an internal procedure that had become bogged down.

On the merits, in rebuttal of the plea that it had failed to provide the forms needed for consideration of his pension entitlements and payment of his repatriation grant, the Fund submitted that it had been right to suspend settlement of his various terminal entitlements because the complaint had not "discharged all his debts to IFAD". It cited a "general rule of international civil service law" set forth in a United Nations administrative instruction of 31 August 1990: on leaving service a staff member must settle all his debts towards the organization and the administration might refuse to issue the form for UNJSPF or delay issuing it until the requirement had been met.

The Tribunal did not share the Fund's view, stating that, while it was true that an organization might try by all legal means to recover any money a staff member might owe it when he or she left service, that did not entitle it to suspend or block consideration of the staff member's pension entitlements. The Tribunal concluded that the complainant might lawfully seek the quashing of the decision refusing to send UNJSPF the forms it needed in order to consider the complainant's pension entitlements, but it was not for the Tribunal to order IFAD to pay the complainant the arrears of pension due to him, since the settlement of his pension rights was a matter for UNJSPF alone, and might be challenged before the Tribunal if need be.

However, with regard to his claim to payment of the repatriation allowance, the Tribunal was of the view that since the Italian criminal court had allowed the Fund's complaint, a large amount of money was involved and IFAD had to have recourse to the High Court to seek repayment of the funds misappropriated by the complainant or, failing that, damages, IFAD was right to defer consideration of the complainant's entitlement to a repatriation allowance.

The complainant having succeeded in part, the Tribunal awarded him costs set at 2,000 euros.

7. Judgement No. 2111 (6 November 2001): In re Cuvillier (No. 4) v. International Labour Organization[20]

Complaint concerning the taxation of staff member's pension by national authorities—Competency of Tribunal to review matter—Question of receivability

The complainant, who was a resident of Switzerland, was an official of ILO from 1959 to 1987 and had been receiving a retirement pension since 1 March 1987, when she had been granted early retirement. Since then she had continued to challenge, through both the Federal and Geneva tax authorities and ILO, the right of Switzerland to tax her pension. Having never succeeded, and in particular having had appeals to the Swiss Federal Tribunal rejected on 6 December 1996 and 19 June 1997, she filed an internal complaint with the Director-General of ILO on 26 July 2000 under article 13.2 of the Staff Regulations against "unjustified treatment inconsistent with the status of an official". In her internal complaint she alleged that ILO had allowed a situation of non-law to develop, had wrongly supported the position of the Swiss authorities and had

disregarded the fact that the "salaries, emoluments and indemnities", exonerated from taxes under article 17(*b*) of the Headquarters Agreement concluded between Switzerland and ILO, also included pensions. The complainant requested the Director-General:

—To acknowledge that the note verbale of 17 December 1984 from the Permanent Mission of Switzerland addressed to the international organizations based in Geneva respecting the tax liability of retired officials in Switzerland had indeed been received by ILO;

—To provide an indication of the action he intended to take thereon, giving reasons; and

—To undertake to do what was necessary for the establishment of the tribunal envisaged in article 27 of the Headquarters Agreement.

The Director of the Office of the Director-General replied to what he described as an "internal complaint" on 5 September 2000, indicating that the complainant could not have recourse to article 13.2 as her claims were not related to treatment inconsistent with the Staff Regulations, unjustifiable treatment by a superior official or rights deriving from the duties discharged by her when she worked. The complainant was reminded that the Office had already replied to her earlier claims and that the Swiss authorities as well as the Office had made it known from the beginning that "UNJSPF periodical pension benefits [were] liable to taxation in Switzerland". Dissatisfied with this reply, the complainant came to the Tribunal requesting that the decision contained in the letter of 5 September be set aside.

In response, ILO argued that the Tribunal was not competent to entertain the complaint, pleading irreceivability on several grounds. The Tribunal noted that the dispute concerned the dismissal of an internal complaint filed under article 13.2 of the Staff Regulations, and that, in principle, that provision only entitled an "official" who considered that she or he was entitled to do so to have an internal complaint examined according to the established procedure. However, the Tribunal acknowledged that the relationship between officials and international organizations did not come to an end when they ceased working (see, in this respect, Judgement No. 986*, in re Ayoub (No. 2), Von Knorring, Perret-Nguyen (No. 2) and Santorelli*, 1989). Moreover, although the Tribunal's competence was limited pursuant to article II, paragraph 1, of its statute to "complaints alleging non-observance, in substance or in form, of the terms of appointment of officials of the ILO, and of such provisions of the Staff Regulations as are applicable to the case", that provision did not prevent the Tribunal from ruling on complaints filed by officials of international organizations who were no longer working and considered that, following their retirement, they had suffered injury to the rights and guarantees conferred upon them by their status. As noted by the Tribunal, in the present case, the complainant had reproached the organization with failing to provide the protection, to which she considered herself entitled, to establish her tax exoneration.

While the Tribunal was competent to judge whether the impugned decision was well founded, to do so the complaint still had to be receivable, and in that respect the pleas of irreceivability put forward by ILO succeeded. As the Tribunal pointed out, although the complainant was asking what action would be taken pursuant to the note verbale from the Permanent Mission of Switzerland, her real motive was to exhort the organization to contest the letter and, as further pointed out by the Tribunal, the issue had been raised in many letters addressed to ILO to

which the complainant had either explicitly or implicitly received negative replies. Moreover, the claims that ILO should be ordered to make necessary arrangements for the establishment of the tribunal envisaged in article 27 of the Headquarters Agreement were also irreceivable: they had already been rejected in earlier decisions which had not been challenged in time. Lastly, there was no evidence, in the opinion of the Tribunal, that ILO had failed in its duty of protection towards its officials and, where appropriate, its former officials. And the complainant clearly could not challenge the decision of the Swiss Federal Tribunal through ILO or through the Tribunal.

For the above reasons, the complaint was dismissed.

C. Decisions of the World Bank Administrative Tribunal[21]

1. Decision No. 241 (26 April 2001): Lee v. International Bank for Reconstruction and Development[22]

*Termination because of redundancy—Staff rule 7.01, paragraph 8.02(*c*) versus paragraph 8.02(*d*)—Need to allow for more than literal interpretation of Staff Rules—Duty to promote harmonious relationships—Review of business and managerial discretionary decisions—Question of transparency in the process—Issue of age discrimination—Improper handling of administrative review—Duty to assist redundant staff member in finding alternative employment*

The Applicant joined the Bank in August 1977 on a temporary assignment as a Research Assistant, and after holding a series of temporary appointments, receiving a two-year fixed-term appointment, the conversion of her appointment to regular status and two promotions, the Applicant's title was changed to that of Research Analyst in April 1991. The Applicant's most recent position was as a Research Analyst in the Macroeconomics Division, Africa Technical Families, of the East Africa Department (AFTM2). In November 1997, a new manager became Sector Manager of AFTM2, and after reorganization of the unit the Applicant was informed, in February 1998, that her position would be declared redundant.

The Applicant appealed, contending that the Bank's decision to terminate her employment for redundancy under staff rule 7.01, paragraphs 8.02(*d*) and 8.03, was an abuse of discretion, being improperly motivated, discriminatory and lacking in transparency. She also contended that the Bank had failed to give her request for administrative review appropriate consideration and had equally failed to assist her in finding employment within the Bank subsequent to the decision of redundancy.

Regarding the redundancy decision, the Applicant maintained that her redundancy should have been classified under staff rule 7.01, paragraph 8.02(*c*) (skills-mix), rather than paragraph 8.02(*d*) (reduction in number of positions). The Tribunal disagreed, stating that paragraph 8.02(*d*) provided that "employment may become redundant when the Bank Group determines in the interests of efficient administration . . . specific types or levels of positions must be reduced in number", and that is what had happened in the Applicant's case. The references to the Applicant's skills

in some of the Bank's memoranda had been made in the context of comparing her capabilities and skills to those of other Research Analysts within the department, in order to decide who among them would be declared redundant. The Tribunal observed that, as stated in Decision No. 192, *Garcia-Mujica* (1998), the mere fact that skills were part of the Respondent's consideration did not mean that the redundancy was based on a mismatch between the Applicant's skills and the skills required for a redesigned position under paragraph 8.02(*c*). Moreover, the Tribunal found that the four possible bases under paragraph 8.02 for deciding that a staff member's employment had become redundant were not completely separated or detached from one another, and organizational changes to meet the changing needs of the Bank must allow for more than mathematical and literal interpretation of the Staff Rules.

The Applicant also had contended that her termination was based on personal bias by the Sector Manager of AFTM2, who had targeted her for redundancy. However, after noting the three incidents the Applicant described as being the basis for this allegation, the Tribunal concluded that they did not substantiate her allegation. The Tribunal, however, noted that those incidents evidenced a strained and unfriendly relationship between the Applicant and the Sector Manager, and the record did not show that the Bank had taken this strained relationship into account while dealing with the termination of the Applicant's long-standing appointment. Nor did the record show any action taken by the Bank to promote harmonious relations between the Applicant and her superiors, a duty imposed on the Bank by principle 2.1 of the Bank's Principles of Staff Employment.

The Tribunal found that the redundancy decision was based on business and managerial considerations, and that the decision to reduce the number of Research Analysts in AFTM2, which eventually led to the redundancy decision, was part and parcel of an effort by management to implement certain policy directives. The argument put forward by the Respondent to justify its decision was that the reduction was necessary to increase efficiency and to lower costs, particularly as the more complex simulations, analysis and design were increasingly beyond the skills of the Research Analysts in AFTM2 and would have to be performed by higher-level staff. In the Tribunal's view, even if the wisdom of such a strategy were to be questioned, it remained within the discretionary power of management to choose a managerial strategy aimed at improving the quality of work and to limit the cost of such work, and the Tribunal had consistently refrained from substituting its own judgement on policy and managerial decisions for that of the Respondent. The Tribunal stated that it reviewed decisions involving managerial discretion only to ensure that they did not constitute an abuse of discretion, being arbitrary, discriminatory, improperly motivated or carried out in violation of a fair and reasonable procedure (Decision No. 5, *Saberi* (1982), and Decision No. 185, *Ezatkhah* (1998)).

The Applicant also contended that, pursuant to staff rule 7.01, paragraph 8.03, "a transparent process of evaluating all staff at the same level performing the same or similar functions" had not taken place before selecting a certain staff member for termination. In that regard, the Tribunal found that the Sector Manager and the Human Resources Officer should have kept records of their discussions with the Task Team Leaders who had worked with the three Research Analysts, in order to decide which of the three would be chosen for redundancy. Moreover, the Sector Manager had neither kept nor presented any record showing the results of the comparison of the credentials of the incumbent Research Analysts, nor had the Human Resources

Officer kept a record of any conversations with potential volunteers for redundancy. Those irregularities, though falling short of substantiating the Applicant's allegation of abuse of discretion, represented, in the view of the Tribunal, procedural flaws that could not be forgiven in the process leading to the eventual termination of the employment of a staff member who had served the Bank for almost 20 years. The Tribunal, while finding that these procedural flaws entitled the Applicant to compensation, also observed that regardless of the procedural flaws, the record supported the Bank's claim that the selection of the Applicant for redundancy had been based on an effort to identify the weakest performer among the Research Analysts vulnerable to termination for redundancy.

The Applicant had also argued that she was declared redundant due to her age, but the Tribunal could not find any evidence supporting this allegation. Moreover, such an argument in and of itself was not evidence of abuse of discretion on the part of the Bank, and, in the opinion of the Tribunal, it only emphasized the need for the Respondent to apply a higher standard of care with respect to a decision terminating the employment of a staff member who had been in the service of the Respondent for a long period of time, and who, on account of his or her age, was less likely to find employment elsewhere.

The Applicant also complained that her request for administrative review of the redundancy decision had been mishandled by the Bank, i.e., it was not seriously examined and a hasty decision was taken confirming the decision under review. The Tribunal, while noting that the facts surrounding the submission of the request for administrative review were somewhat uncertain and confused, did observe the very short time during which the Bank considered on the merits the Applicant's request, as well as the unusual brevity of the letter, dated 26 February 1999, addressed to the Applicant to inform her that her request for review had been denied. The Tribunal found that the Applicant's request had not been properly handled by the Bank, and that the Bank's categorical and unexplained refusal to explain to the Applicant the reasons justifying its decision not to reverse the redundancy decision or to grant her an extension of her administrative leave were manifestations of unsympathetic and arbitrary treatment for which the Applicant was entitled to compensation.

As to the Applicant's complaint that the Bank had failed to assist her in finding a new assignment subsequent to the termination of her employment, the Tribunal noted that the record did not substantiate this allegation. The fact that neither the efforts of the Applicant nor those of the Bank were successful did not mean that the Bank had failed in assisting the Applicant, and, as stated in Decision No. 161, *Arellano* (1997), the Bank's obligation in that respect was "to make an effort; . . . not . . . to ensure the success of such effort".

On the basis of the above, the Tribunal concluded that the Bank's decision to terminate the Applicant's employment for redundancy under staff rule 7.01 was not an abuse of discretion. However, the Tribunal also concluded that the manner in which the Applicant had been treated by the Respondent and in which her complaints had been handled, during the critical time immediately preceding and following the decision of terminating her employment, were not consistent with the right to fair treatment. The Tribunal awarded the Applicant compensation in the amount of 18 months' net salary and costs in the amount of $7,297.22.

2. Decision No. 245 (23 July 2001): Nunberg v. International Bank for Reconstruction and Development[23]

Complaint that 5 per cent increase in salary to negate gender discrimination was too low—Discretionary decisions—Proof of gender inequity—Question of 5 per cent increase being fair and reasonable—Difficulty of applying an individual regression analysis—Because of importance of issues, Tribunal awards costs

The Applicant joined the Bank in November 1983 as a Consultant in the Public Sector Management Unit, and in October 1985 she was granted a regular appointment as a Public Sector Management Specialist, level 23. She was promoted and transferred a number of times, and gained the position of Principal Public Management Specialist, level 25, in July 1995. Her performance evaluations were very positive and those evaluations were reflected in her promotions and annual salary increases.

Between February 1992 and April 1993, a study of salaries, which had been jointly commissioned by the Bank and the Staff Association, was carried out (by Professors R. Oaxaca and M. Ransom), which concluded that in regard to grades 22 to 30, Part I women (of whom the Applicant was one) earned approximately 16 per cent less than Part I men. The Applicant received a 5 per cent increase in her salary based on the study. After reviews of this decision, she filed an application with the Tribunal, challenging the 1995 decision to grant her a 5 per cent increase, on the basis that the decision was incompatible with the principle of fairness and that it did not overcome the gender discrimination affecting her or provide her with an equitable level of compensation.

In consideration of the case, the Tribunal noted that its general approach to decisions involving the exercise of discretion was that it would not interfere or substitute its own judgement unless the decision constituted an abuse of discretion (Decision No. 1, *de Merode* (1981), and Decision No. 81, *Bertrand* (1989)).

The Tribunal noted that the Oaxaca and Ransom report had found that there were differentials between the salaries of Part I females and those of Part I males, and that on average 9.1 per cent of that differential could be attributed to gender inequity. However, as pointed out by the Tribunal, it did not follow from those findings that every Part I woman necessarily suffered pay inequity of 9.1 per cent, nor did the report establish that the Applicant's salary was in fact affected by gender inequity, let alone the extent of any such inequity.

The Tribunal further pointed out that while the Applicant had not relied solely on the statistical analysis of the report to establish her claim, contending that there were several factors which showed that her salary had been affected by gender discrimination, most of those factors did not withstand examination. For example, her argument that she was a strong performer, but had salary increases mainly in the satisfactory range, in the view of the Tribunal, was inconclusive to show discrimination without other data relevant to salary determination, such as peer comparisons and budgetary constraints. Furthermore, her submission that studies showed that equitable starting salaries were connected with inequitable salary progression was not evidence specific to her own situation. Similarly, the Applicant's submission that her salary must have been affected by inherent bias, such as stereotypical assumptions which affected the salary increases granted to women, was of a general nature and did not provide evidence of discrimination in her own case, in the opinion of the Tribunal.

However, the Tribunal observed that the findings of the 1993 Oaxaca and Ransom report and the Applicant's receiving a salary increase of 5 per cent implied that there was an inequity affecting the Applicant's salary, which was contradictory to principle 6.1 of the Principles of Staff Employment, to provide levels of compensation that were equitable internally. And although there was no evidence to show that any particular decision relating to the Applicant's salary had been affected by wrongful intent, failure to meet the obligation arising under principle 6.1 did not depend on a specific intent. In that regard, a burden fell on the Bank to show that its decision to grant an increase of 5 per cent was a fair and reasonable response to the salary inequity affecting the Applicant, and that it was in accordance with the principles of fairness and impartiality (Decision No. 81, *Bertrand* (1989)).

The Bank had argued that although it did not accept that there was discrimination against the Applicant, it claimed to have discharged any obligation it may have had towards her by the award of 5 per cent increase. Unfortunately, as pointed out by the Tribunal, the Bank had not explained how it had established that the increase of 5 per cent granted to the Applicant was appropriate to overcome inequity. On the other hand, the regression analysis requested by the Applicant, after reviewing the matter, appeared to the Tribunal as no more than a step in a complex process. According to the Tribunal, such an analysis might reveal whether the pay inequity affecting the Applicant was greater or less than the average of 9.1 per cent found by Oaxaca and Ransom to affect Part I women, and whether any such difference was statistically significant; it might indicate in a statistical sense what should be the equitable salary for a person with the observable characteristics of the Applicant if there were no gender inequity. But, in the view of the Tribunal, the outcome of that exercise could not determine finally what salary was fair and equitable for her personally.

The Tribunal, taking into account the difficulties in applying the results of an individual regression analysis to an individual salary claim and the fact that the value of other analytical methods, such as cohort analysis, had received support from expert opinion, was unable to find that the Bank's refusal to provide the material for a regression analysis was inconsistent with the principles of fairness and equity. Furthermore, the later studies, including the cohort study conducted by the Bank, did not show any salary inequity affecting the Applicant, and although the precise extent of the gender inequity which affected the Applicant's salary in 1995 remained uncertain, on the material before it, the Tribunal was unable to find that the Bank had failed to comply with the principles of fairness and equity or that the decision was an abuse of discretion.

While sharing the Applicant's concerns about possible gender discrimination in the Bank's salary structure, which the Tribunal perceived as resulting not from actual intent but in all likelihood from historical patterns, the Tribunal was also aware of the Bank's efforts to overcome any such discrimination. In the present case, the Tribunal had been unable to make a specific finding of discrimination affecting the Applicant individually, after the 5 per cent adjustment decided by the Bank, as neither the evidence specific to her situation nor the studies carried out by the Bank supported such a finding and there was no compelling case for applying the methodology proposed by the Applicant. The Tribunal dismissed the claim and, based on the importance of the legal issues raised by the Applicant, awarded costs in the amount of $11,845.88.

D. Decisions of the Administrative Tribunal of the International Monetary Fund[24]

JUDGEMENT NO. 2001-1 (30 MARCH 2001): ESTATE OF MR. "D" V. INTERNATIONAL MONETARY FUND[25]

Admissibility of the application—Tribunal's jurisdiction under article II of its statute—Exhaustion of remedies requirement of article V—Importance of timeliness—Exceptional circumstances for excusing lack of timeliness

Mr. "D" was a retired staff member of the World Bank and was enrolled under a family policy in the Medical Benefits Plan maintained by the International Monetary Fund. In May 1998, Mr. "D", who had begun treatment for metastasized lung cancer, travelled (with his doctor's permission) to his home country to attend to personal business, and while there he became ill with pneumonia and had to be placed on a ventilator. Mr. "D'"s adult children, who had accompanied him on the trip, deemed conditions in the hospital "deplorable" and, in consultation with the doctors on the scene, decided to arrange for the medical evacuation of their father to the Maryland hospital in which he earlier had been receiving treatment. He was evacuated on 2 June, and died in September 1998.

Subsequently, the Estate of Mr. "D", represented by its executrix Ms. "D" (Mr. "D'"s daughter), challenged the decision under the Medical Benefits Plan to deny reimbursement of medical evacuation expenses incurred by the decedent in May-June 1998. The Fund responded to the application in the Administrative Tribunal with a motion for summary dismissal, contending that the Applicant had not met the requirement of article V of the Tribunal's statute that, when the Fund had established channels of administrative review for the settlement of disputes applicable to the case in question, an application might be brought in the Tribunal only after the exhaustion of all available channels of administrative review. Since a motion for summary dismissal suspended the period for answering the application until the motion had been acted on by the Tribunal, at the current stage the Tribunal was limited to the question of the admissibility of the application.

Considering the issue of whether the Tribunal, as a threshold matter, had jurisdiction *ratione personae* over the estate of Mr. "D", the Tribunal concluded that it did have such jurisdiction over the Applicant's claim under article II of its statute, for two reasons: (*a*) the commentary to the statute provided examples of those covered that were not exhaustive: "Such individuals would include . . . non-staff enrollees in the Medical Benefits Plan, for example . . .". Other individuals in the situation, "for example" of the Applicant, could be "included"; and (*b*) given the intent of the statute and the structure of the Fund's benefit programme to afford staff members in question a person who was a successor in interest to a non-staff enrollee.

In examining the issue whether the Applicant had exhausted all remedies as required by article V of the Tribunal's statute, the Tribunal recalled the twin goals of providing opportunities for resolution of the dispute and for building a detailed record in the event of subsequent adjudication. The commentary to the statute emphasized that the Tribunal was intended as a last resort after the administration had had a full opportunity to determine whether corrective measures should be taken. As pointed out by the Tribunal, in the present case, it was not contested that the Applicant had complied with all the procedures and time limits, except for the ini-

tial requirement of section 6.03 to request administrative review by the Chief of the Staff Benefits Division within three months of the denial of the benefit.

The Tribunal further recalled that international administrative tribunals had emphasized not only the importance of the exhaustion of administrative remedies but also that the process should be pursued in a timely manner, and the timeliness of the review process was directly linked to the purpose of that review:

> "Prompt exhaustion of remedies provides an early opportunity to the institution to rectify possible errors—when memories are fresh, documents are likely to be in hand, and disputed decisions are more amenable to adjustment. This purpose would be significantly undermined if the Tribunal were to condone long and inexcusable delays in the invocation of these remedies." (Asian Development Bank Administrative Tribunal Decision No. 41, *Alcartado* (1998))

Hence, as the Tribunal noted, administrative tribunals frequently had dismissed applications for failure to meet the exhaustion requirements of their statutes when the underlying administrative review had not been timely pursued.

The Tribunal also noted that in assessing compliance with statutory requirements for the exhaustion of administrative review, international administrative tribunals sometimes considered claims of exceptional circumstances to excuse a failure to comply on a timely basis with the underlying review procedures. In that regard, the Tribunal observed that the statute of the International Monetary Fund Administrative Tribunal recognized "exceptional circumstances".

In the present case, the Tribunal noted that the Applicant's strongest argument for "exceptional circumstances" was that she had not been provided timely and sufficient notice of the Fund's administrative review procedures. She further contended that, not being a staff member, she did not have access to the usual channels of information within the Fund regarding dispute resolution procedures. The Respondent had countered that the Applicant was a highly educated and adept claimant who had not made a reasonable effort to inform herself of the Fund's administrative procedures.

As noted by the Tribunal, as a general rule, it had been held that lack of individual notification of review procedures did not excuse failure to comply with such procedures (see, for example, World Bank Administrative Tribunal (WBAT) Decision No. 174, *Guya* (1997)). However, as further noted by the Tribunal, Ms. "D" was not and had never been a staff member of the Fund, and could not be assumed to have had access to the information on dispute resolution disseminated to staff members. The Tribunal also observed that it was significant that, at each stage in which the Applicant was informed of the requisite procedures, she had conformed to the deadlines. Moreover, the Tribunal noted that the vacillation on the part of the Respondent as to whether Ms. "D" was required to follow the administrative review procedures also suggested flexibility in the application of those review procedures (see WBAT Decision No. 78, *Robinson* (1989)). The Tribunal therefore concluded that, in the present case, it was incumbent on the Fund to inform Ms. "D", who could not be assumed to know, of the specifics of the further recourse open to her; and that, on the contrary, the Fund had given the impression to Ms. "D" that, with the report of the external medical examiner, she had exhausted all of her options.

Accordingly, the Tribunal denied the Fund's motion for summary dismissal, and the Fund's answer on the merits, the Applicant's reply and the Fund's rejoinder would follow, according to the schedule prescribed by the Staff Rules.

NOTES

[1] In view of the large number of judgements that were rendered in 2001 by administrative tribunals of the United Nations and related intergovernmental organizations, only those judgements which are of general interest and/or set out a significant point of United Nations administrative law have been summarized in the present edition of the *Yearbook*. For the integral text of the complete series of judgements rendered by the tribunals, namely, Judgements Nos. 901 to 1040 of the United Nations Administrative Tribunal; Judgements Nos. 2003 to 2118 of the Administrative Tribunal of the International Labour Organization; Decisions Nos. 238 to 259 of the World Bank Administrative Tribunal; and Judgements Nos. 2001-1 and 2002-2 of the Administrative Tribunal of the International Monetary Fund, see, respectively: documents AT/DEC/901 to AT/DEC/1040; *Judgements of the Administrative Tribunal of the International Labour Organization*: *90th to 92nd Ordinary Sessions*; *World Bank Administrative Tribunal Reports 2001*; and Administrative Tribunal Judgements of the International Monetary Fund 2001.

[2] Under article 2 of its statute, the United Nations Administrative Tribunal is 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 Tribunal shall be open: (*a*) to any staff member of the Secretariat of the United Nations even after his employment has ceased, and to any person who has succeeded to the staff member's rights on his death; and (*b*) to any other person who can show that he is entitled to rights under any contract or terms of appointment, including the provisions of staff regulations and rules upon which the staff member could have relied.

Article 14 of the statute states that the competence of the Tribunal may be extended to any specialized agency brought into relationship with the United Nations in accordance with the provisions of Articles 57 and 63 of the Charter of the United Nations upon the terms established by a special agreement to be made with each such agency by the Secretary-General of the United Nations. Such agreements have been concluded, pursuant to the above provisions, with two specialized agencies: the International Civil Aviation Organization and the International Maritime Organization. In addition, the Tribunal is competent to hear applications alleging non-observance of the Regulations of the United Nations Joint Staff Pension Fund, including those applications from staff members of the International Tribunal for the Law of the Sea.

[3] Mayer Gabay, President; Marsha A. Echols and Brigitte Stern, Members.

[4] Kevin Haugh, Vice-President, presiding; Spyridon Flogaitis and Omer Yousif Bireedo, Members.

[5] Mayer Gabay, President; Marsha A. Echols and Brigitte Stern, Members.

[6] Julio Barboza, First Vice-President, presiding; Kevin Haugh, Second Vice-President; Brigitte Stern, Member.

[7] Kevin Haugh, Vice-President, presiding; Omer Yousif Bireedo and Brigitte Stern, Members.

[8] Kevin Haugh, Second Vice-President, presiding; Marsha A. Echols and Spyridon Flogaitis, Members.

[9] Mayer Gabay, President; Julio Barboza, Vice-President; Spyridon Flogaitis, Member.

[10] Mayer Gabay, President; Marsha A. Echols and Spyridon Flogaitis, Members.

[11] Kevin Haugh, Vice-President, presiding; Marsha A. Echols and Omer Yousif Bireedo, Members.

[12] Mayer Gabay, President; Spyridon Flogaitis and Brigitte Stern, Members. See also IMF Judgement No. 2001-2 (*Mr. "P" (No. 2) v. IMF)*, wherein the issue of a former spouse's claim to a staff member's pension, inter alia, was before the IMF Tribunal.

[13] The Administrative Tribunal of the International Labour Organization is competent to hear complaints alleging non-observance, in substance or in form, of the terms of appointment of officials and of the staff regulations of the International Labour Organization and of the other international organizations that have recognized the competence of the Tribunal, namely, as at 31 December 2001: International Labour Organization, including the International Training

Centre; World Health Organization, including the Pan American Health Organization; International Telecommunication Union; United Nations Educational, Scientific and Cultural Organization; World Meteorological Organization; Food and Agriculture Organization of the United Nations; European Organization for Nuclear Research; World Trade Organization; International Atomic Energy Agency; World Intellectual Property Organization; European Organization for the Safety of Air Navigation (Eurocontrol); Universal Postal Union; European Southern Observatory; Intergovernmental Council of Copper Exporting Countries; European Free Trade Association; Inter-Parliamentary Union; European Molecular Biology Laboratory; World Tourism Organization; European Patent Organisation; African Training and Research Centre in Administration for Development; Intergovernmental Organisation for International Carriage by Rail; International Center for the Registration of Serials; International Office of Epizootics; United Nations Industrial Development Organization; International Criminal Police Organization (Interpol); International Fund for Agricultural Development; International Union for the Protection of New Varieties of Plants; Customs Cooperation Council; Court of Justice of the European Free Trade Association; Surveillance Authority of the European Free Trade Association; International Service for National Agricultural Research; International Organization for Migration; International Centre for Genetic Engineering and Biotechnology; Organisation for the Prohibition of Chemical Weapons; International Hydrographic Organization; Energy Charter Conference; International Federation of Red Cross and Red Crescent Societies; Preparatory Commission for the Comprehensive Nuclear-Test-Ban Treaty Organization; European and Mediterranean Plant Protection Organization; and International Plant Genetic Resources Institute. The Tribunal also is competent to hear disputes with regard to the execution of certain contracts concluded by the International Labour Organization and disputes relating to the application of the regulations of the former Staff Pension Fund of the International Labour Organization.

[14] Michel Gentot, President; Mella Carroll, Vice-President; James K. Hugessen, Judge.

[15] Mella Carroll, Vice-President; James K. Hugessen and Flerida Ruth P. Romero, Judges.

[16] Michel Gentot, President; Mella Carroll, Vice-President; and James K. Hugessen, Judge.

[17] Michel Gentot, President; Jean-François Egli and Seydou Ba, Judges.

[18] Michel Gentot, President; Mella Carroll, Vice-President; Jean-François Egli, Judge.

[19] Ibid.

[20] Michel Gentot, President; Mella Carroll, Vice-President; Hildegard Rondón de Sansó, Judge.

[21] The World Bank Administrative Tribunal is competent to hear and pass judgement upon any applications alleging non-observance of the contract of employment or terms of appointment, including all pertinent regulations and rules in force at the time of the alleged non-observance, of members of the staff of the International Bank for Reconstruction and Development, the International Development Association and the International Finance Corporation (referred to collectively in the statute of the Tribunal as "the Bank Group"). The Tribunal is open to any current or former member of the staff of the Bank Group, any person who is entitled to a claim upon a right of a member of the staff as a personal representative or by reasons of the staff member's death and any person designed or otherwise entitled to receive a payment under any provision of the Staff Retirement Plan.

[22] Francisco Orrego Vicuña (a Vice-President) as President; Thio Su Mien (a Vice-President); A. Kamal Abul-Magd and Bola A. Ajibola, Judges.

[23] Robert A. Gorman, President; Francisco Orrego Vicuña and Thio Su Mien, Vice-Presidents; A. Kamal Abul-Magd, Bola A. Ajibola, Elizabeth Evatt and Jan Paulsson, Judges.

[24] The Administrative Tribunal of the International Monetary Fund became operational on 1 January 1994. The Tribunal is empowered to review any employment-related decision taken by the Fund on or after 15 October 1992.

[25] Stephen M. Schwebel, President; Nisuke Ando and Michel Gentot, Associate Judges.

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)

LIABILITY ISSUES

1. PAYMENT OF SETTLEMENT CLAIMS—LIABILITIES OF A PRIVATE LAW NATURE—PROCEDURES FOR SETTLEMENT—BUDGET CONSIDERATIONS

Memorandum to the Controller

I. *Introduction and summary conclusion*

1. I refer to your query regarding the settlement of claims and the making of settlement payments.

2. You have sought advice as to the regulatory basis for the payment of claims settlements that have been recommended by this Office and the payment of such settlements. In that connection, you noted that the United Nations Financial Regulations and Rules do not expressly provide for payments of such settlements. You also referred to financial rule 110.1, which requires that "the expenditures of the Organization remain within the appropriations as voted and are incurred only for the purposes approved by the General Assembly."

3. The question you raise is an important one. The answers are found not only in the inherent authority of the Organization to incur liabilities of a private law nature and the obligation to compensate for such liabilities, but are also reflected in various specific authorities and in the long-standing practice of the Organization. Notably, the General Assembly has been made aware of and taken note of this practice.

II. *Background*

A. *Juridical status of the Organization*

4. As a point of departure, I should like to observe that, as an attribute of the international legal and juridical personality of the United Nations,[1] it is established that the Organization is capable of incurring obligations and liabilities of a private law nature.[2] Such obligations and liabilities may arise, for example, from contracts entered into by the Organization. The capacity of the Organization to contract is specifically provided in the Convention on the Privileges and Immunities of the United Nations, article I, section 1.[3] The authority of the United Nations to resolve claims arising under such contracts and other types of liability claims, such as those arising from damage or injury caused by the Organization to property or persons, is reflected in article 29 of the Convention on Privileges and Immunities and the long-standing practice of the Organization in addressing such claims.[4] This prac-

tice has been reported to and endorsed by the General Assembly; see paragraphs below. Further evidence of the Organization's recognition that it may incur, and that the Administration may address, liabilities of a private law character is derived from the establishment by the General Assembly of limits to various types of such liabilities. Thus, in Headquarters regulation No. 4 on "Limitation of damages in respect of acts occurring within the Headquarters district", adopted by the General Assembly in its resolution 41/210 of 11 December 1986, the Assembly established limits to its liability for tort claims arising from injuries incurred by third parties in the Headquarters district. In its resolution 52/247 of 26 June 1998, the General Assembly established temporal and financial limitations on its liabilities to third parties resulting or arising from peacekeeping operations.

B. Procedures for the settlement of private law claims

5. Pursuant to the Convention on the Privileges and Immunities of the United Nations, article VIII, section 29, the United Nations is required to make provisions for appropriate modes of settlement of, inter alia, "disputes arising out of contracts or other disputes of a private law character, to which the United Nations is a party". In a study prepared for the International Law Commission in 1967 on the practice of the United Nations, the specialized agencies and the International Atomic Energy Agency concerning their status, privileges and immunities, the Secretariat reported that claims against the United Nations arising from commercial contracts were settled by negotiation and arbitration, and that other claims of a private law nature, for example, personal injury claims, were settled amicably, e. g., by means of insurance coverage in the case of injuries arising from the operation of United Nations vehicles or by discussions between the Organization and the injured party.[5]

6. In 1995, the Secretary-General submitted to the General Assembly a comprehensive report on the procedures employed by the Organization for implementing that obligation in a wide variety of contexts, including claims arising from contracts and leases, third-party claims for personal injury outside the peacekeeping context and claims arising from peacekeeping operations.[6] As elaborated in that report, while specific procedures have been devised for particular types of claims, the central features of the modes of settlement used by the United Nations pursuant to article VIII, section 29, of the Convention are the amicable resolution of such claims, where possible, such as through negotiation or, in certain cases, insurance, and, if amicable settlement cannot be achieved, the submission of claims to formal dispute resolution procedures, usually arbitration. Claims are submitted to arbitration pursuant to arbitration clauses contained in contracts entered into by the United Nations or, for claims that do not arise from such contracts, pursuant to arbitration agreements negotiated and entered into by the United Nations with the claimant. The General Assembly took note of the report.[7]

7. Procedures for the settlement of third-party claims arising from peacekeeping operations were reported by the Secretary-General to the General Assembly in 1996,[8] in a study prepared in response to a recommendation of the Advisory Committee on Administrative and Budgetary Questions (ACABQ),[9] endorsed by the General Assembly,[10] calling upon the Secretary-General to develop and propose "appropriate measures and procedures which would provide for a simple, efficient and prompt settlement of third-party claims" and for limits to the liabilities of the United Nations in respect of such claims. Part of the study prepared by the Secretariat reported on the current procedures for handling third-party claims.[11] Those proce-

dures, too, involve amicable settlement in the first instance, where possible, failing which formal dispute resolution procedures may be employed. Although the status-of-forces agreements concluded by the United Nations with host countries provide for a standing claims commission as the formal claims resolution procedure, as reported in the Secretary-General's study, this mechanism has not been used to date. Instead, third-party claims that could not be settled amicably have been submitted to arbitration.

8. The study was commended by ACABQ[12] and was endorsed by the General Assembly in its resolution 51/13 of 4 November 1996, in which it requested the Secretary-General to develop specific measures for implementing the principles outlined in the study, which included measures to limit the liability of the Organization. The Secretary-General recommended such measures in a follow-up report in 1997.[13] The recommended measures were adopted by the General Assembly in its resolution 52/247 of 26 June 1998.

III. *Analysis*

A. *Roles of Secretariat units with respect to settlements*

9. The roles and mandates within the Secretariat for negotiating settlements were reported by the Secretary-General to the General Assembly in 1999.[14] As stated in paragraph 11 of that report, the Office of Legal Affairs, after analysing the relevant factual and legal issues, may "recommend a settlement range based on an assessment as to the degree to which the Organization is exposed to liability in the case and the costs in terms of money, time and effort to arbitrate the matter. Authority from the Under-Secretary-General for Management/Controller to settle for that amount is generally sought before negotiations are undertaken with the contractor . . . if agreement in principle can be reached between the United Nations and the contractor, the formal documentation settling the claim is prepared by the Office of Legal Affairs and submitted to the Under-Secretary-General for Management/Controller and to the contractor for signature." While that portion of the report referred to handling contract claims, essentially the same process is used with respect to other types of private law claims. In addition to the above report, the practice whereby authorization to negotiate settlements recommended by this Office is sought from the Controller, and the Controller signs the documentation finalizing such settlements, such as settlement agreements and releases, had been previously reported to the General Assembly.[15] This practice is consistent with financial rule 106.1 which provides: "No commitments, obligations or expenditures against any funds may be incurred without the written authorization of the Controller."

10. As noted above, settlements recommended by the Office of Legal Affairs are based on its assessment as to the Organization's exposure to legal liability in the case and the costs that the Organization would incur if it had to arbitrate the matter in the absence of an amicable settlement. It should be noted that the liability of the Organization to a third party is independent of its internal financial regulations and processes. In this regard, the International Court of Justice has ruled in two advisory opinions that, although the General Assembly has the authority under the Charter of the United Nations to approve the budget of the Organization, it has no alternative but to honour obligations incurred by the Organization; see *Effects of Awards of Compensation made by the United Nations Administrative Tribunal, Advisory Opinion*, *I.C.J. Reports 1954*, p. 47; *Certain Expenses of the United Nations*,

Advisory Opinion, *I.C.J. Reports 1962*, p. 151. This obligation also follows from general principles of law.

B. *Financial Regulations and Rules*

11. Financial rule 104.1 provides: "An outstanding legal obligation is to be based on a contract, purchase order, agreement or other form of undertaking by the United Nations or *based on a liability recognized by the United Nations*, which obligation is supported by an appropriate obligating document . . ." (emphasis added). It is our understanding that the "obligating document" referred to in this provision is dealt with in financial rule 110.2 (*a*), requiring certifying officers to submit to the Controller "the appropriate documents in support of proposed obligations and expenditures", and financial rule 110.3 (*a*), providing that "every obligation or proposal for the incurring of expenditure shall require: (*a*) certification by a certifying officer designated for the purpose by the Controller before the expenditure is actually incurred, *provided that the Controller shall have authority to certify obligations and expenditures under all accounts* . . ." (emphasis added). The practice whereby a submission by the relevant substantive unit (e. g., the Field Administration and Logistics Division, Department of Peacekeeping Operations, in cases arising from peacekeeping operations or the Procurement Division in cases arising from contracts) of the analysis of a claim by the Office of Legal Affairs and a recommendation of settlement, and the written approval of the Controller of such a recommendation, is consistent with those provisions.

12. Some of the liabilities of a private law nature discussed in the present memorandum arise from contracts, purchase orders, leases and other agreements. Other liabilities arise from property damage, injury or death caused by or legally attributable to the United Nations. Such liabilities that are recognized by the United Nations, for example, on the basis of a legal analysis and recommendation of the Office of Legal Affairs and approval of any settlement of such liability by the Controller, are precisely of the kind that fall within the terms of financial rule 104.1.

13. As pointed out in your memorandum of 19 April 2000, financial rule 110.1 requires that "the expenditures of the Organization remain within the appropriations as voted and [be] incurred only for the purposes approved by the General Assembly". It is explained above that once the Organization incurs a legal liability, it is legally obligated to pay that liability. It is for the appropriate financial officials of the Organization to take the necessary steps to do so.

14. Some settlements recommended by the Office of Legal Affairs involve payments that, as concluded by this Office, the Organization is obligated to make under contracts, purchases orders, leases and other agreements. If funding for those contracts or other agreements has already been provided for in a budgetary appropriation approved by the General Assembly, this would, in our view, constitute sufficient authorization under financial rule 110.1 to make such settlement payments. If for some reason a legal liability arising under a contract or other agreement exceeds the amount that the General Assembly has appropriated for that contract, additional funding would have to be obtained (although the "purpose" of the payment—satisfaction of an obligation under a contract—would already have been approved by the General Assembly in its original budgetary appropriation for that contract).

15. With respect to other liabilities, such as liabilities arising outside contracts (for example, tort liabilities to third parties), the appropriate steps would have to be taken to obtain funds and pay those liabilities. In the context of peacekeeping operations, we have been informed by the Field Administration and Logistics Division, Department of Peacekeeping Operations, that the current practice is for the budgets of peacekeeping operations to contain a line item, "claims and adjustments", to cover potential third-party claims. In addition, we have been informed that the budgets for the pre-liquidation phase of peacekeeping operations typically include a line item to cover outstanding or anticipated third-party claims. The approval of these budgets by the General Assembly would, in our view, constitute the required authority under financial rule 110.1 to pay settlements of such claims. To the extent that the amounts of such payments exceed the amounts budgeted, additional funds would have to be obtained.

16. As discussed above, the fact that funds have not been appropriated to pay legal obligations is not an excuse for failing to pay these obligations. This has been recognized in two advisory opinions of the International Court of Justice and it follows from general principles of law.

IV. *Conclusion*

17. As a matter of international law, it is clear that the Organization can incur liabilities of a private law nature and is obligated to pay in regard to such liabilities. It is equally clear that the Administration has the obligation and the authority to resolve claims of a private law nature, and that there is a long practice of the Administration in exercising that authority. It is also true that the practice has been presented to the General Assembly and that it is aware of that practice.

18. With respect to the exercise of that authority within the framework of the Financial Regulations and Rules, it is clear that in all but a handful of cases the money to satisfy the liability will come from funds specifically authorized by the General Assembly for a particular activity, for example, for a particular peacekeeping mission or a particular contract.

19. In this connection, it would be useful for the budgets for those activities which may give rise to claims to include a line item to cover potential claims or "unforeseen expenses". We understand that this is currently the practice in peacekeeping budgets.

20. In the rare instance where there are no funds (or insufficient funds) specifically authorized for the particular activity, we believe that, in the light of the authorities and practices relating generally to the settlement of disputes of a private law nature, discussed above, financial rule 104.1, particularly the reference to "liability recognized by the United Nations", and financial rule 110.2 (*d*), authorizing the Controller to transfer funds between allotments, provide the authority to you to use funds not specifically authorized for the activity at issue if such funds are available for that purpose and the use of those funds would not prevent or interfere with a mandated activity or operation. Of course, this may require the Administration to seek additional funding from the General Assembly to replace this amount so that funds would be available to meet the purpose for which such funds originally were authorized.

23 February 2001

2. Liability for damage caused by a troop-contributing country to equipment provided by another country to a United Nations peacekeeping operation—"No-fault incident" factor—Gross negligence or wilful misconduct—Memoranda of Understanding

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

1. This refers to your memorandum dated 7 February 2001 requesting our advice in connection with "the current policies and procedures" regarding the resolution of liability issues when damage is caused by troops from one country to equipment provided by another country to a United Nations peacekeeping operation. You explained that this issue had arisen in connection with arrangements in United Nations Assistance Mission in Sierra Leone (UNAMSIL) and United Nations Interim Force in Lebanon (UNIFIL).

2. Subsequent to your memorandum, your office provided us, by telephone, with further clarifications on the matter. On 14 March 2001, your office forwarded to us, by electronic mail, the draft report of the Post-Phase V Working Group on the Reform of Procedures for Determining Reimbursement of Contingent-owned Equipment ("the Working Group"), which you requested us to take into account in providing our advice. You also requested Office of Legal Affairs advice specifically in connection with the text in paragraph 3 of your memorandum, which, you indicated, would be added as an appendix to annex B (Major equipment), of memoranda of understanding to be signed with countries involved in such arrangements.

3. The essential features of the principles outlined in the text proposed in paragraph 3 of your memorandum are as follows. First, the United Nations would be responsible for training personnel of the contingent that would operate the equipment. Secondly, the Organization's Board of Inquiry and Property Survey Board procedures would be followed to investigate, and to determine financial responsibility for, damage to the equipment while being used pursuant to the proposed arrangements. There would be no other recourse outside this mechanism for resolving claims arising from equipment damage or losses. Thirdly, the Government providing the equipment would be reimbursed only in case of damage or loss due to the gross negligence or wilful misconduct of the contingent responsible for operating the equipment. For that purpose, the United Nations would make deductions from amounts owed to the Government whose personnel had caused the damage.

Practice concerning reimbursement for contingent-owned equipment

4. At the outset, we note that there are no guidelines concerning the liability of one troop-contributing country for damage that its troops may cause to the equipment of another country participating in a United Nations peacekeeping operation. Current United Nations guidelines have not contemplated such damage because equipment operated by military contingents in United Nations peacekeeping operations traditionally falls into two categories, namely, (*a*) United Nations-owned equipment and (*b*) contingent-owned equipment provided by Governments and operated by their respective contingents.

5. Under the procedures applicable to incidents arising prior to 1 July 1996 ("the old procedures"), the United Nations reimbursed a troop-contributing country in respect of damage to its contingent-owned equipment unless such damage was caused by the gross negligence or wilful misconduct of the country's personnel. Under the procedures concerning incidents arising on or after 1 July 1996 ("the new procedures"), no such reimbursement takes place, since the troop-contributing country is compensated for the risk of damage to its equipment by the inclusion of a "no-fault incident" factor into the monthly wet lease or dry lease rates (A/C.5/49/70 para. 33 (*a*), and appendix VI, p. 68, para. 1).

6. We understand that in view of the recent developments involving the provision of equipment by one country for use by personnel from another country, it has become necessary for the Organization to adopt policy guidelines that would apply with respect to such arrangements. The guidelines would form the basis of agreements to be entered into by the United Nations with countries providing and those operating such equipment. In that connection, we note that the Working Group has made recommendations for consideration by the General Assembly, as set out in its draft report (A/C.5/55/39, paras. 41-50), which you forwarded to us.

7. The two important issues that arise in connection with the possible damage to contingent-owned equipment provided under such arrangements are, on the one hand, the liability of the Government whose personnel operate the equipment' and on the other, the entitlement of the Government providing the equipment to receive compensation. We discuss those issues below.

Liability of the Government whose personnel operate the equipment

8. Since, traditionally, equipment used by contingents in peacekeeping operations is owned either by the contingent operating it or by the United Nations, the issue of the liability of contingents for equipment damage has arisen mostly in connection with United Nations-owned equipment. The general practice, under the old procedures, was to hold the contingent liable, and to require it to reimburse the United Nations, for damage to United Nations-owned equipment arising from the gross negligence or the wilful misconduct of contingent personnel. In less serious cases of negligence on the part of contingent personnel, the United Nations would normally absorb the resultant loss.

9. This principle has been incorporated into the model Memorandum of Understanding concerning contribution of resources by Member States to peacekeeping operations under the new procedures (i.e., procedures applicable to incidents occurring on or after 1 July 1996, as referred to above—document A/51/967, dated 27 August 1997, entitled "Reform of the procedures for determining reimbursement to Member States for contingent-owned equipment"). Paragraph 10 of the model Memorandum of Understanding provides:

> "10. The Government will reimburse the United Nations for loss of or damage to United Nations-owned equipment and property caused by the personnel or equipment provided by the Government if such loss or damage (*a*) occurred outside the performance of services or any other activity or operation under this Memorandum or (*b*) arose or resulted from gross negligence or wilful misconduct of the personnel provided by the Government."

10. Thus, the requirement that a Government assume financial responsibility for damage caused by the gross negligence or wilful misconduct of its personnel to equipment provided by another country, as proposed in your memorandum, would

be consistent with the established practice of the Organization and with the model Memorandum of Understanding in respect of damage to United Nations property. However, in order to ensure greater consistency with the model Memorandum of Understanding, the Government whose contingent operates another Government's equipment would also have to assume financial liability for damage caused by its personnel "outside the performance of services or any other activity or operation" under the Memorandum of Understanding concerning that equipment.

Reimbursement to the country providing the equipment in case of damage

11. You have stated that the country providing the equipment would not be entitled to reimbursement for damage to the equipment attributable to the ordinary negligence of the contingent operating the equipment, in view of the inclusion of the "no-fault incident" factor in the monthly wet lease rates, as referred to above. We note that this is consistent with the provisions of the model Memorandum of Understanding relating to damage to contingent-owned equipment as a result of ordinary negligence on the part of the personnel of the country providing such equipment (see A/51/967, annex B, "Major equipment provided by the Government", para. 17(*a*), and the definition of "no-fault incident", annex F, "Definitions", para. 19).

12. Currently, this principle applies to situations in which the damage or loss has been caused by the personnel of the country providing the equipment, but not by the negligence of personnel from other contingents. This view finds support in financial rule 110.32, as amended by ST/SGB/1998/15, section 3.1. That section provides, inter alia, that when considering contingent-owned equipment cases, the Headquarters and Local Property Survey Boards will assess "whether, on the basis of the facts of the loss or damage, the Government is responsible for the loss of or damage to the contingent-owned equipment owing to, inter alia, the negligence or wilful misconduct of *its* personnel" (ST/SGB/1998/15, sect. 3.1 (*c*)) (emphasis added).

13. Pursuant to financial rule 110.32, as amended by ST/SGB/1998/15, the United Nations has the responsibility to reimburse a Government whose contingent-owned equipment is damaged through the "fault" of "United Nations personnel", unless there is an agreement to the contrary (cf. ST/SGB/1998/15, sect. 3.1, paragraph (*b*)). "United Nations personnel", vis-à-vis the Government providing equipment to the Organization, would seem to include the personnel provided by other Governments to the United Nations peacekeeping mission. Thus, under the Financial Rules, a Local Property Survey Board could conceivably determine that the United Nations is at fault and has the responsibility to pay compensation in case of damage caused by the (ordinary) negligence of personnel from one Government to equipment provided by another Government. However, the provisions in your memorandum, if adopted, would eliminate the possibility of such liability for the United Nations, as the "no-fault incident" factor in the monthly wet lease reimbursements would be deemed to cover the risk of damage caused by the negligence of the contingent operating the equipment.

Procedures for dealing with cases relating to damage to equipment

14. In case of loss of or damage to equipment provided pursuant to the proposed arrangements, we note that investigations would be conducted by Boards of Inquiry, and that financial responsibility would be determined by the Local Property Survey Boards. According to your memorandum, the Board of Inquiry would follow the procedures and guidelines in chapter 16 of the Field Administration Manual

(1992). However, unlike your memorandum, the draft report of the Working Group makes no reference to chapter 16 of the Field Administration Manual or to any other procedures or guidelines to be followed by a Board of Inquiry. To ensure a common understanding between the United Nations and Governments involved in the proposed arrangements, we would suggest that the reference to chapter 16 of the Field Administration Manual or to any other agreed Board of Inquiry procedures be included in Memoranda of Understanding relating to those arrangements.

15. Moreover, we would suggest that the language of such Memoranda of Understanding take into account the different terms of reference of a Board of Inquiry as spelled out in the Field Administration Manual (1992), on the one hand, and of the Local Property Survey Board as provided in financial rules 110.32, as amended by ST/SGB/1998/15. Pursuant to the Field Administration Manual, while a Board of Inquiry shall "establish the responsibility of individuals or groups" when conducting its inquiry (Manual, chap. 16, part IV, para. 3.3 (*b*)), it "does not consider questions of compensation or legal liability" (ibid., para. 3.8). The role of the Board of Inquiry, as stated in the Manual, is to investigate and establish the facts of serious incidents occurring in a peacekeeping mission. On the other hand, pursuant to the Financial Rules, the function of the Local Property Survey Board, in the case of property damage, is to make a determination concerning culpability based on the facts of the case, and to make recommendations to the Controller with respect to financial liability.

Suggested changes to the draft provisions in your memorandum

16. We have the following suggestions concerning the text in paragraph 3 of your memorandum, which are necessarily limited as we do not know what other provisions would be in the Memorandum of Understanding. In paragraph 3*b*., we suggest that the second sentence be redrafted as follows:

> "If, having duly considered the recommendations of the Property Survey Board, the Controller determines that there was gross negligence or wilful misconduct on the part of the personnel of the user Government, the user Government will be liable for the damage and the related cost of repair or, in case of write-off of the equipment, its generic fair market value less the dry lease payments already made by the United Nations, will be deducted from amounts owed by the United Nations to the user Government."

We suggest that the entire paragraph 3*c*. be rewritten as follows:

> "*c*. The provider Government agrees that if major equipment that it has provided is damaged by the personnel of the user Government, the United Nations will convene a Board of Inquiry to determine the facts, and will also establish fault and the cost of damage based on the recommendations of the Property Survey Board. The provider Government agrees to accept the determination of the United Nations in accordance with this procedure as final in such cases. If, pursuant to these procedures, the United Nations determines that the damage was due to gross negligence or wilful misconduct on the part of the personnel of the user Government, the provider Government will be reimbursed the cost of repair or, in case of write-off of the equipment, its generic fair market value less the dry lease rates already paid by the United Nations."

We also suggest the addition of the definition of "the Controller" in paragraph 3*d*., as follows:

> "The Controller: the Controller of the United Nations".

Conclusion

17. Finally, we believe that the proposed arrangements raise complex liability issues and must be based on a clear common understanding among all three parties, namely, the United Nations, the Government providing the equipment and the Government operating the equipment, concerning their respective rights and responsibilities. This requires that all three parties sign the same Memorandum of Understanding. However, such a Memorandum of Understanding would have to indicate those provisions which would concern all three parties together, those that would apply between the United Nations and each Government separately and those (if any) that would apply directly between the two Governments.

29 March 2001

3. UNITED NATIONS REIMBURSEMENT OF SALARIES PAID TO TROOPS DURING SICK LEAVE ATTRIBUTABLE TO UNITED NATIONS SERVICE—COMMON LAW REMEDY OF *per quod servitium amisit*—REIMBURSEMENT BY UNITED NATIONS BASED ON TWO CRITERIA

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

1. This refers to your memorandum dated 18 April 2001 forwarding to us, for advice, the letter dated 10 January 2001 from the Permanent Mission. In its letter, the Permanent Mission requests the Organization to reconsider its decision declining reimbursement of salary paid to troops during sick leave arising from injury or illness attributable to service with the United Nations. Following your memorandum of 18 April, there have been further telephone discussions between staff of our respective offices in an attempt to clarify the grounds upon which the Government seeks reimbursement.

2. We note that, in essence, the arguments raised by the Government in support of its request are the same as those advanced in the Government's earlier letter, dated 10 December 1998. After considering advice provided by this Division on 10 May 1999, the Field Administration and Logistics Division replied to that letter on 26 May 1999, declining the Government's request. In the letter dated 10 January 2001, the Permanent Mission suggests that, because the injured soldiers could not perform any duties for the Government while on sick leave, the salaries they received during that period represent a "real and direct cost" to the Government arising from the soldiers' service with the United Nations.

3. The Organization's position on the salary payments to soldiers who are on sick leave is that such payments do not constitute compensation for injury or illness, and that they are not expenses arising from injury or illness. Such salary payments are due by the Government by virtue of the contract of employment between the Government and the soldier concerned. The Organization fulfils its obligations by reimbursing compensation paid by the Government pursuant to national law, in respect of death or disability sustained in United Nations service by troops provided by that Government to a United Nations peacekeeping mission. Moreover, in appropriate cases, the Organization also bears the reasonable costs of medical treatment of such troops for injuries or illness attributed to United Nations service.

4. The Permanent Mission's letter of 10 January also refers to the view expressed by the national legal officials that, under national law, the common law remedy of *per quod servitium amisit* would normally be available to the Crown and would thus allow the Government to recover damages from "the wrongdoer/tort-feasor" responsible for the injuries caused to the members of the national forces.

5. In our view, wrongdoing or tort on the Organization's part has never played any role in determining the reimbursement by the Organization of compensation paid by Member States to their troops for injury or illness incurred in United Nations service. Reimbursement to the Government is based on two criteria. First, the injury or illness must be attributable to United Nations service and must not have been caused by the gross negligence or wilful misconduct of the victim. Secondly, there must be certification by a designated official of the Government that the Government has paid compensation in accordance with the applicable national law. Thus, the fact that the United Nations makes a reimbursement does not imply that the related injury or illness was caused by any wrongdoing or tortious act on the part of the Organization. Indeed, reimbursement is made even when the facts of a case show that the injury or illness was caused by the soldier's own negligence, as long as such negligence does not amount to gross negligence or wilful misconduct.

6. Accordingly, in our view, the latest arguments made by the Permanent Mission are not sufficient to warrant a change to the Organization's decision to decline reimbursement of salary payments made by the Government to its soldiers while they were on sick leave. The reasons for this conclusion, which are discussed above, are twofold and may be summarized as follows. In the first instance, as stated in previous memoranda from this Office, salary payments to personnel on sick leave are not compensation for injury or illness and are therefore the sole responsibility of the Government as the employer of such personnel. Secondly, the common law remedy of *per quod servitium amisit*, cited by the Permanent Mission, does not apply to the arrangements between the Organization and Member States concerning the reimbursement of compensation payments by the Member States for injuries or illnesses sustained by their troops while serving with the United Nations.

24 July 2001

PERSONNEL

4. Release of UNRRA personnel files—Agreement between United Nations and United Nations Relief and Rehabilitation Administration regarding transfer of assets and activities to United Nations—Restrictions on certain documents does not preclude access of son of deceased staff member to official status file

Memorandum to the Assistant Secretary-General for Human Resources Management

1. I refer to your memorandum of 5 December 2000, together with attachments, seeking the advice of the Legal Counsel regarding a request from the son of a deceased employee of the United Nations Relief and Rehabilitation Administration (UNRRA) to gain access to the official status file of his father. We understand that the father was killed on duty in an accident for which he was declared responsible,

and that the official status file also contains other unflattering information about the deceased.

Background and applicable rules

2. UNRRA was created on 9 November 1943 as an organization entirely independent from the United Nations. In 1948, UNRRA, having completed its operational phase, initiated a process to close its operations. On 27 September 1948, the United Nations entered into an agreement with UNRRA concerning the transfer to the United Nations of the residual assets and activities of UNRRA. Through that agreement, the United Nations took over the latter's accounting functions, supervision of a history project and maintenance of records and also accepted some of the claims against UNRRA. UNRRA was terminated on 31 March 1949.

3. Part III of the 1948 transfer agreement contains provisions regarding the transfer of UNRRA records and archives, including provisions regarding personnel records. The provisions in question stipulate as follows:

> "1. In accordance with the provisions of this part, UNRRA will transfer to the United Nations sufficient funds to enable UNRRA records and archives to be placed in a proper condition for preservation for future use in accordance with the general agreement previously reached and recorded in letters from the Director-General of UNRRA, dated 26 January 1948, and the Acting Secretary-General of the United Nations, dated 2 February 1948 (attached as appendix II), and will transfer to the United Nations custody of UNRRA's records and archives subject to the provisions of this part, save that those retained by UNRRA for use during the liquidation period will be transferred to the United Nations at such subsequent date as the UNRRA Administrator for Liquidation may determine.
>
> ". . .
>
> "3. The United Nations will complete work on the UNRRA records and archives in accordance with whichever of the two alternative plans set out below may be accepted by the UNRRA General Committee.
>
> "4. *Plan A*
>
> (*a*) The United Nations will assume complete responsibility for custody and administration of the UNRRA records and archives as from the effective date of this agreement, and will also assume financial responsibility for their custody and maintenance after 31 December 1949.
>
> . . .
>
> "5. *Plan B*
>
> (*a*) The United Nations will assume complete responsibility for custody and administration of the UNRRA records and archives as from the effective date of this agreement.
>
> ". . .
>
> "7. The United Nations will ensure that the UNRRA archives and records transferred in accordance with this part will be used only in accordance with the conditions specified in the aide-mémoire attached to the letter from the Director-General of UNRRA, dated 26 January 1948, referred to in paragraph 1, and attached as appendix II.

". . .

"12. The personnel records of individual UNRRA employees not retained on the staff of the Administrator for Liquidation will be transferred by UNRRA to the United Nations in New York on or before 31 December 1948. The personnel records retained shall be transferred to the United Nations by the Administrator for Liquidation at such time as he may determine. The United Nations will, from the date on which such records are transferred, assume full responsibility for custody and administration of these records and for answering inquiries concerning personnel formerly employed by UNRRA. The special conditions attaching to such retention, administration, use and location of these records will be separately agreed."

4. Although no information is available in Office of Legal Affairs files on whether it was plan A or plan B that, in the end, was accepted by the UNRRA General Committee, both plans provide for the United Nations to assume complete responsibility for the custody and administration of the UNRRA records and archives as from the effective date of the 1948 transfer agreement.

5. Appendix II to the transfer agreement between UNRRA and the United Nations contains certain correspondence between the Director-General of UNRRA and the Acting Secretary-General of the United Nations, and an aide-mémoire setting forth the conditions and restrictions under which the UNRRA archives and records would be kept by the United Nations. In his letter addressed to the Secretary-General, dated 26 January 1948, the Director-General of UNRRA stated the following:

". . . [T]he main objective in this respect is to ensure that UNRRA records will be freely available for authorized and proper use but that, at the same time, their use, inspection or publication will be subject to such restrictions as are necessary to discharge UNRRA's obligations to member Governments and to its staff.

"Attached hereto is an aide-mémoire setting forth the conditions and restrictions under which it is contemplated that the UNRRA archives and records would be kept by the United Nations, it being understood that these restrictions and conditions would be enforced through the exercise by the United Nations of its control over archives in its possession and through the immunities and other rights and privileges which it possesses. Any archives and records not referred to in the aide-mémoire are to be considered unrestricted. Prior to the transfer, the Administration will have organized, screened and established its files in proper form for permanent archives, including the segregation and identification of all records subject to restriction, to the maximum extent possible."

6. On 2 February 1948, the Acting Secretary-General acknowledged receipt of this letter, and confirmed that the United Nations Secretariat would be prepared to take over the UNRRA records and archives, and that the United Nations Secretariat would retain those records and archives on the understanding that inspection or publication or other use would be subject to the conditions and restrictions specified in the aide-mémoire attached to the letter.

7. The aide-mémoire attached to the letter from the Director-General of UNRRA contains restrictions regarding the following types of archives: records relating to member or recipient Governments of UNRRA, records concerning personnel security investigations, and records dealing with internal UNRRA matters

involving the investigation of UNRRA offices or individuals in connection with the performance of their functions. Archives and records not referred to in the aide-mémoire were to be considered unrestricted. Accordingly, the omission from the aide-mémoire of personnel records of individual UNRRA employees could be interpreted as an acknowledgement that those records are unrestricted.

8. However, according to the above-cited paragraph 12 of the transfer agreement, an agreement concerning special conditions attaching to the retention, administration, use and location of the personnel records of individual UNRRA employees was to be drawn up separately. We have not been able to locate such an agreement in our files and are not aware that such an agreement was in fact ever drawn up.

Legal analysis and advice

9. Since the above-cited transfer agreement provides that the United Nations has assumed complete responsibility for the custody and administration of the UNRRA records and archives, they are now part of the United Nations archives. As long as the UNRRA records and archives are not used in a manner contrary to the conditions stipulated in the aide-mémoire, the United Nations should be able to decide on their release. Since the use of the UNRRA personnel records is not restricted in the conditions stipulated in the aide-mémoire, a request for access to the official status file of a deceased former UNRRA employee should, in my view, be handled in the same manner as a request for access to the official status file of a deceased United Nations staff member.

10. We understand that such a request is normally addressed to the Personnel Officer of the deceased staff member's last department, who approves the release of the official status file. If that department cannot be determined, such requests should be directed to the Assistant Secretary-General for Human Resources Management. Since UNRRA was terminated on 31 March 1949, it would be for the Assistant Secretary-General for Human Resources Management to determine whether the official status file in this case can be released.

11. Finally, I note that the last provision of the aide-mémoire which concerns records dealing with internal UNRRA matters involving the investigation of UNRRA offices or individuals in connection with the performance of their functions, stipulates, inter alia, that "any document or other paper adversely reflecting or commenting on an individual employee of UNRRA against whom no action has been taken by UNRRA with respect to the matter referred to in the document, shall not be made available without the consent of the individual concerned." I understand that the official status file in question may contain exactly the type of information referred to in the above-cited provision. However, for obvious reasons, the condition that "the consent of the individual concerned" should be secured for making the file "available" cannot be satisfied. Although lack of consent of the individual concerned could provide a legal justification for denying access to the file to a third party, i.e., an individual or entity not related to the deceased, in the current case, the requester is the son of the deceased UNRRA staff member and the apparent successor of his rights. Accordingly, the above limitation per se should not preclude access for the requester to the file in question.

2 March 2001

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5. Application for international patent protection for United Nations University's Universal Network Language—Patent Cooperation Treaty application process—Status of United Nations University and its Rector

Memorandum to the Director, United Nations University, Office at the United Nations, New York

Background

1. This responds to the letter of 22 March 2001 addressed to me from the Rector of the United Nations University (UNU) concerning patent protection. We understand that the Institute of Advanced Studies at UNU has developed an "electronic language" known as the Universal Network Language for which UNU seeks to establish patent protection in (a Member State) and internationally. According to the UNU Rector's letter, the purpose of establishing patent protection for the Universal Network Language in the name of and for the benefit of the Organization is to ensure that the Universal Network Language can be made freely available to all peoples and can be protected from commercial exploitation by third parties.

2. In his letter, the UNU Rector stated that UNU had applied to the Member State's Patent Office in order to secure a patent for the Universal Network Language. The Member State Patent Office, however, has taken the position that UNU lacks the juridical capacity to obtain a patent for the Universal Network Language and has informed UNU that a patent for the Universal Network Language would have to be obtained in the name of the United Nations itself. The UNU Rector stated that a formal patent application had been made by UNU to a Patent Office of the Member State in November 1999 but that, in view of the issue concerning the entity in whose name the patent for the Universal Network Language should be obtained, that application is pending. We understand that the deadline for amending the patent application in the name of the Organization is 31 March 2001, after which the ability to obtain the patent will be forever barred in the Member State, and possibly internationally.

3. The UNU Rector stated that UNU had retained the services of a law firm of the Member State for the purpose of submitting the patent application. Attached to the UNU Rector's letter was a copy of an institutional contractual agreement between UNU and the firm, pursuant to which UNU had retained the services of the firm. For the purpose of filing the patent application for the Universal Network Language in the name of the Organization, the firm has prepared two forms of a power of attorney by which the Organization would empower two of the firm's lawyers to act on behalf of the Organization in filing a patent application for the Universal Network Language with the Member State's Patent Office and for all matters relating to an international application under the Patent Cooperation Treaty.

Analysis and recommendation

4. As an initial matter, we are not aware of any international legal regime that requires States Members of the Organization to extend patent protection in respect of ideas, inventions or processes, such as the Universal Network Language, created by the Organization. This is in contrast to the Paris Convention for the Protection of Industrial Property, which expressly requires States parties to protect the name and emblem of

the Organization, and the Universal Copyright Convention, which provides copyright protection for publications of the United Nations. The Patent Cooperation Treaty, done at Washington, D.C., in June 1970, 1160 U.N.T.S. 231 (1970), 28 U.S.T. 7645, [1970] TIAS No. 8733, does not provide for specific patent protection for the intellectual property of the United Nations. However, the Patent Cooperation Treaty does provide a means for filing for protection of patents such that the protection extended is valid in all States that are members of the International Patent Cooperation Union, established by that Treaty. Accordingly, in order to obtain worldwide patent protection in respect of the Universal Network Language, we understand that it would be sufficient to register a patent for the Universal Network Language in a Member State while at the same time filing an international application under the Patent Cooperation Treaty in a Member State, a Contracting State to the Treaty.

5. For purposes of completing the patent application process for the Universal Network Language in a Member State and under the Patent Cooperation Treaty, the firm seeks a power of attorney by an authorized official of the United Nations granting the firm's principal attorneys power to act on behalf of the Organization. We have reviewed the forms for power of attorney prepared by the firm, and we do not consider that it is necessary that this Office execute the forms granting the attorneys the power to act on behalf of the Organization. Instead, we consider that the Rector of UNU, an official appointed by the Secretary-General, has the authority to take all action necessary with respect to the patent application process, including, if necessary, executing such forms for power of attorney.

6. In this regard, we note that article XI, paragraph 1, of the Charter of the United Nations University ("UNU Charter") provides that the University is an "autonomous organ of the General Assembly and shall enjoy the status, privileges and immunities provided in Articles 104 and 105 of the Charter of the United Nations and in other international agreements and United Nations resolutions relating to the status, privileges and immunities of the Organization." Article XI, paragraph 3, of the UNU Charter further provides that the "University may enter into agreements, contracts or arrangements with Governments, organizations, institutions, firms or individuals for the purpose of carrying out its activities." Finally, article V of the UNU Charter provides that the Rector of the University is "appointed by the Secretary-General" and further provides, in paragraph 3 thereof, that the "Rector shall be the chief administrative officer of the University" and shall have the authority, inter alia, to "[m]ake arrangements with Governments and international as well as national public and private organizations with a view to offering and receiving services related to the activities of the University."

7. In our view, the UNU Charter provides sufficient authority for the Rector of UNU to take any and all appropriate action and make any and all appropriate arrangements with the patent authorities of the Government of a Member State to apply for and obtain both national and international patents in respect of the Universal Network Language in the name of and for the benefit of the United Nations. Thus, we consider that, rather than having an official of the United Nations at Headquarters in New York complete the forms for power of attorney submitted by the firm, the Rector of UNU should sign all patent applications and/or complete and sign all necessary forms and take any and all other action necessary and appropriate to apply for and obtain national and international patent protection for the Universal Network Language. Of course, if the Rector were away from the office, then the authority of the Rector would extend to the official whom the Rector has designated to act on his behalf during such absence.

8. This Office intends to contact the firm and to liaise with the firm in the prosecution of the patent application process. We will, of course, keep your office informed about our coordination with the firm. In the future, UNU should be sure to coordinate with this Office in connection with the retention and use of outside legal counsel for matters that affect the Organization generally.

29 March 2001

6. Joint IPU/United Nations publication on Convention on the Elimination of All Forms of Discrimination against Women and its Optional Protocol—Administrative instruction ST/AI/189 governs United Nations publications—Requirements to be met if published by IPU, by the United Nations

Memorandum to the Chief, Women's Rights Unit, Division for the Advancement of Women, Department of Economic and Social Affairs

1. This is with reference to your memorandum dated 1 June 2001, requesting advice on the proposal for a joint publication between the United Nations and the Inter-Parliamentary Union (IPU) for parliamentarians on the Convention on the Elimination of All Forms of Discrimination against Women and its Optional Protocol ("the handbook").

2. You attached to your memorandum the copy of the title and cover pages of the publication entitled *Respect for International Humanitarian Law* issued jointly by IPU and the International Committee of the Red Cross (ICRC). We assume that your office and IPU intend to prepare a similar publication. We note that IPU and ICRC publish this publication jointly and that it is copyrighted in the name of both organizations.

3. United Nations publications are governed by the ST/AI/189 series of administrative instructions on publications ("Regulations for the control and limitation of documentation"). In the light of its special status, i.e., as an international intergovernmental organization with certain privileges and immunities, the United Nations does not enter into arrangements with a non-United Nations entity to prepare and issue a joint publication, such as the one attached to your memorandum, i.e., publications for which the United Nations and a non-United Nations entity are jointly responsible and for which the copyright is being held in the name of both entities. Indeed, within the context of ST/AI/189/Add.2 and ST/AI/189/Add.6/Rev.4, the term "joint publication" is limited to publications for which the United Nations and a United Nations specialized agency or agencies are jointly responsible. Therefore, a joint publication between the United Nations and IPU, which is not a specialized agency, with a joint copyright, would be prohibited under United Nations rules and policies.

4. Under the circumstances, and given that a joint copyright is not permissible, we recommend that the intended handbook be published either by the United Nations or by IPU. The decision whether the handbook is to be published by IPU or by the United Nations is, in our view, a policy decision based on several factors, such as funding, scope of contributions by the United Nations vis-à-vis IPU, timing, etc. If you decide that IPU will publish the handbook, you may wish to consider that IPU should also be given the copyright to the handbook.

Published by IPU

5. In case the handbook will be published by IPU, and the copyright of the handbook will remain with IPU, the United Nations should be provided with the unlimited right to use the handbook free of royalties or other charges. The United Nations should also be provided with a certain number of free copies. Furthermore, the handbook may not bear the United Nations emblem and seal. The contribution of the United Nations in the preparation of the publication should be acknowledged. The cooperation may be given appropriate mention in the foreword or preface or on the title page in the following terms:

> "Prepared in cooperation with the Women's Rights Unit, Department of Social and Economic Affairs, United Nations".

6. Under this scenario, we would like to point out the following with respect to your specific questions mentioned in paragraph 3 of your memorandum:

- We believe that the approval of the UN Publication Board would not be required. We understand that the handbook is not part of the regular publication programme of the Department of Economic and Social Affairs and, given that the United Nations will only partially contribute to its contents, the approval of the Publication Board does not seem necessary;
- IPU is free to translate the handbook into any other language;
- The determination as to whether costs should be charged or whether the handbook should be published free of charge is not subject to United Nations rules or regulations, and this matter would be for IPU to decide, presumably in consultation with your Office.

Published by the United Nations

7. The requirements for a United Nations publication prepared together with IPU would be very similar to the requirements mentioned above. The United Nations should be the exclusive holder of the copyright for the publication, while providing IPU with an unlimited right to use the publication free of charge. In accordance with ST/AI/189/Add.2 and ST/AI/189/Add.21, the cover page of the publication shall bear the United Nations emblem only. However, we consider the appearance of the IPU logo on the title page acceptable in connection with the acknowledgement of the contribution of IPU for the publication. The rules for acknowledgements and/or attribution in United Nations publications are set forth in ST/AI/189/Add.6/Rev.4; in accordance with those rules, the acknowledgement could read as follows:

> "Prepared in cooperation with the Inter-Parliamentary Union" [followed by the IPU emblem].

8. The approval of the United Nations Publication Board would be required for this project. IPU may be provided with a certain number of copies free of charge. The translation of the publication from English into other languages could be done by IPU. However, this should be indicated in the versions published in those other languages. ST/AI/189/Add.15/Rev.1 governs the pricing of United Nations publications. Under rule 1 of ST/AI/189/Add.15/Rev.1, the responsibility for determining prices for publications rests with the Sales Section, Publishing Division. In this connection, you may wish to note that while there are no legal objections to distributing the handbook free of charge, the General Assembly has expressly approved the principle that, whenever it is desirable and possible, the sale of public informational

material should be encouraged not only because the proceeds go to the Working Capital Fund, but also because publications that are sold rather than freely distributed usually command greater respect and are more likely to be read and hence have a greater impact (see ST/AI/189/Add.15/Rev.1, para. 1).

9. Finally, you may wish to consider the following in case the handbook will be published by the United Nations. If there are any parts or chapters in the publication clearly recognizable as having been prepared by IPU, you may wish to add a disclaimer to the effect that the positions expressed in those chapters are those of IPU and do not necessarily reflect the position of the United Nations. Furthermore, you may wish to consider that IPU should be required to obtain permission from the authors for the inclusion of their work in the handbook and to indemnify and hold the United Nations harmless from and against all suits, proceedings, claims and liability of any kind arising from or relating to allegations or claims that the IPU contribution to the publication constitutes an infringement of any copyright or other intellectual property.

10. In the light of the above, we recommend that you enter into a contract with IPU. Given the variables in how the project will be implemented, we are not yet in a position to provide you with a model contract. However, once the modalities have been agreed upon by your Office and IPU, this Office is available to assist in the preparation or review of a contract. Please do not hesitate to contact us if you have any further questions in this matter.

19 June 2001

7. Declaration on Cities and Other Human Settlements in the New Millennium with respect to mandate and status of Commission on Human Settlements and the mandate, role and function of Habitat—Options for reviewing and strengthening those bodies—Compatibility of standing committees and functional commissions establishing subsidiary bodies

Facsimile to the Executive Director, United Nations Centre for Human Settlements

1. This is with reference of your inquiry to the Legal Counsel of 13 June 2001 concerning the Declaration on Cities and Other Human Settlements in the New Millennium with respect to the mandate and status of the Commission on Human Settlements (the Commission) and the status, role and function of the United Nations Centre for Human Settlements (Habitat). Our comments are as follows:

2. The long-standing status of the Commission as a standing committee of the Economic and Social Council derives from the manner in which the Commission was established. In part II of General Assembly resolution 32/162 of 19 December 1977, the Assembly decided that the Economic and Social Council should transform the Committee on Housing, Building and Planning into a Commission on Human Settlements. In so doing, the Assembly did not request the Council to establish the Commission as a functional commission and as such the Commission retained the status of its predecessor, the Committee on Housing, Building and Planning.

3. While we are not in a position to comment on the political differences or the budgetary differences between a standing committee and a functional commission, the only legal differences between the two lie in the rules of procedure applicable thereto. Standing committees are governed by the rules of procedure of the Economic and Social Council, whereas functional commissions are governed by the rules of procedure of the functional commissions of the Economic and Social Council.

4. As for options to achieve the General Assembly's request to the Secretary-General, it is important to recall that, in the Declaration on Cities and Other Human Settlements in the New Millennium,[16] the General Assembly, inter alia, invited the Secretary-General to report to the Assembly at its fifty-sixth session on options for reviewing and strengthening the mandate and status of the Commission and the status, role and functions of Habitat in accordance with the relevant resolutions of the General Assembly and the Economic and Social Council and decisions of the Habitat II Conference. With respect to the status of the Commission, there are, of course, several options, including recommending that the General Assembly consider transforming the Commission into (*a*) a functional commission of the Economic and Social Council, or even (*b*) a subsidiary organ of the General Assembly itself. In accordance with the Declaration, however, it is the prerogative of the Secretary-General to formulate and submit options for consideration and possible adoption by the General Assembly. In formulating options, the Secretary-General may, of course, take into account proposals and comments made by the Economic and Social Council and concerned Secretariat units, including Habitat.

5. With respect to a new denomination for Habitat, it should be recalled that in its resolution 32/162, the Assembly also established Habitat and specifically named it the "United Nations Centre for Human Settlements (Habitat)". Any recommendation to change the denomination should therefore be presented to the General Assembly for its consideration and approval. It would again be a matter within the discretion of the Secretary-General to include such a recommendation in the report he is invited to submit pursuant to the Declaration on Cities and Other Human Settlements in the New Millennium.

6. As to the compatibility of standing committees establishing subsidiary bodies, we wish to refer to rule 24, paragraph 2, of the rules of procedure of the Economic and Social Council, which provides that "except for the regional commissions, the commissions and committees of the Council shall not create either standing or ad hoc intersessional subsidiary bodies without prior approval of the Council". As such, both standing committees and functional commissions must obtain the prior approval of the Council in order to establish subsidiaries. Therefore, as long as the Committee obtains the prior approval of the Council, standing committees may establish subsidiary bodies. Accordingly, given that in its resolution 18/1 the Commission has submitted the recommendation to establish a Committee of Permanent Representatives (the Committee) to the Economic and Social Council for its approval, there is no legal objection to the establishment of the Committee as a subsidiary of the Commission provided that the Council approves.

7. We are not in a position to comment on the political ramifications or possible negative perceptions of a "piecemeal" decision by the Council that a specific decision on the establishment of a subsidiary body of the Commission might have on the general role of the Council vis-à-vis the status and mandate of the Commission. In

any event, in the light of the provisions of rule 24 mentioned above, the Commission is legally obliged to obtain the prior approval of the Council in order to establish the Committee as its subsidiary body. Such action by the Council does not prevent the Council from making recommendations on the status and role of the Commission directly to the General Assembly and/or to the Secretary-General for inclusion in the report he has been invited to submit to the General Assembly at its fifty-sixth session.

8. The Council's review and approval of the recommendation contained in resolution 18/1 does not preclude its involvement in the elaboration of options for reviewing and strengthening the mandate and status of the Commission and the status, role and functions of Habitat in accordance with the outcome of the twenty-fifth special session of the General Assembly. As indicated above, the Council, if it so desired, could provide its recommendations and comments either directly to the General Assembly or to the Secretary-General for inclusion in the report he has been invited to submit to the General Assembly at its fifty-sixth session.

20 June 2001

8. Status of World Tourism Organization in United Nations system—Deemed to be a "related organization" of the United Nations—Suggested formulation: WTO (Trade) and WTO (Tourism)

Memorandum to the Under-Secretary-General for General Assembly Affairs and Conference Services

1. This is with reference to your memorandum of 16 October 2001 to the Legal Counsel concerning the status of the World Tourism Organization in the United Nation system. Our comments are as follows.

2. In its resolution 32/156 of 19 December 1977, the General Assembly approved the Agreement on Cooperation and Relationships between the United Nations and the World Tourism Organization. In accordance with article IV, paragraph 2, of that Agreement, the World Tourism Organization "shall be invited to send representatives to attend in an observer capacity meetings of the Economic and Social Council or its subsidiary organs, conferences convened by it and meetings of other United Nations bodies which deal with matters of common interest and to participate, with the approval of the body concerned and without the right to vote, in debates on questions of concern to the World Tourism Organization". In paragraph (*c*) of its decision 109 (LIX) of 23 July 1975, the Economic and Social Council had similarly designated the World Tourism Organization to participate, on a continuing basis, in the work of the Council. In its resolution 36/41 of 19 November 1981, the General Assembly similarly decided "that the World Tourism Organization may participate, on a continuing basis, in the work of the General Assembly in areas of concern to that Organization".

3. Based on General Assembly resolutions 32/156 and 36/41 and Economic and Social Council decision 109 (LIX), the World Tourism Organization may be deemed to be a related organization of the United Nations system, a status currently enjoyed by the International Atomic Energy Agency, the Preparatory Commission

for the Comprehensive Nuclear-Test-Ban Treaty Organization, the Organisation for the Prohibition of Chemical Weapons and the World Trade Organization.

4. As the Agreement on Cooperation and Relationships between the United Nations and the World Tourism Organization does not contain reporting provisions, and as General Assembly resolution 36/41 does not accord an explicit right to make statements, the World Tourism Organization does not enjoy an automatic right to address the General Assembly. In the absence of a decision by or a specific request to report to, the General Assembly, the World Tourism Organization may not address the Assembly. We note that, on at least one prior occasion, in paragraph 6 of its resolution 36/41, the General Assembly requested the Secretary-General of the World Tourism Organization to submit to the General Assembly at its thirty-eighth session, through the Economic and Social Council, a report on the progress made in the implementation of the Manila Declaration.[17]

5. In the light of the conclusion reached above, the World Tourism Organization should be added to the list of organizations in the correspondence unit worksheet. Incidentally, the Preparatory Commission for the Comprehensive Nuclear Test Ban Treaty Organization and the Organisation for the Prohibition of Chemical Weapons should also be added.

6. All related organizations, including the World Tourism Organization, should be provided seating after the specialized agencies in the General Assembly Hall.

7. We note with satisfaction that the World Tourism Organization has been invited to the fifty-sixth regular session of the General Assembly and its special session on children. The World Tourism Organization should be invited to all meetings and conferences of the General Assembly, the Economic and Social Council and their subsidiary organs to which the other related organizations are invited. In this connection, we wish to refer to the footnote contained in the rules of procedure of meetings and conferences concerning the participation of specialized agencies and related organizations. In the future, that footnote should also include the World Tourism Organization.

8. Provided that the World Tourism Organization does indeed maintain a liaison office at Headquarters, it should be listed among the specialized agencies and related organizations listed in part VI of the "Blue Book".

9. As for the acronym, in order to avoid any confusion, we would suggest the following formulations: WTO (Trade) and WTO (Tourism). The matter should of course be discussed with the two organizations concerned.

10. By copy of this memorandum, we intend to bring this matter to the attention of the Office of Inter-Agency Affairs to ensure, if such is not already the case, that the World Tourism Organization and its status as a related organization of the United Nations system are properly reflected in the meeting of the Administrative Committee on Coordination, the Directory of senior officials of the United Nations system of organizations and the United Nations system chart.

18 October 2001

9. CONSTITUTION OF A QUORUM OF PREPARATORY COMMISSION FOR THE COMPREHENSIVE NUCLEAR-TEST-BAN TREATY ORGANIZATION—RULES OF PROCEDURE OF PREPARATORY COMMISSION—"MEMBERS PRESENT AND VOTING"

Facsimile to the Director, Legal and External Relations Division, Preparatory Commission for the Comprehensive Nuclear-Test-Ban Treaty Organization, Vienna

1. This is with reference to your facsimile of today's date to the Legal Counsel concerning the rules of procedure of the Preparatory Commission for the Comprehensive Nuclear-Test-Ban Treaty Organization with respect to the quorum. At the outset, we note that, in accordance with paragraph 5(*a*) of the Text on the Establishment of the Preparatory Commission, the costs of the Commission and its activities shall be met annually by all States signatories in accordance with the United Nations scale of assessments with certain adjustments. As the Text explicitly applies the United Nations scale of assessments to the Preparatory Commission, such application is not subject to a decision by the Commission itself. In any event, our comments on the questions set out in your facsimile are as follows.

2. On the first question, rule 12 of the rules of procedure of the Preparatory Commission provides that "a majority of the members of the Commission shall constitute a quorum". Rule 12 speaks only in terms of membership, not in terms of eligibility to vote. As there are 161 States signatories, you are correct in concluding that 81 States signatories constitute the required quorum. As such, whether or not a particular State signatory has fully discharged its financial obligations within the meaning of paragraph 5(*b*) of the Text on the Establishment of the Preparatory Commission, that State, if present, is counted for purposes of determining the existence of a quorum.

3. With respect to your second question, quorum is based solely on a member's presence at the meeting; quorum is not related to that member's eligibility to vote.

4. In response to your third question, please be advised that, if it is determined that a quorum does not exist prior to the opening of a meeting, the meeting should not be opened until such time as a quorum is obtained. If during the course of a meeting a representative calls for or challenges the existence of a quorum and it is determined that indeed there is no quorum, the presiding officer should immediately suspend or adjourn the meeting. While rule 67 of the rules of procedure of the General Assembly similarly provides that the presence of a majority of the members is required to take a decision, rule 67 provides that "the President may declare open and permit a debate to proceed when at least one third of the members of the General Assembly are present". Rule 12 of the rules of procedure of the Preparatory Commission does not provide separate quorum requirements for debate and decision-making purposes. As such, in our view, it would not even be possible to continue the debate in the absence of a majority of the members of the Commission. Therefore, once it is determined that there is no quorum, the meeting should be suspended or adjourned. When the meeting is resumed or reconvened, it is not necessary—but would be advisable—to inform the members present that there is a quorum.

5. The absence of a quorum does not invalidate the proceedings that have taken place at the meeting or conference up to the point when the absence of a quorum is ascertained. The absence of a quorum also does not invalidate any decisions that have been taken prior to that point. Any challenges to the quorum should be raised prior to a decision being taken; ex post facto challenges are not receivable, as many members may have been at the meeting at the time a vote was taken but either chose not to participate in the vote or left the room after voting. Once a decision has been taken, it cannot be overturned unless there is a motion to reconsider in accordance with rule 24 of the rules of procedure of the Preparatory Commission.

6. Pursuant to rule 28 of the rules of procedure of the Preparatory Commission, "the phrase 'members present and voting' means members casting an affirmative or negative vote. Members who abstain from voting shall be regarded as not voting". In accordance with paragraph 5(*b*) of the Text, States signatories that have not fully discharged their financial obligations do not have a right to vote. Accordingly, while members who do not have the right to vote may be present for quorum purposes, by definition they cannot vote and therefore cannot be counted among the members "present and voting".

7. Finally, we concur with your conclusion that, depending on the number of States signatories that have lost their right to vote, the number of States signatories present for quorum purposes may be much larger than the actual number of States "present and voting". It should also be kept in mind that the number of States signatories that are present for quorum purposes and that enjoy the right to vote but choose to abstain from voting will, in accordance with rule 28, further reduce the number of members "present and voting".

31 October 2001

10. Legal status of Global Ministerial Environmental Forum—Relationship between Forum and Governing Council of UNEP—Relationship between membership of Governing Council of UNEP and membership of (or modalities of participation in) Global Ministerial Environmental Forum

Letter to the Executive Director, United Nations Environment Programme

This is in response to your letter of 19 October 2001. In that letter you ask this Office to clarify the three issues that were raised by Member States with regard to the adoption by the Governing Council of UNEP at its twenty-first session of decision 21/21 of 9 February 2001, concerning governance of UNEP and the implementation of General Assembly resolution 53/242 of 28 July 1999. According to your letter, those issues are as follows:

(*a*) Legal status of the Global Ministerial Environmental Forum;

(*b*) Relationship between the Global Ministerial Environmental Forum and the Governing Council of UNEP;

(*c*) Relationship between the membership of the Governing Council of UNEP and the membership of (or modalities of participation in) the Global Ministerial Environmental Forum.

Introduction

As noted in your letter, a decision concerning the institution of a Global Ministerial Environmental Forum was taken by the General Assembly at its fifty-third session in its resolution 53/242 of 28 July 1999. In that resolution, the Assembly took note of the report of the Secretary-General on environment and human settlements and the report of the United Nations Task Force on Environment and Human Settlements annexed thereto, containing recommendations on reforming and strengthening the activities of the United Nations in the field of environment, and human settlements. The Assembly also took into account in the resolution the views on the Secretary-General's report of the Governing Council of UNEP, as contained in its decision 20/17 of 5 February 1999, and in paragraph 6 of the resolution, which relates to the institution of the Global Ministerial Environmental Forum, the Assembly:

> "*Welcomes* the proposal to institute an annual, ministerial-level, global environmental forum, with the Governing Council of the United Nations Environment Programme constituting the forum in the years that it meets in regular session and, in alternative years, with the forum taking the form of a special session of the Governing Council, in which participants can gather to review important and emerging policy issues in the field of the environment, with due consideration for the need to ensure the effective and efficient functioning of the governance mechanisms of the United Nations Environment Programme, as well as possible financial implications, and the need to maintain the role of the Commission on Sustainable Development as the main forum for high-level policy debate on sustainable development".

Analysis of paragraph 6 of General Assembly resolution 53/242

(a) *Interrelation between the institution of the Global Ministerial Environmental Forum and universal membership of the Governing Council of UNEP*

It follows from paragraph 6 of resolution 53/242 that the General Assembly, on the one hand, decided that the Global Ministerial Environmental Forum should be instituted as a global forum, which implies that participation in it must be universal, and, on the other, stipulated that the Governing Council of UNEP, whose membership is limited to 58 member States, should constitute the Global Ministerial Environmental Forum with the latter taking the form of either regular or special sessions of the Governing Council.

It appears from the legislative history of resolution 53/242 that recommendation 13 of the Task Force, which related to the institution of the Forum, contained two interrelated parts. In subparagraph (*a*) of recommendation 13 it was suggested that the Governing Council of UNEP should constitute the Forum and in subparagraph (*c*) it was recommended that the membership of the Governing Council should be changed to make it universal (see A/53/463, annex, para. 47). The Secretary-General in his report supported recommendation 13 of the Task Force in its entirety, including the proposed change in the membership of the Governing Council of UNEP. Since the Governing Council is a subsidiary body of the General Assembly and subparagraph (*c*) of recommendation 13 contained

a proposal with significant institutional implications, the Secretary-General pointed out in his report that the implementation of that recommendation would require action by the General Assembly.

The Governing Council of UNEP in its decision 20/17 of 5 February 1999 on the report of the Secretary-General expressed its support for the proposal that an annual ministerial-level global environmental forum should be instituted and that the UNEP Governing Council should constitute that forum. However, with reference to subparagraph (*c*) of recommendation 13, the Council only took note of the proposal concerning universal membership of the Governing Council of UNEP and the ongoing debate in that regard.

As noted above, the General Assembly in paragraph 6 of its resolution 53/242 did not endorse the proposal concerning universal membership of the Governing Council of UNEP either.

(b) *Concept of the Global Ministerial Environmental Forum as a different format of United Nations meetings*

Analysis of the legislative history of resolution 53/242 further indicates that a recommendation of the Task Force regarding the institution of the Forum was based on the conviction of its members that the current intergovernmental forums, including the Governing Council of UNEP and the Commission on Sustainable Development, were inadequate to give the kind of guidance that was needed in the environmental field. Members of the Task Force were of the view that the traditional United Nations format for intergovernmental meetings did not fully meet the need for high-level consideration of environmental issues because it featured formal discussion leading to agreement on the exact wording of a text. The Task Force believed that to achieve the purposes which intergovernmental meetings on environmental and human settlements should fulfil, a format was needed that would allow for actual debate, more in-depth discussions, more interaction with major groups to produce innovative strategies that could meet tomorrow's challenges. The Task Force concluded that such a format could be realized through the institution of an annual ministerial-level global environmental forum (see A/53/463, annex, para. 47). The Secretary-General echoed these arguments by stating in his report that institutional adjustments are needed to "provide a forum in which high-level debate on global issues is informed by a comprehensive approach to the international environmental agenda" (A/53/463, para. 41).

It appears from the above clarifications that although the Task Force and the Secretary-General proposed in their respective reports that the membership of the Governing Council should be made universal, they did not view the Governing Council as an organ that would perform the functions of the Global Ministerial Environmental Forum. The latter, in their view, is supposed to be a *forum*, as opposed to being an organ, for in-depth discussions and interaction with major groups, and its main task should be the development of new, innovative strategies rather than adoption of concrete decisions.

The General Assembly, in its resolution 53/242, did not decide on the establishment of a new organ. It stated that an arrangement was needed at the ministerial level to provide for a forum "in which participants can gather to review important and emerging policy issues in the field of the environment" and that the Governing Council of UNEP should constitute such a forum.

Conclusions

It follows from the foregoing that the Governing Council of UNEP should organize its work in a way which would allow it to act at its sessions as a global forum in which its participants can review important and emerging policy issues in the field of the environment. Under the resolution, however, that should be done "with due consideration for the need to ensure the effective and efficient functioning of the governance mechanisms of the United Nations Environment Programme, as well as possible financial implications".

Therefore, with reference to your first question, we are of the view that the Global Ministerial Environmental Forum does not have its own independent legal standing or status because under paragraph 6 of General Assembly resolution 53/242 it is merely a forum for discussions and dialogue. As provided in the resolution, the Governing Council of UNEP, when it acts as the Forum, should adjust and modify its working methods in a way that should allow it to serve as a forum with universal participation at the ministerial level to review policy issues in the field of environment. Thus, as to your second question, we believe that, in accordance with paragraph 6 of General Assembly resolution 53/242, the Governing Council of UNEP constitutes the Global Ministerial Environmental Forum when it acts like a forum which performs the tasks defined in that paragraph of the resolution. As to the relationship between the membership of the Governing Council of UNEP and the Forum, it should be governed by the functions assigned by the General Assembly to the Council in the respective resolutions. The Governing Council of UNEP has the membership and mandate which are defined by General Assembly resolution 2997 (XXVII) of 15 December 1972 concerning the establishment of UNEP. Under General Assembly resolution 53/242, the Governing Council of UNEP, when it acts as the Global Ministerial Environmental Forum, is supposed to have universal participation and its mandate is limited to the tasks defined in paragraph 6 of that resolution.

20 November 2001

11. Role of High Representative for Bosnia and Herzegovina—General Framework Agreement for Peace in Bosnia and Herzegovina—United Nations International Police Task Force—United Nations Mission in Bosnia and Herzegovina—Relationship between High Representative and United Nations

Note to the Under-Secretary-General, Department of Political Affairs

1. This refers to your note dated 16 November 2001 seeking our views on issues concerning the relations between the High Representative for Bosnia and Herzegovina and the United Nations, particularly, the High Representative's reporting/briefing obligations to the Security Council, as well as other statutory obligations, if any.

2. The General Framework Agreement for Peace in Bosnia and Herzegovina and the annexes thereto (collectively the Peace Agreement) covered military and civilian aspects of the settlement and provided for a complex set of arrangements. The implementation of the civilian aspects of the peace settlement involved the assistance of numerous international organizations such as the United Nations, the Organization for Security and Cooperation in Europe, the World Bank and other specialized agencies, the International Committee of the Red Cross as well as non-

governmental organizations. As far as the High Representative and the United Nations are concerned, their respective roles are set out in annexes 10 and 11 to the Peace Agreement.

The High Representative

3. Pursuant to annex 10 to the Peace Agreement, containing the "Agreement on Civilian Implementation of the Peace Settlement", the Parties requested the designation of a High Representative, to be appointed consistent with relevant United Nations Security Council resolutions, to facilitate the Parties' own efforts and to mobilize and, as appropriate, coordinate the activities of the organizations and agencies involved in the civilian aspects of the peace settlement by carrying out, as entrusted by a United Nations Security Council resolution, tasks described in article II of annex 10. In addition to coordinating the activities of the civilian organizations and agencies to ensure the efficient implementation of the civilian aspects of the peace settlement, the tasks of the High Representative included: respecting the autonomy of the civilian organizations and agencies in Bosnia and Herzegovina within their spheres of operation while as necessary giving general guidance to them about the impact of their activities on the implementation of the peace settlement; providing guidance to, and receiving reports from, the Commissioner of the International Police Task Force (IPTF), the establishment of which was requested by the Parties pursuant to annex 11 of the Peace Agreement; and reporting periodically on progress in implementation of the Peace Agreement to, inter alia, the United Nations. Furthermore, the Parties designated the High Representative as "the final authority" in theatre regarding the interpretation of the civilian implementation of the Peace Agreement (annex 10, article V).

4. On 8 December 1995, the Peace Implementation Conference in London approved the designation of the first High Representative, Mr. Carl Bildt, and invited the Security Council to agree to such designation.

5. The Security Council, in its resolution 1031 (1995) of 15 December 1995, endorsed the establishment of a High Representative, following the request of the Parties, who, "in accordance with annex 10 on the civilian implementation of the Peace Agreement, will monitor the implementation of the Peace Agreement and mobilize and, as appropriate, give guidance to, and coordinate the activities of, the civilian organizations and agencies involved" (para. 26). By that same resolution, the Council agreed to the designation of Mr. Carl Bildt as High Representative and confirmed that the latter was "the final authority in theatre regarding the interpretation of annex 10 on the civilian implementation of the Peace Agreement" (para. 27). The Council also requested the Secretary-General to submit to it reports from the High Representative, in accordance with annex 10 of the Peace Agreement and the conclusions of the London Conference, on the implementation of the Peace Agreement (para. 32).

United Nations Mission in Bosnia and Herzegovina (UNMIBH)

6. Pursuant to annex 11 to the Peace Agreement, concerning the "Agreement on International Police Task Force", the Parties requested the United Nations to establish, by a decision of the Security Council, a "UN International Police Task Force" (IPTF) to carry out a programme of assistance allowing the monitoring, observing and inspecting of law enforcement activities and facilities throughout Bosnia and Herzegovina, as described in article III of annex 11. Under the same annex, the Parties agreed that any obstruction of IPTF activities would constitute a

failure to cooperate with IPTF and that the IPTF Commissioner would communicate such failure to the High Representative.

7. While annex 11 provides that the IPTF is autonomous with regard to the execution of its functions, it specifically provides that its activities shall be coordinated with the High Representative. Furthermore, the IPTF Commissioner shall receive guidance from the High Representative and periodically report on matters within his responsibility to the High Representative and the Secretary-General of the United Nations.

8. Annex 11 of the Peace Agreement applies to the United Nations/United Nations Mission in Bosnia and Herzegovina by virtue of a decision made by the Security Council pursuant to its resolution 1035 (1995). By that resolution, the Council established IPTF to be entrusted with the tasks set out in annex 11 to the Peace Agreement and a United Nations civilian office and endorsed the arrangements set out in that regard in the Secretary-General's report of 6 February 1996 (S/1996/83). Under such arrangements, IPTF and the United Nations civilian office, known as the United Nations Mission in Bosnia and Herzegovina (UNMIBH), were placed under the authority of the Secretary-General through the United Nations Coordinator, who is the Special Representative of the Secretary-General and Head of Mission of UNMIBH and who, in turn, coordinates with the High Representative.

Relationship between the High Representative and the United Nations

9. The complexity of the arrangements concerning the civilian implementation of the Peace Agreement required a close and effective coordination between the numerous civilian organizations and agencies involved. To that end, the Peace Agreement assigned the leading political role to the High Representative, a role which was confirmed by the Security Council. In that connection, the High Representative also enjoys the assistance of UNMIBH. However, such assistance is clearly intended to facilitate the execution of his responsibilities and not to put under his authority UNMIBH or any such organizations and agencies. The Peace Agreement makes clear that the High Representative is to respect "their autonomy within their spheres of operation" (annex 10, article II, para. 1(*c*)).

10. At the same time, the High Representative is not under the authority of the United Nations or its Secretary-General. He does, however, have certain obligations vis-à-vis the United Nations, which include, in particular, providing guidance to UNMIBH and reporting to the Secretary-General on the civilian implementation of the Peace Agreement. Accordingly, the High Representative has on a regular basis provided reports to the Secretary-General, who in turn submits them to the Security Council. The first such report was submitted to the Security Council under cover of a letter dated 13 March 1996 from the Secretary-General addressed to the President of the Security Council (S/1996/190). Since then, the High Representative has submitted 19 other reports, the latest having been submitted by the Secretary-General to the Council by a letter dated 20 July 2001 (S/2001/723).

11. While pursuant to annexes 10 and 11 of the Peace Agreement and relevant Security Council resolutions the Commissioner of IPTF and the Special Representative of the Secretary-General are under the obligations to coordinate their activities with and report, as appropriate, to the High Representative, the latter is also under the obligation to provide them with the necessary guidance, respect their autonomy in their spheres of operation and report to the Secretary-General on the

civilian implementation of the Peace Agreement. Unless otherwise decided by the Security Council, these same obligations should continue to apply.

27 November 2001

12. Legal status of Cine and Video Club—Proposed donation of audio-visual equipment to Organization—United Nations financial regulations 7.2 to 7.4 and financial rules 107.5 to 107.7—Option of Organization purchasing new audio-visual equipment

Memorandum to the Chief, Office of the Under-Secretary-General for Management, Department of Management

1. This is with reference to your memorandum dated 29 October 2001, forwarding a memorandum from the Controller dated 10 July 2001, a memorandum from the United Nations Staff Recreation Council Cine and Video Club dated 28 June 2001 and a note from the Office of Central Support Services dated 9 July 2001, with attachment, all addressed to the Under-Secretary-General for Management, Department of Management. These documents relate to the proposed upgrade of the technical facilities, i.e., the donation and installation of new audio-visual equipment, in the Dag Hammarskjöld Library Auditorium.

2. From the documentation received and our discussions with some of the officers involved in the project, our understanding of the matter is as follows. The Film Society (formerly known as the Cine and Video Club) has obtained a commitment from a major United States film company to provide to the Film Society, at no costs to the Society, state-of-the-art audio-visual equipment to be used for future showings of movies in the context of the Film Society's mandate. We understand that the gift to the Film Society will be in the form of a donation and contribution in kind, as the United States film company will essentially pay for the acquisition and installation of the new audio-visual equipment. We note that the Dag Hammarskjöld Library Auditorium is currently being refurbished and understand that it would be desirable for the installation of new audio-visual equipment to take place during the refurbishment process, rather than following its completion. We further understand that the United States film company willing to finance the acquisition and installation of the new audio-visual equipment is seeking, in return, a commitment by the Film Society to show a certain number of films in the Auditorium over the next two years or so using the new equipment acquired through the United States film company. We further understand that it will be up to the Film Society and the film company to agree on the titles and dates of the showing of these films.

3. We note that other departments have expressed a need for an upgrade of the existing audio-visual equipment in the Dag Hammarskjöld Library Auditorium and welcomed the initiative from the Film Society in this respect. We further note that other departments intend to use the audio-visual equipment in the Auditorium and that the Broadcast and Conference Support Section, Information Technology Services Division, suggests that it be consulted during the process of acquiring the new equipment. In this respect, we understand that the United States film company has no specific views or demands as to the future use of the audio-visual equipment, except that a certain number of films be shown over the next two years, and concurs with the equipment being used by other departments or offices.

4. As you indicated in the first paragraph of your memorandum of 29 October 2001, this initiative raises a number of questions, including the issues mentioned in the Controller's memorandum of 10 July 2001 regarding the legal status of the Film Society and the overall responsibility with respect to the implementation of the arrangements to be made with the United States film company. Also, the Controller questions the approach to upgrading the current equipment in the proposed way and suggested that new audio-visual equipment should be purchased through the regular budget, in particular since there seems to be a general agreement among various offices that the existing equipment is outdated.

Donation to the Film Society

5. We understand that this is an initiative by the Film Society and that the discussions with the United States film company are being conducted by the President of the Film Society. Nevertheless, the proposed donation to the Film Society raises several problems. As you are probably aware, the United Nations Staff Recreation Council was established for the benefit of the United Nations staff members and the United Nations community as a subsidiary body of the United Nations. However, with respect to the individual clubs, this Office has consistently taken the view that the clubs, while being members of the United Nations Staff Recreation Council, are not regarded as extensions of the United Nations in the same way as the Council. Their membership may or may not consist of United Nations staff members (under article II of the United Nations Staff Recreation Council Constitution, there exists only a minimum requirement of 10 staff members necessary for the creation of a club), and each club is governed by its own officials or committee elected or appointed from among its own members. We understand that these clubs are unincorporated associations and therefore do not constitute legal entities independent of their members. Accordingly, any arrangement entered into, for example, by the President of the Film Society would make the President of the Film Society ultimately responsible for the implementation of such an arrangement.

6. Given that the intention of the project is to permanently install the equipment in the Auditorium and that other departments and offices intend to use it in connection with their official functions, we believe that an arrangement between the Film Society and the United States film company would not be in the interest of the Organization and we would advise against it. Such an arrangement would raise various problems, including overall responsibility for maintenance or repair, in particular if damages occurred during the use of the equipment by other departments and not by the Film Society.

Donation directly to the United Nations Staff Recreation Council

7. However, we understand that it is indeed the intention of the President of the Film Society not to limit the use of the equipment to the showing of movies by the Film Society, but rather to obtain the new state-of-the-art equipment for its use by the Secretariat. Under the circumstances, it seems appropriate to have the donation made vis-à-vis the Organization itself and we therefore recommend that the United Nations Staff Recreation Council enter into the arrangement with the United States film company regarding acquisition and installation of the new audio-visual equipment. As stated above, the Council is a subsidiary body of the Organization and any donation to that body would consequently be considered to be a donation to the Organization itself.

Conditions for acceptance of a donation to the Organization

8. The policy of the United Nations regarding acceptance of donations is based on United Nations financial regulations 7.2 to 7.4 and financial rules 107.5 to 107.7 promulgated under them. Financial regulation 7.2 provides that:

> "Voluntary contributions, whether or not in cash, may be accepted by the Secretary-General 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."

9. Given that financial regulation 7.2 specifically declares voluntary contributions to be acceptable "whether or not in cash", in-kind donations, such as the proposed donation to assist in the acquisition of the new audio-visual equipment, are permitted under the United Nations Financial Regulations and Rules. Financial rules 107.5 to 107.7 provide that:

"*Rule 107.5*

> "In cases other than those approved by the General Assembly, the establishment of any trust fund or the receipt of any voluntary contribution, gift or donation to be administered by the United Nations requires the approval of the Secretary-General, who may delegate this authority to the USG/AM [Under-Secretary-General for Administration and Management]."

"*Rule 107.6*

> "No voluntary contribution, gift or donation for a specific purpose may be accepted if the purpose is inconsistent with the policies and aims of the United Nations."

"*Rule 107.7*

> "Voluntary contributions, gifts or donations which directly or indirectly involve an immediate or ultimate financial liability for the Organization may be accepted only with the approval of the General Assembly."

10. The administration of the above financial rule 107.5 has been delegated to the Controller (see ST/AI/270/Rev.1 dated 12 April 1989, entitled "Delegation of authority under the Financial Rules"). From our view, the purpose of the intended donation would seem consistent with the policies and aims of the Organization and we refer in this respect to the reactions from other departments in relation to the initiative (see above). However, this decision is ultimately a policy decision to be made by your Office. In this regard, we believe that the Information Technology Services Division should be consulted in the overall process, in particular inasmuch as it relates to the needs of other offices intending to use the new equipment and, possibly, to the technical aspects of the new equipment.

11. The other issue is whether the intended donation will result in additional financial liabilities for the Organization, which would require the approval of the General Assembly, in accordance with the above provisions. We note that the proposed donation may result in maintenance and possibly repair obligations to the Organization. It is not clear whether these obligations entail additional financial liability for the Organization, the determination of which is to be made by the Controller. Therefore, we recommend that the Controller be consulted on this point. Subject to the acceptance of the intended donation by the Controller under financial rule 107.5, we have no legal objection to the

donation provided that it will be implemented as described above. I am copying this note to the Controller for his appropriate action under rule 107.5. In this regard, please note that we consider that the obligation to show a certain number of movies does not constitute an additional financial liability. The mandate of the Film Society is to show movies to United Nations staff and guests and this obligation, therefore, does not require any action by the Film Society that it would not do otherwise.

Purchase of new audio-visual equipment by the Organization

12. Finally, and with respect to the Controller's question as to whether it would not be advisable to purchase the new audio-visual equipment from the regular budget, we note that this would, of course, be an option available to the Organization. From a legal point of view, there would be no objection to such an approach; however, in the light of the "window of opportunity" created by the current refurbishment of the Dag Hammarskjöld Library Auditorium, it seems to be in the Organization's interest to acquire the equipment at this point and have it installed during the ongoing refurbishment of the Auditorium, rather than purchase new equipment in accordance with the usual procedures which would be more expensive and, in all likelihood, more time-consuming as, among other things, such purchase would have to include a competitive bidding process. While this is essentially a policy decision to be taken by your Office, in conjunction with other offices and the President of the United Nations Staff Recreation Council, under the circumstances, and given that we consider a proposed donation to the Council to be legally acceptable, we recommend that the Organization obtain the new equipment as suggested by the Film Society. Should your Office, in conjunction with the President of the United Nations Staff Recreation Council, decide to proceed as outlined above, and provided that the Controller confirms that the acceptance of the new equipment would not entail any additional financial liabilities for the Organization, this Office would be available to assist in drafting the arrangements between the United Nations Staff Recreation Council and the United States film company, if necessary. In any event, please do not hesitate to contact us if you have any additional questions in this matter.

10 December 2001

PROCUREMENT

13. UNITED NATIONS PRACTICE CONCERNING ACCEPTANCE OF VOLUNTARY CONTRIBUTIONS FROM ITS CONTRACTORS—ACTUAL AND POTENTIAL FAO CONTRACTORS—UNITED NATIONS FINANCIAL REGULATIONS 7.2 TO 7.4 AND RULES 107.5 TO 107.7—GUIDELINES ON COOPERATION BETWEEN UNITED NATIONS AND BUSINESS COMMUNITY

Letter to the Legal Counsel, Food and Agriculture Organization of the United Nations

. . .

This refers to your electronic mail of 26 April 2001, requesting information concerning the practice of the United Nations with respect to the acceptance of proposed contributions from its contractors.

You have indicated that under the FAO principles and guidelines for cooperation with the private sector, "under no circumstances may a contribution be accepted if, by way of its acceptance, a contributor appears to be gaining or is led to believe he or she is gaining an inside track to the decision-making process of FAO, whether on policy or internal administrative matters, including procurement and tenders". (We note that we have a copy of the "Principles and guidelines for FAO cooperation with the private sector" dated 3 March 1999.) You further indicated that, as a corollary, the principles and guidelines provide, in particular, that:

> "Contributions should not normally be solicited from FAO contractors but, if offered, it must be made clear that acceptance of a contribution will not affect renewal of contracts, treatment in tender, etc.
>
> "The acceptance of major contributions should generally be avoided in circumstances where tenders are being made and the contributor is likely to be a bidder. If accepted on an exceptional basis, it must be made clear to the contributor that acceptance of the contribution will not affect any decisions relating to the tender. Any such exception must be cleared by the Office of the Director General."

You have indicated the view that while special attention should be given to proposed contributions from *actual* FAO suppliers or concessionaires, contributions from *potential* suppliers and concessionaires may be accepted if, in the near future, no tender is envisaged in which they may likely participate. You have further indicated that, on the other hand, the Procurement Services of FAO is of the view that all companies which provide goods or services which may be requested by FAO, regardless of whether or not a plan exists to proceed with the procurement of such goods and services, should be automatically excluded, with the only exception of those operating in a monopolistic situation or at predetermined and publicly known tariffs available to all clients.

Taking into account that the latter view would de facto exclude most, if not all, possible sponsors, you seek our comments and information concerning the practice of the United Nations on this matter and, in particular, with respect to potential contractors.

The acceptance of voluntary contributions by the United Nations is regulated by United Nations financial regulations 7.2 to 7.4 and financial rules 107.5 to 107.7 promulgated under them. Financial regulation 7.2 provides that:

> "Voluntary contributions, whether or not in cash, may be accepted by the Secretary-General 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."

Financial rules 107.5 to 107.7 provide that:

> "*Rule 107.5*
>
> "In cases other than those approved by the General Assembly, the establishment of any trust fund or the receipt of any voluntary contribution, gift or donation to be administered by the United Nations requires the approval of the Secretary-General, who may delegate this authority to the USG/AM [Under-Secretary-General for Administration and Management]."

"*Rule 107.6*

"No voluntary contribution, gift or donation for a specific purpose may be accepted if the purpose is inconsistent with the policies and aims of the United Nations."

"*Rule 107.7*

"Voluntary contributions, gifts or donations which directly or indirectly involve an immediate or ultimate financial liability for the Organization may be accepted only with the approval of the General Assembly."

You will note that the above financial regulation and rules, or other provisions in the Financial Regulations and Rules, do not include any specific provisions prohibiting acceptance of voluntary contributions from actual or potential United Nations contractors. However, we believe that the word "policies" referred to in financial regulation 7.2 and rule 107.6 includes the policy against unfair competitive bidding. Therefore, should a proposed contribution by an actual or potential United Nations contractor appear to suggest that its purpose or effect would be for the contributor to gain inside information concerning the United Nations or any other unfair advantage, such contribution would be rejected on the ground that it is not consistent with United Nations policy.

Furthermore, we believe that the above-referenced policy is also reflected in the "Guidelines on Cooperation between the United Nations and the Business Community" ("the Guidelines"), issued by the Secretary-General on 17 July 2000 (see A/56/323, annex III). One of the general principles in the Guidelines is "no unfair advantage", stating, inter alia, that "cooperation should not imply endorsement or preference of a particular business entity or its products or services" (see Guidelines, sect. IV, para. 14(*d*)). Moreover, the Guidelines include a reminder that entering into cooperation arrangements with the business community is "distinct from procurement activities" (see para. 18 of the Guidelines, on modalities). That reminder, together with the principle against unfair advantage, in the Guidelines, directly addresses your concern about the acceptance of voluntary contributions from actual or potential United Nations contractors.

In this connection, in a recent case involving a proposed in-kind contribution (telecommunications equipment) by a private sector entity, this Office advised that one of the conditions for accepting the contribution should be that the equipment had to be based on an open standard which would allow parts and related pieces for the equipment to be non-proprietary. We raised this issue to ensure that by accepting the contribution we would not be tied down to that company's products when procuring parts and other related pieces for the equipment.

It may be that this issue will be raised more frequently in view of the increasing number of cooperation arrangements between the United Nations and the private sector involving, inter alia, voluntary contributions from private sector partners. In that event, the concerned organization may wish to establish more specific rules or guidelines on this issue.

17 May 2001

14. Legal requirements for United Nations concert productions involving commercial and non-profit promoters or entities

Memorandum to the Director, News and Media Division, Department of Public Information

1. I am writing as a follow-up to a telephonic discussion that took place yesterday among the Chief of the Public Liaison Service, Legal Officers of the Office of Legal Affairs, and the Department of Information. During the discussion, the Chief of the Service requested that we specify the legal requirements for United Nations concert productions in order to provide your office with guidance in dealing with various proposals of a commercial or non-profit nature from individuals or entities to stage this year's United Nations Day concert. The Chief also stated that your office had received approval from the Secretary-General and the Chief of Staff to consider such proposals.

2. We understand that in prior years Member States have sponsored United Nations Day concerts under agreements (or Memoranda of Understanding) with the Organization. However, as no Member State thus far has agreed to sponsor the upcoming United Nations Day concert, the Department of Public Information is exploring alternative proposals for staging the concert. In one case, the chief executive officer of a company proposed to arrange for a rock band to perform. In addition, he suggested that the groups could perform together both for United Nations Day and for Disarmament Week, which occurs this year at the same time. Apparently, he also suggested that such performances could be webcast and that funds garnered from such a broadcast and from sales of recordings would cover the costs to the Organization for staging the concert. The Chief also mentioned that another group, which she believed to be a non-profit organization based in Washington, D.C., was interested in staging a joint concert.

3. Based on the Organization's unfortunate prior experience with concerts staged by private promoters and in the light of the applicable financial regulations, rules and administrative issuances governing such activities, we would recommend that, at a minimum, your office take into account the following requirements when considering acting on proposals such as those described above:

(*a*) The Organization must enter into a binding written agreement with one person or entity (i.e., the concert promoter or producer) who is obligated by such agreement to: (i) take all necessary action, including subcontracting with all performers and suppliers; (ii) coordinate all activities with the Organization that are required in order to stage the concert; (iii) bear all financial responsibility for the costs of staging such concert; and (iv) account to the Organization for all revenue garnered from the concert, as well as any broadcasts or any rebroadcasts or other performance or reproduction thereof in any medium;

(*b*) The concert promoter or entity must pay the Organization's costs for staging the concert in advance thereof and, in this regard, must be prepared to guarantee such payment through an appropriate form of payment or performance bond delivered at the time of the conclusion of the written agreement referred to above;

(*c*) To the extent that any such written agreement contemplates income to the Organization (whether from royalties, performance fees or otherwise) in excess of $40,000, prior to execution, the agreement must be submitted to the Headquarters Committee on Contracts for review and subsequent approval by the Assistant Secretary-General, Office of Central Support Services;

(*d*) Normally, the Organization retains all copyright to concert performances and any rebroadcast or other reproduction thereof in any medium and thus, to the extent that the concert promoter or any performer desires a licence of such rights or proposes other copyright arrangements, this Office will have to be consulted;

(*e*) Any named performers or performing groups whom the concert promoter or producer plans to have perform must sign a written commitment to do so, and such written commitment(s) must be provided to the Organization prior to the conclusion of a written agreement with the concert promoter or producer;

(*f*) Any promotional activities involving the use of or reference to the United Nations or its emblem must be consistent with the policies and practices of the Organization and, thus, should be reviewed by this Office; and

(*g*) The Organization must be satisfied that such promoter or producer, whether an individual or an entity, is fully qualified and is ready, willing and able to undertake all obligations required to produce and stage such a concert.

4. With regard to the Chief's request for guidance on how to respond to the most recent communication, we suggest that the points set out in subparagraphs (*a*) to (*g*) above be included verbatim in such a reply. In this regard, such a reply should emphasize that any promotional activities proposed to be undertaken by such means as a letter of introduction should occur only after a written agreement with the Organization has been concluded and following review by this Office and the Department of Public Information of the content and nature of such proposed promotional activities.

9 August 2001

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

[No legal opinions of secretariats of intergovernmental organizations to be reported for 2001.]

NOTES

[1] See Article 104 of the Charter of the United Nations; Convention on the Privileges and Immunities of the United Nations, article I, section 1; *Reparations for Injuries Suffered in the Service of the United Nations, Advisory Opinion, I.C.J. Reports 1949*, p. 174.

[2] See, generally, "The practice of the United Nations, the specialized agencies and the International Atomic Energy Agency concerning their status, privileges and immunities: study prepared by the Secretariat" (hereinafter referred to as "the Secretariat study"), *Yearbook of the International Law Commission, 1967*, vol. II, document A/CN.4/L.118 and Add.1 and 2, part two, sect. A, chap. I, sects. 1-4. A supplement to the study was prepared in 1985: A/CN.4/L.383 and Add.1-3. See also Convention on the Privileges and Immunities of the United Nations, article VIII, section 29.

[3] See also the Secretariat study, part two, sect. A, chap. I, sect. 1.

[4] See, generally, Convention on the Privileges and Immunities of the United Nations, article VIII, section 29; "Procedures in place for implementation of article VIII, section 29, of the Convention on the Privileges and Immunities of the United Nations, adopted by the General Assembly on 13 February 1946: report of the Secretary-General", A/C.5/49/65; the Secretariat study, part two, sect. A, chap. I, sect. 4 (*c*); discussed in section III, below.

[5] See the Secretariat study, part two, sect. A, chap. I, sect. 4 (*c*), para. 44.

[6] A/C.5/49/65 (see note 4 above).

[7] Decision 50/503 of 17 September 1996.

[8] "Administrative and budgetary aspects of the financing of the United Nations peacekeeping operations: financing of the United Nations peacekeeping operations: report of the Secretary-General", A/51/389, paras. 20-25.

[9] A/50/903/Add.1, para. 20.

[10] General Assembly resolution 50/235 of 7 June 1996, paragraph 16.

[11] A/51/389, paras. 20-25.

[12] A/51/491, para. 3.

[13] "Administrative and budgetary aspects of the financing of the United Nations peacekeeping operations: financing of the United Nations peacekeeping operations: report of the Secretary-General", A/51/903.

[14] A/54/458.

[15] See A/C.5/49/65, para. 12 (with respect to tort claims settled under Headquarters regulation No. 4) (the General Assembly took note of this report in decision 50/503 of 17 September 1996); A/51/389, para. 24 (with respect to third-party claims arising from peacekeeping operations) (ACABQ and the General Assembly endorsed this study: see A/51/491, para. 3, and General Assembly resolution 51/13 of 4 November 1996).

[16] General Assembly resolution S-25/2, annex.

[17] Manila Declaration on World Tourism, adopted by the World Tourism Conference, Manila, 27 September-10 October 1980.

Part Three

JUDICIAL DECISIONS ON QUESTIONS RELATING TO THE UNITED NATIONS AND RELATED INTERGOVERNMENTAL ORGANIZATIONS

Chapter VII

DECISIONS AND ADVISORY OPINIONS OF INTERNATIONAL TRIBUNALS

Arbitration Tribunal constituted by the Government of the French Republic and the United Nations Educational, Scientific and Cultural Organization to consider the question of the tax regime governing pensions paid to retired UNESCO officials residing in France

AWARD

The Arbitration Tribunal composed of:

Mr. Kéba Mbaye, *Presiding Arbitrator*

Mr. Jean-Pierre Quéneudec, *Arbitrator*

Mr. Nicolas Valticos, *Arbitrator*

After deliberation, *makes the following award:*

1. On 2 July 1954, the French Republic and the United Nations Educational, Scientific and Cultural Organization (UNESCO) signed an agreement regarding the headquarters of UNESCO and its privileges and immunities on French territory (hereinafter "Headquarters Agreement" or the "Agreement"). Article 22 of that Agreement, entitled "Officials and experts", states:

> "Officials governed by the provisions of the Staff Regulations of the Organization
>
> "(*a*) Shall be immune from legal process in respect of all activities performed by them in their official capacity (including words spoken or written);
>
> "(*b*) Shall be exempt from all direct taxation on salaries and emoluments paid to them by the Organization;
>
> "(*c*) Subject to the provisions of article 23, shall be exempt from all military service and from all other compulsory service in France;
>
> "(*d*) Shall, together with their spouses and the dependent members of their families, be exempt from immigration restrictions and registration provisions relating to foreigners;
>
> "(*e*) Shall, with regard to foreign exchange, be granted the same facilities as are granted to members of diplomatic missions accredited to the Government of the French Republic;
>
> "(*f*) Shall, together with their spouses and dependent members of their families, be accorded the same facilities for repatriation as are granted to members of diplomatic missions accredited to the Government of the French Republic in time of international crisis;

"(*g*) Shall, provided they formerly resided abroad, be granted the right to import free of duty their furniture and personal effects at the time of their installation in France;

"(*h*) May temporarily import motor cars free of duty, under customs certificates without deposits."

2. The Agreement was thus signed following the decision to establish the headquarters of UNESCO, a specialized agency of the United Nations, in Paris.

3. A number of UNESCO officials subsequently decided to reside in Paris after retirement. It appears that 1,867 retired UNESCO officials have a mailing address in France, and in addition 1,877 beneficiaries of retired UNESCO officials reside in France.

4. UNESCO does not have its own staff pension fund. It is affiliated with the United Nations Joint Staff Pension Fund, along with a number of other organizations in the United Nations system.

The Joint Staff Pension Fund provides for a retirement benefit, early retirement benefit, deferred retirement benefit, disability benefit, child's benefit, widow's or widower's benefit, secondary dependant's benefit, withdrawal settlement or residual settlement.

Enrolment in the Fund is not mandatory, although it is rare that staff members do not participate. However, at the time of recruitment a staff member may opt out. This provision is mentioned in the UNESCO Staff Regulations and Staff Rules.

5. The full title of the 1954 Agreement is the "Agreement between the Government of the French Republic and the United Nations Educational, Scientific and Cultural Organization regarding the Headquarters of UNESCO and the Privileges and Immunities of the Organization on French Territory".

The third preambular paragraph of the Agreement reads as follows:

"*Desiring* to regulate, by this Agreement, all questions relating to the establishment of the permanent headquarters of the United Nations Educational, Scientific and Cultural Organization in Paris and consequently to define its privileges and immunities in France".

6. Prima facie, therefore, it would seem that the purpose of the Agreement with respect to privileges and immunities was to define those accorded to UNESCO in France. However, the Agreement could not deal only with headquarters questions. At that time, France had not acceded to the Convention on the Privileges and Immunities of the Specialized Agencies of 1947. It was therefore necessary, as France notes, for the two Parties to include provisions in the Headquarters Agreement relating to the privileges and immunities to be enjoyed by officials of UNESCO.

7. Relations between France and UNESCO have been generally trouble-free. Nevertheless, it appears that differences between the Parties emerged between 1975 and 1980 concerning the interpretation and application of article 22(*b*) of the Agreement. Its deliberations up to now do not enable the Tribunal to ascribe the emergence of the dispute either to a reversal of French practice or, on the contrary, to the implementation of a stated policy by the authorities. However, it seems to the Tribunal that there was a period during which circumstances were such that a difference on the question now at issue between UNESCO and France arose between the Parties to the 1954 Agreement.

* * *

8. Be that as it may, a dispute did definitely arise in the 1980s and 1990s over the application of article 22(*b*) of the 1954 Agreement. The subparagraph reads as follows:

> "Officials governed by the provisions of the Staff Regulations of the Organization
>
> "(*a*) . . .
>
> "(*b*) Shall be exempt from all direct taxation on salaries and emoluments paid to them by the Organization".

The dispute concerns the interpretation of the above-cited provisions.

9. The view of UNESCO is that ". . . article 22(*b*) of the 1954 Headquarters Agreement is applicable to former UNESCO officials residing in France and drawing, after separation from service, a retirement pension paid by the United Nations Joint Staff Pension Fund".

10. The Tribunal will deal later with the subsidiary claim of UNESCO and what divides the parties on that issue.

11. According to France, the Headquarters Agreement governs the obligations of the host State, not the obligations of the State of residence of former officials. In that regard, it states in its counter-memorial that:

> "[A]rticle 22(*b*) of the Agreement between the Government of the French Republic and the United Nations Educational, Scientific and Cultural Organization regarding the Headquarters of UNESCO and the Privileges and Immunities of the Organization on French Territory . . . does not apply to former UNESCO officials residing in France and drawing, after separation from service, a retirement pension paid by the United Nations Joint Staff Pension Fund".

12. In agreeing to submit their dispute to arbitration, the Parties had reference to article 29 of the Headquarters Agreement.

Article 29 of the Agreement reads as follows:

> "1. Any dispute between the Organization and the Government of the French Republic concerning the interpretation or application of this Agreement, or any supplementary agreement, if it is not settled by negotiation or any other appropriate method agreed to by the parties, shall be submitted for final decision to an arbitration tribunal composed of three members; one shall be appointed by the Director-General of the Organization, another by the Minister of Foreign Affairs of the Government of the French Republic and the third chosen by those two. If the two arbitrators cannot agree on the choice of the third, the appointment shall be made by the President of the International Court of Justice.
>
> "2. The Director-General or the Minister of Foreign Affairs may request the General Conference to ask an advisory opinion of the International Court of Justice on any legal question raised in the course of such proceedings. Pending an opinion of the Court, the two parties shall abide by a provisional decision of the arbitration tribunal. Thereafter, this tribunal shall give a final decision, taking into account the advisory opinion of the Court."

In accordance with that article, the Parties set up an Arbitration Tribunal ("the Tribunal") composed of three members. UNESCO appointed Mr. Nicolas Valticos and France appointed Mr. Jean-Pierre Quéneudec. These two arbitrators chose a third, Mr. Kéba Mbaye, to serve as presiding arbitrator.

13. The Parties then signed an agreement to arbitrate the dispute ("Arbitration Agreement") on 19 April 2001 in Paris. Article II of the Arbitration Agreement defined the mandate of the Tribunal as follows:

> "Ruling in accordance with international law and in particular with international civil service law, the Tribunal is asked to say whether article 22(*b*) of the Agreement is applicable to former UNESCO officials residing in France and drawing, after separation from service, a retirement pension paid by the United Nations Joint Staff Pension Fund."

14. With the approval of the parties, the Tribunal adopted a mission statement, part III of which summarizes the matter in these terms:

> "The Parties, being unable to agree as to the application of the Agreement between France and UNESCO regarding the Headquarters of UNESCO and the Privileges and Immunities of the Organization on French Territory signed in Paris on 2 July 1954 (the 'Agreement'), decided to establish an arbitration tribunal to resolve the dispute. The Arbitration Agreement signed on 19 April 2001 in Paris by the Parties stipulates in article II that, '[r]uling in accordance with international law and in particular with international civil service law, the Tribunal is asked to say whether article 22(*b*) of the Agreement is applicable to former UNESCO officials residing in France and drawing, after separation from service, a retirement pension paid by the United Nations Joint Staff Pension Fund'."

15. Each Party appointed an agent. UNESCO appointed Mr. Stany Kol and France appointed Mr. Ronny Abraham.

The place of arbitration is Paris.

The language of arbitration is French.

The Tribunal appointed Mr. Ousmane Diallo, Clerk, to assist it.

16. In accordance with the provisions of article VI of the Arbitration Agreement and part V(*c*) of the mission statement, the following pleadings were submitted during the written phase:

(*a*) Memorial by UNESCO on 16 August 2001;

(*b*) Counter-memorial by France on 12 December 2001;

(*c*) Reply by UNESCO on 12 March 2002;

(*d*) Rejoinder by France on 10 June 2002.

17. The written proceedings were declared closed by the Tribunal on 30 August 2002.

The oral proceedings were conducted in hearings in camera on 30 August 2002 in Paris.

During the hearings the following persons presented oral arguments and replies:

- On behalf of UNESCO, Mr. Stany Kol, Mr. Christian Dominice and Mr. Witold Zyss;
- On behalf of France, Mr. Ronny Abraham and Mr. Jean-Pierre Cot.

The Tribunal then commenced its deliberations on 31 August 2002.

* * *

18. The following submissions were put forward during the written proceedings and reiterated at the conclusion of the oral proceedings:

19. On behalf of UNESCO

In its memorial

- As its principal submissions:

(1) That article 22(*b*) of the Headquarters Agreement of 2 July 1954 is applicable to former UNESCO officials residing in France and drawing, after separation from service, a retirement pension paid by the United Nations Joint Staff Pension Fund;

(2) That, in consequence, retired officials are exempt from any direct tax on the said pension;

(3) That the amount of the said pension should not be considered in determining the tax rate on the income subject to direct tax;

(4) That a withdrawal settlement paid in lieu of all or part of a pension is also exempt from any direct tax.

- As its subsidiary submissions, in the event that complete exemption is not recognized:

(1) That by application of article 22(*b*) retired officials are exempt from any direct tax on a portion of their pension which shall not be less than 70 per cent;

(2) That only the taxable portion of the pension shall be considered in determining the tax rate on the income subject to direct tax;

(3) That a withdrawal settlement paid in lieu of all or part of a pension is also exempt from any direct tax.

In its reply

- As its principal submissions:

(1) That article 22(*b*) of the Headquarters Agreement of 2 July 1954 is applicable to former UNESCO officials residing in France and drawing, after separation from service, a retirement pension paid by the United Nations Joint Staff Pension Fund;

(2) That, in consequence, retired officials are exempt from any direct tax on the said pension;

(3) That the amount of the said pension should not be considered in determining the tax rate on the income subject to direct tax;

(4) That a withdrawal settlement paid in lieu of all or part of a pension is also exempt from any direct tax.

- As its subsidiary submissions, in the event that complete exemption is not recognized:

(1) That by application of article 22(*b*) retired officials are exempt from any direct tax on a portion of their pension, which shall not be less than 70 per cent;

(2) That only the taxable portion of the pension shall be considered in determining the tax rate on the income subject to direct tax;

(3) That the withdrawal settlement paid in lieu of all or part of a pension is also exempt from any direct tax.

20. On behalf of France

In its counter-memorial [it asked the Tribunal]:

(1) To find that article 22(*b*) of the Agreement of 2 July 1954 is not applicable to former UNESCO officials residing in France and drawing, after separation from service, a retirement pension paid by the United Nations Joint Staff Pension Fund;

(2) To hold that it is not a matter for the Tribunal to decide whether there exists a general rule of international law exempting from tax the pensions paid to former international civil servants;

(3) Subsidiarily, to find that in any event there is no general rule of international law requiring France to exempt from tax the retirement pensions paid to former UNESCO officials residing in its territory;

(4) To reject the subsidiary submissions of UNESCO regarding the exemption of a portion of the retirement pension.

In its rejoinder [it asked the Tribunal]:

(1) To find that article 22(*b*) of the Agreement of 2 July 1954 is not applicable to former UNESCO officials residing in France and drawing, after separation from service, a retirement pension paid by the United Nations Joint Staff Pension Fund, whether that pension is paid periodically or in the form of a withdrawal settlement in lieu of all or part of the pension;

(2) To reject the subsidiary submissions regarding the exemption of a portion of the retirement pension as having no basis in law.

* * *

21. During the oral proceedings, each of the Parties reiterated its final written submissions and developed them.

After closure of the hearings, France distributed the notes of the oral arguments of Mr. Ronny Abraham and Mr. Jean-Pierre Cot.

On the instructions of the Tribunal, the Clerk advised UNESCO that it too was allowed to transmit to the Tribunal the notes of its oral arguments. That was done. UNESCO transmitted its notes by letter dated 3 September 2002. Previously, it had furnished the Tribunal and the other Party with a document containing its submissions as set out in its reply.

* * *

22. The Tribunal, having been authorized by the Parties to determine its own procedure, subject to the provisions of the Arbitration Agreement, and to decide any question concerning the conduct of the arbitration, indicated that "it would, if necessary, to determine a question of procedure, resort mutatis mutandis to the rules applicable to the International Court of Justice". The Tribunal takes "rules" to mean not only the Statute of the International Court of Justice and its Rules of Court but also the Resolution concerning the Internal Judicial Practice of the Court, the Tribunal being empowered to interpret the phrase "mutatis mutandis".

* * *

23. The question submitted to the Tribunal is as follows: the Parties have asked it:

> ". . . to say whether article 22(*b*) of the Agreement is applicable to former UNESCO officials residing in France and drawing, after separation from service, a retirement pension paid by the United Nations Joint Staff Pension Fund".

24. Although the Parties agree on the definition of the point in dispute and the general jurisdiction of the Tribunal, their positions nevertheless diverge on some points.

25. In the view of UNESCO, the Tribunal should arrive at its interpretation according to the rules and principles now prevailing, as it would in interpreting agreements that in one way or another concern international civil servants; and if two different interpretations are possible, it should choose the one that is consistent with the rules and principles that apply in the legal realm of international organizations and that govern their agents.

26. France declares itself in agreement with that statement.

27. In the view of UNESCO, the Tribunal should carry out its mandate within the limits of article II of the Arbitration Agreement, but taking into consideration everything it mentions. There is an important component of the definition of its mandate that the Tribunal may not neglect. It must decide what is meant by the phrase in the Arbitration Agreement, "ruling in accordance with international law and in particular with international civil service law".

UNESCO adds, with reference to the scope of application of the Headquarters Agreement, that article 22(*b*) should be understood in the light of the state of the economy and the content of the Agreement.

28. In the view of France, the question at hand is the applicability of article 22(*b*) to a specific situation, and the Headquarters Agreement sets forth the obligations of the host State of UNESCO, not those of the State of residence of former UNESCO officials.

France stresses that the object and purpose of the Agreement, as a headquarters agreement, is to specify the conditions under which UNESCO is to operate in French territory, rather than to regulate the tax position of former UNESCO officials.

France, then, draws a distinction between the host State and the State of residence and their different obligations, a point that UNESCO notes but argues is irrelevant to the case in hand. In the view of France, it is not the task of the Tribunal to determine whether there exists a general rule of international law requiring any State in which a former international civil servant resides to exempt such a person from tax on his or her retirement pension.

29. UNESCO is in agreement on the latter point.

30. In short, France considers it sufficient to decide whether article 22(*b*) is meant to apply only to active officials or to former officials as well.

France thus urges the Tribunal to consider the issue of its jurisdiction and to speak solely to the question of the applicability of article 22(*b*) of the 1954 Agreement to former UNESCO officials.

31. The positions of the Parties have therefore moved closer together but are not identical on every point.

UNESCO objects that France would limit the Tribunal's reliance on international law and in particular international civil service law merely to the rules of treaty interpretation. Recalling a recent judgment of the International Court of Justice in

the case concerning *Kasikili/Sedudu Island* (*Botswana/Namibia*) (Judgment of 13 December 1999, *I.C.J. Reports 1999*, p. 1045), UNESCO cites article I of the arbitration agreement in that case and points out that the Court, responding to Botswana's argument that the reference to the "rules and principles of international law" covered only the "rules and principles of treaty interpretation", notes:

> "Even if there had been no reference to the 'rules and principles of international law', the Court would in any event have been entitled to apply the general rules of international treaty interpretation for the purposes of interpreting the 1890 Treaty. It can therefore be assumed that the reference expressly made, in this provision, to the 'rules and principles of international law', if it is to be meaningful, signifies something else. In fact, the Court observes that the expression in question is very general and, if interpreted in its normal sense, could not refer solely to the rules and principles of treaty interpretation." (*I.C.J. Reports 1999*, p. 1102).

On that basis, UNESCO argues that the Tribunal should ascribe the proper meaning to the opening phrase of article II of the Arbitration Agreement, following the principle that the terms used by the Parties in a treaty provision should be interpreted in accordance with their ordinary meaning.

However, in the present dispute, "UNESCO acknowledges that the expression appearing in article II of the Arbitration Agreement has a special meaning". According to UNESCO, the article is structured somewhat differently from article I of the arbitration agreement between Botswana and Namibia.

Lastly, UNESCO merely maintains that the expression used in article II of the Arbitration Agreement in the present case "sheds light on the interpretation to be given to article 22(*b*) of the Headquarters Agreement". UNESCO does not claim that there is a legal basis other than article 22(*b*) of the Headquarters Agreement on which the Tribunal could formulate the answer to the question put to it. Moreover, UNESCO denies that it has invoked an alleged custom regarding former officials.

Therefore, on the point discussed above, the Parties are in agreement.

France for its part concludes its arguments by maintaining that "nothing prevents a host State from assuming obligations in the headquarters agreement that are not connected with the functioning of the organization". Moreover, it acknowledges that international agreements may create subjective rights for former officials. It points out, however, that, the organization may be bound by certain obligations (such as reimbursement by the United Nations of the tax collected on pensions of former officials) without there being a parallel obligation on the member States, since the "internal rules of the international organization are not ipso facto binding on member States".

* * *

32. It is not disputed that the Tribunal should interpret article 22(*b*) "in accordance with international law and in particular with international civil service law".

33. To do so raises a series of questions, which the Tribunal will examine one at a time.

First of all, the Tribunal must examine its mandate and determine the limits of its jurisdiction, as the Parties have asked it to do.

34. In its memorial, speaking of the Tribunal's mandate, UNESCO argues:

> "[A]rticle 22(*b*) of the Headquarters Agreement, the scope of application and effects of which the Tribunal is asked to determine in article II of

the Arbitration Agreement, stipulates that the salaries and emoluments paid to UNESCO officials shall be exempt from taxation. The appropriate interpretation to be given to this provision will later be thoroughly examined. What should be emphasized here is that the reference to article 22(*b*) definitely covers the tax regime on retirement pensions in all its aspects. The Tribunal thus has full powers to assess the matter."

35. In its counter-memorial France states:

"The Tribunal does not have a mandate to rule definitively on the tax regime on retirement pensions in all its aspects, and its power to make an assessment is not unlimited."

It goes on to clarify:

"It is not its task to determine whether there exists a general rule of international law requiring any State in which a former international civil servant resides to exempt such a person from tax on his or her retirement pension."

36. In its reply UNESCO, reverting to the topic of the Tribunal's mandate, says:

"[T]he Tribunal's jurisdiction and the limits placed on it are determined by the Arbitration Agreement between the Parties and in particular by article II of that Agreement."

Hence, UNESCO, like France, considers that the Arbitration Tribunal should not exceed the jurisdiction conferred upon it by the Parties but should exercise that jurisdiction to its full extent.

* * *

37. The Tribunal notes that the Parties are ultimately in agreement that, as UNESCO puts it in its reply:

"The issue is thus the tax regime applicable to such a pension; it must be determined whether the pension should enter into the calculation of the tax that must be paid by a former official who continues to reside in the host State of the organization."

38. The question before the Tribunal, therefore, is to decide whether article 22(*b*) of the Headquarters Agreement is or is not applicable to retirement pensions. The Tribunal will focus on this question. In that regard, it observes that article 22(*b*) does not elaborate on the nature of the "salaries and emoluments" that it exempts from tax, except to state that they pertain to officials.

* * *

39. The interpretation the Tribunal is called upon to make of article 22(*b*) of the Agreement in the light of international law and in particular international civil service law is to decide whether it applies to former officials of the organization residing in France and drawing a pension.

It should be recalled that, when the parties to a dispute have signed an arbitration agreement, the scope and limits of the jurisdiction of the arbitration tribunal called upon to settle the dispute must be looked for in that agreement. The International Court of Justice recalls the principle, notably in the case concerning the *Continental Shelf (Libyan Arab Jamahiriya/Malta)* (*I.C.J. Reports 1985*, p. 23, para. 19).

In the present case, the Arbitration Agreement signed by the Parties has not been amended, so that the Tribunal has only to apply it as it was signed.

40. The jurisdiction of the Tribunal is clearly defined. With regard to the significance it should give to the words "ruling in accordance with international law and in particular with international civil service law", it considers that the definition of its jurisdiction, while specific, includes the obligation to apply (and thus to respect) international law and in particular international civil service law. This means that in arriving at its interpretation it cannot ignore or violate a principle or law of international law that applies to its mission. But that obligation also has limits, in that the answer to the question submitted to the Tribunal in the Arbitration Agreement is to be sought in article 22(*b*) and only there. The task of the Tribunal is not, therefore, on the basis of some principle or rule of general international law, to alter what the Parties have decided. Such an approach, reminiscent of an annulment proceeding, would clearly exceed the power that the Parties have conferred on the Tribunal in the Arbitration Agreement. That power is limited to determining, in the light of international law, what the Parties have decided and to spell it out. In other words, the power of the Tribunal does not authorize it to say that the Parties could not have taken such and such a decision because it would have been contrary to this or that principle or rule of international law, but merely to elucidate what the Parties really decided, clarifying it in the light of international law and in particular international civil service law. These are two different approaches, which the Tribunal understands that it should not confuse.

More specifically, the Tribunal wishes to clarify at the outset that it does not see its task as one of seeking and applying a principle or rule of international law that would allow it to confirm (or deny) that the retirement pension paid by the United Nations Joint Staff Pension Fund to former UNESCO officials residing in France is taxable. This is what the Parties meant by saying that they are not maintaining that there exists a legal basis for exempting retirement pensions from taxation other than article 22(*b*) of the Headquarters Agreement.

The jurisdiction of the Tribunal thus focuses on a limited aim, which is, once again, to interpret article 22(*b*). It involves determining whether the term "officials" is meant to include "retired officials" and whether the phrase "salaries and emoluments" is meant to include "retirement pensions". The answer to one of these two questions will, as we shall see below, largely determine the interpretation the Tribunal is called upon to make.

41. To answer these questions, the Tribunal must first take into account that it is interpreting a treaty. In its task of interpretation it will therefore have to apply the rule set forth in article 31 of the Vienna Convention on the Law of Treaties of 1969 and the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations of 1986. That article applies in this case, as the Tribunal will explain below, despite article 4 of the 1969 Convention, which limits its scope "to treaties which are concluded by States after the entry into force of the present Convention with regard to such States".

As the International Court of Justice has had occasion to recall (*Kasikili/Sedudu Island, I.C.J. Reports 1999*, p. 1059), article 31 expresses a rule of customary law. According to article 31, paragraph 1, "[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose". The first thing to consider, then, is the ordinary meaning to be given to the word "officials" (*fonctionnaires*), first of all, and then to the words "salaries" (*traitements*) and "emoluments" (*émoluments*).

42. Next, in an effort to determine the intent of the Parties, the Tribunal will try to discover what they mutually intended when they framed the wording of article 22(*b*). With the same aim, it will research the subsequent practice of the Parties or any other legal element that can be taken to be an amendment of the provisions of article 22(*b*) or a mutual interpretation of its scope.

43. As indicated earlier, the claim of UNESCO is in two parts, a principal part and a subsidiary part. The Tribunal will consider the parts in that order.

44. First, the Tribunal will recall the positions of the Parties, which it summarizes as follows:

UNESCO maintains that the exemption of officials from taxation as provided in article 22(*b*) extends to retired officials residing in France.

France considers that article 22(*b*) applies only to officials in active service.

45. Article 31 of the Vienna Convention on the Law of Treaties recommends that, in interpreting a treaty, the terms of the treaty should be given their ordinary meaning "in their context and in the light of its object and purpose".

The 1954 Agreement is the UNESCO Headquarters Agreement. It should also be recalled (as mentioned earlier) that the entire text of article 22 of the Headquarters Agreement relates to "officials governed by the provisions of the Staff Regulations of the Organization".

46. The Tribunal's first step should be to determine the "ordinary meaning" of the terms employed in article 22(*b*) of the Agreement.

47. The Tribunal must first consider the meaning of the word "official". In that regard, one can say that in its current and commonly accepted meaning, the word "officials" (in the plural) does not include officials who are no longer in active service. In the Arbitration Agreement, the Parties themselves speak of "former officials". That expression does not seem, even for them, to be synonymous with "officials".

The Tribunal considers that the ordinary meaning of the word "officials" does not include former officials.

The *Petit Larousse* defines an "international official" [or "international civil servant"] as an "agent of an international organization under a statutory or specific contractual regime". According to this definition, when the agent is no longer an agent of the organization, he or she ceases to be an official. In effect, the link that endows the individual with the status of an official is broken upon retirement. It can no longer be said that the former official is governed "by a statutory or specific contractual regime". The fact that the individual may maintain certain ties to the organization, or that the staff regulations may make reference to former officials, is not sufficient reason to conclude that the person retains the status of official (or contractual staff member).

According to the *Dictionnaire de la terminologie du droit international* (edited by Jules Basdevant), Sirey, 1960, "international official" [or "international civil servant"] is a "term introduced in the modern era to designate a person who is entrusted with carrying out on a regular basis certain functions of international significance by virtue of an intergovernmental agreement on behalf and under the supervision of several States or an international organization".

The *Dictionnaire de droit international public* (edited by Jean Salmon), Bruylant, 2001, states that an "international official" [or "international civil serv-

ant"] is a "person entrusted, on the basis of an agreement among States or by an international organization, with carrying out functions of international significance on their behalf and under their supervision, on a statutory basis, for a fixed or indefinite term".

It is also useful to consider the notion of retirement. In that regard, the explanation cited below shows that the position of the official and that of the retiree (or former official) are so different as to be incompatible.

As it happens, *Le vocabulaire juridique* published by the Association Henri Capitant (edited by Gérard Cornu), Presses Universitaires de France, 1987, after defining "retirement", goes on to say that, "for military officers, *unlike civilian officials*, retirement is a statutory position characterized by the continuance of their status beyond their separation from service with the armed forces" (italics added by the Tribunal).

It therefore appears to the Tribunal that the term "officials" used in article 22(*b*) does not extend to former officials. That is its first conclusion.

48. Second, the Tribunal must consider how the words "salaries and emoluments" (*traitements et émoluments*) are to be understood.

"*Traitement*" [rendered in English as "salary"] is the word that has traditionally been used in French to refer to the remuneration associated with the performance of a civil service function, either in government or in an international organization.

The Tribunal should not make too much of the fact that in the internal rules of some organizations, including UNESCO, and in French administrative law the retirement pension is often presented as an extension of the salary. In that very line of thought, in any case, it is clear that the terms, in their ordinary meaning, are not synonymous. Moreover, even on the assumption that the modern notion of "salary benefits" includes not only the pay received during active service but also the retirement benefits, for purposes of weighing the attractiveness of the job, the Tribunal has been presented with no evidence that that would alter the ordinary meaning that should be given to the words "salaries" and "emoluments" in article 22(*b*) of the 1954 Agreement. The Tribunal is obliged to adhere to the ordinary meaning of the words, which does not include the notion of retirement pension in the context and in the light of the purpose of the Agreement. That purpose, as the Tribunal has already noted, was to set forth the privileges and immunities of UNESCO.

In the view of the Tribunal, the problem at hand does not hinge on whether the retirement pension is or is not in reality an extension of the salary. All the Tribunal has to decide is whether, in the application of the provisions of article 22(*b*) and in the light of international civil service law, the retirement pension is a salary. Its answer to that question is no.

49. The term "emoluments" (*émoluments*) is less precise than the word "salaries". In the singular, "*émolument*" [in French] is any sum paid by way of benefit, profit, interest or gain. In the plural [and in English usage], as it appears in article 22(*b*) of the Agreement, it is generally understood to mean income resulting from an employment or office and any sum paid by way or in lieu of a benefit. According to the *Dictionnaire de l'Academie*, "*émoluments*" means "all sums received by an official when, in addition to his or her fixed salary, subject to the withholding of a pension contribution, are added compensation and allowances not subject to such withholding". A straightforward reading of this definition shows that the recipient of the emoluments in question already receives a "fixed salary, subject to the with-

holding of a pension contribution"; the reference is to an "official" and reinforces the meaning that the Tribunal has attributed to the word "official". A pension is clearly not included among the examples of emoluments. Therefore, it is difficult to conclude that the word "emoluments" used in the 1954 Headquarters Agreement covers anything other than the various forms of compensation and allowances that constitute supplementary elements of remuneration and may be granted in addition to the official's salary in the strict sense.

In the Tribunal's view, the term "emoluments" used in the Agreement comprises only the various forms of compensation and allowances paid to officials as reflected in the phrase in Article 32, paragraph 8, of the Statute of the International Court of Justice, which provides that the "salaries, allowances and compensation" of the judges and the Registrar shall be free of all taxation.

Moreover, a look at the context of the disputed provision shows that all the other provisions of article 22 of the Agreement are applicable only to officials in active service. Since the chapeau of the article heads subparagraphs (*a*) to (*h*), all those provisions should apply to former officials as well if they were intended to be included in the term "officials". It appears that that is not the case.

It is important to note that an agreement concluded between the same parties, which was signed in Paris on 14 November 1974 and entered into force on 21 January 1976 (*Journal officiel de la République française*, 1 March 1976, p. 1398), concerning the establishment and operation of the International Centre for the Registration of Serial Publications, in article 15, paragraph 1, expressly stipulates:

> "Staff members of the Centre with permanent appointments in categories I, II and III, as defined in annex II to this Agreement [the Director, officials of the Centre, administrative and technical personnel] shall be exempt from all direct taxation on salaries and emoluments paid to them for their activities at the Centre, excluding retirement pensions or survivors' benefits."

50. It could be argued that the fact that retirement pensions and survivors' benefits are expressly excluded in the above provision and not in the 1954 Agreement means that the Parties intended to include them in the latter case.

The Tribunal does not share that view. It could also be argued that the 1974 agreement shows that the use of the term "staff members of the Centre" leaves a doubt as to the status of such staff members that must be clarified, whereas when the Parties use the term "officials", as in the 1954 Agreement, there is not a shadow of a doubt in their minds what they mean by the word.

In the provision cited above, the terms "salaries and emoluments" are juxtaposed with the terms "retirement pensions" and "survivors' benefits". This confirms that UNESCO and France are not confusing the words in quotation marks with one another.

Thus, by excluding retirement pensions from the notion of "salaries and emoluments" in another agreement, the Parties show that retirement pensions are not salaries or emoluments.

The example of other headquarters agreements that do include retirement pensions in the exemption from taxation, such as the Agreement between the Republic of Austria and the United Nations regarding the Seat of the United Nations in Vienna of 29 November 1995, which superseded the Agreement regarding the Headquarters of the United Nations Industrial Development Organization (UNIDO) of 13 April 1967, are instructive in this regard. In those cases, the parties are exercising the

freedom allowed them by the Convention on the Privileges and Immunities of the United Nations of 13 February 1946 (hereinafter "the General Convention") to decide what provision they wish to make regarding exemption of retirement pensions from taxation. In relation to Austria, moreover, UNESCO expresses that idea when it states that "exemption of the pensions of retired international officials is a matter of political will".

The same reasoning applies to the European Union regulations exempting retirement pensions from tax. An express provision is required to institute the exemption.

51. In the light of the above, the Tribunal concludes that, based on the ordinary meaning of the terms of the Agreement and their context, the word "officials" does not include retired officials and the words "salaries and emoluments" do not cover retirement pensions.

* * *

52. Notwithstanding the above conclusion, the Tribunal must now consider whether the Parties nevertheless intended retired officials to be covered by the term "officials" and their pensions to be covered by the terms "salaries and emoluments" as used in article 22(*b*) of the Agreement.

The Tribunal will now address this question.

53. In other words, even though the Tribunal has arrived at the conclusion that the word "officials" does not apply to retired officials and the words "salaries and emoluments" do not apply to pensions drawn by retired officials residing in France, it is possible that the Parties, at the time they signed the 1954 Agreement, meant for the benefits of the provisions of article 22(*b*) to extend to retired officials.

The Tribunal has to consider whether that is the case and must determine whether the Parties intended to give a special meaning, in the sense of article 31, paragraph 4, of the Vienna Convention on the Law of Treaties, to the terms "officials" and "salaries and emoluments".

54. The Parties are in agreement that article 22(*b*) is modelled on article V, section 18 (*b*), of the General Convention of 1946. They do not dispute the fact that the latter provision does not exempt retirement pensions. They admit that the Subcommission on Privileges and Immunities established by the Sixth Committee of the United Nations, after considering the question of exempting retirement pensions from taxation, reserved the right to revert to the issue, if necessary, and decided that provisions to that effect should not be included in the General Convention.

55. Clarifying the situation, the Secretary-General of the United Nations, in a report on the proposal concerning staff pension and provident funds and related benefits, said that every agreement concerning tax exemption should include a clause exempting from taxation the allowances payable by way of pensions or family allowances, even if domestic laws did not exempt them.

He concluded that it was advisable to include in agreements on tax immunity an article providing for such immunity for payments made under the regulations and rules of the pension fund, family allowances and education grants.

In other words, he left it to the parties to an agreement on privileges and immunities to decide what provision to make in that regard. This is the path followed by the parties to an agreement of that type, particularly with regard to the exemption of retirement pensions from taxation.

56. During the negotiations leading to the 1954 Agreement, did France and UNESCO discuss the question of exempting pensions from taxation?

57. According to UNESCO, it was hardly aware of the problem of the eventual taxation of retirement pensions by the host State. Its records offer no evidence on that point, although they reveal that the wording of other aspects of the Agreement received careful scrutiny. The question, according to UNESCO, never seems to have held the attention of the negotiators.

UNESCO explains that that fact is readily understandable given the context. When UNESCO was established in 1946, it was decided that a provisional agreement should be concluded pending the adoption of a convention on privileges and immunities that would be applicable to France and UNESCO. With the adoption of the Convention on the Privileges and Immunities of the Specialized Agencies in 1947, the General Conference authorized the Director-General to negotiate a definitive agreement, in the event the 1954 Agreement, envisaged as complementary to that Convention, which, it was believed at the time, France would quickly ratify.

According to UNESCO, another reason was that the number of retired officials was still negligible when the 1954 Agreement was concluded, and no one dreamed at the time how much the retirement system would grow. The expansion has been great, to the point that today there are 68,935 participants in the United Nations Joint Staff Pension Fund and the benefits paid out amount to US$ 1,997,654,590.

UNESCO acknowledges that the explicit inclusion of a provision in the Convention on the Privileges and Immunities of the United Nations to exempt retirement pensions from taxation, although originally contemplated, was deferred. But it explains that, at the time that France and UNESCO concluded their provisional agreement and later their definitive agreement, the question did not appear to have assumed any importance in the elaboration of the texts and there did not seem to be any intention of dealing with it.

UNESCO deduces from this that it would be surprising if the negotiators of the 1954 Agreement did in fact have a clear idea, whether for or against exemption, about the tax status of the pensions that future retired officials of UNESCO would be drawing.

It notes, moreover, that other aspects of international civil service regulations were still in the process of being worked out and would be defined only little by little.

58. According to France, on the other hand, in 1954 the two Parties could have included a provision in the Headquarters Agreement exempting retirement pensions, if that had been their intention. By way of example, France cites the headquarters agreement between Austria and UNIDO, which did provide for such an exemption. It adds that most headquarters agreements adopt the formula of the General Convention of 13 February 1946 and do not make retirement pensions tax-exempt.

In France's view, derogations from the norm are always made explicit, and the negotiators of the 1954 Agreement were well aware of what was at stake. Yet they opted to adhere to the formula taken from the General Convention.

* * *

59. The two views sketched out above bear on the question of whether the Parties, at the time they negotiated the Headquarters Agreement, did or did not de-

liberately decide that pensions would not be included in the exemption from taxation stipulated in article 22(*b*).

Posed in this way, the question cannot be answered yes or no, although UNESCO argues that the negotiators of the Agreement ignored the question of the retirement pensions, since it did not seem important at the time. In any event, it is a fact that at the time the 1954 Headquarters Agreement was being negotiated, the General Convention had been adopted, and the *travaux préparatoires* that had preceded it were in existence.

60. In this matter, the problem as the Tribunal sees it is the following: Is it reasonable to assume that in 1954 the negotiators of an agreement as important as the Headquarters Agreement between France and UNESCO were unaware of the events surrounding the negotiations that led to the General Convention of 1946?

61. The Tribunal can answer this question easily. It cannot accept the hypothesis that the Parties in 1954 were unaware that in 1946 the issue of exempting pensions from taxation had been raised, that it had not been resolved in the General Convention and that, in the light of subsequent developments, the issue had been referred to individual future agreements. That would be tantamount to accusing the negotiators and the Parties they represented of a degree of negligence inconceivable at that level of responsibility. Parties to a treaty are presumed to know the rules of international law that are current at the time they are negotiating and making decisions and in particular to know the rules likely to affect their future obligations. To reject such a principle would be to leave the door open to an unacceptable level of legal uncertainty. The Tribunal, therefore, is not asking whether the Parties in fact, when negotiating the Headquarters Agreement, did or did not discuss the state of international civil service law at the time with particular reference to the issue of retirement pensions. What matters to the Tribunal is that such law existed and that they were aware of it. The Parties are presumed to have been aware of the state of international civil service law at the time they negotiated and to have taken it into account. That presumption is one of the keys to illuminating the meaning of article 22(*b*), as the Parties have asked. The Tribunal is forced to the conclusion that, if the Parties had wished article 22(*b*) to apply to retired officials and their retirement pensions, they would specifically have said so, in accordance with the rules applicable to the matter that they were regulating by mutual agreement. Therefore, the Tribunal believes that France and UNESCO were fully aware of what they were doing when they framed the wording of article 22(*b*) as it stands.

The Tribunal deduces that in 1954 France and UNESCO, which could not have been unaware that the issue of exemption of retirement pensions from taxation had been raised during the elaboration of the General Convention of 1946 and yet had not been resolved in that Convention, chose not to address it. That is sufficient reason for the Tribunal to conclude that article 22(*b*) does not cover the issue. Hence, the Tribunal finds that the Parties did not intend to give the terms "officials" and "salaries and emoluments" a special meaning different from the ordinary meaning it identified above.

62. Having thus resolved the problem of the intention of the Parties at the time the Agreement was concluded, the Tribunal must consider that the Parties, in their subsequent practice, might have given the terms in question a different interpretation. It now has to examine whether they altered the meaning they had given to the terms originally through a decision or through their behaviour. Such a modifica-

tion could have resulted from a subsequent agreement between the parties or from mutual practice.

There has been no agreement of a kind just described between the Parties. It should be recalled, however, that in the agreement mentioned earlier concerning the establishment and operation of the International Centre for the Registration of Serial Publications, concluded between the same Parties at Paris on 14 November 1974, the "staff members of the Centre with permanent appointments in categories I, II and III, as defined in annex II" are identified as being "the Director, officials of the Centre, administrative and technical personnel". According to the same provision, these staff members are "exempt from all direct taxation on salaries and emoluments paid to them for their activities at the Centre, excluding retirement pensions and survivors' benefits." It appears from these provisions, as the Tribunal has already noted, that as between the Parties retirement pensions and survivors' benefits are excluded from salaries and emoluments.

What has been the subsequent practice of the Parties?

This is the question that the Tribunal will now consider.

63. If a practice has been established in the application of the 1954 Agreement involving an interpretation which tends to extend the provisions of article 22(*b*) to retired UNESCO officials resident in France, the Tribunal must take due account of it.

64. Before verifying that hypothesis, it should be noted that the Parties are in disagreement regarding the nature of the practice subsequent to the Agreement, which must be taken into account.

65. UNESCO argues that the practice of a State consists of the acts, attitudes and conduct of all its organs, including the administration. It maintains that in this case, the important issue is the day-to-day attitude of the administration, whether or not it was strictly applying a particular directive. In fact, retired UNESCO officials did benefit from a liberal attitude for some 40 years, and they could in good faith consider that attitude as being, if not the rule, which was the position of UNESCO as such, at least so solidly established that it had a bearing on the choice of residence made by many of them on reaching retirement age.

UNESCO does not deny that the French authorities neither recommended nor supported or confirmed that practice of the tax administration. It therefore sees a difference between the stated position and the observed practice. It argues that, when France recalls that its tax system is declaration-based (so that there may be de facto non-taxation, even where the person concerned would normally be subject to taxation), it is essentially imputing the long-standing practice of the tax administration to the actions of UNESCO or to the conduct of some of its retired officials. UNESCO further states that the real situation is totally different from that described by France and that one might wonder why, if the French administration merely lacked the necessary information to tax the retirement pensions, it waited so long before taking action aimed at taking them.

UNESCO observes that there is a coincidence between the steps that have been taken and the changes in position towards the retired officials. UNESCO further points out that article 170 of the General Tax Code, which states that only taxable income is to be declared, is the reason why many retirees did not indicate the amount of their pension on their tax declarations, especially since, under the long-standing practice of the tax administration, those pensions were not taxed.

66. The position of France, on the contrary, is that the practice followed by the tax administration was at most a form of tolerance or courtesy and that, in relation to the concept of "subsequent practice" (since an international obligation is involved), only the positions of authorities competent to enter into commitments on behalf of the State should be taken into account when seeking to determine whether the Parties have made a treaty interpretation. As France sees it, the authorities have officially taken a position in that regard on a number of occasions. France points out that in 1956 the Secretary of State for the Budget, replying to a parliamentary question, stated that the pensions of former UNESCO officials were indeed subject to national taxation. Furthermore, the same position was stated before the Senate in 1994. In explanation of the attitude of the tax administration, France recalls that the French tax system is declaration-based and that as a result taxation cannot take place if no declaration is forthcoming. If the relevant information is received subsequently from other sources, a tax adjustment takes place.

France argues that the obligation to provide details of the payees and the amounts paid lies with the "paying party". However, on two occasions, in 1988 and 1991, UNESCO rejected requests from the French administration to inform it of the amounts paid to its former officials. France goes on to argue that this is the reason why for many years many retired officials could not be charged income tax in France.

67. The Tribunal therefore has to decide a preliminary issue: it must determine who should be the originators of a practice that, if the two Parties agree, can be considered as an interpretation of the Agreement. This problem clearly has two aspects. The first relates to the status of the originators of the relevant practice; the second concerns the agreement of the Parties upon the practice in question.

68. The Tribunal sees the situation as follows: in explanation of the period during which, and the cases in which, the pensions of the retired officials were not taxed, France adduces its taxation system and the negative attitude of UNESCO towards the tax administration. As to the authorities competent to enter into commitments on behalf of the State, its position has not changed.

69. UNESCO considers that the tax administration, by not taxing the retired officials, established a practice, which UNESCO itself has tacitly accepted, so that it does not have to provide information to enable the taxation of its former officials.

70. The Tribunal holds that the supposed interpretation of a provision of a treaty by the parties to that treaty, and which may result from "subsequent practice", must be based on an unequivocal common position of the parties. The purpose of recourse to subsequent practice as a means of interpretation of an agreement is to establish the unequivocal agreement of the parties regarding the interpretation of a clause of that treaty. The Tribunal resorts to subsequent practice only to verify the correctness of the conclusion it has reached as to the intentions of the Parties. This observation might prima facie give the impression that the Tribunal is inclined to favour the opinion whereby such an interpretation can be revealed only by the authorities competent to bind the State internationally.

That is not the case.

71. The Tribunal considers that the solution to the aforementioned problem is less clear-cut. This is demonstrated by analysis of the jurisprudence of the International Court of Justice and of its predecessor, the Permanent Court of International Justice, and by an examination of legal doctrine.

Recourse to "subsequent practice" as a means of interpretation was solidly established in the practice of treaty interpretation prior to the 1969 Vienna Convention on the Law of Treaties, with just a few reservations. This can be seen, for example, in the advisory opinion of the Permanent Court of International Justice on the *Competence of the International Labour Organization to Regulate Agricultural Labour* (*P.C.I.J., 1922*, Series B, No. 2, p. 39) or the judgment of the International Court of Justice in the *Corfu Channel* case (*Corfu Channel, Merits, Judgment, I.C.J. Reports 1949*, p. 25). This is why the International Law Commission included subsequent practice in article 3, paragraph 3, of the 1969 Vienna Convention as an "authentic element of interpretation" to be taken into account together with any agreement regarding the interpretation of the treaty (*Yearbook of the International Law Commission, 1966*, vol. II, p. 221). In its commentary, the Commission states that "an agreement as to the interpretation of a provision reached after the conclusion of the treaty represents an authentic interpretation by the parties which must be read into the treaty for purposes of its interpretation" (ibid., para. 14). It goes on to state: "The importance of such subsequent practice in the application of the treaty, as an element of interpretation, is obvious; for it constitutes objective evidence of the understanding of the parties as to the meaning of the treaty." However, the Commission stated no explicit opinion as to who could be the originator of the practice in question.

72. The question under consideration by the Tribunal has been dealt with by the International Court of Justice in a number of decisions, such as the case concerning *Sovereignty over Certain Frontier Land* (*I.C.J. Reports 1959*, pp. 227-230) and the case concerning the *Temple of Preah Vihear* (*I.C.J. Reports 1952*, pp. 32-33). The same is true of the case concerning *Kasikili/Sedudu Island (Botswana/Namibia)* (*I.C.J. Reports 1999*, pp. 1075-1092).

73. Thus, the Court has had to consider the conduct of organs other than those competent to bind the State internationally, in looking for practice having the effect of an interpretation of a treaty.

74. The Tribunal holds that the determining factor is the unequivocal expression of the position of the State. This position can arise equally out of declarations or acts of the authorities invested with treaty-making power or those of administrative organs responsible for applying the agreement. In either case, however, the position of the contracting State must be unequivocal, particularly in the case of a treaty which entails an obligation. For a State to be under an obligation as a result of an agreement, it must be possible to deduce that obligation clearly from the terms of the agreement as originally drafted or as amended or interpreted by the parties concerned.

In the present case there is a sharp discrepancy, which UNESCO itself has pointed out, between the declarations of authorities competent to express the position of the French State, on the one hand, and, on the other, the attitudes of the French tax administration. Moreover, in the case of the latter, it is not possible to deduce from its conduct an unequivocal position which would indicate its belief that article 22(*b*) of the 1954 Headquarters Agreement applies to retired UNESCO officials resident in France. Its stance has been anything but consistent from one place to another and has also varied over time.

It is therefore of little importance that UNESCO was not called upon to state its position one way or the other. The Tribunal holds that, where there is a difference between the conduct of the administration and that of the authorities competent to express the position of a State, precedence should be given to the latter.

Furthermore, for a practice as defined in article 31, paragraph 3(*b*), of the Vienna Convention on the Law of Treaties to be deemed to exist, there must be an indisputable concordance between the positions of the parties, and those positions must be such as to establish the meaning of a provision of the treaty.

75. UNESCO recognizes that there has been no such concordance; indeed, it states that the agreement of the Parties regarding interpretations of article 22(*b*) is not to be sought in subsequent practice.

UNESCO adds that the fact that the French tax authorities refrained from taxing the pensions, a situation which continued until recently, is the reason why UNESCO took no action, that it is self-sufficient and that there is no need for UNESCO to agree to it "in one way or another".

In any case, since the Tribunal has chosen to give greater weight to the conduct of the authorities competent to speak for France, the fact that UNESCO chose to express its position by remaining silent in response to the practice of non-taxation of retirement pensions by the tax administration would, in the case in hand, have no legal consequence for the Agreement.

76. The Tribunal is forced to the conclusion that, since the French authorities have always maintained that retired UNESCO officials do not benefit from the provisions of article 22(*b*) of the 1954 Agreement (although there have been lapses in the tax administration, on the one hand, and although UNESCO for its part has, as it were, remained silent until relatively recently), there has been no "subsequent practice" which can be considered as constituting an interpretation of the Agreement in a sense other than that which clearly derives from its terms and which coincides with the intentions of the Parties at the time of the negotiations.

77. Thus, the Tribunal concludes that, in relation to the application of article 22(*b*) of the 1954 Agreement, there has been no practice between France and UNESCO from which it could be deduced that an agreement has existed regarding an interpretation whereby the provisions of that article would apply to retired UNESCO officials residing in France. This conclusion is in conformity with the object and purpose of the Agreement and with the rule according to which tax exemption is functional and is justified by the desire to ensure the independence of the international civil service.

78. In this regard, the Tribunal emphasizes that the letter of 28 September 1987, in which the Minister-Delegate to the Minister of State for the Budget wrote that "the lump-sum settlement which some retired United Nations officials are entitled to request at the time of their retirement is not subject to income tax", does not change the conclusion it has reached. The Minister-Delegate's statement falls outside the scope of the question submitted to the Tribunal.

It should be recalled that the Tribunal has not been asked to determine whether the sums paid to retired UNESCO officials residing in France are wholly or partially subject to income tax. All the Tribunal has to do is to determine whether the exemption provided for under article 22(*b*) of the 1954 Agreement between France and UNESCO for the benefit of officials in active service is also applicable to officials who have retired from UNESCO and are residing in France.

79. The Parties have put forward several other arguments based on certain principles. Although it does not think that these principles are capable of altering the conclusions it has reached, the Tribunal nevertheless believes that it should consider them briefly, since the Parties have invoked them in support of their positions.

Specifically, the principles invoked are the following:

80. Equality of States.

This principle is invoked by UNESCO. The argument runs that, since the public funds available to international organizations consist of the contributions of States members of the organizations, it would be contrary to the principle of equality of States for one of them to take a portion of the funds in the form of taxes and so enrich itself to the detriment of the other States.

The Tribunal considers that the principle of equality of States, while incontestable, has no direct bearing on the question it is called upon to answer. The Tribunal is asked to determine what the Parties decided and expressed, with no subsequent amendment, in article 22(*b*) of the 1954 Agreement.

81. The principle of non-taxation of foreign public funds.

This principle, if indeed it is one, derives directly from the principle of equality of States. It was invoked by counsel for UNESCO.

The Tribunal holds that such a principle has no bearing on the mandate conferred by the Parties, the limits of which, as already emphasized, are relatively narrow.

82. The rule whereby the provisions of a treaty may create subjective rights for individuals.

Both Parties recognize the existence of this rule.

The rule is found in modern international law. It has often been applied by the International Court of Justice. In itself, however, it does not resolve the problem submitted to the Tribunal; nor can it substitute for one of the Parties to the 1954 Agreement a different natural or legal person, in this case the former officials of UNESCO residing in France. The problem submitted to the Tribunal, to repeat, is to decide whether the Agreement signed between France and UNESCO in 1954 did or did not give former UNESCO officials residing in France the right to be exempted from tax on their retirement pensions. Even if we follow the reasoning of UNESCO, the conclusion reached does not change the fact that the Parties to the 1954 Agreement are France and UNESCO, and that it is their mutual intention that the Tribunal must seek to determine in interpreting article 22(*b*).

83. The Noblemaire principle.

This principle is invoked by UNESCO.

According to the Noblemaire principle, conceived by the League of Nations and taken up by the United Nations, international officials (civil servants) should receive salaries equal to those offered in the highest-paid national civil service. The principle concerns both the States that establish an organization and the organization itself. Prospective international civil servants certainly take it into consideration when they choose their careers. However, it has no specific bearing on the line of reasoning the Tribunal is following in order to answer the question posed in article II of the Arbitration Agreement.

84. The continued existence of ties between the international organization and its officials even after their retirement.

UNESCO cited this rule or practice.

Although it is not contested that certain ties are maintained, notably the duty of discretion (as set forth in regulation 1.5 of the Staff Regulations and Staff Rules

of UNESCO), that finding has no bearing on the Tribunal's determination of the limits of the scope of article 22(*b*) of the 1954 Headquarters Agreement, which deals with the exemption from taxation of the salaries and emoluments of officials of UNESCO.

85. The principle of equal treatment.

This principle was invoked by UNESCO as applicable to its former officials.

The Tribunal finds that, although some States exempt all or part of the retirement pensions from income tax, in France that is not the case. In the view of UNESCO, that situation violates the principle of equal treatment that should protect international officials.

In the present case, bearing in mind the Tribunal's observation that each State undertakes such commitments with respect to former officials as it agrees upon with the particular organization for which it is the host country, the principle of equal treatment in this case applies only to the treatment France metes out to the various former UNESCO officials residing in its territory. And, in fact, it does not discriminate among them. Moreover, since the Tribunal holds that it is a matter for the parties to an agreement that deals with the exemption of the salaries and emoluments of officials to decide whether or not to extend the benefit to retired officials, the argument based on the principle of equal treatment has no bearing on the Tribunal's reasoning.

86. The Parties have stressed that the arbitration question entrusted to the Tribunal is of considerable importance and will have an impact on basic questions affecting the situation of international civil servants.

The Tribunal does recognize the importance of the present arbitration proceedings. It cannot be persuaded, however, to rule on matters outside the scope of what the Parties have asked it to do, or to base its decision on principles that have no bearing on its mandate. In any case, its award will have only the relative effect of any arbitral award.

* * *

87. Although the arguments set forth above, together with the principles or rules on which they are based, as well as some of the other arguments advanced by the Parties (including the sharp drop in the standard of living of retirees, the restriction of the freedom of retirees to settle where they choose, the creation of disparities among retired international civil servants or the measures taken by the United Nations or UNESCO by way of compensation, particularly the reimbursement of staff members for tax collected by States and the increase in the base for calculating the pension), are of considerable interest, the Tribunal nonetheless does not deem that they have any real bearing, one way or the other, on the answer to the specific question put to it, which it has answered. For that reason, it judges it unnecessary to present a detailed analysis that would be irrelevant in this case to the accomplishment of its task.

* * *

88. The Tribunal will now consider the subsidiary claim of UNESCO.

It will be recalled that in its subsidiary submissions UNESCO asks the Tribunal to find that, by application of article 22(*b*), retired UNESCO officials residing in France are exempt from any direct tax on a portion of their pension which shall not be less than 70 per cent. UNESCO explains that the reason for the percentage is that the Joint Staff Pension Fund, in its management of the retirement funds, brings in interest on them equivalent to approximately 30 per cent of the amount of the pension. UNESCO maintains, furthermore, that only the taxable portion of the pension should be considered in determining the tax rate on the income subject to direct tax

and that the withdrawal settlement paid in lieu of all or part of a pension should be exempt from any direct tax.

The Tribunal will now examine this subsidiary claim.

89. As UNESCO sees it, a portion of the pension is principal. The principal portion can be estimated at approximately 70 per cent, for the reasons stated above (in paragraph 88). In consequence, it should not be subject to income tax.

The deduction applies with even greater force, according to UNESCO, to a withdrawal settlement. In that case, it believes, the entire amount received by the retired official should escape taxation.

90. As France sees it, if the principal paid out to former officials is a pension, it should be subject to the normal regime for pensions: that is, it should be taxable. If, on the other hand, it is not a pension, the problem that UNESCO raises is outside the jurisdiction of the Tribunal, since the latter's mandate is limited to deciding whether article 22(*b*) of the 1954 Agreement is applicable to pensions of former UNESCO officials residing in France.

91. The Tribunal has already determined that article 22(*b*) of the Headquarters Agreement is not applicable to the retirement pensions of former UNESCO officials residing in France. With that conclusion it has fulfilled its mandated task.

92. The Tribunal reiterates that the question submitted to it is very specific. The Tribunal is asked to say whether article 22(*b*) of the 1954 Agreement between France and UNESCO is applicable to pensions paid to former UNESCO officials residing in France.

Therefore, it cannot follow UNESCO into a debate about whether a portion of the pension is principal and constitutes an emolument of the official or about what happens when the retiring official receives a lump-sum payment upon retirement in lieu of a pension. It is obliged to refrain from considering these questions for fear of straying outside the bounds of its jurisdiction. Moreover, UNESCO says (and France did not contest it prior to these arbitration proceedings, at least insofar as the withdrawal settlement is concerned) that "despite the reversal of position with regard to pensions, that so far has not been called into question". The aim of UNESCO, therefore, is simply to have the exemption confirmed, but that task would exceed the Tribunal's mandate.

93. The conclusion to be drawn from the foregoing is that the Tribunal is unable to consider the subsidiary claim of UNESCO because it is not competent to do so.

* * *

94. The Tribunal believes that the answer it has given to the question submitted to it is not contrary to the practices of international organizations or the decisions of international administrative courts.

For these reasons,

THE TRIBUNAL

1. Finds that article 22(*b*) of the Headquarters Agreement of 1954 is not applicable to former UNESCO officials residing in France and drawing, after separation from service, a retirement pension paid by the United Nations Joint Staff Pension Fund;

2. Declares that it is not competent to rule on the subsidiary submissions of UNESCO;

3. Rejects all other submissions of the Parties;

4. Decides that the costs, expenses, fees and compensation of the present arbitration proceedings shall be shared equally by UNESCO and the Government of the French Republic and that each of the Parties shall bear all its other expenses;

5. Orders the Clerk to make the final disbursements, close the accounts of the Tribunal and divide the balance equally between the two Parties.

DONE in French at Paris in the Palais de la Sorbonne on 14 January 2003 in three copies, one to be placed in the archives of the Tribunal and the other two to be given to the Parties.

(*Signed*) Kéba MBAYE
Presiding Arbitrator

(*Signed*) Jean-Pierre QUÉNEUDEC
Arbitrator

(*Signed*) Nicolas VALTICOS
Arbitrator

Mr. Nicolas Valticos, availing himself of the right conferred by article VII, paragraph 2, of the Arbitration Agreement, has appended to the award a separate opinion.

SEPARATE OPINION OF NICOLAS VALTICOS ON THE ARBITRAL AWARD

I concur at the legal level with the opinion of the other members of the Arbitral Tribunal and do not deny that it is well founded in law. There is, however, a point on which I wish to add an observation, namely, the considerable length of time that elapsed in some cases between the start of retirement of UNESCO officials now residing in France and the point at which they were contacted by the tax administration of the French Government. While we may make allowances for the French tax system and the circumstances cited by the Government, it is nonetheless striking that the period during which, despite its well-known efficiency, the French tax administration failed to tax the retirement pensions was often very long, although this certainly should not lead us to go so far as to postulate a point of tacit agreement constituting "subsequent practice" of the Parties. Such long delays, however, may for some time have given the impression that the French Government had tacitly consented to the idea of non-taxation of the pensions of retiring UNESCO officials and may have created expectations which subsequently proved to be unfounded.

That being the case, now that the issue has clearly been resolved by the Arbitral Tribunal on the strictly legal level, the Parties might perhaps consider consulting together in order to draw the appropriate conclusions from the situation. The solution might reasonably, indeed legitimately—in order to compensate for the delays, misunderstandings and disappointed expectations, and more generally to bind up the wounds—entail adopting one or more formulas which would grant certain relief to retired officials who have clearly suffered from the dashing of their optimistic expectations as a result of the sometimes lengthy delays before the tax administration took action. Even allowing for the French tax system, it is difficult to deny that those delays in some respects entailed a degree of negligence. Such a formula could to some extent compensate the retired officials concerned or at any rate alleviate their situation, and encourage those still in service to continue to fulfil their tasks efficiently at UNESCO headquarters.

(*Signed*) Nicolas VALTICOS

Chapter VIII

DECISIONS OF NATIONAL TRIBUNALS

1. The Netherlands

THE HAGUE DISTRICT COURT
Civil Law Division—President

Judgement in interlocutory injunction proceedings of 31 August 2001

Plea of Slobodan Milošević for release from detention by the International Criminal Tribunal for the Former Yugoslavia and returned to the territory of the Federal Republic of Yugoslavia

Slobodan Milošević
domiciled in Belgrade, Federal Republic of Yugoslavia,
currently residing in Scheveningen in the municipality of The Hague,
plaintiff,
procurator litis A. B. B. Beelaard,
advocates N. M. P. Steijnen, E. T. Hummels and E. Olof, all of Zeist,

The State of the Netherlands (Ministries of General Affairs and Foreign Affairs)
with its seat in The Hague
defendant,
procurator litis Cécile M. Bitter,
advocate G. J. H. Houtzagers.

1. *The facts*

On the basis of the documents and the oral proceedings of 23 August 2001, the following facts will be deemed to have been established in this case.

—By resolution 827 (1993) of 25 May 1993 (*Netherlands Treaty Series* 1993, 168), the United Nations Security Council, "acting under Chapter VII of the Charter of the United Nations", decided to establish an international tribunal "for the sole purpose of prosecution of persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991". The annex to the resolution includes the Statute ("Statute of the International Tribunal; hereafter, "the Statute") of the aforementioned tribunal (hereafter, "the Tribunal"). Article 31 of the Statute provides that the Tribunal shall have its seat in The Hague.

—Article 9, paragraph 2, of the Statute reads as follows:

"The International Tribunal shall have primacy over national courts. At any stage of the procedure, the International Tribunal may formally request na-

tional courts to defer to the competence of the International Tribunal in accordance with the present Statute and the Rules of Procedure and Evidence of the International Tribunal."

—Article 29, paragraph 1, of the Statute includes the following sentence: "States shall cooperate with the International Tribunal in the investigation and prosecution of persons accused of committing serious violations of international humanitarian law."

—The relationship between the Netherlands—as host country—and the Tribunal is laid down in the Agreement of 29 July 1994 between the Netherlands and the United Nations (*Netherlands Treaty Series* 1994, No. 189), also referred to as "the Headquarters Agreement". This Agreement also provides for the practical implementation of certain of the Statute's provisions. The Netherlands implemented resolution 827 (1993) and the Statute by Act of Parliament of 21 April 1994 (*Bulletin of Acts and Decrees* 1994, 308).

—The plaintiff is the former President of the Federal Republic of Yugoslavia.

—After the plaintiff's detention in Belgrade on 1 April 2001 to answer criminal charges, he was transferred to the Tribunal on 29 June 2001 in compliance with the arrest warrant issued by the Tribunal on 22 January 2001. He was flown to Welschap aerodrome near Eindhoven and from there taken to the United Nations Detention Unit, a section of the Scheveningen prison complex reserved exclusively for the detention of persons being prosecuted before the Tribunal, where he has been held since then.

2. *The claims, the grounds on which they are based and the defence*

The plaintiff has asked the court—in essence—to order the defendant as follows:

—*Principally*: to release him unconditionally within 8 hours of the notice of service of this judgement;

Or

—To return the plaintiff or order his return to the territory of the Federal Republic of Yugoslavia within 24 hours of the notice of service of this judgement;

Or

—To plead forthwith before the so-called Tribunal and all international bodies and institutions of relevance in this connection for his immediate and unconditional release;

Or

—To plead forthwith before the so-called Tribunal and all international bodies and institutions of relevance in this connection for his immediate return to the territory of the Federal Republic of Yugoslavia.

In support of his claims, the plaintiff contends as follows:

—The so-called Tribunal, elements in the Serbian Government and the defendant blatantly kidnapped and abducted him in a coordinated action, which must be regarded as a flagrant breach of his human rights. At the time the Federal Constitutional Court of Yugoslavia had suspended his extradition

to the so-called Tribunal pending the Court's ruling, which it had not yet given, on the lawfulness of this extradition. He was therefore still under the protection of the domestic courts. Even so, the defendant permitted his transfer to the territory of the Netherlands and handed him over to the so-called Tribunal. The defendant's actions should be deemed unlawful in respect of the plaintiff.

—The so-called Tribunal has no basis in law and possesses no democratic legitimacy. The Security Council is not competent to establish an international tribunal, as only a few United Nations Member States are involved in it. The Tribunal has not been established by treaty. Neither the Charter of the United Nations nor international law provides any legal basis for the so-called Tribunal. Not a single rule of law exists that would entitle the Security Council to limit the sovereign rights of States. The establishment of the so-called Tribunal is a flagrant violation of the principle of the sovereign equality of all United Nations Member States, as enshrined in Article 2, paragraph 1, of the Charter of the United Nations. The Security Council has no jurisdiction over the individual citizens of States. That the so-called Tribunal can and should sit in judgement over its own lawfulness is neither credible nor acceptable.

—The so-called Tribunal cannot, therefore, be regarded as an independent and impartial tribunal within the meaning of article 6 of the European Convention on Human Rights, particularly since it maintains close and friendly relations with the North Atlantic Treaty Organization (NATO) and is indeed dependent on NATO. Its prosecutors and judges are not appointed in an impartial procedure.

—The defendant is acting unlawfully towards the plaintiff by cooperating in the Security Council's decision to establish the so-called Tribunal, which is self-evidently incompatible with fundamental human rights. The defendant may therefore be regarded, in a sense, as a co-perpetrator of human rights violations. Furthermore, the Security Council makes arbitrary and unlawful distinctions between countries. The Security Council and/or the United Nations do not implement resolutions adopted against countries that harbour ill-will against the Western States [sic].

—As a former head of State, the plaintiff can claim immunity from prosecution. No conceivable rule of law can be invoked on the basis of which this immunity could be declared to have lost its validity, as asserted in the Statute of the so-called Tribunal. At no time in history has immunity ever been declared null and void before. Immunity is an instrument to safeguard the sovereignty of States and should therefore be respected above all else. Whatever crimes may have been committed, the plaintiff, as head of State, cannot be held to account for them.

—The Dutch courts are pre-eminently competent to rule on the legal protection of persons who are within the territory of the Netherlands. This applies to the plaintiff in the same way as to anyone else. Not a single valid rule of law can be found that would exclude such an appeal. The plaintiff cannot ask the so-called Tribunal to release him provisionally.

The defendant presented its defence, furnished with arguments. Where necessary this defence will be discussed below.

3. *Assessment of the dispute*

3.1 The defendant's primary line of defence is that the Tribunal possesses exclusive competence to hear the principal application for release. It holds that it has been expressly acknowledged, both in domestic and in international law, that the Tribunal possesses exclusive competence within the Dutch legal order to decide on the deprivation of liberty of persons facing charges before the Tribunal, and that this is not a matter for the Netherlands. Whatever cooperation there may have been between the defendant and the Tribunal has been limited to the transport of individuals, including the transit of persons being transferred from another country to the Netherlands, who must be transported across the territory of the Netherlands, and to the security of these persons.

3.2 To answer the question of competence, however, it is first necessary to address the plaintiff's contentions regarding the Tribunal's legal basis or legal validity, which he challenges. After all, were it to be ruled at law that the Tribunal possesses no legal validity, this would necessarily lead to the conclusion that the President is competent to hear the principal application for release in interlocutory injunction proceedings.

3.3 The essence of the plaintiff's challenge to the Tribunal's legal validity is that in his view the Tribunal should have been established by an international convention or that its establishment should at least have been based on a motion adopted by the United Nations General Assembly.

This may be answered as follows. The issue of the Security Council's competence has already been dealt with at length by Trial Chamber II (Decision of 10 August 1995) and the Appeals Chamber of the Tribunal (*Prosecutor v. D. Tadić*). The latter eventually ruled on appeal, by judgement of 2 October 1995 ("Decision on the defence motion for interlocutory appeal on jurisdiction") that the Security Council's competence can be based on Chapter VII of the Charter of the United Nations. Compelling considerations supporting this conclusion were that there was nothing in the Charter to militate against the inauguration and establishment of a tribunal for the prosecution and trial of persons suspected of serious violations of international humanitarian law, that the inauguration and establishment of the Tribunal can be considered to fall within the scope of Article 41 of the Charter, and that an international organization such as the United Nations, in which it is simply impossible to observe the traditional separation of legislative, executive and judicial powers, and where indeed no such separation exists, is perfectly entitled to establish a tribunal by way of a measure.

Contrary to what the plaintiff apparently believes, it has by no means been established that the decision of 2 October 1995 is incorrect or that the grounds on which it was reached were unsound. Given the lengthy and detailed arguments furnished in support of the decision of 2 October 1995, the plaintiff's contentions in this regard do not place the matter in a new light. Since the above leads to the conclusion that the said decision and the grounds upon which it was based are upheld in these proceedings, the plaintiff no longer has an interest in his proposition that the Tribunal cannot and must not decide on its own jurisdiction. This proposition need not, therefore, be addressed.

3.4 The plaintiff also maintains that the Tribunal is not an independent and impartial tribunal within the meaning of article 6 of the European Convention on Human Rights. This contention too is dismissed by the court. Leaving aside the

fact that the Tribunal's actions are constrained by numerous regulations, including lengthy and detailed rules for the protection of the rights of the accused, it must be noted that the European Court of Human Rights has also now ruled that the Tribunal fulfils all the criteria necessary for the protection of the accused, including those of impartiality and independence (European Court of Human Rights, judgement of 4 May 2000 in the case of *Naletilić v. Croatia* (Application No. 51891/99)). Accordingly, this argument cannot prevail with the court.

3.5 Since the above leads to the conclusion that the Tribunal may be assumed to possess legal validity, the court must now assess the defence adduced by the defendant in point 3.1 above.

In this regard the court considers as follows.

It has been established that pursuant to the Headquarters Agreement and the implementation act based on it, the Netherlands has transferred its jurisdiction to hear an application for release from detention to the Tribunal. Since article 9, paragraph 2, of the Statute provides, in respect of jurisdiction, that the Tribunal has primacy over national courts, and Article 103 of the Charter of the United Nations asserts that rules [sic] pursuant to the Charter and hence those pursuant to Security Council resolutions take precedence over all other rules, it must be concluded that the Dutch courts have no jurisdiction to decide on the plaintiff's application for release. Everything that the plaintiff has advanced in this connection fails in this light.

3.6 The above therefore leads to the conclusion that the President must declare that he has no jurisdiction to hear the plaintiff's principal claim. A direct or indirect return to the territory of the Federal Republic of Yugoslavia, as urged in the alternative claims, would in effect mean that the plaintiff would no longer be detained to answer the charges brought by the Prosecutor of the Tribunal. Viewed in this light, these claims too are essentially applications for release from detention. Moreover, these alternative claims raise all sorts of other matters (e.g. regarding the plaintiff's departure from the Federal Republic of Yugoslavia, his transfer to the Tribunal and a possible invocation of immunity from prosecution) which, having regard to the substance of the previous consideration, likewise fall within the exclusive competence of the Tribunal. In these circumstances, the President considers that he has no jurisdiction to hear the alternative claims.

3.7 As the court finds against the plaintiff, the latter will be ordered to pay the costs of these proceedings.

4. *Decision*

The President:

Declares that he has no jurisdiction to hear the plaintiff's claims;

Orders the plaintiff to pay the costs of these proceedings, amounting thus far to NLG 3,500 for the defendant, NLG 400 of which is for court fees.

Judgement given by R. J. Paris and pronounced at a public hearing on 31 August 2001 in the presence of the clerk of the court.

EVL

[*two signatures*]

2. United Kingdom of Great Britain and Northern Ireland

(*a*) HIGH COURT OF JUSTICIARY
30 March 2001

Opinion of High Court involving the International Court of Justice advisory opinion on the legality of the threat or use of nuclear weapons under international law

Three persons were charged on indictment with malicious mischief by damaging a submarine and equipment belonging to the Ministry of Defence and used in the deployment of the Trident nuclear missile. The accused admitted having caused the damage, but pleaded in defence that their conduct was justified by the necessity of preventing the Government from continuing to commit an offence against customary international law, in terms of which, they contended, the deployment of the missiles as part of the Government's policy of nuclear deterrence was unlawful. In the course of their trial the accused led evidence as to customary international law from a number of experts. The presiding sheriff sustained the plea of necessity and directed the jury to acquit the accused.

The Lord Advocate referred the following questions of law to the High Court under s 123 (1) of the Criminal Procedure (Scotland) Act 1995:

> "(1) In a trial under Scottish criminal procedure, is it competent to lead evidence as to the content of customary international law as it applies to the United Kingdom?
>
> "(2) Does any rule of customary international law justify a private individual in Scotland in damaging or destroying property in pursuit of his or her objection to the United Kingdom's possession of nuclear weapons, its action in placing such weapons at locations within Scotland or its policies in relation to such weapons?
>
> "(3) Does the belief of an accused person that his or her actions are justified in law constitute a defence to a charge of malicious mischief or theft?
>
> "(4) Is it a general defence to a criminal charge that the offence was committed in order to prevent or bring to an end the commission of an offence by another person?"

The accused appeared in the hearing as respondents. The first respondent suggested that question 2 should be reformulated as follows:

> "Does international law and/or Scots law justify an individual in Scotland in damaging or destroying property which is being used for criminal purposes, in order to prevent those criminal actions being carried out by the United Kingdom—namely the United Kingdom's deployment, within and without Scotland, of Trident nuclear warheads and its threat to use such warheads in accordance with HM Government's current defence policy?"

In the course of the hearing an additional submission was made on behalf of one of the respondents to the effect that the normal criteria of the defence of necessity did not apply in the case of acts of malicious mischief carried out by groups such as that to which the respondents belonged, which were known in the United States as "citizen interveners".

Held (1) that a rule of customary international law is a rule of Scots law and as such is a matter for the judge and not the jury, and that there can be no question

of the jury requiring to hear or consider the evidence of a witness, however expert, as to what the law is (para. 23);

(2) (i) That the defence of necessity is available only where there is so pressing a need for action that the actor has no alternative but to do what would otherwise be a criminal act under the compulsion of the circumstances in which he finds himself (para. 39);

(ii) That the general requirements of the defence of necessity included that the actor must have good cause to fear that death or serious injury would result unless he acted, that that cause for fear must have resulted from a reasonable belief as to the circumstances, that the actor must have been impelled to act as he did by those considerations, and that the defence would only be available if a sober person of reasonable firmness, sharing the characteristics of the actor, would have responded as he did (para. 42);

(iii) That there was no acceptable basis for restricting rescue to the protection of persons already known to and having a relationship with the rescuer at the moment of response to the other's danger, although proportionality of response might be a function of relationship (para. 44);

(iv) That there was no compelling reason for excluding the defence of necessity solely on the ground that persons at risk were remote from the locus of the alleged malicious damage, provided that they were within the reasonably foreseeable area of risk (para. 45);

(v) That the actor must, at the material time, have reason to think that the acts carried out had some prospect of removing the perceived danger, and that, if the action could achieve no more than, say, a postponement or interruption of danger (so that it was only averted for a time) or some lessening of its likelihood (without removing the danger even temporarily) the assessment of any necessity would be less simple and issues of proportionality would arise, and merely making a danger less likely might not be regarded as justified by necessity at all (para. 46); and that as a matter of general principle it appeared clear that the conduct carried out must be broadly proportional to the risk, that being always a question of fact to be determined in the circumstances of the particular case (para. 47);

(vi) That there was no substance in the submission that there was a class of citizen interveners in relation to whose actions (*a*) there might be situations in which a delay between the perception of harm and action in response was acceptable, (*b*) the question of other available legal means should not be confined to ascertaining whether there were in fact such means but should include a consideration of whether the accused reasonably believed that there were other effective means of responding to the situation and (*c*) the court in considering the effectiveness of the action taken should have regard to the accused's reasonable belief that the action would lessen the harm rather than to the true likelihood that the action would avert danger (paras. 53-55); and

(vii) That there was no substance in the suggestion that what the respondents did was justified by necessity, that their actions were planned over months, that what they did was not a natural or instinctive or indeed any kind of reaction to some immediate perception of danger or perception of immediate danger, that the circumstances were not even remotely analo-

gous to those which provide a justification for intervention to prevent immediate danger, that there was not the slightest indication that the damage which the respondents did, and which they apparently claimed was necessary as a means of averting or perhaps reducing danger or harm, had or could have had any conceivable impact upon the supposedly immediate risk, and that whatever drove them or compelled them to do so as they did bore no resemblance to necessity in Scots law (para. 100);

(3) (i) That it was not possible to say a priori that a threat to use Trident or its use could never be seen as compatible with the requirements of international humanitarian law (para. 93);

(ii) That the relevant rules of conventional and customary international law, and in particular the rules of international humanitarian law, were not concerned with regulating the conduct of States in time of peace (para. 95);

(iii) That the general minatory element in the deployment of nuclear weapons in time of peace was utterly different from the kind of specific "threat" which was equated with actual use in those rules of customary international law which make both use and threat illegal (para. 96);

(iv) That there was no basis for a contention that the general deployment of Trident in pursuit of a policy of deterrence constituted a continuous or continuing "threat" of the kind that might be illegal as equivalent to use, and that the conduct of the United Kingdom Government with which the respondents sought to interfere was in no sense illegal (para. 98); and

(v) That the contention that the respondents' conduct was justified as a matter of customary international law was without foundation, that the general deployment of Trident was not illegal as a matter of customary international law, and that in any event, even on the hypothesis of armed conflict and actual threat, customary international law did not entitle persons such as the respondents to intervene as self-appointed substitute law-enforcers with a right to commit what would otherwise be criminal offences in order to stop or inhibit, the criminal acts of others (para. 99);

(4) That the expression "a point of law which has arisen in relation to that charge" in s 123 (1) must be read as referring not merely to points of law which are in some general ways inherent in the charge itself, but also to points of law which have actually arisen in the proceedings which led to acquittal or conviction on the charge in question, including points of law which arise from any defence which is advanced against the charge, that the points of law relied upon by the respondents at the trial would be points of law within the scope of s 123 (1), that questions 2, 3 and 4 did not as stated express those particular points of law, but that they were not incompetent and the court was not restricted to answering the questions posed, that the questions as stated provided a useful broad starting point within the scope of the section and provided boundaries beyond which the court should not go, but that within these boundaries it was appropriate to deal with the more specific points of law which arose from the defence advanced (para. 101); and

(5) (i) Question 2 as stated answered in the negative (para. 104);

(ii) Question 2 as reformulated by the first respondent answered in the negative in relation to international law (para. 105) and in relation to any justification based on the Scots law of necessity (para. 106);

(6) Question 3 answered in the negative (para. 107), the mere fact that a person carried out acts which constituted a crime under a misconception of his legal rights not being a defence (para. 109); and

(7) Question 4 answered in the negative (paras. 110 and 111).

Opinion reserved as to the status of the prerogative in matters relating to the defence of the realm (para. 60).

Observed (1) that the court had grave misgivings as to the justiciability of the issues it had been asked to deal with in relation to defence policy and the deployment of Trident (para. 113);

(2) That the formulation of the defence of necessity in the American Law Institute's Model Penal Code suggesting that it was available where the actor believed that the evil sought to be avoided was greater than that sought to be prevented by the law defining the offence charged appeared to suffer from a number of defects, produced an element of personal belief rather than objective reasonableness, defined the test in terms of comparative evil without apparent regard to the quality of the conduct threatened, appeared to justify a crime carried out to prevent another crime whenever the threatened crime involved a greater harm, and did not seem to require immediacy in any way, and that American codifications of the criminal law were unlikely to provide a reliable basis for ascertaining Scots law (para. 55).

Advisory Opinion of International Court of Justice, 8 July 1996, considered (paras. 67-86).

CASES-REF-TO: Advisory Opinion of International Court of Justice, 8 July 1996; General List No. 95

CCSU v Minister for the Civil Service [1985] 1 AC 374; [1984] 1 WLR 1174; [1984] 3 All ER 935

Chandler v Director of Public Prosecutions [1964] AC 763; [1962] 3 WLR 694; [1962] 3 All ER 142; 46 Cr App R 347 Clark v Syme 1957 JC 1; 1957 SLT 32

Commonwealth v Berrigan, 509Pa 112; 472 A.2d 1099 (Pa Super 1984); 501 A.2d 226 (Pa 1985)

Commonwealth v Capitolo, 471 A.2d 462 (Pa Super 1984)

Hutchinson v Newbury Magistrates' Court [2000] EWHC 24 (9 October 2000)

John v Donnely, 1999 SCCR 802; 1999 JC 336; 2000 SLT 11

Moss v Howdle, 1997 SCCR 215; 1997 JC 123; 1997 SLT 782

Operation Dismantle v The Queen [1985] (SCR 414; 18 DLR (4th) 481

Palazzo v Copeland, 1976 JC 52

People v Gray, 571 NY Supp 2d 850

Perka v The Queen [1984] 2 SCR 232; 13 DLR (4th) 1

R v Howe [1987] 1 AC 417; [1987] 2 WLR 568; [1987] 1 All ER 771; 85 Cr App R 32

R v Martin [1989] 1 All ER 652; [1989] RTR 63; 88 Cr App R 88

R v Ministry of Defence, ex parte Smith [1996] QB 517; [1996] 2 WLR 35; [1996] 4 All ER 257

R v Secretary of State for the Home Department, ex parte Fire Brigades Union [1995] 2 AC 513; [1995] 2 WLR 464; [1995] 2 All ER 244

Southwark London Borough Council v Williams [1971] 1 Ch 734; [1971] 2 WLR 467; [1971] 2 All ER 175

United States v Bailey, 444 US 394; 62 L Ed 2d 575 (1980)

Ward v Robertson, 1938 JC 32; 1938 SLT 165.

INTRODUCTION: On 21 January 2000, the Lord Advocate presented a petition in the following terms to the High Court under s 123 of the Criminal Procedure (Scotland) Act 1995.

"1. (The) material facts which give rise to this reference are as follows.

(*a*) Three persons (hereinafter referred to as 'the panels') were indicted for trial in the sheriff court at Greenock on an indictment containing four charges, a copy of the indictment is annexed hereto. Evidence was led by the Crown in support of said charges and no submission was made that there was no case to answer.

(*b*) The evidence established, inter alia, that the acts alleged against the panels had been motivated by and carried out in furtherance of their opposition to nuclear weapons and in particular the Trident weapons system.

(*c*) On behalf of the panels there was tendered the evidence of Professor Francis A. Boyle, Professor Paul Rodger and Ms. Rebecca Johnston, all of whom were held out as experts on aspects of the development and current content of international law in relation to nuclear weapons. The procurator fiscal objected to the admissibility of the evidence which it was sought to lead from said witnesses, inter alia, on the ground that it is incompetent to lead evidence as to a question of law. The sheriff repelled said objections and allowed the evidence to be led. The evidence given by said witnesses referred, inter alia, to the advisory opinion of the International Court of Justice of 8 July 1996 on the *Legality of the Threat or Use of Nuclear Weapons*.

(*d*) At the conclusion of the defence case it was submitted on behalf of the panels that the sheriff should direct the jury to acquit the panels. As understood and summarized by the sheriff, that submission was as follows: '. . . the three accused considered that Trident was being used illegally based on an understanding of what was international law and on advice given to them. And if they were right that the use and threat of nuclear weapons is illegal . . . they had a right particularly given the enormity or [sic] the risks of nuclear weapons to try to do something to stop that illegality'. It was also submitted on behalf of the panels that esto Trident was not being illegally used, the panels were nevertheless under the necessity of trying to do something to stop the United Kingdom from continuing to implement its policies in relation to nuclear weapons.

(*e*) The sheriff, on the basis of said submissions, held that the accused had acted without the criminal intent required for the constitution of the crime of malicious mischief and directed the jury to acquit the panels of the charges of malicious mischief.

"2. The petitioner according refers the following questions of law to your Lordships for opinion.

(1) In a trial under Scottish criminal procedure, is it competent to lead evidence as to the content of customary international law as it applies to the United Kingdom?

(2) Does any rule of customary international law justify a private individual in Scotland in damaging or destroying property in pursuit of his or her objection to the United Kingdom's possession of nuclear weapons, its action in placing such weapons at locations within Scotland or its policies in relation to such weapons?

(3) Does the belief of an accused person that his or her actions are justified in law constitute a defence to a charge of malicious mischief or theft?

(4) Is it a general defence to a criminal charge that the offence was committed in order to prevent or bring to an end the commission of an offence by another person?

"May it therefore please your Lordships to order service of the foregoing petition upon the persons designed in the schedule appended hereto and thereafter to fix a date for the hearing of the reference herein and to order intimation of said date to said persons; and upon consideration of these presents to answer the questions of laws submitted for the opinions, of your Lordships in the premises as to your Lordships shall seem proper."

The indictment against the panels was in the following terms.

"(1) [On] 8 June 1999 on board the vessel *Maytime* then moored in the waters of Loch Goil, near Lochgoilhead, Argyll, you . . . did wilfully and maliciously damage said vessel and did score two windows on board said vessel with a glass cutter or other similar object and did attempt to drill a hole in one of said windows;

". . .

"(3) on date and place above libelled you, did maliciously and wilfully damage equipment, fixtures and fittings on board said vessel *Maytime* and in particular did cut a hole in a metal wire fence in the laboratory of said vessel, did smash the contents of electronic equipment cabinet and rip out electrical cables in said cabinet, did cut off the main control switch for the winch on said vessel, did damage a padlock on the door to the control room of said vessel by attempting to saw through same with a hacksaw and thereafter covering said padlock in glue or a similar substance rendering said padlock inoperative, did pour glue or a similar substance on to the wires and controls of a crane on the upper deck of said vessel, on the controls of the winch aforesaid and on to the cleats securing the hatch on said vessel, did place a chain around the crane on the upper deck of said vessel thereby preventing said crane from operating, and did smash a computer monitor on said vessel, did damage a wall clock in the laboratory of said vessel and did damage a cabinet containing a power supply to an adjacent platform, by forcing said cabinet open and damaging same;

"(4) on date and place above libelled you . . . did maliciously and wilfully damage a quantity of computer equipment, electrical and office equipment, acoustic equipment and amplifier, recording equipment, fax machines, telephone, tools, documents, records, electronic components, a briefcase, radio equipment, rangefinder, books and a case and contents, and did deposit said items in the waters of Loch Goil, whereby said items became waterlogged, useless and inoperable; OR ALTERNATIVELY

"date and place above libelled, you, did steal said quantity of computer equipment, electrical and office equipment, acoustic equipment and amplifier, recording equipment, fax machines, telephone, tools, documents, records, electronic components, a briefcase, radio equipment, rangefinder, books and a case and contents, and did remove said items from said vessel and did deposit said items in the waters of Loch Goil and did thus steal same."

Their trial took place between 27 September and 21 October 1999 in the sheriff court at Dunoon before Sheriff Gimblett and a jury.

COUNSEL: For the Lord Advocate: Menzies, QC, Di Rollo, A-D; For the Advocate General: Murphy, QC; For the first respondent: Party: amicus curiae: Moynihan, QC; For the second respondent: L Anderson, Mayer; For the third respondent: O'Neill, QC, McLaughlin.

JUDGEMENT-READ: On 30 March 2001, the following opinion of the court was delivered.

PANEL:

Lord Prosser, Lord Kirkwood, Lord Penrose.

JUDGEMENTS: OPINION OF THE COURT:

Introductory

[1] Angela Zelter, Bodil Roder and Ellen Moxley stood trial on indictment at Greenock Sheriff Court on 27 September 1999 and subsequent dates. The indictment contained four charges, all of which were directed against all three accused, and all of which related to events alleged to have occurred on 8 June 1999, on board the vessel *Maytime*, then moored in the waters of Loch Goil. *Maytime* had a role in relation to submarines carrying Trident missiles. Charge (2) (a charge of attempted theft) was not insisted in by the Crown and need not be referred to further. Charges (1) and (3), and the first alternative under charge (4), were all charges of malicious damage. Charge (1) related to some minor damage to the vessel itself. Charge (3) related to damage to equipment, fixtures and fittings on board the vessel. And charge (4) related to damage to a quantity of computer equipment and other moveables said to have been deposited in the waters of Loch Goil and thereby to have become waterlogged, useless and inoperable. The alternative to this fourth charge was that the accused removed these items from the vessel, deposited them in Loch Goil and thus stole them.

[2] At the conclusion of the trial on 21 October 1999, the sheriff directed the jury to return a verdict of not guilty in respect of each of the accused, on charges (1) and (3) and on both of the alternatives contained in charge (4). In accordance with this direction, the jury unanimously found all three accused not guilty on these three remaining charges.

Lord Advocate's Reference

[3] Section 123 (1) of the Criminal Procedure (Scotland) Act 1995 provides inter alia as follows:

> "Where a person tried on indictment is acquitted or convicted of a charge, the Lord Advocate may refer a point of law which has arisen in relation to that charge to the High Court for their opinion . . ."

[4] This petition is presented by the Lord Advocate in terms of section 123 (1) of the 1995 Act. He refers four questions of law to the court for our opinion. In accordance with procedures set out in section 123, the first respondent, Angela Zelter, elected to appear personally (as she had done at the trial) and each of the second and third respondents elected to be represented by counsel (as they had been at the trial). On 4 April 2000, the court appointed a hearing to be fixed in respect of the reference, and also inter alia, in respect that Ms. Zelter had not elected to be represented by counsel, appointed GJB Moynihan, QC, to act as amicus curiae. The court did not require formal answers, but appointed all parties to lodge skeletal arguments.

Written statements of argument were subsequently lodged by all parties, although not all could be described as skeletal.

Subsidiary issues

[5] Various matters have been raised by the parties by motions made at various stages in the proceedings. In addition, however, certain other applications require to be mentioned.

[6] On behalf of the second respondent, a petition was presented to the nobile officium of the court as a means of raising certain preliminary points in connection with the Lord Advocate's Reference. That petition proceeded upon certain fundamental misconceptions as to the history and nature of the proceedings. So far as insisted in, the points in question could be and were raised in the course of the proceedings. That having become evident, no further argument was advanced on behalf of the second respondent to show that the petition to the nobile officium was necessary or indeed competent. It was not however abandoned. At the end of the proceedings, the advocate-député moved us inter alia to dismiss that petition. That is plainly appropriate.

[7] At various dates prior to the hearing fixed in relation to the Lord Advocate's Reference, minutes were lodged on behalf of each of the three respondents, giving notice of an intention to raise devolution issues in connection with the Reference. In addition to the issues raised in these minutes, their presentation naturally gave rise to questions of procedure, and in particular the question of whether the issues raised in these minutes, or any of them, required to be considered and disposed of before any hearing on the Lord Advocate's Reference and the questions upon which he sought the court's opinion. Hearings to resolve the matters contained in these minutes were fixed to coincide with the hearing in relation to the Reference itself. We considered it more appropriate to hear the submissions of parties in relation to the questions set out in the Reference before hearing the submissions of parties on the matters raised by these minutes. In the event, many of these latter issues were thus rendered academic and were not insisted in. The lodging of these minutes resulted in the Advocate General being represented at the hearing, but in the event nothing remained upon which counsel for the Advocate General wished to make any submissions. We consider such issues as did remain, briefly, at the end of this opinion.

Competency

[8] In various ways and at various stages, points have been raised on behalf of each of the respondents, and by the amicus curiae, as to whether one or more of the questions set out in the Lord Advocate's petition might be incompetent, in terms of section 123 (1) of the 1995 Act. It did not appear to us that the issues regarding the competency of any of these questions could be resolved satisfactorily before we had heard the submissions of parties on the substantive issues. In particular, we did not see it as possible to decide a priori in relation to any question whether it could be said to express a point of law which had "arisen" in relation to any of the charges, or to determine in advance the nature, scope or indeed number of any points of law which we might consider to be raised by any particular question. In these circumstances, we reserved the issue of competency, indicating to the parties that in their submissions they would be permitted, and indeed expected, to cover issues which they considered had arisen in relation to the charges but which they saw the questions as framed as failing to identify, or indeed evading. In the event, this procedure

did not appear to us to produce any difficulty, and we touch upon questions of competency along with the substantive issues.

The questions

[9] The questions set out in the petition are these.

"(1) In a trial under Scottish criminal procedure, is it competent to lead evidence as to the content of customary international law as it applies to the United Kingdom?

"(2) Does any rule of customary international law justify a private individual in Scotland in damaging or destroying property in pursuit of his or her objection to the United Kingdom's possession of nuclear weapons, its action in placing such weapons at locations within Scotland or its policies in relation to such weapons?

"(3) Does the belief of an accused person that his or her actions are justified in law constitute a defence to a charge of malicious mischief or theft?

"(4) Is it a general defence to a criminal charge that the offence was committed in order to prevent or bring to an end the commission of an offence by another person?"

Procedure at the trial

[10] Before coming to other matters, we think it useful to mention certain matters in relation to procedural aspects of the trial. The Crown led a number of witnesses, and the sheriff tells us that none of the Crown evidence was really in dispute. In addition, six joint minutes were lodged, relating to such matters as the recovery of property from the loch, the cost of replacement or repair, and evidence linking the accused with presence on the vessel. All three accused gave evidence, and it is worth noting that in relation to the events of 8 June 1999, and indeed the background to these events, they admitted much of what the Crown wished to establish in support of the charges. However, the evidence which the accused sought to put before the jury, either personally in their evidence or by evidence from other witnesses, included evidence as to a wide range of matters relating to the United Kingdom's Trident missiles, and also evidence as to customary international law. This gave rise to numerous objections, and argument upon matters of competency, admissibility and relevancy. Apart from the three accused, four defence witnesses were called: Professor Paul Rogers, Professor Francis Boyle, Rebecca Johnston and Judge Ulf Panzer. At this stage we merely note that the sheriff allowed evidence from these witnesses, although with certain restrictions.

[11] At the conclusion of the defence evidence on 19 October 1999, the sheriff allowed the first accused and counsel for the other accused to make submissions outwith the presence of the jury. These submissions were concluded the next day, when the procurator fiscal responded. Further submissions were then advanced by counsel for both the second and third accused. The submissions had covered quite a range of matters. After an adjournment, the sheriff stated certain conclusions which she had reached, and the reasons for reaching them. Overall, she concluded that it fell to her formally to instruct the jury that they should acquit all three accused of the charges relating to wilful and malicious damage. Thereafter, and on the following day, further submissions were heard outwith the presence of the jury in relation to the alternative charge under charge (4) of theft. The sheriff concluded that the jury should be instructed to acquit in respect of that matter also. The jury returned, and as we have indicated, they acquitted on all the remaining charges, on the sheriff's direction.

Issues and non-issues

[12] It is worth emphasizing that the issues for this court are those raised by the four questions in the reference. Answering these questions naturally makes it necessary to consider and resolve certain more specific or subsidiary issues. But before coming to the issues which we think we have to resolve, we think it is worth identifying certain matters which it is not for us to consider, or which we need not consider because the parties are at one.

[13] As was emphasized on behalf of the respondents, this is not an appeal and quite apart from the provision in section 123 (5) of the 1995 Act that our opinion "shall not affect the acquittal", it is not for us to consider the rightness of the acquittal, as such. On the other hand, the very fact that points of law referred to this court for its opinion must have arisen in relation to charges upon which a person has been acquitted or convicted makes it plain that the answers which are given by the court may show or suggest that in the court's opinion the acquittal or conviction was, or was not, sound. The extent to which that will happen will depend in any particular case upon the questions posed, but also upon the nature of the submissions made by any of the parties to the court, which the court will have to consider. On behalf of the respondents, it was suggested that, having regard to section 123 (5) in particular, we should avoid saying anything that would cast doubt on the rightness of their acquittal. We think that it is quite wrong. The acquittal will stand, whatever we say. And what we should say depends on what we consider has to be said in relation to the points of law referred to us for our opinion and the submissions made by the parties—including the respondents. The nature of the submissions made by the respondents was such that they relate closely to the soundness of the acquittal. But this is not of the essence of these proceedings. The questions are general, and not particular.

[14] In these circumstances, consideration of the sheriff's reasoning is likewise not of the essence. The arguments with which she was faced in the course of the trial, and the submissions made to her, were in our opinion both confusing and often confused. And they appear at times to have differed substantially from any argument advanced in this court. In the circumstances, we do not find it necessary to consider these arguments and submissions, or the sheriff's reasoning, in any detail.

[15] In factual terms, there was no real dispute at the trial as to what the accused had done. Moreover, at least in this court there was no dispute that what they did was criminal if one ignored certain exculpatory issues raised in their defence. As a foundation for that defence, the respondents sought to show, and in this court contend, that the deployment of Trident missiles by the United Kingdom Government is a breach of customary international law, and as such, illegal and indeed criminal in Scots law. Having regard to what happened at the trial, and to the submissions made in this court, certain questions arise as to the factual basis, or the appropriate hypothesis, upon which we should proceed in considering the characteristics and implications of the deployment of Trident. But the respondents' basic contention is that the actions of the United Kingdom Government are criminal in Scots law. Subject to one qualification which we shall mention in due course, it is upon that hypothesis alone that they approach the particular question which arose at trial (whether the otherwise criminal acts of the accused were in some way justified and thus non-criminal) and the more general questions which arise in this court, as to whether there is a justification or defence in relation to otherwise criminal acts of malicious damage or theft, in the ways described in questions 2, 3 and 4.

[16] It is to be noted that the respondents do not contend that mere bona fide belief that the Government's actions were criminal would provide any basis for the further contention that their actions were justified: they proceed upon the basis that the Government must actually be acting contrary to Scots law, for such a further contention to be open to the respondents. It is also to be emphasized that we are not asked, by either the Crown or the respondents, to consider or resolve any questions as to demonstration or protest, or the lawful boundaries of positive action as an expression of opinion. The respondents' position is that their otherwise criminal intervention was of a character and purpose quite different from protest or the like. It was action designed to prevent or obstruct a crime, in circumstances where that intervention was justified and non-criminal—either in terms of customary international law or in terms of the law of Scotland in relation to the defence of necessity. That was as they submitted, and indeed is, a wholly different matter from the expression of opinion through demonstrative action, or merely symbolic obstruction or civil disobedience in an attempt to bring influence to bear upon Government.

[17] This brings us to a matter which we think we should mention before coming to deal with the questions upon which our opinion is sought. Demonstration and protest and civil disobedience have a long and indeed proud history. Those who involve themselves in action of that kind will often be willing, or indeed intend, to step over the limits of legality, in order to make their point as forcibly as they can. And correspondingly they may be willing, or intend, to undergo punishment for any breach of the law—such minor martyrdom perhaps helping to reinforce and publicize the point which they are making. In distinguishing their own position from that world of action, and insisting that their own otherwise criminal conduct was non-criminal because it was justified, the respondents could be seen as moving into a relatively familiar area of legal and jurisprudential discussion: what are the circumstances which our law recognizes as entitling a person to do things which would otherwise be criminal? And that is indeed a substantial part of what was put in issue at the trial, and what was the subject of submissions to us.

[18] But three points are to be noted. First, it would be unrealistic to think that the issue arose at trial merely as a legal point which should result in acquittal: it is clear that in doing what they did, the respondents were effectively inviting prosecution, with a view, inter alia, to raising the issue of justification in court, and perhaps inducing some members of the public to see the trial as some kind of "test" case in relation to positive intervention and interference in defence matters. It has thus not only been the Crown who, by their questions, have raised general issues: the respondents themselves appear to us to have wished to do so, ever since they first planned what they eventually did on 8 June 1999.

[19] Secondly, while issues of justification and necessity may turn upon the prior question of whether an accused was faced with, and in some way trying to prevent, acts by another which were themselves criminal, the criminality of the events which the accused thus tries to avert is not always of the essence. And in taking the alleged criminality of the Government's actions in relation to Trident as a cornerstone of their argument the respondents appeared to us, particularly in much that was said by Ms. Zelter, to be treating the Government's alleged criminality in this respect not merely as something which had to be established in order to succeed in the defence of necessity and justification, but as itself the primary issue, with the respondents' actions at Loch Goil, and their subsequent trial, amounting to no more than a slightly complicated mechanism for bringing the Crown's conduct in relation

to Trident indirectly before a court, for scrutiny and, if possible, condemnation as criminal. As we mention later, Ms. Zelter emphasized that her inability to induce others to take action, in relation to what she perceived as criminal action on the part of the Government, was one of the foundations for arguing that she and the other respondents had no choice but to do what they did. But we think that it is worth noting, before coming to that particular question, that in addition to their claimed aim of physical prevention of what was being done by the Government in relation to Trident, the respondents appear also to have had, and still to have, the quite different aim of obtaining from a British court a finding that the Government's conduct was criminal.

[20] Thirdly, we should record that some emphasis was placed upon the respondents' membership of an organization which apparently takes an interest in questions of nuclear weapons and disarmament. That organization apparently has a number of principles or rules by which members such as the respondents abide when taking action in furtherance of the organization's aims. (One such principle is apparently non-violence—familiar enough in the context of protest and civil disobedience, but harder to understand when one is responding to necessity.) This is one of a number of background facts which help to explain how these three respondents came together for their Loch Goil exploit, with a significant degree of planning and a substantial body of information or belief as to defence matters and indeed international law. In many ways their action appears to have been a carefully chosen element in a widely based political campaign. The sheriff, having referred to the various sources of the respondents' knowledge and understanding of such matters, says that the respondents had formed "an unchallenged, sincere, unshakeable view" upon various matters, and contrasts them with "ordinary" peace protesters. We are not sure what is meant by "unchallenged" in this context. And one might suggest that holding "unshakeable" views is not always helpful when their soundness is in issue. The point which we think requires comment relates to the respondents' sincerity. Sincerity is significant, inasmuch as any kind of bad faith could be destructive of the types of defence which the respondents relied upon, and which underlies questions 2, 3 and 4. Sincerity is, however, quite common. And at least in the proceedings before this court (apart from a point discussed at paras. 49-55 below) we did not understand it to be suggested on behalf of any of the respondents that either in relation to themselves or upon the more general questions before us, the sincerity of a person's beliefs was in any way relevant except as negating any suggestion of mala fides which might be made.

[21] Against this background of matters which are not really in issue, we come to the questions referred for our opinion.

Question 1: In a trial under Scottish criminal procedure, is it competent to lead evidence as to the content of customary international law as it applies to the United Kingdom?

[22] At the respondents' trial, evidence was led as to the content of customary international law as it applies to the United Kingdom. The sheriff says that it seemed to her that in addition to the "non-legal" experts, "It was absolutely necessary for expert evidence to be led from an expert in international law, and whether or not it has ever been done in Scotland before seemed not to matter if I considered it essential." She goes on to say that "It did not seem appropriate that counsel, not necessarily skilled in international law, should address me on such a vital part of the defence". Thereafter she observes that it would not have been difficult for the Crown

Office to bring in "counter-experts". It is to be noted that the evidence in question was led before the jury and not merely before the sheriff (outwith the presence of the jury) as some kind of alternative or substitute for legal submissions. (It is also to be noted that at the trial, the respondents' understanding of what the law was—as distinct from the fundamental question of what the law was—was apparently seen as having potential significance. And the reasonableness of their understanding seems to have been regarded by the sheriff as also having a potential significance. But these peculiarities do not appear to us to have any bearing upon this question.)

[23] We are in no doubt that in relation to evidence in the trial itself this question must be answered in the negative. A rule of customary international law is a rule of Scots law. As such, in solemn proceedings it is a matter for the judge and not for the jury. The jury must be directed by the judge upon such a matter, and must accept any such direction. There can thus be no question of the jury requiring to hear or consider the evidence of a witness, however expert, as to what the law is.

[24] It was pointed out to us that evidence as to foreign law may competently be led in Scottish proceedings. That is because the law in question is foreign, and in Scottish proceedings is a question of fact and not of law. Any analogy between such foreign law and customary international law is false. It was also pointed out that it may be necessary, in some circumstances, to lead evidence as to what a particular person believed the law to be. But that is an entirely different question from the question of what the law is. In such a situation it would still be the responsibility of the court to direct the jury as to the actual law, which would not be a matter for evidence.

[25] The sheriff's comments afford no reason for leading evidence before the jury upon questions of law. If anything, what they suggest is that it might be desirable for a judge in solemn proceedings to be helped in coming to a correct understanding of the law (which could then be incorporated in directions to the jury) by hearing the evidence of experts or specialists in a particular field of law.

[26] Just as it is for the judge to direct the jury upon a point of law, it is important to remember that it is for the solicitor or counsel appearing on behalf of any party to present to the court any submission which is thought appropriate upon any issue of law. If there is an authoritative basis for any such submission, it may of course be referred to. And we of course acknowledge that a court may find it convenient to be referred to textbooks, articles or other written material which a party's legal representative may put forward in his submissions as providing a succinct or illuminating formulation of some proposition which he wishes to put forward as part of his submissions. A court would not nowadays, in our opinion, reject such a procedure merely because the material was not technically authoritative.

[27] We can see some initial attraction in the suggestion that if a court is willing to read what a particular expert has written in a general context, it might on occasion be sensible to hear what he has to say, in the particular context of the case in hand. We do not feel it appropriate to rule out that possibility, as a matter of law. Such argument as was addressed to us in relation to question 1 was of course directed primarily to the question of evidence *in causa*, before the jury; and while the possible usefulness of such material to a judge was touched upon, having regard to what the sheriff had said, the point was not fully argued. At that level, we are inclined to think that the matter would be one for the judge's discretion, although we would wish to reserve our opinion on that point. We would, however, add that if in any particular situation it were thought necessary by those representing a party to have recourse to some specialist source of advice, the appropriate course would of course

normally be to seek that advice, whether in writing or by consultation or both, so that the appropriate submissions could be made, by that party's representative, at the appropriate time. In matters of customary international law, we can appreciate that the question of whether an *opinio juris* has emerged, and won the general acceptance which is necessary to constitute a rule of customary international law, might well make recourse to expertise appropriate. But having regard to the different skills and expertise of an advocate on the one hand, and some other kind of specialist on the other hand, we find it very hard to imagine any situation in which the appropriate material should be presented to the court in the form of evidence with examination and cross-examination, and perhaps counter-evidence for the other party. We note the sheriff's views. In the present case, the matter was regrettably complicated by the evidence being led in front of the jury, by its becoming entangled in questions as to the respondents' beliefs as to the law, and by the fact that the Crown (quite rightly in our opinion) did not seek to have the issue of law determined by evidence and counter-evidence. But on any analysis, the history of the matter at trial serves as a dire reminder and warning of how issues of law, however recondite or complex, must be carefully identified and formulated both for and by the presiding judge.

Fundamental principles

[28] Questions 2, 3 and 4 depend on a consideration of a number of fundamental principles of Scots law, as well as questions of customary international law. It is convenient to consider these issues generally, in order to provide a context in which these three questions can be answered.

Malicious damage

[29] It is not disputed that what the respondents did amounted in law to malicious damage, if (*a*) they had the relevant mens rea and (*b*) there was no exculpatory defence whereby the law would see what they did as justified. The second, third and fourth questions relate not to the general nature of malicious damage or the mens rea which it requires, but to issues of justification. But some of the propositions which were advanced, in particular on behalf of the second respondent, make it appropriate for us to say something about malicious damage and the mens rea which it requires before turning to issues of justification.

[30] The context for a discussion of the scope of possible defences to a charge of malicious damage is a proper understanding of the components of the crime itself. The modern crime of malicious damage has been defined as the intentional or reckless destruction or damage of the property of another whether by destroying crops, killing or injuring animals, knocking down walls or fences or in any other way. The mens rea of the crime in the case of intentional damage, which is the only relevant head in the present case, consists in the knowledge that the destructive conduct complained of was carried out with complete disregard for or indifference to, the property or possessory rights of another. The case of *Ward v Robertson* illustrates the boundary between innocent and guilty destructive conduct for present purposes. There was nothing in the facts found in that case to show that the appellant knew or must have known that walking across permanent pasture would render the grass useless or unsuitable for grazing purposes. Had the field been sown with an ordinary commercial crop, the inference of the necessary knowledge would have been drawn. The immediate destructive purpose of the conduct would have been inferred, without regard to underlying motive, from facts and circumstances showing that the appellant knew or must have known that trampling down the crop would have destroyed or damaged it.

[31] The traditional formulation of the *nomen juris* may be potentially misleading. But there is no room for doubt as to the formal requirements of proof of the offence. "Malice" does not require proof of spite or any other form of motive. The constituent parts of the crime are few. The property in question must have belonged to or have been in the possession of another. That property must have been damaged intentionally or recklessly. There must have been knowledge, or facts from which knowledge can be inferred, that the conduct complained of would cause damage to a third party's patrimonial rights in the property in question. In our opinion the admitted facts in the present case show that the respondents set out deliberately to cause damage, including the damage which they did inflict, and there is no substance whatsoever in the argument that they lacked the mens rea required for proof of malicious damage. The only substantial issue relates to the contention that they were justified in inflicting that damage.

Basis for claiming justification

[32] Apart from certain rather confusing submissions as to the nature of malicious damage, and the mens rea which it would normally require, the respondents' submissions at trial, and in this court, may be expressed broadly as a contention that what they did should not merely be regarded as a course of action, in isolation, but must be assessed as a reaction or response to what the Government was doing with Trident. And the submission that their reaction or response was justified (in the legal sense of providing a full defence to the charges which they faced) took two distinct forms. First it was contended that what the Government was doing with Trident was itself illegal or criminal, and that that fact made it lawful to take action which would otherwise be criminal to prevent or inhibit the Government's illegal or criminal acts. And as a separate argument, it was contended that what the respondents did was done out of necessity, which in Scots law provides a complete defence. The first of these arguments depended upon customary international law in two different ways. First, it was not suggested that what the Government was doing with Trident would be illegal or criminal apart from customary international law; but it was contended that these actions were illegal or criminal as a matter of customary international law, and thus became so as a matter of Scots law. Secondly, and quite separately, it was argued that again as a matter of customary international law the illegality or criminality of what the Government was doing with Trident constituted a justification (not otherwise to be found in Scots law, and quite apart from any justification by necessity) for what the respondents had done. This aspect of the submissions advanced on behalf of the respondents can thus be seen as entirely separate from their submissions in relation to necessity. But in some cases where a defence of necessity is advanced, as a justification for acts intended to avert or inhibit danger, it will be necessary to consider whether the alleged danger flows from an act which in some way breaches the civil or criminal law or from what is an entirely lawful act, notwithstanding any danger that it may create for others. We think that the respondents see the first argument, depending not on necessity but upon customary international law, as the more "important" (perhaps because of a somewhat extraneous wish to have the Government's actions condemned as illegal or criminal, rather than for reasons directly connected with the issue of their own possible guilt). But we find it appropriate to consider the law relating to necessity first, before coming to questions of customary international law and the lawfulness of the Government's conduct in relation to Trident.

Necessity

[33] We do not propose to attempt any definition of the defence of necessity. And we would add that in our opinion any clarification or refinement of the concept of necessity is far more likely to emerge from a particular set of facts in a given case than from consideration of a general question. However, we would agree with what is said in Glanville Williams: *Criminal Law*, p. 728:

> "The peculiarity of necessity as a doctrine of law is the difficulty or impossibility of formulating it with any approach to precision . . . It is in reality a dispensing power exercised by the judges where they are brought to feel that obedience to the law would have endangered some higher value. Sir William Scott said in The Gratitudine [(1801) 3 Ch Rob 240 at p. 246; 165 ER 459]:
>
> "'The law of cases of necessity is not likely to be well furnished with precise rules; necessity creates the law; it supersedes rules; and whatever is reasonable and just in such cases, is likewise legal. It is not to be considered a matter of surprise, therefore, if much instituted rule is not to be found on such subjects.'"

There are none the less certain factors which have been authoritatively recognized as contributing to the type of necessity which constitutes a defence, and others which in principle can be seen as having to be taken into account. In any particular case it will be necessary to consider whether the defence is established having regard to such factors.

[34] It was common ground that necessity may be a relevant defence in the case of malicious damage as in other crimes. In appropriate circumstances the property of another might present the kind of immediate danger to the life or health of an individual or that individual's companion described by Lord Justice-General Rodger in *Moss v Howdle* that would justify destruction or material damage. In that case the court held that it made no difference whether the danger relied on arose from a contingency such as a natural disaster or illness rather than from deliberate threats. In the context of damage to property the danger may arise from accident or carelessness which may cause some physical thing to become dangerous. A vehicle rolling out of control towards a crowd might be intercepted by someone other than the owner or driver as the only way of preventing death or injury, even if the actions carried out caused damage to the vehicle. The contingency giving rise to the danger again appears to be immaterial.

[35] If a danger arises from natural causes, as opposed to some kind of human action, the justification for destroying or damaging the property of another obviously does not depend upon any claim to be preventing something unlawful or criminal. But where the danger arises from some human act or omission, which might be in breach of the criminal law or of some civil duty or obligation, the question arises as to what bearing, if any, such considerations might have in judging whether the defence of necessity is established. In the present case, there is no question of the alleged danger arising from contingencies such as natural disaster. The alleged danger is said to be created by the Government's actions. Moreover, there is no question of the danger arising from actions which are delictual or in breach of contract or otherwise in breach of known civil obligations. What is said is simply that the Government's actions are in breach of customary international law, and consequently in breach of domestic law. In these circumstances, it is unnecessary and inappropriate for us to consider whether any other type of breach of the law could ever be a factor having a bearing upon whether the defence of necessity was estab-

lished. Furthermore, in the absence of any such other breaches, it is apparent that the Government's actions in relation to Trident must be regarded as entirely lawful unless the breach of customary international law is established. If the Government's actions were thus entirely lawful, notwithstanding any danger that they might create, it is difficult to see how the defence of necessity could be invoked in relation to the otherwise criminal acts of a third party, done in order to prevent such entirely lawful actions. At all events, in the present case it was not submitted that if the Government's acts were lawful the defence of necessity would be available. It is thus an essential element of the respondents' argument in relation to necessity that they must show that the Government is in breach of customary international law. Such a breach is thus essential to the contention founded upon necessity, just as it is essential to the separate contention which is based not upon necessity but upon customary international law alone.

[36] It must, of course, be remembered that while such a breach of law is thus a necessary part of the defence of necessity in the circumstances of this case, that fact in no way diminishes the need to establish necessity according to Scots law, taking all appropriate factors into account. Subject to what we say later in relation to the respondents' argument based upon customary international law, it is not a defence to a charge of malicious damage to contend that the damage was done to prevent the commission of another offence: *Palazzo v Copeland*, the Lord Justice-General, at p. 54. The principles of our domestic law are general and clear. A person may not take the law into his or her own hands. A person may not commit an offence in an attempt to stop another. In relation to the defence of necessity, it may of course be the case that criminal conduct is the source of the danger, perhaps in the direct sense of criminal acts which are embarked upon or threatened and are themselves dangerous, or more indirectly as having created or contributed to some circumstances in which an accused claims that it was necessary for him to intervene. But even if such criminality were relevant, as showing that the creation of the danger was not itself lawful, the factors demonstrating necessity are circumstantial factors, concerning the danger itself, and require to be established regardless of whether what gave rise to the danger was a criminal act or, for example, a natural disaster. We turn to consider these factors.

[37] It is clear that timing is a crucial consideration. Immediacy of danger is an essential element in the defence of necessity. Unless the danger is immediate, in the ordinary sense of that word, there will at least be time to take a non-criminal course, as an alternative to destructive action. A danger which is threatened at a future time, as opposed to immediately impending, might be avoided by informing the owner of the property and so allowing that person to take action to avert the danger, or informing some responsible authority of the perceived need for intervention. That authority could then consider whether intervention was in its view necessary, and whether and how it could be carried out legally. If there is scope for legitimate intervention in the time scale set by the circumstances, it is difficult to see why the law should allow a third party to intervene by actions that would ordinarily be characterized as involving criminal conduct. One might not weigh the conduct of the rescuer or intervener in too fine a balance, and there may be marginal cases of difficulty. But making allowance for human judgment in the heat of the moment, the danger to which the individual claims to respond must have the character of immediacy.

[38] A related factor is the range of choice presented by the circumstances. In *Perka v The Queen* Dickson J analysed the defence of necessity in considerable

detail. At p. 249 he commented on the concept of necessity as an excuse for conduct which would otherwise be criminal. On his analysis the defence arose where, realistically, the individual had no choice, where the action was "remorselessly compelled by normal human instincts" [at p. 249e]. He adopted the views expressed in George Fletcher: *Rethinking Criminal Law*, that involuntary conduct should be excused in the context of criminal law, and observed [at p. 250a-b]:

> "I agree with this formulation of the rationale for excuses in the criminal law. In my view this rationale extends beyond specific codified excuses and embraces the residual excuse known as the defence of necessity. At the heart of this defence is the perceived injustice of punishing violations of the law in circumstances in which the person had no other viable or reasonable choice available; the act was wrong but it is excused because it was realistically unavoidable."

[39] In *Moss v Howdle* the Lord Justice-General, at p. 223, referred to the discussion of the juridical basis of the defence of necessity, and declined to add to it. He referred to Dickson J's opinion among other authorities, and said [at p. 223D and F]:

> "It follows that the defence cannot apply where the circumstances did not in fact constrain the accused to act in breach of the law . . .
>
> "Miss Scott did not dispute that the availability of the defence had to be tested in this way, nor that, if Mr. Moss had had an alternative course of action which was lawful, the defence could not apply."

So far, then, one can say that the defence is available only where there is so pressing a need for action that the actor has no alternative but to do what would otherwise be a criminal act under the compulsion of the circumstances in which he finds himself.

[40] The next issue, which arises directly from the above, relates to the circumstances justifying action, and is whether it is enough that the actor is driven by considerations personal to him. It appears plain that for action to meet the test there must be reasonable grounds for the view that it is necessary. The test has been expressed in different ways. On one view, the circumstances compelling action must be so extreme that no ordinary human being confronted by them would think that there was an alternative to the criminal conduct if the emergency were to be averted. For the Crown it was contended that the threat leading to action must be so compelling that any normal person would carry out the action in the circumstances confronting the accused. There is a risk that each of these propositions fails to have regard to the reality that there are normal people who may not react to an emergency. Not all normal people are equally brave or of equal resolve. Nor do all normal people perceive emergency or urgency, or danger itself, in the same way. (It is worth emphasizing that questions as to "personal" response are very different from questions as to prior personal beliefs or preconceptions.)

[41] We were referred to the English law of duress as discussed in *R v Howe*. The appellants in that case had contended that they had killed their victim under duress. The third question referred to the House of Lords in that case was: "Does the defence of duress fail if the prosecution prove that a person of reasonable firmness sharing the characteristics of the defendant would not have given way to the threats as did the defendant?" At p. 426[D-E], the Lord Chancellor, Lord Hailsham, said:

"(The) definition of duress . . . was correctly stated by both trial judges to contain an objective element . . . and this must involve a threat of such a degree of violence that 'a person of reasonable firmness' with the characteristics and in the situation of the defendant could not have been expected to resist. No doubt there are subjective elements as well, but, unless the test is purely subjective to the defendant which, in my view, it is not, the answer to the third certified question . . . must be 'yes'."

In *R v Martin* Simon Brown J restated the English rule as follows [at pp. 653H-654A]:

"(First), English law does, in extreme circumstances, recognise a defence of necessity. Most commonly this defence arises as duress, that is pressure upon the accused's will from the wrongful threats or violence of another. Equally, however, it can arise from other objective dangers threatening the accused or others. Arising thus it is conveniently called 'duress of circumstances'.

"Second, the defence is available only if, from an objective standpoint, the accused can be said to be acting reasonably and proportionately in order to avoid a threat of death or serious injury.

"Third, assuming the defence to be open to the accused on his account of the facts, the issue should be left to the jury, who should be directed to determine these two questions: first, was the accused, or may he have been, impelled to act as he did because as a result of what he reasonably believed to be the situation he had good cause to fear that otherwise death or serious physical injury would result; second, if so, may a sober person of reasonable firmness, sharing the characteristics of the accused, have responded to that situation by acting as the accused acted? If the answer to both these questions was Yes, then the . . . defence of necessity would have been established."

[42] The Lord Chancellor in *R v Howe* emphasized that duress of circumstances was an aspect of necessity. In *Moss v Howdle* that approach was adopted by the Lord Justice-General. Leaving aside the English terminology, these observations provide considerable assistance in understanding some of the requirements of the general defence of necessity. The actor must have good cause to fear that death or serious injury would result unless he acted; that cause for fear must have resulted from a reasonable belief as to the circumstances; the actor must have been impelled to act as he did by those considerations; and the defence will only be available if a sober person of reasonable firmness, sharing the characteristics of the actor, would have responded as he did.

[43] These tests acknowledge that different people respond to danger in different ways. The test applies to what a "sober person of reasonable firmness, sharing the characteristics of the accused" would do. It would not be enough to exclude a defence of necessity, which in all other respects was appropriate, to show that a person with different characteristics from the actor would have lacked the resolve to take effective action. Taking the simple example of a runaway vehicle, one can readily imagine circumstances in which an attempt to interfere with a moving vehicle would expose the actor to personal danger. Some individuals might find that risk unacceptable. In *Perka* Dickson J included in his preliminary conclusions that the involuntariness of the actor's conduct "is measured on the basis of society's expectation of appropriate and normal resistance to pressure" [p. 259d]. Society would, in normal course, recognize that there must be a range of acceptable responses to any given danger or other form of pressure. There may be certain dangers that only the most resolute would respond to by intervention.

[44] For the Crown it was contended that for a response to danger to be justified by the defence of necessity the person or persons exposed to risk must be positively identified and have some relation to the actor. On that approach the person who intercepted the runaway vehicle mentioned above would have a defence of necessity if he had a "companion" in the vulnerable crowd, but not if they were all strangers. In our opinion there is no acceptable basis for restricting rescue to the protection of persons already known to and having a relationship with the rescuer at the moment of response to the other's danger. No doubt a close relationship may enter into the issue of necessity in some respects. Proportionality of response may be a function of relationship, for example. A parent's reaction to apprehended danger to a child might reasonably be more extreme than that of an unrelated bystander. But the existence of a prior relationship as a precondition of necessity has nothing to commend it, in our view. In this respect we consider that the submissions of the amicus curiae were sound. If one had to define "companion" it would be anyone who could reasonably be foreseen to be in danger of harm if action were not taken to prevent the harmful event.

[45] There was considerable discussion whether the defence of necessity could be available where the place and person or persons under threat from the apprehended danger were remote from the locus of the allegedly malicious damage. We can see no reason in principle why the defence should not be so available. In the modern world many industrial processes have inherent in them the potential for mass destruction over a wide area surrounding a given plant. If a person damaged industrial plant to prevent a disaster which he reasonably believed to be imminent but which he could avoid by the actions taken, there is no compelling reason for excluding the defence of necessity solely on the grounds that persons at risk were remote from the plant provided that they were within the reasonably foreseeable area of risk.

[46] It was also contended by the Crown that the actor must, at the material time, have reason to think that the acts carried out had some prospect of removing the perceived danger. In our view that proposition is sound. What the defence is concerned with is conduct directly related to the avoidance of a particular danger which would cause harm if the acts of intervention were not carried out. If there were no prospect that the conduct complained of would affect the danger anticipated the relationship between the danger and the conduct would not be established. In the context of the destruction of or damage to another person's property to avert danger, having regard to its condition or what was being done to it or with it or the threat presented by it, the connection might ordinarily be easy to establish, as in the case of the runaway vehicle. In other circumstances, if the action could achieve no more than, say, a postponement or interruption of danger (so that it is only averted for a time) or some lessening of its likelihood (without removing the danger even temporarily) the assessment of any necessity would be less simple. In particular, issues of proportionality would arise; and merely making a danger less likely might not be regarded as justified by necessity at all.

[47] As a matter of general principle it appears clear that the conduct carried out must be broadly proportional to the risk. That will always be a question of fact to be determined in the circumstances of the particular case.

[48] There was of course a major dispute between the parties as to whether and how the defence of necessity might be said to be available in the present case. But leaving aside for the moment questions as to the application of the appropriate

principles, it appears to us that there was little or no dispute among the parties as to what those principles were—with one exception. It is convenient to consider that exception at this stage.

[49] In the final stages of the hearing, in the second speech for the second respondent, Mr. Anderson introduced an argument which had not been advanced either in the first speech for the second respondent or on behalf of either of the other respondents. It was not adopted on behalf of either of the other respondents.

[50] Put shortly, the argument was to the effect that the criteria for necessity identified in *Moss v Howdle* or indeed anywhere else in Scottish authority, did not represent the law of necessity in relation to a particular category of what would otherwise be malicious damage. This was said to be damage done by what were called "citizen interveners". The argument was based on certain American decisions, and, as we understood it, was to the effect that these decisions revealed principles which we could and should incorporate into Scots law despite the absence of previous Scottish authority for doing so, presumably as a way of applying old principles to a new kind of situation.

[51] Before considering the American decisions, we would observe that we were not provided with any definition of "citizen interveners". In objective terms, it appears that they are simply citizens who intervene to damage public property. As such, they are apparently defined by their own decision to intervene, and are thus self-selecting and, it seems to us, self-indulgent. As such, it is not clear to us why they require any special description such as "citizen interveners". What one is apparently talking about are people who have come to the view that their own opinions should prevail over those of others, for reasons which are not identified. They might of course be persons of otherwise blameless character and of indubitable intelligence. But they might not. It is not only the good or the bright or the balanced who for one reason or another may feel unable to accept the ordinary role of a citizen in a democracy. It is one curiosity of the expression "citizen intervener" (as indeed it is of the words "global citizen" used by the respondents) that citizenship is invoked by persons who apparently claim to be representing some unidentified category or number of fellow "citizens"—but can point to nothing in any generally understood concept of citizenship which would give them any right to act in furtherance of these particular citizens' wishes, and against the wishes of other citizens.

[52] As Edmund Davies LJ said in *Southwark London Borough Council v Williams* at p. 745H, the law regards with the deepest suspicion any remedies of self-help, and permits those remedies to be resorted to only in very special circumstances. "The reason for such circumspection is clear—necessity can very easily become simply a mask for anarchy." (One may note in passing that he went on to observe that it appeared that all the cases where a plea of necessity had succeeded were cases which deal with "an urgent situation of imminent peril".) These observations were quoted with approval *in Hutchinson v Newbury Magistrates Court*. It is hard to see how such a variety of possible saints and sinners as "citizen interveners" could be regarded as acting out of some special kind of necessity as a matter of law, without introducing anarchy in a particularly shapeless and indeed dangerous form. The phrase is evidently intended to suggest legitimacy of conduct in the public interest. But it seems to have no objective basis justifying any such implication.

[53] Mr. Anderson contended that the general defence of justification was much wider than the Scottish cases and writings suggested, and that American cases, especially *Commonwealth v Berrigan*; *People v Gray*; and *Commonwealth*

v Capitolo contained valuable observations that the court might rely on. Three propositions were said to be established by these authorities. (1) The question of immediacy should not be restricted to reacting immediately; there could be situations in which a delay between the perception of harm and action in response was acceptable. (2) The question whether there were other available legal means of acting should not be confined to ascertaining whether there were in fact such means but should include a consideration of whether the accused reasonably believed that there were other effective means of responding to the situation. (3) In considering the effectiveness of the action taken the court should have regard to the accused's reasonable belief that the action taken would lessen the harm rather than to the true likelihood that the action would avert danger. It seemed to be acknowledged that in terms of Scots law these propositions are novel.

[54] The American cases are not persuasive. Berrigan was concerned with two provisions of the Pennsylvania criminal code. In the Superior Court Judge Brosky at paragraph [4] quoted observations of Justice Rehnquist in *United States v Bailey* on the American common law of necessity, and distinguished them on the basis that "in Pennsylvania, however, the justification defence enacted by our General Assembly . . . is an expanded, modern variant on the common law defence of necessity". Justice Rehnquist's comments on the defences of duress and necessity, as a measure of the American common law, are totally destructive of Mr. Anderson's first and second propositions. He said:

> "Under any definition of these defences one principle remains constant: if there was a reasonable, legal alternative to violating the law, 'a chance both to refuse to do the criminal act and also to avoid the threatened harm', the defenses will fail."

The adoption by Pennsylvania of a statutory defence which is inconsistent with American common law is an unlikely basis for an amendment to Scots common law. Capitolo was decided on the basis of the same code and similar comments apply. *People v Gray* was a decision of a first instance criminal court in New York. Mr. Anderson accepted that many of the propositions found in Justice Safer-Espinoza's opinion were not vouched by other authority. However, he informed us that similar views were held in other first-instance criminal courts in America. In citing American authority he reminded us that in *Moss v Howdle* the Lord Justice-General had cited the views of Cardozo J for the proposition that "Danger invites rescue". There may perhaps be a developing or changing jurisprudence in the criminal courts of the United States. Safer-Espinoza J may in time achieve the eminence of Cardozo J. But it would be premature to accept her judgement as having as yet achieved the status of an authoritative statement of the modern law of necessity in America, much less as having persuasive authority on what the components of that defence should be in other countries.

[55] Mr. Anderson's submissions were wholly lacking in substance. The amicus curiae in his submissions suggested that the formulation of the law of necessity in the American Law Institute's Model Penal Code might assist. That code suggests that the defence is available where the actor believes the conduct to be necessary to avoid an evil, to himself or to another, where, inter alia, the evil sought to be avoided by his conduct is greater that that sought to be prevented by the law defining the offence charged. That formulation may require more precise scrutiny. But it appears to suffer from a number of defects for present purposes. It introduces an element of personal belief rather than objective reasonableness. It defines the test in terms of

comparative evil without apparent regard to the quality of the conduct threatened. It appears to justify a crime carried out to prevent another crime whenever the threatened crime involved a greater harm. It does not seem to require immediacy in any way. In our view American codifications of the criminal law are unlikely to provide a reliable basis for ascertaining Scots law. The law of Scotland is as declared in *Moss v Howdie*. Reform is not for us, but for Parliament. It is against the background of the factors identified in Moss that the defences available to people in the position of the respondents have to be considered.

Legality of Government action: justiciability

[56] Turning from the principles governing necessity to the issue of the legality of the Government's actings, we consider first the justiciability of such an issue. The advocate-député did not argue that the legality of the deployment of Trident II was not justiciable in this court. Having initiated the present proceedings the Crown were not best placed to do so. But it has to be observed that there may be an important issue which is not disposed of as a result. The position in 1964 is illustrated by *Chandler v Director of Public Prosecutions*, which involved the activities of the Committee of 100. At p. 791, Lord Reid said:

> "It is in my opinion clear that the disposition and armament of the armed forces are and for centuries have been within the exclusive discretion of the Crown and that no one can seek a legal remedy on the ground that such discretion has been wrongly exercised . . . Anyone is entitled, in or out of Parliament, to urge that policy regarding the armed forces should be changed; but until it is changed, on a change of Government or otherwise, no one is entitled to challenge it in court."

The best interests of the State in matters of defence were a matter for the prerogative.

[57] For the third respondent, Ms. Moxley, Mr. O'Neill argued that the law had developed since 1964. There was a growing acceptance that exercise of prerogative powers was open to judicial review. But even upon that basis, the first case he relied on scarcely assisted his position in the present context. In *CCSU v Minister for the Civil Service*, the House of Lords discussed the progressive relaxation of the rule that exercise of the prerogative was not justiciable. But there were important qualifications. At p. 398[E-F], Lord Fraser of Tullybelton said:

> "As De Keyser's case [[1920] AC 508; [1920] All ER 80] shows, the courts will inquire into whether a particular prerogative power exists or not, and, if it does exist, into its extent. But once the existence and the extent of a power are established to the satisfaction of the court, the court cannot inquire into the propriety of its exercise. That is undoubtedly the position as laid down in the authorities . . . and it is plainly reasonable in relation to many of the most important prerogative powers which are concerned with control of the armed forces and with foreign policy and with other matters which are unsuitable for discussion or review in the law courts."

Lord Diplock, at p. 412F, said that national security, the defence of the realm against enemies, is the responsibility of the executive, and not the courts of justice: "It is par excellence a non-justiciable question." Lord Roskill, at p. 418C, included the disposal of the armed forces among the prerogative powers which were not subject to judicial review.

[58] Mr. O'Neill next discussed the Canadian case of *Operation Dismantle v The Queen*. The plaintiffs sought an injunction to prevent the testing of the Cruise missile on the ground that it conflicted with the right to life assured by section 7 of the Canadian Charter of Rights and Freedoms. The Federal Court of Appeal held that the issues were non-justiciable. The Supreme Court rejected that proposition. Wilson J discussed Chandler at some length, putting a gloss on Lord Radcliffe's observations at several points. However, she does not appear to have been referred to the *CCSU* case. Her observations on Chandler are in our opinion incompatible with the consistent view in the United Kingdom that the disposition of the armed forces is non-justiciable. The case cannot assist the respondents in this court.

[59] We were next referred to *R v Ministry of Defence*, ex parte Smith. The case related to the legality of a rule prohibiting homosexuals from the armed forces. It was held that the prerogative did not preclude the court's jurisdiction. But the terms of the decision are important. The relevant question was discussed only by the Divisional Court. At p. 539 [E], Simon Brown LJ said:

> "I have no hesitation in holding this challenge justiciable. To my mind only the rarest cases will today be ruled strictly beyond the court's purview—only cases involving national security properly so called and where in addition the courts really do lack the expertise or material to form a judgment on the point at issue."

In that case no operational considerations were involved. Finally in this chapter we were referred to *R v Secretary of State for the Home Department*, ex parte Fire Brigades Union. Along with the case of Smith this shows a broadening of the circumstances in which the courts will hold questions relating to the exercise of the prerogative justiciable. But they have no direct bearing on the present case.

[60] In our view it is not at all clear that if this issue had been fully debated before us the incorporation of Trident II in the United Kingdom's defence strategy, in pursuance of a strategic policy of global deterrence, would have been regarded as giving rise to issues which were properly justiciable. Chandler remains binding authority in this court. Such developments as have taken place seem to have left untouched the status of the prerogative in matters relating to the defence of the realm. However, we have not been asked to dispose of the case on this basis, and we see no alternative but to reserve the issue for another occasion.

Trident and danger

[61] Question 2 refers to "the United Kingdom's possession of nuclear weapons, its action in placing such weapons at locations within Scotland or its policies in relation to such weapons". We shall return to the terms of the question. We were not asked by the respondents or the Crown to consider the characteristics of any nuclear weapon other than Trident II, although contrasts were drawn between the characteristics of that weapon and others. It is convenient at this stage to note certain undisputed facts about Trident, and to indicate briefly the established facts or suggested hypotheses which it might be necessary to take into account in answering question 2.

[62] It is not disputed that the United Kingdom possesses Trident II. And while question 2 takes such mere possession as the starting point in the phrase which we have quoted, no issue arises in relation to such mere possession: an hypothesis of mere possession without any kind of placement or deployment is perhaps somewhat unreal in any event but it is undisputed that Trident II is not thus merely possessed,

or in some sense merely held, in Scotland. It is in fact deployed. The respondents are content to proceed upon the basis that mere possession would not entail any illegality on the part of the Government. The decision in *John v Donnelly* was not questioned. It is not for this court to make factual findings. In particular, it is not for us to make findings as to the characteristics or destructive potential of Trident. Nor is it for us to make findings as to the manner in which Trident is deployed, or any implications derived from its deployment as to the purpose of the deployment, the circumstances, if any, in which it might be used or the form which the damage which it would cause would take. Nor is it for us to make factual findings as to Government policies or intentions in relation to Trident. It is also to be emphasized that while the sheriff clearly took account of factual evidence in reaching her decision, the trial does not provide us, and the questions do not deal, with any set of facts specific to or established in this case. But having regard to the nature of the questions we do not think that it is necessary or indeed desirable, to proceed upon any single or established view of the facts. The generality of question 2, in particular, seems to us inevitably to require a broader approach, considering hypothetical rather than actual situations. And in particular, we regard it as appropriate to consider, as a hypothesis, the situation as the respondents see and describe it. We do not have material upon which we could accept or reject the factual picture which they present to us. But within the ambit of question 2, we think it necessary to consider what the legal position would be, upon this as well as other hypotheses.

[63] It is said that the Trident nuclear warheads are 100 to 120 kilotons each, approximately eight or ten times larger than the weapons used at Hiroshima and Nagasaki. Emphasis was placed upon the blast, heat and radioactive effects of the detonation of such a warhead, and what were described as the inevitably uncontainable radioactive effects, in terms of both space and time. All these asserted characteristics were relied upon as showing that the damage done, and the suffering caused, could not be other than indiscriminate. Suggestions that the weapons deployed by the United Kingdom could be used in restricted ways, defensively or tactically or being directed only against specific types of target, were said not to be possible, or if possible not to remove this element of being indiscriminate in the suffering and damage which they would cause. In particular, it was said that they would be inevitably indiscriminate as between military personnel and civilians who could not be excluded from the uncontainable effects which we have mentioned. Even if much smaller warheads were used (and the possibility of this was not accepted in the context of the United Kingdom's deployment of Trident) one was still dealing with weapons of mass destruction, with uncontainable consequences.

[64] In addition to relying upon the characteristics of the weapons deployed by the United Kingdom and the inevitable and indiscriminate consequences which they attributed to them, the respondents relied also upon material which they saw as demonstrating Government intentions and policy, and thus the circumstances in which there was a risk that the weapons would actually be used. In its most general form, the proposition is said to be based upon logic. Deterrent will not deter unless it is credible. It will be credible only if those sought to be deterred are convinced that the weapons would be used (or, one might think, fear that they might). There must therefore, it is said, be an actual willingness and intention to use the weapons, at least in some circumstances. One may doubt the logical perfection of such arguments; but in contending that there was a real risk of actual use, at least in some circumstances, the respondents were able to rely both upon the familiar facts of deterrence (round-the-clock deployment, permanent preparedness to fire at a few min-

utes' notice, long-term targeting and deployments related to particular trouble spots and the like) and also statements in various forms from high Government sources indicating a willingness and intention to use these weapons in response not only to nuclear attack but in certain other circumstances. The respondents of course went into greater detail. We do not find it necessary to do so. But the argument moves from a claim that if certain circumstances were to emerge there would be a risk of threat and actual use, to a portrayal of the risk as already present: there is said to be, inherent in deployment, a continuing and continuous risk of actual use of Trident, and the continuing and continuous "threat" to use it, with its inevitably indiscriminate consequences. The respondents contend both that the United Kingdom's deployment of these weapons is illegal in terms of customary international law, and that recourse to what would otherwise constitute the offence of malicious damage is justified, as a matter of necessity and in order to prevent an illegal act, where the continuity of this risk and threat can be interrupted or reduced by inflicting damage on equipment of the kind found on board *Maytime*. The respondents' picture of the deployment of Trident and the policies of Government was not accepted by the advocate-député on behalf of the Crown; but we are satisfied that, as hypothesis, it makes it possible to consider question 2 in a reasonably specific context, and to regard it as arising from the charges upon which the respondents were acquitted. We shall have to return to the concept of deterrence, and to the particular word "threat" in our consideration of customary international law, to which we now turn.

The legality of the deployment of Trident

[65] The foundation of the respondents' contention that the United Kingdom's deployment of Trident is illegal as a matter of customary international law is the Advisory Opinion given by the International Court of Justice, as requested by the General Assembly of the United Nations by resolution 49/75 K adopted on 15 December 1994, on the question: "Is the threat or use of nuclear weapons in any circumstance permitted under international law?" We were informed by the amicus curiae that one of the issues which led to this reference arose from the distinction drawn in debate, by the nuclear States, between deterrence on the one hand and threat of use or use of nuclear weapons on the other hand. The General Assembly clearly hoped that the advisory opinion would provide authoritative guidance on that and other issues. It is of course to be noted that the question related to nuclear weapons in general, and not to Trident, and that the Court was thus not concerned with or considering the particular characteristics of Trident, as distinct from other nuclear weapons which might be less inevitably or uncontainably indiscriminate than Trident is seen as being by the respondents.

[66] Before turning to consider the International Court's advisory opinion, we think it worth emphasizing that that is what it is: it is an advisory opinion, not a judicial determination of customary international law. For the purposes of giving an advisory opinion, upon the question before it, the Court had to consider what was or was not permitted under international law in relation to the threat or use of nuclear weapons. Similarly, this court, in relation to the questions before us and having regard to the contentions of the respondents, must in our opinion consider what is and is not permitted by customary international law in relation to the United Kingdom's deployment and policies in relation to Trident, upon the hypothesis which the respondents say is appropriate. But it is worth emphasizing that although the advisory opinion may be regarded as confirmatory of the then rules of customary international law, it is not in itself to be regarded as having changed them. We do not understand

the Court itself to have taken any other view of its function. And correspondingly, it is this court's function to reach its own conclusions as to the rules of customary international law, taking full account of, but not being bound by, the conclusions reached by the International Court of Justice.

The advisory opinion

[67] The Court delivered its opinion on 8 July 1996. The Court stated at paragraph 20 of its opinion that the real objective of the question was clear: "[To] determine the legality or illegality of the threat or use of nuclear weapons." That view reflected an approach identifiable in the submissions of certain States appearing before the court that the question posed offered an opportunity to express an unqualified view of the legality of the threat or use of nuclear weapons whatever the circumstances. For example, one finds in the submissions made on behalf of Australia an invitation to set aside the past and to accept the submission that "the use or threat of nuclear weapons would now be contrary to fundamental principles of humanity, and hence, contrary to customary international law". It is clear that the Court was asked by certain States to consider the question in the widest context.

[68] The Court resolved, after discussion, that it had jurisdiction to answer such a general question, but noted, at paragraph 19, that there was an entirely different question which arose, namely whether the Court, under the constraints placed on it as a judicial organ, would be able to give a complete answer to the question asked. At paragraph 18 the majority opinion notes that the Court's function is to state existing law. It does not legislate. As a matter of language, the advocate-député was correct in argument before us in saying that the question might have been answered in the positive or negative without qualification, as indeed the court was invited to do by Australia among other States. However one reads the opinion, and the *dispositif* in particular, the Court was clearly unable to dispose of the question in a universal and unqualified way. In order to understand the limits within which the Court did consider that it could express an opinion, the starting point has to be an examination of the sources of international law considered by the Court which might bear upon the question of the legality of Trident.

[69] In paragraphs 24 to 32 of its advisory opinion, the Court rejected a number of submissions by several States. The inherent right to life, and the prohibition on arbitrary deprivation of life, under article 6 of the International Covenant on Civil and Political Rights, were distinguished in paragraph 25. The law against genocide was distinguished in paragraph 26. The possible relevance of laws for the protection of the environment was considered in paragraphs 27 to 33. Those laws indicated important environmental factors to be taken into account, but did not specifically prohibit the use of nuclear weapons. Against that background, in paragraph 34, the Court identified the most directly relevant applicable law governing the question as (*a*) that relating to the use of force enshrined in the Charter of the United Nations; and (*b*) the law applicable in armed conflict which regulates the conduct of hostilities; together with (*c*) relevant specific treaties on nuclear weapons.

[70] The observations in paragraph 25 on article 6 of the International Covenant on Civil and Political Rights, taken along with the identification of the relevant sources in paragraph 34, are of some possible relevance in the present case in the context of an argument that the Court's opinion has a bearing on the policy of deterrence in time of peace.

[71] Before turning to the sources identified and the rules of international law that can be deduced from them, it is relevant to note what the Court understood it

was dealing with in considering "nuclear weapons". Paragraphs 35 and 36 make it clear that what the Court had in mind were weapons of mass destruction, potentially catastrophic in their destructive potential, with the capacity to cause untold human suffering and the ability to cause damage, including genetic defects and illness, to generations to come. It was the legality of the threat or use of weapons of this kind that the Court proceeded to consider. If the Court had considered that there was an identifiable and distinct class of small-scale or tactical nuclear weapons which could be regarded as different, and could be set aside in their advice, it would no doubt have made that clear. The question of whether weapons capable of mass destruction can be used on a small scale, or tactically, or in some other limited way, is another matter, and is recognized by the Court.

[72] At paragraph 37 of its opinion, the Court states that it will now address the question of legality or illegality of recourse to nuclear weapons in the light of the provisions of the Charter of the United Nations relating to the threat or use of force, and in the succeeding paragraphs gives consideration to a number of provisions of that kind. The general provision of Article 2, paragraph 4, is noted:

> "All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State or in any other manner inconsistent with the Purposes of the United Nations."

Reference is also made to Articles 51 and 42. At paragraph 39 it is observed that these provisions do not refer to specific weapons, but apply to any use of "force", regardless of the weapons employed.

> "The Charter neither expressly prohibits, nor permits, the use of any specific weapon, including nuclear weapons. A weapon that is already unlawful per se, whether by treaty or custom, does not become lawful by reason of its being used for legitimate purpose under the Charter."

At paragraph 42 it is acknowledged that the use of nuclear weapons in self-defence cannot be excluded in all circumstances, and after reference to certain other matters the Court, at paragraph 47, comes to questions which are more directly relevant for present purposes. The Court observes that whether a "signalled intention to use force if certain events occur" is or is not a "threat within Article 2, paragraph 4, of the Charter" depends upon various factors. It is not suggested that the general Purposes of the Charter throw any particular light upon the legality of nuclear as opposed to other weapons. In relation to the concepts of "threat" and "use", for the purposes of Article 2, paragraph 4, the Court records that no State (whether or not it defended the policy of deterrence) suggested to the Court that it would be lawful to threaten to use force if the use of force contemplated would be illegal. But in paragraph 48 the Court comes to the question of whether a policy of deterrence (with a credible intention to use nuclear weapons) is a "threat" contrary to Article 2, paragraph 4. What it says is that this depends upon whether the particular use of force envisaged would be directed against the territorial integrity or political independence of a State or upon certain other considerations, whereby the use or threat of force would be unlawful. In the absence of these other considerations, therefore, it is directing a particular use of force against a particular "target" State's integrity or independence which is seen as possibly amounting to a "threat" in the sense of Article 2, paragraph 4. If that is inherent in the concept of "threat", it is apparent that the Court sees deployment as a deterrent as not necessarily involving this crucial element of "threat".

[73] Turning from the Charter, the Court considered the law applicable in situations of armed conflict. Noting at paragraph 57 that the pattern until now has been for weapons of mass destruction to be declared illegal by specific instruments, the court does not find any specific prohibition of recourse to nuclear weapons. At paragraph 58 it goes on to say that in the last two decades a great many negotiations have been conducted regarding nuclear weapons, but notes that they have not resulted in a treaty of general prohibition of the same kind as for bacteriological and chemical weapons. It refers to a number of specific treaties which limit such matters as acquisition, manufacture and possession of nuclear weapons, or their deployment in particular areas, or their testing. And at paragraph 60 it notes the view of certain States that these treaties "bear witness, in their own way, to the emergence of a rule of complete legal prohibition of all use of nuclear weapons". On the other hand, at paragraph 61, it notes that other States see a logical contradiction in reaching such a conclusion. At paragraph 62 the Court itself notes that such treaties, which do not specifically address threat or use, "certainly point to an increasing concern in the international community with these weapons". The Court concludes from this that these treaties could therefore be seen "as foreshadowing a future general prohibition of the use of such weapons, but they do not constitute such a prohibition by themselves". At paragraph 63, referring specifically to the Tlatelolco and Rarotonga treaties, the Court says that they "testify to a growing awareness of the need to liberate the community of States and the international public from the dangers resulting from the existence of nuclear weapons", and it refers to certain more recent treaties. But it concludes by saying: "It does not, however, view these elements as amounting to a comprehensive and universal conventional prohibition, on the use, or the threat of use, of those weapons as such." That is, as we have indicated, accepted in the present case: the contention is not that there is a conventional prohibition, but that these weapons are illegal as a matter of customary international law. None the less, in judging whether there is a settled *opinio juris* as a matter of customary law, it appears to us that the history and nature of conventional provisions may be of substantial significance.

[74] At paragraph 64, the Court turned to an examination of customary international law, noting that the substance of that law must be "looked for primarily in the actual practice and *opinio juris* of States". After noting opposing arguments, it says this at paragraph 67:

> "The Court does not intend to pronounce here upon the practice known as the 'policy of deterrence'. It notes that it is a fact that a number of States adhered to that practice during the greater part of the cold war and continue to adhere to it. Furthermore, the members of the international community are profoundly divided on the matter of whether non-recourse to nuclear weapons over the past 50 years constitutes the expression of an *opinio juris*. Under these circumstances the Court does not consider itself able to find that there is such an *opinio juris*."

We find that passage unequivocal.

[75] Going on to consider certain General Assembly resolutions, the Court notes, inter alia, that they can, in certain circumstances, provide evidence important for establishing the existence of a rule or the emergence of an *opinio juris*. And it acknowledges that a series of resolutions may show the gradual evolution of the *opinio juris* required for the establishment of a new rule. However, it observes that several of the resolutions under consideration were adopted with substantial numbers of negative votes and abstentions and says that "thus, although those resolutions are

a clear sign of deep concern regarding the problem of nuclear weapons, they still fall short of establishing the existence of an *opinio juris* on the illegality of the use of such weapons". At paragraph 73, noting the adoption each year by the General Assembly of resolutions requesting the Member States to conclude a convention prohibiting the use of nuclear weapons in any circumstance, the Court says that this reveals the desire of a very large section of the international community to take, by a specific and express prohibition of the use of nuclear weapons, "a significant step forward along the road to complete nuclear disarmament". And it concludes by saying that the emergence, as lex lata, of a customary rule specifically prohibiting the use of nuclear weapons as such "is hampered by the continuing tensions between the nascent *opinio juris* on the one hand, and the still strong adherence to the practice of deterrence on the other". Again, we find that unequivocal.

[76] At paragraph 74 of the opinion the Court turned to the question whether recourse to nuclear weapons must be considered as illegal in the light of the principles and rules of what is now known as "international humanitarian law", applicable in armed conflict. After noting the varied sources of international humanitarian law, and some of its history, the Court comments at paragraph 77 that the conduct of military operations is governed by a body of legal prescriptions, because "the right of belligerents to adopt means of injuring the enemy is not unlimited". In particular, reference is made to the prohibition of the use of "arms, projectiles or material calculated to cause unnecessary suffering" contained in article 23 of the 1907 Hague Regulations. At paragraph 78 the Court identified the cardinal principles constituting the fabric of humanitarian law:

> "The first is aimed at the protection of the civilian population and civilian objects and establishes the distinction between combatants and non-combatants; States must never make civilians the object of attack and must consequently never use weapons that are incapable of distinguishing between civilian and military targets. According to the second principle, it is prohibited to cause unnecessary suffering to combatants: it is accordingly prohibited to use weapons causing them such harm or uselessly aggravating their suffering. In application of that second principle, States do not have unlimited freedom of choice of means in the weapons they use."

After referring to the Martens Clause, the Court notes that humanitarian law, at a very early stage, prohibited certain types of weapons, either because of their indiscriminate effect on combatants and civilians or because of the unnecessary suffering caused to combatants, that is to say, a harm greater than that unavoidable to achieve legitimate military objectives. And it adds that if an envisaged use of weapons would not meet the requirements of humanitarian law, a "threat" to engage in such use would also be contrary to that law. At paragraph 79, it says that these fundamental rules are to be observed by all States, whether or not they have ratified the conventions that contain them, "because they constitute intransgressible principles of international customary law". Proceeding upon its view that there could be no doubt as to the applicability of humanitarian law to nuclear weapons, and recording [at para. 86] inter alia the United Kingdom's explicit statement that "[so] far as the customary law of war is concerned, the United Kingdom has always accepted that the use of nuclear weapons is subject to the general principles of the *jus in bello*", the Court goes on at paragraph 89 to say that it finds that, as in the case of the principles of humanitarian law applicable in armed conflict, international law leaves no doubt that the principle of neutrality is also applicable to all international armed conflict, whatever type of weapons might be used.

[77] At paragraph 90 the Court observes that the conclusions to be drawn from the applicability of these principles to nuclear weapons are "controversial". Passages from the United Kingdom's Written Statement are quoted, referring to the requirements of self-defence and the "wide variety of circumstances with very different results in terms of likely civilian casualties 'in which nuclear weapons might be used'". It also records at paragraph 92 the different view, that recourse to nuclear weapons could never be compatible with the principles and rules of humanitarian law on the basis that they would in all the circumstances be unable to draw any distinction between the civilian population and combatants, and that their effects, largely uncontrollable, could not be restricted, either in time or in [space,] to lawful military targets. They would kill space, [*sic*] and destroy in a necessarily indiscriminate manner, and the number of casualties would be enormous. On that view, the use of nuclear weapons would be prohibited in any circumstance, notwithstanding the absence of any explicit conventional prohibition. Faced with this conflict of views, the Court says [at para. 95] that it did not consider that it had a sufficient basis for a determination on the validity of either view: "[The] Court considers that it does not have sufficient elements to enable it to conclude with certainty that the use of nuclear weapons would necessarily be at variance with the principles and rules of law applicable in armed conflict in any circumstance." At paragraph 96 the Court mentions the fundamental right of every State to survival, and thus its right to resort to self-defence when its survival is at stake. And it refers again to the "policy of deterrence" in terms similar to those already mentioned at paragraph 67 of its opinion. This section of the opinion concludes by the Court observing [at para. 97] that it "cannot reach a definitive conclusion as to the legality or illegality of the use of nuclear weapons by a State in an extreme circumstance of self-defence, in which its very survival would be at stake".

[78] In the concluding section of its opinion, paragraphs 98 to 103, the Court refers to "the continuing difference of views with regard to the legal status of weapons as deadly as nuclear weapons" [para. 98] and [at para. 99] to article VI of the Treaty on the Non-Proliferation of Nuclear Weapons:

> "Each of the Parties to the Treaty undertakes to pursue negotiations in good faith on effective measures relating to cessation of the nuclear arms race at an early date and to nuclear disarmament, and on a treaty on general and complete disarmament under strict and effective international control."

It points out that this goes beyond a mere obligation of conduct: the obligation is an obligation to achieve a precise result (nuclear disarmament in all its aspects) by adopting a particular course of conduct (the pursuit of negotiations in good faith). The fulfilment of these obligations is described [at para. 104] as "without any doubt an objective of vital importance to the whole of the international community today".

[79] We have thought it appropriate to set out the relevant views and conclusions expressed in the course of the Court's opinion at some length before turning to the Court's replies to the question, as set out in paragraph 2 of the *dispositif*. It is necessary to set out the material parts of the *dispositif* in full. The Court replied to the question as follows:

> "A. Unanimously,
>
> There is in neither customary nor conventional international law any specific authorization of the threat or use of nuclear weapons;

B. By eleven votes to three,

There is in neither customary nor conventional international law any comprehensive and universal prohibition of the threat or use of nuclear weapons as such;

C. Unanimously,

A threat or use of force by means of nuclear weapons that is contrary to Article 2, paragraph 4, of the Charter of the United Nations and that fails to meet all the requirements of Article 51, is unlawful;

D. Unanimously,

A threat or use of nuclear weapons should also be compatible with the requirements of the international law applicable in armed conflict, particularly those of the principles and rules of international humanitarian law, as well as with specific obligations under treaties and other undertakings which expressly deal with nuclear weapons;

E. By seven votes to seven, by the President's casting vote,

It follows from the above-mentioned requirements that the threat or use of nuclear weapons would generally be contrary to the rules of international law applicable in armed conflict, and in particular the principles and rules of humanitarian law;

However, in view of the current state of international law, and of the elements of fact at its disposal, the Court cannot conclude definitively whether the threat or use of nuclear weapons would be lawful or unlawful in an extreme circumstance of self-defence, in which the very survival of a State would be at stake; . . ."

[80] The expression "threat or use of nuclear weapons", which is used in the question upon which the advisory opinion was sought, is also used at heads A, B, D and E of paragraph 2 of the *dispositif*. It seems clear that it must have the same meaning in all four heads. What that meaning is, in our opinion, is clarified by the terms of head C, which refers to threat or use "of force" by means of nuclear weapons "that is contrary to Article 2, paragraph 4, of the Charter of the United Nations". That provision of the Charter, along with Article 51, is discussed as we have indicated at paragraphs 38 to 50 of the Court's opinion. And while those provisions are concerned with a threat or use of nuclear weapons, the expression "threat or use" must have the same meaning as it has in connection with the general concept of force in Article 2, paragraph 4. Apart from making that particular observation, we find it more convenient to discuss the terms and apparent meaning of the various heads of paragraph 2 of the *dispositif* after a consideration of the minority opinions.

Minority opinions

[81] Our attention was drawn to some of the minority opinions. These do not, of course, express the opinion of the Court as to the requirements of customary international law. In some respects they appear to be expressions of views as to what the law ought to be rather than what it is. But they cast some light on the advisory opinion itself and the scope of the material considered by the Court.

[82] Judge Ranjeva delivered a separate opinion from the majority, explaining the basis on which he supported the decision. He put a gloss on the first clause of paragraph 2E, and proceeded to analyse the second part in a highly destructive way. His ultimate conclusion is difficult to reconcile with his support of the whole

clause except on a basis which we cannot reconcile with the reasoning underlying the decision. It is illuminating of his difficulties that he concluded his opinion with the hope that no court would ever have to rule on the basis of the second clause of paragraph 2E of the *dispositif*. We find no help in his individual views in relation to the issues before this court.

[83] Some of the dissenting opinions reflect clearly the divergence of views on matters which are relevant in the present case. Vice-President Schwebel's analysis of the law followed the same lines as the majority opinion. His conclusion on conventional and customary sources was consistent with the majority: the threat or use of nuclear weapons was not, certainly not yet, prohibited in all circumstances. He dismissed the resolutions of the General Assembly as lacking legal authority. His discussion of the principles of international humanitarian law followed. He identified the extremes which in his view allowed of easy answer. It could not be accepted that the use of nuclear weapons on a scale which would, or could, result in millions of deaths in indiscriminate inferno and by far-reaching fallout, which would have profoundly pernicious effects in space and time, and would render uninhabitable much or all of the earth could be lawful. At the other extreme tactical nuclear weapons used in submarine warfare easily could. He figured intermediate cases. He interpreted paragraph 2E as acknowledging that while the use of nuclear weapons might "generally" be in conflict with international law, in specific cases it might not. He proceeded to strong criticism of the second part of paragraph 2E, and developed an argument based on contemporary events in support of the legality of the threat or use of nuclear weapons in certain circumstances.

[84] Judge Weeramantry reflected the opposite opinion. He thought that the Court should have declared that the use or threat of use of nuclear weapons was unlawful in all circumstances without exception. Ms. Zelter relied strongly on passages in his opinion. It is clear, however, that his dissenting opinion does not reflect either the opinion of the Court or the existing law. The terms in which he expresses his own views are recognized by him to be at odds with the majority. He says that in certain respects the majority view is "clearly wrong". In section VII, part 2, of his opinion Judge Weeramantry dealt with his views on deterrence. One can entertain no doubt that he considered that even at the level of minimum deterrence a policy of holding nuclear weapons for deterrence was contrary to law.

[85] These two extremes of opinion illustrate the kind of discussion which took place, not only as to threat and use, but also to deterrence. They show the degree of divergence of opinion on the legality of deterrence among members of the Court. Perhaps because of this divergence of opinion, paragraph E of the *dispositif* is not persuasive of the proposition that in the present state of international law deployment of nuclear weapons in pursuance of a policy of deterrence is per se illegal. The observations of Judge Shahbuddeen in his dissenting opinion are of some importance. He considered that the Court could have answered the question put to it in the only context which he thought relevant, the use of nuclear weapons in self-defence where the use envisaged threatened the survival of the species. He dissented because the Court did not answer the question one way or the other.

Interpretation of the dispositif

[86] We shall come back to the meaning of "threat" when dealing with the submissions of parties. We have no comment otherwise in relation to heads A or C of paragraph 2 of the *dispositif* at this stage. Some comment is, however, appropriate in relation to heads D and E. In relation to head D, we find the use of the words

"should" and "particularly" somewhat surprising and confusing. But we think this head must be read broadly as confirming the applicability to nuclear weapons of the general requirements of international law applicable in armed conflict and indicating (consistently with heads A and B) that apart from specific obligations under treaties and other undertakings, the threat or use of nuclear weapons may be compatible with these requirements, but will not be so if the circumstances are such that the particular threat or use breaches any of the principles and rules of international humanitarian law. Head D is not in our opinion capable of being read as suggesting that deployment of nuclear weapons in pursuance of a general policy of deterrence is per se a "threat". Nor does head D suggest that whatever does amount to a threat of nuclear weapons, or actual use of such weapons, will necessarily be in breach of the principles and rules of international humanitarian law. Indeed, it envisages that they may not be. Head E was plainly regarded as problematic by certain members of the Court. Since head D leaves entirely open the question of when and in what circumstances the threat or use of nuclear weapons might be in breach of customary international law, it is perhaps understandable that the Court might be reluctant to conclude the replies without reflecting in any way the observations which they had made at paragraph 95 of their opinion to the effect that the use of such weapons seems "scarcely reconcilable" with respect for the requirements of international humanitarian law, and at paragraph 97, which suggests an unwillingness to leave the circumstantial questions unanswered, and expresses the idea that their use by a State might always be illegal, except "in extreme circumstance of self-defence, in which its very survival would be at stake". Head E, with its use of the word "generally" and its repetition of what has been said in paragraph 97, is perhaps intended as an indication of where the boundaries of legality and illegality are likely to be found. Even if Trident is to be seen as inevitably indiscriminate, head E does not in our opinion show that the Court saw use or threat of such a weapon (as distinct from some small or tactical nuclear weapon) as always illegal. Indeed, the references to extreme circumstances and survival do not suggest that small or tactical weapons are envisaged. Despite the divided views on head E and indeed the trenchant criticism expressed by Judge Higgins, we would not wish to comment on the propriety of including this type of non-determinative material in what was, after all, an advisory rather than determinative opinion. For us the point is that head E identifies no rule, expressly or by implication.

Intervention to prevent crime

[87] As we have indicated at paragraph 32 above, the respondents rely upon customary international law not merely as showing that what the Government was doing was illegal, but as providing a justification (not otherwise to be found in Scots law, and quite apart from any justification by necessity) for what they did. We come now to that question.

[88] The respondents claim to have "acted in the knowledge that the only effective remedy open to us to prevent a nuclear holocaust was to join with other 'global citizens' in an effort to enforce the law ourselves as the Government, judiciary, police and other institutions of the State were not willing to do it themselves, despite high-level delegations asking them to do so". Leaving aside the question of whether what they did could seriously be seen as helping to prevent a nuclear holocaust, and stripping this claim of some of its vaguer and more tendentious implications, the underlying proposition appears to be that if the law is being broken, and is not being enforced by public institutions empowered to enforce it, individuals have the legal

right to enforce it, or to take steps contributing to its enforcement, notwithstanding that what they do would otherwise itself be criminal. As we have indicated, the law in relation to necessity confers no such general right. What is contended is that customary international law confers such a general right. Indeed it is that contention which appears, even more than alleged necessity, to underlie the respondents' claim to be justified in what they did. Its basis is much less clear.

[89] The argument advanced in support of this proposition, in particular on behalf of the second respondent, was at one stage founded upon the Nuremberg Principles. But these clearly have nothing to do with this matter, and the argument based on them was not insisted in. Counsel for the second respondent, and Ms. Zelter, submitted however that the proposition had a basis in principles revealed at the Nuremberg trials themselves. It was not explained how or why any rule or principle applied in the conduct of those trials, but not incorporated in the Nuremberg Principles, should be regarded as established customary international law. The cases relied upon, both by Ms. Zelter and by counsel for the second respondent, were cases where an accused person pled justification by extreme necessity, arising from the plight of Germany at certain stages in the war or by superior orders at times of grave emergency. Those defences were rejected, and the argument here appeared to be on the lines that as some kind of corollary or implication, deriving from the fact that neither orders nor necessity excused an individual's participation in actions alleged to be criminal at international law, the individual in question should be seen as having had a right to take action (itself otherwise criminal) designed to prevent the military or civilian authorities from committing the crimes in which the accused had in fact implicated himself.

[90] That does not appear to us to have been an issue at the Nuremberg trials in question. And while interesting questions of law might no doubt arise, in relation, say, to a German citizen during the war who in breach of German law chose to kill his officer rather than obey him in committing a crime against humanity, the cases to which we were referred do not appear to us to have determined any such issue.

[91] Particular emphasis was laid upon the case of a Swiss national, Paul Grueninger, who had been dismissed from office and convicted in a local court on the ground of disregard of Swiss federal directives and laws in allowing refugees from Nazi persecution to enter Switzerland. We were told by Ms. Zelter that his trial was reopened in 1995 and that he was acquitted posthumously. The facts of the case appeared clearly from Ms. Zelter's narrative, but the grounds of judgement did not. On the material available his actions appear to have had the character of rescue. There is nothing to support the notion that the case demonstrates some right, as a matter of customary international law, to prevent crime by committing what would otherwise be a criminal act. We see no real analogy between any of these cases and the situation in which the respondents find themselves. What we have referred to as a "notion" is in our opinion no more than that. It has no foundation in law. Unless the respondents' actions are justified by the law of necessity, they cannot be seen as justified.

Submissions as to the illegality of deploying Trident

[92] The arguments advanced to us were essentially those considered by the International Court of Justice for the purposes of giving its advisory opinion, but with one crucial difference. That Court was considering nuclear weapons in general. We were considering Trident in particular. The possibilities which the International Court considered included some in which it had not felt able to say that the in-

evitable consequences would be so indiscriminate as always to entail breach of international humanitarian law. It was submitted that these possibilities related only to small tactical weapons. The Court was unable to hold that the threat or use of nuclear weapons would always and inevitably entail such a breach. It was submitted that for such small weapons, the Court's reluctance to reach an absolute conclusion might be understandable, but that for a weapon such as Trident, the possibility of use compatible with the requirements of international humanitarian law simply did not exist, and the International Court had not suggested that it did. In relation to Trident, therefore, this court should hold that any threat or use would inevitably entail breach of those requirements, and would be illegal as a matter of customary international law. And while that conclusion was said to flow from the rules of international humanitarian law, which had been considered by the International Court of Justice, rather than from the advisory opinion itself, it was submitted that head of paragraph 2 of the *dispositif* demonstrated the Court's reasons for stopping short of a declaration of universal illegality in threatening or using nuclear weapons, and identified the limited category of situations in which such threat or use might be legal—situations in which Trident could not be used.

[93] In our opinion, this submission misconstrues the position adopted by the International Court of Justice. On a correct reading of the *dispositif*, and in particular head E, we understand the Court as stopping short not merely of a declaration that the threat or use of nuclear weapons will always and inevitably be illegal. It also, as we understand, stops short of drawing any line between those threats or uses which will or may be legal and those which will or may be illegal. [The Court] appears to us to consider, as we do, that any breach of international humanitarian law will depend upon circumstances. In any particular case of threat or use, the facts will have to be compared with rules which are not expressed in black and white objective terms, but involve a range of qualitative considerations, covering such matters as the purposes, nature and consequences of the threat or use in question. We are not persuaded that even upon the respondents' description of, or hypothesis as to, the characteristics of Trident it would be possible to say a priori that a threat to use it, or its use, could never be seen as compatible with the requirements of international humanitarian law.

[94] In our opinion there are two fundamental flaws in the respondents' contention that the United Kingdom's deployment of Trident is in breach of customary international law. These two flaws can perhaps be seen as one; but they merge from different considerations, and it is convenient to approach them separately.

[95] First, the submissions advanced on behalf of the respondents appear to us to ignore the fact that the relevant rules of conventional and customary international law, and in particular the rules of international humanitarian law, are not concerned with regulating the conduct of States in time of peace. They specifically relate to warfare and times of armed conflict, and are designed to regulate the conduct of belligerents, against one another or against some neutral State. The International Court of Justice appears to us to have made this plain. In particular, at head E of paragraph 2 of the *dispositif*, the Court was in our opinion expressly concerned with the application of international humanitarian law where a state of belligerence exists. That is what the Court says in the first part of paragraph E. It refers to the rules of international law "applicable in armed conflict", and the principles and rules of humanitarian law are mentioned only in that context, without reference to any rules of humanitarian law in situations where there is no armed conflict. Attempts were

made in argument to apply paragraph E, and the rules generally applicable to armed conflict, to times of peace. We are not persuaded that that can be done. In an alternative approach, it appeared to be suggested that the deployment of Trident was of its nature of such a kind as to create "armed conflict". We can see that that expression may be used to describe situations in which, despite actual use of lethal weaponry, a State or States may deny that there is a state of "war". We are not concerned with such nice distinctions or definitions, when arms are used by one State against another. But it is quite another matter to try to extend the meaning of "armed conflict" to deployment of forces or weaponry in time of peace. The respondents' enthusiasm for their cause may lead them to think along those lines. But enthusiasm is an untrustworthy dictionary. If one considers a case of actual use of nuclear weapons, the situation can no doubt be seen as one in which there is either an invasion of neutrality or ipso facto a state of war. At all events, it is hard to see how such an event would fall outside the expression "armed conflict". Moreover, where there is already armed conflict, with identifiable belligerents, one can readily envisage threats of illegal use of nuclear weapons which, as a matter of international humanitarian law, are to be equiparated with that illegal use, and are thus themselves illegal. In the context of armed conflict between such known belligerents or opponents, such an equiparation is understandable. But in time of peace, it does not appear to us that these rules are either applicable or capable of application. That remains true even where a particular State has a policy of deterrence, and deploys nuclear weaponry in execution of that policy. Application of the rules, and the resultant possibility of illegality, will arise only if and when some specific change turns the situation into one of armed conflict. But that aspect of the matter lies at the heart of the second flaw in the respondents' argument, and is more conveniently dealt within that context.

[96] Quite apart from the fact that the relevant rules of international humanitarian law appear to be restricted to situations of armed conflict, a question arises in relation to any rule which is concerned with the "threat or use" of force or of nuclear weapons, as to whether there is indeed a "threat" of the kind which the rule equiparates with actual use. On behalf of the respondents, the argument appeared to be that deterrence quite simply is a threat. We have no difficulty in acknowledging that in certain contexts the words may be virtually interchangeable. But to adopt another word, the minatory element in one action or set of actions may be very different from the minatory element in another act or set of actions. And we are entirely satisfied that the general minatory element in the deployment of nuclear weapons in time of peace, even upon the respondents' hypothesis as to the United Kingdom Government's policies and intentions, is utterly different from the kind of specific "threat" which is equated with actual use in those rules of customary international law which make both use and threat illegal.

[97] No one familiar with either the streets or the courts of this country could fail to see that a distinction can be drawn between a youngster brandishing a knife at another a foot away from him, and perhaps indicating by word and action that he intends to stab him there and then, and all multifarious situations in which a person may say or show, perhaps very convincingly, that in some circumstances, specified or not, he would have recourse to violence against another or others. One can play with language: the latter may be said to constitute a threat, or perhaps to issue a threat, or to be guilty of threatening behaviour. *Nemo me impune lacessit*. But broadly deterrent conduct, with no specific target and no immediate demands, is familiarly seen as something quite different from a particular threat of practicable violence, made to a specific "target", perhaps coupled with some specific demand

or perhaps simply as the precursor of actual attack. The deployment of Trident II, however far one goes in adding hypotheses as to the immediacy with which it could be used against some potential and arguably identifiable target State, in our opinion in general lacks the links between threat and use and an immediate target, which are essential to a "threat" of the kind dealt with by customary international law or in particular international humanitarian law. A State which has a deployed deterrent plainly could and might take some step which turned the situation into one of armed conflict, and involved a sufficiently specific threat to constitute a breach of customary international law. But that is another matter.

[98] The respondents relied in various ways upon a paper entitled "Nuclear Weapons and the Law" by Lord Murray, based upon a speech given by him in Oxford in October 1998, and published in *Medicine, Conflict and Survival*, vol. 15 (1999) at pp. 126 to 137. Considerable emphasis was laid upon Lord Murray's observations, and while we do not feel the need to refer to his very thoughtful discussion of the International Court of Justice's advisory opinion, it is right to draw attention to one particular passage, which counsel for the respondents did not rely upon but which appears to us to be in point. At p. 132, Lord Murray says this:

> "The Court, I think rightly, proceeded on the basis that threat is equivalent to use. In this context threat means a practical warning directed against a specific opponent. So a general display of military might, such as a Red Square parade in Soviet days or a routine Trident submarine patrol, would not alone constitute a threat at law."

In relation to ordinary deployment, and routine patrols, that appears to us to be plainly right. Insofar as they have a minatory element, it is so general and conditional that it is quite simply not a threat of the kind which is "equivalent to use". Whether that general position would be transformed into such a "threat" in some particular circumstances depends entirely upon those circumstances. According to the respondents, there have been occasions when specific circumstances would alter the general position, and give rise to a specific argument that what the United Kingdom was doing had on that occasion moved beyond general deterrence to specific "threat". These would be questions of fact; but one can have regard to this as an hypothesis. Even so, we see no basis for a contention that the general deployment of Trident in pursuit of a policy of deterrence constitutes a continuous or continuing "threat" of the kind that might be illegal as equivalent to use. In both of these respects, it appears to us that the respondents' contention is baseless, and that the conduct of the United Kingdom Government, with which they sought to interfere, was in no sense illegal.

Necessity in the present case

[99] The contention that the respondents' conduct was justified as a matter of customary international law is thus without foundation. The general deployment of Trident was not illegal as a matter of customary international law. In any event, and even on the hypothesis of armed conflict and actual threat, customary international law does not entitle persons such as the respondents to intervene as self-appointed substitute law-enforcers with a right to commit what would otherwise be criminal offences in order to stop or inhibit, the criminal acts of others. Any justification for what would otherwise be criminal malicious damage must therefore be found in the ordinary domestic law of necessity. Leaving aside the point that the actions of the United Kingdom Government in deploying Trident cannot be said to be illegal, and that any risk or danger which they create is correspondingly not apparently illegal,

it is appropriate to consider whether such risk or danger as it may create could be seen as presenting the respondents with circumstances in which, according to the ordinary requirements for a defence of necessity, they would be justified in doing what they did on board *Maytime*.

[100] We have already observed that clarification or refinement of the concept of necessity is more likely to come from a particular set of facts in a given case than from consideration of a general question. But the facts of the present case are in our opinion of no value as a foundation for any analysis of the defence of necessity. Our conclusion upon that matter cannot sensibly be elaborated. We cannot see any substance at all in the suggestion that what the respondents did was justified by necessity. The actions of the respondents were planned over months. What they did on board *Maytime* was not a natural or instinctive or indeed any kind of reaction to some immediate perception of danger, or perception of immediate danger. Deployment of Trident shows that the United Kingdom had the capacity to threaten use of the weapon, or to use it. One might say that there is a chance or possibility that this might be done, in some situation that might emerge. But there is no apparent basis for saying that such a situation seemed likely to emerge. Even if such a situation had seemed imminent, the risk of its emerging must still be distinguished from the risk that in that situation there would be an actual threat or use. And even if the respondents were well founded in regarding the deployment of Trident as some kind of standing or abiding threat, that possibility must be distinguished from any likelihood that Trident was about to be used. The circumstances are not in our opinion even remotely analogous to those which provide a justification for intervention to prevent imminent danger. Moreover, there is not the slightest indication that the damage which the respondents did, and which they apparently claim was necessary as a means of averting or perhaps reducing danger or harm, had or could have had any conceivable impact upon the supposedly immediate risk. If the respondents said that they were acting as political protesters, willing to carry their protest beyond demonstration into crime, for the sake of publicity for their cause, their reasoning would be comprehensible. But they repudiate any such explanation for what they did. They insist that they were engaged in altering the course of events. If that is how they sincerely see their actions, so be it. But whatever drove them or compelled them to do as they did bears no resemblance to necessity in Scots law.

Questions 2, 3 and 4

[101] Before answering these questions we would refer to paragraphs 3 and 8 above. Section 123 (1) of the 1995 Act is in very broad terms. We are satisfied that the expression "a point of law which has arisen in relation to that charge" must be read as referring not merely to points of law which are in some general way inherent in the charge itself, but also to points of law which have actually arisen in the proceedings which led to acquittal or conviction on the charge in question, including points of law which arise from any defence which is advanced against the charge. In the present case, where it appears that conviction would have been appropriate unless the defence of justification, in one form or another, was established or gave rise to reasonable doubt, we are satisfied that the respondents are well founded in contending that the points of law relied upon by them at trial, in support of their defence of justification, would be points of law within the scope of section 123 (1). Questions 2, 3 and 4 clearly do not, as stated, express those particular points of law. And it can be said, most obviously in relation to question 2, that the points of law which they raise were not points which were put in issue by the respondents, in that

form. But we are not persuaded that that means that the questions are incompetent or that we should restrict ourselves to answering the precise questions posed. As stated, the questions put matters broadly. But on any sensible reading of the section, it appears to us that the charges laid against the respondents, together with the nature of the defence, were such that these broad questions raise points of law which are to be seen as having arisen in relation to the charges. In our opinion the questions as stated provide a useful broad starting point, within the scope of the section, although within the broad boundaries of these questions there arise the more specific issues raised by the respondents, which must be dealt with if any useful or meaningful answer is to be given to the broad questions stated. It was upon that view, in principle, that we acceded to the respondents' wish that we should hear argument upon the points of law which they saw as the "real" issues in the case. And in answering the questions, correspondingly, we do not think that it would be appropriate to restrict ourselves to simple answers to the broad questions stated. These questions provide boundaries beyond which we should not go. But within those boundaries, we think it appropriate to deal with the more specific points of law which arose from the defence advanced at trial, and upon which the respondents made submissions to us.

Question 2

[102] Ms. Zelter urged the court to refuse to answer question 2. Alternatively she proposed that it should be reformulated as follows:

> "Does international law and/or Scots law justify an individual in Scotland in damaging or destroying property which is being used for criminal purposes, in order to prevent those criminal actions being carried out by the United Kingdom namely the United Kingdom's deployment, within and without Scotland, of Trident nuclear warheads and its threat to use such warheads in accordance with HM Government's current defence policy?"

[103] Both formulations might be criticized as tendentious. But it is clear that this question can be addressed within the general scope of the question referred to the court. There is no substance in the contention that the court should decline to answer the Lord Advocate's question.

[104] We answer the question as stated in the negative: as we have indicated, customary international law contains no rule justifying damage or destruction of property. That is the case not only when the damage or destruction is in pursuit of a personal objection of the kind suggested in the question. It is the case even if the United Kingdom's possession of nuclear weapons, or its deployment of these weapons, or its policies in relations to such weapons, are illegal as a matter of customary international law or in particular international humanitarian law.

[105] We also answer this question as reformulated by Ms. Zelter in the negative. The United Kingdom's deployment, within and outwith Scotland, of Trident nuclear warheads, and the Government's current defence policy, do not in our opinion include any "threat" to use such warheads in the sense in which a threat is equiparated to use, so as to be illegal as a matter of customary international law, or international humanitarian law. In any event, even if the deployment of these warheads, and current defence policy, were at present, or were to become, not merely a general deterrent but a "threat" in that sense, international law provides no justification for an individual damaging or destroying property used for those purposes, in order to prevent the actions of the United Kingdom in that respect. As regards Scots law, it likewise provides no justification for such damage or destruction unless such damage or destruction is justified by the Scots law of necessity.

[106] In relation to any justification based upon the Scots law of necessity, the question as reformulated by Ms. Zelter must again be answered unequivocally in the negative. If particular circumstances arose, so that it could be said that the United Kingdom was not merely deploying Trident in execution of a general policy of deterrence, but was making a specific "threat" to use Trident against a target State, then questions as to the legality of its actions could arise as a matter of customary international law. But even leaving aside questions as to justiciability, which we do not feel it appropriate to deal with, any issue of justification would depend not upon the mere fact of any such illegality, but upon the Scots law of necessity, with the requirements inter alia of immediacy of danger and prospects of prevention which we have discussed. In the context of what was done by the respondents, and said to be justified by necessity, the damage or destruction of property has no foundation at all in anything analogous to necessity in Scots law. More generally, the circumstances described in this formulation of question 2 do not in our opinion involve the crucial requirements for a defence of necessity, either in terms of immediacy and response to danger, or in terms of the prospects of prevention of the supposed danger.

Question 3

[107] We answer this question in the negative.

[108] Ms. Zelter objected to the formulation of question 3 on a number of grounds. She contended that reference to "belief" that the actions complained of were justified in law missed the point. The three accused "knew objectively" that Trident was unlawful on the basis of factual analysis and legal argument. The argument became somewhat circular. At certain stages, it relied on the beliefs of the accused being well-founded beliefs, and thus not merely beliefs but facts. But obviously they could not conclusively determine the issues of fact and law involved, and then act on the basis of their own views. No matter how firmly convinced a person might be of his or her conclusions on an issue of fact and law, the validity of those views would be a matter for a properly constituted court to determine so far as the issue was justiciable. At other stages it was simply argued that the respondents had never suggested that mere belief could constitute a defence.

[109] The unequivocal answer to the question posed by the Lord Advocate is provided in the opinion of Lord Justice-General Clyde in *Clark v Syme* at p. 5. The mere fact that a person carried out acts which constituted a crime under a misconception of his legal rights is not a defence. The Crown accepted that there were some offences where honest belief was a factor, for example in cases of bigamy or rape, where the honest belief of the man that the woman consented to intercourse was relevant. But these related to the requisites for proof of the criminal conduct and had no bearing on the present case.

Question 4

[110] We answer this question in the negative.

[111] For the respondents it was argued that the question did not properly focus the issues which arose at the trial, and which ought properly to be addressed at this stage if the court were to deal with them rather than simply refuse to answer the questions posed. However, the answer is straightforward. Apart from the defence of necessity it is not a defence to a criminal charge that the actions complained of were carried out to prevent another person committing a crime.

Devolution minutes

[112] In the event the devolution minutes do not seem to us to require any specific comment beyond what we have said in other contexts.

Summary

[113] In answering the questions, we have tried to deal with the broad issues which they raise, as well as the specific issues which have been seen by the respondents as "real". But in concluding, we would reiterate that we have grave misgivings as to the justiciability of the issues which we have been asked to deal with, in relation to defence policy and the deployment of Trident. And we feel obliged to add that even ignoring the issue of justiciability, we are not persuaded that the facts of what the respondents did, or anything in the nature or purposes of the deployment of Trident, indicate any foundation at all, in Scots or international law, for a defence of justification.

DISPOSITION: Judgement accordingly.

SOLICITORS: Livingstone Brown, Glasgow; McCourts, Edinburgh.

APPENDIX: COMMENTARY

1. This case provides a useful summary of the requirements of law of necessity, making it even clearer than it already was that the court has no sympathy with the suggestion that the defence of necessity arises whenever the positive value preserved by the commission of a crime outweighs the negative value involved in its commission. The defence of necessity is available only where what is involved is an immediate threat to life or of serious injury. Any other situations in which a crime is committed in order to prevent some harm are left, presumably, to prosecutorial discretion.

2. The statement that customary international law is part of the law of Scotland may derive from the passage at p. 56 of the ninth edition of *Oppenheim's International Law*, where it is said that in the United Kingdom "all such rules of customary international law as are either universally recognized or have at any rate received the assent of this country are per se part of the law of the land", which means, the learned author goes on to say, at p. 57, "that international law is part of the lex fori and does not have to be proved as a fact . . . in the same way as a foreign law, although evidence of state practice and of received international opinion is permitted, in order to establish the existence or content of a rule of international law".

Just when a rule of international law becomes part of the law of Scotland is thus not altogether clear, and there is also a lack of clarity about just what evidence can be led before the judge on the matter. It may also be worth bearing in mind the remarks of Buxton LJ in *Hutchinson*, where he said at para. 38 that "the unlawfulness of [a] Government's conduct that is established in English law by the transformation of the rule of international law is unlawfulness of a more elusive nature than is to be found in the substantive criminal law".

(*b*) HOUSE OF LORDS

Shanning International Ltd v. Lloyds TSB Bank plc; Lloyds TSB Bank plc v. Rasheed Bank (28 June 2001)

An appeal from the Court of Appeal concerning United Nations Security Council resolution condemning Iraq's invasion of Kuwait

In September 1989, S agreed to sell medical and hospital equipment to a buyer in Iraq, who agreed to make an advance payment to S of 20 per cent of the purchase price. The payment was to be made against a bank demand guarantee, confirmed by

an Iraqi bank. In January 1990 R, an Iraqi bank, issued the guarantee in reliance on a counter-guarantee by L, an English bank, in favour of R. L's counter-guarantee was secured by a counter-indemnity in L's favour from S, and the deposit by S in a deposit account at L of an amount equal to the whole of the advance payment. On 2 August 1990 S had almost completed the supply when Iraq invaded Kuwait. On 6 August 1990, the Security Council of the United Nations adopted resolution 661 (1990) requiring all States to prevent the supply by their nationals of any products to any person in Iraq or to make funds available to them. Consequently S was unable to complete the contract. After Iraq had been expelled from Kuwait, the Security Council adopted resolution 687 (1991) in April 1991 stating, inter alia, that in accordance with resolution 661 (1990), until a further decision had been taken, the existing embargo on trade to Iraq should continue, and that Iraq should be prevented from obtaining compensation for the negative effects of the embargo. In December 1992, European Council regulation (EEC) No. 3541/92 (Council regulation (EEC) No. 3541/92, art. 2: see post, pp. 1469G-1470A) which, by article 2, prohibited the satisfying of any claim "under or in connection with a contract or transaction the performance of which was affected, directly or indirectly, wholly or in part by the measures decided on pursuant to United Nations Security Council resolution 661 (1990) and related resolutions". S went into liquidation, and its deposit with L was its only substantial asset. S claimed repayment from L of the principal sum of the deposit together with interest. L refused on the ground that R maintained that L was under potential liability to R under the counter-guarantee. L made a Part 20 claim against R seeking declarations. The judge declared that, by virtue of article 2 of Council regulation (EEC) No. 3541/92, R was permanently prohibited from making any claim against L under the guarantee and that L was permanently prohibited from making any claim against S under the counter-indemnity. The Court of Appeal upheld the judge's decision.

On appeal by R and S:

Held, dismissing the appeals, that although the prohibition in article 2 of the regulation was not expressly stated to be permanent, it was clear from all the circumstances which led to the adoption of the regulation and from the preparatory documents, that the purpose of the regulation was to protect non-Iraqi parties who had been unable to perform their contractual obligations due to the United Nations embargo on trade and financial dealings with Iraq from the risk of future claims against them; that in order to achieve that purpose article 2 imposed a permanent prohibition on claims made in connection with commercial transactions which had been affected by the United Nations resolutions; that since S's performance of its contract with an Iraqi buyer had been prevented by the resolutions, any claim which R or L might make under the counter-guarantee and counter-indemnity respectively fell within the prohibition in article 2; and that, accordingly, R and L were permanently prohibited from pursuing those claims (post pp. 1471E-1471F, 1474F, G-1475C, 1477A-1478D).

Decision of the Court of Appeal [2000] 3 CMLR 450 affirmed.

CASES referred to:

Dowling v Ireland (Case C-85/90) [1992] ECR1-5305, ECJ

European Parliament v Council of the European Union (Case C-392/95) [1997] ECR I-3213, ECJ

Garcia v Mutuelle de Prevoyance Sociale d'Acquitaine (Case C-238/94) [1996] ECR I-1673, ECJ

Litster v Forth Dry Dock and Engineering Co Ltd [1990] 1 AC 546; [1989] 2 WLR 634; [1989] 1 All ER 1134, HL(Sc)

INTRODUCTION

APPEAL from the Court of Appeal

These were appeals by leave of the House of Lords (Lord Steyn, Lord Hoffmann and Lord Millett) granted on 8 February 2001 by the appellants, Rasheed Bank and by Shanning International Ltd, from a decision of the Court of Appeal (Simon Brown, Judge and Tuckey LJJ) on 25 May 2000 dismissing the appellants' appeals from a decision of Langley J who on 17 December 1999, on an originating summons issued by Shanning International Ltd, and a Part 20 claim made by Lloyds TSB Bank plc against Rasheed Bank, made declarations that Shanning was permanently prohibited from satisfying any and all claims made or to be made by Lloyds TSB Bank plc under a counter-indemnity dated 5 January 1990 and that Lloyds TSB Bank plc was permanently prohibited from satisfying any and all claims made or to be made by Rasheed Bank under a guarantee dated on or around 22 December 1989.

The facts are stated in the opinion of Lord Bingham of Cornhill.

COUNSEL:

Bernard Eder QC and John Davies for Rasheed Bank; Mark Hapgood QC and Alec Haydon for Lloyds TSB Bank plc; Iain Milligan QC and Stephen Morris for Shanning International Ltd

PANEL:

Lord Bingham of Cornhill, Lord Steyn, Lord Hope of Craighead, Lord Hobhouse of Woodborough, Lord Scott of Foscote

JUDGEMENT BY-1: LORD BINGHAM OF CORNHILL

JUDGEMENT-1:

LORD BINGHAM OF CORNHILL: 1 My Lords, there are effectively three parties to these appeals, to whom it is convenient to refer as Shanning, Lloyds and Rasheed. By an order of 17 December 1999, Langley J made two declarations:

> "(1) . . . that by virtue of article 2(1)(*e*) of regulation (EEC) No. 3541/92 [Shanning] is permanently prohibited from satisfying any and all claims made or to be made by [Lloyds] for payment under a counter-indemnity in writing dated 5 January 1990 given by [Shanning] to [Lloyds].
>
> "(2) . . . that by virtue of article 2(1)(*a*) of regulation (EEC) No. 3541/92 [Lloyds] is permanently prohibited from satisfying any and all claims made or to be made by [Rasheed] for payment under Guarantee No. G89/60047T dated on or around 22 December 1989 issued by [Lloyds] to [Rasheed]."

The judge based these declarations on a construction of Council regulation (EEC) No. 3541/92 which was later upheld by the Court of Appeal [2000] 3 CMLR 450. In these appeals to the House Rasheed challenges the correctness of that construction.

2. The relevant facts may be briefly summarized. By a contract in writing dated 16 September 1989 Shanning agreed with Al-Mansour Contracting Co of Baghdad to supply 10 operating theatres and medical equipment related to those theatres according to technical specifications and bills of quantities identified in the contract. Under the contract Al-Mansour agreed to make an advance payment to Shanning of 20 per cent of the total price, a sum of £907,141.32. The payment was

to be made against a bank demand guarantee, confirmed by an Iraqi bank, which was to be released after presentation of the shipping documents for the last shipment of equipment, under the contract. The contract was governed by the law of Iraq. Rasheed is an Iraqi bank, and issued a guarantee dated 27 January 1990 to Al-Mansour, in the amount of the advance payment. Rasheed issued its guarantee in reliance on a counter-guarantee (No. G89/60047T) dated 22 December 1989 issued by Lloyds in favour of Rasheed. Both these guarantees are governed by Iraqi law. Lloyds in its turn issued its counter-guarantee at the request of Shanning, secured by a counter-indemnity in its favour dated 5 January 1990 issued by Shanning and the deposit by Shanning with Lloyds of an amount equal to the advance payment, £907,141.32. The counter-indemnity issued by Shanning is governed by English law and is expressed to indemnify Lloyds "against all claims demands liabilities costs charges and expenses" which Lloyds might incur "arising out of or in connection with" the counter-guarantee issued by Lloyds in favour of Rasheed. On 2 August 1990, Shanning had almost completed the supply contract. Of the total contract value (in excess of £4.5 m), one shipment only (valued at £270,000) remained to be made.

3. On 2 August 1990, Iraq invaded Kuwait. The international response of the Security Council of the United Nations, the European Community and the United Kingdom was very prompt. On the same date the Security Council adopted resolution 660 (1990) condemning the invasion and demanding an immediate withdrawal by Iraq. The United Kingdom, on 2 and 4 August, made statutory instruments restricting the making of payments or the parting with gold or securities on the orders of any party in Kuwait or Iraq (the Control of Gold, Securities, Payments and Credits (Kuwait) Directions 1990 (SI 1990/1591), the Control of Gold, Securities, Payments and Credits (Republic of Iraq) Directions 1990 (SI 1990/1616)). By resolution 661 (1990) adopted on 6 August, the Security Council decided that all States should (subject to some limited exceptions) prevent the supply of goods or the remission of funds to Iraq or Kuwait. Over the following months the Security Council adopted 11 further resolutions directed to this subject.

4. On 8 August 1990, having regard to resolutions 660 (1990) and 661 (1990), and in order that trade between States members of the Community and Iraq and Kuwait should be prevented, the Council of the European Communities adopted Council regulation (EEC) No. 2340/90, which provided in article 2:

> "As from the date referred to in article 1"—7 August 1990—"the following shall be prohibited in the territory of the Community or by means of aircraft and vessels flying the flag of a member State, and when carried out by any Council national . . . 2. the sale or supply of any commodity or product, wherever it originates or comes from:—to any natural or legal person in Iraq or Kuwait,—to any other natural or legal person for the purposes of any commercial activity carried out in or from the territory of Iraq or Kuwait; 3. any activity the object or effect of which is to promote such sales or supplies."

5. On the same date, 8 August 1990, and also with reference to resolution 661 (1990), the United Kingdom made the Iraq and Kuwait (United Nations Sanctions) Order 1990 (SI 1990/1651) which provided in article 3:

> "Except under the authority of a licence granted by the Secretary of State under this Order or under the Export of Goods (Control) (Iraq and Kuwait Sanctions) Order 1990 no person shall—(*a*) supply or deliver or agree to supply or deliver to or to the order of any person in either Iraq or Kuwait any goods

that are not in either country; (*b*) supply or deliver or agree to supply or deliver any such goods to any person, knowing or having reasonable cause to believe that they will be supplied or delivered to or to the order of a person in either Iraq or Kuwait or that they will be used for the purposes of any business carried on in or operated from Iraq or Kuwait; or (*c*) do any act calculated to promote the supply or delivery of any goods to any person in Iraq or Kuwait or for the purpose of any business carried on in Iraq or Kuwait in contravention of the foregoing provisions of this paragraph."

6. By the Iraq and Kuwait (United Nations Sanctions) (Amendment) Order 1990 (SI 1990/1768), made on 29 August 1990, article 3 of this Statutory Instrument was slightly amended and a new article was inserted which had the effect of prohibiting payment to any person in Iraq or Kuwait under any agreement by which a party ("the obligor") agreed that, if called upon or if a third party failed to fulfil a contractual obligation owed to another, the obligor would make payment to or to the order of the other party to the agreement. On 29 October 1990 the Council, by Council regulation (EEC) No. 3155/90, extended the effect of the embargo imposed by the Community.

7. The liberation of Kuwait from Iraqi occupation led to the adoption by the Security Council on 3 April 1991 of resolution 687 (1991), a wide-ranging instrument directed to the new international situation. The resolution set out a detailed list of conditions to be met by Iraq. It was decided (in para. 24) that in accordance with resolution 661 (1990) and until a further decision had been taken the existing embargo on trade to Iraq should continue. The Secretary-General was requested by paragraph 26 to develop guidelines to facilitate full international implementation of the embargo, and by paragraph 27 international organizations and States were called upon to take such steps as might be necessary to ensure full compliance with the guidelines. Then, in paragraph 29, the Security Council decided that:

"all States, including Iraq, shall take the necessary measures to ensure that no claim shall lie at the instance of the Government of Iraq, or of any person or body in Iraq, or of any person claiming through or for the benefit of any such person or body, in connection with any contract or other transaction where its performance was affected by reason of the measures taken by the Security Council in resolution 661 (1990) and related resolutions."

The Community adopted a regulation on 7 May 1991 to give immediate effect to resolution 687 (1991), but then embarked on consideration of a further measure.

8. On 12 July 1991, the Commission promulgated the draft of a proposed Council regulation which in due course was (subject to some changes) adopted as regulation (EEC) No. 3541/92, the regulation which the House is asked to construe in these appeals. In accordance with the admirable practice of the Commission this proposed regulation was accompanied by an explanatory memorandum, setting out in broad and untechnical terms the object of the proposed instrument. In this memorandum reference was made to resolution 687 (1991), which was said to foresee the lifting of the embargo after the fulfilment of the necessary conditions by Iraq. Paragraph 29 of resolution 687 (1991) was quoted in full and the memorandum then continued:

"2. Paragraph 29 thus provides for protection of economic operators against unjustified claims by Iraqi individuals, companies or organizations. In doing so, it prevents Iraq from obtaining compensation retroactively for the

negative effects of the embargo. Regarding exposure to claims from Iraq, the banking sector as well as European international contractors, have pointed to the fact that a lifting of the embargo could give rise to an avalanche of requests for payment of performance bonds, guarantees, stand-by credits or similar instruments under existing contracts and transactions for reasons of non-performance. The estimated amount of money involved exceeds 500m ECU. Already now exposure of such a dimension seriously reduces the financial room for manoeuvre of contractors. If the corresponding claims would effectively have to be honoured, the consequences on companies would be dramatic. As regards the position of Iraq, obtaining payment would mean an important financial advantage which would clearly be in contradiction with the very objective pursued by the embargo.

"3. Under these conditions, paragraph 29 gives a clear signal that both consequences of admitting claims (i.e., losses for non-Iraqi operators and compensation to Iraq) are unacceptable to the international community. It is important that in implementing the United Nations decision, the effect of this signal is not weakened. This is all the more true, as there is, for the time being, no indication that the embargo could effectively be lifted, given the apparent reluctance of Iraq to comply fully with all conditions set out in resolution 687 (1991). It also seems clear that the practical result intended by paragraph 29 can only be achieved if the principles contained therein are implemented in a uniform way. In a great number of cases, contracts or transactions concerned involve companies and banks in different countries. Different national approaches as regards the modalities of protection granted are therefore bound to weaken the efficiency of such protection altogether. Furthermore, such differences would give rise to distortion of competition between operators in different countries, thus affecting common commercial policy. This calls for implementation, at Community level, by a Community instrument. It also requires close consultation between the Community and third countries, in particular Organization for Economic Cooperation and Development (OECD) members."

Under the heading "Specific considerations" the memorandum continued:

"The measures proposed herewith in order to implement paragraph 29 of United Nations Security Council resolution 687 (1991) are based on the following specific considerations:

"(1) Non-enforceability of claims or prohibition to pay. Paragraph 29 can be interpreted either as making claims by Iraq non-enforceable, or as establishing a prohibition to honour such claims. The practical consequences of each interpretation are different. A system of NON-ENFORCEABILITY would protect banks and exporters against claims mentioned in paragraph 29 of United Nations Security Council resolution 687 (1991), by making it impossible for any Iraqi party to obtain a judgement in its favour unless it could prove that the contract or transaction was not affected by the embargo. However, such a system would allow claims being settled by agreement between the parties concerned. This would considerably weaken the protection granted, as it would expose non-Iraqi operators, in particular contractors, to pressure which might be exerted by the Iraqi side. It would also create uncertainty as to whether the contracts concerned would still have to be treated as valid obligations. Finally, this system would not permit the achievement of the other objective of paragraph 29, i.e. the prevention of retroactive compensation in favour of Iraq.

Therefore, the Commission proposes a system of PROHIBITION TO HONOUR CLAIMS, which would allow to meet both the objective of preventing such retroactive compensation as well as the objective of an effective protection of non-Iraqi parties, and would establish clarity as regards the treatment of the contractual obligations concerned. Furthermore, member States should take all steps required in order to ensure effectiveness of the prohibition, including the establishment of sanctions in case of non-respect.

"(2) Burden of proof. The protection granted to non-Iraqi parties would be imperfect if contractors or banks, when defending themselves against Iraqi claims, would have to prove that the conditions of paragraph 29 are met. Therefore, the burden of proof should be reversed. Consequently, contracts or transactions with regard to which claims are made are regarded as having been affected by the embargo, unless the claimant provides proof to the contrary.

"(3) Possible exceptions. Although the Commission recognizes that an unrestricted application might in some cases lead to hardship, it appears impossible to define in a general way, situations in which the performance of a contract has not been affected by the embargo. The Commission is therefore of the opinion that exceptions from the general rule should be limited to the case where payment has been ordered by a court or a comparable authority provided the legislation applied provides for an effective implementation of the principles contained in paragraph 29 of Security Council resolution 687 (1991)."

9. The Commission's proposed regulation was first considered by the Committee on Foreign Affairs and Security which on 6 November 1992 approved it. On 16 November 1992, the Committee on External Economic Relations also approved it. In a letter expressing its opinion, the Committee, having referred to paragraph 29 of resolution 687 (1991), expressly adopted passages in the Commission's explanatory memorandum. On 19 November 1992 the European Parliament approved the Commission's proposal, although calling for further consultation if the Council intended to make substantial modifications to the Commission's proposal.

10. On 7 December 1992, the Council adopted Council regulation (EEC) No. 3541/92 "prohibiting the satisfying of Iraqi claims with regard to contracts and transactions the performance of which was affected by United Nations Security Council resolution 661 (1990) and related resolutions". In the European manner the text of the regulation was preceded by a series of important recitals explaining its genesis and rationale:

"Whereas, under regulations (EEC) No. 2340/90 and (EEC) No. 3155/90, the Community has taken measures to prevent trade between the Community and Iraq; Whereas the United Nations Security Council has adopted resolution 687 (1991) of 3 April 1991 which, in its paragraph 29, deals with claims by Iraq in relation to contracts and transactions the performance of which was affected by measures taken by the Security Council pursuant to resolution 661 (1990) and related resolutions; Whereas the Community and its member States meeting in political cooperation have agreed that Iraq must comply in full with the provisions of paragraph 29 of United Nations Security Council resolution 687 (1991) and consider that, in deciding whether to reduce or lift measures taken against Iraq, pursuant to paragraph 21 of Security Council resolution 687 (1991), particular account must be taken of any failure by Iraq to comply with paragraph 29 of the same resolution; Whereas, as a consequence of the embargo against Iraq, economic operators in the Community and third coun-

tries are exposed to the risk of claims by the Iraqi side; Whereas it is necessary to protect operators permanently against such claims and to prevent Iraq from obtaining compensation for the negative effects of the embargo; Whereas the Community and its member States meeting in political cooperation have agreed to resort to a Community instrument in order to ensure uniform implementation, throughout the Community, of paragraph 29 of United Nations Security Council resolution 687 (1991); Whereas such uniform implementation is essential for achieving the aims of the Treaty establishing the European Economic Community and in particular for avoiding distortion of competition; Whereas the Treaty does not provide, for the adoption of this regulation, powers other than those of article 235, Having regard to the Treaty establishing the European Economic Community, and in particular article 235 thereof, Having regard to the proposal from the Commission, Having regard to the opinion of the European Parliament".

In the Commission's proposed regulation there was no equivalent of the third of these recitals, and the recitals common to both versions were in a different order. There were some differences of language: the word "permanently" in the fifth of the recitals quoted did not appear in the proposed draft.

11. Article 1 of the regulation contains a series of comprehensive definitions:

"For the purposes of this regulation:

"1. 'contract or transaction' means any transaction of whatever form and whatever the applicable law, whether comprising one or more contracts or similar obligations made between the same or different parties; for this purpose 'contract' includes a bond, financial guarantee and indemnity or credit whether legally independent or not and any related provision arising under or in connection with the transaction;

"2. 'claim' means any claim, whether asserted by legal proceedings or not, made before or after the date of entry into force of this regulation, under or in connection with a contract or transaction, and in particular includes: (*a*) a claim for performance of any obligation arising under or in connection with a contract or transaction; (*b*) a claim for extension or payment of a bond, financial guarantee or indemnity of whatever form . . .

"3. 'measures decided on pursuant to United Nations Security Council resolution 661 (1990) and related resolutions' means measures of the United Nations Security Council or measures introduced by the European Communities or any State, country or international organization in conformity with, as required by, or in connection with the implementation of relevant decisions of the United Nations Security Council, or any action, including any military action, authorized by the United Nations Security Council, in respect of the invasion or occupation of Kuwait by Iraq;

"4. 'person or body in Iraq' means . . . (*b*) any person in, or resident in, Iraq; (*c*) any body having its registered office or headquarters in Iraq; (*d*) any body controlled, directly or indirectly, by one or more of the abovementioned persons or bodies.

"Without prejudice to article 2, performance of a contract or transaction shall also be regarded as having been affected by the measures decided on pursuant to United Nations Security Council resolution 661 (1990) and related

resolutions where the existence or content of the claim results directly or indirectly from those measures."

12. Article 2, which lies at the heart of these appeals, provides (so far as relevant):

> "1. It shall be prohibited to satisfy or to take any step to satisfy a claim made by: (*a*) a person or body in Iraq or acting through a person or body in Iraq . . . (*e*) any person or body making a claim arising from or in connection with the payment of a bond or financial guarantee or indemnity to one or more of the above-mentioned persons or bodies, under or in connection with a contract or transaction the performance of which was affected, directly or indirectly, wholly or in part, by the measures decided on pursuant to United Nations Security Council resolution 661 (1990) and related resolutions.
>
> "2. This prohibition shall apply within the Community and to any national of a member State and any body which is incorporated or constituted under the law of a member State."

It is common ground that article 2 and, for that matter, the United Kingdom statutory instruments already referred to, which remain in force, are effective to prevent Lloyds paying Rasheed and also to prevent Lloyds reimbursing itself out of funds which it holds on behalf of Shanning.

13. Article 3 provides that, without prejudice to the embargo on trade with Iraq introduced pursuant to United Nations Security Council resolution 661 (1990), article 2 should not apply to certain transactions, for example to claims which had been accepted before the adoption of measures in response to resolution 661 (1990), claims for payment under insurance contracts in respect of events occurring before the adoption of such measures and

> "(*f*) claims for sums which the persons or bodies referred to in article 2 prove to a court in a member State are due under any loan made prior to the adoption of the measures decided on pursuant to United Nations Security Council resolution 661 (1990) and related resolutions and that those measures have had no effect on the existence or content of the claim, provided that the claim includes no amount, by way of interest, charge or otherwise, to compensate for the fact that performance was, as a result of those measures, not made in accordance with the terms of the relevant contract or transaction."

14. This issue of construction now arises because Shanning is in liquidation and the liquidators seek payment by Lloyds of the sum which Lloyds holds on deposit on behalf of Shanning. Lloyds for its part adopts a Janus-like position: it is content to pay to Shanning the sum which it holds on behalf of Shanning if on a proper construction of regulation (EEC) No. 3541/92 it can be assured that it cannot hereafter become liable to Rasheed; but if on such a construction any risk exists that it may hereafter be liable to Rasheed, it resists making payment to Shanning. Thus, quite understandably, it aligns itself with whichever of Shanning or Rasheed is to succeed in these appeals.

15. Before the judge the construction issue was whether regulation (EEC) No. 3541/91 imposed a permanent prohibition on Lloyds making any payment to Rasheed under its counter-guarantee against any claim Rasheed might at any time make in connection with this contract and a permanent prohibition on Lloyds reimbursing itself under Shanning's counter-indemnity out of funds held by Lloyds on behalf of Shanning. He rightly held that in construing the regulation a broad purpo-

sive approach was to be followed, giving due weight to the *travaux préparatoires* and recitals to which reference has already been made. Since Shanning sought a declaration on the legal effect of the regulation as it stood, he did not think it right to speculate on the possibility of future revocation or repeal, although he gave reasons for concluding that such possibility could be discounted. Basing himself on the *travaux préparatoires*, the recitals, the political considerations underlying the sanctions policy and common sense, he concluded that Shanning's submission was correct and that the effect of article 2 was to prohibit satisfaction by Shanning and Lloyds respectively of claims which might at any time be made against them by Lloyds or Rasheed respectively.

16. Giving the leading judgement in the Court of Appeal [2000] 3 CMLR 450, Tuckey LJ was of the same opinion. The prohibition in article 2 was to continue in effect even when the embargo was lifted. He did not attach significance to the fact relied on by Rasheed that article 2 did not provide for the discharge of affected contracts. There was no juridical objection to a permanent prohibition on satisfying claims, and that was the legislative technique which had been adopted.

17. Before the House Rasheed challenged the construction put on the regulation by the courts below on two main grounds. First, it was argued, there is nothing in article 2 of the regulation to suggest that the prohibition it imposed was intended to be permanent. Such terms as "permanently" or "for all time" were not to be found. Had the prohibition been intended to be permanent, the article would have provided for the obligations of non-Iraqi parties to be extinguished or discharged, but instead performance was subjected only to a prohibition, which could be temporary. Significance should not be attached to the term "permanently" in the fifth recital, which had not appeared in the Commission's original draft and could not therefore have been regarded as a substantial addition. But if, secondly, the expression "permanently" in the fifth recital was of significance, its effect was only to protect operators against "such claims", which meant claims referred to in the fourth recital, namely, claims which were a consequence of the embargo. That would not cover claims relating, for example, to the quality of goods supplied. So long as there was a possibility of such claims being validly made, Lloyds and Shanning could not be released from their counter-guarantee and counter-indemnity, and the judge was accordingly wrong to make the declarations he did.

18. In my opinion these submissions are at variance with the obvious intent and effect of the regulation. The embargo on trade and financial dealings with Iraq was imposed in the immediate aftermath of the Iraqi invasion of Kuwait in the hope that it would coerce Iraq to withdraw its forces within its own borders. This embargo had the inevitable and intended effect of halting the performance of current contracts. This prevented non-Iraqi contractors and suppliers from fulfilling their contractual obligations and so put them in breach of contract, subject to any defence of frustration or force majeure which might (or might not) be available to them under any relevant law or in any relevant court. The hope that imposition of an embargo would lead to peaceful withdrawal was not realized. Armed intervention was necessary to liberate Kuwait. But it was decided that the embargo on trade and financial dealings with Iraq should continue until Iraq met a series of clearly specified conditions, which it showed little willingness to do. The potential exposure of non-Iraqi contractors and suppliers therefore continued. Resolution 687 (1991) plainly looked forward to the end of the embargo, but it also expressed a very clear intention that no claim should lie at the instance of any Iraqi entity in connection with any transac-

tion where performance had been affected by the embargo. The Community *travaux préparatoires* and regulation (EEC) No. 3541/92 expressed the same clear intention. Were the ending of the embargo to be accompanied by removal of the prohibition on satisfaction of claims against non-Iraqi contractors and suppliers, it is obvious that those who had been involuntarily prevented from performing their contracts would or might become liable to their Iraqi opposite numbers, with the result that the ultimate losers as a result of Iraq's gross violation of international law would be the non-Iraqi contractors and suppliers and not the Iraqi entities (including the government) which the embargo was intended to injure.

19. The present case provides a good example. Shanning had performed a very substantial part of its contract. It had almost earned its contractual reward. It was prevented by the embargo from completing the contract and earning its reward. But for the embargo it seems fair to assume that it would have done so. It may be regarded as an innocent victim of the international community's response to Iraqi lawlessness. It would be extraordinary if, even when the embargo is lifted and normal commercial relations are restored, it were to be exposed even to the risk of claims (and it is "the risk of claims" to which the fourth recital refers) by the Iraqi side.

20. Any claim which Rasheed or Lloyds might make under the counter-guarantee and counter-indemnity would plainly be "under or in connection with a contract or transaction the performance of which was affected, directly or indirectly, wholly or in part" by the embargo. As such it would fall squarely within the prohibition in article 2(1), whatever the nature of the claim. It is not suggested that article 3 would apply.

21. It is plain from the Community *travaux préparatoires* that careful thought was given to the best legislative means of protecting non-Iraqi contractors and suppliers against the risk of claims. It would no doubt have been possible to provide that affected contracts should be treated as discharged, or that rights and obligations arising thereunder should be extinguished. But this would have enabled an Iraqi party which had made an advance payment or deposit to seek a restitutionary remedy, and it was instead thought preferable to prohibit the satisfaction of any claim by any Iraqi entity under or in connection with any affected contract. This may very well have been a wise approach. It was certainly, in my opinion, an effective one.

22. The judge was right to make the declarations he did. If I entertained any real doubt about the construction of regulation (EEC) No. 3541/92 I should see force in Rasheed's submission that a ruling should be sought from the European Court of Justice, but I do not. For these reasons, and also those given by my noble and learned friends Lord Steyn and Lord Hope of Craighead, I would dismiss these appeals. Rasheed must pay the costs of both Shanning and Lloyds in this House.

JUDGEMENT BY-2: LORD STEYN

JUDGEMENT-2:

LORD STEYN: 23. My Lords, in the dispute between Shanning and Rasheed the only matter before the House is the correct construction of article 2 of Council regulation (EEC) No. 3541/92 of 7 December 1992 which prohibited the satisfying of Iraqi claims with regard to contracts and transactions the performance of which was affected by the trade embargo imposed on Iraq by United National Security Council resolution 661 (1990) and related resolutions.

24. There is an illuminating discussion in Cross, *Statutory Interpretation*, 3rd ed. (1995), pp. 105-112, of the correct approach to the construction of instruments

of the European community such as the regulation in question. The following general guide provided by Judge Kutscher, a former member of the European Court of Justice, is cited by Cross, at p. 107:

> "You have to start with the wording (ordinary or special meaning). The court can take into account the subjective intention of the legislature and the function of a rule at the time it was adopted. The provision has to be interpreted in its context and having regard to its schematic relationship with other provisions in such a way that it has a reasonable and effective meaning. The rule must be understood in connexion with the economic and social situation in which it is to take effect. Its purpose, either considered separately or within the system of rules of which it is a part, may be taken into consideration."

Cross points out that of the four methods of interpretation—literal, historical, schematic and teleological—the first is the least important and the last the most important. Cross makes two important comments on the doctrine of teleological or purposive construction. First, in agreement with Bennion, *Statutory Interpretation*, 2nd ed. (1992), section 311, Cross states that the British doctrine of purposive construction is more literalist than the European variety, and permits a strained construction only in comparatively rare cases. Judges need to take account of this difference. Secondly, Cross points out that a purposive construction may yield either an expansive or restrictive interpretation. It follows that regulation No. 3541/92 ought to be interpreted in the light of the purpose of its provisions, read as a coherent whole, and viewed against the economic and commercial context in which the regulation was adopted.

25. In flagrant breach of international law Iraq invaded Kuwait in August 1990. Kuwait was liberated in February 1991. In the meantime the international community, acting pursuant to United Nations resolutions, imposed a trade embargo on Iraq. These primary sanctions affected the implementation of a large number of contracts between Iraqi and EEC Contracting Parties. The legal consequences of the trade embargo are not in issue. The fact is, however, that the primary sanctions were always intended to be a means of persuading Iraq to comply with international norms. It was contemplated that in due course the primary sanctions would have to be lifted. That left the problem of the large number of contracts between EEC and Iraqi parties affected by the trade embargo.

26. Unless drastic and Affective action was taken there was the spectre attested to by the contemporary EEC memorandum of an avalanche of claims by Iraqi parties, including claims by the Iraqi State, Iraqi state agencies and Iraqi corporations, against EEC parties. The prospect of Iraqi parties through successful lawsuits retrospectively transferring to EEC nationals and entities losses resulting from the trade embargo, which Iraq had entirely brought upon itself, was self evidently unacceptable. The obvious means of eliminating this risk to EEC parties was by an EEC Council regulation. The only real question was what legislative technique to adopt. There were two possibilities. The EEC could have chosen the route either of discharging the affected contracts or of prohibiting the satisfying of Iraqi claims on such contracts. Both methods would be directed at the same obvious end, namely the elimination of the risk of Iraqi contracting parties successfully pursuing claims against wholly innocent EEC parties. The first route involved conflict of law problems. It would not have been effective or not necessarily effective, in respect of a system of law other than that of a member State of the EEC. The chosen method was therefore the second. And it is important to note

that Council regulation (EEC) No. 3541/92 was put in place more than two years after the initial imposition of the trade embargo. It was plainly directed at claims already affected by primary sanctions.

27. Against this crystal-clear contextual scene Rasheed advances two implausible arguments. The first is that the prohibition contained in the regulation is not stated to be permanent in the operative part of the regulation and is therefore not permanent in character. The recital quoted by Lord Bingham of Cornhill plainly impresses the stamp of permanence on the entire regulation. Even without this recital the intrinsic nature of the regulation, in order to be effective, would have to be permanent. Unless the prohibition is permanent it cannot achieve its obvious aim. As Tuckey LJ observed in the Court of Appeal [2000] 3 CMLR 450, 481: "to leave open the possibility that claims could be made at some unspecified time in the future would make no sense and would cause great commercial uncertainty." The language of the regulation interpreted against the contextual scene rules out Rasheed's argument that the prohibition contained in the regulation is not permanent in character. Counsel for Rasheed suggested that it is curious, if the prohibition is permanent in character, that the underlying rights and obligations under the affected contracts are still in force. There is, however, no issue before the House as to whether or not the underlying contractual rights and obligations remain in being. And I express no view on the matter. In any event, Tuckey LJ gave the answer to this point. He observed, at p. 481:

> "the chosen method of prohibition is effective and the quest for some juridical basis to explain how claims can be permanently prohibited under contracts which remain in force, is entirely academic. If it is juridically acceptable to prohibit such claims temporarily it must be legislatively possible to prohibit them permanently. That is what the regulation has done in my judgement."

The position is therefore that the regulation validly, effectively and permanently bars Iraqi claims under affected contracts. Rasheed's argument to the contrary is misconceived.

28. The second argument of Rasheed is directed to the subject matter of the prohibition. Counsel for Rasheed argued that the regulation says nothing about prohibiting permanently the satisfaction of claims which are not the consequence of the embargo. He emphasized that the words in the recital aim to prevent Iraqi parties "from obtaining compensation for the negative effects of the embargo". This statement is substantially correct but establishes nothing that assists Rasheed. The prohibition in the operative part of the regulation extends to the satisfaction of any claim "under or in connection with a contract or transaction the performance of which was affected, directly or indirectly, wholly or in part, by [primary sanctions]". It is moreover an agreed fact that the trade embargo made it unlawful "for Lloyds to pay Rasheed under the Lloyds counter-guarantee, and unlawful for Shanning both to complete the supply contract itself and to make payment to Lloyds under the Shanning counter-indemnity". In these circumstances the contractual instruments which Lord Bingham has described were plainly affected by primary sanctions. The argument under this heading must be rejected.

29. In my view the judge rightly made the declarations which have been challenged on this appeal. And the reasons of the Court of Appeal for dismissing the appeal were entirely convincing.

30. For these reasons, as well as the fuller reasons given by Lord Bingham, I would dismiss Rasheed's appeal and make the order which Lord Bingham proposes.

JUDGEMENT BY-3: LORD HOPE OF CRAIGHEAD

JUDGEMENT-3:

LORD HOPE OF CRAIGHEAD: 31. My Lords, I have had the advantage of reading in draft the speech which has been prepared by my noble and learned friend, Lord Bingham of Cornhill. I agree with it, and for the reasons which he gives I too would dismiss the appeal. But our attention was drawn to the importance of this case to the appellants, and to the wider significance throughout the European Union of the issue which they have raised. So I should like to add these brief observations.

32. The critical question is whether the prohibition in article 2 of Council regulation (EEC) No. 3341/92 against the satisfying of Iraqi claims with regard to contracts and transactions the performance of which was affected by United Nations Security Council resolution 661 (1990) and related resolutions is or is not permanent. If the prohibition is permanent, Lloyds will have a complete answer to any and all claims which may be made by Rasheed for payment under the Lloyds counter-guarantee. In that event there will be no obstacle to the recovery by Shanning of the sum which Lloyds holds on deposit on its behalf. Rasheed accepts that the prohibition is in force for the time being. But its contention is that it is not a permanent prohibition, as the underlying obligations were not discharged by the regulation nor are they declared by it to be void. According to its argument, as there is nothing in the regulation to the contrary, the permanence of the prohibition cannot be assumed so it is possible that these claims may become enforceable again when the embargo is lifted.

33. The answer to the question whether or not the prohibition is permanent depends on the meaning of the words used in the regulation. It is a question of construction. In terms of article 189 of the EC Treaty (now article 249 EC) a regulation is binding in its entirety and directly applicable in all member States. The effect of regulation (EEC) No. 3341/92 is to be determined according to the rules of construction which are firmly established in Community law. As Lord Templeman said in *Litster v Forth Dry Dock and Engineering Co Ltd* [1990] 1 AC 546, 558E, the courts of the United Kingdom are under a duty to follow the practice of the European Court of Justice when construing Community instruments. A purposive approach is to be adopted, and the *travaux préparatoires* may be referred to for guidance as to what was intended. Community legislation is to be interpreted, so far as possible, in such a way that it is in conformity with general principles of Community Law: *Dowling v Ireland* (Case C-83/90) [1992] ECR I-5305, 5319, para. 10 per Advocate General Jacobs.

34. The starting point is to examine the words used in the recitals and articles of the regulation itself. Mr. Eder for Rasheed devoted much of his argument to an examination of the wording of the Commission's proposal at the stage when the regulation was still in draft and it was being considered by the European Parliament. I agree that the proposal is available as an aid to construction. Article 190 of the EC Treaty (now article 253 EC) provides that regulations, directives and decisions adopted by the Council shall state the reasons on which they are based and shall refer to any proposals or opinions which were required to be obtained pursuant to the Treaty. But I think that it is necessary to bear in mind that the instrument which is binding in its entirety in terms of the Treaty is the regulation which was adopted by the Council of the European Communities at the end of the legislative process which the Treaty has identified. Moreover, in *Garcia v Mutuelle de Prévoyance Sociale d'Aquitaine* (Case C-238/94) [1996] ECR I-1673, the court held that in view of the clear and precise

terms of the article it was not necessary to look even at the preamble to the directive in order to determine the purpose or the scope of the provision.

35. The Treaty base for regulation (EEC) No. 3541/92 is to be found in article 235 of the EC Treaty (now article 308 EC), as the eighth and ninth recitals of the regulation indicate. This article provides:

> "If action by the Community should prove necessary to attain, in the course of the operation of the common market, one of the objectives of the Community and this Treaty has not provided the necessary powers, the Council shall, acting unanimously on a proposal from the Commission and after consulting the European Parliament, take the appropriate measures."

The regulation which the Council made on 7 December 1992 was based on a proposal presented by the Commission on 12 July 1991 on which an opinion was delivered by the European Parliament on 19 November 1992. But, as I have said, I think that the proper starting point is to examine the wording of the regulation which was adopted by the Council at the end of this process.

36. The fourth and fifth recitals of the regulation are in these terms:

> "Whereas, as a consequence of the embargo against Iraq, economic operators in the Community and third countries are exposed to the risk of claims by the Iraqi side; Whereas it is necessary to protect operators permanently against such claims and to prevent Iraq from obtaining compensation for the negative effects of the embargo".

The phrase "to protect operators permanently" in the fifth recital is an important indication as to the intended effect of the regulation. Mr. Eder did not suggest that these words were in themselves ambiguous. According to their plain meaning, the intention was to put in place a protection against the risk of claims by the Iraqi side which would indeed be permanent. Mr. Eder submitted that the words "such claims" in the fifth recital indicated that the protection was to be limited to claims of the kind described in the fourth recital and that a narrow interpretation ought to be placed on those words. For a proper understanding of the extent of the protection however it is necessary to turn to the articles.

37. The regulation contains six articles, of which the first and the last three are ancillary to its leading provisions. The leading provisions are set out in articles 2 and 3. Article 2 describes the prohibitions. Article 3 contains a list of claims to which the article 2 prohibitions do not apply. But it is subject to an important proviso which excludes from this exception any amount, by way of interest, charge or otherwise, to compensate for the fact that performance was, as a result of the embargo, not made in accordance with the terms of the relevant contract or transaction. The wording and structure of these two articles, when read together with the definition of the word "claim" in article 1 of the regulation, leave no room for doubt that the prohibition in article 2 extends to any and all claims for performance of any obligation arising under or in connection with a contract or transaction and for extension of payment of a bond, financial guarantee or indemnity of whatever form. The articles are carefully structured to leave open the possibility of the making of claims by the operators against the Iraqi side, as it is only the satisfying of claims by the Iraqi side that is prohibited.

38. As for the permanence of the prohibition, it is plain that anything less than a permanent prohibition would not relieve economic operators in the Community from the damaging effects of the embargo. The proviso to article 3 shows that the

Council was well aware of the risk of claims for failures in performance due to the embargo to which economic operators had been exposed by it, to which in any event attention had been drawn by paragraph 29 of the so-called "ceasefire" resolution by the United Nations Security Council (resolution 687 (1991)) which foresaw the lifting of the embargo after the fulfilment of the necessary conditions by Iraq. Unless they were protected against such claims the operators would have to make provision against them for a prolonged and indefinite period. This would be bound to impose a substantial financial burden upon them, to the detriment of their businesses. Nothing less than a permanent prohibition would give them the protection which they needed once the embargo was brought to an end and the sanctions against Iraq were lifted. The significance of the use of the word "permanently" in the fifth recital is that it serves to confirm what a purposive reading of the articles in their whole context would in any event indicate.

39. I see no need in these circumstances to refer back to the *travaux préparatoires* for further guidance. Mr. Eder's argument that we should do so was largely based upon the absence from the recital in the proposal by the Commission which corresponds to the fifth recital in the regulation of the word "permanently", the fact that the word does not appear in article 2 and the lack of any mention in the explanatory memorandum which accompanied it and in the draft resolution embodying the opinion on the proposal of the European Parliament that the prohibition was intended to be permanent. But the legislative history of the regulation simply shows that, as not infrequently happens, the wording of the regulation as adopted by the Council differs in various respects from that of the Commission's proposal. It is settled law that the requirement to consult the European Parliament in the legislative procedure in cases provided for in the Treaty means that it must be freshly consulted whenever the text finally adopted, taken as a whole, differs in essence from the text on which the Parliament has already been consulted*: European Parliament v Council of the European Union* (Case C-392/95) [1997] ECR I-3213, 3246, para. 15. The information which is before your Lordships indicates that the Parliament was not consulted about the changes in the wording of the preamble.

40. The inference which I would draw from the inclusion of the word "permanently" in the fifth recital is that it was introduced in order to explain more fully the purpose of the regulation, but to not change the essence of what had been proposed. It was intended to remove a possible but unintended ambiguity in the words used by the proposal. There was no need to include the word in article 2, as the intention of the regulation as a whole was made plain by the terms of the recital. I do not think that the plain meaning of the regulation can be contradicted by reference to the absence of this word from the proposal and the *travaux préparatoires*. Once this conclusion is reached the basis for Mr. Eder's argument on this point disappears.

JUDGEMENT BY-4: LORD HOBHOUSE OF WOODBOROUGH

JUDGEMENT-4:

LORD HOBHOUSE OF WOODBOROUGH: 41. My Lords, agree that the appeal should be dismissed with costs as proposed by my noble and learned friend, Lord Bingham of Cornhill, and for the reasons which he has given. I would also like to express my agreement with the speech of my noble and learned friend Lord Hope of Craighead and, in particular, what he has said concerning the approach to be adopted in construing a Council regulation.

JUDGEMENT BY-5: LORD SCOTT OF FOSCOTE

JUDGEMENT-5:

LORD SCOTT OF FOSCOTE: 42. My Lords, I have had the advantage of reading in draft the opinions of my noble and learned friends, Lord Bingham of Cornhill, Lord Steyn and Lord Hope of Craighead. For the reasons they give, I too would dismiss this appeal.

DISPOSITION:

Appeals dismissed. Costs to be paid by Rasheed Bank.

SOLICITORS:

CMS Cameron McKenna; Teacher Stern Selby; Norton Rose

(*c*) QUEEN'S BENCH DIVISION (ADMINISTRATIVE COURT)

R (on the application of Othman) v. Secretary of State for Work and Pensions (28 November 2001)

Judicial review of decision of the Secretary of State for Work and Pensions, involving United Nations Security Council sanctions in relation to the situation in Afghanistan and the Taliban

COUNSEL:

S Knafler for the Claimant; J Howell QC and G Clarke for the Respondent

PANEL: COLLINS J

JUDGEMENT BY-1: COLLINS J

JUDGEMENT-1:

COLLINS J: [1] Mr. Omar Mohammed Othman, the Claimant in this case, seeks judicial review of a decision of the Secretary of State for Work and Pensions, whereby he suspended payments of income support to the Claimant with effect from 9 October last. The decision in question was contained in a letter dated 25 October 2001.

[2] The matter has come on very quickly because the Claimant is, he says, as a result without any funds and he, his wife who is pregnant and four children are unable to maintain themselves. They are likely to lose their home and they do not have sufficient money to live on. So it is that the court was able to expedite the hearing of this claim.

[3] The Claimant himself is now some 41 years old. He came to this country in 1993 from Jordan. He claimed asylum. In 1994 his claim was accepted and he was granted leave to enter for a period of four years. That has now expired, but before its expiry he applied for indefinite leave to remain in this country; that application has still not been determined.

[4] The Secretary of State is considering whether he might be able to make use of article 1F of the Refugee Convention, on the basis that the Claimant is no longer entitled to the benefit of the Convention because of his conduct. Whether or not the Secretary of State will take the view that he is able to make use of that provision, or indeed in any other way to decide that the Claimant is not, after all, entitled to stay in this country, is a matter which will in due course be decided.

[5] But the result of that is that his leave is deemed to be extended by virtue of s 3(*c*) of the Immigration Act 1971 and, accordingly, he is lawfully in this country and is not subject to any restrictions upon his ability to work and, more importantly, upon his ability to receive Social Security payments, in particular income support.

[6] The reason why the decision was made to suspend payments was because in February 2001, the Claimant was arrested and detained for questioning under the Prevention of Terrorism (Temporary Provisions) Act 1989. When the police arrested him, they searched his home and found a substantial sum of money in cash in a number of different currencies. There was sterling, dollars, German marks and pesetas. The total was said by the police to amount to £180,000. There is an issue as to that. The Claimant in his statement asserts that it was not nearly as much as that and, somewhat curiously on the face of it, the police did not provide a receipt.

[7] There had been, until yesterday, complaint that the Police had not allowed the Claimant's solicitors or the Claimant, to inspect the money, but Mr. Knafler tells me that yesterday the Claimant's solicitors were able to go and see the money which is apparently bagged up in what are described as evidence bags. It has not been counted by them, but they accept that it appears to be a very substantial sum indeed.

[8] The police did not inform the Department for Work and Pensions of the discovery of this money until they wrote a letter on 23 October confirming an oral communication of 12 October. Quite why they delayed so long, I do not know; no explanation has been provided and there may be, for all I know, a good reason for it.

[9] When that letter was received the Department decided that they should act in accordance with regulation 16 of the Social Security and Child Support (Decisions and Appeals) Regulations 1999. This provides, so far as material:

> "(1) Subject to paragraph (2), the Secretary of State . . . may suspend payment of a relevant benefit, in whole or in part, in the circumstances prescribed in paragraph (3).
>
> "(2) . . .
>
> "(3) The represcribed circumstances are that—
>
> (*a*) It appears to the Secretary of State . . . that—
>
> (i) an issue arises whe-ther the conditions for entitlement to a relevant benefit are or were fulfilled;
>
> (ii) an issue arises whether a decision as to an award of a relevant benefit should be revised under section 9 or superseded under section 10."

[10] The letter of 25 October was, in fact, in reply to a letter from the Claimant's solicitors of 18 October which followed the notification, I think orally originally, to the Claimant that his benefits, his income support, was suspended.

[11] That is not all that has happened, because the Claimant's bank accounts were frozen. That was in accordance with the relevant legislation following the United Nations sanctions decision in relation to the situation in Afghanistan and, more particularly, the Taliban. I shall come back to that in a moment because it is relevant to an issue, indeed, perhaps, the main issue now in these proceedings, based upon an EU regulation which concerns the Claimant specifically.

[12] His two bank accounts in which he had a total of some £1,900 were frozen. This was said to have been savings from the benefits that he had been receiving and put there for the benefit of himself and his family. But the result of the freezing

of his assets is that he has no other means of support than the benefits which he had been receiving and which were then suspended.

[13] Going back to the letter of 25 October, the author states that the suspension was:

> ". . . because it appears to the Secretary of State that an issue arises as to whether the conditions for entitlement to income support are and have been fulfilled, and further an issue arises as to whether a decision as to the award of income support should be revised or superseded."

[14] That is a direct reference to the provisions of regulation 16 which I have already cited.

[15] The letter continues:

> "The Secretary of State has received evidence that your client has capital of approximately £180,000 a sum which is greatly in excess of the prescribed amount. This evidence suggests not only that the conditions of entitlement to income support may not be fulfilled, but also that they may not have been fulfilled for some time. It also raises the question as to whether the award of income support should be revised or superseded . . .
>
> "An investigation is being conducted, but we would invite you to explain your client's position as to capital resources. In your letter you say, 'Of course, he has no access to any savings that he may have had'. We would ask you to clarify this statement. The possession of any substantial savings by a person in receipt of an income related benefit is something which needs to be explained, in view of the capital rule referred to above. Moreover, it is not self-evident that your client 'has no access to any savings that he may have had'. We look forward to receiving a full explanation as to when Mr. Othman came into possession of any capital since he was awarded income support and what has become of it.
>
> "You ask whether the decision to suspend benefit can be reconsidered whilst an investigation is under way, but in the absence of any satisfactory explanation by your client as to his capital position the suspension is justified."

[16] That decision triggered the application for judicial review which is now before me. The claim asserts that the money is in the possession of the police, and so it cannot conceivably be regarded as capital which is available to the Claimant and that, therefore, the suspension is not justified.

[17] The Claimant had not given any explanation to the police as to the ownership of or the reason why he was holding that large sum of money in cash in his home. He has, now in a witness statement which is before me, given an explanation. What he says is:

> "The money that [the police] took had been collected over a period of two years from donations. This money has never been for my personal use and has always been intended by those who gave it and by me to be used to purchase a meeting place for my informal community prayer-group. The money had been held at my house, as I am relevant and trusted leader of the weekly prayer meeting. The money belongs to the community prayer-group and was being held by me for its use. The money was not held in a bank as it would not be proper for such a sum of money to be held in a British Bank. This would not be in accordance with the principles of our Islamic faith. This money has never been returned to the community prayer-group by the police. The police still have this money."

[18] I make no comment as to the probability of that explanation. It is not necessary for me to do so because, as Mr. Howell has pointed out, regulation 16 does not require the Secretary of State to decide on questions of ownership. It applies if it appears to the Secretary of State that an issue arises. As it seems to me, it is perfectly clear that an issue did arise, certainly, whether the conditions for entitlement were fulfilled in the past. Any investigation will decide whether there has in the past been an overpayment and thus a possibility that the Secretary of State can reclaim what has been overpaid, as well as whether there is an ongoing entitlement.

[19] Furthermore, as it seems to me, although all this arose back in February, and that was when the police seized the money, the fact that there was £180,000 in cash in the house in February, and no explanation had been given, entitled the Secretary of State to consider that an issue arose whether now there might be a question as to entitlement. I should say that the amount of capital which affects the payment of income support stands at £8,000 and, of course, £180,000 is somewhat in excess of that.

[20] Mr. Howell also points out that a person has capital within the meaning of the regulations, even if he does not physically have it in his possession, if he has a right to that money. That results from the decision of the Court of Appeal in *Thomas v Chief Adjudication Officer*, a decision dated February 1987, published in report number R(SV) 17/87 from the Reports of the Commissioners.

[21] That was a case where the claimant in question had been awarded a sum of damages. It was not in his possession, but was in his solicitor's possession and the court decided that since he had a right to it (and of course that was an immediate right) it could be said to be in his possession because it was in the possession of his agents.

[22] That decision, in my view, would not apply on the facts of this case because the police hold the money and the only means whereby the claimant can obtain it is by making an application under the Police Property Act 1897. In that application he would have to establish that it was his, that he was entitled to it and the police could prevent him receiving that money if they could establish within the meaning of s 22 of the Police and Criminal Evidence Act 1984 that they were entitled to retain it because they were undertaking an investigation into whether an offence had been committed and the money was reasonably required to be retained for the purposes of that investigation. Accordingly on the facts, it seems to me that the Thomas case would not apply.

[23] But that is not the answer, because the question is whether the Secretary of State at the time he suspended was reasonably entitled to take the view that the Thomas approach might apply, because that of course was an issue which arose and an issue which he did not have to determine whilst he was investigating the matter and the suspension was properly made whilst he was so investigating the matter.

[24] Accordingly, as it seems to me, as a matter of straightforward domestic law and construing the regulations, the Secretary of State acted perfectly properly in suspending the payments in accordance with regulation16.

[25] Mr. Knafler has raised one other matter. He has submitted that the Secretary of State failed to have regard to the hardship that would result from such a suspension, in particular, that the Claimant had no other source of income and the Secretary of State knew that his bank accounts had been frozen so he was not able to make use of them for the purpose of any living expenses.

[26] Regulation 16 inevitably, if used, is bound to result in immediate hardship. It is obvious that if someone's income support is suspended, because an issue has arisen and, as a matter of fact, that person has no other source of income, as may well be the case, hardship will result. It is important then that any investigations are carried out speedily. I have no reason to believe that that would not have occurred in this case and, no doubt, the Secretary of State would quickly have appreciated that he could not rely on the *Thomas* approach and would have to consider whether now it was proper for the payments, or some payments, to continue and whether or not he might in due course be able to recover arrears which were being paid at the time when there was capital available which had not properly been declared.

[27] However, events were overtaken by the realization that there was an EC regulation which directly affected the position of this Claimant. There are in fact two regulations, regulation 467/2001, as amended by regulation 2062/2001. Council regulation 467/2001 is dated 6 March 2001 and article 16 provides:

> "This regulation shall enter into force on the day following that of its publication in the Official Journal of the European communities . . .
>
> "This regulation shall be binding in its entirety and directly applicable in all member States."

[28] The regulation in question is described as a regulation "Prohibiting the export of certain goods and services to Afghanistan, strengthen the flight ban and extending the freeze of funds and other financial resources in respect of the Taliban of Afghanistan, and repealing [an earlier regulation]".

[29] Article 2 of the regulation provides as follows:

> "1. All funds and other financial resources belonging to any natural or legal person, entity or body designated by the Taliban Sanctions Committee and listed in annex I shall be frozen.
>
> "2. No funds or other financial resources shall be made available, directly or indirectly, to or for the benefit of persons, entities or bodies designated by the Taliban Sanctions Committee and listed in annex I.
>
> "3. Paragraphs 1 and 2 shall not apply to funds and financial resources for which the Taliban Sanctions Committee has granted an exemption. Such exemptions shall be obtained though the competent authorities of the Member States listed in annex II."

[30] In relation to freezing of assets the competent authority in the United Kingdom is the Treasury.

[31] "Funds" are given a wide definition in article 1 of the regulation. They mean:

> "Financial assets and economic benefits of any kind, including, but not necessarily limited to, cash, cheques, claims on money, drafts, money orders and other payment instruments; deposits with financial institutions or other entities, balances on accounts, debts and debt obligations; publicly and privately traded securities and debt instruments, including stocks and shares, certificates representing securities, bonds, notes, warrants, debentures, derivatives, contracts; interest, dividends or other income on or value accruing from or generated by assets; credit, right of set-off, guarantees, performance bonds or other financial commitments; letters of credit, bills of lading, bills of sale; documents evidencing an interest in funds or financial resources, and any other instrument of export-financing."

[32] The Taliban Sanctions Committee means the committee established by the United Nations Security Council resolution 1267 (1999). Indeed the regulation in question is largely driven by United Nations resolutions, in particular resolution 1333 (2000), which was adopted in December 2000 and which reaffirmed the need for sanctions to avoid adverse humanitarian consequences on the people of Afghanistan and noted the indictment of Usama bin Laden and his associates by the United States for, inter alia, 7 August 1998 bombings of the embassies in Nairobi and Dar es Salaam. It also noted the request of the United States to the Taliban to surrender them for trial.

[33] Article 5 of the resolution stated that there should be prevention of any supplies to the territory under Taliban control and article 8(*c*) provided that "further measures" should be taken by all States:

> "To freeze without delay funds and other financial assets of Usama bin Laden and individuals and entities associated with him as designated by the Committee, including those in the Al-Qaida organization, and including funds derived or generated from property owned or controlled directly or indirectly by Usama bin Laden and individuals and entities associated with him, and to ensure that neither they nor any other funds or financial resources are made available, by their nationals or by any persons within their territory, directly or indirectly for the benefit of Usama bin Laden, his associates or any entities owned or controlled, directly or indirectly, by Usama bin Laden or individuals and entities associated with him including the Al-Qaida organization, and requests the Committee to maintain an updated list, based on information provided by States and regional organizations, of the individuals and entities designated as being associated with Usama bin Laden, including those in the Al-Qaida organization".

[34] As I said, it was that provision which has driven the relevant parts of the EC regulation with which I am concerned in this case.

[35] It should be noted that article 9 of the regulation provides that no exceptions other than those specifically referred to in the regulation may be granted. The relevant one is that which I have already read contained in article 2.3.

[36] Furthermore, article 12 provides:

> "This regulation shall apply notwithstanding any rights conferred or obligations imposed by any international signed or any contract entered into or any licence or permit granted before the entry into force of this regulation."

[37] Article 13 requires that:

> "1. Each member State shall determine the sanctions to be imposed where the provisions of this regulation are infringed. Such sanctions shall be effective, proportionate and dissuasive.
>
> "Pending the adoption, where necessary, of any legislation to this end, the sanctions to be imposed where the provisions of this regulation are infringed, shall be those determined by the member States in accordance with article 10 of regulation (EC) 337/2000."

[38] That is in virtually identical terms. Article 13.2 reads:

> "2. Each member State shall be responsible for bringing proceedings against any natural or legal person, entity or body under its jurisdiction, in cases of violation of any of the prohibitions laid down in this regulation by any such person, entity or body."

[39] Now it is perfectly clear from the provisions that I have read that the regulation is, and is intended to be, what Mr. Howell has described as "Draconian" in its effect. It is designed, on the face of it, to ensure that any person or body named in the annex is not entitled to any economic benefit of any sort, and so would not be entitled to receive remuneration for working or to enter into any contract which provided any economic benefit to him. It must be foreseeable from that, that such a person would be deprived of any means of livelihood. We are after all living in a country where money is needed to provide for the necessities of life.

[40] Annex 1 to the regulation contains a lengthy list of bodies and individuals directly connected with the Taliban and a shorter list of individuals and bodies associated with Usama bin Laden. But there have been a number of amendments and additions to annex 1 and, in particular, the additions in regulation 2062/2001 of 19 October 2001, which entered into force on the day of its publication in the official journal, which was 20 October.

[41] There are 25 individuals added to annex 1. One of those individuals is this Claimant. He is described under a number of aliases and as living in London, having been born in December 1960. It is I suppose unusual for a European Community directive to be aimed at a named individual, but that is what has happened here. As I have already read, by virtue of article 16, the regulation is binding in its entirety and directly applicable, and so has an immediate, direct effect upon the Claimant.

[42] Mr. Knafler accepts that the result of article 2 is that the Claimant's bank accounts containing a total of some £1,900 will remain frozen. They are properly caught by article 2.1 of the regulation. Furthermore, he accepts that the Claimant will not be able to get possession of the £180,000, which is held by the police.

[43] It may be that in due course some other body or trust, if it really is prayer-meeting money, may be able to obtain it, but that is in the future and that will be for others to consider and determine. If, on the other hand, the money is not for any lawful use then, no doubt, it will, not be returned to the Claimant.

[44] Be that as it may, and this is accepted also by Mr. Howell, it is not money that can be said to be available to him as capital. But, submits Mr. Knafler, the payments of income support do not fall within the provisions of article 2. They are not, he submits, funds, however widely one defines that term, nor should they be regarded as financial resources. The reason for that is that it must have been recognized by those responsible for the regulation that the effect of it would be to deprive a person in the position of Mr. Othman of the means of living. It cannot, accordingly, have been contemplated that monies which were made available by the state to enable him to live would be caught by the regulation.

[45] He reminds me that if the Community wants to consider Social Security it has in other regulations and directives specifically identified Social Security. It can, of course, do that. But I have to look at the language and the purpose behind this provision. The language is exceedingly wide. It is designed to prevent the individual named in the annex from having available any assets which may enable him to assist in any way the aims of Usama bin Laden and his organization and his network. They are intended to be harsh because they are intended to be effective, and unless they are harsh and unless they cover all sorts of payments, they will not fulfil their clear and obvious purpose.

[46] However much I may adopt, as I should, a purposive approach to the construction of these regulations, I cannot, submits Mr. Howell, go behind the clear language of them. It cannot be suggested that the words "financial resources" do not

cover the payment of money such as income support. Indeed, submits Mr. Howell, if one looks at the definition of funds it is equally impossible to say that these are not funds because they are economic benefits which are provided in the form of cash or a payment instrument or direct payments into a bank account.

[47] Furthermore, Mr. Howell submits that there is no room for any exemption; article 9 says that in terms. The only way in which the Claimant can seek to avoid the prohibition upon the receipt of these monies is to apply, through the Treasury, to the Taliban Sanctions Committee. They will have to decide the extent to which any exemption, if any, can be applied.

[48] I should add that Mr. Howell of course accepts that the provisions of the regulation are not aimed at the Claimant's wife or his children, and so it is that child benefit continues to be paid, because that is paid to his wife for the benefit of his children. She is not entitled to claim in her own right because she is his dependant and thus does not qualify, for example, for income support, but of course she would be entitled to claim any benefit which she was able to establish could be paid to her, even though she is married to her husband. Equally, the children would be entitled to any benefit to which they would be entitled individually.

[49] I am not saying that there are any such benefits. I am simply indicating that the prohibitions under the regulations would not apply to any funds payable to her, subject, of course, to the requirement that she should not apply them to the benefit of her husband, because if she did she would be breaching article 2. Of course, there is going to be hardship to her and to the children if the construction, which Mr. Howell submits is the correct construction, should apply.

[50] All this, submits Mr. Knafler, is avoided if a construction of the regulation, in particular article 2, is adopted which excludes payments designed to enable the individual to have a means of livelihood. The problem is the level to which the livelihood has to be maintained. The Claimant has said that the sums in his bank accounts have been accumulated from the benefits which he has been receiving. I do not doubt that some part of that may well be needed for expenditures which arise from time to time, sometimes unexpected, sometimes expected, in amounts which are more than can be catered for by weekly payments, for example clothing, for example, I suppose, bills which fall due on a particular date, albeit the amounts paid have accumulated over a period of time.

[51] But this does suggest that the amounts being received by this Claimant were more than sufficient to maintain livelihood. It seems to me that the language of the regulation is clear. It is not possible to read any exemption or any resource which is not to be covered. The payments of income support directly fall within the description in article 2.2. Mr. Howell further submits that they would technically fall within article 2.1 the moment they were paid, because they would then represent a fund belonging to the Claimant. That again seems to me to be the only possible reading of the language of the article.

[52] However, that does not in my judgement necessarily mean that all that the Claimant can do is to apply to the Sanctions Committee for an exemption. There is what has been described as the "humanitarian safety net". I derive that from the judgement of the Court of Appeal in *R v Hammersmith & Fulham London Borough Council* ex parte M 30 HLR 10, *The Times* 19 February 1997. That was a decision of the Court of Appeal on appeal from a decision of mine concerning the possibility of the use of s 21 of the National Assistance Act 1948, in order to assist asylum seekers who were not entitled to any other form of assistance.

[53] Lord Woolf, MR, said in giving the judgement of the court, having referred to my use of the words "safety net", was this (p. 20):

> "the judge's comments should not be taken as indicating that s 21(1)(*a*) is a safety net provision on which anyone who is short of money and/or short of accommodation can rely and insofar as the judge intended them to be read literally he was error."

[54] May I interpolate in my defence that I did not so intend. Lord Woolf, MR, continued:

> "Section 21(1)(*a*) does not have this wide application. Asylum seekers are not entitled merely because they lack money and accommodation to claim they automatically qualify under section 21(1)(*a*). What they are entitled to claim (and this is the result of the 1996 Act) is that they can as a result of their predicament after they arrive in this country reach a state where they qualify under the subsection because of the effect upon them of the problems under which they are labouring. In addition to the lack of food and accommodation is to be added their inability to speak the language, their ignorance of this country and the fact they have been subject to the stress of coming to this country in circumstances which at least involve their contending to be refugees. Inevitably the combined effect of these factors with the passage of time will produce one or more of the conditions specifically referred to in s 21(1)(*a*). It is for the authority to decide whether they qualify."

[55] Of course, some of those considerations will not apply to this Claimant, but there is that provision which ensures, and is designed to ensure, that he will not suffer to the extent that he has no food or accommodation and so is unable to maintain himself at all.

[56] It seems to me that it does not need a request to the Taliban Sanctions Committee for the United Kingdom to avoid that happening. The law of humanity, as Lord Ellenborough said as long ago as 1803, applies to this sort of situation, and in my judgement the law of humanity applies as much to a European directive as it does to any other law which is applicable in this country.

[57] Accordingly, I would read this regulation subject only to the proviso that the member State is entitled, and indeed perhaps bound, to ensure that the effect of applying the regulation is not so as to mean that the individual in question, in this case the Claimant, has because of having no means of support, reached a situation where his health and perhaps his very life are at risk. That is the situation that, as I understand it, s 21 of the National Assistance Act is designed to avoid.

[58] There is the further point, of course, that the provision of accommodation under that Act is not caught because provision in kind, as opposed to the provision of financial resources, or economic benefits, is not caught by article 2. This has led Mr. Knafler to submit that one would reach the somewhat curious situation (curious is not the word he used, but it is certainly anomalous) that if, because of the prevention of payment of any housing benefit and income support the Claimant were unable to pay his rent and so was evicted from his home, he would be entitled, in all probability, to rely on Part VII of the Housing Act, because he would have become homeless, would be in priority need, because of the existence of his family and children, and would not have been homeless intentionally; it would have been because of the provisions of the regulation. Whether or not that is right, it is not necessary for me to decide. But it certainly gives rise to a potential anomaly.

[59] It seems to me that the Secretary of State is not obliged to provide any benefit under the regulations; indeed the article prohibits him from so doing. On the other hand it does not prohibit him from considering, if he has power to do so, whether any provision should be made to ensure that the Claimant's wife, family and himself are able to live. What that should be and the extent of it, is entirely a matter for him. It may be that he will decide that he need do no more than rely upon the existence of what I have described as the safety net provisions of s 21. There are also, of course, provisions in the Children Act which could be relied on by the children.

[60] In my judgement, for the reasons I have given and because of what I described as the law of humanity, it is not impossible, not prohibited by the regulation, for the authorities (I use that word to encompass all who might be responsible for ensuring that the Claimant has some means of livelihood and that his family do not suffer hardship in excess of any hardship that is reasonably necessary as a result of the provisions of the regulation) to ensure, as I say, that they do have the bare necessities of life. I use the expression "bare necessities of life" advisedly, because I fully recognize that the Claimant is not entitled to anything more than that.

[61] It seems to me that it would be quite absurd to think that that sort of matter would have to be determined by the United Nations through the Taliban Sanctions Committee. Quite apart from anything else, I very much doubt if a decision would be able to be obtained particularly speedily in that way. That is not intended as a criticism; it is merely a recognition of the realities of the situation.

[62] I am bound to say too that, notwithstanding the mandatory provisions of article 13, counsel was not able to put before me any provision of our law which has sought to comply with the obligations under article 13. There appear to be no sanctions for breach of the regulation.

[63] Mr. Knafler also raised the question whether there would be a breach of article 3 of the European Convention on Human Rights and of article 8. It seems to me that it is not necessary for me to determine whether article 3 would be breached. I note Mr. Howell's argument that the European Convention on Human Rights is concerned with civil and political rights, not with social and economic rights. Those are dealt with separately, and he submits that a failure to provide benefits, or indeed the wherewithal to live, cannot create a breach of article 3.

[64] There are, certainly, problems and it may be very difficult to draw the line. The fact is, article 3 prohibits, among other things, inhuman or degrading treatment and if in the knowledge that the result will be starvation, illness or possibly worse, the United Kingdom fails to provide the means whereby that suffering can be avoided and thus causes that suffering, it is at least arguable that article 3 could be breached. That was the view of Stanley Burnton J in the case of *The Queen on the Application of Hussain v Asylum Support Adjudicator*.

[65] However, I emphasize that I see the force of Mr. Howell's argument and there are certainly problems in knowing where one should draw the line in cases such as this. But the argument is unnecessary because of my conclusion that what I have described as the law of humanity comes to the aid of the Claimant and others who might be in the same situation as him. What are the minimum standards, what is necessary to avoid illness, to avoid starvation, to avoid the impossibility of maintaining a minimum standard of existence will be a matter to be considered as the circumstances develop. For example, it may be that the Claimant has friends

who are prepared to provide food for him. It may be that accommodation will have to be provided in some form for him and his family. But whether the situation arises whereby he is in such a state that he can properly say that he is falling below the minimum that humanity requires, then something will have to be done by whoever is at that stage responsible. That is for the future.

[66] I should add that article 8 seems to me not to be a relevant consideration here. Article 8 itself is subject to a derogation by virtue of article 8.2 and it would, in the circumstances, be in my judgement proportionate for the situation that I have indicated to exist in the way that I have submitted.

[67] In all the circumstances, therefore, the claim which has somewhat extended beyond whether the suspension was lawful to whether the regulation applies to prevent any further payments, must be dismissed.

DISPOSITION:

Claim dismissed.

SOLICITORS:

Brinberg Peirce Solicitors; The Treasury Solicitor

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3. United States of America

(*a*) UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Franck Dujardin (Appellant) v. International Bank for Reconstruction and Development, et al. (Appellees) (September Term, 2000)

Immunization from defamation suit under International Organizations Immunities Act of 1945—Two sources of limitation to immunity

Before: HENDERSON, TATEL and GARLAND, *Circuit Judges*

JUDGEMENT

This case was heard on the record from the United States District Court for the District of Columbia and on the briefs and arguments by counsel. The court has accorded the arguments full consideration and has determined the issues presented occasion no need for a published opinion. See D.C. Cir. Rule 36(*b*). The court concludes, specifically, that the appellees are immune from the appellant's defamation suit under the International Organizations Immunities Act of 1945 (IOIA), 22 U.S.C. § 288a(*b*).

Under the IOIA, 22 U.S.C. §§ 288 et seq., international organizations, such as the International Bank for Reconstruction and Development (IBRD or World Bank) and the International Development Agency (IDA), that have been recognized by the President through an "appropriate Executive order", 22 U.S.C. § 288, are afforded immunity from suit.[1] "International organizations, their property and their assets, wherever located, and by whomsoever held, shall enjoy the same immunity from suit and every form of judicial process as is enjoyed by foreign Governments, except

to the extent that such organizations may expressly waive their immunity for the purpose of any proceedings or by the terms of any contract." 22 U.S.C. 288a(*b*). The court recently interpreted this language to grant international organizations absolute immunity from all lawsuits and claims. See *Atkinson v. Inter-American Dev. Bank*, 156 F.3d 1335, 1341-42 (D.C. Cir. 1998). There are only two sources of limitation to the immunity: (1) the organization itself may waive its immunity and (2) the President may specifically limit the organization's immunities when he selects the organization as one entitled to enjoy the IOIA's privileges and immunities. *Mendaro v. World Bank*, 717 F.2d 610, 613 (D.C. Cir. 1983). The World Bank, of which the IDA is a sub-entity, has waived its immunity from suit brought by its debtors, creditors, bondholders and those other potential plaintiffs as to whom the Bank would have subjected itself to suit in order to achieve its chartered objectives. See id. at 615; see also *Atkinson*, 156 F.3d at 1338.

In determining whether the World Bank has waived its immunity here, we ask whether "the particular type of suit would *further* the Bank's objectives." *Atkinson*, 156 F.3d at 1338 (emphasis original). If it does not, "the Bank's immunity should be construed as *not waived*." Id. (emphasis original). The appellant's defamation suit neither furthers the World Bank's objectives nor enhances the Bank's ability to participate in commercial transactions. See id. That such a suit is brought by a former employee of a borrower of the World Bank, whom the Bank allegedly recruited to work for the borrower and to whom it promised employment benefits, does not affect the Bank's immunity. Accordingly, it is

ORDERED that the judgement from which this appeal has been taken be affirmed substantially for the reasons stated in the district court's memorandum opinion of July 27, 2000. See *Dujardin v. International Bank for Reconstruction and Development*, No. 99-3398 (D.D.C. July 27, 2000).[2]

The Clerk is directed to withhold issuance of the mandate herein until seven days after disposition of any timely petition for rehearing. See D.C. Cir. Rule 41 (*a*)(1).

FOR THE COURT:
[*Signed*] Mark J. Langer, Clerk

(*b*) UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Mohammed Faisal Rahman (Plaintiff) v. James D. Wolfensohn, The World Bank, World Bank Publications, and Unknown Parties A, B, C, D, E, F and G (Defendants) (28 August 2001)

Complaint of copyright infringement—Unfair trade practices and unfair competition claims

ORDER

This matter is before the court on Defendants' Motion to Dismiss Pursuant to Rule 12 (*b*) (6) [#5]. Upon consideration of Defendants' Motion, Plaintiff's Response to Defendants' Motion, Defendants' Reply, and Plaintiff's Response to Defendants' Reply, for the reasons stated in the accompanying Memorandum Opinion, it is this 28th day of August 2001

ORDERED, that Defendants' Motion to Dismiss [#5] is granted; and it is further
ORDERED, that Plaintiff's Complaint is dismissed.
This is a final appealable Order. See Fed. R. App. P. 4 (*a*).

[*Signed*] Gladys Kessler
United States District Judge

MEMORANDUM OPINION

Plaintiff Mohammed Faisal Rahman brings suit, *pro se*, alleging that Defendants[3] have infringed his copyright by using his book, *Revised National Economics*, as a model for their publication, *Monitoring Environmental Progress: A Report on Work in Progress*, and that they have engaged in unfair trade practices and unfair competition. Defendants have filed a Motion to Dismiss pursuant to Fed. R. Civ. P. Rule 12 (*b*) (6) for failure to state a claim. Upon consideration of Defendants' Motion, Plaintiff's Response, Defendants' Reply, and Plaintiff's Response to Defendants' Reply, Defendants' Motion [#5] is granted, and Plaintiff's Complaint is dismissed.

I. BACKGROUND[4]

Plaintiff, a resident of the Republic of Trinidad and Tobago, co-authored the book *Revised National Economics* with Dr. A. H. Rahman. The book was copyrighted in the Republic of Trinidad and Tobago and published there in February 1994.[5] The foreword to *Revised National Economics* states that the book is "intended to assist the layman in understanding some of the workings of the forces around him in government and society, and focuses on economic issues in Trinidad and Tobago." M. F. Rahman and Dr. A. H. Rahman, *Revised National Economics* ("Rahman" herein) at foreword (1994)[6]

In 1995, Defendants published *Monitoring Environmental Progress: A Report on Work in Progress* as part of their Environmentally Sustainable Development Series. The work "showcases improvements in [economically sustainable development] indicators that help to analyse policy-oriented issues" and discusses the "empirical processes" used in determining whether environmental conditions are improving or deteriorating. The World Bank, *Monitoring Environmental Progress: A Report on Work in Progress* ("The World Bank" herein) vii (1995). Plaintiff alleges that Defendants unlawfully copied his book and used the ideas expressed therein as a basis for *Monitoring Environmental Progress*.

II. STANDARD OF REVIEW

A "complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957). See also *Tele-Communications of Key West, Inc. v. United States*, 757 F.2d 1330, 1334 (D.C. Cir. 1985); *Vanover v. Hantman*, 77 F. Supp. 2d 91, 98 (D.D.C. 1999). In addition, the court should liberally construe the Complaint's allegations in favour of the Plaintiff. See, e.g., *Ramirez de Arellano v. Weinberger*, 745 F.2d 1500, 1506 (D.C. Cir. 1984); *Shear v. Nat'l Rifle Ass'n of Am.*, 606 F.2d 1251, 1253 (D.C. Cir. 1979). When, as in this case, the Plaintiff appears *pro se*, the court should hold the Complaint to a less stringent standard than it would a pleading drafted by an attorney. *Haines v. Kerner*, 404 U.S. 519, 520 (1972). See also *Richardson v. United States*, 193 F.3d 545, 548 (D.C. Cir. 1999); *United States v. Sanchez*, 88 F.3d 1243, 1247 (D.C. Cir. 1996).

Ordinarily, when "matters outside the pleadings are presented to and not excluded by the court, the motion [to dismiss under Fed. R. Civ. P. 12 (*b*) (6)] shall be treated as one for summary judgement and disposed of as provided in rule 56." Fed. R. Civ. p. 12 (*b*). In this case, complete copies of the works in question were not included in the Complaint but were instead provided by the Defendants. Olson Decl. at 1. However, when a defendant attaches to its motion papers the document that forms the very basis for plaintiff's claim, the court may properly consider that document without converting the motion to dismiss into a motion for summary judgement. *Vanover v. Hantman*, 77 F. Supp. 2d at 98. See also *Greenberg v. Life Ins. Co.*, 177 F.3d 507, 514 (6th Cir. 1999); *Cortec Indus., Inc. v. Sum Holding L.P.*, 949 F.2d 42, 48 (2d Cir. 1991) (holding that "[w]here plaintiff has actual notice of all the information in the movant's papers and has relied upon these documents in framing the complaint the necessity of translating a rule 12 (*b*) (6) motion into one under rule 56 is largely dissipated."); *Lipton v. MCI Worldcom. Inc.*, 135 F. Supp. 2d 182, 186 (D.D.C. 2001); *YWCA v. All State Ins. Co.*, 158 F.R.D. 6, 7 (D.D.C. 1994). Consequently, Defendants' Motion will be treated as a rule 12 (*b*) (6) motion.

III. ANALYSIS

A. *Applicable copyright law*

In order to prevail on his claim of copyright infringement, Plaintiff must prove both that he held the copyright to the work in question and that Defendants copied the work. *Feist Pubs., Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 361 (1991). Since actual copying is often difficult to prove, the court may infer copying when the plaintiff is able to show that the defendant had access to the plaintiff's work and that the two works are "substantially similar."[7] See *Country Kids 'N City Slicks, Inc. v. Sheen*, 77 F.3d 1280, 1284 (10th Cir. 1996); *Nelson v. Grisham*, 942 F. Supp. 649, 651 (D.D.C. 1996); *McCall v. Johnson Publ'g Co.*, 680 F. Supp. 46, 48 (D.D.C. 1988).

It is well established that, when a court has before it complete copies of the two works in question, the court may decide as a matter of law that the works are not substantially similar. *Nelson v. PRN Prods., Inc.*, 873 F.2d 1141, 1143 (8th Cir. 1989); *Boyle v. Stephens, Inc.*, 97 Civ. 1351 (SAS), 1998 U.S. Dist. LEXIS 1968, at *9 (S.D.N.Y. Feb. 23, 1998). "Although the issue of substantial similarity may be an issue of fact for resolution by a jury, a court may determine non-infringement as a matter of law where (1) the similarity between the two works concerns only non-copyrightable elements of the plaintiff's work or (2) no reasonable jury could find that the two works are substantially similar." *Fisher v. United Feature Syndicate, Inc.*, 37 F. Supp. 2d 1213, 1224 (D. Colo. 1997) (citing *Warner Bros. v. ABC*, 720 F.2d 231, 240 (2d Cir. 1983)).

This court has before it complete copies of both *Revised National Economics* and *Monitoring Environmental Progress* and is therefore in a position to determine as a matter of law whether or not the works are substantially similar. See *Nelson v. Grisham*, 942 F. Supp. at 652; *Whitehead v. New Line Cinema*, No. 98-1231, 2000 U.S. Dist. LEXIS 19794, at *6 (D.D.C. June 14, 2000). If a comparison of the two works reveals that they are not substantially similar, then Plaintiff cannot possibly plead any set of facts that will afford him relief. See idem.

In considering whether Defendants' work is substantially similar to Plaintiff's, it is important to note a fundamental principle of copyright law: ideas are not copy-

rightable. "In no case does copyright protection for an original work of authorship extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated or embodied in such work." 17 U.S.C. § 102 (*b*). Therefore, in order to find infringement, the Court must determine that both the ideas and the expressions of those ideas are substantially similar. *Sid & Mary Krofft Television Prods., Inc. v. McDonald's Corp.*, 562 F.2d 1157, 1164 (9th Cir. 1977); *McCall v. Johnson Publ'g Co.*, 680 F. Supp. at 48.

Of course, this principle is more easily stated than applied. As Judge Learned Hand noted, "[o]bviously, no principle can be stated as to when an imitator has gone beyond copying the 'idea,' and has borrowed its 'expression.' Decisions must therefore inevitably be ad hoc." *Peter Pan Fabrics, Inc. v. Martin Weiner Corp.*, 274 F.2d 487, 489 (2d Cir. 1960). Necessarily, the proper approach will vary depending on the type of work to be examined. The Eighth Circuit, in *Hartman v. Hallmark Cards., Inc.*, 833 F.2d 117, 120 (8th Cir. 1987), has adopted a useful two-step analysis for comparing two academic works such as Plaintiff's and Defendants'. The Court of Appeals for the Eighth Circuit explained that:

> "There must be similarity 'not only of the general ideas but of the expressions of those ideas as well.' First, similarity of ideas is analyzed extrinsically, focusing on objective similarities in the details of the works. Second, if there is substantial similarity in ideas, similarity of expression is evaluated using an intrinsic test depending on the response of the ordinary, reasonable person to the forms of expression."

Hartman v. Hallmark Cards, Inc., 833 F.2d at 120 (citations omitted). Under this analysis, if the similarity exists only on the level of ideas rather than expression of those ideas, no infringement has occurred. *Lapsley v. Am. Inst. of Certified Pub. Accountants*, 246 F. Supp. 389, 391 (D.D.C. 1965).

B. *Copyright infringement claim*

Appendix A to Plaintiff's Response contains what Plaintiff calls "A comparative study of two works". Plaintiff's Response to Defendants' Motion to Dismiss ("Pl.'s Resp."), App. A at 1.[8] After some introductory notes,[9] Plaintiff identifies five sets of passages ("items") in which Defendants have allegedly infringed his copyright. Pl.'s Resp. at App. A. The court will address each of these five items in turn.

Item 1

Plaintiff points first to Defendants' statement, "Governments make wide use of taxes and subsidies as tools to influence behavior and reach policy goals." The World Bank, supra, at p. 43. Plaintiff alleges that this is a direct paraphrase of his sentence, "Using systems of reliefs and penalties Government uses direct taxation to control further the lifestyle of the populace." Rahman, supra, at p. 100. While the ideas expressed are similar, that fact, as already noted, does not by itself prove infringement; the *Nelson v. PKN Prods.* test requires a second inquiry: whether an ordinary, reasonable person would find the expressions of the idea to be substantially similar. *Nelson v. PRN Prods., Inc.*, 873 F.2d at p. 1143.

In this instance, no reasonable jury could find substantial similarity. See *Whitehead v. Paramount Pictures Corp.*, 53 F. Supp. 2d 38, 47 (D.D.C. 1999). First, the two sentences differ in both structure and word choice. The only important words

that both sentences contain are "Government(s)," "use/using," and "taxes/taxation." It would be practically impossible to convey this idea without using these words or at least their synonyms. See *Lapsley v. Am. Inst. of Certified Pub. Accountants*, 246 F. Supp. at 391 (finding no infringement because, "since all of these works deal with the same topic, it is only natural that such publications would contain similar words and phrases"). Also, the parties' descriptions of government's aims are quite different. Plaintiff's description suggests criticism of an overly controlling government, while Defendants' wording implies the legitimacy of taxing for such purposes. Though the line between an idea and its expression may be blurred, it is quite clear in this instance that the ordinary, reasonable person would find that any copying was solely of unprotected ideas. See *Nelson v. PNR Prods., Inc.*, 873 F.2d at p. 1143.

Item 2

(*a*) The passages that Plaintiff cites in this subsection do not even pass the first prong of the test: the ideas themselves are not substantially similar. Plaintiff's quoted passage appears within a discussion of the value of currency, in which he suggests that his Government should issue surplus currency using some sort of unexplained "National self-loan account," and that "the surplus currency could be officially withdrawn later as settlement, or offset by draw down on national resource product without the added burden of interest payments having to be made." Rahman, supra, at p. 38. Defendants' passage, on the other hand, pertains to the need for developing countries to save for the future and proposes that the depletion of natural resources be included in the calculation of wealth as a debt owed to the people of the country. The World Bank, supra, at p. 53. Defendants' passage does not address the issues of surplus currency or avoiding interest; therefore, it could not have been copied from Plaintiff's work. An objective assessment reveals that the ideas are not substantially similar.

(*b*) Next, Plaintiff alleges that Defendants copied his work in their statement, "[s]tudies of sustainable development should also consider the human resource savings realized through investment in education and health . . ." The World Bank, supra, at p. 53. The passages Plaintiff alleges formed the basis for this language, however, simply express the idea that education and health are basic human needs that governments are obligated to meet. Rahman, supra, at pp. 15-17. Defendants' work does not imply that Governments have such a duty; it merely names a factor to be included in the calculation of a country's savings. The ideas expressed in the passages cited by Plaintiff are clearly dissimilar.

Item 3

(*a*) The idea introduced in Defendants' statement, "To ensure that wealth is maintained, resource rents should be reinvested in either produced assets or human resources," the World Bank, supra, at p. 56, bears little resemblance to the idea Plaintiff sets forth in his cited passages. Defendants suggest investing in produced assets and human resources because those investments will in turn produce more wealth. Plaintiff, however, recommends exploiting all of his nation's natural resources and converting their value to gold bullion to be stored safely within his country—a quite different approach. Rahman, supra, at p. 50. Any similarity between the idea of converting assets into gold bullion and converting them into produced goods and human resources is insubstantial. The other brief segments Plaintiff cites in this item have nothing to do with reinvesting assets and therefore could not have formed the basis for Defendants' sentence.

(*b*) In Plaintiff's next example, Defendants again write on the general, theoretical level, while Plaintiff discusses what his particular country should do. Defendants write: "[t]he crude estimates of saving provided [in the graphs on page 55] . . . are just accurate enough to suggest that a policy issue is at stake—whether government policies are providing for the future." The World Bank, supra, at p. 56. Plaintiff, too, addresses the need to save for the future; however, he deals specifically with how he believes his country should prepare in light of the possible obsolescence of petroleum products. Rahman, supra, at p. 58, 66. There is a similarity of general topic in that both passages deal with government saving. See *Nichols v. Universal Pictures Corp.*, 45 F.2d 119, 121 (2d Cir. 1930) (noting that, at the most general level in a "series of abstractions," similarities will be easy to find). However, the actual ideas expressed in the two passages are not substantially similar. Defendants pose a general concern raised by their own research and do not refer at all to petroleum products or to the Republic of Trinidad and Tobago. Therefore, although both mention saving, the two works cannot be said to express substantially similar ideas.

Item 4

In this item, Plaintiff quotes numerous passages from his own and Defendants' work, alleging that Defendants copied his definition of the wealth of a nation. In particular, Plaintiff's allegations focus on the ideas of recognizing the importance of human resources, counting foreign investment as a negative factor, and considering the possible depletion of natural resources. The court will consider each of these allegations in turn.

First, Plaintiff claims that the most blatant example of copyright infringement occurs when Defendants list the factors to be included when calculating the wealth of nations. Pl.'s Resp., App. A at p. 9. Certainly, both works discuss the idea of finding an accurate method for measuring the wealth of a nation. The World Bank, supra, at p. 57; Rahman, supra, at p. 130. Of course, under 17 U.S.C. § 102, it is clear that a process or system (however it may be labelled) for determining the wealth of nations cannot be copyrighted. Therefore, the court must determine whether Defendants' expression of that method is substantially similar to Plaintiff's. See *Nelson v. PNR Prods., Inc.*, 873 F.2d at p. 1143.

Plaintiff's book states that his country's assets include "[the] combined natural reserves of [the] country, plus all [its] land, people, infra-structure, buildings, etc." Rahman, supra, at p. 130. Defendants' categories of national assets are: produced assets, natural capital, human resources, and social infrastructure. The World Bank, supra, at p. 65. Of course, "natural reserves" and "natural capital" mean essentially the same thing as "people" and "human resources". However, there is simply no better way to express the value of a country's natural resources and citizenry than by using terms such as these. See *Lapsley v. Am. Inst. of Certified Pub. Accountants*, 246 F. Supp. at p. 391. Therefore, even though the expressions may be similar, there has been no infringement of Plaintiff's copyright.[10] While buildings are included in Defendants' definition of produced assets, and land is included in their definition of natural capital, Defendants also list several assets that Plaintiff does not: social (as opposed to physical) infrastructure and produced assets in general. Therefore, the court finds that the overall expressions of methods to measure a country's assets are not substantially similar.

In his conclusion to this item, Plaintiff points particularly to the fact that both parties emphasize the value of human resources. Pl.'s Resp., App. A at p. 9. While

this is true, the ways in which the parties convey this idea are very different, such that an ordinary, reasonable person would not find them substantially similar. See *Nelson v. PNR Prods., Inc.*, 873 F.2d at p. 1143. The main points in the sections quoted from Plaintiff's book are: (1) that the government should provide free education and cultural events for the public because an ignorant populace will overthrow its society, Rahman, supra at p. 16; (2) that human beings have a right to food, shelter, and clothing, Rahman, supra, at pp. 88-89; and (3) that "[t]he value of labour must appreciate, and not depreciate to the point where its earnings are inadequate for its sustenance," Rahman, supra, at p. 62. The passages quoted from Defendants' book, however, mainly provide details regarding how to measure the value of human resources. Unlike Plaintiff's work, Defendants' book does not state or imply at any point that humans have an inherent right to have Governments meet their basic needs. Defendants' work does note as a factual matter that, as people learn, their value as resources increases over their lifetimes. The World Bank, supra, at p. 61. Plaintiff's comment on the appreciation of human labour seems instead to assert the need for the value of labour to increase for the sake of sustainability. An ordinary, reasonable person could not find Defendants' expression of the idea to be substantially similar to Plaintiff's.

Plaintiff also points to Defendants' inclusion of foreign investment in the list of national liabilities as evidence of copyright infringement. Once again, the ideas are similar, but the expressions are not. Plaintiff's discussion focuses mainly on his belief that foreign investment is not needed in his country and that it is a liability because the investors spend the returns in their home countries. Rahman, supra, at pp. 48-49. Defendants' book neither addresses the particular situation in Trinidad and Tobago, nor mentions the problem of foreign investors "repatriating" their earnings, as Plaintiff puts it. The only similarity between the two works on this point is that they both count foreign investment as a liability when calculating a nation's wealth, an idea to which Plaintiff can hold no copyright. See 17 U.S.C. § 102 (*b*).

Finally, Plaintiff alleges that Defendants' use of the concept of "intergenerational liability" infringes his copyrighted expression regarding the possibility that his country's natural resources, particularly petroleum products, will become obsolete.

In this instance, not even the underlying ideas are similar. Plaintiff writes that, because nuclear and solar energy may someday eliminate the need for fossil fuels, his country should extract all its petroleum now and convert it into tangible assets. Rahman, supra, at p. 50. Defendants, on the other hand, write that the environmental impact of wealth-increasing activities on non-saleable resources like air and water should be included in the calculation of national wealth because future generations will bear the burden of such pollution. The World Bank, supra, at p. 65. Plaintiff does not mention the environmental impact of development on future generations, nor does he address how to account for it when measuring national wealth. Likewise, Defendants' work does not encourage exploiting natural resources and does not express concern that fossil fuels will become obsolete. Defendants' idea bears virtually no resemblance to Plaintiff's.

Item 5

In this item, the passages cited are similar only at the broadest level of generality. See *Nichols v. Universal Pictures Corp.*, 45 F.2d at p. 121. Plaintiff's quotations focus on the responsibility of government to meet the basic needs of the poor,

Rahman, supra, at pp. 16, 72, and to create a system that rewards the poor with the fruits of their labour, Rahman, supra, at p. 62. Defendants mention that poverty, by definition, means in part a lack of basic human necessities and that overcoming poverty is a challenge for developing countries. The World Bank, supra, at pp. 67-68. However, they do not, unlike Plaintiff, assert that the principal duty of government is the eradication of poverty or explain the various ways in which Governments have failed to live up to this duty.

While both parties mention the poor's lack of access to the rewards of affluence, the similarity does not extend beyond the level of an idea. Plaintiff writes, "[o]ur citizens morally own the natural resources, yet are constantly denied the benefits through misguided economic policies." Rahman, supra, at p. 78. Quite differently, Defendants' observation appears within an explanation of a graph comparing the percentage of the population consuming less than one dollar per day with national wealth. The World Bank, supra, at p. 69, fig. 9.3. Defendants write, "[a]t low levels of wealth (less than $20,000 per capita), the relation between wealth and poverty is weak, reflecting both the degree of potential wealth that remains untapped and the poor's lack of access to the benefits generated by the wealth that is available." The World Bank, supra, at p. 69. Certainly, Plaintiff can hold no copyright to the idea that the poor have inadequate access to the benefits of a nation's wealth, see 17 U.S.C. § 102 (*b*) , and, even if he could, the parties' expressions of that idea are not remotely similar in context or wording.

Finally, in this item and in his conclusion, Plaintiff presents as evidence of infringement the fact that his work offers itself up as a "blueprint" for developing nations. Plaintiff cites passages of *Revised Rational Economics* that read, "[w]hile the economic philosophies propounded in this book had their genesis in the Trinbago experience of the post-Williams era, upon reflection, one may find their relevance universal to third world/developing nations," Rahman, supra, at p. 118, and, "[w]ith the overturn of conventional economics through the concepts of this work, perhaps this would be seen as a prototype blueprint for third world economic policy documents," Rahman, supra. at p. 120. As much as Plaintiff may hope his work is followed by other economists, it is substantial similarity, not the mere presentation of a "blueprint", that determines whether a copyright has been infringed.

C. *Unfair trade practices and unfair competition claims*

Plaintiff also seems to claim that Defendants have engaged in unfair trade practices and unfair competition. Following his allegations of copyright infringement, Plaintiff inserts one final sentence that states in conclusory fashion, "[a]fter, [sic] September 1995, Defendant has published, marketed and distributed the book entitled *Monitoring Environmental Progress, A Report on Work in Progress*, and has thereby engaged in unfair trade practices and unfair competition against Plaintiff to Plaintiff's irreparable damage." Complaint ("Compl.") at § 14 (emphasis in original). Neither the Complaint nor any of Plaintiff's motion papers offer a single fact in support of this claim.

Therefore, even if the Complaint is liberally construed, it fails to state a claim for unfair trade practices and unfair competition. While *pro se* plaintiffs are entitled to some leniency in construing their pleadings, see *Haines v. Kerner*, 404 U.S. at p. 520, the Complaint still must allege some supporting facts in order to survive a motion to dismiss. *Crisafi v. Holland*, 655 F.2d 1305, 1307-08 (D.C. Cir. 1981)

(stating that "[a] court may dismiss as frivolous complaints reciting bare legal conclusions with no suggestion of supporting facts"). See also *Price v. Crestar Sec. Corp.*, 44 F. Supp. 2d 351, 353 (D.D.C. 1999) (holding that "although a court will read a *pro se* plaintiff's complaint liberally, a *pro se* plaintiff must at least meet a minimal standard of pleading in the complaint . . ."); *Hall v. Bellmon*, 935 F.2d 1106, 1110 (10th Cir. 1991) (holding that, even in a *pro se* complaint, "conclusory allegations without supporting factual averments are insufficient to state a claim on which relief can be based"). In this case, Plaintiff has failed to allege any facts whatsoever in support of his claims of unfair trade practices and unfair competition. Because Plaintiff has included no supporting factual allegations, he has failed to state a claim for unfair trade practices and unfair competition. Accordingly, those claims are dismissed.

IV. CONCLUSION

A comparison of *Revised National Economics* and *Monitoring Environmental Progress* reveals that the two works are not substantially similar except, in a very few instances, on the level of uncopyrightable ideas.[11] Therefore, the Court concludes that Plaintiff can plead no set of facts that would entitle him to relief on his copyright claim. Furthermore, because Plaintiff has offered no facts in support of his allegation of unfair trade practices and unfair competition, he has failed to state a claim. Accordingly, Defendants' Motion is granted and the Complaint is dismissed.

26 August 2001
(*Date*)

[*Signed*]
Gladys KESSLER
U.S. District Judge

NOTES

[1] The IBRD and the IDA have been designated "public international organizations" pursuant to Executive orders. See Exec. Order No. 9751, 11 Fed. Reg. 7713 (1946) (IBRD); Exec. Order No. 11966, 42 Fed. Reg. 4331 (1977) (IDA).

[2] Because the appellees are immune from suit, we have no occasion to determine the legal adequacies of the appellant's defamation claim. *Cf. Lutcher S.A. Celulose E Papel v. Inter-Am. Dev. Bank*, 382 F.2d 454, 460-61 (D.C. Cir. 1967) (proceeding to merits only after concluding Bank had waived immunity).

[3] Defendant The World Bank is an organization of member States that provides loans and other assistance to nations in an effort to promote sustainable development. Defendant James D. Wolfensohn is president of the World Bank Group. Defendant World Bank Publications produces and makes available to the public copies of reports and information compiled by the World Bank.

[4] For purposes of a rule 12 (*b*) (6) motion, the court must presume that the factual allegations in the Complaint are true. See, e.g., *Albright v. Oliver*, 510 U.S. 266, 268 (1994); *Harris v. Ladner*, 127 F.3d 1121, 1123 (D.C. Cir. 1997). Therefore, the facts set forth in this section are taken from the Complaint.

[5] Plaintiff states that he brings his claim under 17 U.S.C. § 104. Complaint at § 6. The court presumes that Plaintiff is referring to § 104 (*b*), which states in pertinent part: "The works specified by sections 102 and 103 [including works of literature and the arts], when published, are subject to protection under this title if—(1) on the date of first publication, one or more of the authors . . . is a national, domiciliary or sovereign authority of a

treaty party . . .” 17 U.S.C. § 104 (*b*). Because Defendants do not raise any defences relating to § 104 and because their motion can be resolved on other grounds, the court need not address the issue of whether Plaintiff is covered under § 104 (*b*).

[6] For clarity and simplicity in this opinion, the court will cite directly to the two works in question rather than to the exhibits in which they are contained. The works are reproduced in Exhibits A (*Revised National Economics*) and B (*Monitoring Environmental Progress*), which are attached to the Declaration of Thomas P. Olson (“Olson Decl.”), filed with Defendants’ Motion to Dismiss.

[7] Plaintiff purports to claim actual copying, Compl. at § 12, but alleges no facts that would show that Defendants actually copied his book. Instead, he simply alleges that “Defendants, [sic] infringed said copyright by publishing and placing upon the market a book entitled *Monitoring Environmental Progress, A Report on Work in Progress*, which was edited, copied and rewritten largely from Plaintiff’s copyrighted book, entitled *Revised National Economics*.” Compl. at § 12 (emphasis in original). However, Plaintiff’s responses to the Motion indicate that he is bringing this action on a theory of access and substantial similarity. Because Plaintiff is appearing *pro se*, the court will proceed as if he had included the allegations of access and substantial similarity in his Complaint.

[8] Although the opinion cites to those comparisons, it quotes the two works directly rather than using Plaintiff’s (sometimes abbreviated) quotations of those works.

[9] In his introduction, Plaintiff seems to contend that Defendants’ claims about the innovative nature of their work help to prove his case. Pl.’s Resp., App. A at 1. He cites such assertions as “this publication is rich in ‘products’ such as new indicators and innovative concepts,” the World Bank, supra, at viii, and “perhaps the most profound suggestion of intellectual retooling is in the final chapters, which propose a change in the role of national accounting.” Idem, at ix. However, even if Defendants claim that their book contains new ideas, and even if Plaintiff was actually the first to conceive of those ideas, he would have no basis for relief since ideas may not be copyrighted. 17 U.S.C. § 102 (*b*).

[10] In instances such as this, the idea and the expression of the idea are said to merge, so that even the expression of the idea is not protected. See, e.g., *Kepner-Tregoe, Inc. v. Leadership Software*, 12 F.3d 527, 533 (5th Cir. 1994) (“[W]hen an idea can be expressed in very few ways, copyright law does not protect that expression, because doing so would confer a de facto monopoly over the idea. In such cases idea and expression are said to be merged.”); *Atari Games Corp. v. Oman*, 888 F.2d 878, 889 (D.C. Cir. 1989).

[11] Because the court finds that the works are not substantially similar, there is no need to address the issue of access. See *Whitehead v. Paramount Pictures Corp.*, 53 F. Supp. 2d at p. 47 note 4; *McCall v. Johnson Publi’g Co.*, 680 F. Supp. at p. 48.

Part Four

BIBLIOGRAPHY

LEGAL BIBLIOGRAPHY OF THE UNITED NATIONS AND RELATED INTERGOVERNMENTAL ORGANIZATIONS

A. INTERNATIONAL ORGANIZATIONS AND INTERNATIONAL LAW IN GENERAL

1. General
2. Particular questions

B. UNITED NATIONS

1. General
2. Particular organs
3. Particular questions or activities

C. INTERGOVERNMENTAL ORGANIZATIONS RELATED TO THE UNITED NATIONS

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