

*Extract from:*

# UNITED NATIONS JURIDICAL YEARBOOK

1986

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

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



Copyright (c) United Nations

## CONTENTS (continued)

	<i>Page</i>
B. DECISIONS OF THE ADMINISTRATIVE TRIBUNAL OF THE INTERNATIONAL LABOUR ORGANISATION	
1. Judgement No. 729 (17 March 1986): <i>Ilomechina v. Food and Agriculture Organization of the United Nations</i> .....	259
2. Judgement No. 741 (17 March 1986): <i>Farinetti, Porta and Tuzii v. International Centre for Advanced Technical and Vocational Training</i> .....	261
3. Judgement No. 778 (12 December 1986): <i>Petruc v. Food and Agriculture Organization of the United Nations</i> .....	263
C. DECISIONS OF THE WORLD BANK ADMINISTRATIVE TRIBUNAL	
Decision No. 28 (22 April 1986): <i>Gyamfi v. International Bank for Reconstruction and Development</i> .....	265
 CHAPTER VI. SELECTED LEGAL OPINIONS OF THE SECRETARIATS OF THE UNITED NATIONS AND RELATED INTERGOVERNMENTAL ORGANIZATIONS	
A. LEGAL OPINIONS OF THE SECRETARIAT OF THE UNITED NATIONS (ISSUED OR PREPARED BY THE OFFICE OF LEGAL AFFAIRS)	
1. Request by a Member State that the Secretary-General take immediate steps to ensure free access of the general public to all the material stored in the archives of the United Nations War Crimes Commission—Rules governing access to the archives of the Commission .....	269
2. Policy governing access to United Nations documents and files ...	271
3. Presentation of credentials by newly appointed permanent representatives to the United Nations during a temporary absence of the Secretary-General—Power of the Secretary-General to delegate competence in this regard to another official of the United Nations .....	272
4. Protection against unauthorized use of the United Nations name, initials and emblem provided for in General Assembly resolution 92 (1)—Registration and protection of the name and emblem of the United Nations under article 6 <i>ter</i> of the 1882 Paris Convention for the Protection of Industrial Property (as amended in Stockholm in 1967) .....	273
5. Questions relating to the voting procedure and decision-making process of the General Assembly—General rule applicable to the calculation of the majority required for the adoption of resolutions and decisions by the General Assembly—Exceptions to the rule—Effect of absence or non-participation on the binding force of resolutions and decisions .....	274
6. Competence of the Disarmament Commission in connection with the adoption of its agenda—Question of whether the Commission could delete from its provisional agenda an item which	

## CONTENTS *(continued)*

	<i>Page</i>
was included therein pursuant to requests from the General Assembly.....	275
7. Characterization of a committee dealing with programme and budgetary questions as an expert and/or representative of intergovernmental body—Conditions to be met for a United Nations body to be so characterized .....	277
8. Assessment of a non-member State with respect to its participation in the United Nations Environment Programme—Regulation 5.9 of the Financial Regulations of the United Nations—Meaning of the term “participation” .....	280
9. Possible motion involving the conciliation procedures provided for in rule 48 (2) of the rules of procedure of the Trade and Development Board, in connection with action by the Board on the provisional agenda for the seventh session of the United Nations Conference on Trade and Development—Procedural character of issues relating to the provisional agenda for UNCTAD VII.....	282
10. Scope of application of Article 27, paragraph 3, of the Charter of the United Nations—Practice of the Security Council in this regard—Question of giving effect to a judgment of the International Court of Justice within the context of Article 94 of the Charter—A determination by the Court that a matter is a “legal dispute” under Article 36, paragraph 2, of its Statute is not determinative of whether that matter is also a “dispute” within the meaning of Chapter VI and Article 27, paragraph 3, of the Charter .....	283
11. Conditions under which the Security Council may meet away from Headquarters—Article 28, paragraph 3, of the Charter of the United Nations—Council’s practice in regard to meetings away from the seat of the Organization—Detailed arrangements required to deal with the technical, financial and legal aspects of such meetings .....	285
12. Practice in the Security Council for the circulation of communications from States not members of the United Nations—In those instances where such circulation has been questioned, the issue relates to the status of the entity requesting circulation and not to the content of the communication .....	286
13. Participation in the Commission on Narcotic Drugs when it acts as the preparatory body for the International Conference on Drug Abuse and Illicit Trafficking—Decision of the Economic and Social Council providing that “in the preparatory body all States should participate in the decision-making process”—Meaning of the term “participation in the decision-making process”—Consequences of the Council’s decision as regards rule 69 (3) of	

## CONTENTS (continued)

	Page
the rules of procedure of the functional commissions of the Economic and Social Council .....	287
14. Membership of a non-member State in the Commission on Human Settlements—Procedure to be followed by a non-member State to become a member of the Commission—Legal implications of a non-member State making voluntary contributions to the United Nations Habitat and Human Settlements Foundation ..	288
15. Question of the full membership of the Cook Islands in the Economic and Social Commission for Asia and the Pacific—Status of the Cook Islands under General Assembly resolution 2064 (XX) of 16 December 1965 and the terms of reference of ESCAP .....	289
16. Participation in meetings organized by the Economic Commission for Africa—Terms of reference and rules of procedure of the Commission—Question of the participation of members of the Organization of African Unity which are not Members of the United Nations in such meetings—Status of the entity “Sahraoui Arab Democratic Republic” in the United Nations—United Nations practice with regard to contested representation in the Organization—General Assembly resolution 396(V) of 14 December 1950 .....	291
17. Question of who is responsible for compensation for death and injury and third party liability in relation to Namibian trainees undergoing training within the framework of the Field Attachment Programme administered by the Office of the United Nations Commissioner for Namibia .....	292
18. Authority of the Administration to select airlines for official travel for the United Nations—Duty of the Secretary-General to ensure that his staff is not exposed to unnecessary risk—Principle, established in Judgement No. 402 of the Administrative Tribunal of the International Labour Organisation, of the liability of an international organization for requiring staff members to work in unsafe conditions .....	294
19. Legal background for the United Nations position with respect to nationality and place of birth in the United Nations <i>laissez-passer</i> —Articles 100 and 105, paragraph 2, of the Charter of the United Nations—Article VII, sections 24 and 25, of the Convention on the Privileges and Immunities of the United Nations .....	296
20. United Nations policy on the acquisition or retention of United States permanent resident status—Basic rationale for such a policy—Administrative instruction ST/AI/294 of 16 August 1982 .....	297
21. Concept of acquired rights under the United Nations Staff Regulations, the Regulations of the United Nations Joint Staff Pension Fund and the statute of the International Civil Service Commis-	

## CONTENTS (continued)

	<i>Page</i>
sion and in the jurisprudence of the administrative tribunals of the United Nations, ILO and the World Bank.....	298
22. Liability of the United Nations for claims involving off-duty acts of members of peace-keeping forces—Determination of “off-duty” versus “on-duty” status.....	300
23. Use of deadly physical force by United Nations security officers—Relevance of the standards of permissible conduct applicable to a private person under section 35.30 of the New York Penal Law .....	301
24. Venue of future meetings of the Committee on the Elimination of Racial Discrimination—Article 8, paragraph 6, and article 10 of the International Convention on the Elimination of All Forms of Racial Discrimination—Established rules and practices of the United Nations regarding conferences and meetings as embodied in General Assembly resolutions 31/140 and 40/243—Authority of the States parties to the Convention in matters relating to the operation of the Convention.....	302
25. Interpretation of the provisions of article 39, paragraph 2 (c), of the International Cocoa Agreement, 1980 .....	304
26. Article 29, paragraphs 2 and 7, of the Sixth International Tin Agreement .....	305
27. Question whether there is an established procedure in international commodity agreements regarding the appointment of executive directors—Scope of application of the special vote requirement provided for in the 1984 International Sugar Agreement—Procedure to be followed by an international organization with a weighted voting system in order to suspend the rule on roll-call to appoint the Executive Director by secret ballot.	307
28. Applicability of the New York firearm licensing requirements to United Nations security officers carrying pistols within and outside the Headquarters district—Article III, section 7, of the 1947 Agreement between the United Nations and the United States of America regarding the Headquarters of the United Nations—Options available to reduce the financial and administrative burdens imposed on the United Nations by the current firearm licensing requirements.....	309
29. Request by a Member State that the United Nations Centre on Transnational Corporations look to the Ministry of Foreign Affairs of that State as its exclusive point of contact within the Government of the State in question—Discretion of every Member State in this respect—Request by that same State that the Centre send to the indicated office of the Ministry a copy of any communication from the Centre asking for information or assistance from firms or business organizations of that country—Inviolability and integrity of the Organization’s correspon-	

## CONTENTS (continued)

	<i>Page</i>
dence—Article II, sections 3 and 4, of the Convention on the Privileges and Immunities of the United Nations .....	317
30. Request of the host State for ceilings on, or reductions in, the size of missions accredited to the United Nations—Absence of precedent on the matter—Relevant rules and principles of international law as reflected in article 11, paragraph 1 of the 1961 Vienna Convention on Diplomatic Relations, article 14 of the 1975 Vienna Convention on the Representation of States in their Relations with International Organizations of a universal Character and article V, section 15 (2), of the 1947 Agreement between the United Nations and the United States of America regarding the Headquarters of the United Nations—Remedies against any misuse of the freedom of the sending State in determining the composition of its mission .....	319
31. Departure tax on purchase of air tickets—Provision of article II, sections 7 (a) and 8, of the Convention on the Privileges and Immunities of the United Nations—The nature of the tax in question is to be decided by reference to the incidence of the tax ..	321
32. Conditions and procedures for the issuance of residence permits to foreign residents in a Member State—The charging of fees for the issuance of residence permits is incompatible with article II, section 7 (a), and article V, section 18 (d), of the Convention on the Privileges and Immunities of the United Nations .....	322
33. Customs user fee to be introduced by the customs service of a Member State—United Nations officials have generally been accorded the same treatment by customs service as diplomats—Nature of the user fee—Provisions of article II, sections 7 (a) and 8, and article VI, section 22 (a), of the Convention on the Privileges and Immunities of the United Nations .....	323
34. Implementation of the obligation of the United Nations and the specialized agencies to make provision for the settlement of disputes of a private character—Practice followed in this respect by the Organization in question .....	324
35. Question of the application of the United States Foreign Missions Act, 1982, to real estate transactions of international organizations .....	325
36. Question whether a Member State is exempted from real estate taxes on apartments purchased by its Permanent Mission to the United Nations for the exclusive use of the diplomatic staff of the mission—Applicability to permanent missions in New York, by virtue of article V, section 15, of the Agreement between the United Nations and the United States of America regarding the Headquarters of the United Nations, and of article 23, paragraph 1, of the 1961 Vienna Convention on Diplomatic Relations—Position of the United States of America on the matter .....	327

## CONTENTS (*continued*)

Page

37. Question whether article VIII, section 27, of the Interim Arrangement on Privileges and Immunities of the United Nations concluded between the Secretary-General of the United Nations and the Swiss Federal Council applies to the settlement of disputes between the host State and members of permanent missions, notwithstanding the granting to those members of a status analogous to the status of members of diplomatic missions ..... 328
- B. LEGAL OPINIONS OF THE SECRETARIATS OF INTERGOVERNMENTAL ORGANIZATIONS RELATED TO THE UNITED NATIONS
1. Food and Agriculture Organization of the United Nations  
Appearance of a staff member before a professional disciplinary body in a country to which he is assigned..... 330
2. United Nations Industrial Development Organization
- (a) Applicability to the United Nations Industrial Development Organization of the United Nations Financial and Staff Rules—Power of the Director-General to amend those Rules 331
- (b) Exclusive authority of the Director-General to appoint staff .. 334
- (c) Proposed United Nations Association of Political Scientists .. 337
- (d) Exemption of the United Nations Industrial Development Organization and its staff from contributions to the social security system of a member State—Ordinance by the Federal Republic of Germany..... 339

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

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

##### International Chamber of Commerce Court of Arbitration

Food and Agriculture Organization of the United Nations v. BEVAC Company: Arbitral award (Case No. 5003/JJA) of 29 July 1986

Dispute arose in connection with a purchase contract—Conditions governing the sale as stipulated in the “Request for bids and purchase orders, general conditions”—Settlement of disputes arising in connection with the contract—Rules of Conciliation and Arbitration of the International Chamber of Commerce—Law applicable in the case ..... 347

#### CHAPTER VIII. DECISIONS OF NATIONAL TRIBUNALS

##### *Austria*

Poole v. the Government of the Republic of Austria. Overruling of court decision by Ministry of Justice of 28 August 1986

## Chapter VI

### SELECTED LEGAL OPINIONS OF THE SECRETARIATS OF THE UNITED NATIONS AND RELATED INTER- GOVERNMENTAL ORGANIZATIONS

#### A. Legal opinions of the Secretariat of the United Nations

(issued or prepared by the Office of Legal Affairs)

1. REQUEST BY A MEMBER STATE THAT THE SECRETARY-GENERAL TAKE IMMEDIATE STEPS TO ENSURE FREE ACCESS OF THE GENERAL PUBLIC TO ALL THE MATERIAL STORED IN THE ARCHIVES OF THE UNITED NATIONS WAR CRIMES COMMISSION—RULES GOVERNING ACCESS TO THE ARCHIVES OF THE COMMISSION

*Letter from the Secretary-General addressed to the Permanent Representative of a Member State to the United Nations<sup>1</sup>*

I have received your letter of 12 May 1986 in response to my letter of 9 May, concerning your request that I take "the immediate steps necessary to ensure free access of the general public to all the material stored in the archives of the United Nations War Crimes Commission" (UNWCC). In my letter I had indicated that your request called for a fundamental revision in the rules regarding access to the archives in question, of which the United Nations Secretariat was in the position of a custodian and trustee, and that, consequently, I was initiating consultations with former members of UNWCC on this subject.

As you are aware, at the time when the question of the ultimate disposal and custody of the archives of UNWCC was being considered, the Secretary-General of the United Nations, Mr. Trygve Lie, in the light of previous exchanges of correspondence and consultations between officials of the Commission and of the United Nations Secretariat, indicated, in a letter of 15 December 1947 to the Secretary-General of the Commission, that the United Nations was "prepared to assume custody of the archives of the Commission at the time of its closing". He further suggested "that this question might be discussed between competent officials of the two Organizations with a view to determining conditions of transfer, including provisions for ensuring the necessary restriction on any material of a confidential or secret nature". When UNWCC accepted this offer, in a reply dated 28 January 1948, it also expressly agreed to Mr. Lie's suggestions regarding discussions on the conditions of transfer and for ensuring restrictions on any material of a confidential or secret nature. On the basis of the agreement thus reached between the two Organizations, the United Nations, in establishing the rules governing access to the UNWCC archives, consulted with the late Dr. J. J. Litawski, Legal Officer of the Commission, and with the former



Chairman, the late Lord Wright, who indicated general agreement with those rules.

The rules promulgated against the above background permit full access to the bulk of the records of the Commission to persons engaged in bona fide research in the history of the Commission or in related problems in international law or associated fields. However, certain records are subject to restrictions, namely:

(a) Those parts of the minutes and documents of the Commission and its Committees and of the Research Office "Documents" that refer to specified individuals charged or suspected of war crimes;

(b) The lists of war criminals, suspects and witnesses; related indexes; and the formal charges and related papers.

These restricted records may be inspected and used only for official United Nations purposes.

Official United Nations purposes have been understood to include prosecution of war crimes and access has thus been granted to Governments to this end upon written request and upon the understanding that the records are strictly confidential and will be handled on the same basis of confidentiality as any other material being used in a criminal investigation. This derives from the fact that the material in the restricted records has not been submitted to judicial process or otherwise subjected to legal review and, in the great majority of cases, the individuals involved have not been informed of the charges or other data relating to them and thus have had no opportunity to reply. The rules further note that:

"It is understood that the United Nations has not succeeded to the functions of the United Nations War Crimes Commission, and the Secretariat, therefore, cannot be called upon to reply to inquiries regarding persons charged or suspected of war crimes."

The rules have been in force since the UNWCC archives were transferred to the United Nations Secretariat in 1948, and, so far as limitations on access to certain records are concerned, they have been interpreted in practice in a manner that has so far proved satisfactory to every Government that has sought access in specific cases. The particular case to which you refer, and in respect of which you quote from a memorandum of Mr. Stavropoulos, relates not to the rules themselves but to the accompanying understanding that the Secretariat cannot be called upon to reply to inquiries from private sources regarding persons charged or suspected of war crimes. In this case, the Secretariat responded affirmatively to a request from two brothers who wished to establish that their names were not included in the UNWCC lists of war criminals as they claimed that their personal and business reputations had been badly damaged by allegations that they were so listed. The response that they were not so listed did not therefore involve disclosure by the Secretariat of any of the restricted material entrusted to it by UNWCC.

With reference to your letter under reply, I am not aware of any issue at the present time regarding the right of the Secretariat to promulgate the rules governing access to the archives of UNWCC. This is not disputed. However, in interpreting the responsibilities of the Secretariat as custodian and trustee of the records of a body that antedated the United Nations and was entirely independent of it, I have concluded that the proper discharge of these responsibilities, when

important and fundamental changes are proposed in the rules governing access, requires consultations with the Governments that had entrusted those records to the United Nations for their views before any decision is taken.

As you have requested that your letter of 12 May 1986 be circulated as a document of the General Assembly, under items 12 and 135 of the preliminary list, and of the Economic and Social Council, under item 9 of the agenda of its first regular session in 1986, I am giving the same circulation to this reply.

16 May 1986

---

## 2. POLICY GOVERNING ACCESS TO UNITED NATIONS DOCUMENTS AND FILES

### *Letter to a foundation*

I have been requested by the Secretary-General to reply to your letter to him of 12 June 1986 concerning your current project dealing with the relationship between several non-governmental organizations (NGOs) and the United Nations.

I have sought to clarify the matter and it appears that the information you received, to the effect that the Office of Legal Affairs had advised that the NGO files were not open and could therefore not be shown to you, was based on advice relating to the status and nature of restricted official documents given by the Office when it was consulted in a different context in the late 1970s.

I would therefore like to inform you that access to United Nations documents and files are governed by the following considerations:

- (i) Internal office files containing inter-office memoranda and correspondence are not open either to Governments or to members of the public;
- (ii) Official documents and records published with a United Nations document symbol and given general circulation are readily available for review by Governments and interested individuals;
- (iii) Certain official documents are given only limited circulation and are intended for use only by a particular United Nations organ. In these cases, circulation of the documents is limited to the membership of the organ concerned. However, documents with a restricted circulation become accessible to interested Governments and individuals in the United Nations Library when they are discussed in open meetings, which is normally the case. Occasionally, however, certain documents with a restricted circulation are considered in closed session, and then they are available only to the participants in the meeting in question. In such cases, access to the restricted documents is governed by the United Nations body for whose consideration they were prepared.

Turning specifically to the records of the Committee on Non-governmental Organizations, one must distinguish between official documents and records originating from the Secretariat, material submitted by organizations to the Secretariat and reproduced in documents, and internal office files containing

information not intended for use outside the Secretariat. In accordance with the foregoing, there would be no obstacle to granting access to Governments and interested individuals to materials contained in official documents, even if their circulation is restricted, provided that they are considered in open meetings. Secretariat files on NGOs containing inter-office memoranda and correspondence are not open to inspection by Governments or the public. However, materials contained in such files and submitted by NGOs such as reports on their activities and other materials providing information to the United Nations concerning their organization's status, membership, financing, etc., and intended for public use may be made accessible to Governments and interested individuals.

16 May 1986

---

3. PRESENTATION OF CREDENTIALS BY NEWLY APPOINTED PERMANENT REPRESENTATIVES TO THE UNITED NATIONS DURING A TEMPORARY ABSENCE OF THE SECRETARY-GENERAL—POWER OF THE SECRETARY-GENERAL TO DELEGATE COMPETENCE IN THIS REGARD TO ANOTHER OFFICIAL OF THE UNITED NATIONS

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

1. You have requested the views of the Office of Legal Affairs regarding the presentation of credentials by newly appointed permanent representatives to the United Nations during the temporary absence of the Secretary-General.

2. While there seem to be no precedents regarding this situation, it has to be noted that the accreditation of a permanent representative to the United Nations does not require, in order to become effective, the acceptance of the credentials of the permanent representative in question by the Secretary-General himself. What counts is that the credentials are presented to and accepted by an authorized official of the Organization. The Secretary-General therefore can delegate competence regarding accreditation and, in fact, has done so on a permanent basis in Geneva and in Vienna, where the executive heads of the United Nations Office at Geneva and the United Nations Office at Vienna accept the credentials of the permanent representatives, in his stead. Under this circumstances, it is the view of this Office that since the acceptance of credentials of permanent representatives is a part of the executive functions of the Secretary-General, the general delegation of authority to the respective offices and departments would support the conclusion that in the absence of the Secretary-General, credentials should be presented to the Chef de Cabinet, who is the head of the Executive Office of the Secretary-General. However, in view of the protocolary importance of the accreditation procedure, you might wish to obtain a special confirmation of the Secretary-General that this corresponds to his wishes.

3. In the light of the foregoing, it would be in order for you to arrange to accept the credentials of newly appointed permanent representatives, with appropriate arrangements being made for such representatives to meet with the Secretary-General as soon as he resumes his functions.

28 July 1986

4. PROTECTION AGAINST UNAUTHORIZED USE OF THE UNITED NATIONS NAME, INITIALS AND EMBLEM PROVIDED FOR IN GENERAL ASSEMBLY RESOLUTION 92 (1)—REGISTRATION AND PROTECTION OF THE NAME AND EMBLEM OF THE UNITED NATIONS UNDER ARTICLE 6 *TER* OF THE 1882 PARIS CONVENTION FOR THE PROTECTION OF INDUSTRIAL PROPERTY (AS AMENDED IN STOCKHOLM IN 1967)<sup>2</sup>

*Letter to a broadcasting company*

The Secretary-General has asked me to reply to the letter you addressed to him on 2 April in response to his letter of 20 March to the Chairman of the Board of your company regarding the TV miniseries at present in preparation.

In planning to use the United Nations name, initials and emblem as part of a fictional account of hypothetical future events, your company might not have realized that all of the above are protected against unauthorized use, and in particular use for commercial purposes, in accordance with General Assembly resolution 92(1) of 7 December 1946. That resolution requested Member States to take such legislative or other appropriate measures to prevent the use of the emblem, the official seal and the name of the United Nations (including abbreviations of that name through the use of initial letters) without authorization by the Secretary-General. Pursuant to that request most countries enacted protective legislation.

In addition, the emblem and name of the Organization are registered and protected under article 6 *ter* of the 1882 Paris Convention for the Protection of Industrial Property (as amended in Stockholm in 1967), in all countries parties to that treaty.

The commercial use that is prohibited by the above-mentioned instruments is not restricted to various types of deceptive advertising, but evidently includes any use of the protected names or symbols of the Organization for any profit-making purpose, particularly if such use may be calculated to bring the Organization into discredit. While obviously there is no prohibition of any fair political commentary, whether favourable or not, it is quite another thing to implicate the United Nations gratuitously as a villain in a fictitious account.

The legal protection of the name and symbols of the United Nations were enacted for a specific and important public purpose, which has been upheld by courts in the few instances in which we have been obliged to litigate these questions. Fortunately, in almost all instances it has been unnecessary to do so, for a reminder of the rules and of the purpose they serve has been sufficient to resolve any questionable situation. We therefore trust that your company too will be in a position to meet the concerns expressed by the Secretary-General in his above-mentioned letter.

24 April 1986

5. QUESTIONS RELATING TO THE VOTING PROCEDURE AND DECISION-MAKING PROCESS OF THE GENERAL ASSEMBLY—GENERAL RULE APPLICABLE TO THE CALCULATION OF THE MAJORITY REQUIRED FOR THE ADOPTION OF RESOLUTIONS AND DECISIONS BY THE GENERAL ASSEMBLY—EXCEPTIONS TO THE RULE—EFFECT OF ABSENCE OR NON-PARTICIPATION ON THE BINDING FORCE OF RESOLUTIONS AND DECISIONS

*Letter to the Permanent Observer of an intergovernmental organization to the United Nations*

I should like to refer to the note dated 2 May 1986 addressed by your Mission to the Office of Legal Affairs. The Mission has requested information and clarification from the Office with regard to the voting procedure and decision-making process of the General Assembly. Specifically, the questions that have been put to us are the following:

1. How is a Member State that is absent or not participating in the voting process treated in connection with the calculation of the majority required for the adoption of a resolution or decision by the General Assembly?

2. Is a Member State which was absent or which announced its non-participation in the voting process when a particular resolution or decision was put to the vote nevertheless bound by the terms of the resolution or decision in question validly adopted by the General Assembly?

With regard to the first question, I should like to draw your attention to the rules of procedure of the General Assembly<sup>3</sup> governing voting in the Assembly (rules 82 to 95). You will note that in rules 83 and 84, reference is made to “a two-thirds majority of the members present and voting” and in rule 85, to “a majority of the members present and voting”. The term “members present and voting” is defined in rule 86 to mean members that cast an affirmative or negative vote. The same rule expressly states that Members which abstain from voting are considered as not voting. In accordance with these provisions, only Member States which are present and which cast an affirmative or a negative vote are taken into account for the purpose of calculating the majority required for the adoption of a resolution or decision by the General Assembly.

It is relevant however to mention that, while most decisions of the General Assembly require either a simple or a two-thirds majority of the members *present and voting*, there are special cases based on provisions of the Charter of the United Nations or of the Statute of the International Court of Justice where the present and voting element is not applicable to the calculation of the majority required for the adoption of the decisions concerned. One such case is the election of members of the International Court of Justice where, in accordance with the provisions of the Statute of the Court, an absolute majority of votes is required in the General Assembly, such absolute majority being based on the total number of Members of the United Nations plus three non-members which are parties to the Statute of the Court. The other case where a special majority is required is in connection with the adoption of amendments to the Charter of the United Nations which, pursuant to Article 108 of the Charter, require a two-thirds majority of the members of the General Assembly for adoption. In these two cases, the majority required is an absolute or a qualified majority based on a

definite number of States which is not affected by abstentions, absences or announcements by States that they are not participating in the vote. In these two special cases, abstentions, absences and non-participation in the vote do not have the effect of reducing and majority required (which would be the case if the present and voting requirement applied) and therefore have a negative impact.

It should be noted that the officially recognized method of voting under the rules of procedure of the General Assembly is reflected in rule 87 which refers to a "yes" or affirmative vote, a "no" or negative vote and to abstention. Accordingly, non-participation in the vote is not indicated in the official result of the vote announced by the President and reflected in the official record of the meeting. From a legal standpoint, a Member that declares its non-participation in the voting process is in the same situation as a Member State that was absent during the voting.

As to the second question, one must distinguish between resolutions and decisions which are purely recommendatory in nature and resolutions and decisions which are binding on Member States. In general, resolutions and decisions other than those relating to the institutional framework and administrative and financial administration of the Organization are recommendatory in nature and are thus not legally binding even on those Members that vote in favour of the resolutions or decisions in question. To the extent that resolutions or decisions produce legally binding effects on the Members of the Organization, all Member States are legally bound to comply with such resolutions or decisions validly adopted in accordance with the provisions of the rules of procedure of the General Assembly and the Charter of the United Nations. Such legally binding resolutions or decisions include decisions relating to the adoption of the scale of assessments for the appointment of expenses of the Organization under Article 17 of the Charter, decisions relating to the budget of the Organization and other decisions relating to the internal administration and management of the Organization. Once a legally binding resolution or decision of this type is validly adopted, it is binding on all Member States, including those that voted against, abstained, were absent or declared their non-participation in the decision-making process.

9 May 1986

---

6. COMPETENCE OF THE DISARMAMENT COMMISSION IN CONNECTION WITH THE ADOPTION OF ITS AGENDA—QUESTION OF WHETHER THE COMMISSION COULD DELETE FROM ITS PROVISIONAL AGENDA AN ITEM WHICH WAS INCLUDED THEREIN PURSUANT TO REQUESTS FROM THE GENERAL ASSEMBLY

*Memorandum to the Chairman of the Disarmament Commission*

At the initial meeting of the Disarmament Commission, on 2 May 1986, the Office of Legal Affairs was requested to provide legal advice with regard to the competence of the Commission in connection with the adoption of its agenda and in particular the question of whether the Disarmament Commission could delete from its provisional agenda an item which had been included thereon pursuant to a request from the General Assembly.

The Office of Legal Affairs has carefully examined the questions raised at the informal meeting of the Disarmament Commission in the light of the relevant resolutions of the General Assembly. Its views on the questions raised are reflected below.

The Disarmament Commission was established by the General Assembly as a subsidiary organ. Pursuant to paragraph 118 (b) of the Final Document of the Tenth Special Session of the General Assembly,<sup>4</sup> it "shall function under the rules of procedure relating to committees of the General Assembly with such modifications as the Commission may deem necessary and shall make every effort to ensure that, in so far as possible, decisions on substantive issues be adopted by consensus".

At its fortieth session, the General Assembly, by its resolution 40/94 I of 12 December 1985, requested the Disarmament Commission to continue the consideration of the question entitled "curbing the naval arms race: limitation and reduction of naval armaments and extension of confidence-building measures to seas and oceans", with a view to submitting its recommendations to the General Assembly at its forty-first session.

Also at the fortieth session, the General Assembly, by its resolution 40/94 F of 12 December 1985, entitled "Study on the naval arms race", requested the Disarmament Commission "to consider, at its forthcoming session in 1986, the issues contained in the study on the naval arms race . . . and to report on its deliberations and recommendations to the General Assembly at its forty-first session".

On the basis of the requests contained in the above-mentioned resolutions, the Secretary-General included in the provisional agenda for the current session of the Disarmament Commission an item on the question of the naval arms race.

While in general terms an organ has the competence to consider the provisional agenda and to finalize its agenda with such additions, deletions or other modifications as it deems necessary, a subsidiary organ is required to follow the instructions given to it by its parent organ. In this particular case, the Disarmament Commission, a subsidiary organ of the General Assembly, has been requested by the Assembly to consider a particular matter at its 1986 session. In the practice of the United Nations, a request by a principal or parent organ to its subsidiary organ that an item be placed on its agenda is considered to be a directive to be followed by the subsidiary body concerned. It would therefore not be consistent with this practice if the Disarmament Commission were to adopt its agenda for the session without including the item on the naval arms race, which appears on its provisional agenda. Of course, it would be for the Disarmament Commission to determine the manner and the extent to which each item on its agenda is to be considered, taking into account its decision-making practices.

A further question raised during the meeting related to the manner by which the Disarmament Commission decided issues relating to its agenda. It is relevant to recall that the Commission has been requested by the General Assembly to make every effort to reach decisions on substantive issues by consensus. In this regard, however, it should be noted that invariably in United Nations practice the adoption of the agenda is a procedural matter which could be decided, if necessary, by voting.

2 May 1986

7. CHARACTERIZATION OF A COMMITTEE DEALING WITH PROGRAMME AND BUDGETARY QUESTIONS AS AN EXPERT AND/OR REPRESENTATIVE OR INTERGOVERNMENTAL BODY—CONDITIONS TO BE MET FOR A UNITED NATIONS BODY TO BE SO CHARACTERIZED

*Memorandum to the Secretary of the Special Working Group of the Steering Committee on Financial and Administrative Matters*

This is in response to a memorandum addressed to you on 17 June 1986 requesting, on behalf of the Group of High-Level Intergovernmental Experts to Review the Efficiency of the Administrative and Financial Functioning of the United Nations, legal advice on whether it would “be possible to give to the membership of a committee dealing with programme and budgetary questions both an expert and an intergovernmental character, preferably with renewable fixed terms”.

1. To give a body an expert character, it is useful both to specify objective criteria and to establish a mechanism for ensuring substantive compliance therewith; it is also desirable to prevent or at least inhibit easy substitution of members, whether on a temporary or a permanent basis, and to guard their independence.

(a) The objective criteria can be specified in whatever terms and detail seems appropriate, for example, see:

—Advisory Committee on Administration and Budgetary Questions: Rules of procedure of the General Assembly

*“Appointment*

*“Rule 155*

“The General Assembly shall appoint an Advisory Committee on Administrative and Budgetary Questions consisting of sixteen members, including at least three financial experts of recognized standing.

*“Composition*

*“Rule 156*

“The members of the Advisory Committee on Administrative and Budgetary Questions, no two of whom shall be nationals of the same State, shall be selected on the basis of broad geographical representation, personal qualifications and experience and shall serve for a period of three years corresponding to three calendar years. Members shall retire by rotation and shall be eligible for reappointment. The three financial experts shall not retire simultaneously. The General Assembly shall appoint the members of the Advisory Committee at the regular session immediately preceding the expiration of the term of office of the members or, in case of vacancies, at the next session.”<sup>5</sup>

—Joint Inspection Unit: Statute of the Joint Inspection Unit

*“Article 2*

1. The Unit shall consist of not more than eleven Inspectors, chosen from among members of national supervision or inspection bodies, or from among persons of a similar competence on the basis of their special experience in national or international administrative and financial matters,



including management questions. The Inspectors shall serve in their personal capacity.”<sup>6</sup>

—International Civil Service Commission: Statute and rules of procedure

“Article 3

1. The members of the Commission shall be appointed in their personal capacity as individuals of recognized competence who have had substantial experience of executive responsibility in public administration or related fields, particularly in personnel management.

“2. The members of the Commission, no two of whom shall be nationals of the same State, shall be selected with due regard for equitable geographical distribution.”<sup>7</sup>

(b) Though in the first instance the selection of members who meet the stated criteria must be the responsibility of each State concerned, compliance with such responsibility might be monitored and thus reinforced by requiring the State to consult with an appropriate international official (e.g., the Secretary-General) or officer (e.g., the President of the General Assembly, or the Chairman of the Fifth Committee); there also may be a requirement that members be approved by the Assembly.<sup>8</sup> (For example, the persons representing the States members of the functional commissions of the Economic and Social Council must be selected after consultation with the Secretary-General and are subject to confirmation by the Council in accordance with the rules of procedure of the functional commissions of the Economic and Social Council.<sup>9</sup>) The element of State selection can be even further de-emphasized (though at the cost of thereby also de-emphasizing the intergovernmental character of the organ) by providing for the selection to be performed by an international official/officer after “consultation” with Member States (i.e., after receiving their nominations), as well as with other bodies affected by the choice; for example, see:

—Joint Inspection Unit: Statute of the Joint Inspection Unit

“Article 3

“... ”

2. The President of the General Assembly, through appropriate consultations, including consultations with the President of the Economic and Social Council and with the Chairman of the Administrative Committee on Coordination, shall review the qualifications of the proposed candidates. After further consultations, if necessary, with the States concerned, the President of the General Assembly shall submit the list of candidates to the Assembly for appointment.”<sup>10</sup>

—International Civil Service Commission: Statute and rules of procedure

“Article 4

“1. After appropriate consultations with Member States, with the executive heads of the other organizations and with staff representatives, the Secretary-General, in his capacity as Chairman of the Administrative Committee on Coordination, shall compile a list of candidates for appointment as Chairman, Vice-Chairman and members of the Commission and shall consult with the Advisory Committee on Administrative and Budgetary Questions before consideration and decision by the General Assembly.”<sup>11</sup>

(c) Once expert members are selected, it is important to ensure that they cannot casually be replaced:

- (i) They should, subject to the consideration in subparagraph (2) (b) below, be given a reasonable long fixed tenure, if possible renewable (as longer service is apt to enhance expertise).
- (ii) They either should not be supplied with alternates at all (e.g., the members of ACABQ, JIU, ICSC)—so that if a member is absent no one substitutes for him—or their right to appoint alternates should be suitably restricted (e.g., by requiring prior consultation, such as with the Secretary-General, as is provided in respect of alternates to the experts serving on the Economic and Social Council functional commissions or their subsidiary organs.<sup>12</sup>

(d) To protect the independence of the expert members, i.e., to reduce the influence of political considerations on their actions, it can (but need not) be provided (normally in the rules of procedure of the organ, or merely established by practice) that the meetings be closed and that members may not be accompanied by advisers.

2. To give a body a representative or intergovernmental character, it is necessary to provide that:

(a) Each member be appointed or at least nominated by a State (which itself must be selected by some specified procedure); and furthermore that

(b) The appointing or nominating State can, without prohibitive difficulty, remove the member (i.e., terminate his term)—for otherwise there would be no way of ensuring that, if either the Government or its policies or the views of the member itself should change in mid-term, his votes would still reflect the wishes of the appointing State. However, so as to prevent excessive and arbitrary political interference with what is meant to have as well the character of an expert body (see para. 1), it could be provided that if a State wishes to remove "its" member before the end of his term (see para. 1 (c) (i) above), it must first consult with an appropriate international official/officer, and it could even be provided that the removal only becomes effective once the successor has been fully appointed and approved in accordance with the procedures specified in para. 1 (a) and (b).

3. Combining the various considerations set out above, the complete provision governing the composition of an organ as referred to in the question might include the following elements:

(a) A procedure should be devised for selecting a number of Member States to designate the expert members of the organ. This selection might be done by:

- (i) The General Assembly itself (actually after consideration by the Fifth Committee); or
- (ii) The President of the Assembly, perhaps after consultation with the Chairman of the Fifth Committee.

(b) Each selected State would then nominate, after consultation with:

- (i) The Secretary-General; and/or
- (ii) The President of the General Assembly or the Chairman of the Fifth Committee; and/or

(iii) The Chairman or the next senior member of the organ concerned, an expert representative of that State who should fulfil objective qualifications specified in the establishing resolution.<sup>13</sup>

(c) The appointment of these members might, but need not, be subject to confirmation by the General Assembly (perhaps acting on the advice of a nominating committee).

(d) These members would have alternates, or only alternates appointed under a procedure comparable to that specified in subparagraph (b) and perhaps (c) above.

(e) The members should not be accompanied by advisers, at least in closed meetings of the organ.

(f) The members should be appointed for a specified and reasonable substantial term, which could be:

- (i) non-renewable; or
- (ii) renewable a specified number of times; or
- (iii) renewable an indefinite number of times,

and they could be removed by the appointing State after consultation with the Secretary-General/President of the General Assembly, but only with effect from the date on which the successor takes office.

19 June 1986

---

8. ASSESSMENT OF A NON-MEMBER STATE WITH RESPECT TO ITS PARTICIPATION IN THE UNITED NATIONS ENVIRONMENT PROGRAMME—REGULATION 5.9 OF THE FINANCIAL REGULATIONS OF THE UNITED NATIONS—MEANING OF THE TERM “PARTICIPATION”

*Memorandum to the Principal Contributions Officer, Contribution Section, Office of Financial Services*

1. This responds to your memorandum of 8 July on the assessment of a non-member State with respect to its participation in the United Nations Environment Programme in 1984.

2. The starting-point for considering the obligation of non-member States to contribute to particular United Nations activities is regulation 5.9 of the Financial Regulations of the United Nations, the second sentence of which reads as follows:

“States which are not Members of the United Nations but which participate in organs or conferences financed from United Nations appropriations shall contribute to the expenses of such organs or conferences at rates to be determined by the General Assembly, unless the Assembly decides with respect to any such State to exempt it from the requirement of so contributing.”

The question therefore is whether a non-member State “participates” in the organ or conference in question.

3. "Participation" is not a term that has an established strict definition, especially in the present context. In respect of a particular organ, it evidently must be considered in terms of the activities of that organ:

(a) If the activities of a particular organ, e.g., the World Food Council, consist primarily of meetings, then participation would mean taking part in such meetings. Obviously a member of a body participates in it by attending any of its meetings—and perhaps even if the member does not. A non-member of the body could not be a "full participant" in its meetings, but it could participate as "other than a full participant" (see draft standard rules of procedure for United Nations conferences (A/40/611, annex), rule 79 (*chapeau*)), or "as an observer" (e.g., the Palestine Liberation Organization under General Assembly resolution 3237 (XXIX), paras. 1–3) or "without the right to vote" (e.g., non-member States, national liberation movements or intergovernmental organizations in the Economic and Social Council (E/5715/Rev.1, rules 69–71)). Thus the fact that the non-member State in question could not vote in the UNEP Governing Council does not compel a decision that it is a non-participant in the Council, and especially not (see para. 3 (b) below) that it is a non-participant in the Programme (UNEP).

(b) If the organ (e.g., the United Nations Industrial Development Organization) has extensive activities aside from meetings, then participation may mean contribution or receipt of technical assistance or the exchange of information, etc.—aside from participating, in whatever capacity, in the governing organ. However, the mere making of a voluntary contribution, without determining its disposition or taking part in the organs that do so, should not be considered participation within the meaning of regulation 5.9 of the Financial Regulations.

4. Over the years, the United Nations, and in particular your office, must have built up considerable practice as to what level of involvement in the activity of a particular organ constitutes participation. That practice is presumably your best guide in responding to questions such as you posed. However, you might take into account the fact that since the above-quoted extract from regulation 5.9 of the Financial Regulations establishes a mechanism whereby the General Assembly can exempt a participating non-member State from contributing to a particular organ or conference, the State concerned has the possibility of appealing to the Assembly if it considers that the indicated level of involvement does not warrant an assessment.

16 July 1986

9. POSSIBLE MOTION INVOLVING THE CONCILIATION PROCEDURES PROVIDED FOR IN RULE 48 (2) OF THE RULES OF PROCEDURE OF THE TRADE AND DEVELOPMENT BOARD, IN CONNECTION WITH ACTION BY THE BOARD ON THE PROVISIONAL AGENDA FOR THE SEVENTH SESSION OF THE UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT—PROCEDURAL CHARACTER OF ISSUES RELATING TO THE PROVISIONAL AGENDA FOR UNCTAD VII

*Cable to the Legal Liaison Officer, United Nations  
Conference on Trade and Development*

We refer to your telegram concerning a possible motion involving conciliation procedures in connection with action by the Trade and Development Board on the provisional agenda for UNCTAD VII.

Normally, in United Nations practice, decisions concerning the agenda for a meeting are considered to be procedural in nature. This is clear, for instance, in the practice of the Security Council where it is well established that the adoption of the Council's agenda is a procedural matter and consequently, pursuant to Article 27 (2) of the Charter of the United Nations, an affirmative vote of nine members is required and the veto is not applicable.

The conciliation procedures provided for in rule 48 (2) of the rules of procedure of the Trade and Development Board are designed to provide an adequate basis for the adoption of proposals "of a specific nature for action substantially affecting the economic or financial interests of particular countries". Paragraph 2 (e) (ii) of rule 48 of those rules of procedure expressly provides that *inter alia* procedural matters shall not require conciliation. It is of course for the Trade and Development Board itself to determine whether a decision regarding the provisional agenda for UNCTAD VII properly falls within the scope of the conciliation procedures provided for in rule 48 (2). We note that these procedures have never been invoked before and therefore no guidance can be derived from past practice. Prima facie it is our view that the conciliation procedures in rule 48 are not applicable to Trade and Development Board decisions on the provisional agenda for UNCTAD VII because (a) issues relating to the provisional agenda for UNCTAD VII would appear to be primarily procedural matters in the light of the practice in other United Nations bodies and assuming there has not been specific practice in a contrary sense in the Trade and Development Board; and (b) it is in any event doubtful that the provisional agenda for a future conference constitutes a recommendation regarding proposals of a specific nature for action substantially affecting the economic or financial interests of particular countries.

18 September 1986

10. SCOPE OF APPLICATION OF ARTICLE 27, PARAGRAPH 3, OF THE CHARTER OF THE UNITED NATIONS—PRACTICE OF THE SECURITY COUNCIL IN THIS REGARD—QUESTION OF GIVING EFFECT TO A JUDGMENT OF THE INTERNATIONAL COURT OF JUSTICE WITHIN THE CONTEXT OF ARTICLE 94 OF THE CHARTER—A DETERMINATION BY THE COURT THAT A MATTER THAT IS A “LEGAL DISPUTE” UNDER ARTICLE 36, PARAGRAPH 2, OF ITS STATUTE IS NOT DETERMINATIVE OF WHETHER THAT MATTER IS ALSO A “DISPUTE” WITHIN THE MEANING OF CHAPTER VI AND ARTICLE 27, PARAGRAPH 3, OF THE CHARTER

*Memorandum to the Secretary-General*

1. I am submitting herewith some observations on the issue of the application of Article 27, paragraph 3, of the Charter of the United Nations. This issue may be raised in connection with the right of a permanent member to vote when the Security Council meets at the request of (name of a Member State) in connection with the recent judgment of the International Court of Justice.

2. Article 27, paragraph 3, provides that:

“Decisions of the Security Council on all other matters shall be made by an affirmative vote of nine members including the concurring votes of the permanent members; provided that, in decisions under Chapter VI, and under paragraph 3 of Article 52, a party to a dispute shall abstain from voting.”

The *travaux préparatoires* relating to Article 27, paragraph 3, indicate that the drafters of the Charter were attempting to give effect in certain areas of the competence of the Security Council to the general principle that no one may be a judge in his own case (*nemo iudex in sua causa*).

3. The practice of the Security Council shows that in the early years of the Organization the provisions of Article 27, paragraph 3, were observed in at least 10 cases. However, there does not seem to be any instance where the Security Council has made a prior determination that the provisions of Article 27, paragraph 3, applied to a member of the Council. In the 10 cases referred to, the States concerned did not participate in the vote on their own initiative, possibly because they did not expect an outcome unfavourable to their positions. Thus there was no need for a prior determination. In recent years, less attention appears to have been paid in the Security Council to the provisions of Article 27, paragraph 3, although there have been several instances in which it might have been argued that the paragraph was applicable, (e.g., the Panama Canal question, the Afghanistan question, the Korean Airlines incident, the conflict between China and Viet Nam, the situation in Central America and the Gulf of Sidra). The issue was raised by a member of the Council during the consideration of the Comoros question and the Falklands (Malvinas) issue. In both instances the argument was made that the Council was not acting on a dispute under Chapter VI and the matter was not pressed. It is perhaps significant to note that to date when the Council has been discussing the situation in Central America the issue has not been formally raised, including the period while the State in question itself was a member of the Council, although a number of votes were taken.

4. It has not been the practice of the Security Council in most cases brought before it to characterize the question under discussion either as a dispute or a situation (Chapter VI refers to both "disputes" and "situations"), nor does it generally indicate whether a specific proposal it is acting on comes under Chapter VI or some other provisions of the Charter. In the event that a controversy were to develop in the Council as to whether a particular matter came within the terms of Article 27, paragraph 3, it would first be necessary for the Council to make a determination on both these points, i.e., whether the question involved a dispute within the sense of Chapter VI of the Charter and whether the particular recommendation before the Council fell under Chapter VI. In making these determinations, a permanent member could cast a negative vote and thus prevent any such determination from being made in a sense favourable to that permanent member. Such a determination is, in effect, a matter of substance, not a matter of procedure. This follows from the statement by the Sponsoring Governments at the San Francisco Conference on voting procedure in the Security Council which was to the effect that the determination of whether a matter is one of substance or procedure is subject to the veto (this is known as the "double veto").

5. When the Security Council takes up the request of the State in question it is to be expected that a principal issue will be the question of giving effect to the judgment of the International Court of Justice within the context of Article 94 of the Charter. Article 94 reads as follows:

"1. Each Member of the United Nations undertakes to comply with the decision of the International Court of Justice in any case to which it is a party.

"2. If any party to a case fails to perform the obligations incumbent upon it under a judgment rendered by the Court, the other party may have recourse to the Security Council, which may, if it deems necessary, make recommendations or decide upon measures to be taken to give effect to the judgment."

6. If the matter is brought before the Security Council under Article 94, it could be argued that the issue of giving effect to the judgment of the Court is not in itself a dispute and therefore no question of the application of Article 27, paragraph 3, arises. Article 94 is considered by several jurists as providing the Security Council with powers and responsibilities independent of those envisaged in Chapter VI, thus reinforcing an argument that Article 27, paragraph 3, has no application when the Council is considering a matter under Article 94, paragraph 2. Thus no member of the Council would be debarred from voting, even though it is a party to the case which has been adjudicated by the Court.

7. In the course of the debate, it may well be that some confusion will arise from the fact that the International Court of Justice in its judgment frequently refers to the fact that it is dealing with a "dispute." It is clear, however, that the Court is referring to a "legal dispute" within the terms of Article 36, paragraph 2, of its Statute which is an essential element in the determination of the Court's jurisdiction. From the legal point of view, a determination by the Court that a matter is a "legal dispute" under Article 36, paragraph 2, of the Statute of the Court is not determinative of whether that matter is also a "dispute" within the meaning of Chapter VI and Article 27, paragraph 3, of the Charter, this being a matter within the competence of the Security Council. In

this connection it is interesting to note that the Court, in its judgment in the jurisdictional phase of the case, states that it "is asked to pass judgment on certain legal aspects of a situation which has also been considered by the Security Council . . ." (emphasis added).<sup>14</sup>

18 July 1986

---

11. CONDITIONS UNDER WHICH THE SECURITY COUNCIL MAY MEET AWAY FROM HEADQUARTERS—ARTICLE 28, PARAGRAPH 3, OF THE CHARTER OF THE UNITED NATIONS—COUNCIL'S PRACTICE IN REGARD TO MEETINGS AWAY FROM THE SEAT OF THE ORGANIZATION—DETAILED ARRANGEMENTS REQUIRED TO DEAL WITH THE TECHNICAL, FINANCIAL AND LEGAL ASPECTS OF SUCH MEETINGS

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

1. You have asked for my views regarding the conditions under which the Security Council may meet away from Headquarters or otherwise accept invitations to visit member States.

2. Rule 5 of the provisional rules of procedure of the Security Council states that "meetings shall normally be held at the seat of the United Nations." Article 28, paragraph 3, of the Charter of the United Nations permits, however, the Council to hold meetings away from the seat of the Organization if, in its judgement, such meetings will best facilitate its work. In such an event, a formal decision of the Council is required. It would appear from the Charter provision that a decision to meet away from Headquarters should be based on a finding, either explicit or implicit, that this will facilitate the Council's work in connection with an item or items before it. It should be noted that the Charter makes no reference to such meetings purely on the basis of an invitation from a Member State not connected to the work of the Council or to the implementation of any of its decisions. Indeed, on the two occasions when the Council decided to meet away from Headquarters, in Addis Ababa in 1972 and in Panama City in 1973, the Council focused its attention on the question relating to the region with which the Council was seized and the implementation of the relevant Council resolutions.

3. Practice shows that implementation of a decision to meet away from Headquarters requires elaborate and complicated arrangements to deal with the technical (e.g., interpretation, translation, reproduction of documents), financial (e.g., defrayal of extra costs by the host State) and legal aspects (privileges and immunities, access and exit, police protection, liaison, liability, and settlement of disputes). The conclusion of an agreement with the host country to reflect such arrangements would also be necessary and can in some instances be a time-consuming task. In order to make preparations for meetings at Addis Ababa and Panama City, the Council established a committee which held many meetings over a period of several months.



4. Furthermore, according to Article 28 of the Charter, the Security Council is to be organized in such a way as to enable it to function *continuously*, and for that purpose each member shall be represented *at all times* at the seat of the Organization. Consequently, contingency plans would have to be made to comply with these requirements if accredited Council representatives are away from Headquarters, particularly in response to an invitation not related to meetings of the Council. Pursuant to Council practice, each member may be, and is, represented by a deputy and/or alternate representatives. Although there is no legal impediment for the Council to hold meetings attended by accredited deputy or alternate representatives, the desirability, in political terms, of holding such meetings for dealing with urgent or critical problems of international peace and security would have to be considered. In addition, there is also the difficulty that under the provisional rules of procedure, meetings of the Council are to be called by the President. The rules of the Security Council do not contain provisions concerning the possible absence of the President, presumably because of the requirements of Article 28 of the Charter regarding the continuity at all times of the Council at Headquarters.

5. If an invitation extended to the representatives on the Security Council does not relate to a meeting of the Council or otherwise to its work, a question arises as to the official or non-official status of the function concerned. Attendance at such functions does not, merely because the invitees are representatives on the Council, make such functions official activities of the Council. Difficult questions of status, privileges and immunities could arise particularly if a non-official function were held outside the country in which the Headquarters of the United Nations is located, unless the representatives concerned were otherwise present in the country issuing the invitation for an official purpose (i.e., as representatives at a United Nations conference).

3 January 1986

---

12. PRACTICE IN THE SECURITY COUNCIL FOR THE CIRCULATION OF COMMUNICATIONS FROM STATES NOT MEMBERS OF THE UNITED NATIONS—IN THOSE INSTANCES WHERE SUCH CIRCULATION HAS BEEN QUESTIONED, THE ISSUE RELATES TO THE STATUS OF THE ENTITY REQUESTING CIRCULATION AND NOT TO THE CONTENT OF THE COMMUNICATION

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

1. I wish to refer to your queries concerning practice in the Security Council for the circulation of communications from States not Members of the United Nations. Our response to your queries is set out below.

2. There is extensive practice in the Security Council for the circulation of communications from States not Members of the Organization as official documents under the authority of the President of the Security Council. These communications have related to specific items on the agenda of the Council, whether or not those items were under active consideration, and to matters which the non-

member State concerned wished to bring to the attention of the Security Council although they were not specifically on the agenda of the Council. They have also been in the form of rebuttals to specific remarks contained in statements made by representatives participating in the Council during one or more of its meetings.

3. There have been instances where such circulation under the authority of the President has been questioned; the issue related, however, to the status of the entity requesting circulation and not to the content of the communication. We are not aware of any communication which has been denied circulation on the basis of its content.

5 March 1986

- 
13. PARTICIPATION IN THE COMMISSION ON NARCOTIC DRUGS WHEN IT ACTS AS THE PREPARATORY BODY FOR THE INTERNATIONAL CONFERENCE ON DRUG ABUSE AND ILLICIT TRAFFICKING—DECISION OF THE ECONOMIC AND SOCIAL COUNCIL PROVIDING THAT “IN THE PREPARATORY BODY ALL STATES SHOULD PARTICIPATE IN THE DECISION-MAKING PROCESS”—MEANING OF THE TERM “PARTICIPATION IN THE DECISION-MAKING PROCESS”—CONSEQUENCES OF THE COUNCIL’S DECISION AS REGARDS RULE 69 (3) OF THE RULES OF PROCEDURE OF THE FUNCTIONAL COMMISSIONS OF THE ECONOMIC AND SOCIAL COUNCIL

*Memorandum to the Under-Secretary-General for  
Political and General Assembly Affairs*

1. I understand that you have inquired about the consequences of the decision adopted by the Economic and Social Council on Friday, 7 February 1986, regarding participation in the Commission on Narcotic Drugs when it acts as the preparatory body for the International Conference on Drug Abuse and Illicit Trafficking. The relevant part of the above-mentioned decision provides that “in the preparatory body all States should participate in the decision-making process.” The representative of (name of a Member State), when announcing the general agreement reached on the above-mentioned decision, indicated that she had consulted the Office of Legal Affairs regarding the meaning of “participation in the decision-making process.” She stated that she had been informed that the phrase means participation in the entire decision-making process, including the taking of decisions.

2. I wish to confirm the above view of the Office of Legal Affairs as reported to the Economic and Social Council and reflected in the record of the meeting. I wish to state further that the consequence of the above-mentioned decision is a de facto suspension of the provisions of rule 69 (3) of the rules of procedure of the functional commissions of the Economic and Social Council when the Commission acts as the preparatory body for the Conference. Accordingly, any State participating in the preparatory body, whether or not a member of the Commission, has the right to participate in any consensus and the right to vote on any matter if the preparatory body is resorting to a vote.

10 February 1986

14. MEMBERSHIP OF A NON-MEMBER STATE IN THE COMMISSION ON HUMAN SETTLEMENTS—PROCEDURE TO BE FOLLOWED BY A NON-MEMBER STATE TO BECOME A MEMBER OF THE COMMISSION—LEGAL IMPLICATIONS OF A NON-MEMBER STATE MAKING VOLUNTARY CONTRIBUTIONS TO THE UNITED NATIONS HABITAT AND HUMAN SETTLEMENTS FOUNDATION

*Letter to the Permanent Observer Mission of a non-member State to the United Nations*

I wish to refer to our recent conversations regarding your queries on the possible membership of (name of a non-member State) in the Commission on Human Settlements.

By resolution 32/162 of 19 December 1977, the General Assembly decided, *inter alia*, that the Economic and Social Council should transform its Committee on Housing, Building and Planning into a Commission on Human Settlements. The Economic and Social Council effected the transformation, in accordance with Assembly resolution 32/162, by its resolution 1978/1 of 12 January 1978. Neither of these resolutions expressly defines the membership of the Commission.

Normally, if a United Nations organ is to be open to States other than Members of the United Nations, this is expressly provided for in the establishing resolution of the competent deliberative organ. If this is not provided for, non-member States would not in our view be considered automatically eligible for membership in the organ concerned. The Commission on Human Settlements has the status of a standing committee of the Economic and Social Council which reports to the General Assembly through the Council. A body with an identical status is the Commission on Transnational Corporations. It should be noted that the establishing resolution for that Commission expressly provided for membership of "all States" in the Commission and on that basis, the State in question was able to become a member of the Commission. In the light of that precedent, a non-member State, while not legally barred from becoming a member, cannot be automatically considered as eligible for membership in the Commission on Human Settlements without prior approval by the Economic and Social Council.

If the non-member State concerned wishes to become a member of the Commission on Human Settlements, it would be best if its candidature could be submitted to the Economic and Social Council by the current Chairman of the Group of Western European and Other States. The President of the Council could then draw the attention of the Council to the said candidature, make reference to the Commission on Transnational Corporation's precedent and seek the Council's concurrence in considering the State concerned as an eligible candidate. In our view, it would be sufficient for the Council to clarify the issue of eligibility for membership in the Commission in this way, without adopting a formal resolution on the matter or making a recommendation to the General Assembly. The records of the Council would contain express mention of this clarification, thus establishing it as an authoritative interpretation of the resolution for the future.

On the question of the legal implications of the State in question making voluntary contributions to the United Nations Habitat and Human Settlements Foundation, there are no legally binding obligations that arise from such contri-

butions. States that are full participants in the activities of a United Nations organ are, in accordance with the established rules and practice, assessed contributions for expenses relating to the activities of the organ concerned. These contributions are mandatory. They are entirely separate from any voluntary contributions made by States. Thus, if the State concerned becomes a member of the Commission on Human Settlements, it will be assessed for its share of the expenses of the Commission. That assessment would be entirely independent of any voluntary contributions made by the State in question, which would not therefore reduce the amount it would be legally obligated to pay as a result of its membership in the Commission. If, alternatively, the State concerned decided not to seek membership in the Commission, but only to make a voluntary contribution, it would probably be advisable to record in the letter transmitting that contribution that it is not to be considered as active participation by the State in question in the work of the Commission and that it does not intend to seek such participation at the particular time the contribution is made.

17 July 1986

---

15. QUESTION OF THE FULL MEMBERSHIP OF THE COOK ISLANDS IN THE ECONOMIC AND SOCIAL COMMISSION FOR ASIA AND THE PACIFIC—STATUS OF THE COOK ISLANDS UNDER GENERAL ASSEMBLY RESOLUTION 2064 (XX) OF 16 DECEMBER 1965 AND THE TERMS OF REFERENCE OF ESCAP<sup>15</sup>

*Cable to the Special Assistant to the Executive Secretary and the Secretary to the Commission, Economic and Social Commission for Asia and the Pacific*

We refer to your telegram No. 427 concerning the Cook Islands' desire to pursue the issue of full membership in the Economic and Social Commission for Asia and the Pacific at the forthcoming session.

We understand that, in view of circumstances described in your telegram, you intend to issue a note by the Secretariat for the information of the Commission including background information and reflecting the views of the Office of the Legal Counsel. If this is the case, the Office of the Legal Counsel would wish its views to be reflected as follows:

“The Cook Islands is one of the territories listed in paragraph 2 of the terms of reference of ESCAP and thus within the geographical scope of the Commission and an associate member of the Commission under paragraph 4 of the terms of reference. The terms of reference provide for two categories of membership in the Commission for countries and territories within its geographical scope as defined in paragraph 2. Full membership, which is currently confined to fully sovereign States, is governed by paragraph 3, which lists the members. Associate membership, which now encompasses countries and territories not fully sovereign, is governed by paragraph 4, which lists the associate members, including the Cook Islands. In addition to listing the full members, paragraph 3 further provides as follows: ‘Any State in the area which may hereafter become a Member of the United

Nations shall thereupon be admitted as a member of the Commission.' The legal status of the Cook Islands under international law is that of a self-governing territory in free association with New Zealand. Under the constitution of the Cook Islands enacted by the New Zealand Parliament, New Zealand in consultation with the Cook Islands is responsible for the external affairs and defence of the Cook Islands. Moreover, the people of the Cook Islands are New Zealand citizens. These constitutional provisions, as far as the United Nations is aware, have not been amended and are consequently still in effect. It should be noted that the General Assembly of the United Nations, in its resolution 2054 (XX) of 16 December 1965, the last resolution of the Assembly relating specifically to the Cook Islands, considered that the Cook Islands had attained full internal self government but 'reaffirmed the responsibility of the United Nations under General Assembly resolution 1514 (XV) to assist the people of the Cook Islands in the eventual achievement of full independence, if they so wished, at a future date.' It is also relevant to note the following statement made by the representative of New Zealand in the Fourth Committee prior to the adoption of the resolution by the Assembly: 'Yet the Cook Islands could not be called a sovereign independent State, since its people were still New Zealand citizens and the Cooks Islands Parliament, in one clause of a resolution adopted on 26 July 1965, had requested New Zealand, in consultation with the Government of the Cook Islands, to be responsible for the external affairs and defence of the Islands ...' "

No further developments concerning the status of the Cook Islands have been brought to the attention of the General Assembly. In the light of the foregoing, the Cook Islands is not considered to have yet attained the status of a fully independent sovereign State within the meaning of that term in United Nations terminology and practice.

The action taken recently by the World Health Organization and by the Food and Agriculture Organization of the United Nations in admitting the Cook Islands as a member of those organizations does not alter the legal status of the Cook Islands and does not affect the position of the United Nations in this regard. In these circumstances it is the view of the Office of Legal Affairs that under the terms of reference as now formulated, the Cook Islands is not eligible for full membership in ESCAP. It should be noted that any change from the existing situation would require amendment of the terms of reference by the Economic and Social Council. Furthermore, in considering this matter, the Commission would have to take into account the implications of any change in the membership status in ESCAP of the Cook Islands for the status of other associate members.

20 March 1986

16. PARTICIPATION IN MEETINGS ORGANIZED BY THE ECONOMIC COMMISSION FOR AFRICA—TERMS OF REFERENCE AND RULES OF PROCEDURE OF THE COMMISSION—QUESTION OF THE PARTICIPATION OF MEMBERS OF THE ORGANIZATION OF AFRICAN UNITY WHICH ARE NOT MEMBERS OF THE UNITED NATIONS IN SUCH MEETINGS—STATUS OF THE ENTITY “SAHRAOUI ARAB DEMOCRATIC REPUBLIC” IN THE UNITED NATIONS—UNITED NATIONS PRACTICE WITH REGARD TO CONTESTED REPRESENTATION IN THE ORGANIZATION—GENERAL ASSEMBLY RESOLUTION 396 (V) OF 14 DECEMBER 1950

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

I wish to refer to your memorandum of 24 September 1986 on rules for participation in meetings organized by the Economic Commission for Africa. You have requested my observations and comments in connection with a formal complaint by the authorities of (name of a Member State) regarding the participation of a delegation of the “Sahraoui Arab Democratic Republic” (SADR) in meetings organized by the Commission.

The terms of reference and the rules of procedure of ECA, a subsidiary organ of the Economic and Social Council, make provision for the participation in the work of the Commission of States which are Members of the United Nations but which are not members of the Commission. Provision is also made for the participation of national liberation movements recognized by the Organization of African Unity. The SADR has no official status in the United Nations and does not fall within any of the categories of participants referred to in the terms of reference or rules of procedure of ECA. No competent deliberative organ of the United Nations has recognized the “Sahraoui Arab Democratic Republic” as an independent State or Government nor has there been any official contact between the United Nations and the SADR as such. Recent General Assembly resolutions, and in particular resolutions 39/40 of 5 December 1984 and 40/50 of 2 December 1985, which concern the question of Western Sahara, refer to the Kingdom of Morocco and to the Frente Popular para la Liberación de Saguia el-Hamra y de Rio de Oro (the Frente POLISARIO) as the parties to the conflict, and no reference at all is made to the SADR. The admission of the SADR to membership in the Organization of African Unity has no legal effects on the position of the United Nations with regard to Western Sahara as described above. In the context of OAU, the Frente POLISARIO in effect participates as the government of SADR, which is a full member of that organization. As a consequence, it is not considered as a national liberation movement recognized in its area by OAU.

On the general question of contested representation in meetings organized by ECA, it is relevant to draw attention to the analogous issue of the rival representation of a Member State in the United Nations. In this context the General Assembly, in its resolution 396 (V) of 14 December 1950, considered that “it is in the interest of the proper functioning of the Organization that there should be uniformity in the procedure applicable whenever more than one authority claims to be the government entitled to represent a Member State in the United Nations . . .” It is the established practice on the basis of this resolution

that the attitude adopted by the General Assembly be followed by *all* organs of the United Nations. Although Western Sahara is not a Member State, its representation is nevertheless a disputed matter and the situation is therefore analogous to that envisaged in General Assembly resolution 396 (V).

In these circumstances, ECA and its secretariat must necessarily act in a manner which is consistent with the attitude adopted by the General Assembly in matters which directly or indirectly affect Western Sahara. Any action which could be construed as recognition of the entity SADR in ECA would not be consistent with the attitude of the General Assembly, which incidentally has not gone beyond permitting participation of representatives of the Frente POLISARIO as petitioners exclusively within the context of its consideration of the question of Western Sahara. We are not aware of any facilities having been granted by the Economic and Social Council, the parent organ of ECA, for the participation of the Frente POLISARIO in the work of the Council or any of its subsidiary bodies. Of course, this would apply only to official meetings of ECA and it would not affect any meetings of OAU held on United Nations premises in Addis Ababa.

1 October 1986

---

17. QUESTION OF WHO IS RESPONSIBLE FOR COMPENSATION FOR DEATH AND INJURY AND THIRD-PARTY LIABILITY IN RELATION TO NAMIBIAN TRAINEES UNDERGOING TRAINING WITHIN THE FRAMEWORK OF THE FIELD ATTACHMENT PROGRAMME ADMINISTERED BY THE OFFICE OF THE UNITED NATIONS COMMISSIONER FOR NAMIBIA

*Memorandum to the Adviser for Manpower Development, Office of the United Nations Commissioner for Namibia*

1. This is in response to your request for legal advice concerning the question of liability for Namibian trainees presently undergoing training in a number of African countries within the framework of the Field Attachment Programme administered by the Office of the United Nations Commissioner for Namibia. Specifically, you have raised the question of who is responsible for compensation for death and injury and third-party liability in relation to those trainees.

2. It is our understanding that the Field Attachment Programme is part of the Nationhood Programme established by the United Nations Council for Namibia. Its objective is to provide trained Namibians with the practical skills which will enable them to make an effective contribution to the development of an independent Namibia. The Office of the United Nations Commissioner for Namibia acts on behalf of the Council as an administering authority in consultation with the South West Africa People's Organization (SWAPO). In practice, SWAPO selects the trainees and proposes the areas of training. The Office of the Commissioner administers the programme with the assistance of UNDP in those countries where there is no representative of the Commissioner.

3. Disbursements made by the Office of the Commissioner for stipend allowances, medical assistance, etc., of the trainees are financed from the United

Nations Fund for Namibia. The amount of financial assistance that may be provided varies according to the particular programme. In some programmes, the trainees are employed as national civil servants and the United Nations provides only travel expenses or a small living allowance. In the majority of cases, however, the United Nations provides the funds for virtually all aspects of the training programme: a monthly allowance; board and lodging; clothing allowance; medical costs; and travel, including duty trips.

4. In considering the question of liability, it is necessary to examine the contractual link, if any, between the trainee and the sponsoring organization (SWAPO), the host country or the administering organization (the United Nations). This Office is not in a position to comment on the contractual links, if any, between the trainee and SWAPO or the host country. The present advice relates exclusively to the liability of the United Nations. The contractual relationship between the United Nations and the trainee consists of a letter of award which the Office of the United Nations Commissioner for Namibia sends to the trainee. The letter specifies the terms and conditions of the award including, *inter alia*, the following: "The United Nations will cover payment for essential medical treatment or arrange for a medical insurance policy." The letter of award contains no reference to compensation for death or injury of the trainee or to any liability for third-party claims. Since the letter of award clearly does not make the trainees staff members of the United Nations, they do not benefit from the application of appendix D to the Staff Regulations; equally clearly, the letter of award contains no express provision on liability other than for medical expenses.

5. An examination of the contractual relationship between the United Nations and the trainees shows that the United Nations is not liable for compensation or third-party damages. The trainee is not a staff member nor, at the present time, is he or she covered by any United Nations insurance plan. Furthermore, as far as can be determined, the trainees are not covered either by SWAPO or by the host country. The question, therefore, arises as to whether this should be remedied. This is an administrative and policy question rather than a legal question. However, certain options can be envisaged:

(i) The Field Attachment Programme could be brought under an existing insurance plan with the premiums being paid by the United Nations out of the Fund for Namibia. The possibility of joining a group insurance plan such as the Fellowships Global Group Insurance Policy should be explored;

(ii) The Office of the Commissioner for Namibia might consider taking out an insurance policy specifically for the Field Attachment Programme or, if this proves to be too expensive, it might consider being self-insured. The latter option would necessitate creating a providence fund of some kind to cover liability;

(iii) The Office of the Commissioner could seek the cooperation of the host countries in obtaining insurance for the trainees under existing insurance schemes in those countries. This would be particularly appropriate in those cases where the trainees actually provide skills and labour to the host country.

6. Finally, pending a decision on this matter, it would be advisable that the letter of award specifies clearly that the United Nations is not responsible for compensation for death or injury or third-party claims.

10 June 1986



18. AUTHORITY OF THE ADMINISTRATION TO SELECT AIRLINES FOR OFFICIAL TRAVEL FOR THE UNITED NATIONS—DUTY OF THE SECRETARY-GENERAL TO ENSURE THAT HIS STAFF IS NOT EXPOSED TO UNNECESSARY RISK—PRINCIPLE, ESTABLISHED IN JUDGMENT NO. 402 OF THE ADMINISTRATIVE TRIBUNAL OF THE INTERNATIONAL LABOUR ORGANISATION, OF THE LIABILITY OF AN INTERNATIONAL ORGANIZATION FOR REQUIRING STAFF MEMBERS TO WORK IN UNSAFE CONDITIONS

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

1. This is with reference to your memorandum of 6 February 1986 seeking my views on the current United Nations practice of attempting to lower travel costs by requiring staff to travel on designated airlines, presumably because those airlines offer lower fares to the United Nations. My comments on the issues you raise are set out below.

A. AUTHORITY OF THE ADMINISTRATION TO SELECT AIRLINES

2. The arrangements for official travel for the Organization and paid by it are made by the Administration under the exclusive authority of the Secretary-General. It follows that the Administration may prescribe which airlines staff members must use on official travel. The staff is, of course, entitled to the standards of travel specified in the Staff Rules (see, for example, rule 107.10). However, in making the choice of airlines, the Administration has a wide area of discretion and there is no legal objection to organizing travel in such a way as to minimize costs. Indeed, the General Assembly has encouraged the Secretary-General to reduce travel costs. However, as will be seen below, other considerations must also be taken into account.

(i) *Airline selection and safety*

3. The Secretary-General has a general duty to ensure that the staff is not exposed to unnecessary risks. The International Labour Organisation Administrative Tribunal (ILOAT) has expressed this duty as follows:

“It is a fundamental principle of every contract of employment that the employer will not require the employee to work in a place which he knows or ought to know to be unsafe. Staff regulation 1.2, which provides that all staff members are subject to assignment . . . to any of the activities or offices of the Organization, is to be read subject to this principle.” (*In re Grasshoff*, ILOAT Judgement No. 402, para. 1)

4. As you have raised the question of possibly lower safety standards of some airlines, I requested one of my staff to discuss this with the Director of the ICAO Legal Bureau. The Director indicated that there was statistical evidence to show that there was a difference in safety standards between scheduled and non-scheduled (i.e., charter) airlines. The reason for this is that safety standards for scheduled airlines (both International Air Transport Association (IATA) and non-IATA carriers) are much higher than for charter airlines, since the former are much more strictly regulated by States, which apply to scheduled carriers the standards and practice set out in or established in accordance with the Conven-

tion on International Civil Aviation of 1944<sup>16</sup> (which established ICAO and which provides the framework for the regulation of international air traffic). Caution should, therefore, be exercised in the choice of charter carriers where the required standards vary from country to country and where the equipment of the carrier is frequently older and less well-maintained than that of the scheduled airlines.

5. It might, nevertheless, be prudent for the Administration also to study the safety records of the scheduled airlines that it requires staff to use. Organizations such as the Flight Safety Foundation, a United States entity devoted to airline safety, or ICAO may have statistics on airline safety.

(ii) *Airline selection and risk of terrorist action*

6. You also raise the issue of "increased terrorist action which threatens certain airlines, flight routes and passengers of particular nationalities more than others".

7. The Administration will have to take into account whether selection of a particular airline would, due to political circumstances in the area concerned or to the political conditions prevailing in the flag State of the airline, pose such problems; should that be the case then the Administration would have to permit selection of a different route or airline in accordance with the principle referred to in paragraph 3 above.

(iii) *Airline selection based solely on lowest cost*

8. You also wish my comments on whether it is legally unobjectionable for the United Nations to require the use of specific airlines solely on cost considerations.

9. It follows from paragraph 3 above that the Organization cannot impose unnecessary risks on staff. As a result, any requirement, for example, to use charter or non-scheduled carriers instead of scheduled airlines *solely* on financial grounds would be questionable, given the information as to safety secured from the Director of the ICAO Legal Bureau. Of course, at times charter carriers are necessary because no scheduled airlines are available, but use of any charter airline requires careful investigation to ensure that it is safe.

B. LIABILITY OF ORGANIZATIONS FOR IMPOSING UNSAFE CARRIERS

10. In the *Grasshoff* case, ILOAT (Judgment No. 402) held WHO liable for compensation in excess of that provided by the WHO equivalent of appendix D to the United Nations Staff Rules, because WHO had unnecessarily required a staff member to work in unsafe conditions. Should the United Nations require the use of unsafe carriers solely because of costs and should a staff member be injured or killed as a result, the *Grasshoff* principle, if accepted by the United Nations Administrative Tribunal, would result in award of damages in excess of the usual compensation for service-incurred injuries.

11 March 1986

19. LEGAL BACKGROUND FOR THE UNITED NATIONS POSITION WITH RESPECT TO NATIONALITY AND PLACE OF BIRTH IN THE UNITED NATIONS *LAISSEZ-PASSER*—ARTICLES 100 AND 105, PARAGRAPH 2, OF THE CHARTER OF THE UNITED NATIONS—ARTICLE VII, SECTIONS 24 AND 25, OF THE CONVENTION ON THE PRIVILEGES AND IMMUNITIES OF THE UNITED NATIONS

*Memorandum to the Chief of the Transportation Service, Purchase and Transportation Service, Office of General Services*

Reference is made to your memorandum of 7 August 1986, in which you indicated that the International Civil Aviation Organization technical advisory group on machine-readable passports had requested information on the legal background for the United Nations position with respect to nationality and place of birth in the *laissez-passer*.

The requested information is set out below.

LEGAL BACKGROUND FOR THE UNITED NATIONS POSITION WITH RESPECT TO NATIONALITY AND PLACE OF BIRTH IN THE *LAISSEZ-PASSER*

1. Article 100 of the Charter of the United Nations defines the essential character of the duties of the Secretary-General and the staff and the related obligations of the Member States in the following terms:

“1. In the performance of their duties the Secretary-General and the staff shall not seek or receive instructions from any Government or from any other authority external to the Organization. They shall refrain from any action which might reflect on their position as international officials responsible only to the Organization.

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

Accordingly, Article 105, paragraph 2, of the Charter prescribes that the Member States grant, *inter alia*, the officials of the United Nations in their respective territories “such privileges and immunities as are necessary for the independent exercise of their functions in connection with the Organization”.

2. One essential requirement of such privileges is that the officials are accorded all possible independence as to movement and action so as to remain independent of their national Governments. Under the League of Nations system, the member of the Secretariat was issued an identification card. The member, then, had to present the card together with the Secretary-General's request to his national Government to obtain a diplomatic passport. This system proved unsatisfactory because the issuance of the passport depended upon the member Government. Thus, the Convention on the Privileges and Immunities of the United Nations of 13 February 1946<sup>17</sup> provides under article VII, section 24, that “[t]he United Nations may issue United Nations *laissez-passer* to its officials”; and that “[t]hese *laissez-passer* shall be recognized and accepted as valid travel documents by the authorities of Members”, taking into account the provisions of section 25 of the same article dealing with applications for visas where required.

3. The clear intention of the provisions of article VII, section 24, of the Convention is to facilitate the work of the Organization by enabling its officials to travel on *laissez-passer*, rather than on national passports whose issuance and regulation are controlled by Member States. Indeed, it would be impossible for an employee of an international organization to maintain an international viewpoint if his ability to work and travel were controlled by the policies of his Government. In an opinion dated 29 May 1961, Dag Hammarskjöld wrote: "Freedom for officials to travel is one of the most essential privileges which is necessary for the independent exercise of their functions . . . The United Nations cannot accept the view that privileges and immunities of international officials are in any way affected by their nationality."

4. Considering the strictly international status of the officials of the United Nations, the inclusion of nationality or place of birth in the *laissez-passer* is not consistent with the objectives of the *laissez-passer*. The fact that the provisions of article VII, section 24, do not exempt staff members from meeting normal travel and documentary requirements of the Government concerned precludes any inconveniences which may arise from the absence of information regarding nationality or place of birth in the *laissez-passer*.

5. In conformity with the provisions of article VII, section 24, of the Convention, the United Nations has issued *laissez-passer* to officials travelling on official business (including travel on home leave, at official expense) including technical assistance experts, other than those classified as experts on mission for the United Nations. The essential requirement for the issuance of the *laissez-passer* is that the applicant enjoys a status as an official of the United Nations and his nationality or place of birth falls outside the scope of relevant considerations.

25 September 1986

---

20. UNITED NATIONS POLICY ON THE ACQUISITION OR RETENTION OF UNITED STATES PERMANENT RESIDENT STATUS—BASIC RATIONALE FOR SUCH A POLICY—ADMINISTRATIVE INSTRUCTION ST/AI/294 OF 16 AUGUST 1982

*Memorandum to the Under-Secretary-General, Department of Administration and Management*

1. This refers to your request for the views of the Office of Legal Affairs regarding a memorandum of the International Bank for Reconstruction and Development dated 11 February informing you that IBRD has decided to allow its staff to apply for United States permanent resident status, without prior IBRD approval, and suggesting that the same measures be taken by the United Nations.

2. In 1953, the General Assembly established the United Nations policy that persons in permanent residence should be ineligible for appointment as internationally recruited staff members unless they are prepared to change to a G-4 non-immigrant visa status. Likewise, internationally recruited staff members who wish to change to permanent resident status must obtain permission from the Secretary-General to sign the waiver of rights, privileges, exemptions and immunities required by the United States Government for the acquisition or retention of permanent resident status. This permission is rarely granted.

3. The basic rationale for this general policy is the geographic distribution requirement and the necessity for tax reimbursement since permission to execute the waiver of privileges and immunities results in reimbursability by the United Nations of the United States income tax on United Nations salary to which the staff member becomes subject as a permanent resident. This general policy is set out in administrative instruction ST/AI/294 of 16 August 1982 (recently cited favourably by the Administrative Tribunal in its Judgement No. 326: *Fischman*) in implementation of the 1953 General Assembly decision, and expressed as follows:

“The decision of a staff member to remain on or acquire permanent resident status in ... [the] country [of their duty station] in no way represents an interest of the United Nations. On the contrary, this decision may adversely affect the interests of the United Nations in the case of internationally recruited staff members in the Professional category ...”

4. Exceptions to the general policy are enumerated in paragraph 20 of Administrative Instruction ST/AI/294 of 16 August 1982, as follows:

“(a) Stateless persons;

“(b) Newly appointed staff members who have applied for citizenship by naturalization, when such citizenship will be granted imminently;

“(c) General Service staff members previously authorized to retain permanent resident status, on promotion to the Professional category;

“(d) Staff members in the General Service, Manual Workers and Security Service categories.”

5. Consequently, since the above-mentioned general policy on the acquisition or retention of United States permanent resident status was established by the General Assembly, any substantive change thereto would have to be formally approved by the General Assembly.

6. The basic rationale for the general policy followed by the Organization in this matter not having changed, there are, at least from a legal point of view, no arguments which would speak in favour of a move in the General Assembly with a view to a possible change.

5 March 1986

---

21. CONCEPT OF ACQUIRED RIGHTS UNDER THE UNITED NATIONS STAFF REGULATIONS, THE REGULATIONS OF THE UNITED NATIONS JOINT STAFF PENSION FUND AND THE STATUTE OF THE INTERNATIONAL CIVIL SERVICE COMMISSION AND IN THE JURISPRUDENCE OF THE ADMINISTRATIVE TRIBUNALS OF THE UNITED NATIONS, ILO AND THE WORLD BANK

*Cable to the Legal Secretary, Preferential Trade Area for Eastern and Southern African States*

We refer to your telegram of 23 April 1986 on the concept of acquired rights of staff members.

1. Article XII of the United Nations Staff Regulations reads as follows:

*“Regulation 12.1:* These Regulations may be supplemented or amended by the General Assembly, without prejudice to the acquired rights of staff members.

*“Regulation 12.2:* Such staff rules and amendments as the Secretary-General may make to implement these Regulations shall be provisional until the requirements of regulations 12.3 and 12.4 below have been met.

*“Regulation 12.3:* The full text of provisional staff rules and amendments shall be reported annually to the General Assembly. Should the Assembly find that a provisional rule and/or amendment is inconsistent with the intent and purpose of the Regulations, it may direct that the rule and/or amendment be withdrawn or modified.

*“Regulation 12.4:* The provisional rules and amendments reported by the Secretary-General, taking into account such modifications and/or deletions as may be directed by the General Assembly, shall enter into full force and effect on 1 January following the year in which the report is made to the Assembly.

*“Regulation 12.5:* Staff rules shall not give rise to acquired rights within the meaning of regulation 12.1 while they are provisional.”

2. Article 49 (b) of the Regulations of the United Nations Joint Staff Pension Fund relating to amending procedure reads as follows:

*“The Regulations so amended shall enter into force as from the date specified by the General Assembly but without prejudice to rights to benefits acquired through contributory service prior to that date.”*

3. The relevant part of the statute of the International Civil Service Commission reads as follows:

*“Article 26:* The Commission, in making its decisions and recommendations, and the executive heads, in applying them, shall do so without prejudice to the acquired rights of the staff under the staff regulations of the organizations concerned.”

4. The United Nations Administrative Tribunal tends to interpret the concept of acquired rights as meaning that statutory rules cannot be changed with retroactive effect and that amendments to provisions of contracts of employment must be agreed upon by both parties. Following are numbers of relevant judgments of the United Nations Administrative Tribunal as well as of the International Labour Organisation Administrative Tribunal and of the World Bank Administrative Tribunal:

UNAT: 19–27, 28, 53, 87, 110, 176, 180, 181, 182, 194, 197, 202, 230, 241, 248, 266, 273, 295, 296, 311, 341;

ILOAT: 29, 30, 61, 167, 168, 177, 230, 245, 272, 293, 300, 328, 357, 365, 366, 368, 369, 371, 372, 380, 381, 382, 391, 397, 425, 426, 429, 441, 460, 462, 492, 514, 596, 617, 626;

WBAT: 1, 14.

1 May 1986

22. LIABILITY OF THE UNITED NATIONS FOR CLAIMS INVOLVING OFF-DUTY ACTS OF MEMBERS OF PEACE-KEEPING FORCES— DETERMINATION OF “OFF-DUTY” VERSUS “ON-DUTY” STATUS

*Memorandum to the Director, Office for Field Operational and External Support Activities*

1. In response to your memorandum of 12 June 1986 on the liability of the United Nations for claims involving off-duty acts of members of peace-keeping forces, we wish to reiterate the advice previously provided on the subject in our memorandum of 18 April 1986 and in the recent memorandum of 13 June 1986. In paragraph two of the former memorandum, it is stated, *inter alia*, that:

“United Nations policy in regard to off-duty acts of the members of peace-keeping forces is that the Organization has no legal or financial liability for death, injury or damage resulting from such acts. The United Nations may, in particular circumstances, agree to negotiate a settlement with the claimant, but the cost is paid by the Government concerned.”

In paragraph 8 of the latter memorandum, while noting the opinion of the UNIFIL Force Commander concerning a determination of “off-duty” versus “on-duty” status as transmitted in paragraph 6 of his cable of 31 May 1986, we reiterate the following comments in response thereto:

(i) We believe that a soldier may be considered “off duty” not only when he is “on leave” but also when he is not acting in an official or operational capacity while either inside or outside the area of operations. In this regard, we wish to point out that there have been such off-duty determinations made with respect to previous incidents involving soldiers acting in a non-official capacity in the area of operations. We consider the primary factor in determining an “off-duty” situation to be whether the member of a peace-keeping mission was acting in a non-official/non-operational capacity when the incident occurred and not whether he/she was in military or civilian attire at the time of the incident or whether the incident occurred inside or outside the area of operations;

(ii) While the UNIFIL Force Commander states in paragraph 2 of his cable of 31 May that “[the person concerned], while on a state of alert, was on active duty comparable to checkpoint or patrol duty, which are specific duties assigned at a certain time”, it is our opinion that, with regard to United Nations legal and financial liability, a member of the Force on a state of alert may none the less assume an off-duty status if he/she independently acts in an individual capacity, not attributable to the performance of official duties, during that designated “state-of-alert” period.

In confirming the general advice presented above, however, we wish to note that the factual circumstances of each case vary and, hence, a determination of whether the status of a member of a peace-keeping mission is on duty or off duty may depend in part on the particular factors of the case, taking into consideration the opinion of the Force Commander or Chief of Staff.

2. With regard to your request to provide “policy guidelines . . . with respect to those questions related to the status-of-forces agreements outlined under item 5 of the Office of Financial Services memorandum [of 26 November 1985]”, we are unable to express an opinion in general terms in response thereto. In order to provide advice, we would need to know (i) the circumstances of the

specific case under consideration and (ii) the peace-keeping operation involved. With regard to your further general request for the Office of Legal Affairs to respond to "the need for policy guidelines with respect to responsibility of the Organization in incidents of off-duty acts of members of peace-keeping forces and in incidents of illegal acts by members of peace-keeping forces whether on duty or off duty," you may find it helpful to refer to pages D-59, F-9, F-10, F-14, F-28 and F-29 of the Field Administration Handbook<sup>18</sup> which implicitly distinguish between on-duty and off-duty status. Although these sections seem to refer mainly to military observers, we believe that they would have equal applicability with respect to members of a peace-keeping force.

23 July 1986

---

23. USE OF DEADLY PHYSICAL FORCE BY UNITED NATIONS SECURITY OFFICERS—RELEVANCE OF THE STANDARDS OF PERMISSIBLE CONDUCT APPLICABLE TO A PRIVATE PERSON UNDER SECTION 35.30 OF THE NEW YORK PENAL LAW

*Memorandum to the Chief of the Security and Safety Service*

1. This responds to your memorandum of 16 June 1986 requesting advice on the draft of an operations bulletin you wish to issue on the use of deadly physical force by the United Nations Security Officers.

2. We would like to draw your attention to an administrative instruction, ST/AI/309/Rev.1 of 17 February 1984, which was issued by the Assistant-Secretary-General for General Services, on the authority of the United Nations security officers. The content and language of that instruction were the subject of careful review by the Legal Counsel and the Under-Secretary-General for Administration and Management and were subsequently approved by the Joint Advisory Committee.

3. At the time the Instruction was issued, it was the general view that the *Handbook for Personnel of the Security and Safety Service* provided adequate guidance on the scope of authority accorded to the security officers, so that no additional instructions, circulars or bulletins need be issued for that purpose except in the form of ST/AI/309/Rev.1. It was proposed, instead, that the United Nations Security Services training programme for security officers could be intensified to familiarize them with the applicable law as well as the standard practices and procedures outlined in part IX of the *Handbook*.

4. As regards the use of physical force in general, it is important to note that section 35.30 of the New York Penal Law makes a distinction between permissible conduct by a "police officer", a "peace officer", a person directed by a peace officer to assist to effect an arrest, and a "private person". While the United Nations security officers are authorized to function, as agents of the Secretary-General, to preserve order and to protect persons and property within the Headquarters district, their action would be considered, in terms of New York Penal Law, according to the standards of permissible conduct applicable to a "private person". In this respect, section 35.30(4) of the New York Penal Law, as amended, provides as follows:



“A private person acting on his own account may use physical force, other than deadly physical force, upon another person when and to the extent that he reasonably believes such to be necessary to effect an arrest or to prevent the escape from custody of a person whom he reasonably believes to have committed an offence and who in fact has committed such offence; and he may use deadly physical force for such purpose when he reasonably believes such to be necessary to:

“(a) Defend himself or a third person from what he reasonably believes to be the use or imminent use of deadly physical force; or

“(b) Effect the arrest of a person who has committed murder, manslaughter in the first degree, robbery, forcible rape or forcible sodomy and who is in immediate flight therefrom.”

23 July 1986

---

24. VENUE OF FUTURE MEETINGS OF THE COMMITTEE ON THE ELIMINATION OF RACIAL DISCRIMINATION—ARTICLE 8, PARAGRAPH 6, AND ARTICLE 10 OF THE INTERNATIONAL CONVENTION ON THE ELIMINATION OF ALL FORMS OF RACIAL DISCRIMINATION—ESTABLISHING RULES AND PRACTICES OF THE UNITED NATIONS REGARDING CONFERENCES AND MEETINGS AS EMBODIED IN GENERAL ASSEMBLY RESOLUTIONS 31/140 AND 40/243—AUTHORITY OF THE STATES PARTIES TO THE CONVENTION IN MATTERS RELATING TO THE OPERATION OF THE CONVENTION

*Memorandum to the Controller*

1. Reference is made to your memorandum of 18 April 1986 requesting a legal opinion on the venue of future meetings of the Committee on the Elimination of Racial Discrimination (CERD).

2. You have indicated in your memorandum that at the 10th meeting of the States parties to the International Convention on the Elimination of All Forms of Racial Discrimination,<sup>19</sup> on 17 January 1986, the States parties approved without objection suggestions made by the Secretary-General for reductions in the expenditures of the Committee established under the Convention. One of these suggestions made by the Secretary-General in view of the non-payment of contributions relating to expenses of CERD by some States parties and also in the light of the critical financial situation of the Organization was to the effect that both annual sessions of the Committee should henceforth be held at Geneva. It is my understanding that the Committee was formally notified of the decisions taken by the States parties at the 10th meeting. The Committee met in March 1986 and, notwithstanding the venue of future meetings of the Committee, decided that for 1987 and 1988 its spring sessions should be held in New York and its summer sessions at Geneva.

3. The relevant provisions of the International Convention on the Elimination of All Forms of Racial Discrimination which could provide guidance for the Secretariat in resolving the question of the venue of the spring sessions of the Committee in 1987 and in 1988 are contained in article 8, paragraph 6, and article 10. The Committee is an autonomous organ established under article 8 of

the Convention. The Committee consists of 18 members elected by the States parties from among their nationals who shall serve in their personal capacity. Under article 8, paragraph 6, of the Convention, the States parties shall be responsible for the expenses of the members of the Committee while they are in the performance of Committee duties. Under article 10 of the Convention, the Committee is empowered to adopt its own rules of procedure. The same article provides that the secretariat of the Committee is to be provided by the Secretary-General of the United Nations. Also under the same article it is provided that "the meetings of the Committee shall normally be held at United Nations Headquarters."

4. It is relevant to recall that at the time the Convention was adopted, the Human Rights Division (now the Centre) which serves human rights organs was located in New York. Therefore, it was perfectly normal for the Committee to meet at the place where the substantive secretariat that serviced its meetings was located. With the transfer of the Human Rights Division to Geneva, the situation changed and the holding of meetings of CERD at Geneva would be in conformity with the established rules and practices of the United Nations embodied in General Assembly resolutions 31/140 of 17 December 1976 and 40/243 of 18 December 1985.

5. It is clear from the provisions indicated above that they directly affect not only the responsibilities of the Committee but also those of the States parties and of the United Nations. In considering the Committee's competence regarding the venue of its meetings it is necessary to bear in mind that it is the States parties that are responsible for the expenses of the members of the Committee while they are performing their Committee duties and that the United Nations Secretariat has to act within the limits of the expenses authorized by the States parties. It is also necessary to take into account that the selection of the venue for meetings of the Committee involves substantial financial implications not only for the States parties but also for the United Nations from the regular budget. The former are keenly interested in reducing the level of their financial obligations for the Committee's expenses and the latter is in a critical situation which is under urgent review by the General Assembly.

6. While the Committee is an autonomous treaty body, it cannot properly depart from decisions adopted by the States parties which are collectively the supreme authority in matters relating to the operation of the treaty. In the particular case under review it should be noted that the decision of the States parties regarding the venue of future meetings of the Committee is a decision taken within the context of the responsibilities of the States parties relating to the financing of the Committee which is not inconsistent with the provisions of article 10, paragraph 4, under which meetings of CERD shall *normally* be held at Headquarters.

7. In conclusion and in the light of the foregoing, it is the opinion of the Office of Legal Affairs that the Secretary-General, for legal and not only for practical reasons which include the financial resources available for covering the expenses of members and for servicing the sessions of the Committee, has no alternative but to follow the decision of the States parties in scheduling future meetings of CERD.

9 May 1986

25. INTERPRETATION OF THE PROVISIONS OF ARTICLE 39, PARAGRAPH 2 (C), OF THE INTERNATIONAL COCOA AGREEMENT, 1980

*Letter to the Head of Administrative Services Division,  
International Cocoa Organization*

1. I wish to refer to your letter of 28 January 1986. In that letter you posed three questions regarding the legal interpretation of the provisions of article 39, paragraph 2 (c), of the International Cocoa Agreement, 1980.<sup>20</sup> After a careful review of the relevant articles of the Agreement our response to your questions is set out below:

(1) *“Does article 39, paragraph 2 (c), oblige the Council of the International Cocoa Agreement, 1980, to establish the rules for the distribution of the monies identified as contributions paid on imports under the Agreement before the Agreement expires or the liquidation of the buffer stock begins?”*

2. The provisions of subparagraph 2 of article 39 clearly require the establishment by the Council of rules which would govern the distribution of any balance remaining from the proceeds of sales of cocoa from the buffer stock and monies remaining in the buffer stock account after payment of the costs of liquidation and outstanding buffer stock loans. The provisions of article 39, paragraph 2 (c), are, however, silent on *when* the Council should establish the rules. It would appear to us, therefore, that in the absence of any provision in the Agreement specifying when the rules are to be established and in the light of the fact that the purpose of such rules is to govern the distribution of assets at the time of liquidation, the Council can choose to establish the rules either before the expiry or termination of the Agreement or after the expiry or termination of the Agreement but before the liquidation of the buffer stock begins. If the former procedure is adopted, it would, in our view, constitute a contingency rule to be triggered by liquidation of the buffer stock. If the latter procedure is adopted, i.e., establishment of rules *post* expiration or termination of the Agreement but prior to commencement of the liquidation of the buffer stock, this would be part of the liquidation exercise under article 71, paragraph 5, of the Agreement in accordance with which the Council is allowed to “remain in being for as long as necessary to carry out the liquidation of the Organization, settlement of its accounts, and *disposal of its assets* (emphasis added), and shall have during that period such powers and functions as may be necessary for these purposes.”

(2) *“What would be the legal position of the monies identified as contributions paid on imports under the 1980 Agreement if the Council of that Agreement fails to establish rules for distribution before the Agreement expires and is replaced by a new agreement, bearing in mind that the composition of a new agreement might be different from that of the 1980 Agreement?”*

3. The requirement under article 39, paragraph 2 (c), that “the proportion of monies attributable to contributions paid on imports . . . shall be distributed under rules established by the Council” would not be prejudiced by “the failure” of the Council to establish rules for distribution before the expiry or termination of the Agreement. As stated in paragraph 2 above, it is immaterial whether the rules are established before or after the expiry or termination of the

Agreement. The requirements of article 39, paragraph 2 (c), would, in our view, be fulfilled if, prior to distribution of that portion of the remaining monies referred to in that subparagraph, the Council had established rules to govern the distribution. However, obviously, one of these monies could be distributed without such rules to govern the distribution. However, obviously, none of these monies could be distributed without such rules. If it proves impossible for any reason to establish the necessary rules, distribution might require resort to article 58 on "Disputes".

(3) "If the Council of the 1980 Agreement fails to establish rules, can a formula for the distribution of the monies attributable to contributions paid on imports under the 1980 Agreement be provided in a successor agreement?"

4. Unless all the members of the Council of the 1980 Agreement agree to request the Council of a successor agreement to devise a formula for the distribution of that portion of the remaining monies referred to in article 39, paragraph 2 (c), it would seem to us that a provision cannot be placed in a successor agreement mandating the Council or any other entity under that agreement to establish the rules for distribution. The establishment of the rules is clearly a function for the Council of the 1980 Agreement and, as mentioned above, the rules can be established either prior to the expiry or termination of the Agreement or subsequent thereto but before the commencement of liquidation of the buffer stock.

5. Although the answers provided above have been limited to the precise questions you posed, it is important to point out that the questions would be moot if a successor agreement contains provisions on buffer stocking. In that event, the present Council is required under article 39, paragraph 1, to "make such arrangements as it considers appropriate regarding the continued functioning of the buffer stock." The absolute condition contained in the *chapeau* of paragraph 2 of article 39 would have to be fulfilled in order for the questions posed by you to become relevant.

12 February 1986

---

## 26. ARTICLE 29, PARAGRAPHS 2 AND 7, OF THE SIXTH INTERNATIONAL TIN AGREEMENT

### *Letter to the Executive Chairman of the International Tin Council*

I wish to refer to your cable of 21 March 1986 in which you requested the opinion of the Office of Legal Affairs of the United Nations in respect of the following matters arising under the Sixth International Tin Agreement:<sup>21</sup>

"(1) Can the Council decide to suspend buffer stock operations indefinitely in the light of paragraph 7 of article 29? Would this decision by the Council have to be taken unanimously?"

"(2) Can the Council suspend the economic provisions of the Agreement in whole or in part in the absence of a specific provision relating to such a suspension? Would such a Council decision also require unanimity?"

It should first of all be pointed out that the United Nations has no special authority or responsibility to interpret international commodity agreements except where depositary functions (involving those agreements deposited with the Secretary-General) are concerned and therefore any views expressed herein are of a purely advisory character which have no binding effect either on the United Nations or on the Tin Council. The States parties concerned and the International Tin Council remain entirely free in their interpretation of the Sixth International Tin Agreement, responsibility for such interpretation being vested in the Council by article 49 of the Agreement.

The relevant provisions of article 29 are contained in paragraphs 2 and 7 of that article which read as follows:

“2. Notwithstanding the provisions of article 28, paragraph 3 (a) and (e), the Council, if in session, may restrict or suspend the operations of the buffer stock if, in its opinion, the discharge of the obligations laid upon the Manager by those subparagraphs will not achieve the purposes of this Agreement.”

“7. So long as any restriction or suspension of the operations of the buffer stock determined in accordance with this article remains in force, the Council shall review this decision at intervals of not longer than six weeks. If at a session to make such a review the Council does not come to a decision in favour of the continuation of the restriction or suspension, buffer stock operations shall continue without the restriction or shall be resumed.”

The provisions of paragraph 2 of article 29 do not contain any limitation or qualification with regard to the duration of a restriction or suspension of operations of the buffer stock. The paragraph simply enables the Council to restrict or suspend the operations of the buffer stock on one condition, namely “if, in its [the Council’s] opinion, the discharge of the obligations laid upon the Manager by those subparagraphs will not achieve the purposes of this Agreement.”

Paragraph 7 of article 29 requires that when a restriction or suspension of operation of the buffer stock is in force, the Council shall review the decision on such restriction or suspension at intervals of not longer than six weeks. If as a result of such a review no decision is taken to continue the restriction or suspension, the Agreement provides that “buffer stock operations shall continue without restriction or shall be resumed.”

When paragraphs 2 and 7 of article 29 are read together, it is clear that the Council can, if it so wishes, restrict or suspend indefinitely the operations of the buffer stock. However, notwithstanding the indefinite character of such restriction or suspension, the requirement imposed on the Council by paragraph 7 to review the decision at intervals of not longer than six weeks remains applicable. The consequence of such interpretation could lead to an increase in the frequency of Council sessions. Such a possibility would seem to be covered by article 12, paragraph 2 (a).

It would, however, seem possible that at the time of adoption of the decision to restrict or suspend buffer stock operations, the Council can also decide that such decision would be automatically continued every six weeks unless a member or members specifically request a meeting of the Council (prior to the expiry of the six-week period) to review the decision to restrict or suspend operations. Such a decision would seem possible under article 7, subparagraph (a), of the Agreement regarding the powers and functions of the Council. Furthermore, the

automatic continuation of the decision at the end of every six-week period would avoid the necessity of convening the Council every six weeks, yet remain in conformity with article 29, paragraph 7. However, it is not unusual in international commodity agreements in general for decisions to be taken by the relevant councils without formal meetings of those councils.

The decision of the Council under article 29, paragraph 2, to restrict or suspend the operations of the buffer stock is not subject to any qualified majority. In such circumstances, the provisions of article 15, paragraph 2, would apply. The paragraph reads as follows: "Decisions of the Council shall, except where otherwise provided, be taken by a simple distributed majority." Article 2 defines "simple distributed majority" as being "attained if a motion is supported by a majority of the votes cast by Producing Members and a majority of the votes cast by Consuming Members".

We would, regarding our questions in (1) above, therefore conclude that the Council can, if it so wishes, decide by a simple distributed majority vote to restrict or suspend the operations of the buffer stock indefinitely. Such restriction or suspension would, however, be subject to the review requirements referred to in article 29, paragraph 7.

With regard to your question contained in (2) above, it is the opinion of the Office of Legal Affairs that, although the Sixth International Tin Agreement does not, except for the operations of the buffer stock, provide for a suspension of the other provisions of the Agreement, the Council can, in line with general principles of treaty law as reflected in the Vienna Convention on the Law of Treaties,<sup>22</sup> decide to suspend in whole or in part the economic provisions of the Agreement. Such a decision would, pursuant to article 57, subparagraph (b), of the Vienna Convention, require the consent of all the parties to the Sixth International Tin Agreement. The authoritative commentary adopted by the International Law Commission states that "whether or not a treaty contains such a clause [on suspension], it is clear that the operation of the treaty or of some of its provisions may be suspended at any time by consent of *all* the parties."<sup>23</sup>

25 March 1986

- 
27. QUESTION WHETHER THERE IS AN ESTABLISHED PROCEDURE IN INTERNATIONAL COMMODITY AGREEMENTS REGARDING THE APPOINTMENT OF EXECUTIVE DIRECTORS—SCOPE OF APPLICATION OF THE SPECIAL VOTE REQUIREMENT PROVIDED FOR IN THE 1984 INTERNATIONAL SUGAR AGREEMENT—PROCEDURE TO BE FOLLOWED BY AN INTERNATIONAL ORGANIZATION WITH A WEIGHTED VOTING SYSTEM IN ORDER TO SUSPEND THE RULE ON ROLL-CALL TO APPOINT THE EXECUTIVE DIRECTOR BY SECRET BALLOT

*Cable to the Executive Director, International Sugar Organization*

1. We refer to your inquiries by telephone regarding the following questions:

(a) Is there any established procedure in international commodity agreements regarding the appointment of executive directors?

(b) Does the special vote requirement in appointing the Executive Director referred to in article 22 of the International Sugar Agreement 1984<sup>24</sup> apply to preliminary questions relating to such appointment or only to the appointment itself?

(c) The rules of procedure of the International Sugar Council provide only for roll-call in voting. Can the Council resort to secret ballot in appointing the Executive Director?

(d) Is it a general practice in voting procedures of international organizations that a member who abstains from voting is considered as not voting?

2. The response of our Office to the above inquiries is set out below.

(a) As far as we know, no international commodity agreement or rules of procedure of the relevant commodity councils established by such agreements provide for any specific procedures for the election or appointment of executive directors. The relevant agreements only state that the respective councils shall, in some instances subject to consultation with another entity, appoint the executive director. We have no record of any communication from a commodity organization indicating that special procedures have ever been established for the appointment of executive directors.

(b) We confirm that the special vote requirement referred to in article 22, paragraph 1, of the International Sugar Agreement, 1984 relates only to appointment of the Executive Director by the Council and not to any preliminary question concerning such appointment.

(c) Although from the information you gave, it appears that the rules of procedure of the International Sugar Council make no provision for secret ballot, it is common practice in international organizations to conduct elections by secret ballot unless such procedure is waived where there is only one candidate. The International Sugar Council could, following a suspension of the rule on roll-call, decide to appoint the Executive Director by secret ballot. In a weighted voting system such as the one obtaining in the International Sugar Council, that procedure would be complicated. We would suggest the following procedure, based on that in the Governing Council of IFAD—the only international organization with a weighted voting system having provision for secret balloting. Secret ballots should be taken by providing each exporting member and each importing member with one or more ballot papers each indicating a specific number of votes (e.g., 1, 10, 100) and totalling the number of votes the member is entitled to. Furthermore, no number of votes should be so large that only one or two members receive ballots with that number of votes. The ballot papers distributed among exporting members should be one of colour, while those distributed among importing members should be of another colour. Each member may indicate the candidate of his choice on each ballot paper he received and deposit all ballot papers in ballot boxes from which they are taken and counted by tellers appointed from each of the two categories of members by the Chairman of the Council. Alternatively, each member might be given a single ballot indicating its total vote entitlement, but the counting would then be entrusted to an outside party (e.g., a solicitor or public accountant) who can be relied on to provide a correct count and to maintain discretion.

(d) We confirm that it is the general practice of international organizations of the United Nations system that an abstention is not counted as a vote where a voting requirement is expressed as a fraction of "members present and voting".

(e) As the International Sugar Council is the competent body to interpret the International Sugar Agreement 1984, the view expressed above are purely advisory in character and not binding on either that Council or the United Nations.

12 November 1986

---

28. APPLICABILITY OF THE NEW YORK FIREARM LICENSING REQUIREMENTS TO UNITED NATIONS SECURITY OFFICERS CARRYING PISTOLS WITHIN AND OUTSIDE THE HEADQUARTERS DISTRICT—ARTICLE III, SECTION 7 OF THE 1947 AGREEMENT BETWEEN THE UNITED NATIONS AND THE UNITED STATES OF AMERICA REGARDING THE HEADQUARTERS OF THE UNITED NATIONS—OPTIONS AVAILABLE TO REDUCE THE FINANCIAL AND ADMINISTRATIVE BURDENS IMPOSED ON THE UNITED NATIONS BY THE CURRENT FIREARM LICENSING REQUIREMENTS

*Memorandum to the Chief, Security and Safety Service,  
Office of General Services*

I. INTRODUCTION

1. I wish to refer to the inquiry of the Security Coordinator of the United Nations Security and Safety Service, concerning the following two questions:

(a) Whether it is necessary to maintain the practice of obtaining New York City firearm licences for all United Nations security officers who have been authorized by the Secretary-General to carry pistols while performing duties inside and outside the Headquarters district;

(b) If such licensing is required for United Nations security officers, whether the United Nations could take any action in order to reduce the cost and administrative burden of complying with the New York firearm licensing requirements for these United Nations personnel.

2. In response, the analysis below addresses: (1) the applicability of the New York firearm licensing requirements to United Nations security officers performing duties within the Headquarters district; (2) the applicability of such requirements to United Nations security officers performing duties outside the Headquarters district; and (3) the options available to reduce the financial and administrative burdens imposed on the United Nations by these licensing requirements.

3. Based on this analysis, it can be concluded that:

(a) There is no legal basis for claiming any exemption for United Nations security officers from generally applicable New York City firearm licensing requirements when they are carrying out duties outside the Headquarters district; in any event, applicable United Nations regulations require that United Nations



security officers obtain a New York City firearm licence in order to be authorized to carry a pistol while performing duties outside the Headquarters district;

(b) While it is somewhat unclear whether these United Nations regulations require that United Nations security officers be licensed in order to carry a pistol while performing duties inside the Headquarters district, and whether any exemption from New York firearm licensing requirements can be claimed for officers operating within the district, it is meaningless to make any such distinction based upon where the security officer is assigned because circumstances may necessitate that any officer perform functions outside the district. On this basis, all United Nations security officers are currently required to obtain a New York City firearm licence;

(c) Based on the foregoing, the United Nations could: (1) seek a change in applicable New York law to exempt United Nations security officers from the firearm licensing requirements; (2) seek a partial exemption from or reduction in the New York City licensing application and fee requirements for these United Nations personnel. We would suggest, as explained in section IV, A hereunder, that the United Nations pursue, as an initial and immediate step, the second option but eventually contemplate action in furtherance of the first option.

## II. PRESENT UNITED NATIONS REGULATIONS DO NOT EXEMPT UNITED NATIONS SECURITY OFFICERS FROM NEW YORK FIREARM LICENSING REQUIREMENTS

### A. *Applicability of the New York firearm licensing requirements to security officers carrying pistols within the Headquarters district*

4. Pursuant to article III, section 7, of the 1947 Agreement between the United Nations and the United States of America regarding the Headquarters of the United Nations,<sup>25</sup> federal, state and local law generally apply to acts performed within the Headquarters district. The exception provided for in article III, section 8, thereunder, which has been used sparingly, empowers the United Nations to make overriding regulations operative within the Headquarters district. Of the three regulations which have actually been promulgated pursuant thereto, only regulation No. 2 is relevant to this analysis. Headquarters regulation No. 2 states:

“The qualifications and requirements necessary for the performance of professional or other special occupational services within the Headquarters district shall be determined by the Secretary-General; provided that prior to authorizing medical or nursing services by any person, the Secretary-General shall ascertain that such person has been duly qualified to perform such services in his own or another country.”

5. The position of a security officer would seem to fall under the purview of the “other special occupational services” referred to in regulation No. 2 and, on this basis, the Secretary-General would presumably be authorized to set aside any requirements of New York law in determining the requirements governing the security officers’ performance of official duties within the Headquarters district, including those relating to the carrying of firearms. However, since no supplementary United Nations regulations have been issued to exempt United Nations Security Officers from the New York firearm licensing requirements, New York law is applicable to this situation.

6. Based on the foregoing and as pointed out hereunder, it can accordingly be stated that since applicable United Nations regulations do not supersede local law regarding the licensing of firearms, United Nations security officers are obliged to comply with such law. In this regard, administrative instruction ST/AI/309/Rev.1, entitled "Authority of United Nations security officers", states generally that security officers have been instructed to carry out their functions, as agents of the Secretary-General, "in conformity with established rules and regulations, including applicable local law". More specifically, the United Nations Security and Safety Service General Order EQW/2/1/Rev.3, entitled "Firearms—armed posts and firearms control procedures", states that a New York City firearm licence is required for armed security officers assigned to perform duties outside the Headquarters district but does not specify an exemption for the New York licensing requirements for officers assigned to stations within the district. Similarly, part V of the *Handbook for Personnel of Security and Safety Service*, which does not mention the New York firearm licensing regulations, does not exempt United Nations security officers from compliance therewith.

**B. Applicability of the New York firearm licensing requirements to security officers carrying pistols outside the Headquarters district**

7. On the basis of article III, sections 7 through 9, of the Headquarters Agreement, the Secretary-General, as chief administrative officer of the United Nations, is primarily responsible for security measures within the Headquarters district while, pursuant to section 16 of the Agreement, the appropriate United States authorities are responsible for security outside the district. In the above-mentioned capacity, the Secretary-General has authorized United Nations security officers to carry firearms when on duty under certain circumstances. Both administrative instruction ST/AI/309/Rev.1 and the *Handbook for Personnel of the Security and Safety Service* state that United Nations security officers are authorized to function as the Secretary-General's "agents" in order to "preserve order and to protect persons and property within the headquarters district". The *Handbook*, in section 9.01, entitled "Authority and functions of United Nations security officers", also states that security officers are not authorized to extend their functions outside the Headquarters district except in the six situations outlined in section 9.02 therein.

8. While the above-cited provisions indicate that security officers may function outside the Headquarters district in only six specified situations, it is further stipulated in the Security and Safety Service General Order EQW/2/1/Rev.3 of 11 December 1984 that security officers may carry firearms on such assignments outside the district only if they possess a New York City firearm licence. Paragraph 10 of this Order so states:

"Firearms will be removed from the premises only when on inspections of exterior posts, on special assignments and when the security officer is in possession of a pistol licence issued by the New York City Police Department."

C. *Conclusion: all armed United Nations security officers currently need to obtain a New York City firearm licence*

9. Considering that the Secretary-General is empowered, on the basis of the Headquarters Agreement, to authorize the use of firearms within the Headquarters district only and that none of the above-cited relevant United Nations regulations contravene the New York licensing requirements for the carrying of firearms either inside or outside the district, it appears necessary that a United Nations security officer obtain a New York City firearm licence in order to carry firearms outside the Headquarters district. While it may appear somewhat unclear from the language of these United Nations regulations whether United Nations security officers carrying pistols solely within the Headquarters district must adhere to the New York firearm licensing requirements, it is unnecessary to reach any definitive conclusion on this issue because these officers may also be assigned to perform duties outside the district and are required to obtain New York City licences to carry firearms on such assignments. On the basis that it would be impractical, in terms of both manpower and the unpredictable nature of the security officers' functions, to divide the Security and Safety Service into two subgroups of officers—one of which would be authorized to perform duties only within the Headquarters district while the other could perform duties both inside and outside the district—it appears necessary that *all* security officers be licensed.

III. *OPTIONS TO REDUCE THE FINANCIAL AND ADMINISTRATIVE BURDENS IMPOSED BY THE CURRENT FIREARM LICENSING REQUIREMENTS*

10. As was discussed during a previous internal inquiry,<sup>26</sup> there is no possibility of obtaining federal firearm licences for United Nations security officers because the only such licence available is that issued exclusively to firearms importers, manufacturers and dealers (18 USCS § 923); there is no general licensing regime for federal law enforcement officials. Thus, it appears that United Nations security officers may only obtain licences to carry firearms within New York State from the Police Commissioner of New York City, pursuant to article 400 of the New York Penal Law (see also 18 USCA § 927). If we proceed on the premise that licensing is currently required for all armed United Nations security officers, it appears that the following two courses of action are available to the United Nations to reduce the financial and administrative burdens of complying with the New York firearm licensing requirements: (1) seeking a change in applicable New York law to exempt United Nations security officers from the licensing requirement; (2) seeking a reduction in the New York City firearm licensing application and fee requirements for United Nations security officers. A brief discussion of these two options follows.

A. *Seek a statutory change in New York law to provide an exemption from the firearm licensing requirements for United Nations security officers*

1. *Seek to obtain New York "peace officer" status under section 2.10 of the New York Criminal Procedure Law*

11. Under section 265.20 of the New York Penal Law, certain categories of individuals and organizations are exempt from the firearm licensing require-

ments of section 400.00 and are not subject to the proscriptions against the possession of unlicensed weapons outlined in article 265 (see New York Penal Law § 400.00(12)). Specific exemptions are provided in section 265.20 for New York "peace officers", as defined under section 2.10 of the New York Criminal Procedure Law (CPL), as well as for sworn peace officers of another state (see *idem*, § 265.20(a)(1)(c); § 265.20(a)(11)). In view of the fact that CPL section 2.10 was amended in both 1983 and 1984 to add several new categories of persons to its listing of New York peace officers, the Organization might try to seek an amendment to this section to secure peace officer status for United Nations security officers, who would then not be required to obtain licences to possess pistols.

12. There are two major consequences of such an amendment that must be considered: (1) that United Nations security officers would thereby be accorded the nine powers of peace officers prescribed in CPL section 2.20; and (2) that they would be subject to the detailed mandatory training requirements of CPL section 2.30. As peace officers, the present powers of United Nations security officers would be expanded considerably to include the authority to make warrantless arrests (§ 2.20(1)); to use physical and deadly physical force to make an arrest or prevent escape (§ 2.20(2)); to perform warrantless searches when constitutionally permissible (§ 2.20(3)); to issue appearance tickets (§ 2.20(4), (5), (7)); to issue navigation summonses and/or complaints (§ 2.20(6)); and to possess and take custody of firearms not owned by them (§ 2.20(8)). If this option is chosen, it would seem appropriate, in view of the limited functions of United Nations security officers, to issue internal regulations to restrict the powers which they would be permitted to exercise under this section.

13. With regard to the extensive training and certification requirements of section 2.30, it should be noted that the municipal police training council both prescribes a portion of the mandatory training programme for peace officers and reviews the segment of the training course prescribed by the employer to determine whether it shall be certified.<sup>27</sup> Section 2.30 also specifies that a peace officer will be subject to the jurisdiction of the New York courts if he fails to comply with the training and certification requirements. The relevant provision reads as follows:

"Upon the failure or refusal to comply with the requirements of subdivision one of this section, the commissioner of the division of criminal justice services shall apply to the supreme court for an order directed to the person responsible requiring compliance. Upon such application, the court may issue such order as may be just, and a failure to comply with the order of the court shall be a contempt of court and punishable as such." (para. 2)

14. In considering the aforementioned aspects of obtaining peace officer status under section 2.10, the Security and Safety Service should determine, as a matter of policy, whether this status would be acceptable in terms of: (1) the costs of providing a certified programme of instruction, (2) the time required to attend such a training programme, (3) the substantive value of the course of instruction prescribed by the municipal police training council and (4) the procedure for prosecution in the event of non-compliance with the training and certification requirements. With regard to the last consideration, a possibility of prosecution would only arise if a United Nations security officer failed to comply

with the requirements specified in section 2.10 and should be avoidable if the Security and Safety Service required such compliance.<sup>28</sup>

2. *Seek to obtain New York "peace officer" status under section 2.15 of the New York Criminal Procedure Law*

15. The Organization might propose an amendment to CPL section 2.15, the special "federal litany" of article two, rather than to section 2.10 to seek a grant of New York peace officer status for United Nations security officers. Section 2.15, added to article two in 1982, was designed to enhance cooperation between federal and local law-enforcement officials by automatically according New York peace officer status to specific categories of federal officers. It should be noted that a distinguishing feature of the peace officer classification under section 2.15, as compared to that under section 2.10, is that the powers accorded to the 18 categories of persons listed thereunder are limited to those set forth in section 2.20(1), (2), (3) and (8) cited above. Furthermore, the training and certification requirements of section 2.30 are not applicable to these federal officers. In view of these two distinguishing features of section 2.15, the Organization might prefer to seek New York peace officer status for United Nations security officers by an amendment thereto rather than to section 2.10. However, it should be considered that such a proposed amendment might be rejected if section 2.15 was designed solely to integrate the various *federal* law enforcement units into the New York peace officer classification.

3. *Propose an additional "peace officer" classification under a new section of article two of the New York Criminal Procedure Law*

16. Rather than proposing an amendment to either section 2.10 or section 2.15, it might be preferable for the United Nations to seek a grant of New York peace officer status for its security officers by proposing the creation of an additional peace officer classification, which would not include municipal, state or federal law-enforcement units, under a new statutory section of article two. This proposed classification could be constituted exclusively by United Nations security officers or by a broader categorization of security personnel employed by other international organizations functioning in New York State. This new classification, like that under section 2.15, would be distinguished from the classification under section 2.10 in so far as it would establish (1) that only certain law-enforcement powers set forth in section 2.20 would be accorded to this subcategory of peace officers and (2) that the mandatory training and certification requirements of section 2.30 would be inapplicable to them.

B. *Seek to reduce the New York City firearm licensing application requirements*

17. In so far as the Organization must comply with current New York law regarding the licensing of firearms, it may seek a partial exemption from or a reduction in the New York City licensing application and fee requirements to ease the financial and administrative burdens imposed by such licensing. To do so, the Organization might contact, perhaps through the United States Mission to the United Nations, the appropriate municipal and state authorities to request: (1) a reduction or waiver of the application fee for a New York City licence (i.e., \$100 payable to the New York City Police Department and \$28.00 payable to the

New York State Division of Criminal Justice Services); (2) an extension of the present three-year validity period of such a license; and (3) submission of a certification letter from the United Nations in lieu of the required "letter of necessity" with the pistol licence application. With respect to the last proposal, the text of such a letter of certification should state that: (1) the proposed applicant is a United Nations employee serving as a security officer in the Security and Safety Service, (2) the weapon issued to him by the United Nations will be carried only during the course of performing official duties, and (3) the issued weapon will be safeguarded by the Security and Safety Service when it is not being used.

#### IV. RECOMMENDED COURSES OF ACTION

##### A. *Two-step proposal: seek immediate reduction of New York City firearm licensing application requirements and eventual statutory change in New York law*

18. In considering the various proposals presented in section III A above for seeking a statutory change in New York law which would provide peace officer status to United Nations security officers, it should be noted that such a process would probably be quite time-consuming and subject to varying political considerations. While it would seem to us that such conferral of peace officer status would be optimally desirable in so far as United Nations security officers would thereby be exempted from the New York licensing application requirements altogether, we would consider it advisable for the United Nations to seek, as an immediate and initial step, a partial exemption from or reduction in the licensing application and fee requirements by proposing the measures discussed in section III B above to the appropriate municipal and/or state authorities. In the event that these authorities accept the proposed measures, which in effect would make the firearm licensing requirements less onerous for United Nations security officers, the United Nations would at least have alleviated the financial and administrative burdens imposed by the current licensing procedure. After undertaking this interim cost-saving action, the United Nations could then eventually pursue a statutory change in New York law, preferably that of proposing the creation of an additional peace officer classification as discussed in section III A, 3 above, which would fully eliminate the financial and administrative burdens of firearm licensing.

##### B. *Relevant United Nations regulations and proposed amendments*

19. As mentioned in section II A above, applicable United Nations regulations do not contravene New York law regarding the licensing of firearms. However, these regulations might be amended to express more clearly our current requirement that all security officers obtain New York City firearm licences. The relevant provisions of these existing regulations, together with several proposed amendments, are presented hereunder.

##### 1. *Administrative instruction ST/AI/309/Rev.1 of 17 February 1984, entitled "Authority of United Nations security officers"*

20. This administrative instruction states, in general terms, that security officers have been instructed to carry out their functions within the Headquarters

district in conformity with "established rules and regulations", which include local law. The relevant provision reads as follows:

"United Nations security officers function as agents of the Secretary-General to preserve order and to protect persons and property within the headquarters area. All persons on the premises are expected to comply with the directions that may be issued by the security officers in the performance of their functions. The security officers, in turn, have been instructed always to exercise their functions with courtesy and in conformity with established rules and regulations, including applicable local law." (para. 1)

2. *United Nations Security and Safety Service General Order EQW/2/1/Rev.3 of 11 December 1984, entitled "Firearms—armed posts and firearms control procedures"*

21. This General Order, while specifying that those security officers who have received internal training shall be armed as required, fails to establish a training prerequisite for all security officers in so far as it provides as follows:

"Personnel of the Security and Safety Service who have qualified under the United Nations training programme will be armed on duty when required." (para. 1)

The Order further specifies that security officers may be authorized to carry firearms on assignments outside the Headquarters district only if they possess a New York City firearm licence. The relevant provision reads as follows:

"Firearms will be removed from the premises only when on inspections of exterior posts, on special assignments and when the security officer is in possession of a pistol licence issued by the New York City Police Department." (para. 10)

22. In order to clarify that both qualification under the internal training programme and possession of a New York City licence are prerequisites for the carrying of a firearm by a United Nations security officer on any assignment, whether inside or outside the Headquarters district, the above-cited language of paragraph one might be replaced by the following, which largely corresponds with that of the previous General Order on the subject (EQU/2/1/Rev.2), dated 10 March 1975:

"Only personnel of the Security and Safety Service who have qualified under the United Nations Security and Safety Service Firearms Training Programme and are licensed by the New York City Police Department at the request of the United Nations will be issued a firearm when required to be armed on duty."

In addition, the initial phrasing of above-cited paragraph ten of the General Order might be amended to read as follows so as to indicate more clearly the specific circumstances under which a security officer may carry a firearm outside the Headquarters district:

"Firearms will be removed from the Headquarters premises only if the security officer is authorized to perform an inspection of an exterior post or a special assignment, and such officer is in possession of a pistol licence issued by the New York City Police Department."

3. *Handbook for Personnel of the Security and Safety Service (Office of General Services, January 1977)*

23. Section 5.06 of the *Handbook*, entitled "Firearms—issue and control procedures", specifies that all security officers must attend the United Nations training programme to be authorized to carry a firearm, as follows:

"(a) *Authority to carry firearms*—Personnel of the service who are authorized by the United Nations and who are issued firearms, will carry such weapons only when they are on duty . . .

"(d) *Firearms—training and range practice*—All members of the service authorized to carry a firearm shall attend a special training course and periodic briefings given by a designated range officer . . ."

To require that such a trained security officer also possess a New York City licence when carrying firearms while performing assignments either inside or outside the Headquarters district, the existing language of paragraph 5.06 (a) might be replaced by the following, which corresponds substantively with that of the 1972 *Handbook* edition:

"*Authority to carry firearms*—Personnel of the section may only carry firearms:

- (i) If they have been duly licensed by the New York City Police Department;
- (ii) If they have been trained in accordance with paragraph (d) below;
- (iii) When so authorized;
- (iv) While on duty;
- (v) That are issued to them by the United Nations."

7 November 1986

---

29. REQUEST BY A MEMBER STATE THAT THE UNITED NATIONS CENTRE ON TRANSNATIONAL CORPORATIONS LOOK TO THE MINISTRY OF FOREIGN AFFAIRS OF THAT STATE AS ITS EXCLUSIVE POINT OF CONTACT WITHIN THE GOVERNMENT OF THE STATE IN QUESTION—DISCRETION OF EVERY MEMBER STATE IN THIS RESPECT—REQUEST BY THAT SAME STATE THAT THE CENTRE SEND TO THE INDICATED OFFICE OF THE MINISTRY A COPY OF ANY COMMUNICATION FROM THE CENTRE ASKING FOR INFORMATION OR ASSISTANCE FROM FIRMS OR BUSINESS ORGANIZATIONS OF THAT COUNTRY—INVIOABILITY AND INTEGRITY OF THE ORGANIZATION'S CORRESPONDENCE—ARTICLE II, SECTIONS 3 AND 4 OF THE CONVENTION ON THE PRIVILEGES AND IMMUNITIES OF THE UNITED NATIONS

*Memorandum to the Executive Director, United Nations  
Centre on Transnational Corporations*

1. I wish to refer to your memorandum of 28 January 1986 requesting the advice of your Office as to the propriety of the request contained in a letter of



the Permanent Mission of (name of a Member State) dated 22 January 1986 that the United Nations Centre on Transnational Corporations look to the Ministry of Foreign Affairs as its exclusive point of contact within the Government of the State in question and that the Centre send to the indicated Office of the Ministry a copy of any requests by the Centre for information or assistance from firms or business organizations of the country in question.

2. There appear to be two, albeit interrelated, requests contained in the above-mentioned paragraph of the Mission's letter. The first is that the Ministry of Foreign Affairs be the exclusive point of contact of the Centre within the Government in question. We are of the opinion that there is no impropriety in this request on the part of a Member State. Every Member State is entitled to designate for an international organization the points of contact for cooperation between the State and the Organization. In the case of the United Nations this is usually, but not exclusively, the Foreign Ministry.

3. The second request is that the Centre send to the indicated office of the Ministry a copy of any requests by the Centre for information or assistance from firms or business organizations of the country in question. This request raises questions as to the inviolability and integrity of the Organization's correspondence, which is protected by the Convention on the Privileges and Immunities of the United Nations,<sup>29</sup> to which the State concerned is a party. Article II, section 3, of the Convention provides, *inter alia*, that the property of the United Nations (in this case, its correspondence) shall be immune from search, requisition, confiscation, expropriation and any other form of interference, whether by executive, administrative, judicial or legislative action. Section 4 of the same article also provides that the archives of the United Nations, and in general all documents belonging to it or held by it, shall be inviolable wherever located.

4. Consequently, it would be the view of this Office that while a request for copies of the Centre's communications with firms or business organizations of the country in question is not in and of itself improper, it is for the Centre to decide whether it would be appropriate to provide copies to the indicated office or for that matter to any other addressee. The Centre not being under the jurisdiction of the State in question, there is certainly no obligation on the part of the Centre to do so, and attempts by that State to enforce such a suggestion would be incompatible with the provisions of the Convention on Privileges and Immunities cited above.

31 January 1986

30. REQUEST OF THE HOST STATE FOR CEILINGS ON, OR REDUCTIONS IN, THE SIZE OF MISSIONS ACCREDITED TO THE UNITED NATIONS—ABSENCE OF PRECEDENT ON THE MATTER—RELEVANT RULES AND PRINCIPLES OF INTERNATIONAL LAW AS REFLECTED IN ARTICLE 11, PARAGRAPH 1, OF THE 1961 VIENNA CONVENTION ON DIPLOMATIC RELATIONS, ARTICLE 14 OF THE 1975 VIENNA CONVENTION ON THE REPRESENTATION OF STATES IN THEIR RELATIONS WITH INTERNATIONAL ORGANIZATIONS OF A UNIVERSAL CHARACTER AND ARTICLE V, SECTION 15 (2), OF THE 1947 AGREEMENT BETWEEN THE UNITED NATIONS AND THE UNITED STATES OF AMERICA REGARDING THE HEADQUARTERS OF THE UNITED NATIONS—REMEDIES AGAINST ANY MISUSE OF THE FREEDOM OF THE SENDING STATE IN DETERMINING THE COMPOSITION OF ITS MISSION

*Statement made by the Legal Counsel at the 115th meeting of the Committee on Relations with the Host Country, held on 13 March 1986*<sup>30</sup>

1. In response to the request made by the distinguished representative of the Union of Soviet Socialist Republics, I would like to make the following observations on the issue under discussion.

2. From the outset, I would recall that, in the history of the Organization, no case has arisen where the host State has called for ceilings on, or reductions in, the size of missions accredited to the United Nations. This appears also to be true with respect to the specialized agencies. Thus, in the absence of practice, the matter has to be considered purely in the light of relevant rules and principles of international law.

3. In bilateral diplomatic relations, in the absence of specific agreement between the sending and the receiving State, it is for the receiving State to determine the size of a diplomatic mission which it is prepared to accept from a sending State. This is clearly reflected in article 11, paragraph 1, of the 1961 Vienna Convention on Diplomatic Relations,<sup>31</sup> which reads as follows:

“In the absence of specific agreement as to the size of the mission, the receiving State may require that the size of the mission be kept within limits considered by it to be reasonable and normal, having regard to circumstances and conditions in the receiving State and to the needs of the particular mission.”

Thus, in the absence of agreement regarding the size of a diplomatic mission, the receiving State may require limitations on the size of that mission. In making a determination to this effect, national security and other factors are doubtless taken into account, and the governing principle is one of reciprocity.

4. However, other considerations and procedures also have to be taken into account where missions to international organizations are concerned due to the fact that such missions are not accredited to the host country, and that consequently reciprocity is not possible. The test, which is embodied in article 14 of the 1975 Vienna Convention on the Representation of States in their Relations

with International Organizations of a Universal Character,<sup>32</sup> is an objective one. Article 14 provides that:

“The size of the mission shall not exceed what is reasonable and normal, having regard to the functions of the organization, the needs of the particular mission and the circumstances and conditions in the host State.”

While the 1975 Convention is not yet in force, this particular provision reflects a common consensus on the matter.

5. The determination of what, in any particular case concerning missions to international organizations, is reasonable and normal, having regard to the functions of the Organization, the needs of the particular mission and the circumstances and conditions in the host State, again does not depend upon the considerations of the host State alone. Should the host State have any reservations regarding the size of a mission, such reservations are to be resolved through consultations and, if these fail, dispute settlement procedures. In this respect, the International Law Commission, in its commentary on what became article 14 of the 1975 Vienna Convention, observed that:

“... unlike the case of bilateral diplomacy, the members of missions to international organizations are not accredited to the host State. Nor are they accredited to the international organization in the proper sense of the word. As will be seen in different parts of the draft articles, remedy for the grievances which the host State or the organization may have against the permanent mission or one of its members cannot be sought in the prerogatives which derive from the fact that diplomatic envoys are accredited to the receiving State and from the latter’s inherent right, in the final analysis, to refuse to maintain relations with the sending State. In the case of missions to international organizations, the principle of the freedom of the sending State in the composition of its mission and the choice of its members must be recognized in order to ensure the effective functioning of multilateral diplomacy. Remedies against any misuse of that freedom must be sought in the consultation and conciliation procedure[s] ...”<sup>33</sup>

6. The Agreement between the United Nations and the United States of America regarding the Headquarters of the United Nations of 1947<sup>34</sup> does not provide anything different. While not containing a specific provision on the size of missions, it reflects the above-cited principles indicated by the International Law Commission in laying down in article V, section 15 (2), a procedure for determining the staff of missions to be accorded privileges and immunities in the host State. It refers to “such resident members of [the] staffs [of principal resident representatives] as may be agreed upon between the Secretary-General, the Government of the United States and the Government of the Member concerned” who shall “be entitled in the territory of the United States to the same privileges and immunities” as are accorded to diplomatic envoys accredited to the United States. Article V, section 15 (2), thus foresees agreement between the Secretary-General, the Government of the United States and the Government of the State concerned on staff to be assigned to missions. The legislative history of this provision indicates that it relates not only to the categories of staff concerned but also to the size of the mission. As the International Law Commission remarks in its commentary on what became article 14 of the 1975 Vienna Convention, article V, section 15 (2), of the Headquarters Agreement was drafted as a compromise to take account of the concern of the

United States "that there should be some safeguard against too extensive an application".<sup>35</sup> Neither implicitly nor explicitly does article V, section 15 (2), however, abandon the principle of proceeding collectively in resolving specific situations which may arise under that section.

7. Taking into account the legal analysis which I have outlined above, the Secretary-General has informed the Permanent Missions of the States concerned that, under the applicable law, the matter is one which requires consultations. The Secretary-General has expressed his readiness to be, even at this stage, of assistance in regard to such consultations.

---

31. DEPARTURE TAX ON PURCHASE OF AIR TICKETS—PROVISION OF ARTICLE II, SECTIONS 7 (a) AND 8, OF THE CONVENTIONS ON THE PRIVILEGES AND IMMUNITIES OF THE UNITED NATIONS—THE NATURE OF THE TAX IN QUESTION IS TO BE DECIDED BY REFERENCE TO THE INCIDENCE OF THE TAX

*Memorandum to the Director of the Accounts Division,  
Office of Financial Services*

1. I wish to refer to your memorandum of 24 February 1986 concerning a departure tax on purchase of air tickets.

2. The position of the Office of Legal Affairs on this matter, as stated many times in the past, is that such taxes must be considered in the light of the relevant provisions of the Convention on the Privileges and Immunities of the United Nations,<sup>36</sup> namely article II, section 7 (a), which provides for an exemption from all direct taxes (except charges for public services) and section 8 which provides for the remission or return of indirect taxes, subject to appropriate administrative arrangements having been made.

3. It is necessary first of all to establish that the countries concerned are parties to the Convention on the Privileges and Immunities of the United Nations and that they have entered no reservations regarding the section in question. All of the countries referred to are parties to the Convention on the Privileges and Immunities and none have entered reservations to article II, section 7 (a) or section 8.

4. The next step is to establish the nature of the tax in question and whether it is to be considered direct or indirect. The Office of Legal Affairs has always taken the position that this question must be decided by reference to the incidence of the tax. If it falls directly on the Organization it must be considered as a direct tax. An indirect tax is one which is not assessed directly against the purchaser but is paid by the manufacturer or vendor and then passed on to the purchaser as part of the price to be paid. Air travel taxes or departure taxes are typically direct in their incidence and are considered by the Office of Legal Affairs to fall under the provisions of article II, section 7 (a) of the Convention on the Privileges and Immunities of the United Nations. To the extent that any part of this tax is a charge for services rendered, the United Nations would, of course, pay in accordance with the Convention, provided that the authorities concerned can demonstrate that such is the case.

5. On the basis of the foregoing, exemptions from the taxes under consideration should be claimed in the countries in question and where taxes have been paid a refund should be claimed.

13 March 1986

---

32. CONDITIONS AND PROCEDURES FOR THE ISSUANCE OF RESIDENCE PERMITS TO FOREIGN RESIDENTS IN A MEMBER STATE—THE CHARGING OF FEES FOR THE ISSUANCE OF RESIDENCE PERMITS IS INCOMPATIBLE WITH ARTICLE II, SECTION 7 (a), AND ARTICLE V, SECTION 18 (d) OF THE CONVENTION ON THE PRIVILEGES AND IMMUNITIES OF THE UNITED NATIONS

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

The Office of Legal Affairs presents its compliments to the Permanent Mission of (name of a Member State) to the United Nations and has the honour to refer to its note No. 778 of May 1986 concerning the conditions and procedures for the issuance of residence permits to foreign residents. The regulations in question require, *inter alia*, that foreign technical assistance personnel who are not citizens of the State in question residing in its territory obtain a residence permit at a cost of 50,000 CFA francs.

The obligation to obtain a residence permit cannot, in itself, give rise to objections to the extent that it is a formality and the permit is issued free of charge and without restrictions. However, the charging of fees for the issuance of residence permits appears to constitute a violation of the official's right to stay in the country and therefore, in the view of the United Nations, would be incompatible with article V, section 18 (d), of the Convention on the Privileges and Immunities of the United Nations.<sup>37</sup> That Convention, to which the State in question is a party, provides that "officials of the United Nations shall . . . be immune, together with their spouses and relatives dependent on them, from immigration restrictions and alien registration".

Furthermore, since the fees in question are directly linked to the fact that the person concerned is employed by the United Nations, the Organization is obliged to reimburse the official, and the fees charged therefrom become the responsibility of the Organization. To the extent that these charges, in part or in full, constitute a tax rather than payment for services provided, they would also be incompatible with article II, section 7 (a), of the Convention on the Privileges and Immunities of the United Nations, which provides that the United Nations shall be exempt from all direct taxes.

In view of the foregoing, the United Nations has no doubt that the Government in question should exempt all persons who are not citizens of its country employed by the United Nations and posted to duty stations situated in the territory of this country from the application of the new directives concerning the payment of fees.

17 June 1986

33. CUSTOMS USER FEE TO BE INTRODUCED BY THE CUSTOMS SERVICE OF A MEMBER STATE—UNITED NATIONS OFFICIALS HAVE GENERALLY BEEN ACCORDED THE SAME TREATMENT BY CUSTOMS SERVICE AS DIPLOMATS—NATURE OF THE USER FEE—PROVISIONS OF ARTICLE II, SECTIONS 7 (a) AND 8, AND ARTICLE VI, SECTION 22 (a) OF THE CONVENTION ON THE PRIVILEGES AND IMMUNITIES OF THE UNITED NATIONS

*Letter to the Legal Adviser of the Permanent Mission of a Member State to the United Nations*

I wish to refer to our recent discussions concerning the customs user fee to be introduced shortly by your country's authorities.

I have now had an opportunity to examine the legislation and the regulations which you were kind enough to provide and would like to offer the following observations and comments which may be useful to you in your further discussions with the authorities concerned.

First, I should point out that a preliminary estimate by the United Nations Travel Unit has concluded that the cost to the United Nations of the user fee would amount to approximately \$50,000–\$75,000 annually. I need hardly tell you that at the present time an additional financial burden of this magnitude will create difficulties for the Secretariat, will give rise to serious questions by the financial bodies of the Organization and may even hinder the working of the Organization.

Secondly, since the legislation specifically exempts diplomats from the fee and since United Nations officials have, in practice, generally been accorded the same treatment as diplomats by the customs authorities of your country, it would seem logical to extend the exemption to G-4 visa holders. It should also be pointed out that under article VI, section 22 (a), of the Convention on the Privileges and Immunities of the United Nations,<sup>38</sup> to which your country is a party, experts on mission enjoy immunity from seizure of their personal baggage and that if the logic of the diplomatic exemption is followed, experts on mission should receive exactly the same treatment as diplomats. To draw a distinction between experts on mission and officials would be invidious and, therefore, both categories should be exempted.

Finally, I would mention the strictly legal arguments that can be invoked. Without going into a lengthy analysis at this time, an argument can be made that the user fee is in fact a tax and not a charge for a public utility service and that consequently the United Nations should be exempt either under the direct tax provision in article II, section 7 (a), of the Convention on the Privileges and Immunities of the United Nations or reimbursed under the indirect tax provision in article II, section 8. This argument can be developed at much greater length and I would be happy to do so if you think it would be helpful. However, in view of the time factor involved in this matter, I thought it best to let you have my preliminary comments as soon as possible.

20 June 1986

34. IMPLEMENTATION OF THE OBLIGATION OF THE UNITED NATIONS AND THE SPECIALIZED AGENCIES TO MAKE PROVISION FOR THE SETTLEMENT OF DISPUTES OF A PRIVATE CHARACTER—PRACTICE FOLLOWED IN THIS RESPECT BY THE ORGANIZATION IN QUESTION

*Letter to the Legal Counsel, Food and Agriculture  
Organization of the United Nations*

This is in reply to your letter of 30 June 1986 requesting information as to whether any party to the Convention on the Privileges and Immunities of the United Nations,<sup>38</sup> the Convention on the Privileges and Immunities of the Specialized Agencies,<sup>39</sup> the Agreement on the Privileges and Immunities of the International Atomic Energy Agency<sup>40</sup> or a headquarters Agreement has requested the organization concerned to state, in advance and in some detail, how it would give effect to its obligation to make provision for appropriate modes of settlement of disputes of a private character.

Neither the United Nations nor, to the best of our knowledge, any of the specialized agencies has agreed with a State, in general terms, on procedures for the settlement of disputes of a private character.

Normally, individual contracts concluded between the United Nations or a specialized agency and another party contain provisions designating arbitration as the manner in which any disputes arising out of such a contract are to be resolved. As far as the United Nations is concerned, a clause designates arbitration as the mode of settlement, for example, under the rules of the American Arbitration Association, the International Chamber of Commerce or the UNCITRAL Arbitration Rules.

The attribution of jurisdiction for dispute settlement or contract claims to arbitral bodies has not been considered a choice as to the applicable law. The established practice concerning the law applicable to contracts is to reject any specific reference to municipal law. The reason for this is, of course, that it is difficult for the United Nations to be familiar with the legal system of each and every Member State. It has been the practice of the United Nations to interpret the contracts concluded by it on the basis of general principles of law, including international law, and upon the standards and practice established by its internal law.

This dispute settlement practice is also followed by the specialized agencies, and the majority of them provide for recourse to arbitration in "individual contracts", e.g., a commercial contract, for the settlement of disputes arising out of the contract concerned.

To the best of our knowledge, no agreement has been concluded to regulate, in advance and in detail, the modalities of implementation of article IX, section 31, of the Convention on the Privileges and Immunities of the Specialized Agencies. Nevertheless, there is nothing to prevent the conclusion between FAO and the Italian Government of such an agreement which would, in effect, merely confirm the existing principle of article IX, section 31.

16 July 1986

35. QUESTION OF THE APPLICATION OF THE UNITED STATES FOREIGN MISSIONS ACT, 1982, TO REAL ESTATE TRANSACTIONS OF INTERNATIONAL ORGANIZATIONS

*Internal memorandum*

1. The Foreign Missions Act (22 USC 4301 et seq.), enacted on 24 August 1982, became effective on 1 October 1982. Section 201(b) of the Act provides:

“The Congress declares that it is the policy of the United States to support the secure and efficient operation of United States missions abroad, to *facilitate the secure and efficient operation in the United States* of foreign missions and *public international organizations and the official missions to such organizations*, and to assist in obtaining *appropriate benefits*, privileges, and immunities for those missions and organizations and to require their observance of corresponding obligations in accordance with international law”. (emphasis added)

2. Section 205, which deals with acquisition and disposal of property, is addressed primarily to foreign missions, but it can be made applicable to “international organizations” by the Secretary of State by virtue of section 209, “if the Secretary determines that such application is necessary to carry out the policy set forth in section 201(b) and to further the objectives set forth in section 204(b)”. It was made applicable to permanent missions and to offices of the permanent observers to the United Nations by a note verbale dated 19 January 1983 from the United States Mission to the United Nations addressed to all permanent missions and offices of the permanent observers to the United Nations; it has not yet been applied to the United Nations itself. However, pursuant to the Foreign Missions Amendments Act of 1983 (Public Law 98-116) and upon a determination by the Secretary of State under section 209 of the Foreign Missions Act 1982, section 204(b) of the Act was made applicable to “all members and personnel of international organizations in the United States and their families entitled to claim immunity from legal process” for purposes of securing liability insurance for motor vehicles, vessels and aircraft in the United States.

3. Section 204(b) of the Act authorizes the Secretary of State, if he determines that such action is reasonably necessary to protect the interests of the United States, among others, to require foreign missions to obtain “benefits” through the Director or to impose conditions on the execution or performance in the United States of any contract or the acquisition, retention or use of any real property or the application for or acceptance of any benefit. Section 205, which has not been made applicable to international organizations, reads:

“Property of foreign missions

“Section 205.(a) (1) The Secretary may require any foreign mission to notify the Director prior to any proposed acquisition, or any proposed sale or other disposition, of any real property by or on behalf of such mission. If such a notification is required, the foreign mission (or other party acting on behalf of the foreign mission) may initiate or execute any contract, proceeding, application, or other action required for the proposed action—



“(A) only after the expiration of the 60-day period beginning on the date of such notification (or after the expiration of such shorter period as the Secretary may specify in a given case); and

“(B) only if the mission is not notified by the Secretary within that period that the proposal has been disapproved; however, the Secretary may include in such a notification such terms and conditions as the Secretary may determine appropriate in order to remove the disapproval.

“(2) For purposes of this section, ‘acquisition’ includes any acquisition or alteration of, or addition to, any real property or any change in the purpose for which real property is used by a foreign mission.

“(b) The Secretary may require any foreign mission to divest itself of, or forgo the use of, any real property determined by the Secretary—

“(1) not to have been acquired in accordance with this section; or

“(2) not to exceed limitations placed on real property available to a United States mission in the sending State.

“(c) If a foreign mission has ceased conducting diplomatic, consular, and other governmental activities in the United States and has not designated a protecting power or other agent approved by the Secretary to be responsible for the property of that foreign mission, the Secretary—

“(1) until the designation of a protecting power or other agent approved by the Secretary, may protect and preserve any property of that foreign mission; and

“(2) may authorize the Director to dispose of such property at such time as the Secretary may determine after the expiration of the one-year period beginning on the date that the foreign mission ceased those activities, and may remit to the sending State the net proceeds from such disposition.”

4. The words below have been defined in section 202(a) (I) (A) of the Act as follows: “benefits” means, among others, any acquisition or authorization for an acquisition in the United States by or for a foreign mission of real property by purchase, lease, exchange, construction or otherwise; “foreign missions” means any official mission to the United States involving diplomatic, consular or other governmental activities of a foreign Government, or “an international organization (other than an international organization, as defined in section 209(b) of this title), representing a territory or political entity which has been granted diplomatic or other official privileges and immunities under the laws of the United States;” “real property” is defined to include “any right, title, or interest in or to, or the beneficial use of, any real property in the United States, including any office or other building;” and “international organizations” is defined in section 209(b) (I) to mean “a public international organization designated as such pursuant to the International Organizations Immunities Act (22 U.S.C. 288-288f-2) or a public international organization created pursuant to a treaty or other international agreement as an instrument through or by which two or more foreign governments engage in some aspect of their conduct of international affairs”. Furthermore, the Secretary of State is authorized to determine the meaning and applicability of the terms defined in section 202(a) of the Act.

1 May 1986

36. QUESTION WHETHER A MEMBER STATE IS EXEMPTED FROM REAL ESTATE TAXES ON APARTMENTS PURCHASED BY ITS PERMANENT MISSION TO THE UNITED NATIONS FOR THE EXCLUSIVE USE OF THE DIPLOMATIC STAFF OF THE MISSION—APPLICABILITY TO PERMANENT MISSIONS IN NEW YORK, BY VIRTUE OF ARTICLE V, SECTION 15, OF THE AGREEMENT BETWEEN THE UNITED NATIONS AND THE UNITED STATES OF AMERICA REGARDING THE HEADQUARTERS OF THE UNITED NATIONS, AND OF ARTICLE 23, PARAGRAPH 1, OF THE 1961 VIENNA CONVENTION ON DIPLOMATIC RELATIONS—POSITION OF THE UNITED STATES OF AMERICA ON THE MATTER

*Letter to the Deputy Permanent Representative of a Member State*

I wish to refer to the inquiry made recently by your Mission regarding the possible exemption of the State you represent from real estate taxes on apartments purchased by the Mission for the exclusive use of the diplomatic staff of the Mission in New York.

As a matter of international law, the question raised is one which falls within the purview of the Vienna Convention on Diplomatic Relations of 18 April 1961, which is applicable to permanent missions to the United Nations by virtue of article V, section 15, of the Agreement between the United Nations and the United States regarding the Headquarters of the United Nations. Article 23, paragraph 1, of the Convention provides:

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

Under this provision, it is a requirement for exemption that the property be owned by the sending State or the head of the mission and that the property be included among “the premises of the mission”. According to article 1, paragraph (i), of the Convention:

“[T]he ‘premises of the mission’ are the buildings or parts of buildings and the land ancillary thereto, irrespective of ownership, used for the purpose of the mission including the residence of the head of the mission.”

The *travaux préparatoires* of the Vienna Convention indicate that this definition was introduced at the Conference itself.<sup>41</sup>

In practice, the interpretation given to article 23 of the Vienna Convention by States has been divergent. A note by the Secretariat on the “*Practice followed by Member States in exempting diplomatic missions from real estate taxes*” which was issued as a Host Country Committee document in 1974 analyses this practice on the basis of information provided by States in response to a letter of the Legal Counsel. Of particular interest is the reply of the United States, which is contained in document A/AC.154/WG.1/L.2/Add.1. You will note from paragraph 3 of that letter that the position set out by the United States is that, “except as provided by treaty or special legislative enactment, premises owned by the sending State or on its behalf and used for the purposes of providing residential accommodation for other members of the mission staff are not entitled to tax exemptions.”

It is our understanding that this remains the position of the United States. Accordingly, it would appear that the question of the exemption of a Member State from real estate taxes on premises owned by its mission and used for residential accommodation of the mission staff is always subject to reciprocity and depends on the existence of a treaty or special legislative enactment with the Member State concerned.

5 May 1986

---

37. QUESTION WHETHER ARTICLE VIII, SECTION 27, OF THE INTERIM ARRANGEMENT ON PRIVILEGES AND IMMUNITIES OF THE UNITED NATIONS CONCLUDED BETWEEN THE SECRETARY-GENERAL OF THE UNITED NATIONS AND THE SWISS FEDERAL COUNCIL APPLIES TO THE SETTLEMENT OF DISPUTES BETWEEN THE HOST STATE AND MEMBERS OF PERMANENT MISSIONS, NOTWITHSTANDING THE GRANTING TO THOSE MEMBERS OF A STATUS ANALOGOUS TO THE STATUS OF MEMBERS OF DIPLOMATIC MISSIONS

*Memorandum to the Principal Legal Officer, Legal Liaison Office,  
Office of the Director-General, United Nations Office at Geneva*

1. I wish to refer to the request of the Geneva Diplomatic Committee for a legal opinion concerning the scope of article IV, section 13, of the Interim Arrangement on Privileges and Immunities of the United Nations concluded between the Secretary-General of the United Nations and the Swiss Federal Council, and signed at Bern on 11 June 1946 and at New York on 1 July 1946 (the Headquarters Agreement).<sup>42</sup>

2. The precise question on which a legal opinion is sought, as stated in paragraph 3 of your memorandum of 11 October 1985, is whether the United Nations shares the view of the Host State authorities that article IV, section 13, of the Headquarters Agreement "excludes" the members of permanent missions to the Organization who, since 1948, have been accorded a status analogous to the status of members of diplomatic missions, and that, as a result, the dispute settlement provisions of the 1961 Vienna Convention on Diplomatic Relations and not of article VIII, section 27, of the Headquarters Agreement apply to the members of permanent missions. As we understand it, the practical significance of this interpretation of article IV, section 13, of the Headquarters Agreement is that disputes concerning the privileges and immunities of members of permanent missions to the Organization would be settled in accordance with the Optional Protocol to the 1961 Vienna Convention concerning the Compulsory Settlement of Disputes (which has been ratified by the State in question, and which provides for submission of disputes to the compulsory jurisdiction of the International Court of Justice) rather than in accordance with article VIII, section 27, of the Headquarters Agreement which provides for negotiation or arbitration. The Optional Protocol, which is purely bilateral in nature, would exclude an involvement of the United Nations in the procedure for dispute settlement and each

Member State would be obliged to act individually in the defence of its privileges and immunities.

3. The Office of Legal Affairs does not share the view of the host State authorities in this matter. As will be shown below, while the Office of Legal Affairs may share with these authorities their analysis of article IV, section 13, of the Headquarters Agreement, it does not draw the same conclusions as they do concerning the legal effect of this analysis on the dispute settlement provisions of the Agreement.

4. As far as article IV, section 13, is concerned, it is the understanding of the Office of Legal Affairs that the term "representatives" as defined in article IV, section 13, of the Headquarters Agreement does not refer to members of permanent missions which had not, at the time the Agreement was drawn up, been institutionalized and whose status was, therefore, not dealt with as such. To this extent, the Office of Legal Affairs shares the view of the host State authorities that article IV, section 13, "excludes" the members of permanent missions who, in fact, are accorded the more comprehensive regime of the 1961 Vienna Convention on Diplomatic Relations.

5. Be that as it may, the Office of Legal Affairs does not agree with the conclusion drawn by the host State authorities that, because article IV, section 13, of the Headquarters Agreement "excludes" members of permanent missions, the Agreement, in particular article VIII, section 27, is consequently not applicable to them. This conclusion, in the view of the Office of Legal Affairs, is untenable since it would follow therefrom—a wholly unintended result—that, given the less than universal participation in the Vienna Convention and the limited participation in the Optional Protocol, no procedure for settlement of disputes would be available as of 1964 (the date of entry into force of the Vienna Convention) to the members of a number of permanent missions. Prior to 1964, of course, the situation would have been even worse since no dispute settlement procedure would have been available to any State. In view of the bilateral nature, referred to in paragraph 2 above, of the granting of privileges and immunities under the 1961 Convention, the protection of permanent missions by the United Nations would, in effect, become impossible because the dispute settlement procedure under the Optional Protocol is always bilateral.

6. It is the view of the Office of Legal Affairs that the decision of the host State authorities in 1948 to extend to members of permanent missions a status analogous to that of members of diplomatic missions under international law has to be regarded as an arrangement additional to the otherwise unchanged Headquarters Agreement and therefore constitutes a supplementary arrangement within the meaning of article VIII, section 27, of that Agreement. It should be noted that this clause provides for negotiation or arbitration of any dispute between *the United Nations and the authorities of the State concerned* (emphasis added) so that full protection of missions accredited to the Organization is provided for and the strict bilateralism which underlies the Optional Protocol is avoided in those cases.

7. In conclusion, the Office of Legal Affairs wishes to place on record its opinion that the scope of application of article IV, section 13, of the Headquarters Agreement of 1946 does not affect the dispute settlement provision contained in article VIII, section 27, of that Agreement which remains the basis for settling any disputes which may arise between the United Nations and the

authorities of the host State arising from the interpretation or application of the Agreement or any supplementary arrangement or agreement.

20 October 1986

---

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

### **1. FOOD AND AGRICULTURE ORGANIZATION OF THE UNITED NATIONS**

#### **APPEARANCE OF A STAFF MEMBER BEFORE A PROFESSIONAL DISCIPLINARY BODY IN A COUNTRY TO WHICH HE IS ASSIGNED**

#### *Legal opinion delivered by the Legal Counsel to the Director of the Field Programme Development Division*

1. Recently, a staff member who was on the rolls of practising veterinary surgeons of a member nation was summoned to appear before the Board of Veterinary Surgeons of that member nation to answer charges of professional negligence or misconduct committed in the performance of his duties as an FAO expert. It is understood that in this case the person concerned was listed as a veterinary surgeon before becoming a staff member.

2. As you will recall, the FAO representative was instructed to inform the Chairman of the Board that the staff member would not be authorized to appear, and to invite the Board to provide FAO with information on the basis of which it could decide whether disciplinary action was called for under its own rules.

3. From a practical point of view, this case was resolved by the staff member's departure from the country for debriefing at the end of his appointment. He left two days after the Board was scheduled to meet, without appearing. However, the case in question raises some important questions which warrant consideration, since similar cases may arise in the future. These questions are:

(i) Do staff members who would normally belong to a professional association in order to practice (e.g., doctors, lawyers, architects, engineers) have to be on the rolls of practitioners in the countries to which they are assigned?

(ii) If a staff member is on the rolls of practitioners, to what extent is he subject to the administrative or disciplinary procedures of the professional association to which he belongs?

4. The answer to the first question is clearly in the negative. The State authorities or professional associations of a country cannot require staff members to belong to any professional association as a condition for performing official duties as an international civil servant. Their duties are international in character and, in the performance of their duties, they are solely responsible to the executive head of the organization they serve. Consequently, duties performed for FAO cannot be considered as falling within the ambit of the exercise of a profession in the country concerned.

5. In any event, for purely pragmatic reasons, inscription on the rolls of practitioners would be impractical since staff members, whether at headquarters or in the field, would seldom be qualified to practise in more than one or two countries.

6. As regards the second question in paragraph 3 above, a distinction must be made between acts which are part of official duties and those falling outside such duties (e.g., performed prior to becoming a staff member or, exceptionally and if authorized, concurrently with official duties).

7. Professional associations normally operate within the framework of national legislative provisions and, in certain circumstances, the decisions taken by their disciplinary bodies acting in a quasi-judicial capacity may be impugned before national courts. Therefore, if such associations seek to investigate the conduct of a staff member in connection with his official duties, whether or not with a view to taking disciplinary action, his immunity from legal process in respect of words spoken or written and all acts performed by him in his official capacity may—and normally should—be invoked wherever such immunity is enjoyed. A more general reason for invoking immunity from legal process is that the proceedings of professional associations, especially when of a disciplinary nature, may impose constraints on the execution of the organization's programmes or individual projects.

8. For acts that are not related to official duties, professional associations retain disciplinary authority over their members and the organization can, at best, only seek to ensure that such authority is exercised in a way that would not be detrimental to its interests.

9. To invoke immunity from legal process in the circumstances referred to above would be, of course, without prejudice to the Director-General's freedom to waive the staff member's immunity either in its entirety or for limited purposes. Moreover, cooperation with the professional association not only might be appropriate, but also might assist the organization in deciding whether to take disciplinary action under its own rules.

18 April 1986

---

## 2. UNITED NATIONS INDUSTRIAL DEVELOPMENT ORGANIZATION

- (a) Applicability to the United Nations Industrial Development Organization of the United Nations Financial and Staff Rules—Power of the Director-General to amend those Rules

*Memorandum to the Director, Division of Administration*

1. I refer to your note, date 10 February 1986, requesting our advice on the question whether the Director-General may, on his own authority, amend the United Nations Financial and Staff Rules as they are applied to UNIDO.

2. As indicated in your note, this question is governed by article 26.2 of the Constitution of UNIDO, which reads:

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

The “rules and regulations” referred to in this constitutional provision include, but are not necessarily limited to the Financial and Staff Regulations applicable to the former UNIDO.<sup>43</sup> In fact, the reference probably encompasses also important decisions of the organs of the United Nations, whether made by intergovernmental organs or issued by the Secretary-General in the form of a bulletin, an administrative instruction or a personnel directive. For all such categories of legal rules it follows from article 26.2 that they shall apply to UNIDO until the competent organs of UNIDO have adopted new provisions. Having now established the basic rule, I shall further analyse your question by examining which is the competent organ in UNIDO with respect to adoption or amendment of, respectively, Financial Regulations, Financial Rules, Staff Regulations and Staff Rules.

#### A. *Financial Regulations*

3. Article 8.3 of the Constitution of UNIDO provides with respect to the General Conference, *inter alia*:

“3. In addition to exercising other functions specified in this Constitution, the Conference shall:

“(a) ...

“(b) ...

“(c) ... approve the financial regulations of the organization ...”

It is therefore the General Conference which is the competent organ for the adoption or amendment of Financial Regulations. In fact, the General Conference already has exercised its authority in this matter since on 12 December 1985 at its first session the Conference adopted its decision GC.1/Dec.31 whereby:

“The General Conference took note of decision IDB.1/Dec.12 adopted by the Industrial Development Board on 4 November 1985, by which the Board approved the application by the Director-General of the financial regulations of the United Nations as of 31 December 1985, *mutatis mutandis*, pending the adoption of financial regulations of UNIDO by the General Conference.”

#### B. *Financial Rules*

4. UNIDO's Constitution does not expressly mention Financial Rules. They are, however, referred to authoritatively in United Nations financial regulation 10.1 (a), which reads:

“10.1 The Secretary-General shall:

“(a) Establish detailed financial rules and procedures in order to ensure effective financial administration and the exercise of economy”.

The organ of UNIDO which is comparable to the Secretary-General of the United Nations is the Director-General. In this respect article 11.3 of the Constitution of UNIDO provides, *inter alia*, as follows:

“3. The Director-General shall be the chief administrative officer of the organization. Subject to general and specific directives of the Confer-

ence or the Board, the Director-General shall have the overall responsibility and authority to direct the work of the Organization ...”

In view of the above, it follows that the Director-General may amend the United Nations Financial Rules as applied to UNIDO. Such amendments must, of course, be in conformity with the applicable Financial Regulations and should be carefully formulated so as to avoid any ambiguity inherent in the *mutatis mutandis* principle.

### C. Staff Regulations

5. Article 11.5 of the Constitution of UNIDO provides, *inter alia*:

“5. The staff shall be appointed by the Director-General under regulations to be established by the Conference upon recommendation of the Board ...”

It is therefore the General Conference which is the competent organ for the adoption or amendment of Staff Regulations. In fact, the General Conference has not yet exercised its authority in this matter, but the Industrial Development Board at its first session, on 12 November 1985, adopted its decision IDB.1/Dec. 17 by which:

“The Industrial Development Board took note of document UNIDO/IDB.1/18 by which the Director-General informed the Board that he intended to submit to the Board at its second session proposed draft staff regulations of UNIDO for its consideration and subsequent recommendation to the General Conference for approval at its second session. The Board also noted that, pending the approval of such staff regulations, and in accordance with article 26.2 of the Constitution, the Staff Regulations of the United Nations as of 31 December 1985, *mutatis mutandis*, would continue to be applied to the staff of UNIDO.”

Accordingly, while the General Conference has not yet exercised its authority to issue Staff Regulations, by virtue of article 26.2 of UNIDO’s Constitution, the United Nations Staff Regulations continue to apply to UNIDO’s staff.

### D. Staff Rules

UNIDO’s Constitution does not expressly mention Staff Rules. They are, however, referred to authoritatively in the preamble to the Staff Regulations as well as in regulations 12.2 to 5. The preamble reads:

“Scope and purpose

“The Staff Regulations embody the fundamental conditions of service and the basic rights, duties and obligations of the United Nations Secretariat. They represent the broad principles of personnel policy for the staffing and administration of the Secretariat. The Secretary-General, as the Chief Administrative Officer, shall provide and enforce such staff rules consistent with these principles as he considers necessary.”

The Director-General being the organ of UNIDO comparable to the Secretary-General of the United Nations, it would be the former who is the competent organ to issue or amend the United Nations Staff Rules as they apply to UNIDO. Such amendments naturally must be in conformity with the applicable Staff Regulations both as to substance and as to form. In these respects, it is to be noted that Article XII “General provisions of the Staff Regulations”, provides as follows:



“*Regulation 12.1:* The Regulations may be supplemented or amended by the General Assembly, without prejudice to the acquired rights of staff members.

“*Regulation 12.2:* Such staff rules and amendments as the Secretary-General may make to implement these Regulations shall be provisional until the requirements of regulations 12.3 and 12.4 below have been met.

“*Regulation 12.3:* The full text of provisional staff rules and amendments shall be reported annually to the General Assembly. Should the Assembly find that a provisional rule and/or amendment is inconsistent with the intent and purpose of the Regulations, it may direct that the rule and/or amendment be withdrawn or modified.

“*Regulation 12.4:* The provisional rules and amendments reported by the Secretary-General, taking into account such modifications and/or deletions as may be directed by the General Assembly, shall enter into full force and effect on 1 January following the year in which the report is made to the Assembly.

“*Regulation 12.5:* Staff rules shall not give rise to acquired rights within the meaning of regulation 12.1 while they are provisional.”

As applied to UNIDO, these general provisions have the effect that:

(1) Any amendment by the Director-General must be reported to the Board and thereafter to the General Conference together with the Board's recommendation;

(2) The Conference may direct that the amendment be withdrawn or modified;

(3) Amendments issued by the Director-General are provisional until reported to the General Conference and they enter into full force and effect only on 1 January following the year in which they were reported and in a version that takes into account such modifications and/or deletions as may have been directed by the Conference.

2 April 1986

(b) Exclusive authority of the Director-General to appoint staff

*Memorandum to the Director-General*

1. I refer to your request for a legal analysis of the nature of the authority of the Director-General of UNIDO to appoint staff.

2. It would be appropriate to commence the legal analysis with a consideration of the authority of the Secretary-General of the United Nations to appoint staff of that Organization. This is so because of the close links between the United Nations and UNIDO, which in the present matter is given formal legal expression through the fact that UNIDO continues to apply the Staff Regulations and Rules of the United Nations and through article 26.2 of the Constitution of UNIDO which provides that:

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

3. The question of the legal rules and principles governing the Secretary-General's authority to appoint staff of the United Nations was comprehensively analysed by the Legal Counsel of the United Nations, who set out the result of his analysis in a note to the Director of Personnel, dated 13 January 1964. The note contains a detailed examination of the applicable provisions of the Charter of the United Nations, of the proceedings of the Preparatory Commission which drew up the Charter, of relevant proceedings of the General Assembly and of the Secretariat's practice. While enclosing this note<sup>44</sup> in its entirety, it is particularly pertinent to recall its conclusion, which reads:

*“Summary of conclusions regarding the principles governing recruitment to the United Nations*

“15. From the foregoing account of Articles 100 and 101(1) of the Charter, and their application in practice, it clearly emerges that the right of appointment to the Secretariat rests exclusively in the Secretary-General and that Governments may not exercise a veto over employment by the Organization of candidates of their nationality. This, however, does not preclude Governments from submitting information on candidates of their nationality to the Secretary-General, provided that it is clearly understood that it is left to the Secretary-General to assess the weight to be attached to such information and to arrive at an independent decision on whether or not to appoint the candidate concerned. Furthermore, the Secretary-General is under no legal obligation to seek information from Governments on candidates, and it is a matter purely for his discretion to determine when such information should be requested as a matter of policy.”

4. The drafting or preparation of the Constitution of UNIDO proceeded from the basis of three texts of a draft constitution.<sup>45</sup> The United Nations Secretariat, the Group of 77 and Group B had each prepared one such text. All of these texts contained the following formulation:<sup>46</sup>

“6. The staff shall be appointed by the Director-General under regulations established by the Conference.”

This provision was applicable to all staff, except the Deputy Directors-General, who then as later were the subject of a special appointment procedure.

In a text appearing on 23 August 1976 (A/AC.1807/7/Add.1), the Group of 77 and Group D proposed to add “upon recommendation of the Board” after “by the Conference” and this addition was incorporated in a working paper, dated 17 March 1977, of the Subgroup of the Drafting Group on Organs, Work Programme and Financial Matters. It also was included in subsequent documents and now constitutes the first sentence of article 11.5 of UNIDO's Constitution.

5. The three drafts also contained nearly identical formulations regarding the obligation of members to respect the exclusively international character of the Secretariat. These formulations<sup>47</sup> read:

“In the performance of their duties the Director-General [, the Deputy Director-General]<sup>48</sup> and the staff shall not seek or receive instructions from any Government or from any other authority external to the organization. They shall refrain from any action that might reflect on their position as international officials responsible only to the organization. Each Member [member]<sup>48</sup> [,and Associate Member]<sup>49</sup> undertakes to respect the exclusively international character of the responsibilities of the Director-General

[, the Deputy-Director-General]<sup>48</sup> and the staff and not to seek to influence them in the discharge of their responsibilities.”

In a version contained in document A/AC.180/9/Add.1. of 22 November 1976, Group D had proposed the insertion of “and his Deputies” after “the Director-General”. Later, in the progress report of the Chairman of the Drafting Group on Organs, Work Programme and Financial Matters (A/AC.180/CG/WP.17) the bracketed language was removed and the sentence established in the version in which it appears in article 11.4 of UNIDO’s Constitution.

6. Apart from the appointment of deputy directors-general, article 11.5 (first sentence) of UNIDO’s Constitution governs the appointment of staff of UNIDO. This provision reads:

“The staff shall be appointed by the Director-General under regulations to be established by the Conference upon recommendation of the Board.”

From the wording it is clear that this provision vests the power of appointment exclusively in the Director-General. The independence of the Director-General in exercising his power of appointment is further emphasized by article 11.4, which reads:

“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 that might reflect on their position as international officials responsible only to the organization. Each Member undertakes to respect the exclusively international character of the responsibilities of the Director-General and the staff and not to seek to influence them in the discharge of their responsibilities.”

It follows that if appointments were to be necessarily subject to prior governmental approval, it would amount to a violation of article 11.5 (first sentence) of the Constitution since it would mean the Director-General had received instructions from a member State. Furthermore, by attempting to exercise a legal right to prevent the appointment of certain candidates to the Secretariat, a member State might well be considered to be in violation of its duty not to influence the Director-General in the discharge of his responsibilities. Therefore, it is the clear meaning of the applicable provisions of UNIDO’s Constitution—as is also the case for the Charter of the United Nations—that the right of appointment to the secretariat rests exclusively in the Director-General and that Governments may not exercise a legal right of veto over any such appointment. This does not, however, mean that governments may not submit information regarding candidates for appointment, nor does it preclude that the Director-General enters into consultations with a Government regarding a candidate, provided that it is clearly understood that it is left to the Director-General to assess the weight to be given to the information and views contributed by the Government and to arrive at an independent decision whether or not to appoint the candidate concerned.

7. While the foregoing conclusion is generally applicable, the question has been raised whether it also applies to the appointment of staff to the Investment Promotion Services of UNIDO. In this connection it has, in particular, been suggested that since the staff of these services are appointed under the 200 series Staff Rules, they are to be considered technical assistance personnel for whom prior clearance by the Government is necessary. Actually, this suggestion is

incorrect for both factual and legal reasons. The main reasons for the use of the 200 series Staff Rules are:

(1) The Executive Director of the former UNIDO had authority delegated to him from the Secretary-General to establish technical cooperation trust funds, but not other trust funds. At that time, therefore, appointments had to be made under the 200 series Staff Rules;

(2) When appointments are made under the 200 series Staff Rules the nationality quota for Professional staff does not apply. Since several of the Investment Promotion Services are located in over-represented Member States, this is the only way to accede to the donor Government's wish that one of its nationals be appointed.

As can be seen, there were and remain valid reasons for using the 200 series Staff Rules. However, it would be erroneous to maintain that the established practice of the United Nations and of the former UNIDO has been to conclude agreements with Governments requiring the Government's consent to the appointment of 200 series personnel to be stationed in their countries. Although it has been, and in the present UNIDO remains, the administrative practice of the secretariat to inform the Government in advance of an intended appointment and normally to refrain from the appointment if the Government objects, this clearly is a procedure of the secretariat, which fully respects the right of the Director-General to make an independent decision regarding the appointment.

28 April 1986

(c) Proposed United Nations Association of Political Scientists

*Memorandum to the Head, Personnel Service*

1. I wish to refer to your request of 21 April 1986 for legal advice on a staff member's letter of 10 April 1986, in which he proposes the setting up of a United Nations Association of Political Scientists.

2. From a legal viewpoint it is pertinent to examine whether it would be compatible with the Staff Regulations and Rules for a staff member to participate in the proposed association or in its initial establishment.

3. Not having been established, the association's eventual by-laws are not yet known. The above-mentioned letter has been sent to a large number of other staff in the Vienna International Centre, however, indicating that "an expanded meeting of the preparatory group could be held towards the end of May to proceed with constituent arrangements. Draft statutes and a first programme of action would be discussed at that constituent meeting." Furthermore, to the letter was attached a so-called project profile, describing the intended association's concept and objectives, activities, membership, structure and finance. According to the project profile, the association would "be established in Vienna as an international non-governmental organization" with "an assembly of the general membership, an advisory board of prominent and authoritative members and an executive Committee." Membership would be open to the general public, but among the groups specially targeted for membership would be "present and former staff members of the United Nations and its agencies" and "members of diplomatic missions and delegations and other concerned civil servants." Funding would largely consist in dues from members supplemented by revenues from activities such as sales of publications and fund-raising campaigns.

4. While the features of the association, as set out above, could not per se give rise to legal reservations regarding the involvement in the association of staff members, there are other aspects of the initiative which call for a closer examination. Before doing so, however, it would be helpful to recall those Staff Regulations and Rules which have a bearing on the question at hand, namely:

*Staff Regulations*

“*Regulation 1.4:* Members of the Secretariat shall conduct themselves at all times in a manner befitting their status as international civil servants. They shall not engage in any activity that is incompatible with the proper discharge of their duties with the United Nations. They shall avoid any action and in particular any kind of public pronouncement which may adversely reflect on their status, or on the integrity, independence and impartiality which are required by that status. While they are not expected to give up their national sentiments or their political and religious convictions, they shall at all times bear in mind the reserve and tact incumbent upon them by reason of their international status.

“*Regulation 1.5:* Staff members shall exercise the utmost discretion in regard to all matters of official business. They shall not communicate to any person any information known to them by reason of their official position which has not been made public, except in the course of their duties or by authorization of the Secretary-General. Nor shall they at any time use information to private advantage. These obligations do not cease upon separation from the Secretariat.

“*Regulation 1.7:* Staff members may exercise the right to vote but shall not engage in any political activity which is inconsistent with or might reflect upon the independence and impartiality required by their status as international civil servants.”

*Staff Rules*

*Rule 101.6: Outside Activities and Interests*

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

- (i) Issue statements to the press, radio or other agencies of public information;
- (ii) Accept speaking engagements;
- (iii) Take part in film, theatre, radio or television productions;
- (iv) Submit articles, books or other material for publication.”

5. The above-quoted rules require staff members to observe a substantial measure of impartiality, discretion and reserve with respects to acts that relate to the purpose, activities or interests of the Organization. This obligation is particularly strict regarding “information known to them by reason of their official position which has not been made public” and in this respect also applies to former staff members. The question therefore arises whether involvement with the planned association is compatible with such an obligation. From the project profile’s statement of “concept and objectives” it is stated that the association is intended as a response “in response to a situation characterized by mounting attacks, mainly (but not exclusively) in the United States on the United Nations

and its institutions”, and further: “The real crisis, however, would appear to be political. It is the result of a resurgence of basically conservative and isolationist attitudes directed against the very tenets of today’s global society as embodied in the United Nations, namely internationalism, multilateralism and interdependence.” These statements adequately reveal that the association is not conceived as an impartial actor at the international level. The project profile describes the association’s activities, *inter alia*, as follows: “While the Association would not primarily engage in a public relations exercise for the United Nations . . . it would involve itself in defending the purposes and principles of the United Nations as enshrined in its Charter and highlighting its remarkable but under-publicized achievements . . . it will arrange conferences, seminars, lectures and discussions on matters of current interest . . . and publish reports, papers, books and periodicals. . . .” These statements make it clear that the association aims at a general public information and public relations campaign concerning the activities of and issues before the United Nations and its agencies.

6. For the foregoing reasons, the association’s activities are among those in which participation by staff members is generally proscribed by staff regulations 1.4, 1.5 and 1.7. Consequently, staff members would be barred from active participation in the association: they could not hold any office or official position and they could not issue any statements, make speeches or submit materials for publication, except if required by their official duties or with the prior approval of the Director-General.

- (d) Exemption of the United Nations Industrial Development Organization and its staff from contributions to the social security system of a member State—Ordinance by the Federal Republic of Germany

*Note verbale to the Permanent Mission of the Federal Republic of Germany*

The Secretariat of the United Nations Industrial Development Organization presents its compliments to the Permanent Mission of the Federal Republic of Germany and has the honour to refer to the Permanent Mission’s note verbale dated 2 December 1985, by which UNIDO was informed that “an ordinance on the diplomatic privileges and immunities in the field of social security granted to organizations set up pursuant to intergovernmental agreements has entered into force on 14 August 1985 in the Federal Republic of Germany.”

After careful examination of the note verbale and of the ordinance the Secretariat has the honour to convey the following.

First, the Secretariat wishes to recall its notes verbales of 15 January and 24 July 1985, which set out the organization’s position that by virtue of the Convention on the Privileges and Immunities of the United Nations, to which the Federal Republic of Germany is a party, the organization and its staff are exempt from any legal obligation to contribute to the social security system of a Member State. Such exemption is unconditional and therefore not contingent on any declaration or determination by the Member State concerned.

This legal situation continues to obtain for UNIDO and its staff, notwithstanding the conversion of UNIDO from an autonomous organization within the United Nations, established by the General Assembly of the United Nations, to a

specialized agency of the United Nations. In this respect the Constitution of the present UNIDO provides in its article 21.2(b) that the privileges and immunities of the organization shall "in the territory of any member that has not acceded to the Convention on the Privileges and Immunities of the Specialized Agencies in respect of the organization but has acceded to the Convention on the Privileges and Immunities of the United Nations, be as defined in the latter convention . . ." As this provision is applicable in the case of the Federal Republic of Germany, it follows that UNIDO and its staff continue to enjoy the same privileges and immunities in the Federal Republic of Germany as before the conversion of the organization.

Consequently, it remains the position of the Secretariat that the conclusion of an agreement under international law is required before a member State may legally apply its national statutory or administrative rules on social security to the organization and its staff. It has been noted by the Secretariat that this position was accepted by the Federal Republic in its reply conveyed with the note verbale date 13 June 1965, in which it was stated, *inter alia*, that:

"an exemption of international organizations and their staff members in the Federal Republic of Germany may also be regulated by means of an agreement concluded with these organizations under international law. In accordance with article 3 of the draft ordinance, such agreement would take preference over the provisions of articles 1 and 2 of the draft ordinance".

Considering that article 3 of the ordinance—correctly—provides that:

"The specific national, supranational and intergovernmental provisions applying to individual organizations take precedence over articles 1 and 2,"

the Secretariat would not see any need to set aside the ordinance as a whole on the understanding, however, that by virtue of its article 3, the ordinance is not applicable to UNIDO and its staff.

Finally, the Secretariat wishes to convey to the Permanent Mission of the Federal Republic of Germany that the organization's legal position, which is a consequence of the international agreements applicable to this question, should not present insurmountable obstacles to reaching a mutually acceptable solution which takes into account the legitimate interests of all the affected parties. The Secretariat would suggest that consultations be initiated with this purpose in mind.

---

#### NOTES

<sup>1</sup> Reproduced as document A/41/343-E/1986/91 of 16 May 1986.

<sup>2</sup> United Nations, *Treaty Series*, vol. 828, p. 305.

<sup>3</sup> A/520/Rev.15.

<sup>4</sup> *Official Records of the General Assembly, Tenth Special Session, Supplement No. 4 (A/S-10/4)*, sect. III.

<sup>5</sup> A/520/Rev.15.

<sup>6</sup> General Assembly resolution 31/192, annex.

<sup>7</sup> General Assembly resolution 3357 (XXIX), annex.

<sup>8</sup>In order to make the Assembly (or rather the Fifth Committee) a more effective organ for making such critical judgements as to the qualification of experts, consideration might be given to entrusting this task to a small nominating committee.

<sup>9</sup>The relevant rule reads as follows:

“Representatives

“Rule 11

“Each member of the commission shall, after consultation with the Secretary-General and subject to confirmation by the Council,\* designate a person to serve as its representative on the commission.” (E/5975/Rev.1)

“\*Not applicable to the Commission on Narcotic Drugs, which is composed of States whose representatives are appointed by Governments without consultation with the Secretary-General and without confirmation by the Council.”

<sup>10</sup>General Assembly resolution 31/192, annex.

<sup>11</sup>General Assembly resolution 3357 (XXIX), annex.

<sup>12</sup>“Alternates\*”

“Rule 13

“1. Each member of the commission may, in consultation with the Secretary-General, designate an alternate representative to act in place of its representative at any meeting of the commission or, except as provided in paragraph 2 of this rule, of its subsidiary organs. When acting as representative, the alternate so designated shall have the same status as a representative, including the right to vote.

“2. In the case of a subsidiary organ whose members are experts nominated by Governments serving in their individual capacity, if a member is unable to attend all or part of a session he may, with the consent of his Government and in consultation with the Secretary-General, designate an alternate to act in his place during his absence. Such an alternate shall have the same status as the expert serving as member on the subsidiary organ concerned, including the right to vote.” (E/5975/Rev.1)

“\*Not applicable to the Commission on Narcotic Drugs, which is composed of States whose representatives are appointed by Governments without consultation with the Secretary-General and without confirmation by the Council.”

<sup>13</sup>Or, as indicated in paragraph 1 (b), the indicated official/officer could nominate the expert, after consultation with the State.

<sup>14</sup>*I.C.J. Reports 1984*, p. 436.

<sup>15</sup>*Official Records of the Economic and Social Council, 1986, Supplement No. 11, E/1986/32-E/ESCAP/536*, annex V.

<sup>16</sup>United Nations, *Treaty Series*, vol. 15, p. 295.

<sup>17</sup>*Ibid.*, vol. 1, p. 15.

<sup>18</sup>ST/OGS/L.2/Rev.3.

<sup>19</sup>General Assembly resolution 2106 (XX); see also United Nations, *Treaty Series*, vol. 660, p. 195.

<sup>20</sup>*Ibid.*, vol. 1245, p. 221.

<sup>21</sup>*Ibid.*, vol. 1282, p. 205.

<sup>22</sup>*Ibid.*, vol. 1155, p. 331.

<sup>23</sup>Paragraph (1) of the commentary to article 54 of the draft articles (*Official Records of the General Assembly, Twenty-first session, Supplement No. 9 (A/6309/Rev.1)*, p. 80).

<sup>24</sup>TD/SUGAR.10/11.

<sup>25</sup>United Nations, *Treaty Series*, vol. 11, p. 11.

<sup>26</sup>In a letter of 10 July 1972, the Assistant Secretary-General for General Services requested the Permanent Representative of the United States to the United Nations to provide assistance in seeking authorization from the United States State Department for the issuance of federal pistol permits to certain United Nations security officers. The deputy representative of the United States in the United Nations Security Council responded that no such federal gun permit existed. He also recommended, in his letter of 17 August 1972, that United Nations security officers obtain gun permits from both the City and the State.



With regard to the deputy representative's recommendation, it should be noted that a firearm licence issued by the New York City Police Commissioner is effective in all parts of New York State (see Penal Law § 400.00 (6)). Hence, a United Nations security officer would need only to obtain a New York City licence in order lawfully to carry firearms while performing functions in other parts of the state.

<sup>27</sup> Paragraph 1 of section 2.30 reads in part:

"Every peace officer in the State of the New York ... who works a full complement of hours which constitutes a full-time employment for the officer's employer, must successfully complete a training program, a portion of which shall be prescribed by the municipal police training council and by his employer, the state or local agency, unit of local government, state or local commission, or public authority or private organization that employs him. The portion prescribed by the municipal police training council shall be comprised of subjects, and the hours each is to be taught, that shall be required of all types or classes of peace officers ...

"The segment prescribed by the employer for his employees shall be comprised of subjects, and the hours each is to be taught, relating to the special nature of the duties of the peace officers employed by him ... In the reviewing of the employer's submission, the instructors must be found qualified by background and experience, and if so found, the course shall be certified by the municipal police training council ... Each peace officer satisfactorily completing the course shall be awarded a certificate by the division of criminal justice services attesting to that effect ..."

<sup>28</sup> Under article V, section 18(a), of the Convention on the Privileges and Immunities of the United Nations, staff members are immune from suit and legal process relating to all acts performed by them in their official capacity. The nature and scope of the immunity thereby provided to United Nations security officers is described in the following statement of the Office of Legal Affairs dated 21 January 1976:

"Under the Convention on the Privileges and Immunities of the United Nations, the members of the Security and Safety Service, as United Nations officials, have immunity for all acts performed by them in their official capacity; this also includes words spoken or written in the performance of official duties.

"Under his authority as head of the Secretariat, and in accordance with the Agreement with the United States Government regarding the Headquarters of the United Nations, the Secretary-General has charged the Security and Safety Service with the duty of safeguarding persons within the Headquarters district and of protecting United Nations property.

"It is therefore clear that the security personnel enjoy immunity for all acts they carry out pursuant to the instructions they have received from the Secretariat of the United Nations. The Secretary-General will take all necessary action with the authorities of the host State to ensure that this immunity is respected."

Hence, in the event of an incident involving armed United Nations security officers who are executing functions outside the Headquarters district but who have not been licensed by the New York City Police Department, such personnel would not be subject to prosecution for activities connected with their legitimate functions. Such immunity from prosecution, however, would not protect the security officers from *liability* for violation of any local laws, including those governing the carrying and licensing of weapons.

<sup>29</sup> United Nations, *Treaty Series*, vol. 1, p. 15.

<sup>30</sup> Reproduced as document A/AC.154/264.

<sup>31</sup> United Nations, *Treaty Series*, vol. 500, p. 95.

<sup>32</sup> A/CONF.67/16.

<sup>33</sup> Paragraph (4) of the commentary to article 14 of the draft articles (*Official Records of the General Assembly, Twenty-sixth Session, Supplement No. 10 (A/8410/Rev.1)*), pp. 19-20).

<sup>34</sup> United Nations, *Treaty Series*, vol. 11, p. 11.

<sup>35</sup> Paragraph (3) of the commentary to article 14 of the draft articles (*ibid.*).

<sup>36</sup> United Nations, *Treaty Series*, vol. 1, p. 15.

<sup>37</sup> *Ibid.*

<sup>38</sup> Ibid.

<sup>39</sup> Ibid., vol. 33, p. 261.

<sup>40</sup> Ibid., vol. 374, p. 147.

<sup>41</sup> Amendment to article 1 of the ILC draft articles on diplomatic intercourse and immunities, submitted by Bulgaria and the Byelorussian Soviet Socialist Republic, *Official Records of the United Nations Conference on Diplomatic Intercourse and Immunities*, vol. II (United Nations publication, Sales No. 62.X.1), document A/CONF.20/C.1/L.25, p. 10.

<sup>42</sup> United Nations, *Treaty Series*, vol. 1, p. 163.

<sup>43</sup> From a legal viewpoint it would have been correct to refer to General Assembly resolution 2089 (XX) as the resolution by which the former UNIDO was established.

<sup>44</sup> The note is reproduced in *Juridical Yearbook*, 1964, pp. 256–260.

<sup>45</sup> See document A/AC.180/CRP.2, dated 25 March 1976, of the Intergovernmental Committee of the Whole to Draw up a Constitution for UNIDO as a Specialized Agency.

<sup>46</sup> First sentence of article 9.6 of the drafts which eventually became the first sentence of article 11.5 of the Constitution.

<sup>47</sup> Article 9.5 of the draft, which eventually became the last sentence of article 11.4 of the Constitution.

<sup>48</sup> Bracketed language included in Group B's text.

<sup>49</sup> Bracketed language included in the Secretariat's text.