



# REGIONAL COURSES IN INTERNATIONAL LAW

Addis Ababa, Ethiopia  
7 April - 2 May 2014



## STUDY MATERIALS INTERNATIONAL ORGANIZATIONS

Codification Division of the United Nations Office of Legal Affairs





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**PROFESSOR LAURENCE BOISSON DE CHAZOURNES**

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**INTERNATIONAL ORGANIZATIONS**  
**PROFESSOR LAURENCE BOISSON DE CHAZOURNES**

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**Recommended Readings (not reproduced)**

35. Martin Dixon, *Textbook on International Law*, 6<sup>th</sup> ed. (Oxford, Oxford University Press, 2007), pp. 1-22
36. Jan Klabbers, *An Introduction to International Institutional Law*, 2<sup>nd</sup> ed. (New York, Cambridge University Press, 2009), pp. 1-37

**Constituent Charter of the Bank of International  
Settlements, 1930**

## Constituent Charter of the Bank for International Settlements

(of 20 January 1930)<sup>1</sup>

Whereas the Powers signatory to the Hague Agreement of January, 1930, have adopted a Plan which contemplates the founding by the central banks of Belgium, France, Germany, Great Britain, Italy and Japan and by a financial institution of the United States of America of an International Bank to be called the Bank for International Settlements;

And whereas the said central banks and a banking group including Messrs. J. P. Morgan & Company of New York, the First National Bank of New York, New York, and the First National Bank of Chicago, Chicago, have undertaken to found the said Bank and have guaranteed or arranged for the guarantee of the subscription of its authorised capital amounting to five hundred million Swiss francs equal to 145,161,290.32 grammes fine gold, divided into 200,000 shares;

And whereas the Swiss Federal Government has entered into a treaty with the Governments of Germany, Belgium, France, Great Britain, Italy and Japan whereby the said Federal Government has agreed to grant the present Constituent Charter of the Bank for International Settlements and not to repeal, amend or supplement the said Charter and not to sanction amendments to the Statutes of the Bank referred to in Paragraph 4 of the present Charter except in agreement with the said Powers;

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<sup>1</sup> Text amended on account of the renumbering of the Articles of the Statutes and sanctioned on 10 December 1969 in accordance with the conditions laid down in Article 1 of the Convention respecting the Bank for International Settlements.

1. The Bank for International Settlements (hereinafter called the Bank) is hereby incorporated.
2. Its constitution, operations and activities are defined and governed by the annexed Statutes<sup>2</sup> which are hereby sanctioned.
3. Amendment of Articles of the said Statutes other than those enumerated in Paragraph 4 hereof may be made and shall be put into force as provided in Article 57 of the said Statutes and not otherwise.
4. Articles 2, 3, 8, 14, 19, 24, 27, 44, 51, 54, 57 and 58 of the said Statutes shall not be amended except subject to the following conditions: the amendment must be adopted by a two-thirds majority of the Board, approved by a majority of the General Meeting and sanctioned by a law supplementing the present Charter.
5. The said Statutes and any amendments which may be made thereto in accordance with Paragraphs 3 or 4 hereof respectively shall be valid and operative notwithstanding any inconsistency therewith in the provisions of any present or future Swiss law.
6. The Bank shall be exempt and immune from all taxation included in the following categories:
  - (a) stamp, registration and other duties on all deeds or other documents relating to the incorporation or liquidation of the Bank;
  - (b) stamp and registration duties on any first issue of its shares by the Bank to a central bank, financial institution, banking group or underwriter at or before the time of incorporation or in pursuance of Articles 5, 6, 8 or 9 of the Statutes;

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<sup>2</sup> See text of the Statutes currently in force.

- (c) all taxes on the Bank's capital, reserves or profits, whether distributed or not, and whether assessed on the profits of the Bank before distribution or imposed at the time of distribution under the form of a coupon tax payable or deductible by the Bank. This provision is without prejudice to the State's right to tax the residents of Switzerland other than the Bank as it thinks fit;
- (d) all taxes upon any agreements which the Bank may make in connection with the issue of loans for mobilising the German annuities and upon the bonds of such loans issued on a foreign market;
- (e) all taxes on the remunerations and salaries paid by the Bank to members of its administration or its employees of non-Swiss nationality.
7. All funds deposited with the Bank by any Government in pursuance of the Plan adopted by the Hague Agreement of January, 1930, shall be exempt and immune from taxation whether by way of deduction by the Bank on behalf of the authority imposing the same or otherwise.
8. The foregoing exemptions and immunities shall apply to present and future taxation by whatsoever name it may be described, and whether imposed by the Confederation, or by the cantonal, communal or other public authorities.
9. Moreover, without prejudice to the exemptions specified above, there may not be levied on the Bank, its operation or its personnel any taxation other than that of a general character and to which other banking establishments established at Basle or in Switzerland, their operations and their personnel, are not subjected *de facto* and *de jure*.
10. The Bank, its property and assets and all deposits and other funds entrusted to it shall be immune in time of peace and in time of war from any measure such as expropriation, requisition, seizure, confiscation, prohibition or restriction of gold or currency export or import, and any other similar measures.

11. Any dispute between the Swiss Government and the Bank as to the interpretation or application of the present Charter shall be referred to the Arbitral Tribunal provided for by the Hague Agreement of January, 1930.

The Swiss Government shall appoint a member to sit on the occasion of such dispute, the President having a casting vote.

In having recourse to the said Tribunal the Parties may nevertheless agree to submit their dispute to the President or to a member of the Tribunal chosen to act as sole arbiter.



**Articles of Agreement of the  
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	Articles of Agreement of the International Monetary Fund				
	The Governments on whose behalf the present Agreement is signed agree as follows:				
	Introductory Article				
	(i) The International Monetary Fund is established and shall operate in accordance with the provisions of this Agreement as originally adopted and subsequently amended.				
	(ii) To enable the Fund to conduct its operations and transactions, the Fund shall maintain a General Department and a Special Drawing Rights Department. Membership in the Fund shall give the right to participation in the Special Drawing Rights Department.				
	(iii) Operations and transactions authorized by this Agreement shall be conducted through the General Department, consisting in accordance with the provisions of this Agreement of the General Resources Account, the Special Disbursement Account, and the Investment Account; except that operations and transactions involving special drawing rights shall be conducted through the Special Drawing Rights Department.				

## Article I

### Purposes

The purposes of the International Monetary Fund are:

(i) To promote international monetary cooperation through a permanent institution which provides the machinery for consultation and collaboration on international monetary problems.

(ii) To facilitate the expansion and balanced growth of international trade, and to contribute thereby to the promotion and maintenance of high levels of employment and real income and to the development of the productive resources of all members as primary objectives of economic policy.

(iii) To promote exchange stability, to maintain orderly exchange arrangements among members, and to avoid competitive exchange depreciation.

(iv) To assist in the establishment of a multilateral system of payments in respect of current transactions between members and in the elimination of foreign exchange restrictions which hamper the growth of world trade.

(v) To give confidence to members by making the general resources of the Fund temporarily available to them under adequate safeguards, thus providing them with opportunity to correct maladjustments in their balance of payments without resorting to measures destructive of national or international prosperity.

(vi) In accordance with the above, to shorten the duration and lessen the degree of disequilibrium in the international balances of payments of members.

The Fund shall be guided in all its policies and decisions by the purposes set forth in this Article.

## Article II

### Membership

#### Section 1. Original members

The original members of the Fund shall be those of the countries represented at the United Nations Monetary and Financial Conference whose governments accept membership before December 31, 1945.

#### Section 2. Other members

Membership shall be open to other countries at such times and in accordance with such terms as may be prescribed by the Board of Governors. These terms, including the terms for subscriptions, shall be based on principles consistent with those applied to other countries that are already members.

## Article III

### Quotas and Subscriptions

#### Section 1. Quotas and payment of subscriptions

Each member shall be assigned a quota expressed in special drawing

rights. The quotas of the members represented at the United Nations Monetary and Financial Conference which accept membership before December 31, 1945 shall be those set forth in Schedule A. The quotas of other members shall be determined by the Board of Governors. The subscription of each member shall be equal to its quota and shall be paid in full to the Fund at the appropriate depository.

#### Section 2. Adjustment of quotas

(a) The Board of Governors shall at intervals of not more than five years conduct a general review, and if it deems it appropriate propose an adjustment, of the quotas of the members. It may also, if it thinks fit, consider at any other time the adjustment of any particular quota at the request of the member concerned.

(b) The Fund may at any time propose an increase in the quotas of those members of the Fund that were members on August 31, 1975 in proportion to their quotas on that date in a cumulative amount not in excess of amounts transferred under Article V, Section 12(f)(i) and (j) from the Special Disbursement Account to the General Resources Account.

(c) An eighty-five percent majority of the total voting power shall be required for any change in quotas.

(d) The quota of a member shall not be changed until the member has consented and until payment has been made unless payment is deemed to have been made in accordance with Section 3(b) of this Article.

#### Section 3. Payments when quotas are changed

(a) Each member which consents to an increase in its quota under Section 2(a) of this Article shall, within a period determined by the Fund, pay to the Fund twenty-five percent of the increase in special drawing rights, but the Board of Governors may prescribe that this payment may be made, on the same basis for all members, in whole or in part in the currencies of other members specified, with their concurrence, by the Fund, or in the member's own currency. A non-participant shall pay in the currencies of other members specified by the Fund, with their concurrence, a proportion of the increase corresponding to the proportion to be paid in special drawing rights by participants. The balance of the increase shall be paid by the member in its own currency. The Fund's holdings of a member's currency shall not be increased above the level at which they would be subject to charges under Article V, Section 8(b)(ii), as a result of payments by other members under this provision.

(b) Each member which consents to an increase in its quota under Section 2(b) of this Article shall be deemed to have paid to the Fund an amount of subscription equal to such increase.

(c) If a member consents to a reduction in its quota, the Fund shall, within sixty days, pay to the member an amount equal to the reduction. The payment shall be made in the member's currency and in such amount of special drawing rights or the currencies of other members specified, with their concurrence, by the Fund as is necessary to prevent the reduction of the Fund's holdings of the currency below the new quota, provided that in exceptional circumstances the Fund may reduce its holdings of the currency below the new quota by payment to the member in its own currency.

(d) A seventy percent majority of the total voting power shall be

required for any decision under (a) above, except for the determination of a period and the specification of currencies under that provision.

#### Section 4. Substitution of securities for currency

The Fund shall accept from any member, in place of any part of the member's currency in the General Resources Account which in the judgment of the Fund is not needed for its operations and transactions, notes or similar obligations issued by the member or the depository designated by the member under Article XIII, Section 2, which shall be non-negotiable, non-interest bearing and payable at their face value on demand by crediting the account of the Fund in the designated depository. This Section shall apply not only to currency subscribed by members but also to any currency otherwise due to, or acquired by, the Fund and to be placed in the General Resources Account.

#### Article IV

##### Obligations Regarding Exchange Arrangements

###### Section 1. General obligations of members

Recognizing that the essential purpose of the international monetary system is to provide a framework that facilitates the exchange of goods, services, and capital among countries, and that sustains sound economic growth, and that a principal objective is the continuing development of the orderly underlying conditions that are necessary for financial and economic stability, each member undertakes to collaborate with the Fund and other members to assure orderly exchange arrangements and to promote a stable system of exchange rates. In particular, each member shall:

(i) endeavor to direct its economic and financial policies toward the objective of fostering orderly economic growth with reasonable price stability, with due regard to its circumstances;

(ii) seek to promote stability by fostering orderly underlying economic and financial conditions and a monetary system that does not tend to produce erratic disruptions;

(iii) avoid manipulating exchange rates or the international monetary system in order to prevent effective balance of payments adjustment or to gain an unfair competitive advantage over other members; and

(iv) follow exchange policies compatible with the undertakings under this Section.

###### Section 2. General exchange arrangements

(a) Each member shall notify the Fund, within thirty days after the date of the second amendment of this Agreement, of the exchange arrangements it intends to apply in fulfillment of its obligations under Section 1 of this Article, and shall notify the Fund promptly of any changes in its exchange arrangements.

(b) Under an international monetary system of the kind prevailing on January 1, 1976, exchange arrangements may include (i) the maintenance by a member of a value for its currency in terms of the special drawing right or another denominator, other than gold, selected by the member, or (ii) cooperative arrangements by which members maintain the value of their currencies.

cies in relation to the value of the currency or currencies of other members, or (iii) other exchange arrangements of a member's choice.

(c) To accord with the development of the international monetary system, the Fund, by an eighty-five percent majority of the total voting power, may make provision for general exchange arrangements without limiting the right of members to have exchange arrangements of their choice consistent with the purposes of the Fund and the obligations under Section 1 of this Article.

###### Section 3. Surveillance over exchange arrangements

(a) The Fund shall oversee the international monetary system in order to ensure its effective operation, and shall oversee the compliance of each member with its obligations under Section 1 of this Article.

(b) In order to fulfill its functions under (a) above, the Fund shall exercise firm surveillance over the exchange rate policies of members, and shall adopt specific principles for the guidance of all members with respect to those policies. Each member shall provide the Fund with the information necessary for such surveillance, and, when requested by the Fund, shall consult with it on the member's exchange rate policies. The principles adopted by the Fund shall be consistent with cooperative arrangements by which members maintain the value of their currencies in relation to the value of the currency or currencies of other members, as well as with other exchange arrangements of a member's choice consistent with the purposes of the Fund and Section 1 of this Article. These principles shall respect the domestic social and political policies of members, and in applying these principles the Fund shall pay due regard to the circumstances of members.

###### Section 4. Par values

The Fund may determine, by an eighty-five percent majority of the total voting power, that international economic conditions permit the introduction of a widespread system of exchange arrangements based on stable but adjustable par values. The Fund shall make the determination on the basis of the underlying stability of the world economy, and for this purpose shall take into account price movements and rates of expansion in the economies of members. The determination shall be made in light of the evolution of the international monetary system, with particular reference to sources of liquidity, and, in order to ensure the effective operation of a system of par values, to arrangements under which both members in surplus and members in deficit in their balances of payments take prompt, effective, and symmetrical action to achieve adjustment, as well as to arrangements for intervention and the treatment of imbalances. Upon making such determination, the Fund shall notify members that the provisions of Schedule C apply.

###### Section 5. Separate currencies within a member's territories

(a) Action by a member with respect to its currency under this Article shall be deemed to apply to the separate currencies of all territories in respect of which the member has accepted this Agreement under Article XXXI, Section 2(g) unless the member declares that its action relates either to the metropolitan currency alone, or only to one or more specified separate currencies, or to the metropolitan currency and one or more specified separate currencies.

(b) Action by the Fund under this Article shall be deemed to relate to all currencies of a member referred to in (a) above unless the Fund declares otherwise.

#### Article V

#### Operations and Transactions of the Fund

#### Section 1. Agencies dealing with the Fund

Each member shall deal with the Fund only through its Treasury, central bank, stabilization fund, or other similar fiscal agency, and the Fund shall deal only with or through the same agencies.

#### Section 2. Limitation on the Fund's operations and transactions

(a) Except as otherwise provided in this Agreement, transactions on the account of the Fund shall be limited to transactions for the purpose of supplying a member, on the initiative of such member, with special drawing rights or the currencies of other members from the general resources of the Fund, which shall be held in the General Resources Account, in exchange for the currency of the member desiring to make the purchase.

(b) If requested, the Fund may decide to perform financial and technical services, including the administration of resources contributed by members, that are consistent with the purposes of the Fund. Operations involved in the performance of such financial services shall not be on the account of the Fund. Services under this subsection shall not impose any obligation on a member without its consent.

#### Section 3. Conditions governing use of the Fund's general resources

(a) The Fund shall adopt policies on the use of its general resources, including policies on stand-by or similar arrangements, and may adopt special policies for special balance of payments problems, that will assist members to solve their balance of payments problems in a manner consistent with the provisions of this Agreement and that will establish adequate safeguards for the temporary use of the general resources of the Fund.

(b) A member shall be entitled to purchase the currencies of other members from the Fund in exchange for an equivalent amount of its own currency subject to the following conditions:

(i) the member's use of the general resources of the Fund would be in accordance with the provisions of this Agreement and the policies adopted under them;

(ii) the member represents that it has a need to make the purchase because of its balance of payments or its reserve position or developments in its reserves;

(iii) the proposed purchase would be a reserve tranche purchase, or would not cause the Fund's holdings of the purchasing member's currency to exceed two hundred percent of its quota;

(iv) the Fund has not previously declared under Section 5 of this Article, Article VI, Section 1, or Article XXVI, Section 2(a) that the member desiring to purchase is ineligible to use the general resources of the Fund.

(c) The Fund shall examine a request for a purchase to determine whether the proposed purchase would be consistent with the provisions of this Agreement and the policies adopted under them, provided that requests for reserve tranche purchases shall not be subject to challenge.

(d) The Fund shall adopt policies and procedures on the selection of currencies to be sold that take into account, in consultation with members, the balance of payments and reserve position of members and developments in the exchange markets, as well as the desirability of promoting over time balanced positions in the Fund, provided that if a member represents that it is proposing to purchase the currency of another member because the purchasing member wishes to obtain an equivalent amount of its own currency offered by the other member, it shall be entitled to purchase the currency of the other member unless the Fund has given notice under Article VII, Section 3 that its holdings of the currency have become scarce.

(e) (i) Each member shall ensure that balances of its currency purchased from the Fund are balances of a freely usable currency or can be exchanged at the time of purchase for a freely usable currency of its choice at an exchange rate between the two currencies equivalent to the exchange rate between them on the basis of Article XIX, Section 7(a).

(ii) Each member whose currency is purchased from the Fund or is obtained in exchange for currency purchased from the Fund shall collaborate with the Fund and other members to enable such balances of its currency to be exchanged, at the time of purchase, for the freely usable currencies of other members.

(iii) An exchange under (i) above of a currency that is not freely usable shall be made by the member whose currency is purchased unless that member and the purchasing member agree on another procedure.

(iv) A member purchasing from the Fund the freely usable currency of another member and wishing to exchange it at the time of purchase for another freely usable currency shall make the exchange with the other member if requested by that member. The exchange shall be made for a freely usable currency selected by the other member at the rate of exchange referred to in (i) above.

(f) Under policies and procedures which it shall adopt, the Fund may agree to provide a participant making a purchase in accordance with this Section with special drawing rights instead of the currencies of other members.

#### Section 4. Waiver of conditions

The Fund may in its discretion, and on terms which safeguard its interests, waive any of the conditions prescribed in Section 3(b)(iii) and (iv) of this Article, especially in the case of members with a record of avoiding large or continuous use of the Fund's general resources. In making a waiver it shall take into consideration periodic or exceptional requirements of the member requesting the waiver. The Fund shall also take into consideration a member's willingness to pledge as collateral security acceptable assets having a value sufficient in the opinion of the Fund to protect its interests and may require as a condition of waiver the pledge of such collateral security.

#### Section 5. Ineligibility to use the Fund's general resources

Whenever the Fund is of the opinion that any member is using the general resources of the Fund in a manner contrary to the purposes of the Fund, it shall present to the member a report setting forth the views of the Fund and prescribing a suitable time for reply. After presenting such a report to a member, the Fund may limit the use of its general resources by the member. If no reply to the report is received from the member within the prescribed time, or if the reply received is unsatisfactory, the Fund may continue to limit the member's use of the general resources of the Fund or may, after giving reasonable notice to the member, declare it ineligible to use the general resources of the Fund.

Section 6. Other purchases and sales of special drawing rights by the Fund

- (a) The Fund may accept special drawing rights offered by a participant in exchange for an equivalent amount of the currencies of other members.
- (b) The Fund may provide a participant, at its request, with special drawing rights for an equivalent amount of the currencies of other members. The Fund's holdings of a member's currency shall not be increased as a result of these transactions above the level at which the holdings would be subject to charges under Section 8(b)(ii) of this Article.
- (c) The currencies provided or accepted by the Fund under this Section shall be selected in accordance with policies that take into account the principles of Section 3(d) or 7(i) of this Article. The Fund may enter into transactions under this Section only if a member whose currency is provided or accepted by the Fund concurs in that use of its currency.

Section 7. Repurchase by a member of its currency held by the Fund

- (a) A member shall be entitled to repurchase at any time the Fund's holdings of its currency that are subject to charges under Section 8(b) of this Article.
- (b) A member that has made a purchase under Section 3 of this Article will be expected normally, as its balance of payments and reserve position improves, to repurchase the Fund's holdings of its currency that result from the purchase and are subject to charges under Section 8(b) of this Article. A member shall repurchase these holdings if, in accordance with policies on repurchase that the Fund shall adopt and after consultation with the member, the Fund represents to the member that it should repurchase because of an improvement in its balance of payments and reserve position.
- (c) A member that has made a purchase under Section 3 of this Article shall repurchase the Fund's holdings of its currency that result from the purchase and are subject to charges under Section 8(b) of this Article not later than five years after the date on which the purchase was made. The Fund may prescribe that repurchase shall be made by a member in installments during the period beginning three years and ending five years after the date of a purchase. The Fund, by an eighty-five percent majority of the total voting power, may change the periods for repurchase under this section, and any period so adopted shall apply to all members.
- (d) The Fund, by an eighty-five percent majority of the total voting power, may adopt periods other than those that apply in accordance with (c) above, which shall be the same for all members, for the repurchase of holdings of currency acquired by the Fund pursuant to a special policy on the use of its general resources.

- (e) A member shall repurchase, in accordance with policies that the Fund shall adopt by a seventy percent majority of the total voting power, the Fund's holdings of its currency that are not acquired as a result of purchases and are subject to charges under Section 8(b)(ii) of this Article.
- (f) A decision prescribing that under a policy on the use of the general resources of the Fund the period for repurchase under (c) or (d) above shall be shorter than the one in effect under the policy shall apply only to holdings acquired by the Fund subsequent to the effective date of the decision.

(g) The Fund, on the request of a member, may postpone the date of discharge of a repurchase obligation, but not beyond the maximum period under (c) or (d) above or under policies adopted by the Fund under (e) above, unless the Fund determines, by a seventy percent majority of the total voting power, that a longer period for repurchase which is consistent with the temporary use of the general resources of the Fund is justified because discharge on the due date would result in exceptional hardship for the member.

(h) The Fund's policies under Section 3(d) of this Article may be supplemented by policies under which the Fund may decide after consultation with a member to sell under Section 3(b) of this Article its holdings of the member's currency that have not been repurchased in accordance with this Section 7, without prejudice to any action that the Fund may be authorized to take under any other provision of this Agreement.

(i) All repurchases under this Section shall be made with special drawing rights or with the currencies of other members specified by the Fund. The Fund shall adopt policies and procedures with regard to the currencies to be used by members in making repurchases that take into account the principles in Section 3(d) of this Article. The Fund's holdings of a member's currency that is used in repurchase shall not be increased by the repurchase above the level at which they would be subject to charges under Section 8(b)(ii) of this Article.

(j) (i) If a member's currency specified by the Fund under (i) above is not a freely usable currency, the member shall ensure that the repurchasing member can obtain it at the time of the repurchase in exchange for a freely usable currency selected by the member whose currency has been specified. An exchange of currency under this provision shall take place at an exchange rate between the two currencies equivalent to the exchange rate between them on the basis of Article XIX, Section 7(a).

(ii) Each member whose currency is specified by the Fund for repurchase shall collaborate with the Fund and other members to enable repurchasing members, at the time of the repurchase, to obtain the specified currency in exchange for the freely usable currencies of other members.

(iii) An exchange under (j)(i) above shall be made with the member whose currency is specified unless that member and the repurchasing member agree on another procedure.

(iv) If a repurchasing member wishes to obtain, at the time of the repurchase, the freely usable currency of another member specified by the Fund under (i) above, it shall, if requested by the other member, obtain the currency from the other member in exchange for a freely usable currency at the rate of exchange referred to in (j)(i) above. The Fund may adopt regulations on the freely usable currency to be provided in an exchange.

#### Section 8. Charges

(a) (i) The Fund shall levy a service charge on the purchase by a member of special drawing rights or the currency of another member held in the General Resources Account in exchange for its own currency, provided that the Fund may levy a lower service charge on reserve tranche purchases than on other purchases. The service charge on reserve tranche purchases shall not exceed one-half of one percent.

(ii) The Fund may levy a charge for stand-by or similar arrangements. The Fund may decide that the charge for an arrangement shall be offset against the service charge levied under (i) above on purchases under the arrangement.

(b) The Fund shall levy charges on its average daily balances of a member's currency held in the General Resources Account to the extent that they

(i) have been acquired under a policy that has been the subject of an exclusion under Article XXX(c), or

(ii) exceed the amount of the member's quota after excluding any balances referred to in (i) above. The rates of charge normally shall rise at intervals during the period in which the balances are held.

(c) If a member fails to make a repurchase required under Section 7 of this Article, the Fund, after consultation with the member on the reduction of the Fund's holdings of its currency, may impose such charges as the Fund deems appropriate on its holdings of the member's currency that should have been repurchased.

(d) A seventy percent majority of the total voting power shall be required for the determination of the rates of charge under (a) and (b) above, which shall be uniform for all members, and under (c) above.

(e) A member shall pay all charges in special drawing rights, provided that in exceptional circumstances the Fund may permit a member to pay charges in the currencies of other members specified by the Fund, after consultation with them, or in its own currency. The Fund's holdings of a member's currency shall not be increased as a result of payments by other members under this provision above the level at which they would be subject to charges under (b)(ii) above.

#### Section 9. Remuneration

(a) The Fund shall pay remuneration on the amount by which the percentage of quota prescribed under (b) or (c) below exceeds the Fund's average daily balances of a member's currency held in the General Resources Account other than balances acquired under a policy that has been the subject of an exclusion under Article XXX(c). The rate of remuneration, which shall be determined by the Fund by a seventy percent majority of the total voting power, shall be the same for all members and shall be not more than, nor less than four-fifths of, the rate of interest under Article XX, Section 3. In establishing the rate of remuneration, the Fund shall take into account the rates of charge under Article V, Section 8(b).

(b) The percentage of quota applying for the purposes of (a) above shall be:

(i) for each member that became a member before the second amendment of this Agreement, a percentage of quota corresponding to seventy-five percent of its quota on the date of the second amendment of this Agreement, and for each member that became a member after the date of the second amendment of this Agreement, a percentage of quota calculated by dividing the total of the amounts corresponding to the percentages of quota that apply to the other members on the date on which the member became a member by the total of the quotas of the other members on the same date; plus

(ii) the amounts it has paid to the Fund in currency or special drawing rights under Article III, Section 3(a) since the date applicable under (b)(i) above; and minus

(iii) the amounts it has received from the Fund in currency or special drawing rights under Article III, Section 3(c) since the date applicable under (b)(i) above.

(c) The Fund, by a seventy percent majority of the total voting power, may raise the latest percentage of quota applying for the purposes of (a) above to each member to:

(i) a percentage, not in excess of one hundred percent, that shall be determined for each member on the basis of the same criteria for all members, or

(ii) one hundred percent for all members.

(d) Remuneration shall be paid in special drawing rights, provided that either the Fund or the member may decide that the payment to the member shall be made in its own currency.

#### Section 10. Computations

(a) The value of the Fund's assets held in the accounts of the General Department shall be expressed in terms of the special drawing right.

(b) All computations relating to currencies of members for the purpose of applying the provisions of this Agreement, except Article IV and Schedule C, shall be at the rates at which the Fund accounts for these currencies in accordance with Section 11 of this Article.

(c) Computations for the determination of amounts of currency in relation to quota for the purpose of applying the provisions of this Agreement shall not include currency held in the Special Disbursement Account or in the Investment Account.

#### Section 11. Maintenance of value

(a) The value of the currencies of members held in the General Resources Account shall be maintained in terms of the special drawing right in accordance with exchange rates under Article XIX, Section 7(a).

(b) An adjustment in the Fund's holdings of a member's currency pursuant to this Section shall be made on the occasion of the use of that currency in an operation or transaction between the Fund and another member and at such other times as the Fund may decide or the member may request. Payments to or by the Fund in respect of an adjustment shall be made within a reasonable time, as determined by the Fund, after the date of adjustment, and at any other time requested by the member.

Section 12. Other operations and transactions

- (a) The Fund shall be guided in all its policies and decisions under this Section by the objectives set forth in Article VIII, Section 7 and by the objective of avoiding the management of the price, or the establishment of a fixed price, in the gold market.
- (b) Decisions of the Fund to engage in operations or transactions under (c), (d), and (e) below shall be made by an eighty-five percent majority of the total voting power.
- (c) The Fund may sell gold for the currency of any member after consulting the member for whose currency the gold is sold, provided that the Fund's holdings of a member's currency held in the General Resources Account shall not be increased by the sale above the level at which they would be subject to charges under Section 8(b)(ii) of this Article without the concurrence of the member, and provided that, at the request of the member, the Fund at the time of sale shall exchange for the currency of another member such part of the currency received as would prevent such an increase. The exchange of a currency for the currency of another member shall be made after consultation with that member, and shall not increase the Fund's holdings of that member's currency above the level at which they would be subject to charges under Section 8(b)(ii) of this Article. The Fund shall adopt policies and procedures with regard to exchanges that take into account the principles applied under Section 7(i) of this Article. Sales under this provision to a member shall be at a price agreed for each transaction on the basis of prices in the market.
- (d) The Fund may accept payments from a member in gold instead of special drawing rights or currency in any operations or transactions under this Agreement. Payments to the Fund under this provision shall be at a price agreed for each operation or transaction on the basis of prices in the market.
- (e) The Fund may sell gold held by it on the date of the second amendment of this Agreement to those members that were members on August 31, 1975 and that agree to buy it, in proportion to their quotas on that date. If the Fund intends to sell gold under (c) above for the purpose of (f)(ii) below, it may sell to each developing member that agrees to buy it that portion of the gold which, if sold under (c) above, would have produced the excess that could have been distributed to it under (f)(iii) below. The gold that would be sold under this provision to a member that has been declared ineligible to use the general resources of the Fund under Section 5 of this Article shall be sold to it when the ineligibility ceases, unless the Fund decides to make the sale sooner. The sale of gold to a member under this subsection (e) shall be made in exchange for its currency and at a price equivalent at the time of sale to one special drawing right per 0.888 671 gram of fine gold.
- (f) Whenever under (c) above the Fund sells gold held by it on the date of the second amendment of this Agreement, an amount of the proceeds equivalent at the time of sale to one special drawing right per 0.888 671 gram of fine gold shall be placed in the General Resources Account and, except as the Fund may decide otherwise under (g) below, any excess shall be held in the Special Disbursement Account. The assets held in the Special Disbursement Account shall be held separately from the other accounts of the General Department, and may be used at any time:

(i) to make transfers to the General Resources Account for immediate use in operations and transactions authorized by provisions of this Agreement other than this Section;

(ii) for operations and transactions that are not authorized by other provisions of this Agreement but are consistent with the purposes of the Fund. Under this subsection (f)(ii) balance of payments assistance may be made available on special terms to developing members in difficult circumstances, and for this purpose the Fund shall take into account the level of per capita income;

(iii) for distribution to those developing members that were members on August 31, 1975, in proportion to their quotas on that date, of such part of the assets that the Fund decides to use for the purposes of (ii) above as corresponds to the proportion of the quotas of these members on the date of distribution to the total of the quotas of all members on the same date, provided that the distribution under this provision to a member that has been declared ineligible to use the general resources of the Fund under Section 5 of this Article shall be made when the ineligibility ceases, unless the Fund decides to make the distribution sooner. Decisions to use assets pursuant to (i) above shall be taken by a seventy percent majority of the total voting power, and decisions pursuant to (ii) and (iii) above shall be taken by an eighty-five percent majority of the total voting power.

(g) The Fund may decide, by an eighty-five percent majority of the total voting power, to transfer a part of the excess referred to in (f) above to the Investment Account for use pursuant to the provisions of Article XII, Section 6(f).

(h) Pending uses specified under (f) above, the Fund may invest a member's currency held in the Special Disbursement Account in marketable obligations of that member or in marketable obligations of international financial organizations. The income of investment and interest received under (f)(ii) above shall be placed in the Special Disbursement Account. No investment shall be made without the concurrence of the member whose currency is used to make the investment. The Fund shall invest only in obligations denominated in special drawing rights or in the currency used for investment.

(i) The General Resources Account shall be reimbursed from time to time in respect of the expenses of administration of the Special Disbursement Account paid from the General Resources Account by transfers from the Special Disbursement Account on the basis of a reasonable estimate of such expenses.

(j) The Special Disbursement Account shall be terminated in the event of the liquidation of the Fund and may be terminated prior to liquidation of the Fund by a seventy percent majority of the total voting power. Upon termination of the account because of the liquidation of the Fund, any assets in this account shall be distributed in accordance with the provisions of Schedule K. Upon termination prior to liquidation of the Fund, any assets in this account shall be transferred to the General Resources Account for immediate use in operations and transactions. The Fund, by a seventy percent majority of the total voting power, shall adopt rules and regulations for the administration of the Special Disbursement Account.

Article VI

Capital Transfers

#### Section 1. Use of the Fund's general resources for capital transfers

(a) A member may not use the Fund's general resources to meet a large or sustained outflow of capital except as provided in Section 2 of this Article, and the Fund may request a member to exercise controls to prevent such use of the general resources of the Fund. If, after receiving such a request, a member fails to exercise appropriate controls, the Fund may declare the member ineligible to use the general resources of the Fund.

(b) Nothing in this Section shall be deemed:

(i) to prevent the use of the general resources of the Fund for capital transactions of reasonable amount required for the expansion of exports or in the ordinary course of trade, banking, or other business; or

(ii) to affect capital movements which are met out of a member's own resources, but members undertake that such capital movements will be in accordance with the purposes of the Fund.

#### Section 2. Special provisions for capital transfers

A member shall be entitled to make reserve tranche purchases to meet capital transfers.

#### Section 3. Controls of capital transfers

Members may exercise such controls as are necessary to regulate international capital movements, but no member may exercise these controls in a manner which will restrict payments for current transactions or which will unduly delay transfers of funds in settlement of commitments, except as provided in Article VII, Section 3(b) and in Article XIV, Section 2.

#### Article VII

##### Replenishment and Scarce Currencies

#### Section 1. Measures to replenish the Fund's holdings of currencies

The Fund may, if it deems such action appropriate to replenish its holdings of any member's currency in the General Resources. Replenishment and Scarce Currencies Account needed in connection with its transactions, take either or both of the following steps:

(i) propose to the member that, on terms and conditions agreed between the Fund and the member, the latter lend its currency to the Fund or that, with the concurrence of the member, the Fund borrow such currency from some other source either within or outside the territories of the member, but no member shall be under any obligation to make such loans to the Fund or to concur in the borrowing of its currency by the Fund from any other source; (ii) require the member, if it is a participant, to sell its currency to the Fund for special drawing rights held in the General Resources Account, subject to Article XIX, Section 4. In replenishing with special drawing rights, the Fund shall pay due regard to the principles of designation under Article XIX, Section 5.

#### Section 2. General scarcity of currency

If the Fund finds that a general scarcity of a particular currency is

developing, the Fund may so inform members and may issue a report setting forth the causes of the scarcity and containing recommendations designed to bring it to an end. A representative of the member whose currency is involved shall participate in the preparation of the report.

#### Section 3. Scarcity of the Fund's holdings

(a) If it becomes evident to the Fund that the demand for a member's currency seriously threatens the Fund's ability to supply that currency, the Fund, whether or not it has issued a report under Section 2 of this Article, shall formally declare such currency scarce and shall thenceforth apportion its existing and accruing supply of the scarce currency with due regard to the relative needs of members, the general international economic situation, and any other pertinent considerations. The Fund shall also issue a report concerning its action.

(b) A formal declaration under (a) above shall operate as an authorization to any member, after consultation with the Fund, temporarily to impose limitations on the freedom of exchange operations in the scarce currency. Subject to the provisions of Article IV and Schedule C, the member shall have complete jurisdiction in determining the nature of such limitations, but they shall be no more restrictive than is necessary to limit the demand for the scarce currency to the supply held by, or accruing to, the member in question, and they shall be relaxed and removed as rapidly as conditions permit.

(c) The authorization under (b) above shall expire whenever the Fund formally declares the currency in question to be no longer scarce.

#### Section 4. Administration of restrictions

Any member imposing restrictions in respect of the currency of any other member pursuant to the provisions of Section 3(b) of this Article shall give sympathetic consideration to any representations by the other member regarding the administration of such restrictions.

#### Section 5. Effect of other international agreements on restrictions

Members agree not to invoke the obligations of any engagements entered into with other members prior to this Agreement in such manner as will prevent the operation of the provisions of this Article.

#### Article VIII

##### General Obligations of Members

#### Section 1. Introduction

In addition to the obligations assumed under other articles of this Agreement, each member undertakes the obligations set out in this Article.

#### Section 2. Avoidance of restrictions on current payments

(a) Subject to the provisions of Article VII, Section 3(b) and Article XIV, Section 2, no member shall, without the approval of the Fund, impose restrictions on the making of payments and transfers for current international transactions.

(b) Exchange contracts which involve the currency of any member and which

are contrary to the exchange control regulations of that member maintained or imposed consistently with this Agreement shall be unenforceable in the territories of any member. In addition, members may, by mutual accord, cooperate in measures for the purpose of making the exchange control regulations of either member more effective, provided that such measures and regulations are consistent with this Agreement.

#### Section 3. Avoidance of discriminatory currency practices

No member shall engage in, or permit any of its fiscal agencies referred to in Article V, Section 1 to engage in, any discriminatory currency arrangements or multiple currency practices, whether within or outside markets under Article IV or prescribed by or under Schedule C, except as authorized under this Agreement or approved by the Fund. If such arrangements and practices are engaged in at the date when this Agreement enters into force, the member concerned shall consult with the Fund as to their progressive removal unless they are maintained or imposed under Article XIV, Section 2, in which case the provisions of Section 3 of that Article shall apply.

#### Section 4. Convertibility of foreign-held balances

(a) Each member shall buy balances of its currency held by another member if the latter, in requesting the purchase, represents:

(i) that the balances to be bought have been recently acquired as a result of current transactions; or

(ii) that their conversion is needed for making payments for current transactions.

The buying member shall have the option to pay either in special drawing rights, subject to Article XIX, Section 4, or in the currency of the member making the request.

(b) The obligation in (a) above shall not apply when:

(i) the convertibility of the balances has been restricted consistently with Section 2 of this Article or Article VI, Section 3;

(ii) the balances have accumulated as a result of transactions effected before the removal by a member of restrictions maintained or imposed under Article XIV, Section 2;

(iii) the balances have been acquired contrary to the exchange regulations of the member which is asked to buy them; the currency of the member requesting the purchase has been declared scarce under Article VII, Section 3(a); or

(iv) the currency of the member requesting the purchase has been declared scarce under Article VII, Section 3(a); or

(v) the member requested to make the purchase is for any reason not entitled to buy currencies of other members from the Fund for its own currency.

#### Section 5. Furnishing of information

(a) The Fund may require members to furnish it with such information as it

deems necessary for its activities, including, as the minimum necessary for the effective discharge of the Fund's duties, national data on the following matters:

(i) official holdings at home and abroad of (1) gold, (2) foreign exchange;

(ii) holdings at home and abroad by banking and financial agencies, other than official agencies, of (1) gold, (2) foreign exchange;

(iii) production of gold;

(iv) gold exports and imports according to countries of destination and origin;

(v) total exports and imports of merchandise, in terms of local currency values, according to countries of destination and origin;

(vi) international balance of payments, including (1) trade in goods and services, (2) gold transactions, (3) known capital transactions, and (4) other items;

(vii) international investment position, i.e., investments within the territories of the member owned abroad and investments abroad owned by persons in its territories so far as it is possible to furnish this information;

(viii) national income;

(ix) price indices, i.e., indices of commodity prices in wholesale and retail markets and of export and import prices;

(x) buying and selling rates for foreign currencies;

(xi) exchange controls, i.e., a comprehensive statement of exchange controls in effect at the time of assuming membership in the Fund and details of subsequent changes as they occur; and

(xii) where official clearing arrangements exist, details of amounts awaiting clearance in respect of commercial and financial transactions, and of the length of time during which such arrears have been outstanding.

(b) In requesting information the Fund shall take into consideration the varying ability of members to furnish the data requested. Members shall be under no obligation to furnish information in such detail that the affairs of individuals or corporations are disclosed. Members undertake, however, to furnish the desired information in as detailed and accurate a manner as is practicable and, so far as possible, to avoid mere estimates.

(c) The Fund may arrange to obtain further information by agreement with members. It shall act as a centre for the collection and exchange of information on monetary and financial problems, thus facilitating the preparation of studies designed to assist members in developing policies which further the purposes of the Fund.

Section 6. Consultation between members regarding existing international agreements

Where under this Agreement a member is authorized in the special or temporary circumstances specified in the Agreement to maintain or establish

restrictions on exchange transactions, and there are other engagements between members entered into prior to this Agreement which conflict with the application of such restrictions, the parties to such engagements shall consult with one another with a view to making such mutually acceptable adjustments as may be necessary. The provisions of this Article shall be without prejudice to the operation of Article VII, Section 5.

Section 7. Obligation to collaborate regarding policies on reserve assets

Each member undertakes to collaborate with the Fund and with other members in order to ensure that the policies of the member with respect to reserve assets shall be consistent with the objectives of promoting better international surveillance of international liquidity and making the special drawing right the principal reserve asset in the international monetary system.

#### Article IX.

Status, Immunities, and Privileges

##### Section 1. Purposes of Article

To enable the Fund to fulfill the functions with which it is entrusted, the status, immunities, and privileges set forth in this Article shall be accorded to the Fund in the territories of each member.

##### Section 2. Status of the Fund

The Fund shall possess full juridical personality, and in particular, the capacity:

- (i) to contract;
- (ii) to acquire and dispose of immovable and movable property; and
- (iii) to institute legal proceedings.

##### Section 3. Immunity from judicial process

The Fund, its property and its assets, wherever located and by whomsoever held, shall enjoy immunity from every form of judicial process except to the extent that it expressly waives its immunity for the purpose of any proceedings or by the terms of any contract.

##### Section 4. Immunity from other action

Property and assets of the Fund, wherever located and by whomsoever held, shall be immune from search, requisition, confiscation, expropriation, or any other form of seizure by executive or legislative action.

##### Section 5. Immunity of archives

The archives of the Fund shall be inviolable.

##### Section 6. Freedom of assets from restrictions

To the extent necessary to carry out the activities provided for in this Agreement, all property and assets of the Fund shall be free from restrictions, regulations, controls, and moratoria of any nature.

##### Section 7. Privilege for communications

The official communications of the Fund shall be accorded by members the same treatment as the official communications of other members.

##### Section 8. Immunities and privileges of officers and employees

All Governors, Executive Directors, Alternates, members of committees, representatives appointed under Article XII, Section 3(j), advisors of any of the foregoing persons, officers, and employees of the Fund:

(i) shall be immune from legal process with respect to acts performed by them in their official capacity except when the Fund waives this immunity;

(ii) not being local nationals, shall be granted the same immunities from immigration restrictions, alien registration requirements, and national service obligations and the same facilities as regards exchange restrictions as are accorded by members to the representatives, officials, and employees of comparable rank of other members; and

(iii) shall be granted the same treatment in respect of traveling facilities as is accorded by members to representatives, officials, and employees of comparable rank of other members.

##### Section 9. Immunities from taxation

(a) The Fund, its assets, property, income, and its operations and transactions authorized by this Agreement shall be immune from all taxation and from all customs duties. The Fund shall also be immune from liability for the collection or payment of any tax or duty.

(b) No tax shall be levied on or in respect of salaries and emoluments paid by the Fund to Executive Directors, Alternates, officers, or employees of the Fund who are not local citizens, local subjects, or other local nationals.

(c) No taxation of any kind shall be levied on any obligation or security issued by the Fund, including any dividend or interest thereon, by whomsoever held:

(i) which discriminates against such obligation or security solely because of its origin; or

(ii) if the sole jurisdictional basis for such taxation is the place or currency in which it is issued, made payable or paid, or the location of any office or place of business maintained by the Fund.

##### Section 10. Application of Article

Each member shall take such action as is necessary in its own territories for the purpose of making effective in terms of its own law the principles set forth in this Article and shall inform the Fund of the detailed action which it has taken.

#### Article X

Relations with Other International Organizations

The Fund shall cooperate within the terms of this Agreement with any general international organization and with public international organizations having specialized responsibilities in related fields. Any arrangements for such cooperation which would involve a modification of any provision of this Agreement may be effected only after amendment to this Agreement under Article XXVIII.

#### Article XI

##### Relations with Non-Member Countries

###### Section 1. Undertakings regarding relations with non-member countries

Each member undertakes:

(i) not to engage in, nor to permit any of its fiscal agencies referred to in Article V, Section 1 to engage in, any transactions with a non-member or with persons in a non-member's territories which would be contrary to the provisions of this Agreement or the purposes of the Fund;

(ii) not to cooperate with a non-member or with persons in a non-member's territories in practices which would be contrary to the provisions of this Agreement or the purposes of the Fund; and

(iii) to cooperate with the Fund with a view to the application in its territories of appropriate measures to prevent transactions with non-members or with persons in their territories which would be contrary to the provisions of this Agreement or the purposes of the Fund.

###### Section 2. Restrictions on transactions with non-member countries

Nothing in this Agreement shall affect the right of any member to impose restrictions on exchange transactions with non-members or with persons in their territories unless the Fund finds that such restrictions prejudice the interests of members and are contrary to the purposes of the Fund.

#### Article XII

##### Organization and Management

###### Section 1. Structure of the Fund

The Fund shall have a Board of Governors, an Executive Board, a Managing Director, and a staff, and a Council if the Board of Governors decides, by an eighty-five percent majority of the total voting power, that the provisions of Schedule D shall be applied.

###### Section 2. Board of Governors

(a) All powers under this Agreement not conferred directly on the Board of Governors, the Executive Board, or the Managing Director shall be vested in the Board of Governors. The Board of Governors shall consist of one Governor and one Alternate appointed by each member in such manner as it may determine. Each Governor and each Alternate shall serve until a new appointment is made. No Alternate may vote except in the absence of his principal. The Board of Governors shall select one of the Governors as Chairman.

(b) The Board of Governors may delegate to the Executive Board authority to

exercise any powers of the Board of Governors, except the powers conferred directly by this Agreement on the Board of Governors.

(c) The Board of Governors shall hold such meetings as may be provided for by the Board of Governors or called by the Executive Board. Meetings of the Board of Governors shall be called whenever requested by fifteen members or by members having one-quarter of the total voting power.

(d) A quorum for any meeting of the Board of Governors shall be a majority of the Governors having not less than two-thirds of the total voting power.

(e) Each Governor shall be entitled to cast the number of votes allotted under Section 5 of this Article to the member appointing him.

(f) The Board of Governors may by regulation establish a procedure whereby the Executive Board, when it deems such action to be in the best interests of the Fund, may obtain a vote of the Governors on a specific question without calling a meeting of the Board of Governors.

(g) The Board of Governors, and the Executive Board to the extent authorized, may adopt such rules and regulations as may be necessary or appropriate to conduct the business of the Fund.

(h) Governors and Alternates shall serve as such without compensation from the Fund, but the Fund may pay them reasonable expenses incurred in attending meetings.

(i) The Board of Governors shall determine the remuneration to be paid to the Executive Directors and their Alternates and the salary and terms of the contract of service of the Managing Director.

(j) The Board of Governors and the Executive Board may appoint such committees as they deem advisable. Membership of committees need not be limited to Governors or Executive Directors or their Alternates.

###### Section 3. Executive Board

(a) The Executive Board shall be responsible for conducting the business of the Fund, and for this purpose shall exercise all the powers delegated to it by the Board of Governors.

(b) The Executive Board shall consist of Executive Directors with the Managing Director as chairman. Of the Executive Directors:

(i) five shall be appointed by the five members having the largest quotas; and

(ii) fifteen shall be elected by the other members.

For the purpose of each regular election of Executive Directors, the Board of Governors, by an eighty-five percent majority of the total voting power, may increase or decrease the number of Executive Directors in (ii) above. The number of Executive Directors in (ii) above shall be reduced by one or two, as the case may be, if Executive Directors are appointed under (c) below, unless the Board of Governors decides, by an eighty-five percent majority of the total voting power, that this reduction would hinder the effective discharge of the functions of the Executive Board or of Executive Directors or would threaten to upset a desirable balance in the Executive Board.

(c) If, at the second regular election of Executive Directors and there-

after, the members entitled to appoint Executive Directors under (b)(i) above do not include the two members, the holdings of whose currencies by the Fund in the General Resources Account have been, on the average over the preceding two years, reduced below their quotas by the largest absolute amounts in terms of the special drawing right, either one or both of such members, as the case may be, may appoint an Executive Director.

(d) Elections of elective Executive Directors shall be conducted at intervals of two years in accordance with the provisions of Schedule E, supplemented by such regulations as the Fund deems appropriate. For each regular election of Executive Directors, the Board of Governors may issue regulations making changes in the proportion of votes required to elect Executive Directors under the provisions of Schedule E.

(e) Each Executive Director shall appoint an Alternate with full power to act for him when he is not present. When the Executive Directors appointing them are present, Alternates may participate in meetings but may not vote.

(f) Executive Directors shall continue in office until their successors are appointed or elected. If the office of an elected Executive Director becomes vacant more than ninety days before the end of his term, another Executive Director shall be elected for the remainder of the term by the members that elected the former Executive Director. A majority of the votes cast shall be required for election. While the office remains vacant, the Alternate of the former Executive Director shall exercise his powers, except that of appointing an Alternate.

(g) The Executive Board shall function in continuous session at the principal office of the Fund and shall meet as often as the business of the Fund may require.

(h) A quorum for any meeting of the Executive Board shall be a majority of the Executive Directors having not less than one-half of the total voting power.

(i) (i) Each appointed Executive Director shall be entitled to cast the number of votes allotted under Section 5 of this Article to the member appointing him.

(ii) If the votes allotted to a member that appoints an Executive Director under (c) above were cast by an Executive Director together with the votes allotted to other members as a result of the last regular election of Executive Directors, the member may agree with each of the other members that the number of votes allotted to it shall be cast by the appointed Executive Director. A member making such an agreement shall not participate in the election of Executive Directors.

(iii) Each elected Executive Director shall be entitled to cast the number of votes which counted towards his election.

(iv) When the provisions of Section 5(b) of this Article are applicable, the votes which an Executive Director would otherwise be entitled to cast shall be increased or decreased correspondingly. All the votes which an Executive Director is entitled to cast shall be cast as a unit.

(v) When the suspension of the voting rights of a member is terminated under Article XXVI, Section 2(b), and the member is not entitled to appoint an Executive Director, the member may agree with all the members that have elected an Executive Director that the number of votes allotted to that

member shall be cast by such Executive Director, provided that, if no regular election of Executive Directors has been conducted during the period of the suspension, the Executive Director in whose election the member had participated prior to the suspension, or his successor elected in accordance with paragraph 3(c) (i) of Schedule I or with (f) above, shall be entitled to cast the number of votes allotted to the member. The member shall be deemed to have participated in the election of the Executive Director entitled to cast the number of votes allotted to the member.

(j) The Board of Governors shall adopt regulations under which a member not entitled to appoint an Executive Director under (b) above may send a representative to attend any meeting of the Executive Board when a request made by, or a matter particularly affecting, that member is under consideration.

#### Section 4. Managing Director and staff

(a) The Executive Board shall select a Managing Director who shall not be a Governor or an Executive Director. The Managing Director shall be chairman of the Executive Board, but shall have no vote except a deciding vote in case of an equal division. He may participate in meetings of the Board of Governors, but shall not vote at such meetings. The Managing Director shall cease to hold office when the Executive Board so decides.

(b) The Managing Director shall be chief of the operating staff of the Fund and shall conduct, under the direction of the Executive Board, the ordinary business of the Fund. Subject to the general control of the Executive Board, he shall be responsible for the organization, appointment, and dismissal of the staff of the Fund.

(c) The Managing Director and the staff of the Fund, in the discharge of their functions, shall owe their duty entirely to the Fund and to no other authority. Each member of the Fund shall respect the international character of this duty and shall refrain from all attempts to influence any of the staff in the discharge of these functions.

(d) In appointing the staff the Managing Director shall, subject to the paramount importance of securing the highest standards of efficiency and of technical competence, pay due regard to the importance of recruiting personnel on as wide a geographical basis as possible.

#### Section 5. Voting

(a) Each member shall have two hundred fifty votes plus one additional vote for each part of its quota equivalent to one hundred thousand special drawing rights.

(b) Whenever voting is required under Article V, Section 4 or 5, each member shall have the number of votes to which it is entitled under (a) above adjusted

(i) by the addition of one vote for the equivalent of each four hundred thousand special drawing rights of net sales of its currency from the general resources of the Fund up to the date when the vote is taken, or (ii) by the subtraction of one vote for the equivalent of each four hundred thousand special drawing rights of its net purchases under Article V, Section 3(b) and (f) up to the date when the vote is taken, provided that neither net purchases nor net sales shall be deemed at any time to exceed an amount equal to the quota of the member involved.

(c) Except as otherwise specifically provided, all decisions of the Fund

shall be made by a majority of the votes cast.

Section 6. Reserves, distribution of net income, and investment

(a) The Fund shall determine annually what part of its net income shall be placed to general reserve or special reserve, and what part, if any, shall be distributed.

(b) The Fund may use the special reserve for any purpose for which it may use the general reserve, except distribution.

(c) If any distribution is made of the net income of any year, it shall be made to all members in proportion to their quotas.

(d) The Fund, by a seventy percent majority of the total voting power, may decide at any time to distribute any part of the general reserve. Any such distribution shall be made to all members in proportion to their quotas.

(e) Payments under (c) and (d) above shall be made in special drawing rights, provided that either the Fund or the member may decide that the payment to the member shall be made in its own currency.

(f) (i) The Fund may establish an Investment Account for the purposes of this subsection ( f ). The assets of the Investment Account shall be held separately from the other accounts of the General Department.

(ii) The Fund may decide to transfer to the Investment Account a part of the proceeds of the sale of gold in accordance with Article V, Section 12(g) and, by a seventy percent majority of the total voting power, may decide to transfer to the Investment Account, for immediate investment, currencies held in the General Resources Account. The amount of these transfers shall not exceed the total amount of the general reserve and the special reserve at the time of the decision.

(iii) The Fund may invest a member's currency held in the Investment Account in marketable obligations of that member or in marketable obligations of international financial organizations. No investment shall be made without the concurrence of the member whose currency is used to make the investment. The Fund shall invest only in obligations denominated in special drawing rights or in the currency used for investment.

(iv) The income of investment may be invested in accordance with the provisions of this subsection ( f ). Income not invested shall be held in the Investment Account or may be used for meeting the expenses of conducting the business of the Fund.

(v) The Fund may use a member's currency held in the Investment Account to obtain the currencies needed to meet the expenses of conducting the business of the Fund.

(vi) The Investment Account shall be terminated in the event of liquidation of the Fund and may be terminated, or the amount of the investment may be reduced, prior to liquidation of the Fund by a seventy percent majority of the total voting power. The Fund, by a seventy percent majority of the total voting power, shall adopt rules and regulations regarding administration of the Investment Account, which shall be consistent with (vii), (viii), and (ix)

below.

(vii) Upon termination of the Investment Account because of liquidation of the Fund, any assets in this account shall be distributed in accordance with the provisions of Schedule K, provided that a portion of these assets corresponding to the proportion of the assets transferred to this account under Article V, Section 12(g) to the total of the assets transferred to this account shall be deemed to be assets held in the Special Disbursement Account and shall be distributed in accordance with Schedule K, paragraph 2(a)(ii).

(viii) Upon termination of the Investment Account prior to liquidation of the Fund, a portion of the assets held in this account corresponding to the proportion of the assets transferred to this account under Article V, Section 12(g) to the total of the assets transferred to the account shall be transferred to the Special Disbursement Account if it has not been terminated, and the balance of the assets held in the Investment Account shall be transferred to the General Resources Account for immediate use in operations and transactions.

(ix) On a reduction of the amount of the investment by the Fund, a portion of the reduction corresponding to the proportion of the assets transferred to the Investment Account under Article V, Section 12(g) to the total of the assets transferred to this account shall be transferred to the Special Disbursement Account if it has not been terminated, and the balance of the reduction shall be transferred to the General Resources Account for immediate use in operations and transactions.

Section 7. Publication of reports

(a) The Fund shall publish an annual report containing an audited statement of its accounts, and shall issue, at intervals of three months or less, a summary statement of its operations and transactions and its holdings of special drawing rights, gold, and currencies of members.

(b) The Fund may publish such other reports as it deems desirable for carrying out its purposes.

Section 8. Communication of views to members

The Fund shall at all times have the right to communicate its views informally to any member on any matter arising under this Agreement. The Fund may, by a seventy percent majority of the total voting power, decide to publish a report made to a member regarding its monetary or economic conditions and developments which directly tend to produce a serious disequilibrium in the international balance of payments of members. If the member is not entitled to appoint an Executive Director, it shall be entitled to representation in accordance with Section 3(j) of this Article. The Fund shall not publish a report involving changes in the fundamental structure of the economic organization of members.

Article XIII

Offices and Depositories

Section 1. Location of offices

The principal office of the Fund shall be located in the territory of the member having the largest quota, and agencies or branch offices may be established in the territories of other members.

## Section 2. Depositories

(a) Each member shall designate its central bank as a depository for all the Fund's holdings of its currency, or if it has no central bank it shall designate such other institution as may be acceptable to the Fund.

(b) The Fund may hold other assets, including gold, in the depositories designated by the five members having the largest quotas and in such other designated depositories as the Fund may select. Initially, at least one-half of the holdings of the Fund shall be held in the depository designated by the member in whose territories the Fund has its principal office and at least forty percent shall be held in the depositories designated by the remaining four members referred to above. However, all transfers of gold by the Fund shall be made with due regard to the costs of transport and anticipated requirements of the Fund. In an emergency the Executive Board may transfer all or any part of the Fund's gold holdings to any place where they can be adequately protected.

## Section 3. Guarantee of the Fund's assets

Each member guarantees all assets of the Fund against loss resulting from failure or default on the part of the depository designated by it.

## Article XIV Transitional Arrangements

### Section 1. Notification to the Fund

Each member shall notify the Fund whether it intends to avail itself of the transitional arrangements in Section 2 of this Article, or whether it is prepared to accept the obligations of Article VIII, Sections 2, 3, and 4. A member availing itself of the transitional arrangements shall notify the Fund as soon thereafter as it is prepared to accept these obligations.

### Section 2. Exchange restrictions

A member that has notified the Fund that it intends to avail itself of transitional arrangements under this provision may, notwithstanding the provisions of any other articles of this Agreement, maintain and adapt to changing circumstances the restrictions on payments and transfers for current international transactions that were in effect on the date on which it became a member. Members shall, however, have continuous regard in their foreign exchange policies to the purposes of the Fund, and, as soon as conditions permit, they shall take all possible measures to develop such commercial and financial arrangements with other members as will facilitate international payments and the promotion of a stable system of exchange rates. In particular, members shall withdraw restrictions maintained under this Section as soon as they are satisfied that they will be able, in the absence of such restrictions, to settle their balance of payments in a manner which will not unduly encumber their access to the general resources of the Fund.

### Section 3. Action of the Fund relating to restrictions

The Fund shall make annual reports on the restrictions in force under Section 2 of this Article. Any member retaining any restrictions inconsistent with Article VIII, Sections 2, 3, or 4 shall consult the Fund annually as to their further retention. The Fund may, if it deems such action neces-

sary in exceptional circumstances, make representations to any member that conditions are favorable for the withdrawal of any particular restriction, or for the general abandonment of restrictions, inconsistent with the provisions of any other articles of this Agreement. The member shall be given a suitable time to reply to such representations. If the Fund finds that the member persists in maintaining restrictions which are inconsistent with the purposes of the Fund, the member shall be subject to Article XXVI, Section 2(a).

## Article XV

### Special Drawing Rights

#### Section 1. Authority to allocate special drawing rights

To meet the need, as and when it arises, for a supplement to existing reserve assets, the Fund is authorized to allocate special drawing rights to members that are participants in the Special Drawing Rights Department.

#### Section 2. Valuation of the special drawing right

The method of valuation of the special drawing right shall be determined by the Fund by a seventy percent majority of the total voting power, provided, however, that an eighty-five percent majority of the total voting power shall be required for a change in the principle of valuation or a fundamental change in the application of the principle in effect.

## Article XVI

### General Department and Special Drawing Rights Department

#### Section 1. Separation of operations and transactions

All operations and transactions involving special drawing rights shall be conducted through the Special Drawing Rights Department. All other operations and transactions on the account of the Fund authorized by or under this Agreement shall be conducted through the General Department. Operations and transactions pursuant to Article XVII, Section 2 shall be conducted through the General Department as well as the Special Drawing Rights Department.

#### Section 2. Separation of assets and property

All assets and property of the Fund, except resources administered under Article V, Section 2(b), shall be held in the General Department, provided that assets and property acquired under Article XX, Section 2 and Articles XXIV and XXV and Schedules H and I shall be held in the Special Drawing Rights Department. Any assets or property held in one Department shall not be available to discharge or meet the liabilities, obligations, or losses of the Fund incurred in the conduct of the operations and transactions of the other Department, except that the expenses of conducting the business of the Special Drawing Rights Department shall be paid by the Fund from the General Department which shall be reimbursed in special drawing rights from time to time by assessments under Article XX, Section 4 made on the basis of a reasonable estimate of such expenses.

#### Section 3. Recording and information

All changes in holdings of special drawing rights shall take effect only when recorded by the Fund in the Special Drawing Rights Department.

Participants shall notify the Fund of the provisions of this Agreement under which special drawing rights are used. The Fund may require participants to furnish it with such other information as it deems necessary for its functions.

#### Article XVII

#### Participants and Other Holders of Special Drawing Rights

##### Section 1. Participants

Each member of the Fund that deposits with the Fund an instrument setting forth that it undertakes all the obligations of a participant in the Special Drawing Rights Department in accordance with its law and that it has taken all steps necessary to enable it to carry out all of these obligations shall become a participant in the Special Drawing Rights Department as of the date the instrument is deposited, except that no member shall become a participant before the provisions of this Agreement pertaining exclusively to the Special Drawing Rights Department have entered into force and instruments have been deposited under this Section by members that have at least seventy-five percent of the total of quotas.

##### Section 2. Fund as a holder

The Fund may hold special drawing rights in the General Resources Account and may accept and use them in operations and transactions conducted through the General Resources Account with participants in accordance with the provisions of this Agreement or with prescribed holders in accordance with the terms and conditions prescribed under Section 3 of this Article.

##### Section 3. Other holders

The Fund may prescribe:

(i) as holders, non-members, members that are non-participants, institutions that perform functions of a central bank for more than one member, and other official entities;

(ii) the terms and conditions on which prescribed holders may be permitted to hold special drawing rights and may accept and use them in operations and transactions with participants and other prescribed holders; and

(iii) the terms and conditions on which participants and the Fund through the General Resources Account may enter into operations and transactions in special drawing rights with prescribed holders. An eighty-five percent majority of the total voting power shall be required for prescriptions under (i) above. The terms and conditions prescribed by the Fund shall be consistent with the provisions of this Agreement and the effective functioning of the Special Drawing Rights Department.

#### Article XVIII

#### Allocation and Cancellation of Special Drawing Rights

Section 1. Principles and considerations governing allocation and cancellation

(a) In all its decisions with respect to the allocation and cancellation of special drawing rights the Fund shall seek to meet the long-term global

need, as and when it arises, to supplement existing reserve assets in such manner as will promote the attainment of its purposes and will avoid economic stagnation and deflation as well as excess demand and inflation in the world.

(b) The first decision to allocate special drawing rights shall take into account, as special considerations, a collective judgment that there is a global need to supplement reserves, and the attainment of a better balance of payments equilibrium, as well as the likelihood of a better working of the adjustment process in the future.

##### Section 2. Allocation and cancellation

(a) Decisions of the Fund to allocate or cancel special drawing rights shall be made for basic periods which shall run consecutively and shall be five years in duration. The first basic period shall begin on the date of the first decision to allocate special drawing rights or such later date as may be specified in that decision. Any allocations or cancellations shall take place at yearly intervals.

(b) The rates at which allocations are to be made shall be expressed as percentages of quotas on the date of each decision to allocate. The rates at which special drawing rights are to be cancelled shall be expressed as percentages of net cumulative allocations of special drawing rights on the date of each decision to cancel. The percentages shall be the same for all participants.

(c) In its decision for any basic period the Fund may provide, notwithstanding (a) and (b) above, that:

(i) the duration of the basic period shall be other than five years;

(ii) the allocations or cancellations shall take place at other than yearly intervals; or

(iii) the basis for allocations or cancellations shall be the quotas or net cumulative allocations on dates other than the dates of decisions to allocate or cancel.

(d) A member that becomes a participant after a basic period starts shall receive allocations beginning with the next basic period in which allocations are made after it becomes a participant unless the Fund decides that the new participant shall start to receive allocations beginning with the next allocation after it becomes a participant. If the Fund decides that a member that becomes a participant during a basic period shall receive allocations during the remainder of that basic period and the participant was not a member on the dates established under (b) or (c) above, the Fund shall determine the basis on which these allocations to the participant shall be made.

(e) A participant shall receive allocations of special drawing rights made pursuant to any decision to allocate unless:

(i) the Governor for the participant did not vote in favor of the decision; and

(ii) the participant has notified the Fund in writing prior to the first allocation of special drawing rights under that decision that it does

not wish special drawing rights to be allocated to it under the decision. On the request of a participant, the Fund may decide to terminate the effect of the notice with respect to allocations of special drawing rights subsequent to the termination.

(f) If on the effective date of any cancellation the amount of special drawing rights held by a participant is less than its share of the special drawing rights that are to be cancelled, the participant shall eliminate its negative balance as promptly as its gross reserve position permits and shall remain in consultation with the Fund for this purpose. Special drawing rights acquired by the participant after the effective date of the cancellation shall be applied against its negative balance and cancelled.

#### Section 3. Unexpected major developments

The Fund may change the rates or intervals of allocation or cancellation during the rest of a basic period or change the length of a basic period or start a new basic period, if at any time the Fund finds it desirable to do so because of unexpected major developments.

#### Section 4. Decisions on allocations and cancellations

(a) Decisions under Section 2(a), (b), and (c) or Section 3 of this Article shall be made by the Board of Governors on the basis of proposals of the Managing Director concurred in by the Executive Board.

(b) Before making any proposal, the Managing Director, after having satisfied himself that it will be consistent with the provisions of Section 1(a) of this Article, shall conduct such consultations as will enable him to ascertain that there is broad support among participants for the proposal. In addition, before making a proposal for the first allocation, the Managing Director shall satisfy himself that the provisions of Section 1(b) of this Article have been met and that there is broad support among participants to begin allocations; he shall make a proposal for the first allocation as soon after the establishment of the Special Drawing Rights Department as he is so satisfied.

(c) The Managing Director shall make proposals:

(i) not later than six months before the end of each basic period;

(ii) if no decision has been taken with respect to allocation or cancellation for a basic period, whenever he is satisfied that the provisions of (b) above have been met;

(iii) when, in accordance with Section 3 of this Article, he considers that it would be desirable to change the rate or intervals of allocation or cancellation or change the length of a basic period or start a new basic period; or

(iv) within six months of a request by the Board of Governors or the Executive Board; provided that, if under (i), (ii), or (iv) above the Managing Director ascertains that there is no proposal which he considers to be consistent with the provisions of Section 1 of this Article that has broad support among participants in accordance with (b) above, he shall report to the Board of Governors and to the Executive Board.

(d) An eighty-five percent majority of the total voting power shall be

required for decisions under Section 2(a), (b), and (c) or Section 3 of this Article except for decisions under Section 3 with respect to a decrease in the rates of allocation.

#### Article XIX

##### Operations and Transactions in Special Drawing Rights

###### Section 1. Use of special drawing rights

Special drawing rights may be used in the operations and transactions authorized by or under this Agreement.

###### Section 2. Operations and transactions between participants

(a) A participant shall be entitled to use its special drawing rights to obtain an equivalent amount of currency from a participant designated under Section 5 of this Article.

(b) A participant, in agreement with another participant, may use its special drawing rights to obtain an equivalent amount of currency from the other participant.

(c) The Fund, by a seventy percent majority of the total voting power, may prescribe operations in which a participant is authorized to engage in agreement with another participant on such terms and conditions as the Fund deems appropriate. The terms and conditions shall be consistent with the effective functioning of the Special Drawing Rights Department and the proper use of special drawing rights in accordance with this Agreement.

(d) The Fund may make representations to a participant that enters into any operation or transaction under (b) or (c) above that in the judgment of the Fund may be prejudicial to the process of designation according to the principles of Section 5 of this Article or is otherwise inconsistent with Article XXII. A participant that persists in entering into such operations or transactions shall be subject to Article XXIII, Section 2(b).

###### Section 3. Requirement of need

(a) In transactions under Section 2(a) of this Article, except as otherwise provided in (c) below, a participant will be expected to use its special drawing rights only if it has a need because of its balance of payments or its reserve position or developments in its reserves, and not for the sole purpose of changing the composition of its reserves.

(b) The use of special drawing rights shall not be subject to challenge on the basis of the expectation in (a) above, but the Fund may make representations to a participant that fails to fulfill this expectation. A participant that persists in failing to fulfill this expectation shall be subject to Article XXIII, Section 2(b).

(c) The Fund may waive the expectation in (a) above in any transactions in which a participant uses special drawing rights to obtain an equivalent amount of currency from a participant designated under Section 5 of this Article that would promote reconstitution by the other participant under Section 6(a) of this Article; prevent or reduce a negative balance of the other participant; or offset the effect of a failure by the other participant to fulfill the expectation in (a) above.

Section 4. Obligation to provide currency

(a) A participant designated by the Fund under Section 5 of this Article shall provide on demand a freely usable currency to a participant using special drawing rights under Section 2(a) of this Article. A participant's obligation to provide currency shall not extend beyond the point at which its holdings of special drawing rights in excess of its net cumulative allocation are equal to twice its net cumulative allocation or such higher limit as may be agreed between a participant and the Fund.

(b) A participant may provide currency in excess of the obligatory limit or any agreed higher limit.

Section 5. Designation of participants to provide currency

(a) The Fund shall ensure that a participant will be able to use its special drawing rights by designating participants to provide currency for specified amounts of special drawing rights for the purposes of Sections 2(a) and 4 of this Article. Designations shall be made in accordance with the following general principles supplemented by such other principles as the Fund may adopt from time to time:

(i) A participant shall be subject to designation if its balance of payments and gross reserve position is sufficiently strong, but this will not preclude the possibility that a participant with a strong reserve position will be designated even though it has a moderate balance of payments deficit. Participants shall be designated in such manner as will promote over time a balanced distribution of holdings of special drawing rights among them.

(ii) Participants shall be subject to designation in order to promote reconstitution under Section 6(a) of this Article, to reduce negative balances in holdings of special drawing rights, or to offset the effect of failures to fulfill the expectation in Section 3(a) of this Article.

(iii) In designating participants, the Fund normally shall give priority to those that need to acquire special drawing rights to meet the objectives of designation under (ii) above.

(b) In order to promote over time a balanced distribution of holdings of special drawing rights under (a)(i) above, the Fund shall apply the rules for designation in Schedule F or such rules as may be adopted under (c) below.

(c) The rules for designation may be reviewed at any time and new rules shall be adopted if necessary. Unless new rules are adopted, the rules in force at the time of the review shall continue to apply.

Section 6. Reconstitution

(a) Participants that use their special drawing rights shall reconstitute their holdings of them in accordance with the rules for reconstitution in Schedule G or such rules as may be adopted under (b) below.

(b) The rules for reconstitution may be reviewed at any time and new rules shall be adopted if necessary. Unless new rules are adopted or a decision is made to abrogate rules for reconstitution, the rules in force at the time of review shall continue to apply. A seventy percent majority of the total voting power shall be required for decisions to adopt, modify, or

abrogate the rules for reconstitution.

Section 7. Exchange rates

(a) Except as otherwise provided in (b) below, the exchange rates for transactions between participants under Section 2(a) and (b) of this Article shall be such that participants using special drawing rights shall receive the same value whatever currencies might be provided and whichever participants provide those currencies, and the Fund shall adopt regulations to give effect to this principle.

(b) The Fund, by an eighty-five percent majority of the total voting power, may adopt policies under which in exceptional circumstances the Fund, by a seventy percent majority of the total voting power, may authorize participants entering into transactions under Section 2(b) of this Article to agree on exchange rates other than those applicable under (a) above.

(c) The Fund shall consult a participant on the procedure for determining rates of exchange for its currency.

(d) For the purpose of this provision the term participant includes a terminating participant.

Article XX

Special Drawing Rights Department Interest and Charges

Section 1. Interest

Interest at the same rate for all holders shall be paid by the Fund to each holder on the amount of its holdings of special drawing rights. The Fund shall pay the amount due to each holder whether or not sufficient charges are received to meet the payment of interest.

Section 2. Charges

Charges at the same rate for all participants shall be paid to the Fund by each participant on the amount of its net cumulative allocation of special drawing rights plus any negative balance of the participant or unpaid charges.

Section 3. Rate of interest and charges

The Fund shall determine the rate of interest by a seventy percent majority of the total voting power. The rate of charges shall be equal to the rate of interest.

Section 4. Assessments

When it is decided under Article XVI, Section 2 that reimbursement shall be made, the Fund shall levy assessments for this purpose at the same rate for all participants on their net cumulative allocations.

Section 5. Payment of interest, charges, and assessments

Interest, charges, and assessments shall be paid in special drawing rights. A participant that needs special drawing rights to pay any charge or assessment shall be obligated and entitled to obtain them, for currency acceptable to the Fund, in a transaction with the Fund conducted through

the General Resources Account. If sufficient special drawing rights cannot be obtained in this way, the participant shall be obligated and entitled to obtain them with a freely usable currency from a participant which the Fund shall specify. Special drawing rights acquired by a participant after the date for payment shall be applied against its unpaid charges and cancelled.

#### Article XXI

Administration of the General Department and the Special Drawing Rights Department

(a) The General Department and the Special Drawing Rights Department shall be administered in accordance with the provisions of Article XII, subject to the following provisions:

(i) For meetings of or decisions by the Board of Governors on matters pertaining exclusively to the Special Drawing Rights Department only requests by, or the presence and the votes of, Governors appointed by members that are participants shall be counted for the purpose of calling meetings and determining whether a quorum exists or whether a decision is made by the required majority.

(ii) For decisions by the Executive Board on matters pertaining exclusively to the Special Drawing Rights Department only Executive Directors appointed or elected by at least one member that is a participant shall be entitled to vote. Each of these Executive Directors shall be entitled to cast the number of votes allotted to the member which is a participant that appointed him or to the members that are participants whose votes counted towards his election. Only the presence of Executive Directors appointed or elected by members that are participants and the votes allotted to members that are participants shall be counted for the purpose of determining whether a quorum exists or whether a decision is made by the required majority. For the purposes of this provision, an agreement under Article XII, Section 3(i)(ii) by a member that is a participant shall entitle an appointed Executive Director to vote and cast the number of votes allotted to the member.

(iii) Questions of the general administration of the Fund, including reimbursement under Article XVI, Section 2, and any question whether a matter pertains to both Departments or exclusively to the Special Drawing Rights Department shall be decided as if they pertained exclusively to the General Department. Decisions with respect to the method of valuation of the special drawing right, the acceptance and holding of special drawing rights in the General Resources Account of the General Department and the use of them, and other decisions affecting the operations and transactions conducted through both the General Resources Account of the General Department and the Special Drawing Rights Department shall be made by the majorities required for decisions on matters pertaining exclusively to each Department. A decision on a matter pertaining to the Special Drawing Rights Department shall so indicate.

(b) In addition to the privileges and immunities that are accorded under Article IX of this Agreement, no tax of any kind shall be levied on special drawing rights or on operations or transactions in special drawing rights.

(c) A question of interpretation of the provisions of this Agreement on matters pertaining exclusively to the Special Drawing Rights Department shall be submitted to the Executive Board pursuant to Article XXIX(a) only on the request of a participant. In any case where the Executive Board has

given a decision on a question of interpretation pertaining exclusively to the Special Drawing Rights Department only a participant may require that the question be referred to the Board of Governors under Article XXIX(b). The Board of Governors shall decide whether a Governor appointed by a member that is not a participant shall be entitled to vote in the Committee on Interpretation on questions pertaining exclusively to the Special Drawing Rights Department.

(d) Whenever a disagreement arises between the Fund and a participant that has terminated its participation in the Special Drawing Rights Department or between the Fund and any participant during the liquidation of the Special Drawing Rights Department with respect to any matter arising exclusively from participation in the Special Drawing Rights Department, the disagreement shall be submitted to arbitration in accordance with the procedures in Article XXIX(c).

#### Article XXII

General Obligations of Participants

In addition to the obligations assumed with respect to special drawing rights under other articles of this Agreement, each participant undertakes to collaborate with the Fund and with other participants in order to facilitate the effective functioning of the Special Drawing Rights Department and the proper use of special drawing rights in accordance with this Agreement and with the objective of making the special drawing right the principal reserve asset in the international monetary system.

#### Article XXIII

Suspension of Operations and Transactions in Special Drawing Rights

##### Section 1. Emergency provisions

In the event of an emergency or the development of unforeseen circumstances threatening the activities of the Fund with respect to the Special Drawing Rights Department, the Executive Board, by an eighty-five percent majority of the total voting power, may suspend for a period of not more than one year the operation of any of the provisions relating to operations and transactions in special drawing rights, and the provisions of Article XXVII, Section 1(b), (c), and (d) shall then apply.

##### Section 2. Failure to fulfill obligations

(a) If the Fund finds that a participant has failed to fulfill its obligations under Article XIX, Section 4, the right of the participant to use its special drawing rights shall be suspended unless the Fund otherwise decides.

(b) If the Fund finds that a participant has failed to fulfill any other obligation with respect to special drawing rights, the Fund may suspend the right of the participant to use special drawing rights it acquires after the suspension.

(c) Regulations shall be adopted to ensure that before action is taken against any participant under (a) or (b) above, the participant shall be informed immediately of the complaint against it and given an adequate opportunity for stating its case, both orally and in writing. Whenever the participant is thus informed of a complaint relating to (a) above, it shall not use special drawing rights pending the disposition of the complaint.

(d) Suspension under (a) or (b) above or limitation under (c) above shall not affect a participant's obligation to provide currency in accordance with Article XIX, Section 4.

(e) The Fund may at any time terminate a suspension under (a) or (b) above, provided that a suspension imposed on a participant under (b) above for failure to fulfill the obligations under Article XIX, Section 6(a) shall not be terminated until one hundred eighty days after the end of the first calendar quarter during which the participant complies with the rules for reconstitution.

(f) The right of a participant to use its special drawing rights shall not be suspended because it has become ineligible to use the Fund's general resources under Article V, Section 5, Article VI, Section 1, or Article XXVI, Section 2(a). Article XXVI, Section 2 shall not apply because a participant has failed to fulfill any obligations with respect to special drawing rights.

#### Article XXIV

#### Termination of Participation

#### Section 1. Right to terminate participation

(a) Any participant may terminate its participation in the Special Drawing Rights Department at any time by transmitting a notice in writing to the Fund at its principal office. Termination shall become effective on the date the notice is received.

(b) A participant that withdraws from membership in the Fund shall be deemed to have simultaneously terminated its participation in the Special Drawing Rights Department.

#### Section 2. Settlement on termination

(a) When a participant terminates its participation in the Special Drawing Rights Department, all operations and transactions by the terminating participant in special drawing rights shall cease except as otherwise permitted under an agreement made pursuant to (c) below in order to facilitate a settlement or as provided in Sections 3, 5, and 6 of this Article or in Schedule H. Interest and charges that accrued to the date of termination and assessments levied before that date but not paid shall be paid in special drawing rights.

(b) The Fund shall be obligated to redeem all special drawing rights held by the terminating participant, and the terminating participant shall be obligated to pay to the Fund an amount equal to its net cumulative allocation and any other amounts that may be due and payable because of its participation in the Special Drawing Rights Department. These obligations shall be set off against each other and the amount of special drawing rights held by the terminating participant that is used in the setoff to extinguish its obligation to the fund shall be cancelled.

(c) A settlement shall be made with reasonable despatch by agreement between the terminating participant and the Fund with respect to any obligation of the terminating participant or the Fund after the setoff in (b) above. If agreement on a settlement is not reached promptly the provisions of Schedule H shall apply.

#### Section 3. Interest and charges

After the date of termination the Fund shall pay interest on any outstanding balance of special drawing rights held by a terminating participant and the terminating participant shall pay charges on any outstanding obligation owed to the Fund at the times and rates prescribed under Article XX. Payment shall be made in special drawing rights. A terminating participant shall be entitled to obtain special drawing rights with a freely usable currency to pay charges or assessments in a transaction with a participant specified by the Fund or by agreement from any other holder, or to dispose of special drawing rights received as interest in a transaction with any participant designated under Article XIX, Section 5 or by agreement with any other holder.

#### Section 4. Settlement of obligation to the Fund

Currency received by the Fund from a terminating participant shall be used by the Fund to redeem special drawing rights held by participants in proportion to the amount by which each participant's holdings of special drawing rights exceed its net cumulative allocation at the time the currency is received by the Fund. Special drawing rights so redeemed and special drawing rights obtained by a terminating participant under the provisions of this Agreement to meet any installment due under an agreement on settlement or under Schedule H and set off against that installment shall be cancelled.

#### Section 5. Settlement of obligation to a terminating participant

Whenever the Fund is required to redeem special drawing rights held by a terminating participant, redemption shall be made with currency provided by participants specified by the Fund. These participants shall be specified in accordance with the principles in Article XIX, Section 5. Each specified participant shall provide at its option the currency of the terminating participant or a freely usable currency to the Fund and shall receive an equivalent amount of special drawing rights. However, a terminating participant may use its special drawing rights to obtain its own currency, a freely usable currency, or any other asset from any holder, if the Fund so permits.

#### Section 6. General Resources Account transactions

In order to facilitate settlement with a terminating participant, the Fund may decide that a terminating participant shall:

(i) use any special drawing rights held by it after the setoff in Section 2(b) of this Article, when they are to be redeemed, in a transaction with the Fund conducted through the General Resources Account to obtain its own currency or a freely usable currency at the option of the Fund; or

(ii) obtain special drawing rights in a transaction with the Fund conducted through the General Resources Account for a currency acceptable to the Fund to meet any charges or installment due under an agreement or the provisions of Schedule H.

Article XXV  
Liquidation of the Special Drawing Rights Department

(a) The Special Drawing Rights Department may not be liquidated except by decision of the Board of Governors. In an emergency, if the Executive Board decides that liquidation of the Special Drawing Rights Department may be necessary, it may temporarily suspend allocations or cancellations and all operations and transactions in special drawing rights pending decision by the Board of Governors. A decision by the Board of Governors to liquidate the Fund shall be a decision to liquidate both the General Department and the Special Drawing Rights Department.

(b) If the Board of Governors decides to liquidate the Special Drawing Rights Department, all allocations or cancellations and all operations and transactions in special drawing rights and the activities of the Fund with respect to the Special Drawing Rights Department shall cease except those incidental to the orderly discharge of the obligations of participants and of the Fund with respect to special drawing rights, and all obligations of the Fund and of participants under this Agreement with respect to special drawing rights shall cease except those set out in this Article, Article XX, Article XXI(d), Article XXIV, Article XXIX(c), and Schedule H, or any agreement reached under Article XXIV subject to paragraph 4 of Schedule H, and Schedule I.

(c) Upon liquidation of the Special Drawing Rights Department, interest and charges that accrued to the date of liquidation and assessments levied before that date but not paid shall be paid in special drawing rights. The Fund shall be obligated to redeem all special drawing rights held by holders, and each participant shall be obligated to pay the Fund an amount equal to its net cumulative allocation of special drawing rights and such other amounts as may be due and payable because of its participation in the Special Drawing Rights Department.

(d) Liquidation of the Special Drawing Rights Department shall be administered in accordance with the provisions of Schedule I.

#### Article XXVI

##### Withdrawal from Membership

###### Section 1. Right of members to withdraw

Any member may withdraw from the Fund at any time by transmitting a notice in writing to the Fund at its principal office. Withdrawal shall become effective on the date such notice is received.

###### Section 2. Compulsory withdrawal

(a) If a member fails to fulfill any of its obligations under this Agreement, the Fund may declare the member ineligible to use the general resources of the Fund. Nothing in this Section shall be deemed to limit the provisions of Article V, Section 5 or Article VI, Section 1.

(b) If, after the expiration of a reasonable period following a declaration of ineligibility under (a) above, the member persists in its failure to fulfill any of its obligations under this Agreement, the Fund may, by a seventy percent majority of the total voting power, suspend the voting rights of the member. During the period of the suspension, the provisions of Schedule I shall apply. The Fund may, by a seventy percent majority of the total voting power, terminate the suspension at any time.

(c) If, after the expiration of a reasonable period following a decision of

suspension under (b) above, the member persists in its failure to fulfill any of its obligations under this Agreement, that member may be required to withdraw from membership in the Fund by a decision of the Board of Governors carried by a majority of the Governors having eighty-five percent of the total voting power.

(d) Regulations shall be adopted to ensure that before action is taken against any member under (a), (b), or (c) above, the member shall be informed in reasonable time of the complaint against it and given an adequate opportunity for stating its case, both orally and in writing.

###### Section 3. Settlement of accounts with members withdrawing

When a member withdraws from the Fund, normal operations and transactions of the Fund in its currency shall cease and settlement of all accounts between it and the Fund shall be made with reasonable despatch by agreement between it and the Fund. If agreement is not reached promptly, the provisions of Schedule J shall apply to the settlement of accounts.

#### Article XXVII

##### Emergency Provisions

###### Section 1. Temporary suspension

(a) In the event of an emergency or the development of unforeseen circumstances threatening the activities of the Fund, the Executive Board, by an eighty-five percent majority of the total voting power, may suspend for a period of not more than one year the operation of any of the following provisions:

- (i) Article V, Sections 2, 3, 7, 8(a)(i) and (e);
- (ii) Article VI, Section 2;
- (iii) Article XI, Section 1;
- (iv) Schedule C, paragraph 5.

(b) A suspension of the operation of a provision under (a) above may not be extended beyond one year except by the Board of Governors which, by an eighty-five percent majority of the total voting power, may extend a suspension for an additional period of not more than two years if it finds that the emergency or unforeseen circumstances referred to in (a) above continue to exist.

(c) The Executive Board may, by a majority of the total voting power, terminate such suspension at any time.

(d) The Fund may adopt rules with respect to the subject matter of a provision during the period in which its operation is suspended.

###### Section 2.

##### Liquidation of the Fund

(a) The Fund may not be liquidated except by decision of the Board of Governors. In an emergency, if the Executive Board decides that liquidation of the Fund may be necessary, it may temporarily suspend all operations and

transactions, pending decision by the Board of Governors.

(b) If the Board of Governors decides to liquidate the Fund, the Fund shall forthwith cease to engage in any activities except those incidental to the orderly collection and liquidation of its assets and the settlement of its liabilities, and all obligations of members under this Agreement shall cease except those set out in this Article, in Article XXIX(c), in Schedule J, paragraph 7, and in Schedule K.

(c) Liquidation shall be administered in accordance with the provisions of Schedule K.

#### Article XXVIII

##### Amendments

(a) Any proposal to introduce modifications in this Agreement, whether emanating from a member, a Governor, or the Executive Board, shall be communicated to the chairman of the Board of Governors who shall bring the proposal before the Board of Governors. If the proposed amendment is approved by the Board of Governors, the Fund shall, by circular letter or telegram, ask all members whether they accept the proposed amendment. When three-fifths of the members, having eighty-five percent of the total voting power, have accepted the proposed amendment, the Fund shall certify the fact by a formal communication addressed to all members.

(b) Notwithstanding (a) above, acceptance by all members is required in the case of any amendment modifying:

- (i) the right to withdraw from the Fund (Article XXVI, Section 1);
  - (ii) the provision that no change in a member's quota shall be made without its consent (Article III, Section 2(d)); and
  - (iii) the provision that no change may be made in the par value of a member's currency except on the proposal of that member (Schedule C, paragraph 6).
- (c) Amendments shall enter into force for all members three months after the date of the formal communication unless a shorter period is specified in the circular letter or telegram.

#### Article XXIX

##### Interpretation

(a) Any question of interpretation of the provisions of this Agreement arising between any member and the Fund or between any members of the Fund shall be submitted to the Executive Board for its decision. If the question particularly affects any member not entitled to appoint an Executive Director, it shall be entitled to representation in accordance with Article XII, Section 3(j).

(b) In any case where the Executive Board has given a decision under (a) above, any member may require, within three months from the date of the decision, that the question be referred to the Board of Governors, whose decision shall be final. Any question referred to the Board of Governors shall be considered by a Committee on Interpretation of the Board of

Governors. Each Committee member shall have one vote. The Board of Governors shall establish the membership, procedures, and voting majorities of the Committee. A decision of the Committee shall be the decision of the Board of Governors unless the Board of Governors, by an eighty-five percent majority of the total voting power, decides otherwise. Pending the result of the reference to the Board of Governors the Fund may, so far as it deems necessary, act on the basis of the decision of the Executive Board.

(c) Whenever a disagreement arises between the Fund and a member which has withdrawn, or between the Fund and any member during liquidation of the Fund, such disagreement shall be submitted to arbitration by a tribunal of three arbitrators, one appointed by the Fund, another by the member or withdrawing member, and an umpire who, unless the parties otherwise agree, shall be appointed by the President of the International Court of Justice or such other authority as may have been prescribed by regulation adopted by the Fund. The umpire shall have full power to settle all questions of procedure in any case where the parties are in disagreement with respect thereto.

#### Article XXX

##### Explanation of Terms

In interpreting the provisions of this Agreement the Fund and its members shall be guided by the following provisions:

- (a) The Fund's holdings of a member's currency in the General Resources Account shall include any securities accepted by the Fund under Article III, Section 4.
- (b) Stand-by arrangement means a decision of the Fund by which a member is assured that it will be able to make purchases from the General Resources Account in accordance with the terms of the decision during a specified period and up to a specified amount.
- (c) Reserve tranche purchase means a purchase by a member of special drawing rights or the currency of another member in exchange for its own currency which does not cause the Fund's holdings of the member's currency in the General Resources Account to exceed its quota, provided that for the purposes of this definition the Fund may exclude purchases and holdings under:

- (i) policies on the use of its general resources for compensatory financing of export fluctuations;

- (ii) policies on the use of its general resources in connection with the financing of contributions to international buffer stocks of primary products; and

- (iii) other policies on the use of its general resources in respect of which the Fund decides, by an eighty-five percent majority of the total voting power, that an exclusion shall be made.

(d) Payments for current transactions means payments which are not for the purpose of transferring capital, and includes, without limitation:

- (1) all payments due in connection with foreign trade, other current business, including services, and normal short-term banking and credit facilities;

- (2) payments due as interest on loans and as net income from other investments;
- (3) payments of moderate amount for amortization of loans or for depreciation of direct investments; and
- (4) moderate remittances for family living expenses.

The Fund may, after consultation with the members concerned, determine whether certain specific transactions are to be considered current transactions or capital transactions.

(e) Net cumulative allocation of special drawing rights means the total amount of special drawing rights allocated to a participant less its share of special drawing rights that have been cancelled under Article XVIII, Section 2(a).

(f) A freely usable currency means a member's currency that the Fund determines (i) is, in fact, widely used to make payments for international transactions, and (ii) is widely traded in the principal exchange markets.

(g) Members that were members on August 31, 1975 shall be deemed to include a member that accepted membership after that date pursuant to a resolution of the Board of Governors adopted before that date.

(h) Transactions of the Fund means exchanges of monetary assets by the Fund for other monetary assets. Operations of the Fund means other uses or receipts of monetary assets by the Fund.

(i) Transactions in special drawing rights means exchanges of special drawing rights for other monetary assets. Operations in special drawing rights means other uses of special drawing rights.

#### Article XXXI

#### Final Provisions

##### Section 1. Entry into force

This Agreement shall enter into force when it has been signed on behalf of governments having sixty-five percent of the total of the quotas set forth in Schedule A and when the instruments referred to in Section 2(a) of this Article have been deposited on their behalf, but in no event shall this Agreement enter into force before May 1, 1945.

##### Section 2. Signature

(a) Each government on whose behalf this Agreement is signed shall deposit with the Government of the United States of America an instrument setting forth that it has accepted this Agreement in accordance with its law and has taken all steps necessary to enable it to carry out all of its obligations under this Agreement.

(b) Each country shall become a member of the Fund as from the date of the deposit on its behalf of the instrument referred to in (a) above, except that no country shall become a member before this Agreement enters into force under Section 1 of this Article.

(c) The Government of the United States of America shall inform the governments of all countries whose names are set forth in Schedule A, and the

governments of all countries whose membership is approved in accordance with Article II, Section 2, of all signatures of this Agreement and of the deposit of all instruments referred to in (a) above.

(d) At the time this Agreement is signed on its behalf, each government shall transmit to the Government of the United States of America one one-hundredth of one percent of its total subscription in gold or United States dollars for the purpose of meeting administrative expenses of the Fund. The Government of the United States of America shall hold such funds in a special deposit account and shall transmit them to the Board of Governors of the Fund when the initial meeting has been called. If this Agreement has not come into force by December 31, 1945, the Government of the United States of America shall return such funds to the governments that transmitted them.

(e) This Agreement shall remain open for signature at Washington on behalf of the governments of the countries whose names are set forth in Schedule A until December 31, 1945.

(f) After December 31, 1945, this Agreement shall be open for signature on behalf of the government of any country whose membership has been approved in accordance with Article II, Section 2.

(g) By their signature of this Agreement, all governments accept it both on their own behalf and in respect of all their colonies, overseas territories, all territories under their protection, suzerainty, or authority, and all territories in respect of which they exercise a mandate.

(h) Subsection (d) above shall come into force with regard to each signatory government as from the date of its signature.

[The signature and depositary clause reproduced below followed the text of Article XX in the original Articles of Agreement]

Done at Washington, in a single copy which shall remain deposited in the archives of the Government of the United States of America, which shall transmit certified copies to all governments whose names are set forth in Schedule A and to all governments whose membership is approved in accordance with Article II, Section 2.

#### Schedule A

Quotas  
(In millions of United States dollars)

Australia	200
Belgium	225
Bolivia	10
Brazil	150
Canada	300
Chile	50
China	550
Colombia	50
Costa Rica	5
Cuba	50
Czechoslovakia	125
Denmark*	*
Dominican Republic	5
Ecuador	5
Egypt	45
El Salvador	2.5

Ethiopia 6  
 France 450  
 Greece 40  
 Guatemala 5  
 Haiti 5  
 Honduras 2.5  
 Iceland 1  
 India 400  
 Iran 25  
 Iraq 8  
 Liberia .5  
 Luxembourg 10  
 Mexico 90  
 Netherlands 275  
 New Zealand 50  
 Nicaragua 2  
 Norway 50  
 Panama .5  
 Paraguay 2  
 Peru 25  
 Philippine Commonwealth 15  
 Poland 125  
 Union of South Africa 100  
 Union of Soviet Socialist Republics 1200  
 United Kingdom 1300  
 United States 2750  
 Uruguay 15  
 Venezuela 15  
 Yugoslavia 60

\*The quota of Denmark shall be determined by the Fund after the Danish Government has declared its readiness to sign this Agreement but before signature takes place.

Schedule B

Transitional Provisions with Respect to Repurchase, Payment of Additional Subscriptions, Gold, and Certain Operational Matters

1. Repurchase obligations that have accrued pursuant to Article V, section 7(b) before the date of the second amendment of this Agreement and that remain undischarged at that date shall be discharged not later than the date or dates at which the obligations had to be discharged in accordance with the provisions of this Agreement before the second amendment.

2. A member shall discharge with special drawing rights any obligation to pay gold to the Fund in repurchase or as a subscription that is outstanding at the date of the second amendment of this Agreement, but the Fund may prescribe that these payments may be made in whole or in part in the currencies of other members specified by the Fund. A non-participant shall discharge an obligation that must be paid in special drawing rights pursuant to this provision with the currencies of other members specified by the Fund.

3. For the purposes of 2 above 0.888 671 gram of fine gold shall be equivalent to one special drawing right, and the amount of currency payable under 2 above shall be determined on that basis and on the basis of the value of the currency in terms of the special drawing right at the date of discharge.

4. A member's currency held by the Fund in excess of seventy-five percent of the member's quota at the date of the second amendment of this Agreement and not subject to repurchase under 1 above shall be repurchased in accordance with the following rules:

(i) Holdings that resulted from a purchase shall be repurchased in accordance with the policy on the use of the Fund's general resources under which the purchase was made.

(ii) Other holdings shall be repurchased not later than four years after the date of the second amendment of this Agreement.

5. Repurchases under 1 above that are not subject to 2 above, repurchases under 4 above, and any specification of currencies under 2 above shall be in accordance with Article V, Section 7(i).

6. All rules and regulations, rates, procedures, and decisions in effect at the date of the second amendment of this Agreement shall remain in effect until they are changed in accordance with the provisions of this Agreement.

7. To the extent that arrangements equivalent in effect to (a) and (b) below have not been completed before the date of the second amendment of this Agreement, the Fund shall

(a) sell up to 25 million ounces of fine gold held by it on August 31, 1975 to those members that were members on that date and that agree to buy it, in proportion to their quotas on that date. The sale to a member under this sub-paragraph (a) shall be made in exchange for its currency and at a price equivalent at the time of sale to one special drawing right per 0.888 671 gram of fine gold, and

(b) sell up to 25 million ounces of fine gold held by it on August 31, 1975 for the benefit of developing members that were members on that date, provided, however, that the part of any profits or surplus value of the gold that corresponds to the proportion of such a member's quota on August 31, 1975 to the total of the quotas of all members on that date shall be transferred directly to each such member. The requirements under Article V, Section 12(c) that the Fund consult a member, obtain a member's concurrence, or exchange a member's currency for the currencies of other members in certain circumstances shall apply with respect to currency received by the Fund as a result of sales of gold under this provision, other than sales to a member in return for its own currency, and placed in the General Resources Account.

Upon the sale of gold under this paragraph 7, an amount of the proceeds in the currencies received equivalent at the time of sale to one special drawing right per 0.888 671 gram of fine gold shall be placed in the General Resources Account and other assets held by the Fund under arrangements pursuant to (b) above shall be held separately from the general resources of the Fund. Assets that remain subject to disposition by the Fund upon termination of arrangements pursuant to (b) above shall be transferred to the Special Disbursement Account.

Schedule C

Par Values

1. The Fund shall notify members that par values may be established for the purposes of this Agreement, in accordance with Article IV, Sections 1, 3, 4, and 5 and this Schedule, in terms of the special drawing right, or in terms of such other common denominator as is prescribed by the Fund. The common denominator shall not be gold or a currency.

2. A member that intends to establish a par value for its currency shall propose a par value to the Fund within a reasonable time after notice is given under 1 above.

3. Any member that does not intend to establish a par value for its currency under 1 above shall consult with the Fund and ensure that its exchange arrangements are consistent with the purposes of the Fund and are adequate to fulfill its obligations under Article IV, Section 1.

4. The Fund shall concur in or object to a proposed par value within a reasonable period after receipt of the proposal. A proposed par value shall not take effect for the purposes of this Agreement if the Fund objects to it, and the member shall be subject to 3 above. The Fund shall not object because of the domestic social or political policies of the member proposing the par value.

5. Each member that has a par value for its currency undertakes to apply appropriate measures consistent with this Agreement in order to ensure that the maximum and the minimum rates for spot exchange transactions taking place within its territories between its currency and the currencies of other members maintaining par values shall not differ from parity by more than four and one-half percent or by such other margin or margins as the Fund may adopt by an eighty-five percent majority of the total voting power.

6. A member shall not propose a change in the par value of its currency except to correct, or prevent the emergence of, a fundamental disequilibrium. A change may be made only on the proposal of the member and only after consultation with the Fund.

7. When a change is proposed, the Fund shall concur in or object to the proposed par value within a reasonable period after receipt of the proposal. The Fund shall concur if it is satisfied that the change is necessary to correct, or prevent the emergence of, a fundamental disequilibrium. The Fund shall not object because of the domestic social or political policies of the member proposing the change. A proposed change in par value shall not take effect for the purposes of this Agreement if the Fund objects to it. If a member changes the par value of its currency despite the objection of the Fund, the member shall be subject to Article XXVI, Section 2. Maintenance of an unrealistic par value by a member shall be discouraged by the Fund.

8. The par value of a member's currency established under this Agreement shall cease to exist for the purposes of this Agreement if the member informs the Fund that it intends to terminate the par value. The Fund may object to the termination of a par value by a decision taken by an eighty-five percent majority of the total voting power. If a member terminates a par value for its currency despite the objection of the Fund, the member shall be subject to Article XXVI, Section 2. A par value established under this Agreement shall cease to exist for the purposes of this Agreement if the member terminates the par value despite the objection of the Fund, or if the Fund finds that the member does not maintain rates for a substantial volume of exchange transactions in accordance with 5 above, provided that

the Fund may not make such finding unless it has consulted the member and given it sixty days notice of the Fund's intention to consider whether to make a finding.

9. If the par value of the currency of a member has ceased to exist under 8 above, the member shall consult with the Fund and ensure that its exchange arrangements are consistent with the purposes of the Fund and are adequate to fulfill its obligations under Article IV, Section 1.

10. A member for whose currency the par value has ceased to exist under 8 above may, at any time, propose a new par value for its currency.

11. Notwithstanding 6 above, the Fund, by a seventy percent majority of the total voting power, may make uniform proportionate changes in all par values if the special drawing right is the common denominator and the changes will not affect the value of the special drawing right. The par value of a member's currency shall, however, not be changed under this provision if, within seven days after the Fund's action, the member informs the Fund that it does not wish the par value of its currency to be changed by such action.

#### Schedule D

##### Council

1. (a) Each member that appoints an Executive Director and each group of members that has the number of votes allotted to them cast by an elected Executive Director shall appoint to the Council one Councillor, who shall be a Governor, Minister in the government of a member, or person of comparable rank, and may appoint not more than seven Associates. The Board of Governors may change, by an eighty-five percent majority of the total voting power, the number of Associates who may be appointed. A Councillor or Associate shall serve until a new appointment is made or until the next regular election of Executive Directors, whichever shall occur sooner.

(b) Executive Directors, or in their absence their Alternates, and Associates shall be entitled to attend meetings of the Council, unless the Council decides to hold a restricted session. Each member and each group of members that appoints a Councillor shall appoint an Alternate who shall be entitled to attend a meeting of the Council when the Councillor is not present, and shall have full power to act for the Councillor.

2. (a) The Council shall supervise the management and adaptation of the international monetary system, including the continuing operation of the adjustment process and developments in global liquidity, and in this connection shall review developments in the transfer of real resources to developing countries.

(b) The Council shall consider proposals pursuant to Article XXVIII(a) to amend the Articles of Agreement.

3. (a) The Board of Governors may delegate to the Council authority to exercise any powers of the Board of Governors except the powers conferred directly by this Agreement on the Board of Governors.

(b) Each Councillor shall be entitled to cast the number of votes allotted under Article XII, Section 5 to the member or group of members appointing him. A Councillor appointed by a group of members may cast separately the votes allotted to each member in the group. If the number of votes allotted

to a member cannot be cast by an Executive Director, the member may make arrangements with a Councillor for casting the number of votes allotted to the member.

(c) The Council shall not take any action pursuant to powers delegated by the Board of Governors that is inconsistent with any action taken by the Board of Governors and the Executive Board shall not take any action pursuant to powers delegated by the Board of Governors that is inconsistent with any action taken by either the Board of Governors or the Council.

4. The Council shall select a Councillor as chairman, shall adopt regulations as may be necessary or appropriate to perform its functions, and shall determine any aspect of its procedure. The Council shall hold such meetings as may be provided for by the Council or called by the Executive Board.

5. (a) The Council shall have powers corresponding to those of the Executive Board under the following provisions: Article XII, Section 2(c), ( f ), (g), and (j); Article XVIII, Section 4(a) and Section 4(c)(iv); Article XXIII, Section 1; and Article XXVII, Section 1(a).

(b) For decisions by the Council on matters pertaining exclusively to the Special Drawing Rights Department only Councillors appointed by a member that is a participant or a group of members at least one member of which is a participant shall be entitled to vote. Each of these Councillors shall be entitled to cast the number of votes allotted to the member which is a participant that appointed him or to the members that are participants in the group of members that appointed him, and may cast the votes allotted to a participant with which arrangements have been made pursuant to the last sentence of 3(b) above.

(c) The Council may by regulation establish a procedure whereby the Executive Board may obtain a vote of the Councillors on a specific question without a meeting of the Council when in the judgment of the Executive Board an action must be taken by the Council which should not be postponed until the next meeting of the Council and which does not warrant the calling of a special meeting.

(d) Article IX, Section 8 shall apply to Councillors, their Alternates, and Associates, and to any other person entitled to attend a meeting of the Council.

(e) For the purposes of (b) and 3(b) above, an agreement under Article XII, Section 3(i)(ii) by a member, or by a member that is a participant, shall entitle a Councillor to vote and cast the number of votes allotted to the member.

(f) When an Executive Director is entitled to cast the number of votes allotted to a member pursuant to Article XII, Section 3(i)(v), the Councillor appointed by the group whose members elected such Executive Director shall be entitled to vote and cast the number of votes allotted to such member. The member shall be deemed to have participated in the appointment of the Councillor entitled to vote and cast the number of votes allotted to the member.

6. The first sentence of Article XII, Section 2(a) shall be deemed to include a reference to the Council.

Schedule E

#### Election of Executive Directors

1. The election of the elective Executive Directors shall be by ballot of the Governors eligible to vote.

2. In balloting for the Executive Directors to be elected, each of the Governors eligible to vote shall cast for one person all of the votes to which he is entitled under Article XII, Section 5(a). The fifteen persons receiving the greatest number of votes shall be Executive Directors, provided that no person who received less than four percent of the total number of votes that can be cast (eligible votes) shall be considered elected.

3. When fifteen persons are not elected in the first ballot, a second ballot shall be held in which there shall vote only (a) those Governors who voted in the first ballot for a person not elected, and (b) those Governors whose votes for a person elected are deemed under 4 below to have raised the votes cast for that person above nine percent of the eligible votes. If in the second ballot there are more candidates than the number of Executive Directors to be elected, the person who received the lowest number of votes in the first ballot shall be ineligible for election.

4. In determining whether the votes cast by a Governor are to be deemed to have raised the total of any person above nine percent of the eligible votes the nine percent shall be deemed to include, first, the votes of the Governor casting the largest number of votes for such person, then the votes of the Governor casting the next largest number, and so on until nine percent is reached.

5. Any Governor part of whose votes must be counted in order to raise the total of any person above four percent shall be considered as casting all of his votes for such person even if the total votes for such person there- by exceed nine percent.

6. If, after the second ballot, fifteen persons have not been elected, further ballots shall be held on the same principles until fifteen persons have been elected, provided that after fourteen persons are elected, the fifteenth may be elected by a simple majority of the remaining votes and shall be deemed to have been elected by all such votes.

#### Schedule F

##### Designation

During the first basic period the rules for designation shall be as follows:

(a) Participants subject to designation under Article XIX, Section 5(a)(i) shall be designated for such amounts as will promote over time equality in the ratios of the participants' holdings of special drawing rights in excess of their net cumulative allocations to their official holdings of gold and foreign exchange.

(b) The formula to give effect to (a) above shall be such that participants subject to designation shall be designated:

(i) in proportion to their official holdings of gold and foreign exchange when the ratios described in (a) above are equal; and

(ii) in such manner as gradually to reduce the difference between the ratios described in (a) above that are low and the ratios that are high.

#### Schedule G

#### Reconstitution

1. During the first basic period the rules for reconstitution shall be as follows:

(a) (i) A participant shall so use and reconstitute its holdings of special drawing rights that, five years after the first allocation and at the end of each calendar quarter thereafter, the average of its total daily holdings of special drawing rights over the most recent five-year period will be not less than thirty percent of the average of its daily net cumulative allocation of special drawing rights over the same period.

(ii) Two years after the first allocation and at the end of each calendar month thereafter the Fund shall make calculations for each participant so as to ascertain whether and to what extent the participant would need to acquire special drawing rights between the date of the calculation and the end of any five-year period in order to comply with the requirement in (a)(i) above. The Fund shall adopt regulations with respect to the bases on which these calculations shall be made and with respect to the timing of the designation of participants under Article XIX, Section 5(a)(ii), in order to assist them to comply with the requirement in (a)(i) above.

(iii) The Fund shall give special notice to a participant when the calculations under (a)(ii) above indicate that it is unlikely that the participant will be able to comply with the requirement in (a)(i) above unless it ceases to use special drawing rights for the rest of the period for which the calculation was made under (a)(ii) above.

(iv) A participant that needs to acquire special drawing rights to fulfill this obligation shall be obligated and entitled to obtain them, for currency acceptable to the Fund, in a transaction with the Fund conducted through the General Resources Account. If sufficient special drawing rights to fulfill this obligation cannot be obtained in this way, the participant shall be obligated and entitled to obtain them with a freely usable currency from a participant which the Fund shall specify.

(b) Participants shall also pay due regard to the desirability of pursuing over time a balanced relationship between their holdings of special drawing rights and their other reserves.

2. If a participant fails to comply with the rules for reconstitution, the Fund shall determine whether or not the circumstances justify suspension under Article XXIII, Section 2(b).

#### Schedule H

#### Termination of Participation

1. If the obligation remaining after the setoff under Article XXIV, Section 2(b) is to the terminating participant and agreement on settlement between the Fund and the terminating participant is not reached within six months of the date of termination, the Fund shall redeem this balance of special drawing rights in equal half-yearly installments within a maximum of five years of the date of termination. The Fund shall redeem this bal-

ance as it may determine, either (a) by the payment to the terminating participant of the amounts provided by the remaining participants to the Fund in accordance with Article XXIV, Section 5, or (b) by permitting the terminating participant to use its special drawing rights to obtain its own currency or a freely usable currency from a participant specified by the Fund, the General Resources Account, or any other holder.

2. If the obligation remaining after the setoff under Article XXIV, Section 2(b) is to the Fund and agreement on settlement is not reached within six months of the date of termination, the terminating participant shall discharge this obligation in equal half-yearly installments within three years of the date of termination or within such longer period as may be fixed by the Fund. The terminating participant shall discharge this obligation, as the Fund may determine, either (a) by the payment to the Fund of a freely usable currency, or (b) by obtaining special drawing rights, in accordance with Article XXIV, Section 6, from the General Resources Account or in agreement with a participant specified by the Fund or from any other holder, and the setoff of these special drawing rights against the installment due.

3. Installments under either 1 or 2 above shall fall due six months after the date of termination and at intervals of six months thereafter.

4. In the event of the Special Drawing Rights Department going into liquidation under Article XXV within six months of the date a participant terminates its participation, the settlement between the Fund and that government shall be made in accordance with Article XXV and Schedule I.

#### Schedule I

#### Administration of Liquidation of the Special Drawing Rights Department

1. In the event of liquidation of the Special Drawing Rights Department, participants shall discharge their obligations to the Fund in ten half-yearly installments, or in such longer period as the Fund may decide is needed, in a freely usable currency and the currencies of participants holding special drawing rights to be redeemed in any installment to the extent of such redemption, as determined by the Fund. The first half-yearly payment shall be made six months after the decision to liquidate the Special Drawing Rights Department.

2. If it is decided to liquidate the Fund within six months of the date of the decision to liquidate the Special Drawing Rights Department, the liquidation of the Special Drawing Rights Department shall not proceed until special drawing rights held in the General Resources Account have been distributed in accordance with the following rule:

After the distributions made under 2(a) and (b) of Schedule K, the Fund shall apportion its special drawing rights held in the General Resources Account among all members that are participants in proportion to the amounts due to each participant after the distribution under 2(b). To determine the amount due to each member for the purpose of apportioning the remainder of its holdings of each currency under 2(d) of Schedule K, the Fund shall deduct the distribution of special drawing rights made under this rule.

3. With the amounts received under 1 above, the Fund shall redeem special drawing rights held by holders in the following manner and order:

times for the purchase of goods or for payments of sums due to it or to persons in its territories. Each participant so obligated agrees to compensate other participants for any loss resulting from the difference between the value at which the Fund distributed its currency under this Schedule and the value realized by such participants on disposal of its currency.

#### Schedule J

##### Settlement of Accounts with Members Withdrawing

1. The settlement of accounts with respect to the General Resources Account shall be made according to 1 to 6 of this Schedule. The Fund shall be obligated to pay to a member withdrawing an amount equal to its quota, plus any other amounts due to it from the Fund, less any amounts due to the Fund, including charges accruing after the date of its withdrawal; but no payment shall be made until six months after the date of withdrawal. Payments shall be made in the currency of the withdrawing member, and for this purpose the Fund may transfer to the General Resources Account holdings of the member's currency in the Special Disbursement Account or in the Investment Account in exchange for an equivalent amount of the currencies of other members in the General Resources Account selected by the Fund with their concurrence.

2. If the Fund's holdings of the currency of the withdrawing member are not sufficient to pay the net amount due from the Fund, the balance shall be paid in a freely usable currency, or in such other manner as may be agreed. If the Fund and the withdrawing member do not reach agreement within six months of the date of withdrawal, the currency in question held by the Fund shall be paid forthwith to the withdrawing member. Any balance due shall be paid in ten half-yearly instalments during the ensuing five years. Each such instalment shall be paid, at the option of the Fund, either in the currency of the withdrawing member acquired after its withdrawal or in a freely usable currency.

3. If the Fund fails to meet any installment which is due in accordance with the preceding paragraphs, the withdrawing member shall be entitled to require the Fund to pay the installment in any currency held by the Fund with the exception of any currency which has been declared scarce under Article VII, Section 3.

4. If the Fund's holdings of the currency of a withdrawing member exceed the amount due to it, and if agreement on the method of settling accounts is not reached within six months of the date of withdrawal, the former member shall be obligated to redeem such excess currency in a freely usable currency. Redemption shall be made at the rates at which the Fund would sell such currencies at the time of withdrawal from the Fund. The withdrawing member shall complete redemption within five years of the date of withdrawal, or within such longer period as may be fixed by the Fund, but shall not be required to redeem in any half-yearly period more than one-tenth of the Fund's excess holdings of its currency at the date of withdrawal plus further acquisitions of the currency during such half-yearly period. If the withdrawing member does not fulfill this obligation, the Fund may in an orderly manner liquidate in any market the amount of currency which should have been redeemed.

5. Any member desiring to obtain the currency of a member which has withdrawn shall acquire it by purchase from the Fund, to the extent that such member has access to the general resources of the Fund and that such currency is available under 4 above.

(a) Special drawing rights held by governments that have terminated their participation more than six months before the date the Board of Governors decides to liquidate the Special Drawing Rights Department shall be redeemed in accordance with the terms of any agreement under Article XXIV or Schedule H.

(b) Special drawing rights held by holders that are not participants shall be redeemed before those held by participants, and shall be redeemed in proportion to the amount held by each holder.

(c) The Fund shall determine the proportion of special drawing rights held by each participant in relation to its net cumulative allocation. The Fund shall first redeem special drawing rights from the participants with the highest proportion until this proportion is reduced to that of the second highest proportion; the Fund shall then redeem the special drawing rights held by these participants in accordance with their net cumulative allocations until the proportions are reduced to that of the third highest proportion; and this process shall be continued until the amount available for redemption is exhausted.

4. Any amount that a participant will be entitled to receive in redemption under 3 above shall be set off against any amount to be paid under 1 above.

5. During liquidation the Fund shall pay interest on the amount of special drawing rights held by holders, and each participant shall pay charges on the net cumulative allocation of special drawing rights to it less the amount of any payments made in accordance with 1 above. The rates of interest and charges and the time of payment shall be determined by the Fund. Payments of interest and charges shall be made in special drawing rights to the extent possible. A participant that does not hold sufficient special drawing rights to meet any charges shall make the payment with a currency specified by the Fund. Special drawing rights received as charges in amounts needed for administrative expenses shall not be used for the payment of interest, but shall be transferred to the Fund and shall be redeemed first and with the currencies used by the Fund to meet its expenses.

6. While a participant is in default with respect to any payment required by 1 or 5 above, no amounts shall be paid to it in accordance with 3 or 5 above.

7. If after the final payments have been made to participants each participant not in default does not hold special drawing rights in the same proportion to its net cumulative allocation, those participants holding a lower proportion shall purchase from those holding a higher proportion such amounts in accordance with arrangements made by the Fund as will make the proportion of their holdings of special drawing rights the same. Each participant in default shall pay to the Fund its own currency in an amount equal to its default. The Fund shall apportion this currency and residual claims among participants in proportion to the amount of special drawing rights held by each and these special drawing rights shall be cancelled. The Fund shall then close the books of the Special Drawing Rights Department and all of the Fund's liabilities arising from the allocations of special drawing rights and the administration of the Special Drawing Rights Department shall cease.

8. Each participant whose currency is distributed to other participants under this Schedule guarantees the unrestricted use of such currency at all

6. The withdrawing member guarantees the unrestricted use at all times of the currency disposed of under 4 and 5 above for the purchase of goods or for payment of sums due to it or to persons within its territories. It shall compensate the Fund for any loss resulting from the difference between the value of its currency in terms of the special drawing right on the date of withdrawal and the value realized in terms of the special drawing right by the Fund on disposal under 4 and 5 above.

7. If the withdrawing member is indebted to the Fund as the result of transactions conducted through the Special Disbursement Account under Article V, Section 12(f)(ii), the indebtedness shall be discharged in accordance with the terms of the indebtedness.

8. If the Fund holds the withdrawing member's currency in the Special Disbursement Account or in the Investment Account, the Fund may in an orderly manner exchange in any market for the currencies of members the amount of the currency of the withdrawing member remaining in each account after use under 1 above, and the proceeds of the exchange of the amount in each account shall be kept in that account. Paragraph 5 above and the first sentence of 6 above shall apply to the withdrawing member's currency.

9. If the Fund holds obligations of the withdrawing member in the Special Disbursement Account pursuant to Article V, Section 12(h), or in the Investment Account, the Fund may hold them until the date of maturity or dispose of them sooner. Paragraph 8 above shall apply to the proceeds of such disinvestment.

10. In the event of the Fund going into liquidation under Article XXVII, Section 2 within six months of the date on which the member withdraws, the accounts between the Fund and that government shall be settled in accordance with Article XXVII, Section 2 and Schedule K.

Schedule K

#### Administration of Liquidation

1. In the event of liquidation the liabilities of the Fund other than the repayment of subscriptions shall have priority in the distribution of the assets of the Fund. In meeting each such liability the Fund shall use its assets in the following order:

(a) the currency in which the liability is payable;

(b) gold;

(c) all other currencies in proportion, so far as may be practicable, to the quotas of the members.

2. After the discharge of the Fund's liabilities in accordance with 1 above, the balance of the Fund's assets shall be distributed and apportioned as follows:

(a) (i) The Fund shall calculate the value of gold held on August 31, 1975 that it continues to hold on the date of the decision to liquidate. The calculation shall be made in accordance with 9 below and also on the basis of one special drawing right per 0.888 671 gram of fine gold on the date of liquidation. Gold equivalent to the excess of the former value over the latter shall be distributed to those members that were members on August 31, 1975 in proportion to their quotas on that date.

(ii) The Fund shall distribute any assets held in the Special Disbursement Account on the date of the decision to liquidate to those members that were members on August 31, 1975 in proportion to their quotas on that date. Each type of asset shall be distributed proportionately to members.

(b) The Fund shall distribute its remaining holdings of gold among the members whose currencies are held by the Fund in amounts less than their quotas in the proportions, but not in excess of, the amounts by which their quotas exceed the Fund's holdings of their currencies.

(c) The Fund shall distribute to each member one-half the Fund's holdings of its currency but such distribution shall not exceed fifty percent of its quota.

(d) The Fund shall apportion the remainder of its holdings of gold and each currency

(i) among all members in proportion to, but not in excess of, the amounts due to each member after the distributions under (b) and (c) above, provided that distribution under 2(a) above shall not be taken into account for determining the amounts due, and

(ii) any excess holdings of gold and currency among all the members in proportion to their quotas.

3. Each member shall redeem the holdings of its currency apportioned to other members under 2(d) above, and shall agree with the Fund within three months after a decision to liquidate upon an orderly procedure for such redemption.

4. If a member has not reached agreement with the Fund within the three-month period referred to in 3 above, the Fund shall use the currencies of other members apportioned to that member under 2(d) above to redeem the currency of that member apportioned to other members. Each currency apportioned to a member which has not reached agreement shall be used, so far as possible, to redeem its currency apportioned to the members which have made agreements with the Fund under 3 above.

5. If a member has reached agreement with the Fund in accordance with 3 above, the Fund shall use the currencies of other members apportioned to that member under 2(d) above to redeem the currency of that member apportioned to other members which have made agreements with the Fund under 3 above. Each amount so redeemed shall be redeemed in the currency of the member to which it was apportioned.

6. After carrying out the steps in the preceding paragraphs, the Fund shall pay to each member the remaining currencies held for its account.

7. Each member whose currency has been distributed to other members under 6 above shall redeem such currency in the currency of the member requesting redemption, or in such other manner as may be agreed between them. If the members involved do not otherwise agree, the member obligated to redeem shall complete redemption within five years of the date of distribution, but shall not be required to redeem in any half-yearly period more than one-tenth of the amount distributed to each other member. If the member does not fulfill this obligation, the amount of currency which should have been redeemed may be liquidated in an orderly manner in any market.

of Executive Directors, another Executive Director shall be elected for the remainder of the term by such other members by a majority of the votes cast; pending such election, the Executive Director shall continue to hold office, but for a maximum of thirty days from the date of suspension;

(ii) if not more than ninety days remain before the next regular election of Executive Directors, the Executive Director shall continue to hold office for the remainder of the term.

4. The member shall be entitled to send a representative to attend any meeting of the Board of Governors, the Council, or the Executive Board, but not any meeting of their committees, when a request made by, or a matter particularly affecting, the member is under consideration.

8. Each member whose currency has been distributed to other members under 6 above guarantees the unrestricted use of such currency at all times for the purchase of goods or for payment of sums due to it or to persons in its territories. Each member so obligated agrees to compensate other members for any loss resulting from the difference between the value of its currency in terms of the special drawing right on the date of the decision to liquidate the Fund and the value in terms of the special drawing right realized by such members on disposal of its currency.

9. The Fund shall determine the value of gold under this Schedule on the basis of prices in the market.

10. For the purposes of this Schedule, quotas shall be deemed to have been increased to the full extent to which they could have been increased in accordance with Article III, Section 2(b) of this Agreement.

#### Schedule L

##### Suspension of Voting Rights

In the case of a suspension of voting rights of a member under Article XXVI, Section 2(b), the following provisions shall apply:

1. The member shall not:

(a) participate in the adoption of a proposed amendment of this Agreement, or be counted in the total number of members for that purpose, except in the case of an amendment requiring acceptance by all members under Article XXVIII(b) or pertaining exclusively to the Special Drawing Rights Department;

(b) appoint a Governor or Alternate Governor, appoint or participate in the appointment of a Councillor or Alternate Councillor, or appoint, elect, or participate in the election of an Executive Director.

2. The number of votes allotted to the member shall not be cast in any organ of the Fund. They shall not be included in the calculation of the total voting power, except for purposes of the acceptance of a proposed amendment pertaining exclusively to the Special Drawing Rights Department.

3. (a) The Governor and Alternate Governor appointed by the member shall cease to hold office.

(b) The Councillor and Alternate Councillor appointed by the member, or in whose appointment the member has participated, shall cease to hold office, provided that, if such Councillor was entitled to cast the number of votes allotted to other members whose voting rights have not been suspended, another Councillor and Alternate Councillor shall be appointed by such other members under Schedule D, and, pending such appointment, the Councillor and Alternate Councillor shall continue to hold office, but for a maximum of thirty days from the date of suspension.

(c) The Executive Director appointed or elected by the member, or in whose election the member has participated, shall cease to hold office, unless such Executive Director was entitled to cast the number of votes allotted to other members whose voting rights have not been suspended. In the latter case:

(i) if more than ninety days remain before the next regular election



**Articles of Agreement of the International Bank for  
Reconstruction and Development, 1944**

# IBRD Articles of Agreement

(As amended effective February 16, 1989)

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### SCHEDULE A: Subscriptions

## ARTICLE I

### Purposes

The purposes of the Bank are:

- (i) To assist in the reconstruction and development of territories of members by facilitating the investment of capital for productive purposes, including the restoration of economies destroyed or disrupted by war, the reconversion of productive facilities to peacetime needs and the encouragement of the development of productive facilities and resources in less developed countries.
- (ii) To promote private foreign investment by means of guarantees or participations in loans and other investments made by private investors; and when private capital is not available on reasonable terms, to supplement private investment by providing, on suitable conditions, finance for productive purposes out of its own capital, funds raised by it and its other resources.
- (iii) To promote the long-range balanced growth of international trade and the maintenance of equilibrium in balances of payments by encouraging international investment for the development of the productive resources of members, thereby assisting in raising productivity, the standard of living and conditions of labor in their territories.
- (iv) To arrange the loans made or guaranteed by it in relation to international loans through other channels so that the more useful and urgent projects, large and small alike, will be dealt with first.
- (v) To conduct its operations with due regard to the effect of international investment on business conditions in the territories of members and, in the immediate postwar years, to assist in bringing about a smooth transition from a wartime to a peacetime economy.

The Bank shall be guided in all its decisions by the purposes set forth above

## ARTICLE II

### Membership in and Capital of the Bank

#### SECTION 1. Membership

- (a) The original members of the Bank shall be those members of the International Monetary Fund which accept membership in the Bank before the date specified in Article XI, Section 2 (e).
- (b) Membership shall be open to other members of the Fund, at such times and in accordance with such terms as may be prescribed by the Bank.

#### SECTION 2. Authorized Capital

- (a) The authorized capital stock of the Bank shall be \$10,000,000,000, in terms of United States dollars of the weight and fineness in effect on July 1, 1944. The capital stock shall be divided into 100,000 shares (1) having

a par value of \$100,000 each, which shall be available for subscription only by members.

- (b) The capital stock may be increased when the Bank deems it advisable by a three-fourths majority of the total voting power.

### SECTION 3. Subscription of Shares

- (a) Each member shall subscribe shares of the capital stock of the Bank. The minimum number of shares to be subscribed by the original members shall be those set forth in Schedule A. The minimum number of shares to be subscribed by other members shall be determined by the Bank, which shall reserve a sufficient portion of its capital stock for subscription by such members.
- (b) The Bank shall prescribe rules laying down the conditions under which members may subscribe shares of the authorized capital stock of the Bank in addition to their minimum subscriptions.

1. As of April 27, 1988, the authorized capital stock of the Bank had been increased to 1,420,500 shares.

- (c) If the authorized capital stock of the Bank is increased, each member shall have a reasonable opportunity to subscribe, under such conditions as the Bank shall decide, a proportion of the increase of stock equivalent to the proportion which its stock theretofore subscribed bears to the total capital stock of the Bank, but no member shall be obligated to subscribe any part of the increased capital.

### SECTION 4. Issue Price of Shares

Shares included in the minimum subscriptions of original members shall be issued at par. Other shares shall be issued at par unless the Bank by a majority of the total voting power decides in special circumstances to issue them on other terms.

### SECTION 5. Division and Calls of Subscribed Capital

The subscription of each member shall be divided into two parts as follows:

- (i) twenty percent shall be paid or subject to call under Section 7 (i) of this Article as needed by the Bank for its operations;
- (ii) the remaining eighty percent shall be subject to call by the Bank only when required to meet obligations of the Bank created under Article IV, Sections 1 (a) (ii) and (iii).

Calls on unpaid subscriptions shall be uniform on all shares.

### SECTION 6. Limitation on Liability

Liability on shares shall be limited to the unpaid portion of the issue price of the shares.

### SECTION 7. Method of Payment of Subscriptions for Shares

Payment of subscriptions for shares shall be made in gold or United States dollars and in the currencies of the members as follows:

(i) under Section 5 (i) of this Article, two percent of the price of each share shall be payable in gold or United States dollars, and, when calls are made, the remaining eighteen percent shall be paid in the currency of the member;

(ii) when a call is made under Section 5 (ii) of this Article, payment may be made at the option of the member either in gold, in United States dollars or in the currency required to discharge the obligations of the Bank for the purpose for which the call is made;

(iii) when a member makes payments in any currency under (i) and (ii) above, such payments shall be made in amounts equal in value to the member's liability under the call. This liability shall be a proportionate part of the subscribed capital stock of the Bank as authorized and defined in Section 2 of this Article.

#### **SECTION 8. Time of Payment of Subscriptions**

(a) The two percent payable on each share in gold or United States dollars under Section 7 (i) of this Article, shall be paid within sixty days of the date on which the Bank begins operations, provided that

(i) any original member of the Bank whose metropolitan territory has suffered from enemy occupation or hostilities during the present war shall be granted the right to postpone payment of one-half percent until five years after that date;

(ii) an original member who cannot make such a payment because it has not recovered possession of its gold reserves which are still seized or immobilized as a result of the war may postpone a payment until such date as the Bank shall decide.

(b) The remainder of the price of each share payable under Section 7 (i) of this Article shall be paid as and when called by the Bank, provided that

(i) the Bank shall, within one year of its beginning operations, call not less than eight percent of the price of the share in addition to the payment of two percent referred to in (a) above;

(ii) not more than five percent of the price of the share shall be called in any period of three months.

#### **SECTION 9. Maintenance of Value of Certain Currency Holdings of the Bank**

(a) Whenever (i) the par value of a member's currency is reduced, or (ii) the foreign exchange value of a member's currency has, in the opinion of the Bank, depreciated to a significant extent within that member's territories, the member shall pay to the Bank within a reasonable time an additional amount of its own currency sufficient to maintain the value, as of the time of initial subscription, of the amount of the currency of such member which is held by the Bank and derived from currency originally paid in to the Bank by the member under Article II, Section 7 (i), from currency referred to in Article IV, Section 2 (b), or from any additional currency furnished under the provisions of the present paragraph, and which has not been repurchased by the member for gold or for the currency of any member which is acceptable to the Bank.

(b) Whenever the par value of a member's currency is increased, the Bank shall return to such member within a reasonable time an amount of that member's currency equal to the increase in the value of the amount of such currency described in (a) above.

(c) The provisions of the preceding paragraphs may be waived by the Bank when a uniform proportionate change in the par values of the currencies of all its members is made by the International Monetary Fund.

#### **SECTION 10. Restriction on Disposal of Shares**

Shares shall not be pledged or encumbered in any manner whatever and they shall be transferable only to the Bank.

### **IBRD Articles of Agreement III General Provisions Relating to Loans and Guarantees**

#### **SECTION 1. Use of Resources**

(a) The resources and the facilities of the Bank shall be used exclusively for the benefit of members with equitable consideration to projects for development and projects for reconstruction alike.

(b) For the purpose of facilitating the restoration and reconstruction of the economy of members whose metropolitan territories have suffered great devastation from enemy occupation or hostilities, the Bank, in determining the conditions and terms of loans made to such members, shall pay special regard to lightening the financial burden and expediting the completion of such restoration and reconstruction.

#### **SECTION 2. Dealings between Members and the Bank**

Each member shall deal with the Bank only through its Treasury, central bank, stabilization fund or other similar fiscal agency, and the Bank shall deal with members only by or through the same agencies.

#### **SECTION 3. Limitations on Guarantees and Borrowings of the Bank**

The total amount outstanding of guarantees, participations in loans and direct loans made by the Bank shall not be increased at any time, if by such increase the total would exceed one hundred percent of the unimpaired subscribed capital, reserves and surplus of the Bank.

#### **SECTION 4. Conditions on which the Bank may Guarantee or Make Loans**

The Bank may guarantee, participate in, or make loans to any member or any political sub-division thereof and any business, industrial, and agricultural enterprise in the territories of a member, subject to the following conditions:

(i) When the member in whose territories the project is located is not itself the borrower, the member or the central bank or some comparable agency of the member which is acceptable to the Bank, fully guarantees the repayment of the principal and the payment of interest and other charges on the loan.

(ii) The Bank is satisfied that in the prevailing market conditions the borrower would be unable otherwise to obtain the loan under conditions which in the opinion of the Bank are reasonable for the borrower.

(iii) A competent committee, as provided for in Article V, Section 7, has submitted a written report recommending the project after a careful study of the merits of the proposal.

(iv) In the opinion of the Bank the rate of interest and other charges are reasonable and such rate, charges and the schedule for repayment of principal are appropriate to the project.

(v) In making or guaranteeing a loan, the Bank shall pay due regard to the prospects that the borrower, and, if the borrower is not a member, that the guarantor, will be in position to meet its obligations under the loan;

and the Bank shall act prudently in the interests both of the particular member in whose territories the project is located and of the members as a whole.

- (vi) In guaranteeing a loan made by other investors, the Bank receives suitable compensation for its risk.
  - (vii) Loans made or guaranteed by the Bank shall, except in special circumstances, be for the purpose of specific projects of reconstruction or development.
- SECTION 5. Use of Loans Guaranteed, Participated in or Made by the Bank**
- (a) The Bank shall impose no conditions that the proceeds of a loan shall be spent in the territories of any particular member or members.
  - (b) The Bank shall make arrangements to ensure that the proceeds of any loan are used only for the purposes for which the loan was granted, with due attention to considerations of economy and efficiency and without regard to political or other non-economic influences or considerations.
  - (c) In the case of loans made by the Bank, it shall open an account in the name of the borrower and the amount of the loan shall be credited to this account in the currency or currencies in which the loan is made. The borrower shall be permitted by the Bank to draw on this account only to meet expenses in connection with the project as they are actually incurred.

**SECTION 6. Loans to the International Finance Corporation(1)**

- (a) The Bank may make, participate in, or guarantee loans to the International Finance Corporation, an affiliate of the Bank, for use in its lending operations. The total amount outstanding of such loans, participations and guarantees shall not be increased if, at the time or as a result thereof, the aggregate amount of debt (including the guarantee of any debt) incurred by the said Corporation from any source and then outstanding shall exceed an amount equal to four times its unimpaired subscribed capital and surplus.
- (b) The provisions of Article III, Sections 4 and 5 (c) and of Article IV, Section 3 shall not apply to loans, participations and guarantees authorized by this Section.

**IBRD Article IV**

**Operations**

**SECTION 1. Methods of Making or Facilitating Loans**

- (a) The Bank may make or facilitate loans which satisfy the general conditions of Article III in any of the following ways:
  - (i) By making or participating in direct loans out of its own funds corresponding to its unimpaired paid-up capital and surplus and, subject to Section 6 of this Article, to its reserves.
  - 2. Section added by amendment effective December 17, 1965.
  - (ii) By making or participating in direct loans out of funds raised in the market of a member, or otherwise borrowed by the Bank.
  - (iii) By guaranteeing in whole or in part loans made by private investors through the usual investment channels.
- (b) The Bank may borrow funds under (a) (ii) above or guarantee loans under (a) (iii) above only with the approval of the member in whose markets the funds are raised and the member in whose currency the loan

is denominated, and only if those members agree that the proceeds may be exchanged for the currency of any other member without restriction.

**SECTION 2. Availability and Transferability of Currencies**

- (a) Currencies paid into the Bank under Article II, Section 7 (i), shall be loaned only with the approval in each case of the member whose currency is involved; provided, however, that if necessary, after the Bank's subscribed capital has been entirely called, such currencies shall, without restriction by the members whose currencies are offered, be used or exchanged for the currencies required to meet contractual payments of interest, other charges or amortization on the Bank's own borrowings, or to meet the Bank's liabilities with respect to such contractual payments on loans guaranteed by the Bank.
- (b) Currencies received by the Bank from borrowers or guarantors in payment on account of principal of direct loans made with currencies referred to in (a) above shall be exchanged for the currencies of other members or rebanned only with the approval in each case of the members whose currencies are involved; provided, however, that if necessary, after the Bank's subscribed capital has been entirely called, such currencies shall, without restriction by the members whose currencies are offered, be used or exchanged for the currencies required to meet contractual payments of interest, other charges or amortization on the Bank's own borrowings, or to meet the Bank's liabilities with respect to such contractual payments on loans guaranteed by the Bank.
- (c) Currencies received by the Bank from borrowers or guarantors in payment on account of principal of direct loans made by the Bank under Section 1 (a) (i) of this Article, shall be held and used, without restriction by the members, to make amortization payments, or to anticipate payment of or repurchase part or all of the Bank's own obligations.
- (d) All other currencies available to the Bank, including those raised in the market or otherwise borrowed under Section 1 (a) (ii) of this Article, those obtained by the sale of gold, those received as payments of interest and other charges for direct loans made under Sections 1 (a) (i) and (ii), and those received as payments of commissions and other charges under Section 1 (a) (iii), shall be used or exchanged for other currencies or gold required in the operations of the Bank without restriction by the members whose currencies are offered.
- (e) Currencies raised in the markets of members by borrowers on loans guaranteed by the Bank under Section 1 (a) (iii) of this Article, shall also be used or exchanged for other currencies without restriction by such members.

**SECTION 3. Provision of Currencies for Direct Loans**

The following provisions shall apply to direct loans under Sections 1 (a) (i) and (ii) of this Article:

- (a) The Bank shall furnish the borrower with such currencies of members, other than the member in whose territories the project is located, as are needed by the borrower for expenditures to be made in the territories of such other members to carry out the purposes of the loan.
- (b) The Bank may, in exceptional circumstances when local currency required for the purposes of the loan cannot be raised by the borrower on reasonable terms, provide the borrower as part of the loan with an appropriate amount of that currency.
- (c) The Bank, if the project gives rise indirectly to an increased need for foreign exchange by the member in whose territories the project is located, may in exceptional circumstances provide the borrower as part of the loan with an appropriate amount of gold or foreign exchange not in excess of the borrower's local expenditure in connection with the purposes of the loan.
- (d) The Bank may, in exceptional circumstances, at the request of a member in whose territories a portion of the loan is spent, repurchase with gold or foreign exchange a part of that member's currency thus spent but in no case shall the part so repurchased exceed the amount by which the expenditure of the loan in those territories gives rise to an increased need for foreign exchange.

#### **SECTION 4. Payment Provisions for Direct Loans**

Loan contracts under Section 1 (a) (i) or (ii) of this Article shall be made in accordance with the following payment provisions:

(a) The terms and conditions of interest and amortization payments, maturity and dates of payment of each loan shall be determined by the Bank. The Bank shall also determine the rate and any other terms and conditions of commission to be charged in connection with such loan.

In the case of loans made under Section 1 (a) (ii) of this Article during the first ten years of the Bank's operations, this rate of commission shall be not less than one percent per annum and not greater than one and one-half percent per annum, and shall be charged on the outstanding portion of any such loan. At the end of this period of ten years, the rate of commission may be reduced by the Bank with respect both to the outstanding portions of loans already made and to future loans, if the reserves accumulated by the Bank under Section 6 of this Article and out of other earnings are considered by it sufficient to justify a reduction. In the case of future loans the Bank shall also have discretion to increase the rate of commission beyond the above limit, if experience indicates that an increase is advisable.

(b) All loan contracts shall stipulate the currency or currencies in which payments under the contract shall be made to the Bank. At the option of the borrowers however, such payments may be made in gold, or subject to the agreement of the Bank, in the currency of a member other than that prescribed in the contract.

(i) In the case of loans made under Section 1 (a) (i) of this Article, the loan contracts shall provide that payments to the Bank of interest, other charges and amortization shall be made in the currency loaned, unless the member whose currency is loaned agrees that such payments shall be made in some other specified currency or currencies. These payments, subject to the provisions of Article II, Section 9 (c), shall be equivalent to the value of such contractual payments at the time the loans were made, in terms of a currency specified for the purpose by the Bank by a three-fourths majority of the total voting power.

(ii) In the case of loans made under Section 1 (a) (ii) of this Article, the total amount outstanding and payable to the Bank in any one currency shall at no time exceed the total amount of the outstanding borrowings made by the Bank under Section 1 (a) (i) and payable in the same currency.

(c) If a member suffers from an acute exchange stringency, so that the service of any loan contracted by that member or guaranteed by it or by one of its agencies cannot be provided in the stipulated manner, the member concerned may apply to the Bank for a relaxation of the conditions of payment, if the Bank is satisfied that some relaxation is in the interests of the particular member and of the operations of the Bank and

of its members as a whole, it may take action under either, or both, of the following paragraphs with respect to the whole, or part, of the annual service:

(i) The Bank may, in its discretion, make arrangements with the member concerned to accept service payments on the loan in the member's currency for periods not to exceed three years upon appropriate terms regarding the use of such currency and the maintenance of its foreign exchange value; and for the repurchase of such currency on appropriate terms.

(ii) The Bank may modify the terms of amortization or extend the life of the loan, or both.

#### **SECTION 5. Guarantees**

(a) In guaranteeing a loan placed through the usual investment channels, the Bank shall charge a guarantee commission payable periodically on the amount of the loan outstanding at a rate determined by the Bank. During the first ten years of the Bank's operations, this rate shall be not less than one percent per annum and not greater than one and one-half percent per annum. At the end of this period of ten years, the rate of commission may be reduced by the Bank with respect both to the outstanding portions of loans already guaranteed and to future loans if the reserves accumulated by the Bank under Section 6 of this Article and out of other earnings are considered by it sufficient to justify a reduction. In the case of future loans the Bank

shall also have discretion to increase the rate of commission beyond the above limit, if experience indicates that an increase is advisable.

(b) Guarantee commissions shall be paid directly to the Bank by the borrower.

(c) Guarantees by the Bank shall provide that the Bank may terminate its liability with respect to interest if, upon default by the borrower and by the guarantor, if any, the Bank offers to purchase, at par and interest accrued to a date designated in the offer, the bonds or other obligations guaranteed.

(d) The Bank shall have power to determine any other terms and conditions of the guarantee.

#### **SECTION 6. Special Reserve**

The amount of commissions received by the Bank under Sections 4 and 5 of this Article shall be set aside as a special reserve, which shall be kept available for meeting liabilities of the Bank in accordance with Section 7 of this Article. The special reserve shall be held in such liquid form, permitted under this Agreement, as the Executive Directors may decide.

#### **SECTION 7. Methods of Meeting Liabilities of the Bank in Case of Defaults**

In cases of default on loans made, participated in, or guaranteed by the Bank:

(a) The Bank shall make such arrangements as may be feasible to adjust the obligations under the loans, including arrangements under or analogous to those provided in Section 4 (c) of this Article.

(b) The payments in discharge of the Bank's liabilities on borrowings or guarantees under Section 1 (a) (ii) and (iii) of this Article shall be charged:

(i) first, against the special reserve provided in Section 6 of this Article;

(ii) then, to the extent necessary and at the discretion of the Bank, against the other reserves, surplus and capital available to the Bank.

(c) Whenever necessary to meet contractual payments of interest, other charges or amortization on the Bank's own borrowings, or to meet the Bank's liabilities with respect to similar payments on loans guaranteed by it, the Bank may call an appropriate amount of the unpaid subscriptions of members in accordance with Article II, Sections 5 and 7. Moreover, if it believes that a default may be of long duration, the Bank may call an additional amount of such unpaid subscriptions not to exceed in any one year one percent of the total subscriptions of the

members for the following purposes:

(i) To redeem prior to maturity, or otherwise discharge its liability on, all or part of the outstanding principal of any loan guaranteed by it in respect of which the debtor is in default.

(ii) To repurchase, or otherwise discharge its liability on, all or part of its own outstanding borrowings.

#### **SECTION 8. Miscellaneous Operations**

In addition to the operations specified elsewhere in this Agreement, the Bank shall have the power:

(i) To buy and sell securities it has issued and to buy and sell securities which it has guaranteed or in which it has invested, provided that the Bank shall obtain the approval of the member in whose territories the securities are to be bought or sold.

- (ii) To guarantee securities in which it has invested for the purpose of facilitating their sale.
  - (iii) To borrow the currency of any member with the approval of that member.
  - (iv) To buy and sell such other securities as the Directors by a three-fourths majority of the total voting power may deem proper for the investment-of all or part of the special reserve under Section 6 of this Article.
- In exercising the powers conferred by this Section, the Bank may deal with any person, partnership, association, corporation or other legal entity in the territories of any member.

**SECTION 9. Warning to be Placed on Securities**

Every security guaranteed or issued by the Bank shall bear on its face a conspicuous statement to the effect that it is not an obligation of any government unless expressly stated on the security.

**SECTION 10. Political Activity Prohibited**

The Bank and its officers shall not interfere in the political affairs of any member; nor shall they be influenced in their decisions by the political character of the member or members concerned. Only economic considerations shall be relevant to their decisions, and these considerations shall be weighed impartially in order to achieve the purposes stated in Article I.

**IBRD Article V**

**Organization and Management**

**SECTION 1. Structure of the Bank**

The Bank shall have a Board of Governors, Executive Directors, a President and such other officers and staff to perform such duties as the Bank may determine.

**SECTION 2. Board of Governors**

- (a) All the powers of the Bank shall be vested in the Board of Governors consisting of one governor and one alternate appointed by each member in such manner as it may determine. Each governor and each alternate shall serve for five years, subject to the pleasure of the member appointing him, and may be reappointed. No alternate may vote except in the absence of his principal. The Board shall select one of the Governor-s as chairman.
- (b) The Board of Governors may delegate to the Executive Directors authority to exercise any powers of the Board, except the power to:
  - (i) Admit new members and determine the conditions of their admission;
  - (ii) Increase or decrease the capital stock;
  - (iii) Suspend a member;
  - (iv) Decide appeals from interpretations of this agreement given by the Executive Directors;
  - (v) Make arrangements to cooperate with other international organizations (other than informal arrangements of a temporary and administrative character);
  - (vi) Decide to suspend permanently the operations of the Bank and to distribute its assets;

- (vii) Determine the distribution of the net income of the Bank.
- (c) The Board of Governors shall hold an annual meeting and such other meetings as may be provided for by the Board or called by the Executive Directors. Meetings of the Board shall be called by the Directors whenever requested by five members or by members having one quarter of the total voting power.
- (d) A quorum for any meeting of the Board of Governors shall be a majority of the Governors, exercising not less than two-thirds of the total voting power.
- (e) The Board of Governors may by regulation establish a procedure whereby the Executive Directors, when they deem such action to be in the best interests of the Bank, may obtain a vote of the Governors on a specific question without calling a meeting of the Board.
- (f) The Board of Governors, and the Executive Directors to the extent authorized, may adopt such rules and regulations as may be necessary or appropriate to conduct the business of the Bank.
- (g) Governors and alternates shall serve as such without compensation from the Bank, but the Bank shall pay them reasonable expenses incurred in attending meetings.
- (h) The Board of Governors shall determine the remuneration to be paid to the Executive Directors and the salary and terms of the contract of service of the President.

**SECTION 3. Voting**

- (a) Each member shall have two hundred fifty votes plus one additional vote for each share of stock held.
- (b) Except as otherwise specifically provided, all matters before the Bank shall be decided by a majority of the votes cast.

**SECTION 4. Executive Directors**

- (a) The Executive Directors shall be responsible for the conduct of the general operations of the Bank, and for this purpose, shall exercise all the powers delegated to them by the Board of Governors.
  - (b) There shall be twelve Executive Directors, who need not be governors, and of whom:
    - (i) five shall be appointed, one by each of the five members having the largest number of shares;
    - (ii) seven shall be elected according to Schedule B by all the Governors other than those appointed by the five members referred to in (i) above.
- For the purpose of this paragraph, "members" means governments of countries whose names are set forth in Schedule A, whether they are original members or become members in accordance with Article 11, Section I (b). When governments of other countries become members, the Board of Governors may, by a four-fifths majority of the total voting power, increase the total number of directors by increasing the number of directors to be elected.
- Executive Directors shall be appointed or elected every two years. (c) Each executive director shall appoint an alternate with full power to act for him when he is not present. When the executive directors appointing them are present, alternates may participate in meetings but shall not vote.
- (d) Directors shall continue in office until their successors are appointed or elected. If the office of an elected director becomes vacant more than ninety days before the end of his term, another director shall be elected for the remainder of the term by the governors who elected the former director. A majority of the votes cast shall be required for election. While the office remains vacant, the alternate of the former director shall exercise his powers, except that of appointing an alternate.

(e) The Executive Directors shall function in continuous session at the principal office of the Bank and shall meet as often as the business of the Bank may require.

(f) A quorum for any meeting of the Executive Directors shall be a majority of the Directors, exercising not less than one-half of the total voting power.

(g) Each appointed director shall be entitled to cast the number of votes allotted under Section 3 of this Article to the member appointing him. Each elected director shall be entitled to cast the number of votes which counted toward his election. All the votes which a director is entitled to cast shall be cast as a unit.

(h) The Board of Governors shall adopt regulations under which a member not entitled to appoint a director under (b) above may send a representative to attend any meeting of the Executive Directors when a request made by, or a matter particularly affecting, that member is under consideration.

(i) The Executive Directors may appoint such committees as they deem advisable. Membership of such committees need not be limited to governors or directors or their alternates.

#### **SECTION 5. President and Staff**

(a) The Executive Directors shall select a President who shall not be a governor or an executive director or an alternate for either. The President shall be Chairman of the Executive Directors, but shall have no vote except a deciding vote in case of an equal division. He may participate in meetings of the Board of Governors, but shall not vote at such meetings. The President shall cease to hold office when the Executive Directors so decide.

(b) The President shall be chief of the operating staff of the Bank and shall conduct, under the direction of the Executive Directors, the ordinary business of the Bank. Subject to the general control of the Executive Directors, he shall be responsible for the organization, appointment and dismissal of the officers and staff.

(c) The President, officers and staff of the Bank, in the discharge of their offices, owe their duty entirely to the Bank and to no other authority. Each member of the Bank shall respect the international character of this duty and shall refrain from all attempts to influence any of them in the discharge of their duties.

(d) In appointing the officers and staff the President shall, subject to the paramount importance of securing the highest standards of efficiency and of technical competence, pay due regard to the importance of recruiting personnel on as wide a geographical basis as possible.

#### **SECTION 6. Advisory Council**

(a) There shall be an Advisory Council of not less than seven persons selected by the Board of Governors including representatives of banking, commercial, industrial, labor, and agricultural interests, and with as wide a national representation as possible. In those fields where specialized international organizations exist, the members of the Council representative of those fields shall be selected in agreement with such organizations. The Council shall advise the Bank on matters of general policy. The Council shall meet annually and on such other occasions as the Bank may request.

(b) Councillors shall serve for two years and may be reappointed. They shall be paid their reasonable expenses incurred on behalf of the Bank.

#### **SECTION 7. Loan Committees**

The committees required to report on loans under Article III, Section 4, shall be appointed by the Bank. Each such committee shall include an expert selected by the governor representing the member in whose territories the project is located and one or more members of the technical staff of the Bank.

#### **SECTION 8. Relationship to Other International Organizations**

(a) The Bank, within the terms of this Agreement, shall cooperate with any general international organization and with public international organizations having specialized responsibilities in related fields. Any arrangements for such cooperation which would involve a modification of any provision of this Agreement may be effected only after amendment to this Agreement under Article VIII.

(b) In making decisions on applications for loans or guarantees relating to matters directly within the competence of any international organization of the types specified in the preceding paragraph and participated in primarily by members of the Bank, the Bank shall give consideration to the views and recommendations of such organization.

#### **SECTION 9. Location of Offices**

(a) The principal office of the Bank shall be located in the territory of the member holding the greatest number of shares.

(b) The Bank may establish agencies or branch offices in the territories of any member of the Bank.

#### **SECTION 10. Regional Offices and Councils**

(a) The Bank may establish regional offices and determine the location of, and the areas to be covered by, each regional office.

(b) Each regional office shall be advised by a regional council representative of the entire area and selected in such manner as the Bank may decide.

#### **SECTION 11. Depositories**

(a) Each member shall designate its central bank as a depository for all the Bank's holdings of its currency or, if it has no central bank, it shall designate such other institution as may be acceptable to the Bank.

(b) The Bank may hold other assets, including gold, in depositories designated by the five members having the largest number of shares and in such other designated depositories as the Bank may select. Initially, at least one-half of the gold holdings of the Bank shall be held in the depository designated by the member in whose territory the Bank has its principal office, and at least forty percent shall be held in the depositories designated by the remaining four members referred to above, each of such depositories to hold, initially, not less than the amount of gold paid on the shares of the member designating it. However, all transfers of gold by the Bank shall be made with due regard to the costs of transport and anticipated requirements of the Bank. In an emergency the Executive Directors may transfer all or any part of the Bank's gold holdings to any place where they can be adequately protected.

#### **SECTION 12. Form of Holdings of Currency**

The Bank shall accept from any member, in place of any part of the member's currency, paid in to the Bank under Article 11, Section 7 (f), or to meet amortization payments on loans made with such currency, and not needed by the Bank in its operations, notes or similar obligations issued by the Government of the member or the depository designated by such member, which shall be non-negotiable, non-interest-bearing and payable at their par value on demand by credit to the account of the Bank in the designated depository.

#### **SECTION 13. Publication of Reports and Provision of Information**

(a) The Bank shall publish an annual report containing an audited statement of its accounts and shall circulate to members at intervals of three months or less a summary statement of its financial position and a profit and loss statement showing the results of its operations.

(b) The Bank may publish such other reports as it deems desirable to carry out its purposes.

(c) Copies of all reports, statements and publications made under this section shall be distributed to members.

#### **SECTION 14. Allocation of Net Income**

(a) The Board of Governors shall determine annually what part of the Bank's net income, after making provision for reserves, shall be allocated to surplus and what part, if any, shall be distributed.

(b) If any part is distributed, up to two percent non-cumulative shall be paid, as a first charge against the distribution for any year, to each member on the basis of the average amount of the loans outstanding during the year made under Article IV, Section 1 (a) (i), out of currency corresponding to its subscription. If two percent is paid as a first charge, any balance remaining to be distributed shall be paid to all members in proportion to their shares. Payments to each member shall be made in its own currency, or if that currency is not available in other currency acceptable to the member, if such payments are made in currencies other than the member's own currency, the transfer of the currency and its use by the receiving member after payment shall be without restriction by the members.

### **IBRD Article VI**

#### **Withdrawal and Suspension of Membership: Suspension of Operations**

##### **SECTION 1. Right of Members to Withdraw**

Any member may withdraw from the Bank at any time by transmitting a notice in writing to the Bank at its principal office. Withdrawal shall become effective on the date such notice is received.

##### **SECTION 2. Suspension of Membership**

If a member fails to fulfill any of its obligations to the Bank, the Bank may suspend its membership by decision of a majority of the Governors, exercising a majority of the total voting power. The member so suspended shall automatically cease to be a member one year from the date of its suspension unless a decision is taken by the same majority to restore the member to good standing.

While under suspension, a member shall not be entitled to exercise any rights under this Agreement, except the right of withdrawal, but shall remain subject to all obligations.

##### **SECTION 3. Cessation of Membership in International Monetary Fund**

Any member which ceases to be a member of the International Monetary Fund shall automatically cease after three months to be a member of the Bank unless the Bank by three-fourths of the total voting power has agreed to allow it to remain a member.

##### **Section 4. Settlement of Accounts with Governments Ceasing to be Members**

(a) When a government ceases to be a member, it shall remain liable for its direct obligations to the Bank and for its contingent liabilities to the Bank so long as any part of the loans or guarantees contracted before it ceased to be a member are outstanding, but it shall cease to incur liabilities with respect to loans and guarantees entered into thereafter by the Bank and to share either in the income or the expenses of the Bank.

(b) At the time a government ceases to be a member, the Bank shall arrange for the repurchase of its shares as a part of the settlement of accounts with such government in accordance with the provisions of (c)

and (d) below. For this purpose the repurchase price of the shares shall be the value shown by the books of the Bank on the day the government ceases to be a member.

(c) The payment for shares repurchased by the Bank under this section shall be governed by the following conditions:

(i) Any amount due to the government for its shares shall be withheld so long as the government, its central bank or any of its agencies remains liable, as borrower or guarantor, to the Bank and such amount may, at the option of the Bank, be applied on any such liability as it matures. No amount shall be withheld on account of the liability of the government resulting from its subscription for shares under Article H, Section 5 (ii). In any event, no amount due to a member for its shares shall be paid until six months after the date upon which the government ceases to be a member.

(ii) Payments for shares may be made from time to time, upon their surrender by the government, to the extent by which the amount due as the repurchase price in (b) above exceeds the aggregate of liabilities on loans and guarantees in (c) (i) above until the former member has received the full repurchase price.

(iii) Payments shall be made in the currency of the country receiving payment or at the option of the Bank in gold.

(iv) If losses are sustained by the Bank on any guarantees, participations in loans, or loans which were outstanding on the date when the government ceased to be a member, and the amount of such losses exceeds the amount of the reserve provided against losses on the date when the government ceased to be a member, such government shall be obligated to repay upon demand the amount by which the repurchase price of its shares would have been reduced, if the losses had been taken into account when the repurchase price was determined. In addition, the former member government shall remain liable on any call for unpaid subscriptions under Article IL Section 5 (ii), to the extent that it would have been required to respond if the impairment of capital had occurred and the call had been made at the time the repurchase price of its shares was determined.

(d) If the Bank suspends permanently its operations under Section 5 (b) of this Article, within six months of the date upon which any government ceases to be a member, all rights of such government shall be determined by the provisions of Section 5 of this Article.

#### **SECTION 5. Suspension of Operations and Settlement of Obligations**

(a) In an emergency the Executive Directors may suspend temporarily operations in respect of new loans and guarantees pending an opportunity for further consideration and action by the Board of Governors.

(b) The Bank may suspend permanently its operations in respect of new loans and guarantees by a vote of a majority of the Governors, exercising a majority of the total voting power. After such suspension of operations the Bank shall forthwith cease all activities, except those incident to the orderly realization, conservation, and preservation of its assets and settlement of its obligations.

(c) The liability of all members for uncalled subscriptions to the capital stock of the Bank and in respect of the depreciation of their own currencies shall continue until all claims of creditors, including all contingent claims, shall have been discharged.

(d) All creditors holding direct shall be paid out of the assets of the Bank, and then out of payments to the Bank on calls on unpaid subscriptions. Before making any payments to creditors holding direct claims, the Executive Directors shall make such arrangements as are necessary, in their judgment, to insure a distribution to holders of contingent claims ratably with creditors holding direct claims.

(e) No distribution shall be made to members on account of their subscriptions to the capital stock of the Bank until

(i) all liabilities to creditors have been discharged or provided for, and

(ii) a majority of the Governors, exercising a majority of the total voting power, have decided to make a distribution.

(f) After a decision to make a distribution has been taken under (e) above, the Executive Directors may by a two-thirds majority vote make successive distributions of the assets of the Bank to members until all of the assets have been distributed. This distribution shall be subject to the prior settlement of all outstanding claims of the Bank against each member

(g) Before any distribution of assets is made, the Executive Directors shall fix the proportionate share of each member according to the ratio of its shareholding to the total outstanding shares of the Bank.

(h) The Executive Directors shall value the assets to be distributed as at the date of distribution and then proceed to distribute in the following manner:

(i) There shall be paid to each member in its own obligations or those of its official agencies or legal entities within its territories, insofar as they are available for distribution, an amount equivalent in value to its proportionate share of the total amount to be distributed.

(ii) Any balance due to a member after payment has been made under (i) above shall be paid, in its own currency, insofar as it is held by the Bank, up to an amount equivalent in value to such balance.

(iii) Any balance due to a member after payment has been made under (i) and (ii) above shall be paid in gold or currency acceptable to the member, insofar as they are held by the Bank, up to an amount equivalent in value to such balance.

(iv) Any remaining assets held by the Bank after payments have been made to members under (i), (ii), and (iii) above shall be distributed *pro rata* among the members.

(i) Any member receiving assets distributed by the Bank in accordance with (h) above, shall enjoy the same rights with respect to such assets as the Bank enjoyed prior to their distribution.

## **IBRD Article VII**

### **Status, Immunities and Privileges**

#### **SECTION 1. Purposes of the Article**

To enable the Bank to fulfill the functions with which it is entrusted, the status, immunities and privileges set forth in this Article shall be accorded to the Bank in the territories of each member.

#### **SECTION 2. Status of the Bank**

The Bank shall possess full juridical personality, and, in particular, the capacity:

- (i) to contract;
- (ii) to acquire and dispose of immovable and movable property;
- (iii) to institute legal proceedings.

#### **SECTION 3. Position of the Bank with Regard to Judicial Process**

Actions may be brought against the Bank only in a court of competent jurisdiction in the territories of a member in which the Bank has an office, has appointed an agent for the purpose of accepting service or notice of process, or has issued or guaranteed securities. No actions shall, however, be brought by

members or persons acting for or deriving claims from members. The property and assets of the Bank shall, wheresoever located and by whomsoever held, be immune from all forms of seizure, attachment or execution before the delivery of final judgment against the Bank.

#### **SECTION 4. Immunity of Assets from Seizure**

Property and assets of the Bank, wherever located and by whomsoever held, shall be immune from search, requisition, confiscation, expropriation or any other form of seizure by executive or legislative action.

#### **SECTION 5. Immunity of Archives**

The archives of the Bank shall be inviolable.

#### **SECTION 6. Freedom of Assets from Restrictions**

To the extent necessary to carry out the operations provided for in this Agreement and subject to the provisions of this Agreement, all property and assets of the Bank shall be free from restrictions, regulations, controls and moratoria of any nature.

#### **SECTION 7. Privilege for Communications**

The official communications of the Bank shall be accorded by each member the same treatment that it accords to the official communications of other members.

#### **SECTION 8. Immunities and Privileges of Officers and Employees**

All governors, executive directors, alternates, officers and employees of the Bank

(i) shall be immune from legal process with respect to acts performed by them in their official capacity except when the Bank waives this immunity;

(ii) not being local nationals, shall be accorded the same immunities from immigration restrictions, alien registration requirements and national service obligations and the same facilities as regards exchange restrictions as are accorded by members to the representatives, officials, and employees of comparable rank of other members;

(iii) shall be granted the same treatment in respect of travelling facilities as is accorded by members to representatives, officials and employees of comparable rank of other members.

#### **SECTION 9. Immunities from Taxation**

(a) The Bank, its assets, property, income and its operations and transactions authorized by this Agreement, shall be immune from all taxation and from all customs duties. The Bank shall also be immune from liability for the collection or payment of any tax or duty.

(b) No tax shall be levied on or in respect of salaries and emoluments paid by the Bank to executive directors, alternates, officials or employees of the Bank who are not local citizens, local subjects, or other local nationals.

(c) No taxation of any kind shall be levied on any obligation or security issued by the Bank (including any dividend or interest thereon) by whomsoever held.

(i) which discriminates against such obligation or security solely because it is issued by the Bank; or

(ii) if the sole jurisdictional basis for such taxation is the place or currency in which it is issued, made payable or paid, or the location of any office or place of business maintained by the Bank.

(d) No taxation of any kind shall be levied on any obligation or security guaranteed by the Bank (including any dividend or interest thereon) by whomsoever held;

(i) which discriminates against such obligation or security solely because it is guaranteed by the Bank; or

(ii) if the sole jurisdictional basis for such taxation is the location of any office or place of business maintained by the Bank.

#### **SECTION 10. Application of Article**

Each member shall take such action as is necessary in its own territories for the purpose of making effective in terms of its own law the principles set forth in this Article and shall inform the Bank of the detailed action which it has taken.

### **IBRD Article VIII**

#### **Amendments**

(a) Any proposal to introduce modifications in this Agreement, whether emanating from a member, a governor or the Executive Directors, shall be communicated to the Chairman of the Board of Governors who shall bring the proposal before the Board. If the proposed amendment is approved by the Board the Bank shall, by circular letter or telegram, ask all members whether they accept the proposed amendment. When three-fifths of the members, having eighty-five percent (1) of the total voting power, have accepted the proposed amendments, the Bank shall certify the fact by formal communication addressed to an members.

(b) Notwithstanding (a) above, acceptance by an members is required in the case of any amendment modifying:

(i) the right to withdraw from the Bank provided in Article VI, Section 1;

(ii) the right secured by Article U, Section 3 (c);

(iii) the limitation on liability provided in Article II, Section 6.

(c) Amendments shall enter into force for all members three months after the date of the formal communication unless a shorter period is specified in the circular letter or telegram.

### **IBRD Article IX**

#### **Interpretation**

(a) Any question of interpretation of the provisions of this Agreement arising between any member and the Bank or between any members of the Bank shall be submitted to the Executive Directors for their decision. If the question particularly affects any member not entitled to appoint an Executive Director, it shall be entitled to representation in accordance with Article V, Section 4 (h).

(b) In any case where the Executive Directors have given a decision under (a) above, any member may require that the question be referred to the Board of Governors, whose decision

shall be final. Pending the result of the reference to the Board, the Bank may, so far as it deems necessary, act on the basis of the decision of the Executive Directors.

3. 'Eighty-five percent' was substituted to 'four-fifths' by amendment effective February 16, 1989.

(c) Whenever a disagreement arises between the Bank and a country which has ceased to be a member, or between the Bank and any member during the permanent suspension of the Bank, such disagreement shall be submitted to arbitration by a tribunal of three arbitrators, one appointed by the Bank, another by the country involved and an umpire who, unless the parties otherwise agree, shall be appointed by the President of the Permanent Court of International Justice or such other authority as may have been prescribed by regulation adopted by the Bank. The umpire shall have full power to settle an questions of procedure in any case where the parties are in disagreement with respect thereto.

### **IBRD Article X**

#### **Approval Deemed Given**

Whenever the approval of any member is required before any act may be done by the Bank, except in Article VIII, approval shall be deemed to have been given unless the member presents an objection within such reasonable period as the Bank may fix in notifying the member of the proposed act.

### **IBRD Article XI**

#### **Final Provisions**

#### **SECTION 1. Entry into Force**

This Agreement shall enter into force when it has been signed on behalf of governments whose minimum subscriptions comprise not less than sixty-five percent of the total subscriptions set forth in Schedule A and when the instruments referred to in Section 2 (a) of this Article have been deposited on their behalf, but in no event shall this Agreement enter into force before May 1, 1945.

#### **SECTION 2. Signature**

(a) Each government on whose behalf this Agreement is signed shall deposit with the Government of the United States of America an instrument setting forth that it has accepted this Agreement in accordance with its law and has taken all steps necessary to enable it to carry out all of its obligations under this Agreement.

(b) Each government shall become a member of the Bank as from the date of the deposit on its behalf of the instrument referred to in (a) above, except that no government shall become a member before this Agreement enters into force under Section 1 of this Article.

(c) The Government of the United States of America shall inform the governments of all countries whose names are set forth in Schedule A, and all governments whose membership is approved in accordance with Article II, Section 1 (b), of all signatures of this Agreement and of the deposit of all instruments referred to in (a) above.

(d) At the time this Agreement is signed on its behalf, each government shall transmit to the Government of the United States of America one one-hundredth of one percent of the price of each share in gold or United States dollars for the purpose of meeting administrative expenses of the Bank. This payment shall be credited on account of the payment to be made in accordance with Article II Section 8 (a). The Government of the United States of America shall hold such funds in a special deposit account and shall transmit them to the Board of Governors of the Bank when the initial meeting has been called under Section 3 of this Article.

If this Agreement has not come into force by December 31, 1945, the Government of the United States of America shall return such funds to the governments that transmitted them.

(e) This Agreement shall remain open for signature at Washington on behalf of the governments of the countries whose names are set forth in Schedule A until December 31, 1945.

(f) After December 31, 1945, this Agreement shall be open for signature on behalf of the government of any country whose membership has been approved in accordance with Article II, Section 1 (b).

(g) By their signature of this Agreement, all governments accept it both on their own behalf and in respect of all their colonies, overseas territories, all territories under their protection, suzerainty, or authority and all territories in respect of which they exercise a mandate.

(h) In the case of governments whose metropolitan territories have been under enemy occupation, the deposit of the instrument referred to in (a) above may be delayed until one hundred and eighty days after the date on which these territories have been liberated. If, however, it is not deposited by any such government before the expiration of this period, the signature affixed on behalf of that government shall become void and the portion of its subscription paid under (d) above shall be returned to it.

(i) Paragraphs (d) and (h) shall come into force with regard to each signatory government as from the date of its signature.

### SECTION 3. Inauguration of the Bank

(a) As soon as this Agreement enters into force under Section 1 of this Article, each member shall appoint a governor and the member to whom the largest number of shares is allocated in Schedule A shall call the first meeting of the Board of Governors.

(b) At the first meeting of the Board of Governors, arrangements shall be made for the selection of provisional executive directors. The governments of the five countries, to which the largest number of shares are allocated in Schedule A, shall appoint provisional executive directors. If one or more of such governments have not become members, the executive directorships which they would be entitled to fill shall remain vacant until they become members, or until January 1, 1946, whichever is the earlier. Seven provisional executive directors shall be elected in accordance with the provisions of Schedule B and shall remain in office until the date of the first regular election of executive directors which shall be held as soon as practicable after January 1, 1946.

(c) The Board of Governors may delegate to the provisional executive directors any powers except those which may not be delegated to the Executive Directors.

(d) The Bank shall notify members when it is ready to commence operations.

DONE at Washington, in a single copy which shall remain deposited in the archives of the Government of the United States of America, which shall transmit certified copies to all governments whose names are set forth in Schedule A and to all governments whose membership is approved in accordance with Article II, Section 1 (b).

## IBRD Schedule 1

### SCHEDULE A

#### Subscriptions

(millions of dollars)

Australia	24.0	Iran	200.0
Belgium	6.0	Iraq	225.0
Bolivia	0.5	Liberia	7.0
Brazil	10.0	Luxembourg	105.0
Canada	65.0	Mexico	325.0
Chile	275.0	Netherlands	35.0
China	50.0	New Zealand	600.0
Colombia	0.8	Nicaragua	35.0
Costa Rica	50.0	Norway	2.0
Cuba	0.2	Panama	35.0
Czechoslovakia	0.8	Paraguay	125.0
Denmark	17.5	Peru	(a)
Dominican Republic	15.0	Philippine Commonwealth	2.0
Ecuador	125.0	Poland	3.2
Egypt	100.0	Union of South Africa	40.0
El Salvador		Union of Soviet Socialist	1.0
Ethiopia		Republics	3.0
France	1,200.0	United Kingdom	450.0
Greece	1,300.0	United States	25.0
Guatemala	3,175.0	Uruguay	2.0
Haiti	10.5	Venezuela	2.0
Honduras	10.5	Yugoslavia	1.0
Iceland	40.0		1.0
India	400.0	<b>Total</b>	<b>9,100.0</b>

a. The quota of Denmark shall be determined by the Bank after Denmark accepts membership in accordance with these Articles of Agreement.

## IBRD Schedule B

### Election of Executive Directors

- The election of the elective executive directors shall be by ballot of the Governors eligible to vote under Article V, Section 4 (b).
- In balloting for the elective executive directors, each governor eligible to vote shall cast for one person all of the votes to which the member appointing him is entitled under Section 3 of Article V. The seven persons receiving the greatest number of votes shall be executive directors, except that no person who receives less than fourteen percent of the total of the votes which can be cast (eligible votes) shall be considered elected.
- When seven persons are not elected on the first ballot, a second ballot shall be held in which the person who received the lowest number of votes shall be ineligible for election and in which there shall vote only (a) those governors who voted in the first ballot for a person not elected and (b) those governors whose votes for a person elected are deemed under 4 below to have raised the votes cast for that person above fifteen percent of the eligible votes.
- In determining whether the votes cast by a governor are to be deemed to have raised the total of any person above fifteen percent of the eligible votes, the fifteen percent shall be deemed to include, first, the

votes of the governor casting the largest number of votes for such person, then the votes of the governor casting the next largest number, and so on until fifteen percent is reached.

5. Any governor, part of whose votes must be counted in order to raise the total of any person above fourteen percent shall be considered as casting all of his votes for such person even if the total votes for such person thereby exceed fifteen percent.

6. If, after the second ballot, seven persons have not been elected, further ballots shall be held on the same principles until seven persons have been elected, provided that after six persons are elected, the seventh may be elected by a simple majority of the remaining votes and shall be deemed to have been elected by all such votes.



## **Convention on International Civil Aviation, 1944**

**CONVENTION'**  
**ON INTERNATIONAL**  
**CIVIL AVIATION**

Signed at Chicago,  
on 7 December 1944

**PREAMBLE**

WHEREAS the future development of international civil aviation can greatly help to create and preserve friendship and understanding among the nations and peoples of the world, yet its abuse can become a threat to the general security; and

WHEREAS it is desirable to avoid friction and to promote that cooperation between nations and peoples upon which the peace of the world depends;

THEREFORE, the undersigned governments having agreed on certain principles and arrangements in order that international civil aviation may be developed in a safe and orderly manner and that international air transport services may be established on the basis of equality of opportunity and operated soundly and economically;

Have accordingly concluded this Convention to that end.

**PART I**

**AIR NAVIGATION**

**CHAPTER I**

**GENERAL PRINCIPLES**  
**AND APPLICATION OF THE CONVENTION**

**Article 1**

*Sovereignty*

The contracting States recognize that every State has complete and exclusive sovereignty over the airspace above its territory.

*Territory*

For the purposes of this Convention the territory of a State shall be deemed to be the land areas and territorial waters adjacent thereto under the sovereignty, suzerainty, protection or mandate of such State.

**Article 3**

*Civil and state aircraft*

a) This Convention shall be applicable only to civil aircraft, and shall not be applicable to state aircraft.

b) Aircraft used in military, customs and police services shall be deemed to be state aircraft.

c) No state aircraft of a contracting State shall fly over the territory of another State or land thereon without authorization by special agreement or otherwise, and in accordance with the terms thereof.

d) The contracting States undertake, when issuing regulations for their state aircraft, that they will have due regard for the safety of navigation of civil aircraft.

**Article 3 bis\***

a) The contracting States recognize that every State must refrain from resorting to the use of weapons against civil aircraft in flight and that, in case of interception, the lives of persons on board and the safety of aircraft must not be endangered. This provision shall not be interpreted as modifying in any way the rights and obligations of States set forth in the Charter of the United Nations.

b) The contracting States recognize that every State, in the exercise of its sovereignty, is entitled to require the landing at some designated airport of a civil aircraft flying above its territory without authority or if there are reasonable grounds to conclude that it is being used for any purpose inconsistent with the aims of this Convention; it may also give such aircraft any other instructions to put an end to such violations. For this purpose, the contracting States may resort to any appropriate means consistent with relevant rules of international law, including the relevant provisions of this Convention, specifically paragraph a) of this Article. Each contracting State agrees to publish its regulations in force regarding the interception of civil aircraft.

c) Every civil aircraft shall comply with an order given in conformity with paragraph b) of this Article. To this end each contracting State shall establish all necessary provisions in its national laws or regulations to make such compliance mandatory for any civil aircraft registered in that State or operated by an operator who has his principal place of business or permanent residence in that State. Each contracting State shall make any violation of such applicable laws or regulations punishable by severe penalties and shall submit the case to its competent authorities in accordance with its laws or regulations.

\* The 25th (Extraordinary) Session of the Assembly on 10 May 1984 amended the Convention by adopting the Protocol introducing Article 3 bis. This amendment came into force on 1 October 1998.

d) Each contracting State shall take appropriate measures to prohibit the deliberate use of any civil aircraft registered in that State or operated by an operator who has his principal place of business or permanent residence in that State for any purpose inconsistent with the aims of this Convention. This provision shall not affect paragraph a) or derogate from paragraphs b) and c) of this Article.

**Article 4**

*Misuse of civil aviation*

Each contracting State agrees not to use civil aviation for any purpose inconsistent with the aims of this Convention.

**CHAPTER II**

**FLIGHT OVER TERRITORY OF CONTRACTING STATES**

**Article 5**

*Right of non-scheduled flight*

Each contracting State agrees that all aircraft of the other contracting States, being aircraft not engaged in scheduled international air services shall have the right, subject to the observance of the terms of this Convention, to make flights into or in transit non-stop across its territory and to make stops for non-traffic purposes without the necessity of obtaining prior permission, and subject to the right of the State flown over to require landing. Each contracting State nevertheless reserves the right, for reasons of safety of flight, to require aircraft desiring to proceed over regions which are inaccessible or without adequate air navigation facilities to follow prescribed routes, or to obtain special permission for such flights.

Such aircraft, if engaged in the carriage of passengers, cargo, or mail for remuneration or hire on other than scheduled international air services, shall also, subject to the provisions of Article 7, have the privilege of taking on or discharging passengers, cargo, or mail, subject to the right of any State where such embarkation or discharge takes place to impose such regulations, conditions or limitations as it may consider desirable.

from time to time decide to designate, and to that end contracting States will keep in close consultation with the agencies concerned with international regulations relating to sanitary measures applicable to aircraft. Such consultation shall be without prejudice to the application of any existing international convention on this subject to which the contracting States may be parties.

## Article 15

### Article 15

#### *Airport and similar charges*

Every airport in a contracting State which is open to public use by its national aircraft shall likewise, subject to the provisions of Article 68, be open under uniform conditions to the aircraft of all the other contracting States. The like uniform conditions shall apply to the use, by aircraft of every contracting State, of all air navigation facilities, including radio and meteorological services, which may be provided for public use for the safety and expedition of air navigation.

Any charges that may be imposed or permitted to be imposed by a contracting State for the use of such airports and air navigation facilities by the aircraft of any other contracting State shall not be higher.

a) As to aircraft not engaged in scheduled international air services, than those that would be paid by its national aircraft of the same class engaged in similar operations, and

b) As to aircraft engaged in scheduled international air services, than those that would be paid by its national aircraft engaged in similar international air services.

All such charges shall be published and communicated to the International Civil Aviation Organization, provided that, upon representation by an interested contracting State, the charges imposed for the use of airports and other facilities shall be subject to review by the Council, which shall report and make recommendations thereon for the consideration of the State or States concerned. No fees, dues or other charges shall be

or departure from its territory of aircraft engaged in international air navigation, or to the operation and navigation of such aircraft while within its territory, shall be applied to the aircraft of all contracting States without distinction as to nationality, and shall be complied with by such aircraft upon entering or departing from or while within the territory of that State.

## Article 12

### Article 12

#### *Rules of the air*

Each contracting State undertakes to adopt measures to insure that every aircraft flying over or maneuvering within its territory and that every aircraft carrying its nationality mark, wherever such aircraft may be, shall comply with the rules and regulations relating to the flight and maneuver of aircraft there in force. Each contracting State undertakes to keep its own regulations in these respects uniform, to the greatest possible extent, with those established from time to time under this Convention. Over the high seas, the rules in force shall be those established under this Convention. Each contracting State undertakes to insure the prosecution of all persons violating the regulations applicable.

## Article 13

### Article 13

#### *Entry and clearance regulations*

The laws and regulations of a contracting State as to the admission to or departure from its territory of passengers, crew or cargo of aircraft, such as regulations relating to entry, clearance, immigration, passports, customs, and quarantine shall be complied with by or on behalf of such passengers, crew or cargo upon entrance into or departure from, or while within the territory of that State.

## Article 14

### Article 14

#### *Prevention of spread of disease*

Each contracting State agrees to take effective measures to prevent the spread by means of air navigation of cholera, typhus (epidemic), smallpox, yellow fever, plague, and such other communicable diseases as the contracting States shall

prohibited areas shall be of reasonable extent and location so as not to interfere unnecessarily with air navigation. Descriptions of such prohibited areas in the territory of a contracting State, as well as any subsequent alterations therein, shall be communicated as soon as possible to the other contracting States and to the International Civil Aviation Organization.

## Article 10

### Article 10

#### *Landing at customs airport*

Except in a case where, under the terms of this Convention or a special authorization, aircraft are permitted to cross the territory of a contracting State without landing, every aircraft which enters the territory of a contracting State shall, if the regulations of that State so require, land at an airport designated by that State for the purpose of customs and other examination. On departure from the territory of a contracting State, such aircraft shall depart from a similarly designated customs airport. Particulars of all designated customs airports shall be published by the State and transmitted to the International Civil Aviation Organization established under Part II of this Convention for communication to all other contracting States.

## Article 11

### Article 11

#### *Applicability of air regulations*

Subject to the provisions of this Convention, the laws and regulations of a contracting State relating to the admission to

## Article 6

### Article 6

#### *Scheduled air services*

No scheduled international air service may be operated over or into the territory of a contracting State, except with the special permission or other authorization of that State, and in accordance with the terms of such permission or authorization.

## Article 7

### Article 7

#### *Cabotage*

Each contracting State shall have the right to refuse permission to the aircraft of other contracting States to take on in its territory passengers, mail and cargo carried for remuneration or hire and destined for another point within its territory. Each contracting State undertakes not to enter into any arrangements which specifically grant any such privilege on an exclusive basis to any other State or an airline of any other State, and not to obtain any such exclusive privilege from any other State.

## Article 8

### Article 8

#### *Pilotless aircraft*

No aircraft capable of being flown without a pilot shall be flown without a pilot over the territory of a contracting State without special authorization by that State and in accordance with the terms of such authorization. Each contracting State undertakes to insure that the flight of such aircraft without a pilot in regions open to civil aircraft shall be so controlled as to obviate danger to civil aircraft.

## Article 9

### Article 9

#### *Prohibited areas*

Each contracting State may, for reasons of military necessity or public safety, restrict or prohibit uniformly the aircraft of other States from flying over certain areas of its territory, provided that no distinction in this respect is made between the aircraft of the State whose territory is involved, engaged in international scheduled airline services, and the aircraft of the other contracting States likewise engaged. Such

imposed by any contracting State in respect solely of the right of transit over or entry into or exit from its territory of any aircraft of a contracting State or persons or property thereon.

#### Article 20

##### *Display of marks*

Every aircraft engaged in international air navigation shall bear its appropriate nationality and registration marks.

#### Article 21

##### *Report of registrations*

Each contracting State undertakes to supply to any other contracting State or to the International Civil Aviation Organization, on demand, information concerning the registration and ownership of any particular aircraft registered in that State. In addition, each contracting State shall furnish reports to the International Civil Aviation Organization, under such regulations as the latter may prescribe, giving such pertinent data as can be made available concerning the ownership and control of aircraft registered in that State and habitually engaged in international air navigation. The data thus obtained by the International Civil Aviation Organization shall be made available by it on request to the other contracting States.

#### Article 16

##### *Search of aircraft*

The appropriate authorities of each of the contracting States shall have the right, without unreasonable delay, to search aircraft of the other contracting States on landing or departure, and to inspect the certificates and other documents prescribed by this Convention.

### CHAPTER III

#### NATIONALITY OF AIRCRAFT

#### Article 17

##### *Nationality of aircraft*

Aircraft have the nationality of the State in which they are registered.

#### Article 18

##### *Dual registration*

An aircraft cannot be validly registered in more than one State, but its registration may be changed from one State to another.

#### Article 19

##### *National laws governing registration*

The registration or transfer of registration of aircraft in any contracting State shall be made in accordance with its laws and regulations.

affecting international air navigation in accordance with the practices which may be established or recommended from time to time, pursuant to this Convention. Nothing in this Convention shall be construed as preventing the establishment of customs-free airports.

#### Article 24

##### *Customs duty*

a) Aircraft on a flight to, from, or across the territory of another contracting State shall be admitted temporarily free of duty, subject to the customs regulations of the State. Fuel, lubricating oils, spare parts, regular equipment and aircraft stores on board an aircraft of a contracting State, on arrival in the territory of another contracting State and retained on board on leaving the territory of that State shall be exempt from customs duty, inspection fees or similar national or local duties and charges. This exemption shall not apply to any quantities or articles unloaded, except in accordance with the customs regulations of the State, which may require that they shall be kept under customs supervision.

b) Spare parts and equipment imported into the territory of a contracting State for incorporation in or use on an aircraft of another contracting State engaged in international air navigation shall be admitted free of customs duty, subject to compliance with the regulations of the State concerned, which may provide that the articles shall be kept under customs supervision and control.

#### Article 25

##### *Aircraft in distress*

Each contracting State undertakes to provide such measures of assistance to aircraft in distress in its territory as it may find practicable, and to permit, subject to control by its own authorities, the owners of the aircraft or authorities of the State in which the aircraft is registered to provide such measures of assistance as may be necessitated by the circumstances. Each contracting State, when undertaking search for missing aircraft, will collaborate in coordinated measures which may be recommended from time to time pursuant to this Convention.

#### Article 26

##### *Investigation of accidents*

In the event of an accident to an aircraft of a contracting State occurring in the territory of another contracting State, and involving death or serious injury, or indicating serious technical defect in the aircraft or air navigation facilities, the State in which the accident occurs will institute an inquiry into the circumstances of the accident, in accordance, so far as its laws permit, with the procedure which may be recommended by the International Civil Aviation Organization. The State in which the aircraft is registered shall be given the opportunity to appoint observers to be present at the inquiry and the State holding the inquiry shall communicate the report and findings in the matter to that State.

#### Article 27

##### *Exemption from seizure on patent claims*

a) While engaged in international air navigation, any authorized entry of aircraft of a contracting State into the territory of another contracting State or authorized transit across the territory of such State with or without landings shall not entail any seizure or detention of the aircraft or any claim against the owner or operator thereof or any other interference therewith by or on behalf of such State or any person therein, on the ground that the construction, mechanism, parts, accessories or operation of the aircraft is an infringement of any patent, design, or model duly granted or registered in the State whose territory is entered by the aircraft, it being agreed that no deposit of security in connection with the foregoing exemption from seizure or detention of the aircraft shall in any case be required in the State entered by such aircraft.

b) The provisions of paragraph a) of this Article shall also be applicable to the storage of spare parts and spare equipment for the aircraft and the right to use and install the same in the repair of an aircraft of a contracting State in the territory of any other contracting State, provided that any patented part or equipment so stored shall not be sold or distributed internally

in or exported commercially from the contracting State entered by the aircraft.

- c) The benefits of this Article shall apply only to such States, parties to this Convention, as either 1) are parties to the International Convention for the Protection of Industrial Property and to any amendments thereof; or 2) have enacted patent laws which recognize and give adequate protection to inventions made by the nationals of the other States parties to this Convention.

#### Article 28

*Air navigation facilities and standard systems*

Each contracting State undertakes, so far as it may find practicable, to:

- a) Provide, in its territory, airports, radio services, meteorological services and other air navigation facilities to facilitate international air navigation, in accordance with the standards and practices recommended or established from time to time, pursuant to this Convention;
- b) Adopt and put into operation the appropriate standard systems of communications procedure, codes, markings, signals, lighting and other operational practices and rules which may be recommended or established from time to time, pursuant to this Convention;

- c) Collaborate in international measures to secure the publication of aeronautical maps and charts in accordance with standards which may be recommended or established from time to time, pursuant to this Convention.

#### CHAPTER V

CONDITIONS TO BE FULFILLED  
WITH RESPECT TO AIRCRAFT

#### Article 29

*Documents carried in aircraft*

Every aircraft of a contracting State, engaged in international navigation, shall carry the following documents

in conformity with the conditions prescribed in this Convention:

- a) Its certificate of registration;
- b) Its certificate of airworthiness;
- c) The appropriate licenses for each member of the crew;
- d) Its journey log book;
- e) If it is equipped with radio apparatus, the aircraft radio station license;
- f) If it carries passengers, a list of their names and places of embarkation and destination;
- g) If it carries cargo, a manifest and detailed declarations of the cargo.

#### Article 30

*Aircraft radio equipment*

- a) Aircraft of each contracting State may, in or over the territory of other contracting States, carry radio transmitting apparatus only if a license to install and operate such apparatus has been issued by the appropriate authorities of the State in which the aircraft is registered. The use of radio transmitting apparatus in the territory of the contracting State whose territory is flown over shall be in accordance with the regulations prescribed by that State.

- b) Radio transmitting apparatus may be used only by members of the flight crew who are provided with a special license for the purpose, issued by the appropriate authorities of the State in which the aircraft is registered.

#### Article 31

*Certificates of airworthiness*

Every aircraft engaged in international navigation shall be provided with a certificate of airworthiness issued or rendered valid by the State in which it is registered.

#### Article 32

*Licenses of personnel*

- a) The pilot of every aircraft and the other members of the operating crew of every aircraft engaged in international navigation shall be provided with certificates of competency and licenses issued or rendered valid by the State in which the aircraft is registered.
- b) Each contracting State reserves the right to refuse to recognize, for the purpose of flight above its own territory, certificates of competency and licenses granted to any of its nationals by another contracting State.

#### Article 33

*Recognition of certificates and licenses*

Certificates of airworthiness and certificates of competency and licenses issued or rendered valid by the contracting State in which the aircraft is registered, shall be recognized as valid by the other contracting States, provided that the requirements under which such certificates or licenses were issued or rendered valid are equal to or above the minimum standards which may be established from time to time pursuant to this Convention.

#### Article 34

*Journey log books*

There shall be maintained in respect of every aircraft engaged in international navigation a journey log book in which shall be entered particulars of the aircraft, its crew and of each journey, in such form as may be prescribed from time to time pursuant to this Convention.

#### Article 35

*Cargo restrictions*

a) No munitions of war or implements of war may be carried in or above the territory of a State in aircraft engaged in international navigation, except by permission of such State. Each State shall determine by regulations what constitutes

munitions of war or implements of war for the purposes of this Article, giving due consideration, for the purposes of uniformity, to such recommendations as the International Civil Aviation Organization may from time to time make.

- b) Each contracting State reserves the right, for reasons of public order and safety, to regulate or prohibit the carriage in or above its territory of articles other than those enumerated in paragraph a); provided that no distinction is made in this respect between its national aircraft engaged in international navigation and the aircraft of the other States so engaged; and provided further that no restriction shall be imposed which may interfere with the carriage and use on aircraft of apparatus necessary for the operation or navigation of the aircraft or the safety of the personnel or passengers.

#### Article 36

*Photographic apparatus*

Each contracting State may prohibit or regulate the use of photographic apparatus in aircraft over its territory.

#### CHAPTER VI

INTERNATIONAL STANDARDS AND  
RECOMMENDED PRACTICES

#### Article 37

*Adoption of international standards and procedures*

Each contracting State undertakes to collaborate in securing the highest practicable degree of uniformity in regulations, standards, procedures, and organization in relation to aircraft, personnel, airways and auxiliary services in all matters in which such uniformity will facilitate and improve air navigation.

To this end the International Civil Aviation Organization shall adopt and amend from time to time, as may be necessary,

international standards and recommended practices and procedures dealing with:

- a) Communications systems and air navigation aids, including ground marking;
- b) Characteristics of airports and landing areas;
- c) Rules of the air and air traffic control practices;
- d) Licensing of operating and mechanical personnel;
- e) Airworthiness of aircraft;
- f) Registration and identification of aircraft;
- g) Collection and exchange of meteorological information;
- h) Log books;
- i) Aeronautical maps and charts;
- j) Customs and immigration procedures;
- k) Aircraft in distress and investigation of accidents;

and such other matters concerned with the safety, regularity, and efficiency of air navigation as may from time to time appear appropriate.

#### Article 38

*Departures from international standards and procedures*

Any State which finds it impracticable to comply in all respects with any such international standard or procedure, or to bring its own regulations or practices into full accord with any international standard or procedure after amendment of the latter, or which deems it necessary to adopt regulations or practices differing in any particular respect from those established by an international standard, shall give immediate notification to the International Civil Aviation Organization of the differences between its own practice and that established by the international standard. In the case of amendments to international standards, any State which does not make the appropriate amendments to its own regulations or practices shall give notice to the Council within sixty days of the adoption of the amendment to the international standard, or

indicate the action which it proposes to take. In any such case, the Council shall make immediate notification to all other States of the difference which exists between one or more features of an international standard and the corresponding national practice of that State.

#### Article 39

*Endorsement of certificates and licenses*

- a) Any aircraft or part thereof with respect to which there exists an international standard of airworthiness or performance, and which failed in any respect to satisfy that standard at the time of its certification, shall have endorsed on or attached to its airworthiness certificate a complete enumeration of the details in respect of which it so failed.
- b) Any person holding a license who does not satisfy in full the conditions laid down in the international standard relating to the class of license or certificate which he holds shall have endorsed on or attached to his license a complete enumeration of the particulars in which he does not satisfy such conditions.

#### Article 40

*Validity of endorsed certificates and licenses*

No aircraft or personnel having certificates or licenses so endorsed shall participate in international navigation, except with the permission of the State or States whose territory is entered. The registration or use of any such aircraft, or of any certificated aircraft part, in any State other than that in which it was originally certificated shall be at the discretion of the State into which the aircraft or part is imported.

#### Article 41

*Recognition of existing standards of airworthiness*

The provisions of this Chapter shall not apply to aircraft and aircraft equipment of types of which the prototype is submitted

to the appropriate national authorities for certification prior to a date three years after the date of adoption of an international standard of airworthiness for such equipment.

#### Article 42

*Recognition of existing standards of competency of personnel*

The provisions of this Chapter shall not apply to personnel whose licenses are originally issued prior to a date one year after initial adoption of an international standard of qualification for such personnel; but they shall in any case apply to all personnel whose licenses remain valid five years after the date of adoption of such standard.

#### Article 43

*Name and composition*

An organization to be named the International Civil Aviation Organization is formed by the Convention. It is made up of an Assembly, a Council, and such other bodies as may be necessary.

#### Article 44

*Objectives*

The aims and objectives of the Organization are to develop the principles and techniques of international air navigation and to foster the planning and development of international air transport so as to:

- a) Insure the safe and orderly growth of international civil aviation throughout the world;
- b) Encourage the arts of aircraft design and operation for peaceful purposes;
- c) Encourage the development of airways, airports, and air navigation facilities for international civil aviation;
- d) Meet the needs of the peoples of the world for safe, regular, efficient and economical air transport;
- e) Prevent economic waste caused by unreasonable competition;
- f) Insure that the rights of contracting States are fully respected and that every contracting State has a fair opportunity to operate international airlines;

## PART II THE INTERNATIONAL CIVIL AVIATION ORGANIZATION

### CHAPTER VII

#### THE ORGANIZATION

#### Article 47

##### Legal capacity

The Organization shall enjoy in the territory of each contracting State such legal capacity as may be necessary for the performance of its functions. Full juridical personality shall be granted wherever compatible with the constitution and laws of the State concerned.

h) Delegate to the Council the powers and authority necessary or desirable for the discharge of the duties of the Organization and revoke or modify the delegations of authority at any time;

i) Carry out the appropriate provisions of Chapter XIII;

j) Consider proposals for the modification or amendment of the provisions of this Convention and, if it approves of the proposals, recommend them to the contracting States in accordance with the provisions of Chapter XXI;

#### Article 45\*

g) Avoid discrimination between contracting States;

h) Promote safety of flight in international air navigation;

i) Promote generally the development of all aspects of international civil aeronautics.

#### CHAPTER VIII

##### Permanent seat

The permanent seat of the Organization shall be at such place as shall be determined at the final meeting of the Interim Assembly of the Provisional International Civil Aviation Organization set up by the Interim Agreement on International Civil Aviation signed at Chicago on December 7, 1944. The seat may be temporarily transferred elsewhere by decision of the Council, and otherwise than temporarily by decision of the Assembly, such decision to be taken by the number of votes specified by the Assembly. The number of votes so specified will not be less than three-fifths of the total number of contracting States.

##### THE ASSEMBLY

#### Article 48

##### Meetings of Assembly and voting

a) The Assembly shall meet not less than once in three years and shall be convened by the Council at a suitable time and place. An extraordinary meeting of the Assembly may be held at any time upon the call of the Council or at the request of not less than one-fifth of the total number of contracting States addressed to the Secretary General.\*

b) All contracting States shall have an equal right to be represented at the meetings of the Assembly and each

#### Article 46

##### First meeting of Assembly

The first meeting of the Assembly shall be summoned by the Interim Council of the above-mentioned Provisional Organization as soon as the Convention has come into force, to meet at a time and place to be decided by the Interim Council.

\* This is the text of the Article as amended by the 14th Session of the Assembly on 15 September 1962; it entered into force on 11 September 1975. The previous text of this Article as amended by the 8th Session of the Assembly on 14 June 1954 and which entered into force on 12 December 1956 read as follows:

"a) The Assembly shall meet not less than once in three years and shall be convened by the Council at a suitable time and place. Extraordinary meetings of the Assembly may be held at any time upon the call of the Council or at the request of any ten contracting States addressed to the Secretary General."

The original unamended text of the Convention read as follows:

"a) The Assembly shall meet annually and shall be convened by the Council at a suitable time and place. Extraordinary meetings of the Assembly may be held at any time upon the call of the Council or at the request of any ten contracting States addressed to the Secretary General."

contracting State shall be entitled to one vote. Delegates representing contracting States may be assisted by technical advisers who may participate in the meetings but shall have no vote.

c) A majority of the contracting States is required to constitute a quorum for the meetings of the Assembly. Unless otherwise provided in this Convention, decisions of the Assembly shall be taken by a majority of the votes cast.

#### Article 49

##### Powers and duties of Assembly

The powers and duties of the Assembly shall be to:

a) Elect at each meeting its President and other officers;

b) Elect the contracting States to be represented on the Council, in accordance with the provisions of Chapter IX;

c) Examine and take appropriate action on the reports of the Council and decide on any matter referred to it by the Council;

d) Determine its own rules of procedure and establish such subsidiary commissions as it may consider to be necessary or desirable;

e) Vote annual budgets and determine the financial arrangements of the Organization, in accordance with the provisions of Chapter XII.\*

f) Review expenditures and approve the accounts of the Organization;

g) Refer, at its discretion, to the Council, to subsidiary commissions, or to any other body any matter within its sphere of action;

\* This is the text of the Article as amended by the 8th Session of the Assembly on 14 June 1954; it entered into force on 12 December 1956. The original text read as follows:

"e) Vote an annual budget and determine the financial arrangements of the Organization, in accordance with the provisions of Chapter XII."

k) Deal with any matter within the sphere of action of the Organization not specifically assigned to the Council.

#### CHAPTER IX

##### THE COUNCIL

#### Article 50

##### Composition and election of Council

a) The Council shall be a permanent body responsible to the Assembly. It shall be composed of thirty-six contracting States elected by the Assembly. An election shall be held at the first meeting of the Assembly and thereafter every three years, and the members of the Council so elected shall hold office until the next following election.\*

b) In electing the members of the Council, the Assembly shall give adequate representation to 1) the States of chief importance in air transport; 2) the States not otherwise included which make the largest contribution to the provision of facilities for international civil air navigation; and 3) the States not otherwise included whose designation will insure that all

\* This is the text of the Article as amended by the 28th (Extraordinary) Session of the Assembly on 26 October 1990; it entered into force on 28 November 2002. The original text of the Convention provided for twenty-one members of the Council. That text was subsequently amended by the 13th (Extraordinary) Session of the Assembly on 21 June 1961; this amendment entered into force on 17 July 1962 and provided for twenty-seven members of the Council. A second amendment was adopted by the 17th (A) (Extraordinary) Session of the Assembly on 12 March 1971; this amendment entered into force on 16 January 1973 and provided for thirty members of the Council. A third amendment was adopted by the 21st Session of the Assembly on 16 October 1974; this amendment entered into force on 15 February 1980 and provided for thirty-three members of the Council.

the major geographic areas of the world are represented on the Council. Any vacancy on the Council shall be filled by the Assembly as soon as possible; any contracting State so elected to the Council shall hold office for the unexpired portion of its predecessor's term of office.

c) No representative of a contracting State on the Council shall be actively associated with the operation of an international air service or financially interested in such a service.

#### Article 51

##### *President of Council*

The Council shall elect its President for a term of three years. He may be reelected. He shall have no vote. The Council shall elect from among its members one or more Vice Presidents who shall retain their right to vote when serving as acting President. The President need not be selected from among the representatives of the members of the Council but, if a representative is elected, his seat shall be deemed vacant and it shall be filled by the State which he represented. The duties of the President shall be to:

- a) Convene meetings of the Council, the Air Transport Committee, and the Air Navigation Commission;
- b) Serve as representative of the Council; and
- c) Carry out on behalf of the Council the functions which the Council assigns to him.

#### Article 52

##### *Voting in Council*

Decisions by the Council shall require approval by a majority of its members. The Council may delegate authority with respect to any particular matter to a committee of its members. Decisions of any committee of the Council may be appealed to the Council by any interested contracting State.

#### Article 53

##### *Participation without a vote*

Any contracting State may participate, without a vote, in the consideration by the Council and by its committees and commissions of any question which especially affects its

interests. No member of the Council shall vote in the consideration by the Council of a dispute to which it is a party.

#### Article 54

##### *Mandatory functions of Council*

The Council shall:

- a) Submit annual reports to the Assembly;
- b) Carry out the directions of the Assembly and discharge the duties and obligations which are laid on it by this Convention;
- c) Determine its organization and rules of procedure;
- d) Appoint and define the duties of an Air Transport Committee, which shall be chosen from among the representatives of the members of the Council, and which shall be responsible to it;
- e) Establish an Air Navigation Commission, in accordance with the provisions of Chapter X;
- f) Administer the finances of the Organization in accordance with the provisions of Chapters XII and XV;
- g) Determine the emoluments of the President of the Council;
- h) Appoint a chief executive officer who shall be called the Secretary General, and make provision for the appointment of such other personnel as may be necessary, in accordance with the provisions of Chapter XI;
- i) Request, collect, examine and publish information relating to the advancement of air navigation and the operation of international air services, including information about the costs of operation and particulars of subsidies paid to airlines from public funds;
- j) Report to contracting States any infraction of this Convention, as well as any failure to carry out recommendations or determinations of the Council;
- k) Report to the Assembly any infraction of this Convention where a contracting State has failed to take appropriate action within a reasonable time after notice of the infraction;
- l) Adopt, in accordance with the provisions of Chapter VI of this Convention, international standards and

recommended practices; for convenience, designate them as Annexes to this Convention; and notify all contracting States of the action taken;

m) Consider recommendations of the Air Navigation Commission for amendment of the Annexes and take action in accordance with the provisions of Chapter XX;

n) Consider any matter relating to the Convention which any contracting State refers to it.

#### Article 55

##### *Permissive functions of Council*

The Council may:

a) Where appropriate and as experience may show to be desirable, create subordinate air transport commissions on a regional or other basis and define groups of states or airlines with or through which it may deal to facilitate the carrying out of the aims of this Convention;

b) Delegate to the Air Navigation Commission duties additional to those set forth in the Convention and revoke or modify such delegations of authority at any time;

c) Conduct research into all aspects of air transport and air navigation which are of international importance, communicate the results of its research to the contracting States, and facilitate the exchange of information between contracting States on air transport and air navigation matters;

d) Study any matters affecting the organization and operation of international air transport, including the international ownership and operation of international air services on trunk routes, and submit to the Assembly plans in relation thereto;

e) Investigate, at the request of any contracting State, any situation which may appear to present avoidable obstacles to the development of international air navigation; and, after such investigation, issue such reports as may appear to it desirable.

## CHAPTER X

### THE AIR NAVIGATION COMMISSION

#### Article 56

##### *Nomination and appointment of Commission*

The Air Navigation Commission shall be composed of nineteen members appointed by the Council from among persons nominated by contracting States. These persons shall have suitable qualifications and experience in the science and practice of aeronautics. The Council shall request all contracting States to submit nominations. The President of the Air Navigation Commission shall be appointed by the Council.\*

#### Article 57

##### *Duties of Commission*

The Air Navigation Commission shall:

a) Consider, and recommend to the Council for adoption, modifications of the Annexes to this Convention;

b) Establish technical subcommittees on which any contracting State may be represented, if it so desires;

c) Advise the Council concerning the collection and communication to the contracting States of all information which it considers necessary and useful for the advancement of air navigation.

\* This is the text of the Article as amended by the 27th Session of the Assembly on 6 October 1989; it entered into force on 18 April 2005. The original text of the Convention provided for twelve members of the Air Navigation Commission. That text was subsequently amended by the 18th Session of the Assembly on 7 July 1971; this amendment entered into force on 19 December 1974 and provided for fifteen members of the Air Navigation Commission.

**CHAPTER XI**

**PERSONNEL**

**Article 58**

*Appointment of personnel*

Subject to any rules laid down by the Assembly and to the provisions of this Convention, the Council shall determine the method of appointment and of termination of appointment, the training, and the salaries, allowances, and conditions of service of the Secretary General and other personnel of the Organization, and may employ or make use of the services of nationals of any contracting State.

**Article 59**

*International character of personnel*

The President of the Council, the Secretary General, and other personnel shall not seek or receive instructions in regard to the discharge of their responsibilities from any authority external to the Organization. Each contracting State undertakes fully to respect the international character of the responsibilities of the personnel and not to seek to influence any of its nationals in the discharge of their responsibilities.

**Article 60**

*Immunities and privileges of personnel*

Each contracting State undertakes, so far as possible under its constitutional procedure, to accord to the President of the Council, the Secretary General, and the other personnel of the Organization, the immunities and privileges which are accorded to corresponding personnel of other public international organizations. If a general international agreement on the immunities and privileges of international civil servants is arrived at, the immunities and privileges accorded to the President, the Secretary General, and the other personnel of the Organization shall be the immunities and privileges accorded under that general international agreement.

**CHAPTER XII**

**FINANCE**

**Article 61\***

*Budget and apportionment of expenses*

The Council shall submit to the Assembly annual budgets, annual statements of accounts and estimates of all receipts and expenditures. The Assembly shall vote the budgets with whatever modification it sees fit to prescribe, and, with the exception of assessments under Chapter XV to States consenting thereto, shall apportion the expenses of the Organization among the contracting States on the basis which it shall from time to time determine.

**Article 62**

*Suspension of voting power*

The Assembly may suspend the voting power in the Assembly and in the Council of any contracting State that fails to discharge within a reasonable period its financial obligations to the Organization.

**Article 63**

*Expenses of delegations and other representatives*

Each contracting State shall bear the expenses of its own delegation to the Assembly and the remuneration, travel, and other expenses of any person whom it appoints to serve on the Council, and of its nominees or representatives on any subsidiary committees or commissions of the Organization.

\* This is the text of the Article as amended by the 8th Session of the Assembly on 14 June 1954; it entered into force on 12 December 1956. The original text read as follows:

"The Council shall submit to the Assembly an annual budget, annual statements of accounts and estimates of all receipts and expenditures. The Assembly shall vote the budget with whatever modification it sees fit to prescribe, and, with the exception of assessments under Chapter XV to States consenting thereto, shall apportion the expenses of the Organization among the contracting States on the basis which it shall from time to time determine."

**CHAPTER XIII**

**OTHER INTERNATIONAL ARRANGEMENTS**

**Article 64**

*Security arrangements*

The Organization may, with respect to air matters within its competence directly affecting world security, by vote of the Assembly enter into appropriate arrangements with any general organization set up by the nations of the world to preserve peace.

**Article 65**

*Arrangements with other international bodies*

The Council, on behalf of the Organization, may enter into agreements with other international bodies for the maintenance of common services and for common arrangements concerning personnel and, with the approval of the Assembly, may enter into such other arrangements as may facilitate the work of the Organization.

**Article 66**

*Functions relating to other agreements*

a) The Organization shall also carry out the functions placed upon it by the International Air Services Transit Agreement and by the International Air Transport Agreement drawn up at Chicago on December 7, 1944, in accordance with the terms and conditions therein set forth.

b) Members of the Assembly and the Council who have not accepted the International Air Services Transit Agreement of the International Air Transport Agreement drawn up at Chicago on December 7, 1944 shall not have the right to vote on any questions referred to the Assembly or Council under the provisions of the relevant Agreement.

**PART III**

**INTERNATIONAL AIR TRANSPORT**

**CHAPTER XIV**

**INFORMATION AND REPORTS**

**Article 67**

*File reports with Council*

Each contracting State undertakes that its international airlines shall, in accordance with requirements laid-down by the Council, file with the Council traffic reports, cost statistics and financial statements showing among other things all receipts and the sources thereof.

**CHAPTER XV**

**AIRPORTS AND OTHER AIR NAVIGATION FACILITIES**

**Article 68**

*Designation of routes and airports*

Each contracting State may, subject to the provisions of this Convention, designate the route to be followed within its territory by any international air service and the airports which any such service may use.

**Article 69**

*Improvement of air navigation facilities*

If the Council is of the opinion that the airports or other air navigation facilities, including radio and meteorological services, of a contracting State are not reasonably adequate for the safe, regular, efficient, and economical operation of international air services, present or contemplated, the Council shall consult with the State directly concerned, and other States

**PART IV**  
**FINAL PROVISIONS**

**CHAPTER XVII**

**OTHER AERONAUTICAL AGREEMENTS  
AND ARRANGEMENTS**

**Article 76**

*Return of funds*

Funds obtained by the Council through reimbursement under Article 75 and from receipts of interest and amortization payments under Article 74 shall, in the case of advances originally financed by States under Article 73, be returned to the States which were originally assessed in the proportion of their assessments, as determined by the Council.

**Article 73**

*Expenditure and assessment of funds*

Within the limit of the funds which may be made available to it by the Assembly under Chapter XII, the Council may make current expenditures for the purposes of this Chapter from the general funds of the Organization. The Council shall assess the capital funds required for the purposes of this Chapter in previously agreed proportions over a reasonable period of time to the contracting States consenting thereto whose airlines use the facilities. The Council may also assess to States that consent any working funds that are required.

**Article 70**

*Financing of air navigation facilities*

A contracting State, in the circumstances arising under the provisions of Article 69, may conclude an arrangement with the Council for giving effect to such recommendations. The State may elect to bear all of the costs involved in any such arrangement. If the State does not so elect, the Council may agree, at the request of the State, to provide for all or a portion of the costs.

**Article 71**

*Provision and maintenance of facilities by Council*

If a contracting State so requests, the Council may agree to provide, man, maintain, and administer any or all of the airports and other air navigation facilities including radio and meteorological services, required in its territory for the safe, regular, efficient and economical operation of the international air services of the other contracting States, and may specify just and reasonable charges for the use of the facilities provided.

**Article 72**

*Acquisition or use of land*

Where land is needed for facilities financed in whole or in part by the Council at the request of a contracting State, that State shall either provide the land itself, retaining title if it wishes, or facilitate the use of the land by the Council on just and reasonable terms and in accordance with the laws of the State concerned.

**Article 74**

*Technical assistance and utilization of revenues*

When the Council, at the request of a contracting State, advances funds or provides airports or other facilities in whole or in part, the arrangement may provide, with the consent of that State, for technical assistance in the supervision and operation of the airports and other facilities, and for the payment, from the revenues derived from the operation of the airports and other facilities, of the operating expenses of the airports and the other facilities, and of interest and amortization charges.

**Article 75**

*Taking over of facilities from Council*

A contracting State may at any time discharge any obligation into which it has entered under Article 70, and take over airports and other facilities which the Council has provided in its territory pursuant to the provisions of Articles 71 and 72, by paying to the Council an amount which in the opinion of the Council is reasonable in the circumstances. If the State considers that the amount fixed by the Council is unreasonable it may appeal to the Assembly against the decision of the Council and the Assembly may confirm or amend the decision of the Council.

**CHAPTER XVI**

**JOINT OPERATING ORGANIZATIONS  
AND POOLED SERVICES**

**Article 77**

*Joint operating organizations permitted*

Nothing in this Convention shall prevent two or more contracting States from constituting joint air transport operating organizations or international operating agencies and from pooling their air services on any routes or in any regions, but such organizations or agencies and such pooled services shall be subject to all the provisions of this Convention, including those relating to the registration of agreements with the Council. The Council shall determine in what manner the provisions of this Convention relating to nationality of aircraft shall apply to aircraft operated by international operating agencies.

**Article 78**

*Function of Council*

The Council may suggest to contracting States concerned that they form joint organizations to operate air services on any routes or in any regions.

**Article 79**

*Participation in operating organizations*

A State may participate in joint operating organizations or in pooling arrangements, either through its government or through an airline company or companies designated by its government. The companies may, at the sole discretion of the State concerned, be state-owned or partly state-owned or privately owned.

**Article 80**

*Paris and Habana Conventions*

Each contracting State undertakes, immediately upon the coming into force of this Convention, to give notice of denunciation of the Convention relating to the Regulation of Aerial Navigation signed at Paris on October 13, 1919 or the Convention on Commercial Aviation signed at Habana on February 20, 1928, if it is a party to either. As between contracting States, this Convention supersedes the Conventions of Paris and Habana previously referred to.

**Article 81**

*Registration of existing agreements*

All aeronautical agreements which are in existence on the coming into force of this Convention, and which are between a contracting State and any other State or between an airline of a contracting State and any other State or the airline of any other State, shall be forthwith registered with the Council.

**Article 82**

*Abrogation of inconsistent arrangements*

The contracting States accept this Convention as abrogating all obligations and understandings between them which are inconsistent with its terms, and undertake not to enter into any such obligations and understandings. A contracting State which, before becoming a member of the Organization has undertaken any obligations toward a non-contracting State or a national of a contracting State or of a non-contracting State inconsistent with the terms of this Convention, shall take immediate steps to procure its release from the obligations. If an airline of any contracting State has entered into any such inconsistent obligations, the State of which it is a national shall

## CHAPTER XIX

### WAR

#### Article 89

##### *War and emergency conditions*

In case of war, the provisions of this Convention shall not affect the freedom of action of any of the contracting States affected, whether as belligerents or as neutrals. The same principle shall apply in the case of any contracting State which declares a state of national emergency and notifies the fact to the Council.

## CHAPTER XX

### ANNEXES

#### Article 90

##### *Adoption and amendment of Annexes*

a) The adoption by the Council of the Annexes described in Article 54, subparagraph 1), shall require the vote of two-thirds of the Council at a meeting called for that purpose and shall then be submitted by the Council to each contracting State. Any such Annex or any amendment of an Annex shall become effective within three months after its submission to the contracting States or at the end of such longer period of time as the Council may prescribe, unless in the meantime a majority of the contracting States register their disapproval with the Council.

b) The Council shall immediately notify all contracting States of the coming into force of any Annex or amendment thereto.

## CHAPTER XXI

### RATIFICATIONS, ADHERENCES, AMENDMENTS, AND DENUNCIATIONS

#### Article 91

##### *Ratification of Convention*

a) This Convention shall be subject to ratification by the signatory States. The instruments of ratification shall be deposited in the archives of the Government of the United

established under this or the preceding Article shall settle its own procedure and give its decisions by majority vote, provided that the Council may determine procedural questions in the event of any delay which in the opinion of the Council is excessive.

#### Article 86

##### *Appeals*

Unless the Council decides otherwise any decision by the Council on whether an international airline is operating in conformity with the provisions of this Convention shall remain in effect unless reversed on appeal. On any other matter, decisions of the Council shall, if appealed from, be suspended until the appeal is decided. The decisions of the Permanent Court of International Justice and of an arbitral tribunal shall be final and binding.

#### Article 87

##### *Penalty for non-conformity of airline*

Each contracting State undertakes not to allow the operation of an airline of a contracting State through the airspace above its territory if the Council has decided that the airline concerned is not conforming to a final decision rendered in accordance with the previous Article.

#### Article 88

##### *Penalty for non-conformity by State*

The Assembly shall suspend the voting power in the Assembly and in the Council of any contracting State that is found in default under the provisions of this Chapter.

and made public pursuant to Article 83 or the existence and scope of the agreement have been directly communicated to the authorities of the other contracting State or States concerned by a State party to the agreement.

c) The provisions of paragraphs a) and b) above shall also be applicable to cases covered by Article 77.

## CHAPTER XVIII

### DISPUTES AND DEFAULT

#### Article 84

##### *Settlement of disputes*

If any disagreement between two or more contracting States relating to the interpretation or application of this Convention and its Annexes cannot be settled by negotiation, it shall, on the application of any State concerned in the disagreement, be decided by the Council. No member of the Council shall vote in the consideration by the Council of any dispute to which it is a party. Any contracting State may, subject to Article 85, appeal from the decision of the Council to an ad hoc arbitral tribunal agreed upon with the other parties to the dispute or to the Permanent Court of International Justice. Any such appeal shall be notified to the Council within sixty days of receipt of notification of the decision of the Council.

#### Article 85

##### *Arbitration procedure*

If any contracting State party to a dispute in which the decision of the Council is under appeal has not accepted the Statute of the Permanent Court of International Justice and the contracting States parties to the dispute cannot agree on the choice of the arbitral tribunal, each of the contracting States parties to the dispute shall name a single arbitrator who shall name an umpire. If either contracting State party to the dispute fails to name an arbitrator within a period of three months from the date of the appeal, an arbitrator shall be named on behalf of that State by the President of the Council from a list of qualified and available persons maintained by the Council. If, within thirty days, the arbitrators cannot agree on an umpire, the President of the Council shall designate an umpire from the list previously referred to. The arbitrators and the umpire shall then jointly constitute an arbitral tribunal. Any arbitral tribunal

use its best efforts to secure their termination forthwith and shall in any event cause them to be terminated as soon as such action can lawfully be taken after the coming into force of this Convention.

#### Article 83

##### *Registration of new arrangements*

Subject to the provisions of the preceding Article, any contracting State may make arrangements not inconsistent with the provisions of this Convention. Any such arrangement shall be forthwith registered with the Council, which shall make it public as soon as possible.

#### Article 83 bis\*

##### *Transfer of certain functions and duties*

a) Notwithstanding the provisions of Articles 12, 30, 31 and 32 a), when an aircraft registered in a contracting State is operated pursuant to an agreement for the lease, charter or interchange of the aircraft or any similar arrangement by an operator who has his principal place of business or, if he has no such place of business, his permanent residence in another contracting State, the State of registry may, by agreement with such other State, transfer to it all or part of its functions and duties as State of registry in respect of that aircraft under Articles 12, 30, 31 and 32 a). The State of registry shall be relieved of responsibility in respect of the functions and duties transferred.

b) The transfer shall not have effect in respect of other contracting States before either the agreement between States in which it is embodied has been registered with the Council

\* The 23rd Session of the Assembly on 6 October 1980 amended the Chicago Convention by introducing Article 83 bis. This amendment came into force on 20 June 1997.

## SIGNATURE OF CONVENTION

States of America, which shall give notice of the date of the deposit to each of the signatory and adhering States.

b) As soon as this Convention has been ratified or adhered to by twenty-six States it shall come into force between them on the thirtieth day after deposit of the twenty-sixth instrument. It shall come into force for each State ratifying thereafter on the thirtieth day after the deposit of its instrument of ratification.

c) It shall be the duty of the Government of the United States of America to notify the government of each of the signatory and adhering States of the date on which this Convention comes into force.

### Article 92

#### *Adherence to Convention*

a) This Convention shall be open for adherence by members of the United Nations and States associated with them, and States which remained neutral during the present world conflict.

b) Adherence shall be effected by a notification addressed to the Government of the United States of America and shall take effect as from the thirtieth day from the receipt of the notification by the Government of the United States of America, which shall notify all the contracting States.

### Article 93

#### *Admission of other States*

States other than those provided for in Articles 91 and 92 a) may, subject to approval by any general international organization set up by the nations of the world to preserve peace, be admitted to participation in this Convention by means of a four-fifths vote of the Assembly and on such conditions as the Assembly may prescribe: provided that in each case the assent of any State invaded or attacked during the present war by the State seeking admission shall be necessary.

### Article 93 bis\*

a) Notwithstanding the provisions of Articles 91, 92 and 93 above:

1) A State whose government the General Assembly of the United Nations has recommended be debarred from membership in international agencies established by or brought into relationship with the United Nations shall automatically cease to be a member of the International Civil Aviation Organization;

2) A State which has been expelled from membership in the United Nations shall automatically cease to be a member of the International Civil Aviation Organization unless the General Assembly of the United Nations attaches to its act of expulsion a recommendation to the contrary.

b) A State which ceases to be a member of the International Civil Aviation Organization as a result of the provisions of paragraph a) above may, after approval by the General Assembly of the United Nations, be readmitted to the International Civil Aviation Organization upon application and upon approval by a majority of the Council.

c) Members of the Organization which are suspended from the exercise of the rights and privileges of membership in the United Nations shall, upon the request of the latter, be suspended from the rights and privileges of membership in this Organization.

### Article 94

#### *Amendment of Convention*

a) Any proposed amendment to this Convention must be approved by a two-thirds vote of the Assembly and shall then come into force in respect of States which have ratified such amendment when ratified by the number of contracting States specified by the Assembly. The number so specified shall not be less than two-thirds of the total number of contracting States.

\* The 1st Session of the Assembly on 27 May 1947 amended the Chicago Convention by introducing Article 93 bis. This amendment came into force on 20 March 1961.

b) If in its opinion the amendment is of such a nature as to justify this course, the Assembly in its resolution recommending adoption may provide that any State which has not ratified within a specified period after the amendment has come into force shall thereupon cease to be a member of the Organization and a party to the Convention.

### Article 95

#### *Denunciation of Convention*

a) Any contracting State may give notice of denunciation of this Convention three years after its coming into effect by notification addressed to the Government of the United States of America, which shall at once inform each of the contracting States.

b) Denunciation shall take effect one year from the date of the receipt of the notification and shall operate only as regards the State effecting the denunciation.

## CHAPTER XXII

### DEFINITIONS

### Article 96

For the purpose of this Convention the expression:

a) "Air service" means any scheduled air service performed by aircraft for the public transport of passengers, mail or cargo.

b) "International air service" means an air service which passes through the air space over the territory of more than one State.

c) "Airline" means any air transport enterprise offering or operating an international air service.

d) "Stop for non-traffic purposes" means a landing for any purpose other than taking on or discharging passengers, cargo or mail.

IN WITNESS WHEREOF, the undersigned plenipotentiaries, having been duly authorized, sign this Convention on behalf of their respective governments on the dates appearing opposite their signatures.

DONE at Chicago the seventh day of December 1944 in the English language. The texts of this Convention drawn up in the English, French, Russian and Spanish languages are of equal authenticity. These texts shall be deposited in the archives of the Government of the United States of America, and certified copies shall be transmitted by that Government to the Governments of all the States which may sign or adhere to this Convention. This Convention shall be open for signature at Washington, D.C.\*

\* This is the text of the final paragraph as amended by the 22nd Session of the Assembly on 30 September 1977; it entered into force on 17 August 1999. The original text read as follows:

"DONE at Chicago the seventh day of December 1944 in the English language. A text drawn up in the English, French and Spanish languages, each of which shall be of equal authenticity, shall be open for signature at Washington, D.C. Both texts shall be deposited in the archives of the Government of the United States of America, and certified copies shall be transmitted by that Government to the governments of all the States which may sign or adhere to this Convention."

**PROTOCOL<sup>1</sup>**  
**ON THE AUTHENTIC TRILINGUAL TEXT OF**  
**THE CONVENTION ON**  
**INTERNATIONAL CIVIL AVIATION**  
**(CHICAGO, 1944)**

**Signed at Buenos Aires on 24 September 1968**

**THE UNDERSIGNED GOVERNMENTS**

CONSIDERING that the last paragraph of the Convention on International Civil Aviation, hereinafter called "the Convention", provides that a text of the Convention, drawn up in the English, French and Spanish languages, each of which shall be of equal authenticity, shall be open for signature;

CONSIDERING that the Convention was opened for signature, at Chicago, on the seventh day of December, 1944, in a text in the English language;

CONSIDERING, accordingly, that it is appropriate to make the necessary provision for the text to exist in three languages as contemplated in the Convention;

CONSIDERING that in making such provision, it should be taken into account that there exist amendments to the Convention in the English, French and Spanish languages, and that the text of the Convention in the French and Spanish languages should not incorporate those amendments because, in accordance with Article 94 a) of the Convention, each such amendment can come into force only in respect of any State which has ratified it;

HAVE AGREED as follows:

**Article I<sup>2</sup>**

The text of the Convention in the French and Spanish languages annexed to this Protocol, together with the text of the Convention in the English language, constitutes the text equally authentic in the three languages as specifically referred to in the last paragraph of the Convention.

1. Came into force on 24 October 1968.
2. The text of the Convention in the French and Spanish languages mentioned in this Article will be found in the second and third columns at pages 1 to 44 of this document, subject to what is stated in the second paragraph of the Foreword at page (ii).

**Article V**

Any future adherence of a State to the Convention shall be deemed to be acceptance of this Protocol.

**Article VI**

As soon as this Protocol comes into force, it shall be registered with the United Nations and with the International Civil Aviation Organization by the Government of the United States of America.

**Article VII**

- 1) This Protocol shall remain in force so long as the Convention is in force.
- 2) This Protocol shall cease to be in force for a State only when that State ceases to be a party to the Convention.

**Article VIII**

The Government of the United States of America shall give notice to all States members of the International Civil Aviation Organization and to the Organization itself:

- a) of any signature of this Protocol and the date thereof, with an indication whether the signature is with or without reservation as to acceptance;
- b) of the deposit of any instrument of acceptance and the date thereof;
- c) of the date on which this Protocol comes into force in accordance with the provisions of Article IV, paragraph 1).

**Article IX**

This Protocol, drawn up in the English, French and Spanish languages, each text being equally authentic, shall be deposited in the archives of the Government of the United States of America, which shall transmit duly certified copies thereof to the Government of the States members of the International Civil Aviation Organization.

IN WITNESS WHEREOF, the undersigned Plenipotentiaries, duly authorized, have signed this Protocol.

DONE at Buenos Aires this twenty-fourth day of September, one thousand nine hundred and sixty-eight.

**Article II**

If a State party to this Protocol has ratified or in the future ratifies any amendment made to the Convention in accordance with Article 94 a) thereof, then the text of such amendment in the English, French and Spanish languages shall be deemed to refer to the text, equally authentic in the three languages, which results from this Protocol.

**Article III**

1) The States members of the International Civil Aviation Organization may become parties to this Protocol either by:

- a) signature without reservation as to acceptance, or
- b) signature with reservation as to acceptance, or followed by acceptance, or
- c) acceptance.

2) This Protocol shall remain open for signature at Buenos Aires until the twenty-seventh day of September 1968 and thereafter at Washington, D.C.

3) Acceptance shall be effected by the deposit of an instrument of acceptance with the Government of the United States of America.

4) Adherence to or ratification or approval of this Protocol shall be deemed to be acceptance thereof.

**Article IV**

1) This Protocol shall come into force on the thirtieth day after twelve States shall, in accordance with the provisions of Article III, have signed it without reservation as to acceptance or accepted it.

2) As regards any State which shall subsequently become a party to this Protocol, in accordance with Article III, the Protocol shall come into force on the date of its signature without reservation as to acceptance or of its acceptance.



**Convention on the Privileges and Immunities of the  
United Nations, 1946**

No. 4. CONVENTION<sup>1</sup> ON THE PRIVILEGES AND IMMUNITIES OF THE UNITED NATIONS, ADOPTED BY THE GENERAL ASSEMBLY OF THE UNITED NATIONS ON 13 FEBRUARY 1946

*Whereas* Article 104 of the Charter of the United Nations provides that the Organization shall enjoy in the territory of each of its Members such legal capacity as may be necessary for the exercise of its functions and the fulfilment of its purposes and

*Whereas* Article 105 of the Charter of the United Nations provides that the Organization shall enjoy in the territory of each of its Members such privileges and immunities as are necessary for the fulfilment of its purposes and that representatives of the Members of the United Nations and officials of the Organization shall similarly enjoy such privileges and immunities as are necessary for the independent exercise of their functions in connection with the Organization.

*Consequently* the General Assembly by a Resolution adopted on the 13 February 1946, approved the following Convention and proposed it for accession by each Member of the United Nations.

*Article I*

JURIDICAL PERSONALITY

SECTION 1. The United Nations shall possess juridical personality. It shall have the capacity:

- (a) To contract;
- (b) To acquire and dispose of immovable and movable property;
- (c) To institute legal proceedings.

*Article II*

PROPERTY, FUNDS AND ASSETS

SECTION 2. The United Nations, its property and assets wherever located and by whomsoever held, shall enjoy immunity from every form of

<sup>1</sup> Came into force (see page 263 of this volume) on 17 September 1946 as regards United Kingdom of Great Britain and Northern Ireland by the deposit of the instrument of accession.

legal process except insofar as in any particular case it has expressly waived its immunity shall extend to any particular case it has expressly waived its immunity. It is, however, understood that no waiver of immunity shall extend to any measure of execution.

SECTION 3. The premises of the United Nations shall be inviolable. The property and assets of the United Nations, 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.

SECTION 4. The archives of the United Nations, and in general all documents belonging to it or held by it, shall be inviolable wherever located.

SECTION 5. Without being restricted by financial controls, regulations or moratoria of any kind,

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

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

SECTION 6. In exercising its rights under Section 5 above, the United Nations shall pay due regard to any representations made by the Government of any Member insofar as it is considered that effect can be given to such representations without detriment to the interests of the United Nations.

SECTION 7. The United Nations, its assets, income and other property shall be:

(a) Exempt from all direct taxes; it is understood, however, that the United Nations will not claim exemption from taxes which are, in fact, no more than charges for public utility services;

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

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

SECTION 8. While the United Nations will not, as a general rule, claim exemption from excise duties and from taxes on the sale of movable and immovable property which form part of the price to be paid, nevertheless when the United Nations is making important purchases for official use of property on which such duties and taxes have been charged or are chargeable, Members will, whenever possible, make appropriate administrative arrangements for the remission or return of the amount of duty or tax.

### Article III

#### FACILITIES IN RESPECT OF COMMUNICATIONS

SECTION 9. The United Nations shall enjoy in the territory of each Member for its official communications treatment not less favourable than that accorded by the Government of that Member to any other Government including its diplomatic mission in the matter of priorities, rates and taxes on mails, cables, telegrams, radiograms, telephotos, telephone and other communications; and press rates for information to the press and radio. No censorship shall be applied to the official correspondence and other official communications of the United Nations.

SECTION 10. The United Nations shall have the right to use codes and to despatch and receive its correspondence by courier or in bags, which shall have the same immunities and privileges as diplomatic couriers and bags.

### Article IV

#### THE REPRESENTATIVES OF MEMBERS

SECTION 11. Representatives of Members to the principal and subsidiary organs of the United Nations and to conferences convened by the United Nations, shall, while exercising their functions and during the journey to and from the place of meeting, enjoy the following privileges and immunities:

(a) Immunity from personal arrest or detention and from seizure of their personal baggage, and, in respect of words spoken or written and all acts done by them in their capacity as representatives, immunity from legal process of every kind;

(a) Inviolability for all papers and documents;

(c) The right to use codes and to receive papers or correspondence by courier or in sealed bags;

(d) Exemption in respect of themselves and their spouses from immigration restrictions, aliens registration or national service obligations in the state they are visiting or through which they are passing in the exercise of their functions;

(e) The same facilities in respect of currency or exchange restrictions as are accorded to representatives of foreign governments on temporary official missions;

(f) The same immunities and facilities in respect of their personal baggage as are accorded to diplomatic envoys, and also;

(g) Such other privileges, immunities and facilities not inconsistent with the foregoing as diplomatic envoys enjoy, except that they shall have no right to claim exemption from customs duties on goods imported (otherwise than as part of their personal baggage) or from excise duties or sales taxes.

SECTION 12. In order to secure, for the representatives of Members to the principal and subsidiary organs of the United Nations and to conferences convened by the United Nations, complete freedom of speech and independence in the discharge of their duties, the immunity from legal process in respect of words spoken or written and all acts done by them in discharging their duties shall continue to be accorded, notwithstanding that the persons concerned are no longer the representatives of Members.

SECTION 13. Where the incidence of any form of taxation depends upon residence, periods during which the representatives of Members to the principal and subsidiary organs of the United Nations and to conferences convened by the United Nations are present in a state for the discharge of their duties shall not be considered as periods of residence.

SECTION 14. Privileges and immunities are accorded to the representatives of Members not for the personal benefit of the individuals themselves, but in order to safeguard the independent exercise of their functions in connection with the United Nations. Consequently a Member not only has the right but is under a duty to waive the immunity of its representative in any case where in the opinion of the Member the immunity would impede the course of justice, and it can be waived without prejudice to the purpose for which the immunity is accorded.

SECTION 15. The provisions of Sections 11, 12 and 13 are not applicable as between a representative and the authorities of the state of which he is a national or of which he is or has been the representative.

SECTION 16. In this article the expression "representatives" shall be deemed to include all delegates, deputy delegates, advisers, technical experts and secretaries of delegations.

#### Article V

##### OFFICIALS

SECTION 17. The Secretary-General will specify the categories of officials to which the provisions of this Article and Article VII shall apply. He shall submit these categories to the General Assembly. Thereafter these categories shall be communicated to the Governments of all Members. The names of the officials included in these categories shall from time to time be made known to the Governments of Members.

SECTION 18. Officials of the United Nations shall:

- (a) Be immune from legal process in respect of words spoken or written and all acts performed by them in their official capacity;
- (b) Be exempt from taxation on the salaries and emoluments paid to them by the United Nations;
- (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 the officials of comparable ranks forming part of diplomatic missions to the Government concerned;
- (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 and effects at the time of first taking up their post in the country in question.

SECTION 19. In addition to the immunities and privileges specified in Section 18, the Secretary-General and all Assistant Secretaries-General shall be accorded in respect of themselves, their spouses and minor children, the

privileges and immunities, exemptions and facilities accorded to diplomatic envoys, in accordance with international law.

SECTION 20. Privileges and immunities are granted to officials in the interests of the United Nations and not for the personal benefit of the individuals themselves. The Secretary-General shall have the right and the duty to waive the immunity of any official in any case where, in his opinion, the immunity would impede the course of justice and can be waived without prejudice to the interests of the United Nations. In the case of the Secretary-General, the Security Council shall have the right to waive immunity.

SECTION 21. The United Nations shall co-operate at all times with the appropriate authorities of Members to facilitate the proper administration of justice, secure the observance of police regulations and prevent the occurrence of any abuse in connection with the privileges, immunities and facilities mentioned in this Article.

#### Article VI

##### EXPERTS ON MISSIONS FOR THE UNITED NATIONS

SECTION 22. Experts (other than officials coming within the scope of Article V) performing missions for the United Nations shall be accorded such privileges and immunities as are necessary for the independent exercise of their functions during the period of their missions, including the time spent on journeys in connection with their missions. In particular they shall be accorded:

- (a) Immunity from personal arrest or detention and from seizure of their personal baggage;
- (b) In respect of words spoken or written and acts done by them in the course of the performance of their mission, immunity from legal process of every kind. This immunity from legal process shall continue to be accorded notwithstanding that the persons concerned are no longer employed on missions for the United Nations;
- (c) Inviolability for all papers and documents;
- (d) For the purpose of their communications with the United Nations, the right to use codes and to receive papers or correspondence by courier or in sealed bags;

(e) The same facilities in respect of currency or exchange restrictions as are accorded to representatives of foreign governments on temporary official missions;

(f) The same immunities and facilities in respect of their personal baggage as are accorded to diplomatic envoys.

SECTION 23. Privileges and immunities are granted to experts in the interests of the United Nations and not for the personal benefit of the individuals themselves. The Secretary-General shall have the right and the duty to waive the immunity of any expert in any case where, in his opinion, the immunity would impede the course of justice and it can be waived without prejudice to the interests of the United Nations.

#### Article VII

##### UNITED NATIONS LAISSEZ-PASSER

SECTION 24. The United Nations may issue United Nations laissez-passer to its officials. These laissez-passer shall be recognized and accepted as valid travel documents by the authorities of Members, taking into account the provisions of Section 25.

SECTION 25. Applications for visas (where required) from the holders of United Nations laissez-passer, when accompanied by a certificate that they are travelling on the business of the United Nations, shall be dealt with as speedily as possible. In addition, such persons shall be granted facilities for speedy travel.

SECTION 26. Similar facilities to those specified in Section 25 shall be accorded to experts and other persons who, though not the holders of United Nations laissez-passer, have a certificate that they are travelling on the business of the United Nations.

SECTION 27. The Secretary-General, Assistant Secretaries-General and Directors travelling on United Nations laissez-passer on the business of the United Nations shall be granted the same facilities as are accorded to diplomatic envoys.

SECTION 28. The provisions of this article may be applied to the comparable officials of specialized agencies if the agreements for relationship made under Article 63 of the Charter so provide.

#### Article VIII

##### SETTLEMENTS OF DISPUTES

SECTION 29. The United Nations shall make provisions for appropriate modes of settlement of:

(a) Disputes arising out of contracts or other disputes of a private law character to which the United Nations is a party;

(b) Disputes involving any official of the United Nations who by reason of his official position enjoys immunity, if immunity has not been waived by the Secretary-General.

SECTION 30. All differences arising out of the interpretation or application of the present convention shall be referred to the International Court of Justice, unless in any case it is agreed by the parties to have recourse to another mode of settlement. If a difference arises between the United Nations on the one hand and a Member on the other hand, a request shall be made for an advisory opinion on any legal question involved in accordance with Article 96 of the Charter and Article 65 of the Statute of the Court. The opinion given by the Court shall be accepted as decisive by the parties.

#### Final Article

SECTION 31. This convention is submitted to every Member of the United Nations for accession.

SECTION 32. Accession shall be affected by deposit of an instrument with the Secretary-General of the United Nations and the convention shall come into force as regards each Member on the date of deposit of each instrument of accession.

SECTION 33. The Secretary-General shall inform all Members of the United Nations of the deposit of each accession.

SECTION 34. It is understood that, when an instrument of accession is deposited on behalf of any Member, the Member will be in a position under its own law to give effect to the terms of this convention.

SECTION 35. This convention shall continue in force as between the United Nations and every Member which has deposited an instrument of accession for so long as that Member remains a Member of the United

Nations, or until a revised general convention has been approved by the General Assembly and that Member has become a party to this revised convention.

SECTION 36. The Secretary-General may conclude with any Member or Members supplementary agreements adjusting the provisions of this convention so far as that Member or those Members are concerned. These supplementary agreements shall in each case be subject to the approval of the General Assembly.

## **Constitution of the World Health Organization, 1946**

This text replaces that on pages 1-18 of the Forty-fifth edition of *Basic Documents*, following the coming into force of amendments adopted by the Fifty-first World Health Assembly.

## CONSTITUTION OF THE WORLD HEALTH ORGANIZATION<sup>1</sup>

THE STATES Parties to this Constitution declare, in conformity with the Charter of the United Nations, that the following principles are basic to the happiness, harmonious relations and security of all peoples:

Health is a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity.

The enjoyment of the highest attainable standard of health is one of the fundamental rights of every human being without distinction of race, religion, political belief, economic or social condition.

The health of all peoples is fundamental to the attainment of peace and security and is dependent upon the fullest co-operation of individuals and States.

The achievement of any State in the promotion and protection of health is of value to all.

Unequal development in different countries in the promotion of health and control of disease, especially communicable disease, is a common danger.

Healthy development of the child is of basic importance; the ability to live harmoniously in a changing total environment is essential to such development.

The extension to all peoples of the benefits of medical, psychological and related knowledge is essential to the fullest attainment of health.

Informed opinion and active co-operation on the part of the public are of the utmost importance in the improvement of the health of the people.

Governments have a responsibility for the health of their peoples which can be fulfilled only by the provision of adequate health and social measures.

ACCEPTING THESE PRINCIPLES, and for the purpose of co-operation among themselves and with others to promote and protect the health of all peoples, the Contracting Parties agree to the present Constitution and

<sup>1</sup> The Constitution was adopted by the International Health Conference held in New York from 19 June to 22 July 1946, signed on 22 July 1946 by the representatives of 61 States (*Off. Rec. Wild Hlth Org.*, 2, 100) and entered into force on 7 April 1948. Amendments adopted by the Twenty-sixth, Twenty-ninth, Thirty-ninth and Fifty-first World Health Assemblies (resolutions WHA2.6.37, WHA29.38, WHA39.6 and WHA51.23) came into force on 3 February 1977, 20 January 1984, 11 July 1994 and 15 September 2005 respectively and are incorporated in the present text.

hereby establish the World Health Organization as a specialized agency within the terms of Article 57 of the Charter of the United Nations.

### CHAPTER I – OBJECTIVE

#### *Article 1*

The objective of the World Health Organization (hereinafter called the Organization) shall be the attainment by all peoples of the highest possible level of health.

### CHAPTER II – FUNCTIONS

#### *Article 2*

In order to achieve its objective, the functions of the Organization shall be:

- (a) to act as the directing and co-ordinating authority on international health work;
- (b) to establish and maintain effective collaboration with the United Nations, specialized agencies, governmental health administrations, professional groups and such other organizations as may be deemed appropriate;
- (c) to assist Governments, upon request, in strengthening health services;
- (d) to furnish appropriate technical assistance and, in emergencies, necessary aid upon the request or acceptance of Governments;
- (e) to provide or assist in providing, upon the request of the United Nations, health services and facilities to special groups, such as the peoples of trust territories;
- (f) to establish and maintain such administrative and technical services as may be required, including epidemiological and statistical services;
- (g) to stimulate and advance work to eradicate epidemic, endemic and other diseases;
- (h) to promote, in co-operation with other specialized agencies where necessary, the prevention of accidental injuries;
- (i) to promote, in co-operation with other specialized agencies where necessary, the improvement of nutrition, housing, sanitation, recreation, economic or working conditions and other aspects of environmental hygiene;
- (j) to promote co-operation among scientific and professional groups which contribute to the advancement of health;
- (k) to propose conventions, agreements and regulations, and make recommendations with respect to international health matters and to perform

such duties as may be assigned thereby to the Organization and are consistent with its objective;

- (l) to promote maternal and child health and welfare and to foster the ability to live harmoniously in a changing total environment;
- (m) to foster activities in the field of mental health, especially those affecting the harmony of human relations;
- (n) to promote and conduct research in the field of health;
- (o) to promote improved standards of teaching and training in the health, medical and related professions;
- (p) to study and report on, in co-operation with other specialized agencies where necessary, administrative and social techniques affecting public health and medical care from preventive and curative points of view, including hospital services and social security;
- (q) to provide information, counsel and assistance in the field of health;
- (r) to assist in developing an informed public opinion among all peoples on matters of health;
- (s) to establish and revise as necessary international nomenclatures of diseases, of causes of death and of public health practices;
- (t) to standardize diagnostic procedures as necessary;
- (u) to develop, establish and promote international standards with respect to food, biological, pharmaceutical and similar products;
- (v) generally to take all necessary action to attain the objective of the Organization.

### CHAPTER III – MEMBERSHIP AND ASSOCIATE MEMBERSHIP

#### *Article 3*

Membership in the Organization shall be open to all States.

#### *Article 4*

Members of the United Nations may become Members of the Organization by signing or otherwise accepting this Constitution in accordance with the provisions of Chapter XIX and in accordance with their constitutional processes.

#### *Article 5*

The States whose Governments have been invited to send observers to the International Health Conference held in New York, 1946, may become

Members by signing or otherwise accepting this Constitution in accordance with the provisions of Chapter XIX and in accordance with their constitutional processes provided that such signature or acceptance shall be completed before the first session of the Health Assembly.

#### *Article 6*

Subject to the conditions of any agreement between the United Nations and the Organization, approved pursuant to Chapter XVI, States which do not become Members in accordance with Articles 4 and 5 may apply to become Members and shall be admitted as Members when their application has been approved by a simple majority vote of the Health Assembly.

#### *Article 7*<sup>1</sup>

If a Member fails to meet its financial obligations to the Organization or in other exceptional circumstances, the Health Assembly may, on such conditions as it thinks proper, suspend the voting privileges and services to which a Member is entitled. The Health Assembly shall have the authority to restore such voting privileges and services.

#### *Article 8*

Territories or groups of territories which are not responsible for the conduct of their international relations may be admitted as Associate Members by the Health Assembly upon application made on behalf of such territory or group of territories by the Member or other authority having responsibility for their international relations. Representatives of Associate Members to the Health Assembly should be qualified by their technical competence in the field of health and should be chosen from the native population. The nature and extent of the rights and obligations of Associate Members shall be determined by the Health Assembly.

### CHAPTER IV – ORGANS

#### *Article 9*

The work of the Organization shall be carried out by:

- (a) The World Health Assembly (herein called the Health Assembly);
- (b) The Executive Board (hereinafter called the Board);
- (c) The Secretariat.

<sup>1</sup> The amendment to this Article adopted by the Eighteenth World Health Assembly (resolution WHA18.48) has not yet come into force.

## CHAPTER V – THE WORLD HEALTH ASSEMBLY

*Article 10*

The Health Assembly shall be composed of delegates representing Members.

*Article 11*

Each Member shall be represented by not more than three delegates, one of whom shall be designated by the Member as chief delegate. These delegates should be chosen from among persons most qualified by their technical competence in the field of health, preferably representing the national health administration of the Member.

*Article 12*

Alternates and advisers may accompany delegates.

*Article 13*

The Health Assembly shall meet in regular annual session and in such special sessions as may be necessary. Special sessions shall be convened at the request of the Board or of a majority of the Members.

*Article 14*

The Health Assembly, at each annual session, shall select the country or region in which the next annual session shall be held, the Board subsequently fixing the place. The Board shall determine the place where a special session shall be held.

*Article 15*

The Board, after consultation with the Secretary-General of the United Nations, shall determine the date of each annual and special session.

*Article 16*

The Health Assembly shall elect its President and other officers at the beginning of each annual session. They shall hold office until their successors are elected.

*Article 17*

The Health Assembly shall adopt its own rules of procedure.

*Article 18*

The functions of the Health Assembly shall be:

- (a) to determine the policies of the Organization;
- (b) to name the Members entitled to designate a person to serve on the Board;
- (c) to appoint the Director-General;
- (d) to review and approve reports and activities of the Board and of the Director-General and to instruct the Board in regard to matters upon which action, study, investigation or report may be considered desirable;
- (e) to establish such committees as may be considered necessary for the work of the Organization;
- (f) to supervise the financial policies of the Organization and to review and approve the budget;
- (g) to instruct the Board and the Director-General to bring to the attention of Members and of international organizations, governmental or non-governmental, any matter with regard to health which the Health Assembly may consider appropriate;
- (h) to invite any organization, international or national, governmental or non-governmental, which has responsibilities related to those of the Organization, to appoint representatives to participate, without right of vote, in its meetings or in those of the committees and conferences convened under its authority, on conditions prescribed by the Health Assembly; but in the case of national organizations, invitations shall be issued only with the consent of the Government concerned;
- (i) to consider recommendations bearing on health made by the General Assembly, the Economic and Social Council, the Security Council or Trusteeship Council of the United Nations, and to report to them on the steps taken by the Organization to give effect to such recommendations;
- (j) to report to the Economic and Social Council in accordance with any agreement between the Organization and the United Nations;
- (k) to promote and conduct research in the field of health by the personnel of the Organization, by the establishment of its own institutions or by co-operation with official or non-official institutions of any Member with the consent of its Government;
- (l) to establish such other institutions as it may consider desirable;
- (m) to take any other appropriate action to further the objective of the Organization.

*Article 19*

The Health Assembly shall have authority to adopt conventions or agreements with respect to any matter within the competence of the Organization. A two-thirds vote of the Health Assembly shall be required for the adoption of such conventions or agreements, which shall come into force for each Member when accepted by it in accordance with its constitutional processes.

*Article 20*

Each Member undertakes that it will, within eighteen months after the adoption by the Health Assembly of a convention or agreement, take action relative to the acceptance of such convention or agreement. Each Member shall notify the Director-General of the action taken, and if it does not accept such convention or agreement within the time limit, it will furnish a statement of the reasons for non-acceptance. In case of acceptance, each Member agrees to make an annual report to the Director-General in accordance with Chapter XIV.

*Article 21*

The Health Assembly shall have authority to adopt regulations concerning:

- (a) sanitary and quarantine requirements and other procedures designed to prevent the international spread of disease;
- (b) nomenclatures with respect to diseases, causes of death and public health practices;
- (c) standards with respect to diagnostic procedures for international use;
- (d) standards with respect to the safety, purity and potency of biological, pharmaceutical and similar products moving in international commerce;
- (e) advertising and labelling of biological, pharmaceutical and similar products moving in international commerce.

*Article 22*

Regulations adopted pursuant to Article 21 shall come into force for all Members after due notice has been given of their adoption by the Health Assembly except for such Members as may notify the Director-General of rejection or reservations within the period stated in the notice.

*Article 23*

The Health Assembly shall have authority to make recommendations to Members with respect to any matter within the competence of the Organization.

## CHAPTER VI – THE EXECUTIVE BOARD

*Article 24*

The Board shall consist of thirty-four persons designated by as many Members. The Health Assembly, taking into account an equitable geographical distribution, shall elect the Members entitled to designate a person to serve on the Board, provided that, of such Members, not less than three shall be elected from each of the regional organizations established pursuant to Article 44. Each of these Members should appoint to the Board a person technically qualified in the field of health, who may be accompanied by alternates and advisers.

*Article 25*

These Members shall be elected for three years and may be re-elected, provided that of the Members elected at the first session of the Health Assembly held after the coming into force of the amendment to this Constitution increasing the membership of the Board from thirty-two to thirty-four the term of office of the additional Members elected shall, insofar as may be necessary, be of such lesser duration as shall facilitate the election of at least one Member from each regional organization in each year.

*Article 26*

The Board shall meet at least twice a year and shall determine the place of each meeting.

*Article 27*

The Board shall elect its Chairman from among its members and shall adopt its own rules of procedure.

*Article 28*

The functions of the Board shall be:

- (a) to give effect to the decisions and policies of the Health Assembly;
- (b) to act as the executive organ of the Health Assembly;

- (c) to perform any other functions entrusted to it by the Health Assembly;
- (d) to advise the Health Assembly on questions referred to it by that body and on matters assigned to the Organization by conventions, agreements and regulations;
- (e) to submit advice or proposals to the Health Assembly on its own initiative;
- (f) to prepare the agenda of meetings of the Health Assembly;
- (g) to submit to the Health Assembly for consideration and approval a general programme of work covering a specific period;
- (h) to study all questions within its competence;
- (i) to take emergency measures within the functions and financial resources of the Organization to deal with events requiring immediate action. In particular it may authorize the Director-General to take the necessary steps to combat epidemics, to participate in the organization of health relief to victims of a calamity and to undertake studies and research the urgency of which has been drawn to the attention of the Board by any Member or by the Director-General.

*Article 29*

The Board shall exercise on behalf of the whole Health Assembly the powers delegated to it by that body.

CHAPTER VII – THE SECRETARIAT

*Article 30*

The Secretariat shall comprise the Director-General and such technical and administrative staff as the Organization may require.

*Article 31*

The Director-General shall be appointed by the Health Assembly on the nomination of the Board on such terms as the Health Assembly may determine. The Director-General, subject to the authority of the Board, shall be the chief technical and administrative officer of the Organization.

*Article 32*

The Director-General shall be *ex-officio* Secretary of the Health Assembly, of the Board, of all commissions and committees of the Organization and of conferences convened by it. He may delegate these functions.

*Article 33*

The Director-General or his representative may establish a procedure by agreement with Members, permitting him, for the purpose of discharging his duties, to have direct access to their various departments, especially to their health administrations and to national health organizations, governmental or non-governmental. He may also establish direct relations with international organizations whose activities come within the competence of the Organization. He shall keep regional offices informed on all matters involving their respective areas.

*Article 34*

The Director-General shall prepare and submit to the Board the financial statements and budget estimates of the Organization.

*Article 35*

The Director-General shall appoint the staff of the Secretariat in accordance with staff regulations established by the Health Assembly. The paramount consideration in the employment of the staff shall be to assure that the efficiency, integrity and internationally representative character of the Secretariat shall be maintained at the highest level. Due regard shall be paid also to the importance of recruiting the staff on as wide a geographical basis as possible.

*Article 36*

The conditions of service of the staff of the Organization shall conform as far as possible with those of other United Nations organizations.

*Article 37*

In the performance of their duties the Director-General and the staff shall not seek or receive instructions from any government or from any authority external to the Organization. They shall refrain from any action which might reflect on their position as international officers. Each Member of the Organization on its part undertakes to respect the exclusively international character of the Director-General and the staff and not to seek to influence them.

CHAPTER VIII – COMMITTEES

*Article 38*

The Board shall establish such committees as the Health Assembly may direct and, on its own initiative or on the proposal of the Director-General, may establish any other committees considered desirable to serve any purpose within the competence of the Organization.

*Article 39*

The Board, from time to time and in any event annually, shall review the necessity for continuing each committee.

*Article 40*

The Board may provide for the creation of or the participation by the Organization in joint or mixed committees with other organizations and for the representation of the Organization in committees established by such other organizations.

## CHAPTER IX – CONFERENCES

*Article 41*

The Health Assembly or the Board may convene local, general, technical or other special conferences to consider any matter within the competence of the Organization and may provide for the representation at such conferences of international organizations and, with the consent of the Government concerned, of national organizations, governmental or non-governmental. The manner of such representation shall be determined by the Health Assembly or the Board.

*Article 42*

The Board may provide for representation of the Organization at conferences in which the Board considers that the Organization has an interest.

## CHAPTER X – HEADQUARTERS

*Article 43*

The location of the headquarters of the Organization shall be determined by the Health Assembly after consultation with the United Nations.

## CHAPTER XI – REGIONAL ARRANGEMENTS

*Article 44*

- (a) The Health Assembly shall from time to time define the geographical areas in which it is desirable to establish a regional organization.
- (b) The Health Assembly may, with the consent of a majority of the Members situated within each area so defined, establish a regional organization to meet the special needs of such area. There shall not be more than one regional organization in each area.

*Article 45*

Each regional organization shall be an integral part of the Organization in accordance with this Constitution.

*Article 46*

Each regional organization shall consist of a regional committee and a regional office.

*Article 47*

Regional committees shall be composed of representatives of the Member States and Associate Members in the region concerned. Territories or groups of territories within the region, which are not responsible for the conduct of their international relations and which are not Associate Members, shall have the right to be represented and to participate in regional committees. The nature and extent of the rights and obligations of these territories or groups of territories in regional committees shall be determined by the Health Assembly in consultation with the Member or other authority having responsibility for the international relations of these territories and with the Member States in the region.

*Article 48*

Regional committees shall meet as often as necessary and shall determine the place of each meeting.

*Article 49*

Regional committees shall adopt their own rules of procedure.

*Article 50*

The functions of the regional committee shall be:

- (a) to formulate policies governing matters of an exclusively regional character;
- (b) to supervise the activities of the regional office;
- (c) to suggest to the regional office the calling of technical conferences and such additional work or investigation in health matters as in the opinion of the regional committee would promote the objective of the Organization within the region;
- (d) to co-operate with the respective regional committees of the United Nations and with those of other specialized agencies and with other regional international organizations having interests in common with the Organization;

- (e) to tender advice, through the Director-General, to the Organization on international health matters which have wider than regional significance;
- (f) to recommend additional regional appropriations by the Governments of the respective regions if the proportion of the central budget of the Organization allotted to that region is insufficient for the carrying-out of the regional functions;
- (g) such other functions as may be delegated to the regional committee by the Health Assembly, the Board or the Director-General.

*Article 51*

Subject to the general authority of the Director-General of the Organization, the regional office shall be the administrative organ of the regional committee. It shall, in addition, carry out within the region the decisions of the Health Assembly and of the Board.

*Article 52*

The head of the regional office shall be the Regional Director appointed by the Board in agreement with the regional committee.

*Article 53*

The staff of the regional office shall be appointed in a manner to be determined by agreement between the Director-General and the Regional Director.

*Article 54*

The Pan American Sanitary Organization<sup>1</sup> represented by the Pan American Sanitary Bureau and the Pan American Sanitary Conferences, and all other inter-governmental regional health organizations in existence prior to the date of signature of this Constitution, shall in due course be integrated with the Organization. This integration shall be effected as soon as practicable through common action based on mutual consent of the competent authorities expressed through the organizations concerned.

CHAPTER XII – BUDGET AND EXPENSES

*Article 55*

The Director-General shall prepare and submit to the Board the budget estimates of the Organization. The Board shall consider and submit to the Health Assembly such budget estimates, together with any recommendations the Board may deem advisable.

<sup>1</sup> Renamed "Pan American Health Organization" by decision of the XV Pan American Sanitary Conference, September-October 1958.

*Article 56*

Subject to any agreement between the Organization and the United Nations, the Health Assembly shall review and approve the budget estimates and shall apportion the expenses among the Members in accordance with a scale to be fixed by the Health Assembly.

*Article 57*

The Health Assembly or the Board acting on behalf of the Health Assembly may accept and administer gifts and bequests made to the Organization provided that the conditions attached to such gifts or bequests are acceptable to the Health Assembly or the Board and are consistent with the objective and policies of the Organization.

*Article 58*

A special fund to be used at the discretion of the Board shall be established to meet emergencies and unforeseen contingencies.

CHAPTER XIII – VOTING

*Article 59*

Each Member shall have one vote in the Health Assembly.

*Article 60*

(a) Decisions of the Health Assembly on important questions shall be made by a two-thirds majority of the Members present and voting. These questions shall include: the adoption of conventions or agreements; the approval of agreements bringing the Organization into relation with the United Nations and inter-governmental organizations and agencies in accordance with Articles 69, 70 and 72; amendments to this Constitution.

(b) Decisions on other questions, including the determination of additional categories of questions to be decided by a two-thirds majority, shall be made by a majority of the Members present and voting.

(c) Voting on analogous matters in the Board and in committees of the Organization shall be made in accordance with paragraphs (a) and (b) of this Article.

CHAPTER XIV – REPORTS SUBMITTED BY STATES

*Article 61*

Each Member shall report annually to the Organization on the action taken and progress achieved in improving the health of its people.

*Article 62*

Each Member shall report annually on the action taken with respect to recommendations made to it by the Organization and with respect to conventions, agreements and regulations.

*Article 63*

Each Member shall communicate promptly to the Organization important laws, regulations, official reports and statistics pertaining to health which have been published in the State concerned.

*Article 64*

Each Member shall provide statistical and epidemiological reports in a manner to be determined by the Health Assembly.

*Article 65*

Each Member shall transmit upon the request of the Board such additional information pertaining to health as may be practicable.

## CHAPTER XV – LEGAL CAPACITY, PRIVILEGES AND IMMUNITIES

*Article 66*

The Organization shall enjoy in the territory of each Member such legal capacity as may be necessary for the fulfilment of its objective and for the exercise of its functions.

*Article 67*

- (a) The Organization shall enjoy in the territory of each Member such privileges and immunities as may be necessary for the fulfilment of its objective and for the exercise of its functions.
- (b) Representatives of Members, persons designated to serve on the Board and technical and administrative personnel of the Organization shall similarly enjoy such privileges and immunities as are necessary for the independent exercise of their functions in connexion with the Organization.

*Article 68*

Such legal capacity, privileges and immunities shall be defined in a separate agreement to be prepared by the Organization in consultation with the Secretary-General of the United Nations and concluded between the Members.

## CHAPTER XVI – RELATIONS WITH OTHER ORGANIZATIONS

*Article 69*

The Organization shall be brought into relation with the United Nations as one of the specialized agencies referred to in Article 57 of the Charter of the United Nations. The agreement or agreements bringing the Organization into relation with the United Nations shall be subject to approval by a two-thirds vote of the Health Assembly.

*Article 70*

The Organization shall establish effective relations and co-operate closely with such other inter-governmental organizations as may be desirable. Any formal agreement entered into with such organizations shall be subject to approval by a two-thirds vote of the Health Assembly.

*Article 71*

The Organization may, on matters within its competence, make suitable arrangements for consultation and co-operation with non-governmental international organizations and, with the consent of the Government concerned, with national organizations, governmental or non-governmental.

*Article 72*

Subject to the approval by a two-thirds vote of the Health Assembly, the Organization may take over from any other international organization or agency whose purpose and activities lie within the field of competence of the Organization such functions, resources and obligations as may be conferred upon the Organization by international agreement or by mutually acceptable arrangements entered into between the competent authorities of the respective organizations.

## CHAPTER XVII – AMENDMENTS

*Article 73*

Texts of proposed amendments to this Constitution shall be communicated by the Director-General to Members at least six months in advance of their consideration by the Health Assembly. Amendments shall come into force for all Members when adopted by a two-thirds vote of the Health Assembly and accepted by two-thirds of the Members in accordance with their respective constitutional processes.

## CHAPTER XVIII – INTERPRETATION

*Article 74*<sup>1</sup>

The Chinese, English, French, Russian and Spanish texts of this Constitution shall be regarded as equally authentic.

*Article 75*

Any question or dispute concerning the interpretation or application of this Constitution which is not settled by negotiation or by the Health Assembly shall be referred to the International Court of Justice in conformity with the Statute of the Court, unless the parties concerned agree on another mode of settlement.

*Article 76*

Upon authorization by the General Assembly of the United Nations or upon authorization in accordance with any agreement between the Organization and the United Nations, the Organization may request the International Court of Justice for an advisory opinion on any legal question arising within the competence of the Organization.

*Article 77*

The Director-General may appear before the Court on behalf of the Organization in connexion with any proceedings arising out of any such request for an advisory opinion. He shall make arrangements for the presentation of the case before the Court, including arrangements for the argument of different views on the question.

## CHAPTER XIX – ENTRY-INTO-FORCE

*Article 78*

Subject to the provisions of Chapter III, this Constitution shall remain open to all States for signature or acceptance.

*Article 79*

- (a) States may become parties to this Constitution by:
- (i) signature without reservation as to approval;
  - (ii) signature subject to approval followed by acceptance; or
  - (iii) acceptance.

(b) Acceptance shall be effected by the deposit of a formal instrument with the Secretary-General of the United Nations.

*Article 80*

This Constitution shall come into force when twenty-six Members of the United Nations have become parties to it in accordance with the provisions of Article 79.

*Article 81*

In accordance with Article 102 of the Charter of the United Nations, the Secretary-General of the United Nations will register this Constitution when it has been signed without reservation as to approval on behalf of one State or upon deposit of the first instrument of acceptance.

*Article 82*

The Secretary-General of the United Nations will inform States parties to this Constitution of the date when it has come into force. He will also inform them of the dates when other States have become parties to this Constitution.

IN FAITH WHEREOF the undersigned representatives, having been duly authorized for that purpose, sign this Constitution.

DONE in the City of New York this twenty-second day of July 1946, in a single copy in the Chinese, English, French, Russian and Spanish languages, each text being equally authentic. The original texts shall be deposited in the archives of the United Nations. The Secretary-General of the United Nations will send certified copies to each of the Governments represented at the Conference.

<sup>1</sup> The amendment to this Article adopted by the Thirty-first World Health Assembly (resolution WHA31.18) has not yet come into force.

**Agreement between the United Nations and the  
United States of America regarding the Headquarters  
of the United Nations, 1947**

**No. 147. AGREEMENT<sup>1</sup> BETWEEN THE UNITED NATIONS AND THE UNITED STATES OF AMERICA REGARDING THE HEADQUARTERS OF THE UNITED NATIONS. SIGNED AT LAKE SUCCESS, ON 26 JUNE 1947**

THE UNITED NATIONS AND THE UNITED STATES OF AMERICA,

Desiring to conclude an agreement for the purpose of carrying out the Resolution adopted by the General Assembly on 14 December 1946<sup>2</sup> to establish the seat of the United Nations in the City of New York and to regulate questions arising as a result thereof;

Have appointed as their representatives for this purpose:

The United Nations: Trygve LIE, Secretary-General, and

The United States of America: George C. MARSHALL, Secretary of State,

Who have agreed as follows:

**Article I**

**DEFINITIONS**

**Section 1**

In this agreement:

(a) The expression "headquarters district" means: (1) the area defined as such in Annex 1; (2) any other lands or buildings which may from time to time be included therein by supplemental agreement with the appropriate American authorities;

(b) the expression "appropriate American authorities" means such federal, state, or local authorities in the United States as may be appropriate in the context and in accordance with the laws and customs of the United States, including the laws and customs of the state and local government involved;

(c) the expression "General Convention" means the Convention on the Privileges and Immunities of the United Nations approved by the General Assembly of the United Nations on 13 February 1946, as acceded to by the United States;

<sup>1</sup>Came into force on 21 November 1947 by an Exchange of Notes, in accordance with section 28.

<sup>2</sup>United Nations, resolution 99 (I), document A/64/Add.1, page 195.

(d) the expression "United Nations" means the international organization established by the Charter of the United Nations, hereinafter referred to as the "Charter";

(e) the expression "Secretary-General" means the Secretary-General of the United Nations.

**Article II**

THE HEADQUARTERS DISTRICT

**Section 2**

The seat of the United Nations shall be the headquarters district.

**Section 3**

The appropriate American authorities shall take whatever action may be necessary to assure that the United Nations shall not be dispossessed of its property in the headquarters district, except as provided in section 22 in the event that the United Nations ceases to use the same, provided that the United Nations shall reimburse the appropriate American authorities for any costs incurred, after consultation with the United Nations, in liquidating by eminent domain proceedings or otherwise any adverse claims.

**Section 4**

(a) The United Nations may establish and operate in the headquarters district:

(1) its own short-wave sending and receiving radio broadcasting facilities, including emergency link equipment, which may be used on the same frequencies (within the tolerances prescribed for the broadcasting service by applicable United States regulations) for radiotelegraph, radioteletyp, radiotelephone, radiotelephoto, and similar services;

(2) one point-to-point circuit between the headquarters district and the office of the United Nations in Geneva (using single sideband equipment) to be used exclusively for the exchange of broadcasting programs and inter-office communications;

(3) low power, micro-wave, low or medium frequency facilities for communication within headquarters buildings only, or such other buildings as may temporarily be used by the United Nations;

(4) facilities for point-to-point communications to the same extent and subject to the same conditions as permitted under applicable rules and regulations for amateur operators in the United States, except that such rules and regulations shall not be applied in a manner inconsistent with the inviolability of the headquarters district provided by section 9 (a);

(5) such other radio facilities as may be specified by supplemental agreement between the United Nations and the appropriate American authorities.

(b) The United Nations shall make arrangements for the operation of the services referred to in this section with the International Telecommunication Union, the appropriate agencies of the Government of the United States and the appropriate agencies of other affected Governments with regard to all frequencies and similar matters.

(c) The facilities provided for in this section may, to the extent necessary for efficient operation, be established and operated outside the headquarters district. The appropriate American authorities will, on request of the United Nations, make arrangements, on such terms and in such manner as may be agreed upon by supplemental agreement, for the acquisition or use by the United Nations of appropriate premises for such purposes and the inclusion of such premises in the headquarters district.

#### Section 5

In the event that the United Nations should find it necessary and desirable to establish and operate an aerodrome, the conditions for the location, use and operation of such an aerodrome and the conditions under which there shall be entry into and exit therefrom shall be the subject of a supplemental agreement.

#### Section 6

In the event that the United Nations should propose to organize its own postal service, the conditions under which such service shall be set up shall be the subject of a supplemental agreement.

### Article III

#### LAW AND AUTHORITY IN THE HEADQUARTERS DISTRICT

##### Section 7

(a) The headquarters district shall be under the control and authority of the United Nations as provided in this agreement.

(b) Except as otherwise provided in this agreement or in the General Convention, the federal, state and local law of the United States shall apply within the headquarters district.

(c) Except as otherwise provided in this agreement or in the General Convention, the federal, state and local courts of the United States shall have jurisdiction over acts done and transactions taking place in the headquarters district as provided in applicable federal, state and local laws.

(d) The federal, state and local courts of the United States, when dealing with cases arising out of or relating to acts done or transactions taking place in the headquarters district, shall take into account the regulations enacted by the United Nations under section 8.

##### Section 8

The United Nations shall have the power to make regulations, operative within the headquarters district, for the purpose of establishing therein conditions in all respects necessary for the full execution of its functions. No federal, state or local law or regulation of the United States which is inconsistent with a regulation of the United Nations authorized by this section shall, to the extent of such inconsistency, be applicable within the headquarters district. Any dispute between the United Nations and the United States, as to whether a regulation of the United Nations is authorized by this section or as to whether a federal, state or local law or regulation is inconsistent with any regulation of the United Nations authorized by this section, shall be promptly settled as provided in Section 21. Pending such settlement, the regulation of the United Nations shall apply, and the federal, state or local law or regulation shall be inapplicable in the headquarters district to the extent that the United Nations claims it to be inconsistent with the regulation of the United Nations. This section shall not prevent the reasonable application of fire protection regulations of the appropriate American authorities.

### Section 9

(a) The headquarters district shall be inviolable. Federal, state or local officers or officials of the United States, whether administrative, judicial, military or police, shall not enter the headquarters district to perform any official duties therein except with the consent of and under conditions agreed to by the Secretary-General. The service of legal process, including the seizure of private property, may take place within the headquarters district only with the consent of and under conditions approved by the Secretary-General.

(b) Without prejudice to the provisions of the General Convention or Article IV of this agreement, the United Nations shall prevent the headquarters district from becoming a refuge either for persons who are avoiding arrest under the federal, state, or local law of the United States or are required by the Government of the United States for extradition to another country, or for persons who are endeavoring to avoid service of legal process.

### Section 10

The United Nations may expel or exclude persons from the headquarters district for violation of its regulations adopted under Section 8 or for other cause. Persons who violate such regulations shall be subject to other penalties or to detention under arrest only in accordance with the provisions of such laws or regulations as may be adopted by the appropriate American authorities.

## Article IV

### COMMUNICATIONS AND TRANSIT

#### Section 11

The federal, state or local authorities of the United States shall not impose any impediments to transit to or from the headquarters district of: (1) representatives of Members or officials of the United Nations, or of specialized agencies as defined in Article 57, paragraph 2, of the Charter, or the families of such representatives or officials, (2) experts performing missions for the United Nations or for such specialized agencies, (3) representatives of the press or of radio, film or other information agencies, who have been accredited by the United Nations (or by such a specialized agency) in its discretion after consultation with the United States, (4) representatives of non-governmental organizations recognized by the United Nations for the purpose of consultation under Article 71 of the Charter, or (5) other persons invited to the head-

quarters district by the United Nations or by such specialized agency on official business. The appropriate American authorities shall afford any necessary protection to such persons while in transit to or from the headquarters district. This section does not apply to general interruptions of transportation which are to be dealt with as provided in Section 17, and does not impair the effectiveness of generally applicable laws and regulations as to the operation of means of transportation.

### Section 12

The provisions of Section 11 shall be applicable irrespective of the relations existing between the Governments of the persons referred to in that section and the Government of the United States.

### Section 13

(a) Laws and regulations in force in the United States regarding the entry of aliens shall not be applied in such manner as to interfere with the privileges referred to in Section 11. When visas are required for persons referred to in that section, they shall be granted without charge and as promptly as possible.

(b) Laws and regulations in force in the United States regarding the residence of aliens shall not be applied in such manner as to interfere with the privileges referred to in Section 11 and, specifically, shall not be applied in such manner as to require any such person to leave the United States on account of any activities performed by him in his official capacity. In case of abuse of such privileges of residence by any such person in activities in the United States outside his official capacity, it is understood that the privileges referred to in Section 11 shall not be construed to grant him exemption from the laws and regulations of the United States regarding the continued residence of aliens, provided that:

(1) No proceedings shall be instituted under such laws or regulations to require any such person to leave the United States except with the prior approval of the Secretary of State of the United States. Such approval shall be given only after consultation with the appropriate Member in the case of a representative of a Member (or a member of his family) or with the Secretary-General or the principal executive officer of the appropriate specialized agency in the case of any other person referred to in Section 11;

(2) A representative of the Member concerned, the Secretary-General or the principal executive officer of the appropriate specialized agency, as the case may be, shall have the right to appear in any such proceedings on behalf of the person against whom they are instituted;

(3) Persons who are entitled to diplomatic privileges and immunities under Section 15 or under the General Convention shall not be required to leave the United States otherwise than in accordance with the customary procedure applicable to diplomatic envoys accredited to the United States.

(c) This section does not prevent the requirement of reasonable evidence to establish that persons claiming the rights granted by Section 11 come within the classes described in that section, or the reasonable application of quarantine and public health regulations.

(d) Except as provided above in this section and in the General Convention, the United States retains full control and authority over the entry of persons or property into the territory of the United States and the conditions under which persons may remain or reside there.

(e) The Secretary-General shall, at the request of the appropriate American authorities, enter into discussions with such authorities, with a view to making arrangements for registering the arrival and departure of persons who have been granted visas valid only for transit to and from the headquarters district and sojourn therein and in its immediate vicinity.

(f) The United Nations shall, subject to the foregoing provisions of this section, have the exclusive right to authorize or prohibit entry of persons and property into the headquarters district and to prescribe the conditions under which persons may remain or reside there.

#### Section 14

The Secretary-General and the appropriate American authorities shall, at the request of either of them, consult, as to methods of facilitating entrance into the United States, and the use of available means of transportation, by persons coming from abroad who wish to visit the headquarters district and do not enjoy the rights referred to in this Article.

### Article V

#### RESIDENT REPRESENTATIVES TO THE UNITED NATIONS

##### Section 15

(1) Every person designated by a Member as the principal resident representative to the United Nations of such Member or as a resident representative with the rank of ambassador or minister plenipotentiary,

(2) such resident members of their staffs as may be agreed upon between the Secretary-General, the Government of the United States and the Government of the Member concerned;

(3) every person designated by a member of a specialized agency, as defined in Article 57, paragraph 2 of the Charter, as its principal permanent representative, with the rank of ambassador or minister plenipotentiary at the headquarters of such agency in the United States, and

(4) such other principal resident representatives of members of a specialized agency and such resident members of the staffs of representatives of a specialized agency as may be agreed upon between the principal executive officer of the specialized agency, the Government of the United States and the Government of the Member concerned,

shall, whether residing inside or outside the headquarters district, be entitled in the territory of the United States to the same privileges and immunities, subject to corresponding conditions and obligations, as it accords to diplomatic envoys accredited to it. In the case of Members whose governments are not recognized by the United States, such privileges and immunities need be extended to such representatives, or persons on the staffs of such representatives, only within the headquarters district, at their residences and offices outside the district, in transit between the district and such residences and offices, and in transit on official business to or from foreign countries.

### Article VI

#### POLICE PROTECTION OF THE HEADQUARTERS DISTRICT

##### Section 16

(a) The appropriate American authorities shall exercise due diligence to ensure that the tranquility of the headquarters district is not disturbed by the unauthorized entry of groups of persons from outside or by disturbances in its

immediate vicinity and shall cause to be provided on the boundaries of the headquarters district such police protection as is required for these purposes.

(b) If so requested by the Secretary-General, the appropriate American authorities shall provide a sufficient number of police for the preservation of law and order in the headquarters district, and for the removal therefrom of persons as requested under the authority of the United Nations. The United Nations shall, if requested, enter into arrangements with the appropriate American authorities to reimburse them for the reasonable cost of such services.

#### PUBLIC SERVICES AND PROTECTION OF THE HEADQUARTERS DISTRICT

##### Article VII

#### Section 17

(a) The appropriate American authorities will exercise, to the extent requested by the Secretary-General, the powers which they possess to ensure that the headquarters district shall be supplied on equitable terms with the necessary public services, including electricity, water, gas, post, telephone, telegraph, transportation, drainage, collection of refuse, fire protection, snow removal, *et cetera*. In case of any interruption or threatened interruption of any such services, the appropriate American authorities will consider the needs of the United Nations as being of equal importance with the similar needs of essential agencies of the Government of the United States, and will take steps accordingly to ensure that the work of the United Nations is not prejudiced.

(b) Special provision with reference to maintenance of utilities and underground construction are contained in Annex 2.

#### Section 18

The appropriate American authorities shall take all reasonable steps to ensure that the amenities of the headquarters district are not prejudiced and the purposes for which the district is required are not obstructed by any use made of the land in the vicinity of the district. The United Nations shall on its part take all reasonable steps to ensure that the amenities of the land in the vicinity of the headquarters district are not prejudiced by any use made of the land in the headquarters district by the United Nations.

#### Section 19

It is agreed that no form of racial or religious discrimination shall be permitted within the headquarters district.

##### Article VIII

#### MATTERS RELATING TO THE OPERATION OF THIS AGREEMENT

#### Section 20

The Secretary-General and the appropriate American authorities shall settle by agreement the channels through which they will communicate regarding the application of the provisions of this agreement and other questions affecting the headquarters district, and may enter into such supplemental agreements as may be necessary to fulfill the purposes of this agreement. In making supplemental agreements with the Secretary-General, the United States shall consult with the appropriate state and local authorities. If the Secretary-General so requests, the Secretary of State of the United States shall appoint a special representative for the purpose of liaison with the Secretary-General.

#### Section 21

(a) Any dispute between the United Nations and the United States concerning the interpretation or application of this agreement or of any supplemental agreement, which is not settled by negotiation or other agreed mode of settlement, shall be referred for final decision to a tribunal of three arbitrators, one to be named by the Secretary-General, one to be named by the Secretary of State of the United States, and the third to be chosen by the two, or, if they should fail to agree upon a third, then by the President of the International Court of Justice.

(b) The Secretary-General or the United States may ask the General Assembly to request of the International Court of Justice an advisory opinion on any legal question arising in the course of such proceedings. Pending the receipt of the opinion of the Court, an interim decision of the arbitral tribunal shall be observed by both parties. Thereafter, the arbitral tribunal shall render a final decision, having regard to the opinion of the Court.

##### Article IX

#### MISCELLANEOUS PROVISIONS

#### Section 22

(a) The United Nations shall not dispose of all or any part of the land owned by it in the headquarters district without the consent of the United States.

If the United States is unwilling to consent it shall buy the land in question from the United Nations at a price to be determined as provided in paragraph (d) of this section.

(b) If the seat of the United Nations is removed from the headquarters district, all right, title and interest of the United Nations in and to real property in the headquarters district or any part of it shall, on request of either the United Nations or the United States, be assigned and conveyed to the United States. In the absence of such request, the same shall be assigned and conveyed to the sub-division of a state in which it is located or, if such sub-division shall not desire it, then to the state in which it is located. If none of the foregoing desire the same, it may be disposed of as provided in paragraph (a) of this section.

(c) If the United Nations disposes of all or any part of the headquarters district, the provisions of other sections of this agreement which apply to the headquarters district shall immediately cease to apply to the land and buildings so disposed of.

(d) The price to be paid for any conveyance under this section shall, in default of agreement, be the then fair value of the land, buildings and installations, to be determined under the procedure provided in Section 21.

#### Section 23

The seat of the United Nations shall not be removed from the headquarters district unless the United Nations should so decide.

#### Section 24

This agreement shall cease to be in force if the seat of the United Nations is removed from the territory of the United States, except for such provisions as may be applicable in connection with the orderly termination of the operations of the United Nations at its seat in the United States and the disposition of its property therein.

#### Section 25

Wherever this agreement imposes obligations on the appropriate American authorities, the Government of the United States shall have the ultimate responsibility for the fulfillment of such obligations by the appropriate American authorities.

#### Section 26

The provisions of this agreement shall be complementary to the provisions of the General Convention. In so far as any provision of this agreement and any provisions of the General Convention relate to the same subject matter, the two provisions shall, wherever possible, be treated as complementary so that both provisions shall be applicable and neither shall narrow the effect of the other; but in any case of absolute conflict, the provisions of this agreement shall prevail.

#### Section 27

This agreement shall be construed in the light of its primary purpose to enable the United Nations at its headquarters in the United States, fully and efficiently, to discharge its responsibilities and fulfill its purposes.

#### Section 28

This agreement shall be brought into effect by an exchange of notes<sup>1</sup> between the Secretary-General, duly authorized pursuant to a resolution of the General Assembly of the United Nations, and the appropriate executive officer of the United States, duly authorized pursuant to appropriate action of the Congress.

IN WITNESS WHEREOF the respective representatives have signed this agreement and have affixed their seals hereto.

DONE in duplicate, in the English and French languages, both authentic, at Lake Success, this twenty-sixth day of June 1947.

For the United Nations:  
Trygve LIE  
Secretary-General

For the Government of the United States of America:  
G. C. MARSHALL  
Secretary of State

<sup>1</sup> See page 38 of this volume.  
No. 147

## ANNEX 1

The area referred to in Section 1, (a) (1) consists of:

(a) the premises bounded on the East by the westerly side of Franklin D. Roosevelt Drive, on the West by the easterly side of First Avenue, on the North by the southerly side of East Forty-Eighth Street, and on the South by the northerly side of East Forty-Second Street, all as proposed to be widened, in the borough of Manhattan, City and State of New York, and (b) an easement over Franklin D. Roosevelt Drive, above a lower limiting plane to be fixed for the construction and maintenance of an esplanade, together with the structures thereon and foundations and columns to support the same in locations below such limiting plane, the entire area to be more definitely defined by supplemental agreement between the United Nations and the United States of America.

## ANNEX 2

## MAINTENANCE OF UTILITIES AND UNDERGROUND CONSTRUCTION

## Section 1

The Secretary-General agrees to provide passes to duly authorized employees of the City of New York, the State of New York, or any of their agencies or sub-divisions, for the purpose of enabling them to inspect, repair, maintain, reconstruct and relocate utilities, conduits, mains and sewers within the headquarters district.

## Section 2

Underground constructions may be undertaken by the City of New York, or the State of New York, or any of their agencies or sub-divisions, within the headquarters district only after consultation with the Secretary-General, and under conditions which shall not disturb the carrying out of the functions of the United Nations.

## EXCHANGE OF NOTES

## I

Lake Success, New York, 21 November 1947

Sir,

I have the honour to refer to the resolution adopted by the General Assembly on 31 October 1947<sup>1</sup>, at its one hundred and first meeting, relative to the Agreement between the United States of America and the United Nations regarding the Headquarters of the United Nations, signed at Lake Success on 26 June 1947.

By this resolution the General Assembly, after having studied the report of its Sixth Committee and endorsed the opinions expressed therein, has approved the above-mentioned Agreement, which states and defines the mutual obligations of the United Nations and the United States in connexion with the establishment of the permanent Headquarters of the United Nations in the United States. The resolution, consequently, has authorized me to bring that Agreement into force in the manner provided in section 28 of the Agreement.

Pursuant to the resolution and in conformity with section 28 of the Agreement, I have the honour to propose that the present note and your note of this day be considered as bringing the Headquarters Agreement into effect under date hereof.

I have the honour to be, Sir, your obedient servant,

(Signed) Trygve Læ  
Secretary-General

The Honorable Warren R. Austin  
Permanent Representative  
of the United States of America  
at the Seat of the United Nations

<sup>1</sup> United Nations, resolution 169 (II), document A/519, page 91.

## II

November 21, 1947

Excellency:

I have the honor to refer to section 28 of the Agreement between the United Nations and the United States of America regarding the Headquarters of the United Nations, signed at Lake Success June 26, 1947, which provides for bringing that Agreement into effect by an exchange of notes. Reference is made also to the provisions of United States Public Law 357, 80th Congress, entitled "Joint Resolution Authorizing the President to bring into effect an agreement between the United States and the United Nations for the purpose of establishing the permanent headquarters of the United Nations in the United States and authorizing the taking of measures necessary to facilitate compliance with the provisions of such agreement, and for other purposes", which was approved by the President of the United States of America on August 4, 1947.

Pursuant to instructions from my Government, I have the honor to inform you that the Government of the United States of America is prepared to apply the above-mentioned Headquarters Agreement subject to the provisions of Public Law 357.

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I have been instructed by my Government to propose that the present note and your note of this date be considered as bringing the Headquarters Agreement into effect on the date hereof.

Accept, Excellency the renewed assurances of my highest consideration.

(Signed) Warren R. Austin  
United States Representative  
to the United Nations

His Excellency Trygve Lie  
Secretary-General  
of the United Nations



**Agreement Relating to the International  
Telecommunications Satellite Organization, 1971**

**AGREEMENT RELATING TO THE  
INTERNATIONAL TELECOMMUNICATIONS SATELLITE ORGANIZATION**

**PREAMBLE**

The States Parties to this Agreement,

Considering the principle set forth in Resolution 1721 (XVI) of the General Assembly of the United Nations that communication by means of satellites should be available to the nations of the world as soon as practicable on a global and non-discriminatory basis,

Considering the relevant provisions of the Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies, and in particular Article I, which states that outer space shall be used for the benefit and in the interests of all countries,

Recognizing that the International Telecommunications Satellite Organization has, in accordance with its original purpose, established a global satellite system for providing telecommunications services to all areas of the world, which has contributed to world peace and understanding,

Taking into account that the 24<sup>th</sup> Assembly of Parties of the International Telecommunications Satellite Organization decided to restructure and privatize by establishing a private company supervised by an intergovernmental organization,

Acknowledging that increased competition in the provision of telecommunications services has made it necessary for the International Telecommunications Satellite Organization to transfer its space system to the Company defined in Article I(d) of this Agreement in order that the space system continues to be operated in a commercially viable manner,

Intending that the Company will honor the Core Principles set forth in Article III of this Agreement and will provide, on a commercial basis, the space segment required for international public telecommunications services of high quality and reliability,

Having determined that there is a need for an intergovernmental supervisory organization, to which any State member of the United Nations or the International Telecommunication Union may become a Party, to ensure that the Company fulfills the Core Principles on a continuing basis,

Agree as follows:

**Definitions**

**ARTICLE I**

For the purposes of this Agreement:

(a) "Agreement" means the present agreement, including its Annex, and any amendments thereto, but excluding all titles of Articles, opened for signature by Governments at Washington on August 20, 1971, by which the international telecommunications satellite organization is established;

(b) "Space segment" means the telecommunications satellites, and the tracking, telemetry, command, control, monitoring and related facilities and equipment required to support the

operation of these satellites;

(c) "Telecommunications" means any transmission, emission or reception of signs, signals, writing, images and sounds or intelligence of any nature, by wire, radio, optical or other electromagnetic systems;

(d) "Company" means the private entity or entities established under the law of one or more States to which the international telecommunications satellite organization's space system is transferred and includes their successors-in-interest;

(e) "On a Commercial Basis" means in accordance with usual and customary commercial practice in the telecommunications industry;

(f) "Public telecommunications services" means fixed or mobile telecommunications services which can be provided by satellite and which are available for use by the public, such as telephony, telegraphy, telex, facsimile, data transmission, transmission of radio and television programs between approved earth stations having access to the Company's space segment for further transmission to the public, and leased circuits for any of these purposes; but excluding those mobile services of a type not provided under the Interim Agreement and the Special Agreement prior to the opening for signature of this Agreement, which are provided through mobile stations operating directly to a satellite which is designed, in whole or in part, to provide services relating to the safety or flight control of aircraft or to aviation or maritime radio navigation;

(g) "Interim Agreement" means the Agreement Establishing Interim Arrangements for a Global Commercial Communications Satellite System signed by Governments at Washington on August 20, 1964;

(h) "Lifeline Connectivity Obligation" or "LCO" means the obligation assumed by the Company as set out in the LCO contract to provide continued telecommunications services to the LCO customer;

(i) "Special Agreement" means the agreement signed on August 20, 1964, by Governments or telecommunications entities designated by Governments, pursuant to the provisions of the Interim Agreement;

(j) "Public Services Agreement" means the legally binding instrument through which ITSO ensures that the Company honors the Core Principles;

(k) "Core Principles" means those principles set forth in Article III;

(l) "Common Heritage" means those frequency assignments associated with orbital locations in the process of advanced publication, coordination or registered on behalf of the Parties with the International Telecommunication Union ("ITU") in accordance with the provisions set forth in the ITU's Radio Regulations which are transferred to a Party or Parties pursuant to Article XI;

(m) "Global coverage" means the maximum geographic coverage of the earth towards the northernmost and southernmost parallels visible from satellites deployed in geostationary orbital locations;

(n) "Global connectivity" means the interconnection capabilities available to the Company's customers through the global coverage the Company provides in order to make communication possible within and between the five International Telecommunication Union regions defined by the plenipotentiary conference of the ITU, held in Montreux in 1965;

(o) "Non-discriminatory access" means fair and equal opportunity to access the Company's system;

(p) "Party" means a State for which the Agreement has entered into force or has been provisionally applied;

(q) "Property" includes every subject of whatever nature to which a right of ownership can attach, as well as contractual rights;

(r) "LCO customers" means all customers qualifying for and entering into LCO contracts; and

(s) "Administration" means any governmental department or agency responsible for compliance with the obligations derived from the Constitution of the International Telecommunication Union, the Convention of the International Telecommunication Union, and its Administrative Regulations.

### **Establishment of ITSO**

#### **ARTICLE II**

The Parties, with full regard for the principles set forth in the Preamble to this Agreement, establish the International Telecommunications Satellite Organization, herein referred to as "ITSO".

### **Main Purpose and Core Principles of ITSO**

#### **ARTICLE III**

(a) Taking into account the establishment of the Company, the main purpose of ITSO is to ensure, through the Public Services Agreement, that the Company provides, on a commercial basis, international public telecommunications services, in order to ensure performance of the Core Principles.

(b) The Core Principles are:

(i) maintain global connectivity and global coverage;

(ii) serve its lifeline connectivity customers; and

(iii) provide non-discriminatory access to the Company's system.

### **Covered Domestic Public Telecommunications Services**

#### **ARTICLE IV**

The following shall be considered for purposes of applying Article III on the same basis as international public telecommunications services:

(a) domestic public telecommunications services between areas separated by areas not under the jurisdiction of the State concerned, or between areas separated by the high seas;

and

(b) domestic public telecommunications services between areas which are not linked by any terrestrial wideband facilities and which are separated by natural barriers of such an exceptional nature that they impede the viable establishment of terrestrial wideband facilities between such areas, provided that the appropriate approval has been given.

### **Supervision**

#### **ARTICLE V**

ITSO shall take all appropriate actions, including entering into the Public Services Agreement, to supervise the performance by the Company of the Core Principles, in particular, the principle of non-discriminatory access to the Company's system for existing and future public telecommunications services offered by the Company when space segment capacity is available on a commercial basis.

### **Juridical Personality**

#### **ARTICLE VI**

(a) ITSO shall possess juridical personality. It shall enjoy the full capacity necessary for the exercise of its functions and the achievement of its purposes, including the capacity to:

(i) conclude agreements with States or international organizations;

(ii) contract;

(iii) acquire and dispose of property; and

(iv) be a party to legal proceedings.

(b) Each Party shall take such action as is necessary within its jurisdiction for the purpose of making effective in terms of its own law the provisions of this Article.

### **Financial Principles**

#### **ARTICLE VII**

(a) ITSO will be financed for the twelve year period established in Article XXI by the retention of certain financial assets at the time of transfer of ITSO's space system to the Company.

(b) In the event ITSO continues beyond twelve years, ITSO shall obtain funding through the Public Services Agreement

### **Structure of ITSO**

#### **ARTICLE VIII**

ITSO shall have the following organs:

- (a) the Assembly of Parties; and
- (b) an executive organ, headed by the Director General, responsible to the Assembly of Parties.

### **Assembly of Parties**

#### **ARTICLE IX**

- (a) The Assembly of Parties shall be composed of all the Parties and shall be the principal organ of ITSO.
- (b) The Assembly of Parties shall give consideration to general policy and long-term objectives of ITSO.
- (c) The Assembly of Parties shall give consideration to matters which are primarily of interest to the Parties as sovereign States, and in particular ensure that the Company provides, on a commercial basis, international public telecommunications services, in order to:
  - (i) maintain global connectivity and global coverage;
  - (ii) serve its lifeline connectivity customers; and
  - (iii) provide non-discriminatory access to the Company's system.
- (d) The Assembly of Parties shall have the following functions and powers:
  - (i) to direct the executive organ of ITSO as it deems appropriate, in particular regarding the executive organ's review of the activities of the Company that directly relate to the Core Principles;
  - (ii) to consider and take decisions on proposals for amending this Agreement in accordance with Article XV of this Agreement;
  - (iii) to appoint and remove the Director General in accordance with Article X;
  - (iv) to consider and decide on reports submitted by the Director General that relate to the Company's observance of the Core Principles;
  - (v) to consider and, in its discretion, take decisions on recommendations from the Director General;
  - (vi) to take decisions, pursuant to paragraph (b) of Article XIV of this Agreement, in connection with the withdrawal of a Party from ITSO;
  - (vii) to decide upon questions concerning formal relationships between ITSO and States, whether Parties or not, or international organizations;
  - (viii) to consider complaints submitted to it by Parties;

(ix) to consider issues pertaining to the Parties' Common Heritage;

- (x) to take decisions concerning the approval referred to in paragraph (b) of Article IV of this Agreement;
- (xi) to consider and approve the budget of ITSO for such period as agreed to by the Assembly of Parties;
- (xii) to take any necessary decisions with respect to contingencies that may arise outside of the approved budget;
- (xiii) to appoint an auditor to review the expenditures and accounts of ITSO;
- (xiv) to select the legal experts referred to in Article 3 of Annex A to this Agreement;
- (xv) to determine the conditions under which the Director General may commence an arbitration proceeding against the Company pursuant to the Public Services Agreement;
- (xvi) to decide upon amendments proposed to the Public Services Agreement; and
- (xvii) to exercise any other functions conferred upon it under any other Article of this Agreement.
- (e) The Assembly of Parties shall meet in ordinary session every two years beginning no later than twelve months after the transfer of ITSO's space system to the Company. In addition to the ordinary meetings of the Parties, the Assembly of Parties may meet in extraordinary meetings, which may be convened upon request of the executive organ acting pursuant to the provisions of paragraph (k) of Article X, or upon the written request of one or more Parties to the Director General that sets forth the purpose of the meeting and which receives the support of at least one-third of the Parties including the requesting Parties. The Assembly of Parties shall establish the conditions under which the Director General may convene an extraordinary meeting of the Assembly of Parties.
- (f) A quorum for any meeting of the Assembly of Parties shall consist of representatives of a majority of the Parties. Decisions on matters of substance shall be taken by an affirmative vote cast by at least two-thirds of the Parties whose representatives are present and voting. Decisions on procedural matters shall be taken by an affirmative vote cast by a simple majority of the Parties whose representatives are present and voting. Disputes whether a specific matter is procedural or substantive shall be decided by a vote cast by a simple majority of the Parties whose representatives are present and voting. Parties shall be afforded an opportunity to vote by proxy or other means as deemed appropriate by the Assembly of Parties and shall be provided with necessary information sufficiently in advance of the meeting of the Assembly of Parties.
- (g) For any meeting of the Assembly of Parties, each Party shall have one vote.
- (h) The Assembly of Parties shall adopt its own rules of procedure, which shall include provision for the election of a Chairman and other officers as well as provisions for participation and voting.
- (i) Each Party shall meet its own costs of representation at a meeting of the Assembly of Parties. Expenses of meetings of the Assembly of Parties shall be regarded as an administrative cost of ITSO.

#### **Director General**

## ARTICLE X

- (a) The executive organ shall be headed by the Director General who shall be directly responsible to the Assembly of Parties.
- (b) The Director General shall
  - (i) be the chief executive and the legal representative of ITSO and shall be responsible for the performance of all management functions, including the exercise of rights under contract;
  - (ii) act in accordance with the policies and directives of the Assembly of Parties; and
  - (iii) be appointed by the Assembly of Parties for a term of four years or such other period as the Assembly of Parties decides. The Director General may be removed from office for cause by the Assembly of Parties. No person shall be appointed as Director General for more than eight years.
- (c) The paramount consideration in the appointment of the Director General and in the selection of other personnel of the executive organ shall be the necessity of ensuring the highest standards of integrity, competency and efficiency, with consideration given to the possible advantages of recruitment and deployment on a regionally and geographically diverse basis. The Director General and the personnel of the executive organ shall refrain from any action incompatible with their responsibilities to ITSO.
- (d) The Director General shall, subject to the guidance and instructions of the Assembly of Parties, determine the structure, staff levels and standard terms of employment of officials and employees, and shall appoint the personnel of the executive organ. The Director General may select consultants and other advisers to the executive organ.
- (e) The Director General shall supervise the Company's adherence to the Core Principles.
- (f) The Director General shall
  - (i) monitor the Company's adherence to the Core Principle to serve LCO customers by honoring LCO contracts;
  - (ii) consider the decisions taken by the Company with respect to petitions for eligibility to enter into an LCO contract;
  - (iii) assist LCO customers in resolving their disputes with the Company by providing conciliation services; and
  - (iv) in the event an LCO customer decides to initiate an arbitration proceeding against the Company, provide advice on the selection of consultants and arbiters.
- (g) The Director General shall report to the Parties on the matters referred to in paragraphs (d) through (f).
- (h) Pursuant to the terms to be established by the Assembly of Parties, the Director General may commence arbitration proceedings against the Company pursuant to the Public Services Agreement.
- (i) The Director General shall deal with the Company in accordance with the Public Services Agreement.

(j) The Director General, on behalf of ITSO, shall consider all issues arising from the Parties' Common Heritage and shall communicate the views of the Parties to the Notifying Administration(s).

(k) When the Director General is of the view that a Party's failure to take action pursuant to Article XI(c) has impaired the Company's ability to comply with the Core Principles, the Director General shall contact that Party to seek a resolution of the situation and may, consistent with the conditions established by the Assembly of Parties pursuant to Article IX(e), convene an extraordinary meeting of the Assembly of Parties.

(l) The Assembly of Parties shall designate a senior officer of the executive organ to serve as the Acting Director General whenever the Director General is absent or is unable to discharge his duties, or if the office of Director General should become vacant. The Acting Director General shall have the capacity to exercise all the powers of the Director General pursuant to this Agreement. In the event of a vacancy, the Acting Director General shall serve in that capacity until the assumption of office by a Director General appointed and confirmed, as expeditiously as possible, in accordance with subparagraph (b) (iii) of this Article.

## AGREEMENT RELATING TO THE INTERNATIONAL TELECOMMUNICATIONS SATELLITE ORGANIZATION

### Rights and Obligations of Parties

## ARTICLE XI

(a) The Parties shall exercise their rights and meet their obligations under this Agreement in a manner fully consistent with and in furtherance of the principles stated in the Preamble, the Core Principles in Article III and other provisions of this Agreement.

(b) All Parties shall be allowed to attend and participate in all conferences and meetings, in which they are entitled to be represented in accordance with any provisions of this Agreement, as well as any other meeting called by or held under the auspices of ITSO, in accordance with the arrangements made by ITSO for such meetings regardless of where they may take place. The executive organ shall ensure that arrangements with the host Party for each such conference or meeting shall include a provision for the admission to the host country and sojourn for the duration of such conference or meeting, of representatives of all Parties entitled to attend.

(c) All Parties shall take the actions required, in a transparent, non-discriminatory, and competitively neutral manner, under applicable domestic procedure and pertinent international agreements to which they are party, so that the Company may fulfill the Core Principles.

### Frequency Assignments

## ARTICLE XII

(a) The Parties of ITSO shall retain the orbital locations and frequency assignments in process of coordination or registered on behalf of the Parties with the ITU pursuant to the provisions set forth in the ITU's Radio Regulations until such time as the selected Notifying Administration(s) has provided its notification to the Depository that it has approved, accepted or ratified the present Agreement. The Parties shall select among the ITSO members a Party to represent all ITSO member Parties with the ITU during the period in which the Parties of

ITSO retain such assignments.

(b) The Party selected pursuant to paragraph (a) to represent all Parties during the period in which ITSO retains the assignments shall, upon the receipt of the notification by the Depository of the approval, acceptance or ratification of the present Agreement by a Party selected by the Assembly of Parties to act as a Notifying Administration for the Company, transfer such assignments to the selected Notifying Administration(s).

(c) Any Party selected to act as the Company's Notifying Administration shall, under applicable domestic procedure:

(i) authorize the use of such frequency assignment by the Company so that the Core Principles may be fulfilled; and

(ii) in the event that such use is no longer authorized, or the Company no longer requires such frequency assignment(s), cancel such frequency assignment under the procedures of the ITU.

(d) Notwithstanding any other provision of this Agreement, in the event a Party selected to act as a Notifying Administration for the Company ceases to be a member of ITSO pursuant to Article XIV, such Party shall be bound and subject to all relevant provisions set forth in this Agreement and in the ITU's Radio Regulations until the frequency assignments are transferred to another Party in accordance with ITU procedures.

(e) Each Party selected to act as a Notifying Administration pursuant to paragraph (c) shall:

(i) report at least on an annual basis to the Director General on the treatment afforded by such Notifying Administration to the Company, with particular regard to such Party's adherence to its obligations under Article XI(c);

(ii) seek the views of the Director General, on behalf of ITSO, regarding actions required to implement the Company's fulfillment of the Core Principles;

(iii) work with the Director General, on behalf of ITSO, on potential activities of the Notifying Administration(s) to expand access to lifeline countries;

(iv) notify and consult with the Director General on ITU satellite system coordinations that are undertaken on behalf of the Company to assure that global connectivity and service to lifeline users are maintained; and

(v) consult with the ITU regarding the satellite communications needs of lifeline users.

#### **ITSO Headquarters, Privileges, Exemptions, Immunities**

#### **ARTICLE XIII**

(a) The headquarters of ITSO shall be in Washington, D.C. unless otherwise determined by the Assembly of Parties.

(b) Within the scope of activities authorized by this Agreement, ITSO and its property shall be exempt in all States Party to this Agreement from all national income and direct national property taxation. Each Party undertakes to use its best endeavors to bring about, in accordance with the applicable domestic procedure, such further exemption of ITSO and its property from income and direct property taxation, and customs duties, as is desirable,

bearing in mind the particular nature of ITSO.

(c) Each Party other than the Party in whose territory the headquarters of ITSO is located shall grant in accordance with the Protocol referred to in this paragraph, and the Party in whose territory the headquarters of ITSO is located shall grant in accordance with the Headquarters Agreement referred to in this paragraph, the appropriate privileges, exemptions and immunities to ITSO, to its officers, and to those categories of its employees specified in such Protocol and Headquarters Agreement, to Parties and representatives of Parties. In particular, each Party shall grant to these individuals immunity from legal process in respect of acts done or words written or spoken in the exercise of their functions and within the limits of their duties, to the extent and in the cases to be provided for in the Headquarters Agreement and Protocol referred to in this paragraph. The Party in whose territory the headquarters of ITSO is located shall, as soon as possible, conclude a Headquarters Agreement with ITSO covering privileges, exemptions and immunities. The other Parties shall, also as soon as possible, conclude a Protocol covering privileges, exemptions and immunities. The Headquarters Agreement and the Protocol shall be independent of this Agreement and each shall prescribe the conditions of its termination.

#### **Withdrawal**

#### **ARTICLE XIV**

(a) (i) Any Party may withdraw voluntarily from ITSO. A Party shall give written notice to the Depository of its decision to withdraw.

(ii) Notification of the decision of a Party to withdraw pursuant to subparagraph (a)(i) of this Article shall be transmitted by the Depository to all Parties and to the executive organ.

(iii) Subject to Article XII(d), voluntary withdrawal shall become effective and this Agreement shall cease to be in force, for a Party three months after the date of receipt of the notice referred to in subparagraph (a)(i) of this Article.

(b) (i) If a Party appears to have failed to comply with any obligation under this Agreement, the Assembly of Parties, having received notice to that effect or acting on its own initiative, and having considered any representations made by the Party, may decide, if it finds that the failure to comply has in fact occurred, that the Party be deemed to have withdrawn from ITSO. This Agreement shall cease to be in force for the Party as of the date of such decision. An extraordinary meeting of the Assembly of Parties may be convened for this purpose.

(ii) If the Assembly of Parties decides that a Party shall be deemed to have withdrawn from ITSO pursuant to subparagraph (i) of this paragraph (b), the executive organ shall notify the Depository, which shall transmit the notification to all Parties.

(c) Upon the receipt by the Depository or the executive organ, as the case may be, of notice of decision to withdraw pursuant to subparagraph (a)(i) of this Article, the Party giving notice shall cease to have any rights of representation and any voting rights in the Assembly of Parties, and shall incur no obligation or liability after the receipt of the notice.

(d) If the Assembly of Parties, pursuant to paragraph (b) of this Article, deems a Party to have withdrawn from ITSO, that Party shall incur no obligation or liability after such decision.

(e) No Party shall be required to withdraw from ITSO as a direct result of any change in the status of that Party with regard to the United Nations or the International Telecommunication Union.

## Amendment

### ARTICLE XV

- (a) Any Party may propose amendments to this Agreement. Proposed amendments shall be submitted to the executive organ, which shall distribute them promptly to all Parties.
- (b) The Assembly of Parties shall consider each proposed amendment at its first ordinary meeting following its distribution by the executive organ, or at an earlier extraordinary meeting convened in accordance with the procedures of Article IX of this Agreement, provided that the proposed amendment has been distributed by the executive organ at least ninety days before the opening date of the meeting.
- (c) The Assembly of Parties shall take decisions on each proposed amendment in accordance with the provisions relating to quorum and voting contained in Article IX of this Agreement. It may modify any proposed amendment, distributed in accordance with paragraph (b) of this Article, and may also take decisions on any amendment not so distributed but directly consequential to a proposed or modified amendment.
- (d) An amendment which has been approved by the Assembly of Parties shall enter into force in accordance with paragraph (e) of this Article after the Depository has received notice of approval, acceptance or ratification of the amendment from two-thirds of the States which were Parties as of the date upon which the amendment was approved by the Assembly of Parties.
- (e) The Depository shall notify all the Parties as soon as it has received the acceptances, approvals or ratifications required by paragraph (d) of this Article for the entry into force of an amendment. Ninety days after the date of issue of this notification, the amendment shall enter into force for all Parties, including those that have not yet accepted, approved, or ratified it and have not withdrawn from ITSO.
- (f) Notwithstanding the provisions of paragraphs (d) and (e) of this Article, an amendment shall not enter into force less than eight months after the date it has been approved by the Assembly of Parties.

### Settlement of Disputes

### ARTICLE XVI

- (a) All legal disputes arising in connection with the rights and obligations under this Agreement between Parties with respect to each other, or between ITSO and one or more Parties, if not otherwise settled within a reasonable time, shall be submitted to arbitration in accordance with the provisions of Annex A to this Agreement.
- (b) All legal disputes arising in connection with the rights and obligations under this Agreement between a Party and a State which has ceased to be a Party or between ITSO and a State which has ceased to be a Party, and which arise after the State ceased to be a Party, if not otherwise settled within a reasonable time, shall be submitted to arbitration in accordance with the provisions of Annex A to this Agreement, provided that the State which has ceased to be a Party so agrees. If a State ceases to be a Party, after a dispute in which it is a disputant has been submitted to arbitration pursuant to paragraph (a) of this Article, the arbitration shall be continued and concluded.
- (c) All legal disputes arising as a result of agreements between ITSO and any Party shall be subject to the provisions on settlement of disputes contained in such agreements. In the

absence of such provisions, such disputes, if not otherwise settled, may be submitted to arbitration in accordance with the provisions of Annex A to this Agreement if the disputants so agree.

## Signature

### ARTICLE XVII

- (a) This Agreement shall be open for signature at Washington from August 20, 1971 until it enters into force, or until a period of nine months has elapsed, whichever occurs first:
- (i) by the Government of any State party to the Interim Agreement;
- (ii) by the Government of any other State member of the United Nations or the International Telecommunication Union.
- (b) Any Government signing this Agreement may do so without its signature being subject to ratification, acceptance or approval or with a declaration accompanying its signature that it is subject to ratification, acceptance or approval.
- (c) Any State referred to in paragraph (a) of this Article may accede to this Agreement after it is closed for signature.
- (d) No reservation may be made to this Agreement.

## Entry Into Force

### ARTICLE XVIII

- (a) This Agreement shall enter into force sixty days after the date on which it has been signed not subject to ratification, acceptance or approval, or has been ratified, accepted, approved or acceded to, by two-thirds of the States which were parties to the Interim Agreement as of the date upon which this Agreement is opened for signature, provided that such two-thirds include parties to the Interim Agreement which then held at least two-thirds of the quotas under the Special Agreement. Notwithstanding the foregoing provisions, this Agreement shall not enter into force less than eight months or more than eighteen months after the date it is opened for signature.
- (b) For a State whose instrument of ratification, acceptance, approval or accession is deposited after the date this Agreement enters into force pursuant to paragraph (a) of this Article, this Agreement shall enter into force on the date of such deposit.
- (c) Upon entry into force of this Agreement pursuant to paragraph (a) of this Article, it may be applied provisionally with respect to any State whose Government signed it subject to ratification, acceptance or approval if that Government so requests at the time of signature or at any time thereafter prior to the entry into force of this Agreement. Provisional application shall terminate:
- (i) upon deposit of an instrument of ratification, acceptance or approval of this Agreement by that Government;
- (ii) upon expiration of two years from the date on which this Agreement enters into force

without having been ratified, accepted or approved by that Government; or

(iii) upon notification by that Government, before expiration of the period mentioned in subparagraph (ii) of this paragraph, of its decision not to ratify, accept or approve this Agreement.

If provisional application terminates pursuant to subparagraph (ii) or (iii) of this paragraph, the provisions of paragraph (c) of Article XIV of this Agreement shall govern the rights and obligations of the Party

(d) Upon entry into force, this Agreement shall replace and terminate the Interim Agreement.

**Miscellaneous Provisions**

**ARTICLE XIX**

(a) The official and working languages of ITSO shall be English, French and Spanish.

(b) Internal regulations for the executive organ shall provide for the prompt distribution to all Parties of copies of any ITSO document in accordance with their requests.

(c) Consistent with the provisions of Resolution 1721 (XVI) of the General Assembly of the United Nations, the executive organ shall send to the Secretary General of the United Nations, and to the Specialized Agencies concerned, for their information, an annual report on the activities of ITSO.

**Depositary**

**ARTICLE XX**

(a) The Government of the United States of America shall be the Depositary for this Agreement, with which shall be deposited declarations made pursuant to paragraph (b) of Article XVII of this Agreement, instruments of ratification, acceptance, approval or accession, requests for provisional application, and notifications of ratification, acceptance or approval of amendments, of decisions to withdraw from ITSO, or of termination of the provisional application of this Agreement.

(b) This Agreement, of which the English, French and Spanish texts are equally authentic, shall be deposited in the archives of the Depositary. The Depositary shall transmit certified copies of the text of this Agreement to all Governments that have signed it or deposited instruments of accession to it, and to the International Telecommunication Union, and shall notify those Governments, and the International Telecommunication Union, of signatures, of declarations made pursuant to paragraph (b) of Article XVII of this Agreement, of the deposit of instruments of ratification, acceptance, approval or accession, of requests for provisional application, of commencement of the sixty-day period referred to in paragraph (a) of Article XVIII of this Agreement, of the entry into force of this Agreement, of notifications of ratification, acceptance or approval of amendments, of the entry into force of amendments, of decisions to withdraw from ITSO, of withdrawals and of terminations of provisional application of this Agreement. Notice of the commencement of the sixty-day period shall be issued on the first day of that period.

(c) Upon entry into force of this Agreement, the Depositary shall register it with the Secretariat of the United Nations in accordance with Article 102 of the Charter of the United Nations.

**Duration**

**ARTICLE XXI**

This Agreement shall be in effect for at least twelve years from the date of transfer of ITSO's space system to the Company. The Assembly of Parties may terminate this Agreement effective upon the twelfth anniversary of the date of transfer of ITSO's space system to the Company by a vote pursuant to Article IX(f) of the Parties. Such decision shall be deemed to be a matter of substance.

IN WITNESS WHEREOF the Plenipotentiaries gathered together in the city of Washington, who have submitted their full powers, found to be in good and due form, have signed this Agreement.

DONE at Washington, on the 20<sup>th</sup> day of August, one thousand nine hundred and seventy one

**Provisions on Procedures Relating to Settlement of Disputes**

**ANNEX A**

**ARTICLE 1**

The only disputants in arbitration proceedings instituted in accordance with this Annex shall be those referred to in Article XVI of this Agreement.

**ARTICLE 2**

An arbitral tribunal of three members duly constituted in accordance with the provisions of this Annex shall be competent to give a decision in any dispute cognizable pursuant to Article XVI of this Agreement.

**ARTICLE 3**

(a) Not later than sixty days before the opening date of the first and each subsequent ordinary meeting of the Assembly of Parties, each Party may submit to the executive organ the names of not more than two legal experts who will be available for the period from the end of such meeting until the end of the second subsequent ordinary meeting of the Assembly of Parties to serve as presidents or members of tribunals constituted in accordance with this Annex. From such nominees the executive organ shall prepare a list of all the persons thus nominated and shall attach to this list any biographical particulars submitted by the nominating Party, and shall distribute such list to all Parties not later than thirty days before the opening date of the meeting in question. If for any reason a nominee becomes unavailable for selection to the panel during the sixty-day period before the opening date of the meeting of the Assembly of Parties, the nominating Party may, not later than fourteen days before the opening date of the meeting of the Assembly of Parties, substitute the name of another legal expert.

(b) From the list mentioned in paragraph (a) of this Article, the Assembly of Parties shall select eleven persons to be members of a panel from which presidents of tribunals shall be selected, and shall select an alternate for each such member. Members and alternates shall serve for the period prescribed in paragraph (a) of this Article. If a member becomes unavailable to serve on the panel, he shall be replaced by his alternate.

(c) For the purpose of designating a chairman, the panel shall be convened to meet by the

executive organ as soon as possible after the panel has been selected. Members of the panel may participate in this meeting in person, or through electronic means. The quorum for a meeting of the panel shall be nine of the eleven members. The panel shall designate one of its members as its chairman by a decision taken by the affirmative votes of at least six members, cast in one or, if necessary, more than one secret ballot. The chairman so designated shall hold office as chairman for the rest of his period of office as a member of the panel. The cost of the meeting of the panel shall be regarded as an administrative cost of ITSO.

(d) If both a member of the panel and the alternate for that member become unavailable to serve, the Assembly of Parties shall fill the vacancies thus created from the list referred to in paragraph (a) of this Article. A person selected to replace a member or alternate whose term of office has not expired shall hold office for the remainder of the term of his predecessor. Vacancies in the office of the chairman of the panel shall be filled by the panel by designation of one of its members in accordance with the procedure prescribed in paragraph (c) of this Article.

(e) In selecting the members of the panel and the alternates in accordance with paragraph (b) or (d) of this Article, the Assembly of Parties shall seek to ensure that the composition of the panel will always be able to reflect an adequate geographical representation, as well as the principal legal systems as they are represented among the Parties.

(f) Any panel member or alternate serving on an arbitral tribunal at the expiration of his term shall continue to serve until the conclusion of any arbitral proceeding pending before such tribunal.

#### ARTICLE 4

(a) Any petitioner wishing to submit a legal dispute to arbitration shall provide each respondent and the executive organ with a document which contains:

(i) a statement which fully describes the dispute being submitted for arbitration, the reasons why each respondent is required to participate in the arbitration, and the relief being requested;

(ii) a statement which sets forth why the subject matter of the dispute comes within the competence of a tribunal to be constituted in accordance with this Annex, and why the relief being requested can be granted by such tribunal if it finds in favor of the petitioner;

(iii) a statement explaining why the petitioner has been unable to achieve a settlement of the dispute within a reasonable time by negotiation or other means short of arbitration;

(iv) in the case of any dispute for which, pursuant to Article XVI of this Agreement, the agreement of the disputants is a condition for arbitration in accordance with this Annex, evidence of such agreement; and

(v) the name of the person designated by the petitioner to serve as a member of the tribunal.

(b) The executive organ shall promptly distribute to each Party, and to the chairman of the panel, a copy of the document provided pursuant to paragraph (a) of this Article.

#### ARTICLE 5

(a) Within sixty days from the date copies of the document described in paragraph (a) of Article 4 of this Annex have been received by all the respondents, the side of the respondents shall designate an individual to serve as a member of the tribunal. Within that period, the

respondents may, jointly or individually, provide each disputant and the executive organ with a document stating their responses to the document referred to in paragraph (a) of Article 4 of this Annex and including any counter-claims arising out of the subject matter of the dispute. The executive organ shall promptly furnish the chairman of the panel with a copy of any such document.

(b) In the event of a failure by the side of the respondents to make such a designation within the period allowed, the chairman of the panel shall make a designation from among the experts whose names were submitted to the executive organ pursuant to paragraph (a) of Article 3 of this Annex.

(c) Within thirty days after the designation of the two members of the tribunal, they shall agree on a third person selected from the panel constituted in accordance with Article 3 of this Annex, who shall serve as the president of the tribunal. In the event of failure to reach agreement within such period of time, either of the two members designated may inform the chairman of the panel, who, within ten days, shall designate a member of the panel other than himself to serve as president of the tribunal.

(d) The tribunal is constituted as soon as the president is selected.

#### ARTICLE 6

(a) If a vacancy occurs in the tribunal for reasons which the president or the remaining members of the tribunal decide are beyond the control of the disputants, or are compatible with the proper conduct of the arbitration proceedings, the vacancy shall be filled in accordance with the following provisions:

(i) if the vacancy occurs as a result of the withdrawal of a member appointed by a side to the dispute, then that side shall select a replacement within ten days after the vacancy occurs;

(ii) if the vacancy occurs as a result of the withdrawal of the president of the tribunal or of another member of the tribunal appointed by the chairman, a replacement shall be selected from the panel in the manner described in paragraph (c) or (b) respectively of Article 5 of this Annex.

(b) If a vacancy occurs in the tribunal for any reason other than as described in paragraph (a) of this Article, or if a vacancy occurring pursuant to that paragraph is not filled, the remainder of the tribunal shall have the power, notwithstanding the provisions of Article 2 of this Annex, upon the request of one side, to continue the proceedings and give the final decision of the tribunal.

#### ARTICLE 7

(a) The tribunal shall decide the date and place of its sittings.

(b) The proceedings shall be held in private and all material presented to the tribunal shall be confidential, except that ITSO and the Parties who are disputants in the proceedings shall have the right to be present and shall have access to the material presented. When ITSO is a disputant in the proceedings, all Parties shall have the right to be present and shall have access to the material presented.

(c) In the event of a dispute over the competence of the tribunal, the tribunal shall deal with this question first, and shall give its decision as soon as possible.

(d) The proceedings shall be conducted in writing, and each side shall have the right to submit written evidence in support of its allegations of fact and law. However, oral arguments

and testimony may be given if the tribunal considers it appropriate.

(e) The proceedings shall commence with the presentation of the case of the petitioner containing its arguments, related facts supported by evidence and the principles of law relied upon. The case of the petitioner shall be followed by the counter-case of the respondent. The petitioner may submit a reply to the counter-case of the respondent. Additional pleadings shall be submitted only if the tribunal determines they are necessary.

(f) The tribunal may hear and determine counter-claims arising directly out of the subject matter of the dispute, provided the counter-claims are within its competence as defined in Article XVI of this Agreement.

(g) If the disputants reach an agreement during the proceedings, the agreement shall be recorded in the form of a decision of the tribunal given by consent of the disputants.

(h) At any time during the proceedings, the tribunal may terminate the proceedings if it decides the dispute is beyond its competence as defined in Article XVI of the Agreement.

(i) The deliberations of the tribunal shall be secret.

(j) The decisions of the tribunal shall be presented in writing and shall be supported by a written opinion. Its rulings and decisions must be supported by at least two members. A member dissenting from the decision may submit a separate written opinion.

(k) The tribunal shall forward its decision to the executive organ, which shall distribute it to all Parties.

(l) The tribunal may adopt additional rules of procedure, consistent with those established by this Annex, which are necessary for the proceedings.

#### ARTICLE 8

If one side fails to present its case, the other side may call upon the tribunal to give a decision in its favor. Before giving its decision, the tribunal shall satisfy itself that it has competence and that the case is well-founded in fact and in law.

#### ARTICLE 9

Any Party not a disputant in a case, or ITSO, if it considers that it has a substantial interest in the decision of the case, may petition the tribunal for permission to intervene and become an additional disputant in the case. If the tribunal determines that the petitioner has a substantial interest in the decision of the case, it shall grant the petition.

#### ARTICLE 10

Either at the request of a disputant or upon its own initiative, the tribunal may appoint such experts as it deems necessary to assist it.

#### ARTICLE 11

Each Party and ITSO shall provide all information determined by the tribunal, either at the request of a disputant or upon its own initiative, to be required for the handling and determination of the dispute.

#### ARTICLE 12

During the course of its consideration of the case, the tribunal may, pending the final decision, indicate any provisional measures which it considers would preserve the respective rights of the disputants.

#### ARTICLE 13

(a) The decision of the tribunal shall be based on

(i) this Agreement; and

(ii) generally accepted principles of law.

(b) The decision of the tribunal, including any reached by agreement of the disputants pursuant to paragraph (g) of Article 7 of this Annex, shall be binding on all the disputants and shall be carried out by them in good faith. In a case in which ITSO is a disputant, and the tribunal decides that a decision of one of its organs is null and void as not being authorized by or in compliance with this Agreement, the decision of the tribunal shall be binding on all Parties.

(c) In the event of a dispute as to the meaning or scope of its decision, the tribunal shall construe it at the request of any disputant.

#### ARTICLE 14

Unless the tribunal determines otherwise because of the particular circumstances of the case, the expenses of the tribunal, including the remuneration of the members of the tribunal, shall be borne in equal shares by each side. Where a side consists of more than one disputant, the share of that side shall be apportioned by the tribunal among the disputants on that side. Where ITSO is a disputant, its expenses associated with the arbitration shall be regarded as an administrative cost of ITSO.

**Singapore Declaration of Commonwealth Principles,  
1971**

progress in the modern world. The association is based on consultation, discussion and co-operation.

13. In rejecting coercion as an instrument of policy, they recognise that the security of each member state from external aggression is a matter of concern to all members. It provides many channels for continuing exchanges of knowledge and views on professional, cultural, economic, legal and political issues among the member states.

14. These relationships we intend to foster and extend, for we believe that our multi-national association can expand human understanding and understanding among nations, assist in the elimination of discrimination based on differences of race, colour or creed, maintain and strengthen personal liberty, contribute to the enrichment of life for all, and provide a powerful influence for peace among nations.

# SINGAPORE DECLARATION OF COMMONWEALTH PRINCIPLES 1971

When Commonwealth Heads of Government met in Singapore in January 1971, they agreed on a set of ideals which are embraced by all members and provide a basis for peace, understanding and goodwill among all nations and people.

The core beliefs of the Commonwealth are expressed in this Declaration, which embrace equal rights for all regardless of race, colour, creed or political belief, the association's commitment to democratic self-determination and non-racialism, world peace and an end to gross inequity, and its commitment to practice international co-operation in pursuit of these goals.



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Printed in 2004

## SINGAPORE DECLARATION OF COMMONWEALTH PRINCIPLES, 1971

*Issued at the Heads of Government Meeting in Singapore on 22 January 1971*

1. The Commonwealth of Nations is a voluntary association of independent sovereign states, each responsible for its own policies, consulting and co-operating in the common interests of their peoples and in the promotion of international understanding and world peace.
2. Members of the Commonwealth come from territories in the six continents and five oceans, include peoples of different races, languages and religions, and display every stage of economic development from poor developing nations to wealthy industrialised nations. They encompass a rich variety of cultures, traditions and institutions.
3. Membership of the Commonwealth is compatible with the freedom of member governments to be non-aligned or to belong to any other grouping, association or alliance.
4. Within this diversity, all members of the Commonwealth hold certain principles in common. It is by pursuing these principles that the Commonwealth can continue to influence international society for the benefit of mankind.

5. We believe that international peace and order are essential to the security and prosperity of mankind; we therefore support the United Nations and seek to strengthen its influence for peace in the world, and its efforts to remove the causes of tension between nations.

6. We believe in the liberty of the individual, in equal rights for all citizens regardless of race, colour, creed or political belief, and in their inalienable right to participate by means of free and democratic political processes in framing the society in which they live. We therefore strive to promote in each of our countries those representative institutions and guarantees for personal freedom under the law that are our common heritage.

7. We recognise racial prejudice as a dangerous sickness threatening the healthy development of the human race and racial discrimination as an unmitigated evil of society. Each of us will vigorously combat this evil within our own nation. No country will afford to regimes which practice racial discrimination assistance which in its own judgment directly contributes to the pursuit or consolidation of this evil policy.

8. We oppose all forms of colonial domination and racial oppression and are committed to the principles of human dignity and equality. We will therefore use all our efforts to foster human equality and dignity everywhere, and to further the principles of self-determination and non-racialism.

9. We believe that the wide disparities in wealth now existing between different sections of mankind are too great to be tolerated. They also create world tensions. Our aim is their progressive removal. We therefore seek to use our efforts to overcome poverty, ignorance and disease, in raising standards of life and achieving a more equitable international society.

10. To this end our aim is to achieve the freest possible flow of international trade on terms fair and equitable to all, taking into account the special requirements of the developing countries, and to encourage the flow of adequate resources, including governmental and private resources, to the developing countries, bearing in mind the importance of doing this in a true spirit of partnership and of establishing for this purpose in the developing countries conditions which are conducive to sustained investment and growth.

11. We believe that international co-operation is essential to remove the causes of war, promote tolerance, combat injustice, and secure development among the peoples of the world. We are convinced that the Commonwealth is one of the most fruitful associations for these purposes.

12. In pursuing these principles, the members of the Commonwealth believe that they can provide a constructive example of the multi-national approach which is vital to peace and



**Montevideo Treaty, Instrument Establishing the  
Latin American Integration Association  
(ALADI), 1980**

## LAIA FREE TRADE AGREEMENT

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### 1980 TREATY OF MONTEVIDEO

#### INSTRUMENT ESTABLISHING THE LATIN AMERICAN INTEGRATION ASSOCIATION (ALADI)

MONTEVIDEO, AUGUST 1980

#### INTRODUCTORY NOTE

The 1980 Montevideo Treaty undertakes to further the process of economic integration started in the Latin American region two decades ago and provides for the creation of the Latin American Integration Association (LAIA), in place of the Latin American Free Trade Association (LAFTA) established by the Montevideo Treaty concluded in 1960.

This new juridical instrument was signed on 12 August 1980, at Montevideo (Uruguay), by the Ministers of Foreign Affairs of eleven Latin American states, namely: Argentina, Bolivia, Brazil, Chile, Colombia, Ecuador, Mexico, Paraguay, Peru, Uruguay and Venezuela.

The Secretariat has prepared the following English version of the 1980 Montevideo Treaty and of the supplementary resolutions adopted by LAFTA Council of Ministers on August 1980 in order to meet information requests received from abroad. It should be emphasized, however, that the present translation has no legal authority whatsoever, only the Spanish and Portuguese texts being authentically valid.

#### 1980 MONTEVIDEO TREATY

*The Governments of the Argentine Republic, the Republic of Bolivia, the Federative Republic of Brazil, the Republic of Chile, the Republic of Colombia, the Republic of Ecuador, the United Mexican States, the Republic of Paraguay, the Republic of Peru, the Eastern Republic of Uruguay, and the Republic of Venezuela,*

*INSPIRED* by the purpose of strengthening the friendship and solidarity links between their peoples.

*PERSUADED* that economic regional integration is one of the principal means for the Latin American countries to speed up their economic and social development process in order to ensure better standards of life for their peoples.

*DECIDED* to renew the Latin American integration process and establish objectives and mechanisms consistent with the region's real situation.

*CERTAIN* that the continuation of such process requires taking advantage of the positive experience obtained in the implementation of the Montevideo Treaty dated 18 February 1960.

*AWARE* that it is necessary to ensure a special treatment for countries at a relatively less advanced stage of economic development. *WILLING* to encourage the development of solidarity and cooperation ties with other countries and integration areas of Latin America in order to promote a process converging towards the establishment of a regional common market.

*CONVINCED* of the need to contribute towards obtaining a new scheme of horizontal cooperation between developing countries and their integration areas, inspired by the principles of international law regarding development.

*BEARING IN MIND* the decision adopted by the Contracting Parties to the General Agreement on Tariffs and Trade whereby regional or general agreements may be drawn up between developing countries in order to mutually reduce or eliminate obstacles to their reciprocal trade.

*THEY HEREBY AGREE* to sign the present Treaty which, concurrent with the provisions herein contained, shall substitute the Treaty instituting the Latin American Free Trade Association.

## CHAPTER I: OBJECTIVES, DUTIES AND PRINCIPLES

### Article 1

By the present Treaty the Contracting Parties pursue the integration process leading to promote the harmonious and balanced socio-economic development of the region, and to that effect they hereby institute the Latin American Integration Association (hereafter referred to as the "Association"), with headquarters in the city of Montevideo, Eastern Republic of Uruguay.

The long-term objective of such process shall be the gradual and progressive establishment of a Latin American common market.

### Article 2

The rules and mechanisms of the present Treaty, as well as those which may be established within its framework by member countries, shall have as their purpose the performance of the following basic duties of the Association: promotion and regulation of reciprocal trade, economic complementation, and development of economic cooperation actions encouraging market expansion.

### Article 3

In the implementation of the present Treaty and the evolution towards its final objective, member countries shall bear in mind the following principles:

a. Pluralism, sustained by the will of member countries to integrate themselves, over and above the diversity which might exist in political and economic matters in the region;

b. Convergence, meaning progressive multilateralization of partial scope agreements by means of periodical negotiations between member countries, with a view to establish the Latin American common market;

c. Flexibility, characterized by the capacity to allow the conclusion of partial scope agreements, ruled in a form consistent with the progressive attainment of their convergence and the strengthening of integration ties;

d. Differential treatments, as determined in each case, both in regional and partial scope mechanisms, on the basis of three categories of countries, which will be set up taking into account their economic-structural characteristics. Such treatments shall be applied in a determined scale to intermediate developed countries, and in a more favourable manner to countries at a relatively less advanced stage of economic development; and

e. Multiple, to make possible various forms of agreements between member countries, following the objectives and duties of the integration process, using all instruments capable of activating and expanding markets at regional level.

## CHAPTER II: MECHANISMS

### Article 4

In order to fulfill the basic duties of the Association set forth in article 2 of the present Treaty, member countries hereby establish an area of economic preferences, comprising a regional tariff preference, regional scope agreements, and partial scope agreements.

#### First section - Regional tariff preference

##### Article 5

Member countries shall reciprocally grant a regional tariff preference to be applied with reference to the level in force for third countries and be subject to the corresponding regulation.

#### Second section - Regional scope agreements

##### Article 6

Regional scope agreements are those in which all member countries participate. They shall be drawn up within in framework of the objectives and provisions of the present Treaty, and may refer to the same matters and include those instruments foreseen for the partial scope agreements provided for in the third section of the present chapter.

#### Third section - Partial scope agreements

##### Article 7

Partial scope agreements are those wherein all member countries do not participate. These agreements shall tend to create the conditions necessary to deepen the regional integration process by means of their progressive multilateralization.

Rights and obligations to be established in partial scope agreements shall exclusively bind the signatory member countries or those adhered thereto.

##### Article 8

Partial scope agreements may refer to trade, economic complementation, agriculture, trade promotion, or adopt other modalities concurring with article 14 of the present Treaty.

##### Article 9

Partial scope agreements shall be governed by the following general rules:

a. They shall be open for accession to the other member countries, prior negotiation;

b. They shall contain clauses promoting convergence in order that their benefits reach all member countries;

c. They may contain clauses promoting convergence with other Latin American countries, in concurrence with the mechanisms established in the present Treaty;

d. They shall include differential treatments depending on the three categories of countries recognized by the present Treaty. The implementation of such treatments as well as negotiation procedures for their periodical revision at the request of any member country which may consider itself at a disadvantage shall be determined in each agreement;

e. Tariff reductions may be applied to the same products or tariff sub-items and on the basis of a percentage rebate regarding the tariffs applied to imports originating from non-participating countries;

f. They shall be in force for a minimum term of one year; and

g. They may include, among others, specific rules regarding origin, safeguard clauses, non-tariff restrictions, withdrawal of concessions, renegotiation of concessions, denouncement, coordination and harmonization of policies. Should these specific rules not have been adopted, the general provisions to be established by member countries on the respective matters shall be taken into account.

*Article 10*

Trade agreements are exclusively aimed towards trade promotion among member countries, and shall be subject to the specific rules to be established for that purpose.

*Article 11*

Economic complementation agreements are aimed, among other objectives, to promote maximum utilization of production factors, stimulate economic complementation, ensure equitable conditions for competition, facilitate entry of products into the international market, and encourage the balanced and harmonious development of member countries. These agreements shall be subject to the specific rules to be established for that purpose.

*Article 12*

Agricultural agreements are aimed to promote and regulate intraregional trade of agricultural and livestock products. They shall contemplate flexibility elements bearing in mind the participating countries' socio-economic characteristics of production.

These agreements may refer to specific products or groups of products, and may be based on temporary, seasonal, per quota or mixed concessions, or on contracts between State or para-State organizations. They shall be subject to the specific rules to be established for that purpose.

*Article 13*

Trade promotion agreements shall refer to non-tariff matters and tend to promote intraregional trade flows.

They shall be subject to the specific rules to be established for that purpose.

*Article 14*

Member countries may establish, through the corresponding regulations, specific rules to conclude other modalities of partial scope agreements.

For this purpose, they shall take into consideration, among other matters, scientific and technological cooperation, tourism promotion and preservation of the environment.

**CHAPTER III: SYSTEM IN FAVOUR OF COUNTRIES AT A RELATIVELY LESS  
ADVANCED STAGE OF ECONOMIC DEVELOPMENT**

*Article 15*

Member countries shall establish conditions favouring participation of countries at a relatively less advanced stage of economic development in the economic integration process, based on the principles of non-reciprocity and community cooperation.

*Article 16*

For the purpose of ensuring them an effective preferential treatment, member countries shall establish market opening as well as set up programs and other specific forms of cooperation.

*Article 17*

Actions favouring relatively less developed countries shall be concluded through regional scope and partial scope agreements.

In order to ensure the effectiveness of such agreements, member countries shall execute negotiated rules concerning preservation of preferences, elimination of nontariff restrictions and application of safeguard clauses in justified cases.

**First section - Regional scope agreements**

*Article 18*

For each relatively less developed country, member countries shall approve negotiated lists of preferably industrial products originating from each relatively less developed country, for which total elimination of customs duties and other restrictions shall be accorded, without reciprocity, by all other member countries of the Association.

Member countries shall set up the necessary procedures to achieve progressive extension of the respective liberalization lists. Corresponding negotiations may be carried out when deemed convenient.

At the same time, member countries shall endeavour to set up effective compensation mechanisms to take care of negative effects which might influence intraregional trade of the relatively less developed land-locked countries.

**Second section - Partial scope agreements**

*Article 19*

Partial scope agreements negotiated by the relatively less developed countries with other member countries shall conform, wherever pertinent, with the provisions contained in articles 8 and 9 of the present Treaty.

*Article 20*

In order to encourage effective and collective cooperation in favour of relatively less developed countries, member countries shall negotiate Special Cooperation Programs with each one of them.

*Article 21*

In order to facilitate utilization of tariff cuts, member countries may set up cooperation programs and actions in the fields of reinvestment, financing and technology, mainly directed towards supporting the relatively less developed countries, with special regard, among them, to land-locked countries.

member countries shall be carried out in order to find mutually satisfactory solutions, unless the respective partial agreements include clauses concerning automatic extension or waiver of preferences contained in the partial agreements referred to in the present article; and

- c. They shall be multilaterally assessed by the member countries within the Committee in order to acknowledge the scope of the agreements drawn up and facilitate participation of other member countries in same.

## **CHAPTER V: COOPERATION WITH OTHER AREAS OF ECONOMIC INTEGRATION**

### *Article 26*

Member countries shall undertake the actions necessary to establish and develop solidarity and cooperation links with other integration areas outside Latin America, through the Association's participation in horizontal cooperation programs carried out at international level, thus implementing the basic principles and commitments adopted within the context of the Declaration and Action Program on the establishment of a New International Economic Order and of the Charter of Economic Rights and Duties of States.

The Committee shall adopt adequate measures to facilitate compliance with the objectives set forth.

### *Article 27*

At the same time, member countries may draw up partial scope agreements with other developing countries or respective economic integration areas outside Latin America, following the various modalities foreseen in the third section of chapter II of the present Treaty, and under the terms of the pertinent regulative provisions.

Notwithstanding the above, these agreements shall be subject to the following rules:

- a. Concessions granted by member countries participating in them shall not be extended to other members, with the exception of the relatively less developed countries;
- b. When products already negotiated with other member countries in partial scope agreements are included, concessions granted may not be higher than those agreed with the former, and in such case they shall be automatically extended to those countries; and
- c. They shall be declared consistent with the commitments undertaken by member countries within the frame of the present Treaty, in accordance with captions a) and b) of the present article.

### *Article 22*

Notwithstanding the preceding articles, treatments in favour of relatively less developed countries may include collective and partial cooperation actions calling for effective mechanisms meant to compensate the disadvantageous situation faced by Bolivia and Paraguay due to their land-locked location.

Provided that criteria referred to gradual timing are adopted within the regional tariff preference referred to in article 5 of the present Treaty, attempts shall be made to preserve the margins granted in favour of land-locked countries by means of cumulative tariff cuts.

At the same time, attempts shall be made to establish compensation formulae, both as regards the regional tariff preference when deepened, and regional and partial scope agreements.

### *Article 23*

Member countries shall endeavour to grant land-locked countries facilities to establish free zones, warehouses or ports and other administrative international transit facilities in their territories.

## **CHAPTER IV**

Convergence and cooperation with other Latin American countries and areas of economic integration

### *Article 24*

Member countries may establish multilateral association or relationship systems encouraging convergence with other countries and areas of economic integration of Latin America, including the possibility of agreeing with these countries or areas the establishment of a Latin American tariff preference.

Member countries shall in due course regulate the characteristics of these systems.

### *Article 25*

Likewise, member countries may draw up partial scope agreements with other Latin American countries and areas of economic integration, in accordance with the various modalities foreseen in the third section of chapter II of the present Treaty, and under the terms of the respective regulative provisions.

Notwithstanding the above, these agreements shall be subject to the following rules:

- a. Concessions granted by participating member countries shall not be extensive to the others, excepting the relatively less developed countries;
- b. When a member country includes products already negotiated in partial agreements with other member countries, concessions granted may be higher than those agreed with the former; in this case, consultation with the affected

## CHAPTER VI: INSTITUTIONAL ORGANIZATION

### *Article 28*

The political bodies of the Association are:

- a. The Council of Ministers of Foreign Affairs (referred to as the "Council" in this Treaty);
- b. The Evaluation and Convergence Conference (referred to as the "Conference" in this Treaty); and
- c. The Committee of Representatives (referred to as the "Committee" in this Treaty).

### *Article 29*

The technical body of the Association is the General Secretariat (referred to as the "Secretariat" in this Treaty).

### *Article 30*

The Council is the supreme body of the Association and shall adopt whatever decisions may correspond to the higher governing policy of the economic integration process.

The Council shall have the following powers:

- a. To issue general rules aimed at a better compliance with the objectives of the Association, as well as at the harmonious development of the integration process;
- b. To examine the results of the tasks carried out by the Association;
- c. To adopt corrective measures of multilateral scope, following the recommendations adopted by the Conference as per terms of article 33, caption a) of the present Treaty;
- d. To establish the guide-lines to be followed by the other bodies of the Association in their tasks;
- e. To set the basic rules to govern the relations of the Association with other regional associations, international organizations or agencies;
- f. To review and update basic rules governing convergence and cooperation agreements with other developing countries and the respective areas of economic integration;
- g. To take cognizance of questions submitted by the other political bodies and decide upon them;
- h. To delegate upon the other political bodies the power to decide on specific matters aimed at a better compliance with the Association objectives;

y. To accept accession of new member countries;

j. To adopt amendments and additions to the Treaty as per precepts of article 61;

k. To appoint the Secretary-General; and

l. To adopt its own Rules of Procedure.

### *Article 31*

The Council shall be composed of the Ministers of Foreign Affairs of the member countries. However, when in some countries the competence of integration matters is assigned to a Minister or Secretary of State other than the Minister of Foreign Affairs, member countries may be represented at the Council, with full powers, by the respective Minister or Secretary.

### *Article 32*

The Council shall meet and take decisions with the presence of all member countries.

The Council shall meet when convened by the Committee.

### *Article 33*

The Conference shall have the following powers:

- a. To examine the operation of the integration process in all its aspects and the convergence of partial scope agreements through their progressive multilateralization, as well as to recommend the Council the adoption of multilateral scope corrective measures;
- b. To promote actions of broader scope regarding economic integration;
- c. To periodically review the implementation of differential treatments, taking into account not only the evolution of the economic structure of the countries and consequently their degree of development, but also the effective use made by beneficiary countries of the applied differential treatment, as well as of the procedures aimed to improve the implementation of such treatments;
- d. To evaluate the results of the system in favour of countries at a relatively less advanced stage of economic development and adopt measures for its more effective application;
- e. To carry out multilateral negotiations to determine and deepen the regional tariff preference;
- f. To foster negotiation and conclusion of regional scope agreements, wherein all member countries participate, which refer to any matter pertaining to the present Treaty, as per precepts of article 6;
- g. To comply with all the tasks entrusted to it by the Council;

- h. To commend the Secretariat such studies as it deems convenient; and
- y. To adopt its own Rules of Procedure.

*Article 34*

The Conference shall be composed of Plenipotentiaries of member countries.

The Conference shall hold regular sessions every three years at the request of the Committee. It shall also meet at any other time in extraordinary session, when convened by the latter to deal with questions of its specific competence.

The Conference shall meet and take decisions with the presence of all member countries.

*Article 35*

The Committee is the permanent body of the Association and shall have the following powers and duties:

- a. To promote the conclusion of regional scope agreements, under the terms of article 6 of the present Treaty and, for that purpose, to convene governmental meetings at least once a year with the following aims:
  - i. Give continuity to the activities of the new integration process;
  - ii. Evaluate and guide the operation of the process;
  - iii. Analyze and promote measures to attain more advanced mechanisms of integration; and
  - iv. Undertake sectoral and multisectoral negotiations with the participation of all member countries in order to reach regional scope agreements basically referred to tariff cuts;
- b. To adopt the measures necessary to implement the present Treaty and all its supplementary rules;
- c. To regulate the present Treaty;
- d. To perform the tasks entrusted to it by the Council and the Conference;
- e. To adopt the annual work program of the Association and its annual budget;
- f. To fix the contributions of member countries to the Association budget;
- g. To adopt, as proposed by the Secretary-General, the structure of the Secretariat;
- h. To convene the Council and the Conference;
- y. To represent the Association before third parties;

- j. To commend studies to the Secretariat;
- k. To submit recommendations to the Council and the Conference;
- l. To present reports on its activities to the Council;
- m. To propose formulae to solve issues brought forth by member countries claiming non-observance of some of the rules or principles of the present Treaty;
- n. To multilaterally assess partial agreements as may be drawn up by the countries under the terms of article 25 of the present Treaty;
- ñ. To declare the compatibility of partial agreements to be drawn up by member countries under the terms of article 27 of the present Treaty;
- o. To create auxiliary bodies;
- p. To adopt its own Rules of Procedure; and
- q. To take care of business of common interest not falling within the competence of the other bodies of the Association.

*Article 36*

The Committee shall be composed of a Permanent Representative of each member country with the right to one vote.

Each Permanent Representative shall have a Deputy.

*Article 37*

The Committee shall meet and adopt resolutions with the presence of two thirds of the member countries' Representatives.

*Article 38*

The Secretariat shall be headed by a Secretary-General and composed of technical and administrative staff.

The Secretary-General shall hold office for a period of three years and may be re-elected for an equal term.

The Secretary-General shall act in such capacity with respect to all the political bodies of the Association.

The Secretariat shall have the following powers and duties:

- a. To submit proposals to the corresponding Association bodies, through, the Committee, leading towards a better accomplishment of the objectives and duties of the Association;

- o. To comply with requests received from any of the political bodies of the Association; and
- p. To present an annual report to the Committee on the results of the application of the present Treaty and the legal provisions derived therefrom.

*Article 39*

The Secretary-General shall be appointed by the Council.

*Article 40*

In the performance of their duties, the head of the technical body, as well as the technical and administrative staff, shall not seek or receive instructions from any Government or national or international organizations. They shall refrain from any attitude not consistent with their character as international officers.

*Article 41*

Member countries pledge themselves to respect the international nature of the duties of the Secretary-General and Secretariat staff or of its engaged experts and consultants, and to abstain from influencing them in the performance of their duties.

*Article 42*

Auxiliary bodies shall be established for consultation, assessment and technical support. In particular, one body shall be set up composed of officers responsible for the integration policy of member countries.

At the same time, consultative auxiliary bodies shall be set up composed of representatives of the various sectors of economic activity of each one of the member countries.

*Article 43*

The Council, the Conference and the Committee shall adopt their decisions by the affirmative vote of two thirds of the member countries.

Decisions on the following matters excepted from this general rule shall be adopted by a two-thirds affirmative vote, provided there is no negative vote:

- a. Amendments or additions to the present Treaty;
- b. Adoption of decisions corresponding to the higher governing policy of the integration process;
- c. Adoption of decisions executing the results of multilateral negotiations to determine and deepen the regional tariff preference;
- d. Adoption of decisions leading to give partial scope agreements a multilateral regional level;

b. To carry out the necessary studies to fulfill its technical duties and those entrusted to it by the Council, the Conference and the Committee, and to perform the other activities provided for in the annual work program;

c. To carry out studies and actions leading to proposals to member countries, through their Permanent Representatives, regarding conclusion of the agreements foreseen by the present Treaty, within the guide-lines established by the Council and the Conference;

d. To represent the Association before international economic organization and institutions in order to deal with questions of common interest;

e. To administer the Association assets and represent it for such purposes in public and private law acts and contracts;

f. To request technical advice and cooperation of individuals and national and international organizations;

g. To propose the creation of auxiliary bodies to the Committee;

h. To process and furnish member countries, in a systematic and updated manner, statistical information and data on foreign trade regulation systems of member countries in order to facilitate the preparation and carrying out of negotiations within the various Association mechanisms, as well as the further utilization of the respective concessions;

y. To analyze on its own initiative, for all countries, or at the request of the Committee, compliance of agreed commitments, and evaluate legal provisions of member countries which directly or indirectly alter concessions granted;

j. To call meetings of non-governmental auxiliary bodies and coordinate their operation;

k. To periodically evaluate the progress of the integration process and permanently follow up the activities undertaken by the Association and the commitments resulting from the agreements achieved within in framework of same;

l. To organize and put into operation an Economic Promotion Unit for relatively less developed countries and carry out actions to obtain technical and financial resources, as well as studies and projects to comply with the promotion program. At the same time, to draw up an annual report on the advantages obtained from the system in favour of the relatively less developed countries;

m. To prepare the Association's expenditure budget, for approval by the Committee, as well as such subsequent reforms which might be necessary;

n. To prepare and present to the Committee the draft annual work programs;

ñ. To engage, admit and dismiss technical and administrative staff, in accordance with the regulations ruling its structure;

Member countries shall adopt such steps as may be required to comply with the preceding provision, in accordance with their respective National Constitutions.

*Article 47*

In the case of products included in the regional tariff preference or in regional or partial scope agreements which are not produced or will not be produced in substantial quantities in its territory, each member country shall endeavour to avoid that taxes or other internal measures applied result in annulment or reduction of any concession or advantage obtained by any member country as a result of the respective negotiations.

If a member country considers itself at a disadvantage by the measures contained in the preceding paragraph, it may resort to the Committee so that the situation raised may be examined and pertinent recommendations issued.

*Article 48*

Within the territory of other member countries, capitals originating from member countries shall have the right to a treatment not less favourable than that granted to capitals coming from any other non-member country, notwithstanding the provisions set out in agreements which might be concluded on this matter by member countries under the terms of the present Treaty.

*Article 49*

Member countries may establish supplementary rules on trade policy regulating, among other matters, the application of non-tariff restrictions, a system of origin, the adoption of safeguard clauses, export promotion systems and border traffic.

*Article 50*

No provision under the present Treaty shall be interpreted as precluding the adoption and observance of measures regarding:

- a. Protection of public morality;
- b. Implementation of security laws and regulations;
- c. Regulation of imports and exports of arms, munitions, and other war materials and, under exceptional circumstances, all other military equipment;
- d. Protection of human, animal and plant life and health;
- e. Imports and exports of gold and silver in bullion form;
- f. Protection of national treasures of artistic, historical or archeological value; and
- g. Exportation, use and consumption of nuclear materials, radioactive products or any other material used for the development and exploitation of nuclear energy.

- e. Acceptance of accession of new member countries;
  - f. Regulation of the Treaty provisions;
  - g. Establishment of the percentages of member countries' contributions to the budget of the Association;
  - h. Adoption of corrective measures arising from the evaluations of the progress achieved within the integration process;
  - y. Authorization of a term of less than five years regarding obligations, in case of Treaty denouncement;
  - j. Adoption of guide-lines to be followed by the Association bodies in their tasks; and
  - k. Establishment of basic rules governing the relations of the Association with other regional associations, international organizations or agencies.
- Abstention shall not mean a negative vote. Absence at the time of voting shall be interpreted as abstention.

The Council may eliminate subjects from this list of exceptions by the affirmative vote of two thirds of the member countries, provided there is no negative vote.

**CHAPTER VII: GENERAL PROVISIONS**

*Article 44*

Any advantages, favourable treatments, franchises, immunities and privileges which member countries apply to products originating from or bound to any other member country or non-member country, pursuant to decisions or agreements not foreseen in the present Treaty or the Cartagena Agreement, shall be immediately and unconditionally extended to the other member countries.

*Article 45*

Any advantages, favourable treatments, franchises, immunities and privileges already granted or to be granted under agreements between member countries or between these and third countries to facilitate border traffic shall be exclusively applicable to the countries which sign or may have signed them.

*Article 46*

As regards taxes, charges and other internal duties, products originating from the territory of a member country shall be entitled within the territory of the other member countries to a treatment not less favourable than that applied to similar national products.

*Article 51*

Products imported and exported by any member country shall have the right to free transit throughout the territory of the other member countries, and be exclusively subject to payment of charges normally applicable for services rendered.

**CHAPTER VIII: LEGAL STATUS, IMMUNITIES AND PRIVILEGES**

*Article 52*

The Association shall be endowed of complete legal status and specially of the capacity:

- a. To contract;
- b. To acquire such movable and immovable property indispensable to carry out its objectives and to dispose of it;
- c. To file suits; and
- d. To keep funds in any currency and effect the necessary transfers.

*Article 53*

Representatives and other diplomatic officers of member countries accredited before the Association, as well as international officers and advisers of the Association, shall be endowed of diplomatic immunities and privileges and such other rights necessary for exercising their duties within the territory of member countries.

Member countries hereby pledge themselves to draw up within the shortest possible term an agreement aimed at regulating the contents of the preceding paragraph, wherein such privileges and immunities shall be defined.

The Association shall draw up an agreement with the Government of the Eastern Republic of Uruguay in order to determine the privileges and immunities to which the Association, its bodies and its international officers and advisers shall be entitled.

*Article 54*

The legal status of the Latin American Free Trade Association established by the Montevideo Treaty signed on 18 February 1960 shall continue, in all its effects, within the Latin American Integration Association. Therefore, from the date when the present Treaty enters into force, the rights and obligations of the Latin American Free Trade Association shall correspond to the Latin American Integration Association.

**CHAPTER IX: FINAL PROVISIONS**

*Article 55*

The present Treaty may not be signed with reservations, neither may these be received on the occasion of its ratification or accession.

*Article 56*

The present Treaty shall be ratified by the signatory countries at the earliest possible term.

*Article 57*

The present Treaty shall enter into force thirty days after the deposit of the third instrument of ratification as regards the first three countries to ratify it.

Concerning the other signatories, it shall enter into force on the thirtieth day following the deposit of the respective instrument of ratification and in the order in which such ratifications are deposited.

Instruments of ratification shall be deposited with the Government of the Eastern Republic of Uruguay, which shall report the date of deposit to the Governments of the signatory States of the present Treaty, as well as to those which have adhered thereto.

The Government of the Eastern Republic of Uruguay shall notify the date of enforcement of the present Treaty to the Government of each one of the signatory States.

*Article 58*

Upon its entry into force, the present Treaty shall remain open for accession to those Latin American countries which may so request. Acceptance of such accessions shall be adopted by the Council.

The Treaty shall enter into force for the adherent country thirty days after the date of its admission.

Adherent countries shall on that date put in force the commitments resulting from the regional tariff preference as well as the regional scope agreements concluded prior to the date of their accession.

*Article 59*

The present Treaty provisions shall not affect the rights and obligations resulting from agreements signed by any of the signatory countries prior to the date of their enforcement.

*Article 60*

The present Treaty provisions shall not affect the rights and obligations resulting from agreements signed by any of the signatory countries in the term between its signature and the date

of its ratification. For countries which later become members of the Association, the provisions of this article refer to agreements signed prior to their incorporation.

However, each member country shall take the measures necessary to harmonize the provisions of the agreements in force with the objectives of the present Treaty.

*Article 61*

Member countries may introduce amendments or additions to the present Treaty. These shall be executed in protocols to enter into force upon ratification by all member countries and deposit of the respective instruments, subject to other criteria established thereof.

*Article 62*

The present Treaty shall have an indefinite duration.

*Article 63*

Any member country wishing to withdraw from the present Treaty shall report such intention to the other member countries during one of the Committee sessions, formally delivering the denunciation document to the Committee one year after the date of advice referred to above. Once such denunciation has been executed, all rights and obligations corresponding to its condition as a member country shall automatically cease for the denouncing Government.

Notwithstanding the above, rights and obligations resulting from the regional tariff preference shall continue to be effective for a period of five more years, except if, at the time of denouncement, the member countries agree to the contrary. The above term shall start as from the date the denouncement is executed.

With reference to rights and obligations resulting from regional and partial scope agreements, the situation of the denouncing member country shall adjust to the specific rules which may have been established in each agreement. Should these rules not exist, the general provision contained in the previous paragraph of the present article shall apply.

*Article 64*

The present Treaty shall be known as the 1980 Montevideo Treaty.

**CHAPTER X: TRANSITIONAL PROVISIONAL**

*Article 65*

Pending ratification of the present Treaty by all signatory countries, as from the date of its enforcement by ratification of the first three countries, signatory countries which have not yet ratified shall be subject, both as regards their reciprocal relations and their relations with ratifying signatory countries, to the provisions of the legal structure of the Montevideo Treaty dated 18 February 1960, where appropriate, and specially to the resolutions adopted at the Meeting of the Council of Ministers of the Latin American Free Trade Association held on 12 August 1980.

These provisions shall no longer be applied to relations between signatory countries which have ratified the present Treaty and those which have not done so, as from one year following the date of its enforcement.

*Article 66*

The bodies of the Latin American Free Trade Association established by the Montevideo Treaty dated 18 February 1960 shall cease to exist as from the date of enforcement of the present Treaty.

*Article 67*

Non-ratifying signatory countries may participate in the Association bodies with the right to speak and vote whenever possible or of interest to them as long as ratification is pending, or until expiry of the term established in the second paragraph of article 65.

*Article 68*

Signatory countries ratifying the present Treaty after its enforcement shall be subject to all provisions adopted prior to that moment by the Association bodies.

*Article 69*

The resolutions adopted by the Council of Ministers of the Latin American Free Trade Association at its Meeting of 12 August 1980 shall be incorporated to the legal framework of the present Treaty upon its entry into force.

DONE at the city of Montevideo, on the twelfth day of the month of August of the year nineteen hundred and eighty, in an original in the Spanish and Portuguese languages, both texts being equally valid. The Government of the Eastern Republic of Uruguay shall act as depositary of the present Treaty and forward duly authenticated copy of same to the Governments of the other signatory and adherent countries.



**Basic Documents of the European Bank of  
Reconstruction and Development, 1990**



**European Bank**  
for Reconstruction and Development

# Basic Documents of the European Bank for Reconstruction and Development

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## Foreword

The Agreement Establishing the European Bank for Reconstruction and Development was signed in Paris on 29 May 1990 and entered into force on 28 March 1991.

An Amendment to Article 1 of the Agreement was approved by Resolution of the Board of Governors adopted on 30 January 2004, and entered into force on 15 October 2006.

The Inaugural Meeting of the Board of Governors was held in London from 15 to 17 April 1991.

At the Inaugural Meeting, the Board of Governors elected the President and Directors of the Bank and adopted Resolution No 8 authorizing the Bank to commence operations on 15 April 1991.

The Board of Governors also adopted, effective as of 15 April 1991, the By-Laws of the Bank and the Rules of Procedure of the Board of Governors.

The Headquarters Agreement between the Government of the United Kingdom and the Bank was signed on 15 April 1991 and, in accordance with Article 24 thereof, entered into force upon signature.

## Agreement Establishing the European Bank for Reconstruction and Development

The Contracting Parties,

Committed to the fundamental principles of multiparty democracy, the rule of law, respect for human rights and market economies;

Recalling the Final Act of the Helsinki Conference on Security and Co-operation in Europe, and in particular its Declaration on Principles;

Welcoming the intent of Central and Eastern European countries to further the practical implementation of multiparty democracy, strengthening democratic institutions, the rule of law and respect for human rights and their willingness to implement reforms in order to evolve towards market-oriented economies;

Considering the importance of close and co-ordinated co-operation in order to promote the economic progress of Central and Eastern European countries to help their economies become more internationally competitive and assist them in their reconstruction and development and thus to reduce, where appropriate, any risks related to the financing of their economies;

Convinced that the establishment of a multilateral financial institution which is European in its basic character and broadly international in its membership would help serve these ends and would constitute a new and unique structure of co-operation in Europe;

Have agreed to establish hereby the European Bank for Reconstruction and Development (hereinafter called "the Bank") which shall operate in accordance with the following:

## Chapter I: Purpose, functions and membership

### Article 1: Purpose

In contributing to economic progress and reconstruction, the purpose of the Bank shall be to foster the transition towards open market-oriented economies 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. The purpose of the Bank may also be carried out in Mongolia subject to the same conditions. Accordingly, any reference in this Agreement and its annexes to “Central and Eastern European countries”, “countries from Central and Eastern Europe”, “recipient country (or countries)” or “recipient member country (or countries)” shall refer to Mongolia as well.

### Article 2: Functions

1. To fulfil on a long-term basis its purpose of fostering the transition of Central and Eastern European countries towards open market-oriented economies and the promotion of private and entrepreneurial initiative, the Bank shall assist the recipient member countries to implement structural and sectoral economic reforms, including demonopolization, decentralization and privatization, to help their economies become fully integrated into the international economy by measures:

- (i) to promote, through private and other interested investors, the establishment, improvement and expansion of productive, competitive and private sector activity, in particular small and medium-sized enterprises;
- (ii) to mobilize domestic and foreign capital and experienced management to the end described in (i);
- (iii) to foster productive investment, including in the service and financial sectors, and in related infrastructure where that is necessary to support private and entrepreneurial initiatives, thereby assisting in making a competitive environment an raising productivity, the standard of living and conditions of labour;
- (iv) to provide technical assistance for the preparation, financing and implementation of relevant projects, whether individual or in the context of specific investment programmes;
- (v) to stimulate and encourage the development of capital markets;
- (vi) to give support to sound and economically viable projects involving more than one recipient member country;
- (vii) to promote in the full range of its activities environmentally sound and sustainable development; and
- (viii) to undertake such other activities and provide such other services as may further these functions.

2. In carrying out the functions referred to in paragraph 1 of this Article, the Bank shall work in close cooperation with all its members and, in such manner as it may deem appropriate within the terms of this Agreement, with the International Monetary Fund, the International Bank for Reconstruction and Development, the International Finance Corporation, the Multilateral Investment Guarantee Agency, and the Organisation for Economic Co-operation and Development, and shall cooperate with the United Nations and its Specialized Agencies and other related bodies, and any entity, whether public or private, concerned with the economic development of, and investment in, Central and Eastern European countries.

### Article 3: Membership

1. Membership in the Bank shall be open:
  - (i) to (1) European countries and (2) non-European countries which are members of the International Monetary Fund; and
  - (ii) to the European Economic Community and the European Investment Bank.
2. Countries eligible for membership under paragraph 1 of this Article, which do not become members in accordance with Article 61 of this Agreement, may be admitted, under such terms and conditions as the Bank may determine, to membership in the Bank upon the affirmative vote of not less than two-thirds of the Governors, representing not less than three-fourths of the total voting power of the members.

## Chapter II: Capital

### Article 4: Authorized capital stock

1. The original authorized capital stock shall be ten thousand million (10,000,000,000) ECU. It shall be divided into one million (1,000,000) shares, having a par value of ten thousand (10,000) ECU each, which shall be available for subscription only by members in accordance with the provisions of Article 5 of this Agreement.
2. The original capital stock shall be divided into paid-in shares and callable shares. The initial total aggregate par value of paid-in shares shall be three thousand million (3,000,000,000) ECU.
3. The authorized capital stock may be increased at such time and under such terms as may seem advisable, by a vote of not less than two-thirds of the Governors, representing not less than three-fourths of the total voting power of the members.

### Article 5: Subscription of shares

1. Each member shall subscribe to shares of the capital stock of the Bank, subject to fulfillment of the member's legal requirements. Each subscription to the original authorized capital stock shall be for paid-in shares and callable shares in the proportion of three (3) to seven (7). The initial number of shares available to be subscribed to by Signatories to this Agreement which become members in accordance with Article 61 or this Agreement shall be that set forth in Annex A. No member shall have an initial subscription of less than one hundred (100) shares.
2. The initial number of shares to be subscribed to by countries which are admitted to membership in accordance with paragraph 2 of Article 3 of this Agreement shall be determined by the Board of Governors; provided, however, that no such subscription shall be authorized which would have the effect of reducing the percentage of capital stock held by countries which are members of the European Economic Community, together with the European Economic Community and the European Investment Bank, below the majority of the total subscribed capital stock.
3. The Board of Governors shall at intervals of not more than five (5) years review the capital stock of the Bank. In case of an increase in the authorized capital stock, each member shall have a reasonable opportunity to subscribe, under such uniform terms and conditions as the Board of Governors shall determine, to a proportion of the increase in stock equivalent to the proportion which its stock subscribed bears to the total subscribed capital stock immediately prior to such increase. No member shall be obliged to subscribe to any part of an increase of capital stock.

4. Subject to the provisions of paragraph 3 of this Article, the Board of Governors, may, at the request of a member, increase the subscription of that member, or allocate shares to that member within the authorized capital stock which are not taken up by other members; provided, however, that such increase shall not have the effect of reducing the percentage of capital stock held by countries which are members of the European Economic Community, together with the European Economic Community and the European Investment Bank, below the majority of the total subscribed capital stock.
5. Shares of stock initially subscribed to by members shall be issued at par. Other shares shall be issued at par unless the Board of Governors, by a vote of not less than two-thirds of the Governors, representing not less than two-thirds of the total voting power of the members, decides to issue them in special circumstances on other terms.
6. Shares of stock shall not be pledged or encumbered in any manner whatsoever, and they shall not be transferable except to the Bank in accordance with Chapter VII of this Agreement.
7. The liability of the members on shares shall be limited to the unpaid portion of their issue price. No member shall be liable, by reason of its membership, for obligations of the Bank.

### Article 6: Payment of subscriptions

1. Payment of the paid-in shares of the amount initially subscribed to by each Signatory to this Agreement, which becomes a member in accordance with Article 61 of this Agreement, shall be made in five (5) instalments of twenty (20) per cent each of such amount. The first instalment shall be paid by each member within sixty (60) days after the date of entry into force of this Agreement, or after the date of deposit of its instrument of ratification, acceptance or approval in accordance with Article 61, if this latter is later than the date of entry into force. The remaining four (4) instalments shall each become due successively one year from the date on which the preceding instalment became due and shall each, subject to the legislative requirement of each member, be paid.
2. Fifty (50) per cent of payment of each instalment pursuant to paragraph 1 of this Article, or by a member admitted in accordance with paragraph 2 of Article 3 of this Agreement, may be made in promissory notes or other obligations issued by such member and denominated in ECU, in United States dollars or in Japanese yen, to be drawn down as the Bank needs funds for disbursement as a result of its operations. Such notes or obligations shall be non-negotiable, non-interest-bearing and payable to the Bank at par value upon demand. Demands upon such notes or obligations shall, over reasonable periods of time, be made so that the value of such demands in ECU at the time of demand from each member is proportional to the number of paid-in shares subscribed to and held by each such member depositing such notes of obligations.

3. All payment obligations of a member in respect of subscription to shares in the initial capital stock shall be settled either in ECU, in United States dollars or in Japanese yen on the basis of the average exchange rate of the relevant currency in terms of the ECU for the period from 30 September 1989 to 31 March 1990 inclusive.
4. Payment of the amount subscribed to the callable capital stock of the Bank shall be subject to call, taking account of Articles 17 and 42 of this Agreement, only as and when required by the Bank to meet its liabilities.
5. In the event of a call referred to in paragraph 4 of this Article, payment shall be made by the member in ECU, in United States dollars or in Japanese yen. Such calls shall be uniform in ECU value upon each callable share calculated at the time of the call.
6. The Bank shall determine the place for any payment under this Article not later than one month after the inaugural meeting of its Board of Governors, provided that, before such determination, the payment of the first instalment referred to in paragraph 1 of this Article shall be made to the European Investment Bank, as trustee for the Bank.
7. For subscriptions other than those described in paragraphs 1, 2 and 3 of this Article, payments by a member in respect of subscription to paid-in shares in the authorized capital stock shall be made in ECU, in United States dollars or in Japanese yen whether in cash or in promissory notes or in other obligations.
8. For the purpose of this Article, payment or denomination in ECU shall include payment or denomination in any fully convertible currency which is equivalent on the date of payment or encashment to the value of the relevant obligation in ECU.

**Article 7: Ordinary capital resources**

As used in this Agreement, the term "ordinary capital resources" of the Bank shall include the following:

- (i) authorized capital stock of the Bank, including both paid-in and callable shares, subscribed to pursuant to Article 5 of this Agreement;
- (ii) funds raised by borrowings of the Bank by virtue of powers conferred by sub paragraph (i) of Article 20 of this Agreement, to which the commitment to calls provided for in paragraph 4 of Article 6 of this Agreement is applicable;
- (iii) funds received in repayment of loans or guarantees and proceeds from the disposal of equity investment made with the resources indicated in sub paragraphs (i) and (ii) of this Article;

(iv) income derived from loans and equity investment, made from the resources indicated in sub paragraphs (i) and (ii) of this Article, and income derived from guarantees and underwriting not forming part of the special operations of the Bank; and

(v) any other funds or income received by the Bank which do not form part of its Special Funds resources referred to in Article 19 of this Agreement.

## Chapter III: Operations

### Article 8: Recipient countries and use of resources

1. The resources and facilities of the Bank shall be used exclusively to implement the purpose and carry out the functions set forth, respectively, in Articles 1 and 2 of this Agreement.
2. The Bank may conduct its operations in countries from Central and Eastern Europe which are proceeding steadily in the transition towards market-oriented economies and the promotion of private and entrepreneurial initiative, and which apply, by concrete steps and otherwise, the principles set forth in Article 1 of this Agreement.
3. In cases where a member might be implementing policies which are inconsistent with Article 1 of this Agreement, or in exceptional circumstances, the Board of Directors shall consider whether access by a member to Bank resources should be suspended or otherwise modified and may make recommendations accordingly to the Board of Governors. Any decision on these matters shall be taken by the Board of Governors by a majority of not less than two-thirds of the Governors, representing not less than three-fourths of the total voting power of the members.

4. (i) Any potential recipient country may request that the Bank provide access to its resources for limited purposes over a period of three (3) years beginning after the entry into force of this Agreement. Any such request shall be attached as an integral part of this Agreement as soon as it is made.

- (ii) During such a period:

- (a) the Bank shall provide to such a country, and to enterprises in its territory, upon their request, technical assistance and other types of assistance directed to finance its private sector, to facilitate the transition of state-owned enterprises to private ownership and control, and to help enterprises operating competitively and moving to participation in the market-oriented economy, subject to the proportion set forth in paragraph 3 of Article 11 of this Agreement.

- (b) the total amount of any assistance thus provided shall not exceed the total amount of cash disbursed and promissory notes issued by that country for its shares.

- (iii) At the end of this period, the decision to allow such a country access beyond the limits specified in sub paragraphs (a) and (b) shall be taken by the Board of Governors by a majority of not less than three-fourths of the Governors representing not less than eighty-five (85) per cent of the total voting power of the members.

### Article 9: Ordinary and special operations

The operations of the Bank shall consist of ordinary operations financed from the ordinary capital resources of the Bank referred to in Article 7 of this Agreement and special operations financed from the Special Funds resources referred to in Article 19 of this Agreement. The two types of operations may be combined.

### Article 10: Separation of operations

1. The ordinary capital resources and the Special Funds resources of the Bank shall at all times and in all respects be held, used, committed, invested or otherwise disposed of entirely separately from each other. The financial statements of the Bank shall show the reserves of the Bank, together with its ordinary operations and, separately, its special operations.
2. The ordinary capital resources of the Bank shall, under no circumstances, be charged with, or used to discharge, losses or liabilities arising out of special operations or other activities for which Special Funds resources were originally used or committed.
3. Expenses appertaining directly to ordinary operations shall be charged to the ordinary capital resources of the Bank. Expenses appertaining directly to the special operations shall be charged to Special Funds resources. Any other expenses shall, subject to paragraph 1 of Article 18 of this Agreement, be charged as the Bank shall determine.

### Article 11: Methods of operation

1. The Bank shall carry out its operations in furtherance of its purpose and functions as set out in Articles 1 and 2 of this Agreement in any or all of the following ways:

- (i) by making or co-financing together with multilateral institutions, commercial banks or other interested sources, or participating in, loans to private sector enterprises, loans to any state-owned enterprise operating competitively and moving to participation in the market-oriented economy, and loans to any state-owned enterprise to facilitate its transition to private ownership and control; in particular, to facilitate or enhance the participation of private and/or foreign capital in such enterprises;

- (ii) (a) by investment in the equity capital of private sector enterprises;

- (b) by investment in the equity capital of any state-owned enterprise operating competitively and moving to participation in the market-oriented economy, and investment in the equity capital of any state-owned enterprise to facilitate its transition to private ownership and control; in particular to facilitate or enhance the participation of private and/or foreign capital in such enterprises; and

(c) by underwriting, where other means of financing are not appropriate, the equity issue of securities by both private sector enterprises and such state-owned enterprises referred to in (b) above for the ends mentioned in that sub paragraph;

(iii) by facilitating access to domestic and international capital markets by private sector enterprises or by other enterprises referred to in sub paragraph (i) of this paragraph for the ends mentioned in that sub paragraph, through the provision of guarantees, where other means of financing are not appropriate, and through financial advice and other forms of assistance;

(iv) by deploying Special Funds resources in accordance with the agreements determining their use; and

(v) by making or participating in loans and providing technical assistance for the reconstruction or development of infrastructure, including environmental programmes, necessary for private sector development and the transition to a market-oriented economy.

For the purposes of this paragraph, a state-owned enterprise shall not be regarded as operating competitively unless it operated autonomously in a competitive market environment and unless it is subject to bankruptcy laws.

2. (i) The Board of Directors shall review at least annually the Bank's operations and lending strategy in each recipient country to ensure that the purpose and functions of the Bank, as set out in Articles 1 and 2 of this Agreement, are fully served. Any decision pursuant to such a review shall be taken by a majority of not less than two-thirds of the Directors, representing not less than three-fourths of the total voting power of the members.

(ii) The said review shall involve the consideration of, inter alia, each recipient country's progress made on decentralization, demonopolization and privatization and the relative shares of the Bank's lending to private enterprises, to state-owned enterprises in the process of transition to participation in the market-oriented economy or privatization, for infrastructure, for technical assistance, and for other purposes.

3. (i) Not more than forty (40) per cent of the amount of the Bank's total committed loans, guarantees and equity investments, without prejudice to its other operations referred to in this Article, shall be provided to the state sector. Such percentage limit shall apply initially over a two (2) year period, from the date of commencement of the Bank's operations, taking one year with another, and thereafter in respect of each subsequent financial year.

(ii) For any country, not more than forty (40) per cent of the amount of the Bank's total committed loans, guarantees and equity investments over a period of five (5) years, taking one year with another, and without prejudice to the Bank's other operations referred to in this Article, shall be provided to the state sector.

(iii) For the purposes of this paragraph,

(a) the state sector includes national and local Governments, their agencies, and enterprises owned or controlled by any of them;

(b) a loan or guarantee to, or equity investment in, a state-owned enterprise which is implementing a programme to achieve private ownership and control shall not be considered as made to the state sector;

(c) loans to a financial intermediary for onlending to the private sector shall not be considered as made to the state sector.

#### **Article 12: Limitations on ordinary operations**

1. The total amount of outstanding loans, equity investments and guarantees made by the Bank on its ordinary operations shall not be increased at any time, if by such increase the total amount of its unimpaired subscribed capital, reserves and surpluses included in its ordinary capital resources would be exceeded.

2. The amount of any equity investment shall not normally exceed such percentage of the equity capital of the enterprise concerned as shall be determined, by a general rule, to be appropriate by the Board of Directors. The Bank shall not seek to obtain by such an investment a controlling interest in the enterprise concerned and shall not exercise such control or assume direct responsibility for managing any enterprise in which it has an investment, except in the event of actual or threatened default on any of its investments, actual or threatened insolvency of the enterprise in which such investment shall have been made, or other situations which, in the opinion of the Bank, threaten to jeopardize such investment, in which case the Bank may take such action and exercise such rights as it may deem necessary for the protection of its interests.

3. The amount of the Bank's disbursed equity investments shall not at any time exceed an amount corresponding to its total unimpaired paid-in subscribed capital, surpluses and general reserve.

4. The Bank shall not issue guarantees for export credits nor undertake insurance activities.

#### **Article 13: Operating principles**

The Bank shall operate in accordance with the following principles:

(i) the Bank shall apply sound banking principles to all its operations;

(ii) the operations of the Bank shall provide for the financing of specific projects, whether individual or in the context of specific investment programmes, and for technical assistance, designed to fulfil its purpose and functions as set out in Articles 1 and 2 of this Agreement;

(iii) the Bank shall not finance any undertaking in the territory of a member if that member objects to such financing;

(iv) the Bank shall not allow a disproportionate amount of its resources to be used for the benefit of any member;

(v) the Bank shall seek to maintain reasonable diversification in all its investments;

(vi) before a loan, guarantee or equity investment is granted, the applicant shall have submitted an adequate proposal and the President of the Bank shall have presented to the Board of Directors a written report regarding the proposal, together with recommendations, on the basis of a staff study;

(vii) the bank shall not undertake any financing, or provide any facilities, when the applicant is able to obtain sufficient financing or facilities elsewhere on terms and conditions that the Bank considers reasonable;

(viii) in providing or guaranteeing financing, the Bank shall pay due regard to the prospect that the borrower and its guarantor, if any, will be in a position to meet their obligations under the financing contract;

(ix) in case of a direct loan made by the Bank, the borrower shall be permitted by the Bank to draw its funds only to meet expenditure as it is actually incurred;

(x) the Bank shall seek to revolve its funds by selling its investments to private investors whenever it can appropriately do so on satisfactory terms;

(xi) in its investments in individual enterprises, the Bank shall undertake its financing on terms and conditions which it considers appropriate, taking into account the requirements of the enterprise, the risks being undertaken by the Bank, and the terms and conditions normally obtained by private investors for similar financing;

(xii) the Bank shall place no restriction upon the procurement of goods and services from any country from the proceeds of any loan, investment or other financing undertaken in the ordinary or special operations of the Bank, and shall, in all appropriate cases, make its loans and other operations conditional on international invitations to tender being arranged; and

(xiii) the Bank shall take the necessary measures to ensure that the proceeds of any loan made, guaranteed or participated in by the Bank, or any equity investment, are used only for the purposes for which the loan or the equity investment was granted and with due attention to considerations of economy and efficiency.

#### **Article 14: Terms and conditions for loans and guarantees**

1. In the case of loans made, participated in, or guaranteed by the Bank, the contract shall establish the terms and conditions for the loan or the guarantee concerned, including those relating to payment of principal, interest and other fees, charges, maturities and dates of payment in respect of the loan or the guarantee, respectively. In setting such terms and conditions, the Bank shall take fully into account the need to safeguard its income.

2. Where the recipient of loans or guarantees of loans is not itself a member, but is a state-owned enterprise, the Bank may, when it appears desirable, bearing in mind the different approaches appropriate to public and state-owned enterprises in transition to private ownership and control, require the member or members in whose territory the project concerned is to be carried out, or a public agency or any instrumentality of such member or members acceptable to the Bank, to guarantee the repayment of the principal and the payment of interest and other fees and charges of the loan in accordance with the terms thereof. The Board of Directors shall review annually the Bank's practice in this matter, paying due attention to the Bank's creditworthiness.

3. The loan or guarantee contract shall expressly state the currency or currencies, or ECU, in which all payments to the Bank thereunder shall be made.

#### **Article 15: Commission and fees**

1. The Bank shall charge, in addition to interest, a commission on loans made or participated in as part of its ordinary operations. The terms and conditions of this commission shall be determined by the Board of Directors.

2. In guaranteeing a loan as part of its ordinary operations, or in underwriting the sale of securities, the Bank shall charge fees, payable at rates and time determined by the Board of Directors, to provide suitable compensation for its risks.

3. The Board of Directors may determine any other charges of the Bank in its ordinary operations and any commission, fees or other charges in its special operations.

#### **Article 16: Special reserve**

1. The amount of commissions and fees received by the Bank pursuant to Article 15 of this Agreement shall be set aside as a special reserve which shall be kept for meeting the losses of the Bank in accordance with Article 17 of this Agreement. The special reserve shall be held in such liquid form as the Bank may decide.

2. If the Board of Directors determines that the size of the special reserve is adequate, it may decide that all or part of the said commission or fees shall henceforth form part of the income of the Bank.

#### **Article 17: Methods of meeting the losses of the Bank**

1. In the Bank's ordinary operations, in cases of arrears of default on loans made, participated in, or guaranteed by the Bank, and in case of losses on underwriting and in equity investment, the Bank shall take such action as it deems appropriate. The Bank shall maintain appropriate provisions against possible losses.
2. Losses arising in the Bank's ordinary operations shall be charged:
  - (i) first, to the provisions referred to in paragraph 1 of this Article;
  - (ii) second, to net income;
  - (iii) third, against the special reserve provided for in Article 16 of this Agreement;
  - (iv) fourth, against its general reserve and surpluses;
  - (v) fifth, against the unimpaired paid-in capital; and
  - (vi) last, against an appropriate amount of the uncalled subscribed callable capital which shall be called in accordance with the provisions of paragraphs 4 and 5 of Article 6 of this Agreement.

#### **Article 18: Special Funds**

1. The Bank may accept the administration of Special Funds which are designed to serve the purpose and come within the functions of the Bank. The full cost of administering any such Special Fund shall be charged to that Special Fund.
2. Special Funds accepted by the Bank may be used in any manner and on any terms and conditions consistent with the purpose and functions of the Bank, with the other applicable provisions of this Agreement, and with the agreement or agreements relating to such Funds.
3. The Bank shall adopt such rules and regulations as may be required for the establishment, administration and use of each Special Fund. Such rules and regulations shall be consistent with the provisions of this Agreement, except for those provisions expressly applicable only to ordinary operations of the Bank.

#### **Article 19: Special Funds resources**

The term "Special Funds resources" shall refer to the resources of any Special Fund and shall include:

- (i) funds accepted by the Bank for inclusion in any Special Fund;
- (ii) funds repaid in respect of loans or guarantees, and the proceeds of equity investments, financed from the resources of any Special Fund which, under the rules and regulations governing that Special Fund, are received by such Special Fund; and
- (iii) income derived from investment of Special Funds resources.

## **Chapter IV: Borrowing and other miscellaneous powers**

### **Article 20: General powers**

1. The Bank shall have, in addition to the powers specified elsewhere in the Agreement, the power to:
  - (i) borrow funds in member countries or elsewhere, provided always that:
    - (a) before making a sale of its obligations in the territory of a country, the Bank shall have obtained its approval; and
    - (b) where the obligations of the Bank are to be denominated in the currency of a member, the Bank shall have obtained its approvals;
  - (ii) invest or deposit funds not needed in its operations;
  - (iii) buy and sell securities, in the secondary market, which the Bank has issued or guaranteed or in which it has invested;
  - (iv) guarantee securities in which it has invested in order to facilitate their sale;
  - (v) underwrite, or participate in the underwriting of, securities issued by any enterprise for purposes consistent with the purpose and functions of the Bank;
  - (vi) provide technical advice and assistance which serve its purpose and come within its functions;
  - (vii) exercise such powers and adopt such rules and regulations as may be necessary or appropriate in furtherance of its purpose and functions, consistent with the provisions of this Agreement; and
  - (viii) conclude agreements of cooperation with any public or private entity or entities.
2. Every security issued or guaranteed by the Bank shall bear on its face a conspicuous statement to the effect that it is not an obligation of any Government or member, unless it is in fact the obligation of a particular government or member, in which case it shall so state.

## Chapter V: Currencies

### Article 21: Determination and use of currencies

1. Whenever it shall become necessary under this Agreement to determine whether any currency is fully convertible for the purposes of this Agreement, such determination shall be made by the Bank, taking into account the paramount need to preserve its own financial interests, after consultation, if necessary, with the International Monetary Fund.
2. Members shall not impose any restrictions on the receipt, holding, use or transfer by the Bank of the following:
  - (i) currencies or ECU received by the Bank in payment of subscriptions to its capital stock, in accordance with Article 6 of this Agreement;
  - (ii) currencies obtained by the Bank by borrowing;
  - (iii) currencies and other resources administered by the Bank as contributions to Special Funds; and
  - (iv) currencies received by the Bank in payment on account of principal interest, dividends or other charges in respect of loans or investments, or the proceeds of disposal of such investments made out of any of the funds referred to in sub paragraphs (i) to (iii) of this paragraph, or in payment of commission, fees or other charges.

## Chapter VI: Organization and management

### Article 22: Structure

The Bank shall have a Board of Governors, a Board of Directors, a President, one or more Vice-Presidents and such other officers and staff as may be considered necessary.

### Article 23: Board of Governors: Composition

1. Each member shall be represented on the Board of Governors and shall appoint one Governor and one Alternate. Each Governor and Alternate shall serve at the pleasure of the appointing member. No Alternate may vote except in the absence of is or her principal. At each of its annual meetings, the Board shall elect one of the Governors as Chairman who shall hold office until the election of the next Chairman.
2. Governors and Alternates shall serve as such without remuneration from the Bank.

### Article 24: Board of Governors: Powers

1. All the powers of the Bank shall be vested in the Board of Governors.
2. The Board of Governors may delegate to the Board of Directors any or all of its powers, except the power to:
  - (i) admit new members and determine the conditions of their admission;
  - (ii) increase or decrease the authorized capital stock of the Bank;
  - (iii) suspend a member;
  - (iv) decide appeals from interpretations or applications of this Agreement given by the Board of Directors;
  - (v) authorize the conclusion of general agreements for co-operation with other international organizations;
  - (vi) elect the Directors and the President of the Bank;
  - (vii) determine the remuneration of the Directors and Alternate Directors and the salary and other terms of the contract of service of the President;
  - (viii) approve, after reviewing the auditors' report, the general balance sheet and the statement of profit and loss of the Bank;
  - (ix) determine the reserves and the allocation and distribution of the net profits of the Bank;
  - (x) amend this Agreement;

(xi) decide to terminate the operations of the Bank and to distribute its assets; and

(xii) exercise such other powers as are expressly assigned to the Board of Governors in this Agreement.

3. The Board of Governors shall retain full power to exercise authority over any matter delegated or assigned to the Board of Directors under paragraph 2 of this Article, or elsewhere in this Agreement.

#### **Article 25: Board of Governors: Procedure**

1. The Board of Governors shall hold an annual meeting and such other meetings as may be provided for by the Board or called by the Board of Directors. Meetings of the Board of Governors shall be called, by the Board of Directors, whenever requested by not less than five (5) members of the Bank or members holding not less than one quarter of the total voting power of the members.

2. Two-thirds of the Governors shall constitute a quorum for any meeting of the Board of Governors, provided such majority represents not less than two-thirds of the total voting power of the members.

3. The Board of Governors may by regulation establish a procedure whereby the Board of Directors may, when the latter deems such action advisable, obtain a vote of the Governors on a specific question without calling a meeting of the Board of Governors.

4. The Board of Governors, and the Board of Directors to the extent authorized, may adopt such rules and regulations and establish such subsidiary bodies as may be necessary or appropriate to conduct the business of the Bank.

#### **Article 26: Board of Directors: Composition**

1. The Board of Directors shall be composed of twenty-three (23) members who shall not be members of the Board of Governors, and of whom:

(i) eleven (11) shall be elected by the Governors, representing Belgium, Denmark, France, the Federal Republic of Germany, Greece, Ireland, Italy, Luxembourg, the Netherlands, Portugal, Spain, the United Kingdom, the European Economic Community and the European Investment Bank; and

(ii) twelve (12) shall be elected by the Governors representing other members, of whom:

(a) four (4), by the Governors representing those countries listed in Annex A as Central and Eastern European countries eligible for assistance from the Bank;

(b) four (4), by the Governors representing those countries listed in Annex A as other European countries;

(c) four (4), by the Governors representing those countries listed in Annex A as non-European countries.

Directors, as well as representing members whose Governors have elected them, may also represent members who assign their votes to them.

2. Directors shall be persons of high competence in economic and financial matters and shall be elected in accordance with Annex B.

3. The Board of Governors may increase or decrease the size, or revise the composition, of the Board of Directors, in order to take into account changes in the number of members of the Bank, by an affirmative vote of not less than two-thirds of the Governors, representing not less than three-fourths of the total voting power of the members. Without prejudice to the exercise of these powers for subsequent elections, the number and composition of the second Board of Directors shall be as set out in paragraph 1 of this Article.

4. Each Director shall appoint an Alternate with full power to act for him and her when he or she is not present. Directors and Alternates shall be nationals of member countries. No member shall be represented by more than one Director. An Alternate may participate in meetings of the Board but may vote only when he or she is acting on place of his or her principal.

5. Directors shall hold office for a term of three (3) years and may be re-elected; provided that the first Board of Directors shall be elected by the Board of Governors at its inaugural meeting, and shall hold office until the next immediately following annual meeting of the Board of Governors or, if that Board shall so decide at that annual meeting, until its next subsequent annual meeting. They shall continue in office until their successors shall have been chosen and assumed office. If the office of a Director becomes vacant more than one hundred and eighty (180) days before the end of his or her term, a successor shall be chosen in accordance with Annex B for the remainder of the term, by the Governors who elected the former Director. A majority of the votes cast by such Governors shall be required for such election. If the office of a Director becomes vacant one hundred and eighty (180) days or less before the end of his or her term, a successor may similarly be chosen for the remainder of the term, by the votes cast by such Governors who elected the former Director, in which election majority of the votes cast by such Governors shall be required. While the office remains vacant, the Alternate of the former Director shall exercise the powers of the latter, except that of appointing an Alternate.

#### **Article 27: Board of Directors: Powers**

Without prejudice to the powers of the Board of Governors as provided in Article 24 of this Agreement, the Board of Directors shall be responsible for the direction of the general operations of the Bank and, for this purpose, shall, in addition to the powers assigned to it expressly by this Agreement, exercise all the powers delegated to it by the Board of Governors, and in particular:

(i) prepare the work of the Board of Governors;

(ii) in conformity with the general directions of the Board of Governors, establish policies and take decisions concerning loans, guarantees, investment in equity capital, borrowing by the Bank, the furnishing of technical assistance and other operations of the Bank;

(iii) submit the audited accounts for each financial year for approval of the Board of Governors at each annual meeting; and

(iv) approve the budget of the Bank.

**Article 28: Board of Directors: Procedure**

1. The Board of Directors shall normally function as the principal office of the Bank and shall meet as often as the business of the Bank may require.

2. A majority of the Directors shall constitute a quorum for any meeting of the Board of Directors, provided such majority represents not less than two-thirds of the total voting power of the members.

3. The Board of Governors shall adopt regulations under which, if there is no Director of its nationality, a member may send a representative to attend, without right to vote, any meeting of the Board of Directors when a matter particularly affecting that member is under consideration.

**Article 29: Voting**

1. The voting power of each member shall be equal to the number of its subscribed shares in the capital stock of the Bank. In the event of any member failing to pay any part of the amount due in respect of its obligations in relation to paid-in shares under Article 6 of this Agreement, such member shall be unable for so long as such failure continues to exercise that percentage of its voting power which corresponds to the percentage which the amount due but unpaid bears to the total amount of paid-in shares subscribed to by that member in the capital stock of the Bank.

2. In voting in the Board of Governors, each Governor shall be entitled to cast the votes of the member he or she represents. Except as otherwise expressly provided in this Agreement, all matters before the Board of Governors shall be decided by a majority of the voting power of the members voting.

3. In voting in the Board of Directors, each Director shall be entitled to cast the number of votes to which the Governors who have elected him or her are entitled and those to which any Governors who have assigned their votes to him or her, pursuant to section D or Annex B, are entitled. A Director representing more than one member may cast separately the votes of the members he or she represents. Except as otherwise expressly provided in this Agreement, and except for general policy decisions in which cases such policy decisions shall be taken by a majority of not less than two-thirds of the total voting power of the members voting, all matters before the Board of Directors shall be decided by a majority of the voting power of the members voting.

**Article 30: The President**

1. The Board of Governors, by a vote of a majority of the total number of Governors, representing not less than a majority of the total voting power of the members, shall elect a President of the Bank. The President, while holding office, shall not be a Governor or a Director of an Alternate for either.

2. The term of office of the President shall be four (4) years. He or she may be re-elected. He or she shall, however, cease to hold office when the Board of Governors so decides by an affirmative vote of not less than two-thirds of the Governors, representing not less than two-thirds of the total voting power of the members. If the office of the President for any reason becomes vacant, the Board of Governors, in accordance with the provisions of paragraph 1 of this Article, shall elect a successor for up to four (4) years.

3. The President shall not vote, except that he or she may cast a deciding vote in case of an equal division. He or she may participate in meetings of the Board of Governors and shall chair the meetings of the Board of Directors.

4. The President shall be the legal representative of the Bank.

5. The President shall be chief of the staff of the Bank. He or she shall be responsible for the organization, appointment and dismissal of the officers and staff in accordance with regulations to be adopted by the Board of Directors. In appointing officers and staff, he or she shall, subject to the paramount importance of efficiency and technical competence, pay due regard to recruitment on a wide geographical basis among members of the Bank.

6. The President shall conduct, under the direction of the Board of Directors, the current business of the Bank.

**Article 31: Vice-President(s)**

1. One or more Vice-Presidents shall be appointed by the Board of Directors on the recommendation of the President. A Vice-President shall hold office for such term, exercise such authority and perform such functions in the administration of the Bank, as may be determined by the Board of Directors. In the absence or incapacity of the President, a Vice-President shall exercise the authority and perform the functions of the President.

2. A Vice-President may participate in meetings of the Board of Directors but shall have no vote at such meetings, except that he or she may cast the deciding vote when acting in place of the President.

**Article 32: International character of the Bank**

1. The Bank shall not accept Special Funds or other loans or assistance that may in any way prejudice, deflect or otherwise alter its purpose or functions.
2. The Bank, its President, Vice-President(s), officers and staff shall in their decisions take into account only considerations relevant to the Bank's purpose, functions and operations, as set out in this Agreement. Such considerations shall be weighed impartially in order to achieve and carry out the purpose and functions of the Bank.
3. The President, Vice-President(s), officers and staff of the Bank, in the discharge of their offices, shall owe their duty entirely to the Bank and to no other authority. Each member of the Bank shall respect the international character of this duty and shall refrain from all attempts to influence any of them in the discharge of their duties.

**Article 33: Location of offices**

1. The principal office of the Bank shall be located in London.
2. The Bank may establish agencies or branch offices in the territory of any member of the Bank.

**Article 34: Depositories and channels of communication**

1. Each member shall designate its central bank, or such other institution as may be agreed upon with the Bank, as a depository for all the Bank's holdings of its currency as well as other assets of the Bank.
2. Each member shall designate an appropriate official entity with which the Bank may communicate in connection with any matter arising under this Agreement.

**Article 35: Publication of reports and provision of information**

1. The Bank shall publish an annual report containing an audited statement of its accounts and shall circulate to members at intervals of three (3) months or less a summary statement of its financial position and a profit and loss statement showing the results of its operations. The financial accounts shall be kept in ECU.
2. The Bank shall report annually on the environmental impact of its activities and may publish such other reports as it deems desirable to advance its purpose.
3. Copies of all reports, statements and publications made under this Article shall be distributed to members.

**Article 36: Allocation and distribution of net income**

1. The Board of Governors shall determine at least annually what part of the Bank's net income, after making provisions for reserves and, if necessary, against possible losses under paragraph 1 of Article 17 of this Agreement, shall be allocated to surplus or other purposes and what part, if any, shall be distributed. Any such decision on the allocation of the Bank's net income to other purposes shall be taken by a majority of not less than two-thirds of the Governors, representing not less than two-thirds of the total voting power of the members. No such allocation, and no distribution, shall be made until the general reserve amounts to at least ten (10) per cent of the authorized capital stock.
2. Any distribution referred to in the preceding paragraph shall be made in proportion to the number of paid-in shares held by each member; provided that in calculating such number, account shall be taken only of payments received in cash and promissory notes encashed in respect of such shares on or before the end of the relevant fiscal year.
3. Payments to each member shall be made in such manner as the Board of Governors shall determine. Such payments and their use by the receiving country shall be without restriction by any member.

## **Chapter VII: Withdrawal and suspension of membership: temporary suspension and termination of operation**

### **Article 37: Right of members to withdraw**

1. Any member may withdraw from the Bank at any time by transmitting a notice in writing to the Bank at its principal office.
2. Withdrawal by a member shall become effective, and its membership shall cease, on the date specified in its notice but in not event less than six (6) months after such notice is received by the Bank. However, at any time before the withdrawal becomes finally effective, the member may notify the Bank in writing of the cancellation of its notice of intention to withdraw.

### **Article 38: Suspension of membership**

1. If a member fails to fulfil any of its obligations to the Bank, the Bank may suspend its membership by decision of a majority of not less than two-thirds of the Governors, representing not less than two-thirds of the total voting power of the members. The member so suspended shall automatically cease to be a member one year from the date of its suspension unless a decision is taken by not less than the same majority to restore the member to good standing.
2. While under suspension, a member shall not be entitled to exercise any rights under this Agreement, except the right of withdrawal, but shall remain subject to all its obligations.

### **Article 39: Settlement of accounts with former members**

1. After the date on which a member ceases to be a member, such former member shall remain liable for its direct obligations to the Bank and for its contingent liabilities to the Bank so long as any part of the loans, equity investments or guarantees contracted before it ceased to be a member are outstanding; but it shall cease to incur such liabilities with respect to loans, equity investments and guarantees entered into thereafter by the Bank and to share either in the income or the expenses of the Bank.
2. At the time a member ceases to be a member, the Bank shall arrange for the repurchase of such former member's shares as a part of the settlement of accounts with such former member in accordance with the provisions of this Article. For this purpose, the purchase price of the shares shall be the value shown by the books of the Bank on the date of cessation of membership, with the original purchase price of each share being its maximum value.

3. The payment for shares repurchased by the Bank under this Article shall be governed by the following conditions:

- (i) any amount due to the former member for its shares shall be withheld so long as the former member, its central bank or any of its agencies or instrumentalities remains liable, as borrower or guarantor, to the Bank and such amount may, at the option of the Bank be applied on any such liability as it matures. No amount shall be withheld on account of the liability of the former member resulting from its subscription for shares in accordance with paragraphs 4, 5 and 7 of Article 6 of this Agreement. In any event, no amount due to a member for its shares shall be paid until six (6) months after the date upon which the member ceases to be a member;
  - (ii) payments for shares may be made from time to time, upon their surrender by the former member, to the extent by which the amount due as the repurchase price in accordance with paragraph 2 of this Article exceeds the aggregate amount of liabilities on loans, equity investments and guarantees in sub paragraph (i) of this paragraph until the former member has received the full repurchase price;
  - (iii) payments shall be made on such conditions and in such fully convertible currencies, or ECU, and on such dates, as the Bank determines; and
  - (iv) if losses are sustained by the Bank on any guarantees, participation in loans, or loans which were outstanding on the date when the member ceased to be a member, or if a net loss is sustained by the Bank on equity investments held by it on such date, and the amount of such losses exceeds the amount of the reserves provided against losses on the date when the member ceased to be a member, such former member shall repay, upon demand, the amount by which repurchase the price of its shares would have been reduced if the losses had been taken into account when the repurchase price was determined. In addition, the former member shall remain liable on any call for unpaid subscriptions under paragraph 4 of Article 6 of this Agreement, to the extent that it would have been required to respond if the impairment of capital had occurred and the call had been made at the time the repurchase price of its shares was determined.
4. If the Bank terminates its operations pursuant to Article 41 of this Agreement within six (6) months of the date upon which any member ceases to be a member, all rights of such former members shall be determined in accordance with the provisions of Articles 41 to 43 of this Agreement.

### **Article 40: Temporary suspension of operations**

In an emergency, the Board of Directors may suspend temporarily operations in respect of new loans, guarantees, underwriting, technical assistance and equity investments pending an opportunity for further consideration and action by the Board of Governors.

#### **Article 41: Termination of operations**

The Bank may terminate its operations by the affirmative vote of not less than two-thirds of the Governors, representing not less than three-fourths of the total voting power of the members. Upon such termination of operations the Bank shall forthwith cease all activities, except those incident to the orderly realization, conservation and preservation of its assets and settlement of its obligations.

#### **Article 42: Liability of members and payments of claims**

1. In the event of termination of the operations of the Bank, the liability of all members for all uncalled subscriptions to the capital stock of the Bank shall continue until all claims of creditors; including all contingent claims, shall have been discharged.
2. Creditors on ordinary operations holding direct claims shall be paid first out of the assets of the Bank, secondly out of the payments to be made to the Bank in respect of unpaid paid-in shares, and then out of payments to be made to the Bank in respect of callable capital stock. Before making any payments to creditors holding direct claims, the Board of Directors shall make such arrangements as are necessary, in its judgment, to ensure a pro rata distribution among holders of direct and holders of contingent claims.

#### **Article 43: Distribution of assets**

1. No distribution under this Chapter shall be made to members on account of their subscriptions to the capital stock of the Bank until:

- and
- (i) all liabilities to creditors have been discharged or provided for;
  - (ii) the Board of Governors has decided by a vote of not less than two-thirds of the Governors, representing not less than three-fourths of the total voting power of the members, to make a distribution.

2. Any distribution of the assets of the Bank to the members shall be in proportion to the capital stock held by each member and shall be effected at such times and under such conditions as the Bank shall deem fair and equitable. The shares of assets distributed need not be uniform as to type of assets. No member shall be entitled to receive its share in such a distribution of assets until it has settled all of its obligations to the Bank.

3. Any member receiving assets distributed pursuant to this Article shall enjoy the same rights with respect to such assets as the Bank enjoyed prior to their distribution.

## **Chapter VIII: Status, immunities, privileges and exemptions**

#### **Article 44: Purposes of chapter**

To enable the Bank to fulfil its purpose and the functions with which it is entrusted, the status, immunities, privileges and exemptions set forth in this Chapter shall be accorded to the Bank in the territory of each member country.

#### **Article 45: Status of the Bank**

The Bank shall possess full legal personality and, in particular, the full legal capacity:

- (i) to contract;
- (ii) to acquire, and dispose of, immovable and movable property; and
- (iii) to institute legal proceedings.

#### **Article 46: Position of the Bank with regard to judicial process**

Actions may be brought against the Bank only in a court of competent jurisdiction in the territory of a country in which the Bank has an office, has appointed an agent for the purpose of accepting service or notice of process, or has issued or guaranteed securities. No actions shall, however, be brought by members or persons acting for or deriving claims from members. The property and assets of the Bank shall, wheresoever located and by whomsoever held, be immune from all forms of seizure, attachment or execution before the delivery of final judgment against the Bank.

#### **Article 47: Immunity of assets from seizure**

Property and assets of the Bank, wheresoever located and by whomsoever held, shall be immune from search, requisition, confiscation, expropriation or any other form of taking or foreclosure by executive or legislative action.

#### **Article 48: Immunity of archives**

The archives of the Bank, and in general all documents belonging to it or held by it, shall be inviolable.

#### **Article 49: Freedom of assets from restrictions**

To the extent necessary to carry out the purpose and functions of the Bank and subject to the provisions of this Agreement, all property and assets of the Bank shall be free from restrictions, regulations, controls and moratoria of any nature.

#### **Article 50: Privilege for communications**

The official communications of the Bank shall be accorded by each member the same treatment that it accords to the official communications of any other member.

#### **Article 51: Immunities of officers and employees**

All Governors, Directors, Alternates, officers and employees of the Bank and experts performing missions for the Bank shall be immune from legal process with respect to acts performed by them in their official capacity, except when the Bank waives this immunity, and shall enjoy inviolability of all their official papers and documents. This immunity shall not apply, however, to civil liability in the case of damage arising from a road traffic accident caused by any such Governor, Director, Alternate, officer, employee or expert.

#### **Article 52: Privileges of officers and employees**

1. All Governors, Directors, Alternates, officers and employees of the Bank and experts of the Bank performing missions for the Bank:

(i) not being local nationals, shall be accorded the same immunities from immigration restrictions, alien registration requirements and national service obligations, and the same facilities as regards exchange regulations, as are accorded by members to the representatives, official, and employees of comparable rank of other members; and

(ii) shall be granted the same treatment in respect of travelling facilities as is accorded by members to representatives, officials and employees of comparable rank of other members.

2. The spouses and immediate dependants of those Directors, Alternate Directors, officers, employees and experts of the Bank who are resident in the country in which the principal office of the Bank is located shall be accorded opportunity to take employment in that country. The spouses and immediate dependants of those Directors, Alternate Directors, officers, employees and experts of the Bank who are resident in a country in which any agency or branch office of the Bank is located should, wherever possible, in accordance with the national law of that country, be accorded similar opportunity in that country. The Bank shall negotiate specific agreements implementing the provisions of this paragraph with the country in which the principal office of the Bank is located and, as appropriate, with the other countries concerned.

#### **Article 53: Exemption from taxation**

1. Within the scope of its official activities the Bank, its assets, property, and income shall be exempt from all direct taxes.

2. When purchases or services of substantial value and necessary for the exercise of the official activities of the Bank are made or used by the Bank and when the price of such purchases or services includes taxes or duties, the member that has levied the taxes or duties shall, if they are identifiable, take appropriate measures to grant exemption from such taxes or duties or to provide for their reimbursement.

3. Goods imported by the Bank and necessary for the exercise of its official activities shall be exempt from all import duties and taxes, and from all import prohibitions and restrictions. Similarly goods exported by the Bank and necessary for the exercise of its official activities shall be exempt from all export duties and taxes, and from all export prohibitions and restrictions.

4. Goods acquired or imported and exempted under this Article shall not be sold, hired out, lent or given away against payment or free of charge, except in accordance with conditions laid down by the members which have granted exemptions or reimbursements.

5. The provisions of this Article shall not apply to taxes or duties which are no more than charges for public utility services.

6. Directors, Alternate Directors, officers and employees of the Bank shall be subject to an internal effective tax for the benefit of the Bank on salaries and emoluments paid by the Bank, subject to conditions to be laid down and rules to be adopted by the Board of Governors within a period of one year from the date of entry into force of this Agreement. From the date on which this tax is applied, such salaries and emoluments shall be exempt from national income tax. The members may, however, take into account the salaries and emoluments thus exempt when assessing the amount of tax to be applied to income from other sources.

7. Notwithstanding the provisions of paragraph 6 of this Article, a member may deposit, with its instrument of ratification, acceptance or approval, a declaration that such member retains for itself, its political subdivisions or its local authorities the right to tax salaries and emoluments paid by the Bank to citizens or nationals of such member. The Bank shall be exempt from any obligation for the payment, withholding or collection of such taxes. The bank shall not make any reimbursement for such taxes.

8. Paragraph 6 of this Article shall not apply to pensions and annuities paid by the Bank.

9. No tax of any kind shall be levied on any obligation or security issued by the Bank, including any dividend or interest thereon, by whomsoever held:

(i) which discriminates against such obligation or security solely because it is issued by the Bank, or

(ii) if the sole jurisdictional basis for such taxation is the place or currency in which it is issued, made payable or paid, or the location of any office or place of business maintained by the Bank.

10. No tax of any kind shall be levied on any obligation or security guaranteed by the Bank, including any dividend or interest thereon, by whomsoever held:

- (i) which discriminates against such obligation or security solely because its guaranteed by the Bank, or
- (ii) if the sole jurisdictional basis for such taxation is the location of any office; place of business maintained by the Bank.

**Article 54: Implementation of Chapter**

Each member shall promptly take such action as is necessary for the purpose of implementing the provisions of this Chapter and shall inform the Bank of the detailed action which it has taken.

**Article 55: Waiver of immunities, privileges and exemptions**

The immunities, privileges and exemptions conferred under this Chapter are granted in the interest of the Bank. The Board of Directors may waive to such extent and upon such conditions as it may determine any of the immunities, privileges and exemptions conferred under this Chapter in cases where such action would, in its opinion, be appropriate in the best interests of the Bank. The President shall have the right and the duty to waive any immunity, privilege or exemption in respect of any officer, employee or expert of the Bank, other than the President, Vice-President, where, in his or her opinion, the immunity, privilege or exemption would impede the course of justice and can be waived without prejudice to the interests of the Bank. In similar circumstances and under the same conditions, the Board of Directors shall have the right and the duty to waive any immunity, privilege or exemption in respect of the President and each Vice-President.

**Chapter IX: Amendments, interpretation, arbitration**

**Article 56: Amendments**

1. Any proposal to amend this Agreement, whether emanating from a member, a Governor or the Board of Directors, shall be communicated to the Chairman of the Board of Governors who shall bring the proposal before that Board. If the proposed amendment is approved by the Board the Bank shall, by any rapid means of communication, ask all members whether they accept the proposed amendment. When not less than three-fourths of the members (including at least two countries from Central and Eastern Europe listed in Annex A), having not less than four-fifths of the total voting power of the members, have accepted the proposed amendment, the Bank shall certify that fact by formal communication addressed to all members.

2. Notwithstanding paragraph 1 of this Article:

(i) acceptance by all members shall be required in the case of any amendment modifying:

- (a) the right to withdraw from the Bank;
- (b) the rights pertaining to purchase of capital stock provided from in paragraph 3 of Article 5 of this Agreement;

(c) the limitations on liability provided for in paragraph 7 of Article 5 of this Agreement; and

(d) the purpose and functions of the Bank defined by Articles 1 and 2 of this Agreement;

(ii) acceptance by not less than three-fourths of the members having not less than eighty-five (85) per cent of the total voting power of the members shall be required in the case of any amendment modifying paragraph 4 of Article 8 of this Agreement.

When the requirements for accepting any such proposed amendment have been met, the Bank shall certify that fact by formal communication addressed to all members.

3. Amendments shall enter into force for all members three (3) months after the date of the formal communication provided for in paragraphs 1 and 2 of this Article unless the Board of Governors specifies a different period.

## **Article 57: Interpretation and application**

1. Any question of interpretation or application of the provisions of this Agreement arising between any member and the Bank, or between any members of the Bank, shall be submitted to the Board of Directors for its decision. If there is no Director of its nationality in that Board, a member particularly affected by the question under consideration shall be entitled to direct representation in the meeting of the Board of Directors during such consideration. The representative of such member shall, however, have no vote. Such right of representation shall be regulated by the Board of Governors.

2. In any case where the Board of Directors has given a decision under paragraph 1 of this Article, any member may require that the question be referred to the Board of Governors, whose decision shall be final. Pending the decision of the Board of Governors, the Bank may, so far as it deems it necessary, act on the basis of the decision of the Board of Directors.

## **Article 58: Arbitration**

If a disagreement should arise between the Bank and a member which has ceased to be a member, or between the Bank and any member after adoption of a decision to terminate the operations of the Bank, such disagreement shall be submitted to arbitration by a tribunal of three (3) arbitrators, one appointed by the Bank, another by the member or former member concerned, and the third, unless the parties otherwise agree, by the President of the International Court of Justice or such other authority as may have been prescribed by regulations adopted by the Board of Governors. A majority vote of the arbitrators shall be sufficient to reach a decision which shall be final and binding upon the parties. The third arbitrator shall have full power to settle all questions of procedure in any case where the parties are in disagreement with respect thereto.

## **Article 59: Approval deemed given**

Whenever the approval or the acceptance of any member is required before any act may be done by the Bank, except under Article 56 of this Agreement, approval or acceptance shall be deemed to have been given unless the member presents an objection within such reasonable period as the Bank may fix in notifying the member of the proposed act.

## **Chapter X: Final provisions**

### **Article 60: Signature and deposit**

1. This Agreement, deposited with the Government of the French Republic (hereinafter called "the Depository"), shall remain open until 31 December 1990 for signature by the prospective members whose names are set forth in Annex A to this Agreement.

2. The Depository shall communicate certified copies of this Agreement to all the Signatories.

### **Article 61: Ratification, acceptance or approval**

1. The Agreement shall be subject to ratification, acceptance or approval by the Signatories. Instruments of ratification, acceptance or approval shall, subject to paragraph 2 of this Article, be deposited with the Depository not later than 31 March 1991. The Depository shall duly notify the other Signatories of each deposit and the date thereof.

2. Any Signatory may become a party to this Agreement by depositing an instrument of ratification, acceptance or approval until one year after the date of its entry into force or, if necessary, until such later date as may be decided by a majority of Governors, representing a majority of the total voting power of the members.

3. A Signatory whose instrument referred to in paragraph 1 of this Article is deposited before the date on which this Agreement enters into force shall become a member of the Bank on that date. Any other Signatory which complies with the provisions of the preceding paragraph shall become a member of the Bank on the date on which its instrument of ratification, acceptance or approval is deposited.

### **Article 62: Entry into force**

1. This Agreement shall enter into force when instruments of ratification, acceptance or approval have been deposited by Signatories whose initial subscriptions represent not less than two thirds of the total subscriptions set forth in Annex A, including at least two countries from Central and Eastern Europe listed in Annex A.

2. If this Agreement has not entered into force by 31 March 1991, the Depository may convene a conference of interested prospective members to determine the future course of action and decide a new date by which instruments of ratification, acceptance or approval shall be deposited.

### Article 63: Inaugural meeting and commencement of operations

1. As soon as this Agreement enters into force under Article 62 of this Agreement, each member shall appoint a Governor. The Depository shall call the first meeting of the Board of Governors within sixty (60) days of entry into force of this Agreement under Article 62 or as soon as possible thereafter.
2. At its first meeting, the Board of Governors:
  - (i) shall elect the President;
  - (ii) shall elect the Directors of the Bank in accordance with Article 26 of this Agreement;
  - (iii) shall make arrangements for determining the date of the commencement of the Bank's operations; and
  - (iv) shall make such other arrangements as appear to it necessary to prepare for the commencement of the Bank's operations.
3. The Bank shall notify its members of the date of commencement of its operations.

Done at Paris on 29 May 1990 in a single original, whose English, French, German and Russian texts are equally authentic, which shall be deposited in the archives of the Depository which shall transmit a duly certified copy to each of the other prospective members whose names are set forth in Annex A.

## Annex A

### Initial subscriptions to the authorized capital stock for prospective members which may become members in accordance with Article 61

	Number of shares	Capital subscription (in million ECU)
<b>A - European Communities</b>		
(a)		
Belgium	22,800	228.00
Denmark	12,000	120.00
France	85,175	851.75
Germany, Federal Republic of	85,175	851.75
Greece	6,500	65.00
Ireland	3,000	30.00
Italy	85,175	851.75
Luxembourg	2,000	20.00
Netherlands	24,800	248.00
Portugal	4,200	42.00
Spain	34,000	340.00
United Kingdom	85,175	851.75
(b)		
European Economic Community	30,000	300.00
European Investment Bank	30,000	300.00
<b>B - Other European countries</b>		
Austria	22,800	228.00
Cyprus	1,000	10.00
Finland	12,500	125.00
Iceland	1,000	10.00
Israel	6,500	65.00
Liechtenstein	200	2.00
Malta	100	1.00
Norway	12,500	125.00
Sweden	22,800	228.00
Switzerland	22,800	228.00
Turkey	11,500	115.00

### C - Recipient countries

Bulgaria	7,900	79.00
Czechoslovakia	12,800	128.00
German Democratic Republic	15,500	155.00
Hungary	7,900	79.00
Poland	12,800	128.00
Romania	4,800	48.00
Union of Soviet Socialist Republics	60,000	600.00
Yugoslavia	12,800	128.00
<b>D - Non-European countries</b>		
Australia	10,000	100.00
Canada	34,000	340.00
Egypt	1,000	10.00
Japan	85,175	851.75
Korea, Republic of	6,500	65.00
Mexico	3,000	30.00
Morocco	1,000	10.00
New Zealand	1,000	10.00
United States of America	100,000	1,000.00

### E - Non allocated shares

	<b>125</b>	<b>1.25</b>
<b>Total</b>	<b>1,000,000</b>	<b>10,000.00</b>

(\*) Prospective members are listed under the above categories only for the purpose of this Agreement. Recipient countries are referred to elsewhere in this Agreement as Central and Eastern European countries.

## Annex B

**Section A - Election of Directors by Governors representing Belgium, Denmark, France, The Federal Republic of Germany, Greece, Ireland, Italy, Luxembourg, The Netherlands, Portugal, Spain, The United Kingdom, The European Economic Community and The European Investment Bank (hereinafter referred to as Section A Governors)**

1. The provisions set out below in this Section shall apply exclusively to this Section.
2. Candidates for the office of Director shall be nominated by Section A Governors, provided that a Governor may nominate only one person. The election of Directors shall be by ballot of Section A Governors.
3. Each Governor eligible to vote shall cast for one person all of the votes to which the member appointing him or her is entitled under paragraphs 1 and 2 of Article 29 of this Agreement.
4. Subject to paragraph 10 of this Section, the 11 persons receiving the highest number of votes shall be Directors, except that no person who receives less than 4.5 per cent of the total of the votes which can be cast (eligible votes) in Section A shall be considered elected.
5. Subject to paragraph 10 of this Section, if 11 persons are not elected on the first ballot, a second ballot shall be held in which, unless there were no more than 11 candidates, the person who received the lowest number of votes in the first ballot shall be ineligible for election and in which there shall vote only:
  - (a) those Governors who voted in the first ballot for a person not elected and
  - (b) those Governors whose votes for a person elected are deemed under paragraphs 6 and 7 below of this Section to have raised the votes cast for that person above 5.5 per cent of the eligible votes.
6. In determining whether the votes cast by a Governor are deemed to have raised the total votes cast for any person above 5.5 per cent of the eligible votes, the 5.5 per cent shall be deemed to include, first, the votes of the Governor casting the largest number of votes for such person, then the votes of the Governor casting the next largest number and so on, until 5.5 per cent is reached.
7. Any Governor, part of whose votes must be counted in order to raise the total of votes cast for any person above 4.5 per cent shall be considered as casting all of his or her votes for such person, even if the total votes for such person thereby exceed 5.5 per cent and shall not be eligible to vote in a further ballot.

8. Subject to paragraph 10 of this Section, if, after the second ballot, 11 persons have not been elected, further ballots shall be held in conformity with the principles and procedures laid down in this Section, until 11 persons have been elected, provided that, if at any stage 10 persons are elected, notwithstanding the provisions of paragraph 4 of this Section, the eleventh may be elected by a simple majority of the remaining votes cast.

9. In the case of an increase or decrease in the number of Directors to be elected by Section A Governors, the minimum and maximum percentages specified in paragraphs 4, 5, 6 and 7 of this Section shall be appropriately adjusted by the Board of Governors.

10. So long as any Signatory, or group of Signatories, whose share of the total amount of capital subscriptions provided in Annex A is more than 2.4 per cent, has not deposited its instrument or their instruments of ratification, approval or acceptance, there shall be no election for one Director in respect of each such Signatory or group of Signatories. The Governor or Governors representing such a Signatory or group of Signatories shall elect a Director in respect of each Signatory or group of Signatories, immediately after the Signatory becomes a member of the group of Signatories become members. Such Director shall be deemed to have been elected by the Board of Governors at its inaugural meeting, in accordance with paragraph 3 of Article 26 of this Agreement, if he or she is elected during the period in which the first Board of Directors shall hold office.

#### **Section B - Election of Directors by Governors representing other countries**

#### **Section B (i) - Election of Directors by Governors representing those countries listed in Annex A as Central and Eastern European Countries (recipient countries) (hereinafter referred to as Section B (i) Governors)**

1. The provisions set out below in this Section shall apply exclusively to this Section.
2. Candidates for the office of Director shall be nominated by Section B (i) Governors provided that a Governor may nominate only one person. The election of Directors shall be by ballot of Section B (i) Governors.
3. Each Governor eligible to vote shall cast for one person all of the votes to which the member appointing him or her is entitled under paragraphs 1 and 2 of Article 29 of this Agreement.
4. Subject to paragraph 10 of this Section, the 4 persons receiving the highest number of votes shall be Directors, except that no person who receives less than 12 per cent of the total of the votes which can be cast (eligible votes) in Section B (i) shall be considered elected.

5. Subject to paragraph 10 of this Section, if 4 persons are not elected on the first ballot, a second ballot shall be held in which, unless there were no more than 4 candidates, the person who received the lowest number of votes in the first ballot shall be ineligible for election and in which there shall vote only:

(a) those Governors who voted in the first ballot for a person not elected and

(b) those Governors whose votes for a person elected are deemed under paragraphs 6 and 7 below of this Section to have raised the votes cast for that person above 13 per cent of the eligible votes.

6. In determining whether the votes cast by a Governor are deemed to have raised the total votes cast for any person above 13 per cent of the eligible votes, the 13 per cent shall be deemed to include, first, the votes of the Governor casting the largest number of votes for such person, then the votes of the Governor casting the next largest number and so on, until 13 per cent is reached.

7. Any Governor, part of whose votes must be counted in order to raise the total of votes cast for any person above 12 per cent shall be considered as casting all or his or her votes for such person, even if the total votes for such person thereby exceed 13 per cent and shall not be eligible to vote in a further ballot.

8. Subject to paragraph 10 of this Section, if, after the second ballot, four persons have not been elected, further ballots shall be held in conformity with the principles and procedures laid down in this Section, until four persons have been elected, provided that, if at any stage three persons are elected, notwithstanding the provisions of paragraph 4 of this Section, the fourth may be elected by a simple majority of the remaining votes cast.

9. In the case of an increase or decrease in the number of Directors to be elected by Section B (i) Governors, the minimum and maximum percentages specified in paragraphs 4, 5, 6 and 7 of this Section shall be appropriately adjusted by the Board of Governors.

10. So long as any Signatory, or group of Signatories, whose share of the total amount of capital subscriptions provided in Annex A is more than 2.8 per cent, has not deposited its instrument or their instruments of ratification, approval or acceptance, there shall be no election for one Director in respect of each such Signatory or group of Signatories. The Governor or Governors representing such a Signatory or group of Signatories shall elect a Director in respect of each Signatory or group of Signatories, immediately after the Signatory becomes a member of the group of Signatories become members. Such Director shall be deemed to have been elected by the Board of Governors at its inaugural meeting, in accordance with paragraph 3 of Article 26 of this Agreement, if he or she is elected during the period in which the first Board of Directors shall hold office.

**Section B (ii) - Election of Directors by Governors representing those countries listed in Annex A as other European countries (hereinafter referred to as Section B (ii) Governors)**

1. The provisions set out below in this Section shall apply exclusively to this Section.
2. Candidates for the office of Director shall be nominated by Section B (ii) Governors provided that a Governor may nominate only one person. The election of Directors shall be by ballot of Section B (ii) Governors.
3. Each Governor eligible to vote shall cast for one person all the votes to which the member appointing him or her is entitled under paragraphs 1 and 2 of Article 29 of this Agreement.
4. Subject to paragraph 10 of this Section, the four persons receiving the highest number of votes shall be Directors, except that no person who receives less than 20.5 per cent of the votes which can be cast (eligible votes) in section B (ii) shall be considered elected.
5. Subject to paragraph 10 of this Section, if four persons are not elected on the first ballot, a second ballot shall be held in which, unless there were no more than four candidates, the person who received the lowest number of votes in the first ballot shall be ineligible for election and in which there shall vote only:
  - (a) those Governors who voted in the first ballot for a person not elected and
  - (b) those Governors whose votes for a person elected are deemed under paragraphs 6 and 7 below of this Section to have raised the votes cast for that person above 21.5 per cent of the eligible votes.

6. In determining whether the votes cast by a Governor are deemed to have raised the total votes cast for any person above 21.5 per cent of the eligible votes, the 21.5 per cent shall be deemed to include, first, the votes of the Governor casting the largest number of votes for such person, then the votes of the Governor casting the next largest number and so on, until 21.5 per cent is reached.
7. Any Governor, part of whose votes must be counted in order to raise the total of votes cast for any person above 20.5 per cent shall be considered as casting all of his or her votes for such person, even if the total votes for such person thereby exceed 21.5 per cent and shall not be eligible to vote in a further ballot.

8. Subject to paragraph 10 of this Section, if, after the second ballot, four persons have not been elected, further ballots shall be held in conformity with the principles and procedures laid down in this Section, until four persons have been elected, provided that, if at any stage three persons are elected, notwithstanding the provisions of paragraph 4 of this Section, the fourth may be elected by a simple majority of the remaining votes cast.

9. In the case of an increase or decrease in the number of Directors to be elected by section B (ii) Governors, the minimum and maximum percentages specified in paragraphs 4, 5, 6 and 7 of this Section shall be appropriately adjusted by the Board of Governors.

10. So long as any Signatory, or group of Signatories, whose share of the total amount of capital subscriptions provided in Annex A is more than 2.8 per cent, has not deposited its instrument or their instruments of ratification, approval or acceptance, there shall be no election for one Director in respect of each such Signatory or group of Signatories. The Governor or Governors representing such a Signatory or group of Signatories shall elect a Director in respect of each Signatory or group of Signatories, immediately after the Signatory becomes a member or the group of Signatories become members. Such Director shall be deemed to have been elected by the Board of Governors at its inaugural meeting, in accordance with paragraph 3 of Article 26 of this Agreement, if he or she is elected during the period in which the first Board of Directors shall hold office.

**Section B (iii) - Election of Directors by Governors representing those countries listed in Annex A as Non-European countries (hereinafter referred to as Section B (iii) Governors)**

1. The provisions set out below in this Section shall apply exclusively to this Section.
2. Candidates for the office of Director shall be nominated by Section B (iii) Governors provided that a Governor may nominate only one person. The election of Directors shall be by ballot of Section B (iii) Governors.
3. Each Governor eligible to vote shall cast for one person all of the votes to which the member appointing him or her is entitled under paragraphs 1 and 2 of Article 29 of the Agreement.
4. Subject to paragraph 10 of this Section, the four persons receiving the highest number of votes shall be Directors, except that no person who receives less than 8 per cent of the total of the votes which can be cast (eligible votes) in Section B (iii) shall be considered elected.
5. Subject to paragraph 10 of this Section, if four persons are not elected on the first ballot, a second ballot shall be held in which, unless there were not more than four candidates, the person who received the lowest number of votes in the first ballot shall be ineligible for election and in which there shall vote only:
  - (a) those Governors who voted in the first ballot for a person not elected and
  - (b) those Governors whose votes for a person elected are deemed under paragraphs 6 and 7 below of this Section to have raised the votes cast for that person above 9 per cent of the eligible votes.

6. In determining whether the votes cast by a Governor are deemed to have raised the total votes cast for any person above 9 per cent of the eligible votes, the 9 per cent shall be deemed to include, first, the votes of the Governor casting the largest number of votes for such person, then the votes of the Governor casting the next largest number and so on, until 9 per cent is reached.

7. Any Governor, part of whose votes must be counted in order to raise the total of votes cast for any person above 8 per cent shall be considered as casting all of his or her votes for such person, even if the total votes for such person thereby exceed 9 per cent and shall not be eligible to vote in a further ballot.

8. Subject to paragraph 10 of this Section, if, after the second ballot, four persons have not been elected, further ballots shall be held in conformity with the principles and procedures laid down in this Section, until four persons have been elected, provided that, if at any stage three persons are elected, notwithstanding the provisions of paragraph 4 of this Section, the fourth may be elected by a simple majority of the remaining votes cast.

9. In the case of an increase or decrease in the number of Directors to be elected by Section B (iii) Governors, the minimum and maximum percentages specified in paragraphs 4, 5, 6, and 7 of this Section shall be appropriately adjusted by the Board of Governors.

10. So long as any Signatory, or group of Signatories, whose share of the total amount of capital subscriptions provided in Annex A is more than 5 per cent, has not deposited its instrument or their instruments of ratification, approval or acceptance, there shall be no election for one Director in respect of each such Signatory or group of Signatories. The Governor or Governors representing such a Signatory or group of Signatories shall elect a Director in respect of each Signatory or group of Signatories, immediately after the Signatory becomes a member or the group of Signatories become members. Such Director shall be deemed to have been elected by the Board of Governors at its inaugural meeting, in accordance with paragraph 3 of Article 26 of this Agreement, if he or she is elected during the period in which the first Board of Directors shall hold office.

**Section C - Arrangements for the election of Directors representing countries not listed in Annex A**

If the Board of Governors decides, in accordance with paragraph 3 of Article 26 of this Agreement, to increase or decrease the size, or revise the composition, of the Board of Directors, in order to take into account changes in the number of members of the Bank, the Board of Governors shall first consider whether any amendments are required to this Annex and may make any such amendments as it deems necessary as part of such decision.

**Section D - Assignment of votes**

Any Governor who does not participate in voting for the election or whose vote does not contribute to the election of a Director under Section A or Section B (i) or Section B (ii) or Section B (iii) of this Annex may assign the votes to which he or she is entitled to as elected Director, provided that such Governor shall first have obtained the agreement of all those Governors who have elected that Director to such assignments.

A decision by any Governor not to participate in voting for the election of a Director shall not affect the calculation of the eligible votes to be made under Section A, Section B (i), Section B (ii) or Section B (iii) of this Annex.

## Letter from the Head of the Soviet Delegation

To the Chairman of the Conference on the  
Establishment of the European Bank  
for Reconstruction and Development

Mr. Chairman,

As you know, the initiative of the President of France, M. F. Mitterrand, to establish the European Bank for Reconstruction and Development for the purpose of facilitating the transition of Central and Eastern European countries towards market-oriented economies has found understanding and support on behalf of the Soviet authorities. The Soviet delegation participated in the sessions of talks on drafting the constituent documents of the Bank. As a result the constituent countries have reached considerable progress in drawing up the Agreement establishing the European Bank for Reconstruction and Development.

At the same time, certain difficulties largely stem from fears of a number of countries that due to the size of its economy the Soviet Union may become the principal recipient of credits of the Bank and therefore will narrow its capacity to extend aid to other Central and Eastern European Countries.

In this connection I would like to assure you, dear Mr. Chairman, that the intentions of the Soviet Union to become an equal member of the Bank account primarily for its will to establish a new institution of multilateral cooperation so as to foster historical reforms on the European continent.

I would like to inform you that my government is prepared to limit its access to the Bank's resources, pursuant to paragraph 4 of Article 8 of the Articles of Agreement of the Bank, for a period of three years starting from the entry into force of the Articles of Agreement of the Bank.

During that period, the Soviet Union wishes that the Bank will provide technical assistance and other types of assistance directed to finance its private sector, to facilitate the transition of state-owned enterprises to private sector ownership and control and to help enterprises operating competitively and moving to participation in the market-oriented economy, subject to the proportion set forth in paragraph 3 of Article 11 of this Agreement. The total amount of any assistance thus provided by the Bank would not exceed the total amount of the cash disbursed and the promissory notes issued by the Soviet Union for its shares.

I am confident that continuing economic reforms in the Soviet Union will inevitably promote the expansion of the Bank's activities into the territory of the Soviet Union. However, the USSR, being interested in securing the multilateral character of the Bank, will not choose that at any time in future the Soviet borrowings will exceed an amount consistent with maintaining the necessary diversity in the Bank's operations and prudent limits on its exposure.

Please accept, Mr. Chairman, the assurance of my highest consideration.

Head of Soviet Delegation  
Chairman of the Board  
of the State Bank of the USSR  
Victor V. GERASHCHENKO

## Chairman's Report on the Agreement Establishing the European Bank for Reconstruction and Development

The European Bank for Reconstruction and Development (EBRD) stems from an initiative by President Mitterrand of France, strongly endorsed by the European Council at Strasbourg on 9 December 1989, as a positive reaction from the European Community to the dramatic political and economic changes in Central and Eastern Europe.

From the beginning it was envisaged that the meetings to discuss the setting up of the Bank would be open to other countries as well as those of Central and Eastern Europe. The first meetings of potential members took place in Paris on 15 and 16 January 1990, with representatives from all 24 members of the Organization for Economic Cooperation and Development; Malta and Cyprus; eight Central and Eastern European countries; the European Economic Community and the European Investment Bank. At meetings from 8 to 11 March 1990, these Delegates were joined by representatives from Egypt, Israel, the Republic of Korea, Liechtenstein and Morocco and on 8 and 9 April also by representatives from Mexico. The final negotiations were in Paris on 20 May 1990.

During the meetings to discuss the EBRD Articles, Delegates came to the view that certain formulations in the text represented general understandings which needed to be recorded, but which were not suitable for the Articles. It was therefore agreed that the Chairman would produce this report summarizing these understandings and that the report would form part of the EBRD's basic documents, for future reference in interpreting the Articles. The explanatory paragraphs attached to this introduction, which form the bulk of this report, should be viewed against that background. A Signing Ceremony for the Agreement took place in Paris on 29 May 1990, in the presence of President Mitterrand and many Ministers from countries participating in the Bank.

## Explanatory notes

### Article 2

1. Delegates were anxious to show that the focus of the Bank's functions was the private sector but, given that the private sector in the potential recipient countries was at present either small or non-existent, that the Bank would also support the public sector in its transition from purely centralized control to demonopolization, decentralization or privatization and to a competitive business environment, and would assist recipient member countries in implementing structural and economic reforms, only through the measures described in subparagraphs (i) to (viii) inclusive of paragraph 1 of this Article.

2. In paragraph 1, subparagraph (i), Delegates shared the view that "other interested investors" covered both domestic and foreign investors.

3. In paragraph 1, subparagraph (iii), Delegates understood that "infrastructure" might include training in managerial and technical skills.

4. In paragraph 1, subparagraph (vii), Delegates recognized the serious environmental problems in Central and Eastern Europe, and emphasized that principles of environmentally sound development must be integrated into the full range of the Bank's operations. Thus Delegates intended "in the full range of its activities" to include all of the Bank's activities, including technical assistance and all special operations, and not merely that the Bank should be able to provide support directly for specific environmental projects.

5. In paragraph 2, Delegates believed it essential that the Bank should work in "close co-operation" with the IMF and the World Bank Group (including the IFC and MIGA), so as to ensure compatibility with their activities and to benefit from their experience and expertise, as well as to ensure that recipient member countries were pursuing sound economic programmes.

6. In continuing that the close co-operation should be "with all its members", Delegates had especially in mind the important role of the European Economic Community and the European Investment Bank.

7. In the same paragraph, Delegates also understood that "other related bodies and any entity, whether public or private" included such bodies as the Council of Europe (and in particular the Social Development Fund), the International Investment Bank, the Nordic Investment Bank and the Economic Commission for Europe. Delegates noted that the Bank was free, in accordance with paragraph 1 subparagraph (viii) of Article 20 of the Agreement, to enter into agreements of co-operation with any such body.

### Article 3

1. Delegates agreed that both the European Economic Community and the European Investment Bank (EIB) should be members, given the importance accorded to their role by the European Community Heads of State or Government who had first endorsed the idea of the Bank. It was not intended that their membership would be a precedent for other organizations or Banks to become members of the Bank, or that their membership would be used as a precedent for them to become members of other organizations or other banks.

2. Delegations took note that the EIB and its participating members confirmed that the EIB had legal power to make a capital subscription to the Bank under the Statute of the European Investment Bank.

### Article 4

The essentially European character of the Bank lent itself to the denomination of its original authorized capital stock in the European Currency Unit, the ECU. Delegates understood the ECU to be at the centre of the European Monetary System and formulated in relation to a basket of European Community currencies, the weights of which are re-examined by European Community Finance Ministers every five years or, on request, if the weight of any currency has changed by 25 per cent.

### Article 5

1. Paragraph 3 requires the Board of Governors to review the adequacy and composition of the Bank's capital stock at least every five years. A decision may then be taken either to increase the capital stock or not. This paragraph lays down the pre-emptive rights of all members in the event of an increase and stipulates that there is no obligation upon any member to subscribe to new shares. These rights are then protected by paragraph 2 of Article 56 of the Articles of Agreement.

2. Paragraph 4 provides for the possibility of decisions to allow individual members to increase their shareholding in the Bank. Where such an increase is not possible without an increase in the total capital stock, the pre-emptive rights and other requirements of paragraph 3 are brought into play.

### Article 6

1. In paragraph 2, Delegates agreed that the drawdown of promissory notes should be pro rata based on a schedule to be established by the Board of Directors who should take account of the net financing requirement based on historical resource flows.

2. In paragraph 3, Delegates agreed that the initial choice between ECU, United States dollars or Japanese yen made by each member would apply to the payment of all of the instalments mentioned in paragraph 1, as well as to the payments made as a result of a call on the original capital.

#### **Article 8**

In relation to the implementation of paragraph 3 of this Article, Delegates understood that the same procedures and voting arrangements described in this paragraph for suspending or otherwise modifying a member's access to Bank resources should apply to the reverse circumstances, namely when a member's access to Bank resources was being reconsidered in the light of its resuming the implementation of policies consistent with Article 1 of the Agreement.

#### **Article 11**

1. This Article establishes the ways the Bank shall carry out its purpose and functions, including in relation to regional projects. In describing recipients of Bank financing and assistance, and in setting limits on Bank financing and assistance to the state sector, the Article seeks to take into account the different arrangements in the different countries.

2. Delegates emphasised, in relation to the reference to private ownership and control in this Article, that control by private investors meant the ability effectively to determine enterprise decisions and policies.

3. In paragraph 1 subparagraph (v), Delegates were aware that the infrastructure needs of the potential recipient countries were immense but also that there were existing bilateral and multilateral sources of help for that purpose. They thus deliberately limited the Bank's possible activities relating to infrastructure reconstruction and development to those "necessary for private sector development and the transition to a market-oriented economy".

4. Delegates intended that paragraph 1, subparagraph (ii)(c) of this Article would be read together with subparagraph (vii) of Article 13. The Bank was not to engage in underwriting when private sector securities firms or others were able to provide the relevant financing, services and facilities on reasonable terms.

#### **Article 12**

1. Delegates intended this Article to reinforce the financial soundness of the Bank.

2. In interpreting the meaning of "the total amount of outstanding loans, equity investments and guarantees" in paragraph 1, Delegates shared the view that the Board of Directors should exercise prudence in approving all such commitments in line with its obligations under paragraph 1 of this Article.

3. In paragraph 2, Delegates intended the Board of Directors to make a rule stipulating the maximum stake that the Bank should take in the equity of any enterprise, but that this rule should include provision for exceptions in specific circumstances where this seemed desirable or necessary. Such circumstances might for instance arise if a financing partner decided to reduce its own stake in the relevant equity.

4. In paragraph 3, Delegates meant "disbursed equity investments" to be interpreted as excluding any such investments as might subsequently have been disposed of to the value achieved by such realization.

#### **Article 13**

1. Delegates expected that the operational principles set forth in this Article would be supplemented by a more detailed and comprehensive statement of operating policies to be adopted by the Board of Directors. This statement of policies would cover, among other things: the extent to which the Bank would be expected to go to satisfy itself that the funds which it invested were used efficiently and economically and, where such funds were used for the purchase of goods, that the goods were bought on reasonable terms and in favourable markets; and the detailed requirements for the identification, appraisal, monitoring, implementation and ex-post evaluation of all projects, including their economic, technical, managerial, financial and environmental aspects.

2. In sub-paragraph (i), the stipulation that the Bank should apply sound banking principles to all its operations was meant to cover all of its activities, including its financial policies (for example its management of exchange rate risks) and not just the activities listed in the rest of the Article.

3. In sub-paragraph (ii), Delegates described the precise form of programme lending in which the Bank could become involved as "projects, whether individual or in the context of specific investment programmes", so as to make clear that fast-disbursing policy-based lending is not included.

4. In sub-paragraph (vii), the intention of Delegates was that the Bank should not compete with other organizations; rather, it should complement or supplement existing financing possibilities. Delegates also understood that "financing" and "facilities" were broad terms involving the whole range of Bank operations, including underwriting. Delegates intended this sub-paragraph to be read together with sub-paragraph (xi), where the latter applies.

5. In sub-paragraph (x), Delegates intended the word "investments" to cover the Bank's loans and guarantees as well as its equity investments. In connection with this provision it had seemed desirable to avoid writing into the Articles any requirement that preference be given to any particular class or classes of purchasers. However, the Bank could often find it necessary or appropriate, when making an investment, to give to private investors with which it was associated in the enterprise a right of first refusal, within a reasonable time limit, to purchase the Bank's interest therein. Moreover, if the Bank had various opportunities of selling an investment on roughly the same terms, it should bear in mind, in deciding among them, the desirability of fostering local capital markets.

6. In sub-paragraph (xii), Delegates agreed upon completely open procurement (and not procurement open only to members), based on international tendering, where appropriate, and believed that such tenders should be genuinely competitive, in line with the GATT Agreement on Government Procurement. Private sector enterprises in which the Bank held equity or debt might be encouraged, but not obliged, to use international tenders to obtain goods or services efficiently and economically. Delegates were also anxious to give less developed countries, who might not become members, the opportunity to tender for Bank contracts, on equal terms with Bank members, as a means of assisting their development process and of reassuring them, through this original gesture, that the interest of shareholders in the new Bank did not mean reduced interest in their traditional partners in development.

#### **Article 14**

1. Paragraph 1 requires the Bank, in setting terms and conditions for its financing operations, to take full account of the need to safeguard its income. Delegates envisaged that this requirement would avoid the risk of such operations being in practice subsidised from the cost-free resources available to the Bank from members' paid-in subscriptions.

2. The wording of paragraph 2 of this Article gives the Bank some flexibility to react according to circumstances and would permit the Board to consider a wide range of factors in deciding a policy on guarantees for loans to state-owned enterprises.

3. In reaching decisions on these issues, the Board would need to bear in mind that a fundamental goal of the Bank was to develop a strong private sector in eligible member countries. To ensure that private entrepreneurs took full responsibility for their commercial undertakings, the Board shall follow the present practice of the international Finance Corporation in not requiring a member government guarantee on loans to private sector enterprises. It could take into account the fact that a state-owned enterprise would be more likely to respond quickly to market forces, and to make the transition to market-oriented economies, if that enterprise could not rely on a government guarantee to discharge its responsibilities under a Bank loan. The Board could also set loan terms, pursuant to paragraph (xi) of Article 13, to compensate the Bank for any commercial or other risks should it decide not to require a guarantee by a member government.

4. For the purpose of Article 11, paragraph 3, when the Bank does require a member country guarantee to a state-owned enterprise (i.e. a guarantee by the member or a public agency or instrumentality), the loan shall be considered as made to the state sector unless that state-owned enterprise is in transition to private ownership and control. A former state-owned enterprise which has achieved private ownership and control shall be regarded as a private sector enterprise, and the Bank shall not require member country guarantees on new loans to that enterprise.

#### **Article 17**

Delegates made no provision in respect of possible losses arising on special operations. Delegates envisaged that the Bank would make specific arrangements with the source of each relevant Special Fund in the agreement governing its use, so as to protect the separation of each type of resource in accordance with paragraph 2 of Article 10.

#### **Article 18**

Delegates understood that Special Funds accepted by the Bank would be assets of the Bank for the purposes of the privileges and immunities provisions of the Articles. Delegates envisaged that each Special Fund would be used and accounted for separately, but this was not specified since it was a matter for the source of each such Fund to determine in consultation with the Bank.

#### **Article 20**

1. In giving the Bank the general power to underwrite under this Article, Delegates had in mind that the Bank could agree to take on to its own books, if necessary and for a commission, some agreed portion of any shares and securities unsold as a result of a public or private enterprise issuing equity share capital or securities. If the issue proved a complete success such shares or securities would not need to be taken up by the Bank. If some remained unsold, however, and if the Bank's underwriting commitment was invoked, such shares and securities would then form part of the Bank's overall exposure in the country concerned and be subject to any limits applicable.

2. Delegates agreed that underwriting should only represent a small part of the Bank's activities, in view of the financial risks involved; that the Bank should only undertake underwriting services when necessary to fill market gaps; and that the general power to underwrite would be subject to the provisions on underwriting in Articles 11 and 13.

3. In paragraph 1, sub-paragraph (iii), Delegates did not intend this provision to prevent the Bank using private placement or other means of disposing of securities in which it had invested, if an adequate secondary market in those securities did not exist.

4. Delegates agreed that the authority specified in sub-paragraph (iv) of this Article to guarantee securities in which the Bank had invested should not be used in the case of securities which the Bank had acquired as part of its liquidity investments.

#### **Article 24**

Delegates agreed that the Bank would bear the cost of remuneration of not more than four people working full time on Bank matters, in respect of each Directorship.

#### **Article 26**

1. In paragraph 2 of this Article, Delegates hoped that as far as possible Directors would also have a wide and well-balanced knowledge of Central and Eastern Europe, so as to contribute competently to the Bank's purpose and functions as set out in Articles 1 and 2 and to fulfil competently their obligations in paragraph 3 of Article 8.
2. Delegates recognised the importance for the original member countries from recipient countries listed in Annex A of maintaining at least four Directors for this group, so as to allow each such country either its own Director or its own Alternate in the event that the list of such countries is modified. Delegates agreed that in deciding to increase or decrease the size, or revise the composition of the Board of Directors, in order to take into account changed in the number of the members of the Bank, as provided in paragraph 3 of this Article, the Board of Governors should take account of this wish.
3. Delegates agreed that Directors and their Alternates should be resident at the headquarters of the Bank.

#### **Article 28**

In paragraph 3, Delegates noted that usual practice in other International Financial Institutions was not to permit a prospective borrower specially to be represented at the Board.

#### **Article 29**

1. Delegates intended that members whose payments, including encashment of promissory notes, fell short of the full amount due on the relevant dates to the Bank in respect of their paid-in shares should forfeit the corresponding percentage of their voting power unless and until the shortfall was made good.
2. The intention in paragraph 3 was to allow split voting by Directors representing more than one member, without making such voting obligatory.
3. Delegates intended that, in the case of differing views on whether or not issues involved "general policy", decisions would be made by the Board on the basis of advice from the Legal Counsel. In general, decisions on individual operations would not involve such issues, but "general policy issues" would include, *inter alia*, the budget; the annual programme of operations; borrowing policy, including borrowing limits; interest rate policy; exchange risk management policy; the drawing down of notes; underwriting policy and the organizational structure of the Bank.

#### **Article 30**

Delegates intended that men and women should be given equal opportunities in the recruitment process and in terms of service, training, promotion and career development generally.

#### **Article 35**

1. Delegates agreed that there was no need to have a provision about working languages in the Articles. The letter from the Conference Chairman to all Delegates (copy attached to this Report) sets out the understanding of Delegates about working languages.
2. Delegates were conscious that there might be little to report initially on the Bank's environmental impact and that the form of the first annual reports on this subject might be very different from later versions.

#### **Article 36**

Delegates were of the view that the principle behind paragraph 2 was that the distribution of cash should be strictly proportional to the cash payments made by each member, and the notes encashed, in respect of its paid-in shares.

#### **Article 39**

In paragraph 2, Delegates envisaged that all potential new members would join the Bank by subscribing to share capital at par value, with no account being taken of accumulated reserves. Delegates were thus concerned that those who later chose to leave the Bank for any reason should not profit unduly by so doing, or indeed have any profit incentive to do so, in the event of the book value of their shares having greatly increased since their original purchase. The wording of this paragraph therefore had the aim of ensuring that they should not get back more than they had paid in. The reference to "shown by the books of the Bank" could permit adjustments in Bank financial statements to reflect current and accumulated losses.

#### **Article 46**

Delegates noted that this Article was almost exactly the same as Section 3 of Article VII of the I.B.R.D.'s Articles of Agreement. They hoped that courts construing it would draw on the jurisprudence that had evolved in connection with the I.B.R.D.'s Articles.

#### **Article 52**

Delegates accepted paragraph 2 of Article 52 in the light of the locations then being considered for Bank operations.

#### **Articles 51 and 55**

These Articles were worded to reflect recent international thinking and practice, in accordance with the strong wishes of many Delegates.

#### Article 53

1. With respect to Article 53, paragraphs 1, 2 and 3, Delegates shared the view that members would accord the greatest deference to the Bank on whether a Bank activity was “official” or whether a purchase of goods and services was “necessary” for the “official” activities of the Bank, e.g. a duly authorized purchase of goods is to be presumed as “necessary” for the “official” activities of the Bank. Beyond this, Delegates shared the view that paragraph 2 was to be interpreted in the light of national practices applicable to international organizations with similar provisions.

2. It was accepted that nothing in Article 53 was to be interpreted as preventing any member from granting greater exemption from taxation than that provided for in this Article.

3. It was the common understanding of Delegates that “duties”, whilst “import duties” and “export duties”, in paragraph 3, include customs duties.

4. In paragraph 6, Delegates understood that the “internal effective tax” was not a tax as that term is commonly used in tax treaties, national tax practice and so forth, and was not a tax which is imposed in the exercise of sovereign power. In addition they understood that the Bank’s contracts of employment would contain provisions regarding the “internal effective tax”.

5. With respect to paragraphs 6 and 7, Delegates shared the view that the Bank will regularly inform the members concerned, according to arrangements made with such members, of the amount of the salaries and emoluments paid to its Directors, Alternates, officers and employees in order to enable them to tax those salaries and emoluments (paragraph 7) or to tax properly the income from other sources then the exempt salaries and emoluments (paragraph 6).

6. Delegates took note of the importance placed by some members on their right to tax income derived by their residents who are officers or employees of the Bank. The provisions of paragraph 6 and 7 of Article 53 do not preclude these members from lodging appropriate reservations in accordance with international law.

#### Articles 60 and 61

Delegates intended that these Articles should be read in conjunction with Article 3. Prospective members who sign the Agreement by the date specified in Article 60 and who deposit instruments of ratification, acceptance or approval by the date specified in paragraph 1 or paragraph 2 of Article 61, shall become parties to the Agreement in accordance with the Articles and shall, *inter alia*, be entitled to subscribe to the number of shares allocated to them in Annex A. The terms and conditions of membership of prospective members who sign the Agreement after the date specified in Article 60 and/or who deposit their instruments of ratification, acceptance or approval later than the date in paragraphs 1 or 2 of Article 61 will be determined by the Bank in accordance with paragraph 2 of Article 3. In respect of the initial shares to be subscribed to by such members, paragraph 2 of Article 3 should be read in conjunction with paragraph 2 of Article 5.

#### Article 62

Delegates intended, immediately after the adoption of the Agreement by Heads of Delegations, to start discussion on the possibility of transitional arrangements allowing the operations of the bank to start as soon as possible after the date of entry into force of that Agreement.

## Letter from the Chairman of the conference to all delegations

During our discussions about the European Bank for Reconstruction and Development, we agreed to follow the normal practice of making no reference to the working languages in the Bank's Statutes. This letter is therefore to record the understanding we reached together, that the four languages of the authentic text of the Agreement, mentioned in the testimonium, would be the Bank's working languages, to be used by the Bank according to its day to day needs, and taking into consideration the interests of efficiency and economy.

## By-Laws of the European Bank for Reconstruction and Development

These By-Laws are adopted under the authority of, and are intended to be complementary to, the Agreement establishing the European Bank for Reconstruction and Development (hereinafter referred to as the "Agreement"); and they shall be construed accordingly.

In the event of a conflict between the provisions of these By-Laws and the provisions of the Agreement, the provisions of the Agreement shall prevail. In the event of a conflict between these By-Laws and any rules and regulations adopted pursuant to the Agreement, the By-Laws shall prevail.

### Section 1: Principal Office and offices of the Bank

- (a) The Principal Office of the Bank shall be located in London.
- (b) The Board of Directors may authorize the establishment of agencies or branch offices of the Bank at any place in the territories of any member, whenever it is necessary to do so in order to facilitate the efficient conduct of the business of the Bank.

### Section 2: Rules of Procedure - Board of Governors

All matters before the Board of Governors shall be governed by the Rules of Procedure of the Board of Governors.

### Section 3: Conditions of service - Governors

Governors and their Alternates shall perform their duties without remuneration from the Bank. Their expenses incurred in attending meetings of the Board of Governors shall not be paid by the Bank.

### Section 4: Conditions of service - Directors

- (A) Service
  - (a) Each Director and his or her Alternate shall devote to the activities of the Bank such time and attention as the interests of the institution may require, and one or other shall normally be available at the Bank's principal office.
  - (b) If he or she does not intend to be a full time Director of the Bank, such Director shall, as soon as possible after assuming office and from time to time as necessary, determine, in consultation with the President, how much time he or she and his or her Alternate will devote to the business of the Bank.
  - (c) When a Director or his or her Alternate is unable to attend to the business of the Bank for reasons of health or similar reasons, the Director may appoint a temporary Alternate to take his or her place. The temporary Alternate shall receive no salary or compensation for expenses in this capacity for his or her services.

(B) Remuneration

(a) The Bank shall bear the cost of remuneration of any four people in respect of each Directorship. If a Directorship chooses that its Director and his or her Alternate shall be among those four, they shall receive a remuneration for the time of service rendered to the Bank at such annual rates as shall be determined from time to time by the Board of Governors. Remuneration as determined shall continue until changed by the Board of Governors. Such remuneration shall be prorated, in accordance with such provisions as the Board of Directors shall from time to time approve, according to the time spent by the Director or Alternate in the service of the Bank, as evidenced by such detailed certifications necessary to establish the exact periods of service for the Bank. Remuneration shall be paid in accordance with the established procedures of the Bank.

(b) Full-time Directors and Alternates resident in London may participate in such medical, pension, retirement and other benefits as may be established for the staff of the Bank. Directors and Alternates who are not full-time or who are not resident in London shall participate in such medical, pension, retirement and other benefits as shall be agreed with the President on a case-by-case basis with a view to ensuring that the benefits available to those Directors and Alternates are reasonable, once due account has been taken of how much time he or she and his or her Alternate will devote to the business of the Bank.

(C) Expenses (travel and leave)

(a) The Board of Directors may make appropriate provision whereby:

(i) Each Director and Alternate Director shall be entitled to a reasonable allowance for expenses which in the opinion of the Bank were incurred by him or her in travelling officially, with the concurrence of the Board of Directors, to the country or countries he or she represents or on such other missions as the President may request for the Bank.

(ii) Each full-time Director and Alternate Director resident in London shall be entitled upon the completion of each two (2) years of continuous full-time service in either or both capacities to receive a reasonable allowance for expenses incurred for transportation of him or herself and his or her immediate family in making a single round-trip journey for annual leave in the country of which he or she is a national, provided that in the case of a Director, he or she is, at the date of beginning the trip, in a term of service which will expire not less than six (6) months thereafter, and, in the case of an Alternate, he or she is, at the date of beginning of the trip, serving in a term of service which, even if there is a change of Director, is expected to expire not less than six (6) months thereafter.

(b) Any Director or Alternate Director who requests reimbursement or compensation from the Bank for expenses he or she has incurred in fulfilling a commission for the Bank, shall include in this request a statement to the effect that he or she has not received, nor will he or she receive, reimbursement or compensation for such expenses from any other source.

(c) Any Director or Alternate Director shall be entitled in accordance with guidelines established by the Bank, to reimbursement of reasonable expenses which in the opinion of the Bank were incurred by him or her in connection with official Bank business.

(d) The term "full-time" shall be deemed to mean full-time service for the Bank, excepting absences provided for by (a) of this sub-section and occasional other periods of absence from the principal office of the Bank. The "reasonable allowance" for expenses referred to in C (a) (i) above shall include appropriate costs of travel and transportation and shall be based on the established policies and ceilings established by the Bank.

(e) In the interest of the Bank other appropriate arrangements consistent with the By-Laws and their purposes may be made in individual cases, as determined by the Board of Directors.

(D) Office services

The Bank shall provide, subject to the provisions of sub-section B of this section, such secretarial and other staff services, office space and other facilities as may be necessary for the performance of the duties of the Directors and their Alternates.

**Section 5: Conditions of service - President**

The salary, and any other terms of remuneration, and any allowances of the President shall be determined by the Board of Governors on recommendation of the Board of Directors and shall be included in his or her contract. The President may participate in such medical, pension, retirement and other plans as may be established for the staff of the Bank.

**Section 6: Conditions of service - Vice President(s)**

The salary, and any other terms of remuneration, and any allowances, and the term of office, the authority and functions of the Vice-President(s) shall be determined by the Board of Directors and included in his or her contract(s). The Vice President(s) may participate in such medical, pension, retirement and other plans as may be established for the staff of the Bank.

**Section 7: Code of Conduct**

At its inaugural meeting the Board of Governors shall adopt, and may from time to time revise, a Code of Conduct concerning inter alia personal investment holdings and transactions which shall be binding on all Directors, their Alternates and temporary Alternates, the President and Vice President(s), and officers and staff of the Bank.

**Section 8: Delegation of powers**

(a) The Board of Directors is authorized by the Board of Governors to exercise all the powers of the Bank, with the exception of those expressly reserved to the Board of Governors by paragraph 2 of Article 24 and other provisions of the Agreement, and subject to these By-Laws. The Board of Directors shall not take any action pursuant to powers delegated by the Board of Governors which is inconsistent with any action taken by the Board of Governors.

(b) The President shall conduct, under the direction of the Board of Directors, the current business of the Bank. The Board of Directors shall establish conditions (including provision for reporting), procedures and thresholds pursuant to which the President may submit various types of matters to it for consideration under an expedited procedure.

**Section 9: Special representation of members at meetings of the Board of Directors**

Whenever the Board of Directors is to consider a matter particularly affecting a member which has no Director or Alternate of its own nationality, the member shall be promptly informed by rapid means of communication of the date set for its consideration and shall have the right to send a representative to the meeting. No final action shall be taken by the Board of Directors, nor any question affecting the member submitted to the Board of Governors, until the member has been offered a reasonable opportunity to present its views and to be heard at a meeting of the Board of Directors of which the member has had reasonable notice. Any member, so electing, may waive this provision.

**Section 10: Vacant directorships**

(a) When a new Director has to be elected because of a vacancy arising in terms of paragraph 5 of Article 26 of the Agreement, the President shall notify the members which elected the former Director of the existence of the vacancy. The President may convene a meeting of the Governors of such countries for the exclusive purpose of electing a new Director; or he or she may request that candidates be nominated and conduct the election by any rapid means of communication. Successive ballots shall be cast, in accordance with the principles of Annex B of the Agreement, until one of the candidates receives an absolute majority of the votes cast; and after each ballot the candidate with the smallest number of votes shall be dropped from the next ballot.

(b) When a new Director is elected, the Alternate of the former Director shall continue in office until he or she is re-appointed or a successor to him or her is appointed.

**Section 11: Report of the Board of Directors**

At each annual meeting of the Board of Governors, the Board of Directors shall submit an annual report on the operations and policies of the Bank, including a separate report on the activities of any Special Funds of the Bank, established or accepted in accordance with Article 18 of the Agreement.

**Section 12: Financial year**

The financial year of the Bank shall begin on 1 January and end on 31 December of each year, except if the entry into force of the Agreement is later than 1 January, when the financial year shall begin on the date of entry into force and shall end on 31 December of the same year.

**Section 13: Audits and budget**

(a) The accounts of the Bank shall be audited in accordance with generally accepted accounting principles at least once a year by independent external auditors of international reputation chosen by the Board of Directors on the basis of a proposal by the President, and on the basis of this audit the Board of Directors shall submit to the Board of Governors for approval at its annual meeting a statement of accounts, including a general balance sheet and a statement of profit and loss. A separate financial statement shall be submitted for the operations of any Special Fund.

(b) The President shall prepare an annual administrative budget to be presented to the Board of Directors for approval. The budget, as approved, shall be presented to the Board of Governors at its next annual meeting. Notwithstanding the above provision, the President shall submit to the Board of Directors for approval, not later than 3 months after the inaugural meeting of the Board of Governors, the administrative budget of the Bank for its first financial year of operations.

**Section 14: Application for membership of the Bank**

When submitting an application to the Board of Governors, with a recommendation that the applicant country be admitted to membership, the Board of Directors, *inter alia* after a report, in consultation with the applicant country, by the President, shall recommend to the Board of Governors the number of shares of capital stock to be subscribed and such other conditions as, in the opinion of the Board of Directors, the Board of Governors may wish to prescribe.

**Section 15: Suspension of a member**

Before any member is suspended from membership of the Bank, the matter shall be considered by the Board of Directors, *inter alia* after a proposal by the President. The President shall inform the member sufficiently in advance of the complaint against it, and shall give the member reasonable time to explain its case orally and in writing. The Board of Directors shall recommend to the Board of Governors whatever action it considers appropriate. The member shall be notified of the recommendation and of the date on which the matter is to be considered by the Board of Governors, and it shall be given reasonable time in which to present its case orally and in writing before the Board of Governors. Any member may waive this right.

**Section 16: Amendments to the By-Laws**

The Board of Governors may amend these By-Laws at any of its sessions or by taking a vote without a meeting, in accordance with the provisions of Section 10 of the Rules of Procedure of the Board of Governors.

## Rules of Procedure of the Board of Governors

### Section 1: Definitions

- (a) "Governor", except when the Governor is acting as the Chairman or Vice-Chairman of an annual meeting under Section 6, includes the Alternate or a Temporary Alternate when such Alternate is acting for a Governor.
- (b) "Board" refers to the Board of Governors.
- (c) "Director", except where otherwise specified, includes the Alternate when such Alternate is acting for a Director.
- (d) "President" refers to the President of the Bank or to a Vice-President when he or she is acting in place of the President.
- (e) "Agreement" refers to the Agreement Establishing the European Bank for Reconstruction and Development.
- (f) "By-Laws" refers to the By-Laws of the European Bank for Reconstruction and Development.
- (g) "Agenda" refers to the list of items to be considered at a meeting.
- (h) "Member" means a member of the Bank.
- (i) "Secretary" means the Secretary General of the Bank or an official designated by the President to serve in the Secretary General's absence.

### Section 2: Meetings

- (a) The Board shall hold an annual meeting at such date and place as the Board shall determine; provided, however, that the Board of Directors may change the date and place of such annual meeting when special circumstances or reasons arise to justify such action.
- (b) The Board may, in addition, hold special meetings when it so decides or when called by the Board of Directors pursuant to paragraph 1 of Article 25 of the Agreement.
- (c) The Secretary shall notify all members, by the most rapid possible means of communication reasonably available, of the date and place of each meeting of the Board. Such notifications must be dispatched at least forty five (45) days prior to the date of any annual meeting and thirty (30) days prior to the date of a special meeting. In case of emergency, notification by telex, facsimile or other rapid means of communication ten (10) days prior to the date set for the meeting shall be sufficient.

(d) Two thirds of the Governors shall constitute a quorum for any meeting of the Board, provided such majority represents not less than two thirds of the total voting power of the members. Any meeting of the Board of Governors at which there is no quorum may be adjourned by a majority of the Governors present. Any meeting of the Board of Governors at which there is no quorum may be postponed from day to day for a maximum of two (2) days by decision of a majority of the Governors present. No notice need be given of any such postponed meeting.

(e) The Board may order the temporary adjournment of any meeting and its resumption at a later date.

(f) Except as otherwise specifically directed by the Board, the President, together with the Chairman of the Board, and in co-operation with the host country, shall have charge of all arrangements for the holding of meetings of the Board.

### Section 3: Attendance at meetings

(a) The Directors and their Alternates may attend any meeting of the Board and participate therein. However, a Director and his or her Alternate shall not be entitled to vote, unless he or she shall be entitled to vote as a temporary Alternate or Governor.

(b) The Chairman of the Board, in consultation with the Board of Directors, may invite observers to attend any meeting of the Board.

### Section 4: Agenda for meetings of the Board

(a) Under the direction of the Board of Directors, the President shall prepare an agenda for each meeting of the Board of Governors and transmit such agenda to members together with, or in advance of, the notice of the meeting.

(b) Additional subjects may be placed on the agenda for any meeting of Governors by any Governor provided that he or she shall give notice thereof to the President at least fifteen (15) days prior to the date of the meeting. The President shall give notice of such additional items through a supplementary list to be communicated to members within 48 hours of receipt of such notice from a Governor.

(c) The agenda, as well as any supplementary list, shall be submitted to the Board for approval at the first business session of each meeting by the Chairman of the Board.

(d) When a special meeting is called the agenda shall be limited to the items communicated by the President.

(e) In the course of any meeting of the Board, the Board may modify, add to, or eliminate items from the agenda.

(f) In exceptional cases the President, under the direction of the Board of Directors, may include at any time additional items in the draft agenda for any meeting of the Board of Governors. The President shall notify each Governor of such additional items as quickly as possible.

**Section 5: Representation of members**

At each meeting of the Board, the Secretary shall submit a list of the Governors, Alternates, or Temporary Alternates of the members whose appointment has been officially communicated to the Bank.

**Section 6: Chairman and Vice-Chairmen**

(a) At the beginning of its inaugural meeting the Board, under the chairmanship of the Governor for the host country, shall elect one of its Governors to be Chairman and two other Governors to be Vice-Chairmen and they shall serve in their respective positions until the end of the first annual meeting of the Board. In the absence of the Chairman, the Vice-Chairman designated by the Chairman shall act in his or her place.

(b) At the end of each annual meeting the Board shall elect one of its Governors to be Chairman and two other Governors to be Vice-Chairmen, and they shall serve in their respective positions until the end of the next annual meeting of the Board. In the absence of the Chairman, the Vice-Chairman designated by the Chairman shall act in his or her place.

(c) The Chairman, or the Vice-Chairman acting as Chairman, may not vote, but his or her Alternate or Temporary Alternate Governor may vote in his or her place.

**Section 7: Secretary**

The Secretary General of the Bank shall serve as Secretary of the Board.

**Section 8: Committees**

The Board may at any meeting establish such committees as may be necessary or appropriate to facilitate its work and such committees shall report to the Board.

**Section 9: Voting**

(a) Except as otherwise expressly provided in the Agreement, all decisions of the Board shall be made by a majority of the voting power of the members voting. At any meeting the Chairman may ascertain the sense of the meeting in lieu of a formal vote but a formal vote shall be taken whenever requested by any Governor; in this event the written text of the proposal to be voted upon shall be distributed to the Governors.

(b) At any meeting of the Board, the vote of any member must be cast in person by the Governor, his or her Alternate, or in their absence, by a formally designated Temporary Alternate appointed by a member for the purpose of attending and voting at the Board when both the Governor and his or her Alternate are absent.

**Section 10: Voting without meeting**

(a) Whenever the Board of Directors considers that the decision on a specific question which is for the Board to determine should not be postponed until the next annual meeting of the Board and does not warrant the calling of a special meeting of the Board, the Board of Directors shall promptly transmit to each Governor the proposals relating to that question with a request for a vote on such proposals.

(b) In compliance with such a request, votes shall reach the Bank within such period as may be determined by the Board of Directors. Upon the expiration of that period, the President shall report the votes to the Board of Directors which shall record the results of the voting in applying the provisions of paragraphs 1 and 2 of Article 29 of the Agreement as if a meeting of the Board had been held. The President shall communicate the results to all Governors. Unless replies are received from not less than two thirds of the Governors, representing not less than two thirds of the voting power, the proposals shall lapse.

**Section 11: Record of proceedings**

The Board shall keep a summary record of its proceedings which shall be available to all members and kept on file at the Bank.

## Rules of Procedure of the Board of Directors

### Section 1: Authority of these Rules

These Rules of Procedure of the Board of Directors, hereinafter called "Rules", are adopted pursuant to paragraph 4 of Article 25 of the Agreement, to Article 28 of the Agreement, and to Section 8 of the By-laws.

### Section 2: Definitions

- (a) "Director", except for a Director acting as Chairman under Section 3(a), includes the Alternate or a temporary Alternate, as the case may be, when such Alternate is acting for a Director.
- (b) "Board" refers to the Board of Directors.
- (c) "President" refers to the President of the Bank.
- (d) "Agreement" refers to the Agreement Establishing the European Bank for Reconstruction and Development.
- (e) "By-laws" refers to the By-laws of the European Bank for Reconstruction and Development.
- (f) "Agenda" refers to the list of items to be considered at a meeting.
- (g) "Chairman" refers to the person acting as Chairman of the meetings of the Board of Directors pursuant to Section 3(a).
- (h) "Secretary" means the Secretary General of the Bank or an official designated by the President to serve in the Secretary General's absence.

### Section 3: Meetings

- (a) The President, or, in the absence of the President, the First Vice-President, or in the absence of both, the Vice-President so designated by the President, shall act as Chairman of the Board. In the event of their absence from any meeting, the Board shall select a Director as Chairman.
- (b) Meetings of the Board shall be called by the President as the business of the Bank may require. The Board may be called into session at any time by the President on his own initiative. The President shall call the Board at any time at the written request of any Director. In exceptional circumstances, and in the absence or incapacity of both the President and the First Vice-President, the Secretary may call a meeting upon the request of at least three (3) Directors.
- (c) Except in special circumstances when notice of a meeting shall be given as soon as possible, the Secretary shall notify the Directors and their Alternates of meetings at least three (3) working days in advance of each meeting.

- (d) The Board shall meet at the principal office of the Bank unless it decides that a particular meeting shall be held elsewhere.

- (e) A majority of the Directors shall constitute a quorum for any meeting of the Board, provided such majority represents not less than two-thirds of the total voting power of the members.

- (f) In addition to the Directors and their Alternates, the President, Vice-President(s), and the Secretary, meetings of the Board shall be open to attendance only by such members of the Bank's staff as the President may designate, representatives of members appointed under paragraph 3 of the Article 28 of the Agreement, and such other persons as the Board may invite.

- (g) At the request of the President or any Director, meetings may be held in Executive Session which shall be attended only by the Directors and their Alternates, the President, Vice-President(s), the Secretary, and, with the approval of the Board, granted separately for each Executive Session, such other persons as are specifically named, without prejudice to the provisions of paragraph 3 of Article 28 of the Agreement.

### Section 4: Agenda for meetings

- (a) An Agenda for each meeting of the Board shall be prepared by the President, or on his instructions, and a copy of such Agenda shall be given to each Director and his or her Alternate at least three (3) working days before such meeting. In the case of a meeting called in special circumstances, the Agenda shall be given to each Director at least twenty four hours before such meeting. Any matter upon which the Board has power to act shall be included on the Agenda for any meeting of the Board, if any Director so requests.

- (b) If any Director shall so request, action by the Board on any matter, whether or not included on the Agenda for the particular meeting, shall be postponed not more than once for a minimum of two (2) working days.

- (c) The Board may postpone discussion or decision of any agenda item for such period as it deems appropriate.

- (d) Matters not on the Agenda for a meeting may be considered at that meeting unless a Director or the Chairman objects thereto.

- (e) Any item of the Agenda for a meeting, consideration of which has not been completed at that meeting, shall, unless the Board decides otherwise, be automatically included at the beginning of the Agenda for the next meeting.

- (f) Documents for discussion in the Board shall be submitted to Directors at least twenty one (21) calendar days before the schedule discussion, except that documents containing commercially confidential information, or other categories of documents which the Board had decided to handle under expedited procedures, shall be submitted to the Directors at least ten (10) working days before the scheduled discussion.

**Section 5: Voting**

(a) The Chairman shall ordinarily ascertain and announce to the meeting the sense of the meeting with regard to any matter and the Board shall be deemed to have acted in accordance with the announcement by the Chairman without the necessity of taking a formal vote. A Director dissenting from the decision of the Board may require that his or her views be recorded in the summary record of the proceedings of the meeting. Any Director may request a formal vote to be taken in accordance with the provisions of paragraph 3 of Article 29 of the Agreement.

(b) Directors may vote only in person.

**Section 6: Notice to Directors**

(a) Any notice required by these Rules to be given to a Director or his or her Alternate shall be deemed to have been sufficiently given when it shall have been delivered in writing, by telephone, or in person during regular business hours of the Bank at the office of the Director in the principal office of the Bank or as provided for meetings elsewhere called under Section 3(d) above.

(b) Whenever any document is required by these Rules to be delivered to a Director or his or her Alternate it shall be deemed to have been sufficiently delivered if it is deposited, during regular business hours of the Bank, at the office of the Director in the principal office of the Bank or as provided for meetings elsewhere called under Section 3(d) above.

(c) The giving of any notice or the delivery of any document which is required by these Rules to be given or delivered to any Director or his or her Alternate may be waived by the Director in writing, by any reasonable rapid means of communication, or in person, at any time.

**Section 7: Secretary**

The Secretary General shall act as Secretary of the Board.

**Section 8: Minutes**

(a) The Secretary shall be responsible for the preparation of minutes and a summary record of the proceedings of the meetings of the Board.

(b) The draft minutes and summary record of the proceedings shall be circulated to all Directors as soon as possible, and not later than forty eight (48) hours after meetings. They shall be presented to the Board for approval within a reasonable period of time.

(c) The minutes shall contain: (i) the names of attendees; (ii) a record of the approval of the minutes of the previous meeting; (iii) titles of the agenda items; and (iv) agreements and decisions reached.

(d) Any Director may require that his or her views be recorded in the summary record of the proceedings of the meeting.

(e) The Secretary shall be responsible for the custody of the minutes, summary records of the proceedings and other documents relating to proceedings of the Board and shall be the only person authorised to certify copies thereof.

**Section 9: Publicity**

The minutes shall be published. The summary records of the proceedings of the Board are confidential and shall not be published, except when the Board decides to authorise the President to arrange for suitable publicity on any matter relating thereto. The Board shall develop special procedures to assure the confidentiality of commercial transactions.

**Section 10: Amendments**

These Rules may be amended by a majority of the Directors, representing not less than two thirds of the voting power, at any meeting provided at least then (10) days notice of the proposed amendment has been given to the Directors in writing.

**Section 11: Committees**

The Board may establish such committees as may be appropriate to facilitate its work to the extent authorised by the Board of Governors. Such committees shall report to the Board.

*(These Rules were adopted by the Board of Directors on 18-19 April 1991. Sections 5, 8 and 9 were amended by the Board of Directors on 19 September 2006.)*

## Headquarters Agreement

### Between the Government of the United Kingdom of Great Britain and Northern Ireland and the European Bank for Reconstruction And Development

The Government of the United Kingdom of Great Britain and Northern Ireland and the European Bank for Reconstruction and Development;

Having regard to the Agreement Establishing the European Bank for Reconstruction and Development;

Noting that Article 33 of that Agreement provides that the Principal Office of the European Bank for Reconstruction and Development shall be located in London;

Desiring to define the status, privileges and immunities in the United Kingdom of the Bank and persons connected therewith;

Have agreed as follows:

#### Article 1: Use of terms

For the purpose of this Agreement:

(a) "Agreement Establishing the Bank" means the Agreement Establishing the European Bank for Reconstruction and Development signed in Paris on 29th May 1990, and any amendments thereto;

(b) "Bank" means the European Bank for Reconstruction and Development;

(c) "Government" means the Government of the United Kingdom of Great Britain and Northern Ireland (the "United Kingdom");

(d) the terms "Member", "President", "Vice-President", "Governor", "Alternate Governor", "Temporary Alternate Governor", "Director", "Alternate Director" and "Temporary Alternate Director" have the same meaning as in the Agreement Establishing the Bank, its By-laws or Rules of Procedure;

(e) "Premises of the Bank" means the land, buildings and parts of building, including access facilities, used for the Official Activities of the Bank;

(f) "Representatives of Members" means heads of delegations of Members participating in meetings convened by the Bank other than meetings of the Governors or the Board of Directors;

(g) "Members of Delegations" means alternates, advisers, technical experts and secretaries of delegations of Representatives of Members;

(h) "Officers" means the President, the Vice-President and other persons appointed by the President to be Officers of the Bank;

(i) "Employees of the Bank" means the staff of the Bank excluding those staff both recruited locally and assigned to hourly rates of pay;

(j) "Archives of the Bank" includes all records, correspondence, documents, manuscripts, still and moving pictures and films, sound recordings, computer programmes and written materials, video tapes or discs, and discs or tapes containing data belonging to, or held by, the Bank;

(k) "Official Activities of the Bank" includes all activities undertaken pursuant to the Agreement Establishing the Bank, and all activities appropriate to fulfil its purpose and functions under Articles 1 and 2 of that Agreement, or undertaken in exercise of its powers under Article 20 of that Agreement including its administrative activities; and

(l) "Persons Connected with the Bank" means Governors, Alternate Governors, Temporary Alternate Governors, Representatives of Members, Members of Delegations, Directors, Alternate Directors, Temporary Alternate Directors, the President, the Vice-Presidents, Officers and Employees of the Bank, and experts performing missions for the Bank.

#### Article 2: Interpretation

1 This Agreement shall be interpreted in the light of the primary objective of enabling the Bank fully and efficiently to discharge its responsibilities in the United Kingdom and to fulfil its purpose and functions.

2 This Agreement shall be regarded as implementing and supplementing certain of the provisions of the Agreement Establishing the Bank and shall not be regarded as modifying or derogating from the provisions of that Agreement, particularly Chapter VIII thereof.

#### Article 3: Judicial personality

The Bank shall possess full legal personality and, in particular, the full legal capacity:

(a) to contract;

(b) to acquire, and dispose of, immovable and movable property; and

(c) to institute legal proceedings.

#### Article 4: Immunity from Judicial Proceedings

1 Within the scope of its official activities the Bank shall enjoy immunity from jurisdiction, except that the immunity of the Bank shall not apply:

(a) to the extent that the Bank shall have expressly waived any such immunity in any particular case or in any written document;

(b) in respect of civil action arising out of the exercise of its powers to borrow money, to guarantee obligations and to buy or sell or underwrite the sale of any securities;

(c) in respect of a civil action by a third party for damage arising from a road traffic accident caused by an Officer or an Employee of the Bank acting on behalf of the Bank;

(d) in respect of a civil action relating to death or personal injury caused by an act or omission in the United Kingdom;

(e) in respect of the enforcement of an arbitration award made against the Bank as a result of an express submission to arbitration by or on behalf of the Bank; or

(f) in respect of any counter-claim directly connected with court proceedings initiated by the Bank.

2 The property and assets of the Bank shall, wheresoever located and by whomsoever held, be immune from all forms of restraint, seizure, attachment or execution except upon the delivery of final judgment against the Bank.

#### **Article 5: The Premises of the Principal Office of the Bank**

1 The Government shall do its utmost to meet the requirements of the Bank in the selection, negotiation and acquisition of the Premises of the Bank. In particular, but without limitation, the Government shall assist the Bank in the acquisition (by gift, lease, hire or purchase thereof) of such premises as may be selected by the Bank, in consultation with the Government, as the Premises of the Bank.

2 The Government shall not dispose of or seek to dispose of all or any part of the Premises of the Bank without the consent of the Bank.

#### **Article 6: Inviolability of the Premises of the Bank**

1 The Premises of the Bank shall be inviolable, and shall be under the control and authority of the Bank which may establish any regulations necessary for the exercise of its functions therein.

2 No official of the Government or person exercising any public authority, whether administrative, judicial, military, or police, shall enter the Premises of the Bank except with the consent of and under conditions approved by the President. Such consent may be assumed in the case of fire or other disasters requiring prompt protective action. The Bank and the Government shall agree under what circumstances and in what manner any such official may enter the Premises of the Bank without the prior consent of the Bank in connection with fire prevention, sanitary regulations or emergencies.

3 The Bank shall allow duly authorized representatives of public utilities to inspect, repair, maintain, reconstruct, and relocate utilities, conduits, mains and sewers within the Premises of the Bank and its facilities.

4 No service (other than service by post) or execution of any legal process or any ancillary act such as the seizure of private property shall be permitted by the Government to take place within the Premises of the Bank except with the express consent of and under conditions approved by the President.

5 Without prejudice to the terms of this Agreement, the Bank shall prevent the Premises of the Bank from becoming a refuge from justice for persons subject to extradition or deportation, or who are avoiding arrest or service of legal process under the law of the United Kingdom.

#### **Article 7: Protection of the Premises of the Bank**

1 The Government is under a special duty to take all appropriate measures to protect the Premises of the Bank against any intrusion or damage and to prevent any disturbance of the peace of the Bank or impairment of its dignity.

2 If so requested by the Bank, the Government shall, in consultation with the Commissioner of Metropolitan Police and the Bank, develop policies and procedures so that unauthorized entry of any person shall be prevented, order on the Premises of the Bank shall be preserved, and uninvited persons shall be removed from those Premises.

3 The Bank shall take all reasonable steps to ensure that the amenities of the land in the vicinity of the Premises of the Bank are not prejudiced by any use made by the Bank of those Premises.

#### **Article 8: Public utilities and services in the Premises of the Bank**

1 The Government shall do its utmost to ensure that the Bank shall be provided with the necessary public utilities and services, including, but not limited to, electricity, water, sewerage, gas, post, telephone, telegraph, local transportation, drainage, collection of refuse and fire protection and that such public utilities and services shall be supplied on reasonable terms. In case of any interruption or threatened interruption of any of the said utilities and services, the Government shall consider the needs of the Bank of equal importance to those of diplomatic missions and shall take steps to ensure that the operations of the Bank are not prejudiced.

2 Any preferential rates or tariffs which may be granted to diplomatic missions in the United Kingdom for supplies of the utilities and services mentioned in paragraph 1 of this Article shall also be accorded to the Bank if compatible with international conventions, regulations and arrangements to which the Government is a party.

**Article 9: Flag and emblem**

The Bank shall be entitled to display its flag and emblem on the Premises of the Bank and on the means of transport of the Bank and of its President.

**Article 10: Immunity of property and inviolability of Archives of the Bank**

1 The property and assets of the Bank, wheresoever located and by whomsoever held, shall be immune from search, requisition, confiscation, expropriation and any other form of interference or taking or foreclosure by executive or legislative action.

2 The Archives of the Bank shall be inviolable.

**Article 11: Communications and publications**

1 The Bank shall enjoy in the United Kingdom for its official communications and the transfer of all its documents treatment not less advantageous to the Bank than the most favourable treatment accorded by the Government to any international organization, in the matter of priorities, rates and surcharges on mails, cables, radiograms, telefax, telephone and other forms of communications, and press rates for information to the press and radio, and in this respect the Government, in the exercise of any regulatory function, shall have regard to the particular needs of the Bank for telecommunications and the most advanced commercial communications technology.

2 The Government shall permit and protect unrestricted communication on the part of the Bank for all the Official Activities of the Bank, and no censorship shall be applied to the official correspondence and other official communications of the Bank.

3 The Bank shall have the right to use codes and to dispatch and receive official correspondence and other official communications by courier or in sealed bags which shall have immunities and privileges not less favourable than those accorded to diplomatic couriers and bags.

**Article 12: Exemption from taxation**

1 Within the scope of its Official Activities the Bank, its property, assets, income and profits shall be exempt from all present and future direct taxes including income tax, capital gains tax and corporation tax.

2 The Bank shall be granted relief from rates, or any other local taxes or duties or rates in substitution therefor or in addition thereto, levied on the Premises of the Bank with the exception of the proportion which, as in the case of diplomatic missions, represents a charge for public services. The rates, or any other local taxes or duties or rates levied in substitution therefor or in addition thereto, referred to in this paragraph shall in the first instance be paid by the Government, which shall recover from the Bank the proportion which represents a charge for public services.

**Article 13: Exemption from customs and indirect taxes**

1 The Bank shall have exemption from duties (whether of customs or excise) and taxes on importation and exportation of goods which are imported and exported by or on behalf of the Bank and are necessary for its Official Activities, or on the importation or exportation of any publications of the Bank imported and exported by it or on its behalf. Documentation signed by or on behalf of the President shall be conclusive evidence as to the necessity of any such goods for the Official Activities of the Bank.

2 The Bank shall have exemption from prohibitions and restrictions on importation or exportation in the case of goods which are imported or exported by the Bank and are necessary for its Official Activities and in the case of any publications of the Bank imported or exported by it.

3 The Bank shall be exempt from car tax and Value Added Tax on any official vehicles and shall be accorded a refund of Value Added Tax paid on any other goods and services which are supplied for the Official Activities of the Bank.

4 The Bank shall be accorded a refund of duty (whether of customs or excise) and Value Added Tax paid on the importation of hydrocarbon oils (as defined in Section 1 of the Hydrocarbon Oil Duties Act 1979) purchased by it and necessary for the exercise of its Official Activities.

5 The Bank shall have exemption from excise duty on spirits of United Kingdom origin purchased in the United Kingdom for the purpose of official entertainment to the extent that such exemption is accorded to diplomatic missions. Documentation signed by or on behalf of the President shall be conclusive evidence that any purchase is for the purpose of official entertainment.

6 The Bank shall also be exempt from any indirect taxes which may be introduced in the future in the United Kingdom where the Agreement Establishing the Bank provides for such an exemption. The Bank and the Government shall consult as to the method for implementing such exemption.

**Article 14: Resale**

1 Goods which have been acquired or imported under Article 13 shall not be sold, given away, hired out or otherwise disposed of in the United Kingdom unless the Government has been informed beforehand and the relevant duties and taxes paid.

2 The duties and taxes to be paid shall be calculated on the basis of the rate prevailing and the value of the goods on the date on which the goods change hands or are made over to other uses.

#### **Article 15: Privileges and immunities for Persons Connected with the Bank**

1 The Government undertakes to authorize the entry into the United Kingdom without delay, and without charge for visas, of Persons Connected with the Bank, and members of their families forming part of their households.

2 Persons Connected with the Bank shall:

(a) be immune from jurisdiction and legal process, including arrest and detention, even after termination of their mission or service, in respect of acts performed by them in their official capacity, including words written or spoken by them; this immunity shall not apply, however, to civil liability in the case of damage arising from a road traffic accident caused by any such person;

(b) be exempt, together with members of their family forming part of their households, from immigration restrictions and alien registration and from registration formalities for the purposes of immigration control;

(c) be exempt, together with members of their families forming part of their households, from national service obligations;

(d) have the same freedom of movement in the territory of the United Kingdom (subject to its laws and regulations concerning zones entry into which is prohibited or regulated for reasons of national security), and the same treatment in respect of travelling facilities, as is generally accorded to officials of comparable rank of diplomatic missions;

(e) be given, together with members of their families forming part of their households, the same repatriation facilities in times of international crises as officials of comparable rank of diplomatic missions; and

(f) be accorded inviolability for all their official papers and documents.

3 In addition to the privileges and immunities set out in paragraph 2, Directors, Alternate Directors, Officers and Employees of the Bank, and experts under contract longer than 18 months shall, at the time of first taking up their post in the United Kingdom, be exempt from duties (whether of customs or excise) and other such taxes and charges (except payments for services) in respect of import of their furniture and personal effects (including one motor car each), and the furniture and personal effects of members of their family forming part of their household, which are in their ownership or possession or already ordered by them and intended for their personal use or for their establishment. Such goods shall normally be imported within six months of the first entry of such person into the United Kingdom; an extension of this period will however be granted where justified. If such persons on the termination of their functions export goods to which this paragraph applies, they shall be exempt from any duty or other charge which may be imposed by reason of such export (except payment for services). The privileges referred to in this paragraph shall be subject to the conditions governing the disposal of goods imported into the United Kingdom free of duty and to the general restrictions applied in the United Kingdom to all imports and exports.

4 (a) In addition to the privileges and immunities set out in paragraph 2, Governors, Alternate Governors, and Representatives of Members shall:

(i) have the right to use codes and to receive documents or correspondence by special courier or diplomatic bag;

(ii) have the same customs facilities as regards their personal baggage as are accorded to diplomatic agents; and

(iii) be immune from arrest and detention, and from seizure of their personal baggage.

(b) The provisions of this Article in respect of Governors, Alternate Governors, Temporary Alternate Governors, Directors, Alternate Directors, Temporary Alternate Directors and Representatives of Members shall be applicable irrespective of the relations existing between the Governments which those persons represent and the Government of the United Kingdom, and are without prejudice to any special immunities to which such persons may otherwise be entitled.

5 In addition to the privileges and immunities set out in paragraph 2, the President and five (5) Vice-Presidents shall enjoy the same privileges and immunities as are accorded to diplomatic agents, in accordance with international law supplemented by practice in the United Kingdom.

6 The privileges and immunities set out in paragraphs 2(b), 2(c), 2(e), 3, 4 and 5 shall not apply to Persons Connected with the Bank who are nationals of the United Kingdom and the privileges and immunities set out in paragraphs 2(e), 3, 4 and 5 shall not apply to Persons Connected with the Bank who are permanent residents of the United Kingdom.

7 The privileges and immunities in this Article shall not apply to Representatives of the United Kingdom nor the members of their delegations.

#### **Article 16: Income tax**

1 The Directors, Alternate Directors, Officers and Employees of the Bank shall be subject to an internal effective tax imposed by the Bank for its benefit on salaries and emoluments paid by the Bank. From the date on which this tax is applied such salaries and emoluments shall be exempt from United Kingdom income tax, but the Government shall retain the right to take these salaries and emoluments into account for the purpose of assessing the amount of taxation to be applied to income from other sources.

2 In the event that the Bank operates a system for the payment of pensions or annuities to former Officers and Employees of the Bank, the provisions of paragraph 1 of this Article shall not apply to such pensions or annuities.

**Article 17: Social security**

From the date on which the Bank establishes or joins a social security scheme, the Directors, Alternate Directors, Officers and Employees of the Bank shall with respect to services rendered for the Bank be exempt from the provisions of any social security scheme established by the United Kingdom.

**Article 18: Opportunity to take employment**

1 The Bank shall not employ as an Officer or Employee of the Bank any person who is present in the United Kingdom at the time of such employment without taking all reasonable steps to ascertain that such person is not present in the United Kingdom in violation of the relevant immigration laws or is not subject to a prohibition thereunder from taking up employment in the United Kingdom. If the Government determines that any person employed by the Bank was at the time of taking up his employment in violation of the immigration laws or was subject to such a prohibition, the Bank and the Government shall consult with a view to agreeing on the appropriate remedy, including, where appropriate, termination of such employment.

2 The spouses and members of the family forming part of the household of those Directors, Alternate Directors, Officers and Employees of the Bank and experts performing services for the Bank shall be accorded opportunity to take employment in the United Kingdom.

**Article 19: Objects of immunities, privileges and exemptions: Waiver**

1 The immunities, privileges and exemptions conferred under this Agreement are granted in the interests of the Bank. The Board of Directors may waive to such extent and upon such conditions as it may determine any of the immunities, privileges and exemptions conferred under this Agreement in cases where such action would, in its opinion, be appropriate in the best interests of the Bank. The President shall have the right and duty to waive any immunity, privilege or exemption in respect of any Officer or Employee of the Bank or expert performing services for the Bank, other than the President or a Vice-President, where, in his or her opinion, the immunity, privilege or exemption would impede the course of justice and can be waived without prejudice to the interests of the Bank. In similar circumstances and under the same conditions, the Board of Directors shall have the right and the duty to waive any immunity, privilege or exemption in respect of the President and each Vice-President.

2 Privileges and immunities accorded to Representatives of Members and members of Delegations under Article 15 are provided in order to assure complete independence in the exercise of their functions, and may be waived by the member concerned.

**Article 20: Notification of appointments: Cards**

1 The Bank shall inform the Government when an Officer or Employee of the Bank or an expert performing services for the Bank takes up or relinquishes his or her duties. Furthermore, the Bank shall from time to time send to the Government a list of all such Officers, Employees of the Bank and experts. It shall in each case indicate whether or not the individual concerned is a national of the United Kingdom or permanently resident in the United Kingdom.

2 The Government shall issue to all Officers and Employees of the Bank, on notification of their appointment, a card bearing the photograph of the holder and identifying him or her as an Officer or Employee of the Bank.

**Article 21: Co-operation**

1 The Bank shall co-operate at all times with the appropriate authorities of the United Kingdom in order to prevent any abuse of the immunities, privileges, exemptions and facilities provided for in this Agreement.

2 Nothing in this Agreement shall affect the right of the Government to take precautions necessary for the security of the United Kingdom. If the Government considers it necessary to apply the preceding sentence, it shall approach the Bank as rapidly as circumstances allow in order to determine by mutual agreement the measures necessary to protect the interests of the Bank. The Bank shall collaborate to avoid any prejudice to the security of the United Kingdom.

**Article 22: Modification**

At the request either of the Government or of the Bank, consultation shall take place respecting the implementation, modification or extension of this Agreement. Any understanding, modification or extension may be given effect by an Exchange of Notes between authorized representatives of the Government and of the President.

**Article 23: Settlement of disputes**

1 Any dispute between the Government and the Bank concerning the interpretation or application of this Agreement, which is not settled by negotiation or other agreed mode of settlement, shall be referred for final decision to an arbitral tribunal of three arbitrators, to be constituted for each individual case in the following way. Within two months of the receipt of the request for arbitration, the Bank and the Government each shall appoint one member of the tribunal. The two members so appointed shall then select a third arbitrator who is not a national of the United Kingdom. That third arbitrator shall be President of the tribunal.

2 If within three months from the date of notification of the request for arbitration, the necessary appointments have not been made, either the Government or the Bank may, in the absence of any other agreement, invite the President of the International Court of Justice to make the necessary appointments. If the President is a national of the United Kingdom or if he is otherwise prevented from discharging the said function, the Vice-President shall be invited to make the necessary appointments. If the Vice-President is a national of the United Kingdom or if he too is prevented from discharging the said function, the member of the International Court of Justice next in seniority who is not a national of the United Kingdom shall be invited to make the necessary appointments.

3 The decisions of the tribunal shall be final and binding. The tribunal shall adopt its own rules of procedure, and in this respect shall be guided by the Rules of Procedure for Arbitration Proceedings of the International Centre for Settlement of Investment Disputes established by the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, done at Washington D.C. on 18th March 1965.

4 The costs of the tribunal shall be shared equally between the Bank and the Government, unless the tribunal decides otherwise.

**Article 24: Final provisions, entry into force and termination**

1 This Agreement shall enter into force on signature.

2 This Agreement may be terminated by agreement between the Government and the Bank. In the event of the Principal Office of the Bank being moved from the territory of the United Kingdom, this Agreement shall cease to be in force after the period reasonably required for such transfer and the disposal of the property of the Bank in the United Kingdom.

In witness whereof, the respective representatives, duly authorized thereto, have signed this Agreement.

Done in duplicate at London on the 15th day of April 1991.

**For the European Bank for  
Reconstruction and Development**

**For the Government of the United  
Kingdom of Great Britain and  
Northern Ireland**

**Jacques Attali**

**John Major**



**Agreement between the  
International Committee of the Red Cross and the  
Swiss Federal Council to determine the legal status of  
the Committee in Switzerland, 1993**



## ICRC International Committee of the Red Cross Agreement between the International Committee of the Red Cross and the Swiss Federal Council to determine the legal status of the Committee in Switzerland

30-04-1993 Article, International Review of the Red Cross, No. 293

**Full text of the headquarters agreement, signed 19 March 1993, between the ICRC and the government of Switzerland.**

The International Committee of the Red Cross,  
on the one hand,

and

the Swiss Federal Council,

on the other,

wishing to determine the legal status of the Committee in Switzerland and, to that end, to regulate their relations in a headquarters agreement,

have agreed on the following provisions:

### **I. STATUS, PRIVILEGES AND IMMUNITIES OF THE ICRC**

#### **Article 1**

##### **Personality**

The Federal Council recognizes the international juridical personality and the legal capacity in Switzerland of the International Committee of the Red Cross (hereinafter referred to as the Committee or the ICRC), whose functions are laid down in the Geneva Conventions of 1949 and the Additional Protocols of 1977 and in the Statutes of the International Red Cross and Red Crescent Movement.

#### **Article 2**

##### **Freedom of action of the ICRC**

The Swiss Federal Council guarantees the ICRC independence and freedom of action.

#### **Article 3**

##### **Inviolability of premises**

The buildings or parts of buildings and the adjoining ground used for the purposes of the ICRC, by whomsoever they may be owned, shall be inviolable. No agent of the Swiss public authority may enter them without the express consent of the Committee. Only the President or his duly authorized representative shall be competent to waive this right of inviolability.

#### **Article 4**

##### **Inviolability of archives**

The archives of the ICRC and, in general, all documents and data media belonging to it or in its possession shall be inviolable at all times, wherever they may be.

#### **Article 5**

##### **Immunity from legal process and execution**

1. In the conduct of its business, the ICRC shall enjoy immunity from legal process and execution, except:

- a) in so far as this immunity is formally waived, in a specific case, by the President of the ICRC or his duly authorized representative;
- b) in respect of civil liability proceedings brought against the ICRC for damage caused by any vehicle belonging to it or circulating on its behalf;
- c) in respect of a dispute, on relations of service, between the Committee and its staff, former staff or their rightful claimants;
- d) in respect of seizure, by court order, of salaries, wages and other emoluments owed by the ICRC to a member of its staff;
- e) in respect of a dispute between the ICRC and the pension fund or provident fund referred to in Article 10, paragraph 1, of the present agreement;
- f) in respect of a counter-claim directly related to principal proceedings brought by the ICRC; and
- g) in respect of execution of a settlement by arbitration pursuant to Article 22 of the present agreement.

2. The buildings or parts of buildings, the adjoining ground and the assets owned by the ICRC or used by it for its purposes, wherever they may be and by whomsoever they may be held, shall be immune from any measure of execution, expropriation or requisition.

#### **Article 6**

##### **Fiscal position**

1. The ICRC, its assets, income and other property shall be exempt from direct federal, cantonal and communal taxation. With regard to immovable property, however, such exemption shall apply only to that which is owned by the Committee and which is occupied by its services, and to income derived therefrom.

2. The ICRC shall be exempt from indirect federal, cantonal and communal taxation. Exemption from federal purchase tax shall be granted only for purchases intended for the official use of the Committee, and in so far as the amount invoiced for one same and single purchase exceeds five hundred Swiss francs.

## II. PRIVILEGES AND IMMUNITIES GRANTED TO PERSONS SERVING THE ICRC IN AN OFFICIAL CAPACITY

### Article 11

#### *Privileges and immunities granted to the President and the members of the Committee and to ICRC staff and experts*

The President and the members of the Committee, and ICRC staff and experts, irrespective of nationality, shall enjoy the following privileges and immunities:

- a) immunity from legal process, even when they are no longer in office, in respect of words spoken or written and acts performed in the exercise of their functions;
- b) inviolability for all papers and documents.

### Article 12

#### *Privileges and immunities granted to staff not of Swiss nationality*

In addition to the privileges and immunities mentioned in Article 11, ICRC staff who are not of Swiss nationality shall:

- a) be exempt from national service obligations in Switzerland;
- b) be immune, together with their spouses and relatives dependent on them, from immigration restrictions and aliens' registration;
- c) be accorded the same privileges in respect of exchange and transfer facilities for their assets in Switzerland and in other countries as are accorded to officials of the other international organizations;
- d) be given, together with their relatives dependent on them and their domestic staff, the same repatriation facilities as are accorded to officials of the international organizations;
- e) remain subject to the law on old-age and survivors' insurance and continue to pay AVS/AI/APG [4 ] contributions and unemployment and accident insurance contributions.

### Article 13

#### *Exceptions to immunity from legal process and execution*

The persons referred to in Article 11 of the present agreement shall not enjoy immunity from legal process in the event of civil liability proceedings brought against them for damage caused by any vehicle belonging to them or driven by them or in the event of offences under federal road traffic regulations punishable by fine.

### Article 14

#### *Military service of Swiss staff*

1. In a limited number of cases, leave of absence from military service (leave for foreign countries) may be granted to Swiss staff holding executive office at ICRC headquarters; persons granted such leave shall be dispensed from compulsory training service, inspections and shooting practice.

3. The ICRC shall be exempt from all federal, cantonal and communal charges which do not represent charges for specific services rendered.

4. If necessary, the exemptions mentioned above may be applied by way of reimbursement at the request of the ICRC and in accordance with a procedure to be determined by the ICRC and the competent Swiss authorities.

### Article 7

#### *Customs position*

The customs clearance of articles intended for the official use of the ICRC shall be governed by the Ordinance of 13 November 1985 on the customs privileges of international organizations, of the States in their relations with such organizations and of special Missions of foreign States. [1 ]

### Article 8

#### *Free disposal of funds*

The Committee may receive, hold, convert and transfer funds of any kind, gold, any currency, specie and other securities, and may dispose of them freely both within Switzerland and in its relations with other countries.

### Article 9

#### *Communications*

1. The ICRC shall enjoy for its official communications treatment not less favourable than that accorded to the international organizations in Switzerland, to the extent compatible with the International Telecommunication Convention of 6 November 1982. [2 ]

2. The ICRC shall have the right to dispatch and receive its correspondence, including data media, by duly identified courier or bags which shall have the same privileges and immunities as diplomatic couriers and bags.

3. No censorship shall be applied to the duly authenticated official correspondence and other official communications of the ICRC.

4. Operation of telecommunication installations must be coordinated from the technical standpoint with the Swiss PTT. [3 ]

### Article 10

#### *Pension fund*

1. Any pension fund or provident fund established by the ICRC and officially operating on behalf of the President, the members of the Committee or ICRC staff shall, with or without separate legal status, be accorded the same exemptions, privileges and immunities as the ICRC itself with regard to its movable property.

2. Funds and foundations, with or without separate legal status, administered under the auspices of the ICRC and devoted to its official purposes, shall be given the benefit of the same exemptions, privileges and immunities as the ICRC itself with regard to their movable property. Funds set up after the entry into force of the present agreement shall enjoy the same privileges and immunities, subject to the agreement of the competent Federal authorities.

2. For the other Swiss staff of the ICRC, applications for dispensation from or rescheduling of training service, providing all due reasons and counter-signed by the staff member concerned, may be submitted by the ICRC to the Federal Department of Foreign Affairs for trans-mission to the Federal Military Department, which will give them favourable consideration.

3. Finally, a limited number of dispensations from active service will be granted to ICRC staff in order to enable the institution to continue its work even during a period of mobilization.

#### **Article 15**

#### **Object of immunities**

1. The privileges and immunities provided for in the present agreement are not designed to confer any personal benefits on those concerned. They are established solely to ensure, at all times, the free functioning of the ICRC and the complete independence of the persons concerned in discharging their duties.

2. The President of the ICRC must waive the immunity of staff member or expert in any case where he considers that such immunity would impede the course of justice and could be waived without prejudice to the interests of the ICRC. The Assembly of the Committee shall have the power to waive the immunity of the President or of the Committee members.

#### **Article 16**

#### **Entry, stay and departure**

The Swiss authorities shall take all necessary measures to facilitate the entry into, the stay in, and the departure from Swiss territory of persons, irrespective of their nationality, serving the ICRC in an official capacity.

#### **Article 17**

#### **Identity cards**

1. The Federal Department of Foreign Affairs shall give the ICRC, for the President, each member of the Committee and each staff member, an identity card bearing the photograph of the holder. This card, authenticated by the Federal Department of Foreign Affairs and the ICRC, shall serve to identify the holder vis-à-vis all federal, cantonal and communal authorities.

2. The ICRC shall transmit regularly to the Federal Department of Foreign Affairs a list of the members of the Committee and staff of the ICRC who are assigned to the organization's headquarters on a lasting basis, indicating for each person the date of birth, nationality, residence in Switzerland or in another country, and the post held.

#### **Article 18**

#### **Prevention of abuses**

The ICRC and the Swiss authorities shall cooperate at all times to facilitate the proper administration of justice, secure the observance of police regulations and prevent any abuse in connection with the privileges and immunities provided for in this agreement.

#### **Article 19**

#### **Disputes of a private nature**

The ICRC shall make provision for appropriate modes of settlement of:

- a) disputes arising out of contracts to which the ICRC is or becomes party and other disputes of a private law character;
- b) disputes involving any ICRC staff member who by reason of his or her official position enjoys immunity, if such immunity has not been waived under the provisions of Article 15.

#### **III. NON-RESPONSIBILITY OF SWITZERLAND**

#### **Article 20**

#### **Non-responsibility of Switzerland**

Switzerland shall not incur, by reason of the activity of the ICRC on its territory any international responsibility for acts or omissions of the ICRC or its staff.

#### **IV. FINAL PROVISIONS**

#### **Article 21**

#### **Execution**

The Federal Department of Foreign Affairs is the Swiss authority which is entrusted with the execution of this agreement.

#### **Article 22**

#### **Settlement of disputes**

1. Any divergence of opinion concerning the application or interpretation of this agreement which has not been settled by direct negotiations between the parties may be submitted by either party to an arbitral tribunal composed of three members, including the chairman thereof.
2. The Swiss Federal Council and the ICRC shall each appoint one member of the tribunal.
3. The members so appointed shall choose their chairman.
4. In the event of disagreement between the members on the choice of chairman, the chairman shall be chosen, at the request of the members of the tribunal, by the President of the International Court of Justice or, if the latter is unavailable, by the Vice-President, or if he in turn is unavailable, by the longest-serving member of the Court.
5. The tribunal shall be seized of a dispute by either party by petition.
6. The tribunal shall lay down its own procedure.
7. The arbitration award shall be binding on the parties to the dispute.

#### **Article 23**

### **Revision**

1. The present agreement may be revised at the request of either party.
2. In this event, the two parties shall consult each other concerning the amendments to be made to its provisions.

### **Article 24**

#### ***Denunciation***

The present agreement may be denounced by either party, giving two years' notice in writing.

### **Article 25**

#### ***Entry into force***

The present agreement enters into force on the date of its signature.

Done at Berne, on 19 March 1993, in two copies in French.

For the International

For the Swiss Federal Council

Committee of the Red Cross

*The Head of the Federal*

*The President:*

*Department of Foreign Affairs*

### **Notes**

1. RS 631.145.0
2. RS 0.784.16
3. PTT - Post, Telegraph and Telephones (ed.)
4. Old-age, survivors', disability and loss of earnings insurance (ed.).

Cornelio Sommaruga

René Felber





# **Constitutive Act of the African Union, 2000**

## CONSTITUTIVE ACT OF THE AFRICAN UNION

We, Heads of State and Government of the Member States of the Organization of African Unity (OAU):

1. The President of the People's Democratic Republic of Algeria
2. The President of the Republic of Angola
3. The President of the Republic of Benin
4. The President of the Republic of Botswana
5. The President of Burkina Faso
6. The President of the Republic of Burundi
7. The President of the Republic of Cameroon
8. The President of the Republic of Cape Verde
9. The President of the Central African Republic
10. The President of the Republic of Chad
11. The President of the Islamic Federal Republic of the Comoros
12. The President of the Republic of the Congo
13. The President of the Republic of Cote d'Ivoire
14. The President of the Democratic Republic of Congo
15. The President of the Republic of Djibouti
16. The President of the Arab Republic of Egypt
17. The President of the State of Eritrea
18. The Prime Minister of the Federal Democratic Republic of Ethiopia
19. The President of the Republic of Equatorial Guinea
20. The President of the Gabonese Republic
21. The President of the Republic of The Gambia
22. The President of the Republic of Ghana
23. The President of the Republic of Guinea
24. The President of the Republic of Guinea Bissau
25. The President of the Republic of Kenya
26. The Prime Minister of Lesotho
27. The President of the Republic of Liberia
28. The Leader of the 1<sup>st</sup> of September Revolution of the Great Socialist People's Libyan Arab Jamahiriya
29. The President of the Republic of Madagascar
30. The President of the Republic of Malawi
31. The President of the Republic of Mali
32. The President of the Islamic Republic of Mauritania
33. The Prime Minister of the Republic of Mauritius
34. The President of the Republic of Mozambique
35. The President of the Republic of Namibia
36. The President of the Republic of Niger
37. The President of the Federal Republic of Nigeria
38. The President of the Republic of Rwanda
39. The President of the Sahrawi Arab Democratic Republic

40. The President of the Republic of Sao Tome and Principe
41. The President of the Republic of Senegal
42. The President of the Republic of Seychelles
43. The President of the Republic of Sierra Leone
44. The President of the Republic of Somalia
45. The President of the Republic of South Africa
46. The President of the Republic of Sudan
47. The King of Swaziland
48. The President of the United Republic of Tanzania
49. The President of the Togolese Republic
50. The President of the Republic of Tunisia
51. The President of the Republic of Uganda
52. The President of the Republic of Zambia
53. The President of the Republic of Zimbabwe

INSPIRED by the noble ideals which guided the founding fathers of our Continental Organization and generations of Pan-Africanists in their determination to promote unity, solidarity, cohesion and cooperation among the peoples of Africa and African States;

CONSIDERING the principles and objectives stated in the Charter of the Organization of African Unity and the Treaty establishing the African Economic Community;

RECALLING the heroic struggles waged by our peoples and our countries for political independence, human dignity and economic emancipation;

CONSIDERING that since its inception, the Organization of African Unity has played a determining and invaluable role in the liberation of the continent, the affirmation of a common identity and the process of attainment of the unity of our Continent and has provided a unique framework for our collective action in Africa and in our relations with the rest of the world;

DETERMINED to take up the multifaceted challenges that confront our continent and peoples in the light of the social, economic and political changes taking place in the world;

CONVINCED of the need to accelerate the process of implementing the Treaty establishing the African Economic Community in order to promote the socio-economic development of Africa and to face more effectively the challenges posed by globalization;

GUIDED by our common vision of a united and strong Africa and by the need to build a partnership between governments and all segments of civil society, in particular women, youth and the private sector in order to strengthen solidarity and cohesion among our peoples;

CONSCIOUS of the fact that the scourge of conflicts in Africa constitutes a major impediment to the socio-economic development of the continent and of the need to promote peace, security and stability as a prerequisite for the implementation of our development and integration agenda;

DETERMINED to promote and protect human and peoples' rights, consolidate democratic institutions and culture, and to ensure good governance and the rule of law;

FURTHER DETERMINED to take all necessary measures to strengthen our common institutions and provide them with the necessary powers and resources to enable them discharge their respective mandates effectively;

RECALLING the Declaration which we adopted at the Fourth Extraordinary Session of our Assembly in Sirte, the Great Socialist People's Libyan Arab Jamahiriya, on 9.9.99, in which we decided to establish an African Union, in conformity with the ultimate objectives of the Charter of our Continental Organization and the Treaty establishing the African Economic Community;

#### **HAVE AGREED AS FOLLOWS:**

##### **Article 1 Definitions**

In this Constitutive Act:

"Act" means the present Constitutive Act;

"AEC" means the African Economic Community;

"Assembly" means the Assembly of Heads of State and Government of the Union;

"Charter" means the Charter of the OAU;

"Committee" means a Specialized Technical Committee of the Union;

"Council" means the Economic, Social and Cultural Council of the Union;

"Court" means the Court of Justice of the Union;

"Executive Council" means the Executive Council of Ministers of the Union;

"Member State" means a Member State of the Union;

"OAU" means the Organization of African Unity;

"Parliament" means the Pan-African Parliament of the Union;

"Union" means the African Union established by the present Constitutive Act.

##### **Article 2 Establishment**

The African Union is hereby established in accordance with the provisions of this Act.

##### **Article 3 Objectives**

The objectives of the Union shall be to:

- (a) Achieve greater unity and solidarity between the African countries and the peoples of Africa;
- (b) Defend the sovereignty, territorial integrity and independence of its Member States;
- (c) Accelerate the political and socio-economic integration of the continent;
- (d) Promote and defend African common positions on issues of interest to the continent and its peoples;
- (e) Encourage international cooperation, taking due account of the Charter of the United Nations and the Universal Declaration of Human Rights;
- (f) Promote peace, security, and stability on the continent;
- (g) Promote democratic principles and institutions, popular participation and good governance;
- (h) Promote and protect human and peoples' rights in accordance with the African Charter on Human and Peoples' Rights and other relevant human rights instruments;
- (i) Establish the necessary conditions which enable the continent to play its rightful role in the global economy and in international negotiations;
- (j) Promote sustainable development at the economic, social and cultural levels as well as the integration of African economies;

- (k) Promote cooperation in all fields of human activity to raise the living standards of African peoples;
- (l) Coordinate and harmonize policies between existing and future Regional Economic Communities for the gradual attainment of the objectives of the Union;
- (m) Advance the development of the continent by promoting research in all fields, in particular in science and technology;
- (n) Work with relevant international partners in the eradication of preventable diseases and the promotion of good health on the continent.

#### **Article 4 Principles**

The Union shall function in accordance with the following principles:

- (a) Sovereign equality and interdependence among Member States of the Union;
- (b) Respect of borders existing on achievement of independence;
- (c) Participation of the African peoples in the activities of the Union;
- (d) Establishment of a common defence policy for the African Continent;
- (e) Peaceful resolution of conflicts among Member States of the Union through such appropriate means as may be decided upon by the Assembly;
- (f) Prohibition of the use of force or threat to use force among Member States of the Union;
- (g) Non-interference by any Member State in the internal affairs of another;
- (h) The right of the Union to intervene in a Member State pursuant to a decision of the Assembly in respect of grave circumstances, namely war crimes, genocide and crimes against humanity;
- (i) Peaceful co-existence of Member States and their right to live in peace and security;
- (j) The right of Member States to request intervention from the Union in order to restore peace and security;
- (k) Promotion of self-reliance within the framework of the Union;

- (l) Promotion of gender equality;
- (m) Respect for democratic principles, human rights, the rule of law and good governance;
- (n) Promotion of social justice to ensure balanced economic development;
- (o) Respect for the sanctity of human life, condemnation and rejection of impunity and political assassination, acts of terrorism and subversive activities;
- (p) Condemnation and rejection of unconstitutional changes of governments.

#### **Article 5 Organs of the Union**

1. The organs of the Union shall be:

- (a) The Assembly of the Union;
- (b) The Executive Council;
- (c) The Pan-African Parliament;
- (d) The Court of Justice;
- (e) The Commission;
- (f) The Permanent Representatives Committee;
- (g) The Specialized Technical Committees;
- (h) The Economic, Social and Cultural Council;
- (i) The Financial Institutions;

2. Other organs that the Assembly may decide to establish.

#### **Article 6 The Assembly**

- 1. The Assembly shall be composed of Heads of States and Government or their duly accredited representatives.
- 2. The Assembly shall be the supreme organ of the Union.
- 3. The Assembly shall meet at least once a year in ordinary session. At the request of any Member State and on approval by a two-thirds majority of the Member States, the Assembly shall meet in extraordinary session.

4. The Office of the Chairman of the Assembly shall be held for a period of one year by a Head of State or Government elected after consultations among the Member States.

#### **Article 7**

##### **Decisions of the Assembly**

1. The Assembly shall take its decisions by consensus or, failing which, by a two-thirds majority of the Member States of the Union. However, procedural matters, including the question of whether a matter is one of procedure or not, shall be decided by a simple majority.
2. Two-thirds of the total membership of the Union shall form a quorum at any meeting of the Assembly.

#### **Article 8**

##### **Rules of Procedure of the Assembly**

The Assembly shall adopt its own Rules of Procedure.

#### **Article 9**

##### **Powers and Functions of the Assembly**

1. The functions of the Assembly shall be to:
  - (a) Determine the common policies of the Union;
  - (b) Receive, consider and take decisions on reports and recommendations from the other organs of the Union;
  - (c) Consider requests for Membership of the Union;
  - (d) Establish any organ of the Union;
  - (e) Monitor the implementation of policies and decisions of the Union as well as ensure compliance by all Member States;
  - (f) Adopt the budget of the Union;
  - (g) Give directives to the Executive Council on the management of conflicts, war and other emergency situations and the restoration of peace;

- (h) Appoint and terminate the appointment of the judges of the Court of Justice;
  - (i) Appoint the Chairman of the Commission and his or her deputy or deputies and Commissioners of the Commission and determine their functions and terms of office.
2. The Assembly may delegate any of its powers and functions to any organ of the Union.

#### **Article 10**

##### **The Executive Council**

1. The Executive Council shall be composed of the Ministers of Foreign Affairs or such other Ministers or Authorities as are designated by the Governments of Member States.
2. Council shall meet at least twice a year in ordinary session. It shall also meet in an extra-ordinary session at the request of any Member State and upon approval by two-thirds of all Member States.

#### **Article 11**

##### **Decisions of the Executive Council**

1. The Executive Council shall take its decisions by consensus or, failing which, by a two-thirds majority of the Member States. However, procedural matters, including the question of whether a matter is one of procedure or not, shall be decided by a simple majority.
2. Two-thirds of the total membership of the Union shall form a quorum at any meeting of the Executive Council.

#### **Article 12**

##### **Rules of Procedure of the Executive Council**

The Executive Council shall adopt its own Rules of Procedure.

#### **Article 13**

##### **Functions of the Executive Council**

1. The Executive Council shall co-ordinate and take decisions on policies in areas of common interest to the Member States, including the following:

- (a) Foreign trade;
  - (b) Energy, industry and mineral resources;
  - (c) Food, agricultural and animal resources, livestock production and forestry;
  - (d) Water resources and irrigation;
  - (e) Environmental protection, humanitarian action and disaster response and relief;
  - (f) Transport and communications;
  - (g) Insurance;
  - (h) Education, culture, health and human resources development;
  - (i) Science and technology;
  - (j) Nationality, residency and immigration matters;
  - (k) Social security, including the formulation of mother and child care policies, as well as policies relating to the disabled and the handicapped;
  - (l) Establishment of a system of African awards, medals and prizes.
2. The Executive Council shall be responsible to the Assembly. It shall consider issues referred to it and monitor the implementation of policies formulated by the Assembly.
3. The Executive Council may delegate any of its powers and functions mentioned in paragraph 1 of this Article to the Specialized Technical Committees established under Article 14 of this Act.

**Article 14**  
**The Specialized Technical Committees**  
**Establishment and Composition**

1. There is hereby established the following Specialized Technical Committees, which shall be responsible to the Executive Council:
- (a) The Committee on Rural Economy and Agricultural Matters;
  - (b) The Committee on Monetary and Financial Affairs;

- (c) The Committee on Trade, Customs and Immigration Matters;
  - (d) The Committee on Industry, Science and Technology, Energy, Natural Resources and Environment;
  - (e) The Committee on Transport, Communications and Tourism;
  - (f) The Committee on Health, Labour and Social Affairs; and
  - (g) The Committee on Education, Culture and Human Resources.
2. The Assembly shall, whenever it deems appropriate, restructure the existing Committees or establish other Committees.
3. The Specialized Technical Committees shall be composed of Ministers or senior officials responsible for sectors falling within their respective areas of competence.

**Article 15**  
**Functions of the Specialized Technical Committees**

Each Committee shall within its field of competence:

- (a) Prepare projects and programmes of the Union and submit in to the Executive Council;
  - (b) Ensure the supervision, follow-up and the evaluation of the implementation of decisions taken by the organs of the Union;
  - (c) Ensure the coordination and harmonization of projects and programmes of the Union;
  - (d) Submit to the Executive Council either on its own initiative or at the request of the Executive Council, reports and recommendations on the implementation of the provision of this Act; and
  - (e) Carry out any other functions assigned to it for the purpose of ensuring the implementation of the provisions of this Act.
1. Subject to any directives given by the Executive Council, each Committee shall meet as often as necessary and shall prepare its rules of procedure and submit

**Article 16**  
**Meetings**

them to the Executive Council for approval.

**Article 17**  
**The Pan-African Parliament**

1. In order to ensure the full participation of African peoples in the development and economic integration of the continent, a Pan-African Parliament shall be established.
2. The composition, powers, functions and organization of the Pan-African Parliament shall be defined in a protocol relating thereto.

**Article 18**  
**The Court of Justice**

1. A Court of Justice of the Union shall be established;
2. The statute, composition and functions of the Court of Justice shall be defined in a protocol relating thereto.

**Article 19**  
**The Financial Institutions**

The Union shall have the following financial institutions, whose rules and regulations shall be defined in protocols relating thereto:

- (a) The African Central Bank;
- (b) The African Monetary Fund;
- (c) The African Investment Bank.

**Article 20**  
**The Commission**

1. There shall be established a Commission of the Union, which shall be the Secretariat of the Union.
2. The Commission shall be composed of the Chairman, his or her deputy or deputies and the Commissioners. They shall be assisted by the necessary staff for the smooth functioning of the Commission.
3. The structure, functions and regulations of the Commission shall be determined by the Assembly.

**Article 21**  
**The Permanent Representatives Committee**

1. There shall be established a Permanent Representatives Committee. It shall be composed of Permanent Representatives to the Union and other Plenipotentiaries of Member States.
2. The Permanent Representatives Committee shall be charged with the responsibility of preparing the work of the Executive Council and acting on the Executive Council's instructions. It may set up such sub-committees or working groups as it may deem necessary.

**Article 22**  
**The Economic, Social and Cultural Council**

1. The Economic, Social and Cultural Council shall be an advisory organ composed of different social and professional groups of the Member States of the Union.
2. The functions, powers, composition and organization of the Economic, Social and Cultural Council shall be determined by the Assembly.

**Article 23**  
**Imposition of Sanctions**

1. The Assembly shall determine the appropriate sanctions to be imposed on any Member State that defaults in the payment of its contributions to the budget of the Union in the following manner: denial of the right to speak at meetings, to vote, to present candidates for any position or post within the Union or to benefit from any activity or commitments therefrom.
2. Furthermore, any Member State that fails to comply with the decisions and policies of the Union may be subjected to other sanctions, such as the denial of transport and communications links with other Member States, and other measures of a political and economic nature to be determined by the Assembly.

**Article 24**  
**The Headquarters of the Union**

1. The Headquarters of the Union shall be in Addis Ababa in the Federal Democratic Republic of Ethiopia.
2. There may be established such other offices of the Union as the Assembly may, on the recommendation of the Executive Council, determine.

**Article 25**  
**Working Languages**

The working languages of the Union and all its institutions shall be, if possible, African languages, Arabic, English, French and Portuguese.

**Article 26**  
**Interpretation**

The Court shall be seized with matters of interpretation arising from the application or implementation of this Act. Pending its establishment, such matters shall be submitted to the Assembly of the Union, which shall decide by a two-thirds majority.

**Article 27**  
**Signature, Ratification and Accession**

1. This Act shall be open to signature, ratification and accession by the Member States of the OAU in accordance with their respective constitutional procedures.
2. The instruments of ratification shall be deposited with the Secretary-General of the OAU.
3. Any Member State of the OAU acceding to this Act after its entry into force shall deposit the instrument of accession with the Chairman of the Commission.

**Article 28**  
**Entry into Force**

This Act shall enter into force thirty (30) days after the deposit of the instruments of ratification by two-thirds of the Member States of the OAU.

**Article 29**  
**Admission to Membership**

1. Any African State may, at any time after the entry into force of this Act, notify the Chairman of the Commission of its intention to accede to this Act and to be admitted as a member of the Union.
2. The Chairman of the Commission shall, upon receipt of such notification, transmit copies thereof to all Member States. Admission shall be decided by a simple majority of the Member States. The decision of each Member State shall be transmitted to the Chairman of the Commission who shall, upon receipt of the

required number of votes, communicate the decision to the State concerned.

**Article 30**  
**Suspension**

Governments which shall come to power through unconstitutional means shall not be allowed to participate in the activities of the Union.

**Article 31**  
**Cessation of Membership**

1. Any State which desires to renounce its membership shall forward a written notification to the Chairman of the Commission, who shall inform Member States thereof. At the end of one year from the date of such notification, if not withdrawn, the Act shall cease to apply with respect to the renouncing State, which shall thereby cease to belong to the Union.
2. During the period of one year referred to in paragraph 1 of this Article, any Member State wishing to withdraw from the Union shall comply with the provisions of this Act and shall be bound to discharge its obligations under this Act up to the date of its withdrawal.

**Article 32**  
**Amendment and Revision**

1. Any Member State may submit proposals for the amendment or revision of this Act.
2. Proposals for amendment or revision shall be submitted to the Chairman of the Commission who shall transmit same to Member States within thirty (30) days of receipt thereof.
3. The Assembly, upon the advice of the Executive Council, shall examine these proposals within a period of one year following notification of Member States, in accordance with the provisions of paragraph 2 of this Article.
4. Amendments or revisions shall be adopted by the Assembly by consensus or, failing which, by a two-thirds majority and submitted for ratification by all Member States in accordance with their respective constitutional procedures. They shall enter into force thirty (30) days after the deposit of the instruments of ratification with the Chairman of the Commission by a two-thirds majority of the Member States.

**Article 33**  
**Transitional Arrangements and Final Provisions**

1. This Act shall replace the Charter of the Organization of African Unity. However, the Charter shall remain operative for a transitional period of one year or such further period as may be determined by the Assembly, following the entry into force of the Act, for the purpose of enabling the OAU/AEC to undertake the necessary measures regarding the devolution of its assets and liabilities to the Union and all matters relating thereto.
2. The provisions of this Act shall take precedence over and supersede any inconsistent or contrary provisions of the Treaty establishing the African Economic Community.
3. Upon the entry into force of this Act, all necessary measures shall be undertaken to implement its provisions and to ensure the establishment of the organs provided for under the Act in accordance with any directives or decisions which may be adopted in this regard by the Parties thereto within the transitional period stipulated above.
4. Pending the establishment of the Commission, the OAU General Secretariat shall be the interim Secretariat of the Union.
5. This Act, drawn up in four (4) original texts in the Arabic, English, French and Portuguese languages, all four (4) being equally authentic, shall be deposited with the Secretary-General of the OAU and, after its entry into force, with the Chairman of the Commission who shall transmit a certified true copy of the Act to the Government of each signatory State. The Secretary-General of the OAU and the Chairman of the Commission shall notify all signatory States of the dates of the deposit of the instruments of ratification or accession and shall upon entry into force of this Act register the same with the Secretariat of the United Nations.

IN WITNESS WHEREOF, WE have adopted this Act.

Done at Lomé, Togo, this 11<sup>th</sup> day of July, 2000.



**Federal Act on the Privileges, Immunities and  
Facilities and the Financial Subsidies granted by  
Switzerland as a Host State, 2007**

*English is not an official language of the Swiss Confederation. This translation is provided for information purposes only and has no legal force.*

## Federal Act on the Privileges, Immunities and Facilities and the Financial Subsidies granted by Switzerland as a Host State ("Host State Act", "HSA")

of 22 June 2007 (Status as at 1 January 2008)

*The Federal Assembly of the Swiss Confederation,*

on the basis of Article 54 paragraph 1, of the Federal Constitution,<sup>1</sup>  
and having considered the Dispatch to Parliament of the Federal Council dated  
13 September 2006,<sup>2</sup>  
decrees:

### Chapter 1: Subject Matter

#### Art. 1

<sup>1</sup> This Act regulates, in the sphere of host state policy:

- a. the granting of privileges, immunities and facilities;
- b. the granting of financial subsidies and the provision of other support measures.

<sup>2</sup> Privileges, immunities, facilities, and financial subsidies arising under international law or other federal statutes are unaffected.

### Chapter 2: Privileges, Immunities and Facilities Section 1: Beneficiaries

#### Art. 2

<sup>1</sup> The Confederation may grant privileges, immunities and facilities to the following institutional beneficiaries:

AS 2007 6637

<sup>1</sup> SR 101

<sup>2</sup> BB12006 8017

### 192.12

- a. intergovernmental organisations;
- b. international institutions;
- c. quasi-governmental international organisations;
- d. diplomatic missions;
- e. consular posts;
- f. permanent missions or other representations to intergovernmental organisations;
- g. special missions;
- h. international conferences;
- i. secretariats or other bodies established under an international treaty;
- j. independent commissions;
- k. international courts;
- l. arbitration tribunals;
- m. other international bodies.

<sup>2</sup> The Confederation may grant privileges, immunities and facilities to the following natural persons ("individual beneficiaries"):

- a. individuals who, whether on a permanent or a temporary basis, are called to act in an official capacity at one of the institutional beneficiaries referred to in paragraph 1 above;
- b. eminent persons carrying out an international mandate;
- c. individuals entitled to accompany one of the individual beneficiaries referred to in letters a or b, including private household employees.

### Section 2: Content, Scope of Application and Duration

#### Art. 3 Content

<sup>1</sup> The privileges and immunities include:

- a. inviolability of the person, premises, property, archives, documents, correspondence and diplomatic bag;
- b. immunity from legal proceedings and the enforcement of judgments;
- c. exemption from direct taxes;
- d. exemption from indirect taxes;
- e. exemption from customs duties and other import taxes;
- f. freedom to acquire, receive, hold, transfer and convert funds, currencies, cash and other movable property;

- g. freedom of communication, movement and travel;
- h. exemption from the Swiss social security system;
- i. exemption from Swiss entry and residence requirements;
- j. exemption from all personal services, from all public service and from all military duties or obligations of any kind.

2 The facilities include:

- a. the procedures for access to the employment market for the individual beneficiaries referred to in Article 2, paragraph 2, letters a and c above;
- b. the right to use a flag and an emblem;
- c. the right to issue laissez passer and to have them accepted as travel documents by the Swiss authorities;
- d. facilities of registration of vehicles.

3 The Federal Council may accord additional facilities of a more minor nature than those set out in paragraph 2 above.

**Art. 4** Scope of application

<sup>1</sup> The personal and material scope of application of the privileges, immunities and facilities shall be determined case by case in the light of:

- a. international law, Switzerland's international obligations, and international practice;
- b. the beneficiary's legal status and the importance of its role in international relations.

<sup>2</sup> Exemption from direct taxes may be granted to all the beneficiaries referred to in Article 2 above. However, in the case of individual beneficiaries within the meaning of Article 2, paragraph 2 who are Swiss nationals, the exemption shall be granted only if the institutional beneficiary to which they are called has adopted an internal tax system of its own, provided that this condition is in accordance with international law.

<sup>3</sup> Exemption from indirect taxes may be granted to all beneficiaries referred to in Article 2 above. However, individual beneficiaries within the meaning of Article 2 paragraph 2 shall be exempted from value added tax and mineral oil tax only if they hold diplomatic status.

<sup>4</sup> Exemption from customs duties and other import taxes may be granted to all the beneficiaries referred to in Article 2.

<sup>5</sup> The Federal Council shall issue regulations on entry into Switzerland, residence and work for the individual beneficiaries referred to in Article 2, paragraph 2, subject to what is permissible under international law.

**Art. 5** Duration

The duration of privileges, immunities and facilities may be limited.

**Section 3: Requirements for Granting Privileges, Immunities and Facilities**

**Art. 6** General requirements

An institutional beneficiary may be accorded privileges, immunities and facilities if:

- a. it has its headquarters or a branch in Switzerland or carries out activities in Switzerland;
- b. its purposes are not for profit and are of international utility;
- c. it carries out activities in the sphere of international relations; and
- d. its presence in Switzerland is of special interest to Switzerland.

**Art. 7** International institutions

An international institution may be accorded privileges, immunities and facilities if it:

- a. has structures similar to those of an intergovernmental organisation;
- b. performs functions of a governmental nature or functions typically assigned to an intergovernmental organisation; and
- c. enjoys international recognition in the international legal order, and in particular under an international treaty, a resolution of an intergovernmental organisation or a policy document adopted by a group of States.

**Art. 8** Quasi-governmental international organisations

A quasi-governmental international organisation may be accorded privileges, immunities and facilities if:

- a. a majority of its members are states, organisations governed by public law, or entities performing functions of a governmental nature;
- b. it has structures similar to those of an intergovernmental organisation; and
- c. it operates in two or more States.

**Art. 9** International conferences

An international conference may be accorded privileges, immunities and facilities if:

- a. it is convened under the aegis of an intergovernmental organisation, an international institution, a quasi-governmental international organisation, a secretariat or any other body established by an international treaty, under the aegis of Switzerland or at the initiative of a group of States; and

- b. a majority of participants represent States, intergovernmental organisations, international institutions, quasi-governmental international organisations, secretariats or other bodies established by international treaty.

**Art. 10** Secretariats or other bodies established by international treaty

A secretariat or other body may be accorded privileges, immunities and facilities if it is established under an international treaty which assigns to it certain tasks with a view to the implementation of that treaty.

**Art. 11** Independent commissions

An independent commission may be accorded privileges, immunities and facilities if:

- a. its legitimacy derives from a resolution of an intergovernmental organisation or of an international institution, or if it was established by a group of States or by Switzerland;
- b. it enjoys broad political and financial support among the international community;
- c. its mandate is to examine an issue of importance to the international community;
- d. its mandate is limited in time; and
- e. the granting of privileges, immunities and facilities contributes substantially to the fulfilment of its mandate.

**Art. 12** International courts

An international court may be accorded privileges, immunities and facilities if it is established under an international treaty or by a resolution of an intergovernmental organisation or of an international institution.

**Art. 13** Arbitration tribunals

An arbitration tribunal may be accorded privileges, immunities and facilities if:

- a. it is established under an arbitration clause in an international treaty or under an agreement between the subjects of international law who are parties to the arbitration; and
- b. the parties to the arbitration referred to in letter a above can show a particular need for the arbitration tribunal to sit in Switzerland.

**Art. 14** Other international bodies

Any other international body may by way of exception be accorded privileges, immunities and facilities if:

- a. it works closely with one or more intergovernmental organisations or international institutions based in Switzerland or with States in carrying out tasks which are normally the responsibility of those intergovernmental organisations, international institutions or States;
- b. it plays a key role in an important area of international relations;
- c. it has wide recognition at the international level; and
- d. the granting of privileges, immunities and facilities contributes substantially to the fulfilment of its mandate.

**Art. 15** Eminent persons carrying out an international mandate

An eminent person carrying out an international mandate may by way of exception be accorded privileges, immunities and facilities if he or she:

- a. executes a mandate that is limited in time and conferred by an intergovernmental organisation, an international institution or a group of States;
- b. is a foreign national;
- c. is resident in Switzerland for the duration of the mandate and was not habitually resident in Switzerland prior to its commencement;
- d. does not engage in any gainful activity; and
- e. needs to be in Switzerland for the purposes of the mandate.

### Chapter 3: Acquisition of Land and Buildings for Official Purposes

**Art. 16** Acquisition of land and buildings

<sup>1</sup> Institutional beneficiaries, within the meaning of Article 2 paragraph 1, may acquire land and buildings for the purposes of their official activities. The area of the property concerned must not exceed what is necessary for those purposes.

<sup>2</sup> The acquirer must submit an application to the Federal Department of Foreign Affairs ("the Department") and a copy of the same to the relevant authority in the canton concerned.

<sup>3</sup> The Department shall consult the relevant authority in the canton concerned and verify that the acquirer is an institutional beneficiary within the meaning of Article 2 paragraph 1, and that the acquisition is for official purposes. It shall then issue a ruling. Approval of the application is conditional on the necessary authorisations, i.e. building permits and safety clearance being obtained from the competent authorities.

<sup>4</sup> Entry in the land register of an acquisition of land or buildings within the meaning of paragraph 1 above is conditional on approval having been given in accordance with paragraph 3 above.

**Art. 17** Definitions

<sup>1</sup> The acquisition of land and buildings is understood to be any acquisition of a title to a building, part of a building or a piece of land, a right of habitation or a usufruct to a building or a part thereof, or the acquisition of other rights which confer on the holder equivalent status to that of owner, such as a long-term lease of land or buildings if the terms of such lease go beyond the scope of practice in civil matters.

<sup>2</sup> A change of use is deemed an acquisition for these purposes.

<sup>3</sup> Land and buildings for official purposes are buildings or parts of buildings together with the curtilage thereof which are used for the purpose of carrying out the official activities of the institutional beneficiary.

**Chapter 4: Financial Subsidies and other Support Measures****Art. 18** Purposes

The aim of financial subsidies and other support measures is in particular to:

- a. facilitate the installation, work, integration and security in Switzerland of the beneficiaries referred to in Article 19;
- b. promote the reputation of Switzerland as a host state;
- c. further Swiss bids to play host to the beneficiaries referred to in Article 2;
- d. promote activities in the area of host state policy.

**Art. 19** Beneficiaries

Financial subsidies and other support measures may be granted to:

- a. the beneficiaries referred to in Article 2;
- b. international non-governmental organisations (Chapter 5);
- c. associations and foundations whose activities serve the purposes set out in Article 18.

**Art. 20** Modalities

Financial subsidies and other support measures provided by the Confederation may take the form of:

- a. financial subsidies on a one-off or recurring basis;
- b. grants to the institutional beneficiaries referred to in Article 2 paragraph 1, either directly or via the Building Foundation for International Organisations (FIPOI) in Geneva, interest-free building loans repayable within 50 years;
- c. financial contributions to international conferences in Switzerland;

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- d. one-off or recurring subsidies in-kind such as personnel, premises or equipment;
- e. the creation of associations or foundations governed by private law and participation in such associations or foundations;
- f. instructions to the relevant police authorities to implement further security measures going beyond those already adopted by Switzerland to meet its security obligations under international law in the Federal Act of 21 March 1997<sup>3</sup> on Measures to Safeguard Internal Security.

**Art. 21** Due compensation to the cantons

The Confederation may pay due compensation to the cantons for tasks they carry out under Article 20 letter f that do not fall within their competence under the Federal Constitution.

**Art. 22** Finance

The funds necessary to implement this Act will be provided for in the budget. A guarantee credit will be sought in the case of a commitment for which funding extends beyond a single budget year.

**Art. 23** Conditions, procedures and detailed rules

The Federal Council shall lay down the conditions, procedures and detailed rules for the granting of financial subsidies and other support measures.

**Chapter 5: International Non-Governmental Organisations****Art. 24** Principles

<sup>1</sup> International non-governmental organisations (INGOs) may establish themselves in Switzerland in accordance with Swiss law.

<sup>2</sup> The Confederation may facilitate the establishment or the activities of an INGO in Switzerland subject to the applicable law. It may accord an INGO the financial subsidies and other support measures provided for under this Act.

<sup>3</sup> INGOs may be entitled to benefits provided for under other federal acts, in particular the tax exemption provided for under the Federal Act of 14 December 1990 on Direct Federal Taxation<sup>4</sup> and the simplified procedures for the hiring of foreign personnel provided for under Swiss legislation.

<sup>4</sup> INGOs are not eligible for the privileges, immunities and facilities contemplated by this Act.

<sup>3</sup> SR 120

<sup>4</sup> SR 642.11

**Art. 25** Definition

An INGO, for the purposes of this Act, is an organisation:

- a. with the legal form of an association or a foundation formed in accordance with Swiss law;
- b. whose members are natural persons of different nationalities or legal persons formed in accordance with the national laws of different States;
- c. which is genuinely active in several States;
- d. whose objectives are charitable or in the public interest within the meaning of Article 56, letter g, of the Federal Act of 14 December 1990<sup>5</sup> on Direct Federal Taxation;
- e. which operates in conjunction with an intergovernmental organisation or international institution, for example by having observer status at such organisation or institution; and
- f. whose presence in Switzerland is of special interest to Switzerland.

**Chapter 6: Powers****Art. 26** Granting of privileges, immunities and facilities and of financial subsidies and other support measures

<sup>1</sup> The Federal Council shall:

- a. grant the privileges, immunities and facilities;
- b. grant the financial subsidies and adopt the other support measures within the limit of the relevant budget appropriations.

<sup>2</sup> The Federal Council may enter into international treaties concerning:

- a. the granting of privileges, immunities and facilities;
- b. the tax treatment of beneficiaries within the meaning of Article 2;
- c. the status of Swiss employees of institutional beneficiaries within the meaning of Article 2 paragraph 1, for the purposes of Swiss social insurance;
- d. the granting of financial subsidies and other support measures, subject to the budgetary prerogative of the Federal Assembly;
- e. cooperation with neighbouring States in the area of host state policy.

<sup>3</sup> The Federal Council may delegate to the Department the power:

- a. to grant privileges, immunities and facilities of limited duration;
- b. to grant financial subsidies of limited duration, to fund international conferences in Switzerland and to provide subsidies in-kind of limited duration in accordance with Article 20;
- c. to instruct the relevant police authorities to implement further security measures in accordance with Article 20, letter f.

**Art. 27** Terms of employment of individual beneficiaries

<sup>1</sup> The Federal Council may issue standard contracts of employment or otherwise regulate the conditions of employment in Switzerland of the individual beneficiaries referred to in Article 2 paragraph 2, insofar as permissible under international law. It may, in particular, set minimum wages.

<sup>2</sup> The Federal Council shall, in particular, lay down the basic pay and working conditions of the private household employees referred to in Article 2 paragraph 2, as well as the social security arrangements for such employees in the event of illness, accident, invalidity or unemployment, insofar as permissible under international law.

**Art. 28** Settlement of private-law disputes in cases of immunity from legal and enforcement proceedings

When entering into a headquarters agreement with an institutional beneficiary within the meaning of Article 2 paragraph 1, the Federal Council shall ensure that the beneficiary adopt appropriate measures with a view to the satisfactory settlement of:

- a. disputes arising out of contracts to which the institutional beneficiary may be a party and of other private-law disputes;
- b. disputes involving staff of the institutional beneficiary who enjoy immunity by reason of their official capacity, unless that immunity is waived.

**Art. 29** Participation of the cantons

<sup>1</sup> Before entering into any agreement to grant privileges, immunities and facilities for a duration of not less than one year or unlimited in time, the Federal Council shall consult with the canton in which the beneficiary is based and with the neighbouring cantons.

<sup>2</sup> If the privileges, immunities and facilities entail any exception to the tax law of the canton in which the beneficiary is based, the Federal Council's decision shall be taken in consultation with the canton in question.

<sup>3</sup> The cantons shall participate, within the meaning of the Federal Act of 22 December 1999<sup>6</sup> on the Participation of the Cantons in the Foreign Policy of the Confederation, in the negotiation of international treaties in the area of host state policy.

**Art. 30** Information

The Department may provide information to anybody demonstrating a particular interest in:

- a. the nature and extent of the privileges, immunities and facilities accorded, and the beneficiaries thereof;
- b. the financial subsidies and other support measures accorded and the beneficiaries thereof.

**Art. 31** Compliance with the terms of the privileges, immunities and facilities

<sup>1</sup> The Federal Council shall monitor compliance with the terms of the privileges, immunities and facilities granted and shall take the measures necessary if it finds instances of abuse. It may, where appropriate, rescind the relevant agreements or revoke the privileges, immunities and facilities granted.

<sup>2</sup> The Federal Council may delegate to the Department the power to revoke the privileges, immunities and facilities granted to an individual beneficiary.

**Art. 32** Suspension, withdrawal and recovery of financial subsidies and other support measures

The Federal Council or, if within its remit, the Department, may suspend or withdraw financial subsidies and other support measures or demand the full or partial reimbursement of subsidies already provided, if the beneficiary, despite having been issued a notice to comply, fails to fulfil its tasks as foreseen or only partly fulfils its tasks.

**Chapter 7: Final Provisions**

**Art. 33** Implementing provisions

<sup>1</sup> The Federal Council shall enact the implementing provisions.

<sup>2</sup> It may implement the present Act in association with the cantons or private legal entities.

<sup>3</sup> It may delegate administrative responsibilities in the area of host state policy to private legal entities.

<sup>6</sup> SR 138.1

**Art. 34** Repeal and amendment of current law

The repeal and amendment of the current law is regulated in the Annex.

**Art. 35** Coordination with the Foreign Nationals Act of 16 December 2005 (FNA)<sup>7</sup>

*On the commencement of this Act or of the FNA, whichever is later, or on the simultaneous commencement of both, Chapter II number 2 of the Annex to this Act will become redundant and Article 98, paragraph 2, FNA is worded as follows:*

*Art. 98 para. 2*

...

**Art. 36** Referendum and commencement

<sup>1</sup> This Act is subject to an optional referendum.

<sup>2</sup> The Federal Council shall determine the commencement date.

Commencement date: 1 January 2008

<sup>7</sup> SR 142.20. This amendment is inserted in the said Federal Act  
<sup>8</sup> BRB of 7 December 2007 (AS 2007 6649)

*Annex*  
(Art. 34)

### Repeal and amendment of current law

I

The following Federal Acts and Federal Decrees are repealed:

1. Federal Decree of 30 September 1955<sup>9</sup> on Agreements with International Organisations on their Legal Status in Switzerland;
2. Federal Act of 5 October 2001<sup>10</sup> on Participation and Financial Aid in relation to the Foundation for the International Red Cross and Red Crescent Museum;
3. Federal Act of 23 June 2000<sup>11</sup> on Financial Aid to the Building Foundation for International Organisations (FIPOI) in Geneva.

II

The following Federal Acts are amended as follows:

#### 1. Federal Act of 21 March 1997<sup>12</sup> on Measures to Safeguard Internal Security

*Art. 5 para. 1 let. b*

...

#### 2. Federal Act of 26 March 1931<sup>13</sup> on the Residence and Permanent Settlement of Foreign Nationals

*Art. 25 para. 1 let. f*

...

<sup>9</sup> [AS 1956 1137]

<sup>10</sup> [AS 2002 1902]

<sup>11</sup> [AS 2000 2979]

<sup>12</sup> SR 120. This amendment is inserted in the said Federal Act.

<sup>13</sup> [BS 1 121; AS 1949 221, 1987 1665, 1988 332, 1990 1587 Art. 3 para. 2, 1991 362

No. II 11 1034 No. III, 1995 146, 1999 1111 2262 Annex No. 1, 2000 1891 No. IV 2,

2002 685 No. I 1 701 No. I 1 3988 Annex No. 3, 2003 4557 Annex No. II 2, 2004 1633

No. I 1 4655 No. I 1, 2005 5685 Annex No. 2, 2006 979 Art. 2 No. 1 1931 Art. 18

No. 1 2197 Annex No. 3 3459 Annex No. 1 4745 Annex No. 1, 2007 359 Annex No. 1.

AS 2007 5437 Annex No. II]

### 3. Federal Act of 16 December 1983<sup>14</sup> on the Acquisition of Real Estate in Switzerland by Non-Residents

*Art. 7 let. h*

...

*Art. 7a*

...

*Art. 16 para. 2*

*Repealed*

### 4. Subsidies Act of 5 October 1990<sup>15</sup>

*Art. 2 para. 4 let. a*

...

### 5. Value Added Tax Act of 2 September 1999<sup>16</sup>

*Art. 90 para. 2 let. a*

...

### 6. Mineral Oil Tax Act of 21 June 1996<sup>17</sup>

*Art. 17 para. 1 let. g and h*

...

<sup>14</sup> SR 211.412.41. These amendments are inserted in the said Federal Act.

<sup>15</sup> SR 616.1. This amendment is inserted in the said Federal Act.

<sup>16</sup> SR 641.20. This amendment is inserted in the said Federal Act.

<sup>17</sup> SR 641.61. This amendment is inserted in the said Federal Act.

**7. Federal Act of 14 December 1990<sup>18</sup>  
on Direct Federal Taxation**

*Art. 15 para. 1*

...

*Art. 56 let. i*

...

**8. Federal Act of 14 December 1990<sup>19</sup> on the Harmonisation of Direct  
Taxation at Cantonal and Communal Levels**

*Art. 4a*

...

*Art. 23 para. 1 let. h*

...

**9. Federal Act of 13 October 1965<sup>20</sup> on Withholding Tax**

*Art. 28 para. 2*

...

**10. Federal Act of 20 December 1946<sup>21</sup>  
on the Old-Age and Survivors Insurance**

*Art. 1a para. 4 let. b*

...

**11. Federal Act of 18 March 1994<sup>22</sup> on Health Insurance**

*Art. 3 para. 2*

...

**12. Federal Act of 20 March 1981<sup>23</sup> on Accident Insurance**

*Art. 1a para. 2*

...

**13. Unemployment Insurance Act of 25 June 1982<sup>24</sup>**

*Art. 2a*

...

<sup>18</sup> SR 642.11. These amendments are inserted in the said Federal Act.

<sup>19</sup> SR 642.14. These amendments are inserted in the said Federal Act.

<sup>20</sup> SR 642.21. This amendment is inserted in the said Federal Act.

<sup>21</sup> SR 831.10. This amendment is inserted in the said Federal Act.

<sup>22</sup> SR 832.10. This amendment is inserted in the said Federal Act.

<sup>23</sup> SR 832.20. This amendment is inserted in the said Federal Act.

<sup>24</sup> SR 837.0. This amendment is inserted in the said Federal Act.



**Ordinance on the Federal Act on the Privileges and Immunities and Facilities and the Financial Subsidies granted by Switzerland as a Host State, 2007**

*English is not an official language of the Swiss Confederation. This translation is provided for information purposes only and has no legal force.*

**Ordinance  
to the Federal Act on the Privileges, Immunities and  
Facilities and the Financial Subsidies  
granted by Switzerland as a Host State  
(Host State Ordinance, HSO)**

of 7 December 2007 (Status as at 1 January 2008)

*The Swiss Federal Council,*  
on the basis of Article 33 of the Host State Act of 22 June 2007<sup>1</sup> ('HSA'),  
decrees:

**Chapter 1: Subject Matter and Definitions**

**Art. 1** Subject matter

<sup>1</sup> This Ordinance lays down the implementing rules for the HSA. It determines in particular:

- a. the scope of the privileges, immunities and facilities which may be granted to the different types of institutional beneficiary concerned;
- b. the conditions of entry, residence and work on Swiss territory for individual beneficiaries;
- c. the procedure for the acquisition of land and buildings by institutional beneficiaries;
- d. the rules governing the granting of financial subsidies and other support measures.

<sup>2</sup> The conditions of entry, residence and work for private household employees are laid down in a separate ordinance.

**Art. 2** Meaning of permanent mission or other representation to intergovernmental organisations

A permanent mission or other representation to intergovernmental organisations means in particular:

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1 SR 192.12

1

**192.121**

- a. the permanent missions to the United Nations Office or to other intergovernmental organisations, including the permanent missions to the World Trade Organization;
- b. the permanent representations to the Conference on Disarmament;
- c. the permanent delegations of intergovernmental organisations at intergovernmental organisations;
- d. observer bureaux.

**Art. 3** Meaning of special mission

A special mission within the meaning of the Convention of 8 December 1969<sup>2</sup> on Special Missions includes:

- a. temporary missions composed of representatives of a State sent to Switzerland in accordance with Article 2 of the Convention of 8 December 1969 on Special Missions;
- b. temporary missions composed of representatives of States in connection with meetings between two or more States in accordance with Article 18 of the Convention of 8 December 1969 on Special Missions;
- c. temporary missions composed of representatives of a State and of non-State representatives in connection with the exercise of Swiss good offices.

**Art. 4** Meaning of principal individual beneficiary

A principal individual beneficiary is an individual beneficiary as referred to in Article 2 paragraph 2 letters a and b, HSA.

**Art. 5** Meaning of members of local staff

Members of local staff are persons employed by a State to perform official duties within the meaning of the Vienna Convention of 18 April 1961<sup>3</sup> on Diplomatic Relations, the Vienna Convention of 24 April 1963<sup>4</sup> on Consular Relations, or the Convention of 8 December 1969<sup>5</sup> on Special Missions, but who do not form part of the transferable staff of the sending State. These persons may be nationals of the sending State or of another State. They generally perform the duties of service staff within the meaning of the aforementioned Conventions but may also perform other duties referred to in those Conventions.

<sup>2</sup> SR 0.191.2  
<sup>3</sup> SR 0.191.01  
<sup>4</sup> SR 0.191.02  
<sup>5</sup> SR 0.191.2

2

## Chapter 2: Scope of Privileges, Immunities and Facilities

### Section 1: Institutional Beneficiaries

#### Art. 6 General provisions

<sup>1</sup> The following institutional beneficiaries are accorded all of the privileges, immunities and facilities set out in Article 3 HSA in accordance with international law and international practice:

- a. intergovernmental organisations;
- b. international institutions;
- c. diplomatic missions;
- d. consular posts;
- e. permanent missions or other representations to intergovernmental organisations;
- f. special missions;
- g. international conferences;
- h. secretariats or other bodies established under an international treaty;
- i. independent commissions;
- j. international courts;
- k. arbitration tribunals.

<sup>2</sup> Diplomatic missions and permanent missions or other representations to intergovernmental organisations are governed in particular by the Vienna Convention of 18 April 1961<sup>16</sup> on Diplomatic Relations.

<sup>3</sup> Consular posts are governed in particular by the Vienna Convention of 24 April 1963<sup>7</sup> on Consular Relations.

<sup>4</sup> Special missions are governed in particular by the Convention of 8 December 1969<sup>8</sup> on Special Missions.

<sup>5</sup> Privileges, immunities and facilities are granted to independent commissions for the scheduled duration of their activity. The granting of privileges, immunities and facilities may be extended for a limited period if the circumstances so warrant, in particular if the independent commission's mandate is extended or if it requires additional time to draw up and publish its report.

#### Art. 7 Quasi-governmental international organisations

Quasi-governmental international organisations are accorded some or all of the following privileges, immunities and facilities:

- <sup>6</sup> SR 0.191.01
- <sup>7</sup> SR 0.191.02
- <sup>8</sup> SR 0.191.2

- a. inviolability of archives;
- b. exemption from direct taxes;
- c. exemption from indirect taxes;
- d. freedom to acquire, receive, hold, transfer and convert funds, currencies, cash and other movable assets.

#### Art. 8 Other international bodies

<sup>1</sup> Other international bodies may be accorded all of the privileges, immunities and facilities set out in Article 3 HSA.

<sup>2</sup> In determining the scope of the privileges, immunities and facilities to be accorded in each case, the Federal Council shall take into account in particular the structure of the body concerned and its connections to the intergovernmental organisations, international institutions, or States with which it works, as well as its role in international relations and its international prominence.

<sup>3</sup> Subject to any special provisions contained in a headquarters agreement entered into with the Federal Council or in any other international treaty to which Switzerland is party, other international bodies may be hosted by an intergovernmental organisation or by an international institution only with the consent of the Federal Department of Foreign Affairs (FDFA).

## Section 2: Individual Beneficiaries

#### Art. 9 Principles

<sup>1</sup> The privileges, immunities and facilities accorded to individual beneficiaries are granted in the interest of the institutional beneficiaries concerned and not that of the individuals themselves. Their purpose is not to confer any benefit on individuals but to enable the institutional beneficiaries to carry out their work effectively.

<sup>2</sup> In the case of the individuals referred to in Article 2, paragraph 2 letters a and b HSA, the privileges, immunities and facilities are conditional on the FDFA having established that those individuals are genuinely engaged in official duties. In the case of the persons referred to in Article 2 paragraph 2, letter c HSA, they are conditional on the authorisation granted them by the FDFA to accompany the principal individual beneficiary.

<sup>3</sup> All questions relating to a determination as to whether an individual is genuinely engaged in official duties, an authorisation to accompany a principal individual beneficiary, the scope of privileges, immunities and facilities that apply, and all other questions concerning the legal status in Switzerland of individual beneficiaries, are resolved in accordance with diplomatic practice between the FDFA and the institutional beneficiary concerned and without the individual beneficiary being involved in any way.

**Art. 10** Scope of privileges, immunities and facilities

The scope of the privileges, immunities and facilities accorded to individuals who, whether on a permanent or a temporary basis, are called to act in an official capacity at any of the institutional beneficiaries referred to in Article 6 paragraph 1 is determined on the basis of the category of staff to which they belong in accordance with international law and international practice. Individuals shall be assigned to the different categories provided for under international law.

**Art. 11** Categories of individual beneficiary

<sup>1</sup> In the case of intergovernmental organisations, international institutions, international conferences, secretariats or other bodies established under an international treaty, independent commissions and other international bodies, the categories of individual beneficiary are in particular the following:

- a. members of senior management;
- b. high-ranking officials;
- c. other officials;
- d. representatives of the organisation's members;
- e. experts and all other persons acting in an official capacity for these institutional beneficiaries;
- f. persons entitled to accompany any of the individual beneficiaries referred to in letters a to e.

<sup>2</sup> In the case of international courts and arbitration tribunals, the categories of individual beneficiary, in addition to the categories specified in paragraph 1 above, are in particular the following:

- a. judges;
- b. prosecutors, deputy prosecutors, and prosecution service staff;
- c. registrars, deputy registrars, and registry staff;
- d. defence counsel, witnesses and victims;
- e. arbitrators;
- f. persons entitled to accompany any of the individual beneficiaries referred to in letters a to e.

<sup>3</sup> In the case of diplomatic missions, consular posts, permanent missions and other representations to intergovernmental organisations, and special missions, the categories of individual beneficiary are in particular the following:

- a. members of diplomatic staff;
- b. members of administrative and technical staff;
- c. members of service staff;
- d. consular officers;
- e. consular employees;

- f. members of local staff;
- g. persons entitled to accompany any of the individual beneficiaries referred to in letters a to f.

**Art. 12** Individuals who are called to act in an official capacity at a quasi-governmental international organisation

Individuals who, whether on a permanent or a temporary basis, are called to act in an official capacity at a quasi-governmental international organisation and who are not Swiss nationals are accorded some or all of the following privileges and immunities for the duration of their service:

- a. exemption from direct taxes on the salaries, emoluments and allowances paid to them by the quasi-governmental international organisation;
- b. exemption from taxes on lump sums received on any grounds from a pension scheme or other provident fund, as at the time of such payment; the tax exemption does not however cover income earned on such sums or assets in which they are invested, or pensions and annuities paid to former staff by the quasi-governmental international organisation concerned;
- c. exemption from Swiss entry and residence requirements.

<sup>2</sup> Members of the general assembly, foundation board, executive board or other governing body of a quasi-governmental international organisation may be granted immunity from criminal, civil and administrative proceedings for acts performed in their official capacity as well as inviolability for their documents.

**Art. 13** Individuals who are called to act in an official capacity at other international bodies

The scope of the privileges, immunities and facilities accorded to individuals who, whether on a permanent or a temporary basis, are called to act in an official capacity at other international bodies shall be determined on the basis of the privileges, immunities and facilities that the Federal Council shall grant to the other international body concerned, pursuant to Article 8 above, and on the basis of the category of staff to which they belong.

**Art. 14** Eminent persons carrying out an international mandate

Eminent persons carrying out an international mandate may be accorded all of the privileges, immunities and facilities set out in Article 3 HSA. The Federal Council shall determine the scope of the privileges, immunities and facilities according to the circumstances of each particular case.

**Art. 15** Duration of privileges, immunities and facilities granted to individual beneficiaries

<sup>1</sup> Privileges, immunities and facilities are granted to individual beneficiaries for the duration of their official duties.

- 2 Privileges, immunities and facilities accorded to accompanying persons expire at the same time as those accorded to the person they accompany, unless otherwise provided for in this Ordinance (Chapter 3).
- 3 Privileges, immunities and facilities accorded to private household employees come to an end one month after the end of their employment even if a dispute with the former employer in relation to the employment remains unresolved.
- 4 The FDFA shall determine case by case whether, at the end of the period of service and in accordance with international practice, to accord a limited extension of time (courtesy period) in order to give those concerned time to make arrangements for their departure.

### Chapter 3: Entry, Residence and Employment Requirements

#### Art. 16 Entry requirements

- 1 When crossing the border to take up his or her duties, an individual beneficiary must be in possession of a recognised identity document and, where applicable, a visa.
- 2 A request must be made to the FDFA by the institutional beneficiary concerned in order for the individual beneficiary to be allowed take up his or her duties.

#### Art. 17 Residence requirements

- 1 The FDFA shall issue legitimisation cards to members of the staff of institutional beneficiaries established in Switzerland who are entitled to privileges and immunities and to persons entitled to accompany such persons. It shall determine the different types of legitimisation card to be issued and the conditions attaching thereto.
- 2 The immigration authority of the canton concerned shall issue a standard residence permit in accordance with the applicable law to persons called to act in an official capacity at institutional beneficiaries who are entitled only to exemption from taxes, and to persons entitled to accompany them.
- 3 The legitimisation card issued by the FDFA serves as a residence permit for Switzerland, certifies the holder's privileges and immunities, and exempts him or her from any visa requirement for the duration of his or her function.
- 4 Individual beneficiaries holding a legitimisation card issued by the FDFA are exempted from the obligation to register with their cantonal residents registry. They may however register voluntarily.

#### Art. 18 Employment requirements

- 1 Institutional beneficiaries are entitled, in accordance with international law, to determine the terms of employment of their staff.

- 2 Members of diplomatic missions, of consular posts, of permanent missions or other representations to intergovernmental organisations and of special missions who are Swiss nationals or are permanently resident in Switzerland at the commencement of their function are subject to Swiss employment law. Any choice-of-law clause providing for the application of the law of a foreign State shall have effect only to the extent permitted under Swiss law.
- 3 Members of the local staff of diplomatic missions, of consular posts, of permanent missions or other representations to intergovernmental organisations, and of special missions, are subject to Swiss employment law irrespective of their nationality and of their place of residence at the time of engagement. Any choice-of-law clause providing for the application of the law of a foreign State shall have effect only to the extent permitted under Swiss law.

#### Art. 19 Social security

Insofar as the institutional beneficiary as employer is not, under international law, subject to obligatory Swiss social security legislation and the members of the staff of the institutional beneficiary are not subject to that legislation, the institutional beneficiary shall determine the social protection arrangements for its staff in accordance with international law and shall operate a social security scheme of its own.

#### Art. 20 Accompanying persons

- 1 The following persons are entitled to accompany the principal individual beneficiary and enjoy the same privileges, immunities and facilities if living together in the same household:
- the spouse of the principal individual beneficiary;
  - the same-sex partner of the principal individual beneficiary if the partnership has been registered in Switzerland or under an equivalent foreign provision or if the partner is treated by the institutional beneficiary concerned as an official partner or as a dependent;
  - the cohabiting partner of the principal individual beneficiary (which within the meaning of Swiss law is a person of the opposite sex not married to the principal individual beneficiary) if the cohabiting partner is treated by the institutional beneficiary concerned as an official partner or as a dependent;
  - the unmarried children up to the age of 25 of the principal individual beneficiary;
  - the unmarried children up to the age of 25 of the spouse, or of the same-sex partner, or of the cohabiting partner, if officially in that person's care.
- 2 The following persons may, by way of exception, be authorised by the FDFA to accompany a principal individual beneficiary if they live together in the same household; they shall be issued with a legitimisation card but shall not be accorded privileges, immunities or facilities:

- a. the same-sex partner of the principal individual beneficiary if he or she is not recognised by the institutional beneficiary concerned as an official partner or as a dependent but the application for a residence permit is nonetheless submitted by the institutional beneficiary and the relationship can be shown to be long-standing, and if it is not possible for the couple to register their partnership under Swiss law or under the law of another State;
- b. the cohabiting partner of the principal individual beneficiary if the cohabiting partner is not recognised by the institutional beneficiary concerned as an official partner or as a dependent but the application for a residence permit is nonetheless submitted by the institutional beneficiary and the relationship can be shown to be long-standing;
- c. the unmarried children over the age of 25 of the principal individual beneficiary if they are in his or her sole care;
- d. the unmarried children over the age of 25 of the spouse, or of the same-sex partner, or of the cohabiting partner, if they are in the principal individual beneficiary's sole care;
- e. the ascendants of the principal individual beneficiary or of his or her spouse, same-sex partner, or cohabiting partner within the meaning of paragraph 1, if they are in the principal individual beneficiary's sole care;
- f. in exceptional cases, other persons in the sole care of the principal individual beneficiary if it is not possible for them to be entrusted to the care of a third party in the country of origin (cases of force majeure).

<sup>3</sup> Private household employees may be authorised by the FDFA to accompany a principal individual beneficiary if they satisfy the requirements laid down in the separate ordinance on entry, residence and work requirements referred to in Article 1 paragraph 2.

<sup>4</sup> Authorisation for the persons referred to in this Article to accompany a principal individual beneficiary must be sought prior to the entry into Switzerland of such persons.

<sup>5</sup> The FDFA shall determine case by case whether a person wishing to accompany a principal individual beneficiary satisfies the requirements of this article. All questions arising therefrom shall be resolved in accordance with diplomatic practice between the FDFA and the institutional beneficiary concerned and without the individual beneficiary being involved in any way.

**Art. 21** Access to employment for persons called to act in an official capacity

<sup>1</sup> Persons who are called to act in an official capacity at an institutional beneficiary must as a rule perform their official duties on a full-time basis. This is without prejudice to the special provisions governing honorary consuls under the Vienna Convention of 24 April 1963<sup>9</sup> on Consular Relations, and those governing persons whose

duties are limited to a specific mandate, such as lawyers engaged in proceedings before international courts or arbitration tribunals.

<sup>2</sup> Persons who are called to act in an official capacity at an institutional beneficiary may, by way of exception, be authorised by the relevant cantonal authorities to carry out a secondary gainful activity for up to ten hours a week, provided that they are living in Switzerland and the activity concerned is not incompatible with the performance of their official duties. The decision of the cantonal authorities shall be taken in agreement with the FDFA.

<sup>3</sup> Teaching a specialised subject may, in particular, constitute an acceptable secondary activity, but any activity of a commercial nature, *inter alia*, shall be deemed incompatible with the performance of the person's official duties.

<sup>4</sup> Persons who are called to act in an official capacity at an institutional beneficiary who engage in a secondary gainful activity do not enjoy privileges or immunities of any kind in respect of that activity. In particular, they have no immunity from criminal, civil and administrative proceedings or from execution of any judgment or sentence arising in relation to the secondary gainful activity. Such persons are subject to Swiss law in relation to the secondary gainful activity, in particular Swiss social security legislation, and to tax in Switzerland on earnings from the activity, unless otherwise provided for under a bilateral convention on double taxation or on social security.

**Art. 22** Facilitated access to employment for persons entitled to accompany the principal individual beneficiary

<sup>1</sup> The following persons have facilitated access to employment in Switzerland for the duration of the function of the principal individual beneficiary if they are entitled, in accordance with Article 20 paragraph 1, to accompany the principal individual beneficiary and if they are living in Switzerland and in the same household as the principal individual beneficiary:

- a. the spouse of the principal individual beneficiary within the meaning of Article 20 paragraph 1 letter a;
- b. the same-sex partner of the principal individual beneficiary within the meaning of Article 20 paragraph 1 letter b;
- c. the cohabiting partner of the principal individual beneficiary within the meaning of Article 20 paragraph 1 letter c;
- d. the unmarried children of the principal individual beneficiary, within the meaning of Article 20 paragraph 1 letter d if they entered Switzerland as authorised accompanying persons before the age of 21; they are entitled to facilitated access to employment until the age of 25, after which they must take the necessary steps to ensure that their residence and employment situations are in accordance with the legislation governing the residence and establishment of non-nationals;

- e. the unmarried children of the spouse, same-sex partner or cohabiting partner, within the meaning of Article 20 paragraph 1 letter e if they entered Switzerland as authorised accompanying persons before the age of 21; they are entitled to facilitated access to employment until the age of 25, after which they must take the necessary steps to ensure that their residence and employment situations are in accordance with the legislation governing the residence and establishment of non-nationals.
- <sup>2</sup> To facilitate their access to employment, the FDFA shall, on request, issue to the persons referred to in paragraph 1 a document certifying to potential employers that the individual concerned is not subject to the quota on foreign workers, or to the principle of priority recruitment areas, or to labour market regulations (principle of priority preference for residents, and ex ante vetting of pay and conditions).
- <sup>3</sup> Persons within the scope of paragraph 1 who engage in gainful activity shall, on submission of a contract of employment, an offer of employment, or a declaration to the effect that they intend to engage in a self-employed activity together with a description of that activity, be issued by the cantonal authority concerned with a special residence permit, known as a 'Ci permit', in place of their legitimization card. A self-employed activity may be carried out only after the Ci permit-holder has been authorised by the competent authorities to carry out the profession or occupation in question.
- <sup>4</sup> Persons within the scope of paragraph 1 who engage in gainful activity in Switzerland are subject to Swiss law in relation to that activity. In particular, they enjoy no privileges or immunities and are subject to Swiss social security legislation and to tax in Switzerland on the earnings from the gainful activity unless otherwise provided for under a bilateral convention on double taxation or on social security.
- <sup>5</sup> The further implementation rules shall be laid down by the FDFA with the agreement of the Federal Office for Migration.

#### Chapter 4: Procedures for Granting Privileges, Immunities and Facilities

##### Art. 23 The Granting of Privileges, Immunities and Facilities

- <sup>1</sup> Without prejudice to the privileges, immunities and facilities arising directly under international law, the Federal Council shall determine case by case the privileges, immunities and facilities to be granted to institutional beneficiaries and persons who are called to act in an official capacity at such institutions, to eminent persons carrying out an international mandate, and to the persons referred to in Article 20.
- <sup>2</sup> The FDFA is empowered to grant privileges, immunities and facilities and to enter into international agreements for that purpose, where the duration of the institutional beneficiary's activity does not exceed one year to:
- a. special missions, persons called to act in an official capacity at such special missions, and persons entitled to accompany such persons;

- b. international conferences, persons called to act in an official capacity at such international conferences, and persons entitled to accompany such persons.

##### Art. 24 Modalities

- <sup>1</sup> Diplomatic missions, consular posts, and permanent missions or other representations to intergovernmental organisations, the members of such representations and persons entitled to accompany such members become automatically entitled in accordance with international law and international practice to privileges, immunities and facilities on being authorised by the FDFA to establish themselves in Switzerland.
- <sup>2</sup> The privileges, immunities and facilities of the following institutional beneficiaries, of the persons called to act in an official capacity at such institutional beneficiaries, and of the persons entitled to accompany such persons are granted by way of an agreement to that effect entered into between the Federal Council and the institutional beneficiary concerned:
- intergovernmental organisations;
  - international institutions;
  - quasi-governmental international organisations;
  - secretariats or other bodies established under an international treaty;
  - international courts;
  - arbitration tribunals.
- <sup>3</sup> The privileges, immunities and facilities of the following institutional beneficiaries, of the persons who are called to act in an official capacity at such institutional beneficiaries, and of the persons entitled to accompany such persons are granted by way of a unilateral decision of the Federal Council or of the FDFA or by way of an agreement to that effect entered into between the Federal Council or the FDFA and the institutional beneficiary concerned:

- special missions;
  - international conferences;
  - independent commissions;
  - other international bodies.
- <sup>4</sup> The privileges, immunities and facilities of eminent persons carrying out an international mandate are granted by way of a unilateral decision of the Federal Council.

### Chapter 5: Acquisition of Land and Buildings for Official Purposes

#### Art. 25 Procedure

<sup>1</sup> Any application for permission to acquire land or buildings shall be submitted to the FDFA by the acquiring party or its agent, with a copy to be sent to the competent authority in the canton concerned.

<sup>2</sup> The application must include the following particulars and documents:

- a. the draft contract of acquisition indicating the mode of acquisition (sale, gift, long-term lease, etc.);
- b. the purpose of acquisition (residence of head of mission, secretariat of representation, head office of organisation, etc.);
- c. a description of the property, to include in particular the area of the land and of the building; in the case of a vacant site or a proposed extension of an existing building, the area proposed to be built upon must also be indicated;
- d. a list of the properties in Switzerland already owned by the institutional beneficiary, a description of such properties including in particular the area of the land and buildings concerned and the use of same.

<sup>3</sup> The net habitable area of any building intended for residential use may not as a rule exceed 200 m<sup>2</sup>.

<sup>4</sup> The FDFA may impose conditions in respect of an acquisition of property. In particular, it may require reciprocity if the acquiring party is a foreign State acquiring a property for the official needs of its diplomatic mission, consular posts, or permanent missions to intergovernmental organisations in Switzerland.

#### Art. 26 Decision

The FDFA shall issue its decision after receiving the opinion of the canton concerned.

### Chapter 6: Financial Subsidies and other Support Measures

#### Art. 27 Financial powers

<sup>1</sup> The Federal Council shall decide on financial subsidies and other support measures with a foreseeable cost exceeding CHF 3 million in the case of a one-off measure, or CHF 2 million per annum in the case of a recurring measure.

<sup>2</sup> The FDFA:

- a. shall decide on one-off financial subsidies and in-kind subsidies not exceeding CHF 3 million;

- b. shall decide on recurring financial subsidies and in-kind subsidies of a maximum duration of 4 years and not exceeding CHF 2 million per annum;
- c. may fund international conferences in Switzerland;
- d. may enter into international treaties to that end.

#### Art. 28 Procedure for granting subsidies and other support measures

<sup>1</sup> The procedure for granting financial subsidies and other support measures is laid down in respect of each appropriation during the authorisation process.

<sup>2</sup> The procedure for the payment of due compensation to the cantons for the cost of giving effect to Article 20, letter f, HSA is laid down in agreements to be entered into with each canton concerned. The FDFA shall be authorised to enter into such agreements. It indicates in the agreement that, where applicable, the relevant credits are subject to approval by Parliament.

### Chapter 7: International Non-Governmental Organisations

#### Art. 29

International non-governmental organisations (INGOs) wishing to benefit from the measures provided for under federal legislation, in particular the tax exemption provided for by the Federal Act of 14 December 1990<sup>10</sup> on Direct Federal Taxation and the facilitated employment of foreign staff provided for under Swiss legislation, must satisfy the relevant statutory requirements and submit an application to the competent authority designated by the relevant statute.

### Chapter 8: Powers of the FDFA

#### Art. 30

<sup>1</sup> In addition to the powers provided for in the specific provisions of this Ordinance, the FDFA shall:

- a. negotiate the agreements to be entered into pursuant to the HSA or this Ordinance, in consultation with the bodies concerned;
- b. be the authority responsible for implementing the agreements on privileges, immunities, facilities, and financial subsidies and other support measures, without prejudice to the specific powers of other federal bodies;
- c. regulate the details of the implementation of this Ordinance without prejudice to the specific powers of other federal bodies;

<sup>10</sup> SR 642.11

- d. supervise compliance with the terms of the privileges, immunities and facilities; to this effect it shall take all appropriate measures in accordance with international practice; on finding an instance of abuse it may revoke a natural person's privileges, immunities and facilities where such a measure is proportionate with the objectives;
- e. determine case by case whether a person is to be deemed an 'individual beneficiary' within the meaning of Article 2 paragraph 2 letters a and c HSA and issue the appropriate legitimization cards to eligible persons;
- f. determine the length of the courtesy period that may be allowed to an individual beneficiary at the end of his or her period of service;
- g. direct the Federal Security Service to instruct the relevant police authorities to implement the further security measures referred to in Article 20 letter f HSA;
- h. enter into the bilateral agreements necessary to secure for the members of the diplomatic missions, the permanent missions or other representations to intergovernmental organisations and of the consular posts of Switzerland abroad the same privileges, immunities and facilities as are accorded to foreign representations of the same category in Switzerland.

<sup>2</sup> The FDFA shall adopt rules regulating its own internal allocation of responsibilities.

### Chapter 9: Final Provisions

**Art. 31** Amendment of current legislation

The amendment of current legislation is regulated in the Annex.

**Art. 32** Commencement

This Ordinance comes into force on 1 January 2008.

*Annex*  
(Art. 31)

### Amendment of Current Legislation

The following Ordinances are amended as follows:

#### 1. Ordinance of 27 June 2001<sup>11</sup> on Security Matters subject to Federal Powers

*Art. 6 para. 1 let. d*

...

#### 2. Ordinance of 24 October 2007<sup>12</sup> on Fees under the Federal Act on Foreign Nationals

*Art. 13 para. 1 let. b*

...

#### 3. Ordinance of 24 October 2007<sup>13</sup> on Entry and Visa Procedure

*Art. 21 para. 1 let. c*

...

#### 4. Federal Staff Ordinance of 3 July 2001<sup>14</sup>

*Art. 88 para. 2*

...

- <sup>11</sup> SR 120.72. The following amendment is inserted in the said Ordinance.  
<sup>12</sup> SR 142.209. The following amendment is inserted in the said Ordinance.  
<sup>13</sup> SR 142.204. The following amendment is inserted in the said Ordinance.  
<sup>14</sup> SR 172.220.111.3. The following amendment is inserted in the said Ordinance.

**5. Ordinance of 1 October 1984<sup>15</sup> on the Acquisition of Real Estate in Switzerland by Non-Residents**

*Art. 5 para. 3 let. a*

...

*Art. 15 para. 2*

...

**6. Ordinance of 7 June 2004<sup>16</sup> on the Ordipro Information System of the Federal Department for Foreign Affairs**

*Art. 1 para. 2*

...

*Art. 3 let. v and w*

...

*Art. 4 para. 1*

...

*Art. 5 para. 2 let. g*

...

**7. Customs Ordinance of 1 November 2006<sup>17</sup>**

*Art. 6 para. 2*

...

<sup>15</sup> SR 211.412.411. The following amendments are inserted in the said Ordinance.

<sup>16</sup> SR 235.21. The following amendments are inserted in the said Ordinance.

<sup>17</sup> SR 631.01. The following amendment is inserted in the said Ordinance.

**8. Ordinance of 13 November 1985<sup>18</sup> on the Customs Privileges of the International Organisations, of States in their Relations with such Organisations and of the Special Missions of Foreign States**

*Expression replaced*

...

*Art. 1 para. 1<sup>bis</sup>*

...

*Art. 18a*

...

**9. Ordinance of 29 March 2000<sup>19</sup> to the Federal Act on Value Added Tax**

*Expression replaced*

...

*Art. 19a let. a*

...

*Heading before Art. 20*

...

*Art. 20 para. 1 and 1<sup>bis</sup>*

...

*Art. 21*

*Repealed*

*Art. 23 para. 2*

...

*Art. 27a*

...

<sup>18</sup> SR 631.145.0. The following amendments are inserted in the said Ordinance.

<sup>19</sup> SR 641.201. The following amendments are inserted in the said Ordinance.

<p><b>10. Mineral Oil Tax Ordinance of 20 November 1996</b><sup>20</sup></p> <p><i>Art. 26 para. 1 let. b, c and d</i></p> <p>...</p> <p><b>11. Ordinance of 27 October 1976</b><sup>21</sup> <b>on the Licensing of Persons and Vehicles for Road Traffic Purposes</b></p> <p><i>Art. 42 para. 3<sup>ter</sup></i></p> <p>...</p> <p><i>Art. 86 para. 1 let. b and c</i></p> <p>...</p> <p><b>12. Ordinance of 14 June 2002</b><sup>22</sup> <b>on Telecommunications Installations</b></p> <p><i>Art. 16 let. j</i></p> <p>...</p> <p><b>13. Radio and Television Ordinance of 9 March 2007</b><sup>23</sup></p> <p><i>Art. 63 let. d and e</i></p> <p>...</p> <p><b>14. Ordinance of 31 October 1947</b><sup>24</sup> <b>on the Old-Age and Survivors' Insurance</b></p> <p><i>Art. 1b let. a, b and c</i></p> <p>...</p>	<p><i>Art. 33 let. a and b</i></p> <p>...</p> <p><b>15. Ordinance of 27 June 1995</b><sup>25</sup> <b>on Health Insurance</b></p> <p><i>Art. 6</i></p> <p>...</p> <p><i>Art. 7 para. 6</i></p> <p>...</p> <p><b>16. Ordinance of 20 December 1982</b><sup>26</sup> <b>on Accident Insurance</b></p> <p><i>Art. 3 para. 1, 3 and 5</i></p> <p>...</p>
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<sup>20</sup> SR 641.611. The following amendment is inserted in the said Ordinance.  
<sup>21</sup> SR 741.51. The following amendments are inserted in the said Ordinance.  
<sup>22</sup> SR 784.101.2. The following amendment is inserted in the said Ordinance.  
<sup>23</sup> SR 784.401. The following amendment is inserted in the said Ordinance.  
<sup>24</sup> SR 831.101. The following amendments are inserted in the said Ordinance.

<sup>25</sup> SR 832.102. The following amendments are inserted in the said Ordinance.  
<sup>26</sup> SR 832.202. The following amendment is inserted in the said Ordinance.



**Charter of the Association of Southeast Asian  
Nations, 2007**

economic growth, shared prosperity and social progress, and to promote our vital interests, ideals and aspirations;

**RESPECTING** the fundamental importance of amity and cooperation, and the principles of sovereignty, equality, territorial integrity, non-interference, consensus and unity in diversity;

**ADHERING** to the principles of democracy, the rule of law and good governance, respect for and protection of human rights and fundamental freedoms;

**RESOLVED** to ensure sustainable development for the benefit of present and future generations and to place the well-being, livelihood and welfare of the peoples at the centre of the ASEAN community building process;

**CONVINCED** of the need to strengthen existing bonds of regional solidarity to realise an ASEAN Community that is politically cohesive, economically integrated and socially responsible in order to effectively respond to current and future challenges and opportunities;

**COMMITTED** to intensifying community building through enhanced regional cooperation and integration, in particular by establishing an ASEAN Community comprising the ASEAN Security Community, the ASEAN Economic Community and the ASEAN Socio-Cultural Community, as provided for in the Bali Declaration of ASEAN Concord II;

**HEREBY DECIDE** to establish, through this Charter, the legal and institutional framework for ASEAN,

**AND TO THIS END**, the Heads of State or Government of the Member States of ASEAN, assembled in Singapore on the historic occasion of the 40<sup>th</sup> anniversary of the founding of ASEAN, have agreed to this Charter.

## CHARTER OF THE ASSOCIATION OF SOUTHEAST ASIAN NATIONS

### PREAMBLE

**WE, THE PEOPLES** of the Member States of the Association of Southeast Asian Nations (ASEAN), as represented by the Heads of State or Government of Brunei Darussalam, the Kingdom of Cambodia, the Republic of Indonesia, the Lao People's Democratic Republic, Malaysia, the Union of Myanmar, the Republic of the Philippines, the Republic of Singapore, the Kingdom of Thailand and the Socialist Republic of Viet Nam:

**NOTING** with satisfaction the significant achievements and expansion of ASEAN since its establishment in Bangkok through the promulgation of The ASEAN Declaration;

**RECALLING** the decisions to establish an ASEAN Charter in the Vientiane Action Programme, the Kuala Lumpur Declaration on the Establishment of the ASEAN Charter and the Cebu Declaration on the Blueprint of the ASEAN Charter;

**MINDFUL** of the existence of mutual interests and interdependence among the peoples and Member States of ASEAN which are bound by geography, common objectives and shared destiny;

**INSPIRED** by and united under One Vision, One Identity and One Caring and Sharing Community;

**UNITED** by a common desire and collective will to live in a region of lasting peace, security and stability, sustained

## **CHAPTER I PURPOSES AND PRINCIPLES**

### **ARTICLE 1 PURPOSES**

The Purposes of ASEAN are:

1. To maintain and enhance peace, security and stability and further strengthen peace-oriented values in the region;
2. To enhance regional resilience by promoting greater political, security, economic and socio-cultural cooperation;
3. To preserve Southeast Asia as a Nuclear Weapon-Free Zone and free of all other weapons of mass destruction;
4. To ensure that the peoples and Member States of ASEAN live in peace with the world at large in a just, democratic and harmonious environment;
5. To create a single market and production base which is stable, prosperous, highly competitive and economically integrated with effective facilitation for trade and investment in which there is free flow of goods, services and investment; facilitated movement of business persons, professionals, talents and labour; and freer flow of capital;
6. To alleviate poverty and narrow the development gap within ASEAN through mutual assistance and cooperation;
7. To strengthen democracy, enhance good governance and the rule of law, and to promote and protect human rights and fundamental freedoms, with due regard to the rights and responsibilities of the Member States of ASEAN;

8. To respond effectively, in accordance with the principle of comprehensive security, to all forms of threats, transnational crimes and transboundary challenges;
9. To promote sustainable development so as to ensure the protection of the region's environment, the sustainability of its natural resources, the preservation of its cultural heritage and the high quality of life of its peoples;
10. To develop human resources through closer cooperation in education and life-long learning, and in science and technology, for the empowerment of the peoples of ASEAN and for the strengthening of the ASEAN Community;
11. To enhance the well-being and livelihood of the peoples of ASEAN by providing them with equitable access to opportunities for human development, social welfare and justice;
12. To strengthen cooperation in building a safe, secure and drug-free environment for the peoples of ASEAN;
13. To promote a people-oriented ASEAN in which all sectors of society are encouraged to participate in, and benefit from, the process of ASEAN integration and community building;
14. To promote an ASEAN identity through the fostering of greater awareness of the diverse culture and heritage of the region; and
15. To maintain the centrality and proactive role of ASEAN as the primary driving force in its relations and cooperation with its external partners in a regional architecture that is open, transparent and inclusive.

## ARTICLE 2 PRINCIPLES

1. In pursuit of the Purposes stated in Article 1, ASEAN and its Member States reaffirm and adhere to the fundamental principles contained in the declarations, agreements, conventions, concords, treaties and other instruments of ASEAN.

2. ASEAN and its Member States shall act in accordance with the following Principles:

- (a) respect for the independence, sovereignty, equality, territorial integrity and national identity of all ASEAN Member States;
- (b) shared commitment and collective responsibility in enhancing regional peace, security and prosperity;
- (c) renunciation of aggression and of the threat or use of force or other actions in any manner inconsistent with international law;
- (d) reliance on peaceful settlement of disputes;
- (e) non-interference in the internal affairs of ASEAN Member States;
- (f) respect for the right of every Member State to lead its national existence free from external interference, subversion and coercion;
- (g) enhanced consultations on matters seriously affecting the common interest of ASEAN;

- (h) adherence to the rule of law, good governance, the principles of democracy and constitutional government;
- (i) respect for fundamental freedoms, the promotion and protection of human rights, and the promotion of social justice;
- (j) upholding the United Nations Charter and international law, including international humanitarian law, subscribed to by ASEAN Member States;
- (k) abstention from participation in any policy or activity, including the use of its territory, pursued by any ASEAN Member State or non-ASEAN State or any non-State actor, which threatens the sovereignty, territorial integrity or political and economic stability of ASEAN Member States;
- (l) respect for the different cultures, languages and religions of the peoples of ASEAN, while emphasising their common values in the spirit of unity in diversity;
- (m) the centrality of ASEAN in external political, economic, social and cultural relations while remaining actively engaged, outward-looking, inclusive and non-discriminatory; and
- (n) adherence to multilateral trade rules and ASEAN's rules-based regimes for effective implementation of economic commitments and progressive reduction towards elimination of all barriers to regional economic integration, in a market-driven economy.

**CHAPTER II  
LEGAL PERSONALITY**

**ARTICLE 3  
LEGAL PERSONALITY OF ASEAN**

ASEAN, as an inter-governmental organisation, is hereby conferred legal personality.

**CHAPTER III  
MEMBERSHIP**

**ARTICLE 4  
MEMBER STATES**

The Member States of ASEAN are Brunei Darussalam, the Kingdom of Cambodia, the Republic of Indonesia, the Lao People's Democratic Republic, Malaysia, the Union of Myanmar, the Republic of the Philippines, the Republic of Singapore, the Kingdom of Thailand and the Socialist Republic of Viet Nam.

**ARTICLE 5  
RIGHTS AND OBLIGATIONS**

1. Member States shall have equal rights and obligations under this Charter.
2. Member States shall take all necessary measures, including the enactment of appropriate domestic legislation, to effectively implement the provisions of this Charter and to comply with all obligations of membership.
3. In the case of a serious breach of the Charter or non-compliance, the matter shall be referred to Article 20.

**ARTICLE 6  
ADMISSION OF NEW MEMBERS**

1. The procedure for application and admission to ASEAN shall be prescribed by the ASEAN Coordinating Council.
2. Admission shall be based on the following criteria:

(a) location in the recognised geographical region of Southeast Asia;

(b) recognition by all ASEAN Member States;

(c) agreement to be bound and to abide by the Charter; and

(d) ability and willingness to carry out the obligations of Membership.

3. Admission shall be decided by consensus by the ASEAN Summit, upon the recommendation of the ASEAN Coordinating Council.

4. An applicant State shall be admitted to ASEAN upon signing an Instrument of Accession to the Charter.

## CHAPTER IV ORGANS

### ARTICLE 7 ASEAN SUMMIT

1. The ASEAN Summit shall comprise the Heads of State or Government of the Member States.

2. The ASEAN Summit shall:

(a) be the supreme policy-making body of ASEAN;

(b) deliberate, provide policy guidance and take decisions on key issues pertaining to the realisation of the objectives of ASEAN, important matters of interest to Member States and all issues referred to it by the ASEAN Coordinating Council, the ASEAN Community Councils and ASEAN Sectoral Ministerial Bodies;

(c) instruct the relevant Ministers in each of the Councils concerned to hold ad hoc inter-Ministerial meetings, and address important issues concerning ASEAN that cut across the Community Councils. Rules of procedure for such meetings shall be adopted by the ASEAN Coordinating Council;

(d) address emergency situations affecting ASEAN by taking appropriate actions;

(e) decide on matters referred to it under Chapters VII and VIII;

- (f) authorise the establishment and the dissolution of Sectoral Ministerial Bodies and other ASEAN institutions; and
- (g) appoint the Secretary-General of ASEAN, with the rank and status of Minister, who will serve with the confidence and at the pleasure of the Heads of State or Government upon the recommendation of the ASEAN Foreign Ministers Meeting.

3. ASEAN Summit Meetings shall be:

- (a) held twice annually, and be hosted by the Member State holding the ASEAN Chairmanship; and
- (b) convened, whenever necessary, as special or ad hoc meetings to be chaired by the Member State holding the ASEAN Chairmanship, at venues to be agreed upon by ASEAN Member States.

**ARTICLE 8  
ASEAN COORDINATING COUNCIL**

1. The ASEAN Coordinating Council shall comprise the ASEAN Foreign Ministers and meet at least twice a year.
2. The ASEAN Coordinating Council shall:
  - (a) prepare the meetings of the ASEAN Summit;
  - (b) coordinate the implementation of agreements and decisions of the ASEAN Summit;
  - (c) coordinate with the ASEAN Community Councils to enhance policy coherence, efficiency and cooperation among them;

- (d) coordinate the reports of the ASEAN Community Councils to the ASEAN Summit;
  - (e) consider the annual report of the Secretary-General on the work of ASEAN;
  - (f) consider the report of the Secretary-General on the functions and operations of the ASEAN Secretariat and other relevant bodies;
  - (g) approve the appointment and termination of the Deputy Secretaries-General upon the recommendation of the Secretary-General; and
  - (h) undertake other tasks provided for in this Charter or such other functions as may be assigned by the ASEAN Summit.
3. The ASEAN Coordinating Council shall be supported by the relevant senior officials.

**ARTICLE 9  
ASEAN COMMUNITY COUNCILS**

1. The ASEAN Community Councils shall comprise the ASEAN Political-Security Community Council, ASEAN Economic Community Council, and ASEAN Socio-Cultural Community Council.
2. Each ASEAN Community Council shall have under its purview the relevant ASEAN Sectoral Ministerial Bodies.
3. Each Member State shall designate its national representation for each ASEAN Community Council meeting.

4. In order to realise the objectives of each of the three pillars of the ASEAN Community, each ASEAN Community Council shall:

- (a) ensure the implementation of the relevant decisions of the ASEAN Summit;
  - (b) coordinate the work of the different sectors under its purview, and on issues which cut across the other Community Councils; and
  - (c) submit reports and recommendations to the ASEAN Summit on matters under its purview.
5. Each ASEAN Community Council shall meet at least twice a year and shall be chaired by the appropriate Minister from the Member State holding the ASEAN Chairmanship.
6. Each ASEAN Community Council shall be supported by the relevant senior officials.

#### **ARTICLE 10**

##### **ASEAN SECTORAL MINISTERIAL BODIES**

1. ASEAN Sectoral Ministerial Bodies shall:
  - (a) function in accordance with their respective established mandates;
  - (b) implement the agreements and decisions of the ASEAN Summit under their respective purview;
  - (c) strengthen cooperation in their respective fields in support of ASEAN integration and community building; and

(d) submit reports and recommendations to their respective Community Councils.

2. Each ASEAN Sectoral Ministerial Body may have under its purview the relevant senior officials and subsidiary bodies to undertake its functions as contained in Annex 1. The Annex may be updated by the Secretary-General of ASEAN upon the recommendation of the Committee of Permanent Representatives without recourse to the provision on Amendments under this Charter.

#### **ARTICLE 11**

##### **SECRETARY-GENERAL OF ASEAN AND ASEAN SECRETARIAT**

1. The Secretary-General of ASEAN shall be appointed by the ASEAN Summit for a non-renewable term of office of five years, selected from among nationals of the ASEAN Member States based on alphabetical rotation, with due consideration to integrity, capability and professional experience, and gender equality.
2. The Secretary-General shall:
  - (a) carry out the duties and responsibilities of this high office in accordance with the provisions of this Charter and relevant ASEAN instruments, protocols and established practices;
  - (b) facilitate and monitor progress in the implementation of ASEAN agreements and decisions, and submit an annual report on the work of ASEAN to the ASEAN Summit;
  - (c) participate in meetings of the ASEAN Summit, the ASEAN Community Councils, the ASEAN

Coordinating Council, and ASEAN Sectoral Ministerial Bodies and other relevant ASEAN meetings;

- (d) present the views of ASEAN and participate in meetings with external parties in accordance with approved policy guidelines and mandate given to the Secretary-General; and
- (e) recommend the appointment and termination of the Deputy Secretaries-General to the ASEAN Coordinating Council for approval.

3. The Secretary-General shall also be the Chief Administrative Officer of ASEAN.

4. The Secretary-General shall be assisted by four Deputy Secretaries-General with the rank and status of Deputy Ministers. The Deputy Secretaries-General shall be accountable to the Secretary-General in carrying out their functions.

5. The four Deputy Secretaries-General shall be of different nationalities from the Secretary-General and shall come from four different ASEAN Member States.

6. The four Deputy Secretaries-General shall comprise:

- (a) two Deputy Secretaries-General who will serve a non-renewable term of three years, selected from among nationals of the ASEAN Member States based on alphabetical rotation, with due consideration to integrity, qualifications, competence, experience and gender equality; and

(b) two Deputy Secretaries-General who will serve a term of three years, which may be renewed for another three years. These two Deputy Secretaries-General shall be openly recruited based on merit.

7. The ASEAN Secretariat shall comprise the Secretary-General and such staff as may be required.

8. The Secretary-General and the staff shall:

- (a) uphold the highest standards of integrity, efficiency, and competence in the performance of their duties;
- (b) not seek or receive instructions from any government or external party outside of ASEAN; and
- (c) refrain from any action which might reflect on their position as ASEAN Secretariat officials responsible only to ASEAN.

9. Each ASEAN Member State undertakes to respect the exclusively ASEAN character of the responsibilities of the Secretary-General and the staff, and not to seek to influence them in the discharge of their responsibilities.

## **ARTICLE 12 COMMITTEE OF PERMANENT REPRESENTATIVES TO ASEAN**

1. Each ASEAN Member State shall appoint a Permanent Representative to ASEAN with the rank of Ambassador based in Jakarta.

2. The Permanent Representatives collectively constitute a Committee of Permanent Representatives, which shall:

- (a) support the work of the ASEAN Community Councils and ASEAN Sectoral Ministerial Bodies;
- (b) coordinate with ASEAN National Secretariats and other ASEAN Sectoral Ministerial Bodies;
- (c) liaise with the Secretary-General of ASEAN and the ASEAN Secretariat on all subjects relevant to its work;
- (d) facilitate ASEAN cooperation with external partners; and
- (e) perform such other functions as may be determined by the ASEAN Coordinating Council.

**ARTICLE 13**  
**ASEAN NATIONAL SECRETARIATS**

Each ASEAN Member State shall establish an ASEAN National Secretariat which shall:

- (a) serve as the national focal point;
- (b) be the repository of information on all ASEAN matters at the national level;
- (c) coordinate the implementation of ASEAN decisions at the national level;
- (d) coordinate and support the national preparations of ASEAN meetings;
- (e) promote ASEAN identity and awareness at the national level; and

- (f) contribute to ASEAN community building.

**ARTICLE 14**  
**ASEAN HUMAN RIGHTS BODY**

1. In conformity with the purposes and principles of the ASEAN Charter relating to the promotion and protection of human rights and fundamental freedoms, ASEAN shall establish an ASEAN human rights body.
2. This ASEAN human rights body shall operate in accordance with the terms of reference to be determined by the ASEAN Foreign Ministers Meeting.

**ARTICLE 15**  
**ASEAN FOUNDATION**

1. The ASEAN Foundation shall support the Secretary-General of ASEAN and collaborate with the relevant ASEAN bodies to support ASEAN community building by promoting greater awareness of the ASEAN identity, people-to-people interaction, and close collaboration among the business sector, civil society, academia and other stakeholders in ASEAN.
2. The ASEAN Foundation shall be accountable to the Secretary-General of ASEAN, who shall submit its report to the ASEAN Summit through the ASEAN Coordinating Council.

**CHAPTER V  
ENTITIES ASSOCIATED WITH ASEAN**

**ARTICLE 16  
ENTITIES ASSOCIATED WITH ASEAN**

1. ASEAN may engage with entities which support the ASEAN Charter, in particular its purposes and principles. These associated entities are listed in Annex 2.
2. Rules of procedure and criteria for engagement shall be prescribed by the Committee of Permanent Representatives upon the recommendation of the Secretary-General of ASEAN.
3. Annex 2 may be updated by the Secretary-General of ASEAN upon the recommendation of the Committee of Permanent Representatives without recourse to the provision on Amendments under this Charter.

**CHAPTER VI  
IMMUNITIES AND PRIVILEGES**

**ARTICLE 17  
IMMUNITIES AND PRIVILEGES OF ASEAN**

1. ASEAN shall enjoy in the territories of the Member States such immunities and privileges as are necessary for the fulfilment of its purposes.
2. The immunities and privileges shall be laid down in separate agreements between ASEAN and the host Member State.

**ARTICLE 18  
IMMUNITIES AND PRIVILEGES OF THE SECRETARY-  
GENERAL OF ASEAN AND STAFF OF THE ASEAN  
SECRETARIAT**

1. The Secretary-General of ASEAN and staff of the ASEAN Secretariat participating in official ASEAN activities or representing ASEAN in the Member States shall enjoy such immunities and privileges as are necessary for the independent exercise of their functions.
2. The immunities and privileges under this Article shall be laid down in a separate ASEAN agreement.

**ARTICLE 19  
IMMUNITIES AND PRIVILEGES OF THE PERMANENT  
REPRESENTATIVES AND OFFICIALS ON ASEAN DUTIES**

1. The Permanent Representatives of the Member States to ASEAN and officials of the Member States participating in official ASEAN activities or representing ASEAN in the Member

States shall enjoy such immunities and privileges as are necessary for the exercise of their functions.

2. The immunities and privileges of the Permanent Representatives and officials on ASEAN duties shall be governed by the 1961 Vienna Convention on Diplomatic Relations or in accordance with the national law of the ASEAN Member State concerned.

## **CHAPTER VII DECISION-MAKING**

### **ARTICLE 20 CONSULTATION AND CONSENSUS**

1. As a basic principle, decision-making in ASEAN shall be based on consultation and consensus.
2. Where consensus cannot be achieved, the ASEAN Summit may decide how a specific decision can be made.
3. Nothing in paragraphs 1 and 2 of this Article shall affect the modes of decision-making as contained in the relevant ASEAN legal instruments.
4. In the case of a serious breach of the Charter or non-compliance, the matter shall be referred to the ASEAN Summit for decision.

### **ARTICLE 21 IMPLEMENTATION AND PROCEDURE**

1. Each ASEAN Community Council shall prescribe its own rules of procedure.
2. In the implementation of economic commitments, a formula for flexible participation, including the ASEAN Minus X formula, may be applied where there is a consensus to do so.

**CHAPTER VIII  
SETTLEMENT OF DISPUTES**

**ARTICLE 22  
GENERAL PRINCIPLES**

1. Member States shall endeavour to resolve peacefully all disputes in a timely manner through dialogue, consultation and negotiation.
2. ASEAN shall maintain and establish dispute settlement mechanisms in all fields of ASEAN cooperation.

**ARTICLE 23  
GOOD OFFICES, CONCILIATION AND MEDIATION**

1. Member States which are parties to a dispute may at any time agree to resort to good offices, conciliation or mediation in order to resolve the dispute within an agreed time limit.
2. Parties to the dispute may request the Chairman of ASEAN or the Secretary-General of ASEAN, acting in an ex-officio capacity, to provide good offices, conciliation or mediation.

**ARTICLE 24  
DISPUTE SETTLEMENT MECHANISMS IN SPECIFIC INSTRUMENTS**

1. Disputes relating to specific ASEAN instruments shall be settled through the mechanisms and procedures provided for in such instruments.
2. Disputes which do not concern the interpretation or application of any ASEAN instrument shall be resolved

peacefully in accordance with the Treaty of Amity and Cooperation in Southeast Asia and its rules of procedure.

3. Where not otherwise specifically provided, disputes which concern the interpretation or application of ASEAN economic agreements shall be settled in accordance with the ASEAN Protocol on Enhanced Dispute Settlement Mechanism.

**ARTICLE 25  
ESTABLISHMENT OF DISPUTE SETTLEMENT MECHANISMS**

Where not otherwise specifically provided, appropriate dispute settlement mechanisms, including arbitration, shall be established for disputes which concern the interpretation or application of this Charter and other ASEAN instruments.

**ARTICLE 26  
UNRESOLVED DISPUTES**

When a dispute remains unresolved, after the application of the preceding provisions of this Chapter, this dispute shall be referred to the ASEAN Summit, for its decision.

**ARTICLE 27  
COMPLIANCE**

1. The Secretary-General of ASEAN, assisted by the ASEAN Secretariat or any other designated ASEAN body, shall monitor the compliance with the findings, recommendations or decisions resulting from an ASEAN dispute settlement mechanism, and submit a report to the ASEAN Summit.
2. Any Member State affected by non-compliance with the findings, recommendations or decisions resulting from an

ASEAN dispute settlement mechanism, may refer the matter to the ASEAN Summit for a decision.

**ARTICLE 28**  
**UNITED NATIONS CHARTER PROVISIONS AND**  
**OTHER RELEVANT INTERNATIONAL PROCEDURES**

Unless otherwise provided for in this Charter, Member States have the right of recourse to the modes of peaceful settlement contained in Article 33(1) of the Charter of the United Nations or any other international legal instruments to which the disputing Member States are parties.

**CHAPTER IX**  
**BUDGET AND FINANCE**

**ARTICLE 29**  
**GENERAL PRINCIPLES**

1. ASEAN shall establish financial rules and procedures in accordance with international standards.
2. ASEAN shall observe sound financial management policies and practices and budgetary discipline.
3. Financial accounts shall be subject to internal and external audits.

**ARTICLE 30**  
**OPERATIONAL BUDGET AND FINANCES**  
**OF THE ASEAN SECRETARIAT**

1. The ASEAN Secretariat shall be provided with the necessary financial resources to perform its functions effectively.
2. The operational budget of the ASEAN Secretariat shall be met by ASEAN Member States through equal annual contributions which shall be remitted in a timely manner.
3. The Secretary-General shall prepare the annual operational budget of the ASEAN Secretariat for approval by the ASEAN Coordinating Council upon the recommendation of the Committee of Permanent Representatives.
4. The ASEAN Secretariat shall operate in accordance with the financial rules and procedures determined by the ASEAN Coordinating Council upon the recommendation of the Committee of Permanent Representatives.

**CHAPTER X  
ADMINISTRATION AND PROCEDURE**

**ARTICLE 31  
CHAIRMAN OF ASEAN**

1. The Chairmanship of ASEAN shall rotate annually, based on the alphabetical order of the English names of Member States.
2. ASEAN shall have, in a calendar year, a single Chairmanship by which the Member State assuming the Chairmanship shall chair:

- (a) the ASEAN Summit and related summits;
- (b) the ASEAN Coordinating Council;
- (c) the three ASEAN Community Councils;
- (d) where appropriate, the relevant ASEAN Sectoral Ministerial Bodies and senior officials; and
- (e) the Committee of Permanent Representatives.

**ARTICLE 32  
ROLE OF THE CHAIRMAN OF ASEAN**

The Member State holding the Chairmanship of ASEAN shall:

- (a) actively promote and enhance the interests and well-being of ASEAN, including efforts to build an ASEAN Community through policy initiatives, coordination, consensus and cooperation;
- (b) ensure the centrality of ASEAN;

- (c) ensure an effective and timely response to urgent issues or crisis situations affecting ASEAN, including providing its good offices and such other arrangements to immediately address these concerns;
- (d) represent ASEAN in strengthening and promoting closer relations with external partners; and
- (e) carry out such other tasks and functions as may be mandated.

**ARTICLE 33  
DIPLOMATIC PROTOCOL AND PRACTICES**

ASEAN and its Member States shall adhere to existing diplomatic protocol and practices in the conduct of all activities relating to ASEAN. Any changes shall be approved by the ASEAN Coordinating Council upon the recommendation of the Committee of Permanent Representatives.

**ARTICLE 34  
WORKING LANGUAGE OF ASEAN**

The working language of ASEAN shall be English.

**CHAPTER XI  
IDENTITY AND SYMBOLS**

**ARTICLE 35  
ASEAN IDENTITY**

ASEAN shall promote its common ASEAN identity and a sense of belonging among its peoples in order to achieve its shared destiny, goals and values.

**ARTICLE 36  
ASEAN MOTTO**

The ASEAN motto shall be: "*One Vision, One Identity, One Community*"

**ARTICLE 37  
ASEAN FLAG**

The ASEAN flag shall be as shown in Annex 3.

**ARTICLE 38  
ASEAN EMBLEM**

The ASEAN emblem shall be as shown in Annex 4.

**ARTICLE 39  
ASEAN DAY**

The eighth of August shall be observed as ASEAN Day.

**ARTICLE 40  
ASEAN ANTHEM**

ASEAN shall have an anthem.

**CHAPTER XII  
EXTERNAL RELATIONS**

**ARTICLE 41**

**CONDUCT OF EXTERNAL RELATIONS**

1. ASEAN shall develop friendly relations and mutually beneficial dialogue, cooperation and partnerships with countries and sub-regional, regional and international organisations and institutions.
2. The external relations of ASEAN shall adhere to the purposes and principles set forth in this Charter.
3. ASEAN shall be the primary driving force in regional arrangements that it initiates and maintain its centrality in regional cooperation and community building.
4. In the conduct of external relations of ASEAN, Member States shall, on the basis of unity and solidarity, coordinate and endeavour to develop common positions and pursue joint actions.
5. The strategic policy directions of ASEAN's external relations shall be set by the ASEAN Summit upon the recommendation of the ASEAN Foreign Ministers Meeting.
6. The ASEAN Foreign Ministers Meeting shall ensure consistency and coherence in the conduct of ASEAN's external relations.
7. ASEAN may conclude agreements with countries or sub-regional, regional and international organisations and institutions. The procedures for concluding such agreements

shall be prescribed by the ASEAN Coordinating Council in consultation with the ASEAN Community Councils.

**ARTICLE 42  
DIALOGUE COORDINATOR**

1. Member States, acting as Country Coordinators, shall take turns to take overall responsibility in coordinating and promoting the interests of ASEAN in its relations with the relevant Dialogue Partners, regional and international organisations and institutions.
2. In relations with the external partners, the Country Coordinators shall, *inter alia*:
  - (a) represent ASEAN and enhance relations on the basis of mutual respect and equality, in conformity with ASEAN's principles;
  - (b) co-chair relevant meetings between ASEAN and external partners; and
  - (c) be supported by the relevant ASEAN Committees in Third Countries and International Organisations.

**ARTICLE 43  
ASEAN COMMITTEES IN THIRD COUNTRIES  
AND INTERNATIONAL ORGANISATIONS**

1. ASEAN Committees in Third Countries may be established in non-ASEAN countries comprising heads of diplomatic missions of ASEAN Member States. Similar Committees may be established relating to international organisations. Such Committees shall promote ASEAN's interests and identity in the host countries and international organisations.

2. The ASEAN Foreign Ministers Meeting shall determine the rules of procedure of such Committees.

**ARTICLE 44  
STATUS OF EXTERNAL PARTIES**

1. In conducting ASEAN's external relations, the ASEAN Foreign Ministers Meeting may confer on an external party the formal status of Dialogue Partner, Sectoral Dialogue Partner, Development Partner, Special Observer, Guest, or other status that may be established henceforth.
2. External parties may be invited to ASEAN meetings or cooperative activities without being conferred any formal status, in accordance with the rules of procedure.

**ARTICLE 45  
RELATIONS WITH THE UNITED NATIONS SYSTEM AND  
OTHER INTERNATIONAL ORGANISATIONS AND  
INSTITUTIONS**

1. ASEAN may seek an appropriate status with the United Nations system as well as with other sub-regional, regional, international organisations and institutions.
2. The ASEAN Coordinating Council shall decide on the participation of ASEAN in other sub-regional, regional, international organisations and institutions.

**ARTICLE 46  
ACCREDITATION OF NON-ASEAN MEMBER STATES TO  
ASEAN**

Non-ASEAN Member States and relevant inter-governmental organisations may appoint and accredit Ambassadors to ASEAN. The ASEAN Foreign Ministers Meeting shall decide on such accreditation.

**CHAPTER XIII  
GENERAL AND FINAL PROVISIONS**

**ARTICLE 47  
SIGNATURE, RATIFICATION, DEPOSITORY AND ENTRY  
INTO FORCE**

1. This Charter shall be signed by all ASEAN Member States.
2. This Charter shall be subject to ratification by all ASEAN Member States in accordance with their respective internal procedures.
3. Instruments of ratification shall be deposited with the Secretary-General of ASEAN who shall promptly notify all Member States of each deposit.
4. This Charter shall enter into force on the thirtieth day following the date of deposit of the tenth instrument of ratification with the Secretary-General of ASEAN.

**ARTICLE 48  
AMENDMENTS**

1. Any Member State may propose amendments to the Charter.
2. Proposed amendments to the Charter shall be submitted by the ASEAN Coordinating Council by consensus to the ASEAN Summit for its decision.
3. Amendments to the Charter agreed to by consensus by the ASEAN Summit shall be ratified by all Member States in accordance with Article 47.

4. An amendment shall enter into force on the thirtieth day following the date of deposit of the last instrument of ratification with the Secretary-General of ASEAN.

**ARTICLE 49  
TERMS OF REFERENCE AND RULES OF PROCEDURE**

Unless otherwise provided for in this Charter, the ASEAN Coordinating Council shall determine the terms of reference and rules of procedure and shall ensure their consistency.

**ARTICLE 50  
REVIEW**

This Charter may be reviewed five years after its entry into force or as otherwise determined by the ASEAN Summit.

**ARTICLE 51  
INTERPRETATION OF THE CHARTER**

1. Upon the request of any Member State, the interpretation of the Charter shall be undertaken by the ASEAN Secretariat in accordance with the rules of procedure determined by the ASEAN Coordinating Council.
2. Any dispute arising from the interpretation of the Charter shall be settled in accordance with the relevant provisions in Chapter VIII.
3. Headings and titles used throughout the Charter shall only be for the purpose of reference.

**ARTICLE 52  
LEGAL CONTINUITY**

1. All treaties, conventions, agreements, concords, declarations, protocols and other ASEAN instruments which have been in effect before the entry into force of this Charter shall continue to be valid.
2. In case of inconsistency between the rights and obligations of ASEAN Member States under such instruments and this Charter, the Charter shall prevail.

**ARTICLE 53  
ORIGINAL TEXT**

The signed original text of this Charter in English shall be deposited with the Secretary-General of ASEAN, who shall provide a certified copy to each Member State.

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**ARTICLE 54  
REGISTRATION OF THE ASEAN CHARTER**

This Charter shall be registered by the Secretary-General of ASEAN with the Secretariat of the United Nations, pursuant to Article 102, paragraph 1 of the Charter of the United Nations.

**ARTICLE 55  
ASEAN ASSETS**

The assets and funds of the Organisation shall be vested in the name of ASEAN.



**Statement of the Chairman of the Drafting  
Committee, International Law Commission,  
sixty-third session, 3 June 2011**

Responsibility of international organizations

**Statement of the Chairman of the Drafting Committee**

3 June 2011

Mr. Chairman,

It is my pleasure, today, to introduce the second report of the Drafting Committee for the sixty-third session of the Commission. This report, which deals with the topic "Responsibility of international organizations", is contained in document A/CN.4/L.778. The Committee had before it the entire set of draft articles on the responsibility of international organizations, as adopted on first reading, together with the recommendations of the Special Rapporteur contained in his eighth report, the suggestions made during the Plenary debate and the comments received from Governments and international organizations.

The Drafting Committee held 11 meetings from 29 April to 19 May on this topic. I am pleased to report that the Committee was able to complete the second reading of a set of 67 draft articles on the responsibility of international organizations, and decided to submit its report to the Plenary with the recommendation that the draft articles be adopted by the Commission, on second reading.

Mr. Chairman,

This is an historic moment for the International Law Commission. Today's report signifies the drawing to a close of the Commission's work on the subject of international responsibility, which was among the original topics selected in 1949 for consideration by the Commission. This work has been the subject of the Commission's attention for nearly 60 years and is unquestionably one of its most important contributions to the codification and progressive development of international law. Following the successful conclusion in 2001 of the articles on State responsibility, the Commission turned its attention to the question of the responsibility of international organizations, which has kept it busy for the better part of the last decade.

The Commission was particularly fortunate to have had at its disposal the services of extremely well qualified and experienced Special Rapporteurs who have put much of their energy and intellectual talent into conceptualizing and developing the international regime of responsibility for States and now for international organizations. The present Special Rapporteur, Prof. Giorgio Gajja, is no exception and has joined a select list of Special Rapporteurs who have made their mark on the contemporary understanding of international law. On behalf of the Drafting Committee, I wish to express my deep appreciation to the Special Rapporteur for his full cooperation and the efficient manner in which he approached the second reading of the draft articles. His mastery of the subject greatly facilitated the task of the Drafting Committee. I also wish to express my appreciation to the members of the Committee for their cooperation and their constructive manner, as well as the good spirit in which they discussed the articles. Furthermore, I wish to thank the Secretariat for its valuable assistance.

Mr. Chairman,

Before turning to the article by article discussion, I might add that the Committee considered matters of translation into all the languages of the United Nations, in order to align the various linguistic texts with the English original. I will not dwell on such matters today. However,

through you, Mr. Chairman, I will request the members of the Commission who still notice some discrepancies in other language versions of the articles to inform the Secretariat.

Mr. Chairman,

The draft articles on the responsibility of international organizations, as adopted by the Drafting Committee, are structured into six parts.

**Part One - Introduction**

The Drafting Committee retained the title for Part One as "Introduction". It is constituted of two draft articles.

**Draft article 1**

Mr. Chairman,

Draft article 1 pertains to the scope of the draft articles. Paragraph 1 was adopted as formulated on first reading, with the exception that the concluding phrase "act that is wrongful under international law" has been refined to "internationally wrongful act".

The Drafting Committee refined paragraph 2 so as to more closely reflect the scope of the draft articles. In particular, it sought a formula which took into account the fact that the draft articles, in draft articles 60 [59] and 61 [60], also covered the scenario of State responsibility for acts committed by an international organization which were not wrongful acts of that organization. Various formulations were considered. At the same time, the formulation of the paragraph had to also cover the situation envisaged in draft article 62 [61] where a State is responsible not for its own wrongful acts, but for those of an international organization. The Committee drew inspiration from the title of Part Five by reformulating the concluding phrase of the paragraph as "...for an internationally wrongful act in connection with the conduct of an international organization".

The Committee also considered including a specific mention to Part Five but decided against doing so since, although the provisions relating to State responsibility are grouped in Part Five, it is not only that Part which applies to State responsibility. Other Parts, such as Parts One and Six would also be relevant. The Committee considered linguistic options for trying to capture the manner in which the draft articles deal with the responsibility of States, including using terms such as "relates to", "refers to", "concerns", but without success. Accordingly, it decided to retain the more general reference to the drafting articles applying to State responsibility.

The Committee further resorted to the indefinite article "an" (instead of "the internationally wrongful act") so as to align the formulation with that adopted in paragraph 1.

The title of draft article 1 remains "Scope of the present draft articles".

**Draft article 2**

Mr. Chairman,

Draft article 2 pertains to the use of terms. The version being proposed for consideration at second reading contains the definitions of four phrases, as opposed to three in the first reading text.

Subparagraphs (a) and (b), defining "international organization" and "rules of the organization", respectively, have been retained in the version adopted on first reading, save for

the insertion of the word “international” before the first reference to “organization” in subparagraph (b). This was done for the sake of consistency in how the articles refer to international organizations. The same technical refinement has been made in a number of places throughout the draft articles. On subparagraph (b), the Drafting Committee also decided not to accept a suggestion to emphasize those rules which are part of international law, out of recognition that there also existed other rules of an organization which were not necessarily rules of international law, but which were nonetheless relevant to the draft articles, for example, in determining competence or the grant of consent. Nor did it consider it appropriate to include a hierarchy of rules, since such hierarchy could vary by international organization.

The main issues in this draft article, therefore, pertained to new subparagraph (c) and subparagraph (d). Subparagraph (c) was introduced in order to provide a definition of the phrase “organ of an international organization”. This was done on basis of the Special Rapporteur’s proposal which was inspired by article 4, paragraph 2, of the 2001 articles on the responsibility of States. The word “means” was resorted to, as opposed to “includes”, so as to align with the definition for “agents”. The Drafting Committee also considered a proposal which sought to establish a more substantive definition of an organ, as opposed to a *renvoi* to the rules of the organization. Under that proposal the definition would have been rendered as “...person or entity through whom the organization acts and who is charged by the organization with carrying out, or helping to carry out, one of its functions”. The Committee decided to retain the formulation in the more general terms proposed by the Special Rapporteur, out of recognition that the concept of “organ” has a different connotation for various international organizations. Individuals or entities which might not be captured by a definition of “organ” under the rules of an international organization, could nonetheless be considered an “agent” if the terms of subparagraph (d) are satisfied.

Subparagraph (d) defines the concept of “agent of an international organization”. Two changes were made to the first reading text. First, the words “of an international organization” were added after “agent”, so as to align with the formula adopted in new subparagraph (c). The second change involved bringing the provision more into line with the broader definition of the International Court of Justice in the *Reparation for Injuries* Advisory Opinion, by adding the reference to “who is charged by the organization with carrying out, or helping to carry out, one of its functions”. The reference to “through whom the organization acts” was moved to the end of the subparagraph and rendered as “thus, through whom the organization acts”. The word “thus” serves to indicate that this is not a cumulative requirement, but rather a further specification of the requirement of “carrying out, or helping to carry out, one of its functions”, as the Court stated in its Opinion.

The reference to “person or entity” is included out of recognition of the practice of international organizations delegating their functions to other persons or entities, such as other organizations or companies.

The Committee also considered the related issue of whether to avoid an overlap between the category of “organ” and “agent”, through the inclusion of the phrase “other than an organ”. While the Committee recognized that there may be situations where persons or entities, under the rules of the organization, enjoy both the designation of organ and agent, it made sense to draw a distinction between the two in the draft articles since reference is made, for example in draft articles 6 [5] to 8 [7], to “organ or agent”. The combined effect with subparagraph (c) then is that whatever the rules of the organization considers to be an organ is an “organ” for purpose of the draft articles. Everyone or everything else who is charged by the organization with carrying out, or helping to carry out, one of its functions, is an “agent” for purposes of the draft articles.

The title of draft article 2 remains “Use of terms”.

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## Part Two

Mr. Chairman,

I now draw your attention to Part Two of the draft articles, the title of which has been retained as “The internationally wrongful act of an international organization”. The Part is made up of five chapters.

Chapter I of Part Two continues to be entitled “General principles” and is constituted of three draft articles, including the only new draft article introduced during the second reading.

### Draft articles 3 and 4

Mr. Chairman,

Other than a technical refinement to change the second reference to “the international organization”, in both draft articles 3 and 4, to “that organization”, the texts and titles of those two draft articles were adopted without substantive change to the first reading versions. It might be mentioned that the Drafting Committee did take into account a suggestion that had been made by a State to include the requirement of the causation of damage in draft article 4. However, the Committee decided against this since it was not clear how it could be justified that such element would be required for acts committed by international organizations, but not for those committed by States (since the 2001 articles made no such reference).

### Draft article 5

As already mentioned, draft article 5 is new. It arose out of the discussion held in the context of draft article 64 [63] on the principle of *lex specialis*, and in particular whether that provision could be interpreted as implying that if an act is lawful under the rules of an international organization then it would necessarily be lawful under international law. As a matter of policy, the Drafting Committee felt that the draft articles should not allow for such an interpretation.

Accordingly, new draft article 5 deals with the characterization of an act of an international organization as internationally wrongful. It adopts, with the necessary modification, the formulation of the first sentence of article 3 of the 2001 articles on State responsibility, and establishes the principle that it is international law that decides whether an act of an international organization is wrongful or not.

The Drafting Committee did not, however, include the second sentence of the corresponding provision in the 2001 articles on State responsibility since it felt that it was not possible to make an analogous assertion along the lines that such characterization could not be affected by the rules of the organization, because the position taken in the draft articles was that the rules of the organization could include rules of international law which may be relevant to the characterization of an act as being internationally wrongful. While the Committee attempted to capture this nuance by modifying the language of the provision, including through a proposal to make reference to the “internal law” of the organization, it was unable to find a satisfactory reformulation. Accordingly, it settled for the text currently before you, with the understanding that the question of the interaction with the rules of the organization was best left for further explanation in the commentary (which will include a cross-reference to the material covered in the commentary to draft article 10 [9]).

The Drafting Committee agreed to have the provision early in the draft articles, in a similar location to the equivalent article in the State responsibility articles. Initially, it considered

the proposed new provision as a second paragraph to draft article 4, but decided to include it as a separate provision since it dealt with a different set of issues to those covered by draft article 4.

The title of draft article 5 is "Characterization of an act of an international organization as internationally wrongful", which is based on that of article 3 of the 2001 articles on State responsibility.

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## **Chapter II**

Mr. Chairman,

Chapter II continues to consist of four draft articles. The title adopted on first reading, namely "Attribution of conduct to an international organization" was retained.

### **Draft article 6 [5]**

Mr. Chairman,

Draft article 6 [5] covers the issue of the conduct of organs or agents of an international organization. The provision has been retained largely in the form adopted on first reading, with some drafting suggestions. In paragraph 1, the word "as" in "as an act" of the first reading version, was deleted to align the text closer to the 2001 articles on State responsibility.

The Committee took into account a suggestion that it be specified that the conduct in question be undertaken under the instruction and control of the organization, or in an official capacity. However, it decided not to include such an element out of concern not to create the impression of establishing an additional requirement. The issue has been resolved through an amendment to draft article 8 [7].

Paragraph 2 was also refined through an amendment of the opening phrase which now reads "[t]he rules of the organization apply in the determination". This was done to make it clearer that the rules of the organization are not the exclusive basis for determining the functions of the organ or agent, a point that is made in the commentary, but which was not clear in the first reading version of the draft articles. On the one hand, the international organization should not be allowed to rely on the fact that the attribution of functions to an agent went beyond its rules to deny the attribution of the conduct of the agent to it. On the other hand, it was recognized that the rules of the organization would normally apply in the determination of the functions of its organs and agents. The shift from "shall apply to" to "apply in" is intended to indicate this nuance in the meaning of the provision.

The title of draft article 6 [5] has been changed to "Conduct of organs or agents of an international organization" which was considered clearer, and corresponds to the 2001 articles on State responsibility.

### **Draft article 7 [6]**

Mr. Chairman,

The Drafting Committee noted that many of the comments on draft article 7 [6] were addressed to the commentaries. The Committee considered a proposal made by a State to

introduce a qualification that the organs placed at the disposal of the international organization were being used to carry out its functions. The Committee did not consider it necessary to specify this in the draft article. The draft article was, accordingly, adopted in the version adopted on first reading.

The title of draft article 7 [6] was amended to read "Conduct of organs of a State or organs or agents of an international organization placed at the disposal of another international organization", in order to align it closer with the text.

### **Draft article 8 [7]**

Mr. Chairman,

Draft article 8 [7] has been amended through the deletion of the indefinite article "an" before "agent of an international organization" so as to harmonize it with the formula adopted throughout the draft articles. The Committee further decided to replace the first reading reference to "in that capacity" with "in an official capacity and within the overall functions of that organization". The word "and" was included so as to make it clear that these are two distinct issues. This new qualifier was introduced in order to align the text with the practice of international organizations, even though there existed the concern in the Drafting Committee that this would unnecessarily limit the ability of victims to seek recourse against international organizations. On this latter point, the view of the Committee was that the question of the wrongful conduct of an international organization, if any, for failure to control its organs or agents, was a matter for draft article 6 [5].

In the concluding clause, the phrase "even though" has been changed to "even if", which is the formulation used in the corresponding article of the 2001 articles on State responsibility.

The title of draft article 8 [7] remains "Excess of authority or contravention of instructions".

### **Draft article 9 [8]**

Mr. Chairman,

Draft article 9 [8] concerns the question of conduct acknowledged and adopted by an international organization as its own. The provision elicited no changes other than the technical refinement of replacing the phrase "the preceding draft articles" with "draft articles 6 to 8" and deleting the second reference to "international" before "organization", for reasons mentioned earlier.

The title of draft article 9 [8] remains "Conduct acknowledged and adopted by an international organization as its own".

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## **Chapter III**

Mr. Chairman,

Chapter III also continues to consist of four draft articles. The title adopted on first reading, namely "Breach of an international obligation" was retained.

**Draft article 10 [9]**

Mr. Chairman,

Draft article 10 [9] deals with the existence of a breach of an international obligation. As regards paragraph 1, the Drafting Committee took note of a suggestion made by an international organization that it make it clearer in the draft article that breaches of the rules of an organization are not as such breaches of international law. The Committee considered making this nuance clearer by replacing “international obligation” with “obligation under international law”, but decided against it as it would have meant introducing such a change in other draft articles which could have led to unnecessary *a contrario* interpretations arising from the difference between the present draft articles and those on State responsibility. The commentary will clarify that what is meant by “international obligation” are obligations arising under international law. The Committee further focused on amending the concluding clause which in the first reading version read “regardless of its origin and character”. In particular, the Committee considered the use of the pronoun “its” to be confusing, and decided to reformulate the phrase as “regardless of the origin or character of the obligation concerned”. The earlier version “origin and character” has been rendered as “origin or character”, so as to align with the formulation in the 2001 articles on State responsibility.

The matter was also considered in paragraph 2, where the Drafting Committee changed the phrase “breach of an international obligation” to “breach of any international obligation” so as to suggest that by no means all obligations that may arise under the rules of the organization would be international obligations. The Committee further discussed alternative formulations for the words “that may arise”, including “on the basis of”, “under”, and “arising out of”. However, it decided to retain the first reading formulation as an indication that, while the rules of the organization might not *per se* be rules of international law, they nonetheless may serve as the basis of obligations which arise under international law.

The Drafting Committee also introduced the phrase “for an international organization towards its members”, after “international obligation that may arise” as a reminder that the rules of the organization constrain the organization primarily in its relations with its members. Obligations in relation to non-members arising out of the rules of the organization are not likely to be obligations under international law. In short, the phrase serves to confirm what is also said in draft article 32 [31] (and what is implied in draft article 5), namely that the rules of the organization cannot be relied upon as a way of justifying the non-application or modification of rules of international law which would otherwise be applicable to the organization.

The title of draft article 10 [9] remains “Existence of a breach of an international obligation”.

**Draft articles 11 [10], 12 [11] and 13 [12]**

Mr. Chairman,

The texts and titles of draft articles 11 [10], 12 [11] and 13 [12] were adopted in the same versions as on first reading, with minor technical adjustments. In draft article 11 [10], the second “international” before “organization” was deleted, in line with the practice already described. Similarly, in draft article 12 [11], paragraph 2, the concluding reference to “the international obligation” has been replaced by “that obligation”. There is also no longer a comma between the words “wrongful” and “occurs” in paragraph 1 of draft article 13 [12].

**Chapter IV**

Mr. Chairman,

Chapter IV of Part One is entitled “Responsibility of an international organization in connection with the act of a State or another international organization” and is constituted of six draft articles. The Drafting Committee decided to make no changes to the texts and titles of draft articles 14 [13], 15 [14], 16 [15], 18 [17] and 19 [18] as adopted on first reading, other than a technical refinement in subparagraphs (a) of draft articles 14 [13] and 15 [14], replacing the words “that organization” with “the former organization”. Accordingly, draft article 17 [16] was the only draft article in this Chapter that was the subject of modification.

Before proceeding to draft article 17 [16], allow me to state for the record that the Drafting Committee did consider, under draft article 14 [13], the question of whether the element of intention should be added to that of “knowledge of the circumstances of the act”. The commentary to the corresponding article in the State responsibility articles makes reference to the element of intention, and the issue was whether the same thing should be done in the commentary to draft article 14 [13]. The Special Rapporteur, in the commentary to the first reading text, had declined to reproduce the reference to the criterion of intention out of concern that this would give rise to a discrepancy with the draft article, which does not include such element. While there was support in the Drafting Committee for the inclusion of the criterion of intention in the draft article, the Committee decided against doing this as it would imply a reorientation of the concept of responsibility being employed, which could also have implications for the 2001 articles on State responsibility.

**Draft article 17 [16]**

Mr. Chairman,

I now draw your attention to draft article 17 [16], which was the subject of some discussion in the Drafting Committee. As you can see, the provision has been significantly restructured. Before describing the draft article paragraph by paragraph, allow me to dispose of one matter. The Special Rapporteur had proposed making the provision subject to what is now draft articles 14 [13] to 16 [15] by including a phrase to that effect at the beginning of what was paragraph 1. This would serve to remove any overlap between those provisions and draft article 17 [16] (which had been pointed out in some of the comments received) and would make it clear that draft article 17 [16] was an additional basis for establishing responsibility. The Drafting Committee decided that such precision was strictly not necessary, and that it could be explained in the commentary.

The central issue for the Drafting Committee, as in the Plenary debate, was whether the provision should, in principle, extend to cover circumvention through recommendations. If you recall, the Special Rapporteur had proposed to delete paragraph 2 of the first reading text entirely, so as to limit the draft article to responsibility for binding decisions. The Committee also had before it an intermediate proposal which retained the first reading text, including paragraph 2, but deleted references to the organization incurring responsibility for the recommendations it adopts, leaving the concept of responsibility for authorizations. The Committee also had before it a proposal that included the element of a recommendation causing members to commit such an act. It, however, decided not to pursue such approach, preferring instead to base itself on the proposal to limit responsibility for non-binding acts to authorizations granted by an organization. The view

of the Committee was that different organizations ascribed different meanings (and legal consequences) to the notion of “recommendations”. Regardless of such variety in approaches, what mattered was whether by making a recommendation the organization was, in effect, authorizing its members to act in a particular manner. In other words, the concept of “authorization” included within it those types of recommendations which constrained members of the organization to act in a certain manner. This will be explained further in the commentary.

Working on that understanding, the Drafting Committee adopted a provision similar to that adopted on first reading, with the key difference being that the concept of “circumvention” is given greater prominence by being located at the beginning of the formulation adopted for both paragraphs 1 and 2.

Paragraph 1, therefore, maintains the thrust of that adopted on first reading establishing international responsibility for an international organization arising from the adoption of a decision binding on its members. Paragraph 2 extends this to circumvention of an international obligation of an international organization by authorizing its members to commit the act which would be wrongful for the organization if it had committed the act. The additional concept, previously in subparagraph (b) in former paragraph 2, of the act actually having been performed, has been retained and strengthened by linking it to the authorization in the new words “and the act in question is committed because of that authorization”. The idea is of abuse by the international organization of its separate legal personality.

Paragraph 3 is retained substantially in the form adopted on first reading. The only changes introduced were to reflect the members being referred to in the plural, and to delete the reference to recommendations. The Drafting Committee also decided to replace the word “directed” with “addressed”, which is used in the title, so that the final clause now reads “to which the decision or authorization is addressed”.

The title of draft article 17 [16] has been amended to read “Circumvention of international obligations through decisions and authorizations addressed to members”, so as to more closely reflect the content of the provision. The new formula has the additional benefit of being similar to the titles for draft articles 14 [13], 15 [14] and 16 [15].

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## Chapter V

Mr. Chairman,

Chapter V is the final chapter of Part One. Its title remains “Circumstances precluding wrongfulness”. Of the eight draft articles in the chapter, the Drafting Committee made changes only to two. Accordingly, it adopted the texts and titles of draft articles 20 [19], 23 [22], 24 [23], 26 [25] and 27 [26] without change to the first reading version. The Drafting Committee discussed draft article 21 [20], without making changes, and modifications were introduced in draft articles 22 [21] and 25 [24].

### Draft article 21 [20]

Draft article 21 [20] on self-defence was discussed at some length in the Drafting Committee, with a view to providing the Special Rapporteur with guidance for the preparation of the commentary. After considering some tentative proposals for refining the text including by replacing “constitutes” with “may be regarded as”, “may amount to” and “is”, the Committee decided to retain the provision as proposed on first reading, while recognizing that the situation it provided for was, to some extent, theoretical, and not analogous to that raised in the context of States. This is admitted through the inclusion in the first reading text, and retained at second

reading, of the words “and to the extent that” which do not appear in the corresponding provision in the 2001 articles on State responsibility.

The title of draft article 21 [20] remains “Self-defence”.

### Draft article 22 [21]

Draft article 22 [21] deals with the characterization of the resort to countermeasures as a circumstance precluding wrongfulness. As in the Plenary debate, this provision was the subject of some debate in the Drafting Committee. As will be described shortly, the Committee decided to retain, in large part, the version adopted on first reading in a more elaborate manner. The main problem, which the Committee confronted, related to former paragraph 2, and in particular the possibility of the taking of countermeasures by an international organization against one of its members. The Drafting Committee accepted the working hypothesis suggested during the Plenary debate that it was possible to distinguish between countermeasures taken against a member for breaches of obligations unrelated to membership, and those against a member for obligations binding on it because of its membership, even if such distinction was not always easy to draw in practice. The focus of the Committee’s consideration thus was on seeking to qualify the possibility of countermeasures taken by an international organization against its members. One of the options considered was to convert paragraph 2 into a without prejudice clause, but such proposal did not garner sufficient support within the Committee. Instead the Committee decided to structure the provision in line with the hypothesis just referred to.

Paragraph 1 establishes the general scenario of countermeasures taken against non-member States. The Drafting Committee retained the text in the version adopted on first reading. Paragraph 1 applies subject to the exceptional rules in paragraph 2 and new paragraph 3.

Paragraph 2 covers the situation where countermeasures are taken against a member State or international organizations for the breach of an obligation unrelated to the State’s or organization’s membership. As a policy matter, the Drafting Committee was of the view that, even if a dispute concerned an obligation unrelated to membership, there were institutional reasons for limiting the possibility of countermeasures, so as to preserve the relationship between the organization and its member. Paragraph 2, therefore, presents several criteria, which have been retained from the first reading text, with some drafting refinements. The criterion now found in subparagraph (a) was in the chapeau of the first reading text, and has been moved down into the list, to make the text clearer.

Paragraph 3, in turn, deals with the final scenario of countermeasures being taken against a member in response to a breach of an obligation arising as a consequence of membership. Given the legal complexity that such scenario implies, the Drafting Committee felt it necessary to limit the possibility of the taking of countermeasures in such context to only where they are expressly permitted by the rules of the organization. The Committee decided to further restrict the provision by making it clear that what is being referred to is an obligation arising for the wrongdoing member State or international organization under the rules of the organization. In such cases, whether countermeasures are possible would be a matter for the rules of the organization. If the obligation on the member arises from other rules of international law, then paragraph 2 would apply. This relationship between the two paragraphs is signified by the qualifying phrase inserted at the beginning of paragraph 2, “subject to paragraph 3”.

The title of draft article 22 [21] remains “Countermeasures”.

### Draft article 25 [24]

Mr. Chairman,

Draft article 25 [24] concerns the invocation of necessity as a circumstance precluding wrongfulness. The Drafting Committee retained the first reading formulation with refinements in subparagraphs (a) and (b) of paragraph 1. In particular, the Committee amended the scope of subparagraph (a) so as to add to the list of essential interests being safeguarded by the international organization the “interest of its member States”. If you recall, the first reading version was limited to the safeguarding against a grave and imminent peril an essential interest of the international community as a whole. The Committee was of the view that the first reading version potentially excluded many international organizations whose functions did not involve protecting the interest of the international community as a whole. In addition, a comma was inserted after “international community as a whole” and the final clause of subparagraph (a) was changed from “the function to protect that interest” to “the function to protect the interest in question”, by way of making the provision clearer.

A change was introduced in subparagraph (b) through the addition of the word “international” before “obligation”. There was a concern in the Committee that the introduction of a reference to the interests of the members of the international organization in subparagraph (a) meant that subparagraph (b) was no longer in balance with (a). The Drafting Committee felt that making reference to an “international obligation” helped clarify that that part of the subparagraph was referring to the interests of the State or States, including non-member States, against which the circumstance precluding wrongfulness was being invoked.

The Committee further considered but rejected a proposal to also refer to the interests of the international organization itself, in subparagraph (b), on the grounds that such interests were not provided for in subparagraph (a). The rationale is that international organizations do not have “essential interests” on which they can base an invocation of necessity as a circumstance precluding wrongfulness, or on which they can rely to prevent another entity from invoking necessity against them. The Committee decided to retain this policy, which was agreed to during the first reading, since changing it would have meant broadening the concept of “essential interest”.

The title of draft article 25 [24] remains “Necessity”.

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### **Part Three**

Mr. Chairman,

I wish to now turn to Part Three of the draft articles, the title of which has been retained as “Content of the international responsibility of an international organization”. The Part is made up of three chapters.

### **Chapter I**

Chapter I of Part Three continues to be entitled “General principles” and is constituted of six draft articles, of which the texts and titles of the first four, namely draft articles 28 [27] to 31 [30] were adopted without any change to the first reading formulation.

### **Draft article 31 [30]**

Mr. Chairman,

As regards draft article 31 [30], the Drafting Committee considered the possibility of replacing the reference “caused by the internationally wrongful act”, with “caused by its internationally wrongful act” but decided against it for fear of inadvertently changing the concept. The Committee further agreed to reflect in the commentary the point that international organizations can negotiate bilateral agreements to regulate the form and extent of reparation as a means of mitigating the possible impact of the requirement of full reparation.

As already mentioned, draft article 31 [30], which remains entitled “Reparation”, was adopted without change.

### **Draft article 32 [31]**

Draft article 32 [31] has its roots in the corresponding provision in the 2001 articles on State responsibility. Paragraph 1 corresponds to article 32 of the 2001 articles, and establishes the position that the responsible international organization cannot, as a general proposition, rely on its rules as a justification for failure to comply with its obligations under Part Two. The rules of the organization are not opposable to non-member States or organizations unless those third States or organizations have accepted them as governing their relations with the international organization or they apply as a matter of customary international law. Unless the latter conditions exist, the rules of the international organization cannot be relied upon to justify the breach of an international obligation owed to those entities.

The Commission had, during the first reading, accepted the view that this did not fully reflect the prevailing position and that, in the relations between the international organization and its members, the organization’s rules may indeed derogate from what is provided in paragraph 1. This flows from draft article 10 [9] where it is recognized that some rules of the organization may give rise to obligations under international law. Paragraph 2, accordingly, is addressed only to the situation of the relations between the international organization and its members, and recognizes that the rules of the organization may play a role in the operation of Part Three.

During its consideration of draft article 32 [31], the Drafting Committee considered a proposal to include a general statement of principle as to the applicability of the rules of the organization corresponding to that in article 3 of the 2001 articles, but decided to consider this at a later stage. As I have already mentioned, the Committee subsequently did insert a new provision as draft article 5, which replicated the first part of article 3 of the 2001 articles. It, however, refrained from saying anything about the characterization by the rules of the organization of an act as wrongful or not, out of recognition that international law and the rules of the international organization are to some extent intertwined in the relations between members and the organization, and that the rules of the organization could apply as part of international law.

The Drafting Committee decided to keep draft article 32 [31] as being applicable to the specific situation of the content of international responsibility as provided for in Part Three.

The Drafting Committee made no change to paragraph 1. The Committee considered a proposal to insert “as such” after “may not rely on its rules” as an indication of the nuanced role that the rules of the organization play. However, the Committee decided against doing so since it could suggest that there may be situations where the rules of the organization could apply to non-members, which is not the case.

As regards paragraph 2, the Drafting Committee decided to replace the concluding clause, which read in the first reading text “of the responsibility of the organization towards its member States and organizations”, with “to the relations between the organization and its member States and organizations”. This was done to make the provision clearer, and to convey the idea that paragraph 2 is only carving out an exception to paragraph 1 for purposes of the present Part of the draft articles.

reverse the order of the paragraphs in order to present the obligation on the international organization first, and then draft article 39 as adopted on first reading, which deals with the obligations of members of the organization, appears now as paragraph 2.

The title of draft article 40 [39] is “Ensuring the fulfillment of the obligation to make reparation”. This is an amended version of the first reading title. The earlier reference to “effective performance” has been replaced by “fulfillment” so as to align the title with the text of the draft article. Furthermore, the first reading phrase “obligation of reparation” has now been refined to “obligation to make reparation”.

### Chapter III

Mr. Chairman,

The last chapter of Part Three is Chapter III, which continues to be entitled “Serious breaches of obligations under peremptory norms of general international law”. The texts and titles of draft articles 41 [40] and 42 [41] were adopted by the Drafting Committee without change.

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### Part Four

Mr. Chairman,

I propose now to turn to Part Four of the draft articles, which remains entitled “The implementation of the international responsibility of an international organization”. The Part continues to be divided into two chapters.

### Chapter I

Chapter I, which continues to be entitled “Invocation of the responsibility of an international obligation”, is constituted of 8 draft articles. The text and titles of draft articles 43 [42], 44 [43], 46 [45] and 47 [46] were adopted without change to the first reading formulations. Modifications were introduced in draft articles 45 [44], 48 [47] to 50 [49].

### Draft article 45 [44]

Draft article 45 [44] deals with the admissibility of claims. The text adopted is substantially that agreed to on first reading. The only modifications made are the inclusion of the definite article “the” before “nationality of claims” at the end of the first paragraph. In the second paragraph, the reference in the first line to “[w]hen a rule requiring” has been replaced by “[w]hen the rule of”. Furthermore, the clause “provided by that organization” towards the end of paragraph 2 was deleted. The Drafting Committee considered refining that phrase to “provided by the rules of that organization”, but felt that that would be too restrictive since it is possible, for example, for an international organization to simply not assert its immunities. It is not clear that such possibility would necessarily be undertaken in accordance with the rules of the organization. At the same time, there was a concern that the reference to “provided by the rules of that organization” could be read as being discretionary which is not what is intended. The solution was to delete the reference, which also had the benefit of aligning the text with the State responsibility articles.

The earlier version of the title of draft article 32 [31] was “Irrelevance of the rules of the organization”. After considering various options for amending the title, the Committee settled on inverting the title so as to read “relevance” since paragraph 2 was less about the “irrelevance” of the rules and more about their “relevance” in relation to Part Three. The title of draft article 32 [31] was thus amended to read “Relevance of the rules of the organization”. In doing so, it should be noted, for the record, that the Committee was not reversing the position of the State responsibility articles, but was rather reflecting the operation, in the context of the responsibility of international organizations, of the exception in paragraph 2 in relation to the general proposition in paragraph 1.

### Draft article 33 [32]

Draft article 33 [32] deals with the question of the scope of international obligations set out in Part Three. The only change introduced was in paragraph 1, in the manner in which the possible groupings of States and international organizations is described. One suggestion was to render the phrase in the first reading text “to one or more other organizations, to one or more States, or to the international community as a whole” as “to a State or another international organization, to several States or international organizations, or to the international community as a whole”, which is closer to the formulation in draft article 47 [46] as well as that employed in the 2001 articles on State responsibility. The Drafting Committee felt that the proposal added an unnecessary element of imprecision and preferred to work on the basis of the first reading formulation. Other ideas were to add “or combination thereof” or “singularly or jointly” to suggest that there are multiple possible combinations of groupings that are envisaged, but neither proposal garnered sufficient support in the Committee. The Committee settled for “to one or more States, to one or more other organizations, or to the international community as a whole”, which is the first reading text with the reference to States and international organizations reversed as it is the practice to refer to States first.

The title of draft article 33 [32] remains “Scope of international obligations set out in this Part”.

### Chapter II

Mr. Chairman,

Chapter II of Part Three, which continues to be entitled “Reparation for injury”, is constituted of seven draft articles. The Drafting Committee adopted text and titles of draft articles 34 [33] to 39 [38] without change to the first reading formulation. Therefore, in this Chapter, I will only discuss draft article 40 [39], which has been modified.

### Draft article 40 [39]

Draft article 40 [39] concerns the question of the fulfillment of the obligation to make reparation. If you recall, the Special Rapporteur presented a revised text in his eighth report which combined that adopted on first reading, slightly revised and presented as a new paragraph 1, together with a further text proposed during the debate on the first reading text in 2009 but which had not been adopted by the Drafting Committee. That provision was included as a new paragraph 2 in the Special Rapporteur’s proposal.

The Drafting Committee noted that this course of action had been supported in the Plenary, and, therefore, agreed to work on that basis. The Committee accepted a suggestion to

It should be noted that, in the case of the invocation of responsibility by a State or international organization other than an injured State or organization, under draft article 49 [48], paragraph 5, only paragraph 2 of draft article 45 [44] is applicable. In other words, in such cases, there would be no nationality of claims requirement.

The title of draft article 45 [44] remains "Admissibility of claims".

#### **Draft article 47 [46]**

Turning to draft article 47 [46], the Committee considered proposals for refining the text by way of finding a better formula for expressing the possible combinations of States and international organizations which may be injured by the same internationally wrongful act. This included using the word "plurality" which is in the title. As already mentioned, the Committee decided not to make any changes to the text or title, noting that the question of the potential constellations of arrangements was covered by the phrase "each injured State or international organization may separately".

#### **Draft article 48 [47]**

Draft article 48 [47] deals with the situation where there exists a plurality of responsible States or international organizations. In paragraph 1, the Drafting Committee once again considered the manner in which the collectivity of entities was expressed. In this case, it recognized that the formula used in some of the previous draft articles was not appropriate here since this draft article dealt with the situation where one international organization is responsible together with one or more States or international organizations. Accordingly, it retained the formulation as adopted on first reading with the minor refinement of adding the word "international" before "organizations" in the first line, and deleting "international" before "organization" in the last line.

Regarding paragraph 2, the Committee took note of the Special Rapporteur's intention to clarify in the commentary the question of the sequencing of the invocation of subsidiary responsibility in relation to that of primary responsibility. It will be made clear that having a temporal sequence is not a rigid requirement. The Committee considered a proposal to try say as much in the text itself by replacing "has not led to reparation" with "does not lead to reparation" or "has not resulted in reparation", but decided to retain the first reading formulation.

The first reading version included a reference to what is now draft article 62 [61]. The Committee considered different formulations for that cross-reference, including "as in the case provided for in", but eventually decided to delete it since it implied that subsidiary responsibility was provided for in other draft articles. It was also not strictly necessary to provide an example in the text of the draft article, and as a general policy, the Drafting Committee preferred to avoid forward cross-references.

The title of draft article 48 [47] has been revised to now read "Responsibility of an international organization and one or more States or international organizations". This was done to more clearly align the title with the text of paragraph 1.

#### **Draft article 49 [48]**

Draft article 49 [48] concerns the question of the invocation of responsibility by a State or an international organization other than an injured State or international organization. The Drafting Committee focused its consideration on paragraph 3. It added the words "as a whole" after "international community", so as to align the text with the standard phrase "international

community as a whole". The Drafting Committee further considered a proposal to word the final clause of the paragraph 3 as "and such invocation is within the powers and functions of the international organization invoking responsibility". However, there was opposition in the Committee to introduce the concept of "powers" in the draft articles, and the Committee settled for replacing "is included among the functions" with "is within the functions", which it felt was clearer. The present formulation therefore allows an international organization which has the task to promote a certain interest to invoke the responsibility for breaches of obligations in the area covered by that interest.

As already discussed in the context of my introduction to draft article 45 [44], paragraph 5 of draft article 49 [48] limits the requirements by the invocation of responsibility by interested non-injured States or international organizations by excluding the applicability of the nationality of claims rule for such types of claims. The Drafting Committee recalled that there had been a suggestion in the Plenary to make this clearer, but considered the first reading formulation to be satisfactory, and, therefore, decided to retain paragraph 5 as adopted on first reading.

The title of draft article 49 [48] remains "Invocation of responsibility by a State or an international organization other than an injured State or international organization".

#### **Draft article 50 [49]**

Draft article 50 [49] concerns the scope of Chapter I. If you recall, the first reading version presented the provision as describing the scope of the entire Part Three. The Drafting Committee focused on whether this saving clause applied also to Chapter II of the Part, dealing with "countermeasures". The sense was that it did not, since draft article 50 [49] dealt with the entitlement to invoke the responsibility. Making it applicable to the entire Part implied a recognition of the right of persons or entities other than a State or international organization to take countermeasures, which was not what was intended by the provision. This will be made clear in the commentary. Accordingly, the Committee decided to limit the provision by replacing "Part" with "Chapter".

The title of draft article 50 [49] was similarly modified to read "Scope of this Chapter".

#### **Chapter II**

Mr. Chairman,

Chapter II continues to be entitled "Countermeasures". It is constituted of 7 draft articles. The text and titles of draft articles 51 [50], 54 [53], 55 [54] and 56 [55] were adopted without change to the first reading formulations, except for the addition of the words "of countermeasures" in the title of draft article 54 [53], so that it now reads "Proportionality of countermeasures". Modifications were introduced in draft articles 52 [51], 53 [52] and 57 [56], which I will now discuss.

#### **Draft article 52 [51]**

Draft article 52 [51] pertains to the conditions for the taking of countermeasures by members of an international organization. The Drafting Committee modified the provision in order to align it with what was decided in connection with draft article 22 [21]. In particular, it introduced the same distinction drawn there, namely between obligations which arise generally for members of an international organization independently of the rules of the organization and those which are based on the rules of the organization. This necessitated the inclusion of an

additional paragraph, with the former scenario captured in paragraph 1, and the latter in new paragraph 2. This two-tiered arrangement is established by making paragraph 1 subject to new paragraph 2.

As regards the chapeau in paragraph 1, in addition to the introduction of the qualifying clause at the beginning already referred to, the Drafting Committee moved the reference, in the first reading version, to “under the conditions set out in the present chapter” down as new subparagraph (a) and redrafted it as “the conditions referred to in draft article 51 are met”. This was done to align the text with what was adopted in draft article 22 [21].

Subparagraph (b) retains the text of former subparagraph (a).

Subparagraph (c) is based on the first reading version of subparagraph (b), but has been rewritten in order to follow the formulation adopted in paragraph 2(c) of draft article 22 [21].

As already mentioned, paragraph 2 is new. The formulation that you have before you is based on that adopted for paragraph 3 of draft article 22 [21], with some necessary adjustments.

The Drafting Committee considered different options for the title of draft article 52 [51], including “countermeasures by members of an international organization”. The Committee settled for “Conditions for taking countermeasures by members of an international organization”.

#### **Draft article 53 [52]**

Draft article 53 [52] concerns the types of obligations which are not affected by countermeasures. The provision was adopted substantially with the same formulation as adopted on first reading with the following modifications.

Concerning, paragraph 1, subparagraph (b), the Drafting Committee took into account the comment made by Governments and in the Plenary that the reference to “fundamental human rights” was not in line with the contemporary practice of referring to human rights. After some discussion, the Committee decided to delete the word “fundamental”, so as to now render the phrase as “protection of human rights” on the understanding that it will be explained in the commentary that, in doing so, the Committee did not intend to widen the scope of draft article 53 [52], thereby commensurately limiting the possibility of the taking of countermeasures. Instead, it was introducing the change merely by way of resorting to the more contemporary way of referring to human rights, including in the Commission’s own work elsewhere.

Concerning paragraph 2, subparagraph (a), the Drafting Committee decided to simplify the text by replacing the phrase in the first reading text, “the injured State or international organization” with the pronoun “it”.

The Drafting Committee further considered a suggestion received from an international organization to redraft paragraph 2, subparagraph (b), so as to reflect the privileges and immunities of international organizations. It, however, declined to do so because it did not feel that it was the function of subparagraph (b) to list the types of privileges and immunities which international organizations enjoy. Rather the concern was to exclude from the ambit of countermeasures the issues for which international organizations might be most vulnerable through the taking of countermeasures. The proposed change could also not be accepted because not all international organizations falling within the scope of the draft articles enjoy privileges and immunities to the same degree. The Committee considered changing the word “any” to “the”, but decided against it since it suggested that there is a general rule that all the organs and agents enjoy immunities and privileges, which is not the case. Some organizations have no immunities at all. It will be explained in the commentary that the word “any” means wherever such privileges and immunities exist.

The only change made to subparagraph (b) was to change “agents” to “organs or agents”, as a consequence of the introduction of the new definition of “organs of an international organization” in draft article 2.

The title of draft article 53 [52] remains “Obligations not affected by countermeasures”.

#### **Draft article 57 [56]**

Draft article 57 [56] is a without prejudice clause dealing with measures taken by a State or international organization other than an injured State or organization. It finds its origin in the corresponding provision of the 2001 articles on State responsibility. The Drafting Committee focused on improving the formulation of the text without making changes in substance.

The reference in the first reading text to “is without prejudice to the right” has been refined to “does not prejudice the right”. Furthermore, the words “responsibility of an international organization” now appears as “responsibility of another international organization”. Similarly, the phrase “measures against the latter international organizations” has been refined to “measures against that organization”. Finally, the words “injured party” are now presented as “injured State or organization”. Such changes were also introduced to bring the draft article closer into line with the formulation of the corresponding provision in the 2001 articles on State responsibility.

The title of draft article 57 [56] has been amended to now read “Measures taken by States or international organizations other than an injured State or organization” to more closely track the content of the draft article.

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#### **Part Five**

Mr. Chairman,

I turn now to Part Five of the draft articles, the title of which was changed to “Responsibility of a State in connection with the conduct of an international organization”. The Part contains six draft articles. The text and title of draft article 60 [59] was adopted without change. Modifications were introduced in draft articles 58 [57], 59 [58], 61 [60], 62 [61] and 63 [62], which I will now introduce.

#### **Draft article 58 [57]**

Draft article 58 [57] provides for State responsibility when the State aids or assists an international organization in the commission of an internationally wrongful act. Other than a drafting refinement to subparagraph (a) modifying “that State” to “the State”, the Drafting Committee retained the text of the first reading provision as new paragraph 1 of draft article 58 [57].

The focus of the discussion in the Drafting Committee was what is now presented as a new paragraph 2. The Committee took note of the fact that several Governments had called upon the Commission to draw a clearer distinction between participation in the decision-making process within an international organization, as distinct from aiding or assisting the organization in the commission of an internationally wrongful act. While this issue was raised in the Special Rapporteur’s eighth report in the context of a possible clarification in the commentary, the Committee nonetheless decided to include an indication in the text of the draft article itself.

As was done in the context of countermeasures, the Drafting Committee drew a basic conceptual distinction between member States acting *qua* members and member States acting in a capacity other than a member. It felt that the possibility of responsibility for aid or assistance in

the commission of an internationally wrongful act by an international organization should be restricted to the latter scenario.

One possibility considered by the Drafting Committee was to include a general saving clause, possibly in draft articles 62 [61] or 63 [62], stating that nothing in the Part implied that the responsibility of a State arose simply because of a State's membership in the organization. However, this proposal did not find favour in the Committee since its effect on draft articles 61 [60] and 62 [61] was not clear. As a matter of presentation, the Committee preferred to deal with the issue early in Part Five so as to give an accurate presentation of the scope of draft articles 58 [57] and 59 [58], by including a second paragraph in both those draft articles.

The new paragraph 2 accordingly seeks to limit the possibility of a member State being held responsible for the aid or assistance granted to an international organization in the commission of an internationally wrongful act. Such responsibility would not arise in situations where the State is acting as a member in accordance with the rules of the organization, for example, when voting or otherwise participating in the affairs of the organization.

The commentary will make it clear that, while such restriction applies to responsibility derived from the commission of a wrongful act by the organization (i.e. in the context of aid or assistance to that organization or direction and control exercised over it), it does not affect the State's responsibility for its own actions. In other words, the provision does not mean that a State member of an Organization no longer incurs responsibility for the breach of its own international obligations arising from its participation in the activities of the organization. For example, a State voting within an organization in favour of the commission of an act which amounts to a genocide continues to be responsible under international law on its own accord. To the extent that such vote was taken in accordance with the rules of the organization, that State would not in addition be considered responsible for aiding or assisting the organization in the commission of the act in question.

Such concern about preserving the obligations of the member State under international law is captured by the formula "[a]n act of a member State...does not as such engage the international responsibility of that State", which suggests that it may do so in another capacity.

The title of draft article 58 [57] remains "Aid or assistance by a State in the commission of an internationally wrongful act by an international organization".

#### **Draft article 59 [58]**

Draft article 59 [58] concerns the question of State responsibility for direction and control exercised by a State over the commission of an internationally wrongful act. As with draft article 58 [57], the Drafting Committee retained the provision as adopted on first reading as paragraph 1, also with the technical refinement in subparagraph (a), replacing "that State" with "the State". The Committee also decided to repeat paragraph 2 from draft article 58 [57] as new paragraph 2 for draft article 59 [58], as the same considerations apply.

The title of draft article 59 [58] remains "Direction and control exercised by a State over the commission of an internationally wrongful act by an international organization".

#### **Draft article 60 [59]**

As regards draft article 60 [59], I wish to record the fact that the Drafting Committee expressly decided not to include a second paragraph along the lines of what was done in draft articles 58 [57] and 59 [58]. The Committee felt that the possibility of recognizing that coercion may be taken in accordance with the rules of an international organization was unacceptable as a

matter of policy. The provision, therefore, makes no distinction between acts of coercion undertaken qua member and those by member States acting in a different capacity.

As already indicated, the text and title of draft article 60 [59] was adopted in the same form as that adopted on first reading, with the exception of drafting refinements in subparagraph (a) to replace "that international organization" with "the coerced international organization" and in subparagraph (b) to replace "that State" with "the coercing State".

#### **Draft article 61 [60]**

Draft article 61 [60] concerns the question of the responsibility of a member State for circumvention of one of its international obligations. As you can see, the Drafting Committee adopted a reformulated version of paragraph 1.

First, the Special Rapporteur had proposed the inclusion at the beginning of a qualifying clause subjecting draft article 61 [60] to what are now draft articles 58 [57] to 60 [59], so as to limit any overlap between the provisions. However, the proposal was subsequently withdrawn as it had not garnered enough support in the Plenary. The Drafting Committee proceeded to reformulate paragraph 1 on the basis of the version adopted on first reading. In particular, the Committee decided on a formula that would move the phrase "by taking advantage of the fact that the organization has competence in relation to the subject-matter of one of the State's international obligations" earlier in the text.

Further changes included resorting to the word "circumvents" to replace "seeking to avoid complying with" so as to align the provision with the formulation adopted in draft article 17 [16]; and replacing the reference to "prompting" with "causing", which was considered clearer.

The Drafting Committee further considered the question of the criterion of intention. It considered a proposal to include the words "seeks to" before "circumvent" so as to highlight the necessary intention that would be required. However, the Committee decided not to adopt such language since it was ambiguous and could be interpreted as allowing for inchoate responsibility for merely seeking to circumvent, without actually succeeding. The Committee further considered proposals for making this clearer by including the terms "intentionally", "deliberately", "purposefully" or "is able to" before "circumvents", but decided against doing so. Instead, the Committee did not include any such qualifiers so as not to be perceived as changing the concept of responsibility being employed in the draft articles. Nonetheless, it understood the requirement of intention as being implicit in the words "circumvents" and "caused". Not including one of those qualifiers further had the benefit of having a text which emphasized the commission of the act of circumvention by taking advantage of the fact that the organization has competence. This will be explained in the commentary.

No change was made to paragraph 2.

The Drafting Committee also considered a proposal to include a further paragraph along the lines of new paragraph 2, which was included in draft articles 58 [57] and 59 [58], but decided against doing so as it would limit the practical impact of draft article 61 [60].

The title of draft article 61 [60] was amended several times and now reads "Circumvention of international obligations of a State member of an international organization". This was done in order to align the title closer to the content of the draft article.

#### **Draft article 62 [61]**

Draft article 62 [61] concerns the question of the responsibility of a State member of an international organization for the internationally wrongful act of the organization. The Drafting

Committee based itself on the first reading formulation and made some amendments by way of taking into account some of the comments received.

As regards the chapeau of paragraph 1, the Drafting Committee decided, in line with what it did in previous draft articles, to delete the qualifying clause “[w]ithout prejudice to articles [58 to 61]”. It recognized that this would leave a measure of overlap with those draft articles, but found this to be generally tolerable.

In subparagraph (a), the Drafting Committee took into account a recommendation that it be made clear in the text that acceptance needs to operate *vis-à-vis* the State or international organization invoking responsibility, since acceptance could be a matter internal to the organization. The Committee decided to add the phrase “towards the injured party” at the end of subparagraph (a) to clarify the point.

The Committee considered several proposals to clarify subparagraph (b). First, it considered the possibility of emphasizing the element of conduct as the basis for the reliance by saying “[i]t has by its conduct led”, but decided to cover the point in the commentary. Another proposal was to replace the word “led” by “induced” or “caused”, however, none of these suggestions were carried by the Committee.

With regard to paragraph 2, the Drafting Committee took note of suggestions that it be emphasized that the responsibility which was contemplated therein, namely subsidiary responsibility, was exceptional in nature. It decided to emphasize this in the text by changing the opening clause “[t]he international responsibility” to “[a]ny international responsibility”. The commentary will also cover this point. The Committee further refined the text of paragraph 2 by replacing the phrase, in the English text, “which is entailed in accordance with” with “under” so as to align the English with the French text. The Drafting Committee further understood paragraph 2 as implying that the responsibility of a member State arose in a residual manner, so as to be subsidiary to that of the international organization itself. The invocation of such responsibility takes place in accordance with draft article 48 [47], paragraph 2. That the responsibility of the international organization remains unaffected is clarified in draft article 63 [62].

The title of draft article 62 [61] has been slightly amended to read “Responsibility of a State member of an international organization for an internationally wrongful act of that organization”.

#### **Draft article 63 [62]**

Draft article 63 [62] is the final draft article in Part Five, and deals with the effect of the Part.

The Drafting Committee introduced three drafting refinements to the first reading version, namely introducing the definite article “the” before “international responsibility, and the inclusion of “State or” before “other international organization” at the end, so as to align the provision with draft article 19 [18]. As a consequence of the latter inclusion of the reference to the responsibility of a State, the Committee further decided to suppress the phrase “under other provisions of these draft articles” so as to avoid the implication that State responsibility was dealt with by provisions other than those in Part Five.

The title of draft article 63 [62] remains “Effect of this Part”.

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#### **Part Six**

Mr. Chairman,

I turn now to the last Part of the draft articles, namely Part Six, which continues to be entitled “General provisions”. The Drafting Committee considered a proposal to adopt the title “Miscellaneous provisions”, but decided against it. The text and titles of draft articles 65 [64] to 67 [66] were adopted without change to the first reading formulations. Modifications were introduced only in draft article 64 [63]. I will, however, also make some comments for the record on some of the issues raised in the context of draft article 67 [66].

#### **Draft article 64 [63]**

Draft article 64 [63] deals with the *lex specialis* principle. The Drafting Committee did not accept a proposal to include language to the effect that, regardless of the application of the *lex specialis* provision, there should always be a responsible subject, as it felt that such a general proposition could not be sustained. The Committee also did not accept a proposal to add a provision recognizing the principle of speciality, by requiring that the special characteristics of an organization be taken into account.

The Drafting Committee accordingly limited itself to refining the first reading text. Two modifications were introduced. The phrase “or a State for an internationally wrongful act of an international organization” is now rendered as “or of a State in connection with the conduct of an international organization”, so as to align the text with the title of Part Five. The second change was to break what was a single lengthy sentence into two sentences after the words “are governed by special rules of international law”. The second sentence deals with the rules of the organization.

The Committee considered a proposal to expand the scope of the new second sentence to indicate that it was not just the rules applicable in the relations between the organization and its members that were being considered, although it would primarily be those rules that were relevant. This would leave it open for some rules of the organization to also apply in the relations between the organization and third States or organizations. This proposal was not, however, accepted out of concern that it would allow room for an interpretation that the rules of the international organization would always trump general rules of international law. The Committee was of the view that, to the extent that the rules of the organization were relevant in the relations with third States or organizations, this would be not *qua* special rules, but would arise either in the context of the application of general rules (for example, in the determination of the validity of consent) or where the third State or organization had accepted the rules of the organization as binding on it. In the latter case, the basis for applicability would be the acceptance by the State and not the *lex specialis* rule.

The focus then was on breaking the provision into two sentences for ease of reading, but without necessarily making any substantive changes. The formula that was agreed upon, and which is before you, uses the phrase “special rules of international law” to make it explicit that it is that quality, namely that they are rules of international law, that is significant. Furthermore the phrase “may be contained in” serves to indicate that not all such rules of the organization operate as special rules. It was further decided to refine the words “between the international organization and its members” as “between an international organization and its members”.

As a consequence of this discussion, the Drafting Committee considered the possibility of including a statement of principle that an organization cannot rely upon its internal rules to avoid its international responsibility, following a similar statement contained in article 3 of the 2001 articles on State responsibility and further to its discussion in the context of draft article 32 [31]. This idea was subsequently implemented, in a revised form, as new draft article 5, which I introduced earlier in my statement.

The title of draft article 64 [63] remains “*Lex specialis*”.

**Draft article 67 [66]**

Draft article 67 [66] is a saving clause preserving the Charter of the United Nations. As already alluded to, the Drafting Committee decided to retain the formulation of the draft article, and its title, as adopted on first reading. It understood that the provision should not be interpreted as meaning that the United Nations, as an international organization, was exempt from the draft articles.

Furthermore, the Committee considered a proposal to include a reference to the draft articles having to be interpreted in conformity with the Charter, as can be found in the commentary to the equivalent provision in the 2001 articles on State responsibility. It, however, decided against recommending such clarification in either the provision itself or the commentary because it felt that it was easier to sustain such an assertion in the context of State responsibility than in that of the responsibility of international organizations. Contrary to States, international organizations are not capable of becoming parties to the Charter of the United Nations, and as such cannot become members of the Organization. Nor are they necessarily bound by the provisions of the Charter or even the decisions of the organs of the United Nations. The preference, therefore, was for a provision that merely preserved the Charter of the United Nations without taking a position on whether or not it is binding on international organizations generally. A proposal to make this clearer by adding the words “to any obligations arising under” before “the Charter of the United Nations”, did not succeed in the Committee, out of concern that modifying the formulation as had been adopted in the 2001 articles on State responsibility could have unintended consequences.

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Mr. Chairman,

This concludes my introduction of the second report of the Drafting Committee this year. It is my sincere hope that the Plenary will be in a position to adopt the draft articles on the responsibility of international organizations, on second reading, as presented.

Thank you.

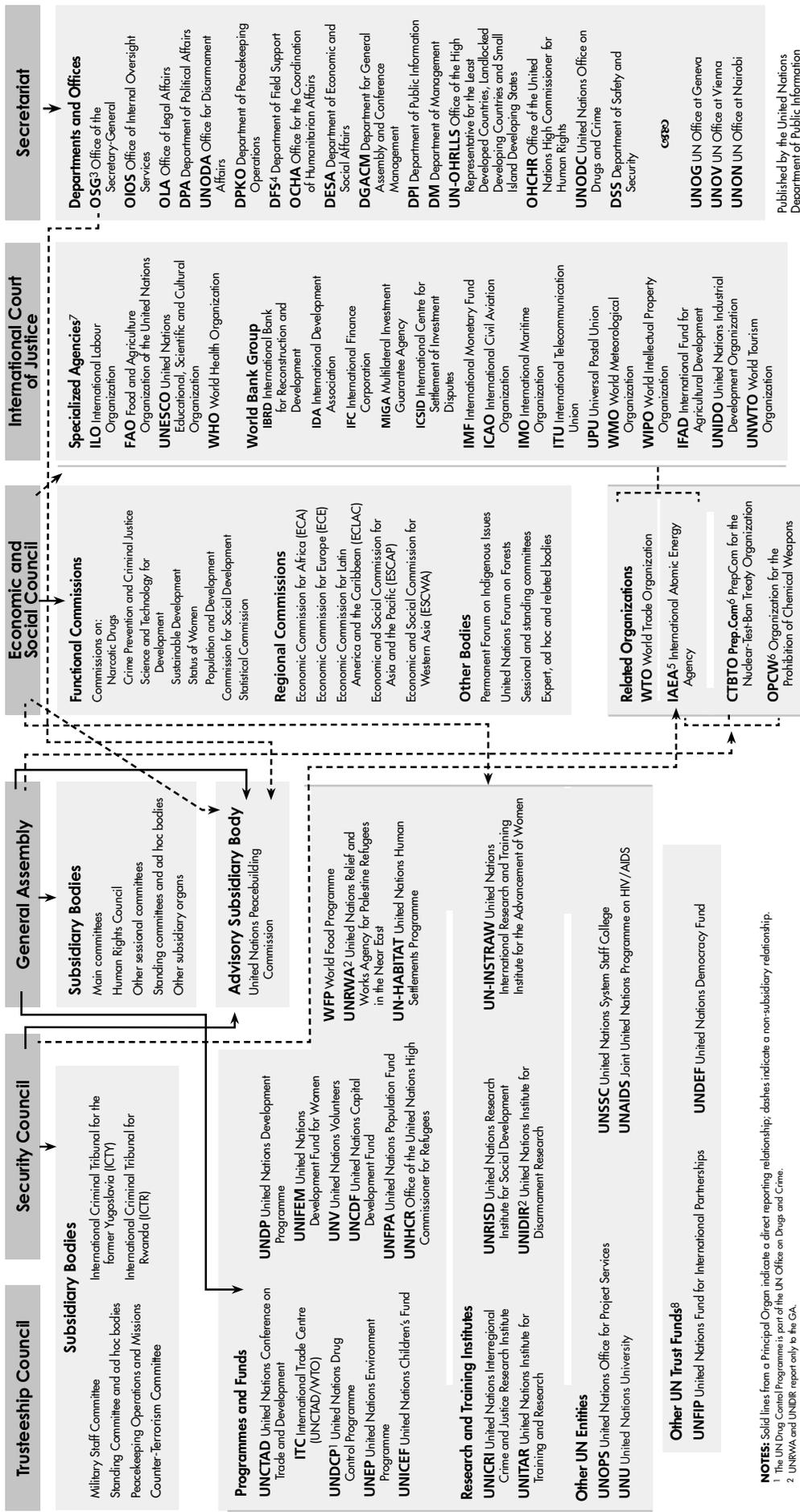


## **Chart of the United Nations System**



# The United Nations System

## Principal Organs



**NOTES:** Solid lines from a Principal Organ indicate a direct reporting relationship; dashes indicate a non-subsidiary relationship.

- The UN Drug Control Programme is part of the UN Office on Drugs and Crime.
- UNRWA and UNDIR report only to the GA.
- The United Nations Ethics Office, the United Nations Ombudsman's Office, and the Chief Information Technology Officer report directly to the Secretary-General.
- In an exceptional arrangement, the Under-Secretary-General for Field Support reports directly to the Under-Secretary-General for Peacekeeping Operations.
- IAEA reports to the Security Council and the General Assembly (GA).
- The CTBTO Prep.Com and OPCW report to the GA.
- Specialized agencies are autonomous organizations working with the UN and each, other through the coordinating machinery of the ECOSOC at the intergovernmental level, and through the Chief Executive Board for coordination (CEB) at the inter-secretarial level.
- UNFIP is an autonomous trust fund operating under the leadership of the United Nations Deputy Secretary-General. UNDEF's advisory board recommends funding proposals for approval by the Secretary-General.

**Admission of a State to the United Nations  
(Charter, Art. 4), Advisory Opinion,  
I.C.J. Reports 1948**

## INTERNATIONAL COURT OF JUSTICE

YEAR 1948.

May 28th, 1948.

**CONDITIONS OF ADMISSION OF A STATE  
TO MEMBERSHIP IN THE UNITED NATIONS**  
(ARTICLE 4 OF THE CHARTER)

*Request for advisory opinion in virtue of Resolution of General Assembly of United Nations of November 17th, 1947.—Request does not refer to actual vote but to statements made by a Member concerning the vote.—Request limited to the question whether the conditions in Article 4, paragraph 1, of the Charter are exhaustive.—Legal or political character of the question.—Competence of the Court to deal with questions in abstract terms.—Competence of the Court to interpret Article 4 of the Charter.—Legal character of the rules in Article 4.—Interpretation based on the natural meaning of terms.—Considerations extraneous to the conditions of Article 4. Considerations capable of being connected with these conditions.—Procedural character of paragraph 2 of Article 4.—Subordination of political organs to treaty provisions which govern them. Article 24 of the Charter.—Demand on the part of a Member making its consent to the admission of an applicant dependent on the admission of other applicants.—Individual consideration of every application for admission on its own merits.*

## ADVISORY OPINION.

*Present: President GUERRERO; Vice-President BASDEVANT; Judges ALVAREZ, FABELA, HACKWORTH, WINIARSKI, ZORIĆ, DE VISSCHER, Sir Arnold MCNAIR, KLAESTAD, BADAWI PASHA, KRYLOV, READ, HSU MO, AZÉVEDO.*

## THE COURT,

composed as above,

gives the following advisory opinion:

On November 17th, 1947, the General Assembly of the United Nations adopted the following Resolution:

*"The General Assembly,*

*Considering Article 4 of the Charter of the United Nations,*

*Considering the exchange of views which has taken place in the Security Council at its Two hundred and fourth, Two hundred and fifth and Two hundred and sixth Meetings, relating to the admission of certain States to membership in the United Nations,*

*Considering Article 96 of the Charter,*

*Requests the International Court of Justice to give an advisory opinion on the following question:*

*Is a Member of the United Nations which is called upon, in virtue of Article 4 of the Charter, to pronounce itself by its vote, either in the Security Council or in the General Assembly, on the admission of a State to membership in the United Nations, juridically entitled to make its consent to the admission dependent on conditions not expressly provided by paragraph 1 of the said Article? In particular, can such a Member, while it recognizes the conditions set forth in that provision to be fulfilled by the State concerned, subject its affirmative vote to the additional condition that other States be admitted to membership in the United Nations together with that State?*

*Instructs the Secretary-General to place at the disposal of the Court the records of the above-mentioned meetings of the Security Council.'*

By a note dated November 24th, 1947, and filed in the Registry on November 29th, the Secretary-General of the United Nations transmitted to the Registrar a copy of the Resolution of the General Assembly. In a telegram sent on December 10th, the Secretary-General informed the Registrar that the note of November 24th was to be regarded as the official notification and that certified true copies of the Resolution had been despatched. These copies reached the Registry on December 12th, and the question was then entered in the General List under No. 3.

The same day, the Registrar gave notice of the request for an opinion to all States entitled to appear before the Court, in accordance with paragraph 1 of Article 66 of the Statute. Furthermore,

as the question put mentioned Article 4 of the Charter, the Registrar informed the Governments of Members of the United Nations, by means of a special and direct communication as provided in paragraph 2 of Article 66, that the Court was prepared to receive from them written statements on the question before February 9th, 1948, the date fixed by an Order made on December 12th, 1947, by the President, as the Court was not sitting.

By the date thus fixed, written statements were received from the following States: China, El Salvador, Guatemala, Honduras, India, Canada, United States of America, Greece, Yugoslavia, Belgium, Iraq, Ukraine, Union of Soviet Socialist Republics, and Australia. These statements were communicated to all Members of the United Nations, who were informed that the President had fixed April 15th, 1948, as the opening date of the oral proceedings. A statement from the Government of Siam, dated January 30th, 1948, which was received in the Registry on February 14th, i.e., after the expiration of the time-limit, was accepted by decision of the President and was also transmitted to the other Members of the United Nations.

By its Resolution the General Assembly instructed the Secretary-General to place at the disposal of the Court the records of certain meetings of the Security Council. In accordance with these instructions and with paragraph 2 of Article 65 of the Statute, where it is laid down that every question submitted for an opinion shall be accompanied by all documents likely to throw light upon it, the Secretary-General sent to the Registry the documents which are enumerated in Section I of the list annexed to the present opinion<sup>1</sup>. A part of these documents reached the Registry on February 10th, 1948, and the remainder on March 20th. The Secretary-General also announced by a letter of February 12th, 1948, that he had designated a representative, authorized to present any written and oral statements which might facilitate the Court's task.

Furthermore, the Governments of the French Republic, of the Federal People's Republic of Yugoslavia, of the Kingdom of Belgium, of the Czechoslovak Republic, and of the Republic of Poland announced that they had designated representatives to present oral statements before the Court.

By decision of the Court, the opening of the oral proceedings was postponed from April 15th to April 22nd, 1948. In the course of public sittings held on April 22nd, 23rd and 24th, the Court heard the oral statements presented.

—on behalf of the Secretary-General of the United Nations, by its representative, Mr. Ivan Kerno, Assistant Secretary-General in charge of the Legal Department;

<sup>1</sup> See page 116.

—on behalf of the Government of the French Republic, by its representative, M. Georges Scelle, Professor at the Faculty of Law of Paris;

—on behalf of the Government of the Federal People's Republic of Yugoslavia, by its representative, Mr. Milan Bartoš, Minister Plenipotentiary;

—on behalf of the Government of the Kingdom of Belgium, by its representative, M. Georges Kaeckenbeeck, D.C.L., Minister Plenipotentiary, Head of the Division for Peace Conferences and International Organization at the Ministry for Foreign Affairs, Member of the Permanent Court of Arbitration;

—on behalf of the Government of the Republic of Czechoslovakia, by its representative, Mr. Vladimír Vochoč, Professor of International Law in Charles University at Prague;

—on behalf of the Government of the Republic of Poland, by its representative, Mr. Manfred Lachs, *Professeur agrégé* of International Law at the University of Warsaw.

In the course of the hearings, new documents were filed by the representatives accredited to the Court. These documents are enumerated in Section II of the list annexed to the present opinion<sup>1</sup>.

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Before examining the request for an opinion, the Court considers it necessary to make the following preliminary remarks:

The question put to the Court is divided into two parts, of which the second begins with the words "In particular", and is presented as an application of a more general idea implicit in the first.

The request for an opinion does not refer to the actual vote. Although the Members are bound to conform to the requirements of Article 4 in giving their votes, the General Assembly can hardly be supposed to have intended to ask the Court's opinion as to the reasons which, in the mind of a Member, may prompt its vote. Such reasons, which enter into a mental process, are obviously subject to no control. Nor does the request concern a Member's freedom of expressing its opinion. Since it concerns a condition or conditions on which a Member "makes its consent dependent", the question can only relate to the statements made by a Member concerning the vote it proposes to give.

It is clear from the General Assembly's Resolution of November 17th, 1947, that the Court is not called upon either to define the meaning and scope of the conditions on which admission is made dependent, or to specify the elements which may serve in a concrete case to verify the existence of the requisite conditions.

<sup>1</sup> See page 119.

The clause of the General Assembly's Resolution, referring to "the exchange of views which has taken place....", is not understood as an invitation to the Court to say whether the views thus referred to are well founded or otherwise. The abstract form in which the question is stated precludes such an interpretation.

The question put is in effect confined to the following point only: are the conditions stated in paragraph 1 of Article 4 exhaustive in character in the sense that an affirmative reply would lead to the conclusion that a Member is not legally entitled to make admission dependent on conditions not expressly provided for in that Article, while a negative reply would, on the contrary, authorize a Member to make admission dependent also on other conditions.

\* \* \*

Understood in this light, the question, in its two parts, is and can only be a purely legal one. To determine the meaning of a treaty provision—to determine, as in this case, the character (exhaustive or otherwise) of the conditions for admission stated therein—is a problem of interpretation and consequently a legal question.

It has nevertheless been contended that the question put must be regarded as a political one and that, for this reason, it falls outside the jurisdiction of the Court. The Court cannot attribute a political character to a request which, framed in abstract terms, invites it to undertake an essentially judicial task, the interpretation of a treaty provision. It is not concerned with the motives which may have inspired this request, nor with the considerations which, in the concrete cases submitted for examination to the Security Council, formed the subject of the exchange of views which took place in that body. It is the duty of the Court to envisage the question submitted to it only in the abstract form which has been given to it; nothing which is said in the present opinion refers, either directly or indirectly, to concrete cases or to particular circumstances.

It has also been contended that the Court should not deal with a question couched in abstract terms. That is a mere affirmation devoid of any justification. According to Article 96 of the Charter and Article 65 of the Statute, the Court may give an advisory opinion on any legal question, abstract or otherwise.

Lastly, it has also been maintained that the Court cannot reply to the question put because it involves an interpretation of the Charter. Nowhere is any provision to be found forbidding the Court, "the principal judicial organ of the United Nations", to exercise in regard to Article 4 of the Charter, a multilateral treaty, an interpretative function which falls within the normal exercise of its judicial powers.

Accordingly, the Court holds that it is competent, on the basis of Article 96 of the Charter and Article 65 of the Statute, and

considers that there are no reasons why it should decline to answer the question put to it.

In framing this answer, it is necessary first to recall the "conditions" required, under paragraph 1 of Article 4, of an applicant for admission. This provision reads as follows:

"Membership in the United Nations is open to all other peace-loving States which accept the obligations contained in the present Charter and, in the judgment of the Organization, are able and willing to carry out these obligations."

The requisite conditions are five in number: to be admitted to membership in the United Nations, an applicant must (1) be a State; (2) be peace-loving; (3) accept the obligations of the Charter; (4) be able to carry out these obligations; and (5) be willing to do so.

All these conditions are subject to the judgment of the Organization. The judgment of the Organization means the judgment of the two organs mentioned in paragraph 2 of Article 4, and, in the last analysis, that of its Members. The question put is concerned with the individual attitude of each Member called upon to pronounce itself on the question of admission.

Having been asked to determine the character, exhaustive or otherwise, of the conditions stated in Article 4, the Court must in the first place consider the text of that Article. The English and French texts of paragraph 1 of Article 4 have the same meaning, and it is impossible to find any conflict between them. The text of this paragraph, by the enumeration which it contains and the choice of its terms, clearly demonstrates the intention of its authors to establish a legal rule which, while it fixes the conditions of admission, determines also the reasons for which admission may be refused; for the text does not differentiate between these two cases and any attempt to restrict it to one of them would be purely arbitrary.

The terms "Membership in the United Nations is open to all other peace-loving States which...." and "*Peuvent devenir Membres des Nations unies tous autres États pacifiques*", indicate that States which fulfil the conditions stated have the qualifications requisite for admission. The natural meaning of the words used leads to the conclusion that these conditions constitute an exhaustive enumeration and are not merely stated by way of guidance or example. The provision would lose its significance and weight, if other conditions, unconnected with those laid down, could be demanded. The conditions stated in paragraph 1 of Article 4 must therefore be regarded not merely as the necessary conditions, but also as the conditions which suffice.

Nor can it be argued that the conditions enumerated represent only an indispensable minimum, in the sense that political considerations could be superimposed upon them, and prevent the admission of an applicant which fulfils them. Such an interpreta-

tion would be inconsistent with the terms of paragraph 2 of Article 4, which provide for the admission of "*tout Etat remplissant ces conditions*"—"any such State". It would lead to conferring upon Members an indefinite and practically unlimited power of discretion in the imposition of new conditions. Such a power would be inconsistent with the very character of paragraph 1 of Article 4 which, by reason of the close connexion which it establishes between membership and the observance of the principles and obligations of the Charter, clearly constitutes a legal regulation of the question of the admission of new States. To warrant an interpretation other than that which ensues from the natural meaning of the words, a decisive reason would be required which has not been established.

Moreover, the spirit as well as the terms of the paragraph preclude the idea that considerations extraneous to these principles and obligations can prevent the admission of a State which complies with them. If the authors of the Charter had meant to leave Members free to import into the application of this provision considerations extraneous to the conditions laid down therein, they would undoubtedly have adopted a different wording.

The Court considers that the text is sufficiently clear; consequently, it does not feel that it should deviate from the consistent practice of the Permanent Court of International Justice, according to which there is no occasion to resort to preparatory work if the text of a convention is sufficiently clear in itself.

The Court furthermore observes that Rule 60 of the Provisional Rules of Procedure of the Security Council is based on this interpretation. The first paragraph of this Rule reads as follows:

"The Security Council shall decide whether in its judgment the applicant is a peace-loving State and is able and willing to carry out the obligations contained in the Charter, and accordingly whether to recommend the applicant State for membership."

It does not, however, follow from the exhaustive character of paragraph 1 of Article 4 that an appreciation is precluded of such circumstances of fact as would enable the existence of the requisite conditions to be verified.

Article 4 does not forbid the taking into account of any factor which it is possible reasonably and in good faith to connect with the conditions laid down in that Article. The taking into account of such factors is implied in the very wide and very elastic nature of the prescribed conditions; no relevant political factor—that is to say, none connected with the conditions of admission—is excluded.

It has been sought to deduce either from the second paragraph of Article 4, or from the political character of the organ recommending or deciding upon admission, arguments in favour of an interpretation of paragraph 1 of Article 4, to the effect that the fulfilment of the conditions provided for in that Article is necessary before the admission of a State can be recommended or decided upon, but that it does not preclude the Members of the Organization from advancing considerations of political expediency, extraneous to the conditions of Article 4.

But paragraph 2 is concerned only with the procedure for admission, while the preceding paragraph lays down the substantive law. This procedural character is clearly indicated by the words "will be effected", which, by linking admission to the decision, point clearly to the fact that the paragraph is solely concerned with the manner in which admission is effected, and not with the subject of the judgment of the Organization, nor with the nature of the appreciation involved in that judgment, these two questions being dealt with in the preceding paragraph. Moreover, this paragraph, in referring to the "recommendation" of the Security Council and the "decision" of the General Assembly, is designed only to determine the respective functions of these two organs which consist in pronouncing upon the question whether or not the applicant State shall be admitted to membership after having established whether or not the prescribed conditions are fulfilled.

The political character of an organ cannot release it from the observance of the treaty provisions established by the Charter when they constitute limitations on its powers or criteria for its judgment. To ascertain whether an organ has freedom of choice for its decisions, reference must be made to the terms of its constitution. In this case, the limits of this freedom are fixed by Article 4 and allow for a wide liberty of appreciation. There is therefore no conflict between the functions of the political organs, on the one hand, and the exhaustive character of the prescribed conditions, on the other.

It has been sought to base on the political responsibilities assumed by the Security Council, in virtue of Article 24 of the Charter, an argument justifying the necessity for according to the Security Council as well as to the General Assembly complete freedom of appreciation in connexion with the admission of new Members. But Article 24, owing to the very general nature of its terms, cannot, in the absence of any provision, affect the special rules for admission which emerge from Article 4.

The foregoing considerations establish the exhaustive character of the conditions prescribed in Article 4.

\* \* \*

The second part of the question concerns a demand on the part of a Member making its consent to the admission of an applicant dependent on the admission of other applicants.

Judged on the basis of the rule which the Court adopts in its interpretation of Article 4, such a demand clearly constitutes a new condition, since it is entirely unconnected with those prescribed in Article 4. It is also in an entirely different category from those conditions, since it makes admission dependent, not on the conditions required of applicants, qualifications which are supposed to be fulfilled, but on an extraneous consideration concerning States other than the applicant State.

The provisions of Article 4 necessarily imply that every application for admission should be examined and voted on separately and on its own merits; otherwise it would be impossible to determine whether a particular applicant fulfils the necessary conditions. To subject an affirmative vote for the admission of an applicant State to the condition that other States be admitted with that State would prevent Members from exercising their judgment in each case with complete liberty, within the scope of the prescribed conditions. Such a demand is incompatible with the letter and spirit of Article 4 of the Charter.

FOR THESE REASONS,

THE COURT,

by nine votes to six,

is of opinion that a Member of the United Nations which is called upon, in virtue of Article 4 of the Charter, to pronounce itself by its vote, either in the Security Council or in the General Assembly, on the admission of a State to membership in the United Nations, is not juridically entitled to make its consent to the admission dependent on conditions not expressly provided by paragraph 1 of the said Article;

and that, in particular, a Member of the Organization cannot, while it recognizes the conditions set forth in that provision to be fulfilled by the State concerned, subject its affirmative vote to the additional condition that other States be admitted to membership in the United Nations together with that State.

The present opinion has been drawn up in French and in English, the French text being authoritative.

Done at the Peace Palace, The Hague, this twenty-eighth day of May, one thousand nine hundred and forty-eight, in two copies, one of which shall be placed in the archives of the Court and the other transmitted to the Secretary-General of the United Nations.

(Signed) J. G. GUERRERO,

President.

(Signed) E. HAMBRO,

Registrar.

Judges ALVAREZ and AZEVEDO, whilst concurring in the opinion of the Court, have availed themselves of the right conferred on them by Article 57 of the Statute and appended to the opinion a statement of their individual opinion.

Judges BASDEVANT, WINIARSKI, MCNAIR, READ, ZORICIC and KRYLOV, declaring that they are unable to concur in the opinion of the Court, have availed themselves of the right conferred on them by Article 57 of the Statute and appended to the opinion a statement of their dissenting opinion.

(Initialled) J. G. G.

(Initialled) E. H.

**Reparation for Injuries Suffered in the Service of the  
United Nations, Advisory Opinion,  
I.C.J. Reports 1949**

## INTERNATIONAL COURT OF JUSTICE

YEAR 1949.

April 11th, 1949.

REPARATION FOR INJURIES  
SUFFERED IN THE SERVICE  
OF THE UNITED NATIONS1949.  
April 11th.  
General List.  
No. 4.

THE COURT,

composed as above,

gives the following advisory opinion :

On December 3rd, 1948, the General Assembly of the United Nations adopted the following Resolution :

"Whereas the series of tragic events which have lately befallen agents of the United Nations engaged in the performance of their duties raises, with greater urgency than ever, the question of the arrangements to be made by the United Nations with a view to ensuring to its agents the fullest measure of protection in the future and ensuring that reparation be made for the injuries suffered ; and

Whereas it is highly desirable that the Secretary-General should be able to act without question as efficaciously as possible with a view to obtaining any reparation due ; therefore

The General Assembly

Decides to submit the following legal questions to the International Court of Justice for an advisory opinion :

*Injuries suffered by agents of United Nations in course of performance of duties.—Damage to United Nations.—Damage to agents.—Capacity of United Nations to bring claims for reparation due in respect of both.—International personality of United Nations.—Capacity as necessary implication arising from Charter and activities of United Nations.—Functional protection of agents.—Claim against a Member of the United Nations.—Claim against a non-member.—Reconciliation of claim by national State and claim by United Nations.—Claim by United Nations against agent's national State.*

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I. In the event of an agent of the United Nations in the performance of his duties suffering injury in circumstances involving the responsibility of a State, has the United Nations, as an Organization, the capacity to bring an international claim against the responsible *de jure* or *de facto* government with a view to obtaining the reparation due in respect of the damage caused (a) to the United Nations, (b) to the victim or to persons entitled through him ?

II. In the event of an affirmative reply on point I (b), how is action by the United Nations to be reconciled with such rights as may be possessed by the State of which the victim is a national ?

Instructs the Secretary-General, after the Court has given its opinion, to prepare proposals in the light of that opinion, and to submit them to the General Assembly at its next regular session."

## ADVISORY OPINION.

*Present :* *President* BASDEVANT ; *Vice-President* GUERRERO ;  
*Judges* ALVAREZ, FABELA, HACKWORTH, WINIARSKI,  
ZORIČIĆ, DE VISSCHER, Sir Arnold McNAIR, KLAESTAD,  
BADAWI PASHA, KRYLOV, READ, HSU MO, AZEVEDO.

In a letter of December 4th, 1948, filed in the Registry on December 7th, the Secretary-General of the United Nations forwarded to the Court a certified true copy of the Resolution of the General Assembly. On December 10th, in accordance with paragraph 1 of Article 66 of the Statute, the Registrar gave notice of the Request to all States entitled to appear before the Court. On December 11th, by means of a special and direct communication as provided in paragraph 2 of Article 66, he informed these States that, in an Order made on the same date, the Court had

stated that it was prepared to receive written statements on the questions before February 14th, 1949, and to hear oral statements on March 7th, 1949.

Written statements were received from the following States: India, China, United States of America, United Kingdom of Great Britain and Northern Ireland, and France. These statements were communicated to all States entitled to appear before the Court and to the Secretary-General of the United Nations. In the meantime, the Secretary-General of the United Nations, having regard to Article 65 of the Statute (paragraph 2 of which provides that every question submitted for an opinion shall be accompanied by all documents likely to throw light upon it), had sent to the Registrar the documents which are enumerated in the list annexed to this Opinion.

Furthermore, the Secretary-General of the United Nations and the Governments of the French Republic, of the United Kingdom and of the Kingdom of Belgium informed the Court that they had designated representatives to present oral statements.

In the course of public sittings held on March 7th, 8th and 9th, 1949, the Court heard the oral statements presented

on behalf of the Secretary-General of the United Nations by Mr. Ivan Kerno, Assistant Secretary-General in charge of the Legal Department as his Representative, and by Mr. A. H. Feller, Principal Director of that Department, as Counsel;

on behalf of the Government of the Kingdom of Belgium, by M. Georges Kaackenbeck, D.C.L., Minister Plenipotentiary of His Majesty the King of the Belgians, Head of the Division for Peace Conferences and International Organization at the Ministry for Foreign Affairs, Member of the Permanent Court of Arbitration;

on behalf of the Government of the French Republic, by M. Charles Chaumont, Professor of Public International Law at the Faculty of Law, Nancy; Legal Adviser to the Ministry for Foreign Affairs;

on behalf of the Government of the United Kingdom of Great Britain and Northern Ireland by Mr. G. G. Fitzmaurice, Second Legal Adviser to the Foreign Office.

\* \* \*

The first question asked of the Court is as follows:

"In the event of an agent of the United Nations in the performance of his duties suffering injury in circumstances involving the responsibility of a State, has the United Nations, as an Organization, the capacity to bring an international claim against

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the responsible *de jure* or *de facto* government with a view to obtaining the reparation due in respect of the damage caused (a) to the United Nations, (b) to the victim or to persons entitled through him?,"

It will be useful to make the following preliminary observations:

(a) The Organization of the United Nations will be referred to usually, but not invariably, as "the Organization".

(b) Questions I (a) and I (b) refer to "an international claim against the responsible *de jure* or *de facto* government". The Court understands that these questions are directed to claims against a State, and will, therefore, in this opinion, use the expression "State" or "defendant State".

(c) The Court understands the word "agent" in the most liberal sense, that is to say, any person who, whether a paid official or not, and whether permanently employed or not, has been charged by an organ of the Organization with carrying out, or helping to carry out, one of its functions—in short, any person through whom it acts.

(d) As this question assumes an injury suffered in such circumstances as to involve a State's responsibility, it must be supposed, for the purpose of this Opinion, that the damage results from a failure by the State to perform obligations of which the purpose is to protect the agents of the Organization in the performance of their duties.

(e) The position of a defendant State which is not a member of the Organization is dealt with later, and for the present the Court will assume that the defendant State is a Member of the Organization.

\* \* \*

The questions asked of the Court relate to the "capacity to bring an international claim"; accordingly, we must begin by defining what is meant by that capacity, and consider the characteristics of the Organization, so as to determine whether, in general, these characteristics do, or do not, include for the Organization a right to present an international claim.

Competence to bring an international claim is, for those possessing it, the capacity to resort to the customary methods recognized by international law for the establishment, the presentation and the settlement of claims. Among these methods may be mentioned protest, request for an enquiry, negotiation, and request for submission to an arbitral tribunal or to the Court in so far as this may be authorized by the Statute.

This capacity certainly belongs to the State; a State can bring an international claim against another State. Such a claim takes the form of a claim between two political entities, equal in law, similar

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in form, and both the direct subjects of international law. It is dealt with by means of negotiation, and cannot, in the present state of the law as to international jurisdiction, be submitted to a tribunal, except with the consent of the States concerned.

When the Organization brings a claim against one of its Members, this claim will be presented in the same manner, and regulated by the same procedure. It may, when necessary, be supported by the political means at the disposal of the Organization. In these ways the Organization would find a method for securing the observance of its rights by the Member against which it has a claim.

But, in the international sphere, has the Organization such a nature as involves the capacity to bring an international claim? In order to answer this question, the Court must first enquire whether the Charter has given the Organization such a position that it possesses, in regard to its Members, rights which it is entitled to ask them to respect. In other words, does the Organization possess international personality? This is no doubt a doctrinal expression, which has sometimes given rise to controversy. But it will be used here to mean that if the Organization is recognized as having that personality, it is an entity capable of availing itself of obligations incumbent upon its Members.

To answer this question, which is not settled by the actual terms of the Charter, we must consider what characteristics it was intended thereby to give to the Organization.

The subjects of law in any legal system are not necessarily identical in their nature or in the extent of their rights, and their nature depends upon the needs of the community. Throughout its history, the development of international law has been influenced by the requirements of international life, and the progressive increase in the collective activities of States has already given rise to instances of action upon the international plane by certain entities which are not States. This development culminated in the establishment in June 1945 of an international organization whose purposes and principles are specified in the Charter of the United Nations. But to achieve these ends the attribution of international personality is indispensable.

The Charter has not been content to make the Organization created by it merely a centre "for harmonizing the actions of nations in the attainment of these common ends" (Article I, para. 4). It has equipped that centre with organs, and has given it special tasks. It has defined the position of the Members in relation to the Organization by requiring them to give it every assistance in any action undertaken by it (Article 2, para. 5), and to accept and carry out the decisions of the Security Council; by authorizing the General Assembly to make recommendations to the Members;

by giving the Organization legal capacity and privileges and immunities in the territory of each of its Members; and by providing for the conclusion of agreements between the Organization and its Members. Practice—in particular the conclusion of conventions to which the Organization is a party—has confirmed this character of the Organization, which occupies a position in certain respects in detachment from its Members, and which is under a duty to remind them, if need be, of certain obligations. It must be added that the Organization is a political body, charged with political tasks of an important character, and covering a wide field namely, the maintenance of international peace and security, the development of friendly relations among nations, and the achievement of international co-operation in the solution of problems of an economic, social, cultural or humanitarian character (Article I); and in dealing with its Members it employs political means. The "Convention on the Privileges and Immunities of the United Nations" of 1946 creates rights and duties between each of the signatories and the Organization (see, in particular, Section 35). It is difficult to see how such a convention could operate except upon the international plane and as between parties possessing international personality.

In the opinion of the Court, the Organization was intended to exercise and enjoy, and is in fact exercising and enjoying, functions and rights which can only be explained on the basis of the possession of a large measure of international personality and the capacity to operate upon an international plane. It is at present the supreme type of international organization, and it could not carry out the intentions of its founders if it was devoid of international personality. It must be acknowledged that its Members, by entrusting certain functions to it, with the attendant duties and responsibilities, have clothed it with the competence required to enable those functions to be effectively discharged.

Accordingly, the Court has come to the conclusion that the Organization is an international person. That is not the same thing as saying that it is a State, which it certainly is not, or that its legal personality and rights and duties are the same as those of a State. Still less is it the same thing as saying that it is "a super-State", whatever that expression may mean. It does not even imply that all its rights and duties must be upon the international plane, any more than all the rights and duties of a State must be upon that plane. What it does mean is that it is a subject of international law and capable of possessing international rights and duties, and that it has capacity to maintain its rights by bringing international claims.

The next question is whether the sum of the international rights of the Organization comprises the right to bring the kind of international claim described in the Request for this Opinion. That is a claim against a State to obtain reparation in respect of the

damage caused by the injury of an agent of the Organization in the course of the performance of his duties. Whereas a State possesses the totality of international rights and duties recognized by international law, the rights and duties of an entity such as the Organization must depend upon its purposes and functions as specified or implied in its constituent documents and developed in practice. The functions of the Organization are of such a character that they could not be effectively discharged if they involved the concurrent action, on the international plane, of fifty-eight or more Foreign Offices, and the Court concludes that the Members have endowed the Organization with capacity to bring international claims when necessitated by the discharge of its functions.

What is the position as regards the claims mentioned in the request for an opinion? Question I is divided into two points, which must be considered in turn.

\* \* \*

Question I (a) is as follows:

"In the event of an agent of the United Nations in the performance of his duties suffering injury in circumstances involving the responsibility of a State, has the United Nations, as an Organization, the capacity to bring an international claim against the responsible *de jure* or *de facto* government with a view to obtaining the reparation due in respect of the damage caused (a) to the United Nations....?"

The question is concerned solely with the reparation of damage caused to the Organization when one of its agents suffers injury at the same time. It cannot be doubted that the Organization has the capacity to bring an international claim against one of its Members which has caused injury to it by a breach of its international obligations towards it. The damage specified in Question I (a) means exclusively damage caused to the interests of the Organization itself, to its administrative machine, to its property and assets, and to the interests of which it is the guardian. It is clear that the Organization has the capacity to bring a claim for this damage. As the claim is based on the breach of an international obligation on the part of the Member held responsible by the Organization, the Member cannot contend that this obligation is governed by municipal law, and the Organization is justified in giving its claim the character of an international claim.

When the Organization has sustained damage resulting from a breach by a Member of its international obligations, it is impossible to see how it can obtain reparation unless it possesses capacity to bring an international claim. It cannot be supposed that in such an event all the Members of the Organization, save the defendant

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State, must combine to bring a claim against the defendant for the damage suffered by the Organization.

The Court is not called upon to determine the precise extent of the reparation which the Organization would be entitled to recover. It may, however, be said that the measure of the reparation should depend upon the amount of the damage which the Organization has suffered as the result of the wrongful act or omission of the defendant State and should be calculated in accordance with the rules of international law. Amongst other things, this damage would include the reimbursement of any reasonable compensation which the Organization had to pay to its agent or to persons entitled through him. Again, the death or disablement of one of its agents engaged upon a distant mission might involve very considerable expenditure in replacing him. These are mere illustrations, and the Court cannot pretend to forecast all the kinds of damage which the Organization itself might sustain.

\* \* \*

Question I (b) is as follows:

...."has the United Nations, as an Organization, the capacity to bring an international claim ... in respect of the damage caused ... (b) to the victim or to persons entitled through him?"

In dealing with the question of law which arises out of Question I (b), it is unnecessary to repeat the considerations which led to an affirmative answer being given to Question I (a). It can now be assumed that the Organization has the capacity to bring a claim on the international plane, to negotiate, to conclude a special agreement and to prosecute a claim before an international tribunal. The only legal question which remains to be considered is whether, in the course of bringing an international claim of this kind, the Organization can recover "the reparation due in respect of the damage caused ... to the victim...."

The traditional rule that diplomatic protection is exercised by the national State does not involve the giving of a negative answer to Question I (b).

In the first place, this rule applies to claims brought by a State. But here we have the different and new case of a claim that would be brought by the Organization.

In the second place, even in inter-State relations, there are important exceptions to the rule, for there are cases in which protection may be exercised by a State on behalf of persons not having its nationality.

In the third place, the rule rests on two bases. The first is that the defendant State has broken an obligation towards the national State in respect of its nationals. The second is that only the party

to whom an international obligation is due can bring a claim in respect of its breach. This is precisely what happens when the Organization, in bringing a claim for damage suffered by its agent, does so by invoking the breach of an obligation towards itself. Thus, the rule of the nationality of claims affords no reason against recognizing that the Organization has the right to bring a claim for the damage referred to in Question I (b). On the contrary, the principle underlying this rule leads to the recognition of this capacity as belonging to the Organization, when the Organization invokes, as the ground of its claim, a breach of an obligation towards itself.

Nor does the analogy of the traditional rule of diplomatic protection of nationals abroad justify in itself an affirmative reply. It is not possible, by a strained use of the concept of allegiance, to assimilate the legal bond which exists, under Article 100 of the Charter, between the Organization on the one hand, and the Secretary-General and the staff on the other, to the bond of nationality existing between a State and its nationals.

The Court is here faced with a new situation. The questions to which it gives rise can only be solved by realizing that the situation is dominated by the provisions of the Charter considered in the light of the principles of international law.

The question lies within the limits already established; that is to say it presupposes that the injury for which the reparation is demanded arises from a breach of an obligation designed to help an agent of the Organization in the performance of his duties. It is not a case in which the wrongful act or omission would merely constitute a breach of the general obligations of a State concerning the position of aliens; claims made under this head would be within the competence of the national State and not, as a general rule, within that of the Organization.

The Charter does not expressly confer upon the Organization the capacity to include, in its claim for reparation, damage caused to the victim or to persons entitled through him. The Court must therefore begin by enquiring whether the provisions of the Charter concerning the functions of the Organization, and the part played by its agents in the performance of those functions, imply for the Organization power to afford its agents the limited protection that would consist in the bringing of a claim on their behalf for reparation for damage suffered in such circumstances. Under international law, the Organization must be deemed to have those powers which, though not expressly provided in the Charter, are conferred upon it by necessary implication as being essential to the performance of its duties. This principle of law was applied by the Permanent Court of International Justice to the International Labour Organization in its Advisory Opinion No. 13 of July 23rd,

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1926 (Series B., No. 13, p. 18), and must be applied to the United Nations.

Having regard to its purposes and functions already referred to, the Organization may find it necessary, and has in fact found it necessary, to entrust its agents with important missions to be performed in disturbed parts of the world. Many missions, from their very nature, involve the agents in unusual dangers to which ordinary persons are not exposed. For the same reason, the injuries suffered by its agents in these circumstances will sometimes have occurred in such a manner that their national State would not be justified in bringing a claim for reparation on the ground of diplomatic protection, or, at any rate, would not feel disposed to do so. Both to ensure the efficient and independent performance of these missions and to afford effective support to its agents, the Organization must provide them with adequate protection.

This need of protection for the agents of the Organization, as a condition of the performance of its functions, has already been realized, and the Preamble to the Resolution of December 3rd, 1948 (*supra*, p. 175), shows that this was the unanimous view of the General Assembly.

For this purpose, the Members of the Organization have entered into certain undertakings, some of which are in the Charter and others in complementary agreements. The content of these undertakings need not be described here; but the Court must stress the importance of the duty to render to the Organization "every assistance" which is accepted by the Members in Article 2, paragraph 5, of the Charter. It must be noted that the effective working of the Organization—the accomplishment of its task, and the independence and effectiveness of the work of its agents—require that these undertakings should be strictly observed. For that purpose, it is necessary that, when an infringement occurs, the Organization should be able to call upon the responsible State to remedy its default, and, in particular, to obtain from the State reparation for the damage that the default may have caused to its agent.

In order that the agent may perform his duties satisfactorily, he must feel that this protection is assured to him by the Organization, and that he may count on it. To ensure the independence of the agent, and, consequently, the independent action of the Organization itself, it is essential that in performing his duties he need not have to rely on any other protection than that of the Organization (save of course for the more direct and immediate protection due from the State in whose territory he may be). In particular, he should not have to rely on the protection of his own State. If he had to rely on that State, his independence might well be compromised, contrary to the principle applied by Article 100 of the Charter. And lastly, it is essential that—

whether the agent belongs to a powerful or to a weak State; to one more affected or less affected, by the complications of international life; to one in sympathy or not in sympathy with the mission of the agent—he should know that in the performance of his duties he is under the protection of the Organization. This assurance is even more necessary when the agent is stateless.

Upon examination of the character of the functions entrusted to the Organization and of the nature of the missions of its agents, it becomes clear that the capacity of the Organization to exercise a measure of functional protection of its agents arises by necessary indentment out of the Charter.

The obligations entered into by States to enable the agents of the Organization to perform their duties are undertaken not in the interest of the agents, but in that of the Organization. When it claims redress for a breach of these obligations, the Organization is invoking its own right, the right that the obligations due to it should be respected. On this ground, it asks for reparation of the injury suffered, for "it is a principle of international law that the breach of an engagement involves an obligation to make reparation in an adequate form"; as was stated by the Permanent Court in its Judgment No. 8 of July 26th, 1927 (Series A., No. 9, p. 21). In claiming reparation based on the injury suffered by its agent, the Organization does not represent the agent, but is asserting its own right, the right to secure respect for undertakings entered into towards the Organization.

Having regard to the foregoing considerations, and to the undeniable right of the Organization to demand that its Members shall fulfil the obligations entered into by them in the interest of the good working of the Organization, the Court is of the opinion that, in the case of a breach of these obligations, the Organization has the capacity to claim adequate reparation, and that in assessing this reparation it is authorized to include the damage suffered by the victim or by persons entitled through him.

\* \* \*

The question remains whether the Organization has "the capacity to bring an international claim against the responsible *de jure* or *de facto* government with a view to obtaining the reparation due in respect of the damage caused (a) to the United Nations, (b) to the victim or to persons entitled through him" when the defendant State is not a member of the Organization.

In considering this aspect of Question I (a) and (b), it is necessary to keep in mind the reasons which have led the Court to give an affirmative answer to it when the defendant State is a Member of the Organization. It has now been established that the Organization has capacity to bring claims on the international

plane, and that it possesses a right of functional protection in respect of its agents. Here again the Court is authorized to assume that the damage suffered involves the responsibility of a State, and it is not called upon to express an opinion upon the various ways in which that responsibility might be engaged. Accordingly the question is whether the Organization has capacity to bring a claim against the defendant State to recover reparation in respect of that damage or whether, on the contrary, the defendant State, not being a member, is justified in raising the objection that the Organization lacks the capacity to bring an international claim. On this point, the Court's opinion is that fifty States, representing the vast majority of the members of the international community, had the power, in conformity with international law, to bring into being an entity possessing objective international personality, and not merely personality recognized by them alone, together with capacity to bring international claims.

Accordingly, the Court arrives at the conclusion that an affirmative answer should be given to Question I (a) and (b) whether or not the defendant State is a Member of the United Nations.

\* \* \*

Question II is as follows:

"In the event of an affirmative reply on point I (b), how is action by the United Nations to be reconciled with such rights as may be possessed by the State of which the victim is a national?"

The affirmative reply given by the Court on point I (b) obliges it now to examine Question II. When the victim has a nationality, cases can clearly occur in which the injury suffered by him may engage the interest both of his national State and of the Organization. In such an event, competition between the State's right of diplomatic protection and the Organization's right of functional protection might arise, and this is the only case with which the Court is invited to deal.

In such a case, there is no rule of law which assigns priority to the one or to the other, or which compels either the State or the Organization to refrain from bringing an international claim.

The Court sees no reason why the parties concerned should not find solutions inspired by goodwill and common sense, and as between the Organization and its Members it draws attention to their duty to render "every assistance" provided by Article 2, paragraph 5, of the Charter.

Although the bases of the two claims are different, that does not mean that the defendant State can be compelled to pay the reparation due in respect of the damage twice over. International tribunals are already familiar with the problem of a claim in which two or more national States are interested, and they know how to protect the defendant State in such a case.

The risk of competition between the Organization and the national State can be reduced or eliminated either by a general convention or by agreements entered into in each particular case. There is no doubt that in due course a practice will be developed, and it is worthy of note that already certain States whose nationals have been injured in the performance of missions undertaken for the Organization have shown a reasonable and co-operative disposition to find a practical solution.

\* \* \*

The question of reconciling action by the Organization with the rights of a national State may arise in another way; that is to say, when the agent bears the nationality of the defendant State.

The ordinary practice whereby a State does not exercise protection on behalf of one of its nationals against a State which regards him as its own national, does not constitute a precedent which is relevant here. The action of the Organization is in fact based not upon the nationality of the victim but upon his status as agent of the Organization. Therefore it does not matter whether or not the State to which the claim is addressed regards him as its own national, because the question of nationality is not pertinent to the admissibility of the claim.

In law, therefore, it does not seem that the fact of the possession of the nationality of the defendant State by the agent constitutes any obstacle to a claim brought by the Organization for a breach of obligations towards it occurring in relation to the performance of his mission by that agent.

FOR THESE REASONS,

The Court is of opinion

*On Question I (a) :*

(i) unanimously,

That, in the event of an agent of the United Nations in the performance of his duties suffering injury in circumstances involving the responsibility of a Member State, the United Nations as an Organization has the capacity to bring an international claim against the responsible *de jure* or *de facto* government with a view to obtaining the reparation due in respect of the damage caused to the United Nations.

(ii) unanimously,

That, in the event of an agent of the United Nations in the performance of his duties suffering injury in circumstances involving the responsibility of a State which is not a member, the United Nations as an Organization has the capacity to bring an international claim against the responsible *de jure* or *de facto* government with a view to obtaining the reparation due in respect of the damage caused to the United Nations.

*On Question I (b) :*

(i) by eleven votes against four,

That, in the event of an agent of the United Nations in the performance of his duties suffering injury in circumstances involving the responsibility of a Member State, the United Nations as an Organization has the capacity to bring an international claim against the responsible *de jure* or *de facto* government with a view to obtaining the reparation due in respect of the damage caused to the victim or to persons entitled through him.

(ii) by eleven votes against four,

That, in the event of an agent of the United Nations in the performance of his duties suffering injury in circumstances involving the responsibility of a State which is not a member, the United Nations as an Organization has the capacity to bring an international claim against the responsible *de jure* or *de facto* government with a view to obtaining the reparation due in respect of the damage caused to the victim or to persons entitled through him.

*On Question II :*

By ten votes against five,

When the United Nations as an Organization is bringing a claim for reparation of damage caused to its agent, it can only do so by basing its claim upon a breach of obligations due to itself ; respect for this rule will usually prevent a conflict between the action of the United Nations and such rights as the agent's national State may possess, and thus bring about a reconciliation between their claims ; moreover, this reconciliation must depend upon considerations applicable to each particular case, and upon agreements to be made between the Organization and individual States, either generally or in each case.

Done in English and French, the English text being authoritative, at the Peace Palace, The Hague, this eleventh day of April, one thousand nine hundred and forty-nine, in two copies, one of which will be placed in the archives of the Court and the other transmitted to the Secretary-General of the United Nations.

(Signed) BASDEVANT,

President.

(Signed) E. HAMBRÖ,

Registrar.

Judge WINIARSKI states with regret that he is unable to concur in the reply given by the Court to Question I (b). In general, he shares the views expressed in Judge Hackworth's dissenting opinion.

Judges ALVAREZ and AZEVEDO, whilst concurring in the Opinion of the Court, have availed themselves of the right conferred on them by Article 57 of the Statute and appended to the Opinion statements of their individual opinion.

Judges HACKWORTH, BADAWI PASHA and KRYLOV, declaring that they are unable to concur in the Opinion of the Court, have availed themselves of the right conferred on them by Article 57 of the Statute and appended to the Opinion statements of their dissenting opinion.

(Initialled) J. B.

(Initialled) E. H.



**Constitution of the Maritime Safety Committee of the  
Inter-Governmental Maritime Consultative  
Organization, Advisory Opinion, I.C.J. Reports 1960**

In the matter of the Constitution of the Maritime Safety Committee of the Inter-Governmental Maritime Consultative Organization,

THE COURT,

composed as above,

gives the following *Advisory Opinion*:

By a letter dated 23 March 1959, filed in the Registry on 25 March, the Secretary-General of the Inter-Governmental Maritime Consultative Organization informed the Court that, by a Resolution adopted on 19 January 1959, a certified true copy of which was transmitted with the Secretary-General's letter, the Assembly of the Inter-Governmental Maritime Consultative Organization had decided to request the Court to give an Advisory Opinion on the question set out in the Resolution, which was in the following terms:

*"The Assembly*

*Considering* that differences of opinion have arisen as to the interpretation of Article 28 (a) of the Convention for the Establishment of the Inter-Governmental Maritime Consultative Organization;

*Considering* that the Convention provides in Article 56 that questions of law may be referred to the International Court of Justice for an advisory opinion;

*Resolves*

To submit to the International Court of Justice, in accordance with Article 65, paragraph 2, of its Statute, a request for an advisory opinion on the following question of law:

Is the Maritime Safety Committee of the Inter-Governmental Maritime Consultative Organization, which was elected on 15 January 1959, constituted in accordance with the Convention for the Establishment of the Organization?

*Instructs* the Secretary-General to place at the disposal of the Court the relevant records of the First Assembly of the Organization and its Committees; and in accordance with Article IX of the Agreement between the United Nations and the Inter-Governmental Maritime Consultative Organization to inform the Economic and Social Council of the United Nations of the present resolution."

In accordance with Article 66, paragraph 1, of the Statute of the Court, notice of the request for an Advisory Opinion was on 9 April 1959 given to all States entitled to appear before the Court.

The Secretary-General of the Inter-Governmental Maritime Consultative Organization having on 14 July 1959 transmitted to

INTERNATIONAL COURT OF JUSTICE

1960  
8 June

General List:  
No. 43

8 June 1960

CONSTITUTION OF THE  
MARITIME SAFETY COMMITTEE OF THE  
INTER-GOVERNMENTAL MARITIME  
CONSULTATIVE ORGANIZATION

*Interpretation of Convention for Establishment of Inter-Governmental Maritime Consultative Organization.—Conditions for election to Maritime Safety Committee.—"Largest ship-owning nations".—"Important interest in maritime safety".—Compliance with latter qualification implied in case of largest ship-owning nations.—Meaning of "elected" in Article 28 (a) of Convention.—Words connoting objective test excluding discretionary choice.—Registered gross tonnage as criterion.*

ADVISORY OPINION

*Present: President KLAESTAD; Vice-President ZAFRULLA KHAN; Judges BASDEVANT, HACKWORTH, WINIARSKI, BADAWI, ARMAND-UGON, KOJEVNIKOV, MORENO QUINTANA, CORDOVA, WELLINGTON KOO, SPIROPOULOS, Sir Percy SPENDER, ALFARO; Deputy-Registrar GARNIER-COIGNET.*

the Court the documents likely to throw light upon the question, and the President considering that the States Members of the Organization as well as the Organization itself were likely to be able to furnish information on the question, those States and the Organization were on 5 August 1959 informed in accordance with Article 66, paragraph 2, of the Statute that the Court would be prepared to receive written statements from them within a time-limit, fixed by an Order of the same date, at 5 December 1959. Written statements were received on behalf of the Governments of Belgium, France, Liberia, the United States of America, the Republic of China, Panama, Switzerland, Italy, Denmark, the United Kingdom of Great Britain and Northern Ireland, Norway, the Netherlands, and India.

These written statements were communicated to the Inter-Governmental Maritime Consultative Organization and to the States Members of the Organization. Public hearings were held on 26, 27, 28 and 29 April, and on 2, 3 and 4 May 1960, when the Court was addressed by the following:

The Honourable Rocheforte L. Weeks, former Assistant Attorney-General, President of the University of Liberia, and

The Honourable Edward R. Moore, Assistant Attorney-General, representing the Government of Liberia;

Dr. Octavio Fábrega, President of the National Council of Foreign Affairs, in the capacity of Ambassador Extraordinary and Plenipotentiary on Special Mission, representing the Government of Panama;

The Honourable Eric H. Hager, Legal Adviser of the Department of State, representing the Government of the United States of America;

M. Riccardo Monaco, Professor of the University of Rome, Chief of the Department of Contentious Matters of the Ministry for Foreign Affairs, representing the Government of Italy;

Mr. W. Riphagen, Professor of International Law at Rotterdam, Legal Adviser of the Ministry for Foreign Affairs, representing the Government of the Netherlands;

Mr. Finn Seyersted, Director of Legal Affairs in the Norwegian Ministry for Foreign Affairs, representing the Government of Norway;

Mr. F. A. Vallat, Deputy Legal Adviser to the Foreign Office, representing the Government of the United Kingdom of Great Britain and Northern Ireland.

\* \* \*

The question submitted to the Court in the Request for an Advisory Opinion, cast though it is in a general form, is directed

to a particular case, and may be formulated in the following manner: has the Assembly, in not electing Liberia and Panama to the Maritime Safety Committee, exercised its electoral power in a manner in accordance with the provisions of Article 28 (a) of the Convention of 6 March 1948 for the Establishment of the Inter-Governmental Maritime Consultative Organization?

The Statements submitted to the Court have shown that linked with the question put to it there are others of a political nature. The Court as a judicial body is however bound, in the exercise of its advisory function, to remain faithful to the requirements of its judicial character.

\* \* \*

The Convention referred to in the Request for an Advisory Opinion establishes a body known as the Inter-Governmental Maritime Consultative Organization (hereinafter called "the Organization"). Its purposes are set out in Article I of the Convention, the most important of which is concerned with maritime safety and efficiency of navigation.

The Organization consists of an Assembly, a Council, a Maritime Safety Committee and such subsidiary organs as the Organization may at any time consider necessary, and a Secretariat.

The Assembly consists of all the Members of the Organization meeting in regular session once every two years. Among its functions is "to elect ... the Maritime Safety Committee as provided in Article 28" (Art. 16 (d)).

The Council consists of sixteen Members. Its principal functions are to receive the recommendations of the Maritime Safety Committee, and to transmit them to the Assembly or to the Members when the Assembly is not in session, together with its own comments and recommendations. Matters within the scope of the duties of the Maritime Safety Committee may be considered by the Council only after obtaining the views of that Committee thereon (Art. 22).

The Maritime Safety Committee's principal duties are set out in Article 29. They include the consideration of any matter within the scope of the Organization and concerned with aids to navigation, construction and equipment of vessels, manning from a safety standpoint, rules for prevention of collisions, handling of dangerous cargoes, maritime safety procedures and requirements and any other matters directly affecting maritime safety. It is called upon to maintain close relationship with such other inter-governmental bodies concerned with transport and communications as may further the object of the Organization in promoting maritime safety.

The composition of the Committee and the mode of designating its Members are governed by Article 28 (a) which reads as follows:

“The Maritime Safety Committee shall consist of fourteen Members elected by the Assembly from the Members, governments of those nations having an important interest in maritime safety, of which not less than eight shall be the largest ship-owning nations, and the remainder shall be elected so as to ensure adequate representation of Members, governments of other nations with an important interest in maritime safety, such as nations interested in the supply of large numbers of crews or in the carriage of large numbers of berthed and unberthed passengers, and of major geographical areas.”

\* \* \*

The Court is called upon to appreciate whether, in not electing Liberia and Panama to the Maritime Safety Committee, the Assembly complied with that provision. For this purpose, the Court must, in the first place, recall the circumstances in which the Assembly proceeded to the election of the Committee and asked for an advisory opinion.

The Assembly began its consideration of the election of members of the Maritime Safety Committee on 14 January 1959. It had before it a working paper prepared by the Secretary-General of the Organization, headed as follows:

“Election of Members of the Maritime Safety Committee, as provided in Article 28 of the Convention.

Merchant fleet of the IMCO Members according to the Lloyd's Register of Shipping Statistical tables 1958.”

Thereunder were set out, in descending order of total gross registered tonnage, the names of Members with the figures of their registered tonnage. On this list Liberia was third and Panama eighth.

The Assembly also had before it a draft United Kingdom resolution which was in the following terms:

“The Assembly,

*Desiring* to elect the eight Members of the Maritime Safety Committee which shall be the largest ship-owning nations,

*Having taken note* of the list prepared by the Secretary-General (doc. IMCO/A. 1/Working Paper 5) showing the registered tonnage of each Member of the Organization

### Resolves

that a separate vote shall be taken for each of the eight places on the Committee;

that the voting shall be in the order in which the nations appear in the Secretary-General's list, and

that those eight nations which first receive a majority of votes in favour shall be declared elected.”

The representative of the Government of Liberia submitted both a separate draft Resolution and an amendment to that of the United Kingdom, to the effect that for the purposes of Article 28 (a) the eight largest ship-owning nations should be determined by reference to the figures for gross registered tonnage as they appeared in *Lloyd's Register of Shipping* current at the date of the election. He submitted that Article 28 (a) laid down the rules to be followed for electing members of the Committee and that these rules had to be strictly observed. Under Article 28 (a) the Assembly had to elect the eight largest ship-owning nations. That, he submitted, was not an election in the usual sense of the word, for once those eight nations had been determined, the Assembly was bound to elect them. The representative of Panama supported these submissions.

There was no challenge that the figures in the Secretary-General's Working Paper, which were identical with the figures shown in the latest issue of *Lloyd's Register of Shipping* and which set out country by country the gross registered tonnage of each nation, were in any way incorrect.

The Government of the United States submitted a proposal to defer the election of the Committee until the Assembly's second regular session and in the meantime to establish a provisional Committee open to all the Members of the Assembly.

The Liberian Government's amendment to the United Kingdom's draft resolution was replaced by a joint amendment of that Government and the United States of America which was essentially in the same terms. Neither the proposal of the United States nor the joint amendment was adopted by the Assembly.

At the meeting of 15 January 1959, the Assembly adopted the United Kingdom draft resolution, thus expressing, according to the terms of the Resolution, its desire “to elect the eight Members of the Maritime Safety Committee which shall be the largest ship-owning nations”. The President asked the Assembly to vote on the eight countries to be elected under Article 28 (a) country by country in the order given in the *Lloyd's Register of Shipping Statistical Tables 1958*. Liberia and Panama failed to be elected, the votes being, respectively, eleven in favour and fourteen against, with three abstentions, and nine in favour and fourteen against, with five abstentions. Liberia and Panama abstained on the latter vote,

on the ground that from the moment Liberia failed to be elected they considered the election was null and void.

At its next meeting, held the same day, the Assembly elected the other six Members of the Committee.

After the election had taken place, the Assembly proceeded to consider a draft resolution by Liberia to the effect that the Assembly should request an advisory opinion from this Court on the legal issues which had arisen in connection with the interpretation of Article 28 (a), and should ask a Committee to formulate the questions to be put to the Court and refer the matter back to the Assembly for approval. The draft Liberian resolution was approved in principle. On 19 January 1959 the Assembly adopted the Resolution set out in the Request for an Opinion.

\* \* \*

The debates which took place prior to the election revealed a wide divergence of views on the relevant requirements of Article 28 (a).

The United Kingdom representative, speaking at the seventh meeting of the Assembly, held on 14 January 1959, stated:

"The United Kingdom delegation felt it would be wrong for the Assembly ... to pretend to ignore the essential difficulty, namely, the special position of Liberia and Panama. There was clearly no question of dealing with the problem of flags of convenience, which lay outside the limits of discussion. What the Assembly had to do was to choose eight countries which, on the one hand, had an important interest in maritime safety and, on the other hand, were the largest ship-owning nations, as these were the criteria laid down in Article 28 of the Convention."

"... What the Assembly had to do was to consider how far governments were interested in maritime questions and to see to what extent they were able to make a contribution in various fields connected with safety... It was obvious that in all those fields neither Liberia nor Panama was, at the moment, in a position to make any important contribution to maritime safety..."

"As to the second criterion he had mentioned, namely, relative importance as a ship-owning nation, he would emphasize that that expression was being used for the first time, but it was perfectly clear. Vessels had really to belong to the countries in question, which was obviously not the case with Panama and Liberia."

"Thus, neither from the point of view of interest in maritime safety nor from that of tonnage could Liberia or Panama be included amongst the eight maritime countries referred to in Article 28 (a) of the Convention."

He added that according to the Convention those eight places should be allotted to the largest ship-owning nations, but that did not necessarily mean those countries whose fleets represented the

largest gross registered tonnage. The names and nationalities of the owners or shareholders of the shipping companies should not be taken into account in that connection, as that would introduce an unnecessarily complicated criterion.

The representative of the Netherlands stated that the concept of the largest ship-owning nations was not necessarily identical with that of the nations having the largest registered tonnage; on the contrary, a country's registered tonnage might in no way reflect its actual importance as a ship-owning nation.

The argument was also put forward that the members to be elected to the Maritime Safety Committee "on the strength of their tonnage" should be those nations which were in a position to make a contribution to the work of the Committee through their knowledge and experience in the field of maritime safety, which requirement Liberia and Panama did not fulfil.

For his part, the representative of the United States of America explained the way in which that country interpreted Article 28 (a). He stated:

"That Article called on the Assembly to elect from among the Member Governments which had an important interest in maritime safety the eight nations which were the largest shipowners, as shown by the statistical tables in *Lloyd's Register*... Article 28 stipulated that no less than eight should be 'the largest ship-owning nations' and not merely 'large ship-owning nations' ... they should be elected automatically."

Later he said that he could not accept the argument advanced by the United Kingdom representative to the effect that the ability of countries to contribute to the work of the Maritime Safety Committee by their expert knowledge and experience was a criterion of eligibility separate from that of status as one of the largest ship-owning nations. In no circumstances should the two nations whose combined registered tonnage represented 15 per cent. of the active fleet of the entire world be excluded from membership of the Committee.

Other States, Members of the Assembly, participated in the debate, but in so far as they expressed any views on the interpretation to be placed upon Article 28 (a) these appear to be reflected in the statements above referred to.

It is in these circumstances that the question whether the Maritime Safety Committee was constituted in accordance with Article 28 (a) comes before the Court.

\* \* \*

The Court will now proceed to consider the answer which should be given to the question submitted to it.

One of the functions of the Assembly is, in accordance with Article 16 (d) of the Convention, "to elect the Members ... on the Maritime Safety Committee as provided in Article 28". The scope and character of this function of the Assembly are accordingly to be found in Article 28. This function can only be exercised under the conditions laid down by that Article.

Article 28 (a) provides that the fourteen Members of the Committee shall be elected by the Assembly from the Members, Governments of those nations having an important interest in maritime safety, of which not less than eight shall be the largest ship-owning nations. The remainder of the members are to be elected so as to ensure adequate representation of other nations with an important interest in maritime safety such as nations interested in supplying large numbers of crews or in the carriage of large numbers of passengers and of major geographical areas.

It has been contended before the Court that the Assembly was entitled to refuse to elect Liberia and Panama, by virtue of a discretion claimed to be vested in it under Article 28 (a). The substance of the argument is as follows: The Assembly is vested with a discretionary power to determine which Members of the Organization have "an important interest in maritime safety" and consequently in discharging its duty to elect the eight largest ship-owning nations, it is empowered to exclude as unqualified for election those nations that in its judgment do not have such an interest. Furthermore, it was submitted that this discretionary power extended also to the determination of which nations were or were not "the largest ship-owning nations".

In the first place, it was sought to find in the expression "elected", which applies to all Members of the Committee, a notion of choice which was said to imply an individual judgment on each member to be elected and a free appraisal as to the qualifications of that member. This was said to apply to both the election of the eight largest ship-owning nations and to that of the remainder of six. The contention assumes a meaning to be accorded to the word "elected" and then applies that meaning to Article 28 (a) and interprets its provisions accordingly. In so doing it places in a subordinate position the specific provision of the Article in relation to the eight "largest ship-owning nations".

The meaning of the word "elected" in the Article cannot be determined in isolation by recourse to its usual or common meaning and attaching that meaning to the word where used in the Article. The word obtains its meaning from the context in which it is used. If the context requires a meaning which connotes a wide choice, it must be construed accordingly, just as it must be given a restrictive meaning if the context in which it is used so requires.

An example is provided in Articles 16 (d) and 17 (c) and (d), where the words "elect" and "elected" are also used. Whatever the margin of choice or individual appraisal which exists in the Assembly in relation to the election of any Member of the Council, that margin of choice or appraisal is one which is no greater than is permitted by the terms of those Articles read with Article 18. The words "elect" and "elected" are construed accordingly.

So, too, in relation to the word "elected" in Article 28, where first therein appearing. Here it is used for the designation of all fourteen Members of the Committee, that is to say, of the two categories of Members, and for the first of these the words employed are "shall be" which, on their face, are mandatory. If these words involve an obligatory designation, to which question the Court will hereafter direct itself, there is an evident contrast between, on the one hand, such a designation and, on the other hand, a free choice.

If the words "of which not less than eight shall be the largest ship-owning nations" do involve an obligatory designation of such nations that satisfy that qualification, the use of the word "elected" to cover the designation of two categories, one of which would be determined on the basis of a definite and pre-established criterion whilst the other would be a matter of choice, cannot convert the designation of the eight nations into an elective procedure which would be contrary to the pre-established criterion.

In the second place it is contended that "having an important interest in maritime safety" is a dominant condition in the qualification for membership on the Committee and being one of the "eight largest ship-owning nations" is a subordinate condition. These two conditions are said to be of a cumulative character with the possession of "an important interest" as the controlling requirement. According to this view fulfilment alone of the condition by any State of being one of the eight largest ship-owning nations does not by itself confer eligibility on a Member State to be appointed to the Committee inasmuch as, it is contended, the word "elected" connotes a discretion in the Assembly to choose from among those qualified under the condition of having an important interest in maritime safety.

It is further claimed that the words "ship-owning nations" have a meaning which embraces consideration of many factors, and that the Assembly was, in the exercise of its discretion, entitled to take those factors into account in the election of the Committee.

\* \* \*

The words of Article 28 (a) must be read in their natural and ordinary meaning, in the sense which they would normally have in their context. It is only if, when this is done, the words of the

Article are ambiguous in any way that resort need be had to other methods of construction. (*Competence of the General Assembly for the Admission of a State to the United Nations, I.C.J. Reports 1950, P. 8.*)

From the terms of Article 28 (a) it is clear that the draftsmen deliberately contemplated that the preponderant control of the Committee was in all circumstances to be vested in "the largest ship-owning nations". This control was to be secured by the provision that not less than eight of the fourteen seats had to be filled by them. The language employed—"of which not less than eight shall be the largest ship-owning nations"—in its natural and ordinary meaning conveys this intent of the draftsmen.

The words "having an important interest in maritime safety" clearly express a qualification for membership on the Committee which is required of each group referred to in Article 28 (a). But, in the context of the whole provision, possession of this interest is implied in relation to the eight largest ship-owning nations as a consequence of the language employed. This particular condition of being one of the eight such nations describes the nature of the required interest in maritime safety and constitutes that interest.

This interpretation accords with the structure of the Article. Having provided that "not less than eight shall be the largest ship-owning nations", the Article goes on to provide that the remainder shall be elected so as to ensure adequate representation of "other nations" with an important interest in maritime safety—nations other than the eight largest ship-owning nations, "such as nations interested in the supply of large numbers of crews" etc., as contrasted with "the largest ship-owning nations". The use of the words "other nations" and "such as" in their context confirms this interpretation.

The argument based on discretion would permit the Assembly, in use only of its discretion, to decide through its vote which nations have or do not have an important interest in maritime safety and to deny membership on the Committee to any State regardless of the size of its tonnage or any other qualification. The effect of such an interpretation would be to render superfluous the greater part of Article 28 (a) and to erect the discretion of the Assembly as the supreme rule for the constitution of the Maritime Safety Committee. This would in the opinion of the Court be incompatible with the principle underlying the Article.

The underlying principle of Article 28 (a) is that the largest ship-owning nations shall be in predominance on the Committee. No

interpretation of the Article which is not consonant with this principle is admissible.

It was to express this principle that the words "of which not less than eight shall be the largest ship-owning nations" were written into the Article. These words cannot be construed as if they read "of which not less than eight shall represent (or be representative of) the largest ship-owning nations". Whichever were the largest ship-owning nations they were necessarily to be appointed to the Committee; that they each possessed an important interest in maritime safety was accepted as axiomatic; it was inherent in their status of the eight largest ship-owning nations.

\* \* \*

The history of the Article and the debate which took place upon the drafts of the same in the United Maritime Consultative Council, which at the request of the Economic and Social Council of the United Nations drew up the text of the Convention for recommendation to Member Governments, confirm the principle indicated above.

The first draft of the Article underwent a number of changes as it evolved. As drafted in July 1946 by a Committee which met in London, it read as follows:

"The Maritime Safety Committee shall consist of twelve Member Governments selected by the Assembly from the Governments of those nations having an important interest in maritime safety and owning substantial amounts of merchant shipping, of which no less than nine shall be the largest ship-owning nations and the remainder shall be selected so as to ensure representation for the major geographical areas. The Maritime Safety Committee shall have power to adjust the number of its members with the approval of the Council."

The nine largest ship-owning nations were self-evidently nations owning substantial amounts of merchant shipping. The first nine largest ship-owning nations were to be on the Committee in any event. In this respect the use in the original English text of the definite article "the", which is maintained throughout each draft and finds expression in Article 28 (a), has a significance which cannot be ignored. It was inserted with evident deliberation. This accords with the record of the various drafts and the discussions which took place on them.

The three nations representative of major geographical areas comprising the "remainder" had to satisfy the dual qualification

both of having an important interest in maritime safety and also owning a substantial amount of shipping.

At this stage there was a deliberate intention on the part of the drafters to confine the membership of the Committee to a very limited number of nations and to have it controlled by the nine largest ship-owning nations. This is apparent in the Report of the Drafting Committee. This Report stated that the proposed Committee "will include the largest ship-owning nations" (as distinct from nations owning substantial amounts of merchant shipping) and that this "is of great importance to its successful operation". Provision was also made, it continued, "for representation of other ship-owning nations from all parts of the world" (other, as distinct from the nine largest), "thus giving recognition to the world-wide interest in the problems involved".

To have suggested that, although a nation was the largest or one of the nine largest ship-owning nations it was within the discretion of the Assembly to determine that it was not a nation "owning substantial amounts of merchant shipping" or did not have an "important interest in maritime safety" would have been unreal. Those qualifications were patently inherent in a nation being one of the nine largest ship-owning nations.

The second draft was submitted by the United States at the Conference of the United Maritime Consultative Council held in Washington in 1946. It followed the form of the first draft. Apart from substituting the word "having" for "owning" substantial amounts of merchant shipping, the substantive alteration was to omit the provision in the Drafting Committee's draft which enabled the Maritime Safety Committee to adjust the number of its Members with the approval of the Council. The proportion between the largest ship-owning nations and the remainder was to be unchangeable. There was to be no freedom for the Members of the Assembly to depart from what were contemplated to be clear provisions governing the proportion between the two.

This predominance on the Committee of the nine did not seem acceptable to some Members of the Conference, India especially, which had put forward to the Drafting Committee its own proposal which, however, that Committee had not felt empowered to substitute for the original wording of the Article because it invoked a matter of principle.

A third draft was then put forward by the Drafting Committee, which was in two versions. The first was based on the United

States' draft and, in fact, followed it word for word. It sought to restrict the whole of the membership to nations having both important interests in maritime safety and substantial amounts of shipping. The nine largest ship-owning nations spoke for themselves in terms of both these criteria but the remainder of three would have to satisfy the Assembly that they qualified under both. The intention of this draft was to confine the whole Committee to nations having substantial amounts of shipping.

The alternative draft (submitted by the Drafting Committee after discussion of the amendment proposed by India) is of special importance. It reflects the struggle of those who sought to reduce the predominance in the Maritime Safety Committee of the nine largest ship-owning nations, and to prevent it from being under the exclusive control of nations "having substantial amounts of shipping". The Indian delegate was to point out during the debate on the drafts, which took place in the United Maritime Consultative Council on 28 October 1946, that other countries "who did not actually own or have a large number of merchant vessels" had also important interests in maritime safety.

The alternative draft accordingly struck out the words "and having substantial amounts of shipping", retained the total membership at twelve, but altered the ratio between "the largest ship-owning nations" and the remainder from nine and three to seven and five.

This was the subject of debate at the meeting of the United Maritime Consultative Council on 28 October 1946.

Objection was taken by the representative of Denmark to the Indian proposal, on the ground that it meant that the Maritime Safety Committee would be composed of twelve Member Governments of which not less than seven "would have to be the largest ship-owning nations". He could not agree unless the total number were increased to fourteen, "of which nine would have to be the largest ship-owning nations". The Indian representative considered that a ratio of seven (largest ship-owning nations) to five (other nations) was a fair ratio. The United States representative said that "the underlying principle which was generally accepted by all" was that "the largest ship-owning nations should be in pre-dominance in the Maritime Safety Committee".

In the result, the matter was held in abeyance for informal discussions between maritime experts from the United Kingdom and the United States of America and representatives of Denmark and India.

There emerged a final draft which followed the alternative draft, and which increased the total membership to fourteen, of which not less than eight were to be the largest ship-owning nations. This draft was in the following terms:

"The Maritime Safety Committee shall consist of fourteen Member Governments selected by the Assembly from the Governments of those nations having an important interest in maritime safety, of which not less than eight shall be the largest ship-owning nations, and the remainder shall be selected so as to ensure adequate representation of other nations with important interests in maritime safety and of major geographical areas..."

This was the draft which came before the United Nations Maritime Conference at Geneva, held in February and March 1948, and a working party on Maritime Safety was set up on 27 February. At the meeting of the Working Party held on 28 February 1948, a proposal was made by India to fashion the draft along the lines of the present Article 17. It met with opposition and was rejected.

India then proposed the addition to the draft article of words to the effect of those now appearing in the text of Article 28 (a), namely, "such as nations interested in the supply of large numbers of crews or in the carriage of large numbers ... of passengers". This proposal was also rejected by the Working Party but was subsequently incorporated in Article 28 (a) after the words "of other nations with an important interest in maritime safety". The present text in all essential aspects was adopted on 1 March 1948 "subject ... to drafting changes". No further discussions are recorded and the text which presently appears in the Convention was finally adopted on 5 March 1948.

Under the first three drafts of the Article, the nine largest ship-owning nations had in any event to be on the Committee. When the subsequent drafts increased the total membership to fourteen, altered the ratio on the Committee between the largest ship-owning nations and other countries, and effected the other amendments already indicated, the intention that it should be obligatory upon the Assembly to appoint to the Committee a predominating number of the largest ship-owning nations remained constant; instead, however, of being at least the nine largest, it was to be at least the eight largest.

The determination to retain the predominance of the largest ship-owning nations finds expression in Article 28 (a), the terms of which exclude the possibility of an interpretation which would authorize the Assembly to refuse membership on the Committee

to any one or more of the eight largest ship-owning nations.

It has been suggested that the word "elected" where it first appears in Article 28 (a) was deliberately chosen in order to confer on the Assembly a wide authority to appraise the relative qualifications of Member States for election to the Committee. The fact is, however, that this word found its way into the Article at some time between 1 March 1948, when the Article was adopted "subject ... to drafting changes", and four days after, namely, on 5 March 1948. It replaced the word "selected" which had appeared in every draft of the Article since 1946.

There was apparently no explanation for, or any discussion on, the alteration. It was a mere drafting change. If the word "elected" had the special significance sought to be attached to it, it seems unlikely that the word would have found its way into the Article in this manner.

What Article 28 (a) requires the Assembly to do is to determine which of its Members are the eight "largest ship-owning nations" within the meaning which these words bear. That is the sole content of its function in relation to them. The words of the Article "of which not less than eight shall be the largest ship-owning nations" have a mandatory and imperative sense and precisely carry out the intention of the framers of the Convention.

\* \* \*

The Court must now consider the meaning of the words "the largest ship-owning nations".

In the opinion of the Netherlands Government, set out in its Written Statement, "the term 'ship-owning nations' is ... not suitable for legal analysis; it cannot be decomposed into elements which have any specific legal connotation ... even the fact that the merchant fleet, flying the flag of a particular State, is owned by nationals of that State cannot in itself qualify that State as a ship-owning nation". Registration and the right to fly the flag and national ownership of merchant vessels "may, together with other factors", it contended, "be relevant for the determination by the Assembly whether or not a State can be considered as a 'ship-owning nation'", but "they do not either separately or jointly impress upon a State the quality required....".

The view of the Government of the United Kingdom, which appears to express the common view of that Government and that of the Netherlands, is set out in the Written Statement of the United Kingdom as follows:

"The expression 'the largest ship-owning nations' has no apparent clear-cut or technical meaning... It is submitted that the intention of those words was to enable the Assembly in the process of election to look at the realities of the situation and to determine according to its own judgment, whether or not candidates for election to the Maritime Safety Committee could properly be regarded as the 'largest ship-owning nations' in a real and substantial sense ... these words, while intended to guide the Assembly, were at the same time deliberately framed so as to enable the Assembly to deal with the matter on the basis of the true situation and the real interest in maritime safety of the State concerned."

This submission asserts an authority in the Assembly to appraise which nations are ship-owning nations and which are the largest among them, the words "the largest ship-owning nations" providing but a guide. The Assembly would be free "to look at the realities" on the basis of "the true situation", whatever in its opinion and that of its individual members these might be considered to be. It would be bound by no ascertainable criteria. Its members in casting their votes would be entitled to have regard to any considerations they might think relevant.

If Article 28 (a) were intended to confer upon the Assembly such an authority, enabling it to choose the eight largest ship-owning nations, uncontrolled by any objective test of any kind, whether it be that of tonnage registration or ownership by nationals or any other, the mandatory words "not less than eight shall be the largest ship-owning nations" would be left without significance. To give to the Article such a construction would mean that the structure built into the Article to ensure the predominance on the Committee of "the" largest ship-owning nations in the ratio of at least eight to six would be undermined and would collapse. The Court is unable to accept an interpretation which would have such a result.

In order to determine which nations are the largest ship-owning nations, it is apparent that some basis of measurement must be applied. The rationale of the situation is that when Article 28 (a) speaks of "the largest ship-owning nations", it can only have in mind a comparative size vis-à-vis other nations owners of tonnage. There is no other practical means by which the size of ship-owning nations may be measured. The largest ship-owning nations are to be elected on the strength of their tonnage, the tonnage which is owned by or belongs to them. The only question is in what sense Article 28 (a) contemplates it should be owned by or belong to them.

A general opinion, shared by the Court, is that it is not possible to contend that the words "ship-owning nations" in Article 28 (a) mean that the ships have to be owned by the State itself.

There appear to be but two meanings which could demand serious consideration: either the words refer to the tonnage beneficially owned by the nationals of a State or they refer to the registered tonnage of a flag State regardless of its private or State ownership.

Liberia and Panama, supported by other States, have contended that the sole test is registered tonnage. On the other hand, it has been submitted by certain States that the proper interpretation of the Article requires that ships should belong to nationals of the State whose flag they fly. This submission was rather concretely expressed by the Government of Norway which suggested using the flag-tonnage as a point of departure, reducing this amount by the amount of tonnage not owned by nationals of the flag State and adding the tonnage which does belong to such nationals but is registered under a different flag.

\* \* \*

An examination of certain Articles of the Convention and the actual practice which was followed in giving effect to them throws some light on the Court's consideration of the question.

Article 60 providing for entry into force of the Convention, and which follows the form to be found in a number of multilateral treaties dealing with safety and working conditions at sea, states:

"The present Convention shall enter into force on the date when 21 States of which seven shall each have a total tonnage of not less than 1,000,000 gross tons of shipping, have become parties to the Convention in accordance with Article 57."

The required conditions having been fulfilled on 17 March 1958, the Convention came into force on that day. As is stated by Legal Counsel of the United Nations in a letter of 10 April 1959:

"In so far as concerns the requirement of Article 60 that seven among the States becoming parties should 'each have a total tonnage' of the stated amount, no question was raised, and no consideration was given, as to whether the total tonnage figure of any State then a party, as indicated by Lloyd's Register, should be altered for any reason bearing upon the ownership of such tonnage."

Article 60 has a special significance. In the English text this Article speaks of certain States which "have" a total tonnage, whilst in Article 28 (a) the reference is to nations "owning" ships.

zation which embodies a list of the ship-owning nations with their respective registered tonnages formulated on the basis of *Lloyd's Register*. Liberia and Panama, countries which were among the eight largest on the list, were not elected by the Assembly but countries which ranked ninth and tenth were elected.

This reliance upon registered tonnage in giving effect to different provisions of the Convention and the comparison which has been made of the texts of Articles 60 and 28 (a), persuade the Court to the view that it is unlikely that when the latter Article was drafted and incorporated into the Convention it was contemplated that any criterion other than registered tonnage should determine which were the largest ship-owning nations. In particular it is unlikely that it was contemplated that the test should be the nationality of stock-holders and of others having beneficial interests in every merchant ship; facts which would be difficult to catalogue, to ascertain and to measure. To take into account the names and nationalities of the owners or shareholders of shipping companies would, to adopt the words of the representative of the United Kingdom during the debate which preceded the election, "introduce an unnecessarily complicated criterion". Such a method of evaluating the ship-owning rank of a country is neither practical nor certain. Moreover, it finds no basis in international practice, the language of international jurisprudence, in maritime terminology, in international conventions dealing with safety at sea or in the practice followed by the Organization itself in carrying out the Convention. On the other hand, the criterion of registered tonnage is practical, certain and capable of easy application.

\* \* \*

Moreover, the test of registered tonnage is that which is most consonant with international practice and with maritime usage.

Article 28 (a) was drawn up by maritime experts who might reasonably be expected to have been acquainted with previous and existing conventions concerned with shipping and dealing with safety at sea and allied subjects. In such conventions a ship has commonly been considered as belonging to a State if it is registered by that State.

The Load Line Convention of 1930 affords a suitable example. Article 3 thereof provides:

- "(a) a ship is regarded as belonging to a country if it is registered by the Government of that country;  
(b) the expression 'Administration' means the Government of the country to which the ship belongs...."

In the French and Spanish texts however, which texts are equally authentic, the same verb "to own" or "to possess" is used in each Article. There can be, and indeed there is, no dispute that whether the reference in Article 60 is to States which "have" the specified tonnage—as in the English text—or whether it is to States which "own" or "possess" that specified tonnage—as in the French and Spanish texts—that reference is to registered tonnage and registered tonnage only and provides an automatic criterion to determine the point of time at which the Convention comes into force.

The practice followed by the Assembly in relation to other Articles reveals the reliance placed upon registered tonnage.

Thus in implementing Article 17 (c) of the Convention, which provides that two members of the Council "shall be elected by the Assembly from among the governments of nations having a substantial interest in providing international shipping services", the Assembly elected Japan and Italy. This was done after it had been reported to the Assembly that the representatives of the Members of the Council who were required under the terms of Article 18 to make their recommendation to the Assembly had

"therefore examined the claims of countries having a substantial interest in providing international shipping services. They did not feel that they should propose to the Assembly a long list of candidates, as two countries clearly surpassed the others in size of their tonnage; they recommended the election of Japan (with tonnage of about 5,500,000 tons) and of Italy (with a tonnage of nearly 5,000,000)."

The tonnages mentioned are those recorded in the list of the Secretary-General of the Organization, which was before the Assembly in the election under Article 28 (a) and which is none other than a copy of *Lloyd's Register of Shipping for 1958*. The registered tonnages of the two countries were taken as the appropriate criterion, there was no suggestion of any other. There were only two Members to be elected under Article 17 (c) and there were only two recommendations to the Assembly.

The apportionment of the expenses of the Organization amongst its Members under the provisions of Article 41 of the Convention is also significant. Under Resolution A.20(I) adopted by the Assembly of the Organization on 19 January 1959, the assessment on each Member State was principally "determined by its respective gross registered tonnage as shown in the latest edition of *Lloyd's Register of Shipping*". Those States whose registered tonnages were the largest paid the largest assessments.

Furthermore, the Assembly, when proceeding to elect the eight largest ship-owning nations under Article 28 (a), took note of the Working Paper prepared by the Secretary-General of the Organi-

A similar provision was to be found in Article 2 of the Convention for the Safety of Life at Sea, 1929.

Among other international conventions which acknowledge the same principles are the Brussels Conventions of 1910 respecting Collisions, and Assistance and Salvage at Sea; the Conventions for the Safety of Life at Sea of 1914 and 1948, and the Convention for Prevention of Pollution of the Sea by Oil, 1954. Numerous bilateral treaties also give expression to it.

The Court is unable to accept the view that when the Article was first drafted in 1946 and referred to "ship-owning nations" in the same context in which it referred to "nations owning substantial amounts of merchant shipping", the draftsmen were not speaking of merchant shipping belonging to a country in the sense used in international conventions concerned with safety at sea and cognate matters from 1910 onwards. It would, in its view, be quite unlikely, if the words "ship-owning nations" were intended to have any different meaning, that no attempt would have been made to indicate this. The absence of any discussion on their meaning as the draft Article developed strongly suggests that there was no doubt as to their meaning; that they referred to registered ship tonnage. It is, indeed, not without significance that about the time the draft Article was finally settled, *Lloyd's Register for 1948* listed as belonging to the various countries of the world the vessels registered in those countries and that under the heading "Countries where owned" there were given the number and gross tonnage of vessels which are the same as those registered under the flag of each nation indicated.

\* \* \*

The conclusion the Court reaches is that where in Article 28 (a) "ship-owning nations" are referred to, the reference is solely to registered tonnage. The largest ship-owning nations are the nations having the largest registered ship tonnage.

The interpretation the Court gives to Article 28 (a) is consistent with the general purpose of the Convention and the special functions of the Maritime Safety Committee. The Organization established by the Convention is a consultative one only, and the Maritime Safety Committee is the body which has the duty to consider matters within the scope of the Organization and of recommending through the Council and the Assembly to Member States, proposals for maritime regulation. In order effectively to carry out these recommendations and to promote maritime safety in its numerous and varied aspects, the co-operation of those States who exercise jurisdiction over a large portion of the world's

existing tonnage is essential. The Court cannot subscribe to an interpretation of "largest ship-owning nations" in Article 28 (a) which is out of harmony with the purposes of the Convention and which would empower the Assembly to refuse Membership of the Maritime Safety Committee to a State, regardless of the fact that it ranks among the first eight in terms of registered tonnage.

It was contended in the course of the arguments that the Assembly, in assessing the size, in relation to ship-owning, of each country, was entitled to take into consideration the notion of a genuine link which it was claimed should exist between ships and the countries in which they are registered. Article 5 of the unratified Geneva Convention on the High Seas of 1958 was invoked in support of this contention. That Article itself provides:

"Each State shall fix the conditions for the grant of its nationality to ships, for the registration of ships in its territory, and for the right to fly its flag..."

The Court having reached the conclusion that the determination of the largest ship-owning nations depends solely upon the tonnage registered in the countries in question, any further examination of the contention based on a genuine link is irrelevant for the purpose of answering the question which has been submitted to the Court for an advisory opinion.

The Assembly elected to the Committee neither Liberia nor Panama, in spite of the fact that, on the basis of registered tonnage, these two States were included among the eight largest ship-owning nations. By so doing the Assembly failed to comply with Article 28 (a) of the Convention which, as the Court has established, must be interpreted as requiring the determination of the largest ship-owning nations to be made solely on the basis of registered tonnage.

For these reasons,

THE COURT IS OF OPINION,

by nine votes to five,

that the Maritime Safety Committee of the Inter-Governmental Maritime Consultative Organization, which was elected on 15 January 1959, is not constituted in accordance with the Convention for the Establishment of the Organization.

Done in English and in French, the English text being authoritative, at the Peace Palace, The Hague, this eighth day of June, one thousand nine hundred and sixty, in two copies, one of which will

be placed in the archives of the Court and the other transmitted to the Secretary-General of the Inter-Governmental Maritime Consultative Organization.

*(Signed)* Helge KLAESTAD,  
President.

*(Signed)* GARNIER-COIGNET,  
Deputy-Registrar.

President KLAESTAD and Judge MORENO QUINTANA append to the Opinion statements of their dissenting opinion.

*(Initialed)* H. K.  
*(Initialed)* G.-C.



**Certain Expenses of the United Nations  
(Article 17, paragraph 2, of the Charter),  
Advisory Opinion, I.C.J. Reports 1962**

## INTERNATIONAL COURT OF JUSTICE

1962  
20 July  
General List  
No. 49

YEAR 1962

20 July 1962

## CERTAIN EXPENSES OF THE UNITED NATIONS

(ARTICLE 17, PARAGRAPH 2, OF THE CHARTER)

*Resolution 1731 (XVI) of General Assembly requesting advisory opinion.—Objections to giving opinion based on proceedings in General Assembly.—Interpretation of meaning of "expenses of the Organization",—Article 17, paragraphs 1 and 2, of Charter.—Lack of justification for limiting terms "budget" and "expenses".—Article 17 in context of Charter.—Respective functions of Security Council and General Assembly.—Article 11, paragraph 2, in relation to budgetary powers of General Assembly.—Role of General Assembly in maintenance of international peace and security.—Agreements under Article 43.—Expenses incurred for purposes of United Nations.—Obligations incurred by Secretary-General acting under authority of Security Council or General Assembly.—Nature of operations of UNEF and ONUC.—Financing of UNEF and ONUC based on Article 17, paragraph 2.—Implementation by Secretary-General of Security Council resolutions.—Expenditures for UNEF and ONUC and Article 17, paragraph 2, of Charter.*

### ADVISORY OPINION

*Present: President WINIARSKI; Vice-President ALFARO; Judges BASDEVANT, BADAWI, MORENO QUINTANA, WELLINGTON KOO, SPIROPOULOS, Sir Percy SPENDER, Sir Gerald FITZMAURICE, KORETSKY, TANAKA, BUSTAMANTE Y RIVERO, JESSUP, MORELLI; Registrar GARNIER-COIGNET.*

Concerning the question whether certain expenditures authorized by the General Assembly "constitute expenses of the Organization" within the meaning of Article 17, paragraph 2, of the Charter of the United Nations",

THE COURT,

composed as above,

gives the following *Advisory Opinion*:

The request which laid the matter before the Court was formulated in a letter dated 21 December 1961 from the Acting Secretary-General of the United Nations to the President of the Court, received in the Registry on 27 December. In that letter the Acting Secretary-General informed the President of the Court that the General Assembly, by a resolution adopted on 20 December 1961, had decided to request the International Court of Justice to give an advisory opinion on the following question:

"Do the expenditures authorized in General Assembly resolutions 1583 (XV) and 1590 (XV) of 20 December 1960, 1595 (XV) of 3 April 1961, 1619 (XV) of 21 April 1961 and 1633 (XVI) of 30 October 1961 relating to the United Nations operations in the Congo undertaken in pursuance of the Security Council resolutions of 14 July, 22 July and 9 August 1960, and 21 February and 24 November 1961, and General Assembly resolutions 1474 (ES-IV) of 20 September 1960 and 1599 (XV), 1600 (XV) and 1601 (XV) of 15 April 1961, and the expenditures authorized in General Assembly resolutions 1122 (XI) of 26 November 1956, 1089 (XI) of 21 December 1956, 1090 (XI) of 27 February 1957, 1151 (XII) of 22 November 1957, 1204 (XII) of 13 December 1957, 1337 (XIII) of 13 December 1958, 1441 (XIV) of 5 December 1959 and 1575 (XV) of 20 December 1960 relating to the operations of the United Nations Emergency Force undertaken in pursuance of General Assembly resolutions 997 (ES-I) of 2 November 1956, 998 (ES-I) and 999 (ES-I) of 4 November 1956, 1000 (ES-I) of 5 November 1956, 1001 (ES-I) of 7 November 1956, 1121 (XI) of 24 November 1956 and 1263 (XIII) of 14 November 1958, constitute 'expenses of the Organization' within the meaning of Article 17, paragraph 2, of the Charter of the United Nations?"

In the Acting Secretary-General's letter was enclosed a certified copy of the aforementioned resolution of the General Assembly. At the same time the Acting Secretary-General announced that he would transmit to the Court, in accordance with Article 65 of the Statute, all documents likely to throw light upon the question.

Resolution 1731 (XVI) by which the General Assembly decided to request an advisory opinion from the Court reads as follows:

*"The General Assembly,*

*Recognizing its need for authoritative legal guidance as to obligations of Member States under the Charter of the United Nations*

in the matter of financing the United Nations operations in the Congo and in the Middle East,

1. *Decides* to submit the following question to the International Court of Justice for an advisory opinion:

"Do the expenditures authorized in General Assembly resolutions 1583 (XV) and 1590 (XV) of 20 December 1960, 1595 (XV) of 3 April 1961, 1619 (XV) of 21 April 1961 and 1633 (XVI) of 30 October 1961 relating to the United Nations operations in the Congo undertaken in pursuance of the Security Council resolutions of 14 July, 22 July and 9 August 1960, and 21 February and 24 November 1961, and General Assembly resolutions 1474 (ES-IV) of 20 September 1960 and 1599 (XV), 1600 (XV) and 1601 (XV) of 15 April 1961, and the expenditures authorized in General Assembly resolutions 1122 (XI) of 26 November 1956, 1089 (XI) of 21 December 1956, 1090 (XI) of 27 February 1957, 1151 (XII) of 22 November 1957, 1204 (XII) of 13 December 1957, 1337 (XIII) of 13 December 1958, 1441 (XIV) of 5 December 1959 and 1575 (XV) of 20 December 1960 relating to the operations of the United Nations Emergency Force undertaken in pursuance of General Assembly resolutions 997 (ES-I) of 2 November 1956, 998 (ES-I) and 999 (ES-I) of 4 November 1956, 1000 (ES-I) of 5 November 1956, 1001 (ES-I) of 7 November 1956, 1121 (XI) of 24 November 1956 and 1263 (XIII) of 14 November 1958, constitute 'expenses of the Organization' within the meaning of Article 17, paragraph 2, of the Charter of the United Nations?"

2. *Requests* the Secretary-General, in accordance with Article 65 of the Statute of the International Court of Justice, to transmit the present resolution to the Court, accompanied by all documents likely to throw light upon the question."

\* \* \*

On 27 December 1961, the day the letter from the Acting Secretary-General of the United Nations reached the Registry, the President, in pursuance of Article 66, paragraph 2, of the Statute, considered that the States Members of the United Nations were likely to be able to furnish information on the question and made an Order fixing 20 February 1962 as the time-limit within which the Court would be prepared to receive written statements from them and the Registrar sent to them the special and direct communication provided for in that Article, recalling that resolution 1731 (XVI) and those referred to in the question submitted for opinion were already in their possession.

The notice to all States entitled to appear before the Court of the letter from the Acting Secretary-General and of the resolution therein enclosed, prescribed by Article 66, paragraph 1, of the Statute, was given by letter of 4 January 1962.

The following Members of the United Nations submitted statements, notes or letters setting forth their views: Australia, Bulgaria,

Byelorussian Soviet Socialist Republic, Canada, Czechoslovakia, Denmark, France, Ireland, Italy, Japan, Netherlands, Portugal, Romania, South Africa, Spain, Ukrainian Soviet Socialist Republic, Union of Soviet Socialist Republics, United Kingdom of Great Britain and Northern Ireland, United States of America and Upper Volta. Copies of these communications were transmitted to all Members of the United Nations and to the Acting Secretary-General of the United Nations.

Mexico, the Philippines and Poland referred in letters to the views expressed on their behalf during the session of the General Assembly.

The Acting Secretary-General of the United Nations, in pursuance of Article 65, paragraph 2, of the Statute, transmitted to the Court a dossier of documents likely to throw light upon the question, together with an Introductory Note and a note by the Controller on the budgetary and financial practices of the United Nations; these documents reached the Registry on 21 February and 1 March 1962.

The Members of the United Nations were informed on 23 March 1962 that the oral proceedings in this case would open towards the beginning of May. On 16 April 1962 they were notified that 14 May had been fixed as the opening date. Hearings were held from 14 to 19 May and on 21 May, the Court being addressed by the following:

for Canada:

M. Marcel Cadieux, Deputy Under-Secretary and Legal Adviser for the Department of External Affairs;

for the Netherlands:

Professor W. Riphagen, Legal Adviser to the Ministry of Foreign Affairs;

for Italy:

M. Riccardo Monaco, Professor at the University of Rome, Head of Department for Contentious Diplomatic Questions, Ministry of Foreign Affairs;

for the United Kingdom of Great Britain and Northern Ireland:

The Rt. Hon. Sir Reginald Manningham-Buller, Q.C., Attorney-General;

for Norway:

Mr. Jens Evensen, Director-General, Ministry of Foreign Affairs;

for Australia:

Sir Kenneth Bailey, Solicitor-General;

for Ireland:

Mr. Aindrias O' Caoimh, S.C., Attorney-General;

for the Union of Soviet Socialist Republics:

Professor G. I. Tunkin, Director of the Juridical-Treaty Department of the Ministry of Foreign Affairs;

for the United States of America:

The Honorable Abram Chayes, Legal Adviser, Department of State.

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Before proceeding to give its opinion on the question put to it, the Court considers it necessary to make the following preliminary remarks:

The power of the Court to give an advisory opinion is derived from Article 65 of the Statute. The power granted is of a discretionary character. In exercising its discretion, the International Court of Justice, like the Permanent Court of International Justice, has always been guided by the principle which the Permanent Court stated in the case concerning the *Status of Eastern Carelia* on 23 July 1923: "The Court, being a Court of Justice, cannot, even in giving advisory opinions, depart from the essential rules guiding their activity as a Court" (P.C.I.J., Series B, No. 5, p. 29). Therefore, and in accordance with Article 65 of its Statute, the Court can give an advisory opinion only on a legal question. If a question is not a legal one, the Court has no discretion in the matter; it must decline to give the opinion requested. But even if the question is a legal one, which the Court is undoubtedly competent to answer, it may nonetheless decline to do so. As this Court said in its Opinion of 30 March 1950, the permissive character of Article 65 "gives the Court the power to examine whether the circumstances of the case are of such a character as should lead it to decline to answer the Request" (*Interpretation of Peace Treaties with Bulgaria, Hungary and Romania (First Phase)*, I.C.J. Reports 1950, p. 72). But, as the Court also said in the same Opinion, "the reply of the Court, itself an 'organ of the United Nations', represents its participation in the activities of the Organization, and, in principle, should not be refused" (*ibid.*, p. 71). Still more emphatically, in its Opinion of 23 October 1956, the Court said that only "compelling reasons" should lead it to refuse to give a requested advisory opinion (*Judgments of the Administrative Tribunal of the I.L.O. upon complaints made against the Unesco*, I.C.J. Reports 1956, p. 86).

The Court finds no "compelling reason" why it should not give the advisory opinion which the General Assembly requested by its resolution 1731 (XVI). It has been argued that the question put to the Court is intertwined with political questions, and that for this reason the Court should refuse to give an opinion. It is true that most interpretations of the Charter of the United Nations will have political significance, great or small. In the nature of things it could not be otherwise. The Court, however, cannot attribute a political character to a request which invites it to undertake an essentially judicial task, namely, the interpretation of a treaty provision.

In the preamble to the resolution requesting this opinion, the General Assembly expressed its recognition of "its need for authori-

tative legal guidance". In its search for such guidance it has put to the Court a legal question—a question of the interpretation of Article 17, paragraph 2, of the Charter of the United Nations. In its Opinion of 28 May 1948, the Court made it clear that as "the principal judicial organ of the United Nations", it was entitled to exercise in regard to an article of the Charter, "a multilateral treaty, an interpretative function which falls within the normal exercise of its judicial powers" (*Conditions of Admission of a State to Membership in the United Nations (Article 4 of the Charter)*, I.C.J. Reports 1947-1948, p. 61).

The Court, therefore, having been asked to give an advisory opinion upon a concrete legal question, will proceed to give its opinion.

\* \* \*

The question on which the Court is asked to give its opinion is whether certain expenditures which were authorized by the General Assembly to cover the costs of the United Nations operations in the Congo (hereinafter referred to as ONUC) and of the operations of the United Nations Emergency Force in the Middle East (hereinafter referred to as UNEF), "constitute 'expenses of the Organization' within the meaning of Article 17, paragraph 2, of the Charter of the United Nations".

Before entering upon the detailed aspects of this question, the Court will examine the view that it should take into consideration the circumstance that at the 1086th Plenary Meeting of the General Assembly on 20 December 1961, an amendment was proposed, by the representative of France, to the draft resolution requesting the advisory opinion, and that this amendment was rejected. The amendment would have asked the Court to give an opinion on the question whether the expenditures relating to the indicated operations were "decided on in conformity with the provisions of the Charter"; if that question were answered in the affirmative, the Court would have been asked to proceed to answer the question which the resolution as adopted actually poses.

If the amendment had been adopted, the Court would have been asked to consider whether the resolutions *authorizing the expenditures* were decided on in conformity with the Charter; the French amendment did not propose to ask the Court whether the resolutions *in pursuance of which the operations in the Middle East and in the Congo were undertaken*, were adopted in conformity with the Charter.

The Court does not find it necessary to expound the extent to which the proceedings of the General Assembly, antecedent to the adoption of a resolution, should be taken into account in interpreting that resolution, but it makes the following comments on the argument based upon the rejection of the French amendment.

The rejection of the French amendment does not constitute a directive to the Court to exclude from its consideration the question whether certain expenditures were "decided on in conformity with the Charter", if the Court finds such consideration appropriate. It is not to be assumed that the General Assembly would thus seek to fetter or hamper the Court in the discharge of its judicial functions; the Court must have full liberty to consider all relevant data available to it in forming an opinion on a question posed to it for an advisory opinion. Nor can the Court agree that the rejection of the French amendment has any bearing upon the question whether the General Assembly sought to preclude the Court from interpreting Article 17 in the light of other articles of the Charter, that is, in the whole context of the treaty. If any deduction is to be made from the debates on this point, the opposite conclusion would be drawn from the clear statements of sponsoring delegations that they took it for granted the Court would consider the Charter as a whole.

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Turning to the question which has been posed, the Court observes that it involves an interpretation of Article 17, paragraph 2, of the Charter. On the previous occasions when the Court has had to interpret the Charter of the United Nations, it has followed the principles and rules applicable in general to the interpretation of treaties, since it has recognized that the Charter is a multilateral treaty, albeit a treaty having certain special characteristics. In interpreting Article 4 of the Charter, the Court was led to consider "the structure of the Charter" and "the relations established by it between the General Assembly and the Security Council"; a comparable problem confronts the Court in the instant matter. The Court sustained its interpretation of Article 4 by considering the manner in which the organs concerned "have consistently interpreted the text" in their practice (*Competence of the General Assembly for the Admission of a State to the United Nations, I.C.J. Reports 1950, pp. 8-9*).

The text of Article 17 is in part as follows:

1. The General Assembly shall consider and approve the budget of the Organization.
2. The expenses of the Organization shall be borne by the Members as apportioned by the General Assembly."

Although the Court will examine Article 17 in itself and in its relation to the rest of the Charter, it should be noted that at least three separate questions might arise in the interpretation of paragraph 2 of this Article. One question is that of identifying what are "the expenses of the Organization"; a second question might

concern apportionment by the General Assembly; while a third concern might involve the interpretation of the phrase "shall be borne by the Members". It is the second and third questions which directly involve "the financial obligations of the Members", but it is only the first question which is posed by the request for the advisory opinion. The question put to the Court has to do with a moment logically anterior to apportionment, just as a question of apportionment would be anterior to a question of Members' obligation to pay.

It is true that, as already noted, the preamble of the resolution containing the request refers to the General Assembly's "need for authoritative legal guidance as to obligations of Member States", but it is to be assumed that in the understanding of the General Assembly, it would find such guidance in the advisory opinion which the Court would give on the question whether certain identified expenditures "constitute expenses of the Organization" within the meaning of Article 17, paragraph 2, of the Charter". If the Court finds that the indicated expenditures are such "expenses", it is not called upon to consider the manner in which, or the scale by which, they may be apportioned. The amount of what are unquestionably "expenses of the Organization within the meaning of Article 17, paragraph 2" is not in its entirety apportioned by the General Assembly and paid for by the contributions of Member States, since the Organization has other sources of income. A Member State, accordingly, is under no obligation to pay more than the amount apportioned to it; the expenses of the Organization and the total amount in money of the obligations of the Member States may not, in practice, necessarily be identical.

The text of Article 17, paragraph 2, refers to "the expenses of the Organization" without any further explicit definition of such expenses. It would be possible to begin with a general proposition to the effect that the "expenses" of any organization are the amounts paid out to defray the costs of carrying out its purposes, in this case, the political, economic, social, humanitarian and other purposes of the United Nations. The next step would be to examine, as the Court will, whether the resolutions authorizing the operations here in question were intended to carry out the purposes of the United Nations and whether the expenditures were incurred in furthering these operations. Or, it might simply be said that the "expenses" of an organization are those which are provided for in its budget. But the Court has not been asked to give an abstract definition of the words "expenses of the Organization". It has been asked to answer a specific question related to certain identified expenditures which have actually been made, but the Court would not adequately discharge the obligation incumbent on it unless it examined in some detail various problems raised by the question which the General Assembly has asked.

It is perhaps the simple identification of "expenses" with the items included in a budget, which has led certain arguments to link the interpretation of the word "expenses" in paragraph 2 of Article 17, with the word "budget" in paragraph 1 of that Article; in both cases, it is contended, the qualifying adjective "regular" or "administrative" should be understood to be implied. Since no such qualification is expressed in the text of the Charter, it could be read in, only if such qualification must necessarily be implied from the provisions of the Charter considered as a whole, or from some particular provision thereof which makes it unavoidable to do so in order to give effect to the Charter.

In the first place, concerning the word "budget" in paragraph 1 of Article 17, it is clear that the existence of the distinction between "administrative budgets" and "operational budgets" was not absent from the minds of the drafters of the Charter, nor from the consciousness of the Organization even in the early days of its history. In drafting Article 17, the drafters found it suitable to provide in paragraph 1 that "The General Assembly shall consider and approve the budget of the Organization". But in dealing with the function of the General Assembly in relation to the specialized agencies, they provided in paragraph 3 that the General Assembly "shall examine the administrative budgets of such specialized agencies". If it had been intended that paragraph 1 should be limited to the administrative budget of the United Nations organization itself, the word "administrative" would have been inserted in paragraph 1 as it was in paragraph 3. Moreover, had it been contemplated that the Organization would also have had another budget, different from the one which was to be approved by the General Assembly, the Charter would have included some reference to such other budget and to the organ which was to approve it.

Similarly, at its first session, the General Assembly in drawing up and approving the Constitution of the International Refugee Organization, provided that the budget of that Organization was to be divided under the headings "administrative", "operational" and "large-scale resettlement"; but no such distinctions were introduced into the Financial Regulations of the United Nations which were adopted by unanimous vote in 1950, and which, in this respect, remain unchanged. These regulations speak only of "the budget" and do not provide any distinction between "administrative" and "operational".

In subsequent sessions of the General Assembly, including the sixteenth, there have been numerous references to the idea of distinguishing an "operational" budget; some speakers have advocated such a distinction as a useful book-keeping device; some considered it in connection with the possibility of differing scales of assessment or apportionment; others believed it should mark a differentiation of activities to be financed by voluntary contribu-

tions. But these discussions have not resulted in the adoption of two separate budgets based upon such a distinction.

Actually, the practice of the Organization is entirely consistent with the plain meaning of the text. The budget of the Organization has from the outset included items which would not fall within any of the definitions of "administrative budget" which have been advanced in this connection. Thus, for example, prior to the establishment of, and now in addition to, the "Expanded Programme of Technical Assistance" and the "Special Fund", both of which are nourished by voluntary contributions, the annual budget of the Organization contains provision for funds for technical assistance; in the budget for the financial year 1962, the sum of \$6,400,000 is included for the technical programmes of economic development, social activities, human rights activities, public administration and narcotic drugs control. Although during the Fifth Committee discussions there was a suggestion that all technical assistance costs should be excluded from the regular budget, the items under these heads were all adopted on second reading in the Fifth Committee without a dissenting vote. The "operational" nature of such activities so budgeted is indicated by the explanations in the budget estimates, e.g. the requests "for the continuation of the operational programme in the field of economic development contemplated in General Assembly resolutions 200 (III) of 4 December 1948 and 304 (IV) of 16 November 1949"; and "for the continuation of the operational programme in the field of advisory social welfare services as contemplated in General Assembly resolution 418 (V) of 1 December 1950".

It is a consistent practice of the General Assembly to include in the annual budget resolutions, provision for expenses relating to the maintenance of international peace and security. Annually, since 1947, the General Assembly has made anticipatory provision for "unforeseen and extraordinary expenses" arising in relation to the "maintenance of peace and security". In a Note submitted to the Court by the Controller on the budgetary and financial practices of the United Nations, "extraordinary expenses" are defined as "obligations and expenditures arising as a result of the approval by a council, commission or other competent United Nations body of new programmes and activities not contemplated when the budget appropriations were approved".

The annual resolution designed to provide for extraordinary expenses authorizes the Secretary-General to enter into commitments to meet such expenses with the prior concurrence of the Advisory Committee on Administrative and Budgetary Questions, except that such concurrence is not necessary if the Secretary-

General certifies that such commitments relate to the subjects mentioned and the amount does not exceed \$2 million. At its fifteenth and sixteenth sessions, the General Assembly resolved "that if, as a result of a decision of the Security Council, commitments relating to the maintenance of peace and security should arise in an estimated total exceeding \$10 million" before the General Assembly was due to meet again, a special session should be convened by the Secretary-General to consider the matter. The Secretary-General is regularly authorized to draw on the Working Capital Fund for such expenses but is required to submit supplementary budget estimates to cover amounts so advanced. These annual resolutions on unforeseen and extraordinary expenses were adopted without a dissenting vote in every year from 1947 through 1959, except for 1952, 1953 and 1954, when the adverse votes are attributable to the fact that the resolution included the specification of a controversial item—United Nations Korean war decorations.

It is notable that the 1961 Report of the Working Group of Fifteen on the Examination of the Administrative and Budgetary Procedures of the United Nations, while revealing wide differences of opinion on a variety of propositions, records that the following statement was adopted without opposition:

*"22. Investigations and observation operations undertaken by the Organization to prevent possible aggression should be financed as part of the regular budget of the United Nations."*

In the light of what has been stated, the Court concludes that there is no justification for reading into the text of Article 17, paragraph 1, any limiting or qualifying word before the word "budget".

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Turning to paragraph 2 of Article 17, the Court observes that, on its face, the term "expenses of the Organization" means all the expenses and not just certain types of expenses which might be referred to as "regular expenses". An examination of other parts of the Charter shows the variety of expenses which must inevitably be included within the "expenses of the Organization" just as much as the salaries of staff or the maintenance of buildings.

For example, the text of Chapters IX and X of the Charter with reference to international economic and social cooperation, especially the wording of those articles which specify the functions and powers of the Economic and Social Council, anticipated the numerous and varied circumstances under which expenses of the Organi-

zation could be incurred and which have indeed eventuated in practice.

Furthermore, by Article 98 of the Charter, the Secretary-General is obligated to perform such functions as are entrusted to him by the General Assembly, the Security Council, the Economic and Social Council, and the Trusteeship Council. Whether or not expenses incurred in his discharge of this obligation become "expenses of the Organization" cannot depend on whether they be administrative or some other kind of expenses.

The Court does not perceive any basis for challenging the legality of the settled practice of including such expenses as these in the budgetary amounts which the General Assembly apportions among the Members in accordance with the authority which is given to it by Article 17, paragraph 2.

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Passing from the text of Article 17 to its place in the general structure and scheme of the Charter, the Court will consider whether in that broad context one finds any basis for implying a limitation upon the budgetary authority of the General Assembly which in turn might limit the meaning of "expenses" in paragraph 2 of that Article.

The general purposes of Article 17 are the vesting of control over the finances of the Organization, and the levying of apportioned amounts of the expenses of the Organization in order to enable it to carry out the functions of the Organization as a whole acting through its principal organs and such subsidiary organs as may be established under the authority of Article 22 or Article 29.

Article 17 is the only article in the Charter which refers to budgetary authority or to the power to apportion expenses, or otherwise to raise revenue, except for Articles 33 and 35, paragraph 3, of the Statute of the Court which have no bearing on the point here under discussion. Nevertheless, it has been argued before the Court that one type of expenses, namely those resulting from operations for the maintenance of international peace and security, are not "expenses of the Organization" within the meaning of Article 17, paragraph 2, of the Charter, inasmuch as they fall to be dealt with exclusively by the Security Council, and more especially through agreements negotiated in accordance with Article 43 of the Charter.

The argument rests in part upon the view that when the maintenance of international peace and security is involved, it is only the Security Council which is authorized to decide on any action relative thereto. It is argued further that since the General Assembly's power is limited to discussing, considering, studying and recommending, it cannot impose an obligation to pay the expenses which result from the implementation of its recommendations. This

argument leads to an examination of the respective functions of the General Assembly and of the Security Council under the Charter, particularly with respect to the maintenance of international peace and security.

Article 24 of the Charter provides:

"In order to ensure prompt and effective action by the United Nations, its Members confer on the Security Council primary responsibility for the maintenance of international peace and security..."

The responsibility conferred is "primary", not exclusive. This primary responsibility is conferred upon the Security Council, as stated in Article 24, "in order to ensure prompt and effective action". To this end, it is the Security Council which is given a power to impose an explicit obligation of compliance if for example it issues an order or command to an aggressor under Chapter VII. It is only the Security Council which can require enforcement by coercive action against an aggressor.

The Charter makes it abundantly clear, however, that the General Assembly is also to be concerned with international peace and security. Article 14 authorizes the General Assembly to "recommend measures for the peaceful adjustment of any situation, regardless of origin, which it deems likely to impair the general welfare or friendly relations among nations, including situations resulting from a violation of the provisions of the present Charter setting forth the purposes and principles of the United Nations". The word "measures" implies some kind of action, and the only limitation which Article 14 imposes on the General Assembly is the restriction found in Article 12, namely, that the Assembly should not recommend measures while the Security Council is dealing with the same matter unless the Council requests it to do so. Thus while it is the Security Council which, exclusively, may order coercive action, the functions and powers conferred by the Charter on the General Assembly are not confined to discussion, consideration, the initiation of studies and the making of recommendations; they are not merely hortatory. Article 18 deals with "*decisions*" of the General Assembly "on important questions". These "*decisions*" do indeed include certain recommendations, but others have dispositive force and effect. Among these latter decisions, Article 18 includes suspension of rights and privileges of membership, expulsion of Members, "and budgetary questions". In connection with the suspension of rights and privileges of membership and expulsion from membership under Articles 5 and 6, it is the Security Council which has only the power to recommend and it is the General Assembly which decides and whose decision determines status; but there is a close collaboration between the two organs. Moreover, these powers of decision of the General Assembly under Arti-

cles 5 and 6 are specifically related to preventive or enforcement measures.

By Article 17, paragraph 1, the General Assembly is given the power not only to "consider" the budget of the Organization, but also to "approve" it. The decision to "approve" the budget has a close connection with paragraph 2 of Article 17, since thereunder the General Assembly is also given the power to apportion the expenses among the Members and the exercise of the power of apportionment creates the obligation, specifically stated in Article 17, paragraph 2, of each Member to bear that part of the expenses which is apportioned to it by the General Assembly. When those expenses include expenditures for the maintenance of peace and security, which are not otherwise provided for, it is the General Assembly which has the authority to apportion the latter amounts among the Members. The provisions of the Charter which distribute functions and powers to the Security Council and to the General Assembly give no support to the view that such distribution excludes from the powers of the General Assembly the power to provide for the financing of measures designed to maintain peace and security.

The argument supporting a limitation on the budgetary authority of the General Assembly with respect to the maintenance of international peace and security relies especially on the reference to "action" in the last sentence of Article 11, paragraph 2. This paragraph reads as follows:

"The General Assembly may discuss any questions relating to the maintenance of international peace and security brought before it by any Member of the United Nations, or by the Security Council, or by a State which is not a Member of the United Nations in accordance with Article 35, paragraph 2, and, except as provided in Article 12, may make recommendations with regard to any such question to the State or States concerned or to the Security Council, or to both. Any such question on which action is necessary shall be referred to the Security Council by the General Assembly either before or after discussion."

The Court considers that the kind of action referred to in Article 11, paragraph 2, is coercive or enforcement action. This paragraph, which applies not merely to general questions relating to peace and security, but also to specific cases brought before the General Assembly by a State under Article 35, in its first sentence empowers the General Assembly, by means of recommendations to States or to the Security Council, or to both, to organize peace-keeping operations, at the request, or with the consent, of the States concerned. This power of the General Assembly is a special power which in no way derogates from its general powers under Article 10

or Article 14, except as limited by the last sentence of Article 11, paragraph 2. This last sentence says that when "action" is necessary the General Assembly shall refer the question to the Security Council. The word "action" must mean such action as is solely within the province of the Security Council. It cannot refer to recommendations which the Security Council might make, as for instance under Article 38, because the General Assembly under Article 11 has a comparable power. The "action" which is solely within the province of the Security Council is that which is indicated by the title of Chapter VII of the Charter, namely "Action with respect to threats to the peace, breaches of the peace, and acts of aggression". If the word "action" in Article 11, paragraph 2, were interpreted to mean that the General Assembly could make recommendations only of a general character affecting peace and security in the abstract, and not in relation to specific cases, the paragraph would not have provided that the General Assembly may make recommendations on questions brought before it by States or by the Security Council. Accordingly, the last sentence of Article 11, paragraph 2, has no application where the necessary action is not enforcement action.

The practice of the Organization throughout its history bears out the foregoing elucidation of the term "action" in the last sentence of Article 11, paragraph 2. Whether the General Assembly proceeds under Article 11 or under Article 14, the implementation of its recommendations for setting up commissions or other bodies involves organizational activity—in connection with the maintenance of international peace and security. Such implementation is a normal feature of the functioning of the United Nations. Such committees, commissions or other bodies or individuals, constitute, in some cases, subsidiary organs established under the authority of Article 22 of the Charter. The functions of the General Assembly for which it may establish such subsidiary organs include, for example, investigation, observation and supervision, but the way in which such subsidiary organs are utilized depends on the consent of the State or States concerned.

The Court accordingly finds that the argument which seeks, by reference to Article 11, paragraph 2, to limit the budgetary authority of the General Assembly in respect of the maintenance of international peace and security, is unfounded.

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It has further been argued before the Court that Article 43 of the Charter constitutes a particular rule, a *lex specialis*, which derogates

from the general rule in Article 17, whenever an expenditure for the maintenance of international peace and security is involved. Article 43 provides that Members shall negotiate agreements with the Security Council on its initiative, stipulating what "armed forces, assistance and facilities, including rights of passage, necessary for the purpose of maintaining international peace and security", the Member State will make available to the Security Council on its call. According to paragraph 2 of the Article:

"Such agreement or agreements shall govern the numbers and types of forces, their degree of readiness and general location, and the nature of the facilities and assistance to be provided."

The argument is that such agreements were intended to include specifications concerning the allocation of costs of such enforcement actions as might be taken by direction of the Security Council, and that it is only the Security Council which has the authority to arrange for meeting such costs.

With reference to this argument, the Court will state at the outset that, for reasons fully expounded later in this Opinion, the operations known as UNEF and ONUC were not *enforcement* actions within the compass of Chapter VII of the Charter and that therefore Article 43 could not have any applicability to the cases with which the Court is here concerned. However, even if Article 43 were applicable, the Court could not accept this interpretation of its text for the following reasons.

There is nothing in the text of Article 43 which would limit the discretion of the Security Council in negotiating such agreements. It cannot be assumed that in every such agreement the Security Council would insist, or that any Member State would be bound to agree, that such State would bear the entire cost of the "assistance" which it would make available including, for example, transport of forces to the point of operation, complete logistical maintenance in the field, supplies, arms and ammunition, etc. If, during negotiations under the terms of Article 43, a Member State would be entitled (as it would be) to insist, and the Security Council would be entitled (as it would be) to agree, that some part of the expense should be borne by the Organization, then such expense would form part of the expenses of the Organization and would fall to be apportioned by the General Assembly under Article 17. It is difficult to see how it could have been contemplated that all potential expenses could be envisaged in such agreements concluded perhaps long in advance. Indeed, the difficulty or impossibility of anticipating the entire financial impact of enforcement measures on Member States is brought out by the terms of Article 50 which provides that a State, whether a Member of the United Nations or not, "which finds itself confronted with special economic problems arising from the carrying out of those [preventive or enforcement] measures, shall have

the right to consult the Security Council with regard to a solution of those problems". Presumably in such a case the Security Council might determine that the overburdened State was entitled to some financial assistance; such financial assistance, if afforded by the Organization, as it might be, would clearly constitute part of the "expenses of the Organization". The economic problems could not have been covered in advance by a negotiated agreement since they would be unknown until after the event and in the case of non-Member States, which are also included in Article 50, no agreement at all would have been negotiated under Article 43.

Moreover, an argument which insists that all measures taken for the maintenance of international peace and security must be financed through agreements concluded under Article 43, would seem to exclude the possibility that the Security Council might act under some other Article of the Charter. The Court cannot accept so limited a view of the powers of the Security Council under the Charter. It cannot be said that the Charter has left the Security Council impotent in the face of an emergency situation when agreements under Article 43 have not been concluded.

Articles of Chapter VII of the Charter speak of "situations" as well as disputes, and it must lie within the power of the Security Council to police a situation even though it does not resort to enforcement action against a State. The costs of actions which the Security Council is authorized to take constitute "expenses of the Organization within the meaning of Article 17, paragraph 2".

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The Court has considered the general problem of the interpretation of Article 17, paragraph 2, in the light of the general structure of the Charter and of the respective functions assigned by the Charter to the General Assembly and to the Security Council, with a view to determining the meaning of the phrase "the expenses of the Organization". The Court does not find it necessary to go further in giving a more detailed definition of such expenses. The Court will, therefore, proceed to examine the expenditures enumerated in the request for the advisory opinion. In determining whether the actual expenditures authorized constitute "expenses of the Organization within the meaning of Article 17, paragraph 2, of the Charter", the Court agrees that such expenditures must be tested by their relationship to the purposes of the United Nations in the sense that if an expenditure were made for a purpose which is not one of the purposes of the United Nations, it could not be considered an "expense of the Organization".

The purposes of the United Nations are set forth in Article 1 of the Charter. The first two purposes as stated in paragraphs 1

and 2, may be summarily described as pointing to the goal of international peace and security and friendly relations. The third purpose is the achievement of economic, social, cultural and humanitarian goals and respect for human rights. The fourth and last purpose is: "To be a center for harmonizing the actions of nations in the attainment of these common ends."

The primary place ascribed to international peace and security is natural, since the fulfilment of the other purposes will be dependent upon the attainment of that basic condition. These purposes are broad indeed, but neither they nor the powers conferred to effectuate them are unlimited. Save as they have entrusted the Organization with the attainment of these common ends, the Member States retain their freedom of action. But when the Organization takes action which warrants the assertion that it was appropriate for the fulfilment of one of the stated purposes of the United Nations, the presumption is that such action is not *ultra vires* the Organization.

If it is agreed that the action in question is within the scope of the functions of the Organization but it is alleged that it has been initiated or carried out in a manner not in conformity with the division of functions among the several organs which the Charter prescribes, one moves to the internal plane, to the internal structure of the Organization. If the action was taken by the wrong organ, it was irregular as a matter of that internal structure, but this would not necessarily mean that the expense incurred was not an expense of the Organization. Both national and international law contemplate cases in which the body corporate or politic may be bound, as to third parties, by an *ultra vires* act of an agent.

In the legal systems of States, there is often some procedure for determining the validity of even a legislative or governmental act, but no analogous procedure is to be found in the structure of the United Nations. Proposals made during the drafting of the Charter to place the ultimate authority to interpret the Charter in the International Court of Justice were not accepted; the opinion which the Court is in course of rendering is an *advisory* opinion. As anticipated in 1945, therefore, each organ must, in the first place at least, determine its own jurisdiction. If the Security Council, for example, adopts a resolution purportedly for the maintenance of international peace and security and if, in accordance with a mandate or authorization in such resolution, the Secretary-General incurs financial obligations, these amounts must be presumed to constitute "expenses of the Organization".

The Financial Regulations and Rules of the United Nations, adopted by the General Assembly, provide:

"Regulation 4.1: The appropriations voted by the General Assembly shall constitute an authorization to the Secretary-

General to incur obligations and make payments for the purposes for which the appropriations were voted and up to the amounts so voted."

Thus, for example, when the General Assembly in resolution 1619 (XV) included a paragraph reading:

"3. *Decides* to appropriate an amount of \$100 million for the operations of the United Nations in the Congo from 1 January to 31 October 1961",

this constituted an authorization to the Secretary-General to incur certain obligations of the United Nations just as clearly as when in resolution 1590 (XV) the General Assembly used this language:

"3. *Authorizes* the Secretary-General ... to incur commitments in 1961 for the United Nations operations in the Congo up to the total of \$24 million..."

On the previous occasion when the Court was called upon to consider Article 17 of the Charter, the Court found that an award of the Administrative Tribunal of the United Nations created an obligation of the Organization and with relation thereto the Court said that:

"the function of approving the budget does not mean that the General Assembly has an absolute power to approve or disapprove the expenditure proposed to it; for some part of that expenditure arises out of obligations already incurred by the Organization, and to this extent the General Assembly has no alternative but to honour these engagements". (*Effects of awards of compensation made by the United Nations Administrative Tribunal, I.C.J. Reports 1954, p. 59*.)

Similarly, obligations of the Organization may be incurred by the Secretary-General, acting on the authority of the Security Council or of the General Assembly, and the General Assembly "has no alternative but to honour these engagements".

The obligation is one thing: the way in which the obligation is met—that is from what source the funds are secured—is another. The General Assembly may follow any one of several alternatives: it may apportion the cost of the item according to the ordinary scale of assessment; it may apportion the cost according to some special scale of assessment; it may utilize funds which are voluntarily contributed to the Organization; or it may find some other method or combination of methods for providing the necessary funds. In this context, it is of no legal significance whether, as a matter of book-keeping or accounting, the General Assembly chooses to have the item in question included under one of the standard established sections of the "regular" budget or whether it is separately listed in some special account or fund. The significant fact is that the item is an expense of the Organization and under

Article 17, paragraph 2, the General Assembly therefore has authority to apportion it.

The reasoning which has just been developed, applied to the resolutions mentioned in the request for the advisory opinion, might suffice as a basis for the opinion of the Court. The Court finds it appropriate, however, to take into consideration other arguments which have been advanced.

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The expenditures enumerated in the request for an advisory opinion may conveniently be examined first with reference to UNEF and then to ONUC. In each case, attention will be paid first to the operations and then to the financing of the operations.

In considering the operations in the Middle East, the Court must analyze the functions of UNEF as set forth in resolutions of the General Assembly. Resolution 998 (ES-I) of 4 November 1956 requested the Secretary-General to submit a plan "for the setting up, with the consent of the nations concerned, of an emergency international United Nations Force to secure and supervise the cessation of hostilities in accordance with all the terms of" the General Assembly's previous resolution 997 (ES-I) of 2 November 1956. The verb "secure" as applied to such matters as halting the movement of military forces and arms into the area and the conclusion of a cease-fire, might suggest measures of enforcement, were it not that the Force was to be set up "with the consent of the nations concerned".

In his first report on the plan for an emergency international Force the Secretary-General used the language of resolution 998 (ES-I) in submitting his proposals. The same terms are used in General Assembly resolution 1000 (ES-I) of 5 November in which operative paragraph 1 reads:

"Establishes a United Nations Command for an emergency international Force to secure and supervise the cessation of hostilities in accordance with all the terms of General Assembly resolution 997 (ES-I) of 2 November 1956."

This resolution was adopted without a dissenting vote. In his second and final report on the plan for an emergency international Force of 6 November, the Secretary-General, in paragraphs 9 and 10, stated:

"While the General Assembly is enabled to *establish* the Force with the consent of those parties which contribute units to the Force, it could not request the Force to be *stationed* or *operate* on the territory of a given country without the consent of the Govern-

ment of that country. This does not exclude the possibility that the Security Council could use such a Force within the wider margins provided under Chapter VII of the United Nations Charter. I would not for the present consider it necessary to elaborate this point further, since no use of the Force under Chapter VII, with the rights in relation to Member States that this would entail, has been envisaged.

10. The point just made permits the conclusion that the setting up of the Force should not be guided by the needs which would have existed had the measure been considered as part of an enforcement action directed against a Member country. There is an obvious difference between establishing the Force in order to secure the cessation of hostilities, with a withdrawal of forces, and establishing such a Force with a view to enforcing a withdrawal of forces."

Paragraph 12 of the Report is particularly important because in resolution 1001 (ES-I) the General Assembly, again without a dissenting vote, "*Concurs* in the definition of the functions of the Force as stated in paragraph 12 of the Secretary-General's report". Paragraph 12 reads in part as follows:

"the functions of the United Nations Force would be, when a ceasefire is being established, to enter Egyptian territory with the consent of the Egyptian Government, in order to help maintain quiet during and after the withdrawal of non-Egyptian troops, and to secure compliance with the other terms established in the resolution of 2 November 1956. The Force obviously should have no rights other than those necessary for the execution of its functions, in co-operation with local authorities. It would be more than an observers' corps, but in no way a military force temporarily controlling the territory in which it is stationed; nor, moreover, should the Force have military functions exceeding those necessary to secure peaceful conditions on the assumption that the parties to the conflict take all necessary steps for compliance with the recommendations of the General Assembly."

It is not possible to find in this description of the functions of UNEF, as outlined by the Secretary-General and concurred in by the General Assembly without a dissenting vote, any evidence that the Force was to be used for purposes of enforcement. Nor can such evidence be found in the subsequent operations of the Force, operations which did not exceed the scope of the functions ascribed to it.

It could not therefore have been patent on the face of the resolution that the establishment of UNEF was in effect "enforcement action" under Chapter VII which, in accordance with the Charter, could be authorized only by the Security Council.

On the other hand, it is apparent that the operations were undertaken to fulfil a prime purpose of the United Nations, that is, to

promote and to maintain a peaceful settlement of the situation. This being true, the Secretary-General properly exercised the authority given him to incur financial obligations of the Organization and expenses resulting from such obligations must be considered "expenses of the Organization within the meaning of Article 17, paragraph 2".

Apropos what has already been said about the meaning of the word "action" in Article 11 of the Charter, attention may be called to the fact that resolution 997 (ES-I), which is chronologically the first of the resolutions concerning the operations in the Middle East mentioned in the request for the advisory opinion, provides in paragraph 5:

"Requests the Secretary-General to observe and report promptly on the compliance with the present resolution to the Security Council *and* to the General Assembly, for such further *action as they may deem appropriate in accordance with the Charter.*"

The italicized words reveal an understanding that either of the two organs might take "action" in the premises. Actually, as one knows, the "action" was taken by the General Assembly in adopting two days later without a dissenting vote, resolution 998 (ES-I) and, also without a dissenting vote, within another three days, resolutions 1000 (ES-I) and 1001 (ES-I), all providing for UNEF.

The Court notes that these "actions" may be considered "measures" recommended under Article 14, rather than "action" recommended under Article 11. The powers of the General Assembly stated in Article 14 are not made subject to the provisions of Article 11, but only of Article 12. Furthermore, as the Court has already noted, the word "measures" implies some kind of action. So far as concerns the nature of the situations in the Middle East in 1956, they could be described as "likely to impair ... friendly relations among nations", just as well as they could be considered to involve "the maintenance of international peace and security". Since the resolutions of the General Assembly in question do not mention upon which article they are based, and since the language used in most of them might imply reference to either Article 14 or Article 11, it cannot be excluded that they were based upon the former rather than the latter article.

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The financing of UNEF presented perplexing problems and the debates on these problems have even led to the view that the General Assembly never, either directly or indirectly, regarded the

expenses of UNEF as "expenses of the Organization within the meaning of Article 17, paragraph 2, of the Charter". With this interpretation the Court cannot agree. In paragraph 15 of his second and final report on the plan for an emergency international Force of 6 November 1956, the Secretary-General said that this problem required further study. Provisionally, certain costs might be absorbed by a nation providing a unit, "while all other costs should be financed outside the normal budget of the United Nations". Since it was "obviously impossible to make any estimate of the costs without a knowledge of the size of the corps and the length of its assignment", the "only practical course ... would be for the General Assembly to vote a general authorization for the cost of the Force on the basis of general principles such as those here suggested".

Paragraph 5 of resolution 1001 (ES-I) of 7 November 1956 states that the General Assembly "Approves provisionally the basic rule concerning the financing of the Force laid down in paragraph 15 of the Secretary-General's report".

In an oral statement to the plenary meeting of the General Assembly on 26 November 1956, the Secretary-General said:

"... I wish to make it equally clear that while funds received and payments made with respect to the Force are to be considered as coming outside the regular budget of the Organization, the operation is essentially a United Nations responsibility, and the Special Account to be established must, therefore, be construed as coming within the meaning of Article 17 of the Charter".

At this same meeting, after hearing this statement, the General Assembly in resolution 1122 (XI) noted that it had "provisionally approved the recommendations made by the Secretary-General concerning the financing of the Force". It then authorized the Secretary-General "to establish a United Nations Emergency Force Special Account to which funds received by the United Nations, outside the regular budget, for the purpose of meeting the expenses of the Force shall be credited and from which payments for this purpose shall be made". The resolution then provided that the initial amount in the Special Account should be \$10 million and authorized the Secretary-General "pending the receipt of funds for the Special Account, to advance from the Working Capital Fund such sums as the Special Account may require to meet any expenses chargeable to it". The establishment of a Special Account does not necessarily mean that the funds in it are not to be derived from contributions of Members as apportioned by the General Assembly.

The next of the resolutions of the General Assembly to be considered is 1089 (XI) of 21 December 1956, which reflects the uncertainties and the conflicting views about financing UNEF. The divergencies are duly noted and there is ample reservation concerning possible future action, but operative paragraph 1 follows the recommendation of the Secretary-General "that the expenses relating to the Force should be apportioned in the same manner as the expenses of the Organization". The language of this paragraph is clearly drawn from Article 17:

"1. Decides that the expenses of the United Nations Emergency Force, other than for such pay, equipment, supplies and services as may be furnished without charge by Governments of Member States, shall be borne by the United Nations and shall be apportioned among the Member States, to the extent of \$10 million, in accordance with the scale of assessments adopted by the General Assembly for contributions to the annual budget of the Organization for the financial year 1957."

This resolution, which was adopted by the requisite two-thirds majority, must have rested upon the conclusion that the expenses of UNEF were "expenses of the Organization" since otherwise the General Assembly would have had no authority to decide that they "shall be borne by the United Nations" or to apportion them among the Members. It is further significant that paragraph 3 of this resolution, which established a study committee, charges this committee with the task of examining "the question of the *apportionment* of the expenses of the Force in excess of \$10 million ... and the principle or the formulation of *scales of contributions different from the scale of contributions* by Member States to the ordinary budget for 1957". The italicized words show that it was not contemplated that the Committee would consider any method of meeting these expenses except through some form of apportionment although it was understood that a different *scale* might be suggested.

The report of this study committee again records differences of opinion but the draft resolution which it recommended authorized further expenditures and authorized the Secretary-General to advance funds from the Working Capital Fund and to borrow from other funds if necessary; it was adopted as resolution 1090 (XI) by the requisite two-thirds majority on 27 February 1957. In paragraph 4 of that resolution, the General Assembly decided that it would at its twelfth session "consider the basis for financing any costs of the Force in excess of \$10 million not covered by voluntary contributions".

Resolution 1151 (XII) of 22 November 1957, while contemplating the receipt of more voluntary contributions, decided in paragraph 4 that the expenses authorized "shall be borne by the Members of the United Nations in accordance with the scales of assessments

adopted by the General Assembly for the financial years 1957 and 1958 respectively.

Almost a year later, on 14 November 1958, in resolution 1263 (XIII) the General Assembly, while "Noting with satisfaction the effective way in which the Force continues to carry out its function", requested the Fifth Committee "to recommend such action as may be necessary to finance this continuing operation of the United Nations Emergency Force".

After further study, the provision contained in paragraph 4 of the resolution of 22 November 1957 was adopted in paragraph 4 of resolution 1337 (XIII) of 13 December 1958. Paragraph 5 of that resolution requested "the Secretary-General to consult with the Governments of Member States with respect to their views concerning the manner of financing the Force in the future, and to submit a report together with the replies to the General Assembly at its fourteenth session". Thereafter a new plan was worked out for the utilization of any voluntary contributions, but resolution 1441 (XIV) of 5 December 1959, in paragraph 2: "Decides to assess the amount of \$20 million against all Members of the United Nations on the basis of the regular scale of assessments", subject to the use of credits drawn from voluntary contributions. Resolution 1575 (XV) of 20 December 1960 is practically identical.

The Court concludes that, from year to year, the expenses of UNEF have been treated by the General Assembly as expenses of the Organization within the meaning of Article 17, paragraph 2, of the Charter.

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The operations in the Congo were initially authorized by the Security Council in the resolution of 14 July 1960 which was adopted without a dissenting vote. The resolution, in the light of the appeal from the Government of the Congo, the report of the Secretary-General and the debate in the Security Council, was clearly adopted with a view to maintaining international peace and security. However, it is argued that that resolution has been implemented, in violation of provisions of the Charter inasmuch as under the Charter it is the Security Council that determines which States are to participate in carrying out decisions involving the maintenance of international peace and security, whereas in the case of the Congo the Secretary-General himself determined which States were to participate with their armed forces or otherwise.

By paragraph 2 of the resolution of 14 July 1960 the Security Council "Decides to authorize the Secretary-General to take the necessary steps, in consultation with the Government of the Republic of the Congo, to provide the Government with such military assistance as may be necessary". Paragraph 3 requested the

Secretary-General "to report to the Security Council as appropriate". The Secretary-General made his first report on 18 July and in it informed the Security Council which States he had asked to contribute forces or matériel, which ones had complied, the size of the units which had already arrived in the Congo (a total of some 3,500 troops), and some detail about further units expected.

On 22 July the Security Council by unanimous vote adopted a further resolution in which the preamble states that it had considered this report of the Secretary-General and appreciated "the work of the Secretary-General and the support so readily and so speedily given to him by all Member States invited by him to give assistance". In operative paragraph 3, the Security Council "Commends the Secretary-General for the prompt action he has taken to carry out resolution S/4387 of the Security Council, and for his first report".

On 9 August the Security Council adopted a further resolution without a dissenting vote in which it took note of the second report and of an oral statement of the Secretary-General and in operative paragraph 1: "Confirms the authority given to the Secretary-General by the Security Council resolutions of 14 July and 22 July 1960 and requests him to continue to carry out the responsibility placed on him thereby". This emphatic ratification is further supported by operative paragraphs 5 and 6 by which all Member States were called upon "to afford mutual assistance" and the Secretary-General was requested "to implement this resolution and to report further to the Council as appropriate".

The Security Council resolutions of 14 July, 22 July and 9 August 1960 were noted by the General Assembly in its resolution 1474 (ES-IV) of 20 September, adopted without a dissenting vote, in which it "fully supports" these resolutions. Again without a dissenting vote, on 21 February 1961 the Security Council reaffirmed its three previous resolutions "and the General Assembly resolution 1474 (ES-IV) of 20 September 1960" and reminded "all States of their obligations under these resolutions".

Again without a dissenting vote on 24 November 1961 the Security Council, once more recalling the previous resolutions, reaffirmed "the policies and purposes of the United Nations with respect to the Congo (Leopoldville) as set out" in those resolutions. Operative paragraphs 4 and 5 of this resolution renew the authority to the Secretary-General to continue the activities in the Congo.

In the light of such a record of reiterated consideration, confirmation, approval and ratification by the Security Council and by the General Assembly of the actions of the Secretary-General in

implementing the resolution of 14 July 1960, it is impossible to reach the conclusion that the operations in question usurped or impinged upon the prerogatives conferred by the Charter on the Security Council. The Charter does not forbid the Security Council to act through instruments of its own choice: under Article 29 it "may establish such subsidiary organs as it deems necessary for the performance of its functions"; under Article 98 it may entrust "other functions" to the Secretary-General.

It is not necessary for the Court to express an opinion as to which article or articles of the Charter were the basis for the resolutions of the Security Council, but it can be said that the operations of ONUC did not include a use of armed force against a State which the Security Council, under Article 39, determined to have committed an act of aggression or to have breached the peace. The armed forces which were utilized in the Congo were not authorized to take military action against any State. The operation did not involve "preventive or enforcement measures" against any State under Chapter VII and therefore did not constitute "action" as that term is used in Article 11.

For the reasons stated, financial obligations which, in accordance with the clear and reiterated authority of both the Security Council and the General Assembly, the Secretary-General incurred on behalf of the United Nations, constitute obligations of the Organization for which the General Assembly was entitled to make provision under the authority of Article 17.

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In relation to ONUC, the first action concerning the financing of the operation was taken by the General Assembly on 20 December 1960, after the Security Council had adopted its resolutions of 14 July, 22 July and 9 August, and the General Assembly had adopted its supporting resolution of 20 September. This resolution 1583 (XV) of 20 December referred to the report of the Secretary-General on the estimated cost of the Congo operations from 14 July to 31 December 1960, and to the recommendations of the Advisory Committee on Administrative and Budgetary Questions. It decided to establish an *ad hoc* account for the expenses of the United Nations in the Congo. It also took note of certain waivers of cost claims and then decided to apportion the sum of \$48.5 million among the Member States "on the basis of the regular scale of assessment" subject to certain exceptions. It made this decision because in the preamble it had already recognized:

"that the expenses involved in the United Nations operations in the Congo for 1960 constitute 'expenses of the Organization' within

the meaning of Article 17, paragraph 2, of the Charter of the United Nations and that the assessment thereof against Member States creates binding legal obligations on such States to pay their assessed shares".

By its further resolution 1590 (XV) of the same day, the General Assembly authorized the Secretary-General "to incur commitments in 1961 for the United Nations operations in the Congo up to the total of \$24 million for the period from 1 January to 31 March 1961". On 3 April 1961, the General Assembly authorized the Secretary-General to continue until 21 April "to incur commitments for the United Nations operations in the Congo at a level not to exceed \$8 million per month".

Importance has been attached to the statement included in the preamble of General Assembly resolution 1619 (XV) of 21 April 1961 which reads:

"*Bearing in mind* that the extraordinary expenses for the United Nations operations in the Congo are essentially different in nature from the expenses of the Organization under the regular budget and that therefore a procedure different from that applied in the case of the regular budget is required for meeting these extraordinary expenses."

However, the same resolution in operative paragraph 4:

"*Decides further* to apportion as expenses of the Organization the amount of \$100 million among the Member States in accordance with the scale of assessment for the regular budget subject to the provisions of paragraph 8 below [paragraph 8 makes certain adjustments for Member States assessed at the lowest rates or who receive certain designated technical assistance], pending the establishment of a different scale of assessment to defray the extraordinary expenses of the Organization resulting from these operations."

Although it is not mentioned in the resolution requesting the advisory opinion, because it was adopted at the same meeting of the General Assembly, it may be noted that the further resolution 1732 (XVI) of 20 December 1961 contains an identical paragraph in the preamble and a comparable operative paragraph 4 on apportioning \$80 million.

The conclusion to be drawn from these paragraphs is that the General Assembly has twice decided that even though certain expenses are "extraordinary" and "essentially different" from those under the "regular budget", they are none the less "expenses of the Organization" to be apportioned in accordance with the power granted to the General Assembly by Article 17, paragraph 2. This conclusion is strengthened by the concluding clause of paragraph 4 of the two resolutions just cited which states that the decision therein to use the scale of assessment already adopted for the

regular budget is made "pending the establishment of a *different scale of assessment* to defray the extraordinary expenses". The only alternative—and that means the "different procedure"—contemplated was another *scale* of assessment and not some method other than assessment. "Apportionment" and "assessment" are terms which relate only to the General Assembly's authority under Article 17.

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At the outset of this opinion, the Court pointed out that the text of Article 17, paragraph 2, of the Charter could lead to the simple conclusion that "the expenses of the Organization" are the amounts paid out to defray the costs of carrying out the purposes of the Organization. It was further indicated that the Court would examine the resolutions authorizing the expenditures referred to in the request for the advisory opinion in order to ascertain whether they were incurred with that end in view. The Court has made such an examination and finds that they were so incurred. The Court has also analyzed the principal arguments which have been advanced against the conclusion that the expenditures in question should be considered as "expenses of the Organization within the meaning of Article 17, paragraph 2, of the Charter of the United Nations", and has found that these arguments are unfounded. Consequently, the Court arrives at the conclusion that the question submitted to it in General Assembly resolution 1731 (XVI) must be answered in the affirmative.

For these reasons,

THE COURT IS OF OPINION,

by nine votes to five,

that the expenditures authorized in General Assembly resolutions 1583 (XV) and 1590 (XV) of 20 December 1960, 1595 (XV) of 3 April 1961, 1619 (XV) of 21 April 1961 and 1633 (XVI) of 30 October 1961 relating to the United Nations operations in the Congo undertaken in pursuance of the Security Council resolutions of 14 July, 22 July and 9 August 1960 and 21 February and 24 November 1961, and General Assembly resolutions 1474 (ES-IV) of 20 September 1960 and 1599 (XV), 1600 (XV) and 1601 (XV) of 15 April 1961, and the expenditures authorized in General Assembly resolutions 1122 (XI) of 26 November 1956, 1089 (XI) of 21 December 1956, 1000 (XI) of 27 February 1957, 1151 (XII) of 22 November 1957, 1204 (XII) of 13 December 1957, 1337 (XIII) of 13 December 1958, 1441 (XIV) of 5 December 1959 and 1575 (XV) of 20 December 1960 relating to the operations of the United Nations Emergency

Force undertaken in pursuance of General Assembly resolutions 997 (ES-I) of 2 November 1956, 998 (ES-I) and 999 (ES-I) of 4 November 1956, 1000 (ES-I) of 5 November 1956, 1001 (ES-I) of 7 November 1956, 1121 (XI) of 24 November 1956 and 1263 (XIII) of 14 November 1958, constitute "expenses of the Organization" within the meaning of Article 17, paragraph 2, of the Charter of the United Nations.

Done in English and in French, the English text being authoritative, at the Peace Palace, The Hague, this twentieth day of July, one thousand nine hundred and sixty-two, in two copies, one of which will be placed in the archives of the Court and the other transmitted to the Secretary-General of the United Nations.

(Signed) B. WINIARSKI,  
President.

(Signed) GARNIER-COIGNET,  
Registrar.

Judge SPIROPOULOS makes the following declaration:

While accepting the Court's conclusion, I cannot agree with all the views put forward in the Advisory Opinion. In particular, I consider that the affirmative reply to the request for an opinion is justified by the argument that the resolutions of the General Assembly authorizing the financing of the United Nations operations in the Congo and the Middle East, being resolutions designed to meet expenditure concerned with the fulfilment of the purposes of the United Nations, which were adopted by two-thirds of the Members of the General Assembly present and voting, create obligations for the Members of the United Nations.

I express no opinion as to the conformity with the Charter of the resolutions relating to the United Nations operations in the Congo and the Middle East, for the following reasons:

The French delegation had proposed to the General Assembly the acceptance of an amendment to the text, finally adopted by it, according to which amendment the question put to the Court would have become: "Were the expenditures authorized, etc. ... decided on in conformity with the provisions of the Charter and, if so, do they constitute 'expenses of the Organization' within the meaning of Article 17, paragraph 2, of the Charter of the United Nations?"

On 20 December 1961, in the course of the meeting of the General Assembly, this amendment was accompanied by a statement by the

French delegation justifying the submission of the French amendment and which, among other things, said:

"In the opinion of the French delegation, the question put to the Court does not enable the latter to give a clear-cut opinion on the juridical basis for the financial obligations of Member States. The Court cannot, in fact, appraise the scope of those resolutions without determining what obligations they may create for Member States under the Charter.

It is for this reason that the French delegation is submitting to the Assembly an amendment [A/L. 378] the adoption of which would enable the Court to determine whether or not the Assembly resolutions concerning the financial implications of the United Nations operations in the Congo and the Middle East are in conformity with the Charter. Only thus, if the matter is referred to the Court, will it be done in such a way as to take into account the scope and nature of the problems raised in the proposal to request an opinion."

The French amendment was rejected.

The rejection of the French amendment by the General Assembly seems to me to show the desire of the Assembly that the conformity or non-conformity of the decisions of the Assembly and of the Security Council concerning the United Nations operations in the Congo and the Middle East should not be examined by the Court. It seems natural, indeed, that the General Assembly should not have wished that the Court should pronounce on the validity of resolutions which have been applied for several years. In these circumstances, I have felt bound to refrain from pronouncing on the conformity with the Charter of the resolutions relating to the United Nations operations in the Congo and the Middle East.

Judges Sir Percy SPENDER, Sir Gerald FITZMAURICE and MORELLI append to the Opinion of the Court statements of their Separate Opinions.

President WINIARSKI and Judges BASDEVANT, MORENO QUINTANA, KORETSKY and BUSTAMANTE Y RIVERO append to the Opinion of the Court statements of their Dissenting Opinions.

(Initialled) B. W.  
(Initialled) G.-C.



**Interpretation of the Agreement of 25 March 1951  
between the WHO and Egypt,  
Advisory Opinion, I.C.J. Reports 1980**

## INTERNATIONAL COURT OF JUSTICE

YEAR 1980

1980  
20 December  
General List  
No. 65

20 December 1980

## INTERPRETATION OF THE AGREEMENT OF 25 MARCH 1951 BETWEEN THE WHO AND EGYPT

*Determination by the Court of the meaning and implications of question submitted for advisory opinion — Need for Court to ascertain and formulate legal questions really in issue.*

*International organizations and host States — Respective powers of the organization and the host State with regard to seat of headquarters or regional offices of organization — Mutual obligations of co-operation and good faith resulting from a State's membership of organization as well as from relations between organization and host State — Legal principles and rules applicable on transfer of office of organization from territory of host State concerning conditions and modalities for effecting transfer — Duty to consult — Consideration of provisions of host agreements and of Vienna Convention on the Law of Treaties — Application of principles and rules of general international law — Mutual obligation to co-operate in good faith to promote the objectives and purposes of the Organization.*

## ADVISORY OPINION

*Present : President Sir Humphrey WALDOCK ; Vice-President ELIAS ; Judges FORSTER, GROS, LACHS, MOROZOV, NAGENDRA SINGH, RUDA, MOSLER, ODA, AGO, EL-ERIAN, SETTE-CAMARA ; Registrar TORRES BERNÁRDEZ.*

Concerning the interpretation of the Agreement signed on 25 March 1951 between the World Health Organization and the Government of Egypt.

THE COURT,

composed as above,

gives the following *Advisory Opinion* :

1. The questions upon which the advisory opinion of the Court has been requested were laid before the Court by a letter dated 21 May 1980, received in the Registry on 28 May 1980, addressed by the Director-General of the World

Health Organization to the Registrar. In that letter the Director-General informed the Court of resolution WHA33.16 adopted by the World Health Assembly on 20 May 1980, in accordance with Article 96, paragraph 2, of the Charter of the United Nations, Article 76 of the Constitution of the World Health Organization, and Article X, paragraph 2, of the Agreement between the United Nations and the World Health Organization, by which the Organization had decided to submit two questions to the Court for advisory opinion. The text of that resolution is as follows :

“The Thirty-third World Health Assembly,

Having regard to proposals which have been made to remove from Alexandria the Regional Office for the Eastern Mediterranean Region of the World Health Organization,

Taking note of the differing views which have been expressed in the World Health Assembly on the question of whether the World Health Organization may transfer the Regional Office without regard to the provisions of Section 37 of the Agreement between the World Health Organization and Egypt of 25 March 1951,

Noting further that the Working Group of the Executive Board has been unable to make a judgment or a recommendation on the applicability of Section 37 of this Agreement,

Decides, prior to taking any decision on removal of the Regional Office, and pursuant to Article 76 of the Constitution of the World Health Organization and Article X of the Agreement between the United Nations and the World Health Organization approved by the General Assembly of the United Nations on 15 November 1947, to submit to the International Court of Justice for its Advisory Opinion the following questions :

1. Are the negotiation and notice provisions of Section 37 of the Agreement of 25 March 1951 between the World Health Organization and Egypt applicable in the event that either party to the Agreement wishes to have the Regional Office transferred from the territory of Egypt?

2. If so, what would be the legal responsibilities of both the World Health Organization and Egypt, with regard to the Regional Office in Alexandria, during the two-year period between notice and termination of the Agreement? , , ,

2. By letters dated 6 June 1980, the Registrar, pursuant to Article 66, paragraph 1, of the Statute of the Court, gave notice of the request for advisory opinion to all States entitled to appear before the Court.

3. The President of the Court, having decided pursuant to Article 66, paragraph 2, of the Statute, that those States Members of the World Health Organization who were also States entitled to appear before the Court, and the Organization itself, were likely to be able to furnish information on the question submitted to the Court, made an Order on 6 June 1980 fixing 1 September 1980 as the time-limit within which written statements might be submitted by those States. Accordingly, the special and direct communication provided for in

Article 66, paragraph 2, of the Statute was included in the above-mentioned letters of 6 June 1980 addressed to those States, and a similar communication was addressed to the WHO.

4. The following States submitted written statements to the Court within the time-limit fixed by the Order of 6 June 1980 : Bolivia, Egypt, Iraq, Jordan, Kuwait, Syrian Arab Republic, United Arab Emirates, United States of America. The texts of these statements were transmitted to the States to which the special and direct communication had been sent, and to the WHO.

5. Pursuant to Article 65, paragraph 2, of the Statute and Article 104 of the Rules of Court, the Director-General of the WHO transmitted to the Court a dossier of documents likely to throw light upon the questions. This dossier was received in the Registry on 11 June 1980 ; it was not accompanied by a written statement, a synopsis of the case or an index of the documents. In response to requests by the President of the Court, the WHO supplied the Court, for its information, with a number of additional documents, and the International Labour Organisation supplied the Court with documents of that Organisation regarded as likely to throw light on the questions before the Court.

6. By a letter of 15 September 1980, the Registrar requested the States Members of the WHO entitled to appear before the Court to inform him whether they intended to submit an oral statement at the public sittings to be held for that purpose, the date fixed for which was notified to them at the same time.

7. Pursuant to Article 106 of the Rules of Court, the Court decided to make the written statements submitted to the Court accessible to the public, with effect from the opening of the oral proceedings.

8. In the course of three public sittings held on 21, 22 and 23 October 1980, oral statements were addressed to the Court by the following representatives :

For the *United Arab Emirates* : Mr. Mustafa Kamil Yasseen, Special Counsellor of the Mission of the United Arab Emirates at Geneva.

For the *Republic of Tunisia* : Mr. Abdelhawahab Chérif, Counsellor, Embassy of Tunisia at The Hague.

For the *United States of America* : Mr. Stephen M. Schwebel, Deputy Legal Adviser, Department of State.

For the *Syrian Arab Republic* : Mr. Adnan Nachabé, Legal Adviser to the Ministry of Foreign Affairs.

For the *Arab Republic of Egypt* : H.E. Mr. Ahmed Osman, Ambassador of Egypt to Austria.

In reply to a question by the President, Mr. Claude-Henri Vignes, Director of the Legal Division of the WHO, stated at the public sitting that the WHO did not intend to submit argument to the Court on the questions put in the request for Opinion, but that he would be prepared, on behalf of the Director-General, to answer any question that the Court might put to him. Questions were put by Members of the Court to the Government of Egypt and to the WHO ; replies were given by the representative of Egypt and by the Director of the Legal Division of the WHO, and additional observations were made by the representatives of the United States of America and the United Arab Emirates.

9. At the close of the public sitting held on 23 October 1980, the President of the Court indicated that the Court remained ready to receive any further observations which the Director of the Legal Division of the WHO or the representatives of the States concerned might wish to submit in writing within a stated time-limit. In pursuance of this invitation, the Governments of the United States of America and Egypt transmitted certain written observations to the Court on 24 October and 29 October 1980 respectively ; copies of these were supplied to the representatives of the other States which had taken part in the oral proceedings, as well as to the WHO. Certain further documents were also supplied to the Court by the WHO after the close of the oral proceedings, in response to a request made by a Member of the Court.

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10. The first, and principal, question submitted to the Court in the request is formulated in hypothetical terms :

“1. Are the negotiation and notice provisions of Section 37 of the Agreement of 25 March 1951 between the World Health Organization and Egypt applicable in the event that either party to the Agreement wishes to have the Regional Office transferred from the territory of Egypt ?”

But a rule of international law, whether customary or conventional, does not operate in a vacuum ; it operates in relation to facts and in the context of a wider framework of legal rules of which it forms only a part. Accordingly, if a question put in the hypothetical way in which it is posed in the request is to receive a pertinent and effectual reply, the Court must first ascertain the meaning and full implications of the question in the light of the actual framework of fact and law in which it falls for consideration. Otherwise its reply to the question may be incomplete and, in consequence, ineffectual and even misleading as to the pertinent legal rules actually governing the matter under consideration by the requesting Organization. The Court will therefore begin by setting out the pertinent elements of fact and of law which, in its view, constitute the context in which the meaning and implications of the first question posed in the request have to be ascertained.

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11. The existence at the present day of a Regional Office of the World Health Organization located at Alexandria has its origin in two main circumstances. One is the policy adopted by the WHO in 1946, which is expressed in Chapter XI of the text of its Constitution, of establishing regional health organizations designed to be an integral part of the Organization. The other is the fact that at the end of the Second World War there existed at Alexandria a health Bureau which, pursuant to that policy

and by agreement between Egypt and the WHO, was subsequently incorporated in the Organization in the manner hereafter described.

12. Article 44 of the WHO Constitution empowers the World Health Assembly to define geographical areas in which it is desirable to establish a regional organization and, with the consent of a majority of the members of the Organization situated within the area, to establish the regional organization. It also provides that there is not to be more than one regional organization in each area. Articles 45 and 46 proceed to lay down that each such regional organization is to be an integral part of the Organization and to consist of a regional committee and a regional office. Articles 47-53 then set out rules to regulate the composition, functions, procedure and staff of regional committees. Finally, Article 54, which contains special provisions regarding the "integration" of pre-existing inter-governmental regional health organizations, reads as follows :

"The Pan American Sanitary Organization represented by the Pan American Sanitary Bureau and the Pan American Sanitary Conferences, and all other inter-governmental regional health organizations in existence prior to the date of signature of this Constitution, shall in due course be integrated with the Organization. This integration shall be effected as soon as practicable through common action based on mutual consent of the competent authorities expressed through the organizations concerned."

The above-mentioned provisions of Chapter XI are thus the constitutional framework within which the WHO came to establish its regional office in Egypt.

13. The existence of a health bureau in Alexandria dates back to the creation of a general Board of Health in Egypt in 1831 for the purpose of preventing the spread of cholera and other diseases by and among pilgrims on the way to and from Mecca. This Board subsequently acquired a certain international character as a result of the association with its quarantine work of seven representatives of States having rights in Egypt under the capitulations régime ; and in 1892 its character as an international health agency became more pronounced as a result of changes in the structure of its council effected by the International Sanitary Convention of Venice of that year. In this form the *Conseil sanitaire maritime et quarantenaire d'Egypte* operated successfully for over forty years, during which, by arrangement with the *Office international d'hygiène publique* and pursuant to the International Sanitary Convention of 1926, it also functioned as the Regional Bureau of Epidemiological Intelligence for the Near East. In 1938, at the request of the Egyptian Government, it was decided, at the International Sanitary Conference of that year that the *Conseil sanitaire* should be abolished and its functions assumed by the governments of Egypt and the other countries concerned, but this did not involve the suppression of the Regional Bureau of Epidemiological Intelligence. The new Bureau, although placed under the authority of the Egyptian Gov-

ernment, was to have the same international character as the former Bureau ; the Egyptian Government was to set up a commission including technical representatives of the affiliated countries. From 1938 onwards the expenses of the Bureau were wholly borne by the Egyptian Government. The Second World War broke out before the projected commission had been constituted, and from December 1940 until the end of hostilities the work of the Alexandria Bureau was taken over by a special wartime service under the Quarantine Department of the Egyptian Ministry of Public Health. After the hostilities had ended, the Bureau resumed its operations.

14. It has not been made entirely clear to the Court what was the exact situation in regard to the Alexandria Sanitary Bureau as a result of the events just described. But it was operating under Egypt's Ministry of Public Health when in 1946, and before the WHO Constitution had been adopted, Egypt raised the question of the relation of the Bureau to the Organization. Even before that, the members of the newly created League of Arab States had taken a decision in favour of using the Alexandria Bureau as their regional sanitary bureau. Meanwhile, however, the Alexandria Bureau was continuing to operate under the Egyptian sanitary authorities rather than as an inter-governmental institution. On the other hand, the projected association of the Bureau with the League of Arab States, the international character of its functions and its previous status may have led to the Bureau being regarded as an inter-governmental institution. This no doubt explains why, as will now be seen, the Alexandria Sanitary Bureau, despite any question there may have been as to its inter-governmental character, was in fact dealt with by the Organization as a case of integration under Article 54 of the WHO Constitution.

15. On 6 March 1947, at the direction of the WHO Interim Commission, the Executive Secretary of the Commission sent a circular letter to member governments enquiring as to whether they might wish to have either the headquarters of the organization or the seat of a regional office located on their territory and as to the facilities they could offer. Soon afterwards he was also directed to get in touch with the authorities "of the Pan Arab Sanitary Organization", and wrote on 2 May 1947 for information to the Egyptian Minister of Public Health. Replying on 26 July 1947, the Egyptian Minister supplied him with a memorandum giving an account of the history and activities of the "Pan Arab Regional Health Bureau" from 1926 onwards. When, on the basis of the memorandum, a recommendation was made by the Committee on Relations to the Interim Commission in September 1947 that negotiations should be started with the "Pan Arab Sanitary Organization", objection was taken that the Pan Arab Sanitary Bureau did not really exist. Some delegates observed that the negotiations should rather be with the Egyptian Government and, ultimately, it was with the Egyptian Government that the negotiations concerning the Bureau took place. In fact, the next development was a reply from the Egyptian Government to the Executive Secretary's circular

letter in which the Government stated that the competent authorities had declared that they were most anxious to see a regional bureau established at Alexandria, which could deal with all questions coming within the scope of the WHO for the entire Middle East.

16. Matters then began to move more quickly. It appears from a report submitted to the Interim Commission in May 1948, mentioned below, that early in January 1948 quarantine experts of the Arab countries met in Alexandria and passed a number of resolutions in favour of establishing a regional organization. This was to be composed of the member States of the League of Arab States and, it was contemplated, certain other States in the region; it was to have a regional committee similarly composed; and it was to use the Alexandria Bureau as its regional office. These resolutions were adopted in the light of the fact that the WHO was to take over the functions of pre-existing regional health organizations. The next step was an invitation from the Egyptian Ministry of Public Health to Dr. Stampar, Chairman of the Interim Commission, to visit Egypt and study on the spot the conditions for setting up the proposed regional organization. In May 1948 a substantial report, referred to above, was duly submitted by the Chairman of the Interim Commission in which he gave a detailed account of the past history and current activities of the Alexandria Bureau and set out the arguments in favour of it as the regional health centre for the Near and Middle East. He ended the report with the conclusion:

“we are bound to admit that the conditions which predestinate Alexandria to be the centre of the future regional health organization for the Near and the Middle East are literally unique”.

The Constitution of the WHO had now come into force and the question of the Alexandria Bureau was discussed in the Committee on Headquarters and Regional Organization at the first session of the new World Health Assembly. Mention was made of the facts that most of the member States of the Eastern Mediterranean area had agreed to the proposal for the establishment of a regional organization in that area, that the Alexandria Bureau was a pre-existing sanitary bureau, and that preliminary steps had already been taken for the final integration of this bureau with the WHO. Taking those facts into account the Committee recommended that the Executive Board should be instructed to integrate the Bureau with the WHO as soon as practicable, through common action, “in accordance with Article 54 of the WHO Constitution”, and this recommendation was approved by the World Health Assembly on 10 July 1948 (resolution WHA1.72).

17. The Director-General of the WHO then proceeded to organize the setting up of a Regional Committee for the Eastern Mediterranean and an agenda was drawn up for its inaugural meeting due to take place on 7 February 1949. Earlier, the Executive Secretary of the Interim Commission had negotiated successfully with the Swiss Government the text of an

agreement for the WHO's headquarters in Geneva which had been approved by the First World Health Assembly on 17 July 1948 and by Switzerland on 21 August 1948; and a model host agreement had been prepared in the WHO for use in negotiations concerning the seats of regional or local WHO offices. Accordingly, when the agenda was drawn up for the Regional Committee's inaugural meeting on 7 February 1949, included in it was the question of a “Draft Agreement with the Host Government of the Regional Office”.

18. At the Regional Committee's meeting the Egyptian Delegation informed the Committee on 7 February 1949 that the Egyptian Council of Ministers had just

“agreed, subject to approval of the Parliament, to lease to the World Health Organization, for the use of the Regional Office for the Eastern Mediterranean area, the site of land and the building thereon which are at present occupied by the Quarantine Administration and the Alexandria Health Bureau, for a period of nine years at a nominal annual rent of P.T.10”.

The Committee next took up the question of the location of the Regional Office for the Eastern Mediterranean area. A motion was introduced, which the Committee at once approved, “to recommend to the Director-General and the Executive Board, subject to consultation with the United Nations, the selection of Alexandria as the site of the Regional Office”. The recitals in the formal resolution to that effect, adopted the following day referred, *inter alia*, to “the desirability of the excellent site and buildings under favourable conditions generously offered by the Government of Egypt”.

19. The Regional Committee also addressed itself to the question of the integration of the Alexandria Sanitary Bureau with the WHO. After recalling that a Committee of the Arab States had previously voted in favour of the integration, the Egyptian delegate observed that, should this happen, “the WHO would have to take over expenses from the date of opening of the Regional Office”. A few brief explanations having been given, the Committee adopted a resolution recommending the integration of the Bureau in the following terms:

“Resolves to recommend to the Executive Board that in establishing the Regional Organization and the Regional Office for the Eastern Mediterranean the functions of the Alexandria Sanitary Bureau be integrated within those of the Regional Organization of the World Health Organization.”

The Egyptian delegate responded by presenting a written statement to the Committee to the effect that, taking into account the resolution just adopted, his Government was pleased to transfer to the World Health Organization the functions and all related files and records of the Alexandria Sanitary Bureau. The statement went on to say that this transfer

would be made on the date on which the Organization notified the Government of Egypt of the commencement of operations in the Regional Office for the Eastern Mediterranean Region. That statement having met with warm thanks from the Committee, the Egyptian delegate proposed that the work of the Regional Office should begin in July 1949 and this proposal was adopted.

20. The Director-General now raised the question of the "Draft Agreement with the Host Government" which he had included in the Agenda. He said he wished to inform the Committee that "such a draft agreement had been produced and handed to the Egyptian Government where it was under study in the legal department". He also stated that the WHO, "though always considering necessary formalities, never allowed them to interfere with Health Work", and the Egyptian delegate then added the comment that, should there be any difference of opinion between the WHO and the legal expert, this could be settled by negotiation.

21. The question passed to the Executive Board of the WHO which, in March 1949, adopted resolution EB3.R30 "conditionally" approving selection of Alexandria as the site of the Regional Office, "subject to consultation with the United Nations". That resolution went on to request the Director-General to thank Egypt for "its generous action" in placing the site and buildings at Alexandria at the disposal of the Organization for nine years at a nominal rent. Next, it formally approved the establishment of the Regional Office for the Eastern Mediterranean and the commencement of its operations on or about 1 July 1949. The resolution then endorsed the Regional Committee's recommendation that the "functions" of the Alexandria Sanitary Bureau be "integrated" within those of the Regional Organization. It further authorized the Director-General to express appreciation to the Egyptian Government for the transfer of the "functions, files and records of the Alexandria Sanitary Bureau to the Organization upon commencement of operations in the Regional Office". The resolution did not deal with the projected host agreement still under negotiation with the Egyptian Government. Pursuant to the Agreement between the WHO and the United Nations which came into force on 10 July 1948 (Article XI), the consultation with the United Nations referred to in the resolution was effected in May 1949. This confirmed the selection of Alexandria as the site of the Regional Office.

22. However the draft host agreement, which necessarily had implications not only for the Ministry of Public Health but for other departments of the Egyptian administration, it would seem, had been undergoing close examination. As appears from a letter of 4 May 1949 from the Ministry of Foreign Affairs to Sir Ali Tewfik Shousha Pasha, then Under-Secretary of State for Public Health but already designated as the first WHO Regional Director for the Eastern Mediterranean, he had been discussing the draft agreement with the Foreign Ministry during April. In that letter the Foreign Ministry referred to the draft agreement as one

"which the World Health Organization intends to conclude with the Egyptian Government on the privileges and immunities to be enjoyed by its regional office which will be established in Alexandria as well as the staff of that office".

It explained that it was enclosing a copy of the memorandum prepared by the Contentieux (legal department) of the Ministries of Foreign Affairs and Justice, setting out their comments on the draft agreement, together with a revised draft. The memorandum stated that, in studying the provisions of the draft, the Contentieux had also had regard to various other agreements concluded, or in course of conclusion, between individual States and specialized agencies on the occasion of the latter establishing headquarters or regional offices in their territories. In this connection, it made mention of the headquarters agreements already concluded by France with the United Nations Educational, Scientific and Cultural Organization, and by Switzerland with WHO itself, as well as draft agreements still under negotiation by France and Peru with the International Civil Aviation Organization regarding the seats of regional offices to be established in their territories. The memorandum went on to suggest numerous changes in the provisions of the agreement and gave detailed explanations of the amendments which the Contentieux wished to see in the draft. The memorandum and revised draft, it appears from a later note of Sir Ali Tewfik Shousha Pasha, were then transmitted to the Director-General of the WHO. It also appears from letters of 29 May and 4 June 1949 supplied to the Court by the WHO that some further exchanges took place between him and the Contentieux concerning the draft agreement at this time.

23. Meanwhile, however, the whole question of privileges and immunities for regional offices of international organizations had become at once more complicated and more pressing for the Egyptian administration. This was because by now Regional Bureaux for the Middle East had already been established in Cairo by the Food and Agriculture Organization of the United Nations, by ICAO and by Unesco, and because in any event it was becoming necessary to consider the question of Egypt's adherence to the Convention on the Privileges and Immunities of the Specialized Agencies. The general situation was laid before Egypt's Council of Ministers by the Foreign Minister in a Note of 25 May 1949. His Note ended with a proposal that, as a provisional measure the Council should grant to the staff of FAO, Unesco and WHO in their Regional Offices the same temporary exemption from customs dues on any articles and equipment imported from abroad and relating to their official work as was already enjoyed by ICAO. This proposal was endorsed by the Council of Ministers at a meeting four days later, and the Regional Director was so informed on 23 June. The operations of the Regional Office being due to commence on 1 July, the need to complete the negotiations for the host agreement had been under consideration by the World Health Assembly itself which passed a resolution on the subject on 25 June at its Second

Session. The Director-General was requested to continue the negotiations with the Government of Egypt in order to obtain an agreement extending privileges and immunities to the Regional Organization and to report to the next session. Pending the coming into force of that agreement, the Assembly invited the Government of Egypt to extend to the Organization the privileges and immunities set out in the Convention on the Privileges and Immunities of the Specialized Agencies. Egypt, however, had not yet adhered to that Convention, and it was only the Council of Ministers' decision authorizing, temporarily, exemption from customs dues that applied when the Regional Office commenced operations, as it did on the agreed date, 1 July 1949.

24. The Director-General continued the negotiations and on 26 July 1949 the WHO's comments on the Contentieux' memorandum were transmitted to the Egyptian Government, together with a revised draft of the host agreement and a draft lease of the site and buildings. On 9 November 1949, a host agreement on the same lines as the draft transmitted to Egypt was signed with the Government of India. In February 1950 the Executive Board noted the state of the negotiations; a letter of 23 March 1950 to the WHO Regional Director from the Contentieux of the Egyptian Government Ministries gave the impression that, subject to minor modifications, WHO's draft was acceptable to Egypt. In that belief the Third World Health Assembly passed a resolution in the following May affirming the Agreement in the form of the WHO's revised draft. Subsequently, however, the Regional Office reported that the Egyptian authorities were, in fact, asking for a number of fairly substantial alterations. As the Director-General considered the amendments requested to touch fundamental points of principle and therefore to be unacceptable, he went himself to Egypt and, in negotiations with the Egyptian authorities on 19 and 20 December 1950, persuaded them to drop the amendments which were the cause of the disagreement. The Egyptian authorities then expressed themselves as ready to accept the host agreement, subject to the approval of the Egyptian Parliament and to certain points being set out in an accompanying Exchange of Notes. Eventually, the Agreement was signed in Cairo on 25 March 1951 and was approved by the Fourth World Health Assembly in May, although one of the points in the Exchange of Notes had given rise to some discussion in the Legal Sub-Committee. The Egyptian Parliament gave its approval towards the end of June and the long-negotiated host agreement finally entered into force on 8 August 1951. As to the lease of the site and buildings of the former Sanitary Bureau to the WHO, which under an Egyptian law also required Parliamentary approval, its execution was not completed until 1955, the operation of the lease then being expressed to have begun several years earlier on 1 July 1949.

25. Mention has finally to be made of an Agreement for the provision of services by the WHO in Egypt, signed on 25 August 1950. At the same time the Court notes that, according to the Director of the Legal Division of the

Organization, this Agreement does not have any particular connection with the setting up of the Regional Office in Egypt. The 1950 Agreement, he explained, is simply a standard form of agreement for the execution of technical co-operation projects, similar to Agreements concluded with other member States which have no WHO office situated on their territories.

26. The position appearing from the events which the Court has so far set out may be summarized as follows. During the early years of the WHO, Egypt raised the question of the relation to the new Organization of the existing long-established Alexandria Sanitary Bureau, and the Interim Commission of the WHO in turn approached Egypt regarding the integration of the existing Bureau with the Organization and the location of the WHO's Regional Office for the Eastern Mediterranean in Alexandria. Agreement was then reached between the WHO and Egypt early in 1949 that the operation of the Alexandria Bureau should be taken over by the WHO in July of that year. That agreement was arrived at on the basis of offers by the Egyptian Government to lease to the Organization for the use of the Regional Office for the Eastern Mediterranean the site and buildings of the existing Alexandria Bureau, and to transfer to the Organization the functions and all related files and records of the Bureau. Egypt's offers were accepted by the Organization which, on its part, undertook to assume financial responsibility for the Bureau on the date of the opening of the Regional Office; and it was then decided that the date should be 1 July 1949. These arrangements were approved by the Egyptian Government and were endorsed by the Organization specifically as an integration of a pre-existing institution under Article 54 of its Constitution. Temporary exemption from customs dues having been provided by Egypt's Council of Ministers, the WHO's Regional Office commenced operating at the seat of the former Sanitary Bureau on 1 July 1949.

27. Meanwhile, negotiations for the conclusion of a host agreement for the Regional Office, begun at least five months earlier, had been making slow progress and were not completed until nearly two years later. On 25 March 1951, however, the Agreement, Section 37 of which is the subject of the present request, was signed and ultimately entered into force on 8 August of that year. That agreement, in the words of its preamble, was concluded:

"for the purpose of determining the privileges, immunities and facilities to be granted by the Government of Egypt to the World Health Organization, to the representatives of its Members and to its experts and officials in particular with regard to its arrangements in the Eastern Mediterranean Region, and of regulating other related matters".

Its provisions followed closely those of the model host agreement prepared in the WHO, and are for the most part typical of those found in host agreements of headquarters or regional or local offices of international

organizations. These provisions are on the lines of the Convention of 21 November 1947 on the Privileges and Immunities of the Specialized Agencies, to which Egypt became a party on 28 September 1954. Under Section 39 of that Convention, however, the Agreement of 25 March 1951 continued to be the instrument defining the legal status of the Regional Office in Alexandria as between the WHO and Egypt.

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28. The Court must now turn to the circumstances which have led to the submission of the present request to the Court. Ever since beginning its activities in Egypt on 1 July 1949, the WHO's Regional Office has operated continuously at the site of the former Sanitary Bureau in Alexandria. In doing so, however, it has encountered certain difficulties stemming from the tense political situation in the Middle East. Those difficulties are reflected in the fact that in 1954 the World Health Assemblies found it necessary to divide the Committee into two sub-committees: Sub-Committee A in which Israel was not, and Sub-Committee B in which it was, represented.

29. On 7 May 1979 the Regional Director received a letter from the governments of five member States of the Region requesting the convening of an extraordinary meeting of the Regional Committee to discuss transferring the Regional Office from Alexandria to one of the other Arab member States. A special session of Sub-Committee A was held on 12 May 1979, attended by representatives of 20 States, but not by Egypt which had asked for the session to be postponed. Sub-Committee A adopted a resolution reciting the wish of the majority of its members that the Regional Office should be transferred to another State in the Region and recommending its transfer. Meanwhile, the question had also been placed on the agenda for the thirty-second Session of the World Health Assembly; and on 16 May 1979 the Egyptian delegation submitted a Memorandum alleging certain procedural irregularities and objecting that the request for transfer was "politically motivated". The question was referred to a Committee which expressed the view that the effects of the implementation of such a decision by the Assembly needed study and recommended that the study be undertaken by the Executive Board.

30. The World Health Assembly adopted the recommendation of the Committee and, on 28 May 1979, the Executive Board set up a Working Group to study all aspects of the matter and report back in January 1980. The Working Group's report, dated 16 January 1980 (which is in the dossier of documents supplied to the Court), included a section entitled "Question of denunciation of the existing Host Agreement", as to which it said:

"The Group considered that it was not in a position to decide whether or not Section 37 of the Agreement with Egypt is applicable. The final position of the Organization on the possible discrepancies of

views will have to be decided upon by the Health Assembly . . . the International Court of Justice could also possibly be requested to provide an advisory opinion under Article 76 of the WHO Constitution."

The Executive Board accordingly transmitted the Working Group's report to the World Health Assembly for consideration and decision.

31. A further special session of Sub-Committee A of the Regional Committee for the Eastern Mediterranean was held in Geneva on 9 May 1980, attended by representatives of 20 States, including Egypt. A resolution was adopted, by 19 votes to 1 (that of Egypt) whereby the Sub-Committee decided to recommend the transfer of the Regional Office for the Eastern Mediterranean to Amman, Jordan, as soon as possible. The representative of Egypt objected that the recommendation was, in his view, based on purely political considerations. The question was again referred to the World Health Assembly at its thirty-third session, and at Egypt's request the text of the 1951 Host Agreement was distributed to member States. At its meeting on 16 May 1980, the Committee concerned had before it a draft resolution submitted by 20 Arab States under which the Health Assembly would decide to transfer the Regional Office to Amman, Jordan, as soon as possible. Before it also was a draft resolution submitted by the United States under which the Assembly would decide, "prior to taking any decision on removal of the Regional Office" to request an advisory opinion of the Court in the terms in which the request has been submitted to the Court. In the course of the debate the Arab States stressed the wish of the great majority of the member States of the Region to transfer the office from Egypt and the harm which they considered its retention in Alexandria would do to the work of the Organization. A number of other States, on the other hand, questioned the desirability of transferring a regional health office for political reasons and expressed doubts regarding the practical aspects of the transfer. The Egyptian delegate, *inter alia*, invoked Section 37, pointing out problems involved in its interpretation. The United States resolution was endorsed by the Committee which recommended its adoption to the World Health Assembly. Three days later, on 19 May, the representatives of 17 Arab States addressed a letter to the Director-General of the Organization informing him of their decision completely to "boycott" the Regional Office in its present location, not to have any dealings with it as from that date, and to deal directly with Headquarters in Geneva.

32. When the Committee's recommendation was considered by the World Health Assembly at a Plenary Meeting on 20 May, the delegate of Jordan disputed the relevance of Section 37 to the question of the transfer of the Regional Office from Egypt, and called for an opinion to be given by the Director of the Legal Division of the Organization. The latter then gave certain explanations as to the problems which he considered to be involved in the interpretation of Section 37 and added that he was not for the moment able to enlighten it further. The Assembly thereupon adopted the

draft resolution recommended by the Committee, the full text of which has been given in the opening paragraph of this Opinion. The resolution, the Court observes, in setting out the Assembly's decision to submit the present request to the Court, explained in recitals the reasons why the Assembly found it necessary to do so. In those recitals the Assembly took note of "the differing views" which had been expressed on the question of whether the Organization "may transfer the Regional Office without regard to the provisions of Section 37 of the Agreement between the World Health Organization and Egypt of 25 March 1951"; and it further noted that the Working Group of the Executive Board had been "unable to make a judgment or a recommendation on the applicability of Section 37 of this Agreement".

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33. In the debates in the World Health Assembly just referred to, on the proposal to request the present opinion from the Court, opponents of the proposal insisted that it was nothing but a political manoeuvre designed to postpone any decision concerning removal of the Regional Office from Egypt, and the question therefore arises whether the Court ought to decline to reply to the present request by reason of its allegedly political character. In none of the written and oral statements submitted to the Court, on the other hand, has this contention been advanced and such a contention would in any case, have run counter to the settled jurisprudence of the Court. That jurisprudence establishes that if, as in the present case, a question submitted in a request is one that otherwise falls within the normal exercise of its judicial process, the Court has not to deal with the motives which may have inspired the request (*Conditions of Admission of a State to Membership in the United Nations (Article 4 of Charter)*, *Advisory Opinion*, 1948, *I.C.J. Reports 1947-1948*, pp. 61-62; *Competence of the General Assembly for the Admission of a State to the United Nations*, *Advisory Opinion*, *I.C.J. Reports 1950*, pp. 6-7; *Certain Expenses of the United Nations (Article 17, paragraph 2, of the Charter)*, *Advisory Opinion*, *I.C.J. Reports 1962*, p. 155). Indeed, in situations in which political considerations are prominent it may be particularly necessary for an international organization to obtain an advisory opinion from the Court as to the legal principles applicable with respect to the matter under debate, especially when these may include the interpretation of its constitution.

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34. Having thus examined the factual and legal context in which the present request for an advisory opinion comes before it, the Court will now consider the full meaning and implications of the hypothetical questions on which it is asked to advise. Since those are formulated in the request by reference to the applicability of Section 37 of the Agreement of 25 March 1951 to a transfer of the Regional Office from Egypt, it is necessary at once

to turn to the provisions of that Section. Included in the 1951 Agreement as one of its "Final Provisions", Section 37 reads :

"Section 37. The present Agreement may be revised at the request of either party. In this event the two parties shall consult each other concerning the modifications to be made in its provisions. If the negotiations do not result in an understanding within one year, the present Agreement may be denounced by either party giving two years' notice."

The "differing views" in the World Health Assembly as to the applicability of these provisions to a transfer of the Regional Office from Egypt, which are mentioned in the recitals to the resolution, concerned various points. One of these was whether a transfer of the seat of the Regional Office from Egypt is or is not covered by the provisions of the 1951 Agreement which to a large extent deal with privileges, immunities and facilities. Another was whether the provisions of Section 37 relate only to the case of a request by one or other party for revision of provisions of the Agreement relating to the question of privileges, immunities and facilities or are also apt to cover its total revision or outright denunciation. But the differences of view also involved further points, as appears from the debates and from the explanations given by the Director of the Legal Division of the WHO at the World Health Assembly's meeting of 20 May. Dealing with a question from the delegate of Jordan about the two years' notice provided for in Section 37, the Director of the Legal Division referred to the enlightenment to be obtained on the point by comparing the provisions in other host agreements. He also drew attention to the possibility of referring to the applicable general principles of international law, emphasizing the relevance in this connection of Article 56 of the International Law Commission's draft articles on treaties concluded between States and international organizations or between international organizations.

35. Accordingly, it is apparent that, although the questions in the request are formulated in terms only of Section 37, the true legal question under consideration in the World Health Assembly is : What are the legal principles and rules applicable to the question under what conditions and in accordance with what modalities a transfer of the Regional Office from Egypt may be effected ? This, in the Court's opinion, must also be considered to be the legal question submitted to it by the request. The Court points out that, if it is to remain faithful to the requirements of its judicial character in the exercise of its advisory jurisdiction, it must ascertain what are the legal questions really in issue in questions formulated in a request (cf. *Admissibility of Hearings of Petitioners by the Committee on South West Africa*, *Advisory Opinion*, *I.C.J. Reports 1956*, p. 26, and see also p. 37 ; *Certain Expenses of the United Nations (Article 17, paragraph 2, of the*

*Charter*), *Advisory Opinion, I.C.J. Reports 1962*, pp. 156-158). It also points out in this connection that the Permanent Court of International Justice, in replying to requests for an advisory opinion, likewise found it necessary in some cases first to ascertain what were the legal questions really in issue in the questions posed in the request (cf. *Jaworzina, Advisory Opinion, 1923, P.C.I.J., Series B, No. 8*, p. 282; *Interpretation of the Greco-Turkish Agreement of 1 December 1926, Advisory Opinion, 1928, P.C.I.J., Series B, No. 16*, pp. 5-16). Furthermore, as the Court has stressed earlier in this Opinion, a reply to questions of the kind posed in the present request may, if incomplete, be not only ineffectual but actually misleading as to the legal rules applicable to the matter under consideration by the requesting Organization. For this reason, the Court could not adequately discharge the obligation incumbent upon it in the present case if, in replying to the request, it did not take into consideration all the pertinent legal issues involved in the matter to which the questions are addressed.

36. The Court will therefore now proceed to consider its replies to the questions formulated in the request on the basis that the true legal question submitted to the Court is : What are the legal principles and rules applicable to the question under what conditions and in accordance with what modalities a transfer of the Regional Office from Egypt may be effected ?

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37. The Court thinks it necessary to underline at the outset that the question before it is not whether, in general, an organization has the right to select the location of the seat of its headquarters or of a regional office. On that question there has been no difference of view in the present case, and there can be no doubt that an international organization does have such a right. The question before the Court is the different one of whether, in the present case, the Organization's power to exercise that right is or is not regulated by reason of the existence of obligations vis-à-vis Egypt. The Court notes that in the World Health Assembly and in some of the written and oral statements before the Court there seems to have been a disposition to regard international organizations as possessing some form of absolute power to determine and, if need be, change the location of the sites of their headquarters and regional offices. But States for their part possess a sovereign power of decision with respect to their acceptance of the headquarters or a regional office of an organization within their territories ; and an organization's power of decision is no more absolute in this respect than is that of a State. As was pointed out by the Court in one of its early Advisory Opinions, there is nothing in the character of international organizations to justify their being considered as some form of "super-State" (*Reparations for Injuries Suffered in the Service of the United Nations, Advisory Opinion, I.C.J. Reports 1949*, p. 179). International organizations are subjects of international law and, as such, are bound by

any obligations incumbent upon them under general rules of international law, under their constitutions or under international agreements to which they are parties. Accordingly, it provides no answer to the questions submitted to the Court simply to refer to the right of an international organization to determine the location of the seat of its regional offices.

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38. The "differing views" expressed in the World Health Assembly regarding the relevance of the Agreement of 25 March 1951, and regarding the question whether the terms of Section 37 of the Agreement are applicable in the event of any transfer of the Regional Office from Egypt, were repeated and further developed in the written and oral statements submitted to the Court. As to the relevance of the 1951 Agreement in the present connection, the view advanced on one side has been that the establishment of the Regional Office in Alexandria took place on 1 July 1949, pursuant to an agreement resulting either from Egypt's offer to transfer the operation of the Alexandria Bureau to the WHO and the latter's acceptance of that offer, or from Egypt's acceptance of a unilateral act of the competent organs of the WHO determining the site of the Regional Office. Proponents of this view maintain that the 1951 Agreement was a separate transaction concluded after the establishment of the Regional Office in Egypt had been completed and the terms of which only provide for the immunities, privileges and facilities of the Regional Office. They point to the fact that some other host agreements of a similar kind contain provisions expressly for the establishment of the seat of the Regional Office and stress the absence of such a provision in the 1951 Agreement. This Agreement, they argue, although it may contain references to the seat of the Regional Office in Alexandria, does not provide for its location there. On this basis, and on the basis of their understanding of the object of the 1951 Agreement deduced from its title, preamble, and text, they maintain that the Agreement has no bearing on the Organization's right to remove the Regional Office from Egypt. They also contend that the 1951 Agreement was not limited to the privileges, immunities and facilities granted only to the Regional Office, but had a more general purpose, namely, to regulate the above-mentioned questions between Egypt and the WHO in general.

39. Proponents of the opposing view say that the establishment of the Regional Office and the integration of the Alexandria Bureau with the WHO were not completed in 1949 ; they were accomplished by a series of acts in a composite process, the final and definitive step in which was the conclusion of the 1951 host agreement. To holders of this view, the act of transferring the operation of the Alexandria Bureau to the WHO in 1949 and the host agreement of 1951 are closely related parts of a single transaction whereby it was agreed to establish the Regional Office at Alexandria. Stressing the several references in the 1951 Agreement to the location of the Office in Alexandria, they argue that the absence of a specific provision regarding its establishment there is due to the fact that this

Agreement was dealing with a pre-existing Sanitary Bureau already established in Alexandria. In general, they emphasize the significance of the character of the 1951 Agreement as a headquarters agreement, and of the constant references to it as such in the records of the WHO and in official acts of the Egyptian State.

40. The differences regarding the application of Section 37 of the Agreement to a transfer of the Regional Office from Egypt have turned on the meaning of the word "revise" in the first sentence and on the interpretation then to be given to the two following sentences of the Section. According to one view the word "revise" can cover only modifications of particular provisions of the Agreement and cannot cover a termination or denunciation of the Agreement, such as would be involved in the removal of the seat of the Office from Egypt; and this is the meaning given to the word "revise" in law dictionaries. On that assumption, and on the basis of what they consider to be the general character of the 1951 Agreement, they consider all the provisions of the Section, including the right of denunciation in the third sentence, to apply only in cases where a request has been made by one or other party for a partial modification of the terms of the Agreement. They conclude that, in consequence, the 1951 Agreement contains no general right of denunciation and invoke the general rules expressed in the first paragraph of Article 56 of the Vienna Convention on the Law of Treaties and the corresponding provision of the International Law Commission's draft articles on treaties concluded between States and international organizations or between international organizations. Under those articles a treaty, "which contains no provision regarding its termination and which does not provide for denunciation or withdrawal" is not subject to denunciation or withdrawal unless, *inter alia*, such a right may be implied by the nature of the treaty. Referring to opinions expressed in the International Law Commission that headquarters agreements of international organizations are by their nature agreements in which a right of denunciation may be implied under the articles in question, they then maintain that such a general right of denunciation is to be implied in the 1951 Agreement. The proponents of this view go on to argue that in any case the transfer of the Regional Office from Egypt is not a matter which can be said to fall within the provisions of Section 37, and that the removal of the seat of the Office from Egypt would not necessarily mean the denunciation of the 1951 Agreement.

41. Opponents of the view just described insist, however, that the word "revise" may also have the wider meaning of "review" and cover a general or total revision of an agreement, including its termination. According to them, the word has not infrequently been used with that meaning in treaties and was so used in the 1951 Agreement. They maintain that this is confirmed by the *travaux préparatoires* of Section 37, which are to be found in negotiations between representatives of the Swiss Government and the ILO concerning the latter's headquarters agreement with Switzerland. These negotiations, they consider, concern the specific question of the

establishment of the ILO's seat in Geneva and, while Switzerland wished in this connection to include a provision for denunciation in the agreement, the ILO did not. The result, they say, was the compromise formula, subsequently introduced into WHO host agreements, which provides for the possibility of denunciation, but only after consultation and negotiation regarding the revision of the instrument. In their view, therefore, the *travaux préparatoires* confirm that the formula in Section 37 was designed to cover revision of the location of the Regional Office's seat at Alexandria, including the possibility of its transfer outside Egypt. They further argue that this interpretation is one required by the object and purpose of Section 37 which, they say, was clearly meant to preclude either of the parties to the Agreement from suddenly and precipitately terminating the legal régime it created. The proponents of this view of Section 37 also take the position that, even if it were to be rejected and the Agreement interpreted as also including a general right of denunciation, Egypt would still be entitled to notice under the general rules of international law. In this connection, they point to Article 56 of the Vienna Convention on the Law of Treaties and the corresponding article in the International Law Commission's draft articles on treaties concluded between States and international organizations or between international organizations. In both articles paragraph 2 specifically provides that in any case where a right of denunciation or withdrawal is implied in a treaty a party shall give not less than twelve months' notice of its intention to exercise the right.

42. The Court has described the differences of view regarding the application of Section 37 to a transfer of the Regional Office from Egypt only in a broad outline which does not reproduce all the refinements with which they have been expressed nor all the considerations by which they have been supported. If it has done this, it is because it considers that the emphasis placed on Section 37 in the questions posed in the request disports in some measure the general legal framework in which the true legal issues before the Court have to be resolved. Whatever view may be held on the question whether the establishment and location of the Regional Office in Alexandria are embraced within the provisions of the 1951 Agreement, and whatever view may be held on the question whether the provisions of Section 37 are applicable to the case of a transfer of the Office from Egypt, the fact remains that certain legal principles and rules are applicable in the case of such a transfer. These legal principles and rules the Court must, therefore, now examine.

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43. By the mutual understandings reached between Egypt and the Organization from 1949 to 1951 with respect to the Regional Office of the Organization in Egypt, whether they are regarded as distinct agreements or as separate parts of one transaction, a contractual legal régime was created

between Egypt and the Organization which remains the basis of their legal relations today. Moreover, Egypt was a member — a founder member — of the newly created World Health Organization when, in 1949, it transferred the operation of the Alexandria Sanitary Bureau to the Organization; and it has continued to be a member of the Organization ever since. The very fact of Egypt's membership of the Organization entails certain mutual obligations of co-operation and good faith incumbent upon Egypt and upon the Organization. Egypt offered to become host to the Regional Office in Alexandria and the Organization accepted that offer; Egypt agreed to provide the privileges, immunities and facilities necessary for the independence and effectiveness of the Office. As a result the legal relationship between Egypt and the Organization became, and now is, that of a host State and an international organization, the very essence of which is a body of mutual obligations of co-operation and good faith. In the present instance Egypt became host to the Organization's Regional Office, with its attendant advantages, and the Organization acquired a valuable seat for its office by the handing over to the Organization of an existing Egyptian Sanitary Bureau established in Alexandria, and the element of mutuality in the legal régime thus created between Egypt and the WHO is underlined by the fact that this was effected through common action based on mutual consent. This special legal régime of mutual rights and obligations has been in force between Egypt and WHO for over thirty years. The result is that there now exists in Alexandria a substantial WHO institution employing a large staff and discharging health functions important both to the Organization and to Egypt itself. In consequence, any transfer of the WHO Regional Office from the territory of Egypt necessarily raises practical problems of some importance. These problems are, of course, the concern of the Organization and of Egypt rather than of the Court. But they also concern the Court to the extent that they may have a bearing on the legal conditions under which a transfer of the Regional Office from Egypt may be effected.

44. The problems were studied by the Working Group set up by the Executive Board of WHO in 1979, and it is evident from the report of that Working Group that much care and co-operation between the Organization and Egypt is needed if the risk of serious disruption to the health work of the Regional Office is to be avoided. It is also apparent that a reasonable period of time would be required to effect an orderly transfer of the operation of the Office from Alexandria to the new site without disruption to the work. Precisely what period of time would be required is a matter which can only be finally determined by consultation and negotiation between WHO and Egypt. It is, moreover, evident that during this period the Organization itself would need to make full use of the privileges, immunities and facilities provided in the Agreement of 25 March 1951 in order to ensure a smooth and orderly transfer of the Office from Egypt to its new site. In short, the situation arising in the event of a transfer of the

Regional Office from Egypt is one which, by its very nature, demands consultation, negotiation and co-operation between the Organization and Egypt.

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45. The Court's attention has been drawn to a considerable number of host agreements of different kinds, concluded by States with various international organizations and containing varying provisions regarding the revision, termination or denunciation of the agreements. These agreements fall into two main groups: (1) those providing the necessary régime for the seat of a headquarters or regional office of a more or less permanent character, and (2) those providing a régime for other offices set up *ad hoc* and not envisaged as of a permanent character. As to the first group, which includes agreements concluded by the ILO and the WHO, their provisions take different forms. The headquarters agreement of the United Nations itself, with the United States, which leaves to the former, the right to decide on its removal, provides for its termination if the seat is removed from the United States "except for such provisions as may be applicable in connection with the orderly termination of the operations of the United Nations at its seat in the United States and the disposition of its property therein". Other agreements similarly provide for cessation of the host agreement upon the removal of the seat, subject to arrangements for the orderly termination of the operations, while others, for example, provide for one year's or six months' notice of termination or denunciation, and there are other variants. The *ad hoc* type of agreement, on the other hand, commonly provides for termination on short periods of notice or by agreement or simply on cessation of the operations subject to orderly arrangements for bringing them to an end.

46. In considering these provisions, the Court feels bound to observe that in future closer attention might with advantage be given to their drafting. Nevertheless, despite their variety and imperfections, the provisions of host agreements regarding their revision, termination or denunciation are not without significance in the present connection. In the first place, they confirm the recognition by international organizations and host States of the existence of mutual obligations incumbent upon them to resolve the problems attendant upon a revision, termination or denunciation of a host agreement. But they do more, since they must be presumed to reflect the views of organizations and host States as to the implications of those obligations in the contexts in which the provisions are intended to apply. In the view of the Court, therefore, they provide certain general indications of what the mutual obligations of organizations and host States to co-operate in good faith may involve in situations such as the one with which the Court is here concerned.

47. A further general indication as to what those obligations may entail is to be found in the second paragraph of Article 56 of the Vienna Con-

vention on the Law of Treaties and the corresponding provision in the International Law Commission's draft articles on treaties between States and international organizations or between international organizations. Those provisions, as has been mentioned earlier, specifically provide that, when a right of denunciation is implied in a treaty by reason of its nature, the exercise of that right is conditional upon notice, and that of not less than twelve months. Clearly, these provisions also are based on an obligation to act in good faith and have reasonable regard to the interests of the other party to the treaty.

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48. In the present case, as the Court has pointed out, the true legal question submitted to it in the request is : What are the legal principles and rules applicable to the question under what conditions and in accordance with what modalities a transfer of the Regional Office from Egypt may be effected ? Moreover, as it has also pointed out, differing views have been expressed concerning both the relevance in this connection of the 1951 Agreement and the interpretation of Section 37 of that Agreement. Accordingly, in formulating its reply to the request, the Court takes as its starting point the mutual obligations incumbent upon Egypt and the Organization to co-operate in good faith with respect to the implications and effects of the transfer of the Regional Office from Egypt. The Court does so the more readily as it considers those obligations to be the very basis of the legal relations between the Organization and Egypt under general international law, under the Constitution of the Organization and under the agreements in force between Egypt and the Organization. The essential task of the Court in replying to the request is, therefore, to determine the specific legal implications of the mutual obligations incumbent upon Egypt and the Organization in the event of either of them wishing to have the Regional Office transferred from Egypt.

49. The Court considers that in the context of the present case the mutual obligations of the Organization and the host State to co-operate under the applicable legal principles and rules are as follows :

- In the first place, those obligations place a duty both upon the Organization and upon Egypt to consult together in good faith as to the question under what conditions and in accordance with what modalities a transfer of the Regional Office from Egypt may be effected.
- Secondly, in the event of its being finally decided that the Regional Office shall be transferred from Egypt, their mutual obligations of co-operation place a duty upon the Organization and Egypt to consult together and to negotiate regarding the various arrangements needed to effect the transfer from the existing to the new site in an orderly manner and with a minimum of prejudice to the work of the Organization and the interests of Egypt.
- Thirdly, those mutual obligations place a duty upon the party which

wishes to effect the transfer to give a reasonable period of notice to the other party for the termination of the existing situation regarding the Regional Office at Alexandria, taking due account of all the practical arrangements needed to effect an orderly and equitable transfer of the Office to its new site.

Those, in the view of the Court, are the implications of the general legal principles and rules applicable in the event of the transfer of the seat of a Regional Office from the territory of a host State. Precisely what periods of time may be involved in the observance of the duties to consult and negotiate, and what period of notice of termination should be given, are matters which necessarily vary according to the requirements of the particular case. In principle, therefore, it is for the parties in each case to determine the length of those periods by consultation and negotiation in good faith. Some indications as to the possible periods involved, as the Court has said, can be seen in provisions of host agreements, including Section 37 of the Agreement of 25 March 1951, as well as in Article 56 of the Vienna Convention on the Law of Treaties and in the corresponding article of the International Law Commission's draft articles on treaties between States and international organizations or between international organizations. But what is reasonable and equitable in any given case must depend on its particular circumstances. Moreover, the paramount consideration both for the Organization and the host State in every case must be their clear obligation to co-operate in good faith to promote the objectives and purposes of the Organization as expressed in its Constitution ; and this too means that they must in consultation determine a reasonable period of time to enable them to achieve an orderly transfer of the Office from the territory of the host State.

50. It follows that the Court's reply to the second question is that the legal responsibilities of the Organization and Egypt during the transitional period between the notification of the proposed transfer of the Office and the accomplishment thereof would be to fulfil in good faith the mutual obligations which the Court has set out in answering the first question.

\* \* \*

51. For these reasons,

THE COURT,

1. By twelve votes to one,

*Decides to comply with the request for an advisory opinion ;*

IN FAVOUR : *President Sir Humphrey Waldock ; Vice-President Elias ; Judges Forster, Gros, Lachs, Nagendra Singh, Ruda, Mosler, Oda, Ago, El-Erian and Sette-Camara ;*

AGAINST : *Judge Morozov ;*

## 2. With regard to Question 1,

By twelve votes to one,

*Is of the opinion* that in the event specified in the request, the legal principles and rules, and the mutual obligations which they imply, regarding consultation, negotiation and notice, applicable as between the World Health Organization and Egypt are those which have been set out in paragraph 49 of this Advisory Opinion and in particular that :

- (a) their mutual obligations under those legal principles and rules place a duty both upon the Organization and upon Egypt to consult together in good faith as to the question under what conditions and in accordance with what modalities a transfer of the Regional Office from Egypt may be effected ;
- (b) in the event of its being finally decided that the Regional Office shall be transferred from Egypt, their mutual obligations of co-operation place a duty upon the Organization and Egypt to consult together and to negotiate regarding the various arrangements needed to effect the transfer from the existing to the new site in an orderly manner and with a minimum of prejudice to the work of the Organization and the interests of Egypt ;
- (c) their mutual obligations under those legal principles and rules place a duty upon the party which wishes to effect the transfer to give a reasonable period of notice to the other party for the termination of the existing situation regarding the Regional Office at Alexandria, taking due account of all the practical arrangements needed to effect an orderly and equitable transfer of the Office to its new site ;

IN FAVOUR : *President* Sir Humphrey Waldock ; *Vice-President* Elias ; *Judges* Forster, Gros, Lachs, Nagendra Singh, Ruda, Mosler, Oda, Ago, El-Erian and Sette-Camara ;

AGAINST : *Judge* Morozov ;

## 3. With regard to Question 2.

By eleven votes to two,

*Is of the opinion* that, in the event of a decision that the Regional Office shall be transferred from Egypt, the legal responsibilities of the World Health Organization and Egypt during the transitional period between the notification of the proposed transfer of the Office and the accomplishment thereof are to fulfil in good faith the mutual obligations which the Court has set out in answering Question 1 ;

IN FAVOUR : *President* Sir Humphrey Waldock ; *Vice-President* Elias ; *Judges* Forster, Gros, Nagendra Singh, Ruda, Mosler, Oda, Ago, El-Erian and Sette-Camara ;

AGAINST : *Judges* Lachs and Morozov.

Done in English and in French, the English text being authoritative, at the Peace Palace, The Hague, this twentieth day of December, one thousand nine hundred and eighty, in three copies, of which one will be placed in the archives of the Court, and the others transmitted to the Secretary-General of the United Nations and to the Director-General of the World Health Organization, respectively.

(*Signed*) Humphrey WALDOCK,  
President.

(*Signed*) Santiago TORRES BERNARDEZ,  
Registrar.

Judges GROS, LACHS, RUDA, MOSLER, ODA, AGO, EL-ERIAN, and SETTE-CAMARA append separate opinions to the Opinion of the Court.

Judge MOROZOV appends a dissenting opinion to the Opinion of the Court.

(*Initialed*) H.W.

(*Initialed*) S.T.B.

**Applicability of the Obligation to Arbitrate under  
Section 21 of the United Nations Headquarters  
Agreement of 26 June 1947,  
Advisory Opinion, I.C.J. Reports 1988**

## INTERNATIONAL COURT OF JUSTICE

YEAR 1988

1988  
26 April  
General List  
No. 77

**APPLICABILITY OF THE OBLIGATION  
TO ARBITRATE UNDER SECTION 21 OF THE  
UNITED NATIONS HEADQUARTERS  
AGREEMENT OF 26 JUNE 1947**

*Headquarters Agreement between the United Nations and the United States of America — Dispute settlement clause — Existence of a dispute — Alleged breach of treaty — Significance of behaviour or decision of party in absence of any argument by that party to justify its conduct under international law — Implementation of contested decision and existence of a dispute — Whether dispute concerns “the interpretation or application” of the Agreement — Whether dispute one “not settled by negotiation or other agreed mode of settlement” — Principle that international law prevails over national law.*

**ADVISORY OPINION**

*Present: President RUDA; Vice-President MBAYE; Judges LACHS, NAGENDRA SINGH, ELIAS, ODA, AGO, SCHWEBEL, Sir Robert JENNINGS, BEDIAOUI, NI, EVENSEN, TARASSOV, GUILLAUME, SHAHABUDDIEN; Registrar VALENCIA-OSPINA.*

Concerning the applicability of the obligation to arbitrate under section 21 of the United Nations Headquarters Agreement of 26 June 1947,

THE COURT,

composed as above,  
after deliberation,

gives the following *Advisory Opinion*:

1. The question upon which the advisory opinion of the Court has been asked was contained in resolution 42/229 B of the United Nations General Assembly, adopted on 2 March 1988. On the same day, the text of that resolution

in English and French was transmitted to the Court, by facsimile, by the United Nations Legal Counsel. By a letter dated 2 March 1988, addressed by the Secretary-General of the United Nations to the President of the Court (received by facsimile on 4 March 1988, and received by post and filed in the Registry on 7 March 1988) the Secretary-General formally communicated to the Court the decision of the General Assembly to submit to the Court for advisory opinion the question set out in that resolution. The resolution, certified true copies of the English and French texts of which were enclosed with the letter and included in the facsimile transmission, was in the following terms:

*“The General Assembly,*

*Recalling its resolution 42/210 B of 17 December 1987 and bearing in mind its resolution 42/229 A above,*

*Having considered the reports of the Secretary-General of 10 and 25 February 1988 [A/42/915 and Add. I],*

*Affirming the position of the Secretary-General that a dispute exists between the United Nations and the host country concerning the interpretation or application of the Agreement between the United Nations and the United States of America regarding the Headquarters of the United Nations, dated 26 June 1947 [see resolution 169 (II)], and noting his conclusions that attempts at amicable settlement were deadlocked and that he had invoked the arbitration procedure provided for in section 21 of the Agreement by nominating an arbitrator and requesting the host country to nominate its own arbitrator,*

*Bearing in mind the constraints of time that require the immediate implementation of the dispute settlement procedure in accordance with section 21 of the Agreement,*

*Noting from the report of the Secretary-General of 10 February 1988 [A/42/915] that the United States of America was not in a position and was not willing to enter formally into the dispute settlement procedure under section 21 of the Headquarters Agreement and that the United States was still evaluating the situation,*

*Taking into account the provisions of the Statute of the International Court of Justice, in particular Articles 41 and 68 thereof,*

*Decides, in accordance with Article 96 of the Charter of the United Nations, to request the International Court of Justice, in pursuance of Article 65 of the Statute of the Court, for an advisory opinion on the following question, taking into account the time constraint:*

*“In the light of facts reflected in the reports of the Secretary-General [A/42/915 and Add. I], is the United States of America, as a party to the Agreement between the United Nations and the United States of America regarding the Headquarters of the United Nations [see resolution 169 (II)], under an obligation to enter into arbitration in accordance with section 21 of the Agreement?”*”

A copy of resolution 42/229 A, referred to in the above resolution, was also enclosed with the Secretary-General's letter.

2. The notice of the request for an advisory opinion prescribed by Article 66, paragraph 1, of the Statute of the Court, was given on 3 March 1988 by telegram from the Registrar to all States entitled to appear before the Court.

3. By an Order dated 9 March 1988 the Court found that an early answer to the request for advisory opinion would be desirable, as contemplated by Article 103 of the Rules of Court. By that Order the Court decided that the United Nations and the United States of America were considered likely to be able to furnish information on the question, in accordance with Article 66, paragraph 2, of the Statute, and fixed 25 March 1988 as the time-limit within which the Court would be prepared to receive written statements from them on the question; and that any other State party to the Statute which desired to do so might submit to the Court a written statement on the question not later than 25 March 1988. Written statements were submitted, within the time-limit so fixed, by the Secretary-General of the United Nations, by the United States of America, and by the German Democratic Republic and by the Syrian Arab Republic.

4. By the same Order the Court decided further to hold hearings, opening on 11 April 1988, at which oral comments on written statements might be submitted to the Court by the United Nations, the United States and such other States as should have presented written statements.

5. The Secretary-General of the United Nations transmitted to the Court, pursuant to Article 65, paragraph 2, of the Statute, a dossier of documents likely to throw light upon the question; these documents were received in the Registry in instalments between 11 and 29 March 1988.

6. At a public sitting held on 11 April 1988, an oral statement was made to the Court by Mr. Carl-August Fleischhauer, the United Nations Legal Counsel, on behalf of the Secretary-General. None of the States having presented written statements expressed a desire to be heard. Certain Members of the Court put questions to Mr. Fleischhauer, which were answered at a further public sitting held on 12 April 1988.

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7. The question upon which the opinion of the Court has been requested is whether the United States of America (hereafter referred to as "the United States"), as a party to the United Nations Headquarters Agreement, is under an obligation to enter into arbitration. The Headquarters Agreement of 26 June 1947 came into force in accordance with its terms on 21 November 1947 by exchange of letters between the Secretary-General and the United States Permanent Representative. The Agreement was registered the same day with the United Nations Secretariat, in accordance with Article 102 of the Charter. In section 21, paragraph (a), it provides as follows:

"Any dispute between the United Nations and the United States concerning the interpretation or application of this agreement or of any supplemental agreement, which is not settled by negotiation or other agreed mode of settlement, shall be referred for final decision to a tribunal of three arbitrators, one to be named by the Secretary-General, one to be named by the Secretary of State of the United States, and the third to be chosen by the two, or, if they should fail to

agree upon a third, then by the President of the International Court of Justice."

There is no question but that the Headquarters Agreement is a treaty in force binding the parties thereto. What the Court has therefore to determine, in order to answer the question put to it, is whether there exists a dispute between the United Nations and the United States of the kind contemplated by section 21 of the Agreement. For this purpose the Court will first set out the sequence of events, preceding the adoption of resolutions 42/229 A and 42/229 B, which led first the Secretary-General and subsequently the General Assembly of the United Nations to conclude that such a dispute existed.

8. The events in question centred round the Permanent Observer Mission of the Palestine Liberation Organization (referred to hereafter as "the PLO") to the United Nations in New York. The PLO has enjoyed in relation to the United Nations the status of an observer since 1974; by General Assembly resolution 3237 (XXIX) of 22 November 1974, the Organization was invited to "participate in the sessions and the work of the General Assembly in the capacity of observer". Following this invitation, the PLO established an Observer Mission in 1974, and maintains an office, entitled office of the PLO Observer Mission, at 115 East 65th Street, in New York City, outside the United Nations Headquarters District. Recognized observers are listed as such in official United Nations publications: the PLO appears in such publications in a category of "organizations which have received a standing invitation from the General Assembly to participate in the sessions and the work of the General Assembly as observers".

9. In May 1987 a bill (S.1203) was introduced into the Senate of the United States, the purpose of which was stated in its title to be "to make unlawful the establishment or maintenance within the United States of an office of the Palestine Liberation Organization". Section 3 of the bill provided that

"It shall be unlawful, if the purpose be to further the interests of the Palestine Liberation Organization or any of its constituent groups, any successor to any of those, or any agents thereof, on or after the effective date of this Act —

(1) to receive anything of value except informational material from the PLO or any of its constituent groups, any successor thereto, or any agents thereof;

(2) to expend funds from the PLO or any of its constituent groups, any successor thereto, or any agents thereof; or

(3) notwithstanding any provision of the law to the contrary, to establish or maintain an office, headquarters, premises, or other facilities or establishments within the jurisdiction of the United States

at the behest or direction of, or with funds provided by the Palestine Liberation Organization or any of its constituent groups, any successor to any of those, or any agents thereof.”

10. The text of this bill was repeated in the form of an amendment, presented in the United States Senate in the autumn of 1987, to the “Foreign Relations Authorization Act, Fiscal Years 1988 and 1989”. From the terms of this amendment it appeared that the United States Government would, if the bill were passed into law, seek to close the office of the PLO Observer Mission. The Secretary-General therefore explained his point of view to that Government, by a letter to the United States Permanent Representative dated 13 October 1987. In that letter he emphasized that the legislation contemplated “runs counter to obligations arising from the Headquarters Agreement”. On 14 October 1987 the PLO Observer brought the matter to the attention of the United Nations Committee on Relations with the Host Country.

11. On 22 October 1987, the view of the Secretary-General was summed up in the following statement made by the Spokesman for the Secretary-General (subsequently endorsed by the General Assembly in resolution 42/210B):

“The members of the PLO Observer Mission are, by virtue of resolution 3237 (XXIX), invitees to the United Nations. As such, they are covered by sections 11, 12 and 13 of the Headquarters Agreement of 26 June 1947. There is therefore a treaty obligation on the host country to permit PLO personnel to enter and remain in the United States to carry out their official functions at United Nations Headquarters.”

In this respect, it may be noted that section 11 of the Headquarters Agreement provides that

“The federal, state or local authorities of the United States shall not impose any impediments to transit to or from the headquarters district of: (1) representatives of Members . . . or the families of such representatives . . . ; (5) other persons invited to the headquarters district by the United Nations . . . on official business . . .”

Section 12 provides that

“The provisions of section 11 shall be applicable irrespective of the relations existing between the Governments of the persons referred to in that section and the Government of the United States.”

Section 13 provides (*inter alia*) that

“Laws and regulations in force in the United States regarding the

entry of aliens shall not be applied in such manner as to interfere with the privileges referred to in section 11.”

12. When the report of the Committee on Relations with the Host Country was placed before the Sixth Committee of the General Assembly on 25 November 1987, the representative of the United States noted:

“that the United States Secretary of State had stated that the closing of that mission would constitute a violation of United States obligation under the Headquarters Agreement, and that the United States Government was strongly opposed to it; moreover the United States representative to the United Nations had given the Secretary-General the same assurances” (A/C.6/42/SR.58).

When the draft resolution which subsequently became General Assembly resolution 42/210B was put to the vote in the Sixth Committee on 11 December 1987, the United States delegation did not participate in the voting because in its opinion: “it was unnecessary and inappropriate since it addressed a matter still under consideration within the United States Government”. The position taken by the United States Secretary of State, namely:

“that the United States was under an obligation to permit PLO Observer Mission personnel to enter and remain in the United States to carry out their official functions at United Nations Headquarters”

was cited by another delegate and confirmed by the representative of the United States, who referred to it as “well known” (A/C.6/42/SR.62).

13. The provisions of the amendment referred to above became incorporated into the United States “Foreign Relations Authorization Act, Fiscal Years 1988 and 1989” as Title X, the “Anti-Terrorism Act of 1987”. At the beginning of December 1987 the Act had not yet been adopted by the United States Congress. In anticipation of such adoption the Secretary-General addressed a letter, dated 7 December 1987, to the Permanent Representative of the United States, Ambassador Vernon Walters, in which he reiterated to the Permanent Representative the view previously expressed by the United Nations that the members of the PLO Observer Mission are, by virtue of General Assembly resolution 3237 (XXIX), invitees to the United Nations and that the United States is under an obligation to permit PLO personnel to enter and remain in the United States to carry out their official functions at the United Nations under the Headquarters Agreement. Consequently, it was said, the United States was under a legal obligation to maintain the current arrangements for the PLO Observer Mission, which had by then been in effect for some 13 years. The Secretary-General sought assurances that, in the event that the proposed

legislation became law, the present arrangements for the PLO Observer Mission would not be curtailed or otherwise affected.

14. In a subsequent letter, dated 21 December 1987, after the adoption on 15/16 December of the Act by the United States Congress, the Secretary-General informed the Permanent Representative of the adoption on 17 December 1987 of resolution 42/210B by the General Assembly. By that resolution the Assembly

*“Having been apprised of the action being considered in the host country, the United States of America, which might impede the maintenance of the facilities of the Permanent Observer Mission of the Palestine Liberation Organization to the United Nations in New York, which enables it to discharge its official functions,*

1. *Reiterates* that the Permanent Observer Mission of the Palestine Liberation Organization to the United Nations in New York is covered by the provisions of the Agreement between the United Nations and the United States of America regarding the Headquarters of the United Nations and should be enabled to establish and maintain premises and adequate functional facilities, and that the personnel of the Mission should be enabled to enter and remain in the United States to carry out their official functions;

2. *Requests* the host country to abide by its treaty obligations under the Headquarters Agreement and in this connection to refrain from taking any action that would prevent the discharge of the official functions of the Permanent Observer Mission of the Palestine Liberation Organization to the United Nations;”

15. On 22 December 1987 the Foreign Relations Authorization Act, Fiscal Years 1988 and 1989, was signed into law by the President of the United States. Title X thereof, the Anti-Terrorism Act of 1987, was, according to its terms, to take effect 90 days after that date. On 5 January 1988 the Acting Permanent Representative of the United States to the United Nations, Ambassador Herbert Okun, in a reply to the Secretary-General’s letters of 7 and 21 December 1987, informed the Secretary-General of this. The letter went on to say that

“Because the provisions concerning the PLO Observer Mission may infringe on the President’s constitutional authority and, if implemented, would be contrary to our international legal obligations under the United Nations Headquarters Agreement, the

Administration intends, during the ninety-day period before this provision is to take effect, to engage in consultations with the Congress in an effort to resolve this matter.”

16. On 14 January 1988 the Secretary-General again wrote to Ambassador Walters. After welcoming the intention expressed in Ambassador Okun’s letter to use the ninety-day period to engage in consultations with the Congress, the Secretary-General went on to say:

“As you will recall, I had, by my letter of 7 December, informed you that, in the view of the United Nations, the United States is under a legal obligation under the Headquarters Agreement of 1947 to maintain the current arrangements for the PLO Observer Mission, which have been in effect for the past 13 years. I had therefore asked you to confirm that if this legislative proposal became law, the present arrangements for the PLO Observer Mission would not be curtailed or otherwise affected, for without such assurance, a dispute between the United Nations and the United States concerning the interpretation and application of the Headquarters Agreement would exist . . .”

Then, referring to the letter of 5 January 1988 from the Permanent Representative and to declarations by the Legal Adviser to the State Department, he observed that neither that letter nor those declarations

“constitute the assurance I had sought in my letter of 7 December 1987 nor do they ensure that full respect for the Headquarters Agreement can be assumed. Under these circumstances, a dispute exists between the Organization and the United States concerning the interpretation and application of the Headquarters Agreement and I hereby invoke the dispute settlement procedure set out in section 21 of the said Agreement.

According to section 21 (a), an attempt has to be made at first to solve the dispute through negotiations, and I would like to propose that the first round of the negotiating phase be convened on Wednesday, 20 January 1988 . . .”

17. Beginning on 7 January 1988, a series of consultations were held; from the account of these consultations presented to the General Assembly by the Secretary-General in the report referred to in the request for advisory opinion, it appears that the positions of the parties thereto were as follows:

“the [United Nations] Legal Counsel was informed that the United States was not in a position and not willing to enter formally into the dispute settlement procedure under section 21 of the Headquarters Agreement; the United States was still evaluating the situation and had not yet concluded that a dispute existed between the United Nations and the United States at the present time because the legislation in question had not yet been implemented. The Executive Branch

was still examining the possibility of interpreting the law in conformity with the United States obligations under the Headquarters Agreement regarding the PLO Observer Mission, as reflected in the arrangements currently made for that Mission, or alternatively of providing assurances that would set aside the ninety-day period for the coming into force of the legislation.” (A/42/915, para. 6.)

18. The United Nations Legal Counsel stated that for the Organization the question was one of compliance with international law. The Headquarters Agreement was a binding international instrument the obligations of the United States under which were, in the view of the Secretary-General and the General Assembly, being violated by the legislation in question. Section 21 of the Agreement set out the procedure to be followed in the event of a dispute as to the interpretation or application of the Agreement and the United Nations had every intention of defending its rights under that Agreement. He insisted, therefore, that if the PLO Observer Mission was not to be exempted from the application of the law, the procedure provided for in section 21 be implemented and also that technical discussions regarding the establishment of an arbitral tribunal take place immediately. The United States agreed to such discussions but only on an informal basis. Technical discussions were commenced on 28 January 1988. Among the matters discussed were the costs of the arbitration, its location, its secretariat, languages, rules of procedure and the form of the *compromis* between the two sides (*ibid.*, paras. 7-8).

19. On 2 February 1988 the Secretary-General once more wrote to Ambassador Walters. The Secretary-General took note that

“the United States side is still in the process of evaluating the situation which would arise out of the application of the legislation and pending the conclusion of such evaluation takes the position that it cannot enter into the dispute settlement procedure outlined in section 21 of the Headquarters Agreement”.

The Secretary-General then went on to say that

“The section 21 procedure is the only legal remedy available to the United Nations in this matter and since the United States so far has not been in a position to give appropriate assurances regarding the deferral of the application of the law to the PLO Observer Mission, the time is rapidly approaching when I will have no alternative but to proceed either together with the United States within the framework of section 21 of the Headquarters Agreement or by informing the General Assembly of the impasse that has been reached.”

20. On 11 February 1988 the United Nations Legal Counsel, referring to the formal invocation of the dispute settlement procedure on 14 Janu-

ary 1988 (paragraph 16 above), informed the Legal Adviser of the State Department of the United Nations’ choice of its arbitrator, in the event of an arbitration under section 21 of the Headquarters Agreement. In view of the time constraints under which both parties found themselves, the Legal Counsel urged the Legal Adviser of the State Department to inform the United Nations as soon as possible of the choice made by the United States. No communication was received in this regard from the United States.

21. On 2 March 1988 the General Assembly, at its resumed forty-second session, adopted resolutions 42/229 A and 42/229 B. The first of these resolutions, adopted by 143 votes to 1, with no abstentions, contains (*inter alia*) the following operative provisions:

“*The General Assembly,*

1. *Supports* the efforts of the Secretary-General and expresses its great appreciation for his reports;

2. *Reaffirms* that the Permanent Observer Mission of the Palestine Liberation Organization to the United Nations in New York is covered by the provisions of the Agreement between the United Nations and the United States of America regarding the Headquarters of the United Nations [see resolution 169 (II)] and that it should be enabled to establish and maintain premises and adequate functional facilities and that the personnel of the Mission should be enabled to enter and remain in the United States of America to carry out their official functions;

3. *Considers* that the application of Title X of the Foreign Relations Authorization Act, Fiscal Years 1988 and 1989, in a manner inconsistent with paragraph 2 above would be contrary to the international legal obligations of the host country under the Headquarters Agreement;

4. *Considers* that a dispute exists between the United Nations and the United States of America, the host country, concerning the interpretation or application of the Headquarters Agreement, and that the dispute settlement procedure set out in section 21 of the Agreement should be set in operation;”.

The second resolution 42/229 B, adopted by 143 votes to none, with no abstentions, has already been set out in full in paragraph 1 above.

22. The United States did not participate in the vote on either resolution; after the vote, its representative made a statement, in which he said:

“The situation today remains almost identical to that prevailing when resolution 42/210 B was put to the vote in December 1987. The

United States has not yet taken action affecting the functioning of any Mission or invitee. As the Secretary-General relayed to the Assembly in the 25 February addendum to his report of 10 February, the United States Government has made no final decision concerning the application or enforcement of recently passed United States legislation, the Anti-Terrorism Act of 1987, with respect to the Permanent Observer Mission of the Palestine Liberation Organization (PLO) to the United Nations in New York.

For these reasons, we can only view as unnecessary and premature the holding at this time of this resumed forty-second session of the General Assembly . . .

The United States Government will consider carefully the views expressed during this resumed session. It remains the intention of this Government to find an appropriate resolution of this problem in light of the Charter of the United Nations, the Headquarters Agreement, and the laws of the United States."

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23. The question put to the Court is expressed, by resolution 42/229 B, to concern a possible obligation of the United States, "In the light of [the] facts reflected in the reports of the Secretary-General [A/42/915 and Add.I], that is to say in the light of the facts which had been reported to the General Assembly at the time at which it took its decision to request an opinion. The Court does not however consider that the General Assembly, in employing this form of words, has requested it to reply to the question put on the basis solely of these facts, and to close its eyes to subsequent events of possible relevance to, or capable of throwing light on, that question. The Court will therefore set out here the developments in the affair subsequent to the adoption of resolution 42/229 B.

24. On 11 March 1988 the Acting Permanent Representative of the United States to the United Nations wrote to the Secretary-General, referring to General Assembly resolutions 42/229 A and 42/229 B and stating as follows:

"I wish to inform you that the Attorney General of the United States has determined that he is required by the Anti-Terrorism Act of 1987 to close the office of the Palestine Liberation Organization Observer Mission to the United Nations in New York, irrespective of any obligations the United States may have under the Agreement between the United Nations and the United States regarding the Headquarters of the United Nations. If the PLO does not comply with the Act, the Attorney General will initiate legal action to close the PLO Observer Mission on or about March 21, 1988, the effective date of the Act. This course of action will allow the orderly enforcement of the Act. The United States will not take other actions to close the

Observer Mission pending a decision in such litigation. Under the circumstances, the United States believes that submission of this matter to arbitration would not serve a useful purpose."

This letter was delivered by hand to the Secretary-General by the Acting Permanent Representative of the United States on 11 March 1988. On receiving the letter, the Secretary-General protested to the Acting Permanent Representative and stated that the decision taken by the United States Government as outlined in the letter was a clear violation of the Headquarters Agreement between the United Nations and the United States.

25. On the same day, the United States Attorney General wrote to the Permanent Observer of the PLO to the United Nations to the following effect:

"I am writing to notify you that on March 21, 1988, the provisions of the 'Anti-Terrorism Act of 1987' (Title X of the Foreign Relations Authorization Act of 1988-89; Pub. L. No. 100-204, enacted by the Congress of the United States and approved Dec. 22, 1987 (the 'Act')) will become effective. The Act prohibits, among other things, the Palestine Liberation Organization ('PLO') from establishing or maintaining an office within the jurisdiction of the United States. Accordingly, as of March 21, 1988, maintaining the PLO Observer Mission to the United Nations in the United States will be unlawful.

The legislation charges the Attorney General with the responsibility of enforcing the Act. To that end, please be advised that, should you fail to comply with the requirements of the Act, the Department of Justice will forthwith take action in United States federal court to ensure your compliance."

26. Finally, on the same day, in the course of a press briefing held by the United States Department of Justice, the Assistant Attorney General in charge of the Office of Legal Counsel said as follows, in reply to a question:

"We have determined that we would not participate in any forum, either the arbitral tribunal that might be constituted under Article XXI, as I understand it, of the UN Headquarters Agreement, or the International Court of Justice. As I said earlier, the statute [i.e., the Anti-Terrorism Act of 1987] has superseded the requirements of the UN Headquarters Agreement to the extent that those requirements are inconsistent with the statute, and therefore, participation in any of these tribunals that you cite would be to no useful end. The statute's mandate governs, and we have no choice but to enforce it."

27. On 14 March 1988 the Permanent Observer of the PLO replied to the Attorney General's letter drawing attention to the fact that the PLO Permanent Observer Mission had been maintained since 1974, and continuing:

"The PLO has maintained this arrangement in pursuance of the relevant resolutions of the General Assembly of the United Nations (3237 (XXIX), 42/210 and 42/229 . . .). The PLO Observer Mission is in no sense accredited to the United States. The United States Government has made clear that PLO Observer Mission personnel are present in the United States solely in their capacity as 'invitees' of the United Nations within the meaning of the Headquarters Agreement. The General Assembly was guided by the relevant principles of the United Nations Charter (Chapter XVI . . .). I should like, at this point, to remind you that the Government of the United States has agreed to the Charter of the United Nations and to the establishment of an international organization to be known as the 'United Nations.'"

He concluded that it was clear that "the US Government is obligated to respect the provisions of the Headquarters Agreement and the principles of the Charter". On 21 March 1988, the United States Attorney General replied to the PLO Permanent Observer as follows:

"I am aware of your position that requiring closure of the Palestine Liberation Organization ('PLO') Observer Mission violates our obligations under the United Nations ('UN') Headquarters Agreement and, thus, international law. However, among a number of grounds in support of our action, the United States Supreme Court has held for more than a century that Congress has the authority to override treaties and, thus, international law for the purpose of domestic law. Here Congress has chosen, irrespective of international law, to ban the presence of all PLO offices in this country, including the presence of the PLO Observer Mission to the United Nations. In discharging my obligation to enforce the law, the only responsible course available to me is to respect and follow that decision.

Moreover, you should note that the Anti-Terrorism Act contains provisions in addition to the prohibition on the establishment or maintenance of an office by the PLO within the jurisdiction of the United States. In particular, I direct your attention to subsections 1003 (a) and (b), which prohibit anyone from receiving or expending any monies from the PLO or its agents to further the interests of the PLO or its agents. All provisions of the Act become applicable on 21 March 1988."

28. On 15 March 1988 the Secretary-General wrote to the Acting

Permanent Representative of the United States in reply to his letter of 11 March 1988 (paragraph 24 above), and stated as follows:

"As I told you at our meeting on 11 March 1988 on receiving this letter, I did so under protest because in the view of the United Nations the decision taken by the United States Government as outlined in the letter is a clear violation of the Headquarters Agreement between the United Nations and the United States. In particular, I cannot accept the statement contained in the letter that the United States may act irrespective of its obligations under the Headquarters Agreement, and I would ask you to reconsider the serious implications of this statement given the responsibilities of the United States as the host country.

I must also take issue with the conclusion reached in your letter that the United States believes that submission of this matter to arbitration would not serve a useful purpose. The United Nations continues to believe that the machinery provided for in the Headquarters Agreement is the proper framework for the settlement of this dispute and I cannot agree that arbitration would serve no useful purpose. On the contrary, in the present case, it would serve the very purpose for which the provisions of section 21 were included in the Agreement, namely the settlement of a dispute arising from the interpretation or application of the Agreement."

29. According to the written statement of 25 March 1988 presented to the Court by the United States,

"The PLO Mission did not comply with the March 11 order. On March 22, the United States Department of Justice therefore filed a lawsuit in the United States District Court for the Southern District of New York to compel compliance. That litigation will afford an opportunity for the PLO and other interested parties to raise legal challenges to enforcement of the Act against the PLO Mission. The United States will take no action to close the Mission pending a decision in that litigation. Since the matter is still pending in our courts, we do not believe arbitration would be appropriate or timely."

The Court has been supplied, as part of the dossier of documents furnished by the Secretary-General, with a copy of the summons addressed to the PLO, the PLO Observer Mission, its members and staff; it is dated 22 March 1988 and requires an answer within 20 days after service.

30. On 23 March 1988, the General Assembly, at its reconvened forty-second session, adopted resolution 42/230 by 148 votes to 2, by which it reaffirmed (*inter alia*) that

“a dispute exists between the United Nations and the United States of America, the host country, concerning the interpretation or application of the Headquarters Agreement, and that the dispute settlement procedure provided for under section 21 of the Agreement, which constitutes the only legal remedy to solve the dispute, should be set in operation”

and requested “the host country to name its arbitrator to the arbitral tribunal”.

31. The representative of the United States, who voted against the resolution, said (*inter alia*) the following in explanation of vote. Referring to the proceedings instituted in the United States courts, he said:

“The United States will take no further steps to close the PLO office until the [United States] Court has reached a decision on the Attorney General’s position that the Act requires closure . . . Until the United States courts have determined whether that law requires closure of the PLO Observer Mission the United States Government believes that it would be premature to consider the appropriateness of arbitration.” (A/42/PV.109, pp. 13-15.)

He also urged:

“Let us not be diverted from the important and historic goal of peace in the Middle East by the current dispute over the status of the PLO Observer Mission.” (*Ibid.*, p. 16.)

32. At the hearing, the United Nations Legal Counsel, representing the Secretary-General, stated to the Court that he had informed the United States District Court Judge seized of the proceedings referred to in paragraph 29 above that it was the wish of the United Nations to submit an *amicus curiae* brief in those proceedings.

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33. In the present case, the Court is not called upon to decide whether the measures adopted by the United States in regard to the Observer Mission of the PLO to the United Nations do or do not run counter to the Headquarters Agreement. The question put to the Court is not about either the alleged violations of the provisions of the Headquarters Agreement applicable to that Mission or the interpretation of those provisions. The request for an opinion is here directed solely to the determination whether under section 21 of the Headquarters Agreement the United Nations was entitled to call for arbitration, and the United States was obliged to enter into this procedure. Hence the request for an opinion concerns solely the applicability to the alleged dispute of the arbitration procedure provided for by the Headquarters Agreement. It is a legal question within

the meaning of Article 65, paragraph 1, of the Statute. There is in this case no reason why the Court should not answer that question.

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34. In order to answer the question put to it, the Court has to determine whether there exists a dispute between the United Nations and the United States, and if so whether or not that dispute is one “concerning the interpretation or application of” the Headquarters Agreement within the meaning of section 21 thereof. If it finds that there is such a dispute it must also, pursuant to that section, satisfy itself that it is one “not settled by negotiation or other agreed mode of settlement”.

35. As the Court observed in the case concerning *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania*, “whether there exists an international dispute is a matter for objective determination” (*I.C.J. Reports 1950*, p. 74). In this respect the Permanent Court of International Justice, in the case concerning *Mavrommatis Palestine Concessions*, had defined a dispute as “a disagreement on a point of law or fact, a conflict of legal views or of interests between two persons” (*P.C.I.J., Series A, No. 2, p. 11*). This definition has since been applied and clarified on a number of occasions. In the Advisory Opinion of 30 March 1950 the Court, after examining the diplomatic exchanges between the States concerned, noted that “the two sides hold clearly opposite views concerning the question of the performance or non-performance of certain treaty obligations” and concluded that “international disputes have arisen” (*Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, First Phase, I.C.J. Reports 1950*, p. 74). Furthermore, in its Judgment of 21 December 1962 in the *South West Africa* cases, the Court made it clear that in order to prove the existence of a dispute

“it is not sufficient for one party to a contentious case to assert that a dispute exists with the other party. A mere assertion is not sufficient to prove the existence of a dispute any more than a mere denial of the existence of the dispute proves its non-existence. Nor is it adequate to show that the interests of the two parties to such a case are in conflict. It must be shown that the claim of one party is positively opposed by the other.” (*I.C.J. Reports 1962*, p. 328.)

The Court found that the opposing attitudes of the parties clearly established the existence of a dispute (*ibid.*; see also *Northern Cameroons, I.C.J. Reports 1963*, p. 27).

36. In the present case, the Secretary-General informed the Court that, in his opinion, a dispute within the meaning of section 21 of the Head-

quarters Agreement existed between the United Nations and the United States from the moment the Anti-Terrorism Act was signed into law by the President of the United States and in the absence of adequate assurances to the Organization that the Act would not be applied to the PLO Observer Mission to the United Nations. By his letter of 14 January 1988 to the Permanent Representative of the United States, the Secretary-General formally contested the consistency of the Act with the Headquarters Agreement (paragraph 16 above). The Secretary-General confirmed and clarified that point of view in a letter of 15 March 1988 (paragraph 28 above) to the Acting Permanent Representative of the United States in which he told him that the determination made by the Attorney General of the United States on 11 March 1988 was a "clear violation of the Headquarters Agreement". In that same letter he once more asked that the matter be submitted to arbitration.

37. The United States has never expressly contradicted the view expounded by the Secretary-General and endorsed by the General Assembly regarding the sense of the Headquarters Agreement. Certain United States authorities have even expressed the same view, but the United States has nevertheless taken measures against the PLO Mission to the United Nations. It has indicated that those measures were being taken "irrespective of any obligations the United States may have under the [Headquarters] Agreement" (paragraph 24 above).

38. In the view of the Court, where one party to a treaty protests against the behaviour or a decision of another party, and claims that such behaviour or decision constitutes a breach of the treaty, the mere fact that the party accused does not advance any argument to justify its conduct under international law does not prevent the opposing attitudes of the parties from giving rise to a dispute concerning the interpretation or application of the treaty. In the case concerning *United States Diplomatic and Consular Staff in Tehran*, the jurisdiction of the Court was asserted principally on the basis of the Optional Protocols concerning the Compulsory Settlement of Disputes accompanying the Vienna Conventions of 1961 on Diplomatic Relations and of 1963 on Consular Relations, which defined the disputes to which they applied as "Disputes arising out of the interpretation or application of" the relevant Convention. Iran, which did not appear in the proceedings before the Court, had acted in such a way as, in the view of the United States, to commit breaches of the Conventions, but, so far as the Court was informed, Iran had at no time claimed to justify its actions by advancing an alternative interpretation of the Conventions, on the basis of which such actions would not constitute such a breach. The Court saw no need to enquire into the attitude of Iran in order to establish the existence of a "dispute"; in order to determine whether it had jurisdiction, it stated:

"The United States' claims here in question concern alleged violations by Iran of its obligations under several articles of the Vienna

Conventions of 1961 and 1963 with respect to the privileges and immunities of the personnel, the inviolability of the premises and archives, and the provision of facilities for the performance of the functions of the United States Embassy and Consulates in Iran . . . By their very nature all these claims concern the interpretation or application of one or other of the two Vienna Conventions." (*I.C.J. Reports 1980*, pp. 24-25, para. 46.)

39. In the present case, the United States in its public statements has not referred to the matter as a "dispute" (save for a passing reference on 23 March 1988 to "the current dispute over the status of the PLO Observer Mission" (paragraph 31 above)), and it has expressed the view that arbitration would be "premature". According to the report of the Secretary-General to the General Assembly (A/42/915, para. 6), the position taken by the United States during the consultations in January 1988 was that it "had not yet concluded that a dispute existed between the United Nations and the United States" at that time "because the legislation in question had not yet been implemented". Finally, the Government of the United States, in its written statement of 25 March 1988, told the Court that:

"The United States will take no action to close the Mission pending a decision in that litigation. Since the matter is still pending in our courts, we do not believe arbitration would be appropriate or timely."

40. The Court could not allow considerations as to what might be "appropriate" to prevail over the obligations which derive from section 21 of the Headquarters Agreement, as "the Court, being a Court of justice, cannot disregard rights recognized by it, and base its decision on considerations of pure expediency" (*Free Zones of Upper Savoy and the District of Gex, Order of 6 December 1930, P.C.I.J., Series A, No. 24, p. 15*).

41. The Court must further point out that the alleged dispute relates solely to what the United Nations considers to be its rights under the Headquarters Agreement. The purpose of the arbitration procedure envisaged by that Agreement is precisely the settlement of such disputes as may arise between the Organization and the host country without any prior recourse to municipal courts, and it would be against both the letter and the spirit of the Agreement for the implementation of that procedure to be subjected to such prior recourse. It is evident that a provision of the nature of section 21 of the Headquarters Agreement cannot require the exhaustion of local remedies as a condition of its implementation.

42. The United States in its written statement might be implying that neither the signing into law of the Anti-Terrorism Act, nor its entry into force, nor the Attorney General's decision to apply it, nor his resort to court proceedings to close the PLO Mission to the United Nations, would have been sufficient to bring about a dispute between the United Nations

and the United States, since the case was still pending before an American court and, until the decision of that court, the United States, according to the Acting Permanent Representative's letter of 11 March 1988, "will not take other actions to close" the Mission. The Court cannot accept such an argument. While the existence of a dispute does presuppose a claim arising out of the behaviour of or a decision by one of the parties, it in no way requires that any contested decision must already have been carried into effect. What is more, a dispute may arise even if the party in question gives an assurance that no measure of execution will be taken until ordered by decision of the domestic courts.

43. The Anti-Terrorism Act was signed into law on 22 December 1987. It was automatically to take effect 90 days later. Although the Act extends to every PLO office situated within the jurisdiction of the United States and contains no express reference to the office of the PLO Mission to the United Nations in New York, its chief, if not its sole, objective was the closure of that office. On 11 March 1988, the United States Attorney General considered that he was under an obligation to effect such a closure; he notified the Mission of this, and applied to the United States courts for an injunction prohibiting those concerned "from continuing violations of" the Act. As noted above, the Secretary-General, acting both on his own behalf and on instructions from the General Assembly, has consistently challenged the decisions contemplated and then taken by the United States Congress and the Administration. Under those circumstances, the Court is obliged to find that the opposing attitudes of the United Nations and the United States show the existence of a dispute between the two parties to the Headquarters Agreement.

44. For the purposes of the present advisory opinion there is no need to seek to determine the date at which the dispute came into existence, once the Court has reached the conclusion that there is such a dispute at the date on which its opinion is given.

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45. The Court has next to consider whether the dispute is one which concerns the interpretation or application of the Headquarters Agreement. It is not however the task of the Court to say whether the enactment, or the enforcement, of the United States Anti-Terrorism Act would or would not constitute a breach of the provisions of the Headquarters Agreement; that question is reserved for the arbitral tribunal which the Secretary-General seeks to have established under section 21 of the Agreement.

46. In the present case, the Secretary-General and the General Assembly of the United Nations have constantly pointed out that the PLO was invited "to participate in the sessions and the work of the General Assem-

ably in the capacity of Observer" (resolution 3237 (XXIX)). In their view, therefore, the PLO Observer Mission to the United Nations was, as such, covered by the provisions of sections 11, 12 and 13 of the Headquarters Agreement; it should therefore "be enabled to establish and maintain premises and adequate functional facilities" (General Assembly resolution 42/229 A, para. 2). The Secretary-General and the General Assembly have accordingly concluded that the various measures envisaged and then taken by the United States Congress and Administration would be incompatible with the Agreement if they were to be applied to that Mission, and that the adoption of those measures gave rise to a dispute between the United Nations Organization and the United States with regard to the interpretation and application of the Headquarters Agreement.

47. As to the position of the United States, the Court notes that, as early as 29 January 1987, the United States Secretary of State wrote to Senator Dole that:

"The PLO Observer Mission in New York was established as a consequence of General Assembly resolution 3237 (XXIX) of November 22, 1974, which invited the PLO to participate as an observer in the sessions and work at the General Assembly."

He added that:

"... PLO Observer Mission personnel are present in the United States solely in their capacity as 'invitees' of the United Nations within the meaning of the Headquarters Agreement... we therefore are under an obligation to permit PLO Observer Mission personnel to enter and remain in the United States to carry out their official functions at UN headquarters..." (*Congressional Record*, Vol. 133, No. 78, p. S6449).

After the adoption of the Anti-Terrorism Act, the Acting Permanent Representative of the United States to the United Nations indicated to the Secretary-General that the provisions of that Act "concerning the PLO Observer Mission... if implemented, would be contrary to... [the] international legal obligations" of the host country under the Headquarters Agreement (paragraph 15 above). The United States then envisaged interpreting that Act in a manner compatible with its obligations (paragraph 17 above). Subsequently, however, the Acting Permanent Representative of the United States, in a letter dated 11 March 1988 (paragraph 24 above), informed the United Nations Secretary-General that the Attorney General of the United States had determined that the Anti-Terrorism Act required him to close the PLO Observer Mission, "irrespective of any obligations the United States may have under" the Headquarters Agreement. On the same day, an Assistant Attorney General declared that the Act had "superseded the requirements of the United Nations Headquarters Agreement to the extent that those requirements are inconsistent with the statute..." (paragraph 26 above). The Secretary-General, in his reply of

15 March 1988 to the letter from the United States Acting Permanent Representative, disputed the view there expressed, on the basis of the principle that international law prevails over domestic law.

48. Accordingly, in a first stage, the discussions related to the interpretation of the Headquarters Agreement and, in that context, the United States did not dispute that certain provisions of that Agreement applied to the PLO Mission to the United Nations in New York. However, in a second stage, it gave precedence to the Anti-Terrorism Act over the Headquarters Agreement, and this was challenged by the Secretary-General.

49. To conclude, the United States has taken a number of measures against the PLO Observer Mission to the United Nations in New York. The Secretary-General regarded these as contrary to the Headquarters Agreement. Without expressly disputing that point, the United States stated that the measures in question were taken "irrespective of any obligations the United States may have under the Agreement". Such conduct cannot be reconciled with the position of the Secretary-General. There thus exists a dispute between the United Nations and the United States concerning the application of the Headquarters Agreement, falling within the terms of section 21 thereof.

50. The question might of course be raised whether in United States domestic law the decisions taken on 11 and 21 March 1988 by the Attorney General brought about the application of the Anti-Terrorism Act, or whether the Act can only be regarded as having received effective application when or if, on completion of the current judicial proceedings, the PLO Mission is in fact closed. This is however not decisive as regards section 21 of the Headquarters Agreement, which refers to any dispute "concerning the interpretation or application" of the Agreement, and not concerning the application of the measures taken in the municipal law of the United States. The Court therefore sees no reason not to find that a dispute exists between the United Nations and the United States concerning the "interpretation or application" of the Headquarters Agreement.

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51. The Court now turns to the question of whether the dispute between the United Nations and the United States is one "not settled by negotiation or other agreed mode of settlement", in the terms of section 21, paragraph (a), of the Headquarters Agreement.

52. In his written statement, the Secretary-General interprets this provision as requiring a two-stage process.

"In the first stage the parties attempt to settle their difference through negotiation or some other agreed mode of settlement . . . If they are unable to reach a settlement through these means, the second stage of the process, compulsory arbitration, becomes applicable." (Para. 17.)

The Secretary-General accordingly concludes that

"In order to find that the United States is under an obligation to enter into arbitration, it is necessary to show that the United Nations has made a good faith attempt to resolve the dispute through negotiation or some other agreed mode of settlement and that such negotiations have not resolved the dispute." (Para. 42.)

53. In his letter to the United States Permanent Representative dated 14 January 1988, the Secretary-General not only formally invoked the dispute settlement procedure set out in section 21 of the Headquarters Agreement, but also noted that "According to section 21 (a), an attempt has to be made at first to solve the dispute through negotiations" and proposed that the negotiations phase of the procedure commence on 20 January 1988. According to the Secretary-General's report to the General Assembly, a series of consultations had already begun on 7 January 1988 (A/42/915, para. 6) and continued until 10 February 1988 (*ibid.*, para. 10). Technical discussions, on an informal basis, on procedural matters relating to the arbitration contemplated by the Secretary-General, were held between 28 January 1988 and 2 February 1988 (*ibid.*, paras. 8-9). On 2 March 1988, the Acting Permanent Representative of the United States stated in the General Assembly that

"we have been in regular and frequent contact with the United Nations Secretariat over the past several months concerning an appropriate resolution of this matter" (A/42/PV.104, p. 59).

54. The Secretary-General recognizes that "The United States did not consider these contacts and consultations to be formally within the framework of section 21 (a) of the Headquarters Agreement" (written statement, para. 44), and in a letter to the United States Permanent Representative dated 2 February 1988, the Secretary-General noted that the United States was taking the position that, pending its evaluation of the situation which would arise from application of the Anti-Terrorism Act, "it cannot enter into the dispute settlement procedure outlined in section 21 of the Headquarters Agreement".

55. The Court considers that, taking into account the United States attitude, the Secretary-General has in the circumstances exhausted such possibilities of negotiation as were open to him. The Court would recall in this connection the dictum of the Permanent Court of International Justice in the *Mavrommatis Palestine Concessions* case that

"the question of the importance and chances of success of diplomatic negotiations is essentially a relative one. Negotiations do not of necessity always presuppose a more or less lengthy series of notes and despatches; it may suffice that a discussion should have been commenced, and this discussion may have been very short; this will be the case if a deadlock is reached, or if finally a point is reached

at which one of the Parties definitely declares himself unable, or refuses, to give way, and there can therefore be no doubt that *the dispute cannot be settled by diplomatic negotiation*" (P.C.I.J., Series A, No. 2, p. 13).

When in the case concerning *United States Diplomatic and Consular Staff in Tehran* the attempts of the United States to negotiate with Iran "had reached a deadlock, owing to the refusal of the Iranian Government to enter into any discussion of the matter", the Court concluded that "In consequence, there existed at that date not only a dispute but, beyond any doubt, a 'dispute . . . not satisfactorily adjusted by diplomacy' within the meaning of" the relevant jurisdictional text (*I.C.J. Reports 1980*, p. 27, para. 51). In the present case, the Court regards it as similarly beyond any doubt that the dispute between the United Nations and the United States is one "not settled by negotiation" within the meaning of section 21, paragraph (a), of the Headquarters Agreement.

56. Nor was any "other agreed mode of settlement" of their dispute contemplated by the United Nations and the United States. In this connection the Court should observe that current proceedings brought by the United States Attorney General before the United States courts cannot be an "agreed mode of settlement" within the meaning of section 21 of the Headquarters Agreement. The purpose of these proceedings is to enforce the Anti-Terrorism Act of 1987; it is not directed to settling the dispute, concerning the application of the Headquarters Agreement, which has come into existence between the United Nations and the United States. Furthermore, the United Nations has never agreed to settlement of the dispute in the American courts; it has taken care to make it clear that it wishes to be admitted only as *amicus curiae* before the District Court for the Southern District of New York.

\*

57. The Court must therefore conclude that the United States is bound to respect the obligation to have recourse to arbitration under section 21 of the Headquarters Agreement. The fact remains however that, as the Court has already observed, the United States has declared (letter from the Permanent Representative, 11 March 1988) that its measures against the PLO Observer Mission were taken "irrespective of any obligations the United States may have under the [Headquarters] Agreement". If it were necessary to interpret that statement as intended to refer not only to the substantive obligations laid down in, for example, sections 11, 12 and 13, but also to the obligation to arbitrate provided for in section 21, this conclusion would remain intact. It would be sufficient to recall the fundamental principle of international law that international law prevails over domestic law. This principle was endorsed by judicial decision as long ago as the arbitral award of 14 September 1872 in the *Alabama* case between Great Britain and the United States, and has frequently been recalled since, for example in the case concerning the *Greco-Bulgarian*

"Communities" in which the Permanent Court of International Justice laid it down that

"it is a generally accepted principle of international law that in the relations between Powers who are contracting Parties to a treaty, the provisions of municipal law cannot prevail over those of the treaty" (P.C.I.J., Series B, No. 17, p. 32).

\* \* \*

58. For these reasons,

THE COURT,

Unanimously,

*Is of the opinion* that the United States of America, as a party to the Agreement between the United Nations and the United States of America regarding the Headquarters of the United Nations of 26 June 1947, is under an obligation, in accordance with section 21 of that Agreement, to enter into arbitration for the settlement of the dispute between itself and the United Nations.

Done in French and in English, the French text being authoritative, at the Peace Palace, The Hague, this twenty-sixth day of April, one thousand nine hundred and eighty-eight, in two copies, one of which will be placed in the archives of the Court and the other transmitted to the Secretary-General of the United Nations.

(Signed) José Maria RUDA,  
President.

(Signed) Eduardo VALENCIA-OSPINA,  
Registrar.

Judge ELIAS appends a declaration to the Advisory Opinion of the Court.

Judges ODA, SCHWEBEL and SHAHABUDDEN append separate opinions to the Advisory Opinion of the Court.

(Initialled) J.M.R.  
(Initialled) E.V.O.



**International Criminal Tribunal for the former Yugoslavia**

*Prosecutor v. Duško Tadić*

**Decision on the Defence Motion on Jurisdiction  
Trial Chamber II, 10 August 1995**

**Before: Judge McDonald, Presiding**

**Judge Stephen**

**Judge Vohrah**

**Registrar: Mrs. Dorothee de Sampayo Garrido-Nijgh**

**Decision: 10 August 1995**

**PROSECUTOR**

**v.**

**DUSKO TADIC A/K/A "DULE"**

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**DECISION ON THE DEFENCE MOTION ON JURISDICTION**

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**The Office of the Prosecutor:**

**Mr. Grant Niemann**

**Ms. Brenda Hollis**

**Mr. Alan Tieger**

**Mr. William Fenrick**

**Mr. Michael Keegan**

**Counsel for the Accused:**

**Mr. Michael Wladimiroff**

**Mr. A.M.M. Orie**

**Mr. Milan Vujin**

**Mr. Krstan Simic**

**DECISION**

On 23 June 1995 the Defence filed a preliminary motion, pursuant to Rule 73 (A) (i) of the Rules of Procedure and Evidence ("the Rules") which provides for objections based on lack of jurisdiction, seeking dismissal of all of the charges against the accused. The Defence motion challenges the powers 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 ("the International Tribunal") to try the accused under three heads: the alleged improper establishment of the International Tribunal; the improper grant of primacy to the International Tribunal; and challenges to the subject-matter jurisdiction of the International Tribunal. The Prosecutor contends that none of these points is valid and

that the International Tribunal has jurisdiction over the accused as charged. The Government of the United States of America has submitted a brief as *amicus curiae*.

The argument of the parties on this motion was heard on 25 and 26 July and judgement on the motion was reserved, to be delivered this day.

**THE TRIAL CHAMBER, HAVING CONSIDERED** the written submissions and oral arguments of the parties and the written submission of the *amicus curiae*,

**HEREBY ISSUES ITS DECISION.**

**REASONS FOR DECISION**

**I. The Establishment of the International Tribunal**

**A. Legitimacy of creation**

1. The attack on the competence of the International Tribunal in this case is based on a number of grounds, some of which may be subsumed under one general heading: that the action of the Security Council in establishing the International Tribunal and in adopting the Statute under which it functions is beyond power; hence the International Tribunal is not duly established by law and cannot try the accused.

2. It is said that, to be duly established by law, the International Tribunal should have been created either by treaty, the consensual act of nations, or by amendment of the Charter of the United Nations, not by resolution of the Security Council. Called in aid of this general proposition are a number of considerations: that before the creation of the International Tribunal in 1993 it was never envisaged that such an ad hoc criminal tribunal might be set up; that the General Assembly, whose participation would at least have guaranteed full representation of the international community, was not involved in its creation; that it was never intended by the Charter that the Security Council should, under Chapter VII, establish a judicial body, let alone a criminal tribunal; that the Security Council had been inconsistent in creating this tribunal while not taking a similar step in the case of other areas of conflict in which violations of international humanitarian law may have occurred; that the establishment of the International Tribunal had neither promoted, nor was capable of promoting, international peace, as the current situation in the former Yugoslavia demonstrates; that the Security Council could not, in any event, create criminal liability on the part of individuals and that this is what the creation of the International Tribunal did; that there existed and exists now no such international emergency as would justify the action of the Security Council; that no political organ such as the Security Council is capable of establishing an independent and impartial tribunal; that there is an inherent defect in the creation, after the event, of ad hoc tribunals to try particular types of offences and, finally, that to give the International Tribunal primacy over national courts is, in any event and in itself, inherently wrong.

3. Essential to these submissions is, of course, the concept that this Trial Chamber has the capacity to review and rule upon the legality of the acts of the Security Council in establishing the International Tribunal. This the Defence asserts, doing so by way of attack upon the jurisdiction of the International Tribunal.

4. There are, clearly enough, matters of jurisdiction which are open to determination by the International Tribunal, questions of time, place and nature of an offence charged. These are properly described as jurisdictional, whereas the validity of the creation of the International Tribunal is not truly a matter of jurisdiction but rather of the lawfulness of its creation, involving scrutiny of the powers of the Security Council and of the manner of their exercise; perhaps, too, of the appropriateness of its response to the situation in the former Yugoslavia.

5. The Trial Chamber has heard out the Defence in its submissions involving judicial review of the actions of the Security Council. However, this International Tribunal is not a constitutional court set up to scrutinise the actions of organs of the United Nations. It is, on the contrary, a criminal tribunal with clearly defined powers, involving a quite specific and limited criminal jurisdiction. If it is to confine its adjudications to those specific limits, it will have no authority to investigate the legality of its creation by the Security Council.

6. The force of criminal law draws its efficacy, in part, from the fact that it reflects a consensus on what is demanded of human behaviour. But it is of equal importance that a body that judges the criminality of this behaviour should be viewed as legitimate. This is the first time that the international community has created a court with criminal jurisdiction. The establishment of the International Tribunal has now spawned the creation of an ad hoc Tribunal for Rwanda. Each of these ad hoc Tribunals represents an important step towards the establishment of a permanent international criminal tribunal. In this context, the Trial Chamber considers that it would be inappropriate to dismiss without comment the accused's contentions that the establishment of the International Tribunal by the Security Council was beyond power and an ill-founded political action, not reasonably aimed at restoring and maintaining peace, and that the International Tribunal is not duly established by law.

7. Any discussion of this matter must begin with the Charter of the United Nations. Article 24 (1) provides that the Members of the United Nations:

confer on the Security Council primary responsibility for the maintenance of international peace and security, and agree that in carrying out its duties under this responsibility the Security Council acts on their behalf.

The powers of the Security Council to discharge its primary responsibility for the maintenance of international peace and security are set out in Chapters VI, VII, VIII and XII of the Charter. The International Tribunal was established under Chapter VII. The Security Council has broad discretion in exercising its authority under Chapter VII and there are few limits on the exercise of that power. As indicated by the *travaux préparatoires*:

Wide freedom of judgment is left as regards the moment [the Security Council] may choose to intervene and the means to be applied, with sole reserve that it should act in accordance with the purposes and principles of the [United Nations].

The broad discretion given to the Security Council in the exercise of its Chapter VII authority itself suggests that decisions taken under this head are not reviewable.

8. For the Defence it is said that it is a basic human right of an accused to have a fair and public hearing by a competent, independent and impartial tribunal established by law. The Defence asserts that this right is protected by a panoply of principles of fundamental justice recognized by human rights law. There can be no doubt that the International Tribunal should seek to provide just such a trial; indeed, in enacting its Statute, care has been taken by the Security Council to ensure that this in fact occurs and the Judges of the International Tribunal, in framing its Rules, have also paid scrupulous regard to the requirements of a fair trial. For example, Article 21 of the Statute of the International Tribunal guarantees the accused the right to a fair trial and Article 20 obligates the Trial Chambers to ensure that trials are, in fact, fair. There are several other provisions to the same effect. However, it is one thing for the Security Council to have taken every care to ensure that a structure appropriate to the conduct of fair trials has been created; it is an entirely different thing in any way to infer from that careful structuring that it was intended that the International Tribunal be empowered to question the legality of the law which established it. The competence of the International Tribunal is precise and narrowly defined; as described in Article 1 of its Statute, it is to prosecute persons responsible for serious violations of international humanitarian law, subject to spatial and temporal limits, and to do so in accordance with the Statute. That is the full extent of the competence of the International Tribunal.

9. The Defence seeks to extend the competence of the International Tribunal to review the actions of the Security Council by reference to the Rules of the International Tribunal. It refers first to Rule 73 (A)(i), which provides that preliminary motions by the accused can include: "objections based on lack of jurisdiction". That Rule relates to challenges to jurisdiction and is no authority for engaging in an investigation, not into jurisdiction, but into the legality of the action of the Security Council in establishing the International Tribunal. The Defence also points to Rule 91, *False Testimony Under Solemn Declaration*, as an example of the exercise by the International Tribunal of powers that are not explicitly provided for in its Statute. There is, however, no analogy to be drawn between the inherent authority of a Chamber to control its own proceedings and any suggested power to review the authority of the Security Council. Therefore, even were it conceivable that the Rules adopted by the Judges could extend the competence of the International Tribunal, the Rules referred to by the Defence do not support such an enlargement.

10. The Defence relies on, or at least refers to, what has been said by the International Court of Justice ("the Court") in three cases: Certain Expenses of the United Nations, 1962 I.C.J. 151, 168 (Advisory Opinion of 20 July) (the "*Expenses Advisory Opinion*"), Legal Consequences for States of the Continued Presence of South Africa in Namibia (South-West Africa) Notwithstanding Security Council Resolution 276, 1971 I.C.J. 16, 45 (Advisory Opinion of 21 June) (the "*Namibia Advisory Opinion*")

and Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (Libya v. U.S.), 1992 I.C.J. 114, 176 (Provisional Measures Order of 14 April) (the "Lockerbie decision"). In the first of these, the *Expenses Advisory Opinion*, the Court specifically stated that, unlike the legal system of some States, there exists no procedure for determining the validity of acts of organs of the United Nations. It referred to proposals at the time of drafting of the Charter that such a power should be given to the Court and to the rejection of those proposals.

11. In the second of these cases, the *Namibia Advisory Opinion*, the Court dealt very specifically with this matter, stating that: "Undoubtedly, the Court does not possess powers of judicial review or appeal in respect of the decisions taken by the United Nations organs concerned".

12. Finally, in the *Lockerbie* decision, Judge Weeramantry, in his dissenting opinion, but in this respect not in dissent from other members of the Court, said that "it is not for this Court to sit in review on a given resolution of the Security Council" and, that in relation to the exercise by the Security Council of its powers under Chapter VII:

the determination under Article 39 of the existence of any threat to the peace . . . is one entirely within the discretion of the Council. . . . the Council and no other is the judge of the existence of the state of affairs which brings Chapter VII into operation. . . . Once [such a determination is] taken the door is opened to the various decisions the Council may make under that Chapter.

13. These opinions of the Court clearly provide no basis for the International Tribunal to review the actions of the Security Council, indeed, they are authorities to the contrary.

14. In support of its submission that this Trial Chamber should review the actions of the Security Council, the Defence contends that the decisions of the Security Council are not "sacrosanct". Certainly, commentators have suggested that there are limits to the authority of the Security Council. It has been posited that such limits may be based on Article 24 (2), which provides that the Security Council:

shall act in accordance with the Purposes and Principles of the United Nations. The specific powers appointed to the Security Council for the discharge of these duties are laid down in Chapters VI, VII, VIII, and XII.

One commentator interprets this provision to mean that the Security Council "cannot, in principle, act arbitrarily and unfettered by any restraints." (D. W. Bowett, *The Law of International Institutions* 33 (1982).) Another commentator has taken the position that although the Security Council has broad discretion in the field of international peace and security, it cannot "act arbitrarily or use the existence of a threat to the peace as a basis for action which . . . is for collateral and independent purposes, such as the overthrow of a government or the partition of a State." (Ian Brownlie, *The*

Decisions of Political Organs of the United Nations and the Rule of Law, in *Essays in Honour of Wang Tieya* 95 (1992).)

15. Support for the view that the Security Council cannot act arbitrarily or for an ulterior purpose is found in the nature of the Charter as a treaty delegating certain powers to the United Nations. In fact, such a limitation is almost a corollary of the principle that the organs of the United Nations must act in accordance with the powers delegated them. It is a matter of logic that if the Security Council acted arbitrarily or for an ulterior purpose it would be acting outside the purview of the powers delegated to it in the Charter.

16. Although it is not for this Trial Chamber to judge the reasonableness of the acts of the Security Council, it is without doubt that, with respect to the former Yugoslavia, the Security Council did not act arbitrarily. To the contrary, the Security Council's establishment of the International Tribunal represents its informed judgement, after great deliberation, that violations of international humanitarian law were occurring in the former Yugoslavia and that such violations created a threat to the peace. One commentator has noted the "careful, incremental approach" of the Security Council to the situation in the former Yugoslavia and described the establishment of the International Tribunal as a protracted, four-step process involving: "(1) condemnation; (2) publication; (3) investigation; and (4) punishment." (James C. O'Brien, *The International Tribunal for Violations of International Humanitarian Law in the Former Yugoslavia*, 87 Am. J. Int'l L. 639, 640-42 (1993).) First, with its resolution 764, adopted on 13 July 1992, the Security Council stressed that "persons who commit or order the commission of grave breaches of the [1949 Geneva] Conventions are *individually responsible* in respect of such breaches". Second, the Security Council publicized this condemnation by adopting, on 12 August 1992, resolution 771, which called upon States and other bodies to submit "substantiated information" to the Secretary-General, who would report to the Security Council "recommending additional measures that might be appropriate". Third, by resolution 780 of 6 October 1992, the Security Council established the Commission of Experts to investigate these violations of international humanitarian law. The Security Council in due course received the report of the Commission of Experts, which concluded that grave breaches of the 1949 Geneva Conventions and other violations of international humanitarian law had been committed in the territory of the former Yugoslavia, including wilful killing, "ethnic cleansing," mass killings, torture, rape, pillage and destruction of civilian property, destruction of cultural and religious property and arbitrary arrests. (See Interim Report of the Commission of Experts, U.N. Doc. S/25274 (26 January 1993).) Finally, on 22 February 1993, by resolution 808, the Security Council decided that an international tribunal should be established and directed the Secretary-General to submit specific proposals for the implementation of that decision. On 25 May 1993, in resolution 827, the Security Council adopted the draft Statute and thus established the International Tribunal.

17. None of the hypothetical cases which commentators have suggested as examples of limits on the powers of the Security Council, whether imposed by the terms of the Charter or general principles of international law and, in particular, *ius cogens*, have any relevance to the present case. Moreover, even if there be such limits, that is not to say that any judicial body, let alone this International Tribunal, can exercise powers of

judicial review to determine whether, in relation to an exercise by the Security Council of powers under Chapter VII, those limits have been exceeded.

18. One may add that in the present case any submission to the contrary becomes particularly unattractive when, in the notorious circumstances of the former Yugoslavia, the Security Council has done no more than take the step of "ameliorating a threat to international peace and security by providing for the prosecution of individuals who violate well-established international law. . . . [something] best addressed by a judicial remedy". (O'Brien, *supra*, at 643.)

19. It is not irrelevant that what the Security Council has enacted under Chapter VII is the creation of a tribunal whose jurisdiction is expressly confined to the prosecution of breaches of international humanitarian law that are beyond any doubt part of customary law, not the establishment of some eccentric and novel code of conduct or some wholly irrational criterion, such as the possession of white hair, as was instanced in argument by the Defence. Arguments based upon *reductio ad absurdum* may be useful to destroy a fallacious proposition but will seldom provide a firm foundation for the creation of a valid one.

20. In argument the spectre was raised of interference by the Security Council in the proceedings of the International Tribunal, for instance, by the abolition of the International Tribunal, in midstream as it were, for wholly political reasons. No doubt this would be within the power of the Security Council, but so too is like action in a national context. National legislatures, with greater or lesser ease, depending upon their powers under their respective constitutions or governing laws, may abolish courts previously created but this in no way detracts from the status of those courts as entities established by law.

21. The Security Council established the International Tribunal as an enforcement measure under Chapter VII of the United Nations Charter after finding that the violations of international humanitarian law in the former Yugoslavia constituted a threat to the peace. In making this finding, the Security Council acted under Article 39 of the Charter, which provides:

The Security Council shall determine the existence of any threat to peace, breach of peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security.

22. When, in resolution 827, the Security Council stated that it was "convinced" that, in the "particular circumstances of the former Yugoslavia", the establishment of the International Tribunal would contribute to the restoration and maintenance of peace, the course it took was novel only in the means adopted but not in the object sought to be attained. The Security Council has on a number of occasions addressed humanitarian law issues in the context of threats to the peace, has called upon States to comply with obligations imposed by humanitarian law and has on occasion taken steps to ensure such compliance. It has done so, for example, in relation to Southern Rhodesia in 1965 and 1966, South Africa in 1977, Lebanon on a number of occasions

in the 1980's, Iran and Iraq in 1987, Iraq again in 1991, Haiti and Somalia in 1993 and, of course, Rwanda in 1994. In the last of these, the establishment of the Rwanda Tribunal by the Security Council followed its finding that the conflict there involved violations of humanitarian law and was a threat to the peace.

23. The making of a judgement as to whether there was such an emergency in the former Yugoslavia as would justify the setting up of the International Tribunal under Chapter VII is eminently one for the Security Council and only for it; it is certainly not a justiciable issue but one involving considerations of high policy and of a political nature. As to whether the particular measure of establishing the International Tribunal is, in fact, likely to be conducive to the restoration of peace and security is, again, pre-eminently a matter for the Security Council and for it alone and no judicial body, certainly not this Trial Chamber, can or should review that step.

24. The concept of non-justiciability, in a national context, has been described as follows:

Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

(*Baker v. Carr*, 369 U.S. 186, 217 (1962).)

The validity of the decision of the Security Council to establish the International Tribunal rests on its finding that the events in the former Yugoslavia constituted a threat to the peace. This finding is necessarily fact-based and raises political, non-justiciable issues. As noted by Judge Weeramantry, such a decision "entails a factual and political judgement and not a legal one". (The *Lockerbie* decision at 176.) A commentator has agreed, saying that "a threat to international peace and security is not a fixed standard which can be easily and automatically applied". (David L. Johnson, *Note, Sanctions and South Africa*, 19 Harv. Int'l L. J. 887, 901 (1978).) The factual and political nature of an Article 39 determination by the Security Council makes it inherently inappropriate for any review by this Trial Chamber.

25. The Defence contends that there has been a lack of consistency in the actions of the Security Council. Certainly the International Tribunal is the first of its kind to be created. However, the fact that the Security Council has not taken a similar step in other, earlier cases cannot in itself be of any relevance in determining the legality of its action in this case.

26. Article 41 of the Charter provides:

The Security Council may decide what measures not involving the use of armed force are to be employed to give effect to its decisions, and it may call upon the Members of the United Nations to apply such measures. These may include complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations.

The Article, on its face, does not limit the discretion of the Security Council to take measures not involving the use of armed force.

27. That it was not originally envisaged that an ad hoc judicial tribunal might be created under Chapter VII, even if that be factually correct, is nothing to the point. Chapter VII confers very wide powers upon the Security Council and no good reason has been advanced why Article 41 should be read as excluding the step, very appropriate in the circumstances, of creating the International Tribunal to deal with the notorious situation existing in the former Yugoslavia. This is a situation clearly suited to adjudication by a tribunal and punishment of those found guilty of crimes that violate international humanitarian law. This is not, as the Defence puts it, a question of the Security Council doing anything it likes; it is a seemingly entirely appropriate reaction to a situation in which international peace is clearly endangered.

28. The Defence argues that the establishment of the International Tribunal is not a measure contemplated by Article 41 because the examples included in that Article focus on economic and political measures, not judicial measures. As the Defence concedes, however, the list in that Article is not exhaustive. Once again, the decision of the Security Council in this regard is fraught with fact-based, policy determinations that make this issue non-justiciable.

29. Further, the Defence contends that the International Tribunal is not an appropriate measure under Article 41 because it has failed to restore peace in the former Yugoslavia. However, the accused is but the first and, as yet, the only accused to be brought before the International Tribunal, and it is wholly premature at this initial stage of its functioning to attempt to assess the effectiveness of the International Tribunal as a measure to restore peace, even were it the function of the International Tribunal to do so.

30. The Security Council discussions on the situation in the former Yugoslavia suggest two ways in which the International Tribunal would help in the restoring and maintaining of peace. First, several States expressed the view that the creation of the International Tribunal would deter further violations of international humanitarian law. (See Provisional Verbatim Record, U.N. SCOR, 48th Sess., 3175th mtg. at 8, 22, U.N. Doc. S/PV.3175 (22 February 1993); Provisional Verbatim Record, U.N. SCOR, 48th Sess., 3217th mtg. at 12, 19, U.N. Doc. S/PV.3217 (25 May 1993).)

31. Second, States took the position that the establishment of the International Tribunal would assist in the restoration of peace in the region. At the Security Council meeting on resolution 808, Hungary, in supporting the establishment of the

International Tribunal, explained how the International Tribunal would be helpful in this regard:

The way the international community deals with questions relating to the events in the former Yugoslavia will leave a profound mark on the future of that part of Europe, and beyond. It will make either easier or more painful, or even impossible, the healing of the psychological wounds the conflict has inflicted upon peoples who for centuries have lived together in harmony and good-neighbourliness, regardless of what we may hear today from certain parties to the conflict. We cannot forget that the peoples, the ethnic communities and the national minorities of Central and Eastern Europe are watching us and following our work with close attention.

(Provisional Verbatim Record of 22 February 1993, *supra*, at 19-20.)

Slovenia also indicated its conviction that:

[T]he establishment of such a tribunal is a necessary and very important step, given the fact that those responsible for such crimes would be judged by an impartial judicial body as well as the fact that it could also contribute positively to the finding of solutions for the restoration of peace in the above-mentioned regions.

(Letter from the Permanent Representative of Slovenia to the United Nations, to the Secretary-General, U.N. Doc. S/25652 (22 April 1993).)

Similarly, a commentator who has written extensively about the International Tribunal has stated:

[I]t is important to try individuals responsible for crimes if there is to be any real hope of defusing ethnic tensions in this region. Blame should not rest on an entire nation but should be assigned to individual perpetrators of crimes and responsible leaders.

(Theodor Meron, *Case for War Crimes Trials in Yugoslavia*, 72 Foreign Affairs 122, 134 (1993).)

The Trial Chamber agrees that due to the nature of the conflict, an adjudicatory body is a particularly appropriate measure to achieve lasting peace in the former Yugoslavia. In any case, the ultimate success or failure of the International Tribunal is certainly not an issue for this Trial Chamber.

32. Then it is said that international law requires that criminal courts be independent and impartial and that no court created by a political body such as the Security

Council can have those characteristics. Of course, criminal courts worldwide are the creations of legislatures, eminently political bodies. The Court, in the *Effect of Awards* case, specifically held that a political organ of the United Nations - in that case, the General Assembly - could and had created "an independent and truly judicial body". (Effect of Awards of Compensation Made by the United Nations Administrative Tribunal, 1954 I.C.J. 47, 53 (Advisory Opinion of 13 July) ("*Effect of Awards*").) The question whether a court is independent and impartial depends not upon the body that creates it but upon its constitution, its judges and the way in which they function. The International Tribunal has, as its Statute and Rules attest, been constituted so as to ensure a fair trial to an accused and it is to be hoped that the way its Judges administer their jurisdiction will leave no room for complaints about lack of impartiality or want of independence.

33. The fact that the Security Council has established an ad hoc tribunal is also said to reveal invalidity because it is said to deny to the accused the right conferred by Article 14 of the International Convention on the Protection of Civil and Political Rights ("*ICCPR*") to be tried by a tribunal "established by law". However, on analysis this introduces no new concept; it is but another way of expressing the general complaint that the creation of the International Tribunal was beyond the power of the Security Council.

34. It is noteworthy that, in the context of the International Covenant and its entitlement in Article 14 to trial by a "tribunal established by law", this phrase requires only that the tribunal be legally constituted. At the time Article 14 was being drafted, it was sought unsuccessfully to amend it to require that tribunals should be "pre-established". As Professor David Harris puts it in his article *The Right to a Fair Trial in Criminal Proceedings as a Human Right*, 16 I.C.L.Q. 353, 356 (1967):

An amendment which sought to change the wording of the United Nations text to read 'pre-established' and so cover all ad hoc or special tribunals was firmly and successfully opposed, however, on the ground that this would make normal judicial reorganization difficult. Mention was also made of the Nuremberg and Tokyo Tribunals which were ad hoc and yet which, it is generally agreed, gave the accused a fair trial in a procedural sense in most respects. . . . the important consideration is whether a court observes certain other requirements once it begins to function, however it might be created.

35. It is also argued that Article 29 of Chapter VI of the Charter does not contemplate the creation by the Security Council of an international judicial body when it refers to the creation of subsidiary organs. The reasoning behind this submission is no more than an assertion that a judicial body cannot be an additional organ of some other body; yet Article 29 is expressed in the broadest terms and nothing appears to limit its scope to non-judicial organs. In any event, it is not under Chapter VI of the Charter that the Security Council has established this Tribunal; as the Statute of the International Tribunal declares in its opening paragraph, it is as a measure under Chapter VII that the Security Council has created this International Tribunal. Moreover, in the *Effect of Awards* case mentioned above, the Court specifically decided that the General Assembly had the power to create an administrative tribunal.

(*Effect of Awards* case at 56-61.) If the General Assembly has the authority to create a subsidiary judicial body, then surely the Security Council can create such a body in the exercise of its wide discretion to act under Chapter VII.

36. Nor has any basis been established for denying to the Security Council the power of indirect imposition of criminal liability upon individuals through the creation of a tribunal having criminal jurisdiction. On the contrary, given that the Security Council found that the threat to the peace posed by the conflict in the former Yugoslavia arose because of large scale violations of international humanitarian law committed by individuals, it was both appropriate and necessary for the Security Council, through the International Tribunal, to act on individuals in order to address the threat to the peace. In this regard it is important that when, in its resolutions 731 and 748, the Security Council required the Libyan Government to surrender the two Libyan nationals who were accused of the Lockerbie bombing and imposed mandatory commercial and diplomatic sanctions to obtain Libya's compliance with its decision, it was, in substance, acting upon individuals, seeking the extradition and trial of those Libyan nationals.

37. Reference was also made to the *jus de non evocando*, a feature of a number of national constitutions. But that principle, if it requires that an accused be tried by the regularly established courts and not by some special tribunal set up for that particular purpose, has no application when what is in issue is the exercise by the Security Council, acting under Chapter VII, of the powers conferred upon it by the Charter of the United Nations. Of course, this involves some surrender of sovereignty by the member nations of the United Nations but that is precisely what was achieved by the adoption of the Charter. In particular, that was achieved, in the case of action by the Security Council under Chapter VII, by Article 2(7) of the Charter and its reference to the application of enforcement measures under Chapter VII. The same observation applies to the contention that there is some vice involved in the conferring of primacy upon this Tribunal. That is no more than a means by which the Security Council seeks to give effect to the powers conferred upon it by Chapter VII. In any event, it is by no means clear that an individual defendant has standing to raise this point.

38. The submission that there should have been involvement of the General Assembly in the creation of the International Tribunal can only have any meaning if what is suggested is the creation of a tribunal by means of an amendment of the Charter. If, however, the International Tribunal can, as seems clear, be created under Chapter VII, the suggestion of an amendment of the Charter is as unnecessary, as it is impractical as a measure appropriate by way of a response to the current situation in the former Yugoslavia.

39. It was claimed on behalf of the accused that he was disadvantaged by his removal from the jurisdiction of German courts to that of the International Tribunal since that denied him the opportunity under the optional Protocol to the ICCPR to have recourse to the Human Rights Committee to complain about the trial accorded him. No doubt this is so, since that right does not appear to apply to proceedings before international tribunals, but that is nothing to the point in any challenge to the jurisdiction of this Trial Chamber; it can only be remedied, if remedy is required, by a further Protocol to the ICCPR. A similar comment applies in the case of the European Convention on Human Rights, to which the Defence also refers.

40. The foregoing disposes of the various submissions of the Defence so far as they relate to the legality of the creation of the International Tribunal, submissions to which the Trial Chamber felt it proper to refer since the Defence raised them but, many of which, as stated above, it does not regard as properly open for consideration by this Trial Chamber since they go, not so much to its jurisdiction, as to the unreviewable lawfulness of the actions of the Security Council.

#### B. Primacy of the International Tribunal

41. The Trial Chamber deals next with the Defence argument that the primacy jurisdiction conferred upon the International Tribunal by Article 9 (2) finds no basis in international law because the national courts of Bosnia and Herzegovina or, alternatively, of the entity known as the Bosnian Serb Republic, have primary jurisdiction to try the accused. This argument in effect again challenges the legality of the action of the Security Council in establishing the International Tribunal: the answer to this has already been provided above. The Trial Chamber is not entitled to engage in an exercise involving the review of a resolution passed by the Security Council. In any event, the accused not being a State lacks the *locus standi* to raise the issue of primacy, which involves a plea that the sovereignty of a State has been violated, a plea only a sovereign State may raise or waive and a right clearly the accused cannot take over from that State. (See Israel v. Eichmann, 36 I.L.R. 5, 62 (1961).) In this regard, it is pertinent to note that the challenge to the primacy of the International Tribunal has been made against the express intent of the two States most closely affected by the indictment against the accused - Bosnia and Herzegovina and the Federal Republic of Germany. The former, on the territory of which the crimes were allegedly committed, and the latter where the accused resided at the time of his arrest, have unconditionally accepted the jurisdiction of the International Tribunal and the accused cannot claim the rights that have been specifically waived by the States concerned. To allow the accused to do so would be to allow him to select the forum of his choice, contrary to the principles relating to coercive criminal jurisdiction. As to the entity known as the Bosnian Serb Republic, similarly, the accused as an individual, has no *locus standi*, for the reasons given above, to raise the issue of this entity's sovereignty rights should it have been endowed with all the attributes of statehood.

42. Before leaving this question relating to the violation of the sovereignty of States, it should be noted that the crimes which the International Tribunal has been called upon to try are not crimes of a purely domestic nature. They are really crimes which are universal in nature, well recognized in international law as serious breaches of international humanitarian law, and transcending the interest of any one State. The Trial Chamber agrees that in such circumstances, the sovereign rights of States cannot and should not take precedence over the right of the international community to act appropriately as they affect the whole of mankind and shock the conscience of all nations of the world. There can therefore be no objection to an international tribunal properly constituted trying these crimes on behalf of the international community.

43. As to the invocation of *jus de non evocando*, which has been dealt with above, nothing more need be said except that the Defence has in no way established that the principle is so universal in application that it amounts to a peremptory norm of

international law which cannot be breached in any event. Therefore the Trial Chamber proposes to speak no more of it.

44. One final word before leaving this topic. The crimes with which the accused is charged form part of customary international law and existed well before the establishment of the International Tribunal. If the Security Council in its informed wisdom, acting well within its powers pursuant to Article 39 and 41 under Chapter VII of the Charter, creates the International Tribunal to share the burden of bringing perpetrators of universal crimes to justice, the Trial Chamber can see no invasion into a State's jurisdiction because, as it has been rightly argued on behalf of the Prosecutor, they were never crimes within the exclusive jurisdiction of any individual State. In any event, Article 2 (7) of the Charter, as has been noted above, prohibiting intervention by the United Nations in matters essentially within a State's domestic jurisdiction, is qualified in that "this principle shall not prejudice the application of enforcement measures under Chapter VII".

## **II. Subject-Matter Jurisdiction**

45. The Trial Chamber must turn now to what are truly matters of jurisdiction. The Defence contends that the charges laid against the accused do not fall within the subject-matter jurisdiction of this Tribunal and it is necessary accordingly to examine the limits of that jurisdiction.

### A. Article 2 : Grave Breaches of the Geneva Convention of 1949

46. The Statute of the International Tribunal confers jurisdiction by Articles 1 to 8 and supplements, and in one respect qualifies, that jurisdiction in Articles 9 and 10. However it is essentially Articles 1, 2, 3 and 5 with which this motion is concerned.

47. Article 1 does no more than confer power to prosecute for serious violations of international humanitarian law and confines that power, spatially, to breaches committed in the territory of the former Yugoslavia and, temporally, to the period since 1991. It further requires that the power thus conferred be exercised in accordance with the provisions of the Statute.

48. Article 2 confers subject-matter jurisdiction to prosecute in respect of grave breaches of the Geneva Conventions and identifies those breaches by the phrase, "namely the following acts against persons or property protected under the provisions of the relevant Geneva Conventions." There then follows an enumeration of acts, culled from the four Conventions and, with very slight variations, repeating and in effect consolidating, the terms of the grave breaches provisions to be found in varying form in each of those Conventions.

49. The Article has been so drafted as to be self-contained rather than referential, save for the identification of the victims of enumerated acts; that identification and that alone involves going to the Conventions themselves for the definition of "persons or property protected." In the present case it is not contended that the alleged victims in the several charges were not protected persons; in any event that will be a matter for evidence in due course.

50. What is contended is that for Article 2 to have any application there must exist a state of international conflict and that none in fact existed at any relevant time or place. However, the requirement of international conflict does not appear on the face of Article 2. Certainly, nothing in the words of the Article expressly require its existence; once one of the specified acts is allegedly committed upon a protected person the power of the International Tribunal to prosecute arises if the spatial and temporal requirements of Article 1 are met.

51. The Report of the Secretary-General, (U.N. Doc. S/25704 (3 May 1993)) (the "Report") makes it clear, in paragraph 34, that it was intended that the rules of international law that were to be applied should be "beyond any doubt part of customary law", so that problems of non-adherence of particular States to any international Convention should not arise. Hence, no doubt, the specific reference to the law of the Geneva Conventions in Article 2 since, as the Report states in paragraph 35, that law applicable in armed conflict has beyond doubt become part of customary law. But there is no ground for treating Article 2 as in effect importing into the Statute the whole of the terms of the Conventions, including the reference in common Article 2 of the Geneva Convention to international conflicts. As stated, Article 2 of the Statute is on its face, self-contained, save in relation to the definition of protected persons and things. It simply confers subject matter jurisdiction to prosecute what, if one were concerned with the Conventions, would indeed be grave breaches of those Conventions, but which are, in the present context, simple enactments of the Statute.

52. When what is in issue is what the Geneva Conventions contemplate in the case of grave breaches, namely their prosecution before a national court and not before an international tribunal, it is natural enough that there should be a requirement of internationality; a nation might well view with concern, as an unacceptable infringement of sovereignty, the action of a foreign court in trying an accused for grave breaches committed in a conflict internal to that nation. Such considerations do not apply to the International Tribunal, any more than do the references in the Conventions to High Contracting Parties and much else in the Conventions; all these are simply inapplicable to the International Tribunal. They do not apply because the International Tribunal is not in fact, applying conventional international law but, rather, customary international law, as the Secretary-General makes clear in his Report, and is doing so by virtue of the mandate conferred upon it by the Security Council. In the case of what are commonly referred to as "grave breaches", this conventional law has become customary law, though some of it may well have been conventional law before being written into the predecessors of the present Geneva Conventions.

53. It follows that the element of internationality forms no jurisdictional criterion of the offences created by Article 2 of the Statute of the International Tribunal. If it did, there are clear indications in the great volume of material before the Trial Chamber that the acts alleged in the indictment were in fact committed in the course of an international armed conflict. However, little of this material is such that judicial notice can be taken of it and none of it is in the form of, nor has it been tendered as, evidence. In these circumstances the Trial Chamber makes no finding regarding the nature of the armed conflict in question.

54. As a submission alternative to its principal submission that there was here an international armed conflict, the Prosecutor contended that certain agreements entered into were, in any event, such that they operated, pursuant to common Article 3 of the 1949 Geneva Conventions ("common Article 3"), "to bring into force, by means of special agreements", those provisions of the Conventions relating to serious breaches.

55. Those agreements, entered into under the auspices of the International Committee of the Red Cross on 22 and 23 May and on 1 October 1992, were accompanied by a programme of action agreed upon on 27 August 1992.

56. That these agreements had the effect contended for by the Prosecutor was contested by the Defence. In view of the conclusion of the Trial Chamber that Article 2 of our Statute expressly and directly confers jurisdiction to prosecute in respect of the commission of the acts enumerated in that Article, it is also unnecessary to express any conclusion regarding this alternative submission.

#### B. Article 3: Violations of the Laws or Customs of War

57. The Defence contends that the accused may not be tried for violations of laws or customs of war under Article 3 of the Statute because that article is based on the Hague Convention (IV) Respecting the Laws and Customs of War on Land and the regulations thereto of 18 October 1907 ("Hague Convention"), and the 1977 Protocol I, which apply only to an international conflict, and that none, in fact, existed at any relevant time or place. The Prosecutor responds by asserting that the term "laws or customs of war" in Article 3 applies to both international and internal conflict and that the International Tribunal may apply the minimum standards of common Article 3 which are applicable to both international and internal armed conflicts. Since the Prosecutor seemingly does not seek to import Protocol I into Article 3 of the Statute, the Trial Chamber does not address that issue.

58. Having considered the position of the parties, the Trial Chamber finds that the character of the conflict, whether international or internal, does not affect the subject-matter jurisdiction of the International Tribunal under Article 3 to try persons who are charged with violations of laws or customs of war.

59. The interpretation of the scope of Article 2 of the Statute is applicable to the view of the Trial Chamber of its subject matter jurisdiction under Article 3. Contrary to the position of the Defence, nothing in the words of Article 3 expressly requires the existence of an international conflict. Indeed, with respect to Article 3, unlike Article 2, there is no mention of any convention. Article 3 simply provides that the International Tribunal "shall have the power to prosecute persons violating the laws or customs of war". A list of prohibitory acts are then set forth in the Article. It is clear that the list is illustrative and not exhaustive, for the list is preceded with the phrase, "such violations shall include, but not be limited to . . ."

60. The competence of the International Tribunal extends to serious violations of international humanitarian law that are a part of customary law. International humanitarian law includes international rules designed to solve humanitarian problems arising from international or non-international armed conflicts. (*See Commentary on the Additional Protocols of 8 June 1977*, at p. XXVII (ICRC 1987).)

Even though the acts enumerated in Article 3 are from the Hague Convention, the term "laws or customs of war" should not be limited to international conflicts. Laws or customs of war include prohibitions of acts committed both in international and internal armed conflicts. Indeed, common Article 3 is clear evidence that customary international law limits the conduct of hostilities in internal armed conflicts. However, unlike contracting parties to treaties, the International Tribunal is not called upon to apply conventional law but instead is mandated to apply customary international law. Therefore, the element of internationality forms no jurisdictional criterion even if the Hague Convention was originally envisaged by the Contracting Parties to apply to international conflicts.

61. Violations of the laws or customs of war are commonly referred to as "war crimes". They can be defined as crimes committed by any person in violation of recognized obligations under rules derived from conventional or customary law applicable to the parties to the conflict. (See L.C. Green, *The Contemporary Law of Armed Conflict* 276 (1993), ("war crimes are violations of the laws and customs of the law of armed conflict and are punishable whether committed by combatants or civilians, including the nationals of neutral states"). See also, C.H. Bassiouni, *A Draft International Criminal Code And Draft Statute For An International Criminal Tribunal* 130 (1987) ("[w]ar crimes consist of conduct (acts or omissions) which is prohibited by the rules of international law applicable in armed conflict, conventions to which the parties to the conflict are Parties, and the recognized principles and rules of international law of armed conflict").

62. In Article 6 (b) of the Charter of the International Military Tribunal at Nuremberg, war crimes are defined as:

[V]iolations of the laws and customs of war. Such violations shall include, but not be limited to, murder, ill-treatment or deportation to slave labor or for any other purpose of civilian population of or in occupied territory, murder or ill-treatment of prisoners of war or persons on the seas, killing of hostages, plunder of public or private property, wanton destructions of cities, towns, or villages, or devastation not justified by military necessity.

63. Although the Statute of the International Military Tribunal limited its competence to the international armed conflict of World War II, historically laws or customs of war have not been limited by the nature of the conflict they regulate. The Lieber Code, broadly recognized as the most famous early example of a national manual outlining the laws of war for the use of armed forces, and one of the first attempts to codify the laws of land warfare, was drafted to regulate the conduct of the United States armed forces during the American Civil War. (*The Lieber Code, Instructions for the Government of Armies of the United States in the Field by Order of the Secretary of War*, General Orders No. 100, Washington, D.C. (24 April 1863), reprinted in L. Friedman (ed.) *I A Documentary History* 158 (1972).) This Code, based on what Lieber regarded as the generally accepted law of his day, was used as the model for other manuals and greatly inspired later developments of the laws of war. Indeed, the drafters of the first proposal for a codification of the "laws or customs of war on land" in The Hague, relied heavily on the "Declaration of Brussels

of 1874", which in turn, was strongly influenced by the Lieber Code. (See F. Kalshoven, *Constraints on the Waging of War* 13 (1987).) It is also an established principle of customary international law that the laws of war might become applicable to non-international armed conflicts of a certain intensity through the doctrine of "recognition of belligerency". (See, for example, *1956 United States Army Field Manual*, which stipulated that "the customary law of war becomes applicable to civil war upon recognition of the rebels as belligerents", para. 11a.) Further, even in internal conflict situations where the recognition of belligerency was explicitly withheld, it has been recognized that some fundamental rules of the law of war would nevertheless apply, regardless of non-recognition of belligerency. (See A. Cassese "The Spanish Civil War and the Development of Customary Law Concerning Internal Armed Conflict", in *Current Problems of International Law* 313 (Cassese, ed. 1975).) Additionally, under the International Law Commission's *Draft Code on Crimes Against The Peace and Security of Mankind*, the notion of "exceptionally serious war crimes", is defined to include certain conduct and no differentiation is made with respect to whether committed in the course of an international or non-international armed conflict. Members of the Security Council are also of the opinion that the term "laws or customs" is not limited to international armed conflicts. (See Statements of U.S., U.K. and French representatives to the Security Council following the adoption of resolution 827, U.N. Doc. S/PV.3217, 15 (May 25, 1993).)

64. The Trial Chamber concludes that Article 3 of the Statute provides a non-exhaustive list of acts which fit within the rubric of "laws or customs of war". The offences that it may consider are not limited to those contained in the Hague Convention and may arise during an armed conflict regardless of whether it is international or internal.

65. The Prosecutor affirmatively contends that the minimum standards contained in common Article 3 are incorporated in Article 3 of the Statute. The Trial Chamber finds that it has subject-matter jurisdiction under Article 3 because violations of laws or customs of war are a part of customary international law over which it has competence regardless of whether the conflict is international or national. However, the Trial Chamber considers that it is necessary to respond to the specific assertion by the Prosecutor that laws or customs of war include the obligations imposed by common Article 3. The Trial Chamber finds that common Article 3 imposes obligations that are within the subject-matter jurisdiction of Article 3 of the Statute because those obligations are a part of customary international law. Further, the Trial Chamber finds that violations of these prohibitions can be enforced against individuals. Imposing criminal responsibility upon individuals for these violations does not violate the principle of *nullum crimen sine lege*.

66. Common Article 3 prohibits the following acts when committed against persons taking no active part in the hostilities:

- (a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;
- (b) taking of hostages;

(c) outrages upon personal dignity, in particular humiliating and degrading treatment;

(d) the passing of sentences and the carrying out of executions without previous judgement pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized people.

67. For the reasons discussed herein, the acts proscribed by common Article 3 constitute criminal offences under international law. The fact that common Article 3 is part of customary international law was definitively decided by the International Court of Justice in the *Nicaragua* case (Military and Paramilitary Activities (Nicar. v. U.S.)), 1986 I.C.J. 4 (Merits Judgement of 27 June 1986) in which the Court, applying customary international law, determined that the rules contained in common Article 3 constitute a "minimum yardstick" applicable in both international and non-international armed conflicts, thus finding that these prohibitions are part of customary international law. As early as 1958 the view was already held that common Article 3:

... merely demands respect for certain rules, which were already recognised as essential in all civilised countries, and embodied in the municipal law of the states in question, long before the Convention was signed. . . . no government can object to observing, in its dealings with internal enemies, whatever the nature of the conflict between it and them, a few essential rules which it in fact observes daily, under its own laws, even when dealing with common criminals.

(*Commentary on the Geneva Conventions of 12 August 1949: [No.] IV Geneva Convention Relative to the Protection of Civilian Persons in Time of War* 36 (Pictet ed., 1958).)

A more recent commentator notes that "... the norms stated in Article 3(1)(a)-(c) are of such an elementary, ethical character, and echo so many provisions in other humanitarian and human rights treaties, that they must be regarded as embodying minimum standards of customary law also applicable to non-international armed conflicts." (Theodor Meron, *Human Rights and Humanitarian Norms as Customary Law* 35 (1991).) The customary status of common Article 3 is further supported by statements made by representatives to the Security Council following the adoption of resolution 827 adopting the Statute of the International Tribunal. The United States representative explicitly stated that she considered Article 3 of the Statute to include common Article 3 of the 1949 Geneva Conventions, and representatives from the United Kingdom and France made similar statements. (UN Doc. S/PV.3217 (25 May 1993), paras. 11, 15 and 19.)

68. The fact that acts proscribed by common Article 3 constitute criminal offences under international law is also evident from the fact that the acts within common

Article 3 are criminal in nature. They are similar in content to acts prohibited by the grave breaches provisions, which clearly entail individual criminal liability. In addition, the type of acts listed in common Article 3 have been found in the past to result in individual criminal liability. For example, Article 44 of the Lieber Code *supra* provided for the prohibition, criminal responsibility and punishment of persons committing acts which are of the type that would today fall within common Article 3. In addition, there have been national trials for individuals charged with violations similar to common Article 3. (See Jordan Paust, *War Crimes Jurisdiction and Due Process: The Bangladesh Experience*, 11 Vanderbilt Journal of Transnational Law 1, 25 (1978).)

69. The customary international law doctrine of recognition of belligerency allows for the application to internal conflicts of the laws applicable to international armed conflict, thus ensuring that even in a non-international conflict individuals can be held criminally responsible for violations of the laws and customs of war. Additionally, some national military manuals and laws emphasise the criminal nature of acts within common Article 3. For example, the United States Army regards violations of common Article 3 as encompassed by the notion of war crimes, thus empowering it to prosecute captured military personnel for war crimes if they were accused of breaches of common Article 3. The German Military Manual describes violations of common Article 3 as "grave breaches of international humanitarian law," implying that violations of common Article 3 could form the basis for individual criminal responsibility. (See Theodor Meron, *International Criminalization of Internal Atrocities*, 89 Am. J. Int'l. L. 554, 564-65 (1995).) Further, the criminal nature of the acts within common Article 3 is evident from the language of common Article 3 itself, which is clearly prohibitory and addresses fundamental offences such as murder and torture which are prohibited in all States:

Therefore, no person who has committed such acts . . . could claim in good faith that he/she did not understand that the acts were prohibited. And the principle *nullum crimen* is designed to protect a person only from being punished for an act that he or she reasonably believed to be lawful when committed.

( *Id.* at 566.)

70. The individual criminal responsibility of the violator need not be explicitly stated in a convention for its provisions to entail individual criminal liability. This is evident from the use of the Fourth Hague Convention and the 1929 Geneva Prisoners of War Convention as the basis for prosecutions and convictions at Nuremberg, despite the fact that neither convention contain any reference to penal prosecution or individual liability for breaches.

71. A further indication that the acts proscribed by common Article 3 constitute criminal offences under international law is that, assuming *arguendo* that there is no clear obligation to punish or extradite violators of non-grave breach provisions of the Geneva Conventions, such as common Article 3, all States have the right to punish those violators. Therefore, individuals can be prosecuted for the violations of the acts

listed and thus prosecution by the International Tribunal based on primacy does not violate the *ex post facto* prohibition. In addition, in the *Nicaragua* case, the Court recognised the applicability of common Article 1 of the Geneva Conventions to non-international armed conflicts. The requirement in common Article 1 that all Contracting Parties must respect and ensure respect for the Conventions may entail resort to penal measures.

72. In his Report, the Secretary-General states that "the application of the principle *nullum crimen sine lege* requires that the International Tribunal should apply rules of international humanitarian law which are beyond any doubt part of customary law". (UN Doc. S/25704, para. 34.) Article 15(1) of the ICCPR contains the prohibition against *nullum crimen sine lege*, and provides in relevant part that "[n]o one shall be held guilty of any criminal offence on account of an act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed". As is demonstrated from the above, common Article 3 is beyond doubt part of customary international law, therefore the principle of *nullum crimen sine lege* is not violated by incorporating the prohibitory norms of common Article 3 in Article 3 of the Statute of the International Tribunal.

73. Additional support for the finding that there is no violation of the principle of *nullum crimen sine lege* is that by incorporating the prohibitory norms of common Article 3 into its national law, the former Yugoslavia has criminalized these offences. (See Art. 125 of the Criminal Code of the former Yugoslavia, which provides that the prohibition of war crimes against the civilian population applies to situations of "war, armed conflict or occupation," irrespective of the nature of the conflict, thus implying that situations of non-international armed conflict could be covered.)

74. For these reasons, the Trial Chamber finds that the character of the conflict, whether international or internal, does not affect the subject-matter jurisdiction of the Tribunal under Article 3. The term "laws or customs of war", applies to international and internal armed conflicts. The minimum standards of common Article 3 apply to the conflict in the former Yugoslavia and the accused's prosecution for those offences does not violate the principle of *nullum crimen sine lege*.

#### C. Article 5: Crimes Against Humanity

75. Crimes against humanity have been described by the Secretary-General in his Report (at paragraph 48) as those inhumane acts of a very serious nature committed as part of a widespread or systematic attack against any civilian population on national, political, ethnic, racial or religious grounds. The Statute then defines the jurisdiction of the International Tribunal over crimes against humanity in Article 5 of the Statute as follows:

The International Tribunal shall have the power to prosecute persons responsible for the following crimes when committed in armed conflict, whether international or internal in character, and directed against any civilian population:

- (a) murder;
- (b) extermination;

- (c) enslavement;
- (d) deportation;
- (e) imprisonment;
- (f) torture;
- (g) rape;
- (h) persecutions on political, racial and religious grounds;
- (i) other inhumane acts.

76. There is no question but that crimes against humanity form part of customary international law. They found expression in Article 6(c) of the Nuremberg Charter of 8 August 1945, Article II(1)(c) of Law No. 10 of the Control Council for Germany of 20 December 1945 and Article 5(c) of the Tokyo Charter of 26 April 1946, three major documents promulgated in the aftermath of World War II.

77. The Defence claims that "the Tribunal only has jurisdiction under Article 5 of the Statute if it involves crimes that have been committed in the execution of or in connection with an international armed conflict." It purports to find authority for this proposition requiring the existence of an armed conflict of an international nature in the Nuremberg Charter which, in its definition of crimes against humanity, spoke of inhumane acts committed "in execution of or in connection with any crime within the jurisdiction of the Tribunal . . ." and in the affirmation given to the principles of international law recognised by the Charter of the Nuremberg Tribunal and Judgement of the Tribunal in General Assembly resolution 95(1) of 1948. The Defence further contends that the broadening of the scope of Article 5 to crimes when committed in armed conflicts of an internal character offends the *nullum crimen* principle.

78. The Trial Chamber does not agree. The nexus in the Nuremberg Charter between crimes against humanity and the other two categories, crimes against peace and war crimes, was peculiar to the context of the Nuremberg Tribunal established specifically "for the just and prompt trial and punishment of the major war criminals of the European Axis countries." (*Nuremberg Charter*, Article 1). As some of the crimes perpetrated by Nazi Germany were of such a heinous nature as to shock the conscience of mankind, it was decided to include crimes against humanity in order to enable the International Military Tribunal to try the major war criminals for the barbarous acts committed against German Jews, amongst others, who, as German nationals, were outside the protection of the laws of warfare which only prohibited violations involving the adversary or enemy populations. (See Antonio Cassese, *International Law in a Divided World* para. 169 (1986).)

79. That no nexus is required in customary international law between crimes against humanity and crimes against peace or war crimes is strongly evidenced by subsequent case law. The military tribunal established under Control Council Law No. 10 stated in the *Einsatzgruppen* case that:

Crimes against humanity are acts committed in the course of wholesale and systematic violation of life and liberty . . . The International Military Tribunal, operating under the London Charter, declared that the Charter's provisions limited the Tribunal to consider only those crimes against humanity which

were committed in the execution of or in connection with crimes against peace and war crimes. The Allied Control Council, in its Law No. 10, removed this limitation so that the present Tribunal has jurisdiction to try all crimes against humanity as long known and understood under the general principles of criminal law.

(4 Trials of War Criminals 499).

80. Further, the Special Rapporteur of the International Law Commission had this to say:

First linked to a state of belligerency . . . the concept of crimes against humanity gradually came to be viewed as autonomous and is today quite separate from that of war crimes . . . Crimes against humanity may be committed in time of war or in time of peace; war crimes can only be committed in time of war.

(Seventh Report on the Draft Code of Crimes Against the Peace and Security of Mankind, [1989] 2 Yearbook of ILC, U.N. Doc., A/N/CN. 4/SER. A/1986/Add. 1).

81. Finally, this view that crimes against humanity are autonomous is confirmed by the *opus classicus* on international law, Oppenheim's International Law, where special reference is made to the fact that crimes against humanity "are now generally regarded as a self-contained category, without the need for any formal link with war crimes . . ." (R. Jennings and A. Watts, 1 *Oppenheim's International Law* 966 (1992)).

82. Even were it arguable that a nexus is required between crimes against humanity and war crimes, the element of internationality certainly forms no jurisdictional criterion because, as has been shown above, war crimes are prohibited under customary international law in armed conflicts both of an international and internal nature.

83. In conclusion, the Trial Chamber emphasises that the definition of Article 5 is in fact more restrictive than the general definition of crimes against humanity recognised by customary international law. The inclusion of the nexus with armed conflict in the article imposes a limitation on the jurisdiction of the International Tribunal and certainly can in no way offend the *nullum crimen* principle so as to bar the International Tribunal from trying the crimes enumerated therein. Because the language of Article 5 is clear, the crimes against humanity to be tried in the International Tribunal must have a nexus with an armed conflict, be it international or internal.

DISPOSITION

The foregoing deals with the several objections to jurisdiction proper raised by the Defence as well as with the other objections not properly relating to jurisdiction but which instead put in issue the lawful creation and competence of the International Tribunal.

For the foregoing reasons, **THE TRIAL CHAMBER**, being seized of the Motion filed by the Defence, and

#### PURSUANT TO RULE 72

**HEREBY DISMISSES** the motion insofar as it relates to primacy jurisdiction and subject-matter jurisdiction under Articles 2, 3 and 5 and otherwise decides it to be incompetent insofar as it challenges the establishment of the International Tribunal

**HEREBY DENIES** the relief sought by the Defence in its Motion on the Jurisdiction of the Tribunal.

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Gabrielle Kirk McDonald  
Presiding Judge

Dated this tenth day of August 1995  
At The Hague  
The Netherlands



**Legality of the Use by a State of Nuclear Weapons in  
Armed Conflict, Advisory Opinion,  
I.C.J. Reports 1996**

## INTERNATIONAL COURT OF JUSTICE

YEAR 1996

8 July 1996

LEGALITY OF THE USE BY A STATE  
OF NUCLEAR WEAPONS  
IN ARMED CONFLICT

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General List  
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*Jurisdiction of the Court to give the advisory opinion requested — Article 65, paragraph 1, of the Statute and Article 96, paragraph 2, of the Charter — Specialized agency authorized to request opinions under the Charter — “Legal question” — Political aspects of the question posed — Motives said to have inspired the request and political implications that the opinion might have — Question arising “within the scope of [the] activities” of the requesting Organization — Interpretation of the constitution of the Organization — Article 2 of the World Health Organization Constitution — Absence of sufficient connection between the functions vested in the Organization and the question posed — “Principle of speciality” — Relationship between the United Nations and the specialized agencies — Issue of World Health Organization practice in the field of nuclear weapons — Resolution duly adopted from a procedural point of view and question whether that resolution has been adopted intra vires — Resolution of the United Nations General Assembly “welcoming” the request for an opinion submitted by the World Health Organization — Conclusion.*

## ADVISORY OPINION

*Present: President BEDJAOUI; Vice-President SCHWEBEL; Judges ODA, GUILLAUME, SHAHABUDDIN, WEERAMANTRY, RANJEVA, HERCZEGH, SHI, FLEISCHHAUER, KOROMA, VERESHCHETIN, FERRARI BRAVO, HIGGINS; Registrar VALENCIA-OSPINA.*

1. By a letter dated 27 August 1993, filed in the Registry on 3 September 1993, the Director-General of the World Health Organization (hereinafter called “the WHO”) officially communicated to the Registrar a decision taken by the World Health Assembly to submit a question to the Court for an advisory

sory opinion. The question is set forth in resolution WHA46.40 adopted by the Assembly on 14 May 1993. That resolution, certified copies of the English and French texts of which were enclosed with the said letter, reads as follows:

“The Forty-sixth World Health Assembly,

Bearing in mind the principles laid down in the WHO Constitution;

Noting the report of the Director-General on health and environmental effects of nuclear weapons<sup>1</sup>;

Recalling resolutions WHA34.38, WHA36.28 and WHA40.24 on the effects of nuclear war on health and health services;

Recognizing that it has been established that no health service in the world can alleviate in any significant way a situation resulting from the use of even one single nuclear weapon<sup>2</sup>;

Recalling resolutions WHA42.26 on WHO’s contribution to the international efforts towards sustainable development and WHA45.31 which draws attention to the effects on health of environmental degradation and recognizing the short- and long-term environmental consequences of the use of nuclear weapons that would affect human health for generations;

Recalling that primary prevention is the only appropriate means to deal with the health and environmental effects of the use of nuclear weapons<sup>3</sup>;

Noting the concern of the world health community about the continued threat to health and the environment from nuclear weapons;

Mindful of the role of WHO as defined in its Constitution to act as the directing and coordinating authority on international health work (Article 2 (a)); to propose conventions, agreements and regulations (Article 2 (k)); to report on administrative and social techniques affecting public health from preventive and curative points of view (Article 2 (p)); and to take all necessary action to attain the objectives of the Organization (Article 2 (v));

Realizing that primary prevention of the health hazards of nuclear weapons requires clarity about the status in international law of their use, and that over the last 48 years marked differences of opinion have been expressed by Member States about the lawfulness of the use of nuclear weapons;

1. *Decides*, in accordance with Article 96 (2) of the Charter of the United Nations, Article 76 of the Constitution of the World Health Organization and Article X of the Agreement between the United Nations and the World Health Organization approved by the General Assembly of the United Nations on 15 November 1947 in its resolution 124 (II), to

<sup>1</sup> Document A46/30.

<sup>2</sup> See *Effects of Nuclear War on Health and Health Services* (2nd ed.), Geneva, WHO, 1987.

request the International Court of Justice to give an advisory opinion on the following question:

'In view of the health and environmental effects, would the use of nuclear weapons by a State in war or other armed conflict be a breach of its obligations under international law including the WHO Constitution?'

2. *Requests the Director-General to transmit this resolution to the International Court of Justice, accompanied by all documents likely to throw light upon the question, in accordance with Article 65 of the Statute of the Court.*'

2. Pursuant to Article 65, paragraph 2, of the Statute, the Director-General of the WHO communicated to the Court a dossier of documents likely to throw light upon the question; the dossier reached the Registry in several instalments.

3. By letters dated 14 and 20 September 1993, the Deputy-Registrar, pursuant to Article 66, paragraph 1, of the Statute of the Court, gave notice of the request for an advisory opinion to all States entitled to appear before the Court.

4. By an Order dated 13 September 1993 the Court decided that the WHO and the member States of that Organization entitled to appear before the Court were likely to be able to furnish information on the question, in accordance with Article 66, paragraph 2, of the Statute; and, by the same Order, the Court fixed 10 June 1994 as the time-limit for the submission to it of written statements on the question. The special and direct communication provided for in Article 66, paragraph 2, of the Statute was included in the aforementioned letters of 14 and 20 September 1993 addressed to the States concerned. A similar communication was transmitted to the WHO by the Deputy-Registrar on 14 September 1993.

5. By an Order dated 20 June 1994, the President of the Court, upon the request of several States, extended to 20 September 1994 the time-limit for the submission of written statements. By the same Order, the President fixed 20 June 1995 as the time-limit within which States and organizations having presented written statements might submit written comments on the other written statements, in accordance with Article 66, paragraph 4, of the Statute.

6. Written statements were filed by the following States: Australia, Azerbaijan, Colombia, Costa Rica, Democratic People's Republic of Korea, Finland, France, Germany, India, Ireland, Islamic Republic of Iran, Italy, Japan, Kazakhstan, Lithuania, Malaysia, Mexico, Nauru, Netherlands, New Zealand, Norway, Papua New Guinea, Philippines, Republic of Moldova, Russian Federation, Rwanda, Samoa, Saudi Arabia, Solomon Islands, Sri Lanka, Sweden, Uganda, Ukraine, United Kingdom of Great Britain and Northern Ireland, and United States of America. In addition, written comments on those written statements were submitted by the following States: Costa Rica, France, India, Malaysia, Nauru, Russian Federation, Solomon Islands, United Kingdom of Great Britain and Northern Ireland, and United States of America. Upon receipt of those statements and comments, the Registrar communicated the text to all States having taken part in the written proceedings.

7. The Court decided to hold public sittings, opening on 30 October 1995, at which oral statements might be submitted to the Court by any State or organization which had been considered likely to be able to furnish information on the question before the Court. By letters dated 23 June 1995, the Registrar

requested the WHO and its member States entitled to appear before the Court to inform him whether they intended to take part in the oral proceedings; it was indicated, in those letters, that the Court had decided to hear, during the same public sittings, oral statements relating to the request for an advisory opinion from the WHO as well as oral statements concerning the request for an advisory opinion meanwhile laid before the Court by the General Assembly of the United Nations on the question of the *Legality of the Threat or Use of Nuclear Weapons*, on the understanding that the WHO would be entitled to speak only in regard to the request it had itself submitted; and it was further specified therein that the participants in the oral proceedings which had not taken part in the written proceedings would receive the text of the statements and comments produced in the course of the latter.

8. Pursuant to Article 106 of the Rules of Court, the Court decided to make the written statements and comments submitted to the Court accessible to the public, with effect from the opening of the oral proceedings.

9. In the course of public sittings held from 30 October 1995 to 15 November 1995, the Court heard oral statements in the following order by:

*for the WHO:* Mr. Claude-Henri Vignes, Legal Counsel;

*for the Commonwealth of Australia:* Mr. Gavan Griffith, Q.C., Solicitor-General of Australia, Counsel,  
The Honourable Gareth Evans, Q.C., Senator,  
Minister for Foreign Affairs, Counsel;

*for the Arab Republic of Egypt:* Mr. Georges Abi-Saab, Professor of International Law, Graduate Institute of International Studies, Geneva, Member of the Institute of International Law;

*for the French Republic:* Mr. Marc Perrin de Brichambaut, Director of Legal Affairs, Ministry of Foreign Affairs,  
Mr. Alain Pellet, Professor of International Law, University of Paris X and Institute of Political Studies, Paris;

*for the Federal Republic of Germany:* Mr. Hartmut Hilgenberg, Director-General of Legal Affairs, Ministry of Foreign Affairs;

*for Indonesia:* H.E. Mr. Johannes Berchmans Soedarman to the Kadarisman, Ambassador of Indonesia to the Netherlands;

*for Mexico:* H.E. Mr. Sergio González Gálvez, Ambassador, Under-Secretary of Foreign Relations;

*for the Islamic Republic of Iran:* H.E. Mr. Mohammad J. Zarif, Deputy Minister, Legal and International Affairs, Ministry of Foreign Affairs;

*for Italy:* Mr. Umberto Leanza, Professor of International Law at the Faculty of Law at the University of Rome "Tor Vergata", Head of the Diplomatic Legal Service at the Ministry of Foreign Affairs;

*for Japan:*

H.E. Mr. Takekazu Kawamura, Ambassador, Director General for Arms Control and Scientific Affairs, Ministry of Foreign Affairs,

Mr. Takashi Hiraoka, Mayor of Hiroshima,  
Mr. Ichio Itoh, Mayor of Nagasaki;

*for Malaysia:*

H.E. Mr. Tan Sri Razali Ismail, Ambassador, Permanent Representative of Malaysia to the United Nations,

Dato' Mohtar Abdullah, Attorney-General;

*for New Zealand:*

The Honourable Paul East, Q.C., Attorney-General of New Zealand,

Mr. Allan Bracegirdle, Deputy Director of Legal Division of the New Zealand Ministry of Foreign Affairs and Trade;

*for the Philippines:*

H.E. Mr. Rodolfo S. Sanchez, Ambassador of the Philippines to the Netherlands,

Professor Merlin M. Magallona, Dean, College of Law, University of the Philippines;

*for the Russian Federation:*

Mr. A. G. Khodakov, Director, Legal Department, Ministry of Foreign Affairs;

*for Samoa:*

H.E. Mr. Neroni Slade, Ambassador and Permanent Representative of Samoa to the United Nations,

Miss Laurence Boisson de Chazournes, Assistant Professor, Graduate Institute of International Studies, Geneva,

Mr. Roger S. Clark, Distinguished Professor of Law, Rutgers University School of Law, Camden, New Jersey;

*for the Marshall Islands:*

The Honourable Theodore G. Kronmiller, Legal Counsel, Embassy of the Marshall Islands to the United States of America,

Mrs. Lijon Ekniliang, Council Member, Rongelap Atoll Local Government;

*for Solomon Islands:*

The Honourable Victor Ngele, Minister of Police and National Security,

Mr. Jean Salmon, Professor of Law, Université libre de Bruxelles,

Mr. Eric David, Professor of Law, Université libre de Bruxelles,

Mr. Philippe Sands, Lecturer in Law, School of Oriental and African Studies, London University, and Legal Director, Foundation for International Environmental Law and Development,

Mr. James Crawford, Whewell Professor of International Law, University of Cambridge;

*for Costa Rica:*  
Mr. Carlos Vargas-Pizarro, Legal Counsel and Special Envoy of the Government of Costa Rica;

*for the United Kingdom of Great Britain and Northern Ireland:*  
The Rt. Honourable Sir Nicholas Lyell, Q.C., M.P., Her Majesty's Attorney-General;

*for the United States of America:*  
Mr. Conrad K. Harper, Legal Adviser, United States Department of State,

Mr. Michael J. Matheson, Principal Deputy Legal Adviser, United States Department of State,

Mr. John H. McNeill, Senior Deputy General Counsel, United States Department of Defense;

*for Zimbabwe:*  
Mr. Jonathan Wutawunashé, Chargé d'affaires a.i., Embassy of the Republic of Zimbabwe in the Netherlands.

Questions were put by Members of the Court to particular participants in the oral proceedings, which replied in writing, as requested, within the prescribed time-limits; the Court having decided that the other participants could also reply to those questions on the same terms, several of them did so. Other questions put by Members of the Court were addressed, more generally, to any participant in the oral proceedings; several of them replied in writing, as requested, within the prescribed time-limits.

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10. The Court has the authority to give advisory opinions by virtue of Article 65 of its Statute, paragraph 1 of which reads as follows:

“The Court may give an advisory opinion on any legal question at the request of whatever body may be authorized by or in accordance with the Charter of the United Nations to make such a request.”

It is also stated, in Article 96, paragraph 2, of the Charter that the

“specialized agencies, which may at any time be so authorized by the General Assembly, may also request advisory opinions of the Court on legal questions arising within the scope of their activities”.

Consequently, three conditions must be satisfied in order to found the jurisdiction of the Court when a request for an advisory opinion is submitted to it by a specialized agency: the agency requesting the opinion must be duly authorized, under the Charter, to request opinions from the

Court; the opinion requested must be on a legal question; and this question must be one arising within the scope of the activities of the requesting agency (cf. *Application for Review of Judgement No. 273 of the United Nations Administrative Tribunal, Advisory Opinion, I.C.J. Reports 1982*, pp. 333-334).

11. Where the WHO is concerned, the above-mentioned texts are reflected in two other provisions, to which World Health Assembly resolution WHA46.40 expressly refers in paragraph 1 of its operative part. These are, on the one hand, Article 76 of that Organization's Constitution, under which:

“Upon authorization by the General Assembly of the United Nations or upon authorization in accordance with any agreement between the Organization and the United Nations, the Organization may request the International Court of Justice for an advisory opinion on any legal question arising within the competence of the Organization.”

And on the other hand, paragraph 2 of Article X of the Agreement of 10 July 1948 between the United Nations and the WHO, under which:

“The General Assembly authorizes the World Health Organization to request advisory opinions of the International Court of Justice on legal questions arising within the scope of its competence other than questions concerning the mutual relationships of the Organization and the United Nations or other specialized agencies.”

This agreement was approved by the United Nations General Assembly on 15 November 1947 (resolution 124 (II)) and by the World Health Assembly on 10 July 1948 (resolution [WHA1.102]).

12. There is thus no doubt that the WHO has been duly authorized, in accordance with Article 96, paragraph 2, of the Charter, to request advisory opinions of the Court. The first condition which must be met in order to found the competence of the Court in this case is thus fulfilled. Moreover, this point has not been disputed; and the Court has in the past agreed to deal with a request for an advisory opinion submitted by the WHO (see *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt, Advisory Opinion, I.C.J. Reports 1980*, pp. 73 *et seq.*).

\* \*

13. However, during both the written and oral proceedings, some States have disputed whether the other conditions necessary for the jurisdiction of the Court have been met in the present case. It has been contended that the question before the Court is an essentially political one,

and also that it goes beyond the scope of the WHO's proper activities, which would *in limine* have deprived the Organization itself of any competence to seise the Court of it.

14. Further, various arguments have been put forward for the purpose of persuading the Court to use the discretionary power it possesses under Article 65, paragraph 1, of the Statute, to decline to give the opinion sought. The Court can however only exercise this discretionary power if it has first established that it has jurisdiction in the case in question; if the Court lacks jurisdiction, the question of exercising its discretionary power does not arise.

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15. The Court must therefore first satisfy itself that the advisory opinion requested does indeed relate to a “legal question” within the meaning of its Statute and the United Nations Charter.

The Court has already had occasion to indicate that questions

“framed in terms of law and rais[ing] problems of international law . . . are by their very nature susceptible of a reply based on law . . . [and] appear . . . to be questions of a legal character” (*Western Sahara, Advisory Opinion, I.C.J. Reports 1975*, p. 18, para. 15).

16. The question put to the Court by the World Health Assembly does in fact constitute a legal question, as the Court is requested to rule on whether,

“in view of the health and environmental effects, . . . the use of nuclear weapons by a State in war or other armed conflict [would] be a breach of its obligations under international law including the WHO Constitution”.

To do this, the Court must identify the obligations of States under the rules of law invoked, and assess whether the behaviour in question conforms to those obligations, thus giving an answer to the question posed based on law.

The fact that this question also has political aspects, as, in the nature of things, is the case with so many questions which arise in international life, does not suffice to deprive it of its character as a “legal question” and to “deprive the Court of a competence expressly conferred on it by its Statute” (*Application for Review of Judgement No. 158 of the United Nations Administrative Tribunal, Advisory Opinion, I.C.J. Reports 1973*, p. 172, para. 14). Whatever its political aspects, the Court cannot refuse to admit the legal character of a question which invites it to discharge an essentially judicial task, namely, an assessment of the legality of the possible conduct of States with regard to the obligations imposed upon them

by international law (cf. *Conditions of Admission of a State to Membership in the United Nations (Article 4 of Charter)*, *Advisory Opinion*, 1948, *I.C.J. Reports 1947-1948*, pp. 61-62; *Competence of the General Assembly for the Admission of a State to the United Nations*, *Advisory Opinion*, *I.C.J. Reports 1950*, pp. 6-7; *Certain Expenses of the United Nations (Article 17, paragraph 2, of the Charter)*, *Advisory Opinion*, *I.C.J. Reports 1962*, p. 155).

Furthermore, as the Court said in the Opinion it gave in 1980 concerning the *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt*:

“Indeed, in situations in which political considerations are prominent it may be particularly necessary for an international organization to obtain an advisory opinion from the Court as to the legal principles applicable with respect to the matter under debate, especially when these may include the interpretation of its constitution.” (*I.C.J. Reports 1980*, p. 87, para. 33.)

17. The Court also finds that the political nature of the motives which may be said to have inspired the request and the political implications that the opinion given might have are of no relevance in the establishment of its jurisdiction to give such an opinion.

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18. The Court will now seek to determine whether the advisory opinion requested by the WHO relates to a question which arises “within the scope of [the] activities” of that Organization, in accordance with Article 96, paragraph 2, of the Charter.

The Court notes that this third condition to which its advisory function is subject is expressed in slightly different terms in Article X, paragraph 2, of the Agreement of 10 July 1948 — which refers to questions arising within the scope of the WHO’s “competence” — and in Article 76 of the WHO Constitution — which refers to questions arising “within the competence” of the Organization. However, it considers that, for the purposes of this case, no point of significance turns on the different formulations.

19. In order to delineate the field of activity or the area of competence of an international organization, one must refer to the relevant rules of the organization and, in the first place, to its constitution. From a formal standpoint, the constituent instruments of international organizations are multilateral treaties, to which the well-established rules of treaty interpretation apply. As the Court has said with respect to the Charter:

“On the previous occasions when the Court has had to interpret the Charter of the United Nations, it has followed the principles and rules applicable in general to the interpretation of treaties, since it

has recognized that the Charter is a multilateral treaty, albeit a treaty having certain special characteristics.” (*Certain Expenses of the United Nations (Article 17, paragraph 2, of the Charter)*, *Advisory Opinion*, *I.C.J. Reports 1962*, p. 157.)

But the constituent instruments of international organizations are also treaties of a particular type; their object is to create new subjects of law endowed with a certain autonomy, to which the parties entrust the task of realizing common goals. Such treaties can raise specific problems of interpretation owing, *inter alia*, to their character which is conventional and at the same time institutional; the very nature of the organization created, the objectives which have been assigned to it by its founders, the imperatives associated with the effective performance of its functions, as well as its own practice, are all elements which may deserve special attention when the time comes to interpret these constituent treaties.

According to the customary rule of interpretation as expressed in Article 31 of the 1969 Vienna Convention on the Law of Treaties, the terms of a treaty must be interpreted “in their context and in the light of its object and purpose” and there shall be

“taken into account, together with the context:

(b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation”.

The Court has had occasion to apply this rule of interpretation several times (see *Arbitral Award of 31 July 1989 (Guinea-Bissau v. Senegal)*, *Judgment*, *I.C.J. Reports 1991*, pp. 69-70, para. 48; *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras: Nicaragua intervening)*, *Judgment*, *I.C.J. Reports 1992*, pp. 582-583, para. 373, and p. 586, para. 380; *Territorial Dispute (Libyan Arab Jamahiriya/Chad)*, *Judgment*, *I.C.J. Reports 1994*, pp. 21-22, para. 41; *Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v. Bahrain)*, *Jurisdiction and Admissibility*, *Judgment*, *I.C.J. Reports 1995*, p. 18, para. 33); it will also apply it in this case for the purpose of determining whether, according to the WHO Constitution, the question to which it has been asked to reply arises “within the scope of [the] activities” of that Organization.

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20. The WHO Constitution was adopted and opened for signature on 22 July 1946; it entered into force on 7 April 1948 and was amended in 1960, 1975, 1977, 1984 and 1994.

The functions attributed to the Organization are listed in 22 subparagraphs (a) to (v)) in Article 2 of its Constitution. None of these subparagraphs expressly refers to the legality of any activity

hazardous to health; and none of the functions of the WHO is dependent upon the legality of the situations upon which it must act. Moreover, it is stated in the introductory sentence of Article 2 that the Organization discharges its functions "in order to achieve its objective". The objective of the Organization is defined in Article 1 as being "the attainment by all the peoples of the highest possible level of health". As for the Preamble to the Constitution, it sets out various principles which the States parties "declare, in conformity with the Charter of the United Nations, . . . [to be] basic to the happiness, harmonious relations and security of all peoples": hence, it is stated therein, *inter alia*, that "[t]he enjoyment of the highest attainable standard of health is one of the fundamental rights of every human being" and that "[t]he health of all peoples is fundamental to the attainment of peace and security"; it is further indicated, at the end of the Preamble that,

"for the purpose of co-operation among themselves and with others to promote and protect the health of all peoples, the Contracting Parties . . . establish . . . the . . . Organization . . . as a specialized agency within the terms of Article 57 of the Charter of the United Nations".

21. Interpreted in accordance with their ordinary meaning, in their context and in the light of the object and purpose of the WHO Constitution, as well as of the practice followed by the Organization, the provisions of its Article 2 may be read as authorizing the Organization to deal with the effects on health of the use of nuclear weapons, or of any other hazardous activity, and to take preventive measures aimed at protecting the health of populations in the event of such weapons being used or such activities engaged in.

The question put to the Court in the present case relates, however, *not to the effects of the use of nuclear weapons on health, but to the legality of the use of such weapons in view of their health and environmental effects*. Whatever those effects might be, the competence of the WHO to deal with them is not dependent on the legality of the acts that caused them. Accordingly, it does not seem to the Court that the provisions of Article 2 of the WHO Constitution, interpreted in accordance with the criteria referred to above, can be understood as conferring upon the Organization a competence to address the legality of the use of nuclear weapons, and thus in turn a competence to ask the Court about that.

22. World Health Assembly resolution WHA46.40, by which the Court has been seized of this request for an opinion, expressly refers, in its Preamble, to the functions indicated under subparagraphs (a), (k), (p) and (v) of Article 2 under consideration. These functions are defined as:

"(a) to act as the directing and co-ordinating authority on international health work;

.....

(k) to propose conventions, agreements and regulations, and make recommendations with respect to international health matters and to perform such duties as may be assigned thereby to the Organization and are consistent with its objective;

(p) to study and report on, in co-operation with other specialized agencies where necessary, administrative and social techniques affecting public health and medical care from preventive and curative points of view, including hospital services and social security;

[and]

(v) generally to take all necessary action to attain the objective of the Organization."

In the view of the Court, none of these functions has a sufficient connection with the question before it for that question to be capable of being considered as arising "within the scope of [the] activities" of the WHO. The causes of the deterioration of human health are numerous and varied; and the legal or illegal character of these causes is essentially immaterial to the measures which the WHO must in any case take in an attempt to remedy their effects. In particular, the legality or illegality of the use of nuclear weapons in no way determines the specific measures, regarding health or otherwise (studies, plans, procedures, etc.), which could be necessary in order to seek to prevent or cure some of their effects. Whether nuclear weapons are used legally or illegally, their effects on health would be the same. Similarly, while it is probable that the use of nuclear weapons might seriously prejudice the WHO's material capability to deliver all the necessary services in such an eventuality, for example, by making the affected areas inaccessible, this does not raise an issue falling within the scope of the Organization's activities within the meaning of Article 96, paragraph 2, of the Charter. The reference in the question put to the Court to the health and environmental effects, which according to the WHO the use of a nuclear weapon will always occasion, does not make the question one that falls within the WHO's functions.

23. However, in its Preamble, resolution WHA46.40 refers to "primary prevention" in the following terms:

"Recalling that primary prevention is the only appropriate means to deal with the health and environmental effects of the use of nuclear weapons";

.....

<sup>2</sup> See *Effects of Nuclear War on Health and Health Services* (2nd ed.), Geneva, WHO, 1987.

Realizing that primary prevention of the health hazards of nuclear weapons requires clarity about the status in international law of their use, and that over the last 48 years marked differences of opinion have been expressed by Member States about the lawfulness of the use of nuclear weapons;

“...”

The document entitled *Effects of Nuclear War on Health and Health Services*, to which the Preamble refers, is a report prepared in 1987 by the Management Group created by the Director-General of the WHO in pursuance of World Health Assembly resolution WHA36.28; this report updates another report on the same topic, which had been prepared in 1983 by an international committee of experts in medical sciences and public health, and whose conclusions had been approved by the Assembly in its above-mentioned resolution. As several States have observed during the present proceedings, the Management Group does indeed emphasize in its 1987 report that “the only approach to the treatment of health effects of nuclear warfare is primary prevention, that is, the prevention of nuclear war” (Summary, p. 5, para. 7). However, the Group states that “it is not for [it] to outline the political steps by which this threat can be removed or the preventive measures to be implemented” (*ibid.*, para. 8); and the Group concludes:

“However, WHO can make important contributions to this process by systematically distributing information on the health consequences of nuclear warfare and by expanding and intensifying international cooperation in the field of health.” (*Ibid.*, para. 9.)

24. The WHO could only be competent to take those actions of “primary prevention” which fall within the functions of the Organization as defined in Article 2 of its Constitution. In consequence, the references to this type of prevention which are made in the Preamble to resolution WHA46.40 and the link there suggested with the question of the legality of the use of nuclear weapons do not affect the conclusions reached by the Court in paragraph 22 above.

25. The Court need hardly point out that international organizations are subjects of international law which do not, unlike States, possess a general competence. International organizations are governed by the “principle of speciality”, that is to say, they are invested by the States which create them with powers, the limits of which are a function of the common interests whose promotion those States entrust to them. The Permanent Court of International Justice referred to this basic principle in the following terms:

“As the European Commission is not a State, but an international institution with a special purpose, it only has the functions bestowed

upon it by the Definitive Statute with a view to the fulfilment of that purpose, but it has power to exercise these functions to their full extent, in so far as the Statute does not impose restrictions upon it.” (*Jurisdiction of the European Commission of the Danube, Advisory Opinion, P.C.I.J., Series B, No. 14*, p. 64.)

The powers conferred on international organizations are normally the subject of an express statement in their constituent instruments. Nevertheless, the necessities of international life may point to the need for organizations, in order to achieve their objectives, to possess subsidiary powers which are not expressly provided for in the basic instruments which govern their activities. It is generally accepted that international organizations can exercise such powers, known as “implied” powers. As far as the United Nations is concerned, the Court has expressed itself in the following terms in this respect:

“Under international law, the Organization must be deemed to have those powers which, though not expressly provided in the Charter, are conferred upon it by necessary implication as being essential to the performance of its duties. This principle of law was applied by the Permanent Court of International Justice to the International Labour Organization in its Advisory Opinion No. 13 of July 23rd, 1926 (Series B, No. 13, p. 18), and must be applied to the United Nations.” (*Reparation for Injuries Suffered in the Service of the United Nations, Advisory Opinion, I.C.J. Reports 1949*, pp. 182-183; cf. *Effect of Awards of Compensation Made by the United Nations Administrative Tribunal, Advisory Opinion, I.C.J. Reports 1954*, p. 57.)

In the opinion of the Court, to ascribe to the WHO the competence to address the legality of the use of nuclear weapons — even in view of their health and environmental effects — would be tantamount to disregarding the principle of speciality; for such competence could not be deemed a necessary implication of the Constitution of the Organization in the light of the purposes assigned to it by its member States.

26. The World Health Organization is, moreover, an international organization of a particular kind. As indicated in the Preamble and confirmed by Article 69 of its Constitution, “the Organization shall be brought into relation with the United Nations as one of the specialized agencies referred to in Article 57 of the Charter of the United Nations”. Article 57 of the Charter defines “specialized agencies” as follows:

“1. The various specialized agencies, established by intergovernmental agreement and having wide international responsibilities, as defined in their basic instruments, in economic, social, cultural, educational, health, and related fields, shall be brought into relationship with the United Nations in accordance with the provisions of Article 63.

2. Such agencies thus brought into relationship with the United Nations are hereinafter referred to as 'specialized agencies.'

Article 58 of the Charter reads:

"The Organization shall make recommendations for the co-ordination of the policies and activities of the specialized agencies."

Article 63 of the Charter then provides:

"1. The Economic and Social Council may enter into agreements with any of the agencies referred to in Article 57, defining the terms on which the agency concerned shall be brought into relationship with the United Nations. Such agreements shall be subject to approval by the General Assembly.

2. It may co-ordinate the activities of the specialized agencies through consultation with and recommendations to such agencies and through recommendations to the General Assembly and to the Members of the United Nations."

As these provisions demonstrate, the Charter of the United Nations laid the basis of a "system" designed to organize international co-operation in a coherent fashion by bringing the United Nations, invested with powers of general scope, into relationship with various autonomous and complementary organizations, invested with sectorial powers. The exercise of these powers by the organizations belonging to the "United Nations system" is co-ordinated, notably, by the relationship agreements concluded between the United Nations and each of the specialized agencies. In the case of the WHO, the agreement of 10 July 1948 between the United Nations and that Organization actually refers to the WHO Constitution in the following terms in Article I:

"The United Nations recognizes the World Health Organization as the specialized agency responsible for taking such action as may be appropriate under its Constitution for the accomplishment of the objectives set forth therein."

It follows from the various instruments mentioned above that the WHO Constitution can only be interpreted, as far as the powers conferred upon that Organization are concerned, by taking due account not only of the general principle of speciality, but also of the logic of the overall system contemplated by the Charter. If, according to the rules on which that system is based, the WHO has, by virtue of Article 57 of the Charter, "wide international responsibilities", those responsibilities are necessarily restricted to the sphere of public "health" and cannot encroach on the responsibilities of other parts of the United Nations system. And there is no doubt that questions concerning the use of force, the regulation of armaments and disarmament are within the competence of the United Nations and lie outside that of the specialized agencies. Besides, any other conclusion would render virtually meaningless the notion of a specialized agency; it is difficult to imagine what other meaning that

notion could have if such an organization need only show that the use of certain weapons could affect its objectives in order to be empowered to concern itself with the legality of such use. It is therefore difficult to maintain that, by authorizing various specialized agencies to request opinions from the Court under Article 96, paragraph 2, of the Charter, the General Assembly intended to allow them to seize the Court of questions belonging within the competence of the United Nations.

For all these reasons, the Court considers that the question raised in the request for an advisory opinion submitted to it by the WHO does not arise "within the scope of [the] activities" of that Organization as defined by its Constitution.

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27. A consideration of the practice of the WHO bears out these conclusions. None of the reports and resolutions referred to in the Preamble to World Health Assembly resolution WHA46.40 is in the nature of a practice of the WHO in regard to the legality of the threat or use of nuclear weapons. The Report of the Director-General (doc. A46/30), referred to in the third paragraph of the Preamble, the aforementioned resolutions WHA34.38 and WHA36.28, as well as resolution WHA40.24, all of which are referred to in the fourth paragraph, as well as the above-mentioned report of the Management Group of 1987 to which reference is made in the fifth and seventh paragraphs, deal exclusively, in the case of the first, with the health and environmental effects of nuclear weapons, and in the case of the remainder, with the effects of nuclear weapons on health and health services. As regards resolutions WHA42.26 and WHA45.31, referred to in the sixth paragraph of the Preamble to resolution WHA46.40, the first concerns the WHO's contribution to international efforts towards sustainable development and the second deals with the effects on health of environmental degradation. None of these reports and resolutions deals with the legality of the use of nuclear weapons.

Resolution WHA46.40 itself, adopted, not without opposition, as soon as the question of the legality of the use of nuclear weapons was raised at the WHO, could not be taken to express or to amount on its own to a practice establishing an agreement between the members of the Organization to interpret its Constitution as empowering it to address the question of the legality of the use of nuclear weapons.

Nowhere else does the Court find any practice of this kind. In particular, such a practice cannot be inferred from isolated passages of certain resolutions of the World Health Assembly cited during the present proceedings, such as resolution WHA15.51 on the role of the physician in the preservation and development of peace, resolution WHA22.58 concerning co-operation between the WHO and the United Nations in regard to chemical and bacteriological weapons and the effects of their

possible use, and resolution WHA42.24 concerning the embargo placed on medical supplies for political reasons and restrictions on their movement. The Court has also noted that the WHO regularly takes account of various rules of international law in the exercise of its functions; that it participates in certain activities undertaken in the legal sphere at the international level — for example, for the purpose of drawing up an international code of practice on transboundary movements of radioactive waste; and that it participates in certain international conferences for the progressive development and codification of international law. That the WHO, as a subject of international law, should be led to apply the rules of international law or concern itself with their development is in no way surprising; but it does not follow that it has received a mandate, beyond the terms of its Constitution, itself to address the legality or illegality of the use of weaponry in hostilities.

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28. It remains to be considered whether the insertion of the words “including the WHO Constitution” in the question put to the Court (which essentially seeks an opinion on the legality of the use of nuclear weapons in general) could allow it to offer an opinion on the legality of the use of nuclear weapons by reference to the passage in the question concerning the WHO Constitution. The Court must answer in the negative. Indeed, the WHO is not empowered to seek an opinion on the interpretation of its Constitution in relation to matters outside the scope of its functions.

\* \* \*

29. Other arguments have nevertheless been put forward in the proceedings to found the jurisdiction of the Court in the present case.

It has thus been argued that World Health Assembly resolution WHA46.40, having been adopted by the requisite majority, “must be presumed to have been validly adopted” (cf. *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, *Advisory Opinion*, I.C.J. Reports 1971, p. 22, para. 20). The Court would observe in this respect that the question whether a resolution has been duly adopted from a procedural point of view and the question whether that resolution has been adopted *intra vires* are two separate issues. The mere fact that a majority of States, in voting on a resolution, have complied with all the relevant rules of form cannot in itself suffice to remedy any fundamental defects, such as acting *ultra vires*, with which the resolution might be afflicted.

As the Court has stated, “each organ must, in the first place at least, determine its own jurisdiction” (*Certain Expenses of the United Nations*

(*Article 17, paragraph 2, of the Charter*), *Advisory Opinion*, I.C.J. Reports 1962, p. 168). It was therefore certainly a matter for the World Health Assembly to decide on its competence — and, thereby, that of the WHO — to submit a request to the Court for an advisory opinion on the question under consideration, having regard to the terms of the Constitution of the Organization and those of the Agreement of 10 July 1948 bringing it into relationship with the United Nations. But likewise it is incumbent on the Court to satisfy itself that the conditions governing its own competence to give the opinion requested are met; through the reference made, respectively, by Article 96, paragraph 2, of the Charter to the “scope of [the] activities” of the Organization and by Article X, paragraph 2, of the Agreement of 10 July 1948 to its “competence”, the Court also finds itself obliged, in the present case, to interpret the Constitution of the WHO.

The exercise of the functions entrusted to the Court under Article 65, paragraph 1, of its Statute requires it to furnish such an interpretation, independently of any operation of the specific recourse mechanism which Article 75 of the WHO Constitution reserves for cases in which a question or dispute arises between States concerning the interpretation or application of that instrument; and in doing so the Court arrives at different conclusions from those reached by the World Health Assembly when it adopted resolution WHA46.40.

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30. Nor can the Court accept the argument that the General Assembly of the United Nations, as the source from which the WHO derives its power to request advisory opinions, has, in its resolution 49/75 K, confirmed the competence of that organization to request an opinion on the question submitted to the Court. In the last preambular paragraph of that resolution, the General Assembly

“[welcomed] resolution 46/40 of 14 May 1993 of the Assembly of the World Health Organization, in which the organization requested the International Court of Justice to give an advisory opinion on whether the use of nuclear weapons by a State in war or other armed conflict would be a breach of its obligations under international law, including the Constitution of the World Health Organization”.

In expressing this opinion, the General Assembly clearly reflected the wish of a majority of States that the Assembly should lend its political support to the action taken by the WHO, which it welcomed. However, the Court does not consider that, in doing so, the General Assembly meant to pass upon the competence of the WHO to request an opinion on the question raised. Moreover, the General Assembly could evidently

not have intended to disregard the limits within which Article 96, paragraph 2, of the Charter allows it to authorize the specialized agencies to request opinions from the Court — limits which were reaffirmed in Article X of the relationship agreement of 10 July 1948.

\* \* \*

31. Having arrived at the view that the request for an advisory opinion submitted by the WHO does not relate to a question which arises "within the scope of [the] activities" of that Organization in accordance with Article 96, paragraph 2, of the Charter, the Court finds that an essential condition of founding its jurisdiction in the present case is absent and that it cannot, accordingly, give the opinion requested. Consequently, the Court is not called upon to examine the arguments which were laid before it with regard to the exercise of its discretionary power to give an opinion.

\* \* \*

32. For these reasons,

THE COURT,

By eleven votes to three,

*Finds* that it is not able to give the advisory opinion which was requested of it under World Health Assembly resolution WHA46.40 dated 14 May 1993.

IN FAVOUR: *President* Bedjaoui; *Vice-President* Schwebel; *Judges* Oda, Guillaume, Ranjeva, Herczegh, Shi, Fleischhauer, Vereshchetin, Ferrari Bravo, Higgins;

AGAINST: *Judges* Shahabuddeen, Weeramantry, Koroma.

Done in French and in English, the French text being authoritative, at the Peace Palace, The Hague, this eighth day of July, one thousand nine hundred and ninety-six, in three copies, one of which will be placed in the archives of the Court and the others transmitted to the Secretary-General of the United Nations and the Director-General of the World Health Organization, respectively.

(*Signed*) Mohammed BEDJAOUI,  
President.

(*Signed*) Eduardo VALENCIA-OSPINA,  
Registrar.

Judges RANJEVA and FERRARI BRAVO append declarations to the Advisory Opinion of the Court.

Judge ODA appends a separate opinion to the Advisory Opinion of the Court.

Judges SHAHABUDDIEN, WEERAMANTRY and KOROMA append dissenting opinions to the Advisory Opinion of the Court.

(*Initialed*) M.B.

(*Initialed*) E.V.O.



**Difference Relating to Immunity from  
Legal Process of a Special Rapporteur of the  
Commission on Human Rights,  
Advisory Opinion, I.C.J. Reports 1999**

## INTERNATIONAL COURT OF JUSTICE

YEAR 1999

29 April 1999

1999  
29 April  
General List  
No. 100DIFFERENCE RELATING TO IMMUNITY FROM  
LEGAL PROCESS OF A SPECIAL RAPPORTEUR  
OF THE COMMISSION ON HUMAN RIGHTS

*Article 96, paragraph 2, of the Charter and Article 65, paragraph 1, of the Statute — Resolution 89 (I) of the General Assembly authorizing the Economic and Social Council to request advisory opinions — Article VIII, Section 30, of the Convention on the Privileges and Immunities of the United Nations — Existence of a “difference” between the United Nations and one of its Members — Opinion “accepted as decisive by the parties” — Advisory nature of the Court’s function and particular treaty provisions — “Legal question” — Question arising “within the scope of [the] activity” of the body requesting it.*

*Jurisdiction and discretionary power of the Court to give an opinion — “Absence of compelling reasons” to decline to give such opinion.*

*Question on which the opinion is requested — Divergence of views — Formulation adopted by the Council as the requesting body.*

*Special Rapporteur of the Commission on Human Rights — “Expert on mission” — Applicability of Article VI, Section 22, of the General Convention — Specific circumstances of the case — Question whether words spoken by the Special Rapporteur during an interview were spoken “in the course of the performance of his mission” — Pivotal role of the Secretary-General in the process of determining whether, in the prevailing circumstances, an expert on mission is entitled to the immunity provided for in Section 22 (b) — Interview given by Special Rapporteur to International Commercial Litigation — Contacts with the media by Special Rapporteurs of the Commission on Human Rights — Reference to Special Rapporteur’s capacity in the text of the interview — Position of the Commission itself.*

*Legal obligations of Malaysia in this case — Point in time from which the question must be answered — Authority and responsibility of the Secretary-General to inform the Government of a member State of his finding on the immunity of an agent — Finding creating a presumption which can only be set aside by national courts for the most compelling reasons — Obligation on the governmental authorities to convey that finding to the national courts concerned — Immunity from legal process “of every kind” within the meaning of Sec-*

*tion 22 (b) of the Convention — Preliminary question which must be expeditiously decided in limine litis.*

*Holding the Special Rapporteur financially harmless.*

*Obligation of the Malaysian Government to communicate the advisory opinion to the national courts concerned.*

*Claims for any damages incurred as a result of acts of the Organization or its agents — Article VIII, Section 29, of the General Convention — Conduct expected of United Nations agents.*

## ADVISORY OPINION

*Present: President SCHWEBEL; Vice-President WEERAMANTRY; Judges ODA, BEDJAOUI, GUILLAUME, RANJEVA, HERCZEGH, SHI, FLEISCHHAUER, KOROMA, VERESHCHETIN, HIGGINS, PARRA-ARANGUREN, KOJUMANS, REZEK; Registrar VALENCIA-OSPINA.*

Concerning the difference relating to immunity from legal process of a Special Rapporteur of the Commission on Human Rights,

THE COURT,

composed as above,

gives the following *Advisory Opinion*:

1. The question on which the Court has been requested to give an advisory opinion is set forth in decision 1998/297 adopted by the United Nations Economic and Social Council (hereinafter called the “Council”) on 5 August 1998. By a letter dated 7 August 1998, filed in the Registry on 10 August 1998, the Secretary-General of the United Nations officially communicated to the Registrar the Council’s decision to submit the question to the Court for an advisory opinion. Decision 1998/297, certified copies of the English and French texts of which were enclosed with the letter, reads as follows:

“*The Economic and Social Council,*

*Having considered the note by the Secretary-General on the privileges and immunities of the Special Rapporteur of the Commission on Human Rights on the independence of judges and lawyers<sup>1</sup>,*

*Considering that a difference has arisen between the United Nations and the Government of Malaysia, within the meaning of Section 30 of the Convention on the Privileges and Immunities of the United Nations, with respect to the immunity from legal process of Dato’ Param Cumaraswamy, the Special Rapporteur of the Commission on Human Rights on the independence of judges and lawyers,*

*Recalling General Assembly resolution 89 (I) of 11 December 1946,*

1. *Requests on a priority basis, pursuant to Article 96, paragraph 2, of the Charter of the United Nations and in accordance with General Assembly*

<sup>1</sup> E/1998/94.

resolution 89 (I), an advisory opinion from the International Court of Justice on the legal question of the applicability of Article VI, Section 22, of the Convention on the Privileges and Immunities of the United Nations in the case of Dato' Param. Kumaraswamy as Special Rapporteur of the Commission on Human Rights on the independence of judges and lawyers, taking into account the circumstances set out in paragraphs 1 to 15 of the note by the Secretary-General<sup>1</sup>, and on the legal obligations of Malaysia in this case;

2. *Calls upon* the Government of Malaysia to ensure that all judgements and proceedings in this matter in the Malaysian courts are stayed pending receipt of the advisory opinion of the International Court of Justice, which shall be accepted as decisive by the parties.

<sup>1</sup> E/1998/94."

Also enclosed with the letter were certified copies of the English and French texts of the note by the Secretary-General dated 28 July 1998 and entitled "Privileges and Immunities of the Special Rapporteur of the Commission on Human Rights on the Independence of Judges and Lawyers" and of the addendum to that note (E/1998/94/Add.1), dated 3 August 1998.

2. By letters dated 10 August 1998, the Registrar, pursuant to Article 66, paragraph 1, of the Statute of the Court, gave notice of the request for an advisory opinion to all States entitled to appear before the Court. A copy of the bilingual printed version of the request, prepared by the Registry, was subsequently sent to those States.

3. By an Order dated 10 August 1998, the senior judge, acting as President of the Court under Article 13, paragraph 3, of the Rules of Court, decided that the United Nations and the States which are parties to the Convention on the Privileges and Immunities of the United Nations adopted by the United Nations General Assembly on 13 February 1946 (hereinafter called the "General Convention") were likely to be able to furnish information on the question in accordance with Article 66, paragraph 2, of the Statute. By the same Order, the senior judge, considering that, in fixing time-limits for the proceedings, it was "necessary to bear in mind that the request for an advisory opinion was expressly made 'on a priority basis'", fixed 7 October 1998 as the time-limit within which written statements on the question might be submitted to the Court, in accordance with Article 66, paragraph 2, of the Statute, and 6 November 1998 as the time-limit for written comments on written statements, in accordance with Article 66, paragraph 4, of the Statute.

On 10 August 1998, the Registrar sent to the United Nations and to the States parties to the General Convention the special and direct communication provided for in Article 66, paragraph 2, of the Statute.

4. By a letter dated 22 September 1998, the Legal Counsel of the United Nations communicated to the President of the Court a certified copy of the amended French version of the note by the Secretary-General which had been enclosed with the request. Consequently, a corrigendum to the printed French version of the request for an advisory opinion was communicated to all States entitled to appear before the Court.

5. The Secretary-General communicated to the Court, pursuant to

Article 65, paragraph 2, of the Statute, a dossier of documents likely to throw light upon the question; these documents were received in the Registry in instalments from 5 October 1998 onwards.

6. Within the time-limit fixed by the Order of 10 August 1998, written statements were filed by the Secretary-General of the United Nations and by Costa Rica, Germany, Italy, Malaysia, Sweden, the United Kingdom and the United States of America; the filing of a written statement by Greece on 12 October 1998 was authorized. A related letter was also received from Luxembourg on 29 October 1998. Written comments on the statements were submitted, within the prescribed time-limit, by the Secretary-General of the United Nations and by Costa Rica, Malaysia, and the United States of America. Upon receipt of those statements and comments, the Registrar communicated them to all States having taken part in the written proceedings.

The Registrar also communicated to those States the text of the introductory note to the dossier of documents submitted by the Secretary-General. In addition, the President of the Court granted Malaysia's request for a copy of the whole dossier; on the instructions of the President, the Deputy-Registrar also communicated a copy of that dossier to the other States having taken part in the written proceedings, and the Secretary-General was so informed.

7. The Court decided to hold hearings, opening on 7 December 1998, at which oral statements might be submitted to the Court by the United Nations and the States parties to the General Convention.

8. Pursuant to Article 106 of the Rules of Court, the Court decided to make the written statements and comments submitted to the Court accessible to the public, with effect from the opening of the oral proceedings.

9. In the course of public sittings held on 7 and 8 December 1998, the Court heard oral statements in the following order by:

*for the United Nations:* Mr. Hans Corell, Under-Secretary-General for Legal Affairs, the Legal Counsel,

Mr. Ralph Zacklin, Assistant Secretary-General for Legal Affairs;

H.E. Mr. José de J. Conejo, Ambassador of Costa Rica to the Netherlands,

Mr. Charles N. Brower, White & Case LLP;

*for Italy:* Mr. Umberto Leanza, Head of the Diplomatic Legal Service at the Ministry of Foreign Affairs;

*for Malaysia:* Dato' Heliliah bt Mohd Yusof, Solicitor General of Malaysia,

Sir Elihu Lauterpacht, C.B.E., Q.C., Honorary Professor of International Law, University of Cambridge.

The Court having decided to authorize a second round of oral statements, the United Nations, Costa Rica and Malaysia availed themselves of this option; at a public hearing held on 10 December 1998, Mr. Hans Corell, H.E. Mr. José de J. Conejo, Mr. Charles N. Brower, Dato' Heliliah bt Mohd Yusof and Sir Elihu Lauterpacht were successively heard.

Members of the Court put questions to the Secretary-General's representative, who replied both orally and in writing. Copies of the written replies were communicated to all the States having taken part in the oral proceedings; Malaysia submitted written comments on these replies.

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10. In its decision 1998/297, the Council asked the Court to take into account, for purposes of the advisory opinion requested, the "circumstances set out in paragraphs 1 to 15 of the note by the Secretary-General" (E/1998/94). Those paragraphs read as follows:

"1. In its resolution 22 A (1) of 13 February 1946, the General Assembly adopted, pursuant to Article 105 (3) of the Charter of the United Nations, the Convention on the Privileges and Immunities of the United Nations (the Convention). Since then, 137 Member States have become parties to the Convention, and its provisions have been incorporated by reference into many hundreds of agreements relating to the headquarters or seats of the United Nations and its organs, and to activities carried out by the Organization in nearly every country of the world.

2. That Convention is, *inter alia*, designed to protect various categories of persons, including 'Experts on Mission for the United Nations', from all types of interference by national authorities. In particular, Section 22 (b) of Article VI of the Convention provides:

'Section 22: Experts (other than officials coming within the scope of Article V) performing missions for the United Nations shall be accorded such privileges and immunities as are necessary for the independent exercise of their functions during the period of their missions, including time spent on journeys in connection with their missions. In particular they shall be accorded:

(b) in respect of words spoken or written and acts done by them in the course of the performance of their mission, immunity from legal process of every kind. This immunity from legal process shall continue to be accorded notwithstanding that the persons concerned are no longer employed on missions for the United Nations.'

3. In its Advisory Opinion of 14 December 1989, on the *Applicability of Article VI, Section 22, of the Convention on the Privileges and Immunities of the United Nations* (the so-called 'Mazilu case'), the International Court of Justice held that a Special Rapporteur of the Subcommission on the Prevention of Discrimination and Protection of Minorities of the Commission on Human Rights was an

'expert on mission' within the meaning of Article VI of the Convention.

4. The Commission on Human Rights, by its resolution 1994/41 of 4 March 1994, endorsed by the Economic and Social Council in its decision 1994/251 of 22 July 1994, appointed Dato' Param Cumaraswamy, a Malaysian jurist, as the Commission's Special Rapporteur on the Independence of Judges and Lawyers. His mandate consists of tasks including, *inter alia*, to inquire into substantial allegations concerning, and to identify and record attacks on, the independence of the judiciary, lawyers and court officials. Mr. Cumaraswamy has submitted four reports to the Commission on the execution of his mandate: E/CN.4/1995/39, E/CN.4/1996/37, E/CN.4/1997/32 and E/CN.4/1998/39. After the third report containing a section on the litigation pending against him in the Malaysian civil courts, the Commission at its fifty-fourth session, in April 1997, renewed his mandate for an additional three years.

5. In November 1995 the Special Rapporteur gave an interview to *International Commercial Litigation*, a magazine published in the United Kingdom of Great Britain and Northern Ireland but circulated also in Malaysia, in which he commented on certain litigations that had been carried out in Malaysian courts. As a result of an article published on the basis of that interview, two commercial companies in Malaysia asserted that the said article contained defamatory words that had 'brought them into public scandal, odium and contempt'. Each company filed a suit against him for damages amounting to M\$30 million (approximately US\$12 million each), 'including exemplary damages for slander'.

6. Acting on behalf of the Secretary-General, the Legal Counsel considered the circumstances of the interview and of the controverted passages of the article and determined that Dato' Param Cumaraswamy was interviewed in his official capacity as Special Rapporteur on the Independence of Judges and Lawyers, that the article clearly referred to his United Nations capacity and to the Special Rapporteur's United Nations global mandate to investigate allegations concerning the independence of the judiciary and that the quoted passages related to such allegations. On 15 January 1997, the Legal Counsel, in a note verbale addressed to the Permanent Representative of Malaysia to the United Nations, therefore requested the competent Malaysian authorities to promptly advise the Malaysian courts of the Special Rapporteur's immunity from legal process with respect to that particular complaint. On 20 January 1997, the Special Rapporteur filed an application in the High Court of Kuala Lumpur (the trial court in which the said suit had been filed) to set aside and/or strike out the plaintiffs' writ, on the ground that the

words that were the subject of the suits had been spoken by him in the course of performing his mission for the United Nations as Special Rapporteur on the Independence of Judges and Lawyers. The Secretary-General issued a note on 7 March 1997 confirming that 'the words which constitute the basis of plaintiffs' complaint in this case were spoken by the Special Rapporteur in the course of his mission' and that the Secretary-General 'therefore maintains that Dato' Param Kumaraswamy is immune from legal process with respect thereto'. The Special Rapporteur filed this note in support of his above-mentioned application.

7. After a draft of a certificate that the Minister for Foreign Affairs proposed to file with the trial court had been discussed with representatives of the Office of Legal Affairs, who had indicated that the draft set out the immunities of the Special Rapporteur incompletely and inadequately, the Minister nevertheless on 12 March 1997 filed the certificate in the form originally proposed: in particular the final sentence of that certificate in effect invited the trial court to determine at its own discretion whether the immunity applied, by stating that this was the case *only* in respect of words spoken or written and acts done by him in the course of the performance of his mission' (emphasis added). In spite of the representations that had been made by the Office of Legal Affairs, the certificate failed to refer in any way to the note that the Secretary-General had issued a few days earlier and that had in the meantime been filed with the court, nor did it indicate that in this respect, i.e. in deciding whether particular words or acts of an expert fell within the scope of his mission, the determination could exclusively be made by the Secretary-General, and that such determination had conclusive effect and therefore had to be accepted as such by the court. In spite of repeated requests by the Legal Counsel, the Minister for Foreign Affairs refused to amend his certificate or to supplement it in the manner urged by the United Nations.

8. On 28 June 1997, the competent judge of the Malaysian High Court for Kuala Lumpur concluded that she was 'unable to hold that the Defendant is absolutely protected by the immunity he claims', in part because she considered that the Secretary-General's note was merely 'an opinion' with scant probative value and no binding force upon the court and that the Minister for Foreign Affairs' certificate 'would appear to be no more than a bland statement as to a state of fact pertaining to the Defendant's status and mandate as a Special Rapporteur and appears to have room for interpretation'. The Court ordered that the Special Rapporteur's motion be dismissed with costs, that costs be taxed and paid forthwith by him and that he file and serve his defence within 14 days. On 8 July, the Court of Appeal dismissed Mr. Kumaraswamy's motion for a stay of execution.

9. On 30 June and 7 July 1997, the Legal Counsel thereupon sent notes verbales to the Permanent Representative of Malaysia, and also held meetings with him and his Deputy. In the latter note, the Legal Counsel, *inter alia*, called on the Malaysian Government to intervene in the current proceedings so that the burden of any further defence, including any expenses and taxed costs resulting therefrom, be assumed by the Government; to hold Mr. Kumaraswamy harmless in respect of the expenses he had already incurred or that were being taxed to him in respect of the proceedings so far; and, so as to prevent the accumulation of additional expenses and costs and the further need to submit a defence until the matter of his immunity was definitively resolved between the United Nations and the Government, to support a motion to have the High Court proceedings stayed until such resolution. The Legal Counsel referred to the provisions for the settlement of differences arising out of the interpretation and application of the 1946 Convention that might arise between the Organization and a Member State, which are set out in Section 30 of the Convention, and indicated that if the Government decided that it cannot or does not wish to protect and to hold harmless the Special Rapporteur in the indicated manner, a difference within the meaning of those provisions might be considered to have arisen between the Organization and the Government of Malaysia.

10. Section 30 of the Convention provides as follows:

'Section 30: All differences arising out of the interpretation or application of the present convention shall be referred to the International Court of Justice, unless in any case it is agreed by the parties to have recourse to another mode of settlement. If a difference arises between the United Nations on the one hand and a Member on the other hand, a request shall be made for an advisory opinion on any legal question involved in accordance with Article 96 of the Charter and Article 65 of the Statute of the Court. The opinion given by the Court shall be accepted as decisive by the parties.'

11. On 10 July yet another lawsuit was filed against the Special Rapporteur by one of the lawyers mentioned in the magazine article referred to in paragraph 5 above, based on precisely the same passages of the interview and claiming damages in an amount of M\$60 million (US\$24 million). On 11 July, the Secretary-General issued a note corresponding to the one of 7 March 1997 (see para. 6 above) and also communicated a note verbale with essentially the same text to the Permanent Representative of Malaysia with the request that it be presented formally to the competent Malaysian court by the Government.

12. On 23 October and 21 November 1997, new plaintiffs filed

a third and fourth lawsuit against the Special Rapporteur for M\$100 million (US\$40 million) and M\$60 million (US\$24 million) respectively. On 27 October and 22 November 1997, the Secretary-General issued identical certificates of the Special Rapporteur's immunity.

13. On 7 November 1997, the Secretary-General advised the Prime Minister of Malaysia that a difference might have arisen between the United Nations and the Government of Malaysia and about the possibility of resorting to the International Court of Justice pursuant to Section 30 of the Convention. Nonetheless on 19 February 1998, the Federal Court of Malaysia denied Mr. Cumaraswamy's application for leave to appeal stating that he is neither a sovereign nor a full-fledged diplomat but merely 'an unpaid, part-time provider of information'.

14. The Secretary-General then appointed a Special Envoy, Maitre Yves Fortier of Canada, who, on 26 and 27 February 1998, undertook an official visit to Kuala Lumpur to reach an agreement with the Government of Malaysia on a joint submission to the International Court of Justice. Following that visit, on 13 March 1998 the Minister for Foreign Affairs of Malaysia informed the Secretary-General's Special Envoy of his Government's desire to reach an out-of-court settlement. In an effort to reach such a settlement, the Office of Legal Affairs proposed the terms of such a settlement on 23 March 1998 and a draft settlement agreement on 26 May 1998. Although the Government of Malaysia succeeded in staying proceedings in the four lawsuits until September 1998, no final settlement agreement was concluded. During this period, the Government of Malaysia insisted that, in order to negotiate a settlement, Maitre Fortier must return to Kuala Lumpur. While Maitre Fortier preferred to undertake the trip only once a preliminary agreement between the parties had been reached, nonetheless, based on the Prime Minister of Malaysia's request that Maitre Fortier return as soon as possible, the Secretary-General requested his Special Envoy to do so.

15. Maitre Fortier undertook a second official visit to Kuala Lumpur, from 25 to 28 July 1998, during which he concluded that the Government of Malaysia was not going to participate either in settling this matter or in preparing a joint submission to the current session of the Economic and Social Council. The Secretary-General's Special Envoy therefore advised that the matter should be referred to the Council to request an advisory opinion from the International Court of Justice. The United Nations had exhausted all efforts to reach either a negotiated settlement or a joint submission through the Council to the International Court of Justice. In this connection, the Government of Malaysia has acknowledged the Organization's right to refer the matter to the Council to request an advisory opinion in accordance with Section 30 of the Convention,

advised the Secretary-General's Special Envoy that the United Nations should proceed to do so, and indicated that, while it will make its own presentations to the International Court of Justice, it does not oppose the submission of the matter to that Court through the Council."

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11. The dossier of documents submitted to the Court by the Secretary-General (see paragraph 5 above) contains the following additional information that bears on an understanding of the request to the Court.

12. The article published in the November 1995 issue of *International Commercial Litigation*, which is referred to in paragraph 5 of the foregoing note by the Secretary-General, was written by David Samuels and entitled "Malaysian Justice on Trial". The article gave a critical appraisal of the Malaysian judicial system in relation to a number of court decisions. Various Malaysian lawyers were interviewed; as quoted in the article, they expressed their concern that, as a result of these decisions, foreign investors and manufacturers might lose the confidence they had always had in the integrity of the Malaysian judicial system.

13. It was in this context that Mr. Cumaraswamy, who was referred to in the article more than once in his capacity as the United Nations Special Rapporteur on the Independence of Judges and Lawyers, was asked to give his comments. With regard to a specific case (the *Ayer Molek* case), he said that it looked like "a very obvious, perhaps even glaring example of judge-choosing", although he stressed that he had not finished his investigation.

Mr. Cumaraswamy is also quoted as having said:

"Complaints are rife that certain highly placed personalities in the business and corporate sectors are able to manipulate the Malaysian system of justice."

He added: "But I do not want any of the people involved to think I have made up my mind." He also said:

"It would be unfair to name any names, but there is some concern about this among foreign businessmen based in Malaysia, particularly those who have litigation pending."

14. On 18 December 1995, two commercial firms and their legal counsel addressed letters to Mr. Cumaraswamy in which they maintained that they were defamed by Mr. Cumaraswamy's statements in the article, since it was clear, they claimed, that they were being accused of corruption in the *Ayer Molek* case. They informed Mr. Cumaraswamy that they had "no choice but to issue defamation proceedings against him" and added

“It is important that all steps are taken for the purpose of mitigating the continuing damage being done to [our] business and commercial reputations which is worldwide, as quickly and effectively as possible.”

15. On 28 December 1995, in view of the foregoing letters, the Secretariat of the United Nations issued a Note Verbale to the Permanent Mission of Malaysia in Geneva, requesting that the competent Malaysian authorities be advised, and that they in turn advise the Malaysian courts, of the Special Rapporteur’s immunity from legal process. This was the first in a series of similar communications, containing the same finding, sent by or on behalf of the Secretary-General — some of which were sent once court proceedings had been initiated (see paragraphs 6 *et seq.* of the note by the Secretary-General, reproduced in paragraph 10 above).

16. On 12 December 1996, the two commercial firms issued a writ of summons and statement of claim against Mr. Cumaraswamy in the High Court of Kuala Lumpur. They claimed damages, including exemplary damages, for slander and libel, and requested an injunction to restrain Mr. Cumaraswamy from further defaming the plaintiffs.

17. As stated in the note of the Secretary-General, quoted in paragraph 10 above, three further lawsuits flowing from Mr. Cumaraswamy’s statements to *International Commercial Litigation* were brought against him.

The Government of Malaysia did not transmit to its courts the texts containing the Secretary-General’s finding that Mr. Cumaraswamy was entitled to immunity from legal process.

The High Court of Kuala Lumpur did not pass upon Mr. Cumaraswamy’s immunity *in limine litis*, but held that it had jurisdiction to hear the case before it on the merits, including making a determination of whether Mr. Cumaraswamy was entitled to any immunity. This decision was upheld by both the Court of Appeal and the Federal Court of Malaysia.

18. As indicated in paragraph 4 of the above note by the Secretary-General, the Special Rapporteur made regular reports to the Commission on Human Rights (hereinafter called the “Commission”).

In his first report (E/CN.4/1995/39), dated 6 February 1995, Mr. Cumaraswamy did not refer to contacts with the media. In resolution 1995/36 of 3 March 1995, the Commission welcomed this report and took note of the methods of work described therein in paragraphs 63 to 93.

In his second report (E/CN.4/1996/37), dated 1 March 1996, the Special Rapporteur referred to the *Ayer Molek* case and to a critical press statement made by the Bar Council of Malaysia on 21 August 1995. The

report also included the following quotation from a press statement issued by Mr. Cumaraswamy on 23 August 1995:

“Complaints are rife that certain highly placed personalities in Malaysia including those in business and corporate sectors are manipulating the Malaysian system of justice and thereby undermining the due administration of independent and impartial justice by the courts.

Under the mandate entrusted to me by the United Nations Commission on Human Rights, I am duty bound to investigate these complaints and report to the same Commission, if possible at its fifty-second session next year. To facilitate my inquiries I will seek the cooperation of all those involved in the administration of justice, including the Government which, under my mandate, is requested to extend its cooperation and assistance.”

In resolution 1996/34 of 19 April 1996, the Commission took note of this report and of the Special Rapporteur’s working methods.

In his third report (E/CN.4/1997/32), dated 18 February 1997, the Special Rapporteur informed the Commission of the article in *International Commercial Litigation* and the lawsuits that had been initiated against him, the author, the publisher, and others. He also referred to the notifications of the Legal Counsel of the United Nations to the Malaysian authorities. In resolution 1997/23 of 11 April 1997, the Commission took note of the report and the working methods of the Special Rapporteur, and extended his mandate for another three years.

In his fourth report (E/CN.4/1998/39), dated 12 February 1998, the Special Rapporteur reported on further developments with regard to the lawsuits initiated against him. In its resolution 1998/35 of 17 April 1998, the Commission similarly took note of this report and of the working methods reflected therein.

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19. As indicated above (see paragraph 1), the note by the Secretary-General was accompanied by an addendum (E/1998/94/Add.1) which reads as follows:

“In paragraph 14 of the note by the Secretary-General on the privileges and immunities of the Special Rapporteur of the Commission on Human Rights on the independence of judges and lawyers (E/1998/94), it is reported that the ‘Government of Malaysia succeeded in staying proceedings in the four lawsuits until September 1998’. In this connection, the Secretary-General has been informed that on 1 August 1998, Dato’ Param Cumaraswamy was served with a Notice of Taxation and Bill of Costs dated 28 July 1998 and signed by the Deputy Registrar of the Federal Court notifying him that the

bill of costs of the Federal Court application would be assessed on 18 September 1998. The amount claimed is M\$310,000 (US\$77,500). On the same day, Dato' Param Kumaraswamy was also served with a Notice dated 29 July 1998 and signed by the Registrar of the Court of Appeal notifying him that the Plaintiff's bill of costs would be assessed on 4 September 1998. The amount claimed in that bill is M\$550,000 (US\$137,500)."

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20. The Council considered the note by the Secretary-General (E/1998/94) at the forty-seventh and forty-eighth meetings of its substantive session of 1998, held on 31 July 1998. At that time, the Observer for Malaysia disputed certain statements in paragraphs 7, 14 and 15 of the note. The note concluded with a paragraph 21 containing the Secretary-General's proposal for two questions to be submitted to the Court for an advisory opinion:

"21. . . .

'Considering the difference that has arisen between the United Nations and the Government of Malaysia with respect to the immunity from legal process of Mr. Dato' Param Kumaraswamy, the United Nations Special Rapporteur of the Commission on Human Rights on the Independence of Judges and Lawyers, in respect of certain words spoken by him:

1. Subject only to Section 30 of the Convention on the Privileges and Immunities of the United Nations, does the Secretary-General of the United Nations have the exclusive authority to determine whether words were spoken in the course of the performance of a mission for the United Nations within the meaning of Section 22 (b) of the Convention?

2. In accordance with Section 34 of the Convention, once the Secretary-General has determined that such words were spoken in the course of the performance of a mission and has decided to maintain, or not to waive, the immunity from legal process, does the Government of a Member State party to the Convention have an obligation to give effect to that immunity in its national courts and, if failing to do so, to assume responsibility for, and any costs, expenses and damages arising from, any legal proceedings brought in respect of such words?"

On 5 August 1998, at its forty-ninth meeting, the Council considered and adopted without a vote a draft decision submitted by its Vice-President following informal consultations. After referring to Section 30 of the General Convention, the decision requested the Court to give an advisory

opinion on the question formulated therein, and called upon the Government of Malaysia to ensure that

"all judgements and proceedings in this matter in the Malaysian courts are stayed pending receipt of the advisory opinion of the . . . Court . . . , which shall be accepted as decisive by the parties" (E/1998/L.49/Rev.1).

At that meeting, the Observer for Malaysia reiterated his previous criticism of paragraphs 7, 14 and 15 of the Secretary-General's note, but made no comment on the terms of the question to be put to the Court as now formulated by the Council. On being so adopted, the draft became decision 1998/297 (see paragraph 1 above).

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21. As regards events subsequent to the submission of the request for an advisory opinion, and more precisely, the situation with regard to the proceedings pending before the Malaysian courts, Malaysia has provided the Court with the following information:

"the hearings on the question of stay in respect of three of the four cases have been deferred until 9 February 1999 when they are due again to be mentioned in court, and when the plaintiff will join in requesting further postponements until this Court's advisory opinion has been rendered, and sufficient time has been given to all concerned to consider its implications.

The position in the first of the four cases is the same, although it is fixed for mention on 16 December [1998]. However, it will then be treated in the same way as the other cases. As to cost, the requirement for the payment of costs by the defendant has also been stayed, and that aspect of the case will be deferred and considered in the same way."

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22. The Council has requested the present advisory opinion pursuant to Article 96, paragraph 2, of the Charter of the United Nations. This paragraph provides that organs of the United Nations, other than the General Assembly or the Security Council,

"which may at any time be so authorized by the General Assembly, may also request advisory opinions of the Court on legal questions arising within the scope of their activities".

Article 65, paragraph 1, of the Statute of the Court states that

"[t]he Court may give an advisory opinion on any legal question at

the request of whatever body may be authorized by or in accordance with the Charter of the United Nations to make such a request”.

23. In its decision 1998/297, the Council recalls that General Assembly resolution 89 (I) gave it authorization to request advisory opinions, and it expressly makes reference to the fact

“that a difference has arisen between the United Nations and the Government of Malaysia, within the meaning of Section 30 of the Convention on the Privileges and Immunities of the United Nations, with respect to the immunity from legal process of Dato’ Param Cumaraswamy, the Special Rapporteur of the Commission on Human Rights on the independence of judges and lawyers”.

24. This is the first time that the Court has received a request for an advisory opinion that refers to Article VIII, Section 30, of the General Convention, which provides that

“all differences arising out of the interpretation or application of the present convention shall be referred to the International Court of Justice, unless in any case it is agreed by the parties to have recourse to another mode of settlement. If a difference arises between the United Nations on the one hand and a Member on the other hand, a request shall be made for an advisory opinion on any legal question involved in accordance with Article 96 of the Charter and Article 65 of the Statute of the Court. The opinion given by the Court shall be accepted as decisive by the parties.”

25. This section provides for the exercise of the Court’s advisory function in the event of a difference between the United Nations and one of its Members. In this case, such a difference exists, but that fact does not change the advisory nature of the Court’s function, which is governed by the terms of the Charter and of the Statute. As the Court stated in its Advisory Opinion of 12 July 1973,

“the existence, in the background, of a dispute the parties to which may be affected as a consequence of the Court’s opinion, does not change the advisory nature of the Court’s task, which is to answer the questions put to it . . .” (*Application for Review of Judgement No. 158 of the United Nations Administrative Tribunal, Advisory Opinion, I.C.J. Reports 1973*, p. 171, para. 14).

Paragraph 2 of the Council’s decision requesting the advisory opinion repeats *expressis verbis* the provision in Article VIII, Section 30, of the General Convention that the Court’s opinion “shall be accepted as decisive by the parties”. However, this equally cannot affect the nature of the function carried out by the Court when giving its advisory opinion. As the Court said in its Advisory Opinion of 23 October 1956, in a case involving similar language in Article XII of the Statute of the Adminis-

trative Tribunal of the International Labour Organisation, such “decisive” or “binding” effect

“goes beyond the scope attributed by the Charter and by the Statute of the Court to an Advisory Opinion . . . It in no wise affects the way in which the Court functions; that continues to be determined by its Statute and its Rules. Nor does it affect the reasoning by which the Court forms its Opinion or the content of the Opinion itself.” (*Judgments of the Administrative Tribunal of the ILO upon Complaints Made against Unesco, Advisory Opinion, I.C.J. Reports 1956*, p. 84).

A distinction should thus be drawn between the advisory nature of the Court’s task and the particular effects that parties to an existing dispute may wish to attribute, in their mutual relations, to an advisory opinion of the Court, which, “as such, . . . has no binding force” (*Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, First Phase, Advisory Opinion, I.C.J. Reports 1950*, p. 71). These particular effects, extraneous to the Charter and the Statute which regulate the functioning of the Court, are derived from separate agreements; in the present case Article VIII, Section 30, of the General Convention provides that “[t]he opinion given by the Court shall be accepted as decisive by the parties”. That consequence has been expressly acknowledged by the United Nations and by Malaysia.

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26. The power of the Court to give an advisory opinion is derived from Article 96, paragraph 2, of the Charter and from Article 65 of the Statute (see paragraph 22 above). Both provisions require that the question forming the subject-matter of the request should be a “legal question”. This condition is satisfied in the present case, as all participants in the proceedings have acknowledged, because the advisory opinion requested relates to the interpretation of the General Convention, and to its application to the circumstances of the case of the Special Rapporteur, Dato’ Param Cumaraswamy. Thus the Court held in its Advisory Opinion of 28 May 1948 that “[t]o determine the meaning of a treaty provision . . . is a problem of interpretation and consequently a legal question” (*Conditions of Admission of a State to Membership in the United Nations (Article 4 of the Charter), Advisory Opinion, 1948, I.C.J. Reports 1947-1948*, p. 61).

27. Article 96, paragraph 2, of the Charter also requires that the legal questions forming the subject-matter of advisory opinions requested by authorized organs of the United Nations and specialized agencies shall arise “within the scope of their activities”. The fulfilment of this condition has not been questioned by any of the participants in the present proceedings. The Court finds that the legal questions submitted by the Council in its request concern the activities of the Commission, since they relate to the mandate of its Special Rapporteur appointed

“to inquire into substantial allegations concerning, and to identify and record attacks on, the independence of the judiciary, lawyers and court officials”.

Mr. Kumaraswamy’s activities as Rapporteur and the legal questions arising therefrom are pertinent to the functioning of the Commission; accordingly they come within the scope of activities of the Council, since the Commission is one of its subsidiary organs. The same conclusion was reached by the Court in an analogous case, in its Advisory Opinion of 15 December 1989, also given at the request of the Council, regarding the *Applicability of Article VI, Section 22, of the Convention on the Privileges and Immunities of the United Nations* (*I.C.J. Reports 1989*, p. 187, para. 28).

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28. As the Court held in its Advisory Opinion of 30 March 1950, the permissive character of Article 65 of the Statute “gives the Court the power to examine whether the circumstances of the case are of such a character as should lead it to decline to answer the Request” (*Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, First Phase, Advisory Opinion, I.C.J. Reports 1950*, p. 72). Such discretionary power does not exist when the Court is not competent to answer the question forming the subject-matter of the request, for example because it is not a “legal question”. In such a case, “the Court has no discretion in the matter; it must decline to give the opinion requested” (*Certain Expenses of the United Nations (Article 17, paragraph 2, of the Charter), Advisory Opinion, I.C.J. Reports 1962*, p. 155; cf. *Legality of the Use by a State of Nuclear Weapons in Armed Conflict, I.C.J. Reports 1996 (I)*, p. 73, para. 14). However, the Court went on to state, in its Advisory Opinion of 20 July 1962, that “even if the question is a legal one, which the Court is undoubtedly competent to answer, it may nonetheless decline to do so” (*I.C.J. Reports 1962*, p. 155).

29. In its Advisory Opinion of 30 March 1950, the Court made it clear that, as an organ of the United Nations, its answer to a request for an advisory opinion “represents its participation in the activities of the Organization, and, in principle, should not be refused” (*Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, First Phase, Advisory Opinion, I.C.J. Reports 1950*, p. 71); moreover, in its Advisory Opinion of 20 July 1962, citing its Advisory Opinion of 23 October 1956, the Court stressed that “only ‘compelling reasons’ should lead it to refuse to give a requested advisory opinion” (*Certain Expenses of the United Nations (Article 17, paragraph 2, of the Charter), Advisory Opinion, I.C.J. Reports 1962*, p. 155). (See also, for example, *Applicability of Article VI, Section 22, of the Convention on the Privileges and Immunities of the United Nations, Advisory Opinion, I.C.J. Reports 1989*, pp. 190-

191, para. 37; and *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996 (I)*, p. 235, para. 14.)

30. In the present case, the Court, having established its jurisdiction, finds no compelling reasons not to give the advisory opinion requested by the Council. Moreover, no participant in these proceedings questioned the need for the Court to exercise its advisory function in this case.

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31. Article 65, paragraph 2, of the Statute provides that

“[q]uestions upon which the advisory opinion of the Court is asked shall be laid before the Court by means of a written request containing an exact statement of the question upon which an opinion is required”.

In compliance with this requirement, the Secretary-General transmitted to the Court the text of the Council’s decision, paragraph 1 of which reads as follows:

“1. Requests on a priority basis, pursuant to Article 96, paragraph 2, of the Charter of the United Nations and in accordance with General Assembly resolution 89 (I), an advisory opinion from the International Court of Justice on the legal question of the applicability of Article VI, Section 22, of the Convention on the Privileges and Immunities of the United Nations in the case of Dato’ Param Kumaraswamy as Special Rapporteur of the Commission on Human Rights on the independence of judges and lawyers, taking into account the circumstances set out in paragraphs 1 to 15 of the note by the Secretary-General, and on the legal obligations of Malaysia in this case.”

32. Malaysia has asserted to the Court that it had “at no time approved the text of the question that appeared in E/1998/L.49 or as eventually adopted by ECOSOC and submitted to the Court” and that it “never did more than ‘take note’ of the question as originally formulated by the Secretary-General and submitted to the ECOSOC in document E/1998/94”. It contends that the advisory opinion of the Court should be restricted to the existing difference between the United Nations and Malaysia. In Malaysia’s view, this difference relates to the question (as formulated by the Secretary-General himself (see paragraph 20 above)) of whether the latter has the exclusive authority to determine whether acts of an expert (including words spoken or written) were performed in the course of his or her mission. Thus, in the conclusion to the revised version of its written statement, Malaysia states, *inter alia*, that it

“considers that the Secretary-General of the United Nations has not been vested with the exclusive authority to determine whether words

were spoken in the course of the performance of a mission for the United Nations within the meaning of Section 22 (b) of the Convention”.

In its oral pleadings, Malaysia maintained that

“in implementing Section 30, ECOSOC is merely a vehicle for placing a difference between the Secretary-General and Malaysia before the Court. ECOSOC does not have an independent position to assert as it might have had were it seeking an opinion on some legal question other than in the context of the operation of Section 30. ECOSOC . . . is no more than an instrument of reference, it cannot change the nature of the difference or alter the content of the question.”

33. In the written statement presented on behalf of the Secretary-General, the Legal Counsel of the United Nations requested the Court “to establish that, subject to Article VIII, Sections 29 and 30 of the Convention, the Secretary-General has exclusive authority to determine whether or not words or acts are spoken, written or done in the course of the performance of a mission for the United Nations and whether such words or acts fall within the scope of the mandate entrusted to a United Nations expert on mission”.

In this submission, it has also been argued

“that such matters cannot be determined by, or adjudicated in, the national courts of the Member States parties to the Convention. The latter position is coupled with the Secretary-General’s right and duty, in accordance with the terms of Article VI, Section 23, of the Convention, to waive the immunity where, in his opinion, it would impede the course of justice and it can be waived without prejudice to the interests of the United Nations.”

34. The other States participating in the present proceedings have expressed varying views on the foregoing issue of the exclusive authority of the Secretary-General.

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35. As the Council indicated in the preamble to its decision 1998/297, that decision was adopted by the Council on the basis of the note submitted by the Secretary-General on “Privileges and Immunities of the Special Rapporteur of the Commission on Human Rights on the Independence of Judges and Lawyers” (see paragraph 1 above). Paragraph 1 of the operative part of the decision refers expressly to paragraphs 1 to 15 of that note but not to paragraph 21, containing the two questions that the Secretary-General proposed submitting to the Court (see para-

graph 20 above). The Court would point out that the wording of the question submitted by the Council is quite different from that proposed by the Secretary-General.

36. Participants in these proceedings have advanced differing views as to what is the legal question to be answered by the Court. The Court observes that it is for the Council — and not for a member State nor for the Secretary-General — to formulate the terms of a question that the Council wishes to ask.

37. The Council adopted its decision 1998/297 without a vote. The Council did not pass upon any proposal that the question to be submitted to the Court should include, still less be confined to, the issue of the exclusive authority of the Secretary-General to determine whether or not acts (including words spoken or written) were performed in the course of a mission for the United Nations and whether such words or acts fall within the scope of the mandate entrusted to an expert on mission for the United Nations. Although the Summary Records of the Council do not expressly address the matter, it is clear that the Council, as the organ entitled to put the request to the Court, did not adopt the questions set forth at the conclusion of the note by the Secretary-General, but instead formulated its own question in terms which were not contested at that time (see paragraph 20 above). Accordingly, the Court will now answer the question as formulated by the Council.

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38. The Court will initially examine the first part of the question laid before the Court by the Council, which is:

“the legal question of the applicability of Article VI, Section 22, of the Convention on the Privileges and Immunities of the United Nations in the case of Dato’ Param Cumaraswamy as Special Rapporteur of the Commission on Human Rights on the independence of judges and lawyers, taking into account the circumstances set out in paragraphs 1 to 15 of the note by the Secretary-General . . .”

39. From the deliberations which took place in the Council on the content of the request for an advisory opinion, it is clear that the reference in the request to the note of the Secretary-General was made in order to provide the Court with the basic facts to which to refer in making its decision. The request of the Council therefore does not only pertain to the threshold question whether Mr. Cumaraswamy was and is an expert on mission in the sense of Article VI, Section 22, of the General Convention but, in the event of an affirmative answer to this question, to the consequences of that finding in the circumstances of the case.

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40. Pursuant to Article 105 of the Charter of the United Nations:

“1. The Organization shall enjoy in the territory of each of its Members such privileges and immunities as are necessary for the fulfilment of its purposes.

2. Representatives of the Members of the United Nations and officials of the Organization shall similarly enjoy such privileges and immunities as are necessary for the independent exercise of their functions in connexion with the Organization.

3. The General Assembly may make recommendations with a view to determining the details of the application of paragraphs 1 and 2 of this Article or may propose conventions to the Members of the United Nations for this purpose.”

Acting in accordance with Article 105 of the Charter, the General Assembly approved the General Convention on 13 February 1946 and proposed it for accession by each Member of the United Nations. Malaysia became a party to the General Convention, without reservation, on 28 October 1957.

41. The General Convention contains an Article VI entitled “Experts on Missions for the United Nations”. It is comprised of two Sections (22 and 23). Section 22 provides:

“Experts (other than officials coming within the scope of Article V) performing missions for the United Nations shall be accorded such privileges and immunities as are necessary for the independent exercise of their functions during the period of their missions, including time spent on journeys in connection with their missions. In particular they shall be accorded:

- .....
- (b) in respect of words spoken or written and acts done by them in the course of the performance of their mission, immunity from legal process of every kind. This immunity from legal process shall continue to be accorded notwithstanding that the persons concerned are no longer employed on missions for the United Nations.
- .....”

42. In its Advisory Opinion of 14 December 1989 on the *Applicability of Article VI, Section 22, of the Convention on the Privileges and Immunities of the United Nations*, the Court examined the applicability of Section 22 *ratione personae, ratione temporis* and *ratione loci*. In this context the Court stated:

“The purpose of Section 22 is . . . evident, namely, to enable the United Nations to entrust missions to persons who do not have the status of an official of the Organization, and to guarantee them ‘such privileges and immunities as are necessary for the independent exer-

cise of their functions’ . . . . The essence of the matter lies not in their administrative position but in the nature of their mission.” (*I.C.J. Reports 1989*, p. 194, para. 47.)

In that same Advisory Opinion, the Court concluded that a Special Rapporteur who is appointed by the Sub-Commission on Prevention of Discrimination and Protection of Minorities and is entrusted with a research mission must be regarded as an expert on mission within the meaning of Article VI, Section 22, of the General Convention (*ibid.*, p. 197, para. 55).

43. The same conclusion must be drawn with regard to Special Rapporteurs appointed by the Human Rights Commission, of which the Sub-Commission is a subsidiary organ. It may be observed that Special Rapporteurs of the Commission usually are entrusted not only with a research mission but also with the task of monitoring human rights violations and reporting on them. But what is decisive is that they have been entrusted with a mission by the United Nations and are therefore entitled to the privileges and immunities provided for in Article VI, Section 22, that safeguard the independent exercise of their functions.

44. By a letter of 21 April 1994, the Chairman of the Commission informed the Assistant Secretary-General for Human Rights of Mr. Kumaraswamy’s appointment as Special Rapporteur. The mandate of the Special Rapporteur is contained in resolution 1994/41 of the Commission entitled “Independence and Impartiality of the Judiciary, Jurors and Assessors and the Independence of Lawyers”. This resolution was endorsed by the Council in its decision 1994/251 of 22 July 1994. The Special Rapporteur’s mandate consists of the following tasks:

- “(a) to inquire into any substantial allegations transmitted to him or her and report his or her conclusions thereon;
- (b) to identify and record not only attacks on the independence of the judiciary, lawyers and court officials but also progress achieved in protecting and enhancing their independence, and make concrete recommendations, including accommodations for the provision of advisory services or technical assistance when they are requested by the State concerned;
- (c) to study, for the purpose of making proposals, important and topical questions of principle with a view to protecting and enhancing the independence of the judiciary and lawyers”.

45. The Commission extended by resolution 1997/23 of 11 April 1997 the Special Rapporteur’s mandate for a further period of three years.

In the light of these circumstances, the Court finds that Mr. Kumaraswamy must be regarded as an expert on mission within the meaning of Article VI, Section 22, as from 21 April 1994, that by virtue of this capa-

city the provisions of this Section were applicable to him at the time of his statements at issue, and that they continue to be applicable.

46. The Court observes that Malaysia has acknowledged that Mr. Cumaraswamy, as Special Rapporteur of the Commission, is an expert on mission and that such experts enjoy the privileges and immunities provided for under the General Convention in their relations with States parties, including those of which they are nationals or on the territory of which they reside. Malaysia and the United Nations are in full agreement on these points, as are the other States participating in the proceedings.

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47. The Court will now consider whether the immunity provided for in Section 22 (b) applies to Mr. Cumaraswamy in the specific circumstances of the case; namely, whether the words used by him in the interview, as published in the article in *International Commercial Litigation* (November issue 1995), were spoken in the course of the performance of his mission, and whether he was therefore immune from legal process with respect to these words.

48. During the oral proceedings, the Solicitor General of Malaysia contended that the issue put by the Council before the Court does not include this question. She stated that the correct interpretation of the words used by the Council in its request

“does not extend to inviting the Court to decide whether, assuming the Secretary-General to have had the authority to determine the character of the Special Rapporteur’s action, he had properly exercised that authority” and added:

“Malaysia observes that the word used was ‘applicability’ not ‘application’. ‘Applicability’ means ‘whether the provision is applicable to someone’ not ‘how it is to be applied’.”

49. The Court does not share this interpretation. It follows from the terms of the request that the Council wishes to be informed of the Court’s opinion as to whether Section 22 (b) is applicable to the Special Rapporteur, in the circumstances set out in paragraphs 1 to 15 of the note of the Secretary-General and whether, therefore, the Secretary-General’s finding that the Special Rapporteur acted in the course of the performance of his mission is correct.

50. In the process of determining whether a particular expert on mission is entitled, in the prevailing circumstances, to the immunity provided for in Section 22 (b), the Secretary-General of the United Nations has a pivotal role to play. The Secretary-General, as the chief administrative officer of the Organization, has the authority and the responsibility to exercise the necessary protection where required. This authority has been recognized by the Court when it stated:

“Upon examination of the character of the functions entrusted to the Organization and of the nature of the missions of its agents, it becomes clear that the capacity of the Organization to exercise a measure of functional protection of its agents arises by necessary intendment out of the Charter.” (*Reparation for Injuries Suffered in the Service of the United Nations, Advisory Opinion, I.C.J. Reports 1949*, p. 184.)

51. Article VI, Section 23, of the General Convention provides that “[p]rivileges and immunities are granted to experts in the interests of the United Nations and not for the personal benefit of the individuals themselves”. In exercising protection of United Nations experts, the Secretary-General is therefore protecting the mission with which the expert is entrusted. In that respect, the Secretary-General has the primary responsibility and authority to protect the interests of the Organization and its agents, including experts on mission. As the Court held:

“In order that the agent may perform his duties satisfactorily, he must feel that this protection is assured to him by the Organization, and that he may count on it. To ensure the independence of the agent, and, consequently, the independent action of the Organization itself, it is essential that in performing his duties he need not have to rely on any other protection than that of the Organization . . .” (*Ibid.*, p. 183.)

52. The determination whether an agent of the Organization has acted in the course of the performance of his mission depends upon the facts of a particular case. In the present case, the Secretary-General, or the Legal Counsel of the United Nations on his behalf, has on numerous occasions informed the Government of Malaysia of his finding that Mr. Cumaraswamy had spoken the words quoted in the article in *International Commercial Litigation* in his capacity as Special Rapporteur of the Commission and that he consequently was entitled to immunity from “every kind” of legal process.

53. As is clear from the written and oral pleadings of the United Nations, the Secretary-General was reinforced in this view by the fact that it has become standard practice of Special Rapporteurs of the Commission to have contact with the media. This practice was confirmed by the High Commissioner for Human Rights who, in a letter dated 2 October 1998, included in the dossier, wrote that: “it is more common than not for Special Rapporteurs to speak to the press about matters pertaining to their investigations, thereby keeping the general public informed of their work”.

54. As noted above (see paragraph 13), Mr. Cumaraswamy was explicitly referred to several times in the article “Malaysian Justice on Trial” in *International Commercial Litigation* in his capacity as United Nations Special Rapporteur on the Independence of Judges and Lawyers. In his reports to the Commission (see paragraph 18 above), Mr. Cumaraswamy

had set out his methods of work, expressed concern about the independence of the Malaysian judiciary, and referred to the civil lawsuits initiated against him. His third report noted that the Legal Counsel of the United Nations had informed the Government of Malaysia that he had spoken in the performance of his mission and was therefore entitled to immunity from legal process.

55. As noted in paragraph 18 above, in its various resolutions the Commission took note of the Special Rapporteur's reports and of his methods of work. In 1997, it extended his mandate for another three years (see paragraphs 18 and 45 above). The Commission presumably would not have so acted if it had been of the opinion that Mr. Cumaraswamy had gone beyond his mandate and had given the interview to *International Commercial Litigation* outside the course of his functions. Thus the Secretary-General was able to find support for his findings in the Commission's position.

56. The Court is not called upon in the present case to pass upon the aptness of the terms used by the Special Rapporteur or his assessment of the situation. In any event, in view of all the circumstances of this case, elements of which are set out in paragraphs 1 to 15 of the note by the Secretary-General, the Court is of the opinion that the Secretary-General correctly found that Mr. Cumaraswamy, in speaking the words quoted in the article in *International Commercial Litigation*, was acting in the course of the performance of his mission as Special Rapporteur of the Commission. Consequently, Article VI, Section 22 (b), of the General Convention is applicable to him in the present case and affords Mr. Cumaraswamy immunity from legal process of every kind.

\* \* \*

57. The Court will now deal with the second part of the Council's question, namely, "the legal obligations of Malaysia in this case".

58. Malaysia maintains that it is premature to deal with the question of its obligations. It is of the view that the obligation to ensure that the requirements of Section 22 of the Convention are met is an obligation of result and not of means to be employed in achieving that result. It further states that Malaysia has complied with its obligation under Section 34 of the General Convention, which provides that a party to the Convention must be "in a position under its own law to give effect to [its] terms", by enacting the necessary legislation; finally it contends that the Malaysian courts have not yet reached a final decision as to Mr. Cumaraswamy's entitlement to immunity from legal process.

59. The Court wishes to point out that the request for an advisory opinion refers to "the legal obligations of Malaysia in this case". The difference which has arisen between the United Nations and Malaysia originated in the Government of Malaysia not having informed the competent

Malaysian judicial authorities of the Secretary-General's finding that Mr. Cumaraswamy had spoken the words at issue in the course of the performance of his mission and was, therefore, entitled to immunity from legal process (see paragraph 17 above). It is as from the time of this omission that the question before the Court must be answered.

60. As the Court has observed, the Secretary-General, as the chief administrative officer of the Organization, has the primary responsibility to safeguard the interests of the Organization; to that end, it is up to him to assess whether its agents acted within the scope of their functions and, where he so concludes, to protect these agents, including experts on mission, by asserting their immunity. This means that the Secretary-General has the authority and responsibility to inform the Government of a member State of his finding and, where appropriate, to request it to act accordingly and, in particular, to request it to bring his finding to the knowledge of the local courts if acts of an agent have given or may give rise to court proceedings.

61. When national courts are seised of a case in which the immunity of a United Nations agent is in issue, they should immediately be notified of any finding by the Secretary-General concerning that immunity. That finding, and its documentary expression, creates a presumption which can only be set aside for the most compelling reasons and is thus to be given the greatest weight by national courts.

The governmental authorities of a party to the General Convention are therefore under an obligation to convey such information to the national courts concerned, since a proper application of the Convention by them is dependent on such information.

Failure to comply with this obligation, among others, could give rise to the institution of proceedings under Article VIII, Section 30, of the General Convention.

62. The Court concludes that the Government of Malaysia had an obligation, under Article 105 of the Charter and under the General Convention, to inform its courts of the position taken by the Secretary-General. According to a well-established rule of international law, the conduct of any organ of a State must be regarded as an act of that State. This rule, which is of a customary character, is reflected in Article 6 of the Draft Articles on State Responsibility adopted provisionally by the International Law Commission on first reading, which provides:

"The conduct of an organ of the State shall be considered as an act of that State under international law, whether that organ belongs to the constituent, legislative, executive, judicial or other power, whether its functions are of an international or an internal character, and whether it holds a superior or a subordinated position in the organization of the State." (*Yearbook of the International Law Commission*, 1973, Vol. II, p. 193.)

Because the Government did not transmit the Secretary-General's finding to the competent courts, and the Minister for Foreign Affairs did not refer to it in his own certificate, Malaysia did not comply with the above-mentioned obligation.

63. Section 22 (b) of the General Convention explicitly states that experts on mission shall be accorded immunity from legal process of every kind in respect of words spoken or written and acts done by them in the course of the performance of their mission. By necessary implication, questions of immunity are therefore preliminary issues which must be expeditiously decided *in limine litis*. This is a generally recognized principle of procedural law, and Malaysia was under an obligation to respect it. The Malaysian courts did not rule *in limine litis* on the immunity of the Special Rapporteur (see paragraph 17 above), thereby nullifying the essence of the immunity rule contained in Section 22 (b). Moreover, costs were taxed to Mr. Kumaraswamy while the question of immunity was still unresolved. As indicated above, the conduct of an organ of a State — even an organ independent of the executive power — must be regarded as an act of that State. Consequently, Malaysia did not act in accordance with its obligations under international law.

\*

64. In addition, the immunity from legal process to which the Court finds Mr. Kumaraswamy entitled entails holding Mr. Kumaraswamy financially harmless for any costs imposed upon him by the Malaysian courts, in particular taxed costs.

\*

65. According to Article VIII, Section 30, of the General Convention, the opinion given by the Court shall be accepted as decisive by the parties to the dispute. Malaysia has acknowledged its obligations under Section 30.

Since the Court holds that Mr. Kumaraswamy is an expert on mission who under Section 22 (b) is entitled to immunity from legal process, the Government of Malaysia is obligated to communicate this advisory opinion to the competent Malaysian courts, in order that Malaysia's international obligations be given effect and Mr. Kumaraswamy's immunity be respected.

\*

66. Finally, the Court wishes to point out that the question of immunity from legal process is distinct from the issue of compensation for any damages incurred as a result of acts performed by the United Nations or by its agents acting in their official capacity.

The United Nations may be required to bear responsibility for the damage arising from such acts. However, as is clear from Article VIII, Section 29, of the General Convention, any such claims against the United Nations shall not be dealt with by national courts but shall be settled in accordance with the appropriate modes of settlement that "[t]he United Nations shall make provisions for" pursuant to Section 29.

Furthermore, it need hardly be said that all agents of the United Nations, in whatever official capacity they act, must take care not to exceed the scope of their functions, and should so comport themselves as to avoid claims against the United Nations.

\* \* \*

67. For these reasons,

THE COURT

*Is of the opinion:*

(1) (a) By fourteen votes to one,

That Article VI, Section 22, of the Convention on the Privileges and Immunities of the United Nations is applicable in the case of Dato' Param Kumaraswamy as Special Rapporteur of the Commission on Human Rights on the Independence of Judges and Lawyers;

IN FAVOUR: *President Schwebel; Vice-President Weeramantry; Judges Oda, Bedjaoui, Guillaume, Ranjeva, Herczegh, Shi, Fleischhauer, Vereshchetin, Higgins, Parra-Aranguren, Kooijmans, Rezek;*

AGAINST: *Judge Koroma;*

(b) By fourteen votes to one,

That Dato' Param Kumaraswamy is entitled to immunity from legal process of every kind for the words spoken by him during an interview as published in an article in the November 1995 issue of *International Commercial Litigation*;

IN FAVOUR: *President Schwebel; Vice-President Weeramantry; Judges Oda, Bedjaoui, Guillaume, Ranjeva, Herczegh, Shi, Fleischhauer, Vereshchetin, Higgins, Parra-Aranguren, Kooijmans, Rezek;*

AGAINST: *Judge Koroma;*

(2) (a) By thirteen votes to two,

That the Government of Malaysia had the obligation to inform the Malaysian courts of the finding of the Secretary-

General that Dato' Param Cumaraswamy was entitled to immunity from legal process;

IN FAVOUR: *President Schwebel; Vice-President Weeramantry; Judges Bedjaoui, Guillaume, Ranjeva, Herczegh, Shi, Fleischhauer, Vereshchetin, Higgins, Parra-Aranguren, Kooijmans, Rezek;*

AGAINST: *Judges Oda, Koroma;*

(b) By fourteen votes to one,

That the Malaysian courts had the obligation to deal with the question of immunity from legal process as a preliminary issue to be expeditiously decided *in limine litis*;

IN FAVOUR: *President Schwebel; Vice-President Weeramantry; Judges Oda, Bedjaoui, Guillaume, Ranjeva, Herczegh, Shi, Fleischhauer, Vereshchetin, Higgins, Parra-Aranguren, Kooijmans, Rezek;*

AGAINST: *Judge Koroma;*

(3) Unanimously,

That Dato' Param Cumaraswamy shall be held financially harmless for any costs imposed upon him by the Malaysian courts, in particular taxed costs;

(4) By thirteen votes to two,

That the Government of Malaysia has the obligation to communicate this Advisory Opinion to the Malaysian courts, in order that Malaysia's international obligations be given effect and Dato' Param Cumaraswamy's immunity be respected;

IN FAVOUR: *President Schwebel; Vice-President Weeramantry; Judges Bedjaoui, Guillaume, Ranjeva, Herczegh, Shi, Fleischhauer, Vereshchetin, Higgins, Parra-Aranguren, Kooijmans, Rezek;*

AGAINST: *Judges Oda, Koroma.*

Done in English and in French, the English text being authoritative, at the Peace Palace, The Hague, this twenty-ninth day of April, one thousand nine hundred and ninety-nine, in two copies, one of which will be placed in the archives of the Court and the other transmitted to the Secretary-General of the United Nations.

(*Signed*) Stephen M. SCHWEBEL,  
President.

(*Signed*) Eduardo VALENCIA-OSPINA,  
Registrar.

Vice-President WEERAMANTRY and Judges ODA and REZEK append separate opinions to the Advisory Opinion of the Court.

Judge KOROMA appends a dissenting opinion to the Advisory Opinion of the Court.

(*Initialled*) S.M.S.

(*Initialled*) E.V.O.

**Behrami v. France and  
Saramati v. France, Germany and Norway, ((dec.)  
[GC], nos. 71412/01 and 78166/01) *ECHR*, 2 May 2007**



COUR EUROPÉENNE DES DROITS DE L'HOMME  
EUROPEAN COURT OF HUMAN RIGHTS

GRAND CHAMBER

DECISION

AS TO THE ADMISSIBILITY OF

Application no. 71412/01  
by Agim BEHRAMI and Bekir BEHRAMI  
against France

and

Application no. 78166/01  
by Ruzhdi SARAMATI  
against France, Germany and Norway

The European Court of Human Rights, sitting on 2 May 2007 as a Grand Chamber composed of:

Mr C.L. ROZAKIS, *President*,  
Mr J.-P. COSTA,  
Sir Nicolas BRATZA,  
Mr B.-M. ZUPAN I ,  
Mr P. LORENZEN,  
Mr I. CABRAL BARRETO,  
Mr M. PELLONPÄÄ,  
Mr A.B. BAKA,  
Mr K. TRAJA,  
Mrs S. BOTOUCHAROVA,  
Mr M. UGREKHELIDZE,  
Mrs A. MULARONI,  
Mrs E. FURA-SANDSTRÖM,  
Mrs A. GYULUMYAN,  
Mr E. MYJER,  
Ms D. JO IEN ,  
Mr D. POPOVI , *Judges*,

and Mr M. O'BOYLE, *Deputy Registrar*,

Having regard to the above applications lodged on 28 September 2000 and 28 September 2001, respectively

Having regard to the decision of 13 June 2006 by which the Chamber of the Second Section to which the cases had originally been assigned relinquished its jurisdiction in favour of the Grand Chamber, none of the parties having objected to relinquishment (Article 30 of the Convention and Rule 72 of the Rules of Court).

Having regard to the agreement of the parties to the *Saramati* case to the appointment of a common interest judge (Judge Costa) pursuant to Rule 30 of the Rules of Court,

Having regard to the parties' written and oral submissions and noting the agreement of Germany not to make oral submissions following the applicant's request to withdraw his case against that State (paragraphs 64-65 of the decision below),

Having regard to the written submissions of the United Nations requested by the Court, the comments submitted by the Governments of the Denmark, Estonia, Greece, Poland, Portugal and of the United Kingdom as well as those of the German Government accepted as third party submissions, all under Rule 44(2) of the Rules of Court,

Having regard to the oral submissions in both applications at a hearing on 15 November 2006,

Having decided to join its examination of both applications pursuant to Rule 42 § 1 of the Rules of Court,

Having deliberated on 15 November 2006 and on 2 May 2007, decides as follows:

THE FACTS<sup>1</sup>

1. Mr Agim Behrami, was born in 1962 and his son, Mr Bekir Behrami, was born in 1990. Both are of Albanian origin. Mr Agim Behrami complained on his own behalf, and on behalf of his deceased son, Gadaf Behrami born in 1988. These applicants live in the municipality of Mitrovica in Kosovo, Republic of Serbia. They were represented by Mr Gazmend Nushi, a lawyer with the Council for the Defence of Human Rights and Freedoms, an organisation based in Pristina, Kosovo. Mr Saramati was born in 1950. He is also of Albanian origin living in Kosovo. He was represented by Mr Hazer Susuri of the Criminal Defence Resource Centre, Kosovo. At the oral hearing in the cases, the applicants were further represented by Mr Keir Starmer, QC and Mr Paul Troop as Counsel, assisted by Ms Nuala Mole, Mr David Norris and Mr Ahmet Hasolli, as Advisers.

The French Government were represented by their Agents, Mr R. Abraham, Mr J.-L. Florent and, subsequently, Ms Edwige Belliard, assisted

<sup>1</sup> The abbreviations used are explained in the text but also listed in alphabetical order in the Appendix to this decision.

by Ms Anne-Françoise Tissier and by Mr Mostafa Mihraje, advisers, all of the legal directorate of the Ministry of Foreign Affairs.

The German Government were represented by Dr Hans-Jörg Behrens, Deputy Agent and Professor Dr. Christian Tomuschat, Counsel. The Norwegian Government were represented by their Agents, Mr Rolf Einar Fife and Ms Therese Steen, assisted by Mr Torfinn Rislåa Arnsten, Adviser.

## I. RELEVANT BACKGROUND TO THE CASES

2. The conflict between Serbian and Kosovar Albanian forces during 1998 and 1999 is well documented. On 30 January 1999, and following a decision of the North Atlantic Council (“NAC”) of the North Atlantic Treaty Organisation (“NATO”), NATO announced air strikes on the territory of the then Federal Republic of Yugoslavia (“FRY”) should the FRY not comply with the demands of the international community. Negotiations took place between the parties to the conflict in February and March 1999. The resulting proposed peace agreement was signed by the Kosovar Albanian delegation but not by the Serbian delegation. The NAC decided on, and on 23 March 1999 the Secretary General of NATO announced, the beginning of air strikes against the FRY. The air strikes began on 24 March 1999 and ended on 8 June 1999 when the FRY troops agreed to withdraw from Kosovo. On 9 June 1999 “KFOR”, the FRY and the Republic of Serbia signed a “Military Technical Agreement” (“MTA”) by which they agreed on FRY withdrawal and the presence of an international security force following an appropriate UN Security Council Resolution (“UNSC Resolution”).

3. UNSC Resolution 1244 of 10 June 1999 provided for the establishment of a security presence (KFOR) by “Member States and relevant international institutions”, “under UN auspices”, with “substantial NATO participation” but under “unified command and control”. NATO pre-deployment to The Former Yugoslav Republic of Macedonia allowed deployment of significant forces to Kosovo by 12 June 1999 (in accordance with OPLAN 10413, NATO’s operational plan for the UNSC Resolution 1244 mission called “Operation Joint Guardian”). By 20 June FRY withdrawal was complete. KFOR contingents were grouped into four multinational brigades (“MNBs”) each of which was responsible for a specific sector of operations with a lead country. They included MNB Northeast (Mitrovica) and MNB Southeast (Prizren), led by France and Germany, respectively. Given the deployment of Russian forces after the arrival of KFOR, a further agreement on 18 June 1999 (between Russia and the United States) allocated various areas and roles to the Russian forces.

4. UNSC Resolution 1244 also decided on the deployment, under UN auspices, of an interim administration for Kosovo (UNMIK) and requested the Secretary General (“SG”), with the assistance of relevant international

organisations, to establish it and to appoint a Special Representative to the SG (“SRSG”) to control its implementation. UNMIK was to coordinate closely with KFOR. UNMIK comprised four pillars corresponding to the tasks assigned to it. Each pillar was placed under the authority of the SRSG and was headed by a Deputy SRSG. Pillar I (as it was at the relevant time) concerned humanitarian assistance and was led by UNHCR before it was phased out in June 2000. A new Pillar I (police and justice administration) was established in May 2001 and was led directly by the UN, as was Pillar II (civil administration). Pillar III, concerning democratisation and institution building, was led by the Organisation for Security and Co-operation in Europe (“OSCE”) and Pillar IV (reconstruction and economic development) was led by the European Union.

## II THE CIRCUMSTANCES OF THE BEHRAMI CASE

5. On 11 March 2000 eight boys were playing in the hills in the municipality of Mitrovica. The group included two of Agim Behrami’s sons, Gadaf and Bekim Behrami. At around midday, the group came upon a number of undetonated cluster bomb units (“CBUs”) which had been dropped during the bombardment by NATO in 1999 and the children began playing with the CBUs. Believing it was safe, one of the children threw a CBU in the air: it detonated and killed Gadaf Behrami. Bekim Behrami was also seriously injured and taken to hospital in Pristina (where he later had eye surgery and was released on 4 April 2000). Medical reports submitted indicate that he underwent two further eye operations (on 7 April and 22 May 2000) in a hospital in Bern, Switzerland. It is not disputed that Bekim Behrami was disfigured and is now blind.

6. UNMIK police investigated. They took witness statements from, *inter alia*, the boys involved in the incident and completed an initial report. Further investigation reports dated 11, 12 and 13 March 2000 indicated, *inter alia*, that UNMIK police could not access the site without KFOR agreement; reported that a French KFOR officer had accepted that KFOR had been aware of the unexploded CBUs for months but that they were not a high priority; and pointed out that the detonation site had been marked out by KFOR the day after the detonation. The autopsy report confirmed Gadaf Behrami’s death from multiple injuries resulting from the CBU explosion. The UNMIK Police report of 18 March 2000 concluded that the incident amounted to “unintentional homicide committed by imprudence”.

7. By letter dated 22 May 2000 the District Public Prosecutor wrote to Agim Behrami to the effect that the evidence was that the CBU detonation was an accident, that criminal charges would not be pursued but that Mr Behrami had the right to pursue a criminal prosecution within eight days of the date of that letter. On 25 October 2001 Agim Behrami complained to the Kosovo Claims Office (“KCO”) that France had not respected UNSC Resolution 1244. The KCO forwarded the complaint to the French Troop

Contributing Nation Claims Office (TCNCO”). By letter of 5 February 2003 that TCNCO rejected the complaint stating, *inter alia*, that the UNSC Resolution 1244 had required KFOR to supervise mine clearing operations until UNMIK could take over and that such operations had been the responsibility of the UN since 5 July 1999.

### III. THE CIRCUMSTANCES OF THE SARAMATI CASE

8. On 24 April 2001 Mr Saramati was arrested by UNMIK police and brought before an investigating judge on suspicion of attempted murder and illegal possession of a weapon. On 25 April 2001 that judge ordered his pre-trial detention and an investigation into those and additional charges. On 23 May 2001 a prosecutor filed an indictment and on 24 May 2001 the District Court ordered his detention to be extended. On 4 June 2001 the Supreme Court allowed Mr Saramati’s appeal and he was released.

9. In early July 2001 UNMIK police informed him by telephone that he had to report to the police station to collect his money and belongings. The station was located in Prizren in the sector assigned to MNB Southeast, of which the lead nation was Germany. On 13 July 2001 he so reported and was arrested by UNMIK police officers by order of the Commander of KFOR (“COMKFOR”), who was a Norwegian officer at the time.

10. On 14 July 2001 detention was extended by COMKFOR for 30 days.

11. On 26 July 2001, and in response to a letter from Mr Saramati’s representatives taking issue with the legality of his detention, KFOR Legal Adviser advised that KFOR had the authority to detain under the UNSC Resolution 1244 as it was necessary “to maintain a safe and secure environment” and to protect KFOR troops. KFOR had information concerning Mr Saramati’s alleged involvement with armed groups operating in the border region between Kosovo and the Former Yugoslav Republic of Macedonia and was satisfied that Mr Saramati represented a threat to the security of KFOR and to those residing in Kosovo.

12. On 26 July 2001 the Russian representative in the UNSC referred to “the arrest of Major Saramati, the Commander of a Kosovo Protection Corps Brigade, accused of undertaking activities threatening the international presence in Kosovo”.

13. On 11 August 2001 Mr Saramati’s detention was again extended by order of COMKFOR. On 6 September 2001 his case was transferred to the District Court for trial, the indictment retaining charges of, *inter alia*, attempted murder and the illegal possession of weapons and explosives. By letter dated 20 September 2001, the decision of COMKFOR to prolong his detention was communicated to his representatives.

14. During each trial hearing from 17 September 2001 to 23 January 2002 Mr Saramati’s representatives requested his release and the trial court

responded that, although the Supreme Court had so ruled in June 2001, his detention was entirely the responsibility of KFOR.

15. On 3 October 2001 a French General was appointed to the position of COMKFOR.

16. On 23 January 2002 Mr Saramati was convicted of attempted murder under Article 30 § 2(6) of the Criminal Code of Kosovo in conjunction with Article 19 of the Criminal Code of the FRY. He was acquitted on certain charges and certain charges were either rejected or dropped. Mr Saramati was transferred by KFOR to the UNMIK detention facilities in Prishtina.

17. On 9 October 2002 the Supreme Court of Kosovo quashed Mr Saramati’s conviction and his case was sent for re-trial. His release from detention was ordered. A re-trial has yet to be fixed.

### IV. RELEVANT LAW AND PRACTICE

#### A. The prohibition on the unilateral use of force and its collective security counterpart

18. The prohibition on the unilateral use of force by States, together with its counterpart principle of collective security, mark the dividing line between the classic concept of international law, characterised by the right to have recourse to war (*ius ad bellum*) as an indivisible part of State sovereignty, and modern international law which recognises the prohibition on the use of force as a fundamental legal norm (*ius contra bellum*).

19. More particularly, the *ius contra bellum* era of public international law is accepted to have begun (at the latest, having regard, *inter alia*, to the Kellogg-Briand Pact signed in 1928) with the end of the First World War and with the constitution of the League of Nations. The aim of this organisation of universal vocation was maintaining peace through an obligation not to resort to war (First recital and Article 11 of the Covenant of the League of Nations) as well as through universal systems of peaceful settlement of disputes (Articles 12-15 of the Covenant) and of collective security (Article 16 of the Covenant). It is argued by commentators that, by that stage, customary international law prohibited unilateral recourse to the use of force unless in self-defence or as a collective security measure (for example, R. Kolb, “*Ius Contra Bellum – Le Droit international relatif au maintien de la paix*”, Helbing and Lichtenhahn, Bruylant, 2003, pp. 60-68).

20. The UN succeeded the League of Nations in 1946. The primary objective of the UN was to maintain international peace and security (First recital and Article 1 § 1 of the Charter) and this was to be achieved through two complimentary actions. The first, often described as “positive peace” (the Preamble to the Charter as well as Article 2 § 3, Chapter VI, Chapter IX-X and certain measures under Article 41 of Chapter VII), aimed at the suppression of the causes of dispute and the building of sustainable peace.

The second type of action, “negative peace”, was founded on the Preamble, Article 2 § 4 and most of the Chapter VII measures and amounted to the prohibition of the unilateral use of force (Article 2 § 4) in favour of collective security implemented by a central UN organ (the UNSC) with the monopoly on the right to use force in conflicts identified as threatening peace. Two matters were essential to this peace and security mechanism: its “collective” nature (States had to act together against an aggressor identified by the UNSC) as well as its “universality” (competing alliances were considered to undermine the mechanism so that coercive action by regional organisations was subjected to the universal system by Article 53 of the Charter).

**B. The Charter of the UN, 1945**

21. The Preamble as well as Articles 1 and 2, in so far as relevant, provide as follows:

“WE THE PEOPLES OF THE UNITED NATIONS DETERMINED

- to save succeeding generations from the scourge of war, which twice in our lifetime has brought untold sorrow to mankind, and
- to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small, and
- to establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained, and
- to promote social progress and better standards of life in larger freedom,

AND FOR THESE ENDS

- to practice tolerance and live together in peace with one another as good neighbours, and
- to unite our strength to maintain international peace and security, and
- to ensure, by the acceptance of principles and the institution of methods, that armed force shall not be used, save in the common interest, and
- to employ international machinery for the promotion of the economic and social advancement of all peoples,

HAVE RESOLVED TO COMBINE OUR EFFORTS TO ACCOMPLISH THESE AIMS

Accordingly, our respective Governments, ..., have agreed to the present Charter of the United Nations and do hereby establish an international organisation to be known as the United Nations.

Article 1

The Purposes of the United Nations are:

1. To maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace, and to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace;

...

Article 2

...

5. All Members shall give the United Nations every assistance in any action it takes in accordance with the present Charter, and shall refrain from giving assistance to any state against which the United Nations is taking preventive or enforcement action.

...

7. Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter VII.”

22. Chapter V deals with the UNSC and Article 24 outlines its “Functions and Powers” as follows:

“1. In order to ensure prompt and effective action by the [UN], its Members confer on the [UNSC] primary responsibility for the maintenance of international peace and security, and agree that in carrying out its duties under this responsibility the [UNSC] acts on their behalf.

2. In discharging these duties the [UNSC] shall act in accordance with the Purposes and Principles of the [UN]. The specific powers granted to the [UNSC] for the discharge of these duties are laid down in Chapters VI, VII, VIII, and XII. ...”

Article 25 provides:

“The Members of the United Nations agree to accept and carry out the decisions of the [UNSC] in accordance with the present Charter.”

23. Chapter VII is entitled “Action with respect to threats to the peace, breaches of the peace and acts of aggression”. Article 39 provides:

“The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security.”

The notion of a “threat to the peace” within the meaning of Article 39 has evolved to include internal conflicts which threaten to “spill over” or

concern serious violations of fundamental international (often humanitarian) norms. Large scale cross border displacement of refugees can also render a threat international (Article 2(7) of the UN Charter; and, for example, R. Kolb, “*Ius Contra Bellum – Le Droit international relatif au maintien de la paix*”, Helbing and Lichtenhahn, Bruylant, 2003, pp. 60-68; and “*Yugoslav Territory, United Nations Trusteeship or Sovereign State? Reflections on the current and Future Legal Status of Kosovo*”, Zimmermann and Stahn, NJIL 70, 2001, p. 437).

Articles 41 and 42 read as follows:

“41. The Security Council may decide what measures not involving the use of armed force are to be employed to give effect to its decisions, and it may call upon the Members of the United Nations to apply such measures. These may include complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations.”

42. Should the Security Council consider that measures provided for in Article 41 would be inadequate or have proved to be inadequate, it may take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security. Such action may include demonstrations, blockade, and other operations by air, sea, or land forces of Members of the United Nations.”

24. Articles 43-45 provide for the conclusion of agreements between member states and the UNSC for the former to contribute to the latter land and air forces necessary for the purpose of maintaining international peace and security. No such agreements have been concluded. There is, consequently, no basis in the Charter for the UN to oblige Member States to contribute resources to Chapter VII missions. Articles 46-47 provide for the UNSC to be advised by a Military Staff Committee (comprising military representatives of the permanent members of the UNSC) on, *inter alia*, military requirements for the maintenance of international peace and security and on the employment and command of forces placed at the UNSC's disposal. The MSC has had very limited activity due to the absence of Article 43 agreements.

25. Chapter VII continues:

“Article 48

The action required to carry out the decisions of the Security Council for the maintenance of international peace and security shall be taken by all the Members of the United Nations or by some of them, as the Security Council may determine.

Such decisions shall be carried out by the Members of the United Nations directly and through their action in the appropriate international agencies of which they are members.

Article 49

The Members of the United Nations shall join in affording mutual assistance in carrying out the measures decided upon by the Security Council.”

### C. Article 103 of the Charter

26. This Article reads as follows:

“In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail.”

27. The ICJ considers Article 103 to mean that the Charter obligations of UN member states prevail over conflicting obligations from another international treaty, regardless of whether the latter treaty was concluded before or after the UN Charter or was only a regional arrangement (*Nicaragua v. United States of America*, ICJ Reports, 1984, p. 392, at § 107. See also *Kadi v. Council and Commission*, § 183, judgment of the Court of First Instance of the European Communities (“CFI”) of 21 September 2005 (under appeal) and two more recent judgments of the CFI in the same vein: *Yusuf and Al Barakat v. Council and Commission*, 21 September 2005, §§ 231, 234, 242-243 and 254 as well as *Ayadi v. Council*, 12 July 2006, § 116). The ICJ has also found Article 25 to mean that UN member states' obligations under a UNSC Resolution prevail over obligations arising under any other international agreement (Orders of 14 April 1992 (provisional measures), Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (*Libyan Arab Jamahiriya v. United States of America and Libyan Arab Jamahiriya v. United Kingdom*), ICJ Reports, 1992, p. 16, § 42 and p. 113, § 39, respectively).

### D. The International Law Commission (“ILC”)

28. Article 13 of the UN Charter provided that the UN General Assembly should initiate studies and make recommendations for the purpose of, *inter alia*, encouraging the progressive development of international law and its codification. On 21 November 1947, the General Assembly adopted Resolution 174(II) establishing the ILC and approving its Statute.

#### I. Draft Articles on the Responsibility of International Organisations

29. Article 3 of these draft Articles adopted in 2003 during the 55<sup>th</sup> session of the ILC is entitled “General principles” and it reads as follows (see the Report of the ILC, General Assembly Official Records, 55<sup>th</sup> session, Supplement No. 10 A/58/10 (2003):

“1. Every internationally wrongful act of an international organization entails the international responsibility of the international organization.

2. There is an internationally wrongful act of an international organization when conduct consisting of an action or omission:

- (a) Is attributable to the international organization under international law; and
- (b) Constitutes a breach of an international obligation of that international organization.

30. Article 5 of the draft Articles adopted in 2004 during the 56<sup>th</sup> session of the ILC is entitled “Conduct of organs or agents placed at the disposal of an international organisation by a State or another international organisation” and reads as follows (see the Report of the ILC, General Assembly Official Records, 56<sup>th</sup> session, Supplement No. 10 A/59/10 (2004) and Report of the Special Rapporteur on the Responsibility of International Organisations, UN, Official Documents, A/CN.4/541, 2 April 2004):

“The conduct of an organ of a State or an organ or agent of an international organisation that is placed at the disposal of another international organisation shall be considered under international law an act of the latter organisation if the organisation exercises effective control over that conduct.”

31. The ILC Commentary on Article 5, in so far as relevant, provides:

“When an organ of a State is placed at the disposal of an international organization, the organ may be fully seconded to that organization. In this case the organ’s conduct would clearly be attributable only to the receiving organization. ... Article 5 deals with the different situation in which the lent organ or agent still acts to a certain extent as organ of the lending State or as organ or agent of the lending organization. This occurs for instance in the case of military contingents that a State placed at the disposal of the [UN] for a peacekeeping operation, since the State retains disciplinary powers and criminal jurisdiction over the members of the national contingent. In this situation the problem arises whether a specific conduct of the lent organ or agent has to be attributed to the receiving organization or to the lending State or organization. ...

Practice relating to peacekeeping forces is particularly significant in the present context because of the control that the contributing State retains over disciplinary matters and criminal affairs. This may have consequences with regard to attribution of conduct. ...

Attribution of conduct to the contributing State is clearly linked with the retention of some powers by that State over its national contingent and thus on the control that the State possesses in the relevant respect.

As has been held by several scholars, when an organ or agent is placed at the disposal of an international organization, the decisive question in relation to attribution of a given conduct appears to be who has effective control over the conduct in question.”

32. The report noted that it would be difficult to attribute to the UN action resulting from contingents operating under national rather than UN command and that in joint operations, international responsibility would be determined, absent an agreement, according to the degree of effective control exercised by either party in the conduct of the operation. It continued:

“What has been held with regard to joint operations ... should also apply to peacekeeping operations, insofar as it is possible to distinguish in their regard areas of effective control respectively pertaining to the [UN] and the [TCN]. While it is understandable that, for the sake of efficiency of military operations, the [UN] insists on claiming exclusive command and control over peacekeeping forces, attribution of conduct should also in this regard be based on a factual criterion.”

33. As regards UN peacekeeping forces (namely, those directly commanded by the UN and considered subsidiary organs of the UN), the Report quoted the UN’s legal counsel as stating that the acts of such subsidiary organs were in principle attributable to the organisation and, if committed in violation of an international obligation, entailed the international responsibility of the organisation and its liability in compensation. This, according to the Report, summed up the UN practice in respect of several UN peacekeeping missions referenced in the Report.

#### 2. *Draft Articles on State Responsibility*

34. Article 6 of these draft Articles is entitled “Conduct of organs placed at the disposal of a State by another State” and it reads as follows (Report of the ILC, General Assembly Official Records, 56th session, Supplement No. 10 (A/56/10)):

“The conduct of an organ placed at the disposal of a State by another State shall be considered an act of the former State under international law if the organ is acting in the exercise of elements of the governmental authority of the State at whose disposal it is placed.”

Article 6 addresses the situation in which an organ of a State is put at the disposal of another, so that the organ may act temporarily for the latter’s benefit and under its authority. In such a case, the organ, originally that of one State, acts exclusively for the purposes of and on behalf of another State and its conduct is attributed to the latter State alone.

#### E. The Vienna Convention on the Law of Treaties

35. Article 30 is entitled “Application of successive treaties relating to the same subject matter” and its first paragraph reads as follows:

“1. Subject to Article 103 of the Charter of the United Nations, the rights and obligations of States Parties to successive treaties relating to the same subject matter shall be determined in accordance with the following paragraphs.”

#### F. The MTA of 9 June 1999

36. Following the agreement by the FRY that its troops would withdraw from Kosovo and the consequent suspension of air operations against the FRY, the MTA was signed between “KFOR” and the Governments of the FRY and the Republic of Serbia on 9 June 1999 which provided for the

phased withdrawal of FRY forces and the deployment of international presences. Article I (entitled “General Obligations”) noted that it was an agreement for the deployment in Kosovo:

“under United Nations auspices of effective international civil and security presences. The Parties note that the [UNSC] is prepared to adopt a resolution, which has been introduced, regarding these measures.”

37. Paragraph 2 of Article I provided for the cessation of hostilities and the withdrawal of FRY forces and, further, that:

“The State governmental authorities of the [FRY] and the Republic of Serbia understand and agree that the international security force (“KFOR”) will deploy following the adoption of the UNSC [Resolution] ... and operate without hindrance within Kosovo and with the authority to take all necessary action to establish and maintain a secure environment for all citizens of Kosovo and otherwise carry out its mission. They further agree to comply with all of the obligations of this Agreement and to facilitate the deployment and operation of this force.”

38. Article V provided that COMKFOR would provide the authoritative interpretation of the MTA and the security aspects of the peace settlement it supported.

39. Appendix B set out in some detail the breadth and elements of the envisaged security role of KFOR in Kosovo. Paragraph 3 provided that neither the international security force nor its personnel would be “liable for any damages to public or private property that they may cause in the course of duties related to the implementation of this agreement”.

40. The letter of 10 June 1999 from NATO submitting the MTA to the SG of the UN and the latter’s letter onwards to the UNSC, described the MTA as having been signed by the “NATO military authorities”.

### G. The UNSC Resolution 1244 of 10 June 1999

41. The Resolution reads, in so far as relevant, as follows:

“Bearing in mind the purposes and principles of the Charter of the United Nations, and the primary responsibility of the Security Council for the maintenance of international peace and security,

Recalling its [previous relevant] resolutions ...,

Regretting that there has not been full compliance with the requirements of these resolutions,

Determined to resolve the grave humanitarian situation in Kosovo ... and to provide for the safe and free return of all refugees and displaced persons to their homes,

...

Welcoming the general principles on a political solution to the Kosovo crisis adopted on 6 May 1999 (S/1999/516, annex 1 to this resolution) and welcoming also

the acceptance by the [FRY] of the principles set forth in points 1 to 9 of the paper presented in Belgrade on 2 June 1999 (S/1999/649, annex 2 to this resolution), and the [FRY’s] agreement to that paper,

...

Determining that the situation in the region continues to constitute a threat to international peace and security,

Determined to ensure the safety and security of international personnel and the implementation by all concerned of their responsibilities under the present resolution, and acting for these purposes under Chapter VII of the Charter of the United Nations,

...

5. Decides on the deployment in Kosovo, under United Nations auspices, of international civil and security presences, with appropriate equipment and personnel as required, and welcomes the agreement of the [FRY] to such presences;

6. Requests the Secretary-General to appoint, in consultation with the Security Council, a Special Representative to control the implementation of the international civil presence, and further requests the Secretary-General to instruct his Special Representative to coordinate closely with the international security presence to ensure that both presences operate towards the same goals and in a mutually supportive manner;

7. Authorizes Member States and relevant international organizations to establish the international security presence in Kosovo as set out in point 4 of annex 2 with all necessary means to fulfil its responsibilities under paragraph 9 below;

...

9. Decides that the responsibilities of the international security presence to be deployed and acting in Kosovo will include:

...

(e) Supervising de-mining until the international civil presence can, as appropriate, take over responsibility for this task;

(f) Supporting, as appropriate, and coordinating closely with the work of the international civil presence;

(g) Conducting border monitoring duties as required;

...

10. Authorizes the Secretary-General, with the assistance of relevant international organizations, to establish an international civil presence in Kosovo in order to provide an interim administration for Kosovo under which the people of Kosovo can enjoy substantial autonomy within the [FRY], and which will provide transitional administration while establishing and overseeing the development of provisional

democratic self-governing institutions to ensure conditions for a peaceful and normal life for all inhabitants of Kosovo;

11. Decides that the main responsibilities of the international civil presence will include: ...

- (b) Performing basic civilian administrative functions where and as long as required;
- (c) Organizing and overseeing the development of provisional institutions for democratic and autonomous self-government pending a political settlement, including the holding of elections;
- (d) Transferring, as these institutions are established, its administrative responsibilities while overseeing and supporting the consolidation of Kosovo's local provisional institutions and other peace-building activities;
- ...
- (i) Maintaining civil law and order, including establishing local police forces and meanwhile through the deployment of international police personnel to serve in Kosovo;
- (j) Protecting and promoting human rights;
- (k) Assuring the safe and unimpeded return of all refugees and displaced persons to their homes in Kosovo;
- ...

19. Decides that the international civil and security presences are established for an initial period of 12 months, to continue thereafter unless the Security Council decides otherwise;

20. Requests the Secretary-General to report to the Council at regular intervals on the implementation of this resolution, including reports from the leaderships of the international civil and security presences, the first reports to be submitted within 30 days of the adoption of this resolution;

21. Decides to remain actively seized of the matter.”

42. Annex 1 listed the general principles on a political solution to the Kosovo crisis adopted by the G-8 Foreign Ministers on 6 May 1999. Annex 2 comprised nine principles (guiding the resolution of the crisis presented in Belgrade on 2 June 1999 to which the FRY had agreed) including:

“... 3. Deployment in Kosovo under [UN] auspices of effective international civil and security presences, acting as may be decided under Chapter VII of the Charter, capable of guaranteeing the achievement of common objectives.

4. The international security presence with substantial [NATO] participation must be deployed under unified command and control and authorized to establish a safe environment for all people in Kosovo and to facilitate the safe return to their homes of all displaced persons and refugees.

5. Establishment of an interim administration for Kosovo as a part of the international civil presence ..., to be decided by the Security Council of the [UN]. The interim administration to provide transitional administration while establishing and overseeing the development of provisional democratic self-governing institutions to ensure conditions for a peaceful and normal life for all inhabitants in Kosovo. ...”

43. While this Resolution used the term “authorize”, that term and the term “delegation” are used interchangeably. Use of the term “delegation” in the present decision refers to the empowering by the UNSC of another entity to exercise its function as opposed to “authorising” an entity to carry out functions which it could not itself perform.

#### H. Agreed Points on Russian Participation in KFOR (18 June 1999)

44. Following Russia's involvement in Kosovo after the deployment of KFOR troops, an Agreement was concluded as to the basis on which Russian troops would participate in KFOR. Russian troops would operate in certain sectors according to a command and control model annexed to the agreement: all command arrangements would preserve the principle of unity of command and, while the Russian contingent was to be under the political and military control of the Russian Government, COMKFOR had authority to order NATO forces to execute missions refused by Russian forces.

45. Its command and control annex described the link between the UNSC and the NAC as one of “Consultation/Interaction” and between the NAC and COMKFOR as one of “operational control”.

#### I. Regulation No. 2000/47 on the Status, Privileges and Immunities of KFOR and UNMIK and their Personnel in Kosovo

46. This Regulation was adopted on 18 August 2000 by the SRSG to implement the Joint Declaration of 17 August 2000 on the status of KFOR and UNMIK and their personnel, and the privileges and immunities to which they are entitled. It was deemed to enter into force on 10 June 1999.

KFOR personnel were to be immune from jurisdiction before the courts in Kosovo in respect of any administrative, civil or criminal act committed by them in Kosovo and such personnel were to be “subject to the exclusive jurisdiction of their respective sending States” (section 2 of the Regulation). UNMIK personnel were also to be immune from legal process in respect of words spoken and all acts performed by them in their official capacity (section 3). The SG could waive the immunity of UNMIK personnel and requests to waive jurisdiction over KFOR personnel were to be referred to the relevant national commander (section 6).

### J. NATO/KFOR (unclassified) HQ KFOR Main Standing Operating Procedures (“SOP”), March 2003

47. Referring to UNSC Resolution 1244 and UNMIK Regulation No. 2000/47, the SOP was intended as a guide. The KCO would adjudicate claims relating to the overall administration of military operations in Kosovo by KFOR in accordance with Annex A to the SOP. It would also determine whether the matter was against a TCN, in which case the claim would be forwarded to that TCN.

48. TCNs were responsible for adjudicating claims that arose from their own activities in accordance with their own rules and procedures. While there was at that time no approved policy for processing and paying claims that arose out of KFOR operations in Kosovo, TCNs were encouraged to process claims (through TCN Claims Offices – “TCNCOs”) in accordance with Annex B which provided guidelines on the claims procedure. While the adjudication of claims against a TCN was purely a “national matter for the TCN concerned”, the payment of claims in a fair manner was considered to further the rule of law, enhance the reputation of KFOR and to serve the interests of force protection for KFOR.

49. Annex C provided guidelines for the structure and procedures before the Kosovo Appeals Commission (from the KCO or from a TCNCO).

### K. European Commission for Democracy through Law (“the Venice Commission”), Opinion on human rights in Kosovo: Possible establishment of review mechanisms (no. 280/2004, CDL-AD (2004) 033)

50. The relevant parts of paragraph 14 of the Opinion read:

“KFOR contingents are grouped into four multinational brigades. KFOR troops come from 35 NATO and non-NATO countries. Although brigades are responsible for a specific area of operations, they all fall “under the unified command and control” (UN SC Resolution 1244, Annex 2, para. 4) of [COMKFOR] from NATO. “Unified command and control” is a military term of art which only encompasses a limited form of transfer of power over troops. [TCNs] have therefore not transferred “full command” over their troops. When [TCNs] contribute troops to a NATO-led operation they usually transfer only the limited powers of “operational control” and/or “operational command”. These powers give the NATO commander the right to give orders of an operational nature to the commanders of the respective national units. The national commanders must implement such orders on the basis of their own national authority. NATO commanders may not give other kinds of orders (e.g. those affecting the personal status of a soldier, including taking disciplinary measures) and NATO commanders, in principle, do not have the right to give orders to individual soldiers ... In addition, [TCNs] always retain the power to withdraw their soldiers at any moment. The underlying reason for such a rather complex arrangement is the desire of [TCNs] to preserve as much political responsibility and democratic control over their troops as is compatible with the requirements of military efficiency. This enables states to do the utmost for the safety of their soldiers, to preserve their

discipline according to national custom and rules, to maintain constitutional accountability and, finally, to preserve the possibility to respond to demands from the national democratic process concerning the use of their soldiers.”

### L. Detention and De-mining in Kosovo

#### I. Detention

51. A letter from COMKFOR to the OSCE of 6 September 2001 described how COMKFOR authorised detention: each case was reviewed by KFOR staff, the MNB commander and by a review panel at KFOR HQ, before being authorised by COMKFOR based on KFOR/OPS/FRAGO997 (superseded by COMKFOR Detention Directive 42 in October 2001).

#### 2. De-mining

52. Landmines and unexploded ordinance (from the NATO bombardment of early 1999) posed a significant problem in post-conflict Kosovo, a problem exacerbated by the relative absence of local knowledge given the large scale displacement of the population during the conflict. The UN Mine Action Service (UNMAS) was the primary UN body charged with monitoring de-mining developments in general.

53. On 12 June 1999 the SG delivered his operational plan for the civil mission in Kosovo to the UNSC (Doc. No. S/1999/672). In outlining the structure of UNMIK, he noted that mine action was dealt with under humanitarian affairs (the former Pillar I of UNMIK) and that UNMIK had been tasked to establish, as soon as possible, a mine action centre. The UN Mine Action Coordination Centre (“UNMACC”): used interchangeably with “UNMIK MACC”) opened its office in Kosovo on 17 June 1999 and it was placed under the direction of the Deputy SRSG of Pillar I. Pending the transfer of responsibility for mine action to UNMACC, in accordance with the UNSC Resolution 1244, KFOR acted as the *de facto* coordination centre. The SG’s detailed report on UNMIK of 12 July 1999 (Doc No. S/1999/779) confirmed that UNMACC would plan mine action activities and act as the point of coordination between the mine action partners including KFOR, UN agencies, NGOs and commercial companies”.

54. On 24 August 1999 the Concept Plan for UNMIK Mine Action Programme (“MAP”) was published in a document entitled “UNMIK MACC, Office of the Deputy SRSG (Humanitarian Affairs)”. It confirmed that the UN, through UNMAS, the SRSG and the Deputy SRSG of Pillar I of UNMIK retained “overall responsibility” for the MAP in terms of providing policy guidance, identifying needs and priorities, coordinating with UN and non-UN partners as well as member states, and defining the overall operational plan and structure. The MAP was an “integral component of UNMIK”. As to the role of UNMIK MACC, it was

underlined that, since the UN did not intend to implement the mine action activities in Kosovo itself, it would rely on a variety of operators including UN agencies, KFOR contingents, NGOs and commercial companies. Those operators had to be accredited, supported and co-ordinated to ensure they worked in a coherent and integrated manner. Accordingly, a key factor in the execution of the MAP was the integration and coordination of all de-mining activities through an appropriately structured UNMIK MACC which would, *inter alia*, act as the “focal point and coordination mechanism for all mine activities in Kosovo”. The Concept Plan went on to define the nature of the problem and the consequent phases and priorities for mine clearance.

55. Accordingly, on 24 August 1999 a memorandum was sent by the Deputy SRSG of Pillar I to the SRSG, requesting that, since the Concept Plan had been approved, it should also be forwarded to KFOR “along with an appropriate annotation that UNMIK have now assumed the responsibility for humanitarian mine action in Kosovo”.

56. KFOR Directive on CBU Marking (KFOR/OPS/FRAGO 300) was adopted on 29 August 1999 and provided:

“...KFOR will only clear mines/CBUs when deemed essential to the conduct of the mission and to maintain freedom of movement. KFOR does not wish to undertake de-mining, which is the responsibility of UNMACC and the NGOs. However, there is growing pressure for KFOR to dispose of NATO munitions. Therefore it has been decided that KFOR will do more to reduce the threat without amending its policy by marking the perimeter of each of the CBU footprints ... MNBs are to conduct these tasks against a priority list co-ordinated with UNMACC and UNMIK regional offices. The intent is to mark all known areas by 10 October 1999”.

57. On 5 October 1999 that Deputy SRSG wrote to COMKFOR noting paragraph 9(e) of UNSC Resolution 1244, attaching the Concept Plan, confirming that “we are now in a position to officially assume responsibility for mine action in Kosovo” and underlining the critical need for UNMIK and KFOR to co-operate and to work closely together.

58. The report of KFOR for July 1999 (submitted to the UNSC by the SG’s letter of 10 August 1999) explained that KFOR worked closely with UNMAS and had “jointly established” UNMACC. The report continued:

“Upon entry into Kosovo and prior to establishment of UNMACC, KFOR organized a Mines Action Centre, which has since been augmented by [UN] personnel and has now become UNMACC. This is now ... charged by the [UN] with de-mining the region. It accomplishes this task using civilian contracted de-mining teams. KFOR is principally conducting mission-essential mine and unexploded ordnance clearance, including clearance of essential civilian infrastructure and public buildings.”

KFOR’s report for August 1999 (submitted to the UNSC by the SG’s letter of 15 September 1999) confirmed that KFOR worked closely with UNMACC which had been “set up jointly” by KFOR and the UN. KFOR’s subsequent monthly reports (submitted to the UNSC by the SG) noted that KFOR worked closely with UNMAS and UNMACC and emphasised that the eradication of the CBU threat was a priority for MNBs, the aim being to

mark and clear as many areas as possible before the first snow (report Nos. S/1999/868, S/1999/982, S/1999/1062, S/1999/1185 and S/1999/1266).

59. By letter dated 6 April 2000 to COMKFOR, the Deputy SRSG drew the latter’s attention to recent CBU explosions involving deaths and asked for the latter’s personal support to ensure KFOR continued to support the mine clearance project by marking CBU sites as a matter of urgency and providing any further information they had.

60. In 2001 UNMAS commissioned an external evaluation of its mine action programme in Kosovo for the period mid-1999–2001. The report, entitled “An evaluation of the United Nations Mine Action Programme in Kosovo 1999-2001”, commented as follows:

“At the beginning of August 1999, the MACC had *de facto* taken full control of the mine action programme, although formally it still fell under KFOR’s responsibility. ... This was followed, on 24 August, by UNMIK’s approval of the [Concept Plan]. ... [which] coincided with a Memo being sent by ... DSRSG (24 August) to ... SRSG ... [That request was followed up with a letter dated 5 October 1999 from [Deputy SRSG] to General Jackson, [COMKFOR], ... Through this letter the formal handing over from the military to the civilian sector of the mine action programme for Kosovo took place, as mandated in [UNSC Resolution] 1244; although, in reality, this had already taken place towards the end of August.”

## COMPLAINTS

61. Agim Behami complained under Article 2, on his own behalf and on behalf of his son Gadaf Behrami, about the latter’s death and Bekir Behrami complained about his serious injury. They submitted that the incident took place because of the failure of French KFOR troops to mark and/or defuse the un-detonated CBUs which those troops knew to be present on that site.

62. Mr Saramati complained under Article 5 alone, and in conjunction with Article 13 of the Convention, about his extra-judicial detention by KFOR between 13 July 2001 and 26 January 2002. He also complained under Article 6 § 1 that he did not have access to court and about a breach of the respondent States’ positive obligation to guarantee the Convention rights of those residing in Kosovo.

## THE LAW

63. Messrs Behrami invoked Article 2 of the Convention as regards the impugned inaction of KFOR troops. Mr Saramati relied on Articles 5, 6 and 13 as regards his detention by, and on the orders of, KFOR. The President of the Court agreed that the parties’ submissions to the Grand Chamber could be limited to the admissibility of the cases.

## I. WITHDRAWAL OF THE SARAMATI CASE AGAINST GERMANY

64. In arguing that he fell within the jurisdiction of, *inter alia*, Germany, Mr Saramati initially maintained that a German KFOR officer had been involved in his arrest in July 2001 and he also referred to the fact that Germany was the lead nation in MNB Southeast. In their written submissions to the Grand Chamber, the German Government indicated that, despite detailed investigations, they had not been able to establish any involvement of a German KFOR officer in Mr Saramati's arrest.

Mr Saramati responded that, while German KFOR involvement was his recollection and while he had made that submission in good faith, he was unable to produce any objective evidence in support. He therefore accepted the contrary submission of Germany and, further, that German KFOR control of the relevant sector was of itself an insufficient factual nexus to bring him within the jurisdiction of Germany. By letter of 2 November 2006 he requested the Court to allow him to withdraw his case against Germany, which State did not therefore make oral submissions at the subsequent Grand Chamber hearing.

65. The Court considers reasonable the grounds for Mr Saramati's request. There being two remaining respondent States in this case also disputing, *inter alia*, that Mr Saramati fell within their jurisdiction as well as the compatibility of his complaints, the Court does not find that respect for human rights requires a continued examination of Mr Saramati's case against Germany (Article 37 § 1 *in fine* of the Convention) and it should therefore be struck out as against that State.

In such circumstances, the President of the Court has accepted the submissions of the German Government as third party observations under Rule 44 § 2 of the Rules of Court. References hereunder to the respondent States do not therefore include Germany and it is referred to below as a third party.

## II. THE CASES AGAINST FRANCE AND NORWAY

### A. The issue to be examined by the Court

66. The applicants maintained that there was a sufficient jurisdictional link, within the meaning of Article 1 of the Convention, between them and the respondent States and that their complaints were compatible *ratione loci, personae* and *materiae* with its provisions.

67. The respondent and third party States disagreed.

The respondent Governments essentially contended that the applications were incompatible *ratione loci* and *personae* with the provisions of the Convention because the applicants did not fall within their jurisdiction

within the meaning of Article 1 of the Convention. They further maintained that, in accordance with the “*Monetary Gold* principle” (*Monetary Gold Removed from Rome in 1943*, ICJ Reports 1954), this Court could not decide the merits of the case as it would be determining the rights and obligations of non-Contracting Parties to the Convention.

The French Government also submitted that the cases were inadmissible under Article 35 § 1 mainly because the applicants had not exhausted remedies available to them, although they accepted that issues of jurisdiction and compatibility had to be first examined. While the Norwegian Government responded to questions during the oral hearing as to the remedies available to Mr Saramati, they did not argue that his case was inadmissible under Article 35 § 1 of the Convention.

The third party States submitted in essence that the respondent States had no jurisdiction *loci* or *personae*. The UN, intervening as a third party in the *Behrami* case at the request of the Court, submitted that, while de-mining fell within the mandate of UNMACC created by UNMIK, the absence of the necessary CBU location information from KFOR meant that the impugned inaction could not be attributed to UNMIK.

68. Accordingly, much of these submissions concerned the question of whether the applicants fell within the extra-territorial “jurisdiction” of the respondent States within the meaning of Article 1 of the Convention, the compatibility *ratione loci* of the complaints and, consequently, the decision in *Bankovi and Others v. Belgium and 16 Other Contracting States* (dec.) [GC], no. 52207/99, ECHR 2001 XII) as well as related jurisprudence of this Court (*Drozdz and Janousek v. France and Spain*, judgment of 26 June 1992, Series A no. 240; *Loizidou v. Turkey*, judgment of 18 December 1996, Reports 1996 VI, § 56; *Cyprus v. Turkey* [GC], no. 25781/94, ECHR 2001-IV; *Issa and Others v. Turkey*, no. 31821/96, 16 November 2004; *Ila cu and Others v. Moldova and Russia* [GC], no. 48787/99, ECHR 2004-VII; *Öcalan v. Turkey* [GC], no. 46221/99, ECHR 2005-IV; and No. 23276/04, *Hussein v. Albania and Others*, (dec.) 14 March 2006).

In this respect, it was significant for the applicants in the *Behrami* case that, *inter alia*, France was the lead nation in MNB Northeast and Mr Saramati underlined that French and Norwegian COMKFOR issued the relevant detention orders. The respondent (as well as third party) States disputed their jurisdiction *ratione loci* arguing, *inter alia*, that the applicants were not on their national territory, that it was the UN which had overall effective control of Kosovo, that KFOR controlled Mr Saramati and not the individual COMKFORs and that the applicants were not resident in the “legal space” of the Convention.

69. The Court recalls that Article 1 requires Contracting Parties to guarantee Convention rights to individuals falling within their “jurisdiction”. This jurisdictional competence is primarily territorial and, while the notion of compatibility *ratione personae* of complaints is distinct, the two concepts can be inter-dependent (*Bankovi and Others*, cited above, at § 75 and

*Bosphorus Hava Yollar Turizm ve Ticaret Anonimirketi (Bosphorus Airways) v. Ireland* [GC], no. 45036/98, §§ 136 and 137, ECHR 2005-VI). In the present case, the Court considers, and indeed it was not disputed, that the FRY did not “control” Kosovo (within the meaning of the word in the above-cited jurisprudence of the Court concerning northern Cyprus) since prior to the relevant events it had agreed in the MTA, as it was entitled to do as the sovereign power (*Bankovi and Others*, cited above, at §§ 60 and 71 and further references therein; Shaw, *International Law*, 1997, 4th Edition, p. 462, Nguyen Quoc Dinh, *Droit International Public*, 1999, 6th Edition, pp. 475-478; and Dixon, *International Law*, 2000, 4th Edition, pp. 133-135), to withdraw its own forces in favour of the deployment of international civil (UNMIK) and security (KFOR) presences to be further elaborated in a UNSC Resolution, which Resolution had already been introduced under Chapter VII of the UN Charter (see Article 1 of the MTA, paragraph 36 above).

70. The following day, 10 June 1999, UNSC Resolution 1244 was adopted. KFOR was mandated to exercise complete military control in Kosovo. UNMIK was to provide an interim international administration and its first Regulation confirmed that the authority vested in it by the UNSC comprised all legislative and executive power as well as the authority to administer the judiciary (UNMIK Regulation 1999/1 and see also UNMIK Regulation 2001/9). While the UNSC foresaw a progressive transfer to the local authorities of UNMIK’s responsibilities, there is no evidence that either the security or civil situation had relevantly changed by the dates of the present events. Kosovo was, therefore, on those dates under the effective control of the international presences which exercised the public powers normally exercised by the Government of the FRY (*Bankovi and Others*, cited above, at § 71).

71. The Court therefore considers that the question raised by the present cases is, less whether the respondent States exercised extra-territorial jurisdiction in Kosovo but far more centrally, whether this Court is competent to examine under the Convention those States’ contribution to the civil and security presences which did exercise the relevant control of Kosovo.

72. Accordingly, the first issue to be examined by this Court is the compatibility *ratione personae* of the applicants’ complaints with the provisions of the Convention. The Court has summarised and examined below the parties’ submissions relevant to this question.

### **B. The applicants’ submissions**

73. The applicants maintained that KFOR (as opposed to the UN or UNMIK) was the relevant responsible organisation in both cases.

The MTA and UNSC Resolution 1244 provided that KFOR, on which UNMIK relied to exist, controlled and administered Kosovo in a manner equivalent to that of a State. In addition, KFOR was responsible for de-mining and the applicants referred in support to KFOR’s duties outlined in the MTA, in UNSC Resolution 1244, in FRAGO300, in the UNSG reports to the UNSC (which indicated that UNMACC had been “set up jointly” by KFOR and the UN to co-ordinate de-mining (see the SG reports cited at paragraph 58 above) and in a report of the International Committee of the Red Cross (“*Explosive Remnants of War, Cluster Bombs and Landmines in Kosovo*”, Geneva, August 2000, revised June 2001). Since KFOR had been aware of the unexploded ordnance and controlled the site, it should have excluded the public. Moreover, NATO had initially dropped the cluster bombs. Their oral submissions endorsed the UN submissions to the effect that, if UNMACC had responsibility for co-ordinating de-mining, KFOR retained direct responsibility for supporting de-mining which was “critical” to the success of the clearance operation. Mr Saramati’s detention was clearly a security matter for KFOR (citing the KFOR documents referred to at paragraph 51 above).

74. The impugned acts involved the responsibility *ratione personae* of France, in the *Behrami* case, as well as Norway in the *Saramati* case.

75. In the first place, France had voted in the NAC in favour of deploying an international force to Kosovo.

76. Secondly, the French contingent’s control of MNB Northeast was a relevant jurisdictional link in the *Behrami* case. While Germany was the lead nation in MNB Southeast, the applicants considered that that was, of itself, an insufficient jurisdictional link in the *Saramati* case.

77. Thirdly, neither the acts nor omissions of KFOR soldiers were attributable to the UN or NATO. KFOR was a NATO-led multinational force made up of NATO and non-NATO troops (from 10-14 States) allegedly under “unified” command and control. KFOR was not established as a UN force or organ, in contrast to other peacekeeping forces and to UNMIK and UNMACC under direct UN command. If KFOR had been such a UN force (with the prefix “UN”), it would have had a UN Commander in Chief, troops would not have accepted instructions from TCNs and all personnel would have had UN immunities. On the contrary, NATO and other States were authorised to establish the security mission in Kosovo under “unified command and control”. However, this was a “term of art” (the Venice Commission, cited at paragraph 50 above): since there was no operational command link between the UNSC and NATO and since the TCNs retained such significant power, there was no unified chain of command from the UNSC so that neither the acts nor the omissions of KFOR troops could be attributed to NATO or to the UN (relying, in addition, on detailed academic publications).

As to the link between KFOR and the UNSC, the applicants referred to the Attachment to the Agreement on Russian Participation (paragraph 45 above) which described that link as one of “consultation/interaction”.

As to the input of TCNs, the applicants noted that KFOR troops (including COMKFOR) were directly answerable to their national commanders and fell exclusively within the jurisdiction of their TCN: the rules of engagement were national; troops were disciplined by national command; deployment decisions were national; the troops were financed by the States; individual TCNCOs had been set up; TCNs retained disciplinary, civil and criminal jurisdiction over troops for their actions in Kosovo (UNMIK Regulation 2000/47 and HQ KFOR Main SOP, paragraphs 47-49 above) and, since a British court considered itself competent to examine a case about the actions of British KFOR in Kosovo, individual State accountability was feasible (*Bici & Anor v Ministry of Defence* [2004] EWHC 786); and it was national commanders who decided on the waiver of the immunity of KFOR troops whereas the SG so decided for UNMIK personnel. It was disingenuous to accept that KFOR troops were subject to the exclusive control of their TCN and yet deny that they fell within their jurisdiction. There was no TCN/UN agreement or a Status of Forces Agreement (“SOFA”) between the UN and the FRY.

78. Fourthly, as regards Mr Saramati’s case, final decisions on detention lay with COMKFOR who decided without reference to NATO high command or other TCN’s and he was not accountable to, nor reliant on, NATO for those decisions. Since the ordering of detention was a separate exercise of jurisdiction by each COMKFOR, this case was distinguishable from the case of *Hess v. the United Kingdom* (28 May 1975, Decisions and Reports no. 2, p. 72).

79. Fifthly, and alternatively, KFOR did not have a separate legal personality and could not be a subject of international law or bear international responsibility for the acts or omissions of its personnel.

80. Even if this Court were to consider that the relevant States were executing an international (UN/NATO) mandate, this would not absolve them from their Convention responsibility for two alternative reasons. In the first place, Article 103 of the UN Charter would have applied to relieve States of their Convention responsibilities only if UNSC Resolution 1244 required them to act in a manner which breached the Convention which was not the case: there was no conflict between the demands of that Resolution and the Convention. Secondly, the Convention permitted States to transfer sovereign power to an international organisation to pursue common goals if it was necessary to comply with international legal obligations and if the organisation imposing the obligation provided substantive and procedural protection “equivalent” to that of the Convention (*Bosphorus*, cited above, § 155): neither NATO nor KFOR provided such protection.

81. Finally, and as to the respondent States’ arguments, their submissions on the *Monetary Gold* principle were fundamentally misconceived. In addition, it would be inconsistent with the object and purpose of the Convention to accept that States should be deterred from participating in peacekeeping missions by the recognition of this Court’s jurisdiction in the present cases.

### C. The submissions of the respondent States

#### 1. The French Government

82. The Government argued that the term “jurisdiction” in Article 1 was closely linked to the notion of a State’s competence *ratione personae*. In addition, and according to the ILC, the criterion by which the responsibility of an international organisation was engaged in respect of acts of agents at its disposal was the overall effective, as opposed to exclusive, control of the agent by the organisation (paragraphs 30-33 above).

83. The French contingent was placed at the disposal of KFOR which, from a security point of view, exercised effective control in Kosovo. KFOR was an international force under unified command, as could be seen from numerous constituent and applying instruments, over which the French State did not exercise any authority. The MNBs were commanded by an officer from a lead nation, the latter was commanded by COMKFOR who was in turn commanded, through the NATO chain of command, by the UNSC. Operational control of the forces was that of COMKFOR, strategic control was exercised by Supreme Allied Commander Europe of NATO (“SACEUR”) and political control was exercised by the NAC of NATO and, finally, by the UNSC. Decisions and acts were therefore taken in the name of KFOR and the French contingent acted at all times according to the OPLAN devised and controlled by NATO. KFOR was therefore an application of the peace-keeping operations authorised by the UNSC whose resolutions formed the legal basis for NATO to form and command KFOR. In such circumstances, the acts of the national contingents could not be imputed to a State but rather to the UN which exercised overall effective control of the territory.

84. The lack of jurisdiction *ratione personae* of France was confirmed by the following. In the first place, reference was made to the immunities of KFOR and UNMIK and to the special remedies put in place for obtaining damages which were adapted to the particular context of the international mission of KFOR (paragraphs 46-49 above). Secondly, if the Parliamentary Assembly of the Council of Europe (“PACE”) recommended (Resolution 1417 (2005) of 25 January 2005) the creation of a human rights’ court in Kosovo, it could not have considered that Convention Contracting Parties already exercised Article 1 jurisdiction there. Thirdly, the Committee for the

Prevention of Torture, Inhuman and Degrading Treatment (“the CPT”) concluded agreements with KFOR and UNMIK in May 2006 as it considered that Kosovo did not fall under the several jurisdiction of Contracting States. Fourthly, the Venice Commission, in its above-cited Opinion, did not consider that the jurisdiction of Convention States, or therefore of this Court, extended to Kosovo. Fifthly, any recognition of this Court’s jurisdiction would involve judging the actions of non-Contracting States contrary to the *Monetary Gold* principle (judgment cited above). Sixthly, the ILC draft Articles on State Responsibility (paragraph 34 above) meant that the French contingent’s acts and omissions (carried out under the authority of NATO and on behalf of KFOR) were not imputable to France.

### 2. The Norwegian Government

85. The case was incompatible *ratione personae* as Mr Saramati was not within the jurisdiction of the respondent States.

86. The legal framework for KFOR detention was the MTA, UNSC Resolution 1244, OPLAN 10413, KFOR Rules of Engagement, FRAGO997 replaced (in October 2001) by COMKFOR Detention Directive 42.

87. The command structure was hierarchical under unified command and control: each TCN transferred authority over their contingents to the NATO chain of command to ensure the attainment of the common KFOR objective. That chain of command ran from COMKFOR (appointed every 6 months with NATO approval), through a NATO chain of command to the NAC of NATO and onward to the UNSC which had overall authority and control. In all operational matters, no national military chain of command existed between Norway and COMKFOR so that the former could not instruct COMKFOR nor could COMKFOR deviate from NATO orders. All MNBs and their lead countries were fully within the KFOR chain of command. The present case was distinguishable from the above-cited *Bosphorus* case since no TCN had any sovereign rights over or in Kosovo.

88. KFOR was therefore a cohesive military force under the authority of the UNSC which monitored the discharge of the mandate through the SG reports. This constituted, with the civilian presence (UNMIK), a comprehensive UN administration of which national contributions were building blocks and not autonomous units.

89. The monitoring systems in place confirmed this: as noted above, the UNSC received feedback *via* the SG from KFOR and UNMIK; it was UNMIK which submitted a report to the UN Human Rights Committee on the human rights situation in Kosovo (Concluding Observations of the Human Rights Committee: Serbia and Montenegro, 12 August 2004, CCPR/CO/81/SEMO) and this Government also referred to the PACE, CPT and the Venice Commission positions relied on by the French Government (paragraph 84 above).

90. Finally, this Government underlined the serious repercussions of extending Article 1 to cover peacekeeping missions and, notably, the possibility of deterring States from participating in such missions and of making already complex peacekeeping missions unworkable due to overlapping and perhaps conflicting national or regional standards.

### 3. Joint (oral) submissions of France and Norway

91. In these submissions, the States also explained the necessarily evolved nature of modern peacekeeping missions, developed in response to growing demand. That the UN was the controlling umbrella was consistent with UNMIK and KFOR having independent command and control structures and applied regardless of whether KFOR was a traditionally established UN security presence under direct UN operational command or whether, as in the present cases, the UNSC had authorised an organisation or States to implement its security functions. The structure adopted in the present cases maintained the necessary integrity, effectiveness and centrality of the mandate (Report of the Panel on United Nations Peace Operations (the “Brahmi report”, A/55/305-S/2000/809). The security presence acted under UN auspices and action was taken by, and on behalf of, the international structures established by the UNSC and not by, or on behalf of, any TCN. Neither the status of “lead nation” of a MNB and its consequent control of a sector of Kosovo nor the nationality of the French and Norwegian COMKFOR could detach those States from their international mandate.

92. As to the de-mining and detention mandates, UNSC Resolution 1244 authorised KFOR to use all necessary means to secure, *inter alia*, the environment, public safety and, until UNMIK could take over responsibility, de-mining. That Resolution also authorized KFOR to carry out security assessments related to arms smuggling (to the Former Yugoslav Republic of Macedonia) and to detain persons according to detention directives and orders adopted under unified command.

93. Referring to the above-cited *Bosphorus* judgment, they noted that neither of the respondent States exercised sovereignty in Kosovo and none had handed over sovereign powers over Kosovo to an international organisation.

94. There were important sub-issues in the case including liability for involvement in a UN peacekeeping mission and the link between a regional instrument and international peacekeeping mission authorised by an organisation of universal vocation. In this context, they underlined the serious repercussions which the recognition of TCN jurisdiction would have including deterring TCN participation in, and undermining the coherence and therefore effectiveness of, such peacekeeping missions.

95. Finally, the applicants’ suggestion, that the impugned action and inaction constituted a sufficient jurisdictional link between the States and the applicants, was misconceived. The applicants had also confused the

legal personality of international structures (such as NATO and the UN) and that of their member states. Even if KFOR did not have separate legal personality, it was under the control of the UN, which did. Neither the retention of disciplinary control by TCN's nor the Venice Commission Opinion relied upon by the applicants was inconsistent with the international operational control of such an operation by NATO through KFOR.

#### **D. The submissions of the third parties**

##### *1. The Government of Denmark*

96. The applicants did not fall within the jurisdiction of the respondent States and the applications were therefore inadmissible as incompatible *ratione personae*.

97. The cases raised fundamental issues as to the scope of the Convention as a regional instrument and its application to acts of the international peace-keeping forces authorised under Chapter VII of the UN Charter. 192 States had vested the UNSC (including all Convention Contracting States) with primary responsibility for the maintenance of international peace and security (Article 24 of the UN Charter) and, in fulfilling that function, it had the authority to make binding decisions (Article 25) which prevailed over other international obligations (Article 103). The UNSC could lay down the necessary framework for civil and military assistance and, in the case of Kosovo, this was UNSC Resolution 1244. The central question was, therefore, whether personnel contributed by TCNs were also exercising jurisdiction on behalf of the TCN.

98. In the first place, even if the most relevant recognised instance of extra-territorial jurisdiction was the notion (developed in the above-cited jurisprudence concerning Northern Cyprus and the subsequent *Issa* case) of “effective overall control”, the TCNs could not have exercised such control since the relevant TCN personnel acted in fulfilment of UNMIK and KFOR functions. UNMIK exercised virtually all governmental powers in Kosovo and was answerable, *via* the SRSG and SG, to the UNSC. Its staff were employed by the UN. The “unified command and control” structure of KFOR, a coherent multinational force established under UNSC Resolution 1244 and falling under a single line of command under the authority of COMKFOR, rendered untenable the proposition of individual TCN liability for the acts or inaction of their troops carried out in the exercise of international authority.

99. Secondly, States put personnel at the disposal of the UN in Kosovo to pursue the purposes and principles of the UN Charter. A finding of “no jurisdiction” would not leave the applicants in a human rights’ vacuum, as

they suggested, given the steps being taken by those international presences to promote human rights’ protection.

100. Thirdly, the Convention had to be interpreted and applied in the light of international law, in particular, on the responsibility of international organisations for organs placed at their disposal. Referring to the ongoing work of the ILC in this respect (paragraphs 30-33 above), they noted that that work so far had demonstrated no basis for holding a State responsible for peacekeeping forces placed at the disposal of the UNSC acting under Chapter VII, under unified command and control, within the mandate outlined and in execution of orders from that command structure.

101. Finally, if there were specific inadequacies in human rights’ protection in Kosovo, these should be dealt with within the UN context. Seeking to address those deficiencies through this Court risked deterring States from participating in UN peacekeeping missions and undermining the coherence and effectiveness of such missions.

##### *2. The Government of Estonia*

102. The impugned action and inaction were regulated by UNSC Resolution 1244 adopted under Chapter VII of the UN Charter and the States were thereby fulfilling an obligation which fell within the scope of, and complied with, that Resolution in a manner which complied with international human rights standards as prescribed in the UN Charter. Even if there was a conflict between a State’s UN and other treaty obligations, the former took precedent (Articles 25 and 103 of the UN Charter).

##### *3. The German Government’s written submissions*

103. There was no jurisdictional link between Mr Saramati and the respondents because, *inter alia*, the agents of the respondents acted on behalf of UNMIK and KFOR.

104. Ultimate responsibility for Kosovo lay with the UN since effective control of Kosovo was exercised by UNMIK and KFOR pursuant to UNSC Resolution 1244. The UNSC retained overall responsibility and delegated the implementation of the Resolution’s objectives to certain international actors all the while monitoring the discharge of mandates. KFOR retained, and operated under the principle of, “unified command and control”; neither the national contingents nor COMKFOR had roles other than their international mandate under UNSC Resolution 1244 and none exercised sovereign powers, a fact not changed by the retention by TCNs of criminal and disciplinary competence over soldiers. The UNSC, *via* the SG and the SRSG, continued to be the guiding and legal authority for UNMIK. In short, both presences were international, coherent and comprehensive structures admitting of no national instruction.

105. These submissions as to the unity of the UN operation were confirmed by secondary legislation in Kosovo: if UNMIK took care to

ensure in its regulations human rights' protection and monitoring, that implied that the Convention control mechanisms did not apply. In addition, the Human Rights Committee of the UN regarded the inhabitants of Kosovo as falling under the jurisdiction of UNMIK (see paragraph 89 above).

106. This Court could not review acts of the UN, not least since Article 103 of the UN Charter established the primacy of the UN legal order. The above-cited *Bosphorus* case could be distinguished since the impugned actions of the Irish authorities took place on Irish territory over which they were deemed to have had full and effective control (relying on the above-cited judgment of *Ila cu and Others*, §§ 312-33 and *Assanidze v. Georgia* [GC], no. 71503/01, §§ 19-142, ECHR 2004-II) whereas none of the present respondent States enjoyed any sovereign rights or authority over the territory of Kosovo (the above cited Opinion of the Venice Commission and Resolution of PACE). Any determination by this Court of a complaint against UNMIK/KFOR would also breach the *Monetary Gold* principle (cited at paragraph 67 above).

107. Even if the respondent States were found to have “jurisdiction”, the impugned act could not be imputed to those States and, in this respect, the actual command structure was clearly determinative. Having regard to Article 6 of the ILC draft Articles on Responsibility of States for international wrongful acts, Article 5 of the ILC draft Articles on the Responsibility of International Organisations and the report of the Special Rapporteur to the ILC as regards the latter (see paragraphs 30-33 above), any damage caused by UN peacekeeping forces acting within their mandate would be attributable to the UN.

108. Finally, the difficulties to which post-conflict situations gave rise had to be recalled, notably the fact that full human rights' protection was not possible in such a reconstructive context. If TCNs feared their several liability if standards fell below those of the Convention, they might restrain from participating in such missions which would run counter to the spirit of the Convention and its jurisprudence which supported international co-operation and the proper functioning of international organisations (the above-cited cases of *Bankovi and Others*, at § 62, *Ila cu and Others*, at § 332 and *Bosphorus*, at § 150).

#### 4. The Greek Government

109. The legal basis for the civil and military presence in Kosovo was UNSC Resolution 1244. KFOR formed part, and acted in Kosovo under the direction, of a multinational framework formed by the UN and NATO. Even assuming that KFOR (along with UNMIK) exercised effective control in Kosovo, that presence was under the control of the UN and/or NATO and once the TCNs stayed within the relevant mandate they did not exercise any individual control or jurisdiction in Kosovo. Referring to the Opinion of the Venice Commission (cited at paragraph 50 above), the Government

concluded that any action/inaction of KFOR was attributable to the UN and/or NATO and not to the respondent States.

#### 5. The Polish Government

110. A State could not be held responsible for the activities of KFOR or UNMIK, those entities acted under the authority of the UN pursuant to UNSC Resolution 1244 and the UN could not be held accountable under the Convention. In providing resources and personnel to the UN (with a legal personality distinct from its member states), TCNs were not exercising governmental authority in Kosovo. The complaints were therefore incompatible *ratione personae*.

111. A finding that States were severally liable for participating in peacekeeping and democracy-building missions would have a devastating effect on such missions notably as regards the States' willingness to participate in such missions which result would run counter to the values of the UN Charter, the Statute of the Council of Europe and the Convention.

#### 6. The Government of the United Kingdom

112. The applicants did not fall within the jurisdiction of the respondent States so the question of the attribution of actions to those States did not arise (*Bankovi and Others* decision, at § 75).

113. UNSC Resolution 1244 was adopted under Chapter VII of the UN Charter and, according to Article 103 of that Charter, the obligations of members states of the UN under that Resolution took priority over other international treaty obligations.

The administration of Kosovo was in the hands of the UN, *via* UNMIK and the SRSG, and that administration was not subject to the Convention. UNMIK was an international civil presence created by the UN in Kosovo answerable, *via* the SRSG, to the UNSC on its tasks set out in UNSC Resolution 1244. UNMIK was responsible for the civil administration of Kosovo and was therefore responsible for human rights matters. As to determining in particular, responsibility was that of UNMACC: regard was had to the terms of UNSC Resolution 1244, to the establishment of UNMACC and its taking *de facto* and then formal control of de-mining in August and October 1999, respectively. UNMACC being an agency of the UN, any allegation about de-mining could not engage the responsibility of France.

KFOR was a multinational and international security presence so that at no time did any respondent State exercise effective overall control over a part of Kosovo. The MNBs comprised contingents from many TCNs (including substantial contingents from States not parties to the Convention and from outside Europe) and were answerable to an overall commander (“unified command and control”). Even if a State was a “lead nation” of a MNB which controlled a particular sector, that gave that State no degree of control or authority over the inhabitants or territory of Kosovo. Neither

KFOR as a whole nor the TCNs exercised control over any part of Kosovo: UNMIK was tasked with civil administration and with human rights matters and KFOR did not control that administration in a manner comparable to the Turkish forces identified by the Court as regards Northern Cyprus (see cases cited at paragraph 68 above).

114. Accordingly, the effect of UNSC Resolution 1244 was that, at the relevant time, the UNSC exercised the powers of government in Kosovo through an international administration supported by an international security presence to which the respondent States and other non-Contracting States had provided troops.

None of the respondent States were therefore in a position to secure the rights and freedoms defined in Article 1 of the Convention to any of the inhabitants of Kosovo. None were asserting sovereign authority but rather international authority through an international security presence mandated by the UNSC and acting pursuant to powers conferred by a binding Chapter VII decision. This conclusion was reinforced by the above-cited *Hess* case. The present case could be distinguished from the situation in *R (Al-Skeini) v. Secretary of State for Defence* ([2005] EWCA Ci 1609) where a contingent in an international operation had exclusive control of a place of detention.

In addition, while the duty under Article 1 was indivisible (*Bankovi and Others*, at § 75), the respondent States had neither the power nor the responsibility to secure the rights and freedoms defined in Article 1 since that responsibility was specifically vested in UNMIK.

115. The application raised fundamental questions about the relationship between the Convention (a regional treaty and “constitutional instrument of European public order”) and the universal system for the maintenance of international peace in which the Council of Europe played an important part. To superimpose that regional human rights’ structure upon a peace keeping force established by the universal organisation would be inappropriate as a matter of principle and run counter to the *ordre public* to which the Court frequently referred and, further, risked causing serious difficulties to Contracting States in participating in UN and other multinational peacekeeping operations outside the territories of the Convention States.

116. To avoid this result, Article 1 should be interpreted to mean that, where officials from States act together within the scope of an international operation authorised by the UN, they are not exercising sovereign jurisdiction but that of the international authority, so that their acts did not bring those affected within the jurisdiction of the States or engage the Convention responsibility of those States.

#### 7. *The Government of Portugal.*

117. They adopted the observations of the UK Government.

#### 8. *The UN*

118. The UN outlined the respective mandates and responsibilities of UNMIK and KFOR as set out in UNSC Resolution 1244. The mandate adopted by the UNSC was an expression of the will of the member states to grant a UN organ authority, as opposed to a duty, to act: it was not an obligation of result. In executing the mandate, the UN operation retained, unless otherwise specified, discretion to determine implementation including timing and priorities. The UN recalled the relevant provisions of UNSC Resolution 1244 which outlined the main responsibilities of the civil and security presences, noting that the general and at time “imprecise” mandate was, for the most part, left to be concretised and agreed upon in the realities of their daily operations.

In addition, it was important to understand the legal status of UNMIK and its relationship to KFOR. UNMIK was a subsidiary organ of the UN endowed with all-inclusive legislative and administrative powers in Kosovo including the administration of justice (UNMIK Regulation 1999/1, at paragraph 70 above), it was headed by a SRSG and reported directing to the UNSC *via* the SG. KFOR was established as an equal presence but with a separate mandate and control structure: it was a NATO led operation authorised by the UNSC under unified command and control. There was no formal or hierarchical relationship between the two presences nor was the military in any way accountable to the civil presence. However, both were required to co-ordinate and operate in a mutually supportive manner towards the same goals.

119. As to de-mining in particular, paragraph 9(e) of UNSC Resolution 1244 (according responsibility for de-mining to KFOR but expressly leaving for determination by the two presences how that task would be transferred to UNMIK) and paragraph 11(k) (entrusting UNMIK with ensuring the safe and unimpeded return of persons to their homes) constituted the mandate for the UNMIK MAP. On 17 June 1999 UNMACC was established as the focal point and co-ordination mechanism for all mine action activities in Kosovo (the Concept Plan, paragraph 54 above). To fulfil these functions it depended largely on close co-operation with all de-mining partners and, notably, KFOR. Responsibility for de-mining was *de facto* assumed by UNMACC in August 1999 although it was not until October 1999 that UNMIK officially informed KFOR (letter from the Deputy SRSG at paragraph 57 above). However, this did not relieve KFOR of its residual and continuous responsibility to support de-mining activities and, in particular, to identify, mark and report on the location of CBU sites. KFOR’s continuing responsibilities for de-mining activities were set out in the Concept Plan and, more particularly, in the NATO OPLAN 10413 (paragraph 3 above). One of KFOR’s most important tasks was information sharing and marking strike sites. Indeed, according to FRAGO300 (paragraph 56 above), KFOR had decided to increase its commitment to

were international structures established by, and answerable to, the UNSC. The applicants maintained that KFOR had the mandate to both detain and de-mine and that the nature and structure of KFOR was sufficiently different to UNMIK as to engage the respondent States individually.

124. Having regard to the MTA (notably paragraph 2 of Article 1), UNSC Resolution 1244 (paragraph 9 as well as paragraph 4 of Annex 2 to the Resolution) as confirmed by FRAGO997 and later COMKFOR Detention Directive 42 (see paragraph 51 above), the Court considers it evident that KFOR's security mandate included issuing detention orders.

125. As regards de-mining, the Court notes that Article 9(e) of UNSC Resolution 1244 provided that KFOR retained responsibility for supervising de-mining until UNMIK could take over, a provision supplemented by, as pointed out by the UN to the Court, Article 11(k) of the Resolution. The report of the SG to the UNSC of 12 June 1999 (paragraph 53 above) confirmed that this activity was a humanitarian one (former Pillar I of UNMIK) so UNMIK was to establish UNMACC pending which KFOR continued to act as the *de facto* coordination centre. When UNMACC began operations, it was therefore placed under the direction of the Deputy SRSR of Pillar I. The UN submissions to this Court, the above-cited Evaluation Report, the Concept Plan, FRAGO 300 and the letters of the Deputy SRSR of August and October 1999 to KFOR (paragraphs 55 and 57 above) confirm, in the first place, that the mandate for supervising de-mining was *de facto* and *de jure* taken over by UNMACC, created by UNMIK, at the very latest, by October 1999 and therefore prior to the detonation date in the *Behrami* case and, secondly, that KFOR remained involved in de-mining as a service provider whose personnel therefore acted on UNMIK's behalf.

126. The Court does not find persuasive the parties' arguments to the contrary. Whether, as noted by the applicants and the UN respectively, NATO had dropped the CBU's or KFOR had failed to secure the site and provide information thereon to UNMIK, this would not alter the mandate of UNMIK. The reports of the SG to the UNSC (53 above) cited by the applicants may have referred to UNMACC as having been set up jointly by KFOR and the UN, but this described the provision of assistance to UNMIK by the previous *de facto* co-ordination centre (KFOR); it was therefore transitional assistance which accorded with KFOR's general obligation to support UNMIK (paragraphs 6 and 9(f) of UNSC Resolution 1244) and such assistance in the field did not change UNMIK's mandate. The report of the International Committee of the Red Cross relied upon by the applicants, indicated (at p. 23) that mine clearance in Kosovo was coordinated by UNMACC which in turn fell under the aegis of UNMIK. Finally, even if KFOR support was, as a matter of fact, essential to the continued presence of UNMIK (the applicants' submission), this did not alter the fact that the Resolution created separate and distinct presences, with different mandates and responsibilities and, importantly, without any hierarchical relationship or accountability between them (UN submissions, paragraph 118 above).

CBU site marking. Accordingly, UNMIK's responsibility for de-mining was dependant on accurate information being available on locations and, since UNMACC was unaware of the location of the unmarked CBU's relevant to the present case, it took no action to de-mine.

120. In sum, while the de-mining operation would have fallen within UNMACC's mandate, in the absence of the necessary location information from KFOR, the impugned inaction could not be attributed to UNMIK.

### E. The Court's assessment

121. The Court has adopted the following structure in its decision set out below. It has, in the first instance, established which entity, KFOR or UNMIK, had a mandate to detain and de-mine, the parties having disputed the latter point. Secondly, it has ascertained whether the impugned action of KFOR (detention in *Saramati*) and inaction of UNMIK (failure to de-mine in *Behrami*) could be attributed to the UN: in so doing, it has examined whether there was a Chapter VII framework for KFOR and UNMIK and, if so, whether their impugned action and omission could be attributed, in principle, to the UN. The Court has used the term "attribution" in the same way as the ILC in Article 3 of its draft Articles on the Responsibility of International Organisations (see paragraph 29 above). Thirdly, the Court has then examined whether it is competent *ratione personae* to review any such action or omission found to be attributable to the UN.

122. In so doing, the Court has borne in mind that it is not its role to seek to define authoritatively the meaning of provisions of the UN Charter and other international instruments: it must nevertheless examine whether there was a plausible basis in such instruments for the matters impugned before it (*mutatis mutandis*, *Bramigan and McBride v. the United Kingdom*, judgment of 26 May 1993, Series A no. 258-B, § 72).

It also recalls that the principles underlying the Convention cannot be interpreted and applied in a vacuum. It must also take into account relevant rules of international law when examining questions concerning its jurisdiction and, consequently, determine State responsibility in conformity and harmony with the governing principles of international law of which it forms part, although it must remain mindful of the Convention's special character as a human rights treaty (Article 31 § 3 (c) of the Vienna Convention on the Law of Treaties of 23 May 1969; *Al-Adsani v. the United Kingdom* [GC], no. 35763/97, § 55, ECHR 2001-XI; and the above-cited decision of *Banković and Others*, at § 57).

#### 1. The entity with the mandate to detain and to de-mine

123. The respondent and third party States argued that it made no difference whether it was KFOR or UNMIK which had the mandate to detain (the *Saramati* case) and to de-mine (the *Behrami* case) since both

127. Accordingly, the Court considers that issuing detention orders fell within the security mandate of KFOR and that the supervision of de-mining fell within UNMIK's mandate.

2. *Can the impugned action and inaction be attributed to the UN?*

(a) **The Chapter VII foundation for KFOR and UNMIK**

128. As the first step in the application of Chapter VII, the UNSC Resolution 1244 referred expressly to Chapter VII and made the necessary identification of a “threat to international peace and security” within the meaning of Article 39 of the Charter (paragraph 23 above). The UNSC Resolution 1244, *inter alia*, recalled the UNSC’s “primary responsibility” for the “maintenance of international peace and security”. Being “determined to resolve the grave humanitarian situation in Kosovo” and to “provide for the safe and free return of all refugees and displaced persons to their homes”, it determined that the “situation in the region continues to constitute a threat to international peace and security” and, having expressly noted that it was acting under Chapter VII, it went on to set out the solutions found to the identified threat to peace and security.

129. The solution adopted by UNSC Resolution 1244 to this identified threat was, as noted above, the deployment of an international security force (KFOR) and the establishment of a civil administration (UNMIK).

In particular, that Resolution authorised “Member States and relevant international organisations” to establish the international security presence in Kosovo as set out in point 4 of Annex 2 to the Resolution with all necessary means to fulfil its responsibilities listed in Article 9. Point 4 of Annex 2 added that the security presence would have “substantial [NATO] participation” and had to be deployed under “unified command and control”. The UNSC was thereby delegating to willing organisations and members states (see paragraph 43 as regards the meaning of the term “delegation” and paragraph 24 as regards the voluntary nature of this State contribution) the power to establish an international security presence as well as its operational command. Troops in that force would operate therefore on the basis of UN delegated, and not direct, command. In addition, the SG was authorised (Article 10) to establish UNMIK with the assistance of “relevant international organisations” and to appoint, in consultation with the UNSC, a SRSG to control its implementation (Articles 6 and 10 of the UNSC Resolution). The UNSC was thereby delegating civil administration powers to a UN subsidiary organ (UNMIK) established by the SG. Its broad mandate (an interim administration while establishing and overseeing the development of provisional self-government) was outlined in Article 11 of the Resolution.

130. While the Resolution referred to Chapter VII of the Charter, it did not identify the precise Articles of that Chapter under which the UNSC was

acting and the Court notes that there are a number of possible bases in Chapter VII for this delegation by the UNSC: the non-exhaustive Article 42 (read in conjunction with the widely formulated Article 48), the non-exhaustive nature of Article 41 under which territorial administrations could be authorised as a necessary instrument for sustainable peace; or implied powers under the Charter for the UNSC to so act in both respects based on an effective interpretation of the Charter. In any event, the Court considers that Chapter VII provided a framework for the above-described delegation of the UNSC’s security powers to KFOR and of its civil administration powers to UNMIK (see generally and *inter alia*, White and Ulgen, “*The Security Council and the Decentralised Military Option: Constitutionality and Function*”, Netherlands Law Review 44, 1997, 386; Sarooshi, “*The United Nations and the Development of Collective Security: The Delegation by the UN Security Council of its Chapter VII powers*”, Oxford University (1999); Chesterman, “*Just War or Just Peace: Humanitarian Intervention and International Law*”, (2002) Oxford University Press, pp. 167-169 and 172); Zimmermann and Stahn, cited above; De Wet, “*The Chapter VII Powers of the United Nations Security Council*”, 2004, pp. 260-265; Wolfrum “*International Administration in Post-Conflict Situations by the United Nations and other International Actors*”, Max Planck UNYB Vol. 9 (2005), pp. 667-672; Friedrich, “*UNMIK in Kosovo: struggling with Uncertainty*”, Max Planck UNYB 9 (2005) and the references cited therein; and *Prosecutor v. Duško Tadić*, Decision of 2.10.95, Appeals Chamber of ICTY, §§ 35-36).

131. Whether or not the FRY was a UN member state at the relevant time (following the dissolution of the former Socialist Federal Republic of Yugoslavia), the FRY had agreed in the MTA to these presences. It is true that the MTA was signed by “KFOR” the day before the UNSC Resolution creating that force was adopted. However, the MTA was completed on the express basis of a security presence “under UN auspices” and with UN approval and the Resolution had already been introduced before the UNSC. The Resolution was adopted the following day, annexing the MTA and no international forces were deployed until the Resolution was adopted.

(b) **Can the impugned action be attributed to KFOR?**

132. While Chapter VII constituted the foundation for the above-described delegation of UNSC security powers, that delegation must be sufficiently limited so as to remain compatible with the degree of centralisation of UNSC collective security constitutionally necessary under the Charter and, more specifically, for the acts of the delegate entity to be attributable to the UN (as well as Chesterman, de Wet, Friedrich, Kolb and Sarooshi all cited above, see Gowlland-Debbas “*The Limits of Unilateral Enforcement of Community Objectives in the Framework of UN Peace Maintenance*” EIL (2000) Vol 11, No. 2 369-370; Niels Blokker, “*Is the authorisation Authorised? Powers and Practice of the UN Security Council*

to *Authorise the Use of Force by “Coalition of the Able and Willing”*, EJIL (2000), Vol. 11 No. 3; pp. 95-104 and *Meroni v. High Authority* Case 9/56, [1958] ECR 133).

Those limits strike a balance between the central security role of the UNSC and two realities of its implementation. In the first place, the absence of Article 43 agreements which means that the UNSC relies on States (notably its permanent members) and groups of States to provide the necessary military means to fulfil its collective security role. Secondly, the multilateral and complex nature of such security missions renders necessary some delegation of command.

133. The Court considers that the key question is whether the UNSC retained ultimate authority and control so that operational command only was delegated. This delegation model is now an established substitute for the Article 43 agreements never concluded.

134. That the UNSC retained such ultimate authority and control, in delegating its security powers by UNSC Resolution 1244, is borne out by the following factors.

In the first place, and as noted above, Chapter VII allowed the UNSC to delegate to “Member States and relevant international organisations”. Secondly, the relevant power was a delegable power. Thirdly, that delegation was neither presumed nor implicit, but rather prior and explicit in the Resolution itself. Fourthly, the Resolution put sufficiently defined limits on the delegation by fixing the mandate with adequate precision as it set out the objectives to be attained, the roles and responsibilities accorded as well as the means to be employed. The broad nature of certain provisions (see the UN submissions, paragraph 118 above) could not be eliminated altogether given the constituent nature of such an instrument whose role was to fix broad objectives and goals and not to describe or interfere with the detail of operational implementation and choices. Fifthly, the leadership of the military presence was required by the Resolution to report to the UNSC so as to allow the UNSC to exercise its overall authority and control (consistently, the UNSC was to remain actively seized of the matter, Article 21 of the Resolution). The requirement that the SG present the KFOR report to the UNSC was an added safeguard since the SG is considered to represent the general interests of the UN.

While the text of Article 19 of UNSC Resolution 1244 meant that a veto by one permanent member of the UNSC could prevent termination of the relevant delegation, the Court does not consider this factor alone sufficient to conclude that the UNSC did not retain ultimate authority and control.

135. Accordingly, UNSC Resolution 1244 gave rise to the following chain of command in the present cases. The UNSC was to retain ultimate authority and control over the security mission and it delegated to NATO (in consultation with non-NATO member states) the power to establish, as well as the operational command of, the international presence, KFOR.

NATO fulfilled its command mission *via* a chain of command (from the NAC, to SHAPE, to SACEUR, to CJC South) to COMKFOR, the commander of KFOR. While the MNBs were commanded by an officer from a lead TCN, the latter was under the direct command of COMKFOR. MNB action was to be taken according to an operational plan devised by NATO and operated by COMKFOR in the name of KFOR.

136. This delegation model demonstrates that, contrary to the applicants’ argument at paragraph 77 above, direct operational command from the UNSC is not a requirement of Chapter VII collective security missions.

137. However, the applicants made detailed submissions to the effect that the level of TCN control in the present cases was such that it detached troops from the international mandate and undermined the unity of operational command. They relied on various aspects of TCN involvement including that highlighted by the Venice Commission (paragraph 50 above) and noted KFOR’s legal personality separate to that of the TCNs.

138. The Court considers it essential to recall at this point that the necessary (see paragraph 24 above) donation of troops by willing TCNs means that, in practice, those TCNs retain some authority over those troops (for reasons, *inter alia*, of safety, discipline and accountability) and certain obligations in their regard (material provision including uniforms and equipment). NATO’s command of operational matters was not therefore intended to be exclusive, but the essential question was whether, despite such TCN involvement, it was “effective” (ILC Report cited at paragraph 32 above).

139. The Court is not persuaded that TCN involvement, either actual or structural, was incompatible with the effectiveness (including the unity) of NATO’s operational command. The Court does not find any suggestion or evidence of any actual TCN orders concerning, or interference in, the present operational (detention) matter. Equally there is no reason to consider that the TCN structural involvement highlighted by the applicants undermined the effectiveness of NATO’s operational control. Since TCN troop contributions are in law voluntary, the continued level of national deployment is equally so. That TCNs provided materially for their troops would have no relevant impact on NATO’s operational control. It was not argued that any NATO rules of engagement imposed would not be respected. National command (over own troops or a sector in Kosovo) was under the direct operational authority of COMKFOR. While individual claims might potentially be treated differently depending on which TCN was the source of the alleged problem (national commanders decided on whether immunity was to be waived, TCNs had exclusive jurisdiction in (at least) disciplinary and criminal matters, certain TCNs had put in place their own TCNCOs and at least one TCN accepted civil jurisdiction (the above-cited *Bici* case)), it has not been explained how this, of itself, could undermine the effectiveness or unity of NATO command in *operational* matters. The Court does not see how the failure to conclude a SOFA

between the UN and the host FRY could affect, as the applicants suggested, NATO's operational command. That COMKFOR was charged (the applicants at paragraph 78 above) exclusively with issuing detention orders amounting to a division of labour and not a break in a unified command structure since COMKFOR acted at all times as a KFOR officer answerable to NATO through the above-described chain of command.

140. Accordingly, even if the UN itself would accept that there is room for progress in co-operation and command structures between the UNSC, TCNs and contributing international organisations (see, for example, Supplement to an Agenda for Peace: Position paper of the SG on the Occasion of the 50th Anniversary of the UN, A/50/60 - S/1995/1; the *Brahami* report, cited above; UNSC Resolutions 1327 (2000) and 1353 (2001); and Reports of the SG of 1 June and 21 December 2001 on the Implementation of the Recommendations of the Special Committee on Peacekeeping Operations and the Panel on UN Peace Operations (A/55/977, A/56/732)), the Court finds that the UNSC retained ultimate authority and control and that effective command of the relevant operational matters was retained by NATO.

141. In such circumstances, the Court observes that KFOR was exercising lawfully delegated Chapter VII powers of the UNSC so that the impugned action was, in principle, "attributable" to the UN within the meaning of the word outlined at paragraphs 29 and 121 above.

(c) Can the impugned inaction be attributed to UNMIK?

142. In contrast to KFOR, UNMIK was a subsidiary organ of the UN. Whether it was a subsidiary organ of the SG or of the UNSC, whether it had a legal personality separate to the UN, whether the delegation of power by the UNSC to the SG and/or UNMIK also respected the role of the UNSC for which Article 24 of the Charter provided, UNMIK was a subsidiary organ of the UN institutionally directly and fully answerable to the UNSC (see ILC report at paragraph 33 above). While UNMIK comprised four pillars (three of which were at the time led by UNHCR, the OSCE and the EU), each pillar was under the authority of a Deputy SRSG, who reported to the SRSG who in turn reported to the UNSC (Article 20 of UNSC Resolution 1244).

143. Accordingly, the Court notes that UNMIK was a subsidiary organ of the UN created under Chapter VII of the Charter so that the impugned inaction was, in principle, "attributable" to the UN in the same sense.

3. Is the Court competent *ratione personae*?

144. It is therefore the case that the impugned action and inaction are, in principle, attributable to the UN. It is, moreover, clear that the UN has a legal personality separate from that of its member states (*The Reparations*

case, ICJ Reports 1949) and that that organisation is not a Contracting Party to the Convention.

145. In its *Bosphorus* judgment (cited above, §§152-153), the Court held that, while a State was not prohibited by the Convention from transferring sovereign power to an international organisation in order to pursue cooperation in certain fields of activity, the State remained responsible under Article 1 of the Convention for all acts and omissions of its organs, regardless of whether they were a consequence of the necessity to comply with international legal obligations, Article 1 making no distinction as to the rule or measure concerned and not excluding any part of a State's "jurisdiction" from scrutiny under the Convention. The Court went on, however, to hold that where such State action was taken in compliance with international legal obligations flowing from its membership of an international organisation and where the relevant organisation protected fundamental rights in a manner which could be considered at least equivalent to that which the Convention provides, a presumption arose that the State had not departed from the requirements of the Convention. Such presumption could be rebutted, if in the circumstances of a particular case, it was considered that the protection of Convention rights was manifestly deficient: in such a case, the interest of international cooperation would be outweighed by the Convention's role as a "constitutional instrument of European public order" in the field of human rights (*ibid.*, §§ 155-156).

146. The question arises in the present case whether the Court is competent *ratione personae* to review the acts of the respondent States carried out on behalf of the UN and, more generally, as to the relationship between the Convention and the UN acting under Chapter VII of its Charter.

147. The Court first observes that nine of the twelve original signatory parties to the Convention in 1950 had been members of the UN since 1945 (including the two Respondent States), that the great majority of the current Contracting Parties joined the UN before they signed the Convention and that currently all Contracting Parties are members of the UN. Indeed, one of the aims of this Convention (see its preamble) is the collective enforcement of rights in the Universal Declaration of Human Rights of the General Assembly of the UN. More generally, it is further recalled, as noted at paragraph 122 above, that the Convention has to be interpreted in the light of any relevant rules and principles of international law applicable in relations between its Contracting Parties. The Court has therefore had regard to two complementary provisions of the Charter, Articles 25 and 103, as interpreted by the International Court of Justice (see paragraph 27 above).

148. Of even greater significance is the imperative nature of the principle aim of the UN and, consequently, of the powers accorded to the UNSC under Chapter VII to fulfil that aim. In particular, it is evident from the Preamble, Articles 1, 2 and 24 as well as Chapter VII of the Charter that the primary objective of the UN is the maintenance of international peace and security. While it is equally clear that ensuring respect for human rights

represents an important contribution to achieving international peace (see the Preamble to the Convention), the fact remains that the UNSC has primary responsibility, as well as extensive means under Chapter VII, to fulfil this objective, notably through the use of coercive measures. The responsibility of the UNSC in this respect is unique and has evolved as a counterpart to the prohibition, now customary international law, on the unilateral use of force (see paragraphs 18-20 above).

149. In the present case, Chapter VII allowed the UNSC to adopt coercive measures in reaction to an identified conflict considered to threaten peace, namely UNSC Resolution 1244 establishing UNMIK and KFOR.

Since operations established by UNSC Resolutions under Chapter VII of the UN Charter are fundamental to the mission of the UN to secure international peace and security and since they rely for their effectiveness on support from member states, the Convention cannot be interpreted in a manner which would subject the acts and omissions of Contracting Parties which are covered by UNSC Resolutions and occur prior to or in the course of such missions, to the scrutiny of the Court. To do so would be to interfere with the fulfilment of the UN's key mission in this field including, as argued by certain parties, with the effective conduct of its operations. It would also be tantamount to imposing conditions on the implementation of a UNSC Resolution which were not provided for in the text of the Resolution itself. This reasoning equally applies to voluntary acts of the respondent States such as the vote of a permanent member of the UNSC in favour of the relevant Chapter VII Resolution and the contribution of troops to the security mission: such acts may not have amounted to obligations flowing from membership of the UN but they remained crucial to the effective fulfilment by the UNSC of its Chapter VII mandate and, consequently, by the UN of its imperative peace and security aim.

150. The applicants argued that the substantive and procedural protection of fundamental rights provided by KFOR was in any event not “equivalent” to that under the Convention within the meaning of the Court's *Bosphorus* judgment, with the consequence that the presumption of Convention compliance on the part of the respondent States was rebutted.

151. The Court, however, considers that the circumstances of the present cases are essentially different from those with which the Court was concerned in the *Bosphorus* case. In its judgment in that case, the Court noted that the impugned act (seizure of the applicant's leased aircraft) had been carried out by the respondent State authorities, on its territory and following a decision by one of its Ministers (§ 137 of that judgment). The Court did not therefore consider that any question arose as to its competence, notably *ratione personae*, vis-à-vis the respondent State despite the fact that the source of the impugned seizure was an EC Council Regulation which, in turn, applied a UNSC Resolution. In the present cases, the impugned acts and omissions of KFOR and UNMIK cannot be

attributed to the respondent States and, moreover, did not take place on the territory of those States or by virtue of a decision of their authorities. The present cases are therefore clearly distinguishable from the *Bosphorus* case in terms both of the responsibility of the respondent States under Article 1 and of the Court's competence *ratione personae*.

There exists, in any event, a fundamental distinction between the nature of the international organisation and of the international cooperation with which the Court was there concerned and those in the present cases. As the Court has found above, UNMIK was a subsidiary organ of the UN created under Chapter VII and KFOR was exercising powers lawfully delegated under Chapter VII of the Charter by the UNSC. As such, their actions were directly attributable to the UN, an organisation of universal jurisdiction fulfilling its imperative collective security objective.

152. In these circumstances, the Court concludes that the applicants' complaints must be declared incompatible *ratione personae* with the provisions of the Convention.

#### 4. Remaining admissibility issues

153. In light of the above conclusion, the Court considers that it is not necessary to examine the remaining submissions of the parties on the admissibility of the application including on the competence *ratione loci* of the Court to examine complaints against the respondent States about extra-territorial acts or omissions, on whether the applicants had exhausted any effective remedies available to them within the meaning of Article 35 § 1 of the Convention and on whether the Court was competent to consider the case given the principles established by the above-cited *Monetary Gold* judgment (the above-cited cited *Bankovi and Others* decision, at § 83).

For these reasons, the Court

*Decides*, unanimously, to strike the *Saramati* application against Germany out of its list of cases.

*Declares*, by a majority, inadmissible the application of *Behrami* and *Behrami* and the remainder of the *Saramati* application against France and Norway.

Michael O'BOYLE  
Deputy Registrar

Christos ROZAKIS  
President

## APPENDIX

### List of Abbreviations

- CBU: Cluster Bomb Unit
- CFI: Court of First Instance of the European Communities
- CIC SOUTH: Commander in Chief of Allied Forces Southern Europe
- COMKFOR: Commander of KFOR
- CPT: Committee for the Prevention of Torture and Inhuman and Degrading Treatment, Council of Europe
- DSRSG – Deputy Special Representative to the Secretary General, UN
- EU: European Union
- FRAGO: Fragmentary Order
- FRY: Federal Republic of Yugoslavia
- ICJ: International Court of Justice
- ICTY: International Criminal Tribunal for the former Yugoslavia
- ILC: International Law Commission
- KCO: Kosovo Claims Office
- KFOR: Kosovo Force
- MAP : Mine Action Programme
- MNB : Multinational Brigade
- MTA: Military Technical Agreement
- NAC: North Atlantic Council, NATO
- NATO: North Atlantic Treaty Organisation
- OPLAN: Operational Plan
- OSCE: Organisation for Security and Co-operation in Europe
- PACE: Parliamentary Assembly, Council of Europe
- SACEUR: Supreme Allied Commander Europe, NATO
- SG: Secretary General, UN
- SHAPE – Supreme Headquarters Allied Powers Europe, NATO
- SOFA: Status of Forces Agreement
- SOP: Standing Operating Procedures
- SRS: Special Representative to the Secretary General, UN
- TCN: Troop Contributing Nation
- TCNCO: Troop Contributing Nation Claims' Office
- UN: United Nations
- UNHCR: United Nations High Commissioner for Refugees
- UNMACC: United Nations Mine Action Co-ordination Centre
- UNMAS: United Nations Mine Action Service
- UNMIK: United Nations Interim Administration Mission in Kosovo
- UNICEF: United Nations Children's Fund
- UNPROFOR: United Nations Protection Force
- UNSC: United Nations Security Council
- UNTAC: United Nations Transitional Administration for Cambodia
- UNTAES: United Nations Transitional Administration for Eastern Slavonia
- UNTAET: United Nations Transitional Administration for East Timor
- Venice Commission – European Commission for Democracy through Law, Council of Europe

**Yassin Abdullah Kadi, Al Barakaat International  
Foundation v. Council of the European Union,  
Commission of the European Communities, United  
Kingdom of Great Britain and Northern Ireland,  
Appeal (Joined Cases C-402/05 P and C-415/05 P),  
ECJ, 3 September 2008**

**Joined Cases C-402/05 P and C-415/05 P**

**Yassin Abdullah Kadi and Al Barakaat International Foundation**

v

**Council of the European Union**

and

**Commission of the European Communities**

(Common foreign and security policy (CFSP) – Restrictive measures taken against persons and entities associated with Usama bin Laden, the Al-Qaeda network and the Taliban – United Nations – Security Council – Resolutions adopted under Chapter VII of the Charter of the United Nations – Implementation in the Community – Common Position 2002/402/CFSP – Regulation (EC) No 881/2002 – Measures against persons and entities included in a list drawn up by a body of the United Nations – Freezing of funds and economic resources – Committee of the Security Council created by paragraph 6 of Resolution 1267 (1999) of the Security Council (Sanctions Committee) – Inclusion of those persons and entities in Annex I to Regulation (EC) No 881/2002 – Actions for annulment – Competence of the Community – Joint legal basis of Articles 60 EC, 301 EC and 308 EC – Fundamental rights – Right to respect for property, right to be heard and right to effective judicial review)

**Summary of the Judgment**

1. *Acts of the institutions – Choice of legal basis – Regulation imposing restrictive measures directed against certain persons and entities associated with Usama bin Laden, the Al-Qaeda network and the Taliban*  
(Arts 57(2) EC, 60 EC, 133 EC and 301 EC; Council Regulation No 881/2002)
2. *Acts of the institutions – Choice of legal basis – Community measures concerning objectives under the EU Treaty in the sphere of external relations – Article 308 EC – Not permissible*  
(Arts 60 EC, 301 EC and 308 EC; Art. 3 EU)
3. *Acts of the institutions – Choice of legal basis – Regulation imposing restrictive measures directed against certain persons and entities associated with Usama bin Laden, the Al-Qaeda network and the Taliban*  
(Arts 60 EC, 301 EC and 308 EC; Council Regulation No 881/2002)
4. *European Communities – Judicial review of the lawfulness of the acts of the institutions – Community measure giving effect to resolutions of the United Nations Security Council – Indirect review of the lawfulness of decisions of the Security Council – Unacceptable*  
(Art. 220 EC; Council Regulation No 881/2002)
5. *Community law – Principles – Fundamental rights – Taking into consideration the European Convention on Human Rights*

(Arts 220 EC, 307 EC; Art. 6(1) EU)

6. *Public international law – Charter of the United Nations – Resolutions of the Security Council adopted under the Charter of the United Nations*
7. *European Communities – Judicial review of the lawfulness of the acts of the institutions – Regulation imposing restrictive measures directed against certain persons and entities associated with Usama bin Laden, the Al-Qaeda network and the Taliban*
8. *European Communities – Judicial review of the lawfulness of the acts of the institutions – Regulation imposing restrictive measures directed against certain persons and entities associated with Usama bin Laden, the Al-Qaeda network and the Taliban*
9. *European Communities – Judicial review of the lawfulness of the acts of the institutions – Regulation imposing restrictive measures directed against certain persons and entities associated with Usama bin Laden, the Al-Qaeda network and the Taliban*
10. *Actions for annulment – Judgment annulling a measure – Effects – Limitation by the Court – Regulation imposing restrictive measures directed against certain persons and entities associated with Usama bin Laden, the Al-Qaeda network and the Taliban*  
(Art. 231 EC)
1. *To accept the interpretation of Articles 60 EC and 301 EC that it is enough for the restrictive measures laid down by Resolution 1390 (2002) of the United Nations Security Council and given effect by Regulation No 881/2002 imposing certain specific restrictive measures directed against certain persons and entities associated with Usama bin Laden, the Al-Qaeda network and the Taliban to be directed at persons or entities present in a third country or associated with one in some other way, would give those provisions an excessively broad meaning and would fail to take any account at all of the requirement, imposed by their very wording, that the measures decided on the basis of those provisions must be taken against third countries.*

Interpreting Article 301 EC as building a procedural bridge between the Community and the European Union, so that it must be construed as broadly as the relevant Community competences, including those relating to the common commercial policy and the free movement of capital, threatens to reduce the ambit and, therefore, the practical effect of that provision, for, having regard to its actual wording, the subject of that provision is the adoption of potentially very diverse measures affecting economic relations with third countries which, therefore, by necessary inference, must not be limited to spheres falling within other material powers of the Community such as those in the domain of the common commercial policy or of the free movement of capital. Moreover, that interpretation finds no support in the wording of Article 301 EC, which confers a material competence on the Community the scope of which is, in theory, autonomous in relation to that of other Community competences.

Having regard to the purpose and subject-matter of that regulation, it cannot be considered that the regulation relates specifically to international trade in that it is essentially intended to promote, facilitate or govern trade, and it could not, therefore, be based on the powers of the Community in the sphere of the common commercial policy. A Community measure falls within the competence in the field of the common commercial policy provided for in Article 133 EC only if it relates specifically to international trade in that it is essentially intended to promote, facilitate or govern trade and has direct and immediate effects on trade in the products concerned. Nor can that regulation be regarded as falling within the ambit of the provisions of the EC Treaty on free movement of capital and payments, in so

far as it prohibits the transfer of economic resources to individuals in third countries. With regard, first of all, to Article 57(2) EC, the restrictive measures at issue do not fall within one of the categories of measures listed in that provision. Next, so far as Article 60(1) EC is concerned, that provision cannot furnish the basis for the regulation in question either for its ambit is determined by that of Article 301 EC. As regards, finally, Article 60(2) EC, this provision does not include any Community competence to that end, given that it does no more than enable the Member States to take, on certain exceptional grounds, unilateral measures against a third country with regard to capital movements and payments, subject to the power of the Council to require a Member State to amend or abolish such measures.

(see paras 168, 176-178, 183, 185, 187-191, 193)

2. The view that Article 308 EC allows, in the special context of Articles 60 EC and 301 EC, the adoption of Community measures concerning not one of the objectives of the Community but one of the objectives under the EU Treaty in the sphere of external relations, including the common foreign and security policy (the CFSP), runs counter to the very wording of Article 308 EC.

While it is correct to consider that a bridge has been constructed between the actions of the Community involving economic measures under Articles 60 EC and 301 EC and the objectives of the EU Treaty in the sphere of external relations, including the CFSP, neither the wording of the provisions of the EC Treaty nor the structure of the latter provides any foundation for the view that that bridge extends to other provisions of the EC Treaty, in particular to Article 308 EC.

Recourse to Article 308 EC demands that the action envisaged should, on the one hand, relate to the 'operation of the common market' and, on the other, be intended to attain 'one of the objectives of the Community'. That latter concept, having regard to its clear and precise wording, cannot on any view be regarded as including the objectives of the CFSP.

The coexistence of the Union and the Community as integrated but separate legal orders, and the constitutional architecture of the pillars, as intended by the framers of the Treaties now in force, constitute considerations of an institutional kind militating against any extension of that bridge to articles of the EC Treaty other than those with which it explicitly creates a link.

In addition, Article 308 EC, being an integral part of an institutional system based on the principle of conferred powers, cannot serve as a basis for widening the scope of Community powers beyond the general framework created by the provisions of the EC Treaty as a whole and, in particular, by those defining the tasks and the activities of the Community.

Likewise, Article 3 EU, in particular its second paragraph, cannot supply a base for any widening of Community powers beyond the objects of the Community.

(see paras 197-204)

3. Article 308 EC is designed to fill the gap where no specific provisions of the Treaty confer on the Community institutions express or implied powers to act, if such powers appear none the less to be necessary to enable the Community to carry out its functions with a view to attaining one of the objectives laid down by the Treaty.

Regulation No 881/2002 imposing certain specific restrictive measures directed against certain persons and entities associated with Usama bin Laden, the Al-Qaeda network and the Taliban, inasmuch as it imposes restrictive measures of an economic and financial nature, plainly falls within the ambit *ratione materiae* of Articles 60 EC and 301 EC. Since those articles do not, however, provide for any express or implied powers of action to

impose such measures on addressees in no way linked to the governing regime of a third country such as those to whom that regulation applies, that lack of power, attributable to the limited ambit *ratione personae* of those provisions, may be made good by having recourse to Article 308 EC as a legal basis for that regulation in addition to the first two provisions providing a foundation for that measure from the point of view of its material scope, provided, however, that the other conditions to which the applicability of Article 308 EC is subject have been satisfied.

The objective pursued by the contested regulation being to prevent persons associated with Usama bin Laden, the Al-Qaeda network or the Taliban from having at their disposal any financial or economic resources, in order to impede the financing of terrorist activities, it may be made to refer to one of the objectives of the Community for the purpose of Article 308 EC. Inasmuch as they provide for Community powers to impose restrictive measures of an economic nature in order to implement actions decided on under the common foreign and security policy, Articles 60 EC and 301 EC are the expression of an implicit underlying objective, namely, that of making it possible to adopt such measures through the efficient use of a Community instrument. That objective may be regarded as constituting an objective of the Community for the purpose of Article 308 EC.

Implementing such measures through the use of a Community instrument does not go beyond the general framework created by the provisions of the EC Treaty as a whole, because by their very nature they offer a link to the operation of the common market, that link constituting another condition for the application of Article 308 EC. If economic and financial measures such as those imposed by the regulation were imposed unilaterally by every Member State, the multiplication of those national measures might well affect the operation of the common market.

(see paras 211, 213, 216, 222, 225-227, 229-230)

4. The Community is based on the rule of law, inasmuch as neither its Member States nor its institutions can avoid review of the conformity of their acts with the basic constitutional charter, the Treaty, which established a complete system of legal remedies and procedures designed to enable the Court of Justice to review the legality of acts of the institutions. An international agreement cannot affect the allocation of powers fixed by the Treaties or, consequently, the autonomy of the Community legal system, observance of which is ensured by the Court by virtue of the exclusive jurisdiction conferred on it by Article 220 EC, jurisdiction that forms part of the very foundations of the Community.

With regard to a Community act which, like Regulation No 881/2002 imposing certain specific restrictive measures directed against certain persons and entities associated with Usama bin Laden, the Al-Qaeda network and the Taliban, is intended to give effect to a resolution adopted by the Security Council under Chapter VII of the Charter of the United Nations, it is not for the Community judicature, under the exclusive jurisdiction provided for by Article 220 EC, to review the lawfulness of such a resolution adopted by an international body, even if that review were to be limited to examination of the compatibility of that resolution with *ius cogens*, but rather to review the lawfulness of the implementing Community measure.

Any judgment given by the Community judicature deciding that a Community measure intended to give effect to such a resolution is contrary to a higher rule of law in the Community legal order would not entail any challenge to the primacy of that resolution in international law.

(see paras 281-282, 286-288)

5. Fundamental rights form an integral part of the general principles of law whose observance

the Court ensures. For that purpose, the Court draws inspiration from the constitutional traditions common to the Member States and from the guidelines supplied by international instruments for the protection of human rights on which the Member States have collaborated or to which they are signatories. In that regard, the European Convention for the Protection of Human Rights and Fundamental Freedoms has special significance. Respect for human rights is therefore a condition of the lawfulness of Community acts, and measures incompatible with respect for human rights are not acceptable in the Community.

The obligations imposed by an international agreement cannot have the effect of prejudicing the constitutional principles of the EC Treaty, which include the principle that all Community acts must respect fundamental rights, that respect constituting a condition of their lawfulness which it is for the Court to review in the framework of the complete system of legal remedies established by the Treaty.

It is not a consequence of the principles governing the international legal order under the United Nations that any judicial review of the internal lawfulness of the Regulation No 881/2002 imposing certain specific restrictive measures directed against certain persons and entities associated with Usama bin Laden, the Al-Qaeda network and the Taliban in the light of fundamental freedoms is excluded by virtue of the fact that that measure is intended to give effect to a resolution of the Security Council adopted under Chapter VII of the Charter of the United Nations. Such immunity from jurisdiction for a Community measure, as a corollary of the principle of the primacy at the level of international law of obligations under the Charter of the United Nations, especially those relating to the implementation of resolutions of the Security Council adopted under Chapter VII of that Charter, cannot find a basis in the EC Treaty. Article 307 EC may in no circumstances permit any challenge to the principles that form part of the very foundations of the Community legal order, which include the principles of liberty, democracy and respect for human rights and fundamental freedoms enshrined in Article 6(1) EU as a foundation of the Union. If Article 300(7) EC, providing that agreements concluded under the conditions set out therein are to be binding on the institutions of the Community and on Member States, were applicable to the Charter of the United Nations, it would confer on the latter primacy over acts of secondary Community law. That primacy at the level of Community law would not, however, extend to primary law, in particular to the general principles of which fundamental rights form part.

The Community judicature must, therefore, in accordance with the powers conferred on it by the EC Treaty, ensure the review, in principle the full review, of the lawfulness of all Community acts in the light of the fundamental rights forming an integral part of the general principles of Community law, including review of Community measures which, like the regulation at issue, are designed to give effect to the resolutions adopted by the Security Council under Chapter VII of the Charter of the United Nations.

(see paras 283-285, 299, 303-304, 306-308, 326)

6. The Community must respect international law in the exercise of its powers and a measure adopted by virtue of those powers must be interpreted, and its scope limited, in the light of the relevant rules of international law.

In the exercise of its power to adopt Community measures taken on the basis of Articles 60 EC and 301 EC, in order to give effect to resolutions adopted by the Security Council under Chapter VII of the Charter of the United Nations, the Community must attach special importance to the fact that, in accordance with Article 24 of the Charter of the United Nations, the adoption by the Security Council of resolutions under Chapter VII of the Charter constitutes the exercise of the primary responsibility with which that international body is invested for the maintenance of peace and security at the global level, a responsibility which, under Chapter VII, includes the power to determine what and who poses a threat to international peace and security and to take the measures necessary to

maintain or restore them.

The Charter of the United Nations does not, however, impose the choice of a predetermined model for the implementation of resolutions adopted by the Security Council under Chapter VII, since they are to be given effect in accordance with the procedure applicable in that respect in the domestic legal order of each Member of the United Nations. The Charter of the United Nations leaves the Members of the United Nations a free choice among the various possible models for transposition of those resolutions into their domestic legal order.

(see paras 291, 293-294, 298)

7. So far as concerns the rights of the defence, in particular the right to be heard, with regard to restrictive measures such as those imposed by Regulation No 881/2002 imposing certain specific restrictive measures directed against certain persons and entities associated with Usama bin Laden, the Al-Qaeda network and the Taliban, the Community authorities cannot be required to communicate, before the name of a person or entity is included for the first time in the list of persons or entities concerned by those measures, the grounds on which that inclusion is based. Such prior communication would be liable to jeopardise the effectiveness of the freezing of funds and resources imposed by that regulation. Nor, for reasons also connected to the objective pursued by that regulation and to the effectiveness of the measures provided by the latter, were the Community authorities bound to hear the appellants before their names were included for the first time in the list set out in Annex I to that regulation. In addition, with regard to a Community measure intended to give effect to a resolution adopted by the Security Council in connection with the fight against terrorism, overriding considerations to do with safety or the conduct of the international relations of the Community and of its Member States may militate against the communication of certain matters to the persons concerned and, therefore, against their being heard on those matters.

Nevertheless, the rights of the defence, in particular the right to be heard, were patently not respected, for neither the regulation at issue nor Common Position 2002/402 concerning restrictive measures against Usama bin Laden, members of the Al-Qaeda organisation and the Taliban and other individuals, groups, undertakings and entities associated with them, to which that regulation refers, provides for a procedure for communicating the evidence justifying the inclusion of the names of the persons concerned in Annex I to that regulation and for hearing those persons, either at the same time as that inclusion or later and, furthermore, the Council neither communicated to the appellants the evidence used against them to justify the restrictive measures imposed on them nor afforded them the right to be informed of that evidence within a reasonable period after those measures were enacted.

(see paras 334, 338-339, 341-342, 345, 348)

8. The principle of effective judicial protection is a general principle of Community law stemming from the constitutional traditions common to the Member States, which has been enshrined in Articles 6 and 13 of the European Convention on Human Rights, this principle having furthermore been reaffirmed by Article 47 of the Charter of fundamental rights of the European Union.

Observance of the obligation to communicate the grounds on which the name of a person or entity is included in the list forming Annex I to Regulation No 881/2002 imposing certain specific restrictive measures directed against certain persons and entities associated with Usama bin Laden, the Al-Qaeda network and the Taliban is necessary both to enable the persons to whom restrictive measures are addressed to defend their rights in the best possible conditions and to decide, with full knowledge of the relevant facts, whether there is any point in their applying to the Community judicature and also to put the latter fully in a

position in which it may carry out the review of the lawfulness of the Community measure in question which is its duty under the EC Treaty.

Given that those persons or entities were not informed of the evidence adduced against them and having regard to the relationship between the rights of the defence and the right to an effective legal remedy, they have also been unable to defend their rights with regard to that evidence in satisfactory conditions before the Community judicature and the latter is not able to undertake the review of the lawfulness of that regulation in so far as it concerns those persons or entities, with the result that it must be held that their right to an effective legal remedy has also been infringed.

(see paras 335-337, 349, 351)

9. The importance of the aims pursued by a Community act is such as to justify negative consequences, even of a substantial nature, for some operators, including those who are in no way responsible for the situation which led to the adoption of the measures in question, but who find themselves affected, particularly as regards their property rights.

With reference to an objective of public interest as fundamental to the international community as the fight by all means, in accordance with the Charter of the United Nations, against the threats to international peace and security posed by acts of terrorism, the freezing of the funds, financial assets and other economic resources of the persons identified by the Security Council or the Sanctions Committee as being associated with Usama bin Laden, members of the Al-Qaeda organisation and the Taliban cannot per se be regarded as inappropriate or disproportionate. In this respect, the restrictive measures imposed by Regulation No 881/2002 imposing certain specific restrictive measures directed against certain persons and entities associated with Usama bin Laden, the Al-Qaeda network and the Taliban constitute restrictions of the right to property which may, in principle, be justified.

The applicable procedures must, however, afford the person or entity concerned a reasonable opportunity of putting his or its case to the competent authorities, as required by Article 1 of Protocol No 1 to the European Convention on Human Rights.

Thus, the imposition of the restrictive measures laid down by that regulation in respect of a person or entity, by including him or it in the list contained in its Annex 1, constitutes an unjustified restriction of the right to property, for that regulation was adopted without furnishing any guarantee enabling that person or entity to put his or its case to the competent authorities, in a situation in which the restriction of property rights must be regarded as significant, having regard to the general application and actual continuation of the restrictive measures affecting him or it.

(see paras 361, 363, 366, 368-370)

10. In so far as a regulation such as Regulation No 881/2002 imposing certain specific restrictive measures directed against certain persons and entities associated with Usama bin Laden, the Al-Qaeda network and the Taliban must be annulled so far as concerns the appellants, by reason of breach of principles applicable in the procedure followed when the restrictive measures introduced by that regulation were adopted, it cannot be excluded that, on the merits of the case, the imposition of those measures on the appellants may for all that prove to be justified.

Annulment of that regulation with immediate effect would thus be capable of seriously and irreversibly prejudicing the effectiveness of the restrictive measures imposed by the regulation and which the Community is required to implement, because in the interval preceding its replacement by a new regulation the appellants might take steps seeking to

prevent measures freezing funds from being applied to them again. In those circumstances, Article 231 EC will be correctly applied in maintaining the effects of the contested regulation, so far as concerns the appellants, for a period that may not exceed three months running from the date of delivery of this judgment.

(see paras 373-374, 376)

#### JUDGMENT OF THE COURT (Grand Chamber) 3 September 2008 (\*)

(Common foreign and security policy (CFSP) – Restrictive measures taken against persons and entities associated with Usama bin Laden, the Al-Qaeda network and the Taliban – United Nations – Security Council – Resolutions adopted under Chapter VII of the Charter of the United Nations – Implementation in the Community – Common Position 2002/402/CFSP – Regulation (EC) No 881/2002 – Measures against persons and entities included in a list drawn up by a body of the United Nations – Freezing of funds and economic resources – Committee of the Security Council created by paragraph 6 of Resolution 1267 (1999) of the Security Council (Sanctions Committee) – Inclusion of those persons and entities in Annex I to Regulation (EC) No 881/2002 – Actions for annulment – Competence of the Community – Joint legal basis of Articles 60 EC, 301 EC and 308 EC – Fundamental rights – Right to respect for property, right to be heard and right to effective judicial review)

In Joined Cases C-402/05 P and C-415/05 P,

TWO APPEALS under Article 56 of the Statute of the Court of Justice, lodged on 17 and 21 November 2005, respectively,

**Yassin Abdullah Kadi**, residing in Jeddah (Saudi Arabia), represented by I. Brownlie QC, D. Anderson QC and P. Saini, Barrister, instructed by G. Martin, Solicitor, with an address for service in Luxembourg,

**Al Barakaat International Foundation**, established in Spånga (Sweden), represented by L. Silbersky and T. Olsson, advokater,

appellants,

the other parties to the proceedings being:

**Council of the European Union**, represented by M. Bishop, E. Finnegan and E. Karlsson, acting as Agents,

defendant at first instance,

supported by

**Kingdom of Spain**, represented by J. Rodríguez Cárcomo, acting as Agent, with an address for service in Luxembourg,

**French Republic**, represented by G. de Bergues, E. Belliard and S. Gasri, acting as Agents,

**Kingdom of the Netherlands**, represented by H.G. Sevenster and M. de Mol, acting as Agents,  
interveners on appeal,  
**Commission of the European Communities**, represented by C. Brown, J. Enegren and P.J. Kuijper, acting as Agents, with an address for service in Luxembourg,

supported by:  
defendant at first instance,

**French Republic**, represented by G. de Bergues, E. Belliard and S. Gasri, acting as Agents,

intervener on appeal,  
**United Kingdom of Great Britain and Northern Ireland**, represented by R. Caudwell, E. Jenkinson and S. Behzadi-Spencer, acting as Agents, assisted by C. Greenwood QC and A. Dashwood, Barrister, with an address for service in Luxembourg,

intervener at first instance,

THE COURT (Grand Chamber),

composed of: V. Skouris, President, C.W.A. Timmermans (Rapporteur), A. Rosas and K. Lenaerts, Presidents of Chambers, J.N. Cunha Rodrigues, R. Silva de Lapuerta, K. Schiemann, J. Makarczyk, P. Küris, P. Lindh, J.-C. Bonichot, T. von Danwitz and A. Arabadjiev, Judges,

Advocate General: M. Poiares Maduro,

Registrar: J. Swedenborg, Administrator,

having regard to the written procedure and further to the hearing on 2 October 2007,

after hearing the Opinion of the Advocate General at the sitting on 16 January 2008 (C-402/05 P) and 23 January 2008 (C-415/05 P),

gives the following

### Judgment

1 By their appeals, Mr Kadi (C-402/05 P) and Al Barakaat International Foundation ('Al Barakaat') (C-415/05 P) seek to have set aside the judgments of the Court of First Instance of the European Communities of 21 September 2005 in Case T-315/01 *Kadi v Council and Commission* [2005] ECR II-3649 ('Kadi') and Case T-306/01 *Yusuf and Al Barakaat International Foundation v Council and Commission* [2005] ECR II-3533 ('Yusuf and Al Barakaat') (together, 'the judgments under appeal').

2 By those judgments the Court of First Instance rejected the actions brought by Mr Kadi and Al Barakaat against Council Regulation (EC) No 881/2002 of 27 May 2002 imposing certain specific restrictive measures directed against certain persons and entities associated with Usama bin Laden, the Al-Qaeda network and the Taliban, and repealing Council Regulation (EC) No 467/2001 prohibiting the export of certain goods and services to Afghanistan, strengthening the

flight ban and extending the freeze of funds and other financial resources in respect of the Taliban of Afghanistan (OJ 2002 L 139, p. 9, 'the contested regulation'), in so far as that act relates to them.

### Legal context

3 Under Article 1(1) and (3) of the Charter of the United Nations, signed at San Francisco (United States of America) on 26 June 1945, the purposes of the United Nations are *inter alia* '[t]o maintain international peace and security' and '[t]o achieve international cooperation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion'.

4 Under Article 24(1) and (2) of the Charter of the United Nations:

'1. In order to ensure prompt and effective action by the United Nations, its Members confer on the Security Council primary responsibility for the maintenance of international peace and security, and agree that in carrying out its duties under this responsibility the Security Council acts on their behalf.

2. In discharging these duties the Security Council shall act in accordance with the Purposes and Principles of the United Nations. The specific powers granted to the Security Council for the discharge of these duties are laid down in Chapters VI, VII, VIII, and XII.'

5 Article 25 of the Charter of the United Nations provides that '[t]he Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter'.

6 Articles 39, 41 and 48 of the Charter of the United Nations form part of Chapter VII thereof, headed 'Action with respect to threats to the peace, breaches of the peace, and acts of aggression'.

7 In accordance with Article 39 of the Charter of the United Nations:

'The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security.'

8 Article 41 of the Charter of the United Nations is worded as follows:

'The Security Council may decide what measures not involving the use of armed force are to be employed to give effect to its decisions, and it may call upon the Members of the United Nations to apply such measures. These may include complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations.'

9 By virtue of Article 48(2) of the Charter of the United Nations, the decisions of the Security Council for the maintenance of international peace and security 'shall be carried out by the Members of the United Nations directly and through their action in the appropriate international agencies of which they are members'.

10 Article 103 of the Charter of the United Nations states that '[i]n the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail'.

### Background to the disputes

11 The background to the disputes has been set out in paragraphs 10 to 36 of *Kadi* and in paragraphs 10 to 41 of *Yusuf and Al Barakat*.

12 For the purposes of this judgment it may be summarised as follows.

13 On 15 October 1999 the Security Council adopted Resolution 1267 (1999), in which it, *inter alia*, condemned the fact that Afghan territory continued to be used for the sheltering and training of terrorists and planning of terrorist acts, reaffirmed its conviction that the suppression of international terrorism was essential for the maintenance of international peace and security and deplored the fact that the Taliban continued to provide safe haven to Usama bin Laden and to allow him and others associated with him to operate a network of terrorist training camps from territory held by the Taliban and to use Afghanistan as a base from which to sponsor international terrorist operations.

14 In the second paragraph of the resolution the Security Council demanded that the Taliban should without further delay turn Usama bin Laden over to appropriate authorities in a country where he has been indicted, or to appropriate authorities in a country where he will be arrested and effectively brought to justice. In order to ensure compliance with that demand, paragraph 4(b) of Resolution 1267 (1999) provides that all the States must, in particular, 'freeze funds and other financial resources, including funds derived or generated from property owned or controlled directly or indirectly by the Taliban, or by any undertaking owned or controlled by the Taliban, as designated by the Committee established by paragraph 6 below, and ensure that neither they nor any other funds or financial resources so designated are made available, by their nationals or by any persons within their territory, to or for the benefit of the Taliban or any undertaking owned or controlled, directly or indirectly, by the Taliban, except as may be authorised by the Committee on a case-by-case basis on the grounds of humanitarian need'.

15 In paragraph 6 of Resolution 1267 (1999), the Security Council decided to establish, in accordance with rule 28 of its provisional rules of procedure, a committee of the Security Council composed of all its members ('the Sanctions Committee'), responsible in particular for ensuring that the States implement the measures imposed by paragraph 4, designating the funds or other financial resources referred to in paragraph 4 and considering requests for exemptions from the measures imposed by paragraph 4.

16 Taking the view that action by the Community was necessary in order to implement Resolution 1267 (1999), on 15 November 1999 the Council adopted Common Position 1999/727/CFSP concerning restrictive measures against the Taliban (OJ 1999 L 294, p. 1).

17 Article 2 of that Common Position prescribes the freezing of funds and other financial resources held abroad by the Taliban under the conditions set out in Security Council Resolution 1267 (1999).

18 On 14 February 2000, on the basis of Articles 60 EC and 301 EC, the Council adopted Regulation (EC) No 337/2000 concerning a flight ban and a freeze of funds and other financial resources in respect of the Taliban of Afghanistan (OJ 2000 L 43, p. 1).

19 On 19 December 2000 the Security Council adopted Resolution 1333 (2000), demanding, *inter alia*, that the Taliban should comply with Resolution 1267 (1999), and, in particular, that they should cease to provide sanctuary and training for international terrorists and their organisations and turn Usama bin Laden over to appropriate authorities to be brought to justice. The Security

Council decided, in particular, to strengthen the flight ban and freezing of funds imposed under Resolution 1267 (1999).

20 Accordingly, paragraph 8(c) of Resolution 1333 (2000) provides that the States are, *inter alia*, '[t]o freeze without delay funds and other financial assets of Usama bin Laden and individuals and entities associated with him as designated by the [Sanctions Committee], including those in the Al-Qaeda organisation, 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-Qaeda organisation'.

21 In the same provision, the Security Council instructed the Sanctions Committee to maintain an updated list, based on information provided by the States and regional organisations, of the individuals and entities designated as associated with Usama bin Laden, including those in the Al-Qaeda organisation.

22 In paragraph 23 of Resolution 1333 (2000), the Security Council decided that the measures imposed, *inter alia*, by paragraph 8 were to be established for 12 months and that, at the end of that period, it would decide whether to extend them for a further period on the same conditions.

23 Taking the view that action by the European Community was necessary in order to implement that resolution, on 26 February 2001 the Council adopted Common Position 2001/154/CFSP concerning additional restrictive measures against the Taliban and amending Common Position 96/746/CFSP (OJ 2001 L 57, p. 1).

24 Article 4 of that common position provides:

'Funds and other financial assets of Usama bin Laden and individuals and entities associated with him, as designated by the Sanctions Committee, will be frozen, and funds or other financial resources will not be made available to Usama bin Laden and individuals or entities associated with him as designated by the Sanctions Committee, under the conditions set out in [Resolution 1333 (2000)].'

25 On 6 March 2001, on the basis of Articles 60 EC and 301 EC, the Council adopted Regulation (EC) No 467/2001 prohibiting the export of certain goods and services to Afghanistan, strengthening the flight ban and extending the freeze of funds and other financial resources in respect of the Taliban of Afghanistan, and repealing Regulation No 337/2000 (OJ 2001 L 67, p. 1).

26 The third recital in the preamble to that regulation states that the measures provided for by Resolution 1333 (2000) 'fall under the scope of the Treaty and, therefore, notably with a view to avoiding distortion of competition, Community legislation is necessary to implement the relevant decisions of the Security Council as far as the territory of the Community is concerned'.

27 Article 1 of Regulation No 467/2001 defines what is meant by 'funds' and 'freezing of funds'.

28 Under Article 2 of Regulation No 467/2001:

1. All funds and other financial resources belonging to any natural or legal person, entity or body designated by the ... Sanctions Committee and listed in Annex 1 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 through the competent authorities of the Member States listed in Annex II.
- 29 Annex I to Regulation No 467/2001 contains the list of persons, entities and bodies affected by the freezing of funds imposed by Article 2. Under Article 10(1) of Regulation No 467/2001, the Commission was empowered to amend or supplement Annex I on the basis of determinations made by either the Security Council or the Sanctions Committee.
- 30 On 8 March 2001 the Sanctions Committee published a first consolidated list of the entities which and the persons who must be subjected to the freezing of funds pursuant to Security Council Resolutions 1267 (1999) and 1333 (2000) (see the Committee's press release AFG/131 SC/7028 of 8 March 2001). That list has since been amended and supplemented several times. The Commission has in consequence adopted various regulations pursuant to Article 10 of Regulation No 467/2001, in which it has amended or supplemented Annex I to that regulation.
- 31 On 17 October and 9 November 2001 the Sanctions Committee published two new additions to its summary list, including in particular the names of the following entity and person:
- 'Al-Qadi, Yasin (A.K.A. Kadi, Shaykh Yassin Abdullah; A.K.A. Kahdi, Yasin), Jeddah, Saudi Arabia', and
  - 'Barakaat International Foundation, Box 4036, Spånga, Stockholm, Sweden; Rinkebytorget 1, 04, Spånga, Sweden'.
- 32 By Commission Regulation (EC) No 2062/2001 of 19 October 2001 amending, for the third time, Regulation No 467/2001 (OJ 2001 L 277, p. 25), Mr Kadi's name was added, with others, to Annex I.
- 33 By Commission Regulation (EC) No 2199/2001 of 12 November 2001 amending, for the fourth time, Regulation No 467/2001 (OJ 2001 L 295, p. 16), the name Al Barakaat was added, with others, to Annex I.
- 34 On 16 January 2002 the Security Council adopted Resolution 1390 (2002), which lays down the measures to be directed against Usama bin Laden, members of the Al-Qaeda network and the Taliban and other associated individuals, groups, undertakings and entities. Paragraphs 1 and 2 of that resolution provide, in essence, for the continuance of the measures freezing funds imposed by paragraphs 4(b) of Resolution 1267 (1999) and 8(c) of Resolution 1333 (2000). In accordance with paragraph 3 of Resolution 1390 (2002), those measures were to be reviewed by the Security Council 12 months after their adoption, at the end of which period the Council would either allow those measures to continue or decide to improve them.
- 35 Taking the view that action by the Community was necessary in order to implement that resolution, on 27 May 2002 the Council adopted Common Position 2002/402/CFSP concerning restrictive measures against Usama bin Laden, members of the Al-Qaeda organisation and the Taliban and other individuals, groups, undertakings and entities associated with them and repealing Common Positions 96/746, 1999/727, 2001/154 and 2001/771/CFSP (OJ 2002 L 139, p. 4). Article 3 of that Common Position prescribes, *inter alia*, the continuation of the freezing of the funds and other financial assets or economic resources of the individuals, groups, undertakings and entities referred to in the list drawn up by the Sanctions Committee in accordance with Security Council Resolutions 1267 (1999) and 1333 (2000).

- 36 On 27 May 2002 the Council adopted the contested regulation on the basis of Articles 60 EC, 301 EC and 308 EC.
- 37 According to the fourth recital in the preamble to that regulation, the measures laid down by, *inter alia*, Resolution 1390 (2002) fall within the scope of the Treaty and, therefore, notably with a view to avoiding distortion of competition, Community legislation is necessary to implement the relevant decisions of the Security Council as far as the territory of the Community is concerned.
- 38 Article 1 of Regulation No 881/2002 defines 'funds' and 'freezing of funds' in terms which are essentially identical to those used in Article 1 of Regulation No 467/2001.
- 39 Under Article 2 of Regulation No 881/2002:
- '1. All funds and economic resources belonging to, or owned or held by, a natural or legal person, group or entity designated by the Sanctions Committee and listed in Annex I shall be frozen.
  2. No funds shall be made available, directly or indirectly, to, or for the benefit of, a natural or legal person, group or entity designated by the Sanctions Committee and listed in Annex I.
  3. No economic resources shall be made available, directly or indirectly, to, or for the benefit of, a natural or legal person, group or entity designated by the Sanctions Committee and listed in Annex I, so as to enable that person, group or entity to obtain funds, goods or services.'
- 40 Annex I to the contested regulation contains the list of persons, groups and entities affected by the freezing of funds imposed by Article 2 of that regulation. That list includes, *inter alia*, the names of the following entity and persons:
- 'Al Barakaat International Foundation; Box 4036, Spånga, Stockholm, Sweden; Rinkebytorget 1, 04, Spånga, Sweden', and
  - 'Al-Qadi, Yasin (alias KADI, Shaykh Yassin Abdullah; alias KAHDI, Yasin), Jeddah, Saudi Arabia'.
- 41 On 20 December 2002 the Security Council adopted Resolution 1452 (2002), intended to facilitate the implementation of counter-terrorism obligations. Paragraph 1 of that resolution provides for a number of derogations from and exceptions to the freezing of funds and economic resources imposed by Resolutions 1267 (1999) and 1390 (2002) which may be granted by the Member States on humanitarian grounds, on condition that the Sanctions Committee gives its consent.
- 42 On 17 January 2003 the Security Council adopted Resolution 1455 (2003), intended to improve the implementation of the measures imposed in paragraphs 4(b) of Resolution 1267 (1999), 8(c) of Resolution 1333 (2000) and 1 and 2 of Resolution 1390 (2002). In accordance with paragraph 2 of Resolution 1455 (2003), those measures are again to be improved after 12 months or earlier if necessary.
- 43 Taking the view that action by the Community was necessary in order to implement Resolution 1452 (2002), on 27 February 2003 the Council adopted Common Position 2003/140/CFSP concerning exceptions to the restrictive measures imposed by Common Position 2002/402 (OJ 2003 L 53, p. 62). Article 1 of Common Position 2003/140 provides that, when implementing the measures set out in Article 3 of Common Position 2002/402, the Community is to provide for the exceptions permitted by that resolution (2002).
- 44 On 27 March 2003 the Council adopted Regulation (EC) No 561/2003 amending, as regards

exceptions to the freezing of funds and economic resources, Regulation (EC) No 881/2002 (OJ 2003 L 82, p. 1). In the fourth recital in the preamble to that regulation, the Council states that it is necessary, in view of Resolution 1452 (2002), to adjust the measures imposed by the Community.

45 In accordance with Article 1 of Regulation No 561/2003, the following article is to be inserted in the contested regulation:

'Article 2a

1. Article 2 shall not apply to funds or economic resources where:

(a) any of the competent authorities of the Member States, as listed in Annex II, has determined, upon a request made by an interested natural or legal person, that these funds or economic resources are:

(i) necessary to cover basic expenses, including payments for foodstuffs, rent or mortgage, medicines and medical treatment, taxes, insurance premiums, and public utility charges;

(ii) intended exclusively for payment of reasonable professional fees and reimbursement of incurred expenses associated with the provision of legal services;

(iii) intended exclusively for payment of fees or service charges for the routine holding or maintenance of frozen funds or frozen economic resources; or

(iv) necessary for extraordinary expenses; and

(b) such determination has been notified to the Sanctions Committee; and

(c) (i) in the case of a determination under point (a)(i), (ii) or (iii), the Sanctions Committee has not objected to the determination within 48 hours of notification; or

(ii) in the case of a determination under point (a)(iv), the Sanctions Committee has approved the determination.

2. Any person wishing to benefit from the provisions referred to in paragraph 1 shall address its request to the relevant competent authority of the Member State as listed in Annex II.

The competent authority listed in Annex II shall promptly notify both the person that made the request, and any other person, body or entity known to be directly concerned, in writing, whether the request has been granted.

The competent authority shall also inform other Member States whether the request for such an exception has been granted.

3. Funds released and transferred within the Community in order to meet expenses or recognised by virtue of this Article shall not be subject to further restrictive measures pursuant to Article 2.

...

#### **The actions before the Court of First Instance and the judgments under appeal**

46 By applications lodged at the Registry of the Court of First Instance, Mr Kadi and Al Barakaat both brought actions seeking annulment of Regulation No 467/2001, the former seeking annulment also

of Regulation No 2062/2001 and the latter annulment also of Regulation No 2199/2001, in so far as those measures concern them. During the proceedings before the Court of First Instance, the appellants amended their claims and pleas in law, so as to refer thenceforth to the contested regulation, in so far as that measure concerns them.

47 By orders of the President of the First Chamber of the Court of First Instance, the United Kingdom of Great Britain and Northern Ireland was given leave to intervene in support of the forms of order sought by the defendants at first instance.

48 In the judgments under appeal, the Court of First Instance decided as a preliminary point that each action must be regarded as being directed thenceforth against the Council alone, supported by the Commission and the United Kingdom, and the sole object of each must be considered to be a claim for annulment of the contested regulation, in so far as it concerned the respective applicants (*Kadi*, paragraph 58, and *Yusuf and Al Barakaat*, paragraph 77).

49 In support of his claims, Mr Kadi put forward in his application before the Court of First Instance three grounds of annulment alleging, in essence, breaches of his fundamental rights. The first alleges breach of the right to be heard, the second, breach of the right to respect for property and of the principle of proportionality, and the third, breach of the right to effective judicial review.

50 For its part, Al Barakaat based its claims on three grounds of annulment: the first alleges that the Council was incompetent to adopt the contested regulation, the second alleges infringement of Article 249 EC and the third alleges breach of its fundamental rights.

*As regards the Council's competence concerning the adoption of the contested regulation*

51 In the contested judgments, the Court of First Instance first of all considered whether the Council was competent to adopt the contested regulation on the legal basis of Articles 60 EC, 301 EC and 308 EC, taking the view, in paragraph 61 of *Kadi*, that that was a matter of public policy which could therefore be raised by the Community judicature of its own motion.

52 In *Yusuf and Al Barakaat*, the Court of First Instance at the outset dismissed the applicants' claim alleging that there was no legal basis for Regulation No 467/2001.

53 In paragraph 107 of that judgment, the Court of First Instance found it appropriate to take such a step, even though the ground of challenge had become devoid of purpose because of the repeal of that regulation by the contested regulation, for it considered that the grounds on which it dismissed that claim formed part of the premises of its reasoning concerning the legal basis of the latter regulation, thenceforth the sole subject of the action for annulment.

54 In this connection, it first rejected, in *Yusuf and Al Barakaat*, paragraphs 112 to 116, the argument that the acts in question affected individuals, who were moreover nationals of a Member State, whereas Articles 60 EC and 301 EC authorised the Council to take measures against third countries only.

55 In paragraph 115 of that judgment, the Court of First Instance held that, just as economic or financial sanctions may legitimately be directed specifically at the rulers of a third country, rather than at the country as such, they may be directed at the persons or entities associated with those rulers or directly or indirectly controlled by them, wherever they may be.

56 According to paragraph 116, that interpretation, which is not contrary to the letter of Article 60 EC or Article 301 EC, is justified both by considerations of effectiveness and by humanitarian concerns.

57 Next, in *Yusuf and Al Barakaat*, paragraphs 117 to 121, the Court of First Instance rejected the argument that the measures at issue in that case were not intended to interrupt or reduce economic relations with a third country but to combat international terrorism and, more particularly, Usama bin Laden.

58 Finally, in paragraphs 122 and 123 of that judgment, it rejected the argument that those measures were disproportionate to the objective pursued by Articles 60 EC and 301 EC.

59 With regard, next, to the challenge to the legal basis of the contested regulation, the Court of First Instance first held, that, as the Council and the Commission have maintained, Articles 60 EC and 301 EC did not constitute in themselves a sufficient legal basis for that regulation (*Kadi*, paragraphs 92 to 97, and *Yusuf and Al Barakaat*, paragraphs 128 to 133).

60 It found, in particular, that that regulation was intended to enforce what are known as 'smart' sanctions of a new kind, a feature of which is that there is nothing at all to link the sanctions to the territory or the governing regime of a third country, for after the collapse of the Taliban regime the measures at issue, as provided for by Resolution 1390 (2002), were aimed directly at Usama bin Laden, the Al-Qaeda network and the persons and entities associated with them.

61 According to the Court of First Instance, in the light of the wording of Articles 60 EC and 301 EC, and especially of the expressions 'as regards the third countries concerned' and 'with one or more third countries' appearing there, it is not possible to have recourse to those articles to impose that new kind of sanction. They in fact authorise only the adoption of measures against a third country, which may include the rulers of such a country and the individuals and entities associated with them or controlled by them, directly or indirectly. When, however, the regime targeted by those measures has disappeared, there no longer exists a sufficient link between those individuals or entities and the third country concerned.

62 The Court of First Instance held, secondly, that the Council had rightly considered that Article 308 EC did not on its own constitute an adequate legal basis for the adoption of the contested regulation (*Kadi*, paragraphs 98 to 121, and *Yusuf and Al Barakaat*, paragraphs 134 to 157).

63 In that regard it decided that the fight against international terrorism, particularly by the imposition of economic and financial sanctions, such as the freezing of funds, in respect of individuals and entities suspected of contributing to the funding of terrorism, cannot be made to refer to one of the objects which Articles 2 EC and 3 EC expressly entrust to the Community (*Kadi*, paragraph 116, and *Yusuf and Al Barakaat*, paragraph 152).

64 According to the Court of First Instance, the measures provided for by the contested regulation could not be authorised by the object of establishing a common commercial policy (Article 3(1)(b) EC), since the Community's commercial relations with a third country are not at issue in a situation such as that in the cases before it. Nor could the objective of creating a system ensuring that competition in the internal market is not distorted (Article 3(1)(g) EC) be validly relied on, for in any event the elements presented to the Court of First Instance provided no grounds for considering that the contested regulation actually helps to avoid the risk of impediments to the free movement of capital or of appreciable distortion of competition.

65 The Court of First Instance held, thirdly, that the Council was competent to adopt the contested regulation which sets in motion in the Community the economic and financial sanctions provided for by Common Position 2002/402, on the joint basis of Articles 60 EC, 301 EC and 308 EC (*Kadi*, paragraph 135, and *Yusuf and Al Barakaat*, paragraph 170).

66 On this point, the Court of First Instance considered that account had to be taken of the bridge, explicitly established at the time of the revision caused by the Maastricht Treaty, between

Community actions imposing economic sanctions under Articles 60 EC and 301 EC and the objectives of the Treaty on European Union in the sphere of external relations (*Kadi*, paragraph 123, and *Yusuf and Al Barakaat*, paragraph 159).

67 According to the Court of First Instance, Articles 60 EC and 301 EC are wholly special provisions of the EC Treaty, in that they expressly contemplate situations in which action by the Community may prove to be necessary in order to achieve not one of the objects of the Community as fixed by the EC Treaty but rather one of the objectives specifically assigned to the European Union by Article 2 EU, namely, the implementation of a common foreign and security policy (CFSP) (*Kadi*, paragraph 124, and *Yusuf and Al Barakaat*, paragraph 160).

68 Under Articles 60 EC and 301 EC, action by the Community is in actual fact, according to the Court of First Instance, action by the Union, the implementation of which finds its basis in the Community pillar after the Council has adopted a common position or a joint action under the CFSP (*Kadi*, paragraph 125, and *Yusuf and Al Barakaat*, paragraph 161).

#### Observance of Article 249 EC

69 In *Yusuf and Al Barakaat*, the Court of First Instance then went on to examine a plea raised only in the case giving rise to that judgment, alleging that the contested regulation, in so far as it directly prejudiced the rights of individuals and prescribed the imposition of individual sanctions, had no general application and therefore contravened Article 249 EC. That regulation could not, as a result, be understood to be a regulation, but rather a bundle of individual decisions.

70 In paragraphs 184 to 188 of that judgment the Court of First Instance rejected that plea.

71 In paragraph 186 of that judgment, it held that the contested regulation unarguably had general application within the meaning of the second paragraph of Article 249 EC, since it prohibits anyone to make available funds or economic resources to certain persons.

72 The Court of First Instance added that the fact that those persons are expressly named in Annex I to the regulation, so that they appear to be directly and individually concerned by it, within the meaning of the fourth paragraph of Article 230 EC, in no way affects the general nature of that prohibition which is effective erga omnes, as is made clear, in particular, by Article 11 of the regulation.

#### Concerning respect of certain fundamental rights

73 As regards, last, the pleas alleging, in both cases, breach of the applicants' fundamental rights, the Court of First Instance considered it appropriate to consider, in the first place, the relationship between the international legal order under the United Nations and the domestic or Community legal order, and also the extent to which the exercise by the Community and its Member States of their powers is bound by resolutions of the Security Council adopted under Chapter VII of the Charter of the United Nations. This consideration would effectively determine the scope of the review of lawfulness, particularly having regard to fundamental rights, which that court must carry out in respect of the Community acts giving effect to such resolutions. It is only if it should find that they fall within the scope of its judicial review and that they are capable of leading to annulment of the contested regulation that the Court of First Instance would have to rule on those alleged breaches (*Kadi*, paragraphs 178 to 180, and *Yusuf and Al Barakaat*, paragraphs 228 to 230).

74 Examining first the relationship between the international legal order under the United Nations and the domestic legal orders or the Community legal order, the Court of First Instance ruled that, from the standpoint of international law, the Member States, as Members of the United Nations, are bound to respect the principle of the primacy of their obligations 'under the Charter' of the United

Nations, enshrined in Article 103 thereof, which means, in particular, that the obligation, laid down in Article 25 of the Charter, to carry out the decisions of the Security Council prevails over any other obligation they may have entered into under an international agreement (*Kadi*, paragraphs 181 to 184, and *Yusuf and Al Barakaat*, paragraphs 231 to 234).

75 According to the Court of First Instance, that obligation of the Member States to respect the principle of the primacy of obligations undertaken by virtue of the Charter of the United Nations is not affected by the EC Treaty, for it is an obligation arising from an agreement concluded before the Treaty, and so falling within the scope of Article 307 EC. What is more, Article 297 EC is intended to ensure that that principle is observed (*Kadi*, paragraphs 185 to 188, and *Yusuf and Al Barakaat*, paragraphs 235 to 238).

76 The Court of First Instance concluded that resolutions adopted by the Security Council under Chapter VII of the Charter of the United Nations are binding on all the Member States of the Community which must therefore, in that capacity, take all measures necessary to ensure that those resolutions are put into effect and may, and indeed must, leave unapplied any provision of Community law, whether a provision of primary law or a general principle of Community law, that raises any impediment to the proper performance of their obligations under that Charter (*Kadi*, paragraphs 189 and 190, and *Yusuf and Al Barakaat*, paragraphs 239 and 240).

77 However, according to the Court of First Instance, the mandatory nature of those resolutions stemming from an obligation under international law does not bind the Community, for the latter is not, as such, directly bound by the Charter of the United Nations, not being a Member of the United Nations, or an addressee of the resolutions of the Security Council, or the successor to the rights and obligations of the Member States for the purposes of public international law (*Kadi*, paragraph 192, and *Yusuf and Al Barakaat*, paragraph 242).

78 Nevertheless, that mandatory force binds the Community by virtue of Community law (*Kadi*, paragraph 193, and *Yusuf and Al Barakaat*, paragraph 243).

79 In that regard, the Court of First Instance referring, by analogy, to Joined Cases 21/72 to 24/72 *International Fruit Company and Others* [1972] ECR 1219, paragraph 18, in particular, held that, in so far as under the EC Treaty the Community has assumed powers previously exercised by Member States in the area governed by the Charter of the United Nations, the provisions of that Charter have the effect of binding the Community (*Kadi*, paragraph 203, and *Yusuf and Al Barakaat*, paragraph 253).

80 In the following paragraph in those judgments, the Court of First Instance concluded, first, that the Community may not infringe the obligations imposed on its Member States by the Charter of the United Nations or impede their performance and, second, that in the exercise of its powers it is bound, by the very Treaty by which it was established, to adopt all the measures necessary to enable its Member States to fulfil those obligations.

81 Being thus called upon, in the second place, to determine the scope of the review of legality, especially in the light of fundamental rights, that it must carry out concerning Community measures giving effect to resolutions of the Security Council, such as the contested regulation, the Court of First Instance first recalled, in *Kadi*, paragraph 209, and *Yusuf and Al Barakaat*, paragraph 260, that, according to case-law, the European Community is based on the rule of law, inasmuch as neither its Member States nor its institutions can avoid review of the question whether their acts are in conformity with the basic constitutional charter, the EC Treaty, which established a complete system of legal remedies and procedures designed to enable the Court of Justice to review the legality of acts of the institutions.

82 In *Kadi*, paragraph 212, and *Yusuf and Al Barakaat*, paragraph 263, the Court of First Instance

considered, however, that the question arising in the cases before it was whether there exist any structural limits, imposed by general international law or by the EC Treaty itself, on that judicial review.

83 In that connection the Court of First Instance recalled, in *Kadi*, paragraph 213, and *Yusuf and Al Barakaat*, paragraph 264, that the contested regulation, adopted in the light of Common Position 2002/402, constitutes the implementation at Community level of the obligation placed on the Member States of the Community, as Members of the United Nations, to give effect, if appropriate by means of a Community act, to the sanctions against Usama bin Laden, members of the Al-Qaeda network and the Taliban and other associated individuals, groups, undertakings and entities, which have been decided and later strengthened by several resolutions of the Security Council adopted under Chapter VII of the Charter of the United Nations.

84 In that situation, the Community acted, according to the Court of First Instance, under circumscribed powers leaving it no autonomous discretion in their exercise, so that it could, in particular, neither directly alter the content of the resolutions at issue nor set up any mechanism capable of giving rise to such alteration (*Kadi*, paragraph 214, and *Yusuf and Al Barakaat*, paragraph 265).

85 The Court of First Instance inferred therefrom that the applicants' challenging of the internal lawfulness of the contested regulation implied that the Court of First Instance should undertake a review, direct or indirect, of the lawfulness of the resolutions put into effect by that regulation in the light of fundamental rights as protected by the Community legal order (*Kadi*, paragraphs 215 and 216, and *Yusuf and Al Barakaat*, paragraphs 266 and 267).

86 In paragraphs 217 to 225 of *Kadi*, drawn up in terms identical to those of paragraphs 268 to 276 of *Yusuf and Al Barakaat*, the Court of First Instance held as follows:

217 The institutions and the United Kingdom ask the Court as a matter of principle to decline all jurisdiction to undertake such indirect review of the lawfulness of those resolutions which, as rules of international law binding on the Member States of the Community, are mandatory for the Court as they are for all the Community institutions. Those parties are of the view, essentially, that the Court's review ought to be confined, on the one hand, to ascertaining whether the rules on formal and procedural requirements and jurisdiction imposed in this case on the Community institutions were observed and, on the other hand, to ascertaining whether the Community measures at issue were appropriate and proportionate in relation to the resolutions of the Security Council which they put into effect.

218 It must be recognised that such a limitation of jurisdiction is necessary as a corollary to the principles identified above, in the Court's examination of the relationship between the international legal order under the United Nations and the Community legal order.

219 As has already been explained, the resolutions of the Security Council at issue were adopted under Chapter VII of the Charter of the United Nations. In these circumstances, determining what constitutes a threat to international peace and security and the measures required to maintain or re-establish them is the responsibility of the Security Council alone and, as such, escapes the jurisdiction of national or Community authorities and courts, subject only to the inherent right of individual or collective self-defence mentioned in Article 51 of the Charter.

220 Where, acting pursuant to Chapter VII of the Charter of the United Nations, the Security Council, through its Sanctions Committee, decides that the funds of certain individuals or entities must be frozen, its decision is binding on the members of the United Nations, in accordance with Article 48 of the Charter.

221 In light of the considerations set out in paragraphs 193 to 204 above, the claim that the Court of First Instance has jurisdiction to review indirectly the lawfulness of such a decision according to the standard of protection of fundamental rights as recognised by the Community legal order, cannot be justified either on the basis of international law or on the basis of Community law.

222 First, such jurisdiction would be incompatible with the undertakings of the Member States under the Charter of the United Nations, especially Articles 25, 48 and 103 thereof, and also with Article 27 of the Vienna Convention on the Law of Treaties [concluded in Vienna on 25 May 1969].

223 Second, such jurisdiction would be contrary to provisions both of the EC Treaty, especially Articles 5 EC, 10 EC, 297 EC and the first paragraph of Article 307 EC, and of the Treaty on European Union, in particular Article 5 EU, in accordance with which the Community judicature is to exercise its powers on the conditions and for the purposes provided for by the provisions of the EC Treaty and the Treaty on European Union. It would, what is more, be incompatible with the principle that the Community's powers and, therefore, those of the Court of First Instance, must be exercised in compliance with international law (Case C-286/90 *Poulsen and Diva Navigation* [1992] ECR I-6019, paragraph 9, and Case C-162/96 *Racke* [1998] ECR I-3655, paragraph 45).

224 It has to be added that, with particular regard to Article 307 EC and to Article 103 of the Charter of the United Nations, reference to infringements either of fundamental rights as protected by the Community legal order or of the principles of that legal order cannot affect the validity of a Security Council measure or its effect in the territory of the Community (see, by analogy, Case 11/70 *Internationale Handelsgesellschaft* [1970] ECR 1125, paragraph 3; Case 234/85 *Keiler* [1986] ECR 2897, paragraph 7, and Joined Cases 97/87 to 99/87 *Dow Chemical Ibérica and Others v Commission* [1989] ECR 3165, paragraph 38).

225 It must therefore be considered that the resolutions of the Security Council at issue fall, in principle, outside the ambit of the Court's judicial review and that the Court has no authority to call in question, even indirectly, their lawfulness in the light of Community law. On the contrary, the Court is bound, so far as possible, to interpret and apply that law in a manner compatible with the obligations of the Member States under the Charter of the United Nations.'

87 In *Kadi*, paragraph 226, and *Yusuf and Al Barakaat*, paragraph 277, the Court of First Instance found that it was, none the less, empowered to check, indirectly, the lawfulness of the resolutions of the Security Council in question with regard to jus cogens, understood as a body of higher rules of public international law binding on all subjects of international law, including the bodies of the United Nations, and from which no derogation is possible.

88 In paragraphs 227 to 231 of *Kadi*, drawn up in terms identical to those of paragraphs 278 to 282 of *Yusuf and Al Barakaat*, the Court of First Instance held as follows:

'227 In this connection, it must be noted that the Vienna Convention on the Law of Treaties, which consolidates the customary international law and Article 5 of which provides that it is to apply "to any treaty which is the constituent instrument of an international organisation and to any treaty adopted within an international organisation", provides in Article 53 for a treaty to be void if it conflicts with a peremptory norm of general international law (jus cogens), defined as "a norm accepted and recognised by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character". Similarly, Article 64 of the Vienna Convention provides that: "if a new peremptory norm of general international law emerges, any existing treaty which is in conflict with that norm becomes

void and terminates".

228 Furthermore, the Charter of the United Nations itself presupposes the existence of mandatory principles of international law, in particular, the protection of the fundamental rights of the human person. In the preamble to the Charter, the peoples of the United Nations declared themselves determined to "reaffirm faith in fundamental human rights, in the dignity and worth of the human person". In addition, it is apparent from Chapter I of the Charter, headed "Purposes and Principles", that one of the purposes of the United Nations is to encourage respect for human rights and for fundamental freedoms.

229 Those principles are binding on the Members of the United Nations as well as on its bodies. Thus, under Article 24(2) of the Charter of the United Nations, the Security Council, in discharging its duties under its primary responsibility for the maintenance of international peace and security, is to act "in accordance with the Purposes and Principles of the United Nations". The Security Council's powers of sanction in the exercise of that responsibility must therefore be wielded in compliance with international law, particularly with the purposes and principles of the United Nations.

230 International law thus permits the inference that there exists one limit to the principle that resolutions of the Security Council have binding effect: namely, that they must observe the fundamental peremptory provisions of jus cogens. If they fail to do so, however improbable that may be, they would bind neither the Member States of the United Nations nor, in consequence, the Community.

231 The indirect judicial review carried out by the Court in connection with an action for annulment of a Community act adopted, where no discretion whatsoever may be exercised, with a view to putting into effect a resolution of the Security Council may therefore, highly exceptionally, extend to determining whether the superior rules of international law falling within the ambit of jus cogens have been observed, in particular, the mandatory provisions concerning the universal protection of human rights, from which neither the Member States nor the bodies of the United Nations may derogate because they constitute "intransgressible principles of international customary law" (Advisory Opinion of the International Court of Justice of 8 July 1996, *The Legality of the Threat or Use of Nuclear Weapons*, Reports 1996, p. 226, paragraph 79; see also, to that effect, Advocate General Jacobs's Opinion in Case C-84/95 *Bosphorus* [1996] ECR I-3953, paragraph 65).'

89 Firstly, with particular regard to the alleged breach of the fundamental right to respect for property, the Court of First Instance considered, in *Kadi*, paragraph 237, and *Yusuf and Al Barakaat*, paragraph 288, that it fell to be assessed whether the freezing of funds provided for by the contested regulation, as amended by Regulation No 561/2003, and, indirectly, by the resolutions of the Security Council put into effect by those regulations, infringed the applicant's fundamental rights.

90 In *Kadi*, paragraph 238, and *Yusuf and Al Barakaat*, paragraph 289, the Court of First Instance decided that such was not the case, measured by the standard of universal protection of the fundamental rights of the human person covered by jus cogens.

91 In *Kadi*, paragraphs 239 and 240, and *Yusuf and Al Barakaat*, paragraphs 290 and 291, the Court of First Instance held that the exemptions to and derogations from the obligation to freeze funds provided for in the contested regulation as a result of its amendment by Regulation No 561/2003, itself putting into effect Resolution 1452 (2002), show that it is neither the purpose nor the effect of that measure to submit the persons entered in the summary list to inhuman or degrading treatment.

92 In *Kadi*, paragraphs 243 to 251, and *Yusuf and Al Barakaat*, paragraphs 294 to 302, the Court of

First Instance held, in addition, that the freezing of funds did not constitute an arbitrary, inappropriate or disproportionate interference with the right to private property of the persons concerned and could not, therefore, be regarded as contrary to *jus cogens*, having regard to the following facts:

- the measures in question pursue an objective of fundamental public interest for the international community, that is to say, the campaign against international terrorism, and the United Nations are entitled to undertake protective action against the activities of terrorist organisations;
- freezing of funds is a temporary precautionary measure which, unlike confiscation, does not affect the very substance of the right of the persons concerned to property in their financial assets but only the use thereof;
- the resolutions of the Security Council at issue provide for a means of reviewing, after certain periods, the overall system of sanctions;
- those resolutions set up a procedure enabling the persons concerned to present their case at any time to the Sanctions Committee for review, through the Member State of their nationality or that of their residence.

93 As regards, secondly, the alleged breach of the right to be heard, and more particularly, first, the applicants' alleged right to be heard by the Community institutions before the contested regulation had been adopted, the Court of First Instance held as follows in paragraph 258 of *Kadi*, to which paragraph 328 of *Yusuf and Al Barakaat* corresponds, *mutatis mutandis*:

'In this instance, as is apparent from the preliminary observations above on the relationship between the international legal order under the United Nations and the Community legal order, the Community institutions were required to transpose into the Community legal order resolutions of the Security Council and decisions of the Sanctions Committee that in no way authorised them, at the time of actual implementation, to provide for any Community mechanism whatsoever for the examination or re-examination of individual situations, since both the substance of the measures in question and the mechanisms for re-examination (see paragraphs 262 et seq. ...) fell wholly within the purview of the Security Council and its Sanctions Committee. As a result, the Community institutions had no power of investigation, no opportunity to check the matters taken to be facts by the Security Council and the Sanctions Committee, no discretion with regard to those matters and no discretion either as to whether it was appropriate to adopt sanctions *vis-à-vis* the applicants. The principle of Community law relating to the right to be heard cannot apply in such circumstances, where to hear the person concerned could not in any case lead the institution to review its position.'

94 The Court of First Instance concluded in *Kadi*, paragraph 259, that the Council was not obliged to hear the applicant on the subject of his inclusion in the list of persons and entities affected by the sanctions, in the context of the adoption and implementation of the contested regulation and, in *Yusuf and Al Barakaat*, paragraph 329, that the Council was not obliged to hear the applicants before the contested regulation was adopted.

95 With regard, second, to breach of the applicants' alleged right to be heard by the Sanctions Committee in connection with their inclusion in the summary list, the Court of First Instance held in paragraph 261 of *Kadi* and paragraph 306 of *Yusuf and Al Barakaat* that no such right was provided for by the Security Council's resolutions at issue.

96 It further held in *Yusuf and Al Barakaat*, paragraph 307, that no mandatory rule of public international law requires a prior hearing for the persons concerned in circumstances such as those of the case in point.

97 The Court of First Instance observed, moreover, that although the resolutions of the Security Council concerned and the subsequent regulations that put them into effect in the Community do not provide for any right of audience for individual persons, they nevertheless set up a mechanism for the re-examination of individual cases, by providing that the persons concerned may address a request to the Sanctions Committee, through their national authorities, in order either to be removed from the summary list or to obtain exemption from the freezing of funds (*Kadi*, paragraph 262, and *Yusuf and Al Barakaat*, paragraph 309).

98 Referring, in *Kadi*, paragraph 264, and in *Yusuf and Al Barakaat*, paragraph 311, to the 'Guidelines of the [Sanctions] Committee for the conduct of its work', as adopted by that committee on 7 November 2002 and amended on 10 April 2003 ('the Sanctions Committee's Guidelines'), and, in *Kadi*, paragraph 266, and *Yusuf and Al Barakaat*, paragraph 313, to various resolutions of the Security Council, the Court of First Instance noted, in those paragraphs, the importance attached by the Security Council, in so far as possible, to the fundamental rights of the persons entered in the list, and especially to their right to be heard.

99 In *Kadi*, paragraph 268, and in *Yusuf and Al Barakaat*, paragraph 315, the Court of First Instance found that the fact, noted in the previous paragraph of both judgments, that the re-examination procedure confers no right directly on the persons concerned themselves to be heard by the Sanctions Committee – the only authority competent to give a decision, on a State's petition, on the re-examination of their case – with the result that those persons are dependent, essentially, on the diplomatic protection afforded by the States to their nationals, is not to be deemed improper in the light of the mandatory prescriptions of the public international order.

100 The Court of First Instance added that it is open to the persons involved to bring an action for judicial review based on domestic law, indeed even directly on the contested regulation and the relevant resolutions of the Security Council which it puts into effect, against any wrongful refusal by the competent national authority to submit their cases to the Sanctions Committee for re-examination (*Kadi*, paragraph 270, and *Yusuf and Al Barakaat*, paragraph 317).

101 The Court of First Instance held, in addition, that in circumstances such as those of the cases in point, in which what is at issue is a temporary precautionary measure restricting the availability of the applicants' property, observance of the fundamental rights of the persons concerned does not require the facts and evidence adduced against them to be communicated to them, once the Security Council or its Sanctions Committee is of the view that there are grounds concerning the international community's security that militate against it (*Kadi*, paragraph 274, and *Yusuf and Al Barakaat*, paragraph 320).

102 Having regard to those considerations, the Court of First Instance held in *Kadi*, paragraph 276, and *Yusuf and Al Barakaat*, paragraph 330, that the applicants' plea alleging breach of the right to be heard must be rejected.

103 Lastly, with regard to the plea alleging breach of the right to effective judicial review, the Court of First Instance found as follows in paragraphs 278 to 285 of *Kadi*, drawn up in terms essentially identical to those of paragraphs 333 to 340 of *Yusuf and Al Barakaat*:

'278 In the circumstances of this case, the applicant has been able to bring an action for annulment before the Court of First Instance under Article 230 EC.

279 In dealing with that action, the Court carries out a complete review of the lawfulness of the contested regulation with regard to observance by the institutions of the rules of jurisdiction and the rules of external lawfulness and the essential procedural requirements which bind their actions.'

280 The Court also reviews the lawfulness of the contested regulation having regard to the Security Council's regulations which that act is supposed to put into effect, in particular from the viewpoints of procedural and substantive appropriateness, internal consistency and whether the regulation is proportionate to the resolutions.

281 Giving a decision pursuant to that review, the Court finds that it is not disputed that the applicant is indeed one of the natural persons entered in the summary list on 19 October 2001.

282 In this action for annulment, the Court has moreover held that it has jurisdiction to review the lawfulness of the contested regulation and, indirectly, the lawfulness of the resolutions of the Security Council at issue, in the light of the higher rules of international law falling within the ambit of *ius cogens*, in particular the mandatory prescriptions concerning the universal protection of the rights of the human person.

283 On the other hand, as has already been observed in paragraph 225 above, it is not for the Court to review indirectly whether the Security Council's resolutions in question are themselves compatible with fundamental rights as protected by the Community legal order.

284 Nor does it fall to the Court to verify that there has been no error of assessment of the facts and evidence relied on by the Security Council in support of the measures it has taken or, subject to the limited extent defined in paragraph 282 above, to check indirectly the appropriateness and proportionality of those measures. It would be impossible to carry out such a check without trespassing on the Security Council's prerogatives under Chapter VII of the Charter of the United Nations in relation to determining, first, whether there exists a threat to international peace and security and, second, the appropriate measures for confronting or settling such a threat. Moreover, the question whether an individual or organisation poses a threat to international peace and security, like the question of what measures must be adopted *vis-à-vis* the persons concerned in order to frustrate that threat, entails a political assessment and value judgments which in principle fall within the exclusive competence of the authority to which the international community has entrusted primary responsibility for the maintenance of international peace and security.

285 It must thus be concluded that, to the extent set out in paragraph 284 above, there is no judicial remedy available to the applicant, the Security Council not having thought it advisable to establish an independent international court responsible for ruling, in law and on the facts, in actions brought against individual decisions taken by the Sanctions Committee.'

104 In *Kadi*, paragraph 268, and *Yusuf and Al Barakaat*, paragraph 315, the Court of First Instance held that any such lacuna in the judicial protection available to the applicant is not in itself contrary to *ius cogens*.

105 In this respect, the Court of First Instance found as follows in paragraphs 288 to 290 of *Kadi*, drawn up in terms essentially identical to those of paragraphs 343 to 345 of *Yusuf and Al Barakaat*:

'288 In this instance, the Court considers that the limitation of the applicant's right of access to a court, as a result of the immunity from jurisdiction enjoyed as a rule, in the domestic legal order of the Member States of the United Nations, by resolutions of the Security Council adopted under Chapter VII of the Charter of the United Nations, in accordance with the relevant principles of international law (in particular Articles 25 and 103 of [that] Charter), is inherent in that right as it is guaranteed by *ius cogens*.

289 Such a limitation is justified both by the nature of the decisions that the Security Council is led to take under Chapter VII of the Charter of the United Nations and by the legitimate objective pursued. In the circumstances of this case, the applicant's interest in having a court

hear his case on its merits is not enough to outweigh the essential public interest in the maintenance of international peace and security in the face of a threat clearly identified by the Security Council in accordance with the Charter of the United Nations. In this regard, special significance must attach to the fact that, far from providing for measures for an unlimited period of application, the resolutions successively adopted by the Security Council have always provided a mechanism for re-examining whether it is appropriate to maintain those measures after 12 or 18 months at most have elapsed ...

290 Last, the Court considers that, in the absence of an international court having jurisdiction to ascertain whether acts of the Security Council are lawful, the setting-up of a body such as the Sanctions Committee and the opportunity, provided for by the legislation, of applying at any time to that committee in order to have any individual case re-examined, by means of a procedure involving both the "petitioned government" and the "designating government" ..., constitute another reasonable method of affording adequate protection of the applicant's fundamental rights as recognised by *ius cogens*.'

106 Consequently the Court of First Instance dismissed the pleas alleging breach of the right to effective judicial review and, as a result, the actions in their entirety.

#### Forms of order sought by the parties to the appeal

107 By his appeal, Mr Kadi claims that the Court should:

- set aside in whole the judgment in *Kadi*;
  - declare the contested regulation null and void, and
  - order the Council and/or the Commission to pay the costs in this appeal and those incurred in the proceedings before the Court of First Instance.
- 108 By its appeal, Al Barakaat claims that the Court should:
- set aside the judgment in *Yusuf and Al Barakaat*;
  - declare the contested regulation null and void, and
  - order the Council and the Commission to pay the costs relating to the present appeal and to the proceedings before the Court of First Instance.

109 The Council contends in both cases that the Court should reject the appeal and order the appellant to pay the costs.

110 In Case C-402/05 P the Commission contends that the Court should:

- declare that none of the grounds of appeal put forward by the appellant is capable of impugning the operative part of the judgment in *Kadi*, and replace the grounds of that judgment with those proposed in its response;
- in consequence, reject the appeal; and
- order the appellant to pay the costs.

- 111 In Case C-415/05 P the Commission contends that the Court should:
- reject the appeal in its entirety, and
  - order the appellant to pay the costs.
- 112 The United Kingdom has brought a cross-appeal contending that the Court should:
- dismiss the appeals, and
  - set aside that part of the judgments under appeal which deal with the question of *ius cogens*, that is to say, paragraphs 226 to 231 of *Kadi* and paragraphs 277 to 281 of *Yusuf and Al Barakaat*.
- 113 The Kingdom of Spain, granted leave to intervene in support of the forms of order sought by the Council by orders of the President of the Court of 27 April 2006 (Case C-402/05 P) and 15 May 2006 (Case C-415/05 P), contends that the Court should:
- reject the appellants' appeals in their entirety and uphold in their entirety the judgments under appeal, and
  - order the appellants to pay the costs;
  - dismiss the Commission's contentions in relation to the first ground of each appeal, upholding the judgments under appeal, and
  - order the Commission to pay the costs;
  - in the alternative, if the Court should set aside the judgment under appeal and, consequently, annul Regulation No 881/2002, order the effects of that regulation to be maintained, pursuant to Article 231 EC, until a new regulation is adopted replacing it.
- 114 The French Republic, granted leave to intervene in support of the forms of order sought by the Council by orders of the President of the Court of 27 April 2006 (Case C-402/05 P) and 15 May 2006 (Case C-415/05 P), contends that the Court should:
- reject the appellants' appeals, allow the cross-appeal of the United Kingdom and carry out a substitution of the grounds as regards the part of the judgments under appeal which concerns *ius cogens*, and
  - order the appellants to pay the costs.

115 The Kingdom of the Netherlands, granted leave to intervene in support of the form of order sought by the Council by orders of the President of the Court of 27 April 2006 (Case C-402/05 P) and 15 May 2006 (Case C-415/05 P), contends in both cases that the Court should dismiss the appeal, with the proviso that there should be substitution of the grounds with regard to the scope of the review of legality or, alternatively, to the question whether norms of *ius cogens* have been infringed.

#### **The grounds of challenge to the judgments under appeal**

- 116 Mr Kadi puts forward two grounds of appeal, the first alleging lack of any legal basis for the contested regulation and the second concerning breach of several rules of international law by the Court of First Instance and the consequences of that breach as regards the assessment of his arguments relating to the infringement of certain of his fundamental rights which he pleaded before the Court of First Instance.
- 117 Al Barakaat puts forward three grounds of appeal, the first alleging lack of any legal basis for the contested regulation, the second infringement of Article 249 EC and the third infringement of certain of its fundamental rights.
- 118 In its cross-appeal the United Kingdom puts forward a single ground relating to the error of law allegedly committed by the Court of First Instance in concluding in the judgments under appeal that it was competent to consider whether the Security Council's resolutions at issue were compatible with the rules of *ius cogens*.
- Concerning the appeals**
- 119 By order of 13 November 2007 the President of the Court ordered the name of Ahmed Ali Yusuf to be struck from the Court's register in response to his abandonment of the appeal that he had brought jointly with Al Barakaat in Case C-415/05 P.
- 120 The parties and the Advocate General having been heard in this regard, it is appropriate, on account of the connection between them, to join the present cases for the purposes of the judgment, in accordance with Article 43 of the Rules of Procedure of the Court.
- Concerning the grounds of appeal relating to the legal basis of the contested regulation*
- Arguments of the parties
- 121 By his first ground of appeal Mr Kadi claims that the Court of First Instance erred in law when it held, in paragraph 135 of *Kadi*, that it was possible for the contested regulation to be adopted on the joint basis of Articles 60 EC, 301 EC and 308 EC.
- 122 That plea falls into three parts.
- 123 In the first part Mr Kadi maintains that the Court of First Instance erred in law in ruling that Articles 60 EC and 301 EC could be regarded as constituting a partial legal basis for the contested regulation. Furthermore, the Court of First Instance did not explain how those provisions, which can provide a basis only for measures against third countries, could be envisaged, together with Article 308 EC, as the legal basis of the contested regulation, when the latter contains only restrictive measures directed against individuals and non-State entities.
- 124 In the second part, Mr Kadi asserts that, if Articles 60 EC and 301 EC were nevertheless to be held to constitute a partial legal basis for the contested regulation, the Court of First Instance erred in law because it misconstrued Article 301 EC and its function as a 'bridge', for that article in no circumstances includes the power to take measures intended to attain an objective of the EU Treaty.
- 125 In the third part, Mr Kadi argues that the Court of First Instance erred in law by interpreting Article 308 EC in such a way that that article might provide a legal basis for legislation for which the necessary powers have not been provided in the EC Treaty and which was not necessary in order to attain one of the Community's objectives. In *Kadi*, paragraphs 122 to 134, the Court of First Instance wrongly assimilated the objectives of the two integrated but separate legal orders

- constituted by the Union and the Community and thus misinterpreted the limitations of Article 308 EC.
- 126 Furthermore, such a view is, to his mind, incompatible with the principle of conferred powers laid down in Article 5 EC. It follows from paragraphs 28 to 35 of Opinion 2/94 of 28 March 1996 (ECR I-1759) that the fact that an objective is mentioned in the Treaty on European Union cannot make good the lack of that objective in the list of the objectives of the EC Treaty.
- 127 The Council and the French Republic contest the first part of Mr Kadi's first ground of appeal, arguing *inter alia* that the reference to Articles 60 EC and 301 EC in the legal basis of the contested regulation is warranted by the fact that those provisions enact restrictive measures whose ambit was to be extended, by means of recourse to Article 308 EC, to persons or non-State entities that were not, therefore, covered by those two articles.
- 128 For its part, the United Kingdom maintains that Article 308 EC was used as a means of supplementing the instrumental powers provided for by Articles 60 EC and 301 EC, those articles not constituting, therefore, a partial legal basis for the contested regulation. The Kingdom of Spain raises in essence the same line of argument.
- 129 With regard to the second part of that ground of appeal, the Council maintains that the *raison d'être* of the bridge provided for in Article 301 EC is precisely to give it the power to adopt measures intended to attain an objective of the EU Treaty.
- 130 The Kingdom of Spain, the French Republic and the United Kingdom maintain that it is Article 308 EC, and not Articles 60 EC and 301 EC, that enabled the adoption of restrictive measures aimed at individuals and non-State entities, so enlarging the ambit of those two articles.
- 131 So far as the third part of Mr Kadi's first ground of appeal is concerned, the Council argues that the whole point of the bridge provided by Article 301 EC is, exceptionally, to use those powers conferred on the Community to impose economic and financial sanctions for the purpose of attaining an objective of the CFSP, and so of the Union, rather than a Community objective.
- 132 The United Kingdom and the Member States intervening in the appeal broadly support that position.
- 133 The United Kingdom clarifies its position by stating that, in its view, the action provided for by the contested regulation can be regarded as contributing to the attainment, not of an objective of the Union but of an objective of the Community, namely, the implicit and purely instrumental objective underlying Articles 60 EC and 301 EC of providing effective means of giving effect, exclusively by way of coercive economic measures, to acts adopted under the power conferred upon the Union by Title V of the EU Treaty.
- 134 According to that Member State, when attainment of that instrumental objective requires forms of economic coercion going beyond the powers specifically conferred on the Council by Articles 60 EC and 301 EC, it is appropriate to have recourse to Article 308 EC to supplement those powers.
- 135 The Commission, having declared that it had reconsidered its point of view, argues, primarily, that Articles 60 EC and 301 EC, having regard to their wording and context, constituted in themselves appropriate and sufficient legal bases for the adoption of the contested regulation.
- 136 In this connection the Commission raises the following arguments:
- the wording of Article 301 EC is sufficiently broad to cover economic sanctions against individuals – provided that they are present in or otherwise associated with a third country.

- The expression 'economic relations' covers a vast range of activities. Any economic sanction, even directed at a third country, such as an embargo, directly affects the individuals concerned and the country only indirectly. The wording of Article 301 EC, especially the term 'in part', does not call for a partial measure to be directed against a particular section of the countries in question, such as the government. Allowing, as it does, the Community to break off completely economic relations with all countries, that provision must also authorise it to interrupt economic relations with a limited number of individuals in a limited number of countries;
- the fact that similar words are used in Article 41 of the Charter of the United Nations and in Article 301 EC shows that the authors of that latter provision clearly intended to provide a platform for the implementation by the Community of all measures adopted by the Security Council that call for action by the Community;
  - Article 301 EC puts in place a procedural bridge between the Community and the Union, but seeks neither to increase nor to reduce the ambit of Community competence. As a result, that provision has to be interpreted as broadly as the relevant Community powers.
- 137 The Commission maintains that the measures at issue fall within the ambit of the common commercial policy, having regard to the effect on trade of measures prohibiting the movement of economic resources, and even that those measures constitute provisions relating to the free movement of capital, since they involve the prohibition of transferring economic resources to individuals in third countries.
- 138 The Commission also argues that it is clear from Article 56(1) and (2) EC that movements of capital and payments between the Community and third countries fall within Community competence, the Member States being able to adopt sanction measures only within the framework of Article 60(2) EC and not of Article 58(1)(b) EC.
- 139 In consequence, the Commission believes that recourse may not be had to Article 308 EC for the adoption of the contested regulation, since power to act is provided for in Articles 60 EC and 301 EC. The Commission, referring in particular to Case C-94/03 *Commission v Council* [2006] ECR I-1, paragraph 35, argues that those articles provide the basis for the main or predominant component of the contested regulation, in relation to which other components such as the freezing of the assets of persons who are both nationals of Member States of the Union and associated with a foreign terrorist group are merely secondary.
- 140 Alternatively, the Commission contends that, before resorting to Article 308 EC, it is necessary to examine the applicability of the articles of the EC Treaty dealing with the common commercial policy and the free movement of capital and payments.
- 141 In the further alternative, it maintains that, if Article 308 EC were to be held to be the legal basis of the contested regulation, it would be the sole legal basis, for recourse to that provision must be based on the consideration that action by the Community is necessary in order to attain one of the objectives of the Community and not, as the Court of First Instance held, the objectives of the EU Treaty in the sphere of external relations, in this case the CFSP.
- 142 The Community objectives involved in this instance are the common commercial policy, mentioned in Article 3(1)(b) EC, and the free movement of capital, referred to by implication in Article 3(1)(c) EC, read in conjunction with the relevant provisions of the EC Treaty, namely those contained in Article 56 EC relating to the free movement of capital to and from third countries. The measures at issue, producing effects on trade, regardless of the fact that they were adopted in pursuit of foreign policy objectives, fall within the ambit of those Community objectives.

- 143 Mr Kadi, the Kingdom of Spain, the French Republic and the United Kingdom, contest the view principally put forward by the Commission, objecting as follows:
- it is an extensive interpretation of Articles 60 EC and 301 EC misconstruing the radically different and new nature of what are known as the 'smart' sanctions in question, in that they are no longer linked to any third country, and a hazardous interpretation, for those articles were introduced at a time when such a link was a feature of sanctions;
  - unlike the 'smart' sanctions in question, a total embargo is essentially directed against the rulers of a third country on whom such a measure is designed to exert pressure, and only indirectly against economic operators in the country concerned, so that it cannot be argued that all sanctions, including embargoes, are primarily directed at individuals;
  - unlike Article 41 of the Charter of the United Nations, Article 301 EC is specifically concerned with the interruption of economic relations 'with one or more third countries', with the result that no argument can be drawn from the similarity of the wording of those two provisions;
  - Article 301 EC is not just a procedural provision. It institutes a specific legal basis and procedure and clearly confers material competence upon the Community;
  - the measures imposed by the contested regulation do not concern commercial relations between the Community and third countries, and cannot, therefore, rely on the objective of the common commercial policy;
  - the Court of First Instance correctly held that those measures do not help to avoid the risk of obstacles to the free movement of capital and that Article 60(2) EC cannot be used as the basis for restrictive measures aimed at individuals or entities. That provision concerning only measures against third countries, the measures at issue could have been adopted only pursuant to Article 58(1)(b) EC.
- 144 The Commission's alternative argument is also challenged by both Mr Kadi and the Kingdom of Spain and the French Republic.
- 145 Recourse to Articles 133 EC or 57(2) EC is not permitted, given that the measures laid down by the contested regulation do not concern commercial relations with third countries and do not fall within the category of movements of capital referred to in Article 57(2) EC.
- 146 Nor can it be argued that the contested regulation is designed to attain any Community objectives within the meaning of Article 308 EC. The objective of the free movement of capital is excluded, for application of the measure freezing funds provided for by that regulation is not capable of giving rise to any credible and serious danger of divergence between Member States. The objective of the common commercial policy is not relevant either, given that the freezing of the funds of an individual in no way linked to the government of a third country does not concern trade with such a country and does not pursue an objective of commercial policy.
- 147 If the submission it principally advances should be accepted, the Commission asks the Court, for reasons of legal certainty and for the sake of the proper performance of the obligations undertaken vis-à-vis the United Nations, to consider as definitive the effects of the contested regulation as a whole, pursuant to Article 231 EC.
- 148 In the same situation, the Kingdom of Spain and the French Republic have also made a request to that effect.

- 149 In contrast, Mr Kadi objects to those requests, claiming that the contested regulation constitutes a serious breach of fundamental rights. In any case, an exception must be made for persons who, like the applicant, have already brought an action against the regulation.
- 150 Al Barakaat's first ground of challenge is that the Court of First Instance held in paragraphs 158 to 170 of *Yusuf and Al Barakaat* that it was possible for the contested regulation to be adopted on the joint basis of Articles 60 EC, 301 EC and 308 EC.
- 151 In its view, the Court of First Instance erred in law when it held, in paragraphs 160 and 164 of that judgment, that Articles 60 EC and 301 EC are not concerned solely with the performance of an action by the Community but may also concern one of the objectives specifically assigned to the Union by Article 2 EU, namely, the implementation of the CFSP.
- 152 Second, Al Barakaat criticises the Court of First Instance for finding, in paragraphs 112, 113, 115 and 116 of that judgment, that sanctions decided on against individuals for the purpose of influencing economic relations with one or more third countries are covered by the provisions of Articles 60 EC and 301 EC, and that that interpretation is justified both by considerations of effectiveness and by humanitarian concerns.
- 153 The Council counters that the Court of First Instance was right to rule, in paragraph 161 of *Yusuf and Al Barakaat*, that, by reason of the bridge supplied by Articles 60 EC and 301 EC, sanctions laid down on the basis of those provisions, as a result of the adoption of a common position or of a joint action under the CFSP providing for the interruption or reduction of the economic relations of the Community with one or more third countries, are intended to attain the CFSP objective pursued by those acts of the Union.
- 154 The Council also argues that the Court of First Instance was entitled to find that recourse to Article 308 EC as an additional legal basis for the contested regulation was justified, given that that article serves only to enable the extension of the economic and financial sanctions already provided for in Articles 60 EC and 301 EC to individuals and entities not sufficiently linked to any given third country.
- 155 Finally, the Council is of the view that the applicant's complaint concerning the efficiency and proportionality of the sanctions provided for by that regulation is irrelevant to the issue of the appropriateness of the legal basis of the regulation.
- 156 With regard to that second complaint, the United Kingdom too takes the view that it has no bearing on the appeal brought by Al Barakaat, given that, as held in paragraph 1 of the operative part of the judgment under appeal, the Court of First Instance found that there was no longer any need to adjudicate on the legality of Regulation No 467/2001.
- 157 As to the rest, the arguments raised by the Kingdom of Spain, the French Republic, the United Kingdom and the Commission, are, in substance, the same as those raised by those parties in connection with Mr Kadi's appeal.
- Findings of the Court
- 158 With regard, first, to the challenges made by Al Barakaat to paragraphs 112, 113, 115 and 116 of *Yusuf and Al Barakaat*, it must be held that those paragraphs relate to the legal basis of Regulation No 467/2001.
- 159 Now, that regulation has been repealed and replaced by the contested regulation. Moreover, as indicated by the Court of First Instance in *Yusuf and Al Barakaat*, paragraph 77, without challenge from Al Barakaat in its appeal, the sole object of the action before the Court of First Instance, after

- Al Barakaat had adjusted its claims for relief and pleas in law to the contested regulation, was annulment of that latter regulation, in so far as it concerns that applicant.
- 160 In those circumstances, those claims cannot in any case lead to the setting aside of that judgment and must therefore be regarded as immaterial.
- 161 In any event, the considerations of *Yusuf and Al Barakaat* to which those claims relate, treated by the Court of First Instance as premisses of its reasoning with regard to the legal basis of the contested regulation, are reproduced in later paragraphs of that judgment and in *Kadi* and will be examined during the assessment of the grounds of appeal challenging those paragraphs.
- 162 There is, therefore, no reason to examine those heads of claim in so far as they relate to the legal basis of Regulation No 467/2001.
- 163 It is appropriate to rule in the second place on the merits of the principal argument put forward by the Commission, that Articles 60 EC and 301 EC, in the light of their wording and context, are in themselves an appropriate and sufficient legal base for the contested regulation.
- 164 That argument is directed against paragraphs 92 to 97 of *Kadi* and paragraphs 128 to 133 of *Yusuf and Al Barakaat*, in which the Court of First Instance ruled to the contrary.
- 165 That argument must be rejected.
- 166 The Court of First Instance in fact rightly ruled that, having regard to the wording of Articles 60 EC and 301 EC, especially to the expressions 'as regards the third countries concerned' and 'with one or more third countries' used there, those provisions concern the adoption of measures vis-à-vis third countries, since that concept may include the rulers of such a country and also individuals and entities associated with or controlled, directly or indirectly, by them.
- 167 The restrictive measures provided for by Resolution 1390 (2002), which the contested regulation was intended to put into effect, are measures notable for the absence of any link to the governing regime of a third country. Following the collapse of the Taliban regime, those measures were aimed directly at Usama bin Laden, the Al-Qaeda network and the persons and entities associated with them, as they appear in the summary list. They do not, therefore, as such, fall within the ambit of Articles 60 EC and 301 EC.
- 168 To accept the interpretation of Articles 60 EC and 301 EC proposed by the Commission, that it is enough for the restrictive measures at issue to be directed at persons or entities present in a third country or associated with one in some other way, would give those provisions an excessively broad meaning and would fail to take any account at all of the requirement, imposed by their very wording, that the measures decided on the basis of those provisions must be taken against third countries.
- 169 In addition, the essential purpose and object of the contested regulation is to combat international terrorism, in particular to cut it off from its financial resources by freezing the economic funds and resources of persons or entities suspected of involvement in activities linked to terrorism, and not to affect economic relations between the Community and each of the third countries where those persons or entities are, always supposing, moreover, that their place of residence is known.
- 170 The restrictive measures provided for by Resolution 1390 (2002) and put into effect by the contested regulation cannot be considered to be measures intended to reduce economic relations with each of those third countries, or, indeed, with certain Member States of the Community, in which are to be found persons or entities whose names are included in the list reproduced in Annex I to that regulation.

- 171 Nor can the argument supported by the Commission be justified by the expression 'in part' appearing in Article 301 EC.
- 172 In point of fact, that expression refers to the possible limitation of the scope *ratione materiae* or *personae* of the measures that might, by definition, be taken under that provision. It has, however, no effect on the necessary status of the persons to whom those measures might be addressed and cannot, therefore, warrant extending the application of the measures to such persons who are in no way linked to the governing regime of a third country and who, by the same token, do not fall within the ambit of that provision.
- 173 The Commission's argument relating to the similarity of the words used in Article 41 of the Charter of the United Nations and in Article 301 EC, from which it deduces that the latter provision constitutes a platform for the implementation by the Community of all measures adopted by the Security Council that call for action by the Community, cannot succeed either.
- 174 Article 301 EC specifically refers to the interruption of economic relations 'with one or more third countries', whereas such an expression is not used in Article 41 of the Charter of the United Nations.
- 175 What is more, in other respects the ambit of Article 41 of the Charter of the United Nations does not coincide with that of Article 301 EC, for the first provision enables the adoption of a series of measures other than those referred to by the second, including measures of a fundamentally different nature from those intended to interrupt or reduce economic relations with third countries, such as the breaking off of diplomatic relations.
- 176 The Commission's argument that Article 301 EC builds a procedural bridge between the Community and the European Union, so that it must be interpreted as broadly as the relevant Community competences, including those relating to the common commercial policy and the free movement of capital, must also be rejected.
- 177 That interpretation of Article 301 EC threatens to reduce the ambit and, therefore, the practical effect of that provision, for, having regard to its actual wording, the subject of that provision is the adoption of potentially very diverse measures affecting economic relations with third countries which, therefore, by necessary inference, must not be limited to spheres falling within other material powers of the Community such as those in the domain of the common commercial policy or of the free movement of capital.
- 178 Moreover, that interpretation finds no support in the wording of Article 301 EC, which confers a material competence on the Community the scope of which is, in theory, autonomous in relation to that of other Community competences.
- 179 It is necessary to examine in the third place the alternative argument raised by the Commission that, if it was not possible for the contested regulation to be adopted on the sole legal basis of Articles 60 EC and 301 EC, recourse to Article 308 EC would not be justified, for that latter provision is, in particular, applicable only if no other provision of the EC Treaty confers the powers necessary to adopt the measure concerned. The restrictive measures imposed by the contested regulation fall within the Community's powers of action, in particular its powers in the sphere of the common commercial policy and free movement of capital.
- 180 In this connection, the Court of First Instance held, in paragraphs 100 of *Kadi* and 136 of *Yusuf and Al Barakaat*, that no specific provision of the EC Treaty provides for the adoption of measures of the kind laid down in the contested regulation relating to the campaign against international terrorism and, more particularly, to the imposition of economic and financial sanctions, such as the freezing of funds, in respect of individuals and entities suspected of contributing to the funding of

international terrorism, where no connection whatsoever has been established with the governing regime of a third State, with the result that the first condition for the applicability of Article 301 EC was satisfied in the case in point.

- 181 That conclusion must be upheld.
- 182 According to the Court's settled case-law, the choice of legal basis for a Community measure must rest on objective factors which are amenable to judicial review, including, in particular, the aim and the content of the measure (see, *inter alia*, Case C-440/05 *Commission v Council* [2007] ECR I-9097, paragraph 61 and the case-law there cited).
- 183 A Community measure falls within the competence in the field of the common commercial policy provided for in Article 133 EC only if it relates specifically to international trade in that it is essentially intended to promote, facilitate or govern trade and has direct and immediate effects on trade in the products concerned (see, *inter alia*, Case C-347/03 *Regione autonoma Friuli-Venezia Giulia and ERSA* [2005] ECR I-3785, paragraph 75 and the case-law there cited).
- 184 With regard to its essential purpose and object, as explained in paragraph 169 above, the contested regulation is intended to combat international terrorism and it provides to that end a series of restrictive measures of an economic and financial kind, such as freezing the economic funds and resources of persons or entities suspected of contributing to the funding of international terrorism.
- 185 Having regard to that purpose and object, it cannot be considered that the regulation relates specifically to international trade in that it is essentially intended to promote, facilitate or govern trade.
- 186 Furthermore, although that regulation may indeed produce effects on international trade, it is plainly not its purpose to give rise to direct and immediate effects of that nature.
- 187 The contested regulation could not, therefore, be based on the powers of the Community in the sphere of the common commercial policy.
- 188 On the other hand, according to the Commission, in so far as the contested regulation prohibits the transfer of economic resources to individuals in third countries, it falls within the ambit of the provisions of the EC Treaty on free movement of capital and payments.
- 189 That assertion too must be rejected.
- 190 With regard, first of all, to Article 57(2) EC, the restrictive measures imposed by the contested regulation do not fall within one of the categories of measures listed in that provision.
- 191 Nor can Article 60(1) EC furnish the basis for the contested regulation, for its ambit is determined by that of Article 301 EC.
- 192 As has earlier been held in paragraph 167 above, that latter provision is not concerned with the adoption of restrictive measures such as those at issue, which are notable for the absence of any link to the governing regime of a third country.
- 193 As regards, finally, Article 60(2) EC, this provision does not include any Community competence to that end, given that it does no more than enable the Member States to take, on certain exceptional grounds, unilateral measures against a third country with regard to capital movements

and payments, subject to the power of the Council to require a Member State to amend or abolish such measures.

- 194 In the fourth place it is appropriate to examine the claims directed by Mr Kadi, in the second and third parts of his first ground of appeal, against paragraphs 122 to 135 of *Kadi*, by Al Barakaat against paragraphs 158 to 170 of *Yusuf and Al Barakaat*, and the Commission's criticisms of those same paragraphs of the judgments under appeal.
- 195 In those paragraphs, the Court of First Instance ruled that it was possible for the contested regulation to be adopted on the joint basis of Articles 60 EC, 301 EC and 308 EC, on the ground that, by reason of the bridge explicitly established between Community actions imposing economic sanctions under Articles 60 EC and 301 EC, on the one hand, and the objectives of the EU Treaty in the sphere of external relations, on the other, recourse to Article 308 EC in the particular context envisaged by the two former articles is justified in order to attain such objectives, in this instance the objective of the CFSP pursued by the contested regulation, that is to say, the campaign against international terrorism and its funding.
- 196 In this regard it must be held that the judgments under appeal are indeed vitiated by an error of law.
- 197 In point of fact, while it is correct to consider, as did the Court of First Instance, that a bridge has been constructed between the actions of the Community involving economic measures under Articles 60 EC and 301 EC and the objectives of the EU Treaty in the sphere of external relations, including the CFSP, neither the wording of the provisions of the EC Treaty nor the structure of the latter provides any foundation for the view that that bridge extends to other provisions of the EC Treaty, in particular to Article 308 EC.
- 198 With specific regard to Article 308 EC, if the position of the Court of First Instance were to be accepted, that provision would allow, in the special context of Articles 60 EC and 301 EC, the adoption of Community measures concerning not one of the objectives of the Community but one of the objectives under the EU Treaty in the sphere of external relations, including the CFSP.
- 199 The inevitable conclusion is that such a view runs counter to the very wording of Article 308 EC.
- 200 Recourse to that provision demands that the action envisaged should, on the one hand, relate to the 'operation of the common market' and, on the other, be intended to attain 'one of the objectives of the Community'.
- 201 That latter concept, having regard to its clear and precise wording, cannot on any view be regarded as including the objectives of the CFSP.
- 202 Furthermore, the coexistence of the Union and the Community as integrated but separate legal orders, and the constitutional architecture of the pillars, as intended by the framers of the Treaties now in force, referred to by the Court of First Instance in paragraphs 120 of *Kadi* and 156 of *Yusuf and Al Barakaat*, constitute considerations of an institutional kind militating against any extension of the bridge to articles of the EC Treaty other than those with which it explicitly creates a link.
- 203 In addition, Article 308 EC, being an integral part of an institutional system based on the principle of conferred powers, cannot serve as a basis for widening the scope of Community powers beyond the general framework created by the provisions of the EC Treaty as a whole and, in particular, by those defining the tasks and the activities of the Community (Opinion 2/94, paragraph 30).
- 204 Likewise, Article 3 EU, referred to by the Court of First Instance in paragraphs 126 to 128 of *Kadi* and 162 to 164 of *Yusuf and Al Barakaat*, in particular its second paragraph, cannot supply a base

for any widening of Community powers beyond the objects of the Community.

205 The effect of that error in law on the validity of the judgments under appeal will be considered later, after the evaluation of the other claims raised against the explanations given in those judgments concerning the possibility of including Article 308 EC in the legal basis of the contested regulation jointly with Articles 60 EC and 301 EC.

206 Those other claims may be divided into two categories.

207 The first category includes, in particular, the first part of Mr Kadi's first ground of appeal, in which he argues that the Court of First Instance erred in law when it accepted that it was possible for Article 308 EC to supplement the legal basis of the contested regulation formed by Articles 60 EC and 301 EC. In his submission, those two latter articles cannot form the legal basis, even in part, of the contested regulation because, according to the interpretation given by the Court of First Instance itself, measures directed against persons or entities in no way linked to the governing regime of a third country – the only persons to whom the contested regulation is addressed – do not fall within the ambit of those articles.

208 That criticism may be compared with that made by the Commission, to the effect that, if it were to be held that recourse to Article 308 EC could be allowed, it would have to be as the sole legal basis, and not jointly with Articles 60 EC and 301 EC.

209 The second category includes the Commission's criticisms of the Court of First Instance's decision, in paragraphs 116 and 121 of *Kadi* and 152 and 157 of *Yusuf and Al Barakaat*, that, for the purposes of the application of Article 308 EC, the objective of the contested regulation, namely, according to the Court of First Instance, the fight against international terrorism, and more particularly the imposition of economic and financial sanctions, such as the freezing of funds, in respect of individuals and entities suspected of contributing to the funding of terrorism, cannot be made to refer to one of the objects which the EC Treaty entrusts to the Community.

210 The Commission maintains in this respect that the implementing measures imposed by the contested regulation in the area of economic and financial sanctions fall, by their very nature, within the scope of the objects of the Community, that is to say, first, the common commercial policy and, second, the free movement of capital.

211 With regard to that first category of claims, it is to be borne in mind that Article 308 EC is designed to fill the gap where no specific provisions of the Treaty confer on the Community institutions express or implied powers to act, if such powers appear none the less to be necessary to enable the Community to carry out its functions with a view to attaining one of the objectives laid down by the Treaty (Opinion 2/94, paragraph 29).

212 The Court of First Instance correctly held that Article 308 EC could be included in the legal basis of the contested regulation, jointly with Articles 60 EC and 301 EC.

213 The contested regulation, inasmuch as it imposes restrictive measures of an economic and financial nature, plainly falls within the ambit *ratione materiae* of Articles 60 EC and 301 EC.

214 To that extent, the inclusion of those articles in the legal basis of the contested regulation was therefore justified.

215 Furthermore, those provisions are part of the extension of a practice based, before the introduction of Articles 60 EC and 301 EC by the Maastricht Treaty, on Article 113 of the EC Treaty (now, after amendment, Article 133 EC) (see, to that effect, Case C-70/94 *Werner* [1995] ECR

I-3189, paragraphs 8 to 10, and Case C-124/95 *Centro-Com* [1997] ECR I-81, paragraphs 28 and 29), which consisted of entrusting to the Community the implementation of actions decided on in the context of European political cooperation and involving the imposition of restrictive measures of an economic nature in respect of third countries.

216 Since Articles 60 EC and 301 EC do not, however, provide for any express or implied powers of action to impose such measures on addressees in no way linked to the governing regime of a third country such as those to whom the contested regulation applies, that lack of power, attributable to the limited ambit *ratione materiae* of those provisions, could be made good by having recourse to Article 308 EC as a legal basis for that regulation in addition to the first two provisions providing a foundation for that measure from the point of view of its material scope, provided, however, that the other conditions to which the applicability of Article 308 EC is subject had been satisfied.

217 The claims in that first category must therefore be rejected as unfounded.

218 With regard to the other conditions for the applicability of Article 308 EC, the second category of claims will now be considered.

219 The Commission maintains that, although Common Position 2002/402, which the contested regulation is intended to put into effect, pursues the objective of the campaign against international terrorism, an objective covered by the CFSP, that regulation must be considered to lay down an implementing measure intended to impose economic and financial sanctions.

220 That objective falls within the scope of the objectives of the Community for the purpose of Article 308 EC, in particular those relating to the common commercial policy and the free movement of capital.

221 The United Kingdom takes the view that the purely instrumental specific objective of the contested regulation, namely, the introduction of coercive economic measures, must be distinguished from the underlying CFSP objective of maintaining international peace and security. That specific objective contributes to the implicit Community objective underlying Articles 60 EC and 301 EC, which is to supply effective means to put into effect, solely by coercive economic measures, acts adopted under the CFSP.

222 The objective pursued by the contested regulation is immediately to prevent persons associated with Usama bin Laden, the Al-Qaeda network or the Taliban from having at their disposal any financial or economic resources, in order to impede the financing of terrorist activities (Case C-117/06 *Möllendorf and Möllendorf-Niehuus* [2007] ECR I-8361, paragraph 63).

223 Contrary to what the Court of First Instance held in paragraphs 116 of *Kadi* and 152 of *Yusuf and Al Barakaat*, that objective can be made to refer to one of the objects which the EC Treaty entrusts to the Community. The judgments under appeal are therefore vitiated by an error of law on this point also.

224 In this regard it may be recalled that, as explained in paragraph 203 above, Article 308 EC, being an integral part of an institutional system based on the principle of conferred powers, cannot serve as a basis for widening the scope of Community powers beyond the general framework created by the provisions of the EC Treaty as a whole.

225 The objective pursued by the contested regulation may be made to refer to one of the objectives of the Community for the purpose of Article 308 EC, with the result that the adoption of that regulation did not amount to disregard of the scope of Community powers stemming from the provisions of the EC Treaty as a whole.

226 Inasmuch as they provide for Community powers to impose restrictive measures of an economic nature in order to implement actions decided on under the CFSP, Articles 60 EC and 301 EC are the expression of an implicit underlying objective, namely, that of making it possible to adopt such measures through the efficient use of a Community instrument.

227 That objective may be regarded as constituting an objective of the Community for the purpose of Article 308 EC.

228 That interpretation is supported by Article 60(2) EC. Although the first paragraph thereof provides the power, within strict limits, for Member States to take unilateral measures against a third country with regard to capital movements and payments, that power may, as provided for by that paragraph, be exercised only so long as Community measures have not been taken pursuant to paragraph 1 of that article.

229 Implementing restrictive measures of an economic nature through the use of a Community instrument does not go beyond the general framework created by the provisions of the EC Treaty as a whole, because such measures by their very nature offer a link to the operation of the common market, that link constituting another condition for the application of Article 308 EC, as set out in paragraph 200 above.

230 If economic and financial measures such as those imposed by the contested regulation, consisting of the, in principle generalised, freezing of all the funds and other economic resources of the persons and entities concerned, were imposed unilaterally by every Member State, the multiplication of those national measures might well affect the operation of the common market. Such measures could have a particular effect on trade between Member States, especially with regard to the movement of capital and payments, and on the exercise by economic operators of their right of establishment. In addition, they could create distortions of competition, because any differences between the measures unilaterally taken by the Member States could operate to the advantage or disadvantage of the competitive position of certain economic operators although there were no economic reasons for that advantage or disadvantage.

231 The Council's statement in the fourth recital in the preamble to the contested regulation that Community legislation was necessary 'notably with a view to avoiding distortion of competition' is shown, therefore, to be relevant in this connection.

232 At this point it is appropriate to rule on the effect of the errors of law, recorded in paragraphs 196 and 223 above, on the validity of the judgments under appeal.

233 It is to be borne in mind that, according to case-law, if the grounds of a judgment of the Court of First Instance reveal an infringement of Community law but its operative part appears well founded on other legal grounds the appeal must be dismissed (see, in particular, Case C-167/04 P *JCB Service v Commission* [2006] ECR I-8935, paragraph 186 and the case-law cited).

234 Clearly the conclusion reached by the Court of First Instance in paragraphs 135 of *Kadi* and 158 of *Yusuf and Al Barakaat* concerning the legal basis of the contested regulation, that is to say, that the Council was competent to adopt that regulation on the joint basis of Articles 60 EC, 301 EC and 308 EC, appears justified on other legal grounds.

235 Although, as held in paragraphs 196 to 204 above, the inclusion of Article 308 EC in the legal basis of the contested regulation cannot be justified by the fact that that measure pursued an objective covered by the CFSP, that provision could nevertheless be held to provide a foundation for the regulation because, as shown in paragraphs 225 to 231 above, that regulation could legitimately be regarded as designed to attain an objective of the Community and as, furthermore, linked to the operation of the common market within the meaning of Article 308 EC. Moreover,

adding Article 308 EC to the legal basis of the contested regulation enabled the European Parliament to take part in the decision-making process relating to the measures at issue which are specifically aimed at individuals whereas, under Articles 60 EC and 301 EC, no role is provided for that institution.

236 Accordingly, the grounds of appeal directed against the judgments under appeal inasmuch as by the latter the Court of First Instance decided that Articles 60 EC, 301 EC and 308 EC constituted the legal basis of the contested regulation must be dismissed in their entirety as unfounded.

#### *Concerning the ground of appeal relating to infringement of Article 249 EC*

##### Arguments of the parties

237 By its second ground of appeal *Al Barakaat* complains that the Court of First Instance held, in paragraph 188 of *Yusuf and Al Barakaat*, that the contested regulation satisfies the condition of general application laid down in Article 249 EC, given that it is addressed in a general and abstract manner to all persons who might actually hold funds belonging to one or more persons mentioned in the Annex to the regulation.

238 *Al Barakaat* maintains that it is wrong not to consider the person whose funds are frozen as the addressee of the act concerned, because the implementation of the decision must reasonably be founded on a legal measure directed against the person in possession of the resources.

239 What is more, according to that appellant, it is contradictory to state, on the one hand, in paragraph 112 of *Yusuf and Al Barakaat*, that the measures at issue were restrictive measures directly affecting individuals or organisations and, on the other, in paragraph 188 of that judgment, that those measures were not addressed to those individuals or organisations, but rather constituted a kind of implementing measure addressed to other persons.

240 The Kingdom of Spain, the United Kingdom, the Council and the Commission broadly endorse the analysis of the Court of First Instance.

##### Findings of the Court

241 The Court of First Instance rightly held in paragraphs 184 to 188 of *Yusuf and Al Barakaat* that the fact that the persons and entities who are the subject of the restrictive measures imposed by the contested regulation are expressly named in Annex I thereto, so that they appear to be directly and individually concerned by it, within the meaning of the fourth paragraph of Article 230 EC, does not mean that that act is not of general application within the meaning of the second paragraph of Article 249 EC or that it is not to be classified as a regulation.

242 In fact, while it is true that the contested regulation imposes restrictive measures on the persons and entities whose names appear in the exhaustive list that constitutes Annex I thereto, a list which is, moreover, regularly amended by the removal or addition of names, so that it is kept in line with the summary list, the fact remains that the persons to whom it is addressed are determined in a general and abstract manner.

243 The contested regulation, like Resolution 1390 (2002) which it is designed to put into effect, lays down a prohibition, worded exceptionally broadly, of making available funds and economic resources to those persons or entities (see, to that effect, *Möllendorf and Möllendorf-Niehuus*, paragraphs 50 to 55).

244 As the Court of First Instance quite rightly held in paragraphs 186 and 188 of *Yusuf and Al Barakaat*, that prohibition is addressed to whoever might actually hold the funds or economic

resources in question.

245 That is how that prohibition falls to be applied in circumstances such as those of the case giving rise to the judgment in *Möllendorf and Möllendorf-Miehnus*, which concerned the question whether the contested regulation forbids the final registration of the transfer of ownership of real property in a land register following the conclusion of a contract of sale if one of the purchasers is a natural person appearing in the list in Annex I to the regulation.

246 In paragraph 60 of that judgment, the Court decided that a transaction such as that registration is prohibited under Article 2(3) of the contested regulation if, in consequence of that transaction, an economic resource would be made available to a person entered in that list, which would enable that person to obtain funds, goods or services.

247 In the light of the foregoing, Al Barakaat's ground of appeal relating to infringement of Article 249 EC must also be dismissed as unfounded.

*Concerning the grounds of appeal relating to infringement of certain fundamental rights*

The heads of claim concerning the part of the judgments under appeal relating to the limits of the review by the Community judicature, in the light of fundamental rights, of the internal lawfulness of the contested regulation

248 In the first part of his second ground of appeal, Mr Kadi maintains that inasmuch as the judgment in *Kadi* takes a view, first, of the relationships between the United Nations and the members of that organisation and, second, of the procedure for the application of resolutions of the Security Council, it is vitiated by errors of law as regards the interpretation of the principles of international law concerned, which gave rise to other errors of law in the assessment of the pleas in law relating to breach of certain of the applicant's specific fundamental rights.

249 That part contains five claims.

250 By his first claim, Mr Kadi argues that in paragraphs 183 and 184 of the judgment the Court of First Instance erred in law in confusing the question of the primacy of the States' obligations under the Charter of the United Nations, enshrined in Article 103 thereof, with the related but separate question of the binding effect of decisions of the Security Council laid down in Article 25 of that Charter.

251 By his second claim, Mr Kadi complains that the Court of First Instance erred in law when, in paragraphs 217 to 225 of that judgment, it took as its premiss that, like obligations under treaty law, resolutions adopted by virtue of Chapter VII of the Charter of the United Nations must automatically form part of the sphere of law and competence of the members of the United Nations.

252 By the third claim, Mr Kadi alleges that the Court of First Instance erred in law when it held, in paragraphs 212 to 225 and 283 and 284 of that judgment, that it had no power enabling it to review the lawfulness of resolutions of the Security Council adopted by virtue of Chapter VII of the Charter of the United Nations.

253 By the fourth claim, Mr Kadi maintains that the reasoning of the Court of First Instance in paragraphs 225 to 232 of that judgment on the subject of *jus cogens* displays considerable incoherence, in so far as, if it must prevail, the principle that resolutions of the Security Council may not be the subject of judicial review and in support of this enjoy immunity from jurisdiction would have to apply generally, and the matters covered by *jus cogens* would not then constitute an exception to that principle.

254 By the fifth claim, Mr Kadi argues that the fact that the Security Council has not established an independent international court responsible for ruling, in law and on the facts, on actions brought against individual decisions taken by the Sanctions Committee, does not mean that the Member States have no lawful power, by adopting reasonable measures, to improve the finding of facts underlying the imposition of sanctions and the identification of the persons affected by them, or that the Member States are prohibited from creating an appropriate legal remedy by reason of the latitude they enjoy in the performance of their obligations.

255 In his reply, referring to *Bosphorus*, Mr Kadi maintains, in addition, that Community law requires all Community legislative measures to be subject to the judicial review carried out by the Court, which also concerns observance of fundamental rights, even if the origin of the measure in question is an act of international law such as a resolution of the Security Council.

256 So long as the law of the United Nations offers no adequate protection for those whose claim that their fundamental rights have been infringed, there must be a review of the measures adopted by the Community in order to give effect to resolutions of the Security Council. According to Mr Kadi, the re-examination procedure before the Sanctions Committee, based on diplomatic protection, does not afford protection of human rights equivalent to that guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950 (the ECHR), as demanded by the European Court of Human Rights in *Bosphorus Hava Yollar Turizm ve Ticaret Anonim irketi v. Ireland* of 30 June 2005, *Reports of Judgments and Decisions* 2005-VI, § 155.

257 Mr Kadi submits that that line of argument, an alternative to the arguments based on international law, is raised in case the Court should hold that there is a conflict between the objectives of faithful implementation of resolutions of the Security Council and the principles of due process or judicial protection.

258 Furthermore, he states that that head of claim is not a new ground of appeal but a development of the fundamental proposition, raised in the notice of appeal, that the Community is bound, when it decides to act by legislative means to give effect to a resolution of the Security Council, to ensure, as a condition of the lawfulness of the legislation it intends thus to introduce, that that legislation should observe the minimum criteria in the field of human rights.

259 By the first part of its third ground of appeal, Al Barakaat criticises the Court of First Instance's preliminary observations in *Yusuf and Al Barakaat* on the relationship between the international legal order under the United Nations and the domestic legal order or the Community legal order and on the extent of the review of lawfulness which the Court of First Instance had to carry out.

260 A resolution of the Security Council, binding *per se* in public international law, can have legal effect *vis-à-vis* persons in a State only if it has been implemented in accordance with the law in force.

261 In this appellant's view, there are no legal grounds for inferring the existence of special treatment or of an exception with regard to implementation of resolutions of the Security Council to the effect that a Community regulation intended to carry out such implementation need not accord with Community rules on the adoption of regulations.

262 Conversely, the French Republic, the Kingdom of the Netherlands, the United Kingdom and the Council approve, in essence, the analysis made in that connection by the Court of First Instance in the judgments under appeal and endorse the conclusion drawn therefrom that, so far as concerns the internal lawfulness of the contested regulation, the latter, inasmuch as it puts into effect resolutions adopted by the Security Council pursuant to Chapter VII of the Charter of the United Nations, in principle escapes all review by the Community judicature, even concerning observance

- of fundamental rights, and so for that reason enjoys immunity from jurisdiction.
- 263 However, unlike the Court of First Instance, those parties take the view that no review of the internal lawfulness of resolutions of the Security Council may be carried out by the Community judicature. They therefore complain that the Court of First Instance decided that such review was possible in the light of *ius cogens*.
- 264 They argue that the judgments under appeal, by allowing an exception in that regard, but without identifying its legal basis, in particular under the provisions of the Treaty, are inconsistent, inasmuch as the arguments excluding in a general manner the exercise of judicial review by the Community judicature of resolutions of the Security Council also militate against the recognition of powers to carry out such a review solely in the light of *ius cogens*.
- 265 Further, the French Republic, the Kingdom of the Netherlands, the United Kingdom and the Commission consider that the Court of First Instance erred in law when it ruled that the fundamental rights at issue in these cases fell within the scope of *ius cogens*.
- 266 A norm may be classified as *ius cogens* only when no derogation from it is possible. The rights invoked in the cases in point – the right to a fair hearing and the right to respect for property – are, however, subject to limitations and exceptions.
- 267 The United Kingdom has brought a cross-appeal in this connection, seeking to have set aside the parts of the judgments under appeal dealing with *ius cogens*, viz., paragraphs 226 to 231 of *Kadi* and 277 to 281 of *Yusuf and Al Barakaat*.
- 268 For their part, the French Republic and the Kingdom of the Netherlands suggest that the Court should undertake a replacement of grounds, claiming that Mr Kadi's and Al Barakaat's pleas in law relating to *ius cogens* should be dismissed by reason of the absolute lack of jurisdiction of the Community judicature to carry out any review of resolutions of the Security Council, even in the light of *ius cogens*.
- 269 The Commission maintains that two reasons may justify not giving effect to an obligation to implement resolutions of the Security Council such as those at issue, whose strict terms leave the Community authorities no discretion in their implementation; they are, first, the case in which the resolution concerned is contrary to *ius cogens* and, second, the case in which that resolution falls outside the ambit of or violates the purposes and principles of the United Nations and was therefore adopted *ultra vires*.
- 270 The Commission takes the view that, given that, according to Article 24(2) of the Charter of the United Nations, the Security Council is bound by the purposes and principles of the United Nations, including, according to Article 1(3) of the Charter, the development of human rights and their promotion, an act adopted by that body in breach of human rights, including the fundamental rights of the individuals at issue, might be regarded as having been adopted *ultra vires* and, therefore, as not binding on the Community.
- 271 In the Commission's view, however, the Court of First Instance was right to hold that the Community judicature cannot in principle review the validity of a resolution of the Security Council in the light of the purposes and principles of the United Nations.
- 272 If, nevertheless, the Court were to accept that it could carry out such a review, the Commission argues that the Court, as the judicature of an international organisation other than the United Nations, could express itself on this question only if the breach of human rights was particularly flagrant and glaring, referring here to *Racke*.

- 273 That is not, in the Commission's view, the case here, owing to the existence of the re-examination procedure before the Sanctions Committee and because it must be supposed that the Security Council had weighed the requirements of international security at issue against the fundamental rights concerned.
- 274 With regard to the guidance given in *Bosphorus*, the Commission maintains that, in contrast to the case giving rise to that judgment, the question of the lawfulness and possible nullity of the resolution in question could arise with regard to the contested regulation if the Council were to rule that the Community may not implement a binding resolution of the Security Council because the standards applied by that body in the sphere of human rights, especially in respect of the right to be heard, are insufficient.
- 275 In addition, the United Kingdom is of the view that Mr Kadi's arguments that the lawfulness of any legislation adopted by the Community institutions in order to give effect to a resolution of the Security Council remains subject, by virtue of Community law, to full review by the Court, regardless of its origin, constitute a new ground of appeal because they were put forward for the first time in that appellant's reply. That Member State submits that in accordance with Articles 42 (2) and 118 of the Rules of Procedure, those arguments must therefore be rejected.
- 276 In the alternative, the United Kingdom maintains that the special status of resolutions adopted under Chapter VII of the Charter of the United Nations, as a result of the interaction of Articles 25, 48 and 103 of that Charter, recognised by Article 297 EC, implies that action taken by a Member State to perform its obligations with a view to maintaining international peace and security is protected against any action founded on Community law. The primacy of those obligations clearly extends to principles of Community law of a constitutional nature.
- 277 That Member State maintains that, in *Bosphorus*, the Court did not declare that it had jurisdiction to determine the validity of a regulation intended to give effect to a resolution of the Security Council adopted under Chapter VII of the Charter of the United Nations, but did no more than interpret the regulation concerned for the purpose of determining whether a measure laid down by that regulation had to be applied by the authorities of a Member State in a given case. The French Republic essentially agrees with that interpretation of *Bosphorus*.
- Findings of the Court
- 278 Before addressing the substance of the question, the Court finds it necessary to reject the objection of inadmissibility raised by the United Kingdom in respect of the line of argument put forward by Mr Kadi in his reply, to the effect that the lawfulness of any legislation adopted by the Community institutions, including an act intended to give effect to a resolution of the Security Council remains subject, by virtue of Community law, to full review by the Court, regardless of its origin.
- 279 In point of fact, as Mr Kadi has stated, that is an additional argument supplementing the ground of appeal set out earlier, at least implicitly, in the notice of appeal and closely connected to that ground, to the effect that the Community, when giving effect to a resolution of the Security Council, was bound to ensure, as a condition of the lawfulness of the legislation it intended thus to introduce, that that legislation should observe the minimum criteria in the field of human rights (see, to that effect, *inter alia*, the order in Case C-430/00 P *Dürbeck v Commission* [2001] ECR I-8547, paragraph 17).
- 280 The Court will now consider the heads of claim in which the appellants complain that the Court of First Instance, in essence, held that it followed from the principles governing the relationship between the international legal order under the United Nations and the Community legal order that the contested regulation, since it is designed to give effect to a resolution adopted by the Security

Council under Chapter VII of the Charter of the United Nations affording no latitude in that respect, could not be subject to judicial review of its internal lawfulness, save with regard to its compatibility with the norms of *ius cogens*, and therefore to that extent enjoyed immunity from jurisdiction.

281 In this connection it is to be borne in mind that the Community is based on the rule of law, inasmuch as neither its Member States nor its institutions can avoid review of the conformity of their acts with the basic constitutional charter, the EC Treaty, which established a complete system of legal remedies and procedures designed to enable the Court of Justice to review the legality of acts of the institutions (Case 294/83 *Les Verts v Parliament* [1986] ECR 1339, paragraph 23).

282 It is also to be recalled that an international agreement cannot affect the allocation of powers fixed by the Treaties or, consequently, the autonomy of the Community legal system, observance of which is ensured by the Court by virtue of the exclusive jurisdiction conferred on it by Article 220 EC, jurisdiction that the Court has, moreover, already held to form part of the very foundations of the Community (see, to that effect, Opinion 1/91 [1991] ECR I-6079, paragraphs 35 and 71, and Case C-459/03 *Commission v Ireland* [2006] ECR I-4635, paragraph 123 and case-law cited).

283 In addition, according to settled case-law, fundamental rights form an integral part of the general principles of law whose observance the Court ensures. For that purpose, the Court draws inspiration from the constitutional traditions common to the Member States and from the guidelines supplied by international instruments for the protection of human rights on which the Member States have collaborated or to which they are signatories. In that regard, the ECHR has special significance (see, *inter alia*, Case C-305/05 *Ordre des barreaux francophones et germanophones and Others* [2007] ECR I-5305, paragraph 29 and case-law cited).

284 It is also clear from the case-law that respect for human rights is a condition of the lawfulness of Community acts (Opinion 2/94, paragraph 34) and that measures incompatible with respect for human rights are not acceptable in the Community (Case C-112/00 *Schmidberger* [2003] ECR I-5659, paragraph 73 and case-law cited).

285 It follows from all those considerations that the obligations imposed by an international agreement cannot have the effect of prejudicing the constitutional principles of the EC Treaty, which include the principle that all Community acts must respect fundamental rights, that respect constituting a condition of their lawfulness which it is for the Court to review in the framework of the complete system of legal remedies established by the Treaty.

286 In this regard it must be emphasised that, in circumstances such as those of these cases, the review of lawfulness thus to be ensured by the Community judiciary applies to the Community act intended to give effect to the international agreement at issue, and not to the latter as such.

287 With more particular regard to a Community act which, like the contested regulation, is intended to give effect to a resolution adopted by the Security Council under Chapter VII of the Charter of the United Nations, it is not, therefore, for the Community judiciary, under the exclusive jurisdiction provided for by Article 220 EC, to review the lawfulness of such a resolution adopted by an international body, even if that review were to be limited to examination of the compatibility of that resolution with *ius cogens*.

288 However, any judgment given by the Community judiciary deciding that a Community measure intended to give effect to such a resolution is contrary to a higher rule of law in the Community legal order would not entail any challenge to the primacy of that resolution in international law.

289 The Court has thus previously annulled a decision of the Council approving an international

agreement after considering the internal lawfulness of the decision in the light of the agreement in question and finding a breach of a general principle of Community law, in that instance the general principle of non-discrimination (Case C-122/95 *Germany v Council* [1998] ECR I-973).

290 It must therefore be considered whether, as the Court of First Instance held, as a result of the principles governing the relationship between the international legal order under the United Nations and the Community legal order, any judicial review of the internal lawfulness of the contested regulation in the light of fundamental freedoms is in principle excluded, notwithstanding the fact that, as is clear from the decisions referred to in paragraphs 281 to 284 above, such review is a constitutional guarantee forming part of the very foundations of the Community.

291 In this respect it is first to be borne in mind that the European Community must respect international law in the exercise of its powers (*Poulsen and Diva Navigation*, paragraph 9, and *Racke*, paragraph 45), the Court having in addition stated, in the same paragraph of the first of those judgments, that a measure adopted by virtue of those powers must be interpreted, and its scope limited, in the light of the relevant rules of international law.

292 Moreover, the Court has held that the powers of the Community provided for by Articles 177 EC to 181 EC in the sphere of cooperation and development must be exercised in observance of the undertakings given in the context of the United Nations and other international organisations (Case C-91/05 *Commission v Council* [2008] ECR I-0000, paragraph 65 and case-law cited).

293 Observance of the undertakings given in the context of the United Nations is required just as much in the sphere of the maintenance of international peace and security when the Community has effect, by means of the adoption of Community measures taken on the basis of Articles 60 EC and 301 EC, to resolutions adopted by the Security Council under Chapter VII of the Charter of the United Nations.

294 In the exercise of that latter power it is necessary for the Community to attach special importance to the fact that, in accordance with Article 24 of the Charter of the United Nations, the adoption by the Security Council of resolutions under Chapter VII of the Charter constitutes the exercise of the primary responsibility with which that international body is invested for the maintenance of peace and security at the global level, a responsibility which, under Chapter VII, includes the power to determine what and who poses a threat to international peace and security and to take the measures necessary to maintain or restore them.

295 Next, it is to be noted that the powers provided for in Articles 60 EC and 301 EC may be exercised only in pursuance of the adoption of a common position or joint action by virtue of the provisions of the EC Treaty relating to the CFSP which provides for action by the Community.

296 Although, because of the adoption of such an act, the Community is bound to take, under the EC Treaty, the measures necessitated by that act, that obligation means, when the object is to implement a resolution of the Security Council adopted under Chapter VII of the Charter of the United Nations, that in drawing up those measures the Community is to take due account of the terms and objectives of the resolution concerned and of the relevant obligations under the Charter of the United Nations relating to such implementation.

297 Furthermore, the Court has previously held that, for the purposes of the interpretation of the contested regulation, account must also be taken of the wording and purpose of Resolution 1390 (2002) which that regulation, according to the fourth recital in the preamble thereto, is designed to implement (*Möllendorff and Möllendorff-Niehuus*, paragraph 54 and case-law cited).

298 It must however be noted that the Charter of the United Nations does not impose the choice of a particular model for the implementation of resolutions adopted by the Security Council under

Chapter VII of the Charter, since they are to be given effect in accordance with the procedure applicable in that respect in the domestic legal order of each Member of the United Nations. The Charter of the United Nations leaves the Members of the United Nations a free choice among the various possible models for transposition of those resolutions into their domestic legal order.

299 It follows from all those considerations that it is not a consequence of the principles governing the international legal order under the United Nations that any judicial review of the internal lawfulness of the contested regulation in the light of fundamental freedoms is excluded by virtue of the fact that that measure is intended to give effect to a resolution of the Security Council adopted under Chapter VII of the Charter of the United Nations.

300 What is more, such immunity from jurisdiction for a Community measure like the contested regulation, as a corollary of the principle of the primacy at the level of international law of obligations under the Charter of the United Nations, especially those relating to the implementation of resolutions of the Security Council adopted under Chapter VII of the Charter, cannot find a basis in the EC Treaty.

301 Admittedly, the Court has previously recognised that Article 234 of the EC Treaty (now, after amendment, Article 307 EC) could, if the conditions for application have been satisfied, allow derogations even from primary law, for example from Article 113 of the EC Treaty on the common commercial policy (see, to that effect, *Centro-Com*, paragraphs 56 to 61).

302 It is true also that Article 297 EC implicitly permits obstacles to the operation of the common market when they are caused by measures taken by a Member State to carry out the international obligations it has accepted for the purpose of maintaining international peace and security.

303 Those provisions cannot, however, be understood to authorise any derogation from the principles of liberty, democracy and respect for human rights and fundamental freedoms enshrined in Article 6(1) EU as a foundation of the Union.

304 Article 307 EC may in no circumstances permit any challenge to the principles that form part of the very foundations of the Community legal order, one of which is the protection of fundamental rights, including the review by the Community judicature of the lawfulness of Community measures as regards their consistency with those fundamental rights.

305 Nor can an immunity from jurisdiction for the contested regulation with regard to the review of its compatibility with fundamental rights, arising from the alleged absolute primacy of the resolutions of the Security Council to which that measure is designed to give effect, find any basis in the place that obligations under the Charter of the United Nations would occupy in the hierarchy of norms within the Community legal order if those obligations were to be classified in that hierarchy.

306 Article 300(7) EC provides that agreements concluded under the conditions set out in that article are to be binding on the institutions of the Community and on Member States.

307 Thus, by virtue of that provision, supposing it to be applicable to the Charter of the United Nations, the latter would have primacy over acts of secondary Community law (see, to that effect, Case C-308/06 *Interbanko and Others* [2008] ECR I-0000, paragraph 42 and case-law cited).

308 That primacy at the level of Community law would not, however, extend to primary law, in particular to the general principles of which fundamental rights form part.

309 That interpretation is supported by Article 300(6) EC, which provides that an international agreement may not enter into force if the Court has delivered an adverse opinion on its compatibility with the EC Treaty, unless the latter has previously been amended.

310 It has however been maintained before the Court, in particular at the hearing, that the Community judicature ought, like the European Court of Human Rights, which in several recent decisions has declined jurisdiction to review the compatibility of certain measures taken in the implementing of resolutions adopted by the Security Council under Chapter VII of the Charter of the United Nations, to refrain from reviewing the lawfulness of the contested regulation in the light of fundamental freedoms, because that regulation is also intended to give effect to such resolutions.

311 In this respect, it is to be found that, as the European Court of Human Rights itself has noted, there exists a fundamental difference between the nature of the measures concerned by those decisions, with regard to which that court declined jurisdiction to carry out a review of consistency with the ECHR, and the nature of other measures with regard to which its jurisdiction would seem to be unquestionable (see *Behrami and Behrami v. France and Saramati v. France, Germany and Norway* of 2 May 2007, not yet published in the *Reports of Judgments and Decisions*, §151).

312 While, in certain cases before it the European Court of Human Rights has declined jurisdiction *ratione personae*, those cases involved actions directly attributable to the United Nations as an organisation of universal jurisdiction fulfilling its imperative collective security objective, in particular actions of a subsidiary organ of the UN created under Chapter VII of the Charter of the United Nations or actions falling within the exercise of powers lawfully delegated by the Security Council pursuant to that chapter, and not actions ascribable to the respondent States before that court, those actions not, moreover, having taken place in the territory of those States and not resulting from any decision of the authorities of those States.

313 By contrast, in paragraph 151 of *Behrami and Behrami v. France and Saramati v. France, Germany and Norway*, the European Court of Human Rights stated that in the case leading to its judgment in *Bosphorus Hava Yolları Turizm ve Ticaret Anonim İrteti v. Ireland*, concerning a seizure measure carried out by the authorities of the respondent State on its territory following a decision by one of its ministers, it had recognised its competence, notably *ratione personae*, vis-à-vis the respondent State, despite the fact that the source of the contested measure was a Community regulation taken, in its turn, pursuant to a resolution of the Security Council.

314 In the instant case it must be declared that the contested regulation cannot be considered to be an act directly attributable to the United Nations as an action of one of its subsidiary organs created under Chapter VII of the Charter of the United Nations or an action falling within the exercise of powers lawfully delegated by the Security Council pursuant to that chapter.

315 In addition and in any event, the question of the Court's jurisdiction to rule on the lawfulness of the contested regulation has arisen in fundamentally different circumstances.

316 As noted above in paragraphs 281 to 284, the review by the Court of the validity of any Community measure in the light of fundamental rights must be considered to be the expression, in a community based on the rule of law, of a constitutional guarantee stemming from the EC Treaty as an autonomous legal system which is not to be prejudiced by an international agreement.

317 The question of the Court's jurisdiction arises in the context of the internal and autonomous legal order of the Community, within whose ambit the contested regulation falls and in which the Court has jurisdiction to review the validity of Community measures in the light of fundamental rights.

318 It has in addition been maintained that, having regard to the deference required of the Community institutions vis-à-vis the institutions of the United Nations, the Court must forgo the exercise of any review of the lawfulness of the contested regulation in the light of fundamental rights, even if such review were possible, given that, under the system of sanctions set up by the United Nations, having particular regard to the re-examination procedure which has recently been significantly improved by various resolutions of the Security Council, fundamental rights are adequately

- protected.
- 319 According to the Commission, so long as under that system of sanctions the individuals or entities concerned have an acceptable opportunity to be heard through a mechanism of administrative review forming part of the United Nations legal system, the Court must not intervene in any way whatsoever.
- 320 In this connection it may be observed, first of all, that in fact, as a result of the Security Council's adoption of various resolutions, amendments have been made to the system of restrictive measures set up by the United Nations with regard both to entry in the summary list and to removal from it (see, in particular, Resolutions 1730 (2006) of 19 December 2006, and 1735 (2006) of 22 December 2006), those amendments were made after the contested regulation had been adopted so that, in principle, they cannot be taken into consideration in these appeals.
- 321 In any event, the existence, within that United Nations system, of the re-examination procedure before the Sanctions Committee, even having regard to the amendments recently made to it, cannot give rise to generalised immunity from jurisdiction within the internal legal order of the Community.
- 322 Indeed, such immunity, constituting a significant derogation from the scheme of judicial protection of fundamental rights laid down by the EC Treaty, appears unjustified, for clearly that re-examination procedure does not offer the guarantees of judicial protection.
- 323 In that regard, although it is now open to any person or entity to approach the Sanctions Committee directly, submitting a request to be removed from the summary list at what is called the 'focal' point, the fact remains that the procedure before that Committee is still in essence diplomatic and intergovernmental, the persons or entities concerned having no real opportunity of asserting their rights and that committee taking its decisions by consensus, each of its members having a right of veto.
- 324 The Guidelines of the Sanctions Committee, as last amended on 12 February 2007, make it plain that an applicant submitting a request for removal from the list may in no way assert his rights himself during the procedure before the Sanctions Committee or be represented for that purpose, the Government of his State of residence or of citizenship alone having the right to submit observations on that request.
- 325 Moreover, those Guidelines do not require the Sanctions Committee to communicate to the applicant the reasons and evidence justifying his appearance in the summary list or to give him access, even restricted, to that information. Last, if that Committee rejects the request for removal from the list, it is under no obligation to give reasons.
- 326 It follows from the foregoing that the Community judicature must, in accordance with the powers conferred on it by the EC Treaty, ensure the review, in principle the full review, of the lawfulness of all Community acts in the light of the fundamental rights forming an integral part of the general principles of Community law, including review of Community measures which, like the contested regulation, are designed to give effect to the resolutions adopted by the Security Council under Chapter VII of the Charter of the United Nations.
- 327 The Court of First Instance erred in law, therefore, when it held, in paragraphs 212 to 231 of *Kadi* and 263 to 282 of *Yusuf and Al Barakaat*, that it followed from the principles governing the relationship between the international legal order under the United Nations and the Community legal order that the contested regulation, since it is designed to give effect to a resolution adopted by the Security Council under Chapter VII of the Charter of the United Nations affording no latitude in that respect, must enjoy immunity from jurisdiction so far as concerns its internal lawfulness

- save with regard to its compatibility with the norms of jus cogens.
- 328 The appellants' grounds of appeal are therefore well founded on that point, with the result that the judgments under appeal must be set aside in this respect.
- 329 It follows that there is no longer any need to examine the heads of claim directed against that part of the judgments under appeal relating to review of the contested regulation in the light of the rules of international law falling within the ambit of jus cogens and that it is, therefore, no longer necessary to examine the United Kingdom's cross-appeal on this point either.
- 330 Furthermore, given that in the latter part of the judgments under appeal, relating to the specific fundamental rights invoked by the appellants, the Court of First Instance confined itself to examining the lawfulness of the contested regulation in the light of those rules alone, when it was its duty to carry out an examination, in principle a full examination, in the light of the fundamental rights forming part of the general principles of Community law, the latter part of those judgments must also be set aside.
- Concerning the actions before the Court of First Instance**
- 331 As provided in the second sentence of the first paragraph of Article 61 of the Statute of the Court of Justice, the latter, when it quashes the decision of the Court of First Instance, may give final judgment in the matter where the state of proceedings so permits.
- 332 In the circumstances, the Court considers that the actions for annulment of the contested regulation brought by the appellants are ready for judgment and that it is necessary to give final judgment in them.
- 333 It is appropriate to examine, first, the claims made by Mr Kadi and Al Barakaat with regard to the breach of the rights of the defence, in particular the right to be heard, and of the right to effective judicial review, caused by the measures for the freezing of funds as they were imposed on the appellants by the contested regulation.
- 334 In this regard, in the light of the actual circumstances surrounding the inclusion of the appellants' names in the list of persons and entities covered by the restrictive measures contained in Annex I to the contested regulation, it must be held that the rights of the defence, in particular the right to be heard, and the right to effective judicial review of those rights, were patently not respected.
- 335 According to settled case-law, the principle of effective judicial protection is a general principle of Community law stemming from the constitutional traditions common to the Member States, which has been enshrined in Articles 6 and 13 of the ECHR, this principle having furthermore been reaffirmed by Article 47 of the Charter of fundamental rights of the European Union, proclaimed on 7 December 2000 in Nice (OJ 2000 C 364, p. 1) (see, to this effect, Case C-432/05 *Unibet* [2007] ECR I-2271, paragraph 37).
- 336 In addition, having regard to the Court's case-law in other fields (see, inter alia, Case 222/86 *Heylens and Others* [1987] ECR 4097, paragraph 15, and Joined Cases C-189/02 P, C-202/02 P, C-205/02 P to C-208/02 P and C-213/02 P *Dansk Rørindustri and Others v Commission* [2005] ECR I-5425, paragraphs 462 and 463), it must be held in this instance that the effectiveness of judicial review, which it must be possible to apply to the lawfulness of the grounds on which, in these cases, the name of a person or entity is included in the list forming Annex I to the contested regulation and leading to the imposition on those persons or entities of a body of restrictive

measures, means that the Community authority in question is bound to communicate those grounds to the person or entity concerned, so far as possible, either when that inclusion is decided on or, at the very least, as swiftly as possible after that decision in order to enable those persons or entities to exercise, within the periods prescribed, their right to bring an action.

337 Observance of that obligation to communicate the grounds is necessary both to enable the persons to whom restrictive measures are addressed to defend their rights in the best possible conditions and to decide, with full knowledge of the relevant facts, whether there is any point in their applying to the Community judicature (see, to that effect, *Heylens and Others*, paragraph 15), and to put the latter fully in a position in which it may carry out the review of the lawfulness of the Community measure in question which is its duty under the EC Treaty.

338 So far as concerns the rights of the defence, in particular the right to be heard, with regard to restrictive measures such as those imposed by the contested regulation, the Community authorities cannot be required to communicate those grounds before the name of a person or entity is entered in that list for the first time.

339 As the Court of First Instance stated in paragraph 308 of *Yusuf and Al Barakaat*, such prior communication would be liable to jeopardise the effectiveness of the freezing of funds and resources imposed by that regulation.

340 In order to attain the objective pursued by that regulation, such measures must, by their very nature, take advantage of a surprise effect and, as the Court has previously stated, apply with immediate effect (*Möllendorf and Möllendorf-Niehuus*, paragraph 63).

341 Nor were the Community authorities bound to hear the appellants before their names were included for the first time in the list set out in Annex I to that regulation, for reasons also connected to the objective pursued by the contested regulation and to the effectiveness of the measures provided by the latter.

342 In addition, with regard to a Community measure intended to give effect to a resolution adopted by the Security Council in connection with the fight against terrorism, overriding considerations to do with safety or the conduct of the international relations of the Community and of its Member States may militate against the communication of certain matters to the persons concerned and, therefore, against their being heard on those matters.

343 However, that does not mean, with regard to the principle of effective judicial protection, that restrictive measures such as those imposed by the contested regulation escape all review by the Community judicature once it has been claimed that the act laying them down concerns national security and terrorism.

344 In such a case, it is none the less the task of the Community judicature to apply, in the course of the judicial review it carries out, techniques which accommodate, on the one hand, legitimate security concerns about the nature and sources of information taken into account in the adoption of the act concerned and, on the other, the need to accord the individual a sufficient measure of procedural justice (see, to that effect, the judgment of the European Court of Human Rights in *Chahal v. United Kingdom* of 15 November 1996, *Reports of Judgments and Decisions* 1996-V, § 131).

345 In the circumstances, the inevitable conclusion is, first of all, that neither the contested regulation nor Common Position 2002/402 to which the former refers provides for a procedure for communicating the evidence justifying the inclusion of the names of the persons concerned in Annex I to that regulation and for hearing those persons, either at the same time as that inclusion or later.

346 It has next to be pointed out that the Council at no time informed the appellants of the evidence adduced against them that allegedly justified the inclusion of their names for the first time in Annex I to the contested regulation and, consequently, the imposition of the restrictive measures laid down by the latter.

347 It is not indeed denied that no information was supplied in that connection to the appellants, whether in Regulation No 467/2001 as amended by Regulations Nos 2062/2001 and 2199/2001, their names being mentioned for the first time in a list of persons, entities or bodies to whom and to which a measure freezing funds applies, in the contested regulation or at some later stage.

348 Because the Council neither communicated to the appellants the evidence used against them to justify the restrictive measures imposed on them nor afforded them the right to be informed of that evidence within a reasonable period after those measures were enacted, the appellants were not in a position to make their point of view in that respect known to advantage. Therefore, the appellants' rights of defence, in particular the right to be heard, were not respected.

349 In addition, given the failure to inform them of the evidence adduced against them and having regard to the relationship, referred to in paragraphs 336 and 337 above, between the rights of the defence and the right to an effective legal remedy, the appellants were also unable to defend their rights with regard to that evidence in satisfactory conditions before the Community judicature, with the result that it must be held that their right to an effective legal remedy has also been infringed.

350 Last, it must be stated that that infringement has not been remedied in the course of these actions. Indeed, given that, according to the fundamental position adopted by the Council, no evidence of that kind may be the subject of investigation by the Community judicature, the Council has adduced no evidence to that effect.

351 The Court cannot, therefore, do other than find that it is not able to undertake the review of the lawfulness of the contested regulation in so far as it concerns the appellants, with the result that it must be held that, for that reason too, the fundamental right to an effective legal remedy which they enjoy has not, in the circumstances, been observed.

352 It must, therefore, be held that the contested regulation, in so far as it concerns the appellants, was adopted without any guarantee being given as to the communication of the incriminatory evidence against them or as to their being heard in that connection, so that it must be found that that regulation was adopted according to a procedure in which the appellants' rights of defence were not observed, which has had the further consequence that the principle of effective judicial protection has been infringed.

353 It follows from all the foregoing considerations that the pleas in law raised by Mr Kadi and Al Barakaat in support of their actions for annulment of the contested regulation and alleging breach of their rights of defence, especially the right to be heard, and of the principle of effective judicial protection, are well founded.

354 Second, the Court will now examine the plea raised by Mr Kadi with regard to breach of the right to respect for property entailed by the freezing measures imposed on him by virtue of the contested regulation.

355 According to settled case-law, the right to property is one of the general principles of Community law. It is not, however, absolute, but must be viewed in relation to its function in society. Consequently, the exercise of the right to property may be restricted, provided that those restrictions in fact correspond to objectives of public interest pursued by the Community and do not constitute, in relation to the aim pursued, a disproportionate and intolerable interference, impairing the very substance of the right so guaranteed (see, in particular, *Regione autonoma Friuli-Venezia*

*Giullia and ERSA*, paragraph 119 and case-law cited; see also, to that effect in the context of a system of restrictive measures, *Bosphorus*, paragraph 21).

356 In order to assess the extent of the fundamental right to respect for property, a general principle of Community law, account is to be taken of, in particular, Article 1 of the First Additional Protocol to the ECHR, which enshrines that right.

357 Next, it falls to be examined whether the freezing measure provided by the contested regulation amounts to disproportionate and intolerable interference impairing the very substance of the fundamental right to respect for the property of persons who, like Mr Kadi, are mentioned in the list set out in Annex I to that regulation.

358 That freezing measure constitutes a temporary precautionary measure which is not supposed to deprive those persons of their property. It does, however, undeniably entail a restriction of the exercise of Mr Kadi's right to property that must, moreover, be classified as considerable, having regard to the general application of the freezing measure and the fact that it has been applied to him since 20 October 2001.

359 The question therefore arises whether that restriction of the exercise of Mr Kadi's right to property can be justified.

360 In this respect, according to the case-law of the European Court of Human Rights, there must also exist a reasonable relationship of proportionality between the means employed and the aim sought to be realised. The Court must determine whether a fair balance has been struck between the demands of the public interest and the interest of the individuals concerned. In so doing, the Court recognises that the legislature enjoys a wide margin of appreciation, with regard both to choosing the means of enforcement and to ascertaining whether the consequences of enforcement are justified in the public interest for the purpose of achieving the object of the law in question [see, to that effect, in particular, *European Court of Human Rights, judgment in J.A. Pye (Oxford) Ltd. and J.A. Pye (Oxford) Land Ltd. v. United Kingdom* of 30 August 2007, *Reports of Judgments and Decisions* 2007-0000, §§ 55 and 75].

361 As the Court has already held in connection with another Community system of restrictive measures of an economic nature also giving effect to resolutions adopted by the Security Council under Chapter VII of the Charter of the United Nations, the importance of the aims pursued by a Community act is such as to justify negative consequences, even of a substantial nature, for some operators, including those who are in no way responsible for the situation which led to the adoption of the measures in question, but who find themselves affected, particularly as regards their property rights (see, to that effect, *Bosphorus*, paragraphs 22 and 23).

362 In the case in point, the restrictive measures laid down by the contested regulation contribute to the implementation, at Community level, of the restrictive measures decided on by the Security Council against Usama bin Laden, members of the Al-Qaeda organisation and the Taliban and other individuals, groups, undertakings and entities associated with them.

363 With reference to an objective of general interest as fundamental to the international community as the fight by all means, in accordance with the Charter of the United Nations, against the threats to international peace and security posed by acts of terrorism, the freezing of the funds, financial assets and other economic resources of the persons identified by the Security Council or the Sanctions Committee as being associated with Usama bin Laden, members of the Al-Qaeda organisation and the Taliban cannot per se be regarded as inappropriate or disproportionate (see, to that effect, *Bosphorus*, paragraph 26, and the judgment of the European Court of Human Rights in *Bosphorus Hava Yolları Turizm ve Ticaret Anonim İriktiv. Ireland*, § 167).

364 On this point, it is also to be taken into consideration that the contested regulation, in the version amended by Regulation No 561/2003, adopted following Resolution 1452 (2002), provides, among other derogations and exemptions, that, on a request made by an interested person, and unless the Sanctions Committee expressly objects, the competent national authorities may declare the freezing of funds to be inapplicable to the funds necessary to cover basic expenses, including payments for foodstuffs, rent, medicines and medical treatment, taxes or public utility charges. In addition, funds necessary for any 'extraordinary expense' whatsoever may be unfrozen, on the express authorisation of the Sanctions Committee.

365 It is further to be noted that the resolutions of the Security Council to which the contested regulation is intended to give effect provide for a mechanism for the periodic re-examination of the general system of measures they enact and also for a procedure enabling the persons concerned at any time to submit their case to the Sanctions Committee for re-examination, by means of a request that may now be made direct to the Committee at what is called the 'focal' point.

366 It must therefore be found that the restrictive measures imposed by the contested regulation constitute restrictions of the right to property which might, in principle, be justified.

367 In addition, it must be considered whether, when that regulation was applied to Mr Kadi, his right to property was respected in the circumstances of the case.

368 It is to be borne in mind in this respect that the applicable procedures must also afford the person concerned a reasonable opportunity of putting his case to the competent authorities. In order to ascertain whether this condition, which constitutes a procedural requirement inherent in Article 1 of Protocol No 1 to the ECHR, has been satisfied, a comprehensive view must be taken of the applicable procedures (see, to that effect, the judgment of the European Court of Human Rights in *Jokela v. Finland* of 21 May 2002, *Reports of Judgments and Decisions* 2002-IV, § 45 and case-law cited, and § 55).

369 The contested regulation, in so far as it concerns Mr Kadi, was adopted without furnishing any guarantee enabling him to put his case to the competent authorities, in a situation in which the restriction of his property rights must be regarded as significant, having regard to the general application and actual continuation of the freezing measures affecting him.

370 It must therefore be held that, in the circumstances of the case, the imposition of the restrictive measures laid down by the contested regulation in respect of Mr Kadi, by including him in the list contained in Annex I to that regulation, constitutes an unjustified restriction of his right to property.

371 The plea raised by Mr Kadi that his fundamental right to respect for property has been infringed is therefore well founded.

372 It follows from all the foregoing that the contested regulation, so far as it concerns the appellants, must be annulled.

373 However, the annulment to that extent of the contested regulation with immediate effect would be imposed by seriously and irreversibly prejudicing the effectiveness of the restrictive measures imposed by the regulation and which the Community is required to implement, because in the interval preceding its replacement by a new regulation Mr Kadi and Al Barakaat might take steps seeking to prevent measures freezing funds from being applied to them again.

374 Furthermore, in so far as it follows from this judgment that the contested regulation must be annulled so far as concerns the appellants, by reason of breach of principles applicable in the procedure followed when the restrictive measures introduced by that regulation were adopted, it cannot be excluded that, on the merits of the case, the imposition of those measures on the

appellants may for all that prove to be justified.

375 Having regard to those considerations, the effects of the contested regulation, in so far as it includes the names of the appellants in the list forming Annex I thereto, must, by virtue of Article 231 EC, be maintained for a brief period to be fixed in such a way as to allow the Council to remedy the infringements found, but which also takes due account of the considerable impact of the restrictive measures concerned on the appellants' rights and freedoms.

376 In those circumstances, Article 231 EC will be correctly applied in maintaining the effects of the contested regulation, so far as concerns the appellants, for a period that may not exceed three months running from the date of delivery of this judgment.

#### Costs

377 Under the first paragraph of Article 122 of the Rules of Procedure, where the appeal is well founded and the Court of Justice itself gives final judgment in the case, it is to make a decision as to costs. Under Article 69(2) of the Rules of Procedure, applicable to appeal proceedings by virtue of Article 118 thereof, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. The first paragraph of Article 69(4) provides that the Member States which have intervened in the proceedings are to bear their own costs.

378 Because Mr Kadi and Al Barakaat's appeals must be upheld and because the contested regulation must be annulled in so far as it concerns the appellants, the Council and the Commission must each be ordered to pay, in addition to their own costs, half of those incurred by Mr Kadi and Al Barakaat, both at first instance and in the present proceedings, in accordance with the forms of order sought to that effect by the appellants.

379 The United Kingdom of Great Britain and Northern Ireland is to bear its own costs both at first instance and in the appeals.

380 The Kingdom of Spain, the French Republic and the Kingdom of the Netherlands are to bear their own costs relating to the appeals.

On those grounds, the Court (Grand Chamber) hereby:

1. Sets aside the judgments of the Court of First Instance of the European Communities of 21 September 2005 in Case T-315/01 *Kadi v Council and Commission* and Case T-306/01 *Yusuf and Al Barakaat International Foundation v Council and Commission*;
2. Annuls Council Regulation (EC) No 881/2002 of 27 May 2002 imposing certain specific restrictive measures directed against certain persons and entities associated with Usama bin Laden, the Al-Qaeda network and the Taliban, and repealing Council Regulation (EC) No 467/2001 prohibiting the export of certain goods and services to Afghanistan, strengthening the flight ban and extending the freeze of funds and other financial resources in respect of the Taliban of Afghanistan, in so far as it concerns Mr Kadi and the Al Barakaat International Foundation;
3. Orders the effects of Regulation No 881/2002 to be maintained, so far as concerns Mr Kadi and the Al Barakaat International Foundation, for a period that may not exceed three months running from the date of delivery of this judgment;
4. Orders the Council of the European Union and the Commission of the European

Communities each to pay, in addition to their own costs, half of those incurred by Mr Kadi and Al Barakaat International Foundation both at first instance and in these appeals;

5. Orders the United Kingdom of Great Britain and Northern Ireland to bear its own costs both at first instance and in these appeals;

6. Orders the Kingdom of Spain, the French Republic and the Kingdom of the Netherlands to bear their own costs.

Signatures

<sup>2</sup>: Languages of the case: English and Swedish.