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UNITED NATIONS JURIDICAL YEARBOOK

2005

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

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

Chapter VI

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

A. Legal opinions of the Secretariat of the United Nations

(Issued or prepared by the Office of Legal Affairs)

1. Privileges and immunities

(*a*) Electronic mail addressed to the Department of Management, United Nations, regarding diplomatic immunity with regard to a "When Actually Employed" contract at the level of Assistant Secretary-General

Diplomatic privileges and immunities for United Nations officials—Convention on the Privileges and Immunities of the United Nations, 1946**—"When Actually Employed" contracts—Status of employment—Days of actual employment—Secretary-General's Bulletin ST/SGB/283***

1. This is in response to your email of 22 February 2005 requesting advice as to whether a person who is the holder of a "When Actually Employed" contract (WAE contract) at the level of an Assistant Secretary-General would enjoy diplomatic privileges and immunities over the entire duration of the WAE contract, or whether such privileges and immunities would only apply in respect of days of actual employment.

2. In our view, such diplomatic privileges and immunities *only apply in respect of days of actual employment*. The Secretary-General's Bulletin regarding "Use of 'When Actually Employed' Contracts for Special Representatives, Envoys and Other Special High Level Positions" of 29 August 1996 (ST/SGB/283) divides WAE contracts into two categories: (i) short term appointments under the 300 series of the Staff Rules; and (ii) on special service agreements. With respect to both kinds of WAE contracts, it is clear that a person employed under a WAE contract has the *status* of a staff member (300 series) or expert on

* This chapter contains legal opinions and other similar memoranda and documents.

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

*** Secretary-General's bulletins are approved and signed by the Secretary-General. Bulletins are issued with respect to the following matters: promulgation of rules for the implementation of regulations, resolutions and decisions adopted by the General Assembly; promulgation of regulations and rules, as required, for the implementation of resolutions and decisions adopted by the Security Council; organization of the Secretariat; the establishment of specially funded programmes; or any other important decision of policy as decided by the Secretary-General (see ST/SGB/1997/1).

mission (special service agreements) "*only when actually employed by the United Nations*". (See paragraphs 12 and 14 of the Bulletin.)

3. This means that status of the WAE contract holder as a staff member, or an expert on mission, only applies as at such time that he or she is employed by the United Nations. In this respect, it should be noted that paragraph 4 of the Bulletin states that "the holder of a WAE contract must be notified in writing of the days during which his or her services will be required, and his or her acceptance must be in writing. In cases of extreme urgency, this may be done on a *post facto* basis". Accordingly, the privileges and immunities would only apply to words spoken or written or acts performed in an official capacity during the actual period or periods of employment. It is clear, of course, that privileges and immunities in respect of activities conducted on such days would continue to apply until waived by the Secretary-General in accordance with the Convention on the Privileges and Immunities of the United Nations.

24 February 2005

(b) Interoffice memorandum to the Assistant Secretary-General, Central Support Services, United Nations, regarding immunity from search for holders of red United Nations *Laissez-Passer*

Privileges and immunities granted to United Nations officials—Article V, section 19, and article VII, section 27, of the Convention on the Privileges and Immunities of the United Nations, 1946[*]—Articles 29 and 36 of the Vienna Convention on Diplomatic Relations, 1961[**]—Diplomatic privileges and immunities granted only to United Nations officials at the level of Assistant Secretary-General and above—Possibility to issue red United Nations *Laissez-Passer* to officials at lower level without granting full scope of diplomatic privileges and immunities—Personal inviolability—Exceptions to personal inviolability with respect to security procedures by airlines

1. This is with reference to your request addressed to [name] by email on 17 February 2005 for a legal opinion concerning the relevant privileges and immunities enjoyed by the holders of red United Nations *Laissez-Passer* (UNLPs) of [. . .]. The email states that a red UNLP holder of [. . .] was twice forced to allow his bags to be searched at [city] airport, and that a security officer had advised that she was under instructions to treat national diplomatic passports differently from United Nations "diplomatic passports", which she said did not entitle their holders to immunity from search.

2. Pursuant to the Guide to the Issuance of United Nations Travel Documents (PAH/INF.78/2) of 1 June 1978, red UNLPs may be issued to officials of the United Nations at the level of Assistant Secretary-General and above, who by virtue of article V, section 19, of the Convention on the Privileges and Immunities of the United Nations (the Convention), are entitled to the "privileges and immunities, exemptions and facilities accorded to diplomatic envoys, in accordance with international law". In accordance with that Guide, red UNLPs may also be issued to officials of the United Nations at the D-2 level who under

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

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

article VII, section 27, of the Convention, are only entitled to the same facilities as are accorded to diplomatic envoys when travelling on the business of the United Nations. The Guide also provides that red UNLPs may, in exceptional cases, be issued to staff members below the rank of D-2 who are designated by the Secretary-General as within one of the categories listed in paragraph 10 thereof. With respect to such staff, the Convention provides neither the diplomatic privileges and immunities nor the facilities accorded to diplomatic envoys.

3. Based on the foregoing, and unless there is an agreement with the Government of the host country which provides otherwise, only officials who are at the level of Assistant Secretary-General and above are entitled to the full scope of diplomatic privileges and immunities. As such, only Assistant Secretary-Generals and above are entitled to "personal inviolability" under article 29 of the Vienna Convention on Diplomatic Relations (the Vienna Convention). As diplomatic agents, they cannot be required to submit to compulsory search procedures by police or other law enforcement authorities. In respect of travel by air, however, such inviolability does not preclude being expected to submit to a search either manually or by x-ray device as it has been established that airlines may refuse to carry persons who have not submitted to search procedures. In addition, pursuant to article 36 of the Vienna Convention, the personal baggage of a diplomatic agent is exempt from search unless there are serious grounds for presuming that it contains articles other than for official or personal use, which may be either prohibited or controlled by the laws of the receiving State. Such inspection, however, can only be conducted in the presence of the diplomatic agent or of his authorized representative.

1 March 2005

(c) Note verbale to the Permanent Representative of a Member State regarding the imposition of a road toll tax on the United Nations High Commissioner for Refugees

Privileges and immunities granted to the United Nations—Article 105 of the Charter of the United Nations—Article II, section 7 (a), of the Convention on the Privileges and Immunities of the United Nations, 1946[*]—Road toll tax—Exemption of any form of direct taxation—No exemption of charges for public utility services—Charges for services must be specifically identified, described, itemized and calculated according to some predetermined unit

The Legal Counsel of the United Nations presents his compliments to the Permanent Representative of [Member State] to the United Nations and has the honour to refer to the decision by the Government of [Member State] to impose a road toll tax on [staff members of the Office of] the United Nations High Commissioner for Refugees (UNHCR) with respect to the purchase of fuel in [Member State]. The Legal Counsel notes that since 2001 UNHCR has not been exempted from the road toll, and has thus incurred an additional annual cost of some US$ 300,000. The Legal Counsel notes that UNHCR has requested exemption from such road toll, in particular via its notes verbales of 14 November

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

2001, 16 December 2003 and 25 August 2004 (as attached),* but to date has not received a response from the Government. The Legal Counsel understands that in September 2001 the [Member State] Revenue Authority advised that an exemption from the road toll for UNHCR was not recommended as this was a "user charge and . . . payable by all fuel users" (copy of advice attached).*

In this connection, the Legal Counsel wishes to clarify the legal position of the United Nations. Pursuant to article II, section 7 (a), of the 1946 Convention on the Privileges and Immunities of the United Nations (the Convention), acceded to by the [Member State] on [date], without reservation, "the United Nations, its assets, income and other property shall be exempt from all direct taxes; it is understood, however, that the United Nations will not claim exemption from taxes which are, in fact, no more than charges for public utility services". The obligation of the Government to exempt UNHCR from "any form of direct taxation" is also set forth under article VIII, paragraph 4 (a), of the Agreement between the United Nations High Commissioner for Refugees and the Government of [Member State] of [date] (the Agreement). Article VIII, paragraph 4 (a), of the Agreement, like the Convention, also specifies that such exemption is on the proviso that "UNHCR will not claim exemption from charges for public utility services". Accordingly, it follows that if a "tax" is in fact a "charge for services", the United Nations will not seek exemption. The question at hand is thus whether the "road toll" is in fact a charge for services, or a form of taxation, from which the United Nations and UNHCR should be exempt under the Convention and the Agreement.

The United Nations' position with respect to charges for public utility services is set out in the Study prepared by the Secretariat on the Practice of the United Nations, the Specialized Agencies and the International Atomic Energy Agency (*Yearbook of the International Law Commission, 1967,* vol. II**). The Study states that the term "public utility" has a restricted connotation applying to particular supplies or services rendered by a Government or a corporation under Government regulation, for which charges are made at a fixed rate according to the amount of supplies furnished or services rendered. As a matter of principle and as a matter of obvious practical necessity, charges for actual services rendered must relate to services which can be specifically identified, described and itemized. The Legal Counsel wishes to advise that unless the above-mentioned tax can be shown to be a charge for services which can be *specifically identified, described, itemized and calculated according to some predetermined unit,* the Government of the [Member State] is bound to exempt the United Nations from payment of such taxation according to its obligations under article II, section 7 (a), of the Convention, and under article VIII, paragraph 4 (a), of the Agreement.

Under section 34 of the Convention, the Government of the [Member State] has an obligation to be "in a position under its own law to give effect to the terms of this Convention." Moreover, any interpretation of the provisions of the Convention on the Privileges and Immunities of the United Nations must be carried out within the spirit of the underlying principles of the Charter of the United Nations, and in particular Article 105 thereof, which provides that the Organization shall enjoy such privileges and immunities as are

* The documents are not reproduced herein.

** *Yearbook of the International Law Commission, 1967,* vol. II (United Nations publication, Sales No. E.68.V.2).

necessary for the fulfilment of its purposes. Measures which might, *inter alia,* increase the financial or other burdens of the Organization have to be viewed as being inconsistent with this provision.

The Legal Counsel is confident that it is not the intention of the Government of the [Member State] to breach its obligations under the Convention, the Agreement or the Charter of the United Nations. Accordingly, the Legal Counsel kindly requests the Permanent Representative of the [Member State] to the United Nations to urge the competent national authorities to continue its previous policy of exempting the United Nations and UNHCR from the payment of the road toll tax in accordance with the Government of the [Member State]'s obligations under international law.

The Legal Counsel avails himself of this opportunity to renew to the Permanent Representative of the [Member State] to the United Nations the assurances of his highest consideration.

14 March 2005

(d) Draft note verbale for the United Nations Development Programme to be addressed to the Ministry of Foreign Affairs of a Member State in respect of a national law requiring mandatory contribution to the national health scheme

Privileges and immunities granted to United Nations officials—Article II, section 7 (a), and article V, section 18 (b), of the Convention on the Privileges and Immunities of the United Nations, 1946*—Articles 101 and 105 of the Charter of the United Nations—Exemption of any form of direct taxation—Equality of treatment of all officials of the Organization, independently of nationality—Mandatory contributions for health insurance under national legislation considered as a form of direct taxation—Locally recruited staff not assigned to hourly rates are entitled to exemption from such taxation—General Assembly resolution 78 (1) of 7 December 1946

The United Nations Development Programme (UNDP) Resident Representative in the [Member State] presents his compliments to the Ministry of Foreign Affairs of the [Member State] and has the honour to refer to a law for health insurance enacted in the [Member State] which provides for obligatory membership in, and contribution to, the national health scheme.

The UNDP Resident Representative has the honour to inform the Ministry of Foreign Affairs of the [Member State] that it has been the consistent practice and policy of the United Nations, pursued by the Organization for more than five decades, that mandatory contributions for health insurance under national legislation are considered a form of direct taxation on the United Nations and therefore contrary to the Convention on the Privileges and Immunities of the United Nations (the Convention), to which the [Member State] has been a party since [date] without reservation.

Pursuant to the provisions of article II, section 7, sub-paragraph (a), of the Convention, the United Nations, its assets, income and other property shall be exempt from all direct taxes. Furthermore, pursuant to article V, section 18, sub-paragraph (b), of the Con-

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

vention, "officials of the United Nations shall be exempt from taxation on the salaries and emoluments paid to them by the United Nations". It should be noted in this regard that General Assembly resolution 76 (1) provides "the granting of privileges and immunities referred to in article V . . . to all members of the staff of the United Nations, with the exception of those who are recruited locally and are assigned to hourly rates". Thus, locally recruited staff who are not assigned to hourly rates are entitled, irrespective of their nationality, to the exemption from such taxation. Under section 34 of the Convention, the [Member State] has an obligation "to be in a position under its own law to give effect to the terms of this Convention".

Thus, as a party to the Convention, the [Member State] is not entitled to make use of United Nations emoluments for any tax purposes. The rationale of the immunity from taxation of salaries paid by the United Nations is to achieve equality of treatment of all officials of the Organization, independently of nationality. These principles were clearly enunciated by the General Assembly in resolution 78 (1) of 7 December 1946 as follows: "In order to achieve full application of the principle of equality among Members and equality of personnel of the United Nations, Members which have not yet completely exempted from taxation, salaries and allowances paid out of the budget of the Organization are requested to take early action in the matter."

The Organization's exemption from national health insurance schemes is further evidenced by the fact that the United Nations has its own comprehensive social security scheme, which includes provisions for health protection, for United Nations staff members. The establishment of such scheme is required under regulation 6.2 of the United Nations Staff Regulations, which are established by the General Assembly according to Article 101 of the Charter of the United Nations.

Finally, any interpretation of the provisions of the Convention must be carried out within the spirit of the underlying principles of the Charter of the United Nations, and in particular Article 105 thereof, which provides that the Organization shall enjoy such privileges and immunities as are necessary for the fulfilment of its purposes. Measures which might, *inter alia,* increase the financial or other burdens of the Organization have to be viewed as being inconsistent with this provision.

The UNDP Resident Representative would be grateful if the Minister of Foreign Affairs would take the necessary steps, in recognition of the foregoing privileges and immunities of the United Nations and its officials, to ensure that the United Nations, its subsidiary organs and their officials are not subject to compulsory membership in the national health insurance scheme.

23 March 2005

(*e*) Facsimile to the Representative of the Secretary-General of a United Nations Office, regarding the issuance of diplomatic cards to United Nations officials by the Host Country

Diplomatic privileges and immunities for United Nations officials—Convention on the Privileges and Immunities of the United Nations, 1946*—Non-State parties to the Convention—Issuance of diplomatic cards by a host country is usually regulated by State practice—Common practice to accord diplomatic status to heads of office regardless of grade

1. This is with reference to your memorandum of 14 March 2005 attaching a note verbale dated 10 March 2005 from the Ministry of Foreign Affairs of [Member State], which advises that diplomatic cards will be issued to United Nations staff members upon submission of their United Nations diplomatic *Laissez-Passer,* or passports which indicate the diplomatic status of the bearer. You request advice as to whether [United Nations office] should reply to this note, and if so, on the possible content of such a reply.

2. Although [Member State] is not a party to the 1946 Convention on the Privileges and Immunities of the United Nations (the Convention), the status of the Organization and its officials in [Member State] derive from the Charter of the United Nations and the Convention. We note in particular that [Member State] is party to the "Agreement between the [Member State] and the United Nations Development Programme" signed on [date], of which article IX provides that the Convention shall apply in respect of the United Nations, its organs and officials, etc., in the country.

3. The issuance of diplomatic cards by the host country is usually regulated by the practice which is followed in each country and not by any specific provisions of the Convention, under which only a very limited number of officials at the level of Assistant Secretary-General and above are accorded diplomatic privileges and immunities. While practice varies from country to country, in most countries the head of the United Nations office is usually accorded diplomatic status for purposes of protocol regardless of their grade. We would also note that at most major United Nations headquarters (other than New York) including Geneva, Vienna, Nairobi and the Regional Economic Commissions, staff members at the level of P-5 and above are granted diplomatic privileges and immunities.

4. We are not informed of the practice in [Member State] but we would suggest that you confirm to us whether or not the head of Office is accorded diplomatic status, which we would regard as the minimum requirement in the light of the established practice.

30 March 2005

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

(f) Interoffice memorandum to the Director of the Investment Management Service of the United Nations Joint Staff Pension Fund regarding the Fund's tax exempt status in certain States

ARTICLE II, SECTION 7 (A), OF THE CONVENTION ON THE PRIVILEGES AND IMMUNITIES OF THE UNITED NATIONS, 1946*—EXEMPTION FROM DIRECT TAXATION OF ALL ASSETS OF THE UNITED NATIONS—ASSETS OF THE UNITED NATIONS JOINT STAFF PENSION FUND HELD ON BEHALF OF THE PARTICIPANTS AND BENEFICIARIES OF THE FUND ARE PROPERTY OF THE UNITED NATIONS—ARTICLE 18 OF THE REGULATIONS, RULES AND PENSION ADJUSTMENT SYSTEM OF THE JOINT STAFF PENSION FUND—MEASURES WHICH MAY INCREASE THE BURDENS, FINANCIAL OR OTHER, OF THE ORGANIZATION ARE CONSIDERED INCONSISTENT WITH ARTICLE 105 OF THE CHARTER OF THE UNITED NATIONS

1. This is in response to your memorandum dated 21 March 2005 addressed to the Director of the General Legal Division, requesting a legal opinion on the tax exempt status of the United Nations Joint Staff Pension Fund in [Member State A] and [Member State B]. We understand that [name], a custodian of the Fund, requested a legal opinion in a meeting on 18 March 2005 in connection with the Fund's outstanding tax claims in [Member State A] and [Member State B].

2. We wish to advise that all assets of the United Nations, including the assets of the United Nations Joint Staff Pension Fund, are exempt from direct taxation. This position derives from the obligations of Member States under the Convention on the Privileges and Immunities of the United Nations (the Convention) and the Charter of the United Nations. We note that [Member State B] acceded to the Convention without reservation on [date], and that [Member State A] acceded to the Convention with no relevant reservation on [date]. Pursuant to article II, section 7 (a), of the Convention, "the United Nations, its assets, income and other property shall be exempt from all direct taxes; it is understood, however, that the United Nations will not claim exemption from taxes which are, in fact, no more than charges for public utility services". Article 105 of the Charter provides that "[t]he Organization shall enjoy in the territory of each of its Members such privileges and immunities as are necessary for the fulfilment of its purposes." Among these privileges and immunities is immunity from taxation of the assets, income and property of the Organization. Measures which may increase the burdens, financial or other, of the Organization are considered to be inconsistent with a Member State's obligations under Article 105 of the Charter.

3. It is clear that the assets of the United Nations include the assets of the United Nations Joint Staff Pension Fund. Article 18 of the Regulations, Rules and Pension Adjustment System of the Joint Staff Pension Fund (the Regulations and Rules) states that "[t]he assets shall be the property of the Fund and shall be acquired, deposited and held in the name of the United Nations . . .". Although the assets are held on behalf of the participants and beneficiaries of the Fund, which may include the employees of non United Nations bodies which meet the criteria for membership as set forth under article 3 (b) of the Regulations and Rules, the assets are nevertheless the property of the United Nations. They are accordingly entitled to exemption from taxation under the Convention on the Privileges and Immunities of the United Nations.

25 April 2005

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

(g) Letter to the Ambassador and Deputy Permanent Representative to the Permanent Mission of [Member State] to the United Nations

Conference of the Parties to the United Nations Framework Convention on Climate Change—Question regarding the scope and application of the Convention on the Privileges and Immunities of the United Nations, 1946,* with regard to the Conference of the Parties—Institutional linkage of the Conference of the Parties to the United Nations—General Assembly resolution 56/199 of 21 December 2001—Inclusion of the sessions of the Conference of the Parties in the United Nations calendar of conferences and meetings—Application of the principles governing United Nations Conferences to the Conference of the Parties—*Mutatis mutandis* application of the 1946 Convention in respect of the Conference of the Parties

I refer to your letter of 25 April 2005 by which you informed us that [Member State] will be hosting the [. . .] session of the Conference of the Parties to the United Nations Climate Change Convention. In this respect, you seek clarification as to whether "the Conference of the Parties, being part of the United Nations, falls within the scope and application of the Convention on the Privileges and Immunities". You further indicate that "if this is the case, [Member State] will be able to grant privileges and immunities for the Conference under an existing legal instrument, and if it is not the case, it will be required to prepare a new regulation in order to provide this meeting with privileges and immunities".

At the outset, we note that the Conference of the Parties is one of the bodies set up by the Climate Change Convention, together with the Convention Secretariat and a number of subsidiary bodies (subsidiary body for scientific and technological advice (article 9), and subsidiary body for implementation (article 10)). While both the legal nature and the functions of these bodies indicate that they have certain distinctive elements attributable to international organizations, none of these bodies is *de jure* a United Nations subsidiary organ.

Notwithstanding, as indicated in your letter, the Secretariat of the Climate Change Convention is presently institutionally linked to the United Nations pursuant to General Assembly resolution 56/199 [of 21 December 2001] approving the continuation of the institutional linkage and related administrative arrangements initially approved by the Conference of the Parties in decision 14/CP.1.

As reflected in General Assembly resolution 56/199, despite the institutional linkage, the Convention Secretariat is not fully integrated in the work programme and management structure of any particular department or programme of the United Nations. It is however a fact that, since 1995, the United Nations provides administrative support to the Convention Secretariat. In addition, the Executive Secretary of the Convention Secretariat is appointed by the Secretary-General, to whom he/she reports on administrative matters through the Under-Secretary-General for Management and on other matters through the Under-Secretary-General for Economic and Social Affairs, while being accountable to the Conference of the Parties.

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

It should also be noted that, over time, the Executive Secretary has functioned within the scope of a broad delegation of authority and that he/she is invited by the General Assembly to report on the work of the Conference of the Parties to the Convention.

Finally, it should be noted that the sessions of the Conference of the Parties and its subsidiary bodies are included in the United Nations calendar of conferences and meetings for the biennium (A/AC.172/2004/2 of 12 March 2004).

In the light of the above, and although the Convention Secretariat may, *per se,* be defined as a "treaty body with an institutional linkage to the United Nations", we are of the view that by virtue of such linkage, the principles governing United Nations conferences convened by United Nations bodies should apply to the [. . .] session of the Conference of the Parties, as was the case with regard to previous conferences of a similar nature. We would thus suggest that, as appropriate, internal legislation be enacted in [Member State] so that (i) the 1946 Convention on Privileges and Immunities of the United Nations be made applicable, *mutatis mutandis,* in respect of the Conference and (ii) participants that are not covered under the 1946 Convention be granted the necessary privileges and immunities.

. . .

11 May 2005

(h) Interoffice memorandum to the Director of the Investment Management Service of the United Nations Joint Staff Pension Fund regarding tax exemption in a Member State

Article II, section 7 (a), of the Convention on the Privileges and Immunities of the United Nations, 1946[*]—Exemption from direct taxation for all assets of the United Nations—No exemption for "distribution tax" assessed against companies in which the United Nations Joint Staff Pension Fund (UNJSPF) is a shareholder

1. This is in response to your memorandum dated 3 May 2005 requesting advice as to whether UNJSPF should pay "distribution tax" in [Member State] in view of its exemption from "direct taxation" under the Convention on the Privileges and Immunities of the United Nations (the Convention), even if, as in the circumstances, the tax is not paid directly by UNJSPF but by entities in which the Fund is a shareholder.

2. You state that UNJSPF has purchased shares in a number of companies which carry on business in [Member State] ([names of banks and companies]), and that you have been advised by the custodians of the Fund, [names of banks] that the sum of [. . .] was deducted as tax from profits accruing to the Fund in its investments in the [Member State] companies. You attach a copy of a letter dated 10 February 2005 from the Ambassador of [State] in response to [name]'s letter of 30 September 2004, advising that under [Member State] Tax Law, the companies are required to pay two categories of taxes: a company tax and a distribution tax. The letter explains that the "distribution tax" is due on the company once it decides to distribute its profits to shareholders. The letter also explains that the amount of [. . .] is "actually an amount of tax due on the companies of which UNJSPF is a

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

shareholder and not of UNJSPF itself and that "under [Member State] law, those companies and UNJSPF are separate juridical entities".

3. As you are aware, pursuant to article II, section 7 (a), of the Convention "the United Nations, its assets, income and other property shall be exempt from all *direct* taxes; it is understood, however, that the United Nations will not claim exemption from taxes which are, in fact, no more than charges for public utility services". As the "distribution tax" is not assessed against the Fund as such, but with respect to the individual companies in which the Fund is a shareholder, it is not a direct tax within the meaning of article II, section 7 (a), of the Convention. Accordingly, as the tax is not being levied against the Fund, there is no entitlement to an exemption from the tax under article II, section 7 (a), of the Convention.

31 May 2005

(i) Note verbale to the Permanent Representative of a Member State to the United Nations regarding the intention of its Government to tax United Nations officials serving in the country

Privileges and immunities granted to United Nations officials—Article 105 of the Charter of the United Nations—Article V of the Convention on the Privileges and Immunities of the United Nations, 1946*—Tax exemption on salaries and emoluments for all staff members regardless of their nationality, including locally recruited staff not assigned to hourly rates—General Assembly resolution 76 (1) of 7 December 1946—Staff Assessment Plan designed to impose a direct assessment on staff members comparable to national income taxes—General Assembly resolution 239 A (III) of 18 November 1948—Equality of treatment for all officials of the Organization—General Assembly resolution 78 (I) of 7 December 1946—National taxation would impose double taxation burden on staff members and increase financial burden of the Organization and its Member States

The Legal Counsel of the United Nations presents his compliments to the Permanent Representative of [Member State] to the United Nations and has the honour to refer to the apparent intention of the Government of [Member State] to tax United Nations national staff serving in [Member State]. The Legal Counsel is advised that the [State] tax authorities have recently commenced a tax recovery action against [name], Head of Human Resources of the United Nations Development Programme (UNDP) in [Member State], who is a locally employed staff member. The Legal Counsel understands that in this connection, the Resident Coordinator of UNDP in [State], has written to the Minister of Foreign Affairs of [Member State], with respect to the tax exempt status of United Nations officials, as set forth in his note of 28 April 2005, and letter of 25 May 2005 (copy attached).**

In order to clarify the relevant privileges and immunities of the United Nations, the Legal Counsel has the honour to refer to the Agreement between the United Nations Development Programme and the Government of [Member State] signed on [date] (the Agreement). Pursuant to paragraph 1 of article LX, of the Standard Basic Assistance Agreement,

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

** The documents are not reproduced herein.

the Government has an obligation "to apply to the United Nations and its organs, including the UNDP and United Nations subsidiary organs acting as UNDP Executing Agencies, their property, funds and assets, and to their officials, including the resident representative and other members of the UNDP mission in the country, the provisions of the Convention on the Privileges and Immunities of the United Nations" (the Convention). In addition, the Legal Counsel has the honour to refer to the Convention, to which [Member State] acceded on [date], without reservation.

In the event of any misunderstanding with respect to the application of privileges and immunities to nationals of [Member State] employed by the United Nations, its organs, and subsidiary organs, the Legal Counsel wishes to clarify the categories of United Nations staff who enjoy privileges and immunities under the Agreement and the Convention, which privileges and immunities include exemption from taxation on the salaries and emoluments paid to them by the United Nations.

Pursuant to article V, section 18 (b), of the Convention, "officials" of the United Nations are "exempt from taxation on the salaries and emoluments paid to them by the United Nations". With respect to the definition of "officials", it should be noted that General Assembly resolution 76 (1) of 7 December 1946 (copy attached)*, adopted pursuant to the procedure laid down in section 17 of the Convention, provides for "the granting of the privileges and immunities referred to in article V . . . to all members of the staff of the United Nations, with the exception of those who are recruited locally and *are assigned to hourly rates*" (emphasis added). Thus, regardless of their nationality, all United Nations officials, *including locally recruited staff who are not assigned to hourly rates,* are entitled to the exemption from such taxation.

Thus, any nationals of [Member State] employed by the United Nations, including locally recruited staff who are not assigned to hourly rates, are entitled to exemption from taxation on their salaries and emoluments paid to them by the United Nations.

Based on the foregoing, [Member State] is not entitled to make use of United Nations emoluments for any tax purposes. In place of national taxation, the United Nations General Assembly, in 1948, adopted a Staff Assessment Plan designed "to impose a direct assessment on United Nations staff members which is comparable to national income taxes" (resolution 239 (III) A). The total funds collected from this assessment are distributed among Member States in proportion to their contributions to the assessed budget of the United Nations. National taxation would therefore impose a double taxation burden on officials of the United Nations and would increase the financial burden of the Organization and its Member States.

Another rationale of the immunity from taxation of salaries paid by the United Nations is to achieve equality of treatment for all officials of the Organization. These principles were clearly enunciated by the General Assembly in resolution 78 (1) of 7 December 1946 as follows: "In order to achieve full application of the principles of equality among Members and equality among personnel of the United Nations, Members which have not yet completely exempted from taxation, salaries and allowances paid out of the budget of the Organization are requested to take early action in the matter."

* The resolution is not reproduced herein.

It should be noted that under section 34 of the Convention, the Government of [Member State] has an obligation to be "in a position under its own law to give effect to the terms of this Convention". Moreover, any interpretation of the provisions of the Convention must be carried out within the spirit of the underlying principles of the Charter of the United Nations, and in particular Article 105 thereof, which provides that the Organization shall enjoy such privileges and immunities as are necessary for the fulfilment of its purposes. Measures which might, *inter alia*, increase the financial or other burdens of the Organization have to be viewed as being inconsistent with this provision.

The Legal Counsel would be grateful if, in fulfilment of its obligations under the Agreement, the Convention, and the United Nations Charter, the Permanent Representative of [Member State] to the United Nations would kindly request the competent authorities in [State] to exempt all officials of the United Nations, including national staff serving in the country, from taxation on the salaries and emoluments paid to them by the United Nations.

The Legal Counsel avails himself of this opportunity to renew to the Permanent Representative of [Member State] to the United Nations the assurances of his highest consideration.

16 September 2005

2. Procedural and institutional issues

(*a*) Interoffice memorandum to the Deputy Director of the Security Council Affairs Division, United Nations, regarding the circulation of documents in all official languages

Submission and circulation of documents in all official languages in Security Council subsidiary organs—Rules 26 and 41 of the Provisional Rules of Procedure of the Security Council and relevant practice applicable to its subsidiary organs—Possibility to consider a document prior to its circulation in all official languages—Actual date of official submission of a report—Obligation to submit a report by a specific date and the obligation to circulate the report in all official languages are two distinct obligations incumbent upon different entities at different points of time—Practice of circulating informal documents only in English unless there is formal objection by a Member State—Discretionary decision of the chairman of a committee to extend the deadline for comments to a report beyond the 48-hour no-objection rule

1. This is in reference to your routing slip of 28 December 2004 attaching a note from the Secretary of the Security Council Committee established pursuant to resolution 1267 (1999) concerning Al-Qaida and the Taliban and Associated Individuals and Entities (the Committee), on the use of official languages in Security Council organs. Our advice was sought on the following issues:

a. Whether a report of the Monitoring Team submitted to the Committee pursuant to Security Council resolution 1526 (2004) by the date indicated in the English language only, could be considered as formally "submitted" before it has been reproduced in all official languages;

b. Whether the Committee's annual report, or for that matter, any communications, letters from the Chairman, or proposals for additions to the Committee's consolidated list, could be considered by members of the Committee before they are translated and circulated in all official languages;

c. The strict application of the 48-hour no-objection rule to the adoption of reports and their amendments, and more particularly, whether after a deadline for submitting comments on a report has expired and an amendment has been circulated under a 48-hour no-objection rule, could a member of the Committee then submit, within the latter 48-hour deadline, another amendment to the report, unrelated to the one circulated under the no-objection rule.

2. These questions were examined in the light of the Provisional Rules of Procedure of the Security Council, which are applicable, as appropriate, to the Committee, as a subsidiary organ of the Security Council in the absence of any other applicable rules. These questions were examined also in the light of the practice of this and similar Security Council committees, as well as the Main Committees of the General Assembly.

3. Rules 26 and 41 of the Provisional Rules of Procedure pertain to the circulation, distribution and publication of documents in all official languages.

They provide, respectively, as follows:

> "The Secretary-General shall be responsible for the preparation of documents required by the Security Council and shall, except in urgent circumstances, *distribute them at least forty-eight hours in advance of the meeting at which they are to be considered*" (emphasis added).

and,

> "Arabic, Chinese, English, French, Russian and Spanish shall *be both the official and the working languages of the Security Council*" (emphasis added).

According to the strict interpretation of the rules, therefore, all documents considered by the Council, and by analogy also by its subsidiary organs, should be circulated in all official languages before they are considered by their members.

A. Official "submission" of a report of the Monitoring Team

4. Security Council resolution 1526 (2004) of 30 January 2004 requested the "Monitoring Team to submit in writing, three comprehensive, independent reports to the Committee, the first by 31 July 2004, the second by 15 December 2004, and the third by 30 June 2005, . . .".

5. The obligation to submit the report by the date indicated and the obligation to circulate the report in all official languages are two distinct obligations incumbent upon different entities at different points of time. While the former applies to the Monitoring Team, the latter is binding upon the Secretariat. If submitted, therefore, within the deadline indicated, the report of the Monitoring Team *in the language submitted* should be considered as "submitted" within the meaning of resolution 1526.

B. Consideration of reports and other communications in all official languages

6. Rule 26 of the Provisional Rules of Procedure does not distinguish between official and unofficial documents for the purpose of distribution in all official languages. Nor does it specify at what stage of the consideration of any working document, should it be so reproduced. In the practice of the Security Council and its various committees, however, unofficial working documents have been considered on the basis of an English text, and submitted for reproduction and issuance in the six official languages at the final stage of the negotiations. In the committees of the General Assembly, the practice has not been consistent. In the Second, Third, Fifth and Sixth Committees, informal consultations are conducted on the basis of informal papers and in the language submitted, for the most part in English. The Sixth Committee, in particular, adopts a pragmatic approach to the reproduction of documents and, depending on the content of the document, it may decide on whether, and at what stage of the discussion a reproduction in the six official languages is required. The Host Country Committee, being the exception, requires the reproduction in all official languages of any draft text before it is considered by members of the Committee.

7. In the practice of the various committees, therefore, the reproduction of working documents in any or all of the United Nations official languages, has been a matter for each of these committees to decide as part of its working methods. While for the most part informal working documents have been considered in the English language, this practice can be challenged by any member who may request the reproduction of a document in all six languages based on the strict interpretation of the rule. In the event of a challenge, and if no agreement is reached among members of the committee, the chairman would have to postpone consideration of the report until such time as the Secretariat reproduces it in all official languages.

8. The question of whether apart from the annual report all other communications, letters or proposals should also be reproduced in all six languages before they are considered by members of the Committee should be decided by the Committee in full consideration of the time, costs and human resources required to comply with the request for reproduction. We should note in this connection the recommendation of the Secretariat in its note of 10 March 2004 (A/58.CRP.5) on the "Historical and analytical note on the practices and working methods of the Main Committees on reports and resolutions" which reads as follows:

> "Draft resolutions and decisions, as far as possible, should be issued as official "L" documents *only after the text is finalized through informal consultations* (with interpretation), as is the practice in the Fifth Committee. *This would lead to better utilization of resources*" (emphasis added) (para. 94).

C. The strict application of the 48-hour no-objection rule

9. The question of whether an amendment to a report can be introduced after a deadline for comments on the report has expired, but within a 48-hour deadline for comments on another amendment to a report, is essentially a question of whether at any time before the adoption of the report the deadline for comments can be extended. While the extension of the deadline is within the discretion of the Chairman, in the circumstances,

we would advise that as long as the report has not been formally adopted, the request for an additional amendment should be receivable.

31 January 2005

(b) Interoffice memorandum to the Legal Adviser of the United Nations Conference on Trade and Development regarding the provision of premises and secretariat functions by the Conference to two non-governmental organizations

USE OF UNITED NATIONS PREMISES, RESOURCES AND E-MAIL ADDRESS BY NON-GOVERNMENTAL ORGANIZATIONS—EXTENT OF SUPPORT GRANTED BY THE UNITED NATIONS TO NON-GOVERNMENTAL ORGANIZATIONS—QUESTION OF CONCLUDING HOST COUNTRY AGREEMENT TO FORMALIZE SUCH SUPPORT—HOSTING OF THE SECRETARIATS OF NON-GOVERNMENTAL ORGANIZATIONS IS INCOMPATIBLE WITH THE SPECIAL STATUS OF THE UNITED NATIONS AND ITS PRIVILEGES AND IMMUNITIES—INFORMATION CIRCULAR IC/GENEVA/2005/14—PROVISION OF SECRETARIAT FUNCTIONS TO NON-GOVERNMENTAL ORGANIZATIONS IS INCOMPATIBLE WITH THE MANDATE OF THE UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT (UNCTAD)—SECRETARY-GENERAL'S BULLETIN ST/SGB/1998/1*—OBLIGATION OF STAFF MEMBERS NOT TO SEEK OR RECEIVE INSTRUCTIONS FROM ANY AUTHORITY EXTERNAL TO THE ORGANIZATION—ARTICLE 100 OF THE CHARTER OF THE UNITED NATIONS AND STAFF REGULATION 1.2 (D)—USE OF THE UNITED NATIONS NAME AND EMBLEM—GENERAL ASSEMBLY RESOLUTION 92 (1) OF 7 DECEMBER 1946

1. This is in reference to your e-mail message of 1 June 2005 to me, concerning the above-captioned matter. In your correspondence, you note that two non-governmental organizations (NGOs) established pursuant to the Swiss Civil Code, the World Association of Investment Promotion Agencies (WAIPA) and the World Association of Debt Management Offices (WADMO), have their headquarters offices located in Geneva, and their secretariats are located on UNCTAD premises on the Palais des Nations, United Nations Office at Geneva (hereinafter the "UNCTAD premises"). You also note that UNCTAD provides secretariat functions for these two organizations, and their e-mail addresses use the UNCTAD name.

I. Background

2. As we understand from your e-mail message, UNCTAD's management is supportive of WAIPA and WADMO, including the hosting of their secretariats on UNCTAD premises and the performance by UNCTAD of secretariat functions for WAIPA and WADMO. In this regard, while your correspondence does not specify whether WAIPA and WADMO are charged for their use of UNCTAD premises or for the performance by UNCTAD of secretariat functions, it appears from the information provided that the premises are provided and the secretariat functions performed for these two organizations free of charge. You have indicated that, while UNCTAD could provide certain support to

* For information on Secretary-General's bulletins, see note in section 1 (a), above.

WAIPA and WADMO, you have serious concerns as to whether such support could include hosting of their secretariats on UNCTAD premises and the performance of secretariat functions for WAIPA and WADMO, and that you have expressed your concerns to the UNCTAD management. In this connection, you have attached a copy of the e-mail message of 19 April 2005 by the Senior Legal Liaison Officer, United Nations Office at Geneva, expressing the same concerns in regard to WAIPA. You concur with the Senior Legal Liaison Officer's views and advice.

3. In your 1 June 2005 correspondence, it is indicated that you have discussed this issue with the Officer-in-Charge of UNCTAD, and that he requests this Office's views as to whether it is appropriate for UNCTAD to (i) allow WAIPA and WADMO secretariats to be located on UNCTAD premises; and (ii) perform secretariat functions for WAIPA and WADMO. You also inquire, in the event that the use of United Nations Office at Geneva premises by WAIPA and WADMO are not sanctioned, whether such uses can be continued if an agreement was entered into between the United Nations, the Government of Switzerland, WAIPA and WADMO.

4. The Statutes of WAIPA provide in article I as follows:

> "1. Following the founding meeting of high-level officials of Investment Promotion Agencies held 26–27 April, 1995 under the auspices of the United Nations Conference on Trade and Development (UNCTAD), an international association of Investment Promotion Agencies is hereby established and shall hereinafter be referred to as World Association of Investment Promotion Agencies (WAIPA).
>
> "2. WAIPA is an autonomous, non-profit making organization established pursuant to articles 60 to 79 of the Swiss Civil Code.
>
> "3. The headquarters of WAIPA shall be situated in Geneva, Switzerland, or at such place as the General Assembly may decide."*

Regarding its secretariat, article XV of the WAIPA Statutes provides, *inter alia,* as follows:

> "3. WAIPA shall seek and utilize to the extent possible support from Foreign Investment Advisory Services (FIAS), Multilateral Investment Guarantee Agency (MIGA), Organization for Economic Cooperation and Development (OECD), United Nations Conference on Trade and Development (UNCTAD), United Nations Industrial Development Organization (UNIDO) and such other bilateral and multilateral agencies as may be authorized by the Steering Committee and the General Assembly."

5. Regarding WADMO, its Statutes provide that it is an autonomous, non-profit making organization established pursuant to articles 60 to 79 of the Swiss Civil Code, and its headquarters shall be in Geneva (chapter I, article 1, paragraphs 2 and 3). Regarding the secretariat of WADMO, chapter 6, article XV, paragraph 3, of the Statutes provides that: "[t]he Secretariat should seek and utilize to the extent possible organizational and other support from bilateral and multilateral agencies, as may be authorized by the Steering Committee and the General Assembly*." In addition, you have indicated that:

> "According to the information received, the idea to create a professional association of debt managers originated in December 1997, during the first inter-regional Confer-

* We understand that the reference to the "General Assembly" is to the General Assembly of WAIPA, established as the "deliberative assembly" of WAIPA under its Statutes (chapter 4, article V).

ence on Debt Management organized by UNCTAD in Geneva. In response to the request of a large number of countries, UNCTAD, through its Debt Management-DMFAS Programme, helped establish the association. WADMO had its founding meeting in April 2000 under the auspices of UNCTAD, (immediately after UNCTAD's second Interregional Debt Management Conference). During the first General Assembly, UNCTAD was asked to serve as the Secretariat of WADMO. UNCTAD, through its Debt Management-DMFAS Programme, formally accepted. The Chief of UNCTAD's Debt Management Programme (UNCTAD staff) is mentioned in the WADMO letterhead, website and WADMO documentation as contact person."

6. The Statutes of WAIPA and WADMO, quoted above, make clear that they are Swiss NGOs that are legally independent and separate from the United Nations. In this regard, while, under the Statutes of WAIPA and WADMO, they are to obtain "support" from UNCTAD, as authorized by the Steering Committee and the General Assembly of WAIPA and WADMO, respectively, it is unclear whether the "support" is intended to include UNCTAD performing secretariat functions. However, even if the Statutes of WAIPA and WADMO should so provide, UNCTAD would be authorized to provide UNCTAD premises to WAIPA and WADMO, and provide secretariat functions to them, only if the provision of premises and such functions was consistent with the mandate of UNCTAD.

II. Use of UNCTAD premises by WAIPA and WADMO

7. With regard to the use by WAIPA and WADMO of a portion of UNCTAD premises, we note that the legal status of the United Nations Office at Geneva premises is based on the "Agreement on Privileges and Immunities of the United Nations concluded between the Swiss Federal Council and the Secretary-General of the United Nations on 19 April 1946"[*] (Host Country Agreement). Section 2 of article II of the Host Country Agreement provides, *inter alia,* that the "premises of the United Nations shall be inviolable" and that the "property and assets of the United Nations in Switzerland shall be immune from search, requisition, confiscation, expropriations, and any other form of interference, whether by executive, administrative, judicial or legislative action." It is noted that such privileges and immunities solely and exclusively apply to the United Nations and not to any third party, such as non-United Nations entities.

8. In view of the above, we concur with your views expressed in your e-mail message of 1 June 2005 to me, that the use by WAIPA and WADMO of a portion of UNCTAD's office space is incompatible with the status of the United Nations and its privileges and immunities. As previously advised in a comparable case, which you have quoted in your e-mail message (see my e-mail message to you of 17 August 2004), concerning the proposed use by [name of non-profit organization], a non-profit organization incorporated under the laws of the [Member State], of premises of the [name of organization], this Office takes the view that the commingling of private non-United Nations entities, organized under the laws of a Member State (such as WAIPA and WADMO), and the United Nations would jeopardize or at least confuse the special regime applicable under the Host Country Agreement as well as the status of the United Nations and its privileges and immunities.

[*] United Nations, *Treaty Series,* vol. 1, p. 163 and vol. 509, p. 309.

9. Moreover, we note that the use of the UNCTAD premises is regulated by Information Circular IC/Geneva/2005/14 of 1 March 2005. That Information Circular restricts the use of United Nations Office at Geneva premises to "meetings, conferences and special events" and does not, in particular, contemplate the long-term hosting of non-United Nations entities. We also note that the mandate of the Secretariat of UNCTAD (see ST/SGB/1998/1 of 15 January 1998 on the "Organization of the Secretariat of the United Nations Conference on Trade and Development") entrusts the Secretary-General of UNCTAD with the responsibility of providing "guidance in UNCTAD's relations with non-governmental actors." (See section 3.2 of ST/SGB/1998/1.) In this regard, the Office of Legal Affairs takes the view that the scope of UNCTAD's mandate to provide guidance to non-United Nations entities, such as WAIPA and WADMO, in the absence of a specific authorization by the General Assembly, cannot be construed to encompass the provision of UNCTAD premises to such non-United Nations entities (see paragraphs 11 to 16 below). Finally, we note that the use of United Nations resources, such as office space, in the absence of such an authorization by the General Assembly, should be for the benefit of the United Nations only and should not be for the benefit of non-United Nations entities.

10. Even if the Government of Switzerland were to agree to formalize the use of UNCTAD premises by WAIPA and WADMO by way of an agreement between the United Nations, the Government of Switzerland, WAIPA and WADMO, we would find that such an agreement would not cure the problems described above, namely the inconsistency of such an arrangement with the status of the United Nations and its privileges and immunities and the mandate of UNCTAD. Moreover, as I indicated in the case of the [name of non-profit organization], such an arrangement would set an unnecessary and undesirable precedent.

III. The involvement of UNCTAD staff members in WAIPA and WADMO

11. As far as we can determine from ST/SGB/1998/1, the mandate of the Secretariat of UNCTAD does not include the performance of secretariat functions for non-United Nations entities. According to section 2.1 (a) of ST/SGB/1998/1, UNCTAD:

> "provides substantive and secretariat services for the United Nations Conference on Trade and Development (every four years), the Trade and Development Board (one annual session) and its subsidiary bodies. In addition, UNCTAD is responsible for substantive servicing of the Commission on Science and Technology for Development, a subsidiary body of the Economic and Social Council."

12. In addition, while section 3.2 of ST/SGB/1998/1 entrusts the Secretary-General of UNCTAD with the responsibility of providing "guidance in UNCTAD's relations with non-governmental actors", it does not provide for the provision of secretariat functions to selected non-United Nations entities as part of such guidance. Further, neither section 7.4, describing the functions of the Globalization, Development and Debt Management Branch of the Division on Globalization and Development Strategies, nor section 8, describing

the functions of the Division on Investment, Technology and Enterprise Development* contain any language that would include the performance of secretariat functions to non-United Nations entities as part of the functions of such Divisions.

13. The Office [of Legal Affairs] has consistently advised that the United Nations should not be involved in the establishment, management or operation of an entity external to the United Nations, since such involvement, as in this case, raises not only the issue of the United Nations' mandate but also the issues of liability and the privileges and immunities of the United Nations. This Office has advised in similar cases that by becoming involved in the establishment, management or operation of an external entity incorporated under the law of a Member State, the United Nations would, effectively, agree to be governed by the Member State laws in respect of the United Nations' involvement with the entity. Compliance with local law could be deemed as the United Nations' agreement to the jurisdiction of the Member State, including its court, should claims or disputes be brought against the entity in the Member State court, resulting in the waiver of the privileges and immunities of the United Nations, particularly immunity from legal process, provided under the 1946 Convention on the Privileges and Immunities of the United Nations.**

14. Based on the foregoing, we are of the view that the performance of secretariat functions for WAIPA and WADMO, in the absence of a specific authorization by the General Assembly, is not part of the mandate of UNCTAD. Accordingly, UNCTAD staff members should also not become involved in the administration or operation of a non-United Nations entity. Moreover, the use of staff resources should be only for official purposes of the Organization, and should not be for the benefit of non-United Nations entities (see also our paragraph 9 above). Furthermore, the involvement by UNCTAD staff members in WAIPA and WADMO also violates the United Nations Charter, as well as Staff Regulations. Article 100 of the United Nations Charter, which is also reflected in staff regulation 1.2 (d), states that:

> "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."

15. Similarly, staff regulation 1.1 (b) states that each staff member is required to make a written declaration promising to "exercise in all loyalty, discretion and conscience the functions entrusted to [him/her] as an international civil servant of the United Nations, to discharge these functions and regulate [his/her] conduct with the interests of the United Nations only in view, and not to seek or accept instructions in regard to the performance of [his/her] duties from any Government or other source external to the Organization".

16. We also note that the use by WAIPA and WADMO of UNCTAD e-mail addresses violates the provisions of General Assembly resolution 92 (1) of 7 December 1946, which reserves the use of the United Nations name and emblem, including the acronym of the

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* ST/SGB/1998/1 has not been amended since it has been issued. It is not clear, however, whether any revisions have been made, in fact, to the organizational structure of the Secretariat of UNCTAD since the issuance of ST/SGB/1998/1. In this regard, it is not clear if the "Debt Management—DMFAS Programme", which you indicated helped establish WADMO, is part of the Globalization, Development and Debt Management Branch.

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

United Nations name, for official purposes of the Organization, as WAIPA and WADMO are non-United Nations entities whose activities do not constitute official business of the Organization. Further, such use also creates the misleading impression that WAIPA and WADMO are United Nations entities, have been endorsed by the United Nations, or are somehow affiliated with the Organization. We recommend, therefore, that the use of UNCTAD e-mail addresses by WAIPA and WADMO be discontinued.

17. Please contact this Office if you need any further assistance in this matter.

7 June 2005

(c) Letter to the Chairperson of the Commission on Human Rights concerning the accreditation and participation of non-governmental organization representatives who are subject to requests for arrest or detention by Interpol in the work of the Commission on Human Rights

Question regarding the possibility to accredit individuals subject to Interpol arrest warrants in view of the implied security risks—Economic and Social Council resolution 1996/31 of 25 July 1996 on the accreditation of non-governmental organizations (NGO) focuses on the organization and not the individuals—Duty of the United Nations to protect its officials, visitors and assets—United Nations is not legally bound to act upon Interpol "red notices", but may consider them when assessing security risks—No general prohibition to accredit individuals subject to Interpol "red notices"—Responsibility of the Director-General of United Nations Office at Geneva, as designated official for security, to assess the risks in any given situation and take appropriate actions—The policy decision by the Commission on Human Rights to deny accreditation to such individuals at previous sessions, being procedural in nature, is not binding for subsequent sessions

I write in response to your letter of 21 April 2005 concerning the accreditation and participation of non-governmental organization representatives who are subject to requests for arrest or detention by Interpol ("red notices") in the work of the Commission on Human Rights. You refer in this regard to the decision taken by the Commission at its fifty-ninth session, by which access to the meetings of the Commission was denied to any individual subject to an Interpol "red notice", and the subsequent decision taken by the United Nations Office at Geneva Director-General to deny such individuals access to the United Nations Office at Geneva premises. You also refer to the request for accreditation of an individual subject to a "red notice" to the sixty-first session of the Commission made by [NGO], which request was denied.

You note in your letter the common desire of all involved to find "an equitable and just solution to the general issue". I hope to contribute to that effort.

You request our advice with respect to the following two questions:

(*i*) Do the conditions for accreditation, spelled out in Economic and Social Council resolution 1996/31 require or permit the expanded Bureau of the Commission, the Commission Secretariat, the United Nations Office at Geneva Director-General or anybody else, to consider the suitability of the individual representing the accredited NGO on the basis that he/she poses a security risk or threat?

(*ii*) Can individuals subject to Interpol arrest warrants be accredited by the United Nations Office at Geneva?

From the outset, and as stated previously, I would like to reiterate that the above-mentioned decisions taken by the Commission and the United Nations Office at Geneva Director-General were ones of policy, within the scope of their respective responsibilities. Further, it is not the role of the Office of Legal Affairs to substitute itself for either the Commission or the Director-General.

With respect to your first question, we believe that Economic and Social Council resolution 1996/31 does not provide a basis for the Bureau, the Commission Secretariat or the Director-General to consider the suitability of a representative of an NGO on the basis of a security risk. Rather, the resolution is directed to establishing conditions for the consultative status of NGOs with the Economic and Social Council.

In this respect, we note that organizations granted consultative status and those on the Roster are required to conform to the principles governing the establishment and nature of their consultative relations with the Council (paragraph 55) and that organizations which do not meet these requirements may be suspended or excluded from participation in the work of the Council and its functional commissions. The conduct of individuals who represent these organizations may also have an impact on their status in the Council. The resolution states that an organization shall be suspended or withdrawn, if, *inter alia,* it "either directly or through its affiliates or representatives acting on its behalf, clearly abuses its status by engaging in a pattern of acts contrary to the purposes and principles of the Charter of the United Nations including unsubstantiated or politically motivated acts against States Members of the United Nations incompatible with those purposes and principles" (paragraph 57 (a)). While it is clear, therefore, that individuals authorized to represent NGOs are also obliged to conform to these principles, we can conclude that the focus of the resolution is on the organization, and not the individuals. Furthermore, we can also conclude that the resolution is to ensure that only those NGOs whose objectives and actions are consistent with the United Nations Charter participate in meetings of the United Nations, rather than directed to security concerns.

With respect to your second question, we wish to advise that there is no general prohibition as such to prevent individuals subject to Interpol "red notices" from being accredited to any meeting of the United Nations. Although certain Member States may have obligations to act upon Interpol "red notices", the United Nations is not obliged to act with respect to notices issued by Interpol. However, it may, if it chooses. Indeed, in our view, it is clear that the Organization, having the duty to protect its officials, visitors and assets, can deny access to its premises to any individual on the grounds of security concerns.

We wish to note that, in each location where the United Nations has a presence, there is a "Designated Official" responsible for security. The Designated Official for security in Geneva is the Director-General at the United Nations Office at Geneva. It is therefore for the good judgment of the Designated Official to assess the risks in any given situation and take the appropriate measures. Although, as indicated above, the Organization is not legally bound to take any action in respect of Interpol "red notices", they may be a key element to be considered when assessing security risks.

Finally, it should be noted that we consider the decision of the Commission at its fifty-ninth session to deny NGO representatives subject to Interpol notices access to meetings, to

be procedural in nature, and as such, not binding on the Commission at its subsequent sessions. The fact that the Commission renewed this decision, explicitly or implicitly, at its sixtieth and sixty-first sessions does not alter this position. The Commission, therefore, should consider itself free to deal with similar requests differently at its sixty-second session.

13 June 2005

(d) Note to the President of the General Assembly regarding voting procedures on a resolution related to the equitable representation on and increase in the membership of the Security Council

Amendments to the Charter of the United Nations—Article 108 of the Charter of the United Nations—Rules and Procedures of the General Assembly—General Assembly resolution 53/30 of 23 November 1998—Affirmative vote of two-thirds of the members of the General Assembly required for amendments to the Charter—Consensus is considered as the absence of objection rather than a particular majority—Possibility for the General Assembly to adopt a resolution on any issue by secret ballot—Procedural motions are adopted by simple majority—Possibility for a Member State to request that a procedural motion be adopted by two-thirds majority

1. At your request, we set out below two issues which may arise in the course of the consideration of draft resolution L.64 [A/59/L.64], or any other draft resolution on the equitable representation on and increase in the membership of the Security Council, which are specific to the amendment procedure. These questions are the following:

a. Whether a resolution or a decision on any of the proposals or amendments could be adopted by consensus, or a vote in this case is mandatory;

b. What is the majority rule required for procedural motions.

A. Adoption by consensus or a vote

2. Under Article 108 of the United Nations Charter a majority vote of two-thirds of the members of the General Assembly is required for an amendment to the Charter. In its resolution 53/30 the General Assembly decided "not to adopt any resolution or decision on the question of equitable representation on and increase in the membership of the Security Council and related matters, without the *affirmative vote of at least two-thirds of the Members of the General Assembly*." A two-thirds majority of 191 Member States requires an affirmative vote of 128.

3. While in the practice of the General Assembly decisions are adopted by consensus, in the present case, the language of both the Charter and the resolution clearly requires an *affirmative vote* of two-thirds of the membership of the Organization. Furthermore, consensus, which is understood as the absence of objection rather than a particular majority, would not guarantee that the 128 required majority is obtained and could, in theory, allow the adoption of a resolution or decision with less than the two-thirds majority required under the Charter and resolution 53/30. Indeed, since a quorum to take a decision is 96, consensus could, in principle, be achieved with only 96 members present in the Assembly at the time of the decision. To ascertain that there is an affirmative vote of 128 members,

any resolution or decision relating to the question under consideration *must therefore be voted upon*, even in the event of a consensus among members of the Assembly.*

4. While the circumstances under which any resolution or decision may eventually be adopted are as yet unknown, the possibility of consensus emerging as a result of a fragile agreement still exists. If political constraints would militate against a vote, it would be for Member States to ascertain, by means other than voting, that a two-thirds majority of the members are in favour of the resolution. It would also be for them to decide whether, as such, adoption without a vote would be compatible with the Charter and resolution 53/30.

5. A vote by "secret ballot", as has been suggested by some delegations, may be another option which would allow members to cast their vote in accordance with the Charter and the resolution, but to avoid the possible political repercussions which might result from an open ballot. The Rules of Procedure of the General Assembly do not provide for secret ballot other than for election. However, the absence of a provision does not, as a matter of principle, prevent the General Assembly, if it so decides, from resorting to a secret ballot to adopt a resolution or decision on any issue under consideration. For example, the Second Committee decided to resort to secret ballot for the selection of the site of the United Nations Industrial Development Organization in December 1966.

6. The role of the President in conducting the procedure, and the question of whether he should announce the procedure of voting at the start of the consideration, or leave it for Member States to request a vote, could preferably be determined at a later stage.

B. Majority required for procedural motions

7. Under the Rules of Procedure of the General Assembly procedural motions are adopted by a simple majority. General Assembly resolution 53/30 should be interpreted to apply to *substantive* resolutions and decisions only, thus maintaining the simple majority rule with regard to all procedural motions. That said, any member of the General Assembly may request that any or all procedural motions should be adopted by a two-thirds majority. In this case, the President should ask the proposer of the motion to explicitly indicate whether the two-thirds majority is of those "present and voting" (in accordance with rule 85 of the Rules of Procedure) or of the members of the General Assembly (in accordance with resolution 53/30). A decision on the motion "to adopt motions by two-thirds majority" should be adopted by a simple majority of those "present and voting".

14 July 2005

(*e*) Note to the Assistant Secretary-General for Policy Coordination and Strategic Planning, United Nations, on voting in the General Assembly

Voting procedures in the General Assembly—Article 18 of the Charter of the United Nations—The term "decision" refers to all types of action which the General Assembly takes by a vote while performing its functions under the Charter—Elections—Rules 82 *et seq* and 91 *et seq* of the Rules of Procedure of the General

* In the case of consensus, the requirement to vote may be presented as a technical means to record the majority required, rather than as an attempt to force Members to make their positions explicit.

ASSEMBLY—POSSIBILITY TO REQUIRE THAT A DECISION BE TAKEN BY A TWO-THIRDS MAJORITY FOR ELECTIONS—ELECTION OF MEMBERS TO THE HUMAN RIGHTS COUNCIL—DECISION THAT MEMBERS TO THE COUNCIL ARE TO BE ELECTED BY A TWO-THIRDS MAJORITY MAY BE SPECIFIED IN THE ESTABLISHING RESOLUTION OR DECIDED *AD HOC* BY THE GENERAL ASSEMBLY WITH A DECISION ADOPTED WITH A SIMPLE MAJORITY

1. This note sets out some general principles of voting in the General Assembly and further addresses the specific questions you had raised in your e-mail of 1 August.

2. The principle that decisions in the General Assembly are taken by a majority vote is enshrined in Article 18 of the Charter of the United Nations. Depending on the substance of the matter in question a simple or a two-thirds majority of the members present and voting is required. In that respect, Article 18 distinguishes between "important questions" (paragraph 2) and "other questions" (paragraph 3). Paragraph 2 draws up a list of questions which are deemed to be important, thus requiring a two-thirds majority. The formulation "(t)hese questions shall include [. . .]" clearly indicates that this list is not exhaustive.

3. Article 18, paragraph 3, of the Charter sets forth that the voting majority required for decisions on "other questions" shall be a (simple) majority of the members present and voting. It further provides for the creation of "additional categories of questions to be decided by a two-thirds majority." The determination of such additional categories shall also be made by a simple majority of the members present and voting.

4. The term "decision", as used in Article 18, refers to all types of action which the General Assembly takes by a vote while performing its functions under the Charter. This also includes, for example, elections.

5. These general principles are restated and supplemented by rules 82 *et seq.* of the Rules of Procedure of the General Assembly. Rules 91 *et seq.* set forth the rules for elections.

6. Assuming the General Assembly (at the level of Heads of State and Government in the framework of the September summit) were to establish a Human Rights Council as a subsidiary organ of the General Assembly by means of a General Assembly resolution, it could specify in that resolution that members to the Human Rights Council are to be elected by a two-thirds majority of the members present and voting. Rule 93 explicitly mentions the possibility to require a two-thirds majority for an election. We would recommend, in that connection, that the required majority be specified in the resolution establishing the Human Rights Council, i.e., possibly in the Outcome Document of the September summit.

7. Alternatively, the General Assembly could decide *ad hoc* that a two-thirds majority shall be required for these elections. In accordance with Article 18, paragraph 3, of the Charter, this decision could be taken by a (simple) majority of the members present and voting.

2 August 2005

(*f*) Letter to the Permanent Representative of a Member State to the United Nations regarding credentials and composition of delegations for the sessions of the General Assembly

Credentials and composition of delegations for the sessions of the General Assembly—Rule 25 of the Rules of Procedure of the General Assembly—Difference between letter of credentials and the list of delegation requested by the Protocol and Liaison Service—Only credentials have legal implications on the status of members of the delegation—List of delegation is published for information purposes only—No credentials are required for Heads of State or Government or Ministers for Foreign Affairs—The manner in which the Secretary-General is informed of their presence depends on national practice

I wish to refer to your letter dated 22 August 2005 by which you requested some clarifications about procedural issues regarding credentials and composition of delegations for the sixtieth session of the United Nations General Assembly and its High-Level Plenary Meeting, in light of section VIII of the note verbale sent by the United Nations Protocol and Liaison Service to all Member States on 16 August 2005.

You referred in your letter to rule 25 of the Rules of Procedure of the General Assembly, which provides that the "delegation of a Member shall consist of not more than five representatives and five alternate representatives and as many advisers, technical advisers, experts and persons of similar status as may be required by the delegation". You also referred to the request by Protocol for a list of delegation that includes only ten persons indicating that the Head of the Delegation should be one of the five representatives, except in the cases of Heads of State, Government and Vice-Presidents. Your specific question is whether the "Minister for Foreign Affairs who signs the credentials for the delegation [should] be counted as one of the five representatives according to rule 25 of Rules of Procedure of General Assembly".

At the outset, I would like to clarify that the letter of credentials and the list of delegation requested by Protocol are two different documents having different legal value and serving different purposes. While the letter of credentials is a legal document spelling out the names of the State's representatives throughout the entire session of the General Assembly, the list of delegation requested by Protocol is a provisional document that reflects the composition of delegations at the beginning of the session for information purposes only. Therefore, both documents do not have to necessarily coincide.

With respect to the letter of credentials, I should recall that, in accordance with rule 27 of the Rules of Procedure of the General Assembly, "credentials shall be issued either by the Head of the State or Government or by the Minister for Foreign Affairs". When any of the three represents his or her country, no credentials are required. The Minister for Foreign Affairs, therefore, whether he or she signs the letter of credentials or not, does not need to be included in that letter as one of the five representatives provided for in rule 25.

However, I should also point out that, on occasion, the presence of the Head of State or Government or that of the Minister for Foreign Affairs in a particular United Nations event is conveyed to the Secretary-General in the letter of credentials. Other Members prefer to do that through a separate note verbale or in a different manner. It should be noted that the manner in which this information is provided to the Secretary-General depends

on the national practice and preference of each Member and does not affect the legal validity of the credentials or of the composition of the delegation.

Regarding the Protocol list referred to in section VIII of the note verbale mentioned above, I should reiterate that it is requested to allow Protocol to publish, for information purposes only, a provisional list of all delegations. This list has no legal effect and does not necessarily reflect the composition of delegations at all times during the session of the General Assembly, as it is only published once.

The letter of credentials is thus the only instrument having legal implications on the status of members of delegations and that the Heads of State or Government and the Minister of Foreign Affairs can represent their country in the United Nations at any time whether or not they are listed in the credentials, or in the list of delegation provided for Protocol.

. . .

6 September 2005

3. Other issues relating to United Nations peace operations

(a) Note to the Assistant Secretary-General, Office of Operations of the Department of Peacekeeping Operations, United Nations, regarding the treaty-making capacity of the United Nations Interim Administration Mission in Kosovo

Treaty-making capacity of the United Nations Interim Administration Mission in Kosovo (UNMIK)—Security Council resolution 1244 (1999) of 10 June 1999—Assumed treaty-making capacity to conclude bilateral agreements on behalf of Kosovo with regard to matters falling within the scope of its mandate and to the extent necessary for the administration of the territory—Treaty establishing the Energy Community deemed necessary for the administration of the territory—Necessity to include reservations regarding the limited duration of the Treaty with respect to UNMIK and a non-prejudice clause on the future status of Kosovo—Such treaty shall not engage the responsibility of the United Nations or create any legal, financial or other obligation for the Organization

1. This is in reference to your note of 6 October 2005 (received on 10 October) requesting our approval of UNMIK's signature on behalf of Kosovo of the Treaty establishing the Energy Community. The final draft of the Treaty is annexed to UNMIK code cable [. . .]. Our comments pertaining to the treaty-making power of UNMIK, the limited duration of the Treaty with respect to UNMIK, and its participation therein "without prejudice" to the future status of Kosovo, are set out below.

2. The question of UNMIK's treaty-making power has been raised with the Office of Legal Affairs (OLA) on a number of occasions. The position maintained by this Office has been that UNMIK, while not expressly vested with treaty-making power independent of that of the United Nations of which it is a subsidiary organ, has the power to conclude bilateral agreements with third States and organizations on behalf of Kosovo. This power has, in practice, been assumed by UNMIK with regard to matters falling within the scope of its responsibilities under Security Council resolution 1244 (1999), and to the extent

necessary for the administration of the territory. A number of agreements have thus been concluded over the years on a variety of practical matters relating to economic development assistance and cooperation, road transport and police cooperation with States and international organizations. A similar limited treaty-making power has been exercised by the United Nations Transitional Administration in East Timor (UNTAET) in matters affecting the territory of East Timor.

3. The purpose of the Treaty establishing the Energy Community is to establish an integrated market in natural gas and electricity and regulate trade in these, as well as in other energy products and carriers in Kosovo. Its conclusion is thus necessary for the administration of Kosovo, and as such falls within the ambit of UNMIK's limited treaty-making power as described above. Accordingly, in the preamble of the Treaty, in the paragraph spelling out the names of the parties to the Treaty, UNMIK should be described as "The United Nations Interim Administration Mission in Kosovo (UNMIK) on behalf of Kosovo". The words "pursuant to the United Nations Security Council resolution 1244" should be deleted. In the signature part UNMIK should be described in an identical manner.

4. Two reservations regarding the limited duration of the Treaty with respect to UNMIK and the future status of Kosovo should be introduced. While it would be our preference to introduce them in the Treaty itself, we would agree that they be introduced in a unilateral declaration or statement issued by UNMIK to that effect. Along the lines proposed by UNMIK-OLA and informally submitted to us for our review, this declaration should state: (i) that the United Nations Interim Administration Mission in Kosovo (UNMIK) established by Security Council resolution 1244 (1999) of 10 June 1999 signs the Treaty on behalf of Kosovo; (ii) that the Treaty is valid in respect of Kosovo for the duration of UNMIK administration under resolution 1244 (1999), and its continued validity beyond that would depend on the future administration of Kosovo; and (iii) that the conclusion of the Treaty on the part of UNMIK is without prejudice to the future status of Kosovo. The declaration should also state that the Treaty does not engage the responsibility of the United Nations, nor does it create for the Organization any legal, financial or other obligation. The declaration should be submitted to this Office for review before it is issued.

5. On the basis of the foregoing, this Office would approve the signing of the Treaty establishing the Energy Community by UNMIK on behalf of Kosovo.

17 October 2005

(b) Interoffice memorandum to the Director, Africa Division of the Department of Peacekeeping Operations, regarding the use and occupancy of the Mobil Compound by the United Nations Mission in Liberia

Question relating to rental payment for property used by the United Nations Mission in Liberia (UNMIL) owned by an individual subject to assets freeze sanctions—Security Council resolution 1532 (2004) of 12 March 2004—Withholding of rental payments by UNMIL—Question of rental payment to the spouse of the said individual—Obligation for the Secretary-General to comply with assets freeze sanctions, even when the host country has not established mechanisms to implement them—Transfer of the property to the spouse after the establish-

MENT OF THE SANCTIONS LIST NOT TO BE CONSIDERED AS LEGALLY BINDING ON UNMIL—ALL RENTAL PAYMENTS LEGALLY DUE SHOULD BE DEPOSITED IN AN ESCROW ACCOUNT UNTIL THE ESTABLISHMENT OF APPROPRIATE MECHANISMS TO IMPLEMENT THE SANCTIONS BY THE HOST GOVERNMENT

1. This is response to your note of 14 November 2005, addressed to [title], by which you requested that the Office of Legal Affairs take the lead in responding to the questions posed by UNMIL in a code cable, dated 2 November 2005, related to the use and occupancy by the Mission of the "Mobil Compound".

2. We understand from the documentation provided to us that the [Member State] contingent of UNMIL has been occupying since 21 August 2003 a property in Monrovia, Liberia, commonly known as the "Mobil Compound", which, since 17 October 2001, belongs to Mr. [X]. Use and occupancy of the Mobil Compound for the period 1 October–31 December 2003 were formalized in a lease agreement signed on 12 December 2003.* A second lease agreement was signed on 7 June 2004, covering the period 1 January–31 December 2004. Both lease agreements were signed by UNMIL with Mrs. [X], in her capacity as the manager of the Mobil Compound on behalf of her husband.

3. On 14 June 2004, the Security Council Committee established pursuant to Security Council resolution 1521 (2003) concerning Liberia approved the first list of individuals and entities subject to the assets freeze sanction set out in paragraph 1 of Security Council resolution 1532 (2004). Since Mr. [X] was included in the Committee's list,** UNMIL decided not to renew the second lease agreement that expired on 31 December 2004 and withhold rental payments. However, the Mission informed that, for logistical reasons beyond its control, the [State] contingent has not yet vacated the premises in the Compound.

4. We are informed that the Mission is currently under pressure from Mrs. [X] to pay outstanding rental fees, vacate the premises as soon as possible and undertake extensive repairs to the premises. UNMIL has sought the advice of Headquarters on "whether the Mission should pay all outstanding rents to Mrs. [X], or withhold such payments until such time as the Office of Legal Affairs and/or the Security Council Committee established pursuant to resolution [Security Council] 1521 provide guidance as regards the exact status of the Mobil Compound".

5. We would like to point out at the outset that while it is the responsibility of States to establish adequate mechanisms to enforce the sanctions imposed by the Security Council, the Secretary-General is, in any event, bound to comply with such sanctions. In a normal situation, without prejudice to its immunity from every form of legal process and in accordance with its obligation to cooperate with local authorities, the United Nations should apply the mechanisms established by the host country to implement the decisions of the Security Council. The lack of such mechanisms, however, does not legally release the Secretary-General of the duty to comply. In such situations, the United Nations continues to be obligated by the decisions of the Security Council and to take all necessary steps to comply with them.

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* The legal basis for the use and occupancy of the Mobil Compound from 21 August to 30 September 2003 is unknown to us.

** We note that Mr. [X] remains in the latest Committee's list dated 30 November 2005 and that his name is written in the list in four different manners: [. . .].

6. In the case of Liberia, we note that, as set out in paragraph 124 of the report of the Panel of Experts, submitted pursuant to paragraph 14 (e) of Security Council resolution 1607 (2005) concerning Liberia* and transmitted to the Security Council on 7 December 2005, "[a]fter one and a half years, the assets freeze imposed by the Security Council in its resolution 1532 (2004) has not yet been implemented in Liberia. None of the assets of designated persons have been frozen". Accordingly, the Panel of Experts recommended in paragraphs 134 and 135 of its report that "[a]dequate international pressure should be put on the incoming Government of Liberia to implement Security Council resolution 1532 (2004) in letter and spirit. Every effort should be made to speed up the legal process in Liberia to freeze the assets of the designated persons" and that "[t]he Government of Liberia should be requested to ensure that no funds are made available to the persons on the assets freeze list, as stated in the resolution".

7. Accordingly, it is our opinion that, even if the Government of Liberia has not yet implemented the assets freeze sanctions, UNMIL should comply with them and ensure that no funds, other financial assets and economic resources are made available, directly or indirectly, to, or for the benefit of, any person included in the assets freeze list of the Committee on Liberia. To that end, and until such a time as the Government of Liberia establishes the appropriate mechanisms to enforce the sanctions, we would recommend that, to the extent possible, the Mission refrain from dealing, directly or indirectly, with persons and/or entities included in such a list and that any outstanding payment legally due to these persons and/or entities be deposited in an escrow account.

8. In the particular case of the Mobil Compound, we note the information provided by the Mission that a) Mrs. [X] acquired property rights over part of the Mobil Compound on 30 May 2002; b) Mrs. [X] was granted a limited authority to manage, administer and control, for Mr. [X] and on his behalf, the entire Mobil Compound on 30 October 2003; and c) Mr. [X], as a result of a separation settlement, assigned all his property rights over the Mobil Compound to a trust administered by Mrs. [X], on behalf and for the sole benefit of Mrs. [X] and their three children, on 15 November 2004.

9. It should be noted that the Mobil Compound, even if managed by his wife from 30 October 2003, was the property of Mr. [X] at the time he was included in the Committee's list, i.e., 14 June 2004, and, therefore, would, presumably, be subject to the assets freeze sanction from that date on. Accordingly, it is recommended that the transfer of this property to his wife, as part of the separation settlement, on 15 November 2004, not be considered as legally binding the Mission. Indeed, had the Liberian Government implemented timely the assets freeze sanction imposed by the Security Council, the transfer would have, in principle, not taken place. The United Nations cannot condone the failure of the Government to implement the sanctions in a timely manner and, as stated above, the Mission should comply with the sanctions from 14 June 2004, whether the host country has established the appropriate mechanisms to implement them or not.

10. Under the circumstances, it would not be appropriate for the Mission to make rental payments for the use and occupancy of the Mobil Compound to Mrs. [X], from 14 June 2004. Of course, this does not mean that the use of occupancy should not be properly compensated. As advised above, all rental payments legally due should be made by deposit-

* S/2005/745.

ing them in an escrow account until such a time as the Government of Liberia establishes appropriate mechanisms to implement the sanctions. Any humanitarian exception to the application of the sanctions should be determined by the Committee, in accordance with its own procedures. It is advisable that both the Government and the Panel of Experts be informed of this decision. At the same time, any rental payments that may have been made from 14 June 2004 for the use and occupancy of the Mobil Compound should be reported also to both the Government and the Panel of Experts.

11. As to whether Mrs. [X] is entitled to a percentage of the rental payments representing the part of the Mobil Compound that she acquired prior to the imposition of the sanctions, this Office is not in a position to ascertain either the validity of the transfer or whether or not it indirectly benefits Mr. [X]. That is for the Government of Liberia, once the mechanisms for the implementation of the sanctions have been established, and the Panel of Experts to ascertain. It would then be advisable to also withhold the proportional rental payments due to Mrs. [X] in an escrow account until a decision in this regard has been taken by the appropriate authorities.

12. Regarding any claims that Mrs. [X] may have against the Mission related to the use and occupancy of the Mobil Compound, including those during the period 1 January 2005 until the time the Mission vacates the premises, the terms and conditions of the last lease agreement signed with her should apply.

13. Finally, we would like to advise that the general guidance and principles outlined in this memorandum should apply to any other person or entity included in the Committee's list, with whom or which the Mission has been dealing, involving transfer of funds, other financial assets and economic resources, since 14 June 2004, such as [name of enterprise].

21 December 2005

4. Treaty law

Note on the notification of withdrawal by the [Member State] from the Optional Protocol to the Vienna Convention on Consular Relations concerning the Compulsory Settlement of Disputes, 1963

Question regarding the possibility to withdraw from the Optional Protocol to the Vienna Convention on Consular Relations concerning the Compulsory Settlement of Disputes, 1963*—Absence of an explicit withdrawal clause—Article 56, paragraph 1, of the Vienna Convention on the Law of Treaties, 1969,** considered as reflecting international customary law—Consensual nature of international jurisdiction—Withdrawal permitted in view of the nature of the instrument as a settlement-of-dispute protocol—"Terminable" nature of settlement-of-dispute treaties—Ultimate test whether a withdrawal from a treaty is possible is in its acceptance by the States parties

* United Nations, *Treaty Series,* vol. 596, p. 487.

** United Nations, *Treaty Series,* vol. 1155, p. 331.

By letter of [date], the [Member State] submitted to the Secretary-General a notification of withdrawal from the Optional Protocol to the Vienna Convention on Consular Relations concerning the Compulsory Settlement of Disputes, 1963 (the Optional Protocol) to the Convention on Consular Relations, 1963[*] (the Consular Convention) (copy attached).[**] The [Member State] became a party to the Optional Protocol in [year].

The Optional Protocol provides for the compulsory jurisdiction of the International Court of Justice (ICJ) in respect of disputes arising out of the interpretation or application of the Consular Convention, unless the parties have agreed on other modes of dispute-settlement. In her letter, the [Member State] notes that as a consequence of withdrawal, "the [Member State] will no longer recognize the jurisdiction of the ICJ reflected in the Optional Protocol."

Both the Consular Convention and the Optional Protocol are silent on the option of withdrawal or denunciation. In the absence of a withdrawal or denunciation clause in either instrument, the depositary is guided by the Vienna Convention on the Law of Treaties, 1969 (the Vienna Convention), and the relevant customary international law rules.

Article 56, paragraph 1, of the Vienna Convention provides that a treaty which contains no withdrawal clause is not subject to withdrawal, unless it is established that the parties intended to permit the possibility of denunciation or withdrawal, or a right of denunciation or withdrawal may be implied in the nature of the treaty. In such a case, according to article 56, paragraph 2, a party must give at least 12 months notice of its intention to denounce or withdraw from the treaty.

While the Vienna Convention is not, strictly speaking, applicable in the present case, both because its entry into force post-dated the Consular Convention and the Optional Protocol, and because the [Member State] is not a party to the Convention, it is nevertheless generally accepted that article 56, paragraph 1, of the Convention reflects customary international law, and as such is binding upon States regardless of their participation in the Convention. It is less clear, however, whether article 56, paragraph 2, as well, is reflective of customary international law, with the result that if determined that the notification should be accepted in deposit, it would have an immediate effect.

In determining whether to accept in deposit the [Member State] notification of withdrawal, this Office has examined the nature of the Protocol, and the question of whether as a settlement-of-dispute treaty it allows for withdrawal or denunciation even in the absence of an explicit withdrawal clause. Having considered the consensual nature of international jurisdiction and States' wide discretion in accepting such jurisdiction, conditioning its scope or terminating it;[***] having examined also the practice, however limited, of States' withdrawal of declarations of acceptance of the compulsory jurisdiction of the ICJ, made under Article 36 of the ICJ Statute,[****] we have come to the conclusion that the nature of the

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[*] United Nations, *Treaty Series,* vol. 596, p. 261.

[**] The instruments are not reproduced herein.

[***] *Military and Paramilitary Activities in and against Nicaragua,* (*Nicaragua* v. *United States of America) I.C.J. Reports 1984,* paragraphs 59 and 61.

[****] Among those who withdrew their acceptance of the Court's compulsory jurisdiction are: Israel, Australia, South Africa, France, China and the United States of America (*Multilateral Treaties Deposited with the Secretary-General, 2004* (United Nations publication, Sales No. E.05.V.3, (ST/LEG/SER. E/23)), vol. I, part I, chapter 1.4).

Optional Protocol as a settlement-of-dispute protocol is such that would allow for withdrawal even in the absence of a withdrawal clause.

On the "terminable" nature of settlement-of-dispute treaties, the views expressed by Sir Humphrey Waldock, the Special Rapporteur on the Law of Treaties, and Judge Jennings in his Separate Opinion in the *Nicaragua Case,* respectively, are worth noting:

> " . . . State practice . . . and especially the modern trend towards Declarations terminable upon notice, seem only to reinforce the clear conclusion to be drawn from treaties of arbitration, conciliation and judicial settlement, *that these treaties are regarded as essentially of a terminable character*" (emphasis added) ILC, *Yearbook,* 1963, vol. II, p. 68*).

> " . . . treaties of arbitration, conciliation and judicial settlement are amongst those which, *even in the absence of a denunciation clause, are by reason of the nature of the treaty, terminable by notice*" (emphasis added) (*I.C.J. Reports 1984,* Separate Opinion of Judge Jennings, p. 552).

While the ultimate test of whether a withdrawal from a treaty can be accepted, is in its acceptance by its States parties, the depository has on two occasions (i.e., the [. . .] notification of withdrawal from the Covenant on Civil and Political Rights, and the withdrawal of [. . .] from the 1958 Geneva Conventions on the Territorial Sea and Fishing) exercised his discretion and refused to accept in deposit a notification of withdrawal where the nature of the treaty, or of the substantive rights and obligations it contained, could not be implied to allow for a withdrawal.**

Convinced that the nature of the Optional Protocol is such that allows for withdrawal or denunciation without a specific withdrawal clause, I have decided to accept the [Member State] notification of withdrawal in deposit as from the date of its receipt, i.e., [date]. As such, the corresponding depositary notification [. . .] (copy attached)*** was circulated without comments. It is understood, however, that the date of receipt in deposit constitutes the effective date of the withdrawal.

22 March 2005

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* *Yearbook of the International Law Commission, 1963,* vol. II (United Nations publication, Sales No. 63.V.2), p. 68.

** In the case of the notification of withdrawal of the Government of the [. . .] with regards to the International Covenant on Civil and Political Rights, 1966, the Secretary-General, relying on article 56 of the Vienna Convention, concluded that in the case of the Covenant, the negotiating parties did not seem to have overlooked the possibility of explicitly providing for withdrawal or denunciation, but rather it appeared that they had deliberately not provided for it. This position was supported by a great number of States which wrote to the Secretary-General confirming their views that the denunciation was not permitted under the Covenant, and that they objected to the denunciation by the [. . .]. A similar situation arose with regard to [. . .] and the Convention on the Territorial Sea and the Contiguous Zone, 1958 and the Convention on Fishing and Conservation of the Living Resources of the High Seas, 1958. In that case, the Secretary-General, in the absence of pertinent clauses in the Conventions concerned and of specific instructions from the parties, did not consider himself authorized to receive the notification or denunciation in deposit. An explanatory footnote in the publication *Multilateral Treaties Deposited with the Secretary-General* was nonetheless inserted. In that case, the [. . .] was the only State which objected to the withdrawal.

*** The depositary notification is not reproduced herein.

5. Personnel questions

(a) Interoffice memorandum to the Office of Human Resources Policy Services, United Nations, regarding permanent resident status in a country other than the United States

Obligation for new staff members to renounce any permanent resident status in a country other than their country of nationality—Obligation for staff members to notify in advance the Secretary-General of their intention to change their nationality or to acquire permanent resident status in another country—Administrative instruction ST/AI/2000/19*—Maintenance of links by staff members with their country of nationality considered to be in the interest of the United Nations in view of the policy of geographical distribution in the Secretariat—Permanent resident status in another country considered as affecting the maintenance of the link with the country of nationality and thus incompatible with the conditions governing employment in the United Nations

1. I refer to your memorandum of 11 May 2005 on the above-captioned subject. You refer, in particular, to administrative instruction ST/AI/2000/19 entitled "Visa status of non-United States staff members serving in the United States, members of their household and their employees, and staff members seeking or holding permanent resident status in the United States".

2. In your memorandum, you state that you "are concerned about any interpretation that would weaken the link between staff members and their country of nationality, especially in view of the intense interest in the geographical composition of the Secretariat on the part of Member States."

3. We understand that you are increasingly faced with individual challenges against the general application of the policy requiring staff members to renounce the permanent resident status they may have acquired in any country they are not a national of. In particular, you mentioned the case of a national from Finland, having acquired permanent resident status in Australia, and being considered for an appointment of one year or longer in New York. She challenges the United Nations policy requesting her to renounce her permanent resident status on the ground that the policy is not specifically authorized by any administrative issuance. You seek advice, noting that the title of ST/AI/2000/19 appears to limit its scope to non-United States staff serving in the Unites States and staff members seeking or holding permanent resident status in the United States.

Current policy

4. Staff rule 104.8 (a) provides that the United Nations shall not recognize more than one nationality for each staff member. Staff rule 104.4 (c) provides that a staff member who intends to acquire permanent resident status in any country other than that of his or her nationality or who intends to change his or her nationality shall notify the Secretary-

* Administrative instructions describe instructions and procedures for the implementation of the Financial Regulations and Rules, Staff Regulations and Rules or Secretary-General's bulletins and are promulgated and signed by the Under-Secretary-General for Administration and Management or by other officials to whom the Secretary-General has delegated specific authority (see ST/SGB/1997/1).

General of that intention before the change in residence status or in nationality becomes final. Staff rule 104.7 (c) provides that an internationally recruited staff member who has changed his or her residence status in such a way that he or she may, in the opinion of the Secretary-General, be deemed to be a permanent resident of any country other than that of his nationality can lose the allowances and benefits available to internationally recruited staff members.

5. ST/AI/2000/19, section 5.1, provides that staff members intending to acquire permanent resident status in any country other than that of their nationality or who intend to change their nationality must notify the Secretary-General of that intention before the change in resident status or in nationality becomes final. Such staff members should inform the Office of Human Resources Management (OHRM) in writing prior to making their application for permanent resident status or naturalization, as the case may be.

6. Under sections 5.6 and 5.7 of ST/AI/2000/19, staff members who have permanent resident status in the United States are required to renounce it and to change to a G-4 visa upon appointment, unless they have applied for citizenship prior to recruitment or they fall within one of the exceptions specified in the instruction. Staff members who seek to acquire such a status after recruitment will not be given permission to do so, unless they fall within one of the exceptions specified in the instruction.

7. The information circular ST/IC/2001/27 entitled "Visa status in the United States of America" provides in paragraph 26:

> "Under section 5.6 of ST/AI/2000/19, non-United States citizens who have permanent resident status in the United States are required to renounce such status and to change to G-4 visa status upon appointment. The same rule provides that staff members who seek to change to permanent resident status will not be granted permission to sign the waiver of rights, privileges, exemptions and immunities required by the United States authorities for the acquisition or retention of permanent resident status. The provision is based on a policy established in 1953 by the General Assembly that persons in permanent resident status should in future be ineligible for appointment as internationally recruited staff members unless they are prepared to change to a G-4 visa status (*or equivalent status in host countries other than the United States of America*). That policy was adopted because it was considered that a decision to remain in permanent resident status in no way represents an interest of the United Nations. *On the contrary, to the extent (if any) that it may weaken existing ties with the country of nationality, it is an undesirable decision*." (Emphasis added.)

Origin of the policy

8. Since 1954, the Organization has consistently interpreted and applied the United Nations policy on geographical distribution as requiring staff members to renounce the permanent resident status they may have acquired in any country they are not a national of prior to recruitment.

9. In its twenty-fifth report to the eighth session of the General Assembly (A/2581, 1 December 1953), the Advisory Committee on Administrative and Budgetary Questions (ACABQ) commented on the question of staff members having permanent resident status in the United States. The ACABQ noted:

"A decision to remain on permanent residence status in no way represents an interest of the United Nations. On the contrary, to the extent (if any) that it may weaken existing ties with the country of nationality, it is an undesirable decision. In any case the interest involved is personal to the staff member who, in pursuit of that interest, seeks authority to waive privileges and immunities that have been granted to the United Nations and not to any individual."

The ACABQ recommended that:

"Persons in permanent residence status should in future be ineligible for appointment as internationally recruited staff members unless they are prepared to change to a G-4 visa status (or equivalent status in host countries other than the United States of America). [. . .]"

The ACABQ finally noted that:

"The Secretary-General refers in his report (A/2533, paragraph 117) to the possibility that staff members opting for permanent residence in another country may intend not to maintain ties with the country of nationality, in which case a question may arise as to the application of the principle of geographical distribution. This is a complex and difficult problem, for the solution of which the Secretary-General does not have at this stage submitted proposals. The Advisory Committee would wish, when such proposals are made, to give further consideration to the matter."

10. The question of a change of nationality was discussed at length during the eighth session of the General Assembly. As a consequence of that discussion, the Fifth Committee adopted a report (A/2615) of 7 December 1953 that included the following paragraphs:

"63. In the ensuing discussion, a number of delegations specifically endorsed the view expressed by the Advisory Committee in its report that a decision to remain in permanent residence status in no way represented an interest of the United Nations and that, on the contrary, to the extent (if any) that it might weaken existing ties with the countries of nationality it was an undesirable decision.

[. . .]

70. *The view was widely shared that international officials should be true representatives of the cultures and personality of the country of which they were nationals, and that those who elected to break their ties with that country could no longer claim to fulfil the conditions governing employment in the United Nations.* [. . .]" (Emphasis added.)

11. Pursuant to the Assembly discussions, the Secretary-General issued information circular ST/AFS/SER.A/238 of 19 January 1954. It provided in paragraph 12:

"The Secretary-General wishes to draw to the attention of the staff the importance of the steps they may wish to take concerning their visa (or residence) status in the country of their duty station or in any other country which is not the country of their nationality, and concerning change of nationality.

The decision of a staff member to remain on or acquire permanent residence status in such a country 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, and be specified undesirable in the case of staff members recruited subject to the requirements of geographical distribution."

ST/AFS/SER.A/238 was subsequently superseded by ST/AI/294 of 16 August 1982 entitled "Visa status of non-United States staff members serving in the United States", which was in turn superseded by ST/AI/2000/19. ST/AI/294 and ST/AI/2000/19 only mention the issue of permanent residence obtained in the United States.

12. The Administrative Tribunal has consistently upheld the policy requiring internationally recruited staff to renounce their permanent resident status in the United States before recruitment, and the policy requiring internationally recruited staff to ask for permission before applying for permanent residence in the United States. (See Judgement No. 326, *Fischman* (1984)[*] and Judgement No. 819, *Moawad* (1997).[**])

Considerations and conclusion

13. We understand that the authority to request staff members to renounce before recruitment their permanent resident status not only in the United States, but in any country they are not a national of, is not reflected in any current administrative issuance. Such authority derives from the view of the General Assembly that international officials should be true representatives of the cultures and personality of the country of which they were nationals, and that those who elect to break their ties with that country can no longer claim to fulfil the conditions governing employment in the United Nations.

14. We also understand that, although not reflected in any administrative issuance, this policy has been consistently applied by OHRM. It is our view that, given the rationale behind this policy, as legislated by the General Assembly in 1953, OHRM is correct in continuing to maintain that policy.

15. In order to prevent future misunderstanding concerning the requirement to renounce permanent resident status in countries other than the United States, OHRM may wish to amend ST/AI/2000/19 to clarify that the United Nations policy, as applied consistently since 1954, is not limited to permanent resident status in the United States, but also to permanent resident status in any country of which the staff member is not a national.

4 August 2005

(*b*) Interoffice memorandum to the Assistant Secretary-General, Human Resources Management, Department of Management, United Nations, on the retroactivity of payments under the proposed new mobility and hardship scheme

Changes to benefits and advantages enjoyed by staff members—Letters of appointment are specifically made subject to the Staff Regulations and Rules—Distinction between contractual and statutory elements of an employment agreement—Right of the General Assembly to establish and amend statutory elements of appointment of staff—Article 101 of the Charter of the United Nations—Contractual elements can only be changed with the agreement of the two parties—Acquired rights derive from the contract of employment and are acquired through service—Guidelines of what constitutes "acquired rights" through the

[*] Judgement No. 326 (17 May 1984): *Fischman* v. *the Secretary-General of the United Nations.*

[**] Judgement No. 819 (25 July 1997): *Moawad* v. *the Secretary-General of the United Nations.*

UNITED NATIONS ADMINISTRATIVE TRIBUNAL'S JURISPRUDENCE—COMPUTATION OF THE AMOUNT OF AN ALLOWANCE IS NOT AN ACQUIRED RIGHT, ALTHOUGH THE ALLOWANCE ITSELF MAY BE—AMENDMENTS AFFECTING A RIGHT ACQUIRED THROUGH SERVICE CANNOT BE RETROACTIVE—POLICY DECISION TO PAY TRANSITIONAL PAYMENT TO COUNTERACT NEGATIVE EFFECTS OF AN AMENDMENT

1. This is in reference to the memorandum of 25 July 2005 from [name] Officer-in-Charge (at the time), Office of Human Resources Management (OHRM), and our subsequent discussions with your Office regarding whether staff members have acquired rights to the provisions of the current mobility and hardship scheme and/or to the continuation of the amounts they currently receive under that scheme, in view of the proposed action by the International Civil Service Commission (ICSC). We understand that, in its annual report for 2005, the ICSC intends to recommend to the General Assembly a change to the current mobility and hardship scheme, as discussed in document ICSC/61/R.4 that you have provided to us. Such a change would result in some staff members receiving higher amounts of allowances, while others would receive lower amounts. We further understand that, even if it were determined that staff members have no acquired rights to the current provisions of the mobility and hardship scheme, you have raised the question of whether it would be "legally advisable for the United Nations to pay, as a good employer, a lump sum amount corresponding to the loss that the staff would experience under the revised scheme for a limited period . . ."

I. Background

2. At its fifty-ninth session, held in July 2004, the ICSC established a Working Group on the Mobility and Hardship Scheme in response to concerns expressed by the General Assembly about the increasing costs generated by the automatic movement of the entitlements under the annual adjustment procedure applied to the base/floor salary scale (see ICSC/61 /R.4, paragraph 1).* I understand that at the outset, the ICSC decided to separate the mobility element from the hardship element and to delink both allowances from the base/floor salary scale, deferring implementation of the decisions until a new system had been put in place (see *ibid.,* paragraph 3)—currently estimated with effect from 1 July 2006. The main difference between the current and the proposed schemes is that the proposed scheme would establish flat rate sums for the mobility, hardship and non-removal allowances, whereas the current scheme establishes payments by linkage to the base/floor salary scale at the P-4, step VI level. Payments are currently calculated as a percentage of this salary base.

3. As a result of the proposed changes to the mobility and hardship scheme based on "flat rate" allowances and not linked to the P-4 salary scale, some staff will receive higher amounts, while others will receive lower amounts for the hardship, mobility and non-removal allowances. (See *ibid.,* annex IV, on the differences in payments). Therefore, with respect to transition of staff to the new mobility and hardship scheme, the Working Group established by the ICSC agreed that "while discretion rested with each organization, it would be expected that the acquired rights of the staff member should be protected by a personal transitional allowance to ensure that she/he would suffer no loss in payments."

* Staff rule 103.22 describes the current requirements for the mobility and hardship allowances.

(See *ibid.,* paragraph 43). However, no proposals were given by the ICSC on the specifics of this transitional allowance.

II. Applicability of acquired rights concept to the proposed changes

4. The concept of "acquired rights" is referred to in the United Nations Staff Regulations and Rules, without defining the term specifically. Staff regulation 12.1 states that "[t]he present Regulations may be supplemented or amended by the General Assembly, without prejudice to the acquired rights of staff members." The United Nations Administrative Tribunal (UNAT) has not provided a detailed and consistent definition of what constitutes an "acquired right" although UNAT jurisprudence contains guidelines that determine what is an acquired right and when such a right might be infringed by administrative action. These guidelines are discussed in more detail below.

A. UNAT jurisprudence

(i) Contractual vs. *statutory rights*

5. In one of its first pronouncements on the issue of acquired rights, the Tribunal was called upon to interpret the effect of staff regulation 12.1, the acquired rights clause, on amendments to procedures established by the United Nations for the termination of temporary appointments. The applicant in *Kaplan* claimed that the procedures governing the termination of temporary appointments were acquired rights and could not be unilaterally amended. (See Judgement No. 19 (1953)[*]). In determining whether such procedures were indeed acquired rights, the Tribunal made a fundamental distinction between contractual and statutory elements of a staff member's employment agreement and found that the guarantee of acquired rights as set forth in staff regulation 12.1 extended to the contractual elements. In its decision, the Tribunal expounded on the relationship between a staff member's acquired rights and the power of the General Assembly to amend the staff regulations which may adversely affect the enjoyment of certain benefits and advantages as follows:

> "The Tribunal considers that relations between staff members and the United Nations involve various elements and are consequently not solely contractual in nature.
>
> Article 101 of the Charter gives the General Assembly the right to establish regulations for the appointment of staff, and consequently the right to change them.
>
> . . .
>
> It follows from the foregoing that notwithstanding the existence of contracts between the United Nations and staff members, the legal regulations governing the staff are established by the General Assembly of the United Nations.
>
> In determining the legal positions of staff members, a distinction should be made between contractual elements and statutory elements:
>
> All matters being contractual which affect the personal status of each member—e.g., nature of his contract, salary, grade;

[*] *Judgement No. 19 (21 August 1953): Kaplan* v. *the Secretary-General of the United Nations.*

All matters being statutory which affect in general the organization of the international civil service, and the need for its proper functioning—e.g., general rules that have no personal references.

While the contractual elements cannot be changed without the agreement of the two parties, the statutory elements on the other hand may always be changed at any time through regulations established by the General Assembly, and these changes are binding on staff members." (See Judgement No. 19, *Kaplan* (1953), paragraph 3.)

6. This approach appears to have been followed by the Tribunal in other cases decided since *Kaplan*. For example, UNAT in a case related to the amendment of the education grant, held that:

"... [T]he amendment made concerns the procedure for computation of the Organization's contribution to educational expenses. ... While it does in fact lead to a reduction in the grant paid on that account to some staff members, it does not seem that the decision exceeds the powers accorded to the Organization in the contract accepted by the Applicant." (See Judgement No. 202, *Quéguiner* (1975),[*] paragraph VI).

The Tribunal further pointed to the fact that the applicant's employment agreement incorporated the Staff Regulations and Staff Rules and that the Staff Regulations and Rules included express reservation of the Organization's right to amend them. (See *ibid.,* paragraph IV.)

7. This holding was reiterated by the Tribunal when it rejected the assertion of acquired rights in a consolidated case challenging the decision authorized by the General Assembly to suspend the increase of post adjustment. (See Judgement No. 370, *Molinier* et al (1986).[**]) In *Molinier,* the Tribunal, citing to *Powell* (Judgement No. 237 (1979)[***]) and *Puvrez* (Judgement No. 82 (1961)[****]), excluded the doctrine of acquired rights to the case for two reasons: "... first, because the rules of post adjustment are statutory ... and secondly, because the doctrine can apply only to benefits accruing through services before the adoption of the amendment and not to remuneration for future services ..." (See Judgement No. 370, *Molinier* et al (1986), para. XMI.)

8. It is our view that under the case law of UNAT, the proposed amendment of the United Nations Staff Rules on the mobility and hardship allowances would not deprive staff of the entitlement to these allowances, which have been acquired through contract, but would merely provide for a change in the computation of the allowance. Such an amendment, whereby the Organization would have the right to calculate the allowances differently, i.e., as a flat rate, rather than linked to the salary scale, would, therefore, be permissible.

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[*] *Judgement No. 202 (3 October 1975): Quéguiner* v. *the Secretary-General of the Intergovernmental Maritime Consultative Organization.*

[**] *Judgement No. 370 (6 June 1986): Molinier* et al v. *the Secretary-General of United Nations.*

[***] *Judgement No. 237 (13 February 1979): Powell* v. *the Secretary-General of United Nations.*

[****] *Judgement No. 82 (4 December 1961): Puvrez* v. *the Secretary-General of International Civil Aviation Organization.*

(ii) *Retroactivity*

9. However, UNAT jurisprudence has been clear and consistent that any amendments that affect a right acquired through service can only be amended prospectively. For example, in *Puvrez,* the Tribunal was called upon to interpret the International Civil Aviation Organization (ICAO) Staff Regulation 12.1 that makes amendment of the staff regulations conditional upon the amendment not adversely affecting "the entitlement of a staff member to any benefits earned through service prior to the effective date of the amendment." The case was based on whether or not an amendment to the Service Code of the ICAO requiring staff members to furnish information concerning income of their spouses in order to qualify for dependency benefits impinged on the acquired rights of the staff members who had been receiving dependency benefits irrespective of the income of their spouses. The Tribunal held that:

> " . . . [N]o amendment of the regulations may affect the benefits and advantages accruing to the staff member for services rendered before the entry into force of an amendment. Hence, no amendment may have an adverse retroactive effect in relation to a staff member, but nothing prevents an amendment of the regulations, where the effects of such amendment apply only to benefits and advantages accruing through service after the adoption of such amendment." (See Judgement No. 82, *Puvrez* (1961), paragraph VII).

10. Similarly, in *Powell,* the Tribunal reiterated *Puvrez's* holding with respect to retroactivity when it considered a staff member's entitlement to reimbursement of income taxes on a lump sum withdrawal of pension benefits. (See Judgement No. 237, *Powell* (1979), paragraph XVI.)

11. In *Mortished,* the issue was whether the conditions for the grant of a relocation allowance could be amended. The Tribunal held that the allowance was expressly provided for in the contract, together with the relationship of the amount of the grant and the length of service. Further, the practice of not requiring proof of relocation had created an acquired right. Finally, the Tribunal held that "respect for acquired rights also means that all the benefits and advantages due to the staff member for services rendered before the coming into force of a new rule remain unaffected." (See UNAT Judgement No. 273, *Mortished* (1981),[*] paragraph XV; affirmed *I.C.J. Reports 1982,* p. 325.)

12. In *Capio,* the Tribunal cited to previous cases, such as *Puvrez* (1961) and *Queguiner* to affirm the prohibition against amendments to regulations and rules affecting benefits and advantages accrued through prior service. The case involved an amendment to the procedure for promotion in the United Nations through a resolution of the General Assembly in 1979. At the time the change was introduced by the Administration, the procedure for promotion of the Applicant had already been initiated by the chief of service and her department had prepared its recommendations. While the Tribunal made it clear that the applicant did not have an acquired right to promotion, it held that, under those circumstances, the Applicant had a right to have the former procedure applied to her promotion, the action taken by the United Nations in implementing the amendment being regarded as a violation of acquired rights. (See UNAT Judgement No. 266, *Capio* (1980),[**] paragraph VIII.)

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[*] *Judgement No. 273 (15 May 1981): Mortished* v. *the Secretary-General of United Nations.*

[**] *Judgement No. 266 (20 November 1980): Capio* v. *the Secretary-General of United Nations.*

13. In *Horlacher,* the Tribunal held that "an amendment of the applicable Staff Regulations and Staff Rules which abolished the right to reimbursement [of income taxes on lump sum withdrawal of pension benefits] would be permissible with regard to pension benefits resulting from service after such an amendment, but could not be applied retroactively with respect to pension benefits resulting from service prior to the amendment." (See Judgement No. 634, *Horlacher* (1994),* paragraph VII.)

III. Conclusion and recommendations

14. The UNAT jurisprudence demonstrates that acquired rights are rights that derive from the staff member's contract of employment and are acquired through service. This is particularly so because the United Nations letters of appointment are specifically made subject to the Staff Regulations and Rules "and to changes which may be duly made in such regulations and rules from time to time." (See United Nations Staff Regulations, annex II, paragraph (a)(i).) However, the Administration has, from time to time, implemented amendments to Staff Regulations and Rules in such a way as to permit existing staff members to continue to take advantage of benefits they had been entitled to prior to the amendments, for a limited time, as a transitional measure. With respect to the benefits accrued by staff members for past service, if it is determined that these are acquired rights, then staff members will continue to receive such entitlements for the remainder of their employment with the Organization.

15. As has been demonstrated above, UNAT has held that the computation of the amount of an allowance is not an acquired right, although entitlement to the allowance itself may be. (See, e.g., discussion in paragraphs 6–8 above.) It is our view that staff members do not have an acquired right to the provisions of the current mobility and hardship scheme, as long as the amendments proposed by ICSC are not applied retroactively.

16. However, the Organization may decide—as a policy matter—to pay each affected staff member a transitional payment to counteract any negative effect of the amendments on the allowances they will receive in future. We understand that this policy has been adopted in the past, for example, when the Organization instituted the current mobility and hardship scheme in 1989, whereby a transitional allowance was payable to staff members who experienced a reduction in their allowances under the revised mobility and hardship scheme. (See "Mobility and Hardship Allowance," ST/AI/363, 1 August 1990, paras. 56–58.)

17. If the Organization once again decides to institute a transitional allowance when implementing the new mobility and hardship scheme, the determination of the length and amount of such an allowance would also be a policy matter.

18. The advice given above is predicated on the assumption that the General Assembly will approve the proposal of ICSC, as presented in its annual report for 2005, with regard to the changes to the mobility and hardship scheme. Should the General Assembly make modifications to the ICSC proposal, it may be necessary to review the question of acquired rights and transitional measures in that context.

11 October 2005

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* *Judgement No. 634 (6 July 1994): Horlacher* v. *the Secretary-General of United Nations.*

6. Miscellaneous

(*a*) Note to the Special Representative of the Secretary-General for a Member State, regarding the Secretary-General's legal power to offer his good offices in the process of demarcation of the border between two Member States

Power of the Secretary-General to offer his good offices to assist in the adjustment of situations which may threaten the maintenance of international peace and security—Appointment of a mediator—Consideration of the dispute regarding demarcation as a source of tension between two States—Declaration on the Prevention and Removal of Disputes Which May Threaten International Peace and Security and on the Role of the United Nations in this Field

I refer to your note dated 10 May 2005, transmitting a letter dated [date] which the Minister of Internal Affairs of [State A] has sent to the Special Representative of the Secretary-General for [State A] regarding the border between [State A] and [State B] in the vicinity of the village of [X]. The Minister states that, at a summit meeting between the Heads of State of [State C] and [State A] and the Head of Government of [State B] held at [city] on [date], the President of [State A] and the [State B] delegation agreed that (i) technical experts appointed by the two Governments should jointly demarcate the boundary between the two States and identify the location of the beacons shown on the map annexed to the Agreement [. . .], done at [city] on [date] (the 1912 Treaty) and (ii) the United Nations, through the Special Representative, should appoint an independent expert to mediate between the two teams in case of disagreement. The Minister requests the Special Representative to have such an expert appointed. You seek our advice.

The boundary between [State A] and [State B] was established in a series of agreements concluded in the late nineteenth and early twentieth centuries, culminating in the Agreement of [date] (the 1912 Treaty). At the same time, the boundary was demarcated by pillars, beacons and cairns, except where it follows the course of certain rivers. The demarcation of one section of the boundary and the positions of the pertinent cairns were shown on a map attached to the 1912 Treaty, it appears that [village X] is located in that section.

We understand from the twenty-third, twenty-fourth and twenty-fifth reports of the Secretary-General on the [United Nations Mission] that, on [date], the Presidents of [State A] and [State B] met in [city] to discuss the issue of the boundary in the vicinity of [village X] and that they issued a joint communiqué affirming that that village belongs to [State A] [. . .]. It appears from the text of that joint communiqué, as attached to [United Nations Mission] Code Cable No. [. . .] of [date], that the task that now remains—at least as far as the establishment of the border is concerned—is to undertake its physical demarcation in the vicinity of the village. In this connection, we understand from [United Nations Mission] Code Cable No. [. . .] of [date] that at least certain of the boundary cairns in the vicinity of [village X] may have been destroyed or moved and so may need replacing or repositioning.

This being so, the task at hand—at least as far as the establishment of the boundary is concerned—would appear to be chiefly technical in nature, requiring expertise that, within the Organization, would most probably be possessed by the Cartographies Section.

In so far as concerns the appointment by the Secretary-General of a mediator, as envisaged in the Minister of the Interior's letter, it is certainly within the Secretary-Gen-

eral's lawful powers under the Charter to offer his good offices, including the appointment of a mediator, to assist in the solution or adjustment of disputes or situations the continuance of which may threaten the maintenance of international peace and security (see the Declaration on the Prevention and Removal of Disputes Which May Threaten International peace and Security and on the Role of the United Nations in this Field, annexed to General Assembly resolution 43/51 of 5 December 1988). It appears from recent reports of the Secretary-General on [United Nations Mission] that the dispute in the area of [village X] is of such a nature, representing a source of tension between [State B] and [State A] and posing a potential threat to the latter's security (*loc. cit.* above; [. . .]). Indeed, it appears that [State B] troops are still present in the area and have yet to withdraw from the village and its environs [. . .].

We do not know whether the Government of [State B] has in fact agreed to the two points set out in the letter of the Minister of the Interior of [State A].

If it has, there would certainly be no legal obstacle to the Secretary-General's indicating that he is prepared to appoint an expert mediator for the purpose outlined in that letter.

If it has not, then it may be recalled that, from a strictly legal point of view, it is not necessary, in order for the Secretary-General to offer his good offices in respect of a dispute or situation, that both parties approach him for that purpose or otherwise indicate that they are willing to accept his offer. He may make such an offer at the invitation of one of them only or even without any invitation from either of them. (From a political point of view, though, for the Secretary-General to offer his good offices at the request of one of the parties alone might be problematic.) In the present case, we understand from the Secretary-General's twenty-fifth report on [United Nations Mission] that the Secretary-General has already offered to provide assistance in resolving the dispute regarding the boundary in the vicinity of the village of [X] (reference to report). This being so, even if [State B] has not agreed to both of the points in the Minister of the Interior's letter, there would certainly not be any legal obstacle to the Special Representative of the Secretary-General's informing [State B] and [State A] that the Secretary-General is prepared to appoint a mediator for the purpose of helping the two States in resolving any differences that might arise between their experts, should they agree to appoint technical teams to undertake the demarcation of the boundary in the vicinity of [X].

Finally, we would note that, if a decision is taken that the Secretary-General should be prepared to appoint a mediator, as requested, then it may be necessary to consult with Office of Programme Planning, Budget and Account to confirm the availability of the necessary financing.

19 May 2005

(b) Annex to the letter dated 25 August 2005* from the Legal Counsel, Under-Secretary-General of the United Nations for Legal Affairs, addressed to the Chairman of the Commission on the Limits of the Continental Shelf

United Nations Convention on the Law of the Sea—Continental shelf—Procedure to delimit the continental shelf of a coastal State—Competence and functions of the Commission on the Limits of the Continental Shelf—Implicit powers of the Commission to adopt its rules of procedures and its scientific and technical guidelines—Possibility for coastal State to reassess or add, in good faith, scientific data in its submission for the determination of its continental shelf and conclude that original limits should be adjusted—Exclusive competence of the Commission to determine whether those limits meet the requirements of the Convention on the Law of the Sea

. . .

Introduction

The question with regard to which the Commission on the Limits of the Continental Shelf (CLCS) decided to seek a legal opinion reads as follows:

> "Is it permissible, under the United Nations Convention on the Law of the Sea and the rules of procedure of the Commission, for a coastal State, which has made a submission to the Commission in accordance with article 76 of the Convention, to provide to the Commission in the course of the examination by it of the submission, additional material and information relating to the limits of its continental shelf or substantial part thereof, which constitute a significant departure from the original limits and formulae lines that were given due publicity by the Secretary-General of the United Nations in accordance with rule 50 of the rules of procedure of the Commission?"

A description of the context within which this legal opinion was sought can be found in the Statement by the Chairman of the Commission on the Limits of the Continental Shelf on the progress of work in the Commission at its fifteenth session (CLCS/44, paras. 12–16).

Part I. *United Nations Convention on the Law of the Sea*

a. General observations

The United Nations Convention on the Law of the Sea is a multilateral treaty the provisions of which are therefore binding on the Commission and States parties to the Convention submitting particulars regarding the outer limit of their continental shelf along with supporting scientific and technical data to the Commission. Therefore, it is important initially to identify the provisions of the Convention which are pertinent to the question on which a legal opinion is being sought by the Commission.

* The text of the letter is not reproduced herein. For the text of the letter, see Doc. CLCS/46.

b. Pertinent provisions of the Convention

It appears that the following provisions of the Convention are relevant to the question at issue.

"Article 76

"Definition of the continental shelf

"1. The continental shelf of a coastal State comprises the seabed and subsoil of the maritime areas that extend beyond its territorial sea throughout the natural prolongation of its territory to the outer edge of the continental margin, or to a distance of 200 nautical miles from the baselines from which the breadth of the territorial sea is measured where the outer edge of the continental margin does not extend up to that distance.

"2. The continental shelf of a coastal State shall not extend beyond the limits provided for in paragraphs 4 to 6.

. . .

"7. The coastal State shall delineate the outer limits of its continental shelf, where that shelf extends beyond 200 nautical miles from the baselines from which the breadth of the territorial sea is measured, by straight lines not exceeding 60 nautical miles in length, connecting fixed points, defined by coordinates of latitude and longitude.

"8. Information on the limits of the continental shelf beyond 200 nautical miles from the baselines from which the breadth of the territorial sea is measured shall be submitted by the coastal State to the Commission on the Limits of the Continental Shelf set up under Annex II on the basis of equitable geographical representation. The Commission shall make recommendations to coastal States on matters related to the establishment of the outer limits of their continental shelf. The limits of the shelf established by a coastal State on the basis of these recommendations shall be final and binding.

. . .

"ANNEX II. COMMISSION ON THE LIMITS OF THE CONTINENTAL SHELF

"Article 1

"In accordance with the provisions of article 76, a Commission on the Limits of the Continental Shelf beyond 200 nautical miles shall be established in conformity with the following articles.

. . .

"Article 3

"1. The functions of the Commission shall be:

"(a) to consider the data and other material submitted by coastal States concerning the outer limits of the continental shelf in areas where those limits extend beyond 200 nautical miles, and to make recommendations in accordance with article 76 and the Statement of Understanding adopted on 29 August 1980 by the Third United Nations Conference on the Law of the Sea;

. . .

"Article 4

"Where a coastal State intends to establish, in accordance with article 76, the outer limits of its continental shelf beyond 200 nautical miles, it shall submit particulars of such limits to the Commission along with supporting scientific and technical data as soon as possible but in any case within 10 years of the entry into force of this Convention for that State. The coastal State shall at the same time give the names of any Commission members who have provided it with scientific and technical advice.

"Article 5

"Unless the Commission decides otherwise, the Commission shall function by way of sub-commissions composed of seven members, appointed in a balanced manner . . ."

c. Analysis of the pertinent provisions of the Convention

It follows from the above provisions of the Convention that a coastal State, which is entitled pursuant to the provisions of article 76 of the Convention to the continental shelf extending beyond 200 nautical miles, is required to submit to the Commission for its consideration information on the limits of its continental shelf beyond 200 nautical miles. The Convention further provides that such information should include particulars of such limits accompanied by supporting scientific and technical data. Thus, under the Convention, scientific and technical data are provided by a coastal State for the purpose of supporting particulars of the limits of the continental shelf submitted by that coastal State to the Commission.

In its request for the legal opinion, the Commission enquires as to whether it is permissible, under the Convention, for a coastal State to provide to the Commission, in the course of the examination by it of the submission of that State, additional material and information relating to the limits of its continental shelf or substantial part thereof, which constitute a significant departure from the original limits and formulae lines that were submitted to the Commission and which were given due publicity by the Secretary-General of the United Nations in accordance with rule 50 of the rules of procedure of the Commission.

It may be assumed that since additional data is presented by a coastal State in support of the particulars of the limits of the continental shelf submitted by it to the Commission, it should not contradict them. In other words, it is expected that the additional material and information should not amount to a revision of the original submission.

It appears, however, that there is nothing in the Convention that could preclude a coastal State from informing the Commission in the course of its examination of the submission of that State that further analysis of the scientific and technical data originally presented to the Commission in support of particulars of the limits of its continental shelf or substantial part thereof has brought this State to a conclusion that some of these particulars were not correct and therefore the outer limits of the continental shelf need to be adjusted.

Likewise, it appears that there is nothing in the Convention that prevents a coastal State from submitting to the Commission, in the course of the examination by the Commission of its original information, new particulars of the limits of its continental shelf

or substantial part thereof if in the view of the coastal State concerned it is justified by additional scientific and technical data obtained by it.

The coastal State concerned will be expected in both cases to explain to the Commission why it believes that some of the limits of the continental shelf originally presented by it to the Commission need to be adjusted or modified and to provide the necessary scientific and technical data supporting this conclusion. It will, of course, then be for the Commission to examine, in the light of its mandate as defined by the Convention, the original submission together with the proposed new limits of part of the continental shelf of the coastal State concerned and to determine whether they meet the requirements of article 76 of the Convention. The findings of the Commission will be reflected in its recommendations on the submission.

Coastal States are expected to act in good faith and exercise caution so that the work of the Commission and the establishment of the outer limits of the continental shelf of these States are not unreasonably prolonged or delayed.

The analysis of the legislative history of the Convention indirectly supports the above conclusions. The travaux préparatoires of the Convention [Official Records of the Third United Nations Conference on the Law of the Sea, Vols. I-XVII][*] show that delegations did not discuss the modalities through which a coastal State would provide the Commission with the particulars of the limits of its continental shelf and the supporting scientific and technical data. Consequently, the fact that the Convention does not expressly permit the coastal State to submit new particulars during the course of the examination of the original submission by the Commission cannot be interpreted to imply that States cannot do so.

Part II. *Rules of procedure and other documents of the Commission*

a. General observations

The Commission is a treaty body which is established by the Convention to perform functions defined in article 3, paragraph 1, of annex II to the Convention. In accordance with subparagraph 1 (a) of that article, the Commission, as noted above, is entrusted with the responsibility to consider the data and other material submitted by a coastal State concerning the outer limits of the continental shelf in areas where those limits extend beyond 200 nautical miles, and to make recommendations in accordance with article 76 and the statement of understanding adopted by the Conference.

In addition to the explicit authority conferred upon it by the Convention, it is recognized that as a treaty body the Commission has certain implied powers that are essential for the fulfilment of its responsibilities under the Convention.

This is the case of the power to adopt rules of procedure and other relevant documents with a view to facilitating the discharge of the functions of the Commission in an orderly and effective manner. Due to the nature of the functions of the Commission, its rules of procedure and other relevant documents are not merely organizational, or internal, in nature. On the contrary, they also offer guidance to States which make a submission to the

[*] United Nations publications, Sales Nos. E.75.V.3, E.75.V.4, E.75.V.5, E.75.V.10, E.76.V.8, E.77.V.2, E.78.V.3, E.78.V.4, E.79.V.3, E.79.V.4, E.80.V.6, E.80.V.12, E.81.V.5, E.82.V.2, E.83.V.4, E.84.V.2 and E.84.V.3.

Commission. Unlike the case of the International Seabed Authority (see article 149, para. 4), the Convention does not contain any article providing the Commission with the power to adopt its own rules or procedure. The Commission, therefore, can do so only by exercising a power which is conferred upon it by necessary implication as being essential to the performance of its duties. The same applies to other relevant documents. This is consistent with the 1949 advisory opinion by the International Court of Justice on *Reparations for injuries suffered in the service of the United Nations*. The Court found in that opinion, inter alia, that "under international law, the Organization must be deemed to have those powers, which, though not expressly provided in the Charter, are conferred upon it by necessary implication as being essential to the performance of its duties" (*I.C.J. Reports 1949,* p. 182). The same considerations can be applied to the Commission with regard to powers which are essential to the performance of its duties, even though not expressly provided in the Convention.

It should be underlined, however, that rules of procedure and other relevant documents adopted by the Commission should be in strict conformity with the pertinent provisions of the Convention, which is the main instrument guiding the work of the Commission. In the case of any conflict between the provisions of these documents, which are supplementary by their nature, and those of the Convention, the latter shall prevail.

In this regard, it must be recalled that the Commission has adopted two documents: the rules of procedure of the Commission (CLCS/40) and the Scientific and Technical Guidelines of the Commission (CLCS/11 and Add.1).

Although the rules of procedure and the Guidelines are two separate documents, they are interrelated. The reference to the Guidelines is contained in various articles of the rules of procedure, which, inter alia, provide that "the Commission may adopt such regulations, guidelines and annexes to the present rules as are required for the effective performance of its functions" (rule 58, para. 1).

The rules of procedure of the Commission currently have three annexes, which—as provided for by rule 58, paragraph 2—form an integral part of the rules of procedure. Of particular relevance to the present legal opinion is annex III, entitled "Modus operandi for the consideration of a submission made to the Commission on the Limits of the Continental Shelf".

It should be observed that the States parties to the Convention acknowledged in one of their decisions the right of the Commission to adopt documents necessary for the proper discharge of its responsibilities under the Convention. In the decision regarding the date of commencement of the 10-year period for making submissions to the Commission set out in article 4 of annex II to the Convention (SPLOS/72), adopted at their Eleventh Meeting, held from 14 to 18 May 2001, the States parties noted "that it was only after the adoption by the Commission of its Scientific and Technical Guidelines on 13 May 1999 that States had before them the basic documents concerning submissions in accordance with article 76, paragraph 8, of the Convention". By that decision, the States parties thus recognized the role played by the Guidelines and highlighted the particular importance they attached to them in the context of implementation of article 76, paragraph 8, of the Convention.

b. Pertinent provisions of the rules of procedure

It appears that the following provisions of the rules of procedure of the Commission are relevant to the question at issue.

"Rule 45

"Submission by a coastal State

"In accordance with article 4 of Annex II to the Convention:

"Where a coastal State intends to establish the outer limits of its continental shelf beyond 200 nautical miles from the baselines from which the breadth of the territorial sea is measured, it shall submit particulars of such limits to the Commission along with supporting scientific and technical data as soon as possible, but in any case within ten years of the entry into force of the Convention for that State.

. . .

"Rule 47

"Form and language of submission

"1. A submission shall conform to the requirements established by the Commission.

. . .

"Rule 48

"Recording of the submission

"1. Each submission shall be recorded by the Secretary-General upon receipt.

. . .

"Rule 50

"Notification of the receipt of a submission and publication of the proposed outer limits of the continental shelf related to the submission

"The Secretary-General shall, through the appropriate channels, promptly notify the Commission and all States Members of the United Nations, including States Parties to the Convention, of the receipt of the submission, and make public the executive summary including all charts and coordinates referred to in paragraph 9.1.4 of the Guidelines and contained in that summary, upon completion of the translation of the executive summary referred to in rule 47, paragraph 3.

. . .

"ANNEX III

"MODUS OPERANDI FOR THE CONSIDERATION OF A SUBMISSION MADE TO THE COMMISSION ON THE LIMITS OF THE CONTINENTAL SHELF

"I. Submission by a coastal State

"1. Format and number of copies of the submission

"1. In accordance with paragraphs 9.1.3, 9.1.4, 9.1.5 and 9.1.6 of the Guidelines, the submission shall contain three separate parts: an executive summary, a main analytical and descriptive part (main body), and a part containing all data referred to in the analytical and descriptive part (supporting scientific and technical data).

. . .

"III. Initial examination of the submission

"3. Format and completeness of the submission

"The subcommission shall examine whether the format of the submission is in compliance with the requirements set out in paragraph 1, and shall ensure that all necessary information has been included in the submission. If it is deemed necessary, the subcommission may request the coastal State to correct the format and/or to provide any necessary additional information, in a timely manner.

. . .

"6. Clarifications

"1. The subcommission shall determine whether there are any matters to be clarified by the coastal State.

"2. If necessary, the Chairperson of the subcommission shall, through the Secretariat, request clarification from the representatives of the coastal State on those matters. Clarifications should be sought in the form of written questions and answers and translated by the Secretariat, if necessary, into the language in which the submission was made.

. . .

"IV. Main scientific and technical examination of the submission

"10. Additional data, information or advice

"1. At any stage of the examination, should the subcommission arrive at the conclusion that there is a need for additional data, information or clarifications, its Chairperson shall request the coastal State to provide such data or information or to make clarifications. Such a request, articulated in precise technical terms, shall be transmitted through the Secretariat. If necessary, the Secretariat will translate the request and questions. The data, information or clarifications requested shall be provided within a time period agreed upon between the coastal State and the subcommission."

c. Pertinent provisions of the Guidelines

"1.2. The Commission prepared these Guidelines for the purpose of providing direction to coastal States which intend to submit data and other material concerning the outer limits of the continental shelf in areas where those limits extend beyond 200 nautical miles from the baselines from which the breadth of the territorial sea is measured. The Guidelines aim to clarify the scope and depth of admissible scientific and technical evidence to be examined by the Commission during its consideration of each submission for the purpose of making recommendations.

. . .

"9.1.3. The submission will be divided in three separate parts in accordance with the Modus Operandi of the Commission (CLCS/L.3). The requested format contains an executive summary (22 copies), a main body (8 copies) and all supporting scientific and technical data (2 copies).

"9.1.4. The executive summary will contain the following information:

"(*a*) Charts at an appropriate scale and coordinates indicating the outer limits of the continental shelf and the relevant territorial sea baselines;

"(*b*) Which provisions of article 76 are invoked to support the submission;

"(*c*) The names of any Commission members who gave advice in the preparation of the submission; and

"(*d*) Any disputes as referred to in rule 44 and annex I to the Rules of Procedure of the Commission."

d. Analysis of the relevant provisions of the rules of procedure and Guidelines

In analysing the provisions of the rules of procedure of the Commission and of the Scientific and Technical Guidelines it must be taken into account that, as noted above, these documents need to be read, understood and interpreted in the light of the Convention, the provisions of which prevail.

It follows from the rules of procedure and the Guidelines that particulars of the limits of the continental shelf and supporting scientific and technical data should be presented to the Commission by a coastal State in the form of a submission. The latter should consist of three separate parts (executive summary, main body and supporting scientific and technical data). It also follows from paragraphs 3, 6 and 10 of annex III to the rules of procedure that the subcommission established by the Commission to consider a submission may, in the course of the initial as well as at any stage of the main examination of that submission, request the coastal State concerned to provide additional data, information or clarifications regarding that submission.

As noted in the section concerning the analysis of the pertinent provisions of the Convention, it is expected that additional data, information and clarifications provided by the coastal State to the Commission in response to such requests should support, integrate and clarify the particulars of the limits of the continental shelf contained in the submission, and that they should not amount to a new or revised submission.

However, as pointed out in the same section, it is quite possible that, in preparing a response to requests for additional information, a coastal State, while reassessing the data originally submitted to the Commission, could reach the conclusion that some of the particulars of the outer limits of its continental shelf contained in its original submission to the Commission need to be adjusted. A situation may also arise in which a coastal State reaches that conclusion not in response to a request by the subcommission but on its own. This may occur, for instance, in the light of additional scientific and technical data obtained by the State concerned, or if errors or miscalculations in the submission are discovered that need to be rectified. The State concerned could then bring these to the attention of the subcommission and the Commission.

The rules of procedure and the Guidelines do not directly address these contingencies. The question, however, arises of how they should be treated in the light of the rules of procedure and the Guidelines. It may be recalled in this regard that the rules of procedure contain certain procedural requirements concerning the handling of submissions. After recording a submission (rule 48), acknowledging its receipt to the submitting coastal State (rule 49) and notifying the Commission and all States Members of the United Nations, including States parties to the Convention, of the receipt of the submission (rule 50), the Secretary-General of the United Nations is required to make public the executive summary of the submission, including all charts and coordinates indicating the outer limits of the continental shelf (paragraph 9.1.4 of the Guidelines).

In the event that a coastal State submits new particulars related to the proposed outer limits of its continental shelf, either in response to requests by the Commission for additional data and information or clarifications or on its own, an issue may arise with regard to the due publicity given to the original submission. If the new particulars lead to a significant departure from the original limits contained in the executive summary that was given due publicity by the Secretary-General of the United Nations, it appears that the newly proposed particulars of the outer limits of the continental shelf should be given similar publicity. All States have an interest in being notified about the limits proposed in a submission. The outer limits of the continental shelf of a State also define the Area (the seabed and ocean floor and subsoil thereof, beyond the limits of national jurisdiction), which is, together with its resources, the common heritage of mankind (article 136 of the Convention). According to the preamble of the Convention, the exploration and exploitation of the Area and its resources "shall be carried out for the benefit of mankind as a whole, irrespective of the geographical location of States". The Commission therefore should consider whether it would be advisable to address the issue of due publicity with regard to new particulars submitted to the Commission in the course of the examination of the original submission in one of its documents.

The question of whether there is a significant discrepancy between the originally submitted and the newly proposed particulars can be properly addressed only by the body with the required scientific and technical competence, namely the Commission. If the Commission concludes that such a discrepancy is significant, it may consider requesting the coastal State concerned to provide the Secretary-General of the United Nations with an addendum to its executive summary so that due publicity is given to this new information through its circulation to all States Members of the United Nations, including States parties to the Convention. The coastal State, of course, could make such a determination itself and directly provide an addendum to the Secretary-General for the purposes of due publicity. However, the Secretary-General should be guided in this regard by the Commission.

It should be observed that the analysis of State practice which has developed following the circulation of the executive summary of the first submission shows that sometimes other States find it necessary to provide comments on particular aspects of the executive summary by sending notes verbales to the Secretary-General with a request that those comments be brought to the attention of the Commission and be circulated to all States Members of the United Nations. The Commission may wish to consider whether this emerging practice should be taken into account and a time frame be established giving States an opportunity to provide comments on the addendum to the executive summary containing the new particulars of the limits of the continental shelf or substantial part thereof of the coastal State concerned.

Conclusions

Additional material and information relating to the limits of the continental shelf or substantial part thereof, provided by a coastal State to the Commission in response to its requests for additional data, information or clarification in the course of the examination by the Commission of the submission of that coastal State, is expected to support,

integrate and clarify the particulars of the limits of the continental shelf contained in the submission.

However, there is nothing in the Convention that precludes a coastal State from submitting to the Commission, in the course of the examination by it of the submission of that State, revised particulars of the limits of its continental shelf if the State concerned reaches a conclusion, while reassessing in good faith the data contained in its submission, that some of the particulars of the limits of the continental shelf in the original submission should be adjusted, or if it discovers errors or miscalculations in the submission that need to be rectified.

Likewise, the Convention does not prevent a coastal State from submitting to the Commission, in the course of the examination by it of the submission of that State, new particulars of the limits of its continental shelf, or substantial part thereof, if in the view of the coastal State concerned, acting in good faith, this is justified by additional scientific and technical data obtained by it.

Consequently, in the cases described above it is permissible for a coastal State which has made a submission to the Commission in accordance with article 76 of the Convention to provide to the Commission, in the course of the examination by it of the submission, additional material and information relating to the limits of its continental shelf or substantial part thereof, which constitute a significant departure from the original limits and formulae lines that were given due publicity by the Secretary-General of the United Nations in accordance with rule 50 of the rules of procedure of the Commission.

As the rules of procedure and the Guidelines do not address the contingencies described above and at the same time require that the executive summary of the submission by a coastal State be given due publicity by the Secretary-General of the United Nations, the Commission may wish to consider whether it would be advisable to address this issue in one of its documents and to provide the necessary guidance to the Secretary-General of the United Nations in this regard.

In concluding, it should be emphasized that it is ultimately up to the Commission in the light of its mandate defined by the Convention to determine, after examining and evaluating data and information provided to it by a coastal State, what particulars of the limits of the continental shelf of the coastal State concerned meet the requirements of article 76 of the Convention.

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

1. International Labour Organization

(*Submitted by the Legal Adviser of the International Labour Conference*)

(*a*) Provisional record No. 18, ninety-third session, fourth item on the agenda: Occupational safety and health, Report of the Committee on Safety and Health*

Legal status of a declaration in the context of the International Labour Organization (ILO)—Difference between declarations, recommendations and conventions with regard to the legal obligations they entail

The Legal Adviser [. . .] explained [to Committee on Safety and Health] that international labour conventions were multilateral treaties that conferred rights and responsibilities on member States that ratified them, and that there was a mechanism for supervising their implementation. International labour recommendations were non-binding instruments that recommended practices, monitoring and so on. Unlike conventions and recommendations, declarations were not mentioned in the ILO Constitution and were not legal instruments. They did not create legal obligations but could recall existing ones. Declarations were more political than other instruments and ILO had not adopted many. Some, such as the Declaration of Philadelphia, were subsequently included in the ILO Constitution, so that when a country became an ILO member it subscribed to the Declaration as well. Others were the Declaration on Apartheid, 1964; the Declaration of Principles Concerning Multinational Corporations and Social Policy, 1977; and the Declaration on Fundamental Principles and Rights at Work, 1998. The last mentioned had an *ad hoc* follow-up mechanism, an expensive one, and outside the usual practices for Conventions.

(*b*) Provisional record No. 18, ninety-third session, fourth item on the agenda: Occupational safety and health, Report of the Committee on Safety and Health**

Legal significance of "framework" conventions

[. . .] the Legal Adviser reminded the Committee [on Safety and Health] that there were only two international labour standards recognized by the International Labour Organization legal system, conventions and recommendations. Although certain conventions had been declared by the Governing Body or Conference to be "fundamental" or "priority" conventions, the terms did not appear either in the text or in the titles of the instruments. Thus, a "framework" convention would likewise not differ from any others in the way its ratification and implementation were monitored by the Organization. However, just as applying the term "fundamental" to some conventions showed that the Organization felt that there was something special about them, using the word "framework" as

* ILC93-PR-18–232-En.doc, paragraph 70.

** *Ibid*., paragraph 75.

proposed in the amendment* would also lead readers to expect an instrument that was different in some way. If the Committee wished to use "framework", Members should be clear as to whether the word implied that the proposed Convention provided a frame for Conventions adopted in the past, a framework on which future Conventions could be built, or a framework to support member States' actions in implementing other Conventions.

(*c*) Provisional record No. 18, ninety-third session, fourth item on the agenda: Occupational safety and health. Report of the Committee on Safety and Health**

Significance of the terms "fundamental rights" and "core conventions"

[. . .] The International Labour Organization (ILO) Legal Adviser explained that the terms [fundamental rights and core conventions] had no agreed legal significance but had been articulated by the Office and approved by the International Labour Conference in 1998, when it adopted the ILO Declaration on Fundamental Principles and Rights at Work. At that time it was understood that the rights and principles contained in the so-called ILO core Conventions were "fundamental" only insofar as their protection was necessary for the enjoyment of the rights contained in the other ILO instruments. However, fundamental human rights had been laid down in other documents such as the Universal Declaration of Human Rights and the International Covenant on Economic, Social and Cultural Rights, rather than in ILO "core Conventions". The right to a safe and healthy working environment, encompassed in the right to life, could be inferred from these other instruments. It would therefore be meaningless to relate the right to a safe and healthy working environment, as proposed in the above sub-amendment,*** to the fundamental principles and rights at work or to so-called ILO core Conventions.

(*d*) Provisional record No. 19, ninety-third session, fifth item on the agenda: Work in the fishing sector (second discussion). Report of the Committee on the Fishing Sector****

Definition of the term "worker"

The Legal Adviser [. . .] explained that the term "worker" had defied definition since the founding of the International Labour Organization in 1919. While there was as yet no definitive answer, elements of a definition could be inferred from an examination of inter-

* The statement by the Legal Adviser relates to a proposed amendment to insert the words "subtitled Framework Convention" after the word "Convention" in the statement of the form of the proposed instrument. (See paragraph 74 of the provisional record No. 18.)

** ILC93-PR-18–232-En.doc, paragraph 283.

*** The statement by the Legal Adviser relates to a proposed sub-subamendment to refer to "a right to a safe and healthy working environment" instead of "a right to life" in the conclusions contained in the report *Promotional framework for occupational safety and health*, prepared by the Office for a first discussion of the fourth item on the agenda of the Conference: "Occupational Safety and Health—Development of a new instrument establishing a promotional framework in this area". (See paragraphs 282 and 283 of the provisional record No. 18.)

**** ILC93-PR-19–234-En.doc, paragraph 573.

national labour conventions. Although unstated, the notion of a "waged" or "salaried" person was often implicit. In the Discrimination (Employment and Occupation) Convention, 1958 (No. 111),* however, the concept of "worker" had been extended beyond a person who earns a wage or salary to encompass any person who works, even including an employer. In the current draft Convention [draft Convention concerning Work in the Fishing Sector], in the absence of a definition, the concept of worker would include not only waged workers, but also independent or self-employed fishers, who might be covered by their country's social security system, which applied to a wide range of people.

(*e*) Provisional record No. 19, ninety-third session, fifth item on the agenda: Work in the fishing sector (second discussion). Report of the Committee on the Fishing Sector**

Impact of the adoption of a new convention on other international labour standards

The Chairperson invited the Legal Adviser to shed light on the impact of the adoption of the new Convention [draft Convention concerning Work in the Fishing Sector] under discussion on the status of other international labour standards related to the fishing sector.

The Legal Adviser noted that the Preamble of the draft Convention mentioned the need to revise the seven international instruments adopted specifically for the fishing sector to bring them up to date. Preambular paragraphs had no mandatory force, however. Should the Committee wish to decide that some or all of the Conventions listed in the Preamble were to be considered revised by the draft Convention, a provision to that effect would need to appear within the body of the Convention. The revised Conventions would be closed to further ratification once the new Convention came into force, although they would remain binding on those members that had previously ratified them and did not ratify the new Convention. Only the new Convention would be open to ratification. The Committee would need to provide a clear indication as to which of the earlier Conventions had been revised by the new Convention and which, if any, were to remain open to ratification.

[. . .] the Legal Adviser explained that the ratification of the new Convention would also entail automatic denunciation of the revised Convention(s) by the ratifying member, unless the Committee wished to have a clause that provided otherwise included in the new Convention. The Drafting Committee would need clear guidance from the Committee on whether or not the new Convention revised any or all of the earlier Conventions and whether the ratification of the new Convention would entail the automatic denunciation of the revised Conventions.

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* Convention (No. 111) concerning discrimination in respect of employment and occupation, United Nations, *Treaty Series*, vol. 362, p. 31.

** ILC93-PR-19–234-En.doc, paragraphs 650 to 652.

2. United Nations Industrial Development Organization

(Submitted by the Legal Adviser of the United Nations Industrial Development Organization)

(*a*) Interoffice memorandum re: Tax exempt status of the United Nations Industrial Development Organization in a State

APPLICABLE PROVISIONS REGARDING PRIVILEGES AND IMMUNITIES IN THE ABSENCE OF A GOVERNMENT DECLARATION ACCEPTING THE APPLICATION OF STANDARD BASIC COOPERATION AGREEMENTS—CONVENTION ON THE PRIVILEGES AND IMMUNITIES OF THE UNITED NATIONS, 1946[*]—CONSTITUTION OF THE UNITED NATIONS INDUSTRIAL DEVELOPMENT ORGANIZATION (UNIDO)[**]

Reference is made to the email message of [name] dated [. . .] requesting advice as to the following issue. A UNIDO project [number] funded by an institute in [State] to be executed both in [State] and [State (city)] is requested to pay taxes (26 per cent) for contributions made in [State]. The email of [name] however did not indicate in what respect such taxes were claimed (import of equipment, publications, services, etc.).

Background information: the legal framework governing project implementation—including issues relating to privileges and immunities of the executing agency—is contained in the Standard Basic Cooperation Agreements (SBCA) signed by most countries either with the United Nations Development Programme (UNDP) or directly with UNIDO. When the SBCA has only been signed with UNDP, the recipient Government is normally requested to sign a Government Declaration accepting the application of the SBCA concluded with UNDP to the project to be executed by UNIDO.

In the present case, the [entity] was the donor but some activities were also to be executed in [State], therefore the Legal Office, during the clearance process of the draft trust fund agreement, requested in a memorandum dated [. . .] to [name], that such declaration be signed by [State]. This issue was reiterated in another memorandum to him dated [. . .]. However, the Government Declaration was not among the documents submitted to the Legal Office. It is also worth mentioning that the draft trust fund agreement did not get the clearance from this Office (last two memoranda to [name] dated [. . .]. All memoranda referred to in this paragraph are attached for ease of reference.[***]

Notwithstanding, the absence of the Declaration rendering the normal legal framework governing the execution of UNIDO projects inoperative, does not mean that UNIDO is deprived from the basic privileges and immunities. In this context, two international treaties to which [State] is a party apply: (1) the Convention on the Privileges and Immunities of the United Nations to which [State] acceded on [date], and (2) the UNIDO Constitution. These documents contain the following provisions.

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

[**] A/CONF.90/19.

[***] The memoranda are not reproduced herein.

Convention on the Privileges and Immunities of the United Nations
Sections 7 and 8:

Section 7:

"The United Nations, its assets, income and other property shall be:

(*a*) Exempt from all direct taxes; it is understood, however, that the United Nations will not claim exemption from taxes which are, in fact, no more than charges for public utility services;

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

(*c*) Exempt from customs duties and prohibitions and restrictions in imports and exports in respect of its publications."

Section 8:

"While the United Nations will not, as a general rule, claim exemption from excise duties and from taxes on the sale of movable and immovable property which form part of the price to be paid, nevertheless when the United Nations is making important purchases for official use of property on which such duties and taxes have been charged or are chargeable, Members will, whenever possible, make appropriate administrative arrangements for the remission or return of the amount of duty or tax."

UNIDO Constitution, article 21, legal capacity, privileges and immunities:

"1. The Organization shall enjoy in the territory of each of its Members such legal capacity and such privileges and immunities as are necessary for the exercise of its functions and for the fulfilment of its objectives. . . .

2. The legal capacity, privileges and immunities referred to in paragraph 1 shall:

(*a*) . . .

(*b*) 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, unless such State notifies the Depositary on depositing its instruments of ratification, acceptance, approval or accession that it will not apply this Convention to the Organization; the Convention on the Privileges and Immunities of the United Nations shall cease to apply to the Organization thirty days after such State has so notified the Depositary;

(*c*) . . ."

In the absence of a Government Declaration but in view of [State's] accession to the Convention on the Privileges and Immunities of the United Nations, on [date], and in the absence of any notification as provided for in article 21 (b) of the Constitution, UNIDO should be granted all necessary privileges including tax exemptions in the territory of [State].

In view of the above, I would suggest that a letter be prepared to the Ministry of Foreign Affairs of [State] requesting that the above information be provided to relevant

authorities so as to obtain (1) exemption of the concerned taxes, and (2) reimbursement of the taxes already paid by the project. Legal Services could review a draft.

(*b*) Letter re: Possible amendments to the Statute and Rules of the Administrative Tribunal of the International Labour Organization

Proposed amendments to the Statute and Rules of the Administrative Tribunal of the International Labour Organization—Staff associations standing before the Administrative Tribunal—Right to intervention—*Amicus curiae* briefs—Tribunal's discretion to hold oral proceedings

I refer to your letters of [dates] on the subject of possible amendments to the Statute and Rules of the Administrative Tribunal of the International Labour Organization (ILOAT). The principal proposal concerns the ILOAT jurisdiction over claims filed by a staff association where a right of the association has allegedly been infringed. I regret that I was not able to reply earlier to your letter of [date], because we required more time to discuss the matter internally. I would note, however, that I discussed this matter with your Deputy at the [date] meeting of United Nations Legal Advisers in [city]. In the light of your most recent letter, I take this additional opportunity to offer the UNIDO views on the subject.

In our letter of [date], we echoed the reservations raised by other organizations to the proposed amendments and expressed the view that the International Labour Office should continue the consultation process in order to reach consensus on a text. At that time, besides the proposal to give a staff association a direct right of action to defend its own rights, there was also a "class action" proposal to give a direct right of action to a staff association in cases involving decisions of a regulatory nature affecting all or a certain category or categories of staff members. In your letter of [date], you submitted draft amendments to the Statute of ILOAT that concern solely the former proposal. We agree with the decision to set aside the latter proposal and therefore concentrate our views on the proposal to give standing to a staff association in respect of a claim alleging the infringement of a right of the association recognized by the organization's staff regulations and rules.

First, and foremost, we are concerned that additional litigation will result if the proposed amendments are implemented. The fact that, under the current proposal, it will be up to each individual organization to amend its staff regulations and rules to allow a staff association the right to file a claim does not, alone, sufficiently address this concern. It is anticipated that the organization's staff association will apply continuous pressure on the administration until the necessary reforms to the staff regulations and rules are implemented. We believe, therefore, that it is not advisable to amend articles II and VII of the ILOAT Statute, as currently proposed, unless an amendment to article IX of the Statute is *concurrently* made so that the expenses occasioned by the staff association's complaint are borne in equal fashion between the organization and the staff association.

Second, we are of the opinion that an award of costs to an organization that successfully defends a complaint brought by its staff association should also be contemplated. Currently, an adverse award of costs may be imposed, at the ILOAT discretion, where an individual staff member's complaint is tantamount to an abuse of process. See ILOAT

Judgment No. 2211.* The "abuse of process" standard is high because ILOAT is mindful of the dissuasive and chilling effect that an adverse award of costs has on individual staff members. However, we believe this standard to be too high in the case of staff associations. Since staff associations receive dues from staff members who choose to join, the financial risk involved in filing a complaint is not the same as in the case of an individual staff member. We would welcome the views of ILOAT on this idea prior to endorsing the current proposal to amend the ILOAT Statute.

Third, it is our view that the proposed amendments to the Statute of ILOAT, although in principle limited to cases involving a direct infringement of a staff association's rights under the organization's regulations and rules, will, nevertheless, result in litigation on administrative decisions of a regulatory nature affecting all or a certain category or categories of staff members. As evident from the relevant regulations and rules of UNIDO [. . .], the staff association's representative body (the UNIDO Staff Council) is entitled to effective participation in identifying, examining and resolving issues relating to staff welfare, including conditions of work, general conditions of life and other matters of personnel policy. Therefore, although under the current proposal the staff association will not have standing to file a claim on behalf of staff members affected by an administrative decision of a regulatory nature, it will, nevertheless have standing to challenge such a decision on the grounds that it was taken in breach of the staff association's right of "effective participation". If the ILOAT remedy in such instances is to overturn the administrative decision, then the current proposal to amend the ILOAT Statute will have the same effect as the previous "class action" proposal that has now been set aside. We would, accordingly, welcome the views of ILOAT on the question of the appropriate remedy in cases where a staff association challenges a decision of a regulatory nature on the grounds that its right of "effective participation" has been infringed.

Finally, if it is possible I would kindly request that you send me copies of the responses you have received from the other organizations who have accepted the jurisdiction of ILOAT in connection with the proposed amendments to the Statute as mentioned in footnote [. . .]. If additional responses are submitted in reply to your letter of [date], I would appreciate also receiving a copy of such responses. Feel free to circulate this letter among the Legal Advisers of the other organizations as you see fit.

Your letters also request our views on additional proposals, i.e., concerning a staff association's right of intervention, the possibility of allowing a staff association to file an *amicus curiae* brief, and the ILOAT discretion to hold oral proceedings if so requested by a party. We share below our observations in respect of these proposals.

Right of intervention to another staff association of the same organization

Although UNIDO at present only has one staff association, we would think that the above-mentioned concerns should apply with equal force in respect of the additional proposal to give a right of intervention by representative staff associations with identical interests in cases of direct right of action by any other association recognized by the same organization.

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* *Judgment No. 2211 (3 February 2003):J. M.-E.* v. *the European Patent Organization.*

Amicus curiae briefs submitted by a staff association

You ask for our views on the possibility for ILOAT to receive, at its discretion, observations in the nature of *amicus curiae,* submitted by representative staff associations in matters involving decisions of a regulatory nature which may affect the staff as a whole or a specific category thereof. In particular, you ask for our views on the following issues: (a) who could initiate such requests other than ILOAT; (b) at which procedural stage(s) such a request could be made and observations could be submitted; (c) what form such observations could take; (d) how the parties could express their views; and (e) what the role of the Registrar of ILOAT would be in communicating among all concerned. If accepted, this proposal would involve modifications to the ILOAT Rules.

In respect of (a), (b) and (e), it is our view that an *amicus* brief by a staff association may be submitted only on the condition that it brings to the attention of ILOAT a relevant matter not already brought to its attention by the complainant and which concerns the entire staff or a specific category thereof, and, absent a request from ILOAT, it is accompanied by the written consent of all the parties. Where the necessary consent has not been obtained, leave to file an *amicus* brief should be submitted by the staff association to ILOAT, with copies also sent by the staff association to the parties. The request should state in a concise and summary way the necessity for filing an *amicus* brief, and the party opposing the request should be given an opportunity to comment. If ILOAT agrees with the staff association's request to file an *amicus* brief (or if the prior written consent of the parties had been obtained), then the *amicus* brief should be filed within the same time as allowed for the respondent's reply to the complaint, with copies also sent by the staff association to the parties. This procedure would limit the role of the Registrar of ILOAT to communicating the ILOAT decision on the request for leave to file an *amicus* brief to the parties and the staff association.

In respect of (c) and (d), we believe that the *amicus* brief should be short and strictly limited to the subject matter of the complaint. The respondent organization should be permitted to address the matters raised in the *amicus* brief in its surrejoinder. Unless requested by ILOAT, the staff association may not submit an *amicus* brief in response to the respondent's reply.

ILOAT discretion to hold oral proceedings if requested by a party

An amendment to article V of the ILOAT Statute has been proposed to make it clear that ILOAT has the discretion to hold oral proceedings if so requested by one of the parties. It is our understanding that the amendment only clarifies a prerogative of ILOAT and, as such, we have no comments in respect of this proposal.

. . .

(*c*) Internal e-mail message re: Scope of decision-making authority of a Director-General elect

Decision-making authority of a Director-General elect

In the course of our brief meeting last evening, you asked for my advice on the scope of decision-making authority of a Director-General elect, i.e., a person who has been rec-

ommended by the Industrial Development Board (IDB) to the General Conference for the post of Director-General.

I wish to confirm the tentative views I conveyed to you at that meeting, i.e., the legal framework of UNIDO does not confer any decision-making authority upon a Director-General elect between the session of IDB that makes a recommendation to the General Conference and the session of the General Conference that considers the recommendation of IDB. If a Director-General elect is already a staff member of UNIDO, he is subject to the authority of the incumbent Director-General and is bound by the terms of his employment contract as long as (1) the terms of the contract of the incumbent Director-General have not expired; (2) the General Conference has not adopted the recommendation of IDB; and (3) the employment contract attached to the General Conference decision has not been signed by the Director-General elect.

For your information, I have also copied some relevant provisions of the Constitution as well as the Staff Regulations of UNIDO which shed light on the scope of authority of an incumbent Director-General and staff who are administered by him.

Attachment

Relevant provisions of the Constitution as well as the Staff Regulations of UNIDO

1. The Constitution of UNIDO

Article 11 (Secretariat)

. . .

2. The Director-General shall be appointed by the Conference upon recommendation of the Board for a period of four years. He may be reappointed for a further term of four years, after which he shall not be eligible for reappointment.

3. The Director-General shall be the chief administrative officer of the Organization. Subject to general or specific directives of the Conference or the Board, the Director-General shall have the over-all responsibility and authority to direct the work of the Organization. Under the authority of and subject to the control of the Board, the Director-General shall be responsible for the appointment, organization and functioning of the staff.

. . .

5. The staff shall be appointed by the Director-General under regulations to be established by the Conference upon recommendation of the Board. Appointments at the level of Deputy Director-General shall be subject to approval by the Board. The conditions of service of staff shall conform as far as possible to those of the United Nations common system. The paramount consideration in the employment of the staff and in determining the conditions of service shall be the necessity of securing the highest standards of efficiency, competence and integrity. Due regard shall be paid to the importance of recruiting staff on a wide and equitable geographical basis.

2. Staff Regulations of UNIDO

Regulation 1.9: The oath or declaration shall be made orally by the Director-General at a public meeting of the General Conference. Staff shall make the oath or declaration before the Director-General or his or her authorized representative.

Regulation 3.1: Staff shall be selected and appointed by the Director-General in accordance with the provisions of the Constitution and of the present regulations.

Regulation 3.6: Upon appointment each staff member shall receive a letter of appointment signed by the Director-General or by an official in the name of the Director-General. The letter of appointment shall contain expressly or by reference all the terms and conditions of employment. Samples of letters of appointment will constitute an annex to the Staff Rules.

Regulation 4.1: Staff are subject to the authority of the Director-General and to assignment by him or her to any of the activities or offices of the Organization. They are responsible to him or her in the exercise of their functions. The Director-General shall establish a normal work week.

(*d*) Internal e-mail message regarding correction of an error in the text of an exchange of letters of [2005]

Correction of factual error in an exchange of letters—Article 79 of the Vienna Convention on the Law of Treaties, 1969*—Corrections to original letters and in copies thereof

I refer to your e-mails of [dates] concerning the correction of a factual error in the texts of the exchange of letters of [2005] (the EoL) extending the duration of UNIDO-[member State] Agreement regarding the Establishment of the [Centre] in [member State] (the Agreement). In your e-mail of [date], you inform me that the letter of [date] from the Permanent Representative of [member State] refers to article VII, paragraph 5, instead of article VII, paragraph 4, of the Agreement (the "error"). I recall that article VII, paragraph 5, relates to annual review of activities of the [Centre] and article VII, paragraph 4, relates to duration of the Agreement and its possible extension. You have asked for my advice on the following issues:

(*a*) Is it possible to correct the error in the texts of the EoL by hand which would alleviate the need for conclusion of a new exchange of letters which may otherwise be bureaucratic and time consuming?

(*b*) If my answer to the above is in the affirmative, whether the correction should be made in the original letters or in their copies?

I conveyed my tentative answers to the above questions over the phone to [name] on [date]. As you were away on leave, I promised to send an e-mail or memo confirming my answers.

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* United Nations, *Treaty Series*, vol. 1155, p. 331.

As the EoL constitutes an Agreement in accordance with the Vienna Convention on the Law of Treaties of 1969 (the Convention), the correction of the error can be done on the basis of paragraph 1 of article 79 of the Convention which reads:

> Article 79 (Correction of errors in texts or in certified copies of treaties)
>
> 1. Where, after the authentication of the text of a treaty, the signatory States and the contracting States are agreed that it contains an error, the error shall, unless they decide upon some other means of correction, be corrected:
>
> (*a*) by having the appropriate correction made in the text and causing the correction to be initialled by duly authorized representatives;
>
> (*b*) by executing or exchanging an instrument or instruments setting out the correction which it has been agreed to make; or
>
> (*c*) by executing a corrected text of the whole treaty by the same procedure as in the case of the original text.

The reference to article VII, paragraph 5, of the Agreement in the text of the original EoL could thus be replaced by a reference to article VII, paragraph 4, of the same Agreement in accordance with paragraph 1 (a) of article 79 of the Convention. The correction should be initialled by the Director-General of UNIDO and the Permanent Representative of [member State] to UNIDO or their duly authorized representatives.

I therefore return the original of the letter of [date] from the Permanent Mission of [member State]. Once the error has been corrected in the originals of the letters of [dates], you may return the original of the letter of [date] to the Legal Service with a copy of the corrected letter of [date] from the Director-General of UNIDO.

(*e*) Note verbale to the Permanent Mission of [member State] relating to United Nations Industrial Development Organization officials' tax exemption on salaries and emoluments

Tax exemption on salaries and emoluments of United Nations Industrial Development Organization officials—Consideration of exempt income in the rate of taxation on non-exempt income—Convention on the Privileges and Immunities of the Specialized Agencies, 1947[*]—Convention on the Privileges and Immunities of the United Nations, 1946[**]

The Secretariat of the United Nations Industrial Development Organization (UNIDO) presents its compliments to the Permanent Mission of [member State] and has the honour to refer to a fax from the [revenue office] dated [. . .] addressed to an official of the Organization, [name], in respect of [her] [year] tax declaration. [Name] joined UNIDO effective [date].

[Name] made a statement by which [she] indicated that an employee of the [revenue office], requested by fax that [she] provide information about [her] income received during the period [. . .]. [She] informed [the employee of the revenue office] that [her] income for that period represented salaries from UNIDO that were tax exempt. [The employee of the

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

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

revenue office] accepted the information but explained that "according to the [member State's] fiscal concept of 'progression' the salary earned through [her] work for UNIDO would be added to the remuneration received before from the [member State] Government in order to identify the tax rate to be applied to [her] earnings in [member State]" for the year [. . .].

By the present note the Secretariat of UNIDO would like to express the view that the fiscal authorities' position to take into account the exempt income earned by UNIDO officials who are citizens of [State] in setting the rate of taxation of non-exempt income runs counter to the international obligations of [member State] in regard to UNIDO.

The Convention on the Privileges and Immunities of the Specialized Agencies, to which the Government of [member State] acceded on [date], applies to UNIDO and its officials, in accordance with article 21, paragraph 2 (a), of the Constitution of UNIDO, which reads as follows:

> "2. The legal capacity, privileges and immunities referred to in paragraph 1 shall:
>
> (*a*) In the territory of any Member that has acceded to the Convention on the Privileges and Immunities of the Specialized Agencies in respect of the Organization, be as defined in the standard clauses of that Convention as modified by an annex thereto approved by the Board . . ."

Article VI, section 19 (b), of the Convention on the Privileges and Immunities of the Specialized Agencies states that:

> "Officials of the specialized agencies shall:
>
> . . .
>
> (*b*) Enjoy the same exemptions from taxation in respect of the salaries and emoluments paid to them by the specialized agencies and *on the same conditions as are enjoyed by officials of the United Nations . . . .*" (emphasis supplied)

Officials of the United Nations are exempt from taxation in respect of their salaries paid to them by the United Nations in accordance with section 18 (b) of the Convention on the Privileges and Immunities of the United Nations. It has been the consistent view of the United Nations that the determination of the rate of tax on non-exempt income by taking into account the exempt income from the United Nations is not consistent with a State's obligations under section 18 (b) of the Convention on the Privileges and Immunities of the United Nations.

It may further be observed that there is a well-established practice of the United Nations Secretariat, whereby no distinction is made among the officials of the United Nations based on their nationality or residence. All members of the staff of the United Nations are officials of that Organization and enjoy the same privileges and immunities provided in the Convention on the Privileges and Immunities of the United Nations, with the exception of staff recruited locally and assigned to hourly rates.

For the reasons explained above, it has been the constant position of UNIDO that States party to the Convention on the Privileges and Immunities of the United Nations or that of the specialized agencies may not take into account the tax-exempt salaries of UNIDO officials in establishing tax rates on non-exempt private income. It is pertinent to recall that the rationale of immunity from taxation accorded by the conventions in respect of the salaries and emoluments paid by international organizations is to protect officials

and ensure the independent exercise of their functions as well as to attain equality in the salary treatment for officials of equal rank throughout the entire Organization.

The Permanent Mission of [member State] is, accordingly, requested to convey the position of the Organization to the [revenue office] in order for it to apply the exemptions from taxation in respect of the salaries and emoluments received by the official in question, [name], during the period [. . .], in keeping with section 19 (b) of the Convention on the Privileges and Immunities of the Specialized Agencies.

The Secretariat of the United Nations Industrial Development Organization avails itself of this opportunity to renew to the Permanent Mission of [member State] the assurances of its highest consideration.

(*f*) Note verbale to the Federal Ministry of Foreign Affairs of [member State] relating to United Nations Industrial Development Organization officials' customs privileges

Customs privileges of United Nations Industrial Development Organization officials—Agreements with other international organizations containing more favourable terms or conditions

The Secretariat of the United Nations Industrial Development Organization (UNIDO) presents its compliments to the Federal Ministry of Foreign Affairs of [member State] and has the honour to refer to the briefing concerning the customs privileges of officials of UNIDO, which was held at the Federal Ministry on [date] and to which representatives of the Secretariat were kindly invited.

The Secretariat has the honour to thank the [member State] authorities for the information they have provided regarding proposed new procedures relating to the customs privileges of officials of UNIDO, which were due to take effect from 1 January 2006, and wishes to inform the Federal Ministry that, in the opinion of the Secretariat, the proposed procedures would appear to limit those privileges in so far as they relate to officials who do not enjoy diplomatic status. The Secretariat has regrettably concluded that aspects of the proposed procedures would not be fully consistent with the provisions of section 37 (o) (i) of the Agreement of [1995] between UNIDO and the [member State] regarding the Headquarters of UNIDO, or with established practice in implementing that section, which provides *inter alia* that all officials—regardless of rank—have the right to import for personal use, free of duty and other levies, prohibitions and restrictions on imports, their furniture and effects in one or more separate shipments, and thereafter to import necessary additions to the same. In consequence, the Secretariat would not be in a position to justify the introduction of the proposed procedures to the affected officials.

It has furthermore come to the attention of the Secretariat that, in view of differing formulations in the various headquarters agreements, it is not intended to implement the proposed procedures in respect of every organization based at the [City]. Notwithstanding the foregoing paragraph, therefore, the Secretariat has the honour to recall that, pursuant to section 55 (b) of the Agreement between UNIDO and the Government of [member State], if and to the extent that the Government shall enter into any agreement with any intergovernmental organization containing terms or conditions more favourable to that organization than similar terms or conditions of the Agreement between UNIDO and the

Government, the Government shall extend such favourable terms or conditions to UNIDO, by means of a supplemental agreement.

In light of the above, the Secretariat wishes to affirm its readiness to participate in any further consultations with the Federal Ministry that may be required to ensure continued observance of the provisions of section 37 (o) (i) of the aforementioned Agreement, and, should this become necessary, to negotiate a supplemental agreement with the Government as foreseen in Section 55 (b) of the same Agreement.

The Secretariat of the United Nations Industrial Development Organization avails itself of this opportunity to renew to the Federal Ministry of Foreign Affairs of [member State] the assurances of its highest consideration.