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## FOREWARD

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

Chapters I and II of the present volume — the twenty-sixth of the series — contain legislative texts and treaty provisions relating to the legal status of the United Nations and related intergovernmental organizations. With a few exceptions, the legislative texts and treaty provisions which are included in these two chapters entered into force in 1988. Decisions given in 1988 by international and national tribunals relating to the legal status of the various organizations are found in chapters VII and VIII.

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

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

Finally, the bibliography, which is prepared under the responsibility of the Office of Legal Affairs by the Dag Hammarskjöld Library, lists works and articles of a legal character published in 1988.

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

## ABBREVIATIONS

ECE	Economic Commission for Europe
ESCAP	Economic and Social Commission for Asia and the Pacific
FAO	Food and Agriculture Organization of the United Nations
FICSA	Federation of International Civil Servants' Associations
IAEA	International Atomic Energy Agency
IBRD	International Bank for Reconstruction and Development
ICAO	International Civil Aviation Organization
ICC	International Chamber of Commerce
ICJ	International Court of Justice
ICSC	International Civil Service Commission
ICSID	International Centre for Settlement of Investment Disputes
IFAD	International Fund for Agricultural Development
ILO	International Labour Organization
IMF	International Monetary Fund
IMO	International Maritime Organization
INSTRA	International Research and Training Institute for the Advancement of Women
ITU	International Telecommunication Union
MIGA	Multilateral Investment Guarantee Agency
UNCHS	United Nations Center for Human Settlements (Habitat)
UNCITRAL	United Nations Commission on International Trade Law
UNDP	United Nations Development Programme
UNEF	United Nations Emergency Force
UNEP	United Nations Environment Programme
UNESCO	United Nations Educational, Scientific and Cultural Organization
UNFPA	United Nations Population Fund
UNHCR	Office of the United Nations High Commissioner for Refugees
UNICEF	United Nations Children's Fund
UNIDIR	United Nations Institute for Disarmament Research
UNIDO	United Nations Industrial Development Organization
UNIIMOG	United Nations Iran-Iraq Military Observer Group
UNITAR	United Nations Institute for Training and Research
UNRWA	United Nations Relief and Work Agency for Palestine Refugees in the Near East

UPU	Universal Postal Union
WHO	World Health Organization
WIPO	World Intellectual Property Organization
WMO	World Meteorological Organization



**Part One**

**LEGAL STATUS OF THE UNITED NATIONS  
AND RELATED INTERGOVERNMENTAL  
ORGANIZATIONS**





## Chapter I

# LEGISLATIVE TEXTS CONCERNING THE LEGAL STATUS OF THE UNITED NATIONS AND RELATED INTERGOVERN- MENTAL ORGANIZATIONS

### 1. Canada

#### PRIVILEGES AND IMMUNITIES (INTERNATIONAL ORGANIZATIONS) ACT<sup>1</sup>

UNITED NATIONS INTER-REGIONAL TRAINING COURSE ON TOPONYMY PRIVILEGES  
AND IMMUNITIES ORDER, 1988<sup>2</sup>

P.C. 1988-1250 23 JUNE, 1988

Her Excellency the Governor General in Council, on the recommendation of the Secretary of State for External Affairs, pursuant to section 3 of the Privileges and Immunities (International Organizations) Act, is pleased hereby to make the annexed Order respecting the privileges and immunities in Canada of the participants in the United Nations Inter-regional Training Course on Toponymy.

ORDER RESPECTING THE PRIVILEGES AND IMMUNITIES IN CANADA OF THE PARTICIPANTS  
IN THE UNITED NATIONS INTER-REGIONAL TRAINING COURSE ON TOPONYMY

#### *Short Title*

1. This Order may be cited as the *United Nations Inter-regional Training Course on Toponymy Privileges and Immunities Order, 1988*.

#### *Interpretation*

2. In this Order,

“Convention” means the Convention on the Privileges and Immunities of the United Nations; (*Convention*)<sup>3</sup>

“experts performing missions for the Organization” means governmental or intergovernmental experts who are invited by the Organization to attend the Meeting; (*experts qui accomplissent des missions pour l'organisation*)

“Meeting” means the United Nations Inter-regional Training Course on Toponymy to be held in Quebec City from August 7 to 20, 1988; (*réunion*)

“officials of the Organization” means all persons required to attend the Meeting on behalf of the Organization; (*fonctionnaires de l'organisation*)

“Organization” means the United Nations Department of Technical Cooperation for Development (*organisation*)

### *Privileges and Immunities*

3. (1) During the period beginning on August 1, 1988 and ending on August 28, 1988, the Organization shall have in Canada the privileges and immunities set forth in Article II of the Convention.

(2) During the period beginning on August 1, 1988 and ending on August 28, 1988, officials of the Organization shall have in Canada, to such extent as may be required for the exercise of their functions in Canada in relation to the Meeting, the privileges and immunities set forth in Article V of the Convention.

(3) During the period beginning on August 1, 1988 and ending on August 28, 1988, experts performing missions for the Organization shall have in Canada, to such extent as may be required for the exercise of their functions in Canada in relation to the Meeting, the privileges and immunities set forth in Article VI of the Convention.

#### REGULATORY IMPACT ANALYSIS STATEMENT

(This statement is not part of the Order.)

#### *Description*

The purpose of the Order is to grant to the Department of Technical Cooperation for Development of the United Nations, to such extent as may be required for the exercise of its functions in Canada, the privileges and immunities set forth in Article II of the Convention on the Privileges and Immunities of the United Nations and to grant to participants in the Meeting, to such extent as may be required for the exercise of their functions, privileges and immunities set forth in Articles V and VI of the Convention. The United Nations Inter-regional Training Course on Toponymy will be held in Quebec City from 7 to 20 August, 1988.

The Articles of the Convention provide the Organization with certain privileges and immunities such as immunity from legal process and the inviolability of its archives. They also provide, for the benefit of non-Canadian officials and experts participating in the meeting, privileges and immunities such as immunity from personal arrest or detention, exemption from immigration restrictions, and diplomatic immunities in respect of their personal baggage. The Order will be valid for a limited period commencing August 1 and terminating August 28, 1988. It is required to allow the Government of Canada to perform its responsibilities as the host of the meeting.

#### *Alternatives Considered*

To meet the objective which is to allow the Government of Canada to fulfill its obligations as host of the Conference, there is no alternative but to have this Order.

#### *Consistency with Regulatory Policy and Citizens' Code*

Early notice of this Order was given in the 1988 Federal Regulatory Plan (323-DEA). This Order is consistent with the Regulatory Policy and Citizens' Code.

*Anticipated Impact*

We anticipate no impact on any of the sectors of the Canadian economy.

*Consultation*

The Order follows consultations with the Department of Energy, Mines and Resources and the Privy Council Office Section of the Department of Justice.

*Compliance Mechanism*

The nature of the Order is protective. Therefore, no enforcement is intended in this case.

## 2. Papua New Guinea

### UNITED NATIONS AND SPECIALIZED AGENCIES (PRIVILEGES AND IMMUNITIES) ACT<sup>4</sup>

CHAPTER No. 88.

#### United Nations and Specialized Agencies (Privileges and Immunities)

GENERAL ANNOTATION

*Administration*

As at 13 February 1976 (the date of gazettal of the most comprehensive allocation of responsibilities to Ministers and Departments at about the effective date), while the administration of this Chapter was not vested specifically in any Minister it seems from the determination of the functions of Departments that it came within the responsibility of the Department of Foreign Affairs and Trade.

Accordingly, unless some different intention is clearly indicated, by note or in the text, it seems that references in or in relation to this Chapter to —

“the Minister” — should be read as references to the Minister for Foreign Affairs and Trade;

“the Departmental Head” — should be read as references to the Secretary for Foreign Affairs and Trade;<sup>1</sup>

“the Department” — should be read as references to the Department of Foreign Affairs and Trade.<sup>2</sup>

Being an Act relating to the privileges and immunities of the United Nations and the Specialized Agencies, and for other purposes.

#### PART I. PRIVILEGES AND IMMUNITIES OF THE UNITED NATIONS

##### 1. Interpretation of Part I.

In this Part, “the Convention” means the General Convention on the Privileges and Immunities of the United Nations which was adopted by the General Assembly of the United Nations on 13 February 1946 and a copy of which is set out in Schedule 1.

2. Juridical status of United Nations.

(1) The United Nations —

(a) is a corporation with perpetual succession; and

(b) has the capacity to contract; and

(c) is capable, in its corporate name, of acquiring, holding and disposing of property and of instituting legal proceedings.

(2) All courts, Judges and persons acting judicially shall take judicial notice of the seal of the United Nations affixed to a document and shall presume that it was duly affixed.

3. Privileges and immunities.

The United Nations or a person in relation to whom the Convention applies has the privileges and immunities applicable under the Convention to the United Nations or that person, as the case may be, in Papua New Guinea.

4. Evidence.

A certificate under the hand of the Minister certifying that, on a specified date or during a specified period —

(a) a specified country was a Member of the United Nations; or

(b) a specified body was a principal or subsidiary organ of the United Nations; or

(c) a specified conference was a conference convened by the United Nations; or

(d) a specified person was —

(i) a representative of a Member of the United Nations to an organ of the United Nations or a conference convened by the United Nations; or

(ii) included in the category of officials of the United Nations to which Articles V and VII of the Convention applied; or

(iii) an expert (other than an official coming within the scope of Article V of the Convention) performing a mission for the United Nations,

is evidence of the matter so certified.

PART II. — PRIVILEGES AND IMMUNITIES OF THE SPECIALIZED AGENCIES

5. Interpretation of Part II.

In this Part, unless the contrary intention appears —

“Specialized Agency” means —

- (a) the International Labour Organization; or
- (b) the Food and Agriculture Organization of the United Nations; or
- (c) the International Civil Aviation Organization; or
- (d) the United Nations Educational, Scientific and Cultural Organization; or
- (e) the International Monetary Fund; or
- (f) the International Bank for Reconstruction and Development; or
- (g) the World Health Organization; or
- (h) the Universal Postal Union; or
- (i) the International Telecommunication Union; or
- (j) the World Meteorological Organization; or
- (k) the Inter-Governmental Maritime Consultative Organization; or
- (l) the International Finance Corporation; or
- (m) the International Development Association;

“the Convention” means the Convention, a copy of which is set out in Schedule 2, as modified by the Annexes set out in that Schedule.

6. Juridical status of Specialized Agencies.

- (1) Each Specialized Agency —
  - (a) is a corporation with perpetual succession; and
  - (b) has the capacity to contract; and
  - (c) is capable, in its corporate name, of acquiring, holding and disposing of property and of instituting legal proceedings.
- (2) All courts, Judges and persons acting judicially shall take judicial notice of the seal of a Specialized Agency affixed to a document and shall presume that it was duly affixed.

7. Privileges and immunities.

- (1) Each Specialized Agency and each person in relation to whom the Convention applies has the privileges and immunities applicable under the Convention (other than those referred to in Section 11 of the Convention) to that specialized agency or that person, as the case may be, in Papua New Guinea.
- (2) A Specialized Agency has the right to avail itself, for telegraphic communications sent by it and containing only matters for publication by the press or for broadcasting (including communications addressed to or dispatched from places outside Papua New Guinea), of the reduced rates applicable for the dispatch of press telegrams.

8. Evidence.

A certificate under the hand of the Minister certifying that, on a specified date or during a specified period —

(a) a specified State, country or Government was a Member of a Specialized Agency; or

(b) a specified meeting was a meeting convened by a Specialized Agency or a meeting within the meaning of Section 1(vi) of the Convention; or

(c) a specified person was —

- (i) a representative of a member of a Specialized Agency at a meeting referred to in Paragraph (b); or
- (ii) included in a category of officials of a Specialized Agency to which Articles VI and VIII of the Convention applied; or
- (iii) on the grounds stated in the certificate, a person entitled under the Convention to privileges and immunities applicable under the Convention,

is evidence of the matter so certified.

PART III. MISCELLANEOUS

9. Protection of names, etc.

(1) Except with the consent in writing of the Minister, a person must not —

(a) use the name or an abbreviation of the name of the United Nations or a Specialized Agency in connection with a trade, business, profession, calling or occupation; or

(b) use —

- (i) a seal, emblem or device that is identical with the official seal or emblem of the United Nations or a Specialized Agency; or
- (ii) a seal, emblem or device so nearly resembling the official seal or emblem of the United Nations or a Specialized Agency as to be capable of being mistaken for that seal or emblem; or
- (iii) a seal, emblem or device that is capable of being taken to be the official seal or emblem of the United Nations or a Specialized Agency.

Penalty: A fine not exceeding K100.00.

(2) Where, without the consent in writing of the Minister, the name or an abbreviation of the name of the United Nations or a Specialized Agency, or a seal, emblem or device referred to in Subsection (1)(b) —

(a) is used as, or as part of, the name, seal or emblem of an association; or

(b) is used as, or as part of, the name or emblem of a newspaper or magazine owned by, or published by or on behalf of, an association; or

(c) is used by an association in connection with any activity of the association so as to imply that the association is in any way connected with that organization,

then —

(d) if the association is a corporation — the association; or

(e) if the association is not a corporation — every member of the governing body of the association,

is guilty of an offence.

(3) A person shall not be convicted of an offence against this section in respect of the use of an abbreviation of the name of the United Nations or a Specialized Agency if the use occurred in such circumstances or in relation to such matters as to be unlikely to be taken to imply any connection with the organization, unless the prosecution proves that the use was intended to imply such a connection.

(4) The conviction of a person of an offence against this section in respect of the use of a name, abbreviation of a name, seal, emblem or device does not prevent a further conviction of that person in respect of the use of that name, abbreviation, seal, emblem or device at any time after the first-mentioned conviction.

(5) For the purposes of this section —

(a) any combination of words or letters, or of both words and letters, that is capable of being understood as referring to the United Nations or a Specialized Agency shall be deemed to be an abbreviation of the name of the United Nations or that Specialized Agency, as the case may be; and

(b) if a seal or emblem is declared by regulations made under this Act to be the official seal or emblem of the United Nations or a Specialized Agency, that seal or emblem shall be taken to be the official seal or emblem of the United Nations or that Specialized Agency, as the case may be.

(6) Proceedings under this section shall not be instituted without the consent in writing of the Minister.<sup>1</sup>

10. Regulations.

The Head of State acting on advice may make regulations, not inconsistent with this Act, prescribing all matters that by this Act are required or permitted to be prescribed, or that are necessary or convenient to be prescribed for carrying out or giving effect to this Act.

SCHEDULES

SCHEDULE 1

CONVENTION ON THE PRIVILEGES AND IMMUNITIES OF THE UNITED NATIONS.

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SCHEDULE 2

CONVENTION ON THE PRIVILEGES AND IMMUNITIES OF THE SPECIALIZED AGENCIES.

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NOTES

<sup>1</sup>Statutes of Canada.

<sup>2</sup>See *Canada Gazette*, part II, vol. 122, No. 14.

<sup>3</sup>United Nations, *Treaty Series*, vol. 1, p. 15.

<sup>4</sup>United Nations Act enacted by the Government of Papua New Guinea, and provided by the United Nations Permanent Mission of Papua New Guinea.

<sup>5</sup>United Nations, *Treaty Series*, vol. 33, p. 261.



## Chapter II

### TREATY PROVISIONS CONCERNING THE LEGAL STATUS OF THE UNITED NATIONS AND RELATED INTERGOVERN- MENTAL ORGANIZATIONS

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

1. CONVENTION ON THE PRIVILEGES AND IMMUNITIES OF  
THE UNITED NATIONS.<sup>1</sup> APPROVED BY THE  
GENERAL ASSEMBLY OF THE UNITED NATIONS  
ON 13 FEBRUARY 1946

The following States became parties to the Convention:<sup>2</sup>

<i>State</i>	<i>Date of receipt of instrument of accession or succession</i>
Antigua and Barbuda	25 October 1988
Viet Nam	6 February 1988

There are 124 States parties to the Convention.<sup>3</sup>

#### 2. AGREEMENTS RELATING TO INSTALLATIONS AND MEETINGS

- (a) Exchange of letters constituting an agreement between the United Nations (Economic and Social Commission for Asia and the Pacific) and the Government of Indonesia concerning the arrangements for the forty-fourth session of the Economic and Social Commission for Asia and the Pacific, to be held at Jakarta from 11 to 20 April 1988. Bangkok, 29 January 1988<sup>4</sup>

LETTER FROM THE ECONOMIC AND SOCIAL COMMISSION FOR ASIA AND THE PACIFIC

29 January 1988

I have the honour to refer to the note verbale from the Indonesian Embassy in Bangkok dated 10 September 1987, No. 0962/03/14/IX/87/EKO, officially extending the invitation of the Government of Indonesia to host the forty-fourth Session of ESCAP in Jakarta from 11 to 20 April 1988.

In this connection, and further to the discussions that have taken place in Bangkok and in Jakarta, I have the honour to seek the Government's confirmation of the following arrangements for the forty-fourth session of ESCAP.

## I

The Government of Indonesia will, at its expense, arrange for the following:

1. Appointment of a senior official to act as the Chairman of the Organizing Committee and another official as the Government focal point, and counterpart staff to assist the secretariat of ESCAP in advance planning and in-session service for the session;
2. Appropriate conference rooms with sound interpretation facilities for meetings of (i) the plenary session, and (ii) two Committees of the Whole and appropriate additional rooms for delegates' meetings. (The total number of participants is estimated at 700-750);
3. Office space for the use of ESCAP substantive, administrative, language and information staff;
4. Travel Bangkok-Jakarta-Bangkok and subsistence while in Jakarta at prevailing United Nations rate for ESCAP essential staff required to service the Session;
5. The additional cost difference of travel and subsistence between Bangkok and Jakarta for external language staff hired from New York, Geneva or other duty stations;
6. Freight charges from Bangkok to Jakarta and return, and customs clearance in Jakarta for shipments containing documents, office equipment, conference equipment, documentation and supplies, reference materials, stationery and reproduction supplies, together with related expenses and appropriate storage facilities;
7. Transportation in Jakarta for ESCAP staff while engaged on official United Nations business;
8. Local provision of administrative support personnel, including: secretaries/stenographers, typists, conference assistants, document clerks, mimeograph machine operators/collators, messengers, helpers, etc.;
9. Local provision of office equipment including WANG word processors, dictaphones, transcribers, typewriters and reproduction equipment such as offset duplicators, master plate makers, collating machines, guillotine, photocopyers and others that may be required;
10. Telephone, telex and postal services;
11. Sufficient and appropriate hotel accommodation for participants and ESCAP staff in Jakarta (to be paid for by its occupants);
12. Apart from the travel costs, subsistence and the freight charges and related contingency expenses set out in points 4, 5 and 6 above, details of all the other points are already included in the administrative plan for the forty-fourth session of ESCAP mutually agreed upon by the Government of Indonesia and ESCAP.

## II

The secretariat of ESCAP will, without cost to the Government of Indonesia, arrange for the following:

1. ESCAP invitations and ESCAP communications with participating countries/organizations concerning substantive matters;
2. Notification to the Government of Indonesia of the names and countries/organizations of the participants as soon as such information is received;
3. Coordination and supervision of all ESCAP secretariat services and arrangements, within and outside Indonesia, for the session.

## III

1. The provisions of the Convention on the Privileges and Immunities of the United Nations and the Convention on the Privileges and Immunities of the Specialized Agencies will be applicable in respect of the session. Representatives of States Members of the United Nations or of the specialized agencies and officials of the United Nations or of the specialized agencies shall enjoy the privileges and immunities specified in those conventions, and other participants invited by the United Nations to the session shall enjoy the privileges and immunities accorded to experts on mission for the United Nations by Article VI of the Convention on Privileges and Immunities of the United Nations, and shall comply with other related provisions of the Convention.

2. In addition, the Government of Indonesia will accord all participants to the session any other facilities as are necessary for the independent exercise of their function in connection with the session.

3. The Government of Indonesia will facilitate the entry into and exit from Indonesia of all participants invited by the United Nations. Visas and entry permits, where required, will be granted as speedily as possible and free of charge.

4. The Government of Indonesia shall be responsible for dealing with any action, claim or other demand arising out of:

(a) Injury to persons or damage to property in the premises referred to in paragraphs 2 and 3 of section I above;

(b) Injury to persons or damage to property occurring during use of the transportation referred to in paragraph 7 of section I above;

(c) Recruitment for the session of the personnel referred to in paragraphs 1 and 8 of section I above;

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

5. Any dispute concerning the interpretation or implementation of this Agreement shall be settled by negotiation and consultation between the parties.

I further propose that upon receipt of your reply in confirmation of the above, this letter and your reply be regarded as constituting an Agreement between the

United Nations and the Government of Indonesia regarding the provision of host facilities by the Government of Indonesia for the forty-fourth session of ESCAP.

(Signed) S. A. M. S. KIBRIA  
Executive Secretary

LETTER FROM THE EMBASSY OF INDONESIA

29 January 1988

I have the honour to acknowledge receipt of your letter, A.C/201 44th Session, of today's date, concerning the arrangements for the forty-fourth session of ESCAP to be hosted by my Government in Jakarta from 11 to 20 April 1988.

I have the further honour to inform you that the Government of Indonesia confirms and accepts all the arrangements proposed in your letter, which together with this reply shall be regarded as constituting an Agreement between the United Nations and the Government of Indonesia regarding the provision of host facilities by the Government of Indonesia for the forty-fourth session of ESCAP.

(Signed) Air Marshal Aried RIYADI

Ambassador Extraordinary and Plenipotentiary and Permanent Representative  
of Indonesia to ESCAP

(b) Agreement between the United Nations and the Government of Nepal regarding the establishment in Kathmandu of the United Nations Regional Centre for Peace and Disarmament in Asia (with Memorandum of Understanding). Signed at New York on 8 June 1988<sup>5</sup>

*The Government of Nepal and the United Nations,*

Considering that His Majesty's Government of Nepal (hereinafter referred to as "the Government") and the United Nations, in accordance with General Assembly resolution 42/39 D of 30 November 1987, have agreed to establish in Kathmandu, Nepal, the United Nations Regional Centre for Peace and Disarmament in Asia (hereinafter referred to as "the Centre"),

Considering that the Government undertakes to assist the United Nations in securing all the necessary facilities for the establishment and functioning of the Centre,

Considering that the Convention on the Privileges and Immunities of the United Nations adopted by the General Assembly of the United Nations on 13 February 1946 (hereinafter referred to as "the Convention"), applies to the field offices which are an integral part of the Secretariat of the United Nations,

Considering that it is desirable to conclude an agreement to regulate questions arising as a result of the establishment of the Centre in Kathmandu,

*Have agreed as follows:*

*Article I*

ESTABLISHMENT OF THE CENTRE

*Section 1*

The United Nations Centre for Peace and Disarmament in Asia shall be established in Kathmandu, Nepal, to carry out the functions assigned to it by the General Assembly and the Secretary-General, within the framework of the Department for Disarmament Affairs.

*Article II*

STATUS OF THE CENTRE

*Section 2*

The premises of the Centre and the residence of the Director shall be inviolable.

*Section 3*

The appropriate Nepalese authorities shall exercise due diligence to ensure the security and protection of the premises of the Centre and its staff.

*Section 4*

The appropriate Nepalese authorities shall exercise their respective powers to ensure that the Centre shall be supplied with the necessary public services on equitable terms. The Centre shall enjoy treatment for the use of telephone, radio-telegraph and mail communication facilities, not less favourable than that normally accorded and extended to diplomatic missions.

*Article III*

FACILITIES AND SERVICES

*Section 5*

In addition to the provisions made in operative paragraph 1 of resolution 42/39 D, the Government shall make an annual contribution toward the maintenance and operation of the Centre. Such contribution shall be stipulated in the memorandum of understanding between the Government and the United Nations which shall form part of this Agreement.

## *Article IV*

### OFFICIALS OF THE CENTRE

#### *Section 6*

Officials of the Centre shall be entitled to the privileges and immunities provided for in Section 18 of the Convention on the Privileges and Immunities of the United Nations to which Nepal is a Party.

#### *Section 7*

In addition to the privileges and immunities referred to in Section 6 above, the Director of the Centre shall enjoy, in respect of himself, his spouse, his relatives dependent on him, the privileges and immunities, exemptions and facilities normally accorded to envoys of international organizations of comparable rank. He shall for this purpose be included in the Diplomatic list of the Ministry of Foreign Affairs of Nepal.

#### *Section 8*

The privileges and immunities referred to in this Agreement are granted solely for the purpose of carrying out effectively the aims and purposes of the United Nations. The Secretary-General of the United Nations may waive the immunity of any staff member whenever, in his opinion, such immunity would impede the course of justice and can be waived without prejudice to the interests of the United Nations.

## *Article V*

### GENERAL PROVISIONS

#### *Section 9*

The provisions of the Convention, to which Nepal acceded on 28 September 1965, shall fully apply to the Centre. The provisions of the present Agreement shall, where possible, be treated as complementary to those of the Convention, so that both provisions of the Agreement and the Convention shall be applicable and neither shall restrict the effect of the other.

#### *Section 10*

This Agreement shall be construed in the light of its primary purpose of enabling the Centre in Nepal fully and efficiently to discharge its responsibilities and fulfil its purpose.

#### *Section 11*

Consultation with respect to modifications of this Agreement shall be entered into at the request of either party; any such modifications shall be by mutual consent.

*Section 12*

This Agreement shall cease to be in force:

- (i) By mutual consent of both parties; or
- (ii) If the Centre is moved from the territory of Nepal, except for such provisions as may be applicable in connection with the termination of the operations of the Centre in Nepal and the disposal of its property therein.

*Section 13*

This Agreement shall come into force upon signature by both parties.

- (c) Agreement between the United Nations and the Government of Lesotho regarding the arrangements for the Regional Seminar on the United Nations Commission on International Trade Law Texts and International Trade Law, to be held at Maseru from 25 to 30 July 1988. Signed at New York on 14 July 1988<sup>6</sup>

*Article X*

LIABILITY

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

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

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

(c) The employment for the Seminar of the personnel provided by the Government of Lesotho under article VIII.

2. The Government of Lesotho shall indemnify and hold harmless the United Nations and its personnel in respect of any such action, claim, or other demand except if it is agreed by the parties hereto that such injury, loss or damage was caused by gross negligence or wilful misconduct of the United Nations personnel.

## Article XI

### PRIVILEGES AND IMMUNITIES

1. The Convention on the Privileges and Immunities of the United Nations shall be applicable in respect of the Seminar. The participants invited by the United Nations shall enjoy the privileges and immunities accorded to experts on mission for the United Nations by article VI of the Convention. Officials of the United Nations participating in or performing functions in connection with the Seminar shall enjoy the privileges and immunities provided under articles V and VII of the Convention. Officials of the specialized agencies participating in the Seminar shall be accorded the privileges and immunities provided under articles VI and VIII of the Convention on the Privileges and Immunities of the Specialized Agencies.

2. Without prejudice to the provisions of the Convention on the Privileges and Immunities of the United Nations, all participants and persons performing functions in connection with the Seminar shall enjoy such privileges and immunities, facilities and courtesies as are necessary for the independent exercise of their functions in connection with the Seminar. Personnel provided by the Government of Lesotho pursuant to this Agreement shall enjoy immunity from legal process in respect of words spoken or written and any act performed by them in their official capacity in connection with the Seminar.

3. The Government of Lesotho undertakes, subject to existing Government policy, to grant free of charge and without unnecessary delay, entry and exit visas to all the participants and all persons performing functions in connection with the Seminar.

4. The Government of Lesotho shall allow the temporary importation, tax-free and duty-free, of all equipment, including technical equipment accompanying representatives of information media, and shall waive import duties and taxes on supplies necessary for the Seminar. It shall issue without delay any necessary import and export permits for this purpose.

(d) Exchange of letters constituting an agreement between the United Nations and the Government of the Islamic Republic of Iran establishing the United Nations Iran-Iraq Military Observer Group. New York, 19 August 1988, and Tehran, 28 March 1989<sup>7</sup>

### LETTER FROM THE UNITED NATIONS

19 August 1988

I have the honour to refer to Security Council resolution 619 (1988) of 9 August 1988 by which the Security Council requested the Secretary-General to establish the United Nations Iran-Iraq Military Observer Group (hereinafter referred to as "UNIIMOG") along the Iran-Iraq border as defined by him in his report and statements to the Security Council.



In order to facilitate the fulfilment of UNIIMOG's purposes, I propose that your Government, in implementation of its obligations under Article 105 of the Charter of the United Nations, extend to UNIIMOG, its property and assets the status, privileges and immunities provided in the Convention on the Privileges and Immunities of the United Nations to which Iran acceded on 8 May 1947. Furthermore, in view of the special importance and difficult nature of the functions which UNIIMOG will perform, I would propose that your Government extend to the Chief Military Observer the privileges and immunities, exemptions and facilities which are enjoyed by diplomatic envoys in accordance with international law, and extend to the military personnel serving under the Chief Military Observer the same privileges and immunities accorded to experts performing missions for the United Nations under article VI of the Convention.

The privileges and immunities necessary for the fulfilment of the functions of UNIIMOG also include freedom of entry and exit without delay or hindrance, of property, supplies, equipment and spare parts; freedom of movement on the land, sea and in the air of personnel, equipment and means of transport; the acceptance of the United Nations registration of means of transport (on land, sea and in the air) and the United Nations licensing of the operators thereof; the right to fly the United Nations flag on premises, observation posts, vehicles, aircraft and vessels; and the right of unrestricted communication by radio or by satellite, within the United Nations radio and satellite network, as well as by telephone, telegraph or other means.

It is understood that the Government of Iran shall provide at its own expense, in agreement with the Chief Military Observer, all such premises as may be necessary for the accommodation and fulfilment of the functions of UNIIMOG, including office space and areas for observation posts and field centres. All such premises shall be inviolable and subject to the exclusive control and authority of the Chief Military Observer. Without prejudice to the use by the United Nations of its own means of transport and communication, it is understood that your Government shall, upon request of the Chief Military Observer, provide any necessary means of transport and communication.

If these proposals meet with our approval, I would suggest that this letter and your reply should constitute an agreement between the United Nations and Iran to take effect as of 0300 GMT on 20 August 1988.

(Signed) JAVIER PEREZ DE CUELLAR  
Secretary-General

LETTER FROM THE MINISTER FOR FOREIGN AFFAIRS OF THE  
ISLAMIC REPUBLIC OF IRAN

28 March 1989

With reference to the letter of 19 August 1988 (corresponding to 28 Mordad 1367) and with regard to Article 105 of the Charter of the United Nations, and also in accordance with the provisions of Security Council resolution 619 (1988), it is hereby agreed to grant on temporary basis to UNIIMOG the privileges and immunities as stipulated in the Convention on the Privileges and Immunities of the United Nations, approved by the General Assembly on 13 February 1946,

which Iran acceded to on 8 May 1947, and the aims of which have been explained in sections 22 and 23 of Article 6 of the aforesaid Convention.

It is evident that conclusion of the final agreement is conditional on the implementation of the provisions of the resolution 598 (1988) and the implementation plan of the Secretary-General concerning the withdrawal of the Iraqi forces to the internationally recognized boundaries, determined by the Treaty of State Frontiers and Neighbourly Relations between Iran and Iraq and annexes thereof of 13 June 1975.

Undoubtedly, the UNIIMOG forces will observe the codes and norms of the Islamic society of Iran.

(Signed) Ali Akbar VELAYATI  
Minister for Foreign Affairs

- (e) Agreement between the United Nations and the Government of Thailand on the United Nations/European Space Agency workshop on microwave remote sensing technology to be hosted by the Government of Thailand from 26 to 30 September 1988. Signed at New York on 16 September 1988<sup>8</sup>

#### *Article V*

##### PRIVILEGES AND IMMUNITIES

1. The Convention on the Privileges and Immunities of the United Nations, adopted by the General Assembly on 13 February 1946, shall be applicable in respect of the Workshop.

2. Participants attending the Workshop in pursuance of paragraphs 1(a) and (c) of article II of this Agreement shall enjoy the privileges and immunities accorded to experts on mission under article VI of the Convention on the Privileges and Immunities of the United Nations.

3. Officials of the United Nations participating in or performing functions in connection with the Workshop shall enjoy the privileges and immunities provided under Articles V and VII of the Convention.

4. Representatives of the specialized agencies participating in the Workshop shall enjoy the privileges and immunities provided under articles VI and VIII of the Convention on the Privileges and Immunities of the Specialized Agencies.

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

6. All participants and persons performing functions in connection with the Workshop shall have the right of unimpeded entry into and exit from Thailand and no impediment shall be imposed on their transit to and from the Work-

shop area. Visas shall be granted free of charge and as speedily as possible. Arrangements shall also be made to ensure that visas for the duration of the Workshop are delivered at the airport of arrival to participants who were unable to obtain them prior to their arrival.

7. The participants in the Workshop, referred to in article II above, officials of the United Nations responsible for the organization of the Workshop and experts on mission for the United Nations in connection with the Workshop shall have the right to take out of Thailand at the time of their departure, without any restrictions, any unexpended portions of the funds they brought into Thailand in connection with the Workshop at the United Nations official rate prevailing when the funds were brought in.

8. The Government shall allow the temporary importation, tax- and duty-free, of all equipment and shall waive import duties and taxes on supplies necessary for the Workshop. It shall issue without delay any necessary import and export permits for this purpose.

#### *Article VI*

##### LIABILITY

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

(a) injury to person or damage to or loss of property in the premises referred to in article IV that are provided by or are under the control of the Government;

(b) injury to person or damage to or loss of property caused by, or incurred in using, the transport services referred to in article IV that are provided by or are under the control of the Government;

(c) the employment for the Workshop of the personnel provided by the Government under article IV.

The Government shall indemnify and hold harmless the United Nations and its officials in respect of any such action, claim or other demand, except it is agreed by the Parties hereto that such injury, loss or damage was caused by gross negligence or wilful misconduct of United Nations personnel.

(f) Agreement between the United Nations and the Government of Peru on a United Nations workshop on regional space information systems to be hosted by the Government of Peru from 24 to 28 October 1988. Signed at New York on 20 October 1988<sup>9</sup>

#### *Article V*

##### PRIVILEGES AND IMMUNITIES

1. The Convention on the Privileges and Immunities of the United Nations adopted by the General Assembly on 13 February 1946, shall be applicable in respect of the Workshop.

2. Participants attending the Workshop in pursuance of paragraphs 1(a) and (c) of article II of this Agreement shall enjoy the privileges and immunities accorded to experts on mission under article VI of the Convention on the Privileges and Immunities of the United Nations.

3. Officials of the United Nations participating in or performing functions in connection with the Workshop shall enjoy the privileges and immunities provided under Articles V and VII of the Convention.

4. Representatives of the specialized agencies participating in the Workshop shall enjoy the privileges and immunities provided under articles VI and VIII of the Convention on the Privileges and Immunities of the Specialized Agencies.

5. The personnel provided by the Government under article IV, paragraph 3, shall enjoy immunity from legal process in respect of words spoken or written and any act performed by them in their official capacity in connection with the Workshop.

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

7. All participants and persons performing functions in connection with the Workshop shall have the right of unimpeded entry into and exit from Peru and no impediment shall be imposed on their transit to and from the Workshop area. Visas shall be granted to those invited by the United Nations to the Workshop by the appropriate authorities of the Government as speedily as possible. Arrangements shall also be made to ensure that visas for the duration of the Workshop are delivered at the airport of arrival to participants who were unable to obtain them prior to their arrival.

8. The participants in the Workshop, referred to in article II above, officials of the United Nations responsible for the organization of the Workshop and experts on mission for the United Nations in connection with the Workshop shall have the right to take out of Peru at the time of their departure, without any restrictions, any unexpended portions of the funds they brought into Peru in connection with the Workshop.

9. The Government shall allow the temporary importation, tax- and duty-free, of all equipment and shall waive import duties and taxes on supplies necessary for the Workshop. It shall issue without delay any necessary import and export permits for this purpose.

#### *Article VI*

#### LIABILITY

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

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

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

(c) The employment for the Workshop of the personnel provided by the Government under article IV.

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

### 3. AGREEMENT RELATING TO THE UNITED NATIONS CHILDREN'S FUND

Basic Agreement between the United Nations (United Nations Children's Fund) and the Government of Djibouti concerning the activities of the United Nations Children's Fund in Djibouti. Signed at Djibouti on 2 November 1988<sup>10</sup>

WHEREAS the United Nations Children's Fund (hereinafter called "UNICEF") was established by the General Assembly of the United Nations as an organ of the United Nations for the purpose of meeting, through the provision of supplies, training and advice, emergency and long-range needs of children, and their continuing needs particularly in developing countries, with a view to strengthening, where appropriate, the permanent child health and child welfare programmes of the countries receiving assistance,

WHEREAS the Government of the Republic of Djibouti (hereinafter called "the Government") desires UNICEF cooperation for the above purposes,

NOW, THEREFORE, UNICEF and the Government agree as follows:

#### *Article 1*

##### REQUESTS TO UNICEF AND PLANS OF OPERATIONS

1. This Agreement establishes the basic conditions and the mutual undertakings governing projects in which UNICEF and the Government are participating.

2. Whenever the Government wishes to obtain assistance from UNICEF, it shall inform UNICEF in writing through the UNICEF representative accredited to the Republic of Djibouti, giving a description of the proposed project and the extent of the proposed participation of the Government and UNICEF in its execution.

3. UNICEF shall consider such requests on the basis of its available resources and its assistance policies.

4. The terms and conditions for each agreed project, including the commitments of the Government and UNICEF with respect to furnishing of supplies, equipment, services or other assistance, shall be set forth in a plan of operations to be signed by the Government and UNICEF, and when appropriate, by other organizations participating in the project. The provisions of this Agreement shall apply to each plan of operations.

...

#### *Article 4*

##### COOPERATION BETWEEN THE GOVERNMENT AND UNICEF AND PROVISION OF LOCAL FACILITIES AND SERVICES TO UNICEF

1. UNICEF may maintain an office in the Republic of Djibouti and may assign authorized officers to visit or be stationed therein for consultation and cooperation with the appropriate officials of the Government with respect to the review and preparation of proposed projects and plans of operations, and the shipment, receipt, distribution or use of any goods furnished by UNICEF, and to advise UNICEF on the progress of the plans of operations and on any other matter relating to the application of this Agreement.

The Government shall permit authorized officers of UNICEF to observe all the phases of execution of the plans of operations in the Republic of Djibouti.

2. The Government, in agreement with UNICEF, shall make the necessary arrangements to ensure that UNICEF gets the necessary public services, on equitable conditions.

3. The Government shall also facilitate the provision of suitable accommodation for international personnel of UNICEF assigned to the Republic of Djibouti.

#### *Article 5*

##### COOPERATION AND INFORMATION

1. The Government shall cooperate with UNICEF in making available to the public adequate information concerning UNICEF assistance.

2. The Government and UNICEF shall cooperate fully to achieve the objectives for which assistance is granted. To that end, they shall exchange views and information concerning the progress of the project.

#### *Article 6*

##### PRIVILEGES AND IMMUNITIES

The Government shall apply to UNICEF, as an organ of the United Nations, to its property, funds and assets, and to its officials, excluding nationals of Djibouti and permanent foreign residents who are locally engaged, the provisions of the Convention on the Privileges and Immunities of the United Nations. No taxes, fees or duties shall be levied on supplies and equipment furnished by UNICEF so long as they are used in accordance with the plans of operations.

#### *Article 7*

##### CLAIMS AGAINST UNICEF

1. The Government shall assume, subject to the provisions of this article, full responsibility in respect to claims resulting from the execution of plans of operations within the territory of the Republic of Djibouti.

2. The Government shall accordingly be responsible for dealing with any claims which may be brought by third parties against UNICEF or its experts, agents or employees and shall defend and hold harmless UNICEF and its experts, agents or employees in case of any claims or liabilities resulting from the execution of plans of operations made pursuant to this Agreement, except where it is agreed by the Government and UNICEF that such claims or liabilities arise from the gross negligence or wilful misconduct of such experts, agents or employees.

3. In the event of the Government making any payment in accordance with the provisions of paragraph 2 of this article, the Government shall be entitled to exercise and enjoy the benefit of all rights and claims of UNICEF against third persons.

4. This article shall not apply with respect to any claim against UNICEF for injuries incurred by a staff member of UNICEF.

5. UNICEF shall place at the disposal of the Government information or other assistance required for the handling of any case to which paragraph 2 of this article relates or for the fulfilment of the purposes of paragraph 3.

### *Article 8*

#### SETTLEMENT OF DISPUTES

1. Where a dispute between the Government and UNICEF arising from this Agreement, or from a plan of operations relating thereto, cannot be settled by negotiations or by any other agreed means of settlement, it shall be submitted to arbitration, if one of the Parties so requests.

2. Each Party shall appoint an arbitrator, to whom it shall explain the dispute, and shall inform the other Party of his name. If the two arbitrators are unable to agree on an arbitration award, they shall immediately appoint a presiding arbitrator. If, within 30 days of the request for arbitration, one of the Parties has not appointed an arbitrator, or if the arbitrators fail to agree on an award or on the appointment of a presiding arbitrator, either Party may ask the President of the International Court of Justice to appoint an arbitrator or a presiding arbitrator.

3. The expenses of arbitration shall be borne by the Parties in the proportion to be determined in the arbitration award. The award shall be accepted by the Parties as a final settlement of the dispute.

#### 4. AGREEMENT RELATING TO THE UNITED NATIONS DEVELOPMENT PROGRAMME

Standard Basic Assistance Agreement between the United Nations (United Nations Development Programme) and the Government of Nigeria.  
Signed at Lagos on 12 April 1988<sup>11</sup>

##### *Article 9*

##### PRIVILEGES AND IMMUNITIES

1. The Government shall apply to the United Nations and its organs, including 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.

2. The Government shall apply to each Specialized Agency acting as an Executing Agency, its property, funds and assets, and to its officials, the provisions of the Convention on the Privileges and Immunities of the Specialized Agencies, including any Annex to the Convention applicable to such Specialized Agency. In case the International Atomic Energy Agency (IAEA) acts as an Executing Agency, the Government shall apply to its property, fund and assets, and to its officials and experts, the Agreement on the Privileges and Immunities of IAEA.

3. Members of the UNDP mission in the country shall be granted such additional privileges and immunities as may be necessary for the effective exercise by the mission of its functions.

4. (a) Except as the Parties may otherwise agree in Project Documents relating to specific projects, the Government shall grant all persons, other than Government nationals employed locally, performing services on behalf of UNDP, a specialized agency or IAEA who are not covered by paragraphs 1 and 2 above the same privileges and immunities as officials of the United Nations, the specialized agency concerned or the IAEA under sections 16, 19 or 18 respectively of the Convention on the Privileges and Immunities of the United Nations or of the Specialized Agencies, or of the Agreement on the Privileges and Immunities of IAEA.

(b) For purpose of the instruments on privileges and immunities referred to in the preceding parts of this article:

- (1) All papers and documents relating to a project in the possession or under the control of the persons referred to in subparagraph 4(a) above shall be deemed to be documents belonging to the United Nations, the specialized agency concerned, or IAEA, as the case may be; and
- (2) Equipment, materials and supplies brought into or purchased or leased by those persons within the country for purposes of a project shall be deemed to be property of the United Nations, the Specialized Agency concerned, or IAEA, as the case may be.



5. The expression “persons performing services” as used in articles IX, X and XIII of this Agreement includes operational experts, volunteers, consultants, and juridical as well as natural persons and their employees. It includes governmental or non-governmental organizations or firms which UNDP may retain, whether as an Executing Agency or otherwise, to execute or to assist in the execution of UNDP assistance to a project, and their employees. Nothing in this Agreement shall be construed to limit the privileges, immunities or facilities conferred upon such organizations or firms or their employees.

#### *Article 10*

##### FACILITIES FOR EXECUTION OF UNDP ASSISTANCE

1. The Government shall take any measures which may be necessary to exempt UNDP, its Executing Agencies, their experts and other persons performing services on their behalf from regulations or other legal provisions which may interfere with operations under this Agreement, and shall grant them such other facilities as may be necessary for the speedy and efficient execution of UNDP assistance. It shall, in particular, grant them the following rights and facilities:

(a) Prompt clearance of experts and other persons performing services on behalf of UNDP or an Executing Agency;

(b) Prompt issuance without cost of necessary visas, licences or permits;

(c) Access to the site of work and all necessary rights of way;

(d) Free movement within or to or from the country, to the extent necessary for proper execution of UNDP assistance;

(e) The most favourable legal rate of exchange;

(f) Any permits necessary for the importation of equipment, materials and supplies, and for their subsequent exportation;

(g) Any permits necessary for importation of property belonging to and intended for the personal use or consumption of officials, of UNDP, its Executing Agencies, or other persons performing services on their behalf, and for the subsequent exportation of such property; and

(h) Prompt release from customs of the items mentioned in subparagraphs (f) and (g) above.

2. Assistance under this Agreement being provided for the benefit of the Government and people of Nigeria, the Government shall bear all risks of operations arising under this Agreement. It shall be responsible for dealing with claims which may be brought by third parties against UNDP or an Executing Agency, their officials or other persons performing services on their behalf, and shall hold them harmless in respect of claims or liabilities arising from operations under this Agreement. The foregoing provision shall not apply where the Parties and the Executing Agency are agreed that a claim or liability arises from the gross negligence or wilful misconduct of the above-mentioned individuals.

## *Article 11*

### SUSPENSION OR TERMINATION OF ASSISTANCE

1. UNDP may by written notice to the Government and to the Executing Agency concerned suspend its assistance to any project if in the judgement of UNDP any circumstance arises which interferes with or threatens to interfere with the successful completion of the project or the accomplishment of its purposes. UNDP may, in the same or a subsequent written notice, indicate the conditions under which it is prepared to resume its assistance to the project. Any such suspension shall continue until such time as such conditions are accepted by the Government and as UNDP shall give written notice to the Government and the Executing Agency that it is prepared to resume its assistance.

2. If any situation referred to in paragraph 1 of this Article shall continue for a period of fourteen days after notice thereof and of suspension shall have been given by UNDP to the Government and the Executing Agency, then at any time thereafter during the continuance thereof, UNDP may by written notice to the Government and Executing Agency terminate its assistance to the project.

3. The provisions of this article shall be without prejudice to any other rights or remedies UNDP may have in the circumstances, whether under general principles of law or otherwise.

## *Article 12*

### SETTLEMENT OF DISPUTES

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

\* \* \*

The United Nations Development Programme also entered into a Basic Assistance Agreement with the Government of Uruguay in 1988.

5. AGREEMENTS RELATING TO THE UNITED NATIONS  
HIGH COMMISSIONER FOR REFUGEES

- (a) Agreement between the United Nations and the Government of Spain relative to the establishment of a branch office of the Office of the United Nations High Commissioner for Refugees in Madrid. Signed at Madrid on 14 March 1988<sup>12</sup>

4. CONSIDERING that the General Convention on Privileges and Immunities of the United Nations, adopted by the General Assembly on 13 February 1946, to which Spain is a party, applies to the local branch offices of the High Commissioner's Office which form an integral part of the Office of UNHCR,

5. CONSIDERING that it is desirable to enter into an agreement in order to regulate the questions arising from the establishment of the UNHCR Branch Office in Spain,

HAVE AGREED AS FOLLOWS:

*Section I*

ESTABLISHMENT OF THE BRANCH OFFICE

*Article 1*

A UNHCR Branch Office shall be established in the City of Madrid, Spain, in order to perform the functions assigned to it by the United Nations General Assembly within the framework of the Office of the United Nations High Commissioner.

*Section II*

STATUS OF THE BRANCH OFFICE

*Article 2*

The Branch Office's premises and the residence of the High Commissioner's Representative in Spain shall be inviolable.

*Article 3*

The Government shall exercise all due diligence in order to guarantee the security and protection of the premises of the Branch Office and its personnel.

*Article 4*

The Representative or any official appointed by him shall have access to applicants for asylum and refugees in Spain or at its borders, in compliance with the functions defined in the United Nations General Assembly resolution 428 (V) of 14 December 1950.

### *Article 5*

The Government shall ensure that all the necessary public services are made available to the Branch Office on equitable terms. The Branch Office shall enjoy, in respect of the use of telephone, radio and postal services, treatment not less favourable than that normally accorded to diplomatic missions accredited in Madrid.

### *Section III*

#### FACILITIES AND SERVICES

### *Article 6*

The Government shall provide suitable premises free of charge and shall be responsible for the expenses incurred in connection with their maintenance.

### *Section IV*

#### OFFICIALS OF THE BRANCH OFFICE

### *Article 7*

The Head of the Branch Office shall be appointed by the United Nations High Commissioner for Refugees and must have the approval of the Spanish Government in order to carry out his duties. Pursuant to the provisions of section 17, article V, of the General Convention on Privileges and Immunities of the United Nations, the Government must be notified periodically of any changes in the composition of the staff of the Branch Office.

The officials of the Branch Office, except general services personnel or similar categories hired locally, shall enjoy the following privileges and immunities in and with respect to Spain:

- (a) Immunity from any jurisdiction in respect of words, written communication or acts carried out by them in the performance of their official duties;
- (b) Immunity from seizure of their official baggage;
- (c) Immunity from inspection of their official baggage;
- (d) Exemption from any kind of taxes on the salaries and emoluments paid to them by the United Nations;
- (e) Exemption for themselves, their spouses, dependent family members, other family members living in their homes and their domestic staff, from immigration restrictions and alien registration;
- (f) Immunity from national service obligations;
- (g) The same privileges in respect of foreign currency exchange as are accorded to officials of comparable rank in the diplomatic missions accredited in Madrid. In particular, the United Nations officials shall be entitled, on terminating their appointment in Spain, to take out of Spain through the authorized

channels, without prohibition or restriction, such amounts as they brought into Spain, as well as any other financial resources of which they are duly able to prove that they are in legitimate possession.

(h) Protection and repatriation facilities for themselves, their spouses, dependent family members, other family members living in their homes and their domestic staff the same as those granted in times of international crisis to the diplomatic representatives accredited in Madrid; and

(i) The right to import for their personal use, free of taxes and other obligations, prohibitions and import restrictions:

- (1) Their furniture and personal effects in one or several separate shipments, and later on the necessary supplements thereto, including motor vehicles, in accordance with the Spanish law applicable to diplomatic representatives accredited in Madrid.
- (2) Reasonable amounts of certain articles for their personal use or consumption, not to be given away or sold, in accordance with the Spanish laws applicable to diplomatic representatives accredited in Madrid.

#### *Article 8*

Apart from the privileges and immunities mentioned in Article 7, the High Commissioner's Representative in Spain shall enjoy for himself, his spouse and his dependent family members, the privileges, immunities, exemptions and facilities normally granted to diplomatic envoys of similar rank. To this effect, the Ministry of Foreign Affairs of Spain shall include him on the list of diplomatic representatives accredited in Madrid.

#### *Article 9*

Delegation officials of the general services staff or similar categories hired locally shall only enjoy, in and with respect to Spain, the privileges and immunities mentioned in clauses (a), (d) and (f) of Article 1 of this Agreement. These officials shall also enjoy the other privileges and immunities to which they may be entitled under article V, section 18, and article VII of the Convention.

#### *Article 10*

The privileges and immunities provided under the Agreement are only granted with a view to ensuring the effective fulfilment of UNHCR's aims and purposes. The High Commissioner shall have the right and the duty to waive the immunity of any official when, in his opinion, the immunity would impede the course of justice and it can be waived without prejudice to the interests of UNHCR.

#### *Article 11*

The Branch Office and the Government shall cooperate at all times in order to facilitate the proper administration of justice, assure the observance of police regulations and prevent any abuse in connection with the privileges, exemptions, immunities and facilities provided under this Agreement.

## Section V

### SETTLEMENT OF DISPUTES

#### Article 12

With respect to disputes of a private nature, the Branch Office shall make provisions for appropriate modes of settlement of:

(a) Disputes arising out of contracts or other disputes of a private law character to which the Branch Office is a party;

(b) Disputes involving any Branch Office official who, by reason of his special status, enjoys immunity — if immunity has not been waived under the provisions of Article 10.

(b) Tripartite Agreement between the United Nations (United Nations High Commissioner for Refugees) and the Governments of France and Suriname on the voluntary repatriation of the Surinamese refugees. Signed at Paramaribo on 25 August 1988<sup>13</sup>

The Government of the Republic of France, the Government of the Republic of Suriname and the United Nations High Commissioner for Refugees:

*Conscious* of the plight of the refugees from Suriname, the majority of which presently is accommodated by the Government of France in the French Department of Guiana;

*Mindful* that repatriation should take place on a strictly voluntary basis, as the result of the freely expressed wish of the refugees, in conditions of safety and dignity;

*Conscious* that the progressive re-establishment of a climate of confidence by all concerned is necessary for the successful voluntary repatriation of these refugees;

*Mindful* that any project for voluntary repatriation and resettlement of these refugees should be sound and adequate, established by recognized international experts in this field and carried out in an organized manner, while bearing in mind the right of every Surinamese citizen to return to and resettle in his/her country on an individual basis;

*Mindful also* that the cost of such a project will be too great for Suriname to bear in the present extremely difficult economic circumstances and that, therefore, international support will be required;

*Bearing in mind* the fundamental mandate of the United Nations High Commissioner for Refugees to promote durable solutions to refugee problems, the foremost of which is voluntary repatriation;

The two Governments having requested the United Nations High Commissioner for Refugees to be associated with the efforts to register the refugees from Suriname and to elaborate programmes aimed at voluntary repatriation and resettlement in their regions of origin and having been informed of the willingness of the United Nations High Commissioner for Refugees to participate in this endeavour and to solicit the support of the international community;

The Government of the Republic of France, the Government of the Republic of Suriname and the United Nations High Commissioner for Refugees, hereafter called the Contracting Parties;

Have agreed:

To establish a Tripartite Commission composed of representatives of the Contracting Parties under the Chairmanship of the United Nations High Commissioner for Refugees, to work out the modalities of the voluntary repatriation of the Surinamese refugees;

That the activities of the Tripartite Commission shall be exclusively humanitarian and non-political;

That the Commission shall elaborate plans and programmes conducive to facilitate the voluntary repatriation and resettlement of the refugees to their regions of origin;

That the Commission shall establish its own rules of procedure, frequency and venue of meetings;

To request the United Nations High Commissioner for Refugees to appeal to the international community for the technical cooperation and financial support of Governments and national and international organizations for the implementation of these programmes;

That representatives of the United Nations High Commissioner for Refugees and representatives of any other organization working under the aegis of the Tripartite Commission, should have free access at all times to the refugees and returnees to ensure the voluntariness of their return and to the areas to which they are returning, to ensure a smooth implementation of these programmes, and the international assistance provided therefor; and

To request the United Nations High Commissioner for Refugees, in his capacity of Chairman of the Commission, to make a quarterly progress report on the activities of the Tripartite Commission established by this Agreement.

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

### 1. CONVENTION ON THE PRIVILEGES AND IMMUNITIES OF THE SPECIALIZED AGENCIES.<sup>14</sup> APPROVED BY THE GENERAL ASSEMBLY OF THE UNITED NATIONS ON 21 NOVEMBER 1947

In 1988, the following States acceded to the Convention or, if already parties, undertook by a subsequent notification to apply the provisions of the Convention, in respect of the specialized agencies indicated below:

<i>State</i>	<i>Date of receipt of instrument of accession or notification</i>	<i>Specialized agencies</i>
Antigua and Barbuda	13 December 1988	ILO, FAO (second revised text of annex II), ICAO, UNESCO, WHO (third revised text of annex VIII), UPU, ITU, WMO
Czechoslovakia	6 September 1988	FAO, WIPO, UNIDO
Dominica	24 January 1988	ILO, FAO (second revised text of annex II), UNESCO, IMF, WHO (third revised text of annex VII), UPU, WHO, IMO (revised text of annex XII), IFAD, UNIDO

As of 31 December 1988, 98 States were parties to the Convention.<sup>16</sup>

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### 2. INTERNATIONAL ATOMIC ENERGY AGENCY

Agreement between the International Atomic Energy Agency and the Government of Nigeria for the application of safeguards in connection with the Treaty on the Non-Proliferation of Nuclear Weapons. Signed at Vienna on 29 February 1988<sup>17</sup>

WHEREAS the Federal Republic of Nigeria (hereinafter referred to as “Nigeria”) is a party to the Treaty on the Non-Proliferation of Nuclear Weapons<sup>18</sup> (hereinafter referred to as “the Treaty”) opened for signature at London, Moscow and Washington on 1 July 1968 and which entered into force on 5 March 1970;

WHEREAS paragraph 1 of article III of the Treaty reads as follows:

“Each non-nuclear-weapon State Party to the Treaty undertakes to accept safeguards, as set forth in an agreement to be negotiated and concluded with the International Atomic Energy Agency in accordance with the Statute of the International Atomic Energy Agency and the Agency’s safeguard system, for the exclusive purpose of verification of the fulfilment of its obligations assumed under this Treaty with a view to preventing diversion of nuclear energy from peaceful uses to



nuclear weapons or other nuclear explosive devices. Procedures for the safeguards required by this article shall be followed with respect to source or special fissionable material whether it is being produced, processed or used in any principal nuclear facility or is outside any such facility. The safeguards required by this article shall be applied on all source or special fissionable material in all peaceful nuclear activities within the territory of such State, under its jurisdiction, or carried out under its control anywhere.”

WHEREAS the International Atomic Energy Agency (hereinafter referred to as “the Agency”) is authorized, pursuant to article III of its Statute, to conclude such agreements;

NOW THEREFORE, Nigeria and the Agency have agreed as follows:

## PART I

### *Article 1*

#### BASIC UNDERTAKING

Nigeria undertakes, pursuant to paragraph 1 of article III of the Treaty, to accept safeguards, in accordance with the terms of this Agreement, on all source or special fissionable material in all peaceful nuclear activities within its territory, under its jurisdiction or carried out under its control anywhere, for the exclusive purpose of verifying that such material is not diverted to nuclear weapons or other nuclear explosive devices.

### *Article 2*

#### APPLICATION OF SAFEGUARDS

The Agency shall have the right and the obligation to ensure that safeguards will be applied, in accordance with the terms of this Agreement, on all source or special fissionable material in all peaceful nuclear activities within the territory of Nigeria, under its jurisdiction or carried out under its control anywhere, for the exclusive purpose of verifying that such material is not diverted to nuclear weapons or other nuclear explosive devices.

### *Article 3*

#### COOPERATION BETWEEN NIGERIA AND THE AGENCY

Nigeria and the Agency shall cooperate to facilitate the implementation of the safeguards provided for in this Agreement.

...

### *Article 8*

#### PROVISION OF INFORMATION TO THE AGENCY

(a) In order to ensure the effective implementation of safeguards under this Agreement, Nigeria shall, in accordance with the provisions set out in Part

II of this Agreement, provide the Agency with information concerning nuclear material subject to safeguards under this Agreement and the features of facilities relevant to safeguarding such material.

- (b) (i) The Agency shall require only the minimum amount of information and data consistent with carrying out its responsibilities under this Agreement.
- (ii) Information pertaining to facilities shall be the minimum necessary for safeguarding nuclear material subject to safeguards under this Agreement.

(c) If Nigeria so requests, the Agency shall be prepared to examine on premises of Nigeria design information which Nigeria regards as being of particular sensitivity. Such information need not be physically transmitted to the Agency provided that it remains readily available for further examination by the Agency on premises of Nigeria.

#### *Article 9*

##### AGENCY INSPECTORS

- (a) (i) The Agency shall secure the consent of Nigeria to the designation of Agency inspectors to Nigeria.
  - (ii) If Nigeria, either upon proposal of a designation or at any other time after a designation has been made, objects to the designation, the Agency shall propose to Nigeria an alternative designation or designations.
  - (iii) If, as a result of the repeated refusal of Nigeria to accept the designation of Agency inspectors, inspections to be conducted under this Agreement would be impeded, such refusal shall be considered by the Board, upon referral by the Director General of the Agency (hereinafter referred to as “the Director General”), with a view to its taking appropriate action.
- (b) Nigeria shall take the necessary steps to ensure that Agency inspectors can effectively discharge their functions under this Agreement.
- (c) The visits and activities of Agency inspectors shall be so arranged as:
- (i) To reduce to a minimum the possible inconvenience and disturbance to Nigeria and to the peaceful nuclear activities inspected; and
  - (ii) To ensure protection of industrial secrets or any other confidential information coming to the inspectors’ knowledge.

*Article 10*

PRIVILEGES AND IMMUNITIES

Nigeria shall accord to the Agency (including its property, funds and assets) and to its inspectors and other officials, performing functions under this Agreement, the same privileges and immunities as those set forth in the relevant provisions of the Agreement on the Privileges and Immunities of the International Atomic Energy Agency.<sup>19</sup>

*Article 11*

TERMINATION OF SAFEGUARDS

*Consumption or dilution of nuclear material*

Safeguards shall terminate on nuclear material upon determination by the Agency that the material has been consumed, or has been diluted in such a way that it is no longer usable for any nuclear activity relevant from the point of view of safeguards, or has become practically irrecoverable.

*Article 12*

*Transfer of nuclear material out of Nigeria*

Nigeria shall give the Agency advance notification of intended transfers of nuclear material subject to safeguards under this Agreement out of Nigeria, in accordance with the provisions set out in Part II of this Agreement. The Agency shall terminate safeguards on nuclear material under this Agreement when the recipient State has assumed responsibility therefor, as provided for in Part II of this Agreement. The Agency shall maintain records indicating each transfer and, where applicable, the reapplication of safeguards to the transferred nuclear material.

*Article 13*

*Provisions relating to nuclear material to be used in non-nuclear activities*

Where nuclear material subject to safeguards under this Agreement is to be used in non-nuclear activities, such as the production of alloys or ceramics, Nigeria shall agree with the Agency, before the material is so used, on the circumstances under which the safeguards on such material may be terminated.

...

*Article 15*

FINANCE

Nigeria and the Agency will bear the expenses incurred by them in implementing their respective responsibilities under this Agreement. However, if Nigeria or persons under its jurisdiction incur extraordinary expenses as a result of a specific request by the Agency, the Agency shall reimburse such expenses

provided that it has agreed in advance to do so. In any case the Agency shall bear the cost of any additional measuring or sampling which inspectors may request.

#### *Article 16*

##### THIRD PARTY LIABILITY FOR NUCLEAR DAMAGE

Nigeria shall ensure that any protection against third party liability in respect of nuclear damage, including any insurance or other financial security, which may be available under its laws or regulations, shall apply to the Agency and its officials for the purpose of the implementation of this Agreement, in the same way as that protection applies to nationals of Nigeria.

#### *Article 17*

##### INTERNATIONAL RESPONSIBILITY

Any claim by Nigeria against the Agency or by the Agency against Nigeria in respect of any damage resulting from the implementation of safeguards under this Agreement, other than damage arising out of a nuclear incident, shall be settled in accordance with international law.

#### *Article 18*

##### MEASURES IN RELATION TO VERIFICATION OF NON-DIVERSION

If the Board, upon report of the Director General, decides that an action by Nigeria is essential and urgent in order to ensure verification that nuclear material subject to safeguards under this Agreement is not diverted to nuclear weapons or other nuclear explosive devices, the Board may call upon Nigeria to take the required action without delay, irrespective of whether procedures have been invoked pursuant to article 22 of this Agreement for the settlement of a dispute.

#### *Article 19*

If the Board, upon examination of relevant information reported to it by the Director General, finds that the Agency is not able to verify that there has been no diversion of nuclear material required to be safeguarded under this Agreement to nuclear weapons or other nuclear explosive devices, it may make the reports provided for in paragraph C of article XII of the Statute of the Agency (hereinafter referred to as "the Statute") and may also take, where applicable, the other measures provided for in that paragraph. In taking such action the Board shall take account of the degree of assurance provided by the safeguards measures that have been applied and shall afford Nigeria every reasonable opportunity to furnish the Board with any necessary reassurance.

#### *Article 20*

##### INTERPRETATION AND APPLICATION OF THE AGREEMENT AND SETTLEMENT OF DISPUTES

Nigeria and the Agency shall, at the request of either, consult about any questions arising out of the interpretation or application of this Agreement.

### *Article 21*

Nigeria shall have the right to request that any question arising out of the interpretation or application of this Agreement be considered by the Board. The Board shall invite Nigeria to participate in the discussion of any such question by the Board.

### *Article 22*

Any dispute arising out of the interpretation or application of this Agreement, except a dispute with regard to a finding by the Board under article 19 or an action taken by the Board pursuant to such a finding, which is not settled by negotiation or another procedure agreed to by Nigeria and the Agency shall, at the request of either, be submitted to an arbitral tribunal composed as follows: Nigeria and the Agency shall each designate one arbitrator, and the two arbitrators so designated shall elect a third, who shall be the Chairman. If, within thirty days of the request for arbitration, either Nigeria or the Agency has not designated an arbitrator, either Nigeria or the Agency may request the President of the International Court of Justice to appoint an arbitrator. The same procedure shall apply if, within thirty days of the designation or appointment of the second arbitrator, the third arbitrator has not been elected. A majority of the members of the arbitral tribunal shall constitute a quorum, and all decisions shall require the concurrence of two arbitrators. The arbitral procedure shall be fixed by the tribunal. The decisions of the tribunal shall be binding on Nigeria and the Agency.

\* \* \*

The International Atomic Energy Agency also concluded similar agreements with the Governments of China and India.

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## 3. INTERNATIONAL LABOUR ORGANIZATION

Agreement between the International Labour Organization and the Government of Sri Lanka concerning the establishment of an office of the Organization in Colombo. Signed at Colombo on 21 March 1988<sup>20</sup>

Whereas the International Labour Organization has decided to establish an office of the International Labour Organization in Colombo;

Whereas the Government of the Democratic Socialist Republic of Sri Lanka has informed the International Labour Organization of its readiness to grant the necessary facilities to that office;

The International Labour Organization and the Government of the Democratic Socialist Republic of Sri Lanka have agreed as follows:

### *Article 1*

The Government will afford every assistance within its powers in securing the necessary facilities for the establishment of the office of the International Labour Organization in Colombo.

*Article 2*

1. The Government will grant the privileges and immunities provided for in the Convention on the Privileges and Immunities of the Specialized Agencies of 21 November 1947 and in its Annex of 10 July 1948, relating to the International Labour Organization, to the office of the International Labour Organization in Colombo, to the staff of such office as well as to any persons mentioned in the Convention or in its above-mentioned Annex, whenever they go on official business to the Democratic Socialist Republic of Sri Lanka.

2. The Government will grant to the office of the International Labour Organization in Colombo, and to all persons referred to in paragraph 1 above, privileges and immunities not less favourable than those granted to any other intergovernmental organization and its staff in the Democratic Socialist Republic of Sri Lanka.

*Article 3*

The Government will facilitate the entry into, sojourn in, and departure from the Democratic Socialist Republic of Sri Lanka of all persons having official business with the office of the International Labour Organization.

*Article 4*

The Government shall endeavour to afford to the International Labour Organization every assistance within its power in securing appropriate office accommodation, and in securing and providing free of charge necessary utilities and services in accordance with its practice with respect to other agencies of the United Nations with representation in Sri Lanka.

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4. UNITED NATIONS EDUCATIONAL, SCIENTIFIC AND CULTURAL ORGANIZATION

Exchange of letters constituting an agreement between the United Nations (United Nations Educational, Scientific and Cultural Organization) and the Government of France relating to measures to facilitate the use by the Organization of the services of French civil servants within the framework of the provisions of the French civil service rules concerning mobility. Paris, 28 November 1988<sup>21</sup>

I

LETTER FROM THE PERMANENT DELEGATION OF FRANCE TO THE UNITED NATIONS  
EDUCATIONAL, SCIENTIFIC AND CULTURAL ORGANIZATION

28 November 1988

Subsequent to the talks between representatives of the French Government and your Organization concerning secondment to UNESCO, under the provisions on mobility, of civil servants recruited from the Ecole Nationale d'Administration or the equivalent, I have the honour, on instructions from my Government, to propose the following measures:

*Article 1*

UNESCO is prepared to accept on secondment civil servants recruited from the Ecole Nationale d'Administration or the equivalent, referred to hereinafter as "professional officers", under the provisions on mobility.

*Article 2*

The professional officers shall not have the status of UNESCO officials. Nevertheless, in addition to their obligations under this Agreement, they shall comply with the general provisions of the Staff Regulations and Staff Rules as specified in their letter of appointment.

*Article 3*

Each year, in due time and as appropriate, UNESCO shall, through the Permanent Delegation of France to UNESCO, inform the French Government of the assignment of professional officers and the nature of the functions entrusted to them.

*Article 4*

The French Government shall propose qualified professional officers to the Organization through the Permanent Delegation of France to UNESCO. The final choice of the professional officers to be accepted shall be made by the Director-General.

*Article 5*

The professional officers shall be appointed by the Director-General of UNESCO once the chief medical officer of the Organization has certified that they meet the medical standards in force.

*Article 6*

The normal period of secondment shall be two years. It may be shortened by mutual agreement between the Director-General and the French authorities. Should a professional officer commit a serious breach of his obligations, the Director-General shall request the French authorities to terminate his secondment.

*Article 7*

UNESCO shall not meet any expenses connected with the secondment of professional officers, other than those mentioned in paragraph 8 below. Salaries, allowances, compensation and reimbursement for expenses of any kind shall be paid to them directly by the French authorities. The said authorities

shall meet, as appropriate, the living, transportation and moving expenses incurred at the time of their secondment and of its termination, as well as those incurred for any home leave or home travel provided for at the time of secondment.

*Article 8*

UNESCO shall meet the costs (including insurance costs) occasioned by any missions it may assign to the professional officers during the period of their secondment. Where appropriate, UNESCO shall also pay compensation for the specific obligations incurred by the professional officers in the performance of their functions. The amount of such compensation shall be established by mutual agreement between UNESCO and the French authorities and specified in the letter of appointment of the professional officer.

*Article 9*

UNESCO shall not provide the professional officers with insurance coverage for old age, illness, accidents or occupational accidents. It shall be the responsibility of the French authorities and, where appropriate, the professional officers themselves to provide for the appropriate insurance coverage.

*Article 10*

The professional officers shall be subject to the authority of the Director-General of UNESCO and shall be responsible to him in the exercise of their functions in the Secretariat.

*Article 11*

In performing the tasks assigned to them, the professional officers shall act in the sole interest of UNESCO, without seeking or accepting instruction from any Government or any authority outside the Organization.

*Article 12*

They shall be bound by professional discretion in all matters relating to the service and shall not communicate to any unauthorized person any document or information that has not been made public.

*Article 13*

They shall observe working hours and shall be subject to the rules concerning leave in force in the Secretariat.

*Article 14*

Upon expiry of the period of secondment, UNESCO shall submit a report to the competent authority of the French Republic through the Permanent Delegation of France to the Organization, stating the duration and nature of the functions of the professional officer and containing, where appropriate, an evaluation of his performance. If the professional officer himself must prepare a report for the French administration, he shall be required to submit it to the Director-General before it is transmitted to the said administration.



I should be grateful if you would inform me whether the foregoing provisions are acceptable to your Organization. If so, this letter and your reply shall constitute an agreement between the French Government and UNESCO on secondment to the latter, under the provisions on mobility, of civil servants recruited from the Ecole Nationale d'Administration or the equivalent.

Each Party shall notify the other of the completion of the formalities required for the entry into force of this Agreement. It shall enter into force on the date of the second of these notifications.

(Signed) Marie-Claude  
CABANA Ambassador, Permanent delegate of France to UNESCO

## II

LETTER FROM THE UNITED NATIONS EDUCATIONAL, SCIENTIFIC AND CULTURAL  
ORGANIZATION TO THE AMBASSADOR, PERMANENT DELEGATE OF FRANCE

28 November 1988

I have the honour to acknowledge receipt of your letter of 28 November 1988, which reads as follows:

[See letter I]

I have the honour to confirm the agreement of UNESCO to the foregoing provisions.

(Signed) Michel de BONNERCOSE  
Director-General, a.i.

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## 5. UNITED NATIONS INDUSTRIAL DEVELOPMENT ORGANIZATION

- (a) Agreement between the United Nations and the United Nations Industrial Development Organization for the transfer of assets. Signed at Vienna on 11 March 1988<sup>22</sup>

*The United Nations and the United Nations Industrial Development Organization,*

*In view of the conversion of the United Nations Industrial Development Organization (hereinafter UNIDO) from an organ of the United Nations into a specialized agency;*

*Desiring the above-mentioned conversion to take place smoothly and with minimum disruption in the activities of both organizations and in such a way*

that the various projects of both organizations, as well as their respective contractual rights and obligations, are preserved and maintained;

Taking into account:

(a) Paragraphs 9 and 10 of General Assembly resolution 34/96 of 13 December 1979 on transitional arrangements relating to the establishment of UNIDO as a specialized agency, which reads as follows:

*“The General Assembly*

*“9. Also authorizes the Secretary-General to transfer to the new agency the assets of the United Nations used by the existing United Nations Industrial Development Organization, in accordance with arrangements to be entered into between the Secretary-General, acting in consultation with the Advisory Committee on Administrative and Budgetary Questions, and the Director-General of the new agency;*

*“10. Further authorizes the Secretary-General to transfer to the new agency the assets of the United Nations Industrial Development Fund, provided that the agency agrees to use such assets in accordance with any undertakings by the United Nations towards the donors of those assets”;*

(b) Paragraphs (a) and (b) of Decision GC.1/Dec.35 of the first General Conference of UNIDO adopted at its eighth plenary meeting, on 12 December 1985, which read as follows:

*“The General Conference,*

*“(a) Requests the Director-General to take the necessary measures to effect transfer of assets from the United Nations to UNIDO;*

*“(b) Authorizes the Director-General to enter into appropriate arrangements with the Secretary-General of the United Nations and the Administrator of the United Nations Development Programme, in respect of transfer of assets.”*

*Recognizing that in the light of the above, appropriate administrative arrangements for the transfer of assets from the United Nations to UNIDO have been made;*

*Have concluded the following Agreement in order to confirm those arrangements:*

## **A. Assets of the United Nations Industrial Development Fund**

### *Article 1*

The assets and liabilities of the United Nations Industrial Development Fund (hereinafter UNIDF), as reflected in the audited financial statements of UNIDF for the year ended 31 December 1985,<sup>23</sup> were transferred to UNIDO by the United Nations with the condition that UNIDO would use such assets in accordance with any undertakings by the United Nations towards the donors of those assets, bearing in mind the provisions concerning the management of UNIDF and the general procedures governing its operations as set forth in the

annexes to United Nations General Assembly resolutions 31/202 and 31/203, as well as in the specific annex for UNIDF to the Financial Regulations and Rules of the United Nations (ST/SGB/UNIDF/Financial Rules/4 (1982)). The record of the transfer of the assets and liabilities of UNIDF in accordance with this article is annexed to this Agreement as Schedule A.

## **B. Other Financial Assets**

### *Article 2*

(a) Assets, liabilities and fund balances relating to technical cooperation activities and to the Special Account for Programme Support costs, insofar as they relate to UNIDO, as shown as at 31 December 1985 in Statement XIV and Schedule 16.1 of the Audited Financial Statements of the United Nations for the Biennium 1984-1985,<sup>24</sup> were transferred to UNIDO in accordance with Schedule B annexed hereto. All other assets and liabilities maintained in Vienna and shown in volume I of the aforementioned Audited Financial Statements, including those relating to the General Fund of the United Nations, were, subject to subparagraph (b) below, retained by the United Nations.

(b) Financial assets, liabilities and fund balances relating to the Garage Administration and the Catering Service as at 31 December 1985 were transferred to UNIDO, in accordance with Schedule C. Assets, liabilities and fund balances relating to the Common Fund for Major Repairs and Replacements were transferred to UNIDO pursuant to the decision of the Joint Committee which administers the Common Fund, at its 10th session on 11 March 1986. The record of the transfer of such financial assets, liabilities and fund balances is annexed to this Agreement as Schedule D.

### *Article 3*

Bank accounts held by UNIDO on behalf of the United Nations up to 31 December 1985 were transferred to UNIDO as from that date, in accordance with Schedule E annexed to the present Agreement, and their panels of signatories were amended accordingly. To the extent that any bank account so transferred to UNIDO comprised or contained an asset of a fund retained by the United Nations pursuant to article 2(a) of this Agreement, a cash settlement was made by UNIDO to the United Nations of the amount in the account, as it appeared in the books of account as at 31 December 1985. The detailed record of the cash settlements is annexed to this Agreement as Schedule F.

## **C. Equipment, furniture and supplies at the Vienna International Centre**

### *Article 4*

(a) Equipment, furniture and supplies at the Vienna International Centre which had been acquired by the United Nations for the use of UNIDO as an organ of the United Nations and for the United Nations units at Vienna, were divided by the parties on the basis of the inventory record existing on 31 December 1985 and

those assets up to then used by UNIDO were transferred to UNIDO. The record of the apportionment of equipment, furniture and supplies in accordance with the present Agreement is annexed as Schedule G to this Agreement.

(b) Equipment, furniture and supplies in stores as at 31 December 1985, as well as such items on order on that date and chargeable to the 1984-1985 United Nations Regular Budget funds, have been apportioned between the parties in accordance with administrative arrangements made between the parties. A record of such apportionment is included in Schedule G to this Agreement.

#### *Article 5*

Equipment, furniture and supplies transferred to UNIDO pursuant to article 4 above that were used by UNIDO by virtue of its responsibilities under the Memorandum of Understanding concerning common services at the Vienna International Centre (1977), for Buildings Management, Catering Service, Conference Services, Language Training and Garage Administration, shall be retransferred to the United Nations to the extent that responsibility for any of these services should ultimately be conferred upon the United Nations.

### **D. Equipment and supplies in the field**

#### *Article 6*

(a) Unless otherwise agreed between the United Nations Development Programme (hereinafter UNDP) and UNIDO, pursuant to paragraph (c) below, title to equipment and supplies in the field, purchased prior to 1 January 1986 with funds of UNDP, as detailed in the relevant project inventories and outstanding transfer of title documents and annexes, if any, shall remain with the United Nations and be vested in UNDP.

(b) In order to avoid interruption in the provision of technical assistance, UNIDO continued to be charged with the management and control of all such equipment and supplies involved in such technical assistance administered by it.

(c) UNIDO and UNDP may conclude an appropriate administrative arrangement regarding management and control of such equipment and supplies.

#### *Article 7*

Title to equipment and supplies in the field, purchased prior to 1 January 1986 from trust funds administered and managed by UNIDO as an organ of the United Nations, from UNIDF or from the United Nations Regular Budget, as detailed in the relevant project inventories and outstanding transfer of title documents and annexes, if any, was transferred to UNIDO as of 1 January 1986.

#### *Article 8*

On completion of the projects financed from UNDP funds, UNIDF or technical cooperation trust funds administered by UNIDO as an organ of the United Nations, title to equipment has been or shall be transferred to the respective Governments receiving technical assistance, at the end of each project in accordance with the respective project document.

## **E. Rights and obligations under existing contracts**

### *Article 9*

(a) Subject to paragraph (b) below, the United Nations hereby transfers to UNIDO the rights and obligations arising from contracts concluded by UNIDO as an organ of the United Nations, for the purpose of acquiring equipment, supplies or services for implementation of technical assistance projects, or for supplier services, equipment or supplies at Vienna or for other official purposes.

(b) Where it is necessary to obtain the explicit consent of a third party to the transfer of rights and obligations arising from contracts concluded by UNIDO as an organ of the United Nations, the United Nations and UNIDO shall cooperate in facilitating the necessary arrangements.

(c) In all cases where UNIDO accepts contractual rights and obligations under existing contracts concluded by UNIDO as an organ of the United Nations, UNIDO shall hold harmless the United Nations for all actions, claims, requests and orders arising from future actions of UNIDO under such contracts; UNIDO shall defend all actions brought against the United Nations in respect of such contracts and shall indemnify the United Nations for any damages arising out of such contracts.

## **F. Headquarters premises**

### *Article 10*

The United Nations and UNIDO recognize that any transfer of part of the premises of the Vienna International Centre cannot be effected directly by an arrangement between the United Nations and UNIDO but requires one or more agreements between the Government of Austria, the United Nations, UNIDO and the International Atomic Energy Agency. Separate arrangements shall therefore be made in this regard.

## **G. General provisions**

### *Article 11*

The United Nations and UNIDO shall resolve all disputes arising out of this Agreement through negotiations.

- (b) Agreement between the United Nations Industrial Development Organization and the Government of India on basic terms and conditions governing the United Nations Industrial Development Organization projects envisaged by the interim programme for the International Centre for Genetic Engineering and Biotechnology. Signed at Vienna on 25 March 1988<sup>25</sup>

...

### *Article III*

#### PRIVILEGES AND IMMUNITIES

1. In respect of the project activities executed within the framework of the present agreement, the Government shall apply to UNIDO, including its organs, its property, funds, assets and its officials and experts on mission, the provisions of the Convention on the Privileges and Immunities of the United Nations or the Convention on the Privileges and Immunities of the Specialized Agencies, as applicable in accordance with article 21 of the Constitution of UNIDO.<sup>26</sup> In particular, the Government shall grant the same privileges, immunities and facilities to these project activities as it usually grants to technical assistance projects implemented by UNIDO in India as an executing agency of the United Nations Development Programme.

2. For this purpose:

(a) Representatives of States Members of the Preparatory Committee for the Establishment of the ICGEB and Observers from Non-Member States shall be assimilated to representatives of Members of UNIDO;

(b) Members of the Panel of Scientific Advisers to the Preparatory Committee shall be considered experts on mission for UNIDO;

(c) Consultants employed by UNIDO for the purpose of implementing the interim programme of the ICGEB shall be considered experts on mission for UNIDO;

(d) All papers and documents relating to the project in the possession or under the control of the persons referred to in subparagraphs (b) and (c) above shall be deemed to be documents belonging to UNIDO;

(e) Equipment, materials and supplies brought into, or purchased, or leased by those persons within the country for purposes of the project shall be deemed to be property of UNIDO. Such items shall nevertheless be subject to the quarantine and other health laws applicable in India to the imports of live materials such as seeds, propagule, plants, animals, embryos, eggs, micro-organisms, etc.

### *Article IV*

#### FACILITIES FOR THE IMPLEMENTATION OF UNIDO ACTIVITIES

1. For the purpose of implementing the privileges and immunities referred to in article III, the Government shall, in particular, grant the following facilities:

(a) Prompt issuance without cost of necessary visas, licenses or permits;

(b) Access to the laboratories and premises, measuring approximately 12,000 sq. feet, of the ICGEB, of which 10,000 sq. feet at the National Institute of Immunology, and 2,000 sq. feet in halls 409 and 411 in the Life Sciences Block of Jawaharlal Nehru University, and all necessary rights of way, as described in the annexed chart;

(c) Free movement within or to or from the country to the extent necessary for proper execution of UNIDO activities subject to such laws and regulations concerning zones, entry into which is prohibited or regulated by the Government for reasons of national security;

(d) The existing legal rate of exchange;

(e) Any permits necessary for the importation of equipment, materials and supplies and for their subsequent exportation;

(f) Any permits necessary for importation of personal effects belonging to and intended for the personal use or consumption of officials of UNIDO, or experts on mission for UNIDO, within the first four months of taking up their posts in India and for the subsequent exportation of such personal effects;

(g) Prompt release from customs of the items mentioned in subparagraphs (e) and (f) above.

(2) (a) UNIDO shall apply in the laboratories at New Delhi, referred to in paragraph 1(b) above, all relevant safety standards applicable in India. UNIDO shall be bound by the environmental laws of India. Strict safety standards shall be applied to the research activities at the above mentioned laboratories. The safety standards shall conform to the regulations and guidelines applicable to national laboratories and other research institutions in India pertaining to the use of hazardous chemicals, handling and disposal of radioactive isotopes and any biohazard material arising from the use of recombinant DNA technology. In addition, the safety guidelines of the National Institute of Health (NIH) of the United States of America shall be strictly adhered to in the handling of plant, animal and human pathogens and in the conduct of recombinant DNA experiments. Compliance with the guidelines in force in India, in addition to those of the NIH, shall be supervised by a Standing Committee on Safety consisting of the Director of the interim programme, the Head of component, New Delhi, and three nominees of the Government. The chairmanship of the meetings of the Standing Committee shall be by rotation among the members. The day-to-day monitoring of the activities at the above mentioned laboratories shall be carried out by a qualified, full time Safety Officer. Records of all hazardous chemicals, biochemicals, biological materials and experiments covered under the recombinant DNA safety guidelines of the Government shall be maintained for frequent monitoring and inspection by appropriate authorities of UNIDO and of the Government.

(b) The Government, in accordance with its laws and regulations, shall be responsible for dealing with any actions, claims or other demands against UNIDO or its personnel arising out of personal injury or damage to property arising from activities in the laboratories and premises referred to in paragraph 1(b) above, except those normally covered by the applicable employment regulations and rules of UNIDO.

(c) Any such action, claim or other demand arising out of events attributable to *force majeure* shall exempt the Government and UNIDO from any obligation.

(d) The foregoing provisions in subparagraphs (b) and (c), above, shall not apply where the Government and UNIDO have agreed that a claim or liability arises from a violation of the safety standards and environmental laws appli-

cable in India, or from gross negligence or wilful misconduct of UNIDO officials or experts on mission for UNIDO.

#### *Article V*

##### PREMISES FOR LABORATORIES AT NEW DELHI

1. The projects for the interim programme will be executed by UNIDO in the premises of the National Institute of Immunology wing, and halls 409 and 411 in the Life Sciences Block of the Jawaharlal Nehru University, which is already available.

2. The Government will provide such premises free of charge. All costs of routine maintenance necessitated by normal wear and tear and all other running costs for the laboratories at New Delhi shall be paid by UNIDO drawing from funds made available through the Trust Fund.

(c) Agreement between the United Nations Industrial Development Organization and the Government of Italy on basic terms and conditions governing the United Nations Industrial Development Organization's project concerning the preparatory phase for the establishment of an International Centre for Science and High Technology. Signed at Vienna on 29 June 1988<sup>27</sup>

#### *Article III*

##### PRIVILEGES AND IMMUNITIES

1. In respect of the project activities executed within the framework of the present agreement, the Government shall apply to UNIDO, including its organs, its property, funds, assets and its officials and experts on mission, the provisions of the Convention on the Privileges and Immunities of the Specialized Agencies, which is applicable in accordance with article 21 of the Constitution of UNIDO.

2. For this purpose:

(a) Members of the Panel of Scientific Advisers to the project, as well as scientists participating in the committees, meetings, workshops, and similar events of the project, shall be considered experts on mission for UNIDO;

(b) Consultants employed by UNIDO, as well as trainees, shall, for the purpose of implementing the project, be considered experts on mission for UNIDO;

(c) All papers and documents relating to the project in the possession or under the control of the persons referred to in subparagraphs (a) and (b) above shall be deemed to be documents belonging to UNIDO;

(d) Equipment, materials and supplies brought into, or purchased, or leased by those persons within the country for purposes of the project shall be deemed to be property of UNIDO.

3. The level of privileges and immunities granted in accordance with the present agreement shall be understood to be subject to such adjustment as may



be required to take fully into account the general understanding concerning additional privileges and immunities to be reached between the appropriate Italian authorities and the Specialized Agencies of the United Nations having offices or projects in Italy. Any such adjustment shall be agreed to in a supplemental agreement to the present agreement.

#### *Article IV*

##### FACILITIES FOR THE IMPLEMENTATION OF UNIDO ACTIVITIES

For the purpose of implementing the privileges and immunities referred to in article III, the Government shall, in particular, grant the following facilities:

- (a) Prompt issuance without cost of necessary visas, licenses or permits;
- (b) Access to the premises of the International Centre for Theoretical Physics at Trieste and all necessary rights of way;
- (c) Free movement within or to or from the country to the extent necessary for proper execution of UNIDO activities;
- (d) The most favourable legal rate of exchange;
- (e) Any permits necessary for the importation of equipment, materials and supplies and for their subsequent exportation;
- (f) Any permits necessary for importation of property belonging to and intended for the personal use or consumption of officials of UNIDO, of experts on mission for UNIDO, and for the subsequent exportation of such property;
- (g) Prompt release from customs of the items mentioned in subparagraphs (e) and (f) above.

...

#### *Article VI*

##### SETTLEMENT OF DISPUTES

1. Any dispute between UNIDO and the Government arising from or related to the interpretation or application of the present agreement, that is not settled by negotiation, shall be dealt with in accordance with article IX of the Convention on the Privileges and Immunities of the Specialized Agencies.

- (d) Basic Cooperation Agreement between the United Nations Industrial Development Organization and the Government of Morocco. Signed at Vienna on 6 September 1988<sup>28</sup>

#### *Article X*

##### PRIVILEGES AND IMMUNITIES

1. The Government shall apply to UNIDO, including its organs, its property, funds, assets and its officials, including the SIDFA and his staff in the country, the provisions of the Convention on the Privileges and Immunities of the United Nations, except that if the Government has acceded in respect of

UNIDO to the Convention on the Privileges and Immunities of the Specialized Agencies, the Government shall apply the provisions of the latter Convention, including any Annex to that Convention applicable to UNIDO.

2. The SIDFA of UNIDO and his staff in the country shall be granted such additional privileges and immunities as may be necessary for the effective exercise of their official functions. In particular, the SIDFA shall enjoy the same privileges and immunities as the Government accords to diplomatic envoys in accordance with international law.

3. (a) Except as the Government and UNIDO may otherwise agree in Project Documents relating to specific projects, the Government shall grant all persons, other than Government nationals employed locally, performing services on behalf of UNIDO, who are not covered by paragraphs 1 and 2 above, the same privileges and immunities as are granted to officials under Section 18 or 19, respectively, of the Conventions on the Privileges and Immunities of the United Nations or of the Specialized Agencies, as applicable.

(b) For purposes of the instruments on privileges and immunities referred to in the preceding parts of this article:

- (i) All papers and documents relating to a project in the possession or under the control of the persons referred to in subparagraph 3(a) above shall be deemed to be documents belonging to UNIDO; and
- (ii) Equipment, materials and supplies brought into, or purchased, or leased by those persons within the country for purposes of a project shall be deemed to be the property of UNIDO.

4. The expression “persons performing services” as used in articles X, XI and XIV of this Agreement includes operational experts, volunteers, consultants and juridical as well as natural persons and their employees. It includes governmental or non-governmental organizations or firms which UNIDO may retain to implement or to assist in the implementation of UNIDO assistance to a project and their employees. Nothing in this Agreement shall be construed to limit the privileges, immunities or facilities conferred upon such organizations or firms or their employees in any other instrument.

#### *Article XI*

##### FACILITIES FOR IMPLEMENTATION OF UNIDO ASSISTANCE

1. The Government shall take any measures which may be necessary to exempt UNIDO, its experts and other persons performing services on its behalf from regulations or other legal provisions which may interfere with operations under this Agreement and shall grant them such other facilities as may be necessary for the speedy and efficient implementation of UNIDO assistance. It shall, in particular, grant them the following rights and facilities:

- (a) Prompt clearance of experts and other persons performing services on behalf of UNIDO;
- (b) Prompt issuance without cost of necessary visas, licenses or permits;

- (c) Access to the site of work and all necessary rights of way;
- (d) Free movement within or to or from the country to the extent necessary for proper execution of UNIDO assistance;
- (e) The most favourable legal rate of exchange;
- (f) Any permits necessary for the tax- and duty-free importation of equipment, materials and supplies, and for their subsequent tax- and duty-free exportation;
- (g) Any permits necessary for tax- and duty-free importation of property belonging to and intended for the personal use or consumption of officials of UNIDO, or of other persons performing services on its behalf, and for the subsequent tax- and duty-free exportation of such property; and
- (h) Prompt release from customs of the items mentioned in subparagraphs (f) and (g) above.

2. Assistance under this Agreement being provided for the benefit of the Government and people of His Majesty the King of Morocco, the Government shall bear all risks of operations arising under this Agreement. It shall be responsible for dealing with claims, which may be brought by third parties against UNIDO, its officials, or other persons performing services on their behalf, and shall hold them harmless in respect of claims or liabilities arising from operations under this Agreement. The foregoing provision shall not apply where the Government and UNIDO have agreed that a claim or liability arises from the gross negligence or wilful misconduct of the above-mentioned individuals.

### *Article XII*

#### SUSPENSION OR TERMINATION OF ASSISTANCE

1. UNIDO may by written notice to the Government suspend its assistance to any project if in the judgement of UNIDO any circumstance arises, which interferes with or threatens to interfere with the successful completion of the project or the accomplishment of its purposes. UNIDO may, in the same or a subsequent written notice, indicate the conditions under which it is prepared to resume its assistance to the project. Any such suspension shall continue until such time as such conditions are accepted by the Government and as UNIDO shall give written notice to the Government that it is prepared to resume its assistance.

2. The provisions of this article shall be without prejudice to any other rights or remedies UNIDO may have in the circumstances, whether under general principles of law or otherwise.

### *Article XIII*

#### SETTLEMENT OF DISPUTES

1. Any dispute between UNIDO and the Government arising out of or relating to the interpretation or application of this Agreement, which is not settled by negotiation or other agreed mode of settlement, shall be submitted to arbitration at the request of either Party. Each Party shall appoint one arbitrator, and the two arbitrators so appointed shall appoint a third, who shall be the chairman.

If within thirty days of the request for arbitration either Party has not appointed an arbitrator or if within fifteen days of the appointment of two arbitrators the third arbitrator has not been appointed, either Party may request the President of the International Court of Justice to appoint an arbitrator. The procedure of the arbitration shall be fixed by the arbitrators, and the expenses of the arbitration shall be borne by the Parties as assessed by the arbitrators. The arbitral award shall contain a statement of the reasons on which it is based and shall be accepted by the parties as the final adjudication of the dispute.

2. Any dispute between the Government and an operational expert arising out of or relating to the conditions of his service with the Government may be referred to UNIDO by either the Government or the operational expert involved, and UNIDO shall use its good offices to assist them in arriving at a settlement. If the dispute cannot be settled in accordance with the preceding sentence or by other agreed mode of settlement, the matter shall at the request of either the Government or UNIDO be submitted to arbitration following the same provisions as are laid down in paragraph 1 of this article, except that the arbitrator not appointed by either Party or by the arbitrators of the Parties shall be appointed by the Secretary-General of the Permanent Court of Arbitration.

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The United Nations Industrial Development Organization also entered into a Basic Cooperation Agreement with the Government of the Niger.

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(e) Agreement between the United Nations Industrial Development Organization and the Government of Cuba regarding the arrangements for the United Nations Industrial Development Organization's first interregional consultation on the food-processing industry, with emphasis on sugar-cane processing. Signed at Vienna on 20 September 1988<sup>29</sup>

### *Article III*

#### PREMISES, EQUIPMENT, UTILITIES AND SUPPLIES

1. The Government shall provide the necessary premises, including conference rooms for informal meetings, office space, working areas and other related facilities. The Government shall at its expense furnish, equip and maintain in good repair all these premises and facilities in a manner that UNIDO considers adequate for the effective conduct of the Consultation. Two conference rooms shall be equipped for reciprocal simultaneous interpretation between five languages and three languages, respectively, and shall have facilities for sound recording in the original and English language. The premises shall remain at the disposal of UNIDO throughout the duration of the Consultation and for such additional time before and after the Consultation as required by the secretariat, in consultation with the Government.

2. The Government shall provide, in a location convenient to the conference area: bank, post office, telephone and cable facilities, as well as appropriate eating facilities and a travel agency.

3. The Government shall bear the cost of all necessary utility services, including local telephone communications, of the secretariat of the Consultation and its communications by telex or telephone with UNIDO headquarters in Vienna when such communications are authorized by or on behalf of the Director-General of UNIDO.

4. The Government shall bear the cost of transport and insurance charges, from any established UNIDO office to the site of the Consultation and return, of all UNIDO equipment and supplies required for the adequate functioning of the Consultation. UNIDO shall determine the mode of shipment of such equipment and supplies.

#### *Article IV*

##### ACCOMMODATION

The Government shall ensure that adequate accommodation in hotels or residences is available at reasonable commercial rates for persons participating in or attending the Consultation.

...

#### *Article VII*

##### POLICE PROTECTION

The Government shall furnish such police protection as may be required to ensure the effective functioning of the Consultation in an atmosphere of security and tranquility free from interference of any kind. While such police services shall be under the direct supervision and control of a senior officer provided by the Government, this officer shall work in close co-operation with a designated senior official of UNIDO.

#### *Article VIII*

##### LOCAL PERSONNEL

1. The Government shall appoint a Liaison Officer who shall be responsible, in consultation with UNIDO, for making and carrying out the administrative and personnel arrangements for the Consultation as required under this Agreement.

2. The Government shall recruit and provide an adequate number of clerks, personnel for the reproduction and distribution of documents, assistant conference officers, ushers, messengers, bilingual receptionists, telephone operators, cleaners and workmen, as required for the proper functioning of the Consultation. The exact requirements in this respect will be established by UNIDO in consultation with the Government.

## Article IX

### FINANCIAL ARRANGEMENTS

1. The Government, in addition to the financial obligations provided for elsewhere in this Agreement, shall in accordance with General Assembly resolution 40/243, section I, paragraph 5, bear the actual additional costs directly or indirectly involved in holding the Consultation in Cuba rather than at the established headquarters of UNIDO at Vienna. Such costs, which are provisionally estimated at approximately US \$70,000, shall include, but not be restricted to, the actual additional costs of travel and staff entitlements of the UNIDO officials assigned to plan for or attend the Consultation, as well as the costs of shipping any necessary equipment and supplies. Arrangements for the travel of UNIDO officials required to plan for or service the Consultation and for the shipment of any necessary equipment and supplies shall be made by the UNIDO secretariat in accordance with the Staff Regulations and Rules of UNIDO and its related administrative practices regarding travel standards, baggage allowances, subsistence payments and terminal expenses.

2. In accordance with the obligation referred to in paragraph one above, the Government shall, in particular, provide to UNIDO:

(a) Nineteen (19) air tickets, Vienna/Havana/Vienna, and hotel accommodation at Havana for nineteen (19) UNIDO officials;

(b) (i) Free hotel accommodation for nineteen (19) staff members from 22 September to 2 October 1988.

(ii) Fifty per cent of the per diem at UNIDO's official rates, in local currency — coupon A vouchers in pesos — upon arrival of the UNIDO officials in Havana, in accordance with a list approved by the Director-General of UNIDO. The coupon A vouchers cannot be converted into any other currency.

(iii) Fifty per cent of the terminal expenses at UNIDO's official rates, in United States dollars.

(c) The equivalent in pesos of US\$ 1,000 to cover hospitality expenses;

(d) All the services and physical facilities required for the Consultation, as well as the cost of shipping any necessary equipment and supplies.

Should any additional costs, as defined in paragraph one above, arise for UNIDO, UNIDO shall after the Consultation give the Government a detailed set of accounts showing the actual additional costs incurred by UNIDO and to be borne by the Government pursuant to paragraph one.

## *Article X*

### LIABILITY

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

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

(b) The employment for the Consultation of the personnel provided by the Government under article VIII;

(c) Any transportation provided by the Government for the Consultation.

2. The Government shall indemnify and hold harmless UNIDO and its officials in respect of any such action, claim or other demand.

## *Article XI*

### PRIVILEGES AND IMMUNITIES

1. The Convention on the Privileges and Immunities of the United Nations, adopted by the General Assembly on 13 February 1946, to which the Government is a party, shall be applicable in respect of the Consultation. In particular, the participants referred to in article II, paragraph 1(a), above, shall enjoy the privileges and immunities provided under article IV of the Convention, the officials of UNIDO performing functions in connection with the Consultation referred to in article II, paragraph 2, above, shall enjoy the privileges and immunities provided under articles V and VII of the Convention and any experts on mission for UNIDO in connection with the Consultation shall enjoy the privileges and immunities provided under articles VI and VII of the Convention.

2. The representatives or observers referred to in article II, paragraph 1(b), above, shall enjoy immunity from legal process in respect of words spoken or written and any act performed by them in connection with their participation in the Consultation.

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

4. Without prejudice to the preceding paragraphs of the present article, all persons performing functions in connection with the Consultation, including those referred to in article VIII and all those participating in the Consultation, shall enjoy the privileges, immunities and facilities necessary for the independent exercise of their functions in connection with the Consultation.

5. All persons referred to in article II shall have the right of entry into and exit from Cuba, and no impediment shall be imposed on their transit to and from the conference area. They shall be granted facilities for speedy travel. Visas and entry permits, where required, shall be granted free of charge, as speedily as possible and not later than two weeks before the date of the opening of the Consultation, provided the application for the visa is made at least three weeks before the opening of the Consultation; if the application is made later, the visa shall be granted not later than three days from the receipt of the application. Arrangements shall also be made to ensure that visas for the duration of the Consultation are delivered at the airport or other specified points of entry to participants who were unable to obtain them prior to their arrival. Exit permits, where required, shall be granted free of charge, as speedily as possible, and in any case not later than three days before the closing of the Consultation.

6. For the purpose of the Convention on the Privileges and Immunities of the United Nations, the conference premises specified in article III, paragraph 1, above, shall be deemed to constitute premises of UNIDO in the sense of section 3 of the Convention and access thereto shall be subject to the authority and control of UNIDO. The premises shall be inviolable for the duration of the Consultation, including the preparatory stage and the winding up.

7. All persons referred to in article II, above, shall have the right to take out of Cuba at the time of their departure, without any restriction, any unexpended portions of the funds they brought into Cuba in connection with the Consultation and to reconvert any such funds at the rate at which they had originally been converted.

8. The Government shall allow the temporary importation, tax- and duty-free, of all equipment, including technical equipment accompanying representatives of information media, and shall waive import duties and taxes on supplies necessary for the Consultation. It shall issue without delay any necessary import and export permits for this purpose.

## *Article XII*

### SETTLEMENT OF DISPUTES

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



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## NOTES

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

<sup>2</sup>The Convention is in force with regard to each State which deposited an instrument of accession or succession with the Secretary-General of the United Nations as from the date of its deposit.

<sup>3</sup>For the list of those States, see *Multilateral Treaties Deposited with the Secretary-General* (United Nations publication, Sales No. E.89.V.6).

<sup>4</sup>Came into force on the date of signature.

<sup>5</sup>Came into force on the date of signature.

<sup>6</sup>Came into force on the date of signature.

<sup>7</sup>Came into force on 20 August 1988.

<sup>8</sup>Came into force on the date of signature.

<sup>9</sup>Came into force on the date of signature.

<sup>10</sup>Came into force on 14 January 1989.

<sup>11</sup>Came into force on the date of signature.

<sup>12</sup>Came into force on 10 April 1989.

<sup>13</sup>Came into force on the date of signature.

<sup>14</sup>United Nations, *Treaty Series*, vol. 33, p. 261.

<sup>15</sup>The Convention is in force with respect to each State which deposited an instrument of accession and in respect of specialized agencies indicated therein or in a subsequent notification as from the date of deposit of such instrument or receipt of such notification.

<sup>16</sup>For the list of those States, see *Multilateral Treaties Deposited with the Secretary-General* (United Nations publication, Sales No. E.89.V.6).

<sup>17</sup>Came into force on the date of signature.

<sup>18</sup>United Nations, *Treaty Series*, vol. 729, p. 161.

<sup>19</sup>INFCIRC/9/Rev.2; United Nations, *Treaty Series*, vol. 374, p. 147.

<sup>20</sup>Came into force on 22 July 1988.

<sup>21</sup>Came into force on 22 February 1990.

<sup>22</sup>Came into force on the date of signature.

<sup>23</sup>See *Official Records of the General Assembly; Forty-first Session, Supplement No. 5I (A/41/5/Add.9)*.

<sup>24</sup>See *Official Records of the General Assembly, Forty-first session, Supplement No. 5 (A/41/5)*, vol. I.

<sup>25</sup>Came into force on the date of signature.

<sup>26</sup>United Nations, *Treaty Series*, vol. 1401, p. 3.

<sup>27</sup>Came into force on the date of signature.

<sup>28</sup>Came into force on the date of signature.

<sup>29</sup>Came into force on the date of signature.



**Part Two**

**LEGAL ACTIVITIES OF THE UNITED  
NATIONS AND RELATED  
INTERGOVERNMENTAL  
ORGANIZATIONS**



## Chapter III

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

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

### 1. DISARMAMENT AND RELATED MATTERS

#### (a) Comprehensive approaches to disarmament

##### (i) *United Nations disarmament bodies and their activities in 1988*

The general improvement in the international situation and the optimism regarding the United Nations itself, generated by the active role it had played in 1988 in alleviating regional conflicts and by the fact that its peacekeeping forces had been awarded the Nobel Peace Prize, led many Member States to hope that the Organization's role in disarmament would also be enhanced.

However, following the inconclusive outcome of the third special session of the General Assembly devoted to disarmament, held in 1988, the Assembly, by its resolution 43/75 R of 7 December 1988,<sup>1</sup> requested the Disarmament Commission to continue its consideration of the role of the United Nations in the field of disarmament as a matter of priority at its next substantive session, in 1989, with a view to the elaboration of concrete recommendations and proposals. Furthermore, the General Assembly, by its resolution 43/78 A of the same date,<sup>2</sup> while commending the Commission for its adoption by consensus of a set of principles of verification on disarmament issues and guidelines for appropriate types of confidence-building measures, called upon the Commission to persevere in its efforts to complete all outstanding items.

The two resolutions adopted on the report of the Conference on Disarmament, 43/78 M<sup>3</sup> and 43/78 I,<sup>4</sup> both of 7 December 1988, reflected the divergence of views among members of the General Assembly concerning the advisability of the Conference's conducting negotiations on all its agenda items. The General Assembly also adopted resolution 43/75 H of 7 December 1988,<sup>5</sup> wherein it deemed important that all Member States make every effort to facilitate the consistent implementation of General Assembly resolutions in the field of disarmament.

Finally, the General Assembly, by its resolution 43/79 of 7 December 1988,<sup>6</sup> renewed the mandate of the Ad Hoc Committee on the Indian Ocean and requested it to intensify its work and complete the remaining preparatory work relating to the Conference on the Indian Ocean to enable the convening of the Conference at Colombo in 1990.

(ii) *General and complete disarmament and the comprehensive programme of disarmament*

Although the Conference on Disarmament continued throughout the year with its efforts to negotiate the comprehensive programme of disarmament, Member States focused their attention on specific aspects and interim measures of disarmament. In this regard, the General Assembly, by its resolution 43/75 B of 7 December 1988,<sup>7</sup> requested the Secretary-General to take action through the appropriate organs, within available resources, for the implementation of the action programme adopted at the International Conference on the Relationship between Disarmament and Development, and to submit a report to the General Assembly at its forty-fourth session. By resolution 43/75 G of the same date,<sup>8</sup> the General Assembly recommended that all States should implement the international system for the standardized reporting of military expenditures, with the aim of achieving a realistic comparison of military budgets, and invited all Member States to communicate to the Secretary-General measures they have adopted towards those ends, for submission to the Assembly at its forty-fourth session.

The General Assembly, by its resolution 43/75 L of 7 December 1988,<sup>9</sup> having examined the report of the Chairman of the Disarmament Commission on the substantive consideration of the question of the naval arms race and disarmament during the 1988 session of the Commission, requested the Commission to continue, at its forthcoming session in 1989, the substantive consideration of the question and to report on its deliberations and recommendations to the General Assembly at its forty-fourth session. The General Assembly also adopted resolution 43/75 M of 7 December 1988,<sup>10</sup> concerning the preparations for the Third Review Conference of the Parties to the Treaty on the Prohibition of the Emplacement of Nuclear Weapons and Other Weapons of Mass Destruction on Sea-Bed and the Ocean Floor and in the Subsoil Thereof.

(iii) *Verification and compliance*

In 1988, the question of verification was pre-eminent in the deliberations of the Disarmament Commission, in those of the General Assembly at its third special session devoted to disarmament and at its forty-third regular session, and in those of the Conference on Disarmament. The General Assembly, by its resolution 43/81 A of 7 December 1988,<sup>11</sup> urged all States parties to arms limitation and disarmament agreements to implement and comply with the entirety of the provisions of such agreements, and called upon all Member States to give serious consideration to the implications of non-compliance with those obligations for international security and stability, as well as for the prospects for further progress in the field of disarmament.

(b) Nuclear disarmament

(i) *Nuclear arms limitation and disarmament*

The General Assembly, both at its third special session and at its forty-third regular session, devoted attention to nuclear disarmament. No major progress, however, was achieved within the multilateral framework. Once again, in the Conference on Disarmament, there was no agreement to set up an ad hoc committee to deal with the item on nuclear disarmament. On the other hand, with

the entry into force in 1988 of the Treaty between the Union of Soviet Socialist Republics and the United States of America on the Elimination of Their Intermediate-Range and Shorter-Range Missiles (INF Treaty),<sup>12</sup> the two countries expressed their determination to achieve the full implementation of all the provisions of the Treaty.

The General Assembly, by its resolution 43/75 A of 7 December 1988,<sup>13</sup> called upon the Union of Soviet Socialist Republics and the United States of America to exert every effort to achieve the goal they set themselves of a treaty on a 50 per cent reduction in strategic offensive arms as part of the process leading to the complete elimination of nuclear weapons. By its resolution 43/75 E of the same date,<sup>14</sup> the Assembly urged the USSR and the United States, which possessed the most important nuclear arsenals, further to discharge their special responsibility for nuclear disarmament, to take the lead in halting the nuclear-arms race and to negotiate in earnest with a view to reaching early agreement on the drastic reduction of their nuclear arsenals. The General Assembly, by its resolution 43/76 B of the same date,<sup>15</sup> urged once more the USSR and the United States, as the two major nuclear-weapon States, to agree to an immediate nuclear-arms freeze, which would, *inter alia*, provide for a simultaneous total stoppage of any further production of nuclear weapons and a complete cut-off in the production of fissionable material for weapons purposes; and called upon all nuclear-weapon States to agree, through a joint declaration, to a comprehensive nuclear-arms freeze. By its resolution 43/78 E of the same date,<sup>16</sup> the Assembly reaffirmed that both bilateral and multilateral negotiations on the nuclear and space arms race are by nature complementary to one another; and again requested the Conference on Disarmament to establish an ad hoc committee at the beginning of its 1989 session to elaborate on paragraph 50 of the Final Document of the Tenth Special Session of the General Assembly<sup>17</sup> and to submit recommendations to the Conference as to how it could best initiate multilateral negotiations of agreements, with adequate measures of verification. Finally, by its resolution 43/82 of the same date,<sup>18</sup> the Assembly requested the Secretary-General to render the necessary assistance and to provide such services as may be required for the Fourth Review Conference of the Parties to the Treaty on the Non-Proliferation of Nuclear Weapons and its preparation — the Conference to be convened in 1990.

#### (ii) *Prevention of nuclear war*

All nations have a vital interest in the negotiation of effective measures for the prevention of nuclear war, since nuclear weapons pose a unique threat to human survival. If nuclear war were to occur, in all certainty its consequences would be global, not simply national. Therefore, the scientific advances that have led to a clearer understanding of the global consequences of a major nuclear war should be pursued internationally.

The General Assembly, by its resolution 43/78 B of 7 December 1988,<sup>19</sup> expressed the hope that those nuclear-weapon States which have not yet done so will consider making declarations with respect to not being the first to use nuclear weapons; and requested the Conference on Disarmament to commence negotiations on the item in its agenda concerning prevention of nuclear war and to consider, *inter alia*, the elaboration of an international instrument of a legally binding character laying down the obligation not to be the first to use nuclear weapons. By

its resolution 43/78 F of the same date,<sup>20</sup> the Assembly reiterated its conviction that, in view of the urgency of the matter and the inadequacy or insufficiency of existing measures, it was necessary to devise suitable steps to expedite effective action for the prevention of nuclear war; and again requested the Conference on Disarmament to undertake, as a matter of the highest priority, negotiations with a view to achieving agreement on appropriate and practical measures that could be negotiated and adopted individually for the prevention of nuclear war and to establish for that purpose an ad hoc committee on the subject at the beginning of its 1989 session. Finally, by its resolution 43/76 E of the same date,<sup>21</sup> the Assembly, noting with regret that the Conference on Disarmament, during its 1988 session, was not able to undertake negotiations with a view to achieving agreement on an international convention prohibiting the use or threat of use of nuclear weapons under any circumstances, taking as a basis the text annexed to General Assembly resolution 41/60 F of 3 December 1986 and 42/39 C of 30 November 1987, reiterated its request to the Conference on Disarmament to commence negotiations, as a matter of priority, in order to reach agreement on an international convention prohibiting the use or threat of use of nuclear weapons under any circumstances, taking as a basis the draft Convention on the Prohibition of the Use of Nuclear Weapons annexed to resolution 43/76.

### (iii) *Cessation of nuclear-weapon tests*

There was not much development in the multilateral or international forums — as compared to the bilateral negotiations between the USSR and the United States — on the cessation of nuclear testing. In other developments, one additional nuclear-weapon State — France — announced its decision to provide data to the United Nations on an annual basis on its underground nuclear tests.

The General Assembly, by its resolution 43/63 A of 7 December 1988,<sup>22</sup> urged once more all nuclear-weapon States, in particular the three depositary Powers of the Treaty Banning Nuclear Weapon Tests in the Atmosphere, in Outer Space and under Water<sup>23</sup> and of the Treaty on the Non-Proliferation of Nuclear Weapons,<sup>24</sup> to seek to achieve the early discontinuance of all test explosions of nuclear weapons for all time and to expedite negotiations to this end; and appealed to all States Members of the Conference on Disarmament to promote the establishment by the Conference at the beginning of its 1989 session of an ad hoc committee with the objective of carrying out the multilateral negotiation of a treaty on the complete cessation of nuclear-test explosions. By its resolution 43/63 B of the same date,<sup>25</sup> the Assembly welcomed the submission to the Depositary Governments of the Treaty Banning Nuclear Weapon Tests in the Atmosphere, in Outer Space and under Water of an amendment proposal (banning underground nuclear tests) for consideration at a conference of the parties to the Treaty convened for that purpose in accordance with article II of the Treaty; and decided to include in the provisional agenda of its forty-fourth session an item entitled “Amendment of the Treaty Banning Nuclear Weapon Tests in the Atmosphere, in Outer Space and under Water.” Finally, the General Assembly, by its resolution 43/64 also of the same date,<sup>26</sup> reaffirmed its conviction that a treaty to achieve the prohibition of all nuclear-test explosions by all States in all environments for all time was a matter of fundamental importance; and, in that connection, urged that a comprehensive nuclear-test-ban treaty be concluded at an early date.



(iv) *Strengthening of the security of non-nuclear-weapon States*

In 1988, the Conference on Disarmament continued its consideration of the question of effective security guarantees to non-nuclear-weapon States. Although new proposals and ideas were put forward in the Ad Hoc Committee, the differences in the perception of the security interests of the nuclear-weapon and the non-nuclear-weapon States were still pronounced and agreement on a common formula still eluded the Committee. Members did, however, reiterate their readiness to continue the search for such a formula for guarantees, in particular one that could be included in an international instrument of a legally binding nature.

The General Assembly, by its resolution 43/68 of 7 December 1988,<sup>27</sup> recommended that the Conference on Disarmament pursue intensive negotiations in its Ad Hoc Committee on Effective International Arrangements to Assure Non-Nuclear-Weapon States against the Use or Threat of Use of Nuclear Weapons at the beginning of its 1989 session, with a view to reaching such an agreement, taking into account the widespread support in the Conference for the conclusion of an international convention.

(v) *Nuclear-weapon-free zones*

A large number of delegations supported the concept and specific proposals in the context of regional disarmament measures and the nuclear non-proliferation regime. Along with the extensive debate on the creation of zones in Africa, the Middle East and South Asia, proposals to create zones in other regions, such as South-East Asia, the Balkans, and Northern and Central Europe, were also commented on. It was stressed that certain conditions should be met in establishing zones in order to ensure their nuclear-free status and to enhance the security both of the regions involved and the entire world. Attention was also drawn to the value of the two existing nuclear-free zones, in Latin America and the South Pacific.

The General Assembly, by its resolution 43/62 of 7 December 1988,<sup>28</sup> once more urged France not to delay ratification of the Additional Protocol I of the Treaty for the Prohibition of Nuclear Weapons in Latin America (Treaty Tlatelolco),<sup>29</sup> since France was the only one of the four States to which the Protocol was open that is not yet party to it.

By its resolution 43/66 of the same date,<sup>30</sup> the Assembly urged once again the States of South Asia to continue to make all possible efforts to establish a nuclear-weapon-free zone in South Asia and to refrain, in the meantime, from any action contrary to this objective.

By its resolution 43/71 A of the same date,<sup>31</sup> the General Assembly reaffirmed that the implementation of the Declaration on the Denuclearization of Africa adopted by the Assembly of Heads of State and Government of the Organization of African Unity would be an important measure to prevent the proliferation of nuclear weapons and to promote international peace and security; called upon all States, corporations, institutions and individuals to desist from further collaboration with the racist regime of South Africa that may enable it to frustrate the objective of the Declaration; demanded once again that the racist regime refrain from manufacturing, testing, deploying, transporting, storing,

using or threatening to use nuclear weapons; and further demanded once again that South Africa submit forthwith all its nuclear installations and facilities to inspection by the IAEA. In resolution 43/71 B of the same date,<sup>32</sup> the Assembly reaffirmed that the acquisition of nuclear-weapon capability by the racist regime of South Africa constituted a very grave danger to international peace and security and, in particular, jeopardized the security of African States and increased the danger of the proliferation of nuclear weapons; and demanded that South Africa and all other foreign interests put an immediate end to the exploration for and exploitation of uranium resources in Namibia.

Finally, by its resolution 43/80 also of the same date,<sup>33</sup> the Assembly demanded once more that Israel place all its nuclear facilities under IAEA safeguards; called upon all States and organizations that have not yet done so to discontinue cooperating with and giving assistance to Israel in the nuclear field; and reiterated its request to the IAEA to suspend any scientific cooperation with Israel that could contribute to its nuclear capabilities.

(vi) *Peaceful uses of nuclear energy and IAEA safeguards and related activities*

Safeguarding the non-proliferation regime and promoting cooperation in the peaceful uses of nuclear energy continued to be dominant concerns of the international community in 1988. With the conclusion of an agreement between China and the IAEA, under which some nuclear facilities in China will be placed under Agency safeguards, all five nuclear-weapon States have now arranged to submit some of their nuclear activities to IAEA safeguards.

The General Assembly, by its resolution 43/16 of 28 October 1988,<sup>34</sup> urged all States to strive for effective and harmonious international cooperation in carrying out the work of the Agency, in promoting the use of nuclear energy and the application of the necessary measures to strengthen further the safety of nuclear installations and to minimize risks to life, health and the environment; in strengthening technical assistance and cooperation for developing countries; and in ensuring the effectiveness and efficiency of the Agency's safeguards system.

(c) *Prohibition or restriction of use of other weapons*

(i) *Chemical and bacteriological (biological) weapons*

In the work of the Conference on Disarmament on the conclusion of a comprehensive ban on chemical weapons, some progress was made in certain areas, such as the definition of a chemical weapons production facility and the destruction of such facilities. Debates during the 1988 session of the Disarmament Commission and the third special session of the General Assembly devoted to disarmament highlighted the timeliness of the issue of chemical weapons. Stress was laid on the urgency of concluding a chemical weapons convention and the need to uphold the authority of the 1925 Geneva Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare.<sup>35</sup>

The General Assembly, by its resolution 43/74 A of 7 December 1988,<sup>36</sup> called upon all States that have not yet done so to accede to the 1925 Geneva Protocol; urged the Conference on Disarmament to pursue as a matter of continuing urgency its negotiations on a convention on the prohibition, stockpiling and use of all chemical weapons and on their destruction; and requested the Secretary-General to carry out promptly investigations in response to reports that may be brought to his attention by any Member State concerning the possible use of chemical and bacteriological (biological) or toxin weapons that may constitute a violation of the Geneva Protocol or other rules of customary international law in order to ascertain the facts of the matter, and to report promptly the results of any such investigation to all Member States, in accordance with the procedure established by the General Assembly in its resolution 42/37 C of 30 November 1987.

(ii) *Prevention of an arms race in outer space*

In 1988, the prevention of an arms race in outer space continued to receive attention, both within and outside the United Nations. There was no breakthrough, however, during the year, in efforts to consolidate and reinforce the legal regime applicable to outer space, to negotiate a multilateral outer space agreement (or agreements) in the interest of international peace and security, to adopt effective provisions for verification with a view to preventing an arms race in outer space, and to promote international cooperation in the peaceful use of outer space.

The General Assembly, by its resolution 43/70 of 7 December 1988,<sup>37</sup> reaffirmed that general and complete disarmament under effective international control warrants that outer space shall be used exclusively for peaceful purposes and that it shall not become an arena for an arms race; recognized, as stated in the report of the Ad Hoc Committee of the Conference on Disarmament, that the legal regime applicable to outer space by itself did not guarantee the prevention of an arms race in outer space, and that this legal regime played a significant role in the prevention of an arms race in that environment; emphasized that further measures with appropriate and effective provisions for verification to prevent an arms race in outer space should be adopted by the international community; called upon all States, in particular those with major space capabilities, to contribute actively to the objective of the peaceful use of outer space and to take immediate measures to prevent an arms race in outer space in the interest of maintaining international peace and security and promoting international cooperation and understanding; and reiterated that the Conference on Disarmament, as the single multilateral disarmament negotiating forum, had the primary role in the negotiation of a multilateral agreement or agreements, as appropriate, on the prevention of an arms race in outer space in all its aspects.

(iii) *New weapons of mass destruction; radiological weapons*

There was no development in the Conference on Disarmament in 1988 regarding the general question of the prohibition of new types of weapons of mass destruction and new systems of such weapons. Issues relevant to the prohibition of radiological weapons in the traditional sense and to the prohibition

of attacks on nuclear facilities were again addressed in the Conference on Disarmament, which re-established the relevant Ad Hoc Committee. Although the work conducted in 1988 contributed further to the clarification of the differing approaches of delegations, considerable differences in substance persisted with regard to both subjects.

The General Assembly, by its resolution 43/72 of 7 December 1988,<sup>38</sup> reaffirmed that effective measures should be undertaken to prevent the emergence of new types of weapons of mass destruction, and in this regard requested the Conference on Disarmament to keep the matter under review.

By its resolution 43/75 J of the same date,<sup>39</sup> the Assembly reaffirmed that armed attacks of any kind against nuclear facilities were tantamount to the use of radiological weapons, owing to the dangerous radioactive forces that such attacks caused to be released; and requested once again the Conference on Disarmament to intensify further its efforts to reach an agreement prohibiting armed attacks against nuclear facilities.

A new item on the dumping of nuclear and industrial wastes in Africa was placed on the agenda of the General Assembly in 1988 and two resolutions, 43/75 Q<sup>40</sup> and 43/75 T,<sup>41</sup> were adopted on 7 December 1988 on the subject. By both resolutions, the Conference on Disarmament was requested to take the matter into account in its ongoing negotiations for a convention on the prohibition of radiological weapons.

(d) Consideration of conventional disarmament and other approaches

(i) *Conventional weapons*

In 1988, the traditional priority accorded to nuclear-related issues remained dominant in the debates in the various international forums. At the same time, the trend of the 1980s towards devoting both increased and more immediate attention to conventional armaments and their regulation not only continued but gained momentum.

The General Assembly, by its resolution 43/67 of 7 December 1988,<sup>42</sup> urged all States that have not yet done so to exert their best endeavours to become parties to the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects and the three Protocols annexed thereto.<sup>43</sup>

By its resolution 43/75 F of the same date,<sup>44</sup> the Assembly reaffirmed the importance of the efforts aimed at resolutely pursuing the limitation and gradual reduction of armed forces and conventional weapons within the framework of progress towards general and complete disarmament; believed that the military forces of all countries should not be used other than for the purpose of self-defence; and urged countries with the largest military arsenals, which bore a special responsibility in pursuing the process of conventional armaments reductions, and the Member States of the two major military alliances to conduct negotiations on conventional disarmament in earnest through appropriate forums, with a view to reaching early agreement on the limitation and gradual and balanced reduction of armed forces and conventional weapons under effective

international control in their respective regions, particularly in Europe, which had the largest concentration of arms and forces in the world.

Finally, by its resolution 43/75 S also of the same date,<sup>45</sup> the Assembly again expressed firm support for the United Nations system, and for the Secretary-General in particular, in efforts to find solutions to conflict situations, thereby reaffirming the primary role of the United Nations in promoting peace and disarmament, and for the strict observance of the principles and norms embodied in the Charter of the United Nations.

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## 2. OTHER POLITICAL AND SECURITY QUESTIONS

### (a) Review of the implementation of the Declaration on the Strengthening of International Security

The General Assembly, by its resolution 43/88 of 7 December 1988,<sup>46</sup> adopted on the recommendation of the First Committee,<sup>47</sup> reaffirmed the validity of the Declaration,<sup>48</sup> and called upon all States to contribute effectively to its implementation; urged once again all States to abide strictly, in their international relations, by their commitment to the Charter of the United Nations; expressed its conviction that the gradual military disengagement of the great Powers and their military alliances from various parts of the world should be promoted; emphasized the role that the United Nations had in the maintenance of international peace and security and in the economic and social development and progress for the benefit of all mankind; and stressed that there was a need further to enhance the effectiveness of the Security Council in discharging its principal role of maintaining international peace and security and to enhance the authority of enforcement capacity of the Council in accordance with the Charter.

### (b) Comprehensive review of the whole question of peace-keeping operations in all their aspects

The General Assembly, by its resolution 43/59 A of 6 December 1988,<sup>49</sup> adopted on the recommendation of the Special Political Committee,<sup>50</sup> took note of the report of the Special Committee on Peace-keeping Operations;<sup>51</sup> invited Member States to submit observations and suggestions to the Secretary-General by 1 March 1989 on peace-keeping operations in all their aspects, with particular emphasis on practical proposals to make these operations more effective; and requested the Secretary-General to prepare within existing resources a compilation of this information and to submit it to the Special Committee during its session in 1989.

By its resolution 43/59 B also of 6 December 1988,<sup>52</sup> adopted on the recommendation of the Special Political Committee,<sup>53</sup> decided to increase the membership of the Special Committee on Peace-keeping Operations to thirty-four, adding China.

(c) Question of Antarctica

The General Assembly, by its resolution 43/83 A of 7 December 1988,<sup>54</sup> adopted on the recommendation of the First Committee,<sup>55</sup> further expressed its deep regret that the Antarctic Treaty Consultative Parties have proceeded with negotiations and adopted on 2 June 1988 a convention on the regulation of Antarctic mineral resource activities, notwithstanding General Assembly resolutions 41/88 B and 42/46 B, calling for the imposition of a moratorium on negotiations to establish a minerals regime until such time as all members of the international community could fully participate in such negotiations; and reiterated its call upon the Antarctic Treaty Consultative Parties to invite the Secretary-General or his representative to all meetings of the Treaty parties, including their consultative meetings.

By its resolution 43/83 B of the same date,<sup>56</sup> adopted on the recommendation of the First Committee,<sup>57</sup> the Assembly appealed once again to the Antarctic Treaty Consultative Parties to take urgent measures to exclude the racist apartheid regime of South Africa from participation in the meetings of the Consultative Parties at the earliest possible date.

(d) Legal aspects of the peaceful uses of outer space

The Legal Sub-Committee of the Committee on the Peaceful Uses of Outer Space held its twenty-seventh session at the United Nations Office at Geneva from 14 to 31 March 1988.<sup>58</sup> The Committee on the Peaceful Uses of Outer Space, at its thirty-first session, held at United Nations Headquarters from 13 to 23 June 1988, took note of the report of the Legal Subcommittee and made recommendations concerning the agenda of the Subcommittee for its twenty-eighth session.<sup>59</sup>

In considering the agenda item on the elaboration of draft principles relevant to the use of nuclear power sources in outer space, the Legal Subcommittee re-established its Working Group on the item, which concentrated on those draft principles where consensus had not been recorded. The Committee welcomed the consensus reached on the text of a draft principle related to the applicability of international law (Principle 1). The Legal Subcommittee also re-established its Working Group on the agenda item on matters relating to the definition and delimitation of outer space and to the character and utilization of the geostationary orbit, including consideration of ways and means to ensure the rational and equitable use of the geostationary orbit without prejudice to the role of the International Telecommunication Union. No consensus developed during the session of the Subcommittee concerning the question of the definition and delimitation of outer space. However, the Committee noted that there was some progress made towards a convergence of views on the question of the activities of States in the utilization of the geostationary orbit.

The Committee recommended that the Legal Subcommittee should continue consideration of the above-mentioned two items at its next session. The Committee further noted that the Subcommittee had adopted by consensus a new agenda item: "Consideration of the legal aspects related to the application of the principle that the exploration and utilization of outer space should be

carried out for the benefit and in the interests of all States, taking into particular account the needs of developing countries,” and also recommended that the Subcommittee take up consideration of this item at its next session.

The General Assembly, by its resolution 43/56 of 6 December 1988,<sup>60</sup> adopted on the recommendation of the Special Political Committee,<sup>61</sup> endorsed the report of the Committee on the Peaceful Uses of Outer Space, as well as the work of the Legal Subcommittee; and invited States that have not yet become parties to the international treaties governing the uses of outer space to give consideration to ratifying or acceding to those treaties.

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

#### (a) Environmental questions

##### *First Special Session of the Governing Council of the United Nations Environment Programme*

The First special session of the Governing Council of UNEP was held at UNEP headquarters, Nairobi, from 14 to 18 March 1988,<sup>62</sup> pursuant to Governing Council decision 14/4 of 18 June 1987 and General Assembly resolution 42/185 of 11 December 1987.

By its decision SS.I/1,<sup>63</sup> entitled “Programme policy and implementation”, the Governing Council resolved to exercise fully the role expected of it, *inter alia*, with respect to the follow-up of the Environmental Perspective to the Year 2000 and Beyond,<sup>64</sup> approved by the General Assembly in its resolution 42/186 of 11 December 1987; with respect to the report of the World Commission on Environment and Development entitled *Our Common Future*,<sup>65</sup> welcomed by the General Assembly in its resolution 42/187 also of 11 December 1987; and with respect to the system-wide medium-term environment programme for the period 1990-1995, in accordance with section I, paragraph 2(b), of General Assembly resolution 2997 (XXVII) of 15 December 1972. By its decision SS.I/2, entitled “The 1990 state-of-the-environment report”, the Council decided that the topic of the state-of-the-environment report for 1990 should be “Children and the environment”, and requested the Executive Director to prepare the report in close cooperation with the United Nations Children’s Fund. Furthermore, the Governing Council, by its decision SS.I/3, approved the system-wide medium-term environment programme for the period 1990-1995, as submitted by the Administrative Committee on Co-ordination (ACC) and with amendments proposed by the Bureau. It also decided that at its fifteenth session it would provide the ACC with its views as policy guidance for a revision of the system-wide medium-term environment programme for the period 1990-1995 to be presented to the Council at its sixteenth session.

Moreover, the Council, by its decision SS.I/4, entitled “Regional and sub-regional programmes in Latin America and the Caribbean”, decided that in developing the medium-term plan of the United Nations Environment Programme for the period 1990-1995, priority should continue to be given, within the oceans and coastal areas programme, to the Action Plan for the Protection of the Marine Environment and Coastal Areas of the South-East Pacific and the Action Plan for the Caribbean Environment Programme. Finally, by its decision SS.I/5, the Council noted with appreciation UNEP’s involvement in and support for the Cairo Programme for African Cooperation; and urged the Executive Director to continue to give priority to the implementation of the Cairo Programme in the next three programme budgets of UNEP.

#### *Consideration by the General Assembly*

At its forty-third session, the General Assembly, by its resolution 43/196 of 20 December 1988,<sup>66</sup> adopted on the recommendation of the Second Committee,<sup>67</sup> decided to consider at its forty-fourth session the question of the convening of a United Nations conference on the environment and development no later than 1992, with a view to taking an appropriate decision at that session on the exact scope, title, venue and date of such a conference and on the modalities and financial implications of holding the conference.

Furthermore, by its resolution 43/53 of 6 December 1988,<sup>68</sup> adopted on the recommendation of the Second Committee,<sup>69</sup> the Assembly recognized that climate change was a common concern of mankind, since climate was an essential condition which sustained life on earth, endorsed the action of the World Meteorological Organization and UNEP in jointly establishing an Intergovernmental Panel on Climate Change to provide internationally coordinated scientific assessments of the magnitude, timing and potential environmental and socio-economic impact of climate change and realistic response strategies; encouraged the convening of conferences on climate change, particularly on global warming, at the regional, national and global levels in order to make the international community better aware of the importance of dealing effectively and in a timely manner with all aspects of climate change resulting from certain human activities; and called upon Governments and intergovernmental organizations to collaborate in making every effort to prevent detrimental effects on climate and activities which affected the ecological balance, and also called upon non-governmental organizations, industry and other productive sectors to play their due role.

Finally, by its resolution 43/212 of 20 December 1988,<sup>70</sup> adopted on the recommendation of the Second Committee,<sup>71</sup> the Assembly urged all States, bearing in mind their respective responsibilities, to take the necessary legal and technical measures in order to halt and prevent the illegal international traffic in, and the dumping and resulting accumulation of, toxic and dangerous products and wastes; also urged all States to prohibit all transboundary movement of toxic and dangerous wastes carried out without the prior consent of the competent authorities of the importing country or without full recognition of the sovereign rights of transit countries; further urged all States in this connection to prohibit such movement without prior notification in writing of the competent authorities of all countries concerned, including transit countries, and to provide all information required to ensure the proper management of the wastes



and full disclosure of the nature of the substances to be received or transported; urged all States generating toxic and dangerous wastes to make every effort to treat and dispose of them in the country of origin to the maximum extent possible consistent with environmentally sound disposal; and requested the Ad Hoc Working Group of Legal and Technical Experts with a Mandate to Prepare a Global Convention on the Control of the Transboundary Movements of Hazardous Wastes, established by UNEP, to give due consideration to the present resolution and to take into account the various views expressed during the forty-third session of the General Assembly on the respective responsibilities for the prevention of the illegal international traffic in, and the dumping and resulting accumulation of, toxic and dangerous products and wastes.

(b) Reverse transfer of technology

The General Assembly, by its resolution 43/184 of 20 December 1988,<sup>72</sup> adopted on the recommendation of the Second Committee,<sup>73</sup> convinced that the continuing outflow of skilled personnel from developing countries seriously hampered their development and had implications of global concern, took note of the outcome of the Fourth Meeting of Governmental Experts on the Reverse Transfer of Technology, held at Geneva from 14 to 18 March 1988;<sup>74</sup> requested the Secretary-General of the United Nations Conference on Trade and Development to make the necessary arrangements so that future work on the reverse transfer of technology could be considered by the Committee on Transfer of Technology in the context of the elaboration of its work programme; and invited other relevant organs and bodies to the United Nations system and other relevant international organizations to take into consideration in their work, as appropriate, individually and in the context of the work of the Inter-Agency Group on Reverse Transfer of Technology, the economic, social and developmental aspects of the reverse transfer of technology and international policy initiatives in this area at the multilateral level.

(c) Report of the Committee on the Development and Utilization of New and Renewable Sources of Energy

By its resolution 43/192 of 20 December 1988,<sup>75</sup> adopted on the recommendation of the Second Committee,<sup>76</sup> the General Assembly took note of the report of the Committee on the Development and Utilization of New and Renewable Sources of Energy at its fourth session,<sup>77</sup> and endorsed the resolutions and decision contained therein; and reaffirmed the importance of the Nairobi Programme of Action for the Development and Utilization of New and Renewable Sources of Energy<sup>78</sup> as the basic framework for action in that field and called for its speedy and full implementation.

(d) Report of the Trade and Development Board

The General Assembly, by its resolution 43/188 of 20 December 1988,<sup>79</sup> adopted on the recommendation of the Second Committee,<sup>80</sup> noting that the 1988 Trade and Development Report<sup>81</sup> had made a constructive contribution to the consideration by the Trade and Development Board, at the first part of

its thirty-fifth session, of the interdependence of problems of trade, development finance and the international monetary system, as well as to the Board's consideration of the debt and development problems of the developing countries; took note of the report of the Trade and Development Board on the second part of its thirty-fourth session,<sup>82</sup> and the first part of its thirty-fifth session;<sup>83</sup> welcomed the review of the implementation of the guidelines contained in the annex to Board Resolution 222 (XXI) of 27 September 1980<sup>84</sup> undertaken by the Board at its thirty-fifth session and urged the Governments concerned to implement fully the relevant provisions contained in Board Resolution 358 (XXXV) of 5 October 1988;<sup>85</sup> and further urged all Governments, bearing in mind their particular contributions, commensurate with their economic weight, and their commitments as embodied in the Final Act,<sup>86</sup> to give full and prompt effect to the policies and measures agreed to therein through continuing action, individually and collectively and in competent international organizations, in pursuit of the objective of revitalizing development, growth and international trade. The Assembly also stressed that it was important that the Uruguay Round of multilateral trade negotiations respond positively to the interests and concerns of all parties thereto, in accordance with its objectives, and that it promote growth and development, particularly in developing countries; and invited the Board to continue to follow closely developments and issues in the Uruguay Round that are of particular concern to the developing countries.

(e) External debt crisis and development: towards a durable solution of the debt problem

By its resolution 43/198 of 20 December 1988,<sup>87</sup> adopted on the recommendation of the Second Committee,<sup>88</sup> the General Assembly expressed its appreciation to the Secretary-General for his involvement in the debt issue and for his report entitled "Towards a durable solution of the debt problem";<sup>89</sup> stressed that a supportive international economic environment, together with a growth-oriented development approach, was needed for supporting the efforts of debtor developing countries in dealing with their external indebtedness and alleviating the political and social costs of structural adjustment programmes and adjustment fatigue, thus contributing to the restoration of their economic growth, development and credit-worthiness; urged the international community to continue to search, through dialogue and shared responsibility, for a durable, equitable and mutually agreed growth-oriented and development-oriented solution to the external indebtedness of developing countries; and invited the multilateral financial institutions to continue to review conditionality criteria, taking into account, *inter alia*, social objectives, growth and development priorities of developing countries and changing conditions of the world economy, and stressed further the need for increased cooperation between the International Monetary Fund, the World Bank and other multilateral financial institutions, which should not lead to cross-conditionality.

(f) Examination of the long-term trends in economic and social development

The General Assembly, by its resolution 43/194 of 20 December 1988,<sup>90</sup> adopted on the recommendation of the Second Committee,<sup>91</sup> took note with interest of the report of the Secretary-General on the overall socio-economic perspective of the world economy to the year 2000.<sup>92</sup>

(g) International drug control

*Status of international instruments*

In the course of 1988, two more States became parties to the 1961 Single Convention on Narcotic Drugs,<sup>93</sup> bringing the total number of States parties to 118; three more States became parties to the 1971 Convention on Psychotropic Substances,<sup>94</sup> bringing the total to 92; one more State became a party to the 1972 Protocol amending the Single Convention on Narcotic Drugs, 1961,<sup>95</sup> bringing the total to 82; three more States became parties to the Single Convention on Narcotic Drugs, 1961, as amended by the Protocol of 25 March 1972 amending the Single Convention on Narcotic Drugs, 1961,<sup>96</sup> bringing the total to 83; and no State became a party to the 1988 United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances,<sup>97</sup> the Convention having been adopted by a United Nations Conference for its adoption, held in Vienna, from 25 November to 20 December 1988.

*Consideration by the General Assembly*

By its resolution 43/121 of 8 December 1988,<sup>98</sup> adopted on the recommendation of the Third Committee,<sup>99</sup> the General Assembly strongly condemned drug trafficking in all its forms, particularly those criminal activities which involved children in the use, production and illicit sale of narcotic drugs and psychotropic substances; urged all States to join together in order to establish national and international programmes to protect children from illicit consumption of drugs and psychotropic substances and from involvement in illicit production and trafficking; and appealed to competent international agencies and the United Nations Fund for Drug Abuse Control to assign high priority to financial support for prevention campaigns and programmes to rehabilitate drug-addicted minors conducted by government bodies dealing with such matters.

The General Assembly, by its resolution 43/122 also of 8 December 1988,<sup>100</sup> adopted on the recommendation of the Third Committee,<sup>101</sup> took note of the report of the Secretary-General on the international campaign against drug abuse and illicit trafficking,<sup>102</sup> and reiterated its condemnation of international drug trafficking as a criminal activity, and encouraged all States to continue to demonstrate the political will to enhance international cooperation to stop illicit trafficking in narcotic drugs and psychotropic substances, including illicit production and consumption. The Assembly also took note of the report of the Secretary-General relating to the International Conference on Drug Abuse and Illicit Trafficking;<sup>103</sup> urged Governments and organizations to adhere to the principles

set forth in the Declaration of the International Conference on Drug Abuse and Illicit Trafficking<sup>104</sup> and to utilize the recommendations of the Comprehensive Multidisciplinary Outline of Future Activities in Drug Abuse Control<sup>105</sup> in developing national and regional strategies, particularly to promote bilateral, regional and international cooperative arrangements; and requested the Secretary-General, within the available resources, to review current information systems in the United Nations drug control units and to develop an information strategy and submit it, with its financial implications, to the Commission on Narcotic Drugs at its thirty-third session.

(h) Crime prevention and criminal justice

The General Assembly, by its resolution 43/99 of 8 December 1988,<sup>106</sup> adopted on the recommendation of the Third Committee,<sup>107</sup> took note with appreciation of the report of the Secretary-General on the implementation of its resolution 42/59 of 30 November 1987<sup>108</sup> and of the relevant recommendations contained therein made by the Committee on Crime Prevention and Control at its tenth session, during which, *inter alia*, it reviewed the results of the interregional preparatory meetings for the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders and endorsed the recommendations; and welcomed the efforts made by Member States and the Secretary-General to translate into action the recommendations contained in the Milan Plan of Action, adopted by the Seventh Congress, and urged those Governments which had not yet done so to provide relevant information to the Secretary-General on the implementation of those recommendations. The Assembly further called upon the specialized agencies, in particular, the International Labour Organization, the United Nations Educational, Scientific and Cultural Organization, the World Health Organization, the International Civil Aviation Organization and the International Maritime Organization and other organizations of the United Nations system to give the necessary attention and priority to national, regional and international measures aimed at fighting crime and improving the quality of the administration of justice; invited Member States to contribute to the United Nations Trust Fund for Social Defence as a means of supporting the work of the United Nations in the field of crime prevention and criminal justice and to forward to the Secretary-General proposals for its revitalization; and encouraged Member States and relevant organizations, in particular, the World Bank, the United Nations Development Programme, the Department of Technical Co-operation for Development of the Secretariat and the regional commissions to support and complement the technical cooperation activities in the field of crime prevention and criminal justice, including the programmes of the United Nations for interregional and regional cooperation for crime prevention, and to provide financial assistance to the regional institutes for the prevention of crime and the treatment of offenders.

(i) Office of the United Nations High Commissioner  
for Refugees (UNHCR)<sup>109</sup>

During the reporting period, following an agreement signed between Afghanistan and Pakistan in April 1988 UNHCR was requested to cooperate and provide assistance in the repatriation of Afghan refugees. In South-East Asia,

Hong Kong was the first in the region to institute a refugee determination procedure for Vietnamese arrivals, and UNHCR was involved in the setting up of those procedures and closely monitored their implementation. Moreover, several hundred applications from Vietnamese people wishing to return home were received by UNHCR, which on 13 December 1988, concluded a memorandum of understanding with the Socialist Republic of Viet Nam on the matter.

Africa witnessed large movements of voluntary repatriation organized under the auspices of UNHCR. Additionally, in accordance with Security Council resolution 435 (1978) and other relevant Security Council resolutions, arrangements were made for the repatriation of Namibian refugees, and the process commenced during the reporting period.

The situation of refugees in Central America continued to be of concern to UNHCR. The region continued to see an outflow of refugees, the majority of whom were concentrated in camps and not usually granted the full treatment outlined in the provisions of the 1951 Convention relating to the Status of Refugees.<sup>110</sup> The refugee problem in Central America was addressed at the Esquipulas II Summit Meetings.<sup>111</sup> Moreover, the Special Plan of Economic Cooperation for Central America, adopted by the General Assembly in 1988,<sup>112</sup> made assistance to refugees, returnees and displaced persons a "priority" and recognized that, unless the conditions for development in the area were created, there would be no long-term solutions to refugee problems in Central America.

In Europe and North America, important changes occurred, during the reporting period, in national legislation relating to asylum-seekers and refugees in a number of countries in the region. In view of those new legal developments, several countries requested the assistance of UNHCR in training officials dealing with requests for asylum. Furthermore, UNHCR has continued to attach high priority to dialogue within governmental and regional forums in order to ensure that efforts at harmonization of asylum policies within the European Community were based on internationally accepted humanitarian standards and principles.

#### *Consideration by the General Assembly*

By its resolution 43/117 of 8 December 1988,<sup>113</sup> adopted on the recommendation of the Third Committee,<sup>114</sup> the General Assembly strongly reaffirmed the fundamental nature of the function of the United Nations High Commissioner for Refugees to provide international protection and the need for Governments to cooperate fully with his Office in order to facilitate the effective exercise of this function, in particular, by acceding to and implementing the relevant international and regional refugee instruments and by scrupulously observing the principles of asylum and *non-refoulement*; and condemned all violations of the rights and safety of refugees and asylum-seekers, in particular, those perpetrated by military or armed attacks against refugee camps and settlements and other forms of violence. The Assembly further noted the close connection between the problems of refugees and of stateless persons and invited States actively to explore and promote measures favourable to stateless persons in accordance with international law; recognized the importance of fair and expeditious procedures for determining refugee status and/or granting asylum in order, *inter alia*, to protect refugees and asylum-seekers from unjustified or unduly pro-

longed detention or stay in camps, and urged States to establish such procedures; and also recognized the importance of achieving durable solutions to refugee problems and, in particular, the need to address in this process the root causes of refugee movements in order to avert new flows of refugees, taking into account the report of the Group of Governmental Experts on International Cooperation to Avert New Flows of Refugees,<sup>115</sup> and to facilitate the solution of existing problems. The Assembly further recognized with appreciation the work done by the High Commissioner to put into practice the concept of development-oriented assistance to refugees and returnees, as initiated at the Second International Conference on Assistance to Refugees in Africa<sup>116</sup> and reaffirmed in the Oslo Declaration and Plan of Action adopted by the International Conference on the Plight of Refugees, Returnees and Displaced Persons in Southern Africa,<sup>117</sup> urged the High Commissioner to continue that process, wherever appropriate, in full cooperation with appropriate international agencies, and further urged Governments to support those efforts; and welcomed the various initiatives undertaken by the High Commissioner in regard to the promotion and dissemination of the principles of refugee law and protection and called upon his Office, in cooperation with Governments, to intensify its activities in this area, bearing in mind the need, in particular, to develop practical applications of refugee law and principles and to continue to organize training courses for governmental and other officials involved in refugee activities.

(j) Human rights questions

(1) *Status and implementation of international instruments*

(i) *International Covenants on Human Rights*

In 1988, one State became a party to the International Covenant on Economic, Social and Cultural Rights (1966),<sup>118</sup> bringing the total number of States parties to 90; no State became a party to the International Covenant on Civil and Political Rights (1966),<sup>119</sup> letting stand the total number of States parties at 85; and three more States became parties to the Optional Protocol to the International Covenant on Civil and Political Rights (1966),<sup>120</sup> bringing the total to 43.

The General Assembly, by its resolution 43/114 of 8 December 1988,<sup>121</sup> adopted on the recommendation of the Third Committee,<sup>122</sup> took note with appreciation of the report of the Human Rights Committee on its thirty-first, thirty-second and thirty-third sessions.<sup>123</sup>

(ii) *Convention on the Elimination of All Forms of Discrimination against Women (1979)*<sup>124</sup>

In 1988, one State became a party to the Convention, bringing the total number of States parties to 93.

The General Assembly, by its resolution 43/100 of 8 December 1988,<sup>125</sup> adopted on the recommendation of the Third Committee,<sup>126</sup> took note with concern of the declining rate of ratification of or accession to the Convention; also took note of the report of the Secretary-General on the status of the Convention;<sup>127</sup> and emphasized the importance of the strictest compliance by States parties with their obligations under the Convention.

(iii) *International Convention on the Elimination of All Forms of Racial Discrimination (1966)*<sup>128</sup>

In 1988, three more States became parties to the Convention, bringing the total to 125.

By its resolution 43/95 of 8 December 1988,<sup>129</sup> adopted on the recommendation of the Third Committee,<sup>130</sup> the General Assembly took note of the report of the Secretary-General on the status of the Convention.<sup>131</sup>

(iv) *International Convention on the Suppression and Punishment of the Crime of Apartheid (1973)*<sup>132</sup>

In 1988, two States became parties to the Convention, bringing the total number of States parties to 65.

The General Assembly, by its resolution 43/97 of 8 December 1988,<sup>133</sup> adopted on the recommendation of the Third Committee,<sup>134</sup> took note of the report of the Secretary-General on the status of the Convention;<sup>135</sup> appealed once again to those States which had not yet done so to ratify or to accede to the Convention without further delay, in particular, those States which had jurisdiction over transnational corporations operating in South Africa and Namibia and without whose cooperation such operations could not be halted; and drew the attention of all States to the opinion expressed by the Group of Three in its report that transnational corporations operating in South Africa and Namibia must be considered accomplices in the crime of apartheid in accordance with article III(b) of the Convention.

(v) *Convention on the Prevention and Punishment of the Crime of Genocide (1948)*<sup>136</sup>

In 1988, two more States became parties to the Convention, bringing the total to 98.

By its resolution 43/138 of 8 December 1988,<sup>137</sup> adopted on the recommendation of the Third Committee,<sup>138</sup> the General Assembly took note of the report of the Secretary-General.<sup>139</sup>

(vi) *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984)*<sup>140</sup>

In 1988, ten more States became parties to the Convention, bringing the total number of States parties to 37.

The General Assembly, by its resolution 43/132 of 8 December 1988,<sup>141</sup> adopted on the recommendation of the Third Committee,<sup>142</sup> took note with appreciation of the report of the Secretary-General on the status of the Convention.<sup>143</sup>

(2) *Reporting obligations of States parties to international instruments on Human Rights and effective functioning of bodies established pursuant to such instruments*

By its resolution 43/115 of 8 December 1988,<sup>144</sup> adopted on the recommendation of the Third Committee,<sup>145</sup> the General Assembly, taking note of the con-

clusions and recommendations of the meeting of persons chairing the Human Rights treaty bodies, held at Geneva from 10 to 14 October 1988,<sup>146</sup> once again urged States parties to international instruments on human rights with reports overdue to make every effort to present their reports as soon as possible and to take advantage of opportunities whereby such reports could be consolidated; and requested the Secretary-General to consider, as a matter of priority, the finalization of the detailed reporting manual to assist States parties in the fulfillment of their reporting obligations and to allow each of the treaty bodies the opportunity to comment on the draft manual.

(3) *Question of a convention on the rights of the child*

The General Assembly, by its resolution 43/112 of 8 December 1988,<sup>147</sup> adopted on the recommendation of the Third Committee,<sup>148</sup> requested the Commission on Human Rights to give the highest priority to the draft convention on the rights of the child and to make every effort at its session in 1989 to complete it and to submit it, through the Economic Social Council, to the General Assembly at the forty-fourth session.

(4) *Measures to improve the situation and ensure the human rights and dignity of all migrant workers*

The General Assembly, by its resolution 43/146 of 8 December 1988,<sup>149</sup> adopted on the recommendation of the Third Committee,<sup>150</sup> took note with satisfaction of the two most recent reports of the Working Group on the Drafting of an International Convention on the Protection of the Rights of All Migrant Workers and Their Families<sup>151</sup> and, in particular, of the progress made by the Working Group on the drafting, in second reading, of the draft convention.

(5) *Human rights and scientific and technological developments: the right to life*

By its resolution 43/111 of 8 December 1988,<sup>152</sup> adopted on the recommendation of the Third Committee,<sup>153</sup> the General Assembly reaffirmed that all people have an inherent right to life; and called upon all States, appropriate United Nations bodies, the specialized agencies and intergovernmental and non-governmental organizations concerned to take the necessary measures to ensure that the results of scientific and technological progress, the material and intellectual potential of mankind, are used for the benefit of mankind and for promoting and encouraging universal respect for human rights and fundamental freedoms.

(6) *Human rights and scientific and technological developments*

The General Assembly, by its resolution 43/110 of 8 December 1988,<sup>154</sup> adopted on the recommendation of the Third Committee,<sup>155</sup> stressed the importance of the implementation by all States of the provisions and principles contained in the Declaration on the Use of Scientific and Technological Progress in the Interests of Peace and for the Benefit of Mankind,<sup>156</sup> in order to promote human rights and fundamental freedoms; called upon all States to make every effort to use the achievements of science and technology in order to promote peaceful social, economic and cultural development and progress and to put an



end to the use of those achievements for military purposes; and also called upon States to take all necessary measures to place all the achievements of science and technology at the service of mankind and to ensure that they did not lead to the degradation of the natural environment.

(7) *Universal realization of the right of peoples to self-determination*

The General Assembly, by its resolution 43/105 of 8 December 1988,<sup>157</sup> adopted on the recommendation of the Third Committee,<sup>158</sup> reaffirmed that the universal realization of the right of all peoples, including those under colonial, foreign and alien domination, to self-determination was a fundamental condition for effective guarantee and observance of human rights and for the preservation and promotion of such rights; and requested the Commission on Human Rights to continue to give special attention to the violation of human rights, especially the right to self-determination, resulting from foreign military intervention, aggression or occupation.

(8) *Right to development*

By its resolution 43/127 of 8 December 1988,<sup>159</sup> adopted on the recommendation of the Third Committee,<sup>160</sup> the General Assembly having considered the report of the Working Group of Governmental Experts on the Right of Development,<sup>161</sup> and all other relevant documents submitted to it at its forty-third session, endorsed the agreement reached by the Commission that future work on the question of the right to development should proceed step by step and in stages; and called upon the Working Group, at its twelfth session, to study the analytical compilation to be prepared by the Secretary-General of all replies received in response to Commission resolution 1988/26, if necessary together with the individual replies themselves, and to submit to the Commission at its forty-fifth session its final recommendations on those proposals which would best contribute to the further enhancement and implementation of the Declaration on the Right to Development<sup>162</sup> at the individual, national and international levels, and especially on the views of the Secretary-General and of Governments on the means of establishing an evaluation system on the implementation and further enhancement of the Declaration.

(9) *The impact of property on the enjoyment of human rights and fundamental freedoms*

By its resolution 43/124 of 8 December 1988,<sup>163</sup> adopted on the recommendation of the Third Committee,<sup>164</sup> the General Assembly took note of the report of the Secretary-General;<sup>165</sup> and called upon States to ensure that their national legislation with regard to all forms of property shall preclude any impairment of the enjoyment of human rights and fundamental freedoms, without prejudice to their right freely to choose and develop their political, social, economic and cultural systems.

(10) *Human rights in the administration of justice*

The General Assembly, by its resolution 43/153 of 8 December 1988,<sup>166</sup> adopted on the recommendation of the Third Committee,<sup>167</sup> reaffirmed the importance of the full implementation of United Nations norms and standards on

human rights in the administration of justice; urged Member States to develop strategies for the practical implementation of those standards, in particular: (a) to adopt in national legislation and practice existing international standards relating to human rights in the administration of justice, and to make them available to all persons concerned, (b) to design realistic and effective mechanisms for the full implementation of those standards and to provide the necessary administrative and judicial structures for their continuous monitoring, (c) to devise measures to promote the observance of those standards, as well as public awareness about their important role, in particular, through their widespread dissemination and through educational and promotional activities, (d) to include, where appropriate, references to the implementation of those standards in their reports under the various international human rights instruments, and to increase, as far as possible, their support to technical cooperation and advisory services at all levels for the more effective implementation of those standards, either directly or through international funding agencies such as the United Nations Development Programme, when developing countries include specific projects in their country programmes.

(11) *International cooperation in solving international problems of a social, cultural or humanitarian character, and in promoting and encouraging universal respect for, and observance of, human rights and fundamental freedoms*

The General Assembly, by its resolution 43/155 of 8 December 1988,<sup>168</sup> adopted on the recommendation of the Third Committee,<sup>169</sup> called upon Member States to implement fully the universally recognized standards for the protection and promotion of human rights enshrined, in particular, in the Charter of the United Nations, the Universal Declaration of Human Rights,<sup>170</sup> the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights and other relevant international instruments; urged all States to cooperate fully with the relevant bodies of the United Nations system as well as other intergovernmental forums dealing with the protection and promotion of human rights and fundamental freedoms in any part of the world; and considered that a world public information campaign on human rights would contribute to the promotion and improvement of understanding of human rights.

(12) *Regional arrangements for the promotion and protection of human rights*

The General Assembly, by its resolution 43/152 of 8 December 1988,<sup>171</sup> adopted on the recommendation of the Third Committee,<sup>172</sup> took note of the report of the Secretary-General;<sup>173</sup> noted with interest that various contacts between regional bodies and commissions and the United Nations have continued to be pursued and strengthened through advisory services and technical assistance activities, particularly, those relating to the organization of regional and subregional training courses in the field of human rights; and requested the Secretary-General to continue to consider the possibility of encouraging those developments; and invited States in areas where regional arrangements in the field of human rights did not yet exist to consider concluding agreements with a view to the establishment within their respective regions of suitable regional machinery for the promotion and protection of human rights.

(13) *Alternative approaches and ways and means within the United Nations system for improving the effective enjoyment of human rights and fundamental freedoms*

There were two resolutions addressing this issue: 43/125<sup>174</sup> and 43/126,<sup>175</sup> both dated 8 December 1988 and adopted on the recommendations of the Third Committee.<sup>176</sup> In resolution 43/126, the General Assembly stressed that the achievement of the right to development required a concerted international and national effort to eliminate economic deprivation, hunger and disease in all parts of the world without discrimination, in accordance with the Declaration and the Programme of Action on the Establishment of a New International Economic Order,<sup>177</sup> the International Development Strategy for the Third United Nations Development Decade<sup>178</sup> and the Charter of Economic Rights and Duties of States.<sup>179</sup>

(k) *Implementation of the International Plan of Action on Aging and related activities*

The General Assembly, by its resolution 43/93 of 8 December 1988,<sup>180</sup> adopted on the recommendation of the Third Committee,<sup>181</sup> recalling its resolution 37/51 of 3 December 1982, by which it endorsed the International Plan of Action on Aging, adopted by consensus by the World Assembly on Aging,<sup>182</sup> took note of the report of the Secretary-General on the question of aging,<sup>183</sup> expressed its satisfaction that the International Institute on Aging had been established in Malta in cooperation with the United Nations and was officially inaugurated by the Secretary-General on 15 April 1988; stressed the imperative need to increase the impetus of the implementation of the Plan of Action at national, regional and international levels, and appealed for resources to be provided commensurate with the requirements; urged the Secretary-General, in compliance with the views of Member States as reflected in his report, to maintain and strengthen the existing programmes on aging and to strengthen the United Nations system-wide coordination of policies and programmes on aging, with the Centre for Social Development and Humanitarian Affairs continuing in its role as focal point in the United Nations system for activities relating to aging; and requested the Commission on the Status of Women to pay particular attention to the specific problems faced by elderly women and to the discrimination suffered by those women because of their sex and age.

(l) *Question of youth*

By its resolution 43/94 of 8 December 1988,<sup>184</sup> adopted on the recommendation of the Third Committee,<sup>185</sup> the General Assembly requested the Secretary-General to promote and monitor intensively, by using the Centre for Social Development and Humanitarian Affairs of the Secretariat as a focal point, the inclusion of youth-related projects and activities in the programmes of the United Nations bodies and of the specialized agencies, specifically, on such themes as communication, health, housing, culture, youth employment and education; and called upon Member States, United Nations bodies, the specialized agencies and other governmental and intergovernmental organizations to implement fully the guidelines relating to the channels of communication adopted by the General Assembly in its resolutions 32/135 of 16 December 1977 and 36/17 of 9 December 1981, not only in general terms but also by concrete measures that take into account the issues of importance to young people.

(m) New International Humanitarian Order

The General Assembly, by its resolution 43/129 of 8 December 1988,<sup>186</sup> adopted on the recommendation of the Third Committee,<sup>187</sup> taking note of the report of the Secretary-General,<sup>188</sup> and convinced of the need for an active follow-up to the recommendations and suggestions made by the Independent Commission and of the importance of the role being played in this regard by the Independent Bureau for Humanitarian Issues set up for that purpose, decided to review at its forty-fifth session the question of a new international humanitarian order.

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#### 4. LAW OF THE SEA

*Status of the United Nations Convention on the Law of the Sea (1982)*<sup>189</sup>

As of 31 December 1988, there were 158 signatories to the Convention, and 37 States and the United Nations Council for Namibia had ratified the Convention.

*Preparatory Commission for the International Seabed Authority and for the International Tribunal for the Law of the Sea*<sup>190</sup>

The Preparatory Commission met twice during 1988. It held its sixth session at Kingston, Jamaica, from 14 March to 8 April, and a meeting in New York from 15 August to 2 September.

At its sixth session, the Preparatory Commission focused its attention on the obligations of the pioneer investors and the certifying States of the International Seabed Authority (India, France, Japan and the USSR were registered in 1987), establishing an informal consultative group to deal with the obligations that flowed from registration under resolution II of the Third United Nations Conference on the Law of the Sea.

The plenary of the Commission completed consideration of the draft rules of procedure of the Legal and Technical Commission and of the Economic Planning Commission, and provisionally approved all of them with a few exceptions. Moreover, the four Special Commissions continued their work in their respective substantive areas, i.e., studies on the problems encountered by the developing land-based producer States likely to be most seriously affected by seabed mineral production; establishment of the Enterprise, the operational arm of the Authority; draft regulations on the transfer of technology; preparation of recommendations regarding arrangements for the establishment of the International Tribunal for the Law of the Sea.

Regarding the International Tribunal for the Law of the Sea, the delegation of the Federal Republic of Germany communicated to the Special Representative of the Secretary-General for the Law of the Sea its intention to hold an international architectural competition for the construction and design of the building to house the International Tribunal in Hamburg.

The report of the Secretary-General further provided in its part two an overview of the activities of the United Nations Office for Ocean Affairs and the Law of the Sea, which, *inter alia*, served as the secretariat for the Preparatory Commission for the International Seabed Authority and for the International Tribunal for the Law of the Sea.

#### *Consideration by the General Assembly*

By its resolution 43/18 of 1 November 1988,<sup>191</sup> adopted without reference to a Main Committee,<sup>192</sup> the General Assembly called upon all States that had not done so to consider ratifying or acceding to the Convention at the earliest possible date to allow the effective entry into force of the new legal regime for the uses of the sea and its resources; further called upon States to observe the provisions of the Convention when enacting their national legislation; also called upon States to desist from taking actions which undermined the Convention or defeated its object and purpose; and noted the progress being made by the Preparatory Commission for the International Seabed Authority and for the International Tribunal for the Law of the Sea in all areas of its work.

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## 5. INTERNATIONAL COURT OF JUSTICE<sup>193 194</sup>

### **Cases before the Court<sup>195</sup>**

#### A. CONTENTIOUS CASES BEFORE THE FULL COURT

(i) *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*<sup>196</sup>

After having ascertained the views of the Government of Nicaragua and having afforded the Government of the United States of America an opportunity of stating its views, the Court, by an Order of 18 November 1987 (*I.C.J. Reports 1987*, p. 188), fixed time limits for written proceedings on the question of the form and amount of reparation to be made in the case, namely, 29 March 1988 for a Memorial of Nicaragua and 29 July 1988 for a Counter-Memorial of the United States.

The Memorial of the Republic of Nicaragua was duly filed on 29 March 1988. The United States of America did not file a Counter-Memorial within the prescribed time limit.

(ii) *Border and Transborder Armed Actions (Nicaragua v. Honduras)*<sup>197</sup>

On 21 March 1988 Nicaragua filed a request for the indication of interim measures of protection. By a letter of 31 March 1988, however, Nicaragua withdrew its request. The President of the Court, on that same day, made an Order recording the withdrawal (*I.C.J. Reports 1988*, p. 9).

At the request of Honduras, and with the agreement of Nicaragua, 6 June 1988 was fixed for the opening of the oral proceedings on the issues of jurisdiction and admissibility. At six public sittings, held between 6 and 15 June 1988, statements were made on behalf of Honduras and of Nicaragua.

At a public sitting held on 20 December 1988 the Court delivered a Judgment on its jurisdiction and the admissibility of the Application (*I.C.J. Reports 1988*, p. 69). An analysis of the Judgment is given below, followed by the text of the operative clause.

*Proceedings and submissions of the Parties* (paras. 1-15)

The Court began by recapitulating the various stages in the proceedings, recalling that the case concerned a dispute between Nicaragua and Honduras regarding the alleged activities of armed bands, said to be operating from Honduras, on the border between Honduras and Nicaragua and in Nicaraguan territory. At the suggestion of Honduras, agreed to by Nicaragua, the current phase of the proceedings was devoted, in accordance with an Order made by the Court on 22 October 1986, solely to the issues of the jurisdiction of the Court and the admissibility of the Application.

*Burden of proof* (para. 16)

I. *The question of the jurisdiction of the Court to entertain the dispute* (paras. 17-48)

A. *The two titles of jurisdiction relied on* (paras. 17-27)

Nicaragua referred, as the basis of the jurisdiction of the Court, to “the provisions of article XXXI of the Pact of Bogotá and to the Declarations made by the Republic of Nicaragua and by the Republic of Honduras respectively, accepting the jurisdiction of the Court as provided for in Article 36, paragraphs 1 and 2, respectively of the Statute”.

Article XXXI of the Pact of Bogotá provides as follows:

“In conformity with Article 36, paragraph 2, of the Statute of the International Court of Justice, the High Contracting Parties declare that they recognize, in relation to any other American State, the jurisdiction of the Court as compulsory *ipso facto*, without the necessity of any special agreement so long as the present Treaty is in force, in all disputes of a juridical nature that arise among them concerning:

- (a) The interpretation of a treaty;
- (b) Any question of international law;
- (c) The existence of any fact which, if established, would constitute the breach of an international obligation;
- (d) The nature or extent of the reparation to be made for the breach of an international obligation.”

The other basis of jurisdiction relied on by Nicaragua was constituted by the declarations of acceptance of compulsory jurisdiction made by the Parties

under Article 36 of the Statute of the Court. Nicaragua claimed to be entitled to found jurisdiction on a Honduran Declaration of 20 February 1960, while Honduras asserted that that Declaration had been modified by a subsequent Declaration, made on 22 May 1986 and deposited with the Secretary-General of the United Nations prior to the filing of the Application by Nicaragua.

Since in relations between the States parties to the Pact of Bogotá, that Pact is governing, the Court first examined the question whether it had jurisdiction under article XXXI of the Pact.

B. *The Pact of Bogotá* (paras. 28-47)

Honduras maintained in its Memorial that the Pact “does not provide any basis for the jurisdiction of the ... Court” and put forward two series of arguments in support of that statement.

(i) *Article XXXI of the Pact of Bogotá* (paras. 29-41)

First, its interpretation of article XXXI of the Pact was that, for a State party to the Pact which has made a declaration under Article 36, paragraph 2, of the Statute, the extent of the jurisdiction of the Court under article XXXI of the Pact was determined by that declaration, and by any reservations appended to it. It also maintained that any modification or withdrawal of such a declaration which was valid under Article 36, paragraph 2, of the Statute was equally effective under article XXXI of the Pact. Honduras had, however, given two successive interpretations of Article XXXI, claiming initially that to afford jurisdiction it must be supplemented by a declaration of acceptance of compulsory jurisdiction and subsequently that it could be so supplemented but need not be.

The Court considered that the first interpretation advanced by Honduras — that article XXXI must be supplemented by a declaration — was incompatible with the actual terms of the article. As regards the second Honduran interpretation, the Court noted the two readings of article XXXI proposed by the Parties: as a treaty provision conferring jurisdiction in accordance with Article 36, paragraph 1, of the Statute or as a collective declaration of acceptance of compulsory jurisdiction under paragraph 2 of that Article. Even on the latter interpretation, however, the declaration, having been incorporated into the Pact of Bogotá, could only be modified in accordance with the rules provided for in the Pact itself. However, article XXXI nowhere envisaged that the undertaking entered into by the parties to the Pact might be amended by means of a unilateral declaration made subsequently under the Statute, and the reference to Article 36, paragraph 2, of the Statute was insufficient in itself to have that effect.

The fact that the Pact defined with precision the obligations of the parties lent particular significance to the absence of any indication of that kind. The commitment in article XXXI applied *ratione materiae* to the disputes enumerated in that text; it related *ratione personae* to the American States parties to the Pact; it remained valid *ratione temporis* for as long as that instrument itself remained in force between those States. Moreover, some provisions of the Treaty (arts. V, VI and VII) restricted the scope of the parties' commitment. The commitment in article XXXI could only be limited by means of reservations to the Pact itself, under article LV thereof. It was an autonomous commitment, independent of any other which the parties might have undertaken or might undertake by depositing with the United Nations Secretary-General a declaration of

acceptance of compulsory jurisdiction under Article 36, paragraphs 2 and 4, of the Statute.

Further confirmation of the Court's reading of article XXXI was to be found in the *travaux préparatoires* of the Bogotá Conference. The text which was to become article XXXI was discussed at the meeting of Committee III of the Conference held on 27 April 1948. It was there accepted that, in their relations with the other parties to the Pact, States which wished to maintain reservations included in a declaration of acceptance of compulsory jurisdiction would have to reformulate them as reservations to the Pact. That solution was not contested in the plenary session, and article XXXI was adopted by the Conference without any amendments on the point. That interpretation, moreover, corresponded to the practice of the parties to the Pact since 1948. They had not, at any time, linked together article XXXI and the declarations of acceptance of compulsory jurisdiction made under Article 36, paragraphs 2 and 4, of the Statute.

Under these circumstances, the Court had to conclude that the commitment in article XXXI of the Pact was independent of such declarations of acceptance of compulsory jurisdiction as might have been made under Article 36, paragraph 2, of the Statute. The Honduran argument as to the effect of the reservation to its 1986 Declaration on its commitment under article XXXI of the Pact therefore could not be accepted.

(ii) *Article XXXII of the Pact of Bogotá* (paras. 42-47)

The second objection of Honduras to jurisdiction was based on article XXXII of the Pact of Bogotá, which reads as follows:

“When the conciliation procedure previously established in the present Treaty or by agreement of the parties does not lead to a solution, and the said parties have not agreed upon an arbitral procedure, either of them shall be entitled to have recourse to the International Court of Justice in the manner prescribed in Article 40 of the Statute thereof. The Court shall have compulsory jurisdiction in accordance with Article 36, paragraph 1, of the said Statute.”

It was the contention of Honduras that articles XXXI and XXXII must be read together. The first was said to define the extent of the Court's jurisdiction and the second to determine the conditions under which the Court might be seised. According to Honduras it followed that the Court could only be seised under article XXXI if, in accordance with article XXXII, there had been a prior recourse to conciliation and lack of agreement to arbitrate, which was not the situation in the present case. Nicaragua on the other hand contended that article XXXI and article XXXII were two autonomous provisions, each of which conferred jurisdiction upon the Court in the cases for which it provided.

Honduras's interpretation of article XXXII ran counter to the terms of that article. Article XXXII makes no reference to Article XXXI; under that text the parties have, in general terms, an entitlement to have recourse to the Court in cases where there has been an unsuccessful conciliation. It is, moreover, quite clear from the Pact that the purpose of the American States in drafting it was to reinforce their mutual commitments with regard to judicial settlement. This was also confirmed by the *travaux préparatoires* of the Bogotá Conference: the



Subcommittee which had prepared the draft took the position “that the principal procedure for the peaceful settlement of conflicts between the American States had to be judicial procedure before the International Court of Justice”. Honduras’s interpretation would however imply that the commitment, at first sight firm and unconditional, set forth in article XXXI would, in fact, be emptied of all content if, for any reason, the dispute were not subjected to prior conciliation. Such a solution would be clearly contrary to both the object and the purpose of the Pact. In short, articles XXXI and XXXII provide for two distinct ways by which access may be had to the Court. The first relates to cases in which the Court can be seised directly and the second to those in which the parties initially resort to conciliation. Nicaragua was currently relying upon article XXXI, not article XXXII.

C. *Finding* (para. 48)

Article XXXI of the Pact of Bogotá thus conferred jurisdiction upon the Court to entertain the dispute submitted to it. For that reason, the Court did not need to consider whether it might have jurisdiction by virtue of the declarations of acceptance of compulsory jurisdiction by Nicaragua and Honduras referred to above.

II. *The question of the admissibility of Nicaragua’s Application* (paras. 49-95)

Four objections had been raised by Honduras to the admissibility of the Nicaraguan Application, two of which were general in nature and the remaining two presented on the basis of the Pact of Bogotá.

The *first ground of inadmissibility* (paras. 51-54) put forward was that the Application “is a politically-inspired, artificial request which the Court should not entertain consistently with its judicial character”. As regards the alleged political inspiration of the proceedings the Court observed that it could not concern itself with the political motivation which might lead a State at a particular time, or in particular circumstances, to choose judicial settlement. As to Honduras’s view that the overall result of Nicaragua’s action was “an artificial and arbitrary dividing up of the general conflict existing in Central America”, the Court recalled that, while there was no doubt that the issues of which the Court had been seised might be regarded as part of a wider regional problem, “no provision of the Statute or Rules contemplates that the Court should decline to take cognizance of one aspect of a dispute merely because that dispute has other aspects, however important”, as the Court observed in the case concerning *United States Diplomatic and Consular Staff in Tehran (I.C.J. Reports 1980, p. 19, para. 36)*.

The *second ground of inadmissibility* (paras. 55-56) put forward by Honduras was that “the Application is vague and the allegations contained in it are not properly particularized”. The Court found in this respect that the Nicaraguan Application in the present case met the requirements of the Statute and Rules of Court that an Application indicate “the subject of the dispute”, specify “the precise nature of the claim” and in support thereof give no more than “a succinct statement of the facts and grounds on which the claim is based”.

Accordingly none of these objections of a general nature to admissibility could be accepted.

The *third ground of inadmissibility* (paras. 59-76) put forward by Honduras was based upon article II of the Pact of Bogotá which reads:

“The High Contracting Parties recognize the obligation to settle international controversies by regional pacific procedures before referring them to the Security Council of the United Nations.

Consequently, in the event that a controversy arises between two or more signatory States which, in the opinion of the parties [in the French text “de l’avis de l’une des parties”], cannot be settled by direct negotiations through the usual diplomatic channels, the parties bind themselves to use the procedures established in the present Treaty, in the manner and under the conditions provided for in the following articles, or, alternatively, such special procedures as, in their opinion, will permit them to arrive at a solution.”

The submission of Honduras on the application of article II was as follows:

“Nicaragua has failed to show that, in the opinion of the Parties, the dispute cannot be settled by direct negotiations, and thus Nicaragua fails to satisfy an essential precondition to the use of the procedures established by the Pact of Bogotá, which include reference of disputes to the International Court of Justice.”

The contention of Honduras was that the precondition to recourse to the procedures established by the Pact was not merely that both parties should hold the opinion that the dispute could not be settled by negotiation, but that they should have “manifested” that opinion.

The Court noted a discrepancy between the four texts (English, French, Portuguese and Spanish) of article II of the Pact, the reference in the French text being to the opinion of *one* of the parties. The Court proceeded on the hypothesis that the stricter interpretation should be used, i.e., that it would be necessary to consider whether the “opinion” of both Parties was that it was not possible to settle the dispute by negotiation. For this purpose the Court did not consider that it was bound by the mere assertion of the one Party or the other that its opinion was to a particular effect: it should, in the exercise of its judicial function, be free to make its own determination of that question on the basis of such evidence as was available to it.

The critical date for determining the admissibility of an application was the date on which it was filed (cf. *South West Africa, Preliminary Objections, I.C.J. Reports 1962*, p. 344), and in this case was thus 28 July 1986.

To ascertain the opinion of the Parties, the Court was bound to analyse the sequence of events in their diplomatic relations; it first found that in 1981 and 1982 the Parties had engaged in bilateral exchanges at various levels including that of the Heads of States. Broadly speaking, Nicaragua sought a bilateral understanding while Honduras increasingly emphasized the regional dimension of the problem and held out for the multilateral approach, eventually producing a plan of internationalization which led to abortive Nicaraguan counter-proposals. The Court then examined the development of what has become known as the Contadora process; it noted that a draft of a “Contadora Act for Peace and Co-operation in

Central America” was presented by the Contadora Group to the Central American States on 12 and 13 September 1985. None of the Central American States fully accepted the draft, but negotiations continued, to break down in June 1986.

The Court had to ascertain the nature of the procedure followed, and ascertain whether the negotiations in the context of the Contadora process could be regarded as direct negotiations through the usual diplomatic channels within the meaning of article II of the Pact. While there were extensive consultations and negotiations between 1983 and 1986, in different forms, both among the Central American States themselves and between those States and those belonging to the Contadora Group, these were organized and carried on within the context of mediation to which they were subordinate. At this time, the Contadora process was primarily a mediation, in which third States, on their own initiative, endeavoured to bring together the viewpoints of the States concerned by making specific proposals to them. That process therefore, which Honduras had accepted, was as a result of the presence and action of third States, markedly different from a “direct negotiation through the usual diplomatic channels”. It thus did not fall within the relevant provisions of article II of the Pact of Bogotá. Furthermore, no other negotiation which would meet the conditions laid down in the text was contemplated on 28 July 1986, the date of filing of the Nicaraguan Application. Consequently Honduras could not plausibly maintain at that date that the dispute between itself and Nicaragua, as defined in the Nicaraguan Application, was at that time capable of being settled by direct negotiation through the usual diplomatic channels.

The Court therefore considered that the provisions of article II of the Pact of Bogotá relied on by Honduras did not constitute a bar to the admissibility of Nicaragua’s Application.

The *fourth ground of inadmissibility* (paras. 77-94) put forward by Honduras was that:

“Having accepted the Contadora process as a ‘special procedure’ within the meaning of article II of the Pact of Bogotá, Nicaragua is precluded both by article IV of the Pact and by elementary considerations of good faith from commencing any other procedure for pacific settlement until such time as the Contadora process has been concluded; and that time has not arrived.”

Article IV of the Pact of Bogotá, upon which Honduras relied, reads as follows:

“Once any pacific procedure has been initiated, whether by agreement between the parties or in fulfillment of the present Treaty or a previous pact, no other procedure may be commenced until that procedure is concluded.”

It was common ground between the Parties that the proceedings before the Court were a “pacific procedure” as contemplated by the Pact of Bogotá, and that therefore if any other “pacific procedure” under the Pact had been initiated and not concluded, the proceedings were instituted contrary to article IV and should therefore be found inadmissible. The disagreement between the Parties was whether the Contadora process was or was not a procedure contemplated

by article IV.

It was clear that the question whether or not the Contadora process could be regarded as a “special procedure” or a “pacific procedure” within the meaning of articles II and IV of the Pact would not have to be determined if such a procedure had had to be regarded as “concluded” by 28 July 1988, the date of filing of the Nicaraguan Application.

For the purpose of article IV of the Pact, no formal act was necessary before a pacific procedure could be said to be “concluded”. The procedure in question did not have to have failed definitively before a new procedure could be commenced. It was sufficient if, at the date on which a new procedure was commenced, the initial procedure had come to a standstill in such circumstances that there appeared to be no prospect of its being continued or resumed.

In order to decide that issue, the Court resumed its survey of the Contadora process. It considered that from that survey it was clear that the Contadora process was at a standstill at the date on which Nicaragua filed its Application. That situation continued until the presentation in February 1987 of the Arias Plan and the adoption by the five Central American States of the Esquipulas II Accord, which, in August 1987, set in train the procedure frequently referred to as the Contadora-Esquipulas II process.

The question therefore arose whether this latter procedure should be regarded as having ensured the continuation of the Contadora process without interruption, or whether on 28 July 1986 that process should have been regarded as having “concluded” for the purposes of article IV of the Pact of Bogotá, and a process of a different nature as having got under way thereafter. That question was of crucial importance, since on the latter hypothesis, whatever might have been the nature of the initial Contadora process with regard to article IV, that article would not have constituted a bar to the commencement of a procedure before the Court on that date.

After having noted the views expressed by the Parties as to the continuity of the Contadora process, which however could not be seen as a concordance of views as to the interpretation of the term “concluded”, the Court found that the Contadora process, as it operated in the first phase, was different from the Contadora-Esquipulas II process initiated in the second phase. The two differed with regard both to their object and to their nature. The Contadora process initially constituted a mediation in which the Contadora Group and Support Group played a decisive part. In the Contadora-Esquipulas II process, on the other hand, the Contadora Group of States played a fundamentally different role. The five countries of Central America set up an independent mechanism of multilateral negotiation, in which the role of the Contadora Group was confined to the tasks laid down in the Equipulas II Declaration, and had effectively shrunk still further subsequently. Moreover, it was during a gap of several months between the end of the initial Contadora process and the beginning of the Contadora-Esquipulas II process that Nicaragua had filed its Application.

The Court concluded that the procedures employed in the Contadora process up to 28 July 1986, the date of filing of the Nicaraguan Application, had been “concluded”, within the meaning of article IV of the Pact of Bogotá, at that

date. That being so, the submissions of Honduras based on article IV of the Pact had to be rejected, and it was unnecessary for the Court to determine whether the Contadora process was a “special procedure” or a “pacific procedure” for the purpose of articles II and IV of the Pact and whether that procedure had the same object as the one in progress before the Court.

The Court had also to deal with the contention, made in the fourth submission of Honduras on the admissibility of the Application, that Nicaragua was precluded also “by elementary considerations of good faith” from commencing any other procedure for pacific settlement until such time as the Contadora process had been concluded. In this respect, the Court considered that the events of June/July 1986 constituted a “conclusion” of the initial procedure both for purposes of article IV of the Pact and in relation to any other obligation to exhaust that procedure which might have existed independently of the Pact.

In conclusion the Court noted, by reference in particular to the terms of the Preamble to successive drafts of the Contadora Act, that the Contadora Group did not claim any exclusive role for the process it set in train.

*Operative clause* (para. 99)

“THE COURT,

(1) Unanimously,

*Finds* that it has jurisdiction under article XXXI of the Pact of Bogotá to entertain the Application filed by the Government of the Republic of Nicaragua on 28 July 1986;

(2) Unanimously,

*Finds* that the Application of Nicaragua is admissible.”

\* \* \*

Judge Lachs appended a declaration to the Judgment (*I.C.J. Reports 1988*, p. 108). Separate opinions were appended to the Judgment by Judges Oda (*ibid.*, pp. 109-125), Schwebel (*ibid.*, pp. 126-132) and Shahabuddeen (*ibid.*, pp. 133-156).

\* \* \*

(iii) *Maritime Delimitation in the Area between Greenland and Jan Mayen*<sup>198</sup>

On 16 August 1988, the Government of Denmark filed in the Registry of the Court an Application instituting proceedings against Norway.

In its Application, Denmark explained that despite negotiations conducted since 1980, it had not been possible to find an agreed solution to a dispute with regard to the delimitation of Denmark’s and Norway’s fishing zones and continental shelf areas in the waters between the east coast of Greenland and the Norwegian island of Jan Mayen, where there is an area of some 72,000 square kilometers to which both Parties lay claim.

It therefore requested the Court:

“to decide, in accordance with international law, where a single line of delimitation shall be drawn between Denmark’s and Norway’s fishing zones and continental shelf areas in the waters between Greenland and Jan Mayen”.

Under the provisions of Article 31 of the Statute, Denmark appointed Mr. P. H. Fischer as judge *ad hoc*.

By an Order of 14 October 1988 (*I.C.J. Reports 1988*, p. 66), the Court, taking into account the views expressed by the Parties, fixed 1 August 1989 as the time limit for the Memorial of Denmark and 15 May 1990 for the Counter-Memorial of Norway. The Memorial was filed within the prescribed time limit.

## B. CONTENTIOUS CASES BEFORE CHAMBERS

### (i) *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras)*<sup>199</sup>

On 8 May 1987 the Court made an Order whereby it acceded to the request of the two Governments to form a special Chamber of five judges to deal with the dispute between them (*I.C.J. Reports 1987*, p. 10). It declared that it had elected Judges Shigeru Oda, José Sette-Camara and Sir Robert Jennings to form, with the judges *ad hoc* chosen by the Parties, the Chamber to deal with the case. By an Order of 27 May 1987 (*I.C.J. Reports 1987*, p. 15), the Court, having consulted the Chamber, fixed 1 June 1988 as the time limit for the filing of a Memorial by each of the Parties.

The Chamber, at a private meeting on 29 May 1987, elected Judge Sette-Camara as its President. By an Order of the same date (*I.C.J. Reports 1987*, p. 176), the Chamber, taking into account the wishes of the Parties as expressed in the Special Agreement, fixed 1 February 1989 as the time limit for the filing of a Counter-Memorial by each of the Parties and 1 August 1989 for the filing of the Replies.

On 9 November 1987 the inaugural public sitting of the Chamber was held, at which the solemn declaration required by the Statute and Rules of Court was made by Judges *ad hoc* Valticos and Virally (the latter is now deceased, see p. 14).

Each of the Parties filed a Memorial within the time limit of 1 June 1988 fixed by the Court in its Order of 27 May 1987.

### (ii) *Elettronica Sicula S.p.A. (ELSI)*<sup>200</sup>

By an Order of 20 December 1988 (*I.C.J. Reports 1988*, p. 158), the Court declared that at an election held the same day Judge Ruda was elected a Member of the Chamber to fill the vacancy left by the death of Judge Nagendra Singh. In accordance with Article 18, paragraph 2, of the Rules of Court, President Ruda became President of the Chamber.

## 6. INTERNATIONAL LAW COMMISSION<sup>201</sup>

### FORTIETH SESSION OF THE COMMISSION<sup>202</sup>

The International Law Commission held its fortieth session at Geneva from 9 May to 29 July 1988 and considered all of its agenda items except the item entitled “Relations between States and international organizations (second part of the topic)”.

On the topics of “State responsibility” and “Jurisdictional immunities of States and their property”, the Special Rapporteurs for those topics presented their preliminary reports<sup>203</sup> to the Commission.

On the question of the “Status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier”, discussions were held on the basis of the eighth report<sup>204</sup> submitted by the Special Rapporteur. The Commission had completed the first reading of the draft articles on the topic at its thirty-eighth session, and at the present session discussed the proposals made by the Special Rapporteur for the second reading.

For the topic “Draft Code of Crimes against the Peace and Security of Mankind”, a draft of which was first formulated in 1954, discussions were held on the basis of the sixth report<sup>205</sup> submitted by its Special Rapporteur. At the conclusion of the discussions, the Commission provisionally adopted, on the recommendation of the Drafting Committee: article 4 (obligation to try or extradite), article 7 (*non bis in idem*), article 8 (non-retroactivity), article 10 (responsibility of the superior), article 11 (official position and criminal responsibility) and article 12 (aggression).

On the topic “The law of the non-navigational uses of international water-courses”, discussions were held on the basis of the fourth report<sup>206</sup> submitted by the Special Rapporteur. At the conclusion of the discussions, the Commission referred four draft articles to the Drafting Committee, and the Commission furthermore provisionally adopted, on the recommendation of the Drafting Committee, 14 draft articles on the topic, with commentaries thereto.

On the topic of “International liability for injurious consequences arising out of acts not prohibited by international law”, discussions were held on the basis of the fourth report<sup>207</sup> submitted by the Special Rapporteur. The Special Rapporteur, in introducing his report, pointed out that the general debate was completed and that it was time to concentrate on specific articles. At the conclusion of the discussions, articles 1 to 10 were referred to the Drafting Committee.

### *Consideration by the General Assembly*

At its forty-third session, the General Assembly had before it the report of the International Law Commission on the work of its fortieth session.<sup>208</sup> By its resolution 43/169 of 9 December 1988,<sup>209</sup> adopted on the recommendation of the Sixth Committee,<sup>210</sup> the General Assembly took note of the report and recommended that the International Law Commission should continue its work on the topics in its current programme. The Assembly also decided that the Sixth Committee, in structuring its debate on the report of the International Law Commission at its forty-fourth session of the General Assembly, should bear in mind

the possibility of reserving time for informal exchanges of views on matters relating to the Commission; and urged Governments and, as appropriate, international organizations to respond in writing as fully and expeditiously as possible to the requests of the Commission for comments, observations and replies to questionnaires and for materials on topics in its programme of work. Furthermore, the General Assembly, by its resolution 43/164 also of 9 December 1988,<sup>211</sup> adopted on the recommendation of the Sixth Committee,<sup>212</sup> invited the International Law Commission to continue its work on the elaboration of the draft Code of Crimes against the Peace and Security of Mankind including the elaboration of a list of crimes, taking into account the progress made at its fortieth session, as well as the views expressed during the forty-third session of the General Assembly; and noted the approach currently envisaged by the Commission in dealing with the judicial authority to be assigned for the implementation of the provisions of the draft Code, and encouraged the Commission to explore further all possible alternatives on the question.

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## 7. UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW<sup>213</sup>

### TWENTY-FIRST SESSION OF THE COMMISSION<sup>214</sup>

The United Nations Commission on International Trade Law (UNCITRAL) held its twenty-first session at New York, from 11 to 20 April 1988.

On the issue of electronic funds transfers, the Commission had before it the report of the Working Group on International Payments on the work of its sixteenth session,<sup>215</sup> at which the Working Group had undertaken the preparation of the Model Rules on electronic funds transfers. There were discussions on whether the Model Rules should be restricted to international funds transfers, and the Commission agreed that a decision to also include domestic funds transfers should be made at a later date.

Regarding the draft Convention on International Bills of Exchange and International Promissory Notes, the Commission considered some procedural aspects of the implementation of General Assembly resolution 42/153 of 7 December 1987 in which the Assembly had requested the Secretary-General to request all States to submit observations and proposals they wished to make on the draft Convention by 30 April 1988. The Commission noted that the General Assembly had decided to consider, at its forty-third session, the draft Convention with a view to its adoption at that session, and in the light of the fact that the draft Convention had been prepared over a 16-year period, the view was expressed that the Commission should recommend to the General Assembly that the project be brought to completion at its forthcoming session.

The Commission considered the report of the Secretary-General on stand-by letters of credit and guarantees,<sup>216</sup> and agreed with the conclusions of the report that a greater degree of certainty and uniformity was desirable in the regulation of these two instruments and that future work be envisaged in two



stages, the first relating to contractual rules or model terms and the second pertaining to statutory law. In this regard, the Commission welcomed the work undertaken by the International Chamber of Commerce (ICC) in preparing draft Uniform Rules on Guarantees, and supported the suggestion that one session of the Working Group on International Contract Practices would be devoted to a review of the ICC draft Rules, while at the same time noting that this would be the first time that a working group of the Commission would review a text prepared by another organization. Concerning the second stage, it was agreed that a final decision on the need for a uniform law dealing with matters that could not effectively be regulated by agreement of the parties, such as fraud or manifest abuse, should be taken at a later stage.

The Commission also had before it the report of the Working Group on International Contract Practices on the work of its eleventh session.<sup>217</sup> The Commission noted that the Working Group had completed its task of preparing a draft text of uniform rules on the liability of operators of transport terminals and that the Working Group had recommended the adoption of the uniform rules in the form of a convention. The Commission decided to consider at its twenty-second session, with a view to its adoption, the draft Convention on the Liability of Operators of Transport Terminals in International Trade as prepared by the Working Group.

Since its nineteenth session in 1986, the Commission, in the context of its discussions on the new international economic order, had considered the topic of countertrade. At the current session, the Commission had before it a report entitled "Preliminary study of legal issues in international countertrade",<sup>218</sup> which contained a description of contractual approaches to countertrade and an enumeration of some of the more important legal issues involved in that type of trade. After discussions, the Commission decided to prepare a legal guide on drawing up countertrade contracts that, however, would not duplicate the work of other organizations.

Also, at the nineteenth session, the Commission had entrusted the topic of procurement to the Working Group on the New International Economic Order, and the Commission noted that the Working Group would commence its work on the topic at the Working Group's tenth session, from 17 to 28 October 1988.

The Commission also had before it, for discussion, a note which had been requested from the Secretariat on the future programme of work of the Commission,<sup>219</sup> and a report of the Secretary-General that sets forth a register of international organizations engaged in activities in the field of international trade law.<sup>220</sup>

#### *Consideration by the General Assembly*

By its resolution 43/166 of 9 December 1988,<sup>221</sup> adopted on the recommendation of the Sixth Committee,<sup>222</sup> the General Assembly took note of the report of the United Nations Commission on International Trade Law on the work of its twenty-first session; reaffirmed the importance, in particular for developing countries, of the work of the Commission concerned with training and assistance in the field of international trade law and the desirability for it to sponsor seminars and symposia, in particular those organized on a regional basis, to promote such training and assistance, and, in this connection, expressed

its appreciation to Lesotho and the Preferential Trade Area of Eastern and Southern African States for their collaboration with the secretariat of the Commission in organizing the seminar on international trade law held at Maseru and to the Governments whose contributions enabled the seminar to take place; repeated its invitation to those States which had not yet done so to consider ratifying or acceding to the following conventions: (a) Convention on the Limitation Period in the International Sale of Goods, of 14 June 1974;<sup>223</sup> (b) Protocol amending the Convention on the Limitation Period in the International Sale of Goods, of 11 April 1980;<sup>224</sup> (c) United Nations Convention on Contracts for the International Sale of Goods, of 11 April 1980;<sup>225</sup> and (d) the United Nations Convention on the Carriage of Goods by Sea, of 31 March 1978.<sup>226</sup> The Assembly further welcomed the decision of the Commission to collect and disseminate court decisions and arbitral awards relating to legal texts emanating from its work so as to further the uniformity of their application in practice. Moreover, the General Assembly, by its resolution 43/165 also of 9 December 1988,<sup>227</sup> adopted on the recommendation of the Sixth Committee,<sup>228</sup> expressed its appreciation to UNCITRAL for preparing the text of the draft Convention on International Bills of Exchange and International Promissory Notes,<sup>229</sup> and adopted and opened for signature or accession the Convention contained in the annex to the present resolution.

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## 8. LEGAL QUESTIONS DEALT WITH BY THE SIXTH COMMITTEE OF THE GENERAL ASSEMBLY AND BY AD HOC LEGAL BODIES<sup>230 231</sup>

### (a) Report of the Committee on Relations with the Host Country

The General Assembly, by its resolution 43/172 of 9 December 1988,<sup>232</sup> adopted on the recommendation of the Sixth Committee,<sup>233</sup> having considered the report of the Committee on Relations with the Host Country,<sup>234</sup> endorsed the recommendations and conclusions of the Committee contained in paragraph 81 of the report; urged the host country, the United States, to take all necessary measures to continue to prevent criminal acts, including harassment and violations of the security of missions and the safety of their personnel or infringements of the inviolability of their property, in order to ensure the existence and functioning of all missions; reiterated its request to the parties concerned to follow consultations with a view to reaching solutions to the issues raised by certain Member States concerning the size of their missions; urged the host country, in the light of the consideration by the Committee of travel regulations issued by the host country, to continue to honour its obligations to facilitate the functioning of the United Nations and the missions accredited to it. Moreover, by its resolution 43/48 of 30 November 1988,<sup>235</sup> adopted on the recommendation of the Sixth Committee,<sup>236</sup> the General Assembly, having been apprised that the Palestine Liberation Organization (PLO), in conformity with the usual practice, had requested through the Secretary-General an entry visa for Mr. Yasser

Arafat, Chairman of the Executive Committee of the PLO, in order to participate in the forty-third session of the General Assembly; having been informed of the decision of the host country to deny the requested visa, in violation of its international legal obligations under the Agreement between the United Nations and the United States regarding the Headquarters of the United Nations,<sup>237</sup> and endorsing the opinion of the Legal Counsel of the United Nations,<sup>238</sup> affirmed the right of the Palestine Liberation Organization freely to designate the members of its delegation to participate in the sessions and the work of the General Assembly; deplored the failure by the host country to approve the granting of the requested entry visa; considered that this decision by the Government of the United States, the host country, constituted a violation of the international legal obligations of the host country under the Agreement; and urged the host country to abide scrupulously by the provisions of the Agreement and to reconsider and reverse its decision.

(b) Declaration on the Prevention and Removal of Disputes and Situations Which May Threaten International Peace and Security and on the Role of the United Nations in this Field

The General Assembly, by its resolution 43/51 of 5 December 1988,<sup>239</sup> adopted on the recommendation of the Sixth Committee,<sup>240</sup> taking note of the report of the Special Committee on the Charter of the United Nations and on the Strengthening of the Role of the Organization,<sup>241</sup> which completed a draft Declaration on the Prevention and Removal of Disputes and Situations Which May Threaten International Peace and Security and on the Role of the United Nations in this Field, approved the text of the Declaration, and requested the Secretary-General to inform the Governments of the States Members of the United Nations or members of specialized agencies, and the Security Council, of the adoption of the Declaration. The text of the Declaration follows:

Declaration on the Prevention and Removal of Disputes and Situations Which May Threaten International Peace and Security and on the Role of the United Nations in this Field

The General Assembly,

*Recognizing* the important role that the United Nations and its organs can play in the prevention and removal of international disputes and situations which may lead to international friction or give rise to an international dispute, the continuance of which may threaten the maintenance of international peace and security (hereafter: “disputes” or “situations”), within their respective functions and powers under the Charter of the United Nations,

*Convinced* that the strengthening of such a role of the United Nations will enhance its effectiveness in dealing with questions relating to the maintenance of international peace and security and in promoting the peaceful settlement of international disputes,

*Recognizing* the fundamental responsibility of States for the prevention and removal of disputes and situations,

*Recalling* that the peoples of the United Nations are determined to practise tolerance and live together in peace with one another as good neighbours,

*Bearing in mind* the right of all States to resort to peaceful means of their own choice for the prevention and removal of disputes or situations,

*Reaffirming* the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, the Manila Declaration on the Peaceful Settlement of International Disputes and the Declaration on the Enhancement of the Effectiveness of the Principle of Refraining from the Threat or Use of Force in International Relations,

*Recalling* that it is the duty of States to refrain in their international relations from military, political, economic or any other form of coercion against the political independence or territorial integrity of any State,

*Calling upon* States to cooperate fully with the relevant organs of the United Nations and to support actions taken by them in accordance with the Charter relating to the prevention or removal of disputes and situations,

*Bearing in mind* the obligation of States to conduct their relations with other States in accordance with international law, including the principles of the United Nations,

*Reaffirming* the principle of equal rights and self-determination of peoples,

*Recalling* that the Charter confers on the Security Council the primary responsibility for the maintenance of international peace and security, and that Member States have agreed to accept and carry out its decisions in accordance with the Charter,

*Recalling also* the important role conferred by the Charter on the General Assembly and the Secretary-General in the maintenance of international peace and security,

1. *Solemnly declares* that:

1. States should act so as to prevent in their international relations the emergence or aggravation of disputes or situations, in particular by fulfilling in good faith their obligations under international law;

2. In order to prevent disputes or situations, States should develop their relations on the basis of the sovereign equality of States and in such a manner as to enhance the effectiveness of the collective security system through the effective implementation of the provisions of the Charter of the United Nations;

3. States should consider the use of bilateral or multilateral consultations in order better to understand each other's views, positions and interests;

4. States party to regional arrangements or members of agencies referred to in Article 52 of the Charter should make every effort to prevent or remove local disputes or situations through such arrangements and agencies;

5. States concerned should consider approaching the relevant organs of the United Nations in order to obtain advice or recommendations on preventive means for dealing with a dispute or situation;

6. Any State party to a dispute or directly concerned with a situation, particularly if it intends to request a meeting of the Security Council, should approach the Council, directly or indirectly, at an early stage and, if appropriate, on a confidential basis;

7. The Security Council should consider holding from time to time meetings, including at a high level with the participation, in particular, of Ministers for Foreign Affairs, or consultations to review the international situation and search for effective ways of improving it;

8. In the course of the preparation for the prevention or removal of particular disputes or situations, the Security Council should consider making use of the various means at its disposal, including the appointment of the Secretary-General as rapporteur for a specified question;

9. When a particular dispute or situation is brought to the attention of the Security Council without a meeting being requested, the Council should consider holding consultations with a view to examining the facts of the dispute or situation and keeping it under review, with the assistance of the Secretary-General when needed; the States concerned should have the opportunity of making their views known;

10. In such consultations, consideration should be given to employing such informal methods as the Security Council deems appropriate, including confidential contacts by its President;

11. In such consultations, the Security Council should consider, *inter alia*:

(a) Reminding the States concerned to respect their obligations under the Charter;

(b) Making an appeal to the States concerned to refrain from any action which might give rise to a dispute or lead to the deterioration of the dispute or situation;

(c) Making an appeal to the States concerned to take action which might help to remove, or to prevent the continuation or deterioration of, the dispute or situation;

12. The Security Council should consider sending, at an early stage, fact-finding or good offices missions or establishing appropriate forms of United Nations presence, including observers and peace-keeping operations, as a means of preventing the further deterioration of the dispute or situation in the areas concerned;

13. The Security Council should consider encouraging and, where appropriate, endorsing efforts at the regional level by the States concerned or by regional arrangements or agencies to prevent or remove a dispute or situation in the region concerned;

14. Taking into consideration any procedures that have already been adopted by the States directly concerned, the Security Council should consider recommending to them appropriate procedures or methods of settlement of disputes or adjustment of situations, and such terms of settlement as it deems appropriate;

15. The Security Council, if it is appropriate for promoting the prevention and removal of disputes or situations, should, at an early stage, consider making use of the provisions of the Charter concerning the possibility of requesting the International Court of Justice to give an advisory opinion on any legal question;

16. The General Assembly should consider making use of the provisions of the Charter in order to discuss disputes or situations, when appropriate, and, in accordance with Article 11 and subject to Article 12 of the Charter, making recommendations;

17. The General Assembly should consider, where appropriate, supporting efforts undertaken at the regional level by the States concerned or by regional arrangements or agencies, to prevent or remove a dispute or situation in the region concerned;

18. If a dispute or situation has been brought before it, the General Assembly should consider including in its recommendations making more use of fact-finding capabilities, in accordance with Article 11 and subject to Article 12 of the Charter;

19. The General Assembly, if it is appropriate for promoting the prevention and removal of disputes or situations, should consider making use of the provisions of the Charter concerning the possibility of requesting the International Court of Justice to give an advisory opinion on any legal question;

20. The Secretary-General, if approached by a State or States directly concerned with a dispute or situation, should respond swiftly by urging the States to seek a solution or adjustment by peaceful means of their own choice under the Charter and by offering his good offices or other means at his disposal, as he deems appropriate;

21. The Secretary-General should consider approaching the States directly concerned with a dispute or situation in an effort to prevent it from becoming a threat to the maintenance of international peace and security;

22. The Secretary-General should, where appropriate, consider making full use of fact-finding capabilities, including, with the consent of the host State, sending a representative or fact-finding missions to areas where a dispute or a situation exists; where necessary, the Secretary-General should also consider making the appropriate arrangements;

23. The Secretary-General should be encouraged to consider using, at as early a stage as he deems appropriate, the right that is accorded to him under Article 99 of the Charter;

24. The Secretary-General should, where appropriate, encourage efforts undertaken at the regional level to prevent or remove a dispute or situation in the region concerned;

25. Should States fail to prevent the emergence or aggravation of a dispute or situation, they shall continue to seek a settlement by peaceful means in accordance with the Charter;

2. *Declares* that nothing in the present Declaration shall be construed as prejudicing in any manner the provisions of the Charter, including those contained in Article 2, paragraph 7, thereof, or the rights and duties of States, or the scope of the functions and the powers of United Nations organs under the Charter, in particular those relating to the maintenance of international peace and security;

3. *Also declares* that nothing in the present Declaration could in any way prejudice the right of self-determination, freedom and independence of peoples

forcibly deprived of that right and referred to in the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, particularly peoples under colonial or racist regimes or other forms of alien domination.

- (c) Observer status of national liberation movements recognized by the Organization of African Unity and/or by the League of Arab States

The General Assembly adopted, on 9 December 1988, resolutions 43/160 A<sup>242</sup> and 43/160 B,<sup>243</sup> on the recommendation of the Sixth Committee.<sup>244</sup> By resolution 43/160 A, the Assembly, taking note of the report of the Secretary-General,<sup>245</sup> decided that the Palestine Liberation Organization (PLO) and the South West Africa People's Organization (SWAPO) were entitled to have their communications relating to the sessions and work of the General Assembly issued and circulated directly, and without intermediary, as official documents of the Assembly; decided also that the PLO and SWAPO were entitled to have their communications relating to the sessions and work of all international conferences convened under the auspices of the General Assembly of the United Nations issued and circulated directly, and without intermediary, as official documents of those conferences; and authorized the Secretariat to issue and circulate as official documents of the United Nations, under the appropriate symbol of other organs or conferences of the United Nations, communications submitted directly, without intermediary, by the PLO and SWAPO, on matters relative to the work of those organs and conferences. By resolution 43/160 B, the Assembly urged all States that have not done so, in particular those which acted as host to international organizations or to conferences convened by, or held under the auspices of, international organizations of a universal character, to consider as soon as possible ratifying, or acceding to, the Vienna Convention on the Representation of States in Their Relations with International Organizations of a Universal Character;<sup>246</sup> and called once more upon the States concerned to accord to the delegations of the national liberation movements recognized by the Organization of African Unity and/or by the League of Arab States and accorded observer status by international organizations, the facilities, privileges and immunities necessary for the performance of their functions, in accordance with the provisions of the Vienna Convention.

- (d) Status of the Protocols Additional to the Geneva Conventions of 1949 and relating to the protection of victims of armed conflicts

The General Assembly, by its resolution 43/161 of 9 December 1988,<sup>247</sup> adopted on the recommendation of the Sixth Committee,<sup>248</sup> having considered the report of the Secretary-General,<sup>249</sup> noted with appreciation the virtually universal acceptance of the Geneva Conventions of 1949<sup>250</sup> and the increasingly wide acceptance of the two additional Protocols of 1977;<sup>251</sup> appealed to all States parties to the Geneva Conventions of 1949 that have not yet done so to consider becoming parties also to the additional Protocols at the earliest possible date; and called upon all States becoming parties to Protocol I to consider making the declaration provided for under article 90 of that Protocol.

(e) Progressive development of the principles and norms of international law relating to the new international economic order

By its resolution 43/162 of 9 December 1988,<sup>252</sup> adopted on the recommendation of the Sixth Committee,<sup>253</sup> the General Assembly, recalling the analytical study<sup>254</sup> submitted to the General Assembly at its thirty-ninth session by the United Nations Institute for Training and Research, noted with appreciation the views and comments submitted by Governments pursuant to resolutions 40/67, 41/73 and 42/149;<sup>255</sup> requested the Secretary-General: (a) to continue to seek proposals of Member States concerning the most appropriate procedures to be adopted with regard to the consideration of the analytical study, as well as the codification and progressive development of the principles and norms of international law relating to the new international economic order, and (b) to include the proposals received in accordance with subparagraph (a) above in a report to be submitted to the General Assembly at its forty-fourth session; and recommended that the Sixth Committee should consider making a final decision at the forty-fourth session of the General Assembly on the question of the appropriate forum within its framework which would undertake the task of completing the elaboration of the process of codification and progressive development of the principles and norms of international law relating to the new international economic order, taking into account the proposals and suggestions which have been or will be submitted by Member States on the matter.

(f) Peaceful settlement of disputes between States

The General Assembly, by its resolution 43/163 of 9 December 1988,<sup>256</sup> adopted on the recommendation of the Sixth Committee,<sup>257</sup> taking note with interest of the report of the Secretary-General,<sup>258</sup> again urged all States to observe and promote in good faith the provisions of the Manila Declaration on the Peaceful Settlement of International Disputes<sup>259</sup> in the settlement of their international disputes; requested the Secretary-General to submit to the General Assembly at its forty-fourth session a further report containing the replies of Member States, relevant United Nations bodies and specialized agencies, regional intergovernmental organizations and interested international legal bodies on the implementation of the Manila Declaration and on ways and means of increasing the effectiveness of this instrument.

(g) Consideration of effective measures to enhance the protection, security and safety of diplomatic and consular missions and representatives

By its resolution 43/167 of 9 December 1988,<sup>260</sup> adopted on the recommendation of the Sixth Committee,<sup>261</sup> the General Assembly took note of the report of the Secretary-General;<sup>262</sup> strongly condemned acts of violence against diplomatic and consular missions and representatives, as well as against missions and representatives to international intergovernmental organizations and officials of such organizations, and emphasized that such acts could never be justified; and urged States to observe, implement and enforce the principles and rules of international law governing diplomatic and consular relations and, in particular, to ensure, in



conformity with their international obligations, the protection, security and safety of the missions, representatives and officials mentioned above officially present in territories under their jurisdiction, including practical measures to prohibit in their territories illegal activities of persons, groups and organizations that encourage, instigate, organize or engage in the perpetration of acts against the security and safety of such missions, representatives and officials.

- (h) Report of the Ad Hoc Committee on the Drafting of an International Convention against the Recruitment, Use, Financing and Training of Mercenaries

The General Assembly, by its resolution 43/168 of 9 December 1988,<sup>263</sup> adopted on the recommendation of the Sixth Committee,<sup>264</sup> took note of the report of the Ad Hoc Committee on the Drafting of an International Convention against the Recruitment, Use, Financing and Training of Mercenaries;<sup>265</sup> and decided to renew the mandate of the Ad Hoc Committee with a view to completing as soon as possible a draft international convention against the recruitment, use, financing and training of mercenaries.

- (i) Report of the Special Committee on the Charter of the United Nations and on the Strengthening of the Role of the Organization

The General Assembly, by its resolution 43/170 of 9 December 1988,<sup>266</sup> adopted on the recommendation of the Sixth Committee,<sup>267</sup> took note of the report of the Special Committee on the Charter of the United Nations and on the Strengthening of the Role of the Organization;<sup>268</sup> decided that the Special Committee should hold its next session from 27 March to 14 April 1989; further decided that the Special Committee should accept the participation of the observers of Member States, including in the meetings of its working group; and requested the Secretary-General to continue, on a priority basis, the preparation of the draft handbook on the peaceful settlement of disputes between States, and to report to the Special Committee at its session in 1989 on the progress of work, before submitting to it the draft handbook in its final form, with a view to its approval at a later stage.

- (j) Development and strengthening of good-neighbourliness between States

The General Assembly adopted, on 9 December 1988, resolutions 43/171 A<sup>269</sup> and 43/171 B,<sup>270</sup> on the recommendation of the Sixth Committee.<sup>271</sup> In resolution 43/171 A, the Assembly took note of the report of the Subcommittee on Good-Neighbourliness,<sup>272</sup> established by the Sixth Committee during the forty-third session of the General Assembly. In resolution 43/171 B, the Assembly reaffirmed that good-neighbourliness fully conformed with the purposes of the United Nations and should be founded upon the strict observance of the principles of the United Nations as embodied in the Charter and in the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations,<sup>273</sup> and so presupposed the rejection of any acts seeking to establish zones of influence or domination.

(k) Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment

The General Assembly, by its resolution 43/173 of 9 December 1988,<sup>274</sup> adopted on the recommendation of the Sixth Committee,<sup>275</sup> approved the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, the text of which follows:

Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment

SCOPE OF THE BODY OF PRINCIPLES

These principles apply for the protection of all persons under any form of detention or imprisonment.

USE OF TERMS

For the purposes of the Body of Principles:

- (a) "Arrest" means the act of apprehending a person for the alleged commission of an offence or by the action of an authority;
- (b) "Detained person" means any person deprived of personal liberty except as a result of conviction for an offence;
- (c) "Imprisoned person" means any person deprived of personal liberty as a result of conviction for an offence;
- (d) "Detention" means the condition of detained persons as defined above;
- (e) "Imprisonment" means the condition of imprisoned persons as defined above;
- (f) The words "a judicial or other authority" mean a judicial or other authority under the law whose status and tenure should afford the strongest possible guarantees of competence, impartiality and independence.

*Principle 1*

All persons under any form of detention or imprisonment shall be treated in a humane manner and with respect for the inherent dignity of the human person.

*Principle 2*

Arrest, detention or imprisonment shall only be carried out strictly in accordance with the provisions of the law and by competent officials or persons authorized for that purpose.

*Principle 3*

There shall be no restriction upon or derogation from any of the human rights of persons under any form of detention or imprisonment recognized or existing in any State pursuant to law, conventions, regulations or custom on the pretext that this Body of Principles does not recognize such rights or that it recognizes them to a lesser extent.

#### *Principle 4*

Any form of detention or imprisonment and all measures affecting the human rights of a person under any form of detention or imprisonment shall be ordered by, or be subject to the effective control of, a judicial or other authority.

#### *Principle 5*

1. These principles shall be applied to all persons within the territory of any given State, without distinction of any kind, such as race, colour, sex, language, religion or religious belief, political or other opinion, national, ethnic or social origin, property, birth or other status.

2. Measures applied under the law and designed solely to protect the rights and special status of women, especially pregnant women and nursing mothers, children and juveniles, aged, sick or handicapped persons shall not be deemed to be discriminatory. The need for, and the application of, such measures shall always be subject to review by a judicial or other authority.

#### *Principle 6*

No person under any form of detention or imprisonment shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.\* No circumstance whatever may be invoked as a justification for torture or other cruel, inhuman or degrading treatment or punishment.

#### *Principle 7*

1. States should prohibit by law any act contrary to the rights and duties contained in these principles, make any such act subject to appropriate sanctions and conduct impartial investigations upon complaints.

2. Officials who have reason to believe that a violation of this Body of Principles has occurred or is about to occur shall report the matter to their superior authorities and, where necessary, to other appropriate authorities or organs vested with reviewing or remedial powers.

3. Any other person who has ground to believe that a violation of this Body of Principles has occurred or is about to occur shall have the right to report the matter to the superiors of the officials involved as well as to other appropriate authorities or organs vested with reviewing or remedial powers.

#### *Principle 8*

Persons in detention shall be subject to treatment appropriate to their unconvicted status. Accordingly, they shall, whenever possible, be kept separate from imprisoned persons.

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\*The term "cruel, inhuman or degrading treatment or punishment" should be interpreted so as to extend the widest possible protection against abuses, whether physical or mental, including the holding of a detained or imprisoned person in conditions which deprive him, temporarily or permanently, of the use of any of his natural senses such as: sight or hearing, or of his awareness of place or the passing of time.

### *Principle 9*

The authorities which arrest a person, keep him under detention or investigate the case shall exercise only the powers granted to them under the law and the exercise of these powers shall be subject to recourse to a judicial or other authority.

### *Principle 10*

Anyone who is arrested shall be informed at the time of his arrest of the reason for his arrest and shall be promptly informed of any charges against him.

### *Principle 11*

1. A person shall not be kept in detention without being given an effective opportunity to be heard promptly by a judicial or other authority. A detained person shall have the right to defend himself or to be assisted by counsel as prescribed by law.

2. A detained person and his counsel, if any, shall receive prompt and full communication of any order of detention, together with the reasons therefor.

3. A judicial or other authority shall be empowered to review as appropriate the continuance of detention.

### *Principle 12*

1. There shall be duly recorded:

(a) The reasons for the arrest;

(b) The time of the arrest and the taking of the arrested person to a place of custody as well as that of his first appearance before a judicial or other authority;

(c) The identity of the law enforcement officials concerned;

(d) Precise information concerning the place of custody.

2. Such records shall be communicated to the detained person, or his counsel, if any, in the form prescribed by law.

### *Principle 13*

Any person shall, at the moment of arrest and at the commencement of detention or imprisonment, or promptly thereafter, be provided by the authority responsible for his arrest, detention or imprisonment, respectively, with information on and an explanation of his rights and how to avail himself of such rights.

### *Principle 14*

A person who does not adequately understand or speak the language used by the authorities responsible for his arrest, detention or imprisonment is entitled to receive promptly in a language which he understands the information referred to in principle 10, principle 11, paragraph 2, principle 12, paragraph 1, and principle 13 and to have the assistance, free of charge, if necessary, of an interpreter in connection with legal proceedings subsequent to his arrest.

### *Principle 15*

Notwithstanding the exceptions contained in principle 16, paragraph 4, and principle 18, paragraph 3, communication of the detained or imprisoned person with the outside world, and in particular his family or counsel, shall not be denied for more than a matter of days.

### *Principle 16*

1. Promptly after arrest and after each transfer from one place of detention or imprisonment to another, a detained or imprisoned person shall be entitled to notify or to require the competent authority to notify members of his family or other appropriate persons of his choice of his arrest, detention or imprisonment or of the transfer and of the place where he is kept in custody.

2. If a detained or imprisoned person is a foreigner, he shall also be promptly informed of his right to communicate by appropriate means with a consular post or the diplomatic mission of the State of which he is a national or which is otherwise entitled to receive such communication in accordance with international law or with the representative of the competent international organization, if he is a refugee or is otherwise under the protection of an intergovernmental organization.

3. If a detained or imprisoned person is a juvenile or is incapable of understanding his entitlement, the competent authority shall on its own initiative undertake the notification referred to in the present principle. Special attention shall be given to notifying parents or guardians.

4. Any notification referred to in the present principle shall be made or permitted to be made without delay. The competent authority may however delay a notification for a reasonable period where exceptional needs of the investigation so require.

### *Principle 17*

1. A detained person shall be entitled to have the assistance of a legal counsel. He shall be informed of his right by the competent authority promptly after arrest and shall be provided with reasonable facilities for exercising it.

2. If a detained person does not have a legal counsel of his own choice, he shall be entitled to have a legal counsel assigned to him by a judicial or other authority in all cases where the interests of justice so require and without payment by him if he does not have sufficient means to pay.

### *Principle 18*

1. A detained or imprisoned person shall be entitled to communicate and consult with his legal counsel.

2. A detained or imprisoned person shall be allowed adequate time and facilities for consultations with his legal counsel.

3. The right of a detained or imprisoned person to be visited by and to consult and communicate, without delay or censorship and in full confidentiality, with his legal counsel may not be suspended or restricted save in exceptional circumstances, to be specified by law or lawful regulations, when it is considered indispensable by a judicial or other authority in order to maintain security and good order.

4. Interviews between a detained or imprisoned person and his legal counsel may be within sight, but not within the hearing, of a law enforcement official.

5. Communications between a detained or imprisoned person and his legal counsel mentioned in the present principle shall be inadmissible as evidence against the detained or imprisoned person unless they are connected with a continuing or contemplated crime.

#### *Principle 19*

A detained or imprisoned person shall have the right to be visited by and to correspond with, in particular, members of his family and shall be given adequate opportunity to communicate with the outside world, subject to reasonable conditions and restrictions as specified by law or lawful regulations.

#### *Principle 20*

If a detained or imprisoned person so requests, he shall if possible be kept in a place of detention or imprisonment reasonably near his usual place of residence.

#### *Principle 21*

1. It shall be prohibited to take undue advantage of the situation of a detained or imprisoned person for the purpose of compelling him to confess, to incriminate himself otherwise or to testify against any other person.

2. No detained person while being interrogated shall be subject to violence, threats or methods of interrogation which impair his capacity of decision or his judgement.

#### *Principle 22*

No detained or imprisoned person shall, even with his consent, be subjected to any medical or scientific experimentation which may be detrimental to his health.

#### *Principle 23*

1. The duration of any interrogation of a detained or imprisoned person and of the intervals between interrogations as well as the identity of the officials who conducted the interrogations and other persons present shall be recorded and certified in such form as may be prescribed by law.

2. A detained or imprisoned person, or his counsel when provided by law, shall have access to the information described in paragraph 1 of the present principle.

#### *Principle 24*

A proper medical examination shall be offered to a detained or imprisoned person as promptly as possible after his admission to the place of detention or imprisonment, and thereafter medical care and treatment shall be provided whenever necessary. This care and treatment shall be provided free of charge.

#### *Principle 25*

A detained or imprisoned person or his counsel shall, subject only to reasonable conditions to ensure security and good order in the place of detention or imprisonment, have the right to request or petition a judicial or other authority for a second medical examination or opinion.

#### *Principle 26*

The fact that a detained or imprisoned person underwent a medical examination, the name of the physician and the results of such an examination shall be duly recorded. Access to such records shall be ensured. Modalities therefore shall be in accordance with relevant rules of domestic law.

#### *Principle 27*

Non-compliance with these principles in obtaining evidence shall be taken into account in determining the admissibility of such evidence against a detained or imprisoned person.

#### *Principle 28*

A detained or imprisoned person shall have the right to obtain within the limits of available resources, if from public sources, reasonable quantities of educational, cultural and informational material, subject to reasonable conditions to ensure security and good order in the place of detention or imprisonment.

#### *Principle 29*

1. In order to supervise the strict observance of relevant laws and regulations, places of detention shall be visited regularly by qualified and experienced persons appointed by, and responsible to, a competent authority distinct from the authority directly in charge of the administration of the place of detention or imprisonment.
2. A detained or imprisoned person shall have the right to communicate freely and in full confidentiality with the persons who visit the places of detention or imprisonment in accordance with paragraph 1 of the present principle, subject to reasonable conditions to ensure security and good order in such places.

#### *Principle 30*

1. The types of conduct of the detained or imprisoned person that constitute disciplinary offences during detention or imprisonment, the description and duration of disciplinary punishment that may be inflicted and the authorities competent to impose such punishment shall be specified by law or lawful regulations and duly published.

2. A detained or imprisoned person shall have the right to be heard before disciplinary action is taken. He shall have the right to bring such action to higher authorities for review.

*Principle 31*

The appropriate authorities shall endeavour to ensure, according to domestic law, assistance when needed to dependent and, in particular, minor members of the families of detained or imprisoned persons and shall devote a particular measure of care to the appropriate custody of children left without supervision.

*Principle 32*

1. A detained person or his counsel shall be entitled at any time to take proceedings according to domestic law before a judicial or other authority to challenge the lawfulness of his detention in order to obtain his release without delay, if it is unlawful.

2. The proceedings referred to in paragraph 1 of the present principle shall be simple and expeditious and at no cost for detained persons without adequate means. The detaining authority shall produce without unreasonable delay the detained person before the reviewing authority.

*Principle 33*

1. A detained or imprisoned person or his counsel shall have the right to make a request or complaint regarding his treatment, in particular in case of torture or other cruel, inhuman or degrading treatment, to the authorities responsible for the administration of the place of detention and to higher authorities and, when necessary, to appropriate authorities vested with reviewing or remedial powers.

2. In those cases where neither the detained or imprisoned person nor his counsel has the possibility to exercise his rights under paragraph 1 of the present principle, a member of the family of the detained or imprisoned person or any other person who has knowledge of the case may exercise such rights.

3. Confidentiality concerning the request or complaint shall be maintained if so requested by the complainant.

4. Every request or complaint shall be promptly dealt with and replied to without undue delay. If the request or complaint is rejected, or in case of inordinate delay, the complainant shall be entitled to bring it before a judicial or other authority. Neither the detained or imprisoned person nor any complainant under paragraph 1 of the present principle shall suffer prejudice for making a request or complaint.

*Principle 34*

Whenever the death or disappearance of a detained or imprisoned person occurs during his detention or imprisonment, an inquiry into the cause of death or disappearance shall be held by a judicial or other authority, either on its own motion or at the instance of a member of the family of such a person or any



person who has knowledge of the case. When circumstances so warrant, such an inquiry shall be held on the same procedural basis whenever the death or disappearance occurs shortly after the termination of the detention or imprisonment. The findings of such inquiry or a report thereon shall be made available upon request, unless doing so would jeopardize an ongoing criminal investigation.

*Principle 35*

1. Damage incurred because of acts or omissions by a public official contrary to the rights contained in these principles shall be compensated according to the applicable rules on liability provided by domestic law.

2. Information required to be recorded under these principles shall be available in accordance with procedures provided by domestic law for use in claiming compensation under the present principle.

*Principle 36*

1. A detained person suspected of or charged with a criminal offence shall be presumed innocent and shall be treated as such until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defence.

2. The arrest or detention of such a person pending investigation and trial shall be carried out only for the purposes of the administration of justice on grounds and under conditions and procedures specified by law. The imposition of restrictions upon such a person which are not strictly required for the purpose of the detention or to prevent hindrance to the process of investigation or the administration of justice, or for the maintenance of security and good order in the place of detention shall be forbidden.

*Principle 37*

A person detained on a criminal charge shall be brought before a judicial or other authority provided by law promptly after his arrest. Such authority shall decide without delay upon the lawfulness and necessity of detention. No person may be kept under detention pending investigation or trial except upon the written order of such an authority. A detained person shall, when brought before such an authority, have the right to make a statement on the treatment received by him while in custody.

*Principle 38*

A person detained on a criminal charge shall be entitled to trial within a reasonable time or to release pending trial.

*Principle 39*

Except in special cases provided by law, a person detained on a criminal charge shall be entitled, unless a judicial or other authority decides otherwise in the interest of the administration of justice, to release pending trial subject to the conditions that may be imposed in accordance with the law. Such authority shall keep the necessity of detention under review.

*General clause*

Nothing in this Body of Principles shall be construed as restricting or derogating from any right defined in the International Covenant on Civil and Political Rights.

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9. RESPECT FOR THE PRIVILEGES AND IMMUNITIES OF OFFICIALS OF THE UNITED NATIONS AND THE SPECIALIZED AGENCIES AND RELATED ORGANIZATIONS

The General Assembly, by its resolution 43/225 of 21 December 1988,<sup>276</sup> adopted on the recommendation of the Fifth Committee,<sup>277</sup> took note with concern of the report of the Secretary-General,<sup>278</sup> submitted on behalf of the Administrative Committee on Coordination, and of the developments indicated therein, in particular, the significant number of new cases of arrest and detention and those regarding previously reported cases under this category; also took note with concern of the restrictions on duty travel of officials as indicated in the report of the Secretary-General; further took note with concern of the information contained in the report of the Secretary-General related to taxation and the status, privileges and immunities of officials; deplored the increase in the number of cases where the functioning, safety and well-being of officials had been adversely affected; also deplored the increasing number of cases in which the lives and well-being of officials had been placed in jeopardy during the exercise of their official functions; called upon all Member States scrupulously to respect the privileges and immunities of all officials of the United Nations and the specialized agencies and related organizations and to refrain from any acts that would impede such officials in the performance of their functions, thereby seriously affecting the proper functioning of the Organization; also called upon the staff of the United Nations and the specialized agencies and related organizations to comply with the obligations resulting from the Staff Regulations and Rules of the United Nations, in particular, regulation 1.8, and from the equivalent provisions governing the staff of the other agencies; and further called upon the Secretary-General, as chief administrative officer of the United Nations, to continue personally to act as the focal point in promoting and ensuring the observance of the privileges and immunities of officials of the United Nations and the specialized agencies and related organizations by using all such means as are available to him.

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## 10. UNITED NATIONS INSTITUTE FOR TRAINING AND RESEARCH

The General Assembly, by its resolution 43/201 of 20 December 1988,<sup>279</sup> adopted on the recommendation of the Second Committee,<sup>280</sup> took note of the report of the Secretary-General<sup>281</sup> prepared in response to resolution 42/197 of 11 December 1987 and the report of the Executive Director of the United Nations Institute for Training and Research;<sup>282</sup> reaffirmed the continuing validity and relevance of the mandate of the Institute, as contained in the amended statute;<sup>283</sup> reaffirmed also the continuing validity of resolution 42/197 and called for the early implementation of all its provisions; and took note of the amendment to the statute of the Institute regarding the designation of alternates to members of the Board of Trustees who are unable to attend any meeting of the Board.<sup>284</sup>

### **B. General review of the legal activities of intergovernmental organizations related to the United Nations**

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

##### I. CONSTITUTIONAL AND GENERAL LEGAL MATTERS

###### A. *Interpretation of the rule on the convening of special sessions of the Finance Committee*

At its ninety-fourth session, the Council examined the issue of the interpretation of rule XXVII.8(b) of the General Rules of the Organization (GRO) and concluded that it was implicit that a Member Nation requesting the convening of a special session of the Finance Committee could also indicate a period, reasonable in the circumstances, within which it would wish it to be convened. The Council recommended that, in order to clarify the matter in the future, the Finance Committee adopt a new provision in its Rules of Procedure providing as follows:

“Where the required number of requests for the calling of a session of the Finance Committee is received under rule XXVII.8(a) or (b) GRO and such requests indicate that the session should be called on a specific date or within a specified time limit, the Chairman and the Director-General shall consult each other and the Members of the Committee with a view to the calling of the session on the date or within the time limit specified, bearing in mind the relevant factors, including the context and urgency of the request, the availability of the Chairman and the majority of the members of the Committee, conflicting meeting schedules and the preparations necessary for convening the session.

Any session called pursuant to such requests shall be called as soon as possible and at the latest within a period which shall not exceed 50 days from

the date of receipt of the third request under subparagraph (a) or the fifth request under subparagraph (b).”<sup>285</sup>

### B. *Regional representation on the Programme and Finance Committees*

Conference resolution 11/87 adopted in November 1987 called on members of the Council, when electing members of the Programme and Finance Committees, to bear in mind the need for just and equitable representation of the various regions, the fact that all regions that so wish should be represented and the importance of rotation among the countries in each Region.

Taking note that certain regions were still underrepresented or not represented at all on the Programme and Finance Committees, the Council decided in its ninety-fourth session to refer the matter once more to the Committee on Constitutional and Legal Matters (CCLM).

### C. *African Forestry Commission*

The Council approved in its ninety-fourth session the change of name of the “African Forestry Commission” to “African Forestry and Wildlife Commission”. The change of title did not entail any change in the terms of reference of the Commission.

## II. ACTIVITIES OF LEGAL INTEREST RELATING TO COMMODITIES

### A. *Hard fibres*

The Intergovernmental Group on Hard Fibres held its twenty-second session in October 1988. It agreed to revise upwards the indicative price of sisal fibre upon recommendation by the Sub-Group of Sisal and Henequen Producing Countries. It recommended that the quota system should be maintained in principle, although the global and national quotas should remain suspended. The Group also agreed, with the exception of two consuming countries, to raise the indicative price for sisal baler twines. For abaca, the Group recommended to raise the indicative price range for the composite of three major grades of Philippine fibre. It decided, however, that the mechanism triggering automatic consultations between producers and consumers when the indicator price was approaching either limit of the range should remain suspended.

### B. *Jute, kenaf and allied fibres*

#### (a) *Informal price arrangements for jute and kenaf*

The informal price arrangements operated under the auspices of the FAO Intergovernmental Group on Jute, Kenaf and Allied Fibres were maintained in 1988. At its twenty-fourth session in 1988, the Group agreed not to change the indicative prices set at its previous session for Bangladesh jute and Thai kenaf.

#### (b) *Support to activities of the International Jute Organization (IJO)*

FAO continued to provide support to the activities of the International Jute Organization through:

- (i) Technical assistance in developing and implementing its projects on jute agriculture and primary processing;
- (ii) Supply of statistical and economic information on jute and its competing synthetic materials;
- (iii) Regular participation in the work of the biannual sessions of its Council and Committee on Projects.

### III. ACTIVITIES OF LEGAL INTEREST RELATING TO PLANT PROTECTION

FAO is developing a network of base collections, as requested by article 7 of the International Undertaking on Plant Genetic Resources and recommended by the Commission on Plant Genetic Resources. In this respect, a letter was sent by the Director-General to Governments and selected institutions to ascertain the readiness to bring their base collections to this network. More than 20 Governments and institutions provided positive replies. Fifteen more Governments expressed further their wish to join the network during the third session of the Commission. A further four Governments have offered space in their gene banks to store international collections. FAO is negotiating with the government of Norway for the establishment and operation of a permafrost international gene bank in Spitsbergen.

Many of the documents for the sessions of the Commission on Plant Genetic Resources and its Working Group included legal considerations on the protection of genetic resources, biodiversity and biotechnology.

### IV. LEGISLATIVE MATTERS

#### A. *Activities connected with international meetings*

FAO participated in and provided contributions to the following international meetings:

- Meeting of the GFCM, Technical Consultation on Red Coral of the Mediterranean, Torre del Greco, Italy, 27-30 September 1988;
- Meeting of the Sub-regional Commission on Fisheries — North-West Africa, Bissau, 12-14 December 1988;
- United National Interregional Meeting on River and Lake Basin Development, with emphasis on the Africa region, Addis Ababa, Ethiopia, 10-15 October 1988;
- “The coastal countries of the Fishery Committee for the Eastern Central Atlantic (CECAF) and the New Law of the Sea”, Workshop organized by the CECAF Subcommittee on Management of Resources within the limits of National Jurisdiction, Tenerife, Spain, 12-14 September 1988;
- European Food Law Association, Brussels, November 1988;

— Implementation of the International Code of Conduct on the Distribution and Use of Pesticides in the South East Asia and the Pacific Region, Bangkok, 14-25 November 1988.

B. *Legislative assistance and advice in the field*

During 1988 legislative assistance and advice were given to various countries on the following topics:

(i) *Agrarian law*

Burkina Faso (legal aspects of Nouhao Valley Development Programme), Guinea (rural land law), Lesotho (food self-sufficiency), Rwanda (marshlands management), West Africa (Meat and Livestock Economic Community: legal aspects of the transhumance in the agro-pastoral zones).

(ii) *Water legislation*

Antigua and Barbuda, Dominica, Grenada, Indonesia, St. Vincent and the Grenadines.

(iii) *Animal legislation*

CEPGL (Convention zoosanitaire entre les Etats membres de la Communauté Economique des Pays des Grands Lacs), Laos.

(iv) *Plant protection legislation*

Argentina, Cameroon, CEPGL (Convention sur la protection des végétaux entre les Etats membres de la Communauté Economique des Pays des Grands Lacs).

(v) *Plant production and seed legislation*

Pakistan (Cotton Standard Institute).

(vi) *Food Legislation*

CEPGL.

(vii) *Fisheries legislation*

Belize, Gambia, Guinee-Bissau (investment in fisheries, chartering of fishing vessels), Indonesia, Mozambique, Rwanda, Tonga.

(viii) *Forestry and wildlife legislation*

Antigua and Barbuda, Dominica, Grenada, Guinea, Indonesia, Malaysia, Montserrat, St. Lucia, St. Vincent and the Grenadines, Togo.

(ix) *Environment legislation*

Gabon, Ghana.

### C. *Legal assistance and advice not involving field missions*

Advice or documentation was furnished to governments, agencies or education centres, at their request, on a range of topics including:

implementation of the international code on pesticides (Asia and the Pacific region); fisheries, forestry and water legislation.

### D. *Legislative Research*

Research was conducted, *inter alia*, on

- Pesticide labeling legislation;
- Coastal State Requirements for foreign fishing;
- National legislation on coral fishing.

### E. *Collection, Translation and Dissemination of Legislative Information*

In 1988 FAO published the annual *Food and Agricultural Legislation* (Recueil de législation: alimentation et agriculture; Colección Legislativa agricultura y alimentación). Annotated lists of relevant laws and regulations relating to food legislation were also published in the semi-annual *Food and Nutrition Review* (Revue alimentation et nutrition; Revista alimentación y nutrición).

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## 2. INTERNATIONAL ATOMIC ENERGY AGENCY

### *Amendment to article VI.A.1 of the IAEA Statute*

During 1988, 14 more Member States — Argentina, Burma, Cyprus, Ecuador, Islamic Republic of Iran, Malaysia, Mauritius, New Zealand, Senegal, Sierra Leone, Syrian Arab Republic, United States of America, Zambia and Zimbabwe — accepted the amendment, bringing the total number of acceptances to 68. The amendment will enter into force when it has been accepted by two thirds of all member States.

### *Convention on the Physical Protection of Nuclear Material*<sup>286</sup>

1. Three more States — Austria, Japan and Mexico — expressed consent to be bound by the Convention. By the end of 1988, 46 States and one regional organization — Euratom — had signed the Convention and 24 States were party to it.

*Convention on Early Notification of a Nuclear Accident*<sup>287</sup>

*Convention on Assistance in the Case of a Nuclear Accident or  
Radiological Emergency*<sup>288</sup>

1. Eleven more States — Austria, Bangladesh, Bulgaria, Egypt, Guatemala, India, Iraq, Mexico, Poland, Switzerland and United States of America — expressed consent to be bound by the Notification Convention. The same States, with the exception of Austria, also acceded to the Assistance Convention. One international organization — World Health Organization — acceded to both Conventions.

2. By the end of 1988, the status of the Conventions was as follows: 72 States had signed the Notification and 31 States and one international organization had become party to it; 70 States had signed the Assistance Convention and 27 States and one international organization had become parties.

*The Vienna Convention on Civil Liability for Nuclear Damage, 1963*<sup>289</sup>

1. The Convention was signed by one State — Chile. By the end of 1988, 10 States had signed the Convention and there were ten parties to it.

*The Joint Protocol Relating to the Application of the Vienna Convention and  
the Paris Convention*<sup>290</sup>

1. On 21 September 1988, an international conference jointly convened in Vienna by the International Atomic Energy Agency and the OECD Nuclear Energy Agency adopted the Joint Protocol Relating to the Application of the Vienna Convention and the Paris Convention. It establishes a link between the two Conventions by way of extending mutually the civil liability regime under each Convention and eliminating conflicts of law which might arise from their simultaneous application in the event of a nuclear accident involving parties to both Conventions.

2. On the date of adoption, the Joint Protocol was signed by the following 18 countries at the Conference: Argentina, Belgium, Chile, Denmark, Egypt, Finland, Germany (Federal Republic of), Greece, Italy, Morocco, Netherlands, Norway, Philippines, Portugal, Spain, Sweden, Switzerland, Turkey and United Kingdom of Great Britain and Northern Ireland. On 7 December 1988 it was signed by Cameroon. Pursuant to Article VII of the Joint Protocol, accession of at least five States parties to the Vienna Convention and five States parties to the Paris Convention is required for its entry into force.

*Examination of the question of liability for nuclear damage*

In 1988, IAEA continued consideration of the question of liability for nuclear damage, including State liability. On 23 September 1988, the thirty-second session of the IAEA General Conference adopted by consensus resolution GC(XXXII)/RES/491, in which it requested the Board of Governors, *inter alia*, to convene in 1989 an open-ended working group to study all aspects of liability for nuclear damage.



## Safeguards Agreements

1. During 1988, Safeguards Agreements were concluded between IAEA and four member States: Nigeria, Panama, India and China. The agreement with Nigeria was concluded pursuant to the Treaty on the Non-Proliferation of Nuclear Weapons;<sup>291</sup> the agreement with Panama was concluded on the basis of the Non-Proliferation Treaty, and the Treaty for the Prohibition of Nuclear Weapons in Latin America (Treaty of Tlatelolco).<sup>292</sup>

2. The agreements with Nigeria<sup>293</sup> and with India<sup>294</sup> entered into force, as well as the Safeguards Agreement concluded in 1986 with Albania.<sup>295</sup> One Safeguards Agreement with Spain ceased to be in force under the terms of the Agreement. By the end of 1988, the total number of non-nuclear-weapon States with agreements in force pursuant to the Non-Proliferation Treaty and/or the Treaty of Tlatelolco was 82, and the total number of all Safeguards Agreements in force with IAEA was 168.

3. The above-mentioned agreements with China and Panama were signed by the parties but had not yet entered into force.

### *Regional cooperation agreements*

By the end of 1988, one more State — Singapore — had accepted the agreement, bringing to 14 the number of States which had notified their acceptance of the 1987 Regional Cooperation Agreement for Research, Development and Training Related to Nuclear Science and Technology.

### *Advisory services in nuclear legislation*

As part of the IAEA Technical Cooperation Programme, further advice on nuclear legislation and regulatory activities was provided to China, Morocco and Tunisia to supplement advice previously provided to the competent authorities of those States.

### *Agreements relating to nuclear safety*

In 1988, IAEA continued to compile texts of bilateral, regional and multi-lateral agreements on cooperation in the field of nuclear safety to which its member States were party, with a view to publishing a compilation of the texts in its Legal Series.

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## 3. INTERNATIONAL CIVIL AVIATION ORGANIZATION

### 1. Legal Meetings

#### *International Conference on Air Law*

The International Conference on Air Law, convened by the decision of the Council of 3 June 1987, met at Montreal from 9 to 24 February; 81 States and 8 observer delegations were represented. The purpose of the Conference was to

consider, with a view to adopting, the draft articles prepared by the 26th Session of the Legal Committee for inclusion in a draft instrument for the suppression of unlawful acts of violence at airports serving international civil aviation. As a result of its deliberations, the Conference adopted by consensus and without vote the Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, Supplementary to the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, Done at Montreal on 23 September 1971.<sup>296</sup> The Protocol was opened for signature at Montreal on 24 February 1988 and on that day was signed by the delegations of 47 States. By the end of 1988, the Protocol had been signed by 61 States.

The basic features of the Protocol are: The Protocol supplements the Montreal Convention of 1971<sup>297</sup> and, as between the Parties to the Protocol, the Montreal Convention and the Protocol are to be read and interpreted together as one single instrument. The purpose of the Protocol is not to amend the basic principles of the Montreal Convention of 1971 but to add to its definition of “offence” unlawful and intentional acts of violence against persons at an airport serving international civil aviation which cause or are likely to cause serious injury or death; similarly, destruction or serious damage to the facilities of such an airport, to an aircraft not in service located thereon or disruption of the services of the airport will constitute offences punishable by severe penalties; the qualifying element of such offences is the fact that such an act endangers or is likely to endanger safety at that airport. Furthermore, under the Protocol Contracting States shall be obliged to establish jurisdiction over the offences defined in the Protocol not only in the case where the offence was committed in their territory but also in the case where the alleged offender is present in their territory and is not extradited to the State where the offence took place.

The Final Act of the Conference which was signed on behalf of 77 States includes the text of a Resolution which addresses the important aspect of preventive measures and urges all States to take all possible measures for the suppression of acts of violence at airports serving international civil aviation, including such preventive measures as are required or recommended under annex 17 to the Chicago Convention. The Resolution also urges the Council of ICAO to continue to attach top priority to the adoption of effective measures for the prevention of acts of unlawful interference and to keep up to date the provisions of annex 17 to the Chicago Convention<sup>298</sup> to this end. Finally, the Resolution urges the international community to consider increasing technical, financial and material assistance to States in need of such assistance to improve security at their airports through bilateral and multilateral effort, in particular, through the ICAO Technical Assistance mechanism.

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## 2. Legal aspects of aviation security

On 25 March 1988 the Council adopted a Resolution relating to the destruction by an act of sabotage of a Korean Air civil aircraft during a scheduled international flight. In this Resolution the Council reaffirmed its determination to continue to treat aviation security as a matter of top priority and instructed the Committee on Unlawful Interference to advise it what changes to the relevant ICAO

aviation security documents are required, in particular, in relation to the security control of transit passengers and the detection of explosive substances. The Council also urged all States to follow faithfully the principles and spirit of the Convention on International Civil Aviation and the relevant Assembly Resolutions so as to assure the safety and regularity of international civil aviation.

On 29 March 1988 the Council considered a progress report presented by the Secretary General on the action taken in the legal and related fields regarding the implementation of Assembly resolution A26-7: Consolidated statement of continuing ICAO policies related to the safeguarding of international civil aviation against acts of unlawful interference. The Council noted the increase of parties to the Tokyo,<sup>299</sup> the Hague<sup>300</sup> and the Montreal Conventions; these three aviation security conventions continue to rank among the most widely accepted multilateral international conventions.

The Council further noted the pertinent information on recent occurrences of unlawful interference received from States concerned pursuant to article 11 of The Hague Convention and article 13 of the Montreal Convention, as well as the information received on the domestic legislative implementation of those two conventions. Furthermore, the Council noted the information presented by Contracting States on cooperation with other States in the suppression of acts of unlawful interference with civil aviation in the different regions of the world, including information on practical instances and modalities of inserting into their bilateral air services agreements a clause on aviation security along the lines of the “model clause” recommended by the Council in its Resolution of 25 June 1986.

On 17 June 1988 the Council adopted a statement on the subject of detaining unlawfully seized aircraft on the ground and not allowing them to continue their hazardous journey. In this statement the Council urges each Contracting State to take measures, as it may find practicable, to ensure that an aircraft subjected to an act of unlawful seizure which has landed in its territory is detained on the ground unless its departure is necessitated by the overriding duty to protect human life.

During its 125th session in December 1988, the Council considered a model agreement for bilateral or regional cooperation in the field of aviation security, prepared by the Secretariat, and decided to send it to Contracting States for comments.

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#### 4. INTERNATIONAL LABOUR ORGANIZATION

##### Legal activities of the Organization<sup>301</sup>

1. The International Labour Conference (ILC), which held its 75th Session in Geneva in June 1988, adopted the following instruments: a Convention and a Recommendation concerning Safety and Health in Construction;<sup>302</sup> and a Convention and a Recommendation concerning Employment Promotion and Protection against Unemployment.<sup>303</sup>

2. The Committee of Experts on the Application of Conventions and Recommendations met at Geneva from 10 to 23 March 1988 and presented its report.<sup>304</sup>

3. The Governing Body Committee on Freedom of Association met at Geneva and adopted Reports Nos. 254<sup>305</sup> and 255<sup>305</sup> (239th Session of the Governing Body, February-March 1988); Report Nos. 256,<sup>306</sup> 257<sup>306</sup> and 258<sup>308</sup> (240th Session of the Governing Body, May-June 1988); and Reports Nos. 259,<sup>307</sup> 260,<sup>307</sup> and 261<sup>307</sup> (241st Session of the Governing Body, November 1988).

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## 5. INTERNATIONAL MONETARY FUND

### *Compensatory and Contingency Financing Facility*

The Executive Board established in August 1988 a Compensatory and Contingency Financing Facility (CCFF), adapting the existing compensatory and cereals facilities, and introducing an external contingency financing policy to help maintain the momentum of Fund-supported growth-oriented adjustment programs in the face of unexpected adverse external shocks. These enhancements of the Fund's financing facilities are designed to meet the needs of the membership in a changing economic environment, and to strengthen the institution's contribution to the international adjustment process.

The new facility replaces the Compensatory Financing Facility for Export Fluctuations (established in 1963), and the Facility for Compensatory Financing of Fluctuations in the Cost of Cereal Imports (established in 1981), which were designed to help members deal with balance of payments difficulties deemed to be of a temporary and reversible character and, therefore, requiring financing more than adjustment. The CCFF will provide financial assistance to member countries that encounter balance of payments difficulties that arise out of (i) temporary export shortfalls, (ii) adverse external contingencies, or (iii) excess costs of cereal imports. External contingency financing will be available to a member facing unanticipated changes in key external variables covering a substantial proportion of the exogenous components of the member's current account. Disbursements under the CCFF will be financed with the Fund's ordinary resources.

The amounts of financing available are 40 per cent of quota each on account of the export shortfall and the external contingency elements, and 17 per cent of quota for the cereal import costs element; in addition, there is an optional tranche of 25 per cent of quota available to supplement any one of these elements, at the choice of the member. In case a member has a satisfactory balance of payments position except for the effect of an export shortfall or an excess in cereal import costs, the limit of 83 per cent of quota under either element has been maintained. In addition, there is a combined limit of 105 per cent of quota on the use of any two of the three elements of the CCFF, and a combined limit of 122 per cent of quota on the use of all three elements.

External contingency financing will be provided in association with a stand-by or extended arrangement, or in association with a Structural Adjustment Facility (SAF) or an Enhanced Structural Adjustment Facility (ESAF) arrangement. External contingency financing will generally not exceed 70 per cent of the amount of the associated arrangement. The applicable contingencies would include unanticipated changes in the exogenous components of export earnings, import prices, and international benchmark interest rates. Other current account transactions (such as tourist receipts and migrant workers' remittances) could also be covered where they are of particular importance. Every effort will be made to obtain contingent financing from sources other than the Fund when the member requests contingency financing coverage from the Fund.

The contingency financing element envisages an appropriate blend of adjustment and financing, as well as symmetry in its application, and in the case of a favorable deviation from a baseline projection specified at the inception of a program, the member will be expected to set aside part of it, preferably by increasing international reserves, or alternatively by either foregoing purchases from the Fund under the associated arrangement, or by making early repurchases of previous contingency financing purchases. Purchases will be phased to coincide with drawings under the associated arrangement, and, for a purchase to take place, the member's performance under the associated arrangement from the Fund must be satisfactory and the member must be prepared to adapt its adjustment policies, if necessary, to ensure the viability of the program supported by the associated arrangement.

#### *Enhanced Structural Adjustment Facility*

The Fund, as Trustee under the Instrument to Establish the Enhanced Structural Adjustment Facility Trust (ESAF Trust), decided in April 1988 that the initial maximum limit on access of each eligible member to the resources of the Trust shall be set at 250 per cent of the member's quota in the Fund, minus any remaining access of the member to the resources of the Structural Adjustment Facility, and minus resources committed to the member for loans in association with Trust loans.

The Fund also decided, as Trustee under the Instrument, that the interest rate on loans from the Trust shall be set at 0.5 per cent effective April 20, 1988.

Pursuant to section III, paragraph 2, of the Instrument mentioned above, the Fund, in its capacity as Trustee of that Trust, approved a number of agreements with governments, central banks and other financial institutions for the financing of the ESAF Trust and with respect to associated lending.

#### *Extended Fund Facility*

In June 1988, the Fund amended its decision on the Extended Fund Facility with respect to the period of arrangements. Under the amended decision, the period of an extended arrangement will normally be three years, but, where appropriate, and at the request of the member, the period of the existing extended arrangement may be lengthened up to four years.

### *Policy on Enlarged Access*

The Fund also amended its decision on Enlarged Access Policy in June 1988 with respect to the use of ordinary and borrowed resources. Under the amended decision, purchases will be made, in case of a stand-by arrangement, with ordinary and borrowed resources in the ratio of 2 to 1 in the first credit tranche, and 1 to 2 in the next three credit tranches. Thereafter, purchases will be made with borrowed resources only. In case of an extended arrangement, purchases by a member will be made with ordinary resources until the outstanding use of ordinary resources in the upper credit tranches and under the extended Fund facility equals 140 per cent of the member's quota. Thereafter, purchases will be made with borrowed resources.

### *General Arrangements to Borrow (GAB)*

Pursuant to article VII, section 1, of the Articles of Agreement of the Fund, the Managing Director was authorized in June 1988 to propose a renewal of the 1983 borrowing agreement with Saudi Arabia in association with the General Arrangements to Borrow (GAB) for a period of five years from 26 December 1988.

The reply was received from Saudi Arabia accepting the proposed renewal and thus the agreement on the renewal entered into force on December 26, 1988.

### *SDRs*

The Fund decided in July 1988 that a participant or prescribed holder, by agreement with a prescribed holder and at the instruction of the Fund, may transfer SDRs to that prescribed holder in effecting a payment due to or from the Fund in connection with financial operations under the ESAF Trust or under an administered account established for the benefit of the ESAF Trust.

### *Structural Adjustment Facility*

The Fund decided in July 1988 that the potential access of each eligible member to the resources of the Structural Adjustment Facility as of 29 July 1988 shall be 63.5 per cent of quota; no more than 20 per cent of quota shall be disbursed under the first annual arrangement, no more than 30 per cent of quota shall be disbursed under the second annual arrangement, and no more than 13.5 per cent of quota shall be disbursed under the third annual arrangement.

### *Burden Sharing and Adjustment in the Rate of Charge and Rate of Remuneration*

The Fund adopted a decision in April 1988 on the principles of "burden sharing," rate of charge, amount for the Special Contingent Account and the net income target, and implementation of burden sharing for fiscal year 1989.

The Fund reviewed the operation of this decision in July 1988, and decided that the adjustment in the rate of charge for the quarter ended 31 July 1988 shall be limited so as to generate an amount equal to the amount generated through the reduction in remuneration for that quarter; the resulting shortfall shall be deemed deferred income in the quarter ending 31 October 1988, and shall be financed through an adjustment of the rate of charge and the rate of remuneration for that quarter.

### *Supplementary Financing Facility Subsidy Account*

In August 1988 the Fund amended section 10 of the Instrument establishing the Supplementary Financing Facility Subsidy Account so that for the purpose of the calculation of charges under (a) and (b) of the provision, any adjustment in the rate of charge referred to in rule I-6(4) that may be made to cover deferred income and placements to the Special Contingent Account should not be taken into consideration.

The Fund also decided that additional subsidy payments should be made with respect to charges paid on holdings of currency referred to in section 7 of the Instrument for the period 17 May 1987 through 30 June 1988.

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## 6. UNITED NATIONS EDUCATIONAL, SCIENTIFIC AND CULTURAL ORGANIZATION

### International Regulations

#### *Entry into force of instruments previously adopted*

Within the period covered by this review, no multilateral conventions or agreements adopted under the auspices of UNESCO entered into force.

#### *Copyright and neighbouring rights*

1. The Subcommittee set up at the second extraordinary session of the Intergovernmental Copyright Committee (1983) met at its third session in Paris, on 21 April 1988, to study prospective amendments to the Committee Rules of Procedure with a view to creating a system of distribution of seats which takes into account the interests set forth in article II of the Universal Copyright Convention.<sup>308</sup>

2. *Photographic Works*: Convened jointly by UNESCO and WIPO, a Committee of Governmental Experts on Photographic Works met at UNESCO Headquarters from 18 to 22 April 1988. The Committee discussed a number of "principles" submitted by the Secretariats which, together with comments, could offer guidance to Governments when they had to deal with those issues.

The results of the Committee were reported to the Executive Committee of the Berne Union and the Intergovernmental Committee of the Universal Copyright Convention in 1989.<sup>309</sup>

3. Convened jointly by UNESCO and WIPO, the Committee of Governmental Experts on the evaluation and synthesis of Principles on various categories of Works met at Geneva from 27 June to 1 July 1988. The principles drawn up for nine categories of works (Audiovisual Works and Phonograms; Works of Architecture; Works of Visual Arts; Dramatic, Choreographic and Musical Works; Works of Applied Art; the Printed Word [photographic works]) were considered by this Committee on the basis of the memorandum on the evaluation and syn-

thesis of principles on the protection of copyright and neighbouring rights in respect of various categories of works prepared by the Secretariats.

It was stressed that the “principles” have no binding force and their purpose was merely to indicate directions that seemed reasonable in the search for solutions which, by safeguarding the rights of authors and other owners of rights, gave them fair treatment and promoted creative activity.

The results of the Committee were reported by the Executive Committee of the Berne Union and the Intergovernmental Committee of the Universal Copyright Convention in 1989.<sup>310</sup>

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## 7. UNITED NATIONS INDUSTRIAL DEVELOPMENT ORGANIZATION

In addition to providing legal advice and assistance to the principal organs of UNIDO, the Director-General and various departments in the organization, the Legal Service of UNIDO continued to deal with subjects related to the completion of the conversion of UNIDO into a specialized agency. These activities can be summed up as follows:

### (a) Constitutional matters

In 1988, 2 States (Albania and the Maldives) became members of UNIDO by acceding to the Constitution,<sup>311</sup> bringing the membership in UNIDO to 152 at the end of 1988.<sup>312</sup> However, in accordance with article 6 of the Constitution, Australia withdrew its membership with effect from the end of 31 December 1988.<sup>313</sup>

### (b) Agreements with inter-governmental, non-governmental, governmental and other organizations

Based on the Guidelines regarding Relationship Agreements with Organizations of the United Nations System other than the United Nations, and with other Intergovernmental and Governmental Organizations, and regarding Appropriate Relations with Non-governmental and other Organizations, adopted by the General Conference,<sup>314</sup> UNIDO concluded the following agreements:

(i) As approved by the Industrial Development Board at its second session,<sup>315</sup> UNIDO concluded relationship agreements with the following intergovernmental organizations not in the United Nations system:<sup>316</sup>

- Cooperation agreement with the African Development Bank (AfDB), signed on 6 February 1988;
- Relationship agreement with the African Regional Centre for Technology (ARCT), signed on 13 August 1988;
- Relationship agreement with the Arab Organization for Mineral Resources (AOMR), signed on behalf of UNIDO on 22 August 1988;



- Relationship agreement with the Arab Organization for Standardization and Metrology (ASMO), signed on 31 May and 15 June 1988;
- Relationship agreement with the Asian and Pacific Coconut Community (APCC), signed on 25 March 1988;
- Relationship agreement with the Central African Customs and Economic Union (CACEU), signed on 23 September 1988;
- Relationship agreement with the Intergovernmental Committee for Migration (ICM), signed on 22 April 1988;
- Relationship agreement with the International Center for Public Enterprises in Developing Countries (ICPE), signed on 12 May 1988;
- Relationship Agreement with the Organization for the Development of the Senegal River (OMVS), signed on 12 August 1988.

(ii) UNIDO also concluded an agreement with the Centre for Development of Industry, Brussels (Belgium), a Memorandum of Understanding with the European Group for Development of Enterprises through International Cooperation, Bischheim (France), and a Cooperation Agreement with the University of Paris I Panthéon-Sorbonne.<sup>316</sup>

(iii) UNIDO concluded agreements or working arrangements with the following Governments or governmental organizations:<sup>316</sup>

- Agreement with India on basic terms and conditions governing UNIDO projects envisaged by the interim programme for the International Centre for Genetic Engineering and Biotechnology, together with a Trust fund agreement and an Exchange of Letters on basic terms and conditions in connection with the above agreement. Agreement with Italy on basic terms and conditions governing the UNIDO project concerning the preparatory phase for the establishment of an International Centre for Science and High Technology;
- Memorandum of Understanding with the Philippines on cooperation in the field of low-cost building materials technologies and construction systems. Memorandum of Understanding with Portugal to cooperate in carrying out industrial development programmes for the benefit of developing countries, with special emphasis on those having Portuguese as their official language; at the same time the parties signed a Note of Understanding on their cooperation for the establishment of the Centre for Pharmaceutical Technology Information Training and Development (ITPT) and a Note of Understanding on training;
- Protocol regarding procurement by UNIDO of equipment, supplies and other property pursuant to the agreement for technical services on training under the Sudan sugar rehabilitation project (signed on 14 June and 14 September 1987);
- “Communiqué final” on the Director-General’s visit to Cameroon from 17 to 21 July 1988 to discuss cooperation between Cameroon and UNIDO in the field of industrial development; joint communiqué on the official visit of the Minister of Industry of the Sudan to UNIDO headquarters, 30 November-2 December 1988.

(c) Agreements with the United Nations or its organs

(i) on 11 March 1988 the Agreement on the Transfer of Assets between the United Nations and UNIDO was signed.<sup>317 318</sup>

(ii) As in 1986 and 1987, UNIDO concluded an agreement with the United Nations on Arrangements for the Sale of UNIDO Publications.

(iii) On 28 May 1988 UNIDO and ECA signed a Working Arrangement on cooperation and consultation within the overall framework set forth by the Relationship Agreement between the United Nations and UNIDO of 18 December 1985. In October 1984, UNIDO signed a Letter of Agreement with the United Nations Fund for Drug Abuse Control (UNFDAC) concerning the continued participation of UNIDO in the implementation of UNFDAC-funded law enforcement and other drug control projects in 1989.

(d) Trust Fund Agreements with Governments on Associate Experts

In 1988 such an Agreement was concluded with the Government of Japan in the form of an Exchange of Letters.

(e) Standard Basic Cooperation Agreement

Such Agreements were concluded with Bolivia, Chile, Morocco, the Niger, the Sudan, and the United Arab Emirates.

(f) Regulations and Rules

(i) *Financial Rules*: Based on the UNIDO Financial Regulations, which were approved by the General Conference at its second session in 1987 and came into force on 1 January 1988,<sup>319</sup> the Director-General issued the Financial Rules of UNIDO,<sup>320</sup> which also became effective on 1 January 1988.

(ii) *Staff Rules*

In accordance with staff regulation 13.49,<sup>319</sup> the Director-General elaborated the Staff Rules of UNIDO, which entered into effect on 1 July 1988.<sup>321 322</sup>

(g) Secretariat procedures with regard to international treaties and agreements

In July 1988, UNIDO issued instructions<sup>323</sup> on the Procedures of the Secretariat concerning the registration, filing and recording, and publication of treaties and international agreements to which the United Nations Industrial Development Organization is a party, pursuant to Article 102 of the Charter of the United Nations and the Regulations adopted by the General Assembly to give effect to Article 102.

(h) UNIDO emblem

At its 4th session, the Industrial Development Board decided to select the emblem and seal used provisionally since January 1986 as the official emblem and seal of UNIDO.<sup>318 324</sup>

(i) Agreements with publishing houses regarding UNIDO publications

The Legal Service has elaborated — together with the UNIDO Publications Board — a model agreement to be used in negotiations with outside publishers for the editing, printing and publication of books, industrial review series or other publications prepared by UNIDO's officials or consultants. On the basis of this model, UNIDO concluded an agreement in 1988 with Cassell Tycooly, London.

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## 8. UNIVERSAL POSTAL UNION

The Universal Postal Union has continued to study the legal and administrative problems which the 1984 Hamburg Congress assigned to the Executive Council. The following are among the most important problems which would be of interest to other organizations.

(a) International postal regulations

The Executive Council decided to submit to the Washington Congress of 1989:

- A proposal aimed at relaxing the procedure provided for in article 102, paragraph 6(r), of the General Regulations, for the introduction of new services or practices;
- Proposals intended to introduce into rule 15 of the Rules of Procedure for Congresses two procedures concerning referral to the Executive Council of proposals to amend the Detailed Regulations;
- Proposals resulting from the decisions taken in 1986 and 1987 on the problem of the legislative competence of the Executive Council.

It also requested the International Bureau to carry out the following studies in 1989:

- To pursue the question of the authentication of the Detailed Regulations based on the practice of other United Nations bodies;
- To analyse whether it was appropriate to state reservations before or after authentication of the aforementioned Detailed Regulations;
- To study the possibility of replacing the terms “delegate” and “plenipotentiary” by the term “representative” in the Acts of the UPU;
- To analyse whether or not it was appropriate to put into force immediately the new mechanism for the revision of the Acts of the UPU, in particular, the legislative competence of the Executive Council in that regard.

(b) Amendment of article 6 of the Universal Postal Union Convention

Since the Executive Council believes that this article concerns only the establishment of new services, it has not subscribed to the idea of including in it provisions expressly confirming the maintenance, between Administrations which so desire, of Agreements or parts thereof that have been terminated by UPU. On the other hand, it will submit to the 1989 Washington Congress a draft resolution which will afford the Administrations concerned the possibility of maintaining or reintroducing between themselves at a later date all or part of the Agreements terminated by UPU.

(c) Credentials of delegates

Two solutions reflecting the two trends which were evident at the 1986 and 1987 sessions were discussed by the Executive Council. The first recommended a certain degree of flexibility concerning irregular or missing credentials, while the second proposed that delegates whose credentials were not in order should forfeit the right to vote.

In the end, it opted for the first solution, supplemented by measures it had already taken in 1987 (decision CE 10/1987), which were aimed at facilitating the deposit of credentials and speeding up the procedure for their approval. This decision requested the International Bureau in particular:

- To prepare model credentials which would be annexed to the invitation to the Congress;
- To approach the Ministries of Foreign Affairs of member countries calling their attention to the special requirements of the UPU with regard to credentials (especially the power of signature);
- To take measures to expedite and accelerate the deposit of credentials so that the Secretariat may have adequate time in which to prepare the documents for the Credentials Committee;
- To provide for the Credentials Committee to meet immediately after the beginning of Congress and to submit its initial report during the first week of Congress.

(d) Function of the depositary of the Acts of the Union and participation of the Swiss Government in the case of accession and admission to and withdrawal from the Union

Pursuant to the request by the Swiss Government, the Executive Council will submit to the 1989 Washington Congress the proposed amendments to the Acts, whereby those residual functions exercised thus far by Switzerland would be transferred to the International Bureau.

The Council has also instructed the International Bureau to review the provisions of article 21, paragraph 4, of the Constitution<sup>325</sup> on the determination of the contribution class of new countries acceding to the Union, provisions which no longer correspond to current practice.

- (e) Transfer to the International Bureau of the power to invite applications for the posts of Director-General and Deputy Director-General of the International Bureau

Having considered the practice of other specialized agencies of the United Nations, the Executive Council has decided to transfer to the International Bureau the power to invite applications for the posts of Director-General and Deputy Director-General of the International Bureau. Accordingly, it will submit to the 1989 Washington Congress a proposal to amend article 108, paragraph 2, of the General Regulations.

- (f) Possible accession of UPU to the 1986 Vienna Convention on the Law of Treaties between States and International Bureau Organizations or between International Organizations<sup>326</sup>

The Executive Council has decided to request the International Bureau to prepare a supplementary report in 1989 on the advisability of acceding to the 1986 Vienna Convention.

- (g) Suggestions regarding the functioning of the Union

In view of the important suggestions made by the International Bureau with regard to adapting the operation of the UPU to the present commercial and technical demands, the Executive Council established a Working Party to consider the matter with a view to preparing proposals for submission to the Congress, or, if possible, proposals applicable before Congress (decision CE 8/1988).

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## 9. WORLD BANK<sup>327</sup>

- (a) International Bank for Reconstruction and Development

### *Amendment of the Articles of Agreement*

On 30 June 1987 the Board of Governors of the Bank adopted a resolution amending article VIII(a) of the Bank's Articles of Agreement, increasing the majority of the total voting power of members required to accept further amendments of the Articles of Agreement from 80 to 85 per cent.<sup>328</sup>

Article VIII of the Bank's Articles of Agreement establishes a two-stage procedure for amending the Articles. A proposed amendment must first be approved by the Board of Governors (by a majority of the votes cast) and thereafter must be accepted by the members. With the exception of amendments of a few provisions of the Articles which must be accepted by all members, amendments must be accepted by three fifths of the members having four fifths (i.e., 80 per cent) of the total voting power.

On 15 November 1988, the Bank formally certified to the members that the required acceptances had been received and that, pursuant to the Articles of Agreement and the resolution, the amendment would come into force for all members on 16 February 1989, three months after the Bank's formal communication.

#### *1988 General capital increase*

On 27 April 1988, the Board of Governors of the Bank adopted two resolutions increasing the authorized capital of the Bank. The first resolution (No. 425) increased the authorized capital by 620,000 shares having a par value of \$100,000 in terms of 1944 gold dollars.

Pursuant to the interpretation of article II, section 2(a), of the Articles of Agreement made by the Executive Directors on 14 October 1986, pursuant to article IX of the Articles, the shares are valued on the basis of the Special Drawing Right (SDR) introduced by the International Monetary Fund, as the SDR was valued in terms of United States dollars immediately before the introduction of the basket method of valuing the SDR on 1 July 1974, such value being equal to \$1.20635 for one SDR.<sup>329</sup>

Members of the Bank are authorized to subscribe their proportionate share of the increase within a period extending to 30 September 1993. Subscribing members will pay 0.3 per cent of the price of shares in United States dollars and 2.7 per cent in their currency. The balance of the price of shares will be part of the Bank's callable capital, which may be called only to meet the Bank's obligations on its borrowings and its guarantees. The increase in capital will support an increase in the Bank's lending operations.

The second resolution (No. 426) increased the authorized capital by an additional 14,000 shares, to accommodate new members. Shares authorized under resolution No. 426 have the same par value as shares authorized under resolution No. 425. The terms and conditions of payment will be specified at the time of subscription by new members.

#### (b) International Development Association

##### *Eighth Replenishment*

On 4 March 1988, the Eighth Replenishment of the Association's resources became effective, the Association having received notification of participation from donors whose aggregate contributions amounted to 80% of the replenishment. The amount of the replenishment is \$11.5 billion, which, together with supplementary contributions of certain donors, brings the total amount of resources available to IDA for lending through June 1990 to over \$12 billion.

#### (c) Multilateral Investment Guarantee Agency

On 12 April 1988, the Convention Establishing the Multilateral Investment Guarantee Agency (MIGA)<sup>330</sup> came into force, creating MIGA as the newest affiliate of the World Bank. MIGA seeks to encourage the flow of investment among its member countries, and in particular to its developing member countries, by issuing guarantees against non-commercial risks and carrying out a wide range of consultative and advisory activities.

The Council of Governors of MIGA held its inaugural meeting on 8 June 1988, during which it adopted the By-Laws of the Agency<sup>331</sup> and elected MIGA's Directors.

The Board of Directors held its first meeting on 22 June 1988 and adopted three further sets of regulations and rules. These are the Financial Regulations, the Rules of Procedure for Meetings of the Board of Directors and MIGA's Operational Regulations.<sup>332</sup>

At its initial meeting, the Board of Directors also designated the President of the World Bank, who under the MIGA Convention is ex officio the Chairman of MIGA's Board, to serve as President of MIGA as well.

As of 31 December 1988, the MIGA Convention had been signed by 72 countries. Forty-eight of these had also ratified the Convention and were members of MIGA.

The texts of MIGA's By-Laws, Financial Regulations, Rules of Procedure and Operational Regulations approved by the Council and Board at their respective initial meetings are identical in most respects to those adopted in September 8 1986 by a Preparatory Committee of signatory States of the Convention. For further details on the work of this committee, see *Juridical Yearbook, 1986*, pp. 168-169.

Also by the end of 1988, MIGA had registered 21 guarantee applications submitted by investors from 6 countries for projects in 11 other countries.

(d) International Centre for Settlement of Investment Disputes

(i) *Signatory States and Contracting States*

As of 31 December 1988, 92 States had signed the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (the ICSID Convention).<sup>333</sup> Of the signatory States, 89 had also ratified the ICSID Convention.

(ii) *Disputes before the Centre*

In *Klöckner/Cameroon* (case ARB/81/2), the dispute had been submitted to a new ICSID tribunal in 1986 following the annulment of the award previously rendered in that case. During 1988, the new tribunal rendered its award. Awards were also issued in 1988 in *Maritime International Nominees Establishment (MINE) v. Republic of Guinea* (case ARB/84/4) and in *Société Ouest Africaine des Bétons Industriels v. State of Senegal* (case ARB/82/1).

Annulment proceedings were subsequently instituted in respect of the award in the *MINE* case and in respect of the second award in the *Klöckner* case.

Also during 1988, the arbitration in *Dr. Gaïth R. Pharaon v. Republic of Tunisia* (case ARB/86/1) was discontinued following an amicable settlement by the parties of their dispute.

As of 31 December 1988, there were nine cases pending before the Centre. These included the two annulment proceedings mentioned above and the following seven further arbitrations:

- *Amco/Indonesia* (case ARB/81/1);
- *Colt Industries Operating Corp., Firearms Division v. Government of the Republic of Korea* (case ARB/84/2);
- *SPP (Middle East) v. Arab Republic of Egypt* (case ARB/84/3);
- *Société d'Etudes de Travaux et de Gestion (SETIMEG) S.A. v. Republic of Gabon* (case ARB/87/1);
- *Mobil Oil Corp., Mobil Petroleum Co., Inc. and Mobil Oil New Zealand Ltd. v. New Zealand Government* (case ARB/87/2);
- *Asian Agricultural Products Ltd. v. Democratic Socialist Republic of Sri Lanka* (case ARB/87/3); and
- *Occidental of Pakistan Inc. v. Islamic Republic of Pakistan* (case ARB/87/4).<sup>334</sup>

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## 10. WORLD HEALTH ORGANIZATION

### (a) Constitutional and legal developments

The amendments to articles 24 and 25 of the Constitution, adopted in 1986 by the Thirty-ninth World Health Assembly to increase the membership of the Executive Board from 31 to 32, now total 39 acceptances by member States.

During the year 1988, two member States (Antigua and Barbuda, and Dominica) acceded to the Convention on the Privileges and Immunities of the Specialized Agencies. By the end of the year, the total number of member States that had acceded to the Convention with respect to WHO was 93.

The Forty-first World Health Assembly requested the Director-General to make arrangements for the Organization's accession to the Convention on Early Notification of a Nuclear Accident<sup>335</sup> and the Convention on Assistance in the Case of a Nuclear Accident or Radiological Emergency,<sup>336</sup> adopted in Vienna on 26 September 1986. To fulfil one of the conditions laid down by the Conventions and in accordance with the Assembly's decision, the instruments of accession, deposited on 28 July 1988, stated that the World Health Organization was competent to act as the directing and coordinating authority in international health work in matters covered by the Conventions, and to provide related assistance upon the request or acceptance of governments, without prejudice to the national competence of each of its member States.



(b) Health legislation

The publication of the quarterly *International Digest of Health Legislation* (and its French-language counterpart, the *Recueil international de législation sanitaire*) has continued. Each volume contains legislation on all aspects of health (including the human environment, bioethics, pharmaceuticals, etc.) from 80 or so jurisdictions (including international organizations), as well as reviews of or notices on new books and other publications on health law and allied topics, reports on conferences, etc. The transmission of information on legislative matters to WHO's member States is another routine yet vital activity that was continued during 1988.

Legislative developments in the field of AIDS and HIV infection continued to receive high priority. There is no precedent for the unabated flow of new laws, regulations, and other legal instruments dealing with many aspects of what has now been recognized as a pandemic. WHO's Health Legislation Unit plays a supportive role to the Global Programme on AIDS, and helps to disseminate information on those products of the Global Programme that have legal or legislative implications. A product that has been widely welcomed is the annotated listing of HIV/AIDS legislation, which is now being updated at least twice a year.<sup>37</sup> WHO continued to monitor HIV- and AIDS-related restrictions on international travel. WHO's Regional Office for Europe will convene an International Consultation on Health Legislation and Ethics in the Field of AIDS and HIV Infection (Oslo, 26-29 April 1989).

WHO continued to provide support to developing countries, at their request, in the review and revision of health legislation. Consultant missions were conducted to a number of countries. WHO staff members played an active role in the Second National Workshop on Health Legislation, held in Shanghai in April 1988; a group of Chinese experts undertook a Study Tour on Health Legislation to four European countries (August-September 1988). The Organization was represented at a number of major international meetings, including the VIIIth World Congress on Medical Law, held at Prague from 21 to 25 August 1988.

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NOTES

<sup>1</sup>Adopted without a vote.

<sup>2</sup>Adopted without a vote.

<sup>3</sup>Adopted by a vote of 136 to 3, with 14 abstentions.

<sup>4</sup>Adopted by a vote of 9 to none, with 53 abstentions.

<sup>5</sup>Adopted by a vote of 131 to 2, with 20 abstentions.

<sup>6</sup>Adopted without a vote.

<sup>7</sup>Adopted without a vote.

<sup>8</sup>Adopted by a vote of 130 to none, with 10 abstentions.

<sup>9</sup>Adopted by a vote of 152 to 1, with 1 abstention.

<sup>10</sup>Adopted without a vote.

<sup>11</sup>Adopted without a vote.

<sup>12</sup>*International Legal Materials*, vol. XXVII, No. 1 (January 1988), p. 84.

<sup>13</sup>Adopted by a vote of 141 to none, with 12 abstentions.

- <sup>14</sup>Adopted without a vote.
- <sup>15</sup>Adopted by a vote of 135 to 12, with 3 abstentions.
- <sup>16</sup>Adopted by a vote of 135 to 13, with 5 abstentions.
- <sup>17</sup>General Assembly resolution S-10/2.
- <sup>18</sup>Adopted by a vote of 137 to none, with 11 abstentions.
- <sup>19</sup>Adopted by a vote of 127 to 17, with 6 abstentions.
- <sup>20</sup>Adopted by a vote of 136 to 3, with 14 abstentions.
- <sup>21</sup>Adopted by a vote of 133 to 17, with 4 abstentions.
- <sup>22</sup>Adopted by a vote of 136 to 4, with 13 abstentions.
- <sup>23</sup>United Nations, *Treaty Series*, vol. 480, p. 43.
- <sup>24</sup>*Ibid.*, vol. 729, p. 161.
- <sup>25</sup>Adopted by a vote of 127 to 3, with 21 abstentions.
- <sup>26</sup>Adopted by a vote of 146 to 2, with 6 abstentions.
- <sup>27</sup>Adopted by a vote of 117 to 17, with 16 abstentions.
- <sup>28</sup>Adopted by a vote of 149 to none, with 5 abstentions.
- <sup>29</sup>*Arms Control and Disarmament Agreements* (United States Arms Control and Disarmament Agency), 1996 edition, p. 59.
- <sup>30</sup>Adopted by a vote of 116 to 3, with 34 abstentions.
- <sup>31</sup>Adopted by a vote of 151 to none, with 4 abstentions.
- <sup>32</sup>Adopted by a vote of 138 to 4, with 12 abstentions.
- <sup>33</sup>Adopted by a vote of 99 to 2, with 51 abstentions.
- <sup>34</sup>Adopted without a vote.
- <sup>35</sup>League of Nations, *Treaty Series*, vol. XCIV, p. 65.
- <sup>36</sup>Adopted without a vote.
- <sup>37</sup>Adopted by a vote of 154 to 1, with no abstentions.
- <sup>38</sup>Adopted by a vote of 152 to none, with 2 abstentions.
- <sup>39</sup>Adopted by a vote of 116 to 2, with 29 abstentions.
- <sup>40</sup>Adopted by a vote of 129 to 1, with 10 abstentions.
- <sup>41</sup>Adopted by a vote of 141 to none, with 13 abstentions.
- <sup>42</sup>Adopted without a vote.
- <sup>43</sup>United Nations, *Treaty Series*, vol. 1342, p. 137.
- <sup>44</sup>Adopted without a vote.
- <sup>45</sup>Adopted by a vote of 125 to none, with 23 abstentions.
- <sup>46</sup>Adopted by a vote of 128 to one, with 22 abstentions.
- <sup>47</sup>See A/43/913.
- <sup>48</sup>General Assembly resolution 2734 (XXV); reproduced in *Juridical Yearbook, 1970*, p. 62.
- <sup>49</sup>Adopted without a vote.
- <sup>50</sup>See A/43/795.
- <sup>51</sup>See A/43/566.
- <sup>52</sup>Adopted without a vote.
- <sup>53</sup>See A/43/795.
- <sup>54</sup>Adopted by a vote of 100 to none, with 6 abstentions.
- <sup>55</sup>See A/43/911.
- <sup>56</sup>Adopted by a vote of 111 to none, with 10 abstentions.
- <sup>57</sup>See A/43/911.
- <sup>58</sup>For the report of the Subcommittee, see A/AC.105/411.
- <sup>59</sup>For the report of the Committee, see *Official Records of the General Assembly, Forty-third Session, Supplement No. 20 (A/43/20)*.
- <sup>60</sup>Adopted without a vote.

<sup>61</sup>See A/43/767.

<sup>62</sup>For detailed information, see *Official Records of the General Assembly, Forty-third Session, Supplement No. 25* (A/43/25).

<sup>63</sup>All decisions of the Governing Council referred to in this section were adopted by consensus.

<sup>64</sup>General Assembly resolution 42/186, annex.

<sup>65</sup>A/42/427, annex.

<sup>66</sup>Adopted without a vote.

<sup>67</sup>See A/43/915/Add.7.

<sup>68</sup>Adopted without a vote.

<sup>69</sup>See A/43/905.

<sup>70</sup>Adopted without a vote.

<sup>71</sup>See A/43/919.

<sup>72</sup>Adopted without a vote.

<sup>73</sup>See A/43/915/Add.2.

<sup>74</sup>*Official Records of the General Assembly, Forty-third Session, Supplement No. 15* (A/43/15), vol. I, annex III.

<sup>75</sup>Adopted without a vote.

<sup>76</sup>See A/43/915/Add.4.

<sup>77</sup>*Official Records of the General Assembly, Forty-third Session, Supplement No. 36* (A/43/36).

<sup>78</sup>*Report of the United Nations Conference on New and Renewable Sources of Energy, Nairobi, 10-21 August 1981* (United Nations publication, Sales No. E.81.1.24), chap. I, sect. A.

<sup>79</sup>Adopted without a vote.

<sup>80</sup>See A/43/915/Add.2.

<sup>81</sup>United Nations publication, Sales No. E.88.II.D.8 and corrigendum.

<sup>82</sup>*Official Records of the General Assembly, Forty-third Session, Supplement No. 15* (A/43/15), vol. I.

<sup>83</sup>*Ibid.*, vol. II.

<sup>84</sup>*Ibid.*, *Thirty-fifth Session, Supplement No. 15* (A/35/15), vol. II, annex I.

<sup>85</sup>*Ibid.*, *Forty-third Session, Supplement No. 15* (A/43/15), vol. II, sect. II.A.

<sup>86</sup>See TD/350.

<sup>87</sup>Adopted by a vote of 150 to 1, with 1 abstention.

<sup>88</sup>See A/43/916.

<sup>89</sup>A/43/647.

<sup>90</sup>Adopted without a vote.

<sup>91</sup>See A/43/915/Add.6.

<sup>92</sup>A/43/554.

<sup>93</sup>United Nations, *Treaty Series*, vol. 520, p. 151.

<sup>94</sup>*Ibid.*, vol. 1019, p. 175.

<sup>95</sup>*Ibid.*, vol. 976, p. 3.

<sup>96</sup>*Ibid.*, p. 105.

<sup>97</sup>E/CONF.82/215, Corr. 1 and 2; issued also as a United Nations publication (Sales No. E.91.XI.6); see also text of the Convention in chap. IV.A of this *Yearbook*.

<sup>98</sup>Adopted without a vote.

<sup>99</sup>See A/43/875.

<sup>100</sup>Adopted without a vote.

<sup>101</sup>See A/43/875.

<sup>102</sup>A/43/684.

<sup>103</sup>A/43/679.

<sup>104</sup>*Report of the International Conference on Drug Abuse and Illicit Trafficking, Vienna, 17-26 June 1987* (United Nations publication, Sales No. E.87.I.18), chap. I, sect. B.

<sup>105</sup>*Ibid.*, sect. A.

<sup>106</sup>Adopted without a vote.

<sup>107</sup>See A/43/811.

<sup>108</sup>A/43/572.

<sup>109</sup>For detailed information, see *Official Records of the General Assembly, Forty-third Session, Supplement No. 12* (A/43/12).

<sup>110</sup>United Nations, *Treaty Series*, vol. 189, p. 137.

<sup>111</sup>A/42/521-5-S/19085, annex, sect. 8.

<sup>112</sup>A/42/949.

<sup>113</sup>Adopted without a vote.

<sup>114</sup>See A/43/874.

<sup>115</sup>A/41/324, annex.

<sup>116</sup>See A/41/572, annex.

<sup>117</sup>See A/43/717 and Corr. 1, annex.

<sup>118</sup>United Nations, *Treaty Series*, vol. 993, p. 3.

<sup>119</sup>*Ibid.*, vol. 999, p. 171.

<sup>120</sup>*Ibid.*

<sup>121</sup>Adopted without a vote.

<sup>122</sup>See A/43/872.

<sup>123</sup>*Official Records of the General Assembly, Forty-third Session, Supplement No. 40* (A/43/40).

<sup>124</sup>United Nations, *Treaty Series*, vol. 1249, p. 13.

<sup>125</sup>Adopted without a vote.

<sup>126</sup>See A/43/812.

<sup>127</sup>A/43/605.

<sup>128</sup>United Nations, *Treaty Series*, vol. 660, p. 195.

<sup>129</sup>Adopted without a vote.

<sup>130</sup>See A/43/777.

<sup>131</sup>A/43/517.

<sup>132</sup>United Nations, *Treaty Series*, vol. 1015, p. 243.

<sup>133</sup>Adopted by a vote of 128 to 1, with 26 abstentions.

<sup>134</sup>See A/43/777.

<sup>135</sup>A/43/516.

<sup>136</sup>United Nations, *Treaty Series*, vol. 78, p. 277.

<sup>137</sup>Adopted without a vote.

<sup>138</sup>See A/43/868.

<sup>139</sup>A/43/478.

<sup>140</sup>United Nations, *Treaty Series*, vol. 1465, p. 85.

<sup>141</sup>Adopted without a vote.

<sup>142</sup>See A/43/878.

<sup>143</sup>A/43/519.

<sup>144</sup>Adopted without a vote.

<sup>145</sup>See A/43/873.

<sup>146</sup>See HRI/MC/1988/CRP.1.

<sup>147</sup>Adopted by a vote of 133 to none, with 24 abstentions.

<sup>148</sup>See A/43/871.

<sup>149</sup>Adopted by a vote of 154 to 1, with 2 abstentions.

- <sup>150</sup>See A/43/868.
- <sup>151</sup>A/C.3/43/1 and A/C.3/43/7.
- <sup>152</sup>Adopted without a vote.
- <sup>153</sup>See A/43/870.
- <sup>154</sup>Adopted by a vote of 133 to none, with 24 abstentions.
- <sup>155</sup>See A/43/870.
- <sup>156</sup>General Assembly resolution 3384 (XXX).
- <sup>157</sup>Adopted without a vote.
- <sup>158</sup>See A/43/778.
- <sup>159</sup>Adopted without a vote.
- <sup>160</sup>See A/43/876.
- <sup>161</sup>E/CN.4/1988/10.
- <sup>162</sup>General Assembly resolution 41/128, annex.
- <sup>163</sup>Adopted by a vote of 129 to 24, with 1 abstention.
- <sup>164</sup>See A/43/876.
- <sup>165</sup>A/43/739.
- <sup>166</sup>Adopted without a vote.
- <sup>167</sup>See A/43/868.
- <sup>168</sup>Adopted without a vote.
- <sup>169</sup>See A/43/868.
- <sup>170</sup>General Assembly resolution 217 A (III).
- <sup>171</sup>Adopted without a vote.
- <sup>172</sup>See A/43/868.
- <sup>173</sup>A/43/328.
- <sup>174</sup>Adopted by a vote of 130 to 1, with 25 abstentions.
- <sup>175</sup>Adopted by a vote of 135 to 8, with 14 abstentions.
- <sup>176</sup>See A/43/876.
- <sup>177</sup>General Assembly resolutions 3201 (S-VI) and 3202 (S-VI).
- <sup>178</sup>General Assembly resolution 35/56, annex.
- <sup>179</sup>General Assembly resolution 3281 (XXIX).
- <sup>180</sup>Adopted without a vote.
- <sup>181</sup>See A/43/808.
- <sup>182</sup>See *Report of the World Assembly on Aging, Vienna, 26 July-6 August 1982* (United Nations publication, Sales No. E.82.I.16), chap. VI, sect. A.
- <sup>183</sup>A/43/583.
- <sup>184</sup>Adopted without a vote.
- <sup>185</sup>See A/43/809.
- <sup>186</sup>Adopted without a vote.
- <sup>187</sup>See A/43/877.
- <sup>188</sup>A/43/734.
- <sup>189</sup>A/CONF.62/122 and Corr. 111.
- <sup>190</sup>For detailed information on the work on the Preparatory Commission, see the report of the Secretary-General (A/43/718).
- <sup>191</sup>Adopted by a vote of 135 to 2, with 6 abstentions.
- <sup>192</sup>See A/43/L.18 and Add.1.
- <sup>193</sup>For the composition of the Court, see General Assembly decision 43/327.
- <sup>194</sup>As of 31 December 1988, the number of States recognizing the jurisdiction of the Court as compulsory in accordance with declarations filed under Article 36, para. 2, of the Statute of the International Court of Justice stood at 49.

- <sup>195</sup>For complete text of cases, see *I.C.J. Yearbook, 1987-88* and *ibid., 1988-1989*.
- <sup>196</sup>See *I.C.J. Yearbook, 1988-89*, No. 43, pp. 132-133.
- <sup>197</sup>*Ibid.*, pp. 133-143.
- <sup>198</sup>*Ibid.*, p. 143.
- <sup>199</sup>*Ibid.*, pp. 145-146.
- <sup>200</sup>*Ibid.*, pp. 146-158.
- <sup>201</sup>For the membership of the Commission, see *Official Records of the General Assembly, Forty-third Session, Supplement No. 10 (A/43/10)*, chap. I.A.
- <sup>202</sup>For detailed information, see *Yearbook of the International Law Commission, 1988*, vol. I (United Nations publication, Sales No. E.90.V.4); *ibid.*, vol. II Part One (United Nations publication, Sales No. E.90.V.5 (Vol. II/Part I)); and *ibid.*, Part Two (United Nations publication, Sales No. E.90.V.5 (Part II)).
- <sup>203</sup>*Yearbook of the International Law Commission, 1988*, vol. II Part One, A/CN.4/416 and Add.1, p. 6, and A/CN.4/415, p. 96, respectively.
- <sup>204</sup>*Ibid.*, A/CN.4/417, p. 163.
- <sup>205</sup>*Ibid.*, A/CN.4/411, p. 197.
- <sup>206</sup>*Ibid.*, A/CN.4/412 and Add.1 and 2, p. 205.
- <sup>207</sup>*Ibid.*, A/CN.4/413, p. 251.
- <sup>208</sup>*Official Records of the General Assembly, Forty-third Session, Supplement No. 10 (A/43/10)*.
- <sup>209</sup>Adopted without a vote.
- <sup>210</sup>See A/43/885.
- <sup>211</sup>Adopted by a vote of 137 to 5, with 13 abstentions.
- <sup>212</sup>See A/43/883.
- <sup>213</sup>For the membership of the Commission, see *Official Records of the General Assembly, Forty-third Session, Supplement No. 17*, chap. I.B, para. 4.
- <sup>214</sup>For detailed information, see *Yearbook of the United Nations Commission on International Trade Law*, vol. XIX: 1988 (United Nations publication, Sales No. E.89.V.8).
- <sup>215</sup>*Yearbook of the United Nations Commission on International Trade Law*, vol. XIX: 1988, A/CN.9/297, p. 25.
- <sup>216</sup>*Ibid.*, A/CN.9/301, p. 46.
- <sup>217</sup>*Ibid.*, A/CN.9/298, p. 63.
- <sup>218</sup>*Ibid.*, A/CN.9/302, p. 87.
- <sup>219</sup>*Ibid.*, A/CN.9/300, p. 163.
- <sup>220</sup>*Ibid.*, A/CN.9/303, p. 149.
- <sup>221</sup>Adopted without a vote.
- <sup>222</sup>See A/43/820.
- <sup>223</sup>*Official Records of the United Nations Conference on Prescription (Limitation) in the International Sale of Goods, New York, 20 May-14 June 1974* (United Nations publication, Sales No. E.74.V.8), p. 101.
- <sup>224</sup>*Official Records of the United Nations Conference on Contracts for the International Sale of Goods, Vienna, 10 March-11 April 1980* (United Nations publication, Sales No. E.82.V.5), p. 191.
- <sup>225</sup>*Ibid.*, p. 178.
- <sup>226</sup>*Official Records of the United Nations Conference on the Carriage of Goods by Sea, Hamburg, 6-31 March 1978* (United Nations publication, Sales No. E.80.VIII.1), document A/CONF.89/13, annex publication, Sales No. E.80.VIII.1), document A/CONF.89/13, annex I.
- <sup>227</sup>Adopted without a vote.
- <sup>228</sup>See A/43/820.
- <sup>229</sup>See text of the Convention in chap. IV.A of this *Yearbook*.
- <sup>230</sup>See also section 6, International Law Commission, and section 7, UNCITRAL,

above.

<sup>231</sup>Unless otherwise indicated, the text that follows presents information on action taken by the General Assembly on agenda items recommended to it by the Sixth Committee.

<sup>232</sup>Adopted without a vote.

<sup>233</sup>See A/43/900/Add.1.

<sup>234</sup>*Official Records of the General Assembly, Forty-third Session, Supplement No. 26 and addendum* (A/43/26 and Add.1).

<sup>235</sup>Adopted by a vote of 151 to 2, with 1 abstention.

<sup>236</sup>See A/43/900.

<sup>237</sup>United Nations, *Treaty Series*, vol. 11, p. 11.

<sup>238</sup>A/C.6/43.7; for text of the legal opinion, see chap. VI.A of this *Yearbook*; see also chaps. VII and VIII.3.a of this *Yearbook*.

<sup>239</sup>Adopted without a vote.

<sup>240</sup>See A/43/886.

<sup>241</sup>*Official Records of the General Assembly, Forty-third Session, Supplement No. 33* (A/43/33).

<sup>242</sup>Adopted by a vote of 117 to 2, with 31 abstentions.

<sup>243</sup>Adopted by a vote of 124 to 9, with 18 abstentions.

<sup>244</sup>See A/43/880.

<sup>245</sup>A/43/528 and Add.1 and 2.

<sup>246</sup>See *Official Records of the United Nations Conference on the Representation of States in Their Relations with International Organizations, Vienna, 4 February-14 March 1975*, vol. II (United Nations publication, Sales No. E.75.V.12), document A/CONF.67/15, annex.

<sup>247</sup>Adopted without a vote.

<sup>248</sup>See A/43/819.

<sup>249</sup>A/43/532.

<sup>250</sup>United Nations, *Treaty Series*, vol. 75, Nos. 970-973.

<sup>251</sup>*Ibid.*, vol. 1125, p. 3.

<sup>252</sup>Adopted by a vote of 129 to none, with 24 abstentions.

<sup>253</sup>See A/43/881.

<sup>254</sup>A/39/504/Add.1, annex III.

<sup>255</sup>A/42/536, A/42/483 and Add.1 and 2, and A/43/529 and Add.1.

<sup>256</sup>Adopted by a vote of 132 to none, with 22 abstentions.

<sup>257</sup>See A/43/882.

<sup>258</sup>A/43/530 and Add.1 and 2.

<sup>259</sup>General Assembly resolution 37/10.

<sup>260</sup>Adopted without a vote.

<sup>261</sup>See A/43/821.

<sup>262</sup>See A/43/527 and Add.1-3.

<sup>263</sup>Adopted without a vote.

<sup>264</sup>See A/43/884.

<sup>265</sup>*Official Records of the General Assembly, Forty-third Session, Supplement No. 43* (A/43/43).

<sup>266</sup>Adopted without a vote.

<sup>267</sup>See A/43/886.

<sup>268</sup>*Official Records of the General Assembly, Forty-third Session, Supplement No. 33* (A/43/33).

<sup>269</sup>Adopted by a vote of 67 to 9, with 65 abstentions.

<sup>270</sup>Adopted by a vote of 124 to 8, with 22 abstentions.

- <sup>271</sup>See A/43/887.
- <sup>272</sup>See A/C.6.43.L.11.
- <sup>273</sup>General Assembly resolution 2625 (XXV).
- <sup>274</sup>Adopted without a vote.
- <sup>275</sup>See A/43/889.
- <sup>276</sup>Adopted without a vote.
- <sup>277</sup>See A/43/954.
- <sup>278</sup>A/C.5/43/18.
- <sup>279</sup>Adopted without a vote.
- <sup>280</sup>See A/43/892.
- <sup>281</sup>A/43/697 and Add.1.
- <sup>282</sup>*Official Records of the General Assembly, Forty-third Session, Supplement No. 14 (A/43/14).*
- <sup>283</sup>See A/43/697/Add.1.
- <sup>284</sup>*Ibid.*, art. III, para.1(e).
- <sup>285</sup>The Finance Committee adopted the recommended amendment by consensus at its ninety-fifth session, held in June 1989.
- <sup>286</sup>Reproduced in IAEA document INFCIRC/274/Rev. 1.
- <sup>287</sup>Reproduced in IAEA document INFCIRC/335.
- <sup>288</sup>Reproduced in IAEA document INFCIRC/336.
- <sup>289</sup>United Nations, *Treaty Series*, vol. 1063, p. 265.
- <sup>290</sup>Reproduced in IAEA document INFCIRC/402.
- <sup>291</sup>United Nations, *Treaty Series*, vol. 729, p. 161.
- <sup>292</sup>*Ibid.*, vol. 634, 281.
- <sup>293</sup>Reproduced in IAEA document INFCIRC/358.
- <sup>294</sup>Reproduced in IAEA document INFCIRC/360.
- <sup>295</sup>Reproduced in IAEA document INFCIRC/359.
- <sup>296</sup>*International Legal Materials*, vol. XXVII, No. 3, p. 627; see also text of the Protocol in this *Yearbook*, chap. IV.B.
- <sup>297</sup>United Nations, *Treaty Series*, vol. 974, p. 177.
- <sup>298</sup>*Ibid.*, vol. 15, p. 295.
- <sup>299</sup>*Ibid.*, vol. 704, p. 219.
- <sup>300</sup>*Ibid.*, vol. 860, p. 105.
- <sup>301</sup>With regard to the adoption of instruments, information on the preparatory work which, by virtue of the double discussion procedure, normally covers a period of two years, is given, in order to facilitate reference work, in the year during which the instrument was adopted.
- <sup>302</sup>*Official Bulletin*, vol. LXXI, 1988, Series A, No. 2, pp. 69-80, 92-99; English, French, Spanish. Regarding preparatory work see: *First Discussion — Safety and Health in Construction*, ILC, 73rd Session (1987), Report V(1) (this report contains, *inter alia*, details of the action which led to the placing of the question on the agenda of the Conference) and Report V(2), 91 and 82 pages respectively; English, French, German, Russian, Spanish. See also ILC, 73rd Session (1987) *Record of Proceedings* No. 23; No. 31, pp. 2-7; English, French, Spanish. *Second Discussion — Safety and Health in Construction*, ILC, 75th Session (1988), Report IV(1), Report IV(2A) and Report IV(2B), 83, 90, and 43 pages respectively; English, French, German, Russian, Spanish. See also ILC, 75th Session (1988) *Record of Proceedings*, No. 25; No. 25A; No. 25B; No. 31, pp. 1-5; No. 35, pp. 8-9; English, French, Spanish.
- <sup>303</sup>*Official Bulletin*, vol. LXXI, 1988, Series A, No. 2, p. 59, pp. 80-92, 99-104; English, French, Spanish. Regarding preparatory work see: *First Discussion — Employment Promotion and Social Security*, ILC, 73rd Session (1987), Report IV(1) (this report contains, *inter alia*, details of the action which led to the placing of the question on the



agenda of the Conference) and Report IV(2), 156 and 108 pages respectively; English, French, German, Russian, Spanish. See also ILC, 73rd Session (1987), *Record of Proceedings*, No. 26; No. 32, pp. 1-8; English, French, Spanish. *Second Discussion* — Employment promotion and social security, ILC, 75th Session (1988), Report V(1), Report V(2A) and Report V(2B), 74, 69 and 27 pages respectively; English, French, German, Russian, Spanish. See also ILC, 75th Session (1988) *Record of Proceedings*, No. 27; No. 27A; No. 27B; No. 35, pp. 8-9; No. 36, pp. 4-5, 11-16; English, French, Spanish.

<sup>304</sup>This report has been published as Report III (Part 4) to the 75th Session of the Conference and comprises two volumes: Vol. A: “General Report and Observations concerning Particular Countries” (Report III (Part 4A)), 421 pages; English, French, Spanish. Vol. B: “Equality in Employment and Occupation, General Survey of the Reports on the Discrimination (Employment and Occupation) Convention (No. 111) and Recommendation (No. 111), 1958” (Report III (Part 4B)), 259 pages; English, French, Spanish.

<sup>305</sup>Official Bulletin, vol. LXXI, 1988, Series B, No. 1.

<sup>306</sup>*Ibid.*, vol. LXXI, 1988, Series B, No. 2.

<sup>307</sup>*Ibid.*, vol. LXXI, 1988, Series B, No. 3.

<sup>308</sup>IGC (1971)/SC.II/5/9.

<sup>309</sup>UNESCO/WIPO/CGE/PEW/4.

<sup>310</sup>UNESCO/WIPO/CGE/SYN/4.

<sup>311</sup>United Nations, *Treaty Series*, vol. 1401, p. 3.

<sup>312</sup>IDB/S.2/3.

<sup>313</sup>IDB.5/12 (PBC.5/18).

<sup>314</sup>GC.1/INF.6 (transmitted with contribution for 1986 *Yearbook*).

<sup>315</sup>GC.2/2 (transmitted with contribution for 1986 *Yearbook*).

<sup>316</sup>Annual report of UNIDO 1988 (IDB.5/10), appendix J.

<sup>317</sup>IDB.4/34.

<sup>318</sup>GC.3/2.

<sup>319</sup>GC.2/INF.

<sup>320</sup>UNIDO/DG/B.74.

<sup>321</sup>UNIDO/DG/B/Staff Rules and Corr.1 and Amend.1-5.

<sup>322</sup>UNIDO/DG/B.82/Rev.1.

<sup>323</sup>UNIDO/DG/B.86.

<sup>324</sup>IDB.4/21.

<sup>325</sup>United Nations, *Treaty Series*, vol. 611, p. 7.

<sup>326</sup>A./CONF.129/15.

<sup>327</sup>The World Bank is comprised of the International Bank for Reconstruction and Development (IBRD), the International Finance Corporation (IFC) and the International Development Association (IDA).

<sup>328</sup>*Juridical Yearbook*, 1987, p. 105.

<sup>329</sup>*Juridical Yearbook*, 1986, p. 167-168.

<sup>330</sup>The MIGA Convention is reprinted in 1 *ICSID Review — Foreign Investment Law Journal* 145 (1986); see also *International Legal Materials*, vol. XXIV, No. 6 (1985), p. 1607.

<sup>331</sup>The By-Laws cover such diverse topics as meetings of MIGA’s Council and the terms of service of the Agency’s President and Directors and also contain a delegation by the Council to the Board of all of the former’s delegable powers.

<sup>332</sup>The Operational Regulations set out details for the conduct of MIGA’s guarantee operations and consultative and advisory activities. These Regulations are reprinted at 3 *ICSID Review — Foreign Investment Law Journal* 264 (1988).

<sup>333</sup>The ICSID Convention is reproduced in *Juridical Yearbook*, 1966, p. 196.

<sup>334</sup>Further details on disputes before the Centre appear in ICSID’s semi-annual newsletter, *News from ICSID*.

<sup>335</sup>*International Legal Materials*, vol. XXV, No. 5 (September 1986), p. 1370.

<sup>336</sup>*Ibid.*, No. 6 (September 1986), p. 1377.

<sup>337</sup>The current version is WHO/GPA/HLE/89/1.

## Chapter IV

### TREATIES CONCERNING INTERNATIONAL LAW CONCLUDED UNDER THE AUSPICES OF THE UNITED NATIONS AND RELATED INTERGOVERNMENTAL ORGANIZATIONS

#### A. Treaties concerning international law concluded under the auspices of the United Nations

1. AGREEMENT ON THE GLOBAL SYSTEM OF TRADE PREFERENCES AMONG DEVELOPING COUNTRIES.<sup>1</sup> DONE AT BELGRADE ON 13 APRIL 1988

#### PREAMBLE

*The States Parties to this Agreement,*

*Recognizing* that economic cooperation among developing countries is a key element in the strategy of collective self-reliance and an essential instrument to promote structural changes contributing to a balanced and equitable process of global economic development and the establishment of the New International Economic Order;

*Recognizing also* that a Global System of Trade Preferences (hereinafter referred to as "GSTP") would constitute a major instrument for the promotion of trade among developing countries members of the Group of 77, and the increase of production and employment in these countries;

*Bearing in mind* the Arusha Programme of Collective Self-Reliance, the Caracas Programme of Action and the Declarations on GSTP adopted by the Ministers for Foreign Affairs of the Group of 77 in New York in 1982, and the Ministerial meetings on GSTP in New Delhi in 1985, in Brasilia in 1986 and in Belgrade in 1988;

*Believing* that the establishment of the GSTP should be accorded high priority as a major instrument of South-South cooperation for the promotion of collective self-reliance as well as for the strengthening of world trade as a whole;

Have agreed as follows:

# Chapter I

## INTRODUCTION

### *Article I*

#### DEFINITIONS

For the purpose of this Agreement:

- (a) “Participant” means:
- (i) Any member of the Group of 77 listed in annex I which has exchanged concessions and has become Party to this Agreement in accordance with its articles 25, 27 or 28;
  - (ii) Any subregional/regional/interregional grouping of developing countries members of the Group of 77 listed in annex I which has exchanged concessions and has become party to this Agreement in accordance with its articles 25, 27 or 28;
- (b) “Least developed country” means a country designated as such by the United Nations;
- (c) “State” or “country” means any State or country member of the Group of 77;
- (d) “Domestic producers” means physical or juridical persons established in the territory of a participant which are engaged in production of commodities and manufactures, including industrial, agricultural, extractive or mining products, in their raw, semi-processed or processed forms in that territory. Furthermore, for the purpose of determining “serious injury” or “threat of serious injury”, the term “domestic producers” in this Agreement shall mean domestic producers as a whole of like or similar products, or those of them whose collective output of the products constitutes a major proportion of the total domestic production of those products;
- (e) “Serious injury” means significant damage to domestic producers, of like or similar products resulting from a substantial increase of preferential imports in situations which cause substantial losses in terms of earnings, production or employment unsustainable in the short term. The examination of the impact on the domestic industry concerned shall also include an evaluation of other relevant economic factors and indices having a bearing on the state of the domestic industry of that product;
- (f) “Threat of serious injury” means a situation in which a substantial increase of preferential imports is of a nature to cause “serious injury” to domestic producers, and that such injury, although not yet existing, is clearly imminent. A determination of threat of serious injury shall be based on facts and not on mere allegation, conjecture, or remote or hypothetical possibility;
- (g) “Critical circumstances” means the emergence of an exceptional situation where massive preferential imports are causing or threatening to cause “serious injury” difficult to repair and which calls for immediate action;

(h) “Sectoral agreements” means agreements amongst participants regarding the removal or reduction of tariff, non-tariff and para-tariff barriers as well as other trade promotion or cooperative measures for specified products or groups of products closely related in end use or in production;

(i) “Direct trade measures” means measures conducive to promoting mutual trade of participants such as long- and medium-term contracts containing import and supply commitments in respect of specific products, buy-back arrangements, state trading operations, and government and public procurement;

(j) “Tariffs” means custom duties stipulated in the national tariff schedules of the participants;

(k) “Non-tariffs” means any measure, regulation, or practice, other than “tariffs” and “para-tariffs”, the effect of which is to restrict imports, or to significantly distort trade;

(l) “Para-tariffs” means border charges and fees, other than “Tariffs”, on foreign trade transactions of a tariff-like effect which are levied solely on imports, but not those indirect taxes and charges, which are levied in the same manner on like domestic products. Import charges corresponding to specific services rendered are not considered as para-tariff measures.

## Chapter II

### GLOBAL SYSTEM OF TRADE PREFERENCES

#### *Article 2*

##### ESTABLISHMENT AND AIMS OF THE GSTP

By the present Agreement, the participants establish the GSTP to promote and sustain mutual trade, and the development of economic cooperation among developing countries, through exchange of concessions in accordance with this Agreement.

#### *Article 3*

##### PRINCIPLES

The GSTP shall be established in accordance with the following principles:

(a) The GSTP shall be reserved for the exclusive participation of developing countries members of the Group of 77;

(b) The benefits of the GSTP shall accrue to the developing countries members of the Group of 77 who are participants in accordance with article 1(a);

(c) The GSTP shall be based and applied on the principle of mutuality of advantages in such a way as to benefit equitably all participants, taking into account their respective levels of economic and industrial development, the pattern of their external trade and their trade policies and systems;

(d) The GSTP shall be negotiated step by step, improved and extended in successive stages, with periodic reviews;

(e) The GSTP shall not replace, but supplement and reinforce, present and future subregional, regional and interregional economic groupings of developing countries of the Group of 77, and shall take into account the concerns and commitments of such economic groupings;

(f) The special needs of the least developed countries shall be clearly recognized and concrete preferential measures in favour of these countries should be agreed upon; the least developed countries will not be required to make concessions on a reciprocal basis;

(g) The GSTP shall include all products, manufactures, and commodities in their raw, semi-processed and processed forms;

(h) Intergovernmental subregional, regional, and interregional groupings for economic cooperation among developing countries members of the Group of 77 may participate, fully as such, if and when they consider it desirable, in any or all phases of the work on the GSTP.

#### *Article 4*

##### COMPONENTS OF THE GSTP

The GSTP may, *inter alia*, consist of the following components:

- (a) Arrangements relating to tariffs;
- (b) Arrangements relating to para-tariffs;
- (c) Arrangements relating to non-tariff measures;
- (d) Arrangements relating to direct trade measures including medium- and long-term contracts;
- (e) Arrangements relating to sectoral agreements.

#### *Article 5*

##### SCHEDULES OF CONCESSIONS

The tariff, para-tariff and non-tariff concessions negotiated and exchanged among participants shall be embodied in schedules of concessions which shall be annexed to and form an integral part of this Agreement.

### **Chapter III**

#### **NEGOTIATIONS**

#### *Article 6*

##### NEGOTIATIONS

1. The participants may hold from time to time rounds of bilateral/plurilateral/multilateral negotiations with a view to the further expansion of the GSTP and the fuller attainment of its aims.

2. The participants may conduct their negotiations in accordance with any or a combination of the following approaches and procedures:

- (a) Product-by-product negotiations;
- (b) Across-the-board tariff reductions;
- (c) Sectoral negotiations;
- (d) Direct trade measures, including medium- and long-term contracts.

## **Chapter IV**

### **COMMITTEE OF PARTICIPANTS**

#### *Article 7*

##### ESTABLISHMENT AND FUNCTIONS

1. A Committee of participants (hereinafter referred to as the “Committee”) shall be established, upon entry into force of this Agreement, consisting of the representatives of the Governments of the participants. The Committee shall perform such functions as may be necessary to facilitate the operation and further the objectives of this Agreement. The Committee shall be responsible for reviewing the application of this Agreement and the instruments adopted within its framework, monitoring the implementation of the results of the negotiations, carrying out consultations, making recommendations and taking decisions as required, and, in general, undertaking whatever measures may be required to ensure the adequate implementation of the objectives and the provisions of this Agreement.

(a) The Committee shall keep under review the possibility of promoting further negotiations for the enlargement of the schedules of concessions and for the enhancement of trade among participants through other measures and may at any time sponsor such negotiations. The Committee shall also ensure prompt and complete dissemination of trade information in order to promote trade among participants;

(b) The Committee shall review disputes and make recommendations thereon in accordance with article 21 of this Agreement;

(c) The Committee may establish such subsidiary organs as may be necessary to the effective discharge of its functions;

(d) The Committee may adopt appropriate regulations and rules as may be necessary to the implementation of this Agreement.

2. (a) The Committee shall endeavour to ensure that all its decisions are taken by consensus;

(b) Notwithstanding any measures that may be taken in compliance with paragraph 2(a) of this article, a proposal or motion before the Committee shall be voted on if a representative so requests;

(c) Decisions shall be taken by two-thirds majority on matters of substance and a simple majority on matters of procedure.

3. The Committee shall adopt its rules of procedure.

4. The Committee shall adopt financial rules and regulations.

### *Article 8*

#### COOPERATION WITH INTERNATIONAL ORGANIZATIONS

The Committee shall make whatever arrangements are appropriate for consultation or cooperation with the United Nations and its organs, in particular the United Nations Conference on Trade and Development (UNCTAD) and the specialized agencies of the United Nations, as well as intergovernmental, subregional, regional and interregional groupings for economic cooperation among developing countries members of the Group of 77.

## **Chapter V**

### **GROUND RULES**

### *Article 9*

#### EXTENSION OF NEGOTIATED CONCESSIONS

1. Except as provided for in paragraphs 2 and 3 of this article, all tariff, para-tariff and non-tariff concessions, negotiated and exchanged among participants in the bilateral/plurilateral negotiations shall, when implemented, be extended to all participants in the GSTP negotiations on a most-favoured-nation (MFN) basis.

2. Subject to Rules and Guidelines prescribed in this regard, participants parties to direct trade measures, sectoral agreements or agreements on non-tariff concessions may decide not to extend the concessions linked to such agreements to other participants. Such non-extension shall not have a detrimental impact on the trade interests of other participants and when it has such an effect, the matter shall be submitted to the Committee for consideration and decision. Such agreements shall be open to all participants in the GSTP through direct negotiations. The Committee shall be informed of the initiation of negotiations on such agreements as well as on their provisions once concluded.

3. Notwithstanding the provisions of paragraphs 1 and 2 of this article, participants may grant tariff, non-tariff and para-tariff concessions applicable exclusively to exports originating from participating least developed countries. Such concessions, when implemented, shall apply in equal measures to all participating least developed countries. If after granting of any exclusive right it proves detrimental to the legitimate trading interest of other participants, the matter may be brought to the Committee for a review of such arrangements.



## *Article 10*

### MAINTENANCE OF THE VALUE OF CONCESSIONS

Subject to terms, conditions or qualifications that might be set out in the schedules containing the concessions granted, a participant shall not impair or nullify these concessions, after the entry into force of this Agreement, through the application of any charge or measure restricting commerce other than those existing prior thereto, except where such charge corresponds to an internal tax imposed on a like domestic product, an anti-dumping or countervailing duty, or fees commensurate with the cost of services rendered, and except any measures authorized under articles 13 and 14.

## *Article 11*

### MODIFICATION AND WITHDRAWAL OF CONCESSIONS

1. Any participant may, after a period of three years from the day the concession was extended, notify the Committee of its intention to modify or withdraw any concession included in its appropriate schedule.

2. The participant intending to withdraw or modify a concession shall enter into consultation and/or negotiations, with a view to reaching agreement on any necessary and appropriate compensation, with participants with which such concession was initially negotiated and with any other participants that have a principal or substantial supplying interest as maybe determined by the Committee.

3. Should no agreement be reached between the participants concerned within six months of the receipt of notification and should the notifying participant proceed with its modification or withdrawal of such concessions, the affected participants as determined by the Committee may withdraw or modify equivalent concessions in their appropriate schedules. Any such modification or withdrawal should be notified to the Committee.

## *Article 12*

### WITHHOLDING OR WITHDRAWAL OF CONCESSIONS

A participant shall at any time be free to withhold or to withdraw in whole or in part any item in its schedule of concessions in respect of which it determines it was initially negotiated with a State which has not become, or has ceased to be, a participant in this Agreement. A participant taking such action shall notify the Committee and, upon request, consult with participants that have a substantial interest in the product concerned.

## *Article 13*

### SAFEGUARD MEASURES

A participant shall be able to take safeguard measures to ward off serious injury or threats of serious injury to domestic producers of like or similar products, which may arise as a direct consequence of unforeseen substantial rise of imports enjoying preferences under the GSTP.

1. Safeguard measures shall be in accordance with the following rules:

(a) Safeguard measures should be consistent with the aims and objectives of the GSTP. These measures should be applied in a non-discriminatory fashion among the participants in the GSTP;

(b) Safeguard measures should be in effect only to the extent and for such time as may be necessary to prevent or remedy such injury;

(c) As a general rule and except in critical circumstances, all safeguard measures shall be taken after consultation between interested participants. Participants intending to take such safeguard measures will be required to demonstrate to the satisfaction of the concerned parties within the Committee the serious injury or threat thereof justifying such measures.

2. Safeguard action to ward off serious injury or a threat of injury should be in accordance with the following procedures:

(a) Notification: Any participant intending to take safeguard measures should notify the Committee of its intention, and the Committee shall circulate this notification to all participants. Upon receipt of such notification, interested participants intending to enter into consultations with the initiating participants shall so notify the Committee within 30 days. In critical circumstances when delay could cause damage which would be difficult to repair, action may be taken provisionally without prior consultations, on the condition that consultations shall be effected immediately after taking such action;

(b) Consultation: Interested participants should enter into consultations for the purpose of reaching an agreement as to the nature of the safeguard measures to be taken, or already taken, and its duration, and as to compensation or the renegotiation of concessions. These consultations should be concluded within three months of receipt of the original notification. Should these consultations not lead to an agreement satisfactory to all parties within the time period specified above, the matter should be referred to the Committee for resolution of the issue. Should the Committee fail to resolve the issue within four weeks of the date of its having been referred to it, the parties affected by the safeguard action have the right to withdraw equivalent concessions or other obligations under GSTP of which the Committee does not disapprove.

#### *Article 14*

##### BALANCE-OF-PAYMENTS MEASURES

If a participant faces serious economic problems during the implementation of the GSTP, such participant shall be able to take measures to meet serious balance-of-payments difficulties.

1. Any participant which finds it necessary to institute or intensify quantitative restrictions or other measures limiting imports concerning products or areas where concessions have been offered with a view to forestalling the threat of or stopping a serious decline in its monetary reserves shall endeavour to do so in order to prevent or remedy such difficulties, in a manner which preserves, as much as possible, the value of negotiated concessions.

2. Such action shall be notified immediately to the Committee which shall circulate such notification to all participants.

3. Any participant which takes action according to paragraph 1 of this article shall afford, upon request from any other participant, adequate opportunity for consultations with a view to preserving the stability of the concession negotiated under the GTSP. If no satisfactory adjustment is effected between the participants concerned within three months of such notification, the matter may be referred to the Committee for a review.

### *Article 15*

#### RULES OF ORIGIN

Products contained in the schedules of concessions annexed to this Agreement shall be eligible for preferential treatment if they satisfy the Rules of Origin, which shall be annexed to and form an integral part of this Agreement.

### *Article 16*

#### PROCEDURES RELATING TO THE NEGOTIATIONS OF LONG-TERM AND MEDIUM-TERM CONTRACTS AMONG INTERESTED PARTICIPANTS IN THE GSTP

1. Within the framework of this Agreement, long-term and medium-term contracts involving import and export commitments in respect to specific commodities or products may be entered into among participants.

2. To facilitate the negotiation and conclusion of such contracts:

(a) Exporting participants should indicate the commodities or products for which they may be prepared to undertake supply commitments together with an indication of the quantities that may be involved;

(b) Importing participants should indicate the commodities or products for which they could envisage undertaking import commitments and, where possible, an indication of the quantities that may be involved;

(c) The Committee will provide assistance for the multilateral exchange of information provided under (a) and (b) above and for bilateral and/or multilateral negotiations among interested exporting and importing participants for the purpose of concluding long-term and medium-term contracts.

3. Participants concerned should notify the Committee of the conclusion of long-term and medium-term contracts as soon as possible.

### *Article 17*

#### SPECIAL TREATMENT FOR LEAST DEVELOPED COUNTRIES

1. In accordance with the Ministerial Declaration on the GSTP, the special needs of the least developed countries shall be clearly recognized [cf-missing text, ms page 215]

2. To become a participant a least developed country shall not be required to make concessions on a reciprocal basis, and such participating least developed country shall benefit from the extension of all tariff, para-tariff and non-tariff concessions exchanged in the bilateral/plurilateral negotiations which are multilateralized.

3. Participating least developed countries should identify their export products for which they may wish to seek concessions in the markets of other participants. Technical assistance by the United Nations and other participants in a position to do so, including the provision of relevant information relating to trade in the products concerned and the major developing import markets, together with market trends and prospects and trade regimes of the participants, should be provided to these countries on a priority basis to assist them in this task.

4. Participating least developed countries may, with respect to export products and markets identified under paragraph 3 above, make specific requests to other participants for tariff, para-tariff and non-tariff concessions and/or direct trade measures, including long-term contracts.

5. Special consideration shall be given to exports from participating least developed countries in the application of safeguard measures.

6. The concessions sought in respect to these products may include:

- (a) Duty-free access, particularly for processed and semi-processed goods;
- (b) The removal of non-tariff barriers;
- (c) The removal, where appropriate, of para-tariff barriers;
- (d) The negotiation of long-term contracts with a view to assisting participating least developed countries to achieve reasonable levels of sustainable exports of their products.

7. Participants shall sympathetically consider requests from participating least developed countries for concessions sought under paragraph 6 above and shall endeavour, wherever possible, to meet such requests, in whole or in part, as a manifestation of concrete preferential measures to be agreed on in favour of participating least developed countries.

### *Article 18*

#### SUBREGIONAL, REGIONAL AND INTERREGIONAL GROUPINGS

Tariff, para-tariff and non-tariff preferences applicable within existing sub-regional, regional and interregional groupings of developing countries notified and registered in this Agreement shall retain their essential character, and there shall be no obligation on the members of such groupings to extend, nor the right of other participants to enjoy the benefits of such preferences. The provisions of this paragraph shall apply equally to the preferential agreements concluded with a view to creating subregional, regional and interregional groupings of developing countries and to future subregional, regional and interregional groupings of developing countries that will be notified as such and duly registered in this Agreement. Furthermore, these provisions shall apply in equal measures to all tariff, para-tariff and non-tariff preferences which may in the future become applicable within such subregional, regional or interregional groupings.

## Chapter VI

### CONSULTATIONS AND SETTLEMENT OF DISPUTES

#### *Article 19*

##### CONSULTATIONS

1. Each participant shall accord sympathetic consideration to, and shall afford adequate opportunity for, consultations regarding such representations as may be made by another participant with respect to any matter affecting the operation of this Agreement.

2. The Committee may, at the request of a participant, consult with any participant in respect of any matter for which it has not been possible to find a satisfactory solution through such consultation under paragraph 1 above.

#### *Article 20*

##### NULLIFICATION OR IMPAIRMENT

1. If any participant should consider that another participant has altered the value of a concession embodied in its schedule or that any benefit accruing to it directly or indirectly under this Agreement is being nullified or impaired as the result of the failure of another participant to carry out any of its obligations under this Agreement or as the result of any other circumstance relevant to the operation of this Agreement, the former may, with a view to the satisfactory adjustment of the matter, make written representations or proposals to the other participants which it considers to be concerned, which thus approached shall give sympathetic consideration to the representations or proposals made to them.

2. If no satisfactory adjustment is effected between the participants concerned within 90 days from the date on which such representation or request for consultation was made, the matter may be referred to the Committee which shall consult with the participants concerned and make appropriate recommendations within 75 days from the date the matter was referred to the Committee. If still no satisfactory adjustment is made within 90 days after the recommendations were made, the aggrieved participant may suspend the application of a substantially equivalent concession, or other obligations of the GSTP which the Committee does not disapprove of.

#### *Article 21*

##### SETTLEMENT OF DISPUTES

Any dispute that may arise among the participants regarding the interpretation and application of the provisions of this Agreement or any instrument adopted within its framework shall be amicably settled by agreement between the parties concerned in line with article 19 of this Agreement. In the event of failure to settle a dispute, it may be referred to the Committee by a party to the dispute. The Committee shall review the matter and make a recommendation thereon within 120 days from the date on which the dispute was submitted to it. The Committee shall adopt appropriate rules for this purpose.

## Chapter VII

### FINAL PROVISIONS

#### *Article 22*

##### IMPLEMENTATION

Each participant shall take such legislative or other measures as may be necessary to implement this Agreement and the instruments adopted within its framework.

#### *Article 23*

##### DEPOSITARY

The Government of the Socialist Federal Republic of Yugoslavia is hereby designated as the depositary of this Agreement.

#### *Article 24*

##### SIGNATURE

This Agreement shall be open for signature at Belgrade, Yugoslavia, from 13 April 1988 until the date of its entry into force in accordance with article 26.

#### *Article 25*

##### DEFINITIVE SIGNATURE, RATIFICATION, ACCEPTANCE OR APPROVAL

Any participant referred to in article 1(a) and in annex I of this Agreement which has exchanged concessions may:

- (a) At the time of signing this Agreement, declare that by such signature it expresses its consent to be bound by this Agreement (definitive signature); or
- (b) After signing this Agreement, ratify, accept or approve it by the deposit of an instrument to that effect with the depositary.

#### *Article 26*

##### ENTRY INTO FORCE

1. This Agreement shall enter into force on the thirtieth day after 15 States referred to in article 1(a) and in annex I of the Agreement from the three regions of the Group of 77, which have exchanged concessions have deposited their instruments of definitive signature, ratification, acceptance, approval in accordance with article 25, paragraphs (a) and (b).

2. For any State which deposits an instrument of ratification, acceptance, approval or accession or a notification of provisional application after the conditions for entry into force of this Agreement have been met, it shall enter into force for that State on the thirtieth day after such deposit or notification.

3. Upon entry into force of this Agreement the Committee shall set a final date for the deposit of instruments of ratification, acceptance, or approval by states referred to in article 25. This date shall not be later than three years following the date of entry into force of this Agreement.

*Article 27*

NOTIFICATION OF PROVISIONAL APPLICATION

A signatory which intends to ratify, accept or approve this Agreement but which has not been able to deposit its instrument, may within sixty days after the Agreement enters into force notify the depositary that it will apply this Agreement provisionally. The provisional application shall not exceed a period of two years.

*Article 28*

ACCESSION

Six months after this Agreement enters into force in accordance with the provisions of this Agreement it shall be open to accession by other members of the Group of 77 who shall have complied with the conditions provided for in this Agreement. To this end the following procedures shall apply:

- (a) The applicant shall notify its intention of accession to the Committee;
- (b) The Committee shall circulate the notification among the participants;
- (c) The applicant shall submit an offer list to the participants and any participant may table a request list to the applicant;
- (d) Once the procedures under (a), (b) and (c) above have been completed, the applicant shall enter into negotiations with the interested participants with a view to reaching agreement on its list of concessions;
- (e) Application for accession from a least developed country shall be considered taking into account the provision for special treatment for least developed countries.

*Article 29*

AMENDMENTS

1. Any participant may propose an amendment to this Agreement. The Committee shall consider and recommend the amendment for adoption by the participants. An amendment shall become effective 30 days after the date on which two-thirds of the participants, in article 1(a), have notified the depositary of their acceptance.

2. Notwithstanding provisions of paragraph 1 of this article:

- (a) Any amendment concerning:
  - (i) The definition of membership stipulated in article 1(a);
  - (ii) The procedure for amending this Agreement;

shall enter into force after its acceptance by all participants in accordance with article 1(a) of this Agreement;

- (b) Any amendment concerning:
  - (i) The principles stipulated in article 3;
  - (ii) The base of consensus and any other bases of voting mentioned in this Agreement;

shall enter into force after its acceptance by consensus.

### *Article 30*

#### WITHDRAWAL

1. Any participant may withdraw from this Agreement at any time after its entry into force. Such withdrawal shall be effective six months from the day on which written notice thereof is received by the depositary. That participant shall simultaneously inform the Committee of the action it has taken.

2. The rights and obligations of a participant which has withdrawn from this Agreement shall cease to apply as of that date. After that date, the participants and the withdrawing participant shall jointly decide whether to withdraw in whole or in part the concessions received by the latter from the former and vice versa.

### *Article 31*

#### RESERVATIONS

Reservations may be made in request of any of the provisions of this Agreement provided they are not incompatible with the object and purpose of this Agreement and are accepted by the majority of the participants.

### *Article 32*

#### NON-APPLICATION\*

1. The GSTP shall not apply as between participants if they have not entered into direct negotiations with each other and if either of them, at the time either accepts this Agreement, does not consent to such application.

2. The Committee may review the operation of this article in particular cases at the request of any of the participants and make appropriate recommendations.

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\*This article can only be invoked in exceptional circumstances duly notified to the Committee.



## Article 33

### SECURITY EXCEPTIONS

Nothing in this Agreement shall be construed to prevent any participant from taking any action which it considers necessary for the protection of its essential security interests.

## Article 34

### ANNEXES

1. The annexes form an integral part of this Agreement and a reference to this Agreement or to one of its chapters includes a reference to the annexes relating thereto.

2. The annexes to this Agreement shall be:

- (a) Annex I — Participants in the Agreement;
- (b) Annex II — Rules of Origin;
- (c) Annex III — Additional Measures in Favour of Least Developed Countries;
- (d) Annex IV — Schedules of Concessions.

DONE at Belgrade, Yugoslavia, on the thirteenth day of April, one thousand nine hundred and eighty-eight, the texts of this Agreement in the Arabic, English, French and Spanish languages being equally authentic.

IN WITNESS WHEREOF the undersigned, being duly authorized thereto, have signed this Agreement on the dates indicated.

### ANNEX I

#### Participants in the Agreement

Algeria	Mexico
Angola	Morocco
Argentina	Mozambique
Bangladesh	Nicaragua
Benin	Nigeria
Bolivia	Pakistan
Brazil	Peru
Cameroon	Philippines
Chile	Qatar
Colombia	Republic of Korea
Cuba	Romania
Democratic People's Republic of Korea	Singapore
Ecuador	Sri Lanka
Egypt	Sudan
Ghana	Thailand
Guinea	Trinidad and Tobago
Guyana	Tunisia
Haiti	United Republic of Tanzania
India	Uruguay
Indonesia	Venezuela
Iran (Islamic Republic of)	Viet Nam
Iraq	Yugoslavia
Libyan Arab Jamahiriya	Zaire
Malaysia	Zimbabwe

## ANNEX II

### Rules of Origin

For determining the origin of products eligible for preferential concessions under the GSTP in the light of paragraphs (a) and (b) of article 3 and article 15 of the Agreement on GSTP the following rules shall be applied:

*Rule 1. Originating products.* Products covered by preferential trading arrangements within the framework of the GSTP imported into the territory within the meaning of rule 5 hereof, shall be eligible for preferential concessions if they conform to the origin requirement under one of the following conditions:

(a) Products wholly produced or obtained in the exporting participant defined in rule 2; or

(b) Products not wholly produced or obtained in the exporting participant, provided that the said products are eligible under rule 3 or rule 4.

*Rule 2. Wholly produced or obtained.* Within the meaning of rule 1(a) the following shall be considered as wholly produced or obtained in the exporting participant:

(a) Raw or mineral products extracted from its soil, its water or its seabeds;<sup>a</sup>

(b) Agricultural products harvested there;<sup>b</sup>

(c) Animals born and raised there;

(d) Products obtained from animals referred to in paragraph (c) above;

(e) Products obtained by hunting or fishing conducted there;

(f) Products of sea fishing and other marine products taken from the high seas by its vessels;<sup>c,d</sup>

(g) Products processed and/or made on board its factory ships exclusively from products referred to in paragraph (f) above;<sup>d,e</sup>

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<sup>a</sup>Include mineral fuels, lubricants and related materials as well as mineral or metal ores.

<sup>b</sup>Include forestry products.

<sup>c</sup>“Vessels” — shall refer to fishing vessels engaged in commercial fishing, registered in a participant’s country and operated by a citizen or citizens or Governments of participants or partnership, corporation or association, duly registered in such participant’s country, at least 60 per cent of equity of which is owned by a citizen or citizens and/or Government of such participant or 75 per cent by citizens and/or Governments of the participants. However, the products taken from vessels engaged in commercial fishing under bilateral agreements which provide for chartering/leasing of such vessels and/or sharing of catch between participants will also be eligible for preferential concessions.

<sup>d</sup>In respect of vessels or factory ships operated by government agencies, the requirement of flying the flag of a participant does not apply.

<sup>e</sup>For the purpose of this Agreement, the term “factory ship” means any vessel, as defined, used for processing and/or making on board products exclusively from those products referred to in paragraph (f) above.

- (h) Used articles collected there, fit only for the recovery of raw materials;
- (i) Waste and scrap resulting from manufacturing operations conducted there;
- (j) Goods produced there exclusively from the products referred to in paragraph (a) to (i) above.

*Rule 3. Not wholly produced or obtained*

(a) Within the meaning of rule 1(b), products worked on or processed as a result of which the total value of the materials, parts or produce originating from non-participants or of undetermined origin used does not exceed 50 per cent of the f.o.b. value of the products produced or obtained and the final process of manufacture is performed within the territory of the exporting participant shall be eligible for preferential concessions, subject to the provisions of rule 3(c) and rule 4.

(b) Sectoral agreements<sup>f</sup>

(c) The value of the non-originating materials, parts or produce shall be:

- (i) The c.i.f. value at the time of importation of the materials, parts or produce where this can be proven; or
- (ii) The earliest ascertainable price paid for the materials, parts or produce of undetermined origin in the territory of the participant where the working or processing takes place.

*Rule 4. Cumulative rules of origin.* Products which comply with origin requirements provided for in rule 1 and which are used by a participant as input for a finished product eligible for preferential treatment by another participant shall be considered as a product originating in the territory of the participant where working or processing of the finished product has taken place provided that the aggregate content originating in the territory of the participant is not less than 60 per cent of its f.o.b. value.<sup>g</sup>

*Rule 5. Direct consignment.* The following shall be considered as directly consigned from the exporting participant to the importing participant:

(a) if the products are transported without passing through the territory of any non-participant:

(b) the products whose transport involves transit through one or more intermediate non-participants with or without transshipment or temporary storage in such countries, provided that:

- (i) The transit entry is justified for geographical reason or by considerations related exclusively to transport requirements;
- (ii) The products have not entered into trade or consumption there; and
- (iii) The products have not undergone any operation there other than unloading and reloading or any operation required to keep them in good condition.

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<sup>f</sup>In respect of products traded within the framework of sectoral agreements negotiated under the GSTP, provision may need to be made for special criteria to apply. Consideration may be given to these criteria as and when the sectoral agreements are negotiated.

<sup>g</sup>“Partial” cumulation as implied by rule 4 above means that only products which have acquired originating status in the territory of one participant may be taken into account when used as inputs for a finished product eligible for preferential treatment in the territory of another participant.

*Rule 6. Treatment and packing.* When determining the origin of products, packing should be considered as forming a whole with the product it contains. However, packing may be treated separately if the national legislation so requires.

*Rule 7. Certificate of origin.* Products eligible for preferential concessions shall be supported by a Certificate of Origin<sup>b</sup> issued by an authority designated by the government of the exporting participant and notified to the other participants in accordance with the Certification Procedures to be developed and approved by the participants.

*Rule 8*

(a) In conformity with paragraphs (a) and (b) of article 3 and article 15 of the Agreement on the GSTP and national legislations, any participant may prohibit importation of products containing any inputs originating from States with which it does not have economic and commercial relations.

(b) Participants will do their best to cooperate in order to specify origin of inputs in the Certificate of Origin.

*Rule 9. Review.* These rules may be reviewed as and when necessary upon request of one third of the participants and may be open to such modifications as may be agreed upon.

*Rule 10. Special criteria percentage.* Products originating in participating least developed countries can be allowed a favourable 10 percentage points applied to the percentages established in rules 3 and 4. Thus, for rule 3, the percentage would not exceed 60 per cent, and for rule 4, the percentage would not be less than 50 per cent.

I. *General Conditions*

To qualify for preference, products must:

(a) Fall within a description of products eligible for preference in the schedule of concessions of the GSTP country of destination;

(b) Comply with the GSTP rules of Origin. Each article in a consignment must qualify separately in its own right; and

(c) Comply with the consignment conditions specified by the GSTP Rules of Origin. In general, products must be consigned directly within the meaning of rule 5 hereof from the country of exportation to the country of destination.

II. *Entries to be made in box 8*

Preference products must be wholly produced or obtained in the exporting participant in accordance with rule 2 of the GSTP Rules of Origin, or where not wholly produced or obtained in the exporting participant must be eligible under rule 3 or rule 4.

(a) Products wholly produced or obtained: enter the letter "A" in box 8.

(b) Products not wholly produced or obtained: the entry in box 8 should be as follows:

1. Enter letter "B" in box 8, for products which meet the working criteria according to rule 3. Entry of letter "B" would be followed by the sum of the value of materials, parts or produce originating from non-participants, or undetermined origin used, expressed as a percentage of f.o.b. value of the exported products (example "B" 50 per cent).

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<sup>b</sup>A standard Certificate of Origin to be used by all participants is annexed.

2. Enter letter “C” in box 8 for products which meet the origin criteria according to rule 4. Entry of letter “C” would be followed by the sum of the aggregate content originating in the territory of the exporting participant expressed as a percentage of the f.o.b. value of the exported product (example “C” 60 per cent).
3. Enter letter “D” in box 8 for products which meet the special origin criteria according to rule 10.

## ANNEX III

### Additional measures in favor of least developed countries

Special consideration shall be given by participants to requests from participating least developed countries for technical assistance and cooperation arrangements designed to assist participating least developed countries in expanding their trade with other developing countries and in taking advantage of the potential benefits of the GSTP, particularly in the following areas:

(a) The identification, preparation and establishment of industrial and agricultural projects in the territories of participating least developed countries which could provide the production base for the expansion of exports of participating least developed countries to other participants, possibly linked to cooperative financing and buy-back arrangements;

(b) The setting up of manufacturing and other facilities in participating least developed countries to meet subregional and regional demand under cooperative arrangements;

(c) The formulation of export promotion policies and the establishment of training facilities in the field of trade to assist participating least developed countries in expanding their exports and in maximizing their benefits from the GSTP;

(d) The provision of support to export marketing of products of participating least developed countries by enabling these countries to share existing facilities (for example, with respect to export credit insurance, access to market information) and by institutional and other positive measures to facilitate imports from participating least developed countries into their own markets;

(e) Bringing together of enterprises in other participants with project sponsors in the participating least developed countries (both public and private) with a view to promoting joint ventures in projects designed to lead to the expansion of trade;

(f) The provision of special facilities and rates in respect to shipping;

(g) The provision of special facilities for the participating land-locked and island least developed countries to deal with transit problems and constraints in transport — where any study or programme of action is to be undertaken in, or in relation to, any transit country, such study or programme of action will be carried out in consultation with, and with the approval of, the transit country concerned;

(h) The provision of increased flows of essential items to the participating least developed countries through special preferential arrangements.

## ANNEX IV

### Schedules of Concessions

[Issued separately.]

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2. PROTOCOL TO THE 1979 CONVENTION ON LONG-RANGE TRANSBOUNDARY AIR POLLUTION CONCERNING THE CONTROL OF EMISSIONS OF NITROGEN OXIDES OR THEIR TRANSBOUNDARY FLUXES.<sup>2</sup> DONE AT SOFIA ON 31 OCTOBER 1988

*The Parties,*

*Determined* to implement the Convention on Long-range Transboundary Air Pollution,<sup>3</sup>

*Concerned* that present emissions of air pollutants are causing damage, in exposed parts of Europe and North America, to natural resources of vital environmental and economic importance,

*Recalling* that the Executive Body for the Convention recognized at its second session the need to reduce effectively the total annual emissions of nitrogen oxides from stationary and mobile sources or their transboundary fluxes by 1995, and the need on the part of other States that had already made progress in reducing these emissions to maintain and review their emission standards for nitrogen oxides,

*Taking into consideration* existing scientific and technical data on emissions, atmospheric movements and effects on the environment of nitrogen oxides and their secondary products, as well as on control technologies,

*Conscious* that the adverse environmental effects of emissions of nitrogen oxides vary among countries,

*Determined* to take effective action to control and reduce national annual emissions of nitrogen oxides or their transboundary fluxes by, in particular, the application of appropriate national emission standards to new mobile and major new stationary sources and the retrofitting of existing major stationary sources,

*Recognizing* that scientific and technical knowledge of these matters is developing and that it will be necessary to take such developments into account when reviewing the operation of this Protocol and deciding on further action,

*Noting* that the elaboration of an approach based on critical loads is aimed at the establishment of an effect-oriented scientific basis to be taken into account when reviewing the operation of this Protocol and at deciding on further internationally agreed measures to limit and reduce emissions of nitrogen oxides or their transboundary fluxes,

*Recognizing* that the expeditious consideration of procedures to create more favourable conditions for exchange of technology will contribute to the effective reduction of emissions of nitrogen oxides in the region of the Commission,

*Noting* with appreciation the mutual commitment undertaken by several countries to implement immediate and substantial reductions of national annual emissions of nitrogen oxides,

*Acknowledging* the measures already taken by some countries which have had the effect of reducing emissions of nitrogen oxides,

*Have agreed as follows:*

### *Article I*

#### DEFINITIONS

For the purposes of the present Protocol,

1. "Convention" means the Convention on Long-range Transboundary Air Pollution, adopted in Geneva on 13 November 1979;

2. "EMEP" means the Cooperative Programme for Monitoring and Evaluation of the Long-range Transmission of Air Pollutants in Europe;

3. "Executive Body" means the Executive Body for the Convention constituted under article 10, paragraph 1, of the Convention;

4. "Geographical scope of EMEP" means the area defined in article 1, paragraph 4, of the Protocol to the 1979 Convention on Long-range Transboundary Air Pollution on Long-term Financing of the Cooperative Programme for Monitoring and Evaluation of the Long-range Transmission of Air Pollutants in Europe (EMEP), adopted in Geneva on 28 September 1984;

5. "Parties" means, unless the context otherwise requires, the Parties to the present Protocol;

6. "Commission" means the United Nations Economic Commission for Europe;

7. "Critical load" means a quantitative estimate of the exposure to one or more pollutants below which significant harmful effects on specified sensitive elements of the environment do not occur according to present knowledge;

8. "Major existing stationary source" means any existing stationary source the thermal input of which is at least 100 MW;

9. "Major new stationary source" means any new stationary source the thermal input of which is at least 50 MW;

10. "Major source category" means any category of sources which emit or may emit air pollutants in the form of nitrogen oxides, including the categories described in the Technical Annex, and which contribute at least 10 per cent of the total national emissions of nitrogen oxides on an annual basis as measured or calculated in the first calendar year after the date of entry into force of the present Protocol, and every fourth year thereafter;

11. "New stationary source" means any stationary source the construction or substantial modification of which is commenced after the expiration of two years from the date of entry into force of this Protocol;

12. "New mobile source" means a motor vehicle or other mobile source which is manufactured after the expiration of two years from the date of entry into force of the present Protocol.

## *Article 2*

### BASIC OBLIGATIONS

1. The Parties shall, as soon as possible and as a first step, take effective measures to control and/or reduce their national annual emissions of nitrogen oxides or their transboundary fluxes so that these, at the latest by 31 December 1994, do not exceed their national annual emissions of nitrogen oxides or transboundary fluxes of such emissions for the calendar year 1987 or any previous year to be specified upon signature of, or accession to, the Protocol, provided that in addition, with respect to any Party specifying such a previous year, its national average annual transboundary fluxes or national average annual emissions of nitrogen oxides for the period from 1 January 1987 to 1 January 1996 do not exceed its transboundary fluxes or national emissions for the calendar year 1987.

2. Furthermore, the Parties shall in particular, and no later than two years after the date of entry into force of the present Protocol:

(a) Apply national emissions standards to major new stationary sources and/or source categories, and to substantially modified stationary sources in major source categories, based on the best available technologies which are economically feasible, taking into consideration the Technical Annex;

(b) Apply national emission standards to new mobile sources in all major source categories based on the best available technologies which are economically feasible, taking into consideration the Technical Annex and the relevant decisions taken within the framework of the Inland Transport Committee of the Commission; and

(c) Introduce pollution control measures for major existing stationary sources, taking into consideration the Technical Annex and the characteristics of the plant, its age and its rate of utilization and the need to avoid undue operational disruption.

3. (a) The Parties shall, as a second step, commence negotiations, no later than six months after the date of entry into force of the present Protocol, on further steps to reduce national annual emissions of nitrogen oxides or transboundary fluxes of such emissions, taking into account the best available scientific and technological developments, internationally accepted critical loads and other elements resulting from the work programme undertaken under article 6.

(b) To this end, the Parties shall cooperate in order to establish:



- (i) Critical loads;
- (ii) Reductions in national annual emissions of nitrogen oxides or transboundary fluxes of such emissions as required to achieve agreed objectives based on critical loads; and
- (iii) Measures and a timetable commencing no later than 1 January 1996 for achieving such reductions.

4. Parties may take more stringent measures than those required by the present article.

### *Article 3*

#### EXCHANGE OF TECHNOLOGY

1. The Parties shall, consistent with their national laws, regulations and practices, facilitate the exchange of technology to reduce emissions of nitrogen oxides, particularly through the promotion of:

- (a) Commercial exchange of available technology;
- (b) Direct industrial contacts and cooperation, including joint ventures;
- (c) Exchange of information and experience; and
- (d) Provision of technical assistance.

2. In promoting the activities specified in subparagraphs (a) to (d) above, the Parties shall create favourable conditions by facilitating contacts and cooperation among appropriate organizations and individuals in the private and public sectors that are capable of providing technology, design and engineering services, equipment or finance.

3. The Parties shall, no later than six months after the date of entry into force of the present Protocol, commence consideration of procedures to create more favourable conditions for the exchange of technology to reduce emissions of nitrogen oxides.

### *Article 4*

#### UNLEADED FUEL

The Parties shall, as soon as possible and no later than two years after the date of entry into force of the present Protocol, make unleaded fuel sufficiently available, in particular cases as a minimum along main international transit routes, to facilitate the circulation of vehicles equipped with catalytic converters.

### *Article 5*

#### REVIEW PROCESS

1. Parties shall regularly review the present Protocol, taking into account the best available scientific substantiation and technological development.

2. The first review shall take place no later than one year after the date of entry into force of the present Protocol.

### *Article 6*

#### WORK TO BE UNDERTAKEN

The Parties shall give high priority to research and monitoring related to the development and application of an approach based on critical loads to determine, on a scientific basis, necessary reductions in emissions of nitrogen oxides. The Parties shall, in particular, through national research programmes, in the work plan of the Executive Body and through other cooperative programmes within the framework of the Convention, seek to:

(a) Identify and quantify effects of emissions of nitrogen oxides on humans, plant and animal life, waters, soils and materials, taking into account the impact on these of nitrogen oxides from sources other than atmospheric deposition;

(b) Determine the geographical distribution of sensitive areas;

(c) Develop measurements and model calculations including harmonized methodologies for the calculation of emissions, to quantify the long-range transport of nitrogen oxides and related pollutants;

(d) Improve estimates of the performance and costs of technologies for control of emissions of nitrogen oxides and record the development of improved and new technologies; and

(e) Develop, in the context of an approach based on critical loads, methods to integrate scientific, technical and economic data in order to determine appropriate control strategies.

### *Article 7*

#### NATIONAL PROGRAMMES, POLICIES AND STRATEGIES

The Parties shall develop without undue delay national programmes, policies and strategies to implement the obligations under the present Protocol that shall serve as a means of controlling and reducing emissions of nitrogen oxides or their transboundary fluxes.

### *Article 8*

#### INFORMATION EXCHANGE AND ANNUAL REPORTING

1. The Parties shall exchange information by notifying the Executive Body of the national programmes, policies and strategies that they develop in accordance with article 7 and by reporting to it annually on progress achieved under, and any changes to, those programmes, policies and strategies, and in particular on:

(a) The levels of national annual emissions of nitrogen oxides and the basis upon which they have been calculated;

(b) Progress in applying national emission standards required under article 2, subparagraphs 2(a) and 2(b), and the national emission standards applied or to be applied, and the sources and/or source categories concerned;

(c) Progress in introducing the pollution control measures required under article 2, subparagraph 2(c), the sources concerned and the measures introduced or to be introduced;

(d) Progress in making unleaded fuel available;

(e) Measures taken to facilitate the exchange of technology; and

(f) Progress in establishing critical loads.

2. Such information shall, as far as possible, be submitted in accordance with a uniform reporting framework.

### *Article 9*

#### CALCULATIONS

EMEP shall, utilizing appropriate models and in good time before the annual meetings of the Executive Body, provide to the Executive Body calculations of nitrogen budgets and also of transboundary fluxes and deposition of nitrogen oxides within the geographical scope of EMEP. In areas outside the geographical scope of EMEP, models appropriate to the particular circumstances of Parties to the Convention therein shall be used.

### *Article 10*

#### TECHNICAL ANNEX

The Technical Annex to the present Protocol is recommendatory in character. It shall form an integral part of the Protocol.

### *Article 11*

#### AMENDMENTS TO THE PROTOCOL

1. Any Party may propose amendments to the present Protocol.

2. Proposed amendments shall be submitted in writing to the Executive Secretary of the Commission who shall communicate them to all Parties. The Executive Body shall discuss the proposed amendments at its next annual meeting provided that these proposals have been circulated by the Executive Secretary to the Parties at least ninety days in advance.

3. Amendments to the Protocol, other than amendments to its Technical Annex, shall be adopted by consensus of the Parties present at a meeting of the Executive Body, and shall enter into force for the Parties which have accepted them on the ninetieth day after the date on which two thirds of the Parties have deposited their instruments of acceptance thereof. Amendments shall enter into force for any Party which has accepted them after two thirds of the Parties have

deposited their instruments of acceptance of the amendment, on the ninetieth day after the date on which that Party deposited its instrument of acceptance of the amendments.

4. Amendments to the Technical Annex shall be adopted by consensus of the Parties present at a meeting of the Executive Body and shall become effective thirty days after the date on which they have been communicated in accordance with paragraph 5 below.

5. Amendments under paragraphs 3 and 4 above shall, as soon as possible after their adoption, be communicated by the Executive Secretary to all Parties.

#### *Article 12*

##### SETTLEMENT OF DISPUTES

If a dispute arises between two or more Parties as to the interpretation or application of the present Protocol, they shall seek a solution by negotiation or by any other method of dispute settlement acceptable to the parties to the dispute.

#### *Article 13*

##### SIGNATURE

1. The present Protocol shall be open for signature at Sofia from 1 November 1988 until 4 November 1988 inclusive, then at the Headquarters of the United Nations in New York until 5 May 1989, by the member States of the Commission as well as States having consultative status with the Commission, pursuant to paragraph 8 of Economic and Social Council resolution 36 (IV) of 28 March 1947, and by regional economic integration organizations, constituted by sovereign States members of the Commission, which have competence in respect of the negotiation, conclusion and application of international agreements in matters covered by the Protocol, provided that the States and organizations concerned are Parties to the Convention.

2. In matters within their competence, such regional economic integration organizations shall, on their own behalf, exercise the rights and fulfill the responsibilities which the present Protocol attributes to their member States. In such cases, the member States of these organizations shall not be entitled to exercise such rights individually.

#### *Article 14*

##### RATIFICATION, ACCEPTANCE, APPROVAL AND ACCESSION

1. The present Protocol shall be subject to ratification, acceptance or approval by Signatories.

2. The present Protocol shall be open for accession as from 6 May 1989 by the States and organizations referred to in article 13, paragraph 1.

3. A State or organization which accedes to the present Protocol after 31 December 1993 may implement articles 2 and 4 no later than 31 December 1995.

4. The instruments of ratification, acceptance, approval or accession shall be deposited with the Secretary-General of the United Nations, who will perform the functions of depositary.

*Article 15*

ENTRY INTO FORCE

1. The present Protocol shall enter into force on the ninetieth day following the date on which the sixteenth instrument of ratification, acceptance, approval or accession has been deposited.

2. For each State and organization referred to in article 13, paragraph 1, which ratifies, accepts or approves the present Protocol or accedes thereto after the deposit of the sixteenth instrument of ratification, acceptance, approval, or accession, the Protocol shall enter into force on the ninetieth day following the date of deposit by such Party of its instrument of ratification, acceptance, approval, or accession.

*Article 16*

WITHDRAWAL

At any time after five years from the date on which the present Protocol has come into force with respect to a Party, that Party may withdraw from it by giving written notification to the depositary. Any such withdrawal shall take effect on the ninetieth day following the date of its receipt by the depositary, or on such later date as may be specified in the notification of the withdrawal.

*Article 17*

AUTHENTIC TEXTS

The original of the present Protocol, of which the English, French and Russian texts are equally authentic, shall be deposited with the Secretary-General of the United Nations.

IN WITNESS WHEREOF the undersigned, being duly authorized thereto, have signed the present Protocol.

DONE at Sofia this thirty-first day of October one thousand nine hundred and eighty-eight.

1. Goods consigned from (Exporter's business name, address, country)		Reference No. GLOBAL SYSTEM OF TRADE PREFERENCES Certificate of Origin (Combined declaration and certificate)			
2. Goods consigned to (Consignee's name, address, country)		Issued in. .... (country) see Notes overleaf			
3. Means of transport and route (as far as known)			4. For Official use		
5. Tariff item number	6. Marks and numbers of packages	7. Number and kind of packages; description of goods	8. Origin criterion (see Notes overleaf)	9. Gross weight or other quantity	10. Number and date of invoices
11. Declaration by the exporter The undersigned hereby declares that the above details and statements are correct; that all the goods were produced in ..... (country) and they comply with the origin requirements specified for those goods in the Global System of Trade Preferences for goods exported to ..... (importing country) ..... Place and date, signature of authorized signatory			12. Certificate It is hereby certified, on the basis of control carried out, that the declaration by the exporter is correct ..... Place and date, signature and stamp of certifying authority		

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## TECHNICAL ANNEX

1. Information regarding emission performance and costs is based on official documentation of the Executive Body and its subsidiary bodies, in particular documents EB.AIR/WG.3/R.8, R.9 and R.16, and ENV/WP.1/R.86, and Corr.1, as reproduced in chapter 7 of *Effects and Control of Transboundary Air Pollution*.<sup>\*</sup> Unless otherwise indicated, the technologies listed are considered to be well established on the basis of operational experience.<sup>\*\*</sup>

2. The information contained in this annex is incomplete. Because experience with new engines and new plants incorporating low emission technology, as well as with retrofitting existing plants, is continuously expanding, regular elaboration and amendment of the annex will be necessary. The annex cannot be an exhaustive statement of technical options; its aim is to provide guidance for the Parties in identifying economically feasible technologies for giving effect to the obligations of the Protocol.

### I. CONTROL TECHNOLOGIES FOR NO<sub>x</sub> EMISSIONS FROM STATIONARY SOURCES

3. Fossil fuel combustion is the main stationary source of anthropogenic NO<sub>x</sub> emissions. In addition, some non-combustion processes can contribute relevant NO<sub>x</sub> emissions.

4. Major stationary source categories of NO<sub>x</sub> emissions may include:

- (a) Combustion plants;
- (b) Industrial process furnaces (e.g., cement manufacture);
- (c) Stationary gas turbines and internal combustion engines; and
- (d) Non-combustion processes (e.g., nitric acid production).

5. Technologies for the reduction of NO<sub>x</sub> emissions focus on certain combustion/process modifications, and, especially for large power plants, on flue gas treatment.

6. For retrofitting of existing plants, the extent of application of low-NO<sub>x</sub> technologies may be limited by negative operational side effects or by other site-specific constraints. In the case of retrofitting, therefore, only approximate estimates are given for typically achievable NO<sub>x</sub> emission values. For new plants, negative side effects can be minimized or excluded by appropriate design features.

7. According to currently available data, the costs of combustion modifications can be considered as small for new plants. However, in the case of retrofitting, for instance at large power plants, they ranged from about 8 to 25 Swiss francs per kW<sub>el</sub> (in 1985). As a rule, investment costs of flue gas treatment systems are considerable higher.

8. For stationary sources, emission factors are expressed in milligrams of NO<sub>2</sub> per normal (0° C, 1013 mb) cubic metre (mg/m<sup>3</sup>), dry basis.

#### *Combustion plants*

9. The category of combustion plants comprises fossil fuel combustion in furnaces, boilers, indirect heaters and other combustion facilities with a heat input larger

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<sup>\*</sup>Air Pollution Studies No. 4 (United Nations publication, Sales No. E.87.II.E.36).

<sup>\*\*</sup>It is at present difficult to provide reliable data on the costs of control technologies in absolute terms. For cost data included in the present annex, emphasis should therefore be placed on the relationships between the costs of different technologies rather than on absolute cost figures.

than 10 MW, without mixing the combustion flue gases with other effluents or treated materials. The following combustion technologies, either singly or in combination, are available for new and existing installations:

- (a) Low-temperature design of the firebox, including fluidized bed combustion;
- (b) Low excess-air operation;
- (c) Installation of special low-NO<sub>x</sub> burners;
- (d) Flue gas recirculation into the combustion air;
- (e) Staged combustion/overfire-air operation; and
- (f) Reburning (fuel staging).\*\*\*

Performance standards that can be achieved are summarized in table 1.

10. Flue gas treatment by selective catalytic reduction (SCR) is an additional NO<sub>x</sub> emission reduction measure with efficiencies of up to 80 per cent and more. Considerable operational experience from new and retrofitted installations is now being obtained within the region of the Commission, in particular for power plants larger than 300 MW (thermal). When combined with combustion modifications, emission values of 200 mg/m<sup>3</sup> (solid fuels, 6 per cent O<sub>2</sub>) and 150 mg/m<sup>3</sup> (liquid fuels, 3 per cent O<sub>2</sub>) can be easily met.

11. Selective non-catalytic reduction (SNCR), a flue gas treatment for a 20-60 per cent NO<sub>x</sub> reduction, is a cheaper technology for special applications (e.g., refinery furnaces and base load gas combustion).

12. NO<sub>x</sub> emissions from stationary gas turbines can be reduced either by combustion modification (dry control) or by water/steam injection (wet control). Both measures are well established. By these means, emission values of 150 mg/m<sup>3</sup> (gas, 15 per cent O<sub>2</sub>) and 300 mg/m<sup>3</sup> (oil, 15 per cent O<sub>2</sub>) can be met. Retrofit is possible.

13. NO<sub>x</sub> emissions from stationary spark ignition IC engines can be reduced either by combustion modifications (e.g., lean-burn and exhaust gas recirculation concepts) or by flue gas treatment (closed-loop 3-way catalytic converter, SCR). The technical and economic feasibility of these various processes depends on engine size, engine type (two stroke/four stroke), and engine operation mode (constant/varying load). The lean-burn concept is capable of meeting NO<sub>x</sub> emission values of 800 mg/m<sup>3</sup> (5 per cent O<sub>2</sub>), the SCR process reduces NO<sub>x</sub> emissions well below 400 mg/m<sup>3</sup> (5 per cent O<sub>2</sub>), and the three-way catalytic converter reduces such emissions even below 200 mg/m<sup>3</sup> (5 per cent O<sub>2</sub>).

#### *Industrial process furnaces — Cement calcinations*

14. The precalcination process is being evaluated within the region of the Commission as a possible technology with the potential for reducing NO<sub>x</sub> concentrations in the flue gas of new and existing cement calcination furnaces to about 300 mg/m<sup>3</sup> (10 per cent O<sub>2</sub>).

#### *Non-combustion processes — Nitric acid production*

15. Nitric acid production with a high pressure absorption (>8 bar) is capable of keeping NO<sub>x</sub> concentrations in undiluted effluents below 400 mg/m<sup>3</sup>. The same emission performance can be met by medium pressure absorption in combination with a SCR process or any other similar efficient NO<sub>x</sub> reduction process. Retrofit is possible.

## II. CONTROL TECHNOLOGIES FOR NO<sub>x</sub> EMISSIONS FROM MOTOR VEHICLES

16. The motor vehicles considered in this annex are those used for road transport, namely: petrol-fuelled and diesel-fuelled passenger cars, light-duty vehicles and heavy-duty vehicles. Appropriate reference is made, as necessary, to the specific vehicle categories (M<sub>1</sub>, M<sub>2</sub>, M<sub>3</sub>, N<sub>1</sub>, N<sub>2</sub>, N<sub>3</sub>) defined in ECE Regulation No. 13 pursuant to the 1958

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\*\*\*There is limited operational experience of this type of combustion technology.



TABLE 1.  $NO_x$  Performance Standards ( $mg/m^3$ ) That Can Be Achieved By Combustion Modifications

Solid Fuels	Plant type $g/l$	Uncontrolled baseline	Range	Existing plant retrofit $lb/$ Typical value	New plant	$O_2$ %	
							Plant type $g/l$
Solid Fuels	10 MW $g/$ to 300 MW	Grate combustion (coal)	300 - 1 000	-	600	400	7
		Fluidized bed combustion					
	(i) Stationary	300 - 600	-	-	400	7	
	(ii) Circulating	150 - 300	-	-	200	7	
	Pulverized coal combustion	(i) Dry bottom	700 - 1 700	600 - 1 100	800	<600	6
		(ii) Wet bottom	1 000 - 2 300	1 000 - 1 400	-	<1 000	6
>300 MW	Pulverized coal combustion	(i) Dry bottom	700 - 1 700	600 - 1 100	-	< 600	6
		(ii) Wet bottom	1 000 - 2 300	1 000 - 1 400	-	< 1 000	6
Liquid Fuels	10 MW $g/$ to 300 MW	Distillate oil combustion	-	-	300	-	3
		Residual oil combustion	500 - 1 400	200 - 400	400	-	3
	>300 MW	Residual oil combustion	500 - 1 400	200 - 400	-	-	3
Gaseous Fuels	10 MW $g/$ to 300 MW		150 - 1 000	100 - 300	-	< 300	3
		>300 MW	250 - 1 400	100 - 300	-	< 300	3

$g/$  Capacity numbers refer to MW (thermal) heat input by fuel (lower heating value).

$lb/$  Only appropriate values can be given due to site-specific factors and greater uncertainty for retrofitting of existing plant.

$g/$  For small (10MW-100MW) plants, a greater degree of uncertainty applies to all figures given.

Agreement concerning the Adoption of Uniform Conditions of Approval and Reciprocal Recognition of Approval for Motor Vehicles Equipment and Parts.

17. Road transport is a major source of anthropogenic  $\text{NO}_x$  emission in many Commission countries, contributing between 40 and 80 per cent of total national emissions. Typically, petrol-fuelled vehicles contribute two thirds of total road transport  $\text{NO}_x$  emissions.

18. The technologies available for the control of nitrogen oxides from motor vehicles are summarized in tables 3 and 6. It is convenient to group the technologies by reference to existing or proposed national and international emission standards differing in stringency of control. Because current regulatory test cycles only reflect urban and metropolitan driving, the estimates of relative  $\text{NO}_x$  emissions given below take account of higher speed driving where  $\text{NO}_x$  emissions can be particularly important.

19. The additional production cost figures for the various technologies given in tables 3 and 6 are manufacturing cost estimates rather than retail prices.

20. Control of production conformity and in-use vehicle performance is important in ensuring that the reduction potential of emission standards is achieved in practice.

21. Technologies that incorporate or are based on the use of catalytic converters require unleaded fuel. Free circulation of vehicles equipped with catalytic converters depends on the general availability of unleaded petrol.

*Petro-fuelled and diesel-fuelled passenger cars ( $M_1$ )*

22. In table 2, four emission standards are summarized. These are used in table 3 to group the various engine technologies for petrol vehicles according to their  $\text{NO}_x$  emission reduction potential.

23. The emission standards A, B, C and D include limits on hydrocarbon (HC) and carbon monoxide (CO) emissions as well as  $\text{NO}_x$ . Estimates of emission reductions for these pollutants, relative to the baseline ECE R.15-04 case, are given in table 4.

24. Current diesel cars can meet the  $\text{NO}_x$  emission requirements of standards A, B and C. Strict particulate emission requirements, together with the stringent  $\text{NO}_x$  limits of standard D, imply that diesel passenger cars will require further development, probably including electronic control of the fuel pump, advanced fuel injection systems, exhaust gas recirculation and particulate traps. Only experimental vehicles exist to date. (See also table 6, footnote a/.)

*Other light-duty vehicles ( $N_1$ )*

25. The control methods for passenger cars are applicable but  $\text{NO}_x$  reductions, cost and commercial lead time factors may differ.

*Heavy-duty petrol-fuelled vehicles ( $M_2, M_3, N_2, N_3$ )*

26. This class of vehicle is insignificant in western Europe and is decreasing in eastern Europe. US 1990 and US 1991  $\text{NO}_x$  emission levels (see table 5) could be achieved at modest cost without significant technology advancement.

*Heavy-duty diesel-fuelled vehicles ( $M_2, M_3, N_2, N_3$ )*

27. In table 5, three emission standards are summarized. These are used in table 6 to group engine technologies for heavy-duty diesel vehicles according to  $\text{NO}_x$  reduction potential. The baseline engine configuration is changing, with a trend away from naturally aspirated to turbo-charged engines. This trend has implications for improved baseline fuel consumption performance. Comparative estimates of consumption are therefore not included.

TABLE 2. DEFINITION OF EMISSION STANDARDS

Standard	Limits	Comments
A. ECE R.15-04	HC + NO <sub>x</sub> : 19-28 g/test	Current ECE standard (Regulation No. 15, including the 04 series of amendments, pursuant to the 1958 Agreement referred to in paragraph 16 above), also adopted by the European Economic Community (Directive 83/351/EEC). ECE R.15 urban test cycle. Emission limit varies with vehicle mass.
B. "Luxembourg 1985"	HC + NO <sub>x</sub> : 1.4-2.0 l : 8.0 g/test This standard only used to group technology (<1.4 l : 15.0 g/test, >2.0 l : 6.5 g/test)	Standards to be introduced during 1988-1993 in the European Economic Community, as discussed at the 1985 Luxembourg meeting of EEC Council of Ministers and finally agreed upon in December 1987. ECE R.15 urban test cycle applies. Standard for engines >2 l is generally equivalent to US 1983 standard. Standard for engines <1.4 l is provisional, definite standard to be elaborated. Standard for engines of 1.4-2.0 applies to all diesel cars >1.4 l.
C. "Stockholm 1985"	NO <sub>x</sub> : 0.62 g/km  NO <sub>x</sub> : 0.76 g/km	Standards for national legislation based on the "master document" developed after the 1985 Stockholm meeting of Environment Ministers from eight countries. Matching US 1987 standards, with the following test procedures:  US Federal Test Procedure (1975).  Highway fuel economy test procedure.
D. "California 1989"	NO <sub>x</sub> : 0.25 g/km	Standards to be introduced in the State of California, United States, from 1989 models onwards. US Federal Test Procedure.

TABLE 3. PETROL ENGINE TECHNOLOGIES, EMISSION PERFORMANCE, COSTS AND FUEL CONSUMPTION FOR EMISSION STANDARD LEVELS

Standard	Technology	Composite <u>a/</u> NO <sub>x</sub> reduction (%)	Additional <u>b/</u> production cost (1986 Swiss francs)	Fuel consumption index <u>a/</u>
A	Baseline (current conventional spark-ignition engine with carburetor)	- <u>c/</u>	-	100
B	(a) Fuel injection + EGR + secondary air <u>d/</u>	25	200	105
	(b) Open-loop three-way catalys (+EGR)	55	150	103
	(c) Lean-burn engine with oxidation catalyst (+EGR) <u>e/</u>	60	200-600	90
C	Closed-loop three-way catalyst	90	300-600	95
D	Closed-loop three-way catalyst (+EGR)	92	350-650	98

a/ Composite NO<sub>x</sub> reduction and fuel consumption index estimates are for an average-weight European car operating under average European driving conditions.

b/ Additional production costs could be more realistically expressed as a percentage of the total car cost. However, since cost estimates are primarily for comparison in relative terms only, the formulation of the original documents has been retained.

c/ Composite NO<sub>x</sub> emission factor = 2.6 g/km.

d/ "EGR" means exhaust gas recirculation.

e/ Based entirely on data for experimental engines. Virtually no production of lean-burn engined vehicles exists.

TABLE 4. ESTIMATED REDUCTIONS IN HC AND CO EMISSIONS  
FROM PETROL-FUELLED PASSENGER CARS  
FOR DIFFERENT TECHNOLOGIES

Standard	HC-reduction (%)	CO-reduction (%)
B	(a) 30-40	50
	(b) 50-60	40-50
	(c) 70-90	70-90
C	90	90
D	90	90

TABLE 5. DEFINITION OF EMISSION STANDARDS

Standard	NO <sub>x</sub> limits (g/kWh)	Comments
I ECE R.49	18	13, mode test
II US-1990	8.0	Transient test
III US-1991	6.7	Transient test

TABLE 6. HEAVY-DUTY DIESEL ENGINE TECHNOLOGIES, EMISSION PERFORMANCE<sup>a/</sup>  
AND COSTS FOR EMISSION STANDARD LEVELS

Standard	Technology	NO <sub>x</sub> reduction estimate(%)	Additional production cost (1984 US\$)
I	Current conventional direct injection diesel engine	-	-
II b/	Turbo-charging + after-cooling + injection timing retard (Combustion chamber and port modification) (Naturally aspirated engines are unlikely to meet this standard)	40	\$115 (\$69 attributable to NO <sub>x</sub> standard) c/
III b/	Further refinements of technologies listed under II together with variable injection timing and use of electronics	50	\$404 (\$68 attributable to NO <sub>x</sub> standard) c/

a/ Deterioration in diesel fuel quality would adversely affect emission and may affect fuel consumption for both heavy and light duty vehicles.

b/ It is still necessary to verify on a large scale the availability of new components.

c/ Particulate control and other considerations account for the balance.

### 3. UNITED NATIONS CONVENTION ON INTERNATIONAL BILLS OF EXCHANGE AND INTERNATIONAL PROMISSORY NOTES.<sup>4</sup> DONE AT NEW YORK ON 9 DECEMBER 1988

#### CHAPTER I. SPHERE OF APPLICATION AND FORM OF THE INSTRUMENT

##### *Article 1*

1. This Convention applies to an international bill of exchange when it contains the heading “International bill of exchange (UNCITRAL Convention)” and also contains in its text the words “International bill of exchange (UNCITRAL Convention).”

2. This Convention applies to an international promissory note when it contains the heading “International promissory note (UNCITRAL Convention)” and also contains in its text the words “International promissory note (UNCITRAL Convention).”

3. This Convention does not apply to cheques.

##### *Article 2*

1. An international bill of exchange is a bill of exchange which specifies at least two of the following places and indicates that any two so specified are situated in different States:

- (a) The place where the bill is drawn;
- (b) The place indicated next to the signature of the drawer;
- (c) The place indicated next to the name of the drawee;
- (d) The place indicated next to the name of the payee;
- (e) The place of payment,

provided that either the place where the bill is drawn or the place of payment is specified on the bill and that such place is situated in a Contracting State.

2. An international promissory note is a promissory note which specifies at least two of the following places and indicates that any two so specified are situated in different States:

- (a) The place where the note is made;
- (b) The place indicated next to the signature of the maker;
- (c) The place indicated next to the name of the payee;
- (d) The place of payment,

provided that the place of payment is specified on the note and that such place is situated in a Contracting State.

3. This Convention does not deal with the question of sanctions that may be imposed under national law in cases where an incorrect or false statement has been made on an instrument in respect of a place referred to in paragraph 1 or 2 of this article. However, any such sanctions shall not affect the validity of the instrument or the application of this Convention.

#### *Article 3*

1. A bill of exchange is a written instrument which:

(a) Contains an unconditional order whereby the drawer directs the drawee to pay a definite sum of money to the payee or to his order;

(b) Is payable on demand or at a definite time;

(c) Is dated;

(d) Is signed by a drawer.

2. A promissory note is a written instrument which:

(a) Contains an unconditional promise whereby the maker undertakes to pay a definite sum of money to the payee or to his order;

(b) Is payable on demand or at a definite time;

(c) Is dated;

(d) Is signed by the maker.

### CHAPTER II. INTERPRETATION

#### SECTION 1. GENERAL PROVISIONS

#### *Article 4*

In the interpretation of this Convention, regard is to be had to its international character and to the need to promote uniformity in its application and the observance of good faith in international transactions.

#### *Article 5*

In this Convention:

(a) “Bill” means an international bill of exchange governed by this Convention;

(b) “Note” means an international promissory note governed by this Convention;

(c) “Instrument” means a bill or a note;

(d) “Drawee” means a person on whom a bill is drawn and who has not accepted it;

(e) “Payee” means a person in whose favour the drawer directs payment to be made or to whom the maker promises to pay;

(f) “Holder” means a person in possession of an instrument in accordance with article 15;

(g) “Protected holder” means a holder who meets the requirements of article 29;

(h) “Guarantor” means any person who undertakes an obligation of guarantee under article 46, whether governed by paragraph 4(b) (“guaranteed”) or paragraph 4(c) (“*aval*”) of article 47;

(i) “Party” means a person who has signed an instrument as drawer, maker, acceptor, endorser or guarantor;

(j) “Maturity” means the time of payment referred to in paragraphs 4, 5, 6 and 7 of article 9;

(k) “Signature” means a handwritten signature, its facsimile or an equivalent authentication effected by any other means; “forged signature” includes a signature by the wrongful use of such means;

(l) “Money” or “currency” includes a monetary unit or account which is established by an intergovernmental institution or by agreement between two or more States, provided that this Convention shall apply without prejudice to the rules of the intergovernmental institution or to the stipulations of the agreement.

#### *Article 6*

For the purposes of this Convention, a person is considered to have knowledge of a fact if he has actual knowledge of that fact or could not have been unaware of its existence.

### SECTION 2. INTERPRETATION OF FORMAL REQUIREMENTS

#### *Article 7*

The sum payable by an instrument is deemed to be a definite sum although the instrument states that it is to be paid:

(a) With interest;

(b) By instalments at successive dates;

(c) By instalments at successive dates with a stipulation in the instrument that upon default in payment of any instalment the unpaid balance becomes due;

(d) According to a rate of exchange indicated in the instrument or to be determined as directed by the instrument; or



(e) In a currency other than the currency in which the sum is expressed in the instrument.

#### *Article 8*

1. If there is a discrepancy between the sum expressed in words and the sum expressed in figures, the sum payable by the instrument is the sum expressed in words.

2. If the sum is expressed more than once in words, and there is a discrepancy, the sum payable is the smaller sum. The same rule applies if the sum is expressed more than once in figures only, and there is a discrepancy.

3. If the sum is expressed in a currency having the same description as that of at least one other State than the State where payment is to be made, as indicated in the instrument, and the specified currency is not identified as the currency of any particular State, the currency is to be considered as the currency of the State where payment is to be made.

4. If an instrument states that the sum is to be paid with interest, without specifying the date from which interest is to run, interest runs from the date of the instrument.

5. A stipulation stating that the sum is to be paid with interest is deemed not to have been written on the instrument unless it indicates the rate at which interest is to be paid.

6. A rate at which interest is to be paid may be expressed either as a definite rate or as a variable rate. For a variable rate to qualify for this purpose, it must vary in relation to one or more reference rates of interest in accordance with provisions stipulated in the instrument and each such reference rate must be published or otherwise available to the public and not be subject, directly or indirectly, to unilateral determination by a person who is named in the instrument at the time the bill is drawn or the note is made, unless the person is named only in the reference rate provisions.

7. If the rate at which interest is to be paid is expressed as a variable rate, it may be stipulated expressly in the instrument that such rate shall not be less than or exceed a specified rate of interest, or that the variations are otherwise limited.

8. If a variable rate does not qualify under paragraph 6 of this article or for any reason it is not possible to determine the numerical value of the variable rate for any period, interest shall be payable for the relevant period at the rate calculated in accordance with paragraph 2 of article 70.

#### *Article 9*

1. An instrument is deemed to be payable on demand:

(a) If it states that it is payable at sight or on demand or on presentment or if it contains words of similar import; or

(b) If no time of payment is expressed.

2. An instrument payable at a definite time which is accepted or endorsed or guaranteed after maturity is an instrument payable on demand as regards the acceptor, the endorser or the guarantor.

3. An instrument is deemed to be payable at a definite time if it states that it is payable:

(a) On a stated date or at a fixed period after a stated date or at a fixed period after the date of the instrument;

(b) At a fixed period after sight;

(c) By instalments at successive dates; or

(d) By instalments at successive dates with the stipulation in the instrument that upon default in payment of any instalment the unpaid balance becomes due.

4. The time of payment of an instrument payable at a fixed period after date is determined by reference to the date of the instrument.

5. The time of payment of a bill payable at a fixed period after sight is determined by the date of acceptance or, if the bill is dishonoured by non-acceptance, by the date of protest or, if protest is dispensed with, by the date of dishonour.

6. The time of payment of an instrument payable on demand is the date on which the instrument is presented for payment.

7. The time of payment of a note payable at a fixed period after sight is determined by the date of the visa signed by the maker on the note or, if his visa is refused, by the date of presentment.

8. If an instrument is drawn, or made, payable one or more months after a stated date or after the date of the instrument or after sight, the instrument is payable on the corresponding date of the month when payment must be made. If there is no corresponding date, the instrument is payable on the last day of that month.

#### *Article 10*

1. A bill may be drawn:

(a) By two or more drawers;

(b) Payable to two or more payees.

2. A note may be made:

(a) By two or more makers;

(b) Payable to two or more payees.

3. If an instrument is payable to two or more payees in the alternative, it is payable to any one of them and any one of them in possession of the instrument may exercise the rights of a holder. In any case the instrument is payable to all of them and the rights of a holder may be exercised only by all of them.

### *Article 11*

A bill may be drawn by the drawer:

- (a) On himself;
- (b) Payable to his order.

## SECTION 3. COMPLETION OF AN INCOMPLETE INSTRUMENT

### *Article 12*

1. An incomplete instrument which satisfies the requirements set out in paragraph 1 of article 1 and bears the signature of the drawer or the acceptance of the drawee, or which satisfies the requirements set out in paragraph 2 of article 1 and paragraph 2(d) of article 3, but which lacks other elements pertaining to one or more of the requirements set out in articles 2 and 3, may be completed, and the instrument so completed is effective as a bill or a note.

2. If such an instrument is completed without authority or otherwise than in accordance with the authority given:

(a) A party who signed the instrument before the completion may invoke such lack of authority as a defence against a holder who had knowledge of such lack of authority when he became a holder;

(b) A party who signed the instrument after the completion is liable according to the terms of the instrument so completed.

## CHAPTER III. TRANSFER

### *Article 13*

An instrument is transferred:

(a) By endorsement and delivery of the instrument by the endorser to the endorsee; or

(b) By mere delivery of the instrument if the last endorsement is in blank.

### *Article 14*

1. An endorsement must be written on the instrument or on a slip affixed thereto (“allonge”). It must be signed.

2. An endorsement may be:

(a) In blank, that is, by a signature alone or by a signature accompanied by a statement to the effect that the instrument is payable to a person in possession of it;

(b) Special, that is, by a signature accompanied by an indication of the person to whom the instrument is payable.

3. A signature alone, other than that of the drawee, is an endorsement only if placed on the back of the instrument.

#### *Article 15*

1. A person is a holder if he is:

(a) The payee in possession of the instrument; or

(b) In possession of an instrument which has been endorsed to him, or on which the last endorsement is in blank, and on which there appears an uninterrupted series of endorsements, even if any endorsement was forged or was signed by an agent without authority.

2. If an endorsement in blank is followed by another endorsement, the person who signed this last endorsement is deemed to be an endorsee by the endorsement in blank.

3. A person is not prevented from being a holder by the fact that the instrument was obtained by him or any previous holder under circumstances, including incapacity or fraud, duress or mistake of any kind, that would give rise to a claim to, or a defence against liability on, the instrument.

#### *Article 16*

The holder of an instrument on which the last endorsement is in blank may:

(a) Further endorse it either by an endorsement in blank or by a special endorsement;

(b) Convert the blank endorsement into a special endorsement by indicating in the endorsement that the instrument is payable to himself or to some other specified person; or

(c) Transfer the instrument in accordance with subparagraph (b) of article 13.

#### *Article 17*

1. If the drawer or the maker has inserted in the instrument such words as “not negotiable”, “not transferable”, “not to order”, “pay (X) only”, or words of similar import, the instrument may not be transferred except for purposes of collection, and any endorsement, even if it does not contain words authorizing the endorsee to collect the instrument, is deemed to be an endorsement for collection.

2. If an endorsement contains the words “not negotiable”, “not transferable”, “not to order”, “pay (X) only”, or words of similar import, the instrument may not be transferred further except for purposes of collection, and any subsequent endorsement, even if it does not contain words authorizing the endorsee to collect the instrument, is deemed to be an endorsement for collection.

### *Article 18*

1. An endorsement must be unconditional.
2. A conditional endorsement transfers the instrument whether or not the condition is fulfilled. The condition is ineffective as to those parties and transferees who are subsequent to the endorsee.

### *Article 19*

An endorsement in respect of a part of the sum due under the instrument is ineffective as an endorsement.

### *Article 20*

If there are two or more endorsements, it is presumed, unless the contrary is proved, that each endorsement was made in the order in which it appears on the instrument.

### *Article 21*

1. If an endorsement contains the words “for collection”, “for deposit”, “value in collection”, “by procuration”, “pay any bank”, or words of similar import authorizing the endorsee to collect the instrument, the endorsee is a holder who:

- (a) May exercise all rights arising out of the instrument;
- (b) May endorse the instrument only for purposes of collection;
- (c) Is subject only to the claims and defences which may be set up against the endorser.

2. The endorser for collection is not liable on the instrument to any subsequent holder.

### *Article 22*

1. If an endorsement contains the words “value in security”, “value in pledge”, or any other words indicating a pledge, the endorsee is a holder who:

- (a) May exercise all rights arising out of the instrument;
- (b) May endorse the instrument only for purposes of collection;
- (c) Is subject only to the claims and defences specified in article 28 or article 30.

2. If such endorsee endorses for collection, he is not liable on the instrument to any subsequent holder.

### *Article 23*

The holder of an instrument may transfer it to a prior party or to the drawee in accordance with article 13; however, if the transferee has previously been a holder of the instrument, no endorsement is required, and any endorsement which would prevent him from qualifying as a holder may be struck out.

#### Article 24

An instrument may be transferred in accordance with article 13 after maturity, except by the drawee, the acceptor or the maker.

#### Article 25

1. If an endorsement is forged, the person whose endorsement is forged, or a party who signed the instrument before the forgery, has the right to recover compensation for any damage that he may have suffered because of the forgery against:

- (a) The forger;
- (b) The person to whom the instrument was directly transferred by the forger;
- (c) A party or the drawee who paid the instrument to the forger directly or through one or more endorsees for collection.

2. However, an endorsee for collection is not liable under paragraph 1 of this article if he is without knowledge of the forgery:

- (a) At the time he pays the principal or advises him of the receipt of payment; or
- (b) At the time he receives payment, if this is later,

unless his lack of knowledge is due to his failure to act in good faith or to exercise reasonable care.

3. Furthermore, a party or the drawee who pays an instrument is not liable under paragraph 1 of this article if, at the time he pays the instrument, he is without knowledge of the forgery, unless his lack of knowledge is due to his failure to act in good faith or to exercise reasonable care.

4. Except as against the forger, the damages recoverable under paragraph 1 of this article may not exceed the amount referred to in article 70 or article 71.

#### Article 26

1. If an endorsement is made by an agent without authority or power to bind his principal in the matter, the principal, or a party who signed the instrument before such endorsement, has the right to recover compensation for any damage that he may have suffered because of such endorsement against:

- (a) The agent;
- (b) The person to whom the instrument was directly transferred by the agent;
- (c) A party or the drawee who paid the instrument to the agent directly or through one or more endorsees for collection.

2. However, an endorsee for collection is not liable under paragraph 1 of this article if he is without knowledge that the endorsement does not bind the principal:

- (a) At the time he pays the principal or advises him of the receipt of payment; or

(b) At the time he receives payment, if this is later, unless his lack of knowledge is due to his failure to act in good faith or to exercise reasonable care.

3. Furthermore, a party or the drawee who pays an instrument is not liable under paragraph 1 of this article if, at the time he pays the instrument, he is without knowledge that the endorsement does not bind the principal, unless his lack of knowledge is due to his failure to act in good faith or to exercise reasonable care.

4. Except as against the agent, the damages recoverable under paragraph 1 of this article may not exceed the amount referred to in article 70 or article 71.

## CHAPTER IV. RIGHTS AND LIABILITIES

### SECTION 1. THE RIGHTS OF A HOLDER AND OF A PROTECTED HOLDER

#### *Article 27*

1. The holder of an instrument has all the rights conferred on him by this Convention against the parties to the instrument.

2. The holder may transfer the instrument in accordance with article 13.

#### *Article 28*

1. A party may set up against a holder who is not a protected holder:

(a) Any defence that may be set up against a protected holder in accordance with paragraph 1 of article 30;

(b) Any defence based on the underlying transaction between himself and the drawer or between himself and his transferee, but only if the holder took the instrument with knowledge of such defence or if he obtained the instrument by fraud or theft or participated at any time in a fraud or theft concerning it;

(c) Any defence arising from the circumstances as a result of which he became a party, but only if the holder took the instrument with knowledge of such defence or if he obtained the instrument by fraud or theft or participated at any time in a fraud or theft concerning it;

(d) Any defence which may be raised against an action in contract between himself and the holder;

(e) Any other defence available under this Convention.

2. The rights to an instrument of a holder who is not a protected holder are subject to any valid claim to the instrument on the part of any person, but only if he took the instrument with knowledge of such claim or if he obtained the instrument by fraud or theft or participated at any time in a fraud or theft concerning it.

3. A holder who takes an instrument after the expiration of the time limit for presentment for payment is subject to any claim to, or defence against liability on, the instrument to which his transferor is subject.

4. A party may not raise as a defence against a holder who is not a protected holder the fact that a third person has a claim to the instrument unless:

- (a) The third person asserted a valid claim to the instrument; or
- (b) The holder acquired the instrument by theft or forged the signature of the payee or an endorsee, or participated in the theft or the forgery.

#### *Article 29*

“Protected holder” means the holder of an instrument which was complete when he took it or which was incomplete within the meaning of paragraph 1 of article 12 and was completed in accordance with authority given, provided that when he became a holder:

- (a) He was without knowledge of a defence against liability on the instrument referred to in paragraphs 1(a), (b), (c) and (e) of article 28;
- (b) He was without knowledge of a valid claim to the instrument of any person;
- (c) He was without knowledge of the fact that it had been dishonoured by non-acceptance or by non-payment;
- (d) The time limit provided by article 55 for presentment of that instrument for payment had not expired;
- (e) He did not obtain the instrument by fraud or theft or participate in a fraud or theft concerning it.

#### *Article 30*

1. A party may not set up against a protected holder any defence except:

- (a) Defences under paragraph 1 of article 33, article 34, paragraph 1 of article 35, paragraph 3 of article 36, paragraph 1 of article 53, paragraph 1 of article 57, paragraph 1 of article 63 and article 84 of this Convention;
- (b) Defences based on the underlying transaction between himself and such holder or arising from any fraudulent act on the part of such holder in obtaining the signature on the instrument of that party;
- (c) Defences based on his incapacity to incur liability on the instrument or the fact that he signed without knowledge that his signature made him a party to the instrument, provided that his lack of knowledge was not due to his negligence and provided that he was fraudulently induced so to sign.

2. The rights to an instrument of a protected holder are not subject to any claim to the instrument on the part of any person, except a valid claim arising from the underlying transaction between himself and the person by whom the claim is raised.

#### *Article 31*

- 1. The transfer of an instrument by a protected holder vests in any subsequent holder the rights to and on the instrument which the protected holder had.
- 2. Those rights are not vested in a subsequent holder if:



has previously been a holder, but not a protected holder.

*Article 32*

Every holder is presumed to be a protected holder unless the contrary is proved.

SECTION 2. LIABILITIES OF THE PARTIES

**A. *General provisions***

*Article 33*

1. Subject to the provisions of articles 34 and 36, a person is not liable on an instrument unless he signs it.

2. A person who signs an instrument in a name which is not his own is liable as if he had signed it in his own name.

*Article 34*

A forged signature on an instrument does not impose any liability on the person whose signature was forged. However, if he consents to be bound by the forged signature or represents that it is his own, he is liable as if he had signed the instrument himself.

*Article 35*

1. If an instrument is materially altered:

(a) A party who signs it after the material alteration is liable according to the terms of the altered text;

(b) A party who signs it before the material alteration is liable according to the terms of the original text. However, if a party makes, authorizes or assents to a material alteration, he is liable according to the terms of the altered text.

2. A signature is presumed to have been placed on the instrument after the material alteration unless the contrary is proved.

3. Any alteration is material which modifies the written undertaking on the instrument of any party in any respect.

*Article 36*

1. An instrument may be signed by an agent.

2. The signature of an agent placed by him on an instrument with the authority of his principal and showing on the instrument that he is signing in a representative capacity for that named principal, or the signature of a principal placed on the instrument by an agent with his authority, imposes liability on the principal and not on the agent.

3. A signature placed on an instrument by a person as agent but who lacks authority to sign or exceeds his authority, or by an agent who has authority to sign but who does not show on the instrument that he is signing in a representative capacity for a named person, or who shows on the instrument that he is signing in a representative capacity but does not name the person whom he represents, imposes liability on the person signing and not on the person whom he purports to represent.

4. The question whether a signature was placed on the instrument in a representative capacity may be determined only by reference to what appears on the instrument.

5. A person who is liable pursuant to paragraph 3 of this article and who pays the instrument has the same rights as the person for whom he purported to act would have had if that person had paid the instrument.

#### *Article 37*

The order to pay contained in a bill does not of itself operate as an assignment to the payee of funds made available for payment by the drawer with the drawee.

### **B. *The drawer***

#### *Article 38*

1. The drawer engages that upon dishonour of the bill by non-acceptance or by non-payment, and upon any necessary protest, he will pay the bill to the holder, or to any endorser or any endorser's guarantor who takes up and pays the bill.

2. The drawer may exclude or limit his own liability for acceptance or for payment by an express stipulation in the bill. Such a stipulation is effective only with respect to the drawer. A stipulation excluding or limiting liability for payment is effective only if another party is or becomes liable on the bill.

### **C. *The maker***

#### *Article 39*

1. The maker engages that he will pay the note in accordance with its terms to the holder, or to any party who takes up and pays the note.

2. The maker may not exclude or limit his own liability by a stipulation in the note. Any such stipulation is ineffective.

### **D. *The drawee and the acceptor***

#### *Article 40*

1. The drawee is not liable on a bill until he accepts it.

2. The acceptor engages that he will pay the bill in accordance with the terms of his acceptance to the holder, or to any party who takes up and pays the bill.

*Article 41*

1. An acceptance must be written on the bill and may be effected:

(a) By the signature of the drawee accompanied by the word “accepted” or by words of similar import; or

(b) By the signature alone of the drawee.

2. An acceptance may be written on the front or on the back of the bill.

*Article 42*

1. An incomplete bill which satisfies the requirements set out in paragraph 1 of article 1 may be accepted by the drawee before it has been signed by the drawer, or while otherwise incomplete.

2. A bill may be accepted before, at or after maturity, or after it has been dishonoured by non-acceptance or by non-payment.

3. If a bill drawn payable at a fixed period after sight, or a bill which must be presented for acceptance before a specified date, is accepted, the acceptor must indicate the date of his acceptance; failing such indication by the acceptor, the drawer or the holder may insert the date of acceptance.

4. If a bill drawn payable at a fixed period after sight is dishonoured by non-acceptance and the drawee subsequently accepts it, the holder is entitled to have the acceptance dated as of the date on which the bill was dishonoured.

*Article 43*

1. An acceptance must be unqualified. An acceptance is qualified if it is conditional or varies the terms of the bill.

2. If the drawee stipulates in the bill that his acceptance is subject to qualification:

(a) He is nevertheless bound according to the terms of his qualified acceptance;

(b) The bill is dishonoured by non-acceptance.

3. An acceptance relating to only a part of the sum payable is a qualified acceptance. If the holder takes such an acceptance, the bill is dishonoured by non-acceptance only as to the remaining part.

4. An acceptance indicating that payment will be made at a particular address or by a particular agent is not a qualified acceptance, provided that:

(a) The place in which payment is to be made is not changed;

(b) The bill is not drawn payable by another agent.

## **E. *The endorser***

### *Article 44*

1. The endorser engages that upon dishonour of the instrument by non-acceptance or by non-payment, and upon any necessary protest, he will pay the instrument to the holder, or to any subsequent endorser or any endorser's guarantor who takes up and pays the instrument.

2. An endorser may exclude or limit his own liability by an express stipulation in the instrument. Such a stipulation is effective only with respect to that endorser.

## **F. *The transferor by endorsement or by mere delivery***

### *Article 45*

1. Unless otherwise agreed, a person who transfers an instrument, by endorsement and delivery or by mere delivery, represents to the holder to whom he transfers the instrument that:

- (a) The instrument does not bear any forged or unauthorized signature;
- (b) The instrument has not been materially altered;
- (c) At the time of transfer, he has no knowledge of any fact which would impair the right of the transferee to payment of the instrument against the acceptor of a bill or, in the case of an unaccepted bill, the drawer, or against the maker of a note.

2. Liability of the transferor under paragraph 1 of this article is incurred only if the transferee took the instrument without knowledge of the matter giving rise to such liability.

3. If the transferor is liable under paragraph 1 of this article, the transferee may recover, even before maturity, the amount paid by him to the transferor, with interest calculated in accordance with article 70, against return of the instrument.

## **G. *The guarantor***

### *Article 46*

1. Payment of an instrument, whether or not it has been accepted, may be guaranteed, as to the whole or part of its amount, for the account of a party or the drawee. A guarantee may be given by any person, who may or may not already be a party.

2. A guarantee must be written on the instrument or on a slip affixed thereto ("*allonge*").

3. A guarantee is expressed by the words "guaranteed", "*aval*", "good as *aval*" or words of similar import, accompanied by the signature of the guaran-

tor. For the purposes of this Convention, the words “prior endorsements guaranteed” or words of similar import do not constitute a guarantee.

4. A guarantee may be effected by a signature alone on the front of the instrument. A signature alone on the front of the instrument, other than that of the maker, the drawer or the drawee, is a guarantee.

5. A guarantor may specify the person for whom he has become guarantor. In the absence of such specification, the person for whom he has become guarantor is the acceptor or the drawee in the case of a bill, and the maker in the case of a note.

6. A guarantor may not raise as a defence to his liability the fact that he signed the instrument before it was signed by the person for whom he is a guarantor, or while the instrument was incomplete.

#### *Article 47*

1. The liability of a guarantor on the instrument is of the same nature as that of the party for whom he has become guarantor.

2. If the person for whom he has become guarantor is the drawee, the guarantor engages:

(a) To pay the bill at maturity to the holder, or to any party who takes up and pays the bill;

(b) If the bill is payable at a definite time, upon dishonour by non-acceptance and upon any necessary protest, to pay it to the holder, or to any party who takes up and pays the bill.

3. In respect of defences that are personal to himself, a guarantor may set up:

(a) Against a holder who is not a protected holder only those defences which he may set up under paragraphs 1, 3 and 4 of article 28;

(b) Against a protected holder only those defences which he may set up under paragraph 1 of article 30.

4. In respect of defences that may be raised by the person for whom he has become a guarantor:

(a) A guarantor may set up against a holder who is not a protected holder only those defences which the person for whom he has become a guarantor may set up against such holder under paragraphs 1, 3 and 4 of article 28;

(b) A guarantor who expresses his guarantee by the words “guaranteed”, “payment guaranteed” or “collection guaranteed”, or words of similar import, may set up against a protected holder only those defences which the person for whom he has become a guarantor may set up against a protected holder under paragraph 1 of article 30;

(c) A guarantor who expresses his guarantee by the words “*aval*” or “good as *aval*” may set up against a protected holder only;

- (i) The defence, under paragraph 1(b) of article 30, that the protected holder obtained the signature on the instrument of the person for whom he has become a guarantor by a fraudulent act;
- (ii) The defence, under article 53 or article 57, that the instrument was not presented for acceptance or for payment;
- (iii) The defence, under article 63, that the instrument was not duly protested for non-acceptance or for non-payment;
- (iv) The defence, under article 84, that a right of action may no longer be exercised against the person for whom he has become guarantor;

(d) A guarantor who is not a bank or other financial institution and who expresses his guarantee by a signature alone may set up against a protected holder only the defences referred to in subparagraph (b) of this paragraph;

(e) A guarantor which is a bank or other financial institution and which expresses its guarantee by a signature alone may set up against a protected holder only the defences referred to in subparagraph (c) of this paragraph.

#### *Article 48*

1. Payment of an instrument by the guarantor in accordance with article 72 discharges the party for whom he became guarantor of his liability on the instrument to the extent of the amount paid.

2. The guarantor who pays the instrument may recover from the party for whom he has become guarantor and from the parties who are liable on it to that party the amount paid and any interest.

### CHAPTER V. PRESENTMENT, DISHONOR BY NON-ACCEPTANCE OR NON-PAYMENT, AND RECOURSE

#### SECTION 1. PRESENTMENT FOR ACCEPTANCE AND DISHONOUR BY NON-ACCEPTANCE

#### *Article 49*

- 1. A bill may be presented for acceptance.
- 2. A bill must be presented for acceptance:

(a) If the drawer has stipulated in the bill that it must be presented for acceptance;

(b) If the bill is payable at a fixed period after sight; or

(c) If the bill is payable elsewhere than at the residence or place of business of the drawee, unless it is payable on demand.

#### *Article 50*

1. The drawer may stipulate in the bill that it must not be presented for acceptance before a specified date or before the occurrence of a specified event. Except where a bill must be presented for acceptance under paragraph 2(b) or (c) of article 49, the drawer may stipulate that it must not be presented for acceptance.

2. If a bill is presented for acceptance notwithstanding a stipulation permitted under paragraph 1 of this article and acceptance is refused, the bill is not thereby dishonoured.

3. If the drawee accepts a bill notwithstanding a stipulation that it must not be presented for acceptance, the acceptance is effective.

#### *Article 51*

A bill is duly presented for acceptance if it is presented in accordance with the following rules:

(a) The holder must present the bill to the drawee on a business day at a reasonable hour;

(b) Presentment for acceptance may be made to a person or authority other than the drawee if that person or authority is entitled under the applicable law to accept the bill;

(c) If a bill is payable on a fixed date, presentment for acceptance must be made before or on that date;

(d) A bill payable on demand or at a fixed period after sight must be presented for acceptance within one year of its date;

(e) A bill in which the drawer has stated a date or time limit for presentment for acceptance must be presented on the stated date or within the stated time limit.

#### *Article 52*

1. A necessary or optional presentment for acceptance is dispensed with if:

(a) The drawee is dead, or no longer has the power freely to deal with his assets by reason of his insolvency, or is a fictitious person, or is a person not having capacity to incur liability on the instrument as an acceptor; or

(b) The drawee is a corporation, partnership, association or other legal entity which has ceased to exist.

2. A necessary presentment for acceptance is dispensed with if:

(a) A bill is payable on a fixed date, and presentment for acceptance cannot be effected before or on that date due to circumstances which are beyond the control of the holder and which he could neither avoid nor overcome; or

(b) A bill is payable at a fixed period after sight, and presentment for acceptance cannot be effected within one year of its date due to circumstances which are beyond the control of the holder and which he could neither avoid nor overcome.

3. Subject to paragraphs 1 and 2 of this article, delay in a necessary presentment for acceptance is excused, but presentment for acceptance is not dispensed with, if the bill is drawn with a stipulation that it must be presented for acceptance within a stated time limit, and the delay in the presentment for acceptance is caused by circumstances which are beyond the control of the holder and which he could neither avoid nor overcome. When the cause of the delay ceases to operate, presentment must be made with reasonable diligence.

### *Article 53*

1. If a bill which must be presented for acceptance is not so presented, the drawer, the endorsers and their guarantors are not liable on the bill.
2. Failure to present a bill for acceptance does not discharge the guarantor of the drawee of liability on the bill.

### *Article 54*

1. A bill is considered to be dishonoured by non-acceptance:
  - (a) If the drawee, upon due presentment, expressly refuses to accept the bill or acceptance cannot be obtained with reasonable diligence or if the holder cannot obtain the acceptance to which he is entitled under this Convention;
  - (b) If presentment for acceptance is dispensed with pursuant to article 52, unless the bill is in fact accepted.
2. (a) If a bill is dishonoured by non-acceptance in accordance with paragraph 1(a) of this article, the holder may exercise an immediate right of recourse against the drawer, the endorsers and their guarantors, subject to the provisions of article 59.
  - (b) If a bill is dishonoured by non-acceptance in accordance with paragraph 1(b) of this article, the holder may exercise an immediate right of recourse against the drawer, the endorsers and their guarantors.
  - (c) If a bill is dishonoured by non-acceptance in accordance with paragraph 1 of this article, the holder may claim payment from the guarantor of the drawee upon any necessary protest.
3. If a bill payable on demand is presented for acceptance, but acceptance is refused, it is not considered to be dishonoured by non-acceptance.

## SECTION 2. PRESENTMENT FOR PAYMENT AND DISHONOUR BY NON-PAYMENT

### *Article 55*

An instrument is duly presented for payment if it is presented in accordance with the following rules:

- (a) The holder must present the instrument to the drawee or to the acceptor or to the maker on a business day at a reasonable hour;
- (b) A note signed by two or more makers may be presented to any one of them, unless the note clearly indicates otherwise;
- (c) If the drawee or the acceptor or the maker is dead, presentment must be made to the persons who under the applicable law are his heirs or the persons entitled to administer his estate;
- (d) Presentment for payment may be made to a person or authority other than the drawee, the acceptor or the maker if that person or authority is entitled under the applicable law to pay the instrument;



(e) An instrument which is not payable on demand must be presented for payment on the date of maturity or on one of the two business days which follow;

(f) An instrument which is payable on demand must be presented for payment within one year of its date;

(g) An instrument must be presented for payment:

- (i) At the place of payment specified on the instrument;
- (ii) If no place of payment is specified, at the address of the drawee or the acceptor or the maker indicated in the instrument; or
- (iii) If no place of payment is specified and the address of the drawee or the acceptor or the maker is not indicated, at the principal place of business or habitual residence of the drawee or the acceptor or the maker;

(h) An instrument which is presented at a clearing-house is duly presented for payment if the law of the place where the clearing house is located or the rules or customs of that clearing-house so provide.

#### *Article 56*

1. Delay in making presentment for payment is excused if the delay is caused by circumstances which are beyond the control of the holder and which he could neither avoid nor overcome. When the cause of the delay ceases to operate, presentment must be made with reasonable diligence.

2. Presentment for payment is dispensed with:

(a) If the drawer, an endorser or a guarantor has expressly waived presentment; such waiver:

- (i) If made on the instrument by the drawer, binds any subsequent party and benefits any holder;
- (ii) If made on the instrument by a party other than the drawer, binds only that party but benefits any holder;
- (iii) If made outside the instrument, binds only the party making it and benefits only a holder in whose favour it was made;

(b) If an instrument is not payable on demand, and the cause of delay in making presentment referred to in paragraph 1 of this article continues to operate beyond thirty days after maturity;

(c) If an instrument is payable on demand, and the cause of delay in making presentment referred to in paragraph 1 of this article continues to operate beyond thirty days after the expiration of the time limit for presentment for payment;

(d) If the drawee, the maker or the acceptor no longer has the power freely to deal with his assets by reason of his insolvency, or is a fictitious person or a

person not having capacity to make payment, or if the drawee, the maker or the acceptor is a corporation, partnership, association or other legal entity which has ceased to exist;

(e) If there is no place at which the instrument must be presented in accordance with subparagraph (g) of article 55.

3. Presentment for payment is also dispensed with as regards a bill, if the bill has been protested for dishonour by non-acceptance.

#### *Article 57*

1. If an instrument is not duly presented for payment, the drawer, the endorsers and their guarantors are not liable on it.

2. Failure to present an instrument for payment does not discharge the acceptor, the maker and their guarantors or the guarantor of the drawee of liability on it.

#### *Article 58*

1. An instrument is considered to be dishonoured by non-payment:

(a) If payment is refused upon due presentment or if the holder cannot obtain the payment to which he is entitled under this Convention;

(b) If presentment for payment is dispensed with pursuant to paragraph 2 of article 56 and the instrument is unpaid at maturity.

2. If a bill is dishonoured by non-payment, the holder may, subject to the provisions of article 59, exercise a right of recourse against the drawer, the endorsers and their guarantors.

3. If a note is dishonoured by non-payment, the holder may, subject to the provisions of article 59, exercise a right of recourse against the endorsers and their guarantors.

### SECTION 3. RECOURSE

#### *Article 59*

If an instrument is dishonoured by non-acceptance or by non-payment, the holder may exercise a right of recourse only after the instrument has been duly protested for dishonour in accordance with the provisions of articles 60 to 62.

#### **A. Protest**

#### *Article 60*

1. A protest is a statement of dishonour drawn up at the place where the instrument has been dishonoured and signed and dated by a person authorized in that respect by the law of that place. The statement must specify:

(a) The person at whose request the instrument is protested;

(b) The place of protest;

(c) The demand made and the answer given, if any, or the fact that the drawee or the acceptor or the maker could not be found.

2. A protest may be made:

(a) On the instrument or on a slip affixed thereto (“*allonge*”); or

(b) As a separate document, in which case it must clearly identify the instrument that has been dishonoured.

3. Unless the instrument stipulates that protest must be made, a protest may be replaced by a declaration written on the instrument and signed and dated by the drawee or the acceptor or the maker, or, in the case of an instrument domiciled with a named person for payment, by that named person; the declaration must be to the effect that acceptance or payment is refused.

4. A declaration made in accordance with paragraph 3 of this article is a protest for the purpose of this Convention.

#### *Article 61*

Protest for dishonour of an instrument by non-acceptance or by non-payment must be made on the day on which the instrument is dishonoured or on one of the four business days which follow.

#### *Article 62*

1. Delay in protesting an instrument for dishonour is excused if the delay is caused by circumstances which are beyond the control of the holder and which he could neither avoid nor overcome. When the cause of the delay ceases to operate, protest must be made with reasonable diligence.

2. Protest for dishonour by non-acceptance or by non-payment is dispensed with:

(a) If the drawer, an endorser or a guarantor has expressly waived protest; such waiver:

(i) If made on the instrument by the drawer, binds any subsequent party and benefits any holder;

(ii) If made on the instrument by a party other than the drawer, binds only that party but benefits any holder;

(iii) If made outside the instrument, binds only the party making it and benefits only a holder in whose favour it was made;

(b) If the cause of delay in making protest referred to in paragraph 1 of this article continues to operate beyond thirty days after the date of dishonour;

(c) As regards the drawer of a bill, if the drawer and the drawee or the acceptor are the same person;

(d) If presentment for acceptance or for payment is dispensed with in accordance with article 52 or paragraph 2 of article 56.

*Article 63*

1. If an instrument which must be protested for non-acceptance or for non-payment is not duly protested, the drawer, the endorsers and their guarantors are not liable on it.

2. Failure to protest an instrument does not discharge the acceptor, the maker and their guarantors or the guarantor of the drawee of liability on it.

**B. Notice of dishonour**

*Article 64*

1. The holder, upon dishonour of an instrument by non-acceptance or by non-payment, must give notice of such dishonour:

(a) To the drawer and the last endorser;

(b) To all other endorsers and guarantors whose addresses the holder can ascertain on the basis of information contained in the instrument.

2. An endorser or a guarantor who receives notice must give notice of dishonour to the last party preceding him and liable on the instrument.

3. Notice of dishonour operates for the benefit of any party who has a right of recourse on the instrument against the party notified.

*Article 65*

1. Notice of dishonour may be given in any form whatever and in any terms which identify the instrument and state that it has been dishonoured. The return of the dishonoured instrument is sufficient notice, provided it is accompanied by a statement indicating that it has been dishonoured.

2. Notice of dishonour is duly given if it is communicated or sent to the party to be notified by means appropriate in the circumstances, whether or not it is received by that party.

3. The burden of proving that notice has been duly given rests upon the person who is required to give such notice.

*Article 66*

Notice of dishonour must be given within the two business days which follow:

(a) The day of protest or, if protest is dispensed with, the day of dishonour;

or

(b) The day of receipt of notice of dishonour.

*Article 67*

1. Delay in giving notice of dishonour is excused if the delay is caused by circumstances which are beyond the control of the person required to give notice, and which he could neither avoid nor overcome. When the cause of the

delay ceases to operate, notice must be given with reasonable diligence.

2. Notice of dishonour is dispensed with:

(a) If, after the exercise of reasonable diligence, notice cannot be given;

(b) If the drawer, an endorser or a guarantor has expressly waived notice of dishonour; such waiver:

(i) If made on the instrument by the drawer, binds any subsequent party and benefits any holder;

(ii) If made on the instrument by a party other than the drawer, binds only that party but benefits any holder;

(iii) If made outside the instrument, binds only the party making it and benefits only a holder in whose favour it was made;

(c) As regards the drawer of the bill, if the drawer and the drawee or the acceptor are the same person.

#### *Article 68*

If a person who is required to give notice of dishonour fails to give it to a party who is entitled to receive it, he is liable for any damages which that party may suffer from such failure, provided that such damages do not exceed the amount referred to in article 70 or article 71.

### SECTION 4. AMOUNT PAYABLE

#### *Article 69*

1. The holder may exercise his rights on the instrument against any one party, or several or all parties, liable on it and is not obliged to observe the order in which the parties have become bound. Any party who takes up and pays the instrument may exercise his rights in the same manner against parties liable to him.

2. Proceedings against a party do not preclude proceedings against any other party, whether or not subsequent to the party originally proceeded against.

#### *Article 70*

1. The holder may recover from any party liable:

(a) At maturity: the amount of the instrument with interest, if interest has been stipulated for;

(b) After maturity:

(i) The amount of the instrument with interest, if interest has been stipulated for, to the date of maturity;

- (ii) If interest has been stipulated to be paid after maturity, interest at the rate stipulated, or, in the absence of such stipulation, interest at the rate specified in paragraph 2 of this article, calculated from the date of presentment on the sum specified in subparagraph (b)(i) of this paragraph;
  - (iii) Any expenses of protest and of the notices given by him;
- (c) Before maturity:
- (i) The amount of the instrument with interest, if interest has been stipulated for, to the date of payment; or, if no interest has been stipulated for, subject to a discount from the date of payment to the date of maturity, calculated in accordance with paragraph 4 of this article;
  - (ii) Any expenses of protest and of the notices given by him.

2. The rate of interest shall be the rate that would be recoverable in legal proceedings taken in the jurisdiction where the instrument is payable.

3. Nothing in paragraph 2 of this article prevents a court from awarding damages or compensation for additional loss caused to the holder by reason of delay in payment.

4. The discount shall be at the official rate (discount rate) or other similar appropriate rate effective on the date when recourse is exercised at the place where the holder has his principal place of business, or, if he does not have a place of business, his habitual residence, or, if there is no such rate, then at such rate as is reasonable in the circumstances.

#### *Article 71*

A party who pays an instrument and is thereby discharged in whole or in part of his liability on the instrument may recover from the parties liable to him:

- (a) The entire sum which he has paid;
- (b) Interest on that sum at the rate specified in paragraph 2 of article 70, from the date on which he made payment;
- (c) Any expenses of the notices given by him.

### CHAPTER VI. DISCHARGE

#### SECTION 1 DISCHARGE BY PAYMENT

#### *Article 72*

1. A party is discharged of liability on the instrument when he pays the holder, or a party subsequent to himself who has paid the instrument and is in possession of it, the amount due pursuant to article 70 or article 71:

- (a) At or after maturity; or
- (b) Before maturity, upon dishonour by non-acceptance.

2. Payment before maturity other than under paragraph 1(b) of this article does not discharge the party making the payment of his liability on the instrument except in respect of the person to whom payment was made.

3. A party is not discharged of liability if he pays a holder who is not a protected holder, or a party who has taken up and paid the instrument, and knows at the time of payment that the holder or that party acquired the instrument by theft or forged the signature of the payee or an endorsee, or participated in the theft or the forgery.

4. (a) A person receiving payment of an instrument must, unless agreed otherwise, deliver:

- (i) To the drawee making such payment, the instrument;
- (ii) To any other person making such payment, the instrument, a receipted account, and any protest.

(b) In the case of an instrument payable by instalments at successive dates, the drawee or a party making a payment, other than payment of the last instalment, may require that mention of such payment be made on the instrument or on a slip affixed thereto (“*allonge*”) and that a receipt therefor be given to him.

(c) If an instrument payable by instalments at successive dates is dishonoured by non-acceptance or by non-payment as to any of its instalments and a party, upon dishonour, pays the instalment, the holder who receives such payment must give the party a certified copy of the instrument and any necessary authenticated protest in order to enable such party to exercise a right on the instrument.

(d) The person from whom payment is demanded may withhold payment if the person demanding payment does not deliver the instrument to him. Withholding payment in these circumstances does not constitute dishonour by non-payment under article 58.

(e) If payment is made but the person paying, other than the drawee, fails to obtain the instrument, such person is discharged but the discharge cannot be set up as a defence against a protected holder to whom the instrument has been subsequently transferred.

### *Article 73*

1. The holder is not obliged to take partial payment.

2. If the holder who is offered partial payment does not take it, the instrument is dishonoured by non-payment.

3. If the holder takes partial payment from the drawee, the guarantor of the drawee, or the acceptor or the maker:

(a) The guarantor of the drawee, or the acceptor or the maker is discharged of his liability on the instrument to the extent of the amount paid;

(b) The instrument is to be considered as dishonoured by non-payment as to the amount unpaid.

4. If the holder takes partial payment from a party to the instrument other than the acceptor, the maker or the guarantor of the drawee:

(a) The party making payment is discharged of his liability on the instrument to the extent of the amount paid;

(b) The holder must give such party a certified copy of the instrument and any necessary authenticated protest in order to enable such party to exercise a right on the instrument.

5. The drawee or a party making partial payment may require that mention of such payment be made on the instrument and that a receipt therefor be given to him.

6. If the balance is paid, the person who receives it and who is in possession of the instrument must deliver to the payor the receipted instrument and any authenticated protest.

#### *Article 74*

1. The holder may refuse to take payment at a place other than the place where the instrument was presented for payment in accordance with article 55.

2. In such case if payment is not made at the place where the instrument was presented for payment in accordance with article 55, the instrument is considered to be dishonoured by non-payment.

#### *Article 75*

1. An instrument must be paid in the currency in which the sum payable is expressed.

2. If the sum payable is expressed in a monetary unit of account within the meaning of subparagraph (I) of article 5 and the monetary unit of account is transferable between the person making payment and the person receiving it, then, unless the instrument specifies a currency of payment, payment shall be made by transfer of monetary units of account. If the monetary unit of account is not transferable between those persons, payment shall be made in the currency specified in the instrument or, if no such currency is specified, in the currency of the place of payment.

3. The drawer or the maker may indicate in the instrument that it must be paid in a specified currency other than the currency in which the sum payable is expressed. In that case:

(a) The instrument must be paid in the currency so specified;

(b) The amount payable is to be calculated according to the rate of exchange indicated in the instrument. Failing such indication, the amount payable is to be calculated according to the rate of exchange for sight drafts (or, if there is no such rate, according to the appropriate established rate of exchange) on the date of maturity:

(i) Ruling at the place where the instrument must be presented for payment in accordance with subparagraph (g) of article 55, if the specified currency is that of that place (local currency); or



- (ii) If the specified currency is not that of that place, according to the usages of the place where the instrument must be presented for payment in accordance with subparagraph (g) of article 55;
- (c) If such an instrument is dishonoured by non-acceptance, the amount payable is to be calculated:
  - (i) If the rate of exchange is indicated in the instrument, according to that rate;
  - (ii) If no rate of exchange is indicated in the instrument, at the option of the holder, according to the rate of exchange ruling on the date of dishonour or on the date of actual payment;
- (d) If such an instrument is dishonoured by non-payment, the amount payable is to be calculated:
  - (i) If the rate of exchange is indicated in the instrument, according to that rate;
  - (ii) If no rate of exchange is indicated in the instrument, at the option of the holder, according to the rate of exchange ruling on the date of maturity or on the date of actual payment.

4. Nothing in this article prevents a court from awarding damages for loss caused to the holder by reason of fluctuations in rates of exchange if such loss is caused by dishonour for non-acceptance or by non-payment.

5. The rate of exchange ruling at a certain date is the rate of exchange ruling, at the option of the holder, at the place where the instrument must be presented for payment in accordance with subparagraph (g) of article 55 or at the place of actual payment.

#### *Article 76*

1. Nothing in this Convention prevents a Contracting State from enforcing exchange control regulations applicable in its territory and its provisions relating to the protection of its currency, including regulations which it is bound to apply by virtue of international agreements to which it is a party.

2. (a) If, by virtue of the application of paragraph 1 of this article, an instrument drawn in a currency which is not that of the place of payment must be paid in local currency, the amount payable is to be calculated according to the rate of exchange for sight drafts (or, if there is no such rate, according to the appropriate established rate of exchange) on the date of presentment ruling at the place where the instrument must be presented for payment in accordance with subparagraph (g) of article 55.

- (b) (i) If such an instrument is dishonoured by non-acceptance, the amount payable is to be calculated, at the option of the holder, at the rate of exchange ruling on the date of dishonour or on the date of actual payment.

- (ii) If such an instrument is dishonoured by non-payment, the amount is to be calculated, at the option of the holder, according to the rate of exchange ruling on the date of presentment or on the date of actual payment.
- (iii) Paragraphs 4 and 5 of article 75 are applicable where appropriate.

## SECTION 2. DISCHARGE OF OTHER PARTIES

### *Article 77*

1. If a party is discharged in whole or in part of his liability on the instrument, any party who has a right on the instrument against him is discharged to the same extent.

2. Payment by the drawee of the whole or a part of the amount of a bill to the holder, or to any party who takes up and pays the bill, discharges all parties of their liability to the same extent, except where the drawee pays a holder who is not a protected holder, or a party who has taken up and paid the bill, and knows at the time of payment that the holder or that party acquired the bill by theft or forged the signature of the payee or an endorsee, or participated in the theft or the forgery.

## CHAPTER VII. LOST INSTRUMENTS

### *Article 78*

1. If an instrument is lost, whether by destruction, theft or otherwise, the person who lost the instrument has, subject to the provisions of paragraph 2 of this article, the same right to payment which he would have had if he had been in possession of the instrument. The party from whom payment is claimed cannot set up as a defence against liability on the instrument the fact that the person claiming payment is not in possession of the instrument.

2. (a) The person claiming payment of a lost instrument must state in writing to the party from whom he claims payment:

- (i) The elements of the lost instrument pertaining to the requirements set forth in paragraph 1 or paragraph 2 of articles 1, 2, and 3; for this purpose the person claiming payment of the lost instrument may present to that party a copy of that instrument;
- (ii) The facts showing that, if he had been in possession of the instrument, he would have had a right to payment from the party from whom payment is claimed;
- (iii) The facts which prevent production of the instrument.

(b) The party from whom payment of a lost instrument is claimed may require the person claiming payment to give security in order to indemnify him

for any loss which he may suffer by reason of the subsequent payment of the lost instrument.

(c) The nature of the security and its terms are to be determined by agreement between the person claiming payment and the party from whom payment is claimed. Failing such an agreement, the court may determine whether security is called for and, if so, the nature of the security and its terms.

(d) If the security cannot be given, the court may order the party from whom payment is claimed to deposit the sum of the lost instrument, and any interest and expenses which may be claimed under article 70 or article 71, with the court or any other competent authority or institution, and may determine the duration of such deposit. Such deposit is to be considered as payment to the person claiming payment.

#### *Article 79*

1. A party who has paid a lost instrument and to whom the instrument is subsequently presented for payment by another person must give notice of such presentment to the person whom he paid.

2. Such notice must be given on the day the instrument is presented or on one of the two business days which follow and must state the name of the person presenting the instrument and the date and place of presentment.

3. Failure to give notice renders the party who has paid the lost instrument liable for any damages which the person whom he paid may suffer from such failure, provided that the damages do not exceed the amount referred to in article 70 or article 71.

4. Delay in giving notice is excused when the delay is caused by circumstances which are beyond the control of the person who has paid the lost instrument and which he could neither avoid nor overcome. When the cause of the delay ceases to operate, notice must be given with reasonable diligence.

5. Notice is dispensed with when the cause of delay in giving notice continues to operate beyond thirty days after the last day on which it should have been given.

#### *Article 80*

1. A party who has paid a lost instrument in accordance with the provisions of article 78 and who is subsequently required to, and does, pay the instrument, or who, by reason of the loss of the instrument, then loses his right to recover from any party liable to him, has the right:

(a) If security was given, to realize the security; or

(b) If an amount was deposited with the court or other competent authority or institution, to reclaim the amount so deposited.

2. The person who has given security in accordance with the provisions of paragraph 2(b) of article 78 is entitled to obtain release of the security when the party for whose benefit the security was given is no longer at risk to suffer loss because of the fact that the instrument is lost.

### *Article 81*

For the purpose of making protest for dishonour by non-payment, a person claiming payment of a lost instrument may use a written statement that satisfies the requirements of paragraph 2(a) of article 78.

### *Article 82*

A person receiving payment of a lost instrument in accordance with article 78 must deliver to the party paying the written statement required under paragraph 2(a) of article 78, received by him, and any protest and a receipted account.

### *Article 83*

1. A party who pays a lost instrument in accordance with article 78 has the same rights which he would have had if he had been in possession of the instrument.

2. Such party may exercise his rights only if he is in possession of the received written statement referred to in article 82.

## CHAPTER VIII. LIMITATION (PRESCRIPTION)

### *Article 84*

1. A right of action arising on an instrument may no longer be exercised after four years have elapsed:

(a) Against the maker, or his guarantor, of a note payable on demand, from the date of the note;

(b) Against the acceptor or the maker or their guarantor of an instrument payable at a definite time, from the date of maturity;

(c) Against the guarantor of the drawee of a bill payable at a definite time, from the date of maturity or, if the bill is dishonoured by non-acceptance, from the date of protest for dishonour or, where protest is dispensed with, from the date of dishonour;

(d) Against the acceptor of a bill payable on demand or his guarantor, from the date on which it was accepted or, if no such date is shown, from the date of the bill;

(e) Against the guarantor of the drawee of a bill payable on demand, from the date on which he signed the bill or, if no such date is shown, from the date of the bill;

(f) Against the drawer or an endorser or their guarantor, from the date of protest for dishonour by non-acceptance or by non-payment or, where protest is dispensed with, from the date of dishonour.

2. A party who pays the instrument in accordance with article 70 or article 71 may exercise his right of action against a party liable to him within one year from the date on which he paid the instrument.

## CHAPTER IX. FINAL PROVISIONS

### *Article 85*

The Secretary-General of the United Nations is hereby designated as the Depositary for this Convention.

### *Article 86*

1. This Convention is open for signature by all States at the Headquarters of the United Nations, New York, until 30 June 1990.

2. This Convention is subject to ratification, acceptance or approval by the signatory States.

3. This Convention is open for accession by all States which are not signatory States as from the date it is open for signature.

4. Instruments of ratification, acceptance, approval and accession are to be deposited with the Secretary-General of the United Nations.

### *Article 87*

1. If a Contracting State has two or more territorial units in which, according to its constitution, different systems of law are applicable in relation to the matters dealt with in this Convention, it may, at the time of signature, ratification, acceptance, approval or accession, declare that this Convention is to extend to all its territorial units or only to one or more of them, and may amend its declaration by submitting another declaration at any time.

2. These declarations are to be notified to the Depositary and are to state expressly the territorial units to which the Convention extends.

3. If a Contracting State makes no declaration under paragraph 1 of this article, the Convention is to extend to all territorial units of that State.

### *Article 88*

1. Any State may declare at the time of signature, ratification, acceptance, approval or accession that its courts will apply the Convention only if both the place indicated in the instrument where the bill is drawn, or the note is made, and the place of payment indicated in the instrument are situated in Contracting States.

2. No other reservations are permitted.

### *Article 89*

1. This Convention enters into force on the first day of the month following the expiration of twelve months after the date of deposit of the tenth instrument of ratification, acceptance, approval or accession.

2. When a State ratifies, accepts, approves or accedes to this Convention after the deposit of the tenth instrument of ratification, acceptance, approval or

accession, this Convention enters into force in respect of that State on the first day of the month following the expiration of twelve months after the date of deposit of its instrument of ratification, acceptance, approval or accession.

*Article 90*

1. A Contracting State may denounce this Convention by a formal notification in writing addressed to the Depositary.

2. The denunciation takes effect on the first day of the month following the expiration of six months after the notification is received by the Depositary. Where a longer period for the denunciation to take effect is specified in the notification, the denunciation takes effect upon the expiration of such longer period after the notification is received by the Depositary. The Convention remains applicable to instruments drawn or made before the date at which the denunciation takes effect.

DONE at New York, this ninth day of December, one thousand nine hundred and eighty-eight in a single original, of which the Arabic, Chinese, English, French, Russian and Spanish texts are equally authentic.

IN WITNESS WHEREOF the undersigned plenipotentiaries, being duly authorized by their respective Governments, have signed this Convention.

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4. UNITED NATIONS CONVENTION AGAINST ILLICIT TRAFFIC IN NARCOTIC DRUGS AND PSYCHOTROPIC SUBSTANCES.<sup>5</sup>  
DONE AT VIENNA ON 20 DECEMBER 1988

Adopted by the Conference at its 6th plenary meeting on 19 December 1988

*The Parties to this Convention,*

*Deeply concerned* by the magnitude of and rising trend in the illicit production of, demand for and traffic in narcotic drugs and psychotropic substances, which pose a serious threat to the health and welfare of human beings and adversely affect the economic, cultural and political foundations of society,

*Deeply concerned also* by the steadily increasing inroads into various social groups made by illicit traffic in narcotic drugs and psychotropic substances, and particularly by the fact that children are used in many parts of the world as an illicit drug consumers market and for purposes of illicit production, distribution and trade in narcotic drugs and psychotropic substances, which entails a danger of incalculable gravity,

*Recognizing* the links between illicit traffic and other related organized criminal activities which undermine the legitimate economies and threaten the stability, security and sovereignty of States,

*Recognizing also* that illicit traffic is an international criminal activity, the suppression of which demands urgent attention and the highest priority,

*Aware* that illicit traffic generates large financial profits and wealth enabling transnational criminal organizations to penetrate, contaminate and corrupt the structures of government, legitimate commercial and financial business, and society at all its levels,

*Determined* to deprive persons engaged in illicit traffic of the proceeds of their criminal activities and thereby eliminate their main incentive for so doing,

*Desiring* to eliminate the root causes of the problem of abuse of narcotic drugs and psychotropic substances, including the illicit demand for such drugs and substances and the enormous profits derived from illicit traffic,

*Considering* that measures are necessary to monitor certain substances, including precursors, chemicals and solvents, which are used in the manufacture of narcotic drugs and psychotropic substances, the ready availability of which has led to an increase in the clandestine manufacture of such drugs and substances,

*Determined* to improve international cooperation in the suppression of illicit traffic by sea,

*Recognizing* that eradication of illicit traffic is a collective responsibility of all States and that, to that end, coordinated action within the framework of international cooperation is necessary,

*Acknowledging* the competence of the United Nations in the field of control of narcotic drugs and psychotropic substances and desirous that the international organs concerned with such control should be within the framework of that Organization,

*Reaffirming* the guiding principles of existing treaties in the field of narcotic drugs and psychotropic substances and the system of control which they embody,

*Recognizing* the need to reinforce and supplement the measures provided in the Single Convention on Narcotic Drugs, 1953, that Convention as amended by the 1972 Protocol Amending the Single Convention on Narcotic Drugs, 1953, and the 1971 Convention on Psychotropic Substances, in order to counter the magnitude and extent of illicit traffic and its grave consequences,<sup>6</sup>

*Recognizing also* the importance of strengthening and enhancing effective legal means for international cooperation in criminal matters for suppressing the international criminal activities of illicit traffic,

*Desiring* to conclude a comprehensive, effective and operative international convention that is directed specifically against illicit traffic and that considers the various aspects of the problem as a whole, in particular those aspects not envisaged in the existing treaties in the field of narcotic drugs and psychotropic substances,

*Hereby agree* as follows:

## Article 1

### DEFINITIONS

Except where otherwise expressly indicated or where the context otherwise requires, the following definitions shall apply throughout this Convention:

(a) “Board” means the International Narcotics Control Board established by the Single Convention on Narcotic Drugs, 1961, and that Convention as amended by the 1972 Protocol Amending the Single Convention on Narcotic Drugs, 1961;<sup>6</sup>

(b) “Cannabis plant” means any plant of the genus *Cannabis*;

(c) “Coca bush” means the plant of any species of the genus *Erythroxylon*;

(d) “Commercial carrier” mean any person or any public, private or other entity engaged in transporting persons, goods or mails for remuneration, hire or any other benefit;

(e) “Commission” means the Commission on Narcotic Drugs of the Economic and Social Council of the United Nations;

(f) “Confiscation”, which includes forfeiture where applicable, means the permanent deprivation of property by order of a court or other competent authority;

(g) “Controlled delivery” means the technique of allowing illicit or suspect consignments of narcotic drugs, psychotropic substances, substances in table I and table II annexed to this Convention, or substances substituted for them, to pass out of, through or into the territory of one or more countries, with the knowledge and under the supervision of their competent authorities, with a view to identifying persons involved in the commission of offences established in accordance with article 3, paragraph 1, of the Convention;

(h) “1961 Convention” means the Single Convention on Narcotic Drugs, 1961;

(i) “1961 Convention as amended” means the Single Convention on Narcotic Drugs, 1961, as amended by the 1972 Protocol Amending the Single Convention on Narcotic Drugs, 1961;

(j) “1971 Convention” means the Convention on Psychotropic Substances,<sup>6</sup> 1971;

(k) “Council” means the Economic and Social Council of the United Nations;

(l) “Freezing” or “seizure” means temporarily prohibiting the transfer, conversion, disposition or movement of property or temporarily assuming custody or control of property on the basis of an order issued by a court or a competent authority;

(m) “Illicit traffic” means the offences set forth in article 3, paragraphs 1 and 2, of this Convention;

(n) “Narcotic drug” means any of the substances, natural or synthetic, in Schedules I and II of the Single Convention on Narcotic Drugs, 1961, and that



Convention as amended by the 1972 Protocol Amending the Single Convention on Narcotic Drugs, 1961;

(o) “Opium poppy” means the plant of the species *Papaver somniferum* L;

(p) “Proceeds” means any property derived from or obtained, directly or indirectly, through the commission of an offence established in accordance with article 3, paragraph 1;

(q) “Property” means assets of every kind, whether corporeal or incorporeal, movable or immovable, tangible or intangible, and legal documents or instruments evidencing title to, or interest in, such assets;

(r) “Psychotropic substance” means any substance, natural or synthetic, or any natural material in schedules I, II, III and IV of the Convention on Psychotropic Substances, 1971;

(s) “Secretary-General” means the Secretary-General of the United Nations;

(t) “Table I” and “table II” mean the correspondingly numbered lists of substances annexed to this Convention, as amended from time to time in accordance with article 12;

(u) “Transit State” means a State through the territory of which illicit narcotic drugs, psychotropic substances and substances in table I and table II are being moved, which is neither the place of origin nor the place of ultimate destination thereof.

## Article 2

### SCOPE OF THE CONVENTION

1. The purpose of this Convention is to promote cooperation among the Parties so that they may address more effectively the various aspects of illicit traffic in narcotic drugs and psychotropic substances having an international dimension. In carrying out their obligations under the Convention, the Parties shall take necessary measures, including legislative and administrative measures, in conformity with the fundamental provisions of their respective domestic legislative systems.

2. The Parties shall carry out their obligations under this Convention in a manner consistent with the principles of sovereign equality and territorial integrity of States and that of non-intervention in the domestic affairs of other States.

3. A Party shall not undertake in the territory of another Party the exercise of jurisdiction and performance of functions which are exclusively reserved for the authorities of that other Party by its domestic law.

## Article 3

### OFFENCES AND SANCTIONS

1. Each Party shall adopt such measures as may be necessary to establish as criminal offences under its domestic law, when committed intentionally:

- (a) (i) The production, manufacture, extraction, preparation, offering, offering for sale, distribution, sale, delivery on any terms whatsoever, brokerage, dispatch, dispatch in transit, importation or exportation of any narcotic drug or any psychotropic substance contrary to the provisions of the 1961 Convention, the 1961 Convention as amended or the 1971 Convention;
- (ii) The cultivation of opium poppy, coca bush or cannabis plant for the purpose of the production of narcotic drugs contrary to the provisions of the 1961 Convention and the 1961 Convention as amended;
- (iii) The possession or purchase of any narcotic drug or psychotropic substance for the purpose of any of the activities enumerated in (i) above;
- (iv) The manufacture, transport or distribution of equipment, materials or of substances listed in table I and table II, knowing that they are to be used in or for the illicit cultivation, production or manufacture of narcotic drugs or psychotropic substances;
- (v) The organization, management or financing of any of the offences enumerated in (i), (ii), (iii) or (iv) above;
- (b) (i) The conversion or transfer of property, knowing that such property is derived from any offence or offences established in accordance with subparagraph (a) of this paragraph, or from an act of participation in such offence or offences, for the purpose of concealing or disguising the illicit origin of the property or of assisting any person who is involved in the commission of such an offence or offences to evade the legal consequences of his actions;
- (ii) The concealment or disguise of the true nature, source, location, disposition, movement, rights with respect to, or ownership of property, knowing that such property is derived from an offence or offences established in accordance with subparagraph (a) of this paragraph or from an act of participation in such an offence or offences;
- (c) Subject to its constitutional principles and the basic concepts of its legal system:
  - (i) The acquisition, possession or use of property, knowing, at the time of receipt, that such property was derived from an offence or offences established in accordance with subparagraph (a) of this paragraph or from an act of participation in such offence or offences;
  - (ii) The possession of equipment or materials or substances listed in table I and table II, knowing that they are being or are to be used in or for the illicit cultivation, production or manufacture of narcotic drugs or psychotropic substances;

- (iii) Publicly inciting or inducing others, by any means, to commit any of the offences established in accordance with this article or to use narcotic drugs or psychotropic substances illicitly;
- (iv) Participation in, association or conspiracy to commit, attempts to commit and aiding, abetting, facilitating and counseling the commission of any of the offences established in accordance with this article.

2. Subject to its constitutional principles and the basic concepts of its legal system, each Party shall adopt such measures as may be necessary to establish as a criminal offence under its domestic law, when committed intentionally, the possession, purchase or cultivation of narcotic drugs or psychotropic substances for personal consumption contrary to the provisions of the 1961 Convention, the 1961 Convention as amended or the 1971 Convention.

3. Knowledge, intent or purpose required as an element of an offence set forth in paragraph 1 of this article may be inferred from objective factual circumstances.

4. (a) Each Party shall make the commission of the offences established in accordance with paragraph 1 of this article liable to sanctions which take into account the grave nature of these offences, such as imprisonment or other forms of deprivation of liberty, pecuniary sanctions and confiscation.

(b) The Parties may provide, in addition to conviction or punishment, for an offence established in accordance with paragraph 1 of this article, that the offender shall undergo measures such as treatment, education, aftercare, rehabilitation or social reintegration.

(c) Notwithstanding the preceding subparagraphs, in appropriate cases of a minor nature, the Parties may provide, as alternatives to conviction or punishment, measures such as education, rehabilitation or social reintegration, as well as, when the offender is a drug abuser, treatment and aftercare.

(d) The Parties may provide, either as an alternative to conviction or punishment, or in addition to conviction or punishment of an offence established in accordance with paragraph 2 of this article, measures for the treatment, education, aftercare, rehabilitation or social reintegration of the offender.

5. The Parties shall ensure that their courts and other competent authorities having jurisdiction can take into account factual circumstances which make the commission of the offences established in accordance with paragraph 1 of this article particularly serious, such as:

(a) The involvement in the offence of an organized criminal group to which the offender belongs;

(b) The involvement of the offender in other international organized criminal activities;

(c) The involvement of the offender in other illegal activities facilitated by commission of the offence;

(d) The use of violence or arms by the offender;

(e) The fact that the offender holds a public office and that the offence is connected with the office in question;

(f) The victimization or use of minors;

(g) The fact that the offence is committed in a penal institution or in an educational institution or social service facility or in their immediate vicinity or in other places to which schoolchildren and students resort for educational, sports and social activities;

(h) Prior conviction, particularly for similar offences, whether foreign or domestic, to the extent permitted under the domestic law of a Party.

6. The Parties shall endeavour to ensure that any discretionary legal powers under their domestic law relating to the prosecution of persons for offences established in accordance with this article are exercised to maximize the effectiveness of law enforcement measures in respect of those offences and with due regard to the need to deter the commission of such offences.

7. The Parties shall ensure that their courts or other competent authorities bear in mind the serious nature of the offences enumerated in paragraph 1 of this article and the circumstances enumerated in paragraph 5 of this article when considering the eventuality of early release or parole of persons convicted of such offences.

8. Each Party shall, where appropriate, establish under its domestic law a long statute of limitations period in which to commence proceedings for any offence established in accordance with paragraph 1 of this article, and a longer period where the alleged offender has evaded the administration of justice.

9. Each Party shall take appropriate measures, consistent with its legal system, to ensure that a person charged with or convicted of an offence established in accordance with paragraph 1 of this article, who is found within its territory, is present at the necessary criminal proceedings.

10. For the purpose of cooperation among the Parties under this Convention, including, in particular, cooperation under articles 5, 6, 7 and 9, offences established in accordance with this article shall not be considered as fiscal offences or as political offences or regarded as politically motivated, without prejudice to the constitutional limitations and the fundamental domestic law of the Parties.

11. Nothing contained in this article shall affect the principle that the description of the offences to which it refers and of legal defences thereto is reserved to the domestic law of a Party and that such offences shall be prosecuted and punished in conformity with that law.

#### *Article 4*

##### JURISDICTION

1. Each Party:

(a) Shall take such measures as may be necessary to establish its jurisdiction over the offences it has established in accordance with article 3, paragraph 1, when:

(i) The offence is committed in its territory;

(ii) The offence is committed on board a vessel flying its flag or an aircraft which is registered under its laws at the time the offence is committed;

(b) May take such measures as may be necessary to establish its jurisdiction over the offences it has established in accordance with article 3, paragraph 1, when:

- (i) The offence is committed by one of its nationals or by a person who has habitual residence in its territory;
- (ii) The offence is committed on board a vessel concerning which that Party has been authorized to take appropriate action pursuant to article 17, provided that such jurisdiction shall be exercised only on the basis of agreements or arrangements referred to in paragraphs 4 and 9 of that article;
- (iii) The offence is one of those established in accordance with article 3, paragraph 1, subparagraph (c)(iv), and is committed outside its territory with a view to the commission, within its territory, of an offence established in accordance with article 3, paragraph 1.

2. Each Party:

(a) Shall also take such measures as may be necessary to establish its jurisdiction over the offences it has established in accordance with article 3, paragraph 1, when the alleged offender is present in its territory and it does not extradite him to another Party on the ground:

- (i) That the offence has been committed in its territory or on board a vessel flying its flag or an aircraft which was registered under its law at the time the offence was committed; or
- (ii) That the offence has been committed by one of its nationals;

(b) May also take such measures as may be necessary to establish its jurisdiction over the offences it has established in accordance with article 3, paragraph 1, when the alleged offender is present in its territory and it does not extradite him to another Party.

3. This Convention does not exclude the exercise of any criminal jurisdiction established by a Party in accordance with its domestic law.

#### *Article 5*

#### CONFISCATION

1. Each Party shall adopt such measures as may be necessary to enable confiscation of:

(a) Proceeds derived from offences established in accordance with article 3, paragraph 1, or property the value of which corresponds to that of such proceeds;

(b) Narcotic drugs and psychotropic substances, materials and equipment or other instrumentalities used in or intended for use in any manner in offences established in accordance with article 3, paragraph 1.

2. Each Party shall also adopt such measures as may be necessary to enable its competent authorities to identify, trace, and freeze or seize proceeds, property, instrumentalities or any other things referred to in paragraph 1 of this article, for the purpose of eventual confiscation.

3. In order to carry out the measures referred to in this article, each Party shall empower its courts or other competent authorities to order that bank, financial or commercial records be made available or be seized. A Party shall not decline to act under the provisions of this paragraph on the ground of bank secrecy.

4. (a) Following a request made pursuant to this article by another Party having jurisdiction over an offence established in accordance with article 3, paragraph 1, the Party in whose territory proceeds, property, instrumentalities or any other things referred to in paragraph 1 of this article are situated shall:

- (i) Submit the request to its competent authorities for the purpose of obtaining an order of confiscation and, if such order is granted, give effect to it; or
- (ii) Submit to its competent authorities, with a view to giving effect to it to the extent requested, an order of confiscation issued by the requesting Party in accordance with paragraph 1 of this article, in so far as it relates to proceeds, property, instrumentalities or any other things referred to in paragraph 1 situated in the territory of the requested Party.

(b) Following a request made pursuant to this article by another Party having jurisdiction over an offence established in accordance with article 3, paragraph 1, the requested Party shall take measures to identify, trace, and freeze or seize proceeds, property, instrumentalities or any other things referred to in paragraph 1 of this article for the purpose of eventual confiscation to be ordered either by the requesting Party or, pursuant to a request under subparagraph (a) of this paragraph, by the requested Party.

(c) The decisions or actions provided for in subparagraphs (a) and (b) of this paragraph shall be taken by the requested Party, in accordance with and subject to the provisions of its domestic law and its procedural rules or any bilateral or multilateral treaty, agreement or arrangement to which it may be bound in relation to the requesting Party.

(d) The provisions of article 7, paragraphs 6 to 19, are applicable *mutatis mutandis*. In addition to the information specified in article 7, paragraph 10, requests made pursuant to this article shall contain the following:

- (i) In the case of a request pertaining to subparagraph (a)(i) of this paragraph, a description of the property to be confiscated and a statement of the facts relied upon by the requesting Party sufficient to enable the requested Party to seek the order under its domestic law;
- (ii) In the case of a request pertaining to subparagraph (a)(ii), a legally admissible copy of an order of confiscation issued by the requesting Party upon which the request is based, a statement of the facts and information as to the extent to which the execution of the order is requested;

(iii) In the case of a request pertaining to subparagraph (b), a statement of the facts relied upon by the requesting Party and a description of the actions requested.

(e) Each party shall furnish to the Secretary-General the text of any of its laws and regulations which give effect to this paragraph and the text of any subsequent changes to such laws and regulations.

(f) If a Party elects to make the taking of the measures referred to in subparagraphs (a) and (b) of this paragraph conditional on the existence of a relevant treaty, that Party shall consider this Convention as the necessary and sufficient treaty basis.

(g) The Parties shall seek to conclude bilateral and multilateral treaties, agreements or arrangements to enhance the effectiveness of international cooperation pursuant to this article.

5. (a) Proceeds or property confiscated by a Party pursuant to paragraph 1 or paragraph 4 of this article shall be disposed of by that Party according to its domestic law and administrative procedures.

(b) When acting on the request of another Party in accordance with this article, a Party may give special consideration to concluding agreements on:

(i) Contributing the value of such proceeds and property, or funds derived from the sale of such proceeds or property, or a substantial part thereof, to intergovernmental bodies specializing in the fight against illicit traffic in and abuse of narcotic drugs and psychotropic substances;

(ii) Sharing with other Parties, on a regular or case-by-case basis, such proceeds or property, or funds derived from the sale of such proceeds or property, in accordance with its domestic law, administrative procedures or bilateral or multilateral agreements entered into for this purpose.

6. (a) If proceeds have been transformed or converted into other property, such property shall be liable to the measures referred to in this article instead of the proceeds.

(b) If proceeds have been intermingled with property acquired from legitimate sources, such property shall, without prejudice to any powers relating to seizure or freezing, be liable to confiscation up to the assessed value of the intermingled proceeds.

(c) Income or other benefits derived from:

(i) Proceeds;

(ii) Property into which proceeds have been transformed or converted; or

(iii) Property with which proceeds have been intermingled;

shall also be liable to the measures referred to in this article, in the same manner and to the same extent as proceeds.

7. Each Party may consider ensuring that the onus of proof be reversed regarding the lawful origin of alleged proceeds or other property liable to confiscation, to the extent that such action is consistent with the principles of its domestic law and with the nature of the judicial and other proceedings.

8. The provisions of this article shall not be construed as prejudicing the rights of bona fide third parties.

9. Nothing contained in this article shall affect the principle that the measures to which it refers shall be defined and implemented in accordance with and subject to the provisions of the domestic law of a Party.

### *Article 6*

#### EXTRADITION

1. This article shall apply to the offences established by the Parties in accordance with article 3, paragraph 1.

2. Each of the offences to which this article applies shall be deemed to be included as an extraditable offence in any extradition treaty existing between Parties. The Parties undertake to include such offences as extraditable offences in every extradition treaty to be concluded between them.

3. If a Party which makes extradition conditional on the existence of a treaty receives a request for extradition from another Party with which it has no extradition treaty, it may consider this Convention as the legal basis for extradition in respect of any offence to which this article applies. The Parties which require detailed legislation in order to use this Convention as a legal basis for extradition shall consider enacting such legislation as may be necessary.

4. The Parties which do not make extradition conditional on the existence of a treaty shall recognize offences to which this article applies as extraditable offences between themselves.

5. Extradition shall be subject to the conditions provided for by the law of the requested Party or by applicable extradition treaties, including the grounds upon which the requested Party may refuse extradition.

6. In considering requests received pursuant to this article, the requested State may refuse to comply with such requests where there are substantial grounds leading its judicial or other competent authorities to believe that compliance would facilitate the prosecution or punishment of any person on account of his race, religion, nationality or political opinions, or would cause prejudice for any of those reasons to any person affected by the request.

7. The Parties shall endeavour to expedite extradition procedures and to simplify evidentiary requirements relating thereto in respect of any offence to which this article applies.

8. Subject to the provisions of its domestic law and its extradition treaties, the requested Party may, upon being satisfied that the circumstances so warrant and are urgent, and at the request of the requesting Party, take a person whose extradition is sought and who is present in its territory into custody or take other appropriate measures to ensure his presence at extradition proceedings.



9. Without prejudice to the exercise of any criminal jurisdiction established in accordance with its domestic law, a Party in whose territory an alleged offender is found shall:

(a) If it does not extradite him in respect of an offence established in accordance with article 3, paragraph 1, on the grounds set forth in article 4, paragraph 2, subparagraph (a), submit the case to its competent authorities for the purpose of prosecution, unless otherwise agreed with the requesting Party;

(b) If it does not extradite him in respect of such an offence and has established its jurisdiction in relation to that offence in accordance with article 4, paragraph 2, subparagraph (b), submit the case to its competent authorities for the purpose of prosecution, unless otherwise requested by the requesting Party for the purposes of preserving its legitimate jurisdiction.

10. If extradition, sought for purposes of enforcing a sentence, is refused because the person sought is a national of the requested Party, the requested Party shall, if its law so permits and in conformity with the requirements of such law, upon application of the requesting Party, consider the enforcement of the sentence which has been imposed under the law of the requesting Party, or the remainder thereof.

11. The Parties shall seek to conclude bilateral and multilateral agreements to carry out or to enhance the effectiveness of extradition.

12. The Parties may consider entering into bilateral or multilateral agreements, whether ad hoc or general, on the transfer to their country of persons sentenced to imprisonment and other forms of deprivation of liberty for offences to which this article applies, in order that they may complete their sentences there.

## Article 7

### MUTUAL LEGAL ASSISTANCE

1. The Parties shall afford one another, pursuant to this article, the widest measure of mutual legal assistance in investigations, prosecutions and judicial proceedings in relation to criminal offences established in accordance with article 3, paragraph 1.

2. Mutual legal assistance to be afforded in accordance with this article may be requested for any of the following purposes:

(a) Taking evidence or statements from persons;

(b) Effecting service of judicial documents;

(c) Executing searches and seizures;

(d) Examining objects and sites;

(e) Providing information and evidentiary items;

(f) Providing originals or certified copies of relevant documents and records, including bank, financial, corporate or business records;

(g) Identifying or tracing proceeds, property, instrumentalities or other things for evidentiary purposes.

3. The Parties may afford one another any other forms of mutual legal assistance allowed by the domestic law of the requested Party.

4. Upon request, the Parties shall facilitate or encourage, to the extent consistent with their domestic law and practice, the presence or availability of persons, including persons in custody, who consent to assist in investigations or participate in proceedings.

5. A Party shall not decline to render mutual legal assistance under this article on the ground of bank secrecy.

6. The provisions of this article shall not affect the obligations under any other treaty, bilateral or multilateral, which governs or will govern, in whole or in part, mutual legal assistance in criminal matters.

7. Paragraphs 8 to 19 of this article shall apply to requests made pursuant to this article if the Parties in question are not bound by a treaty of mutual assistance. If these Parties are bound by such a treaty, the corresponding provisions of that treaty shall apply unless the Parties agree to apply paragraphs 8 to 19 of this article in lieu thereof.

8. Parties shall designate an authority, or when necessary authorities, which shall have the responsibility and power to execute requests for mutual legal assistance or to transmit them to the competent authorities for execution. The authority or the authorities designated for this purpose shall be notified to the Secretary-General. Transmission of requests for mutual legal assistance and any communication related thereto shall be effected between the authorities designated by the Parties; this requirement shall be without prejudice to the right of a Party to require that such requests and communications be addressed to it through the diplomatic channel and, in urgent circumstances, where the Parties agree, through channels of the International Criminal Police Organization, if possible.

9. Requests shall be made in writing in a language acceptable to the requested Party. The language or languages acceptable to each Party shall be notified to the Secretary-General. In urgent circumstances, and where agreed by the Parties, requests may be made orally, but shall be confirmed in writing forthwith.

10. A request for mutual legal assistance shall contain:

(a) The identity of the authority making the request;

(b) The subject matter and nature of the investigation, prosecution or proceeding to which the request relates, and the name and the functions of the authority conducting such investigation, prosecution or proceeding;

(c) A summary of the relevant facts, except in respect of requests for the purpose of service of judicial documents;

(d) A description of the assistance sought and details of any particular procedure the requesting Party wishes to be followed;

(e) Where possible, the identity, location and nationality of any person concerned;

(f) The purpose for which the evidence, information or action is sought.

11. The requested Party may request additional information when it appears necessary for the execution of the request in accordance with its domestic law or when it can facilitate such execution.

12. A request shall be executed in accordance with the domestic law of the requested Party and, to the extent not contrary to the domestic law of the requested Party and where possible, in accordance with the procedures specified in the request.

13. The requesting Party shall not transmit nor use information or evidence furnished by the requested Party for investigations, prosecutions or proceedings other than those stated in the request without the prior consent of the requested Party.

14. The requesting Party may require that the requested Party keep confidential the fact and substance of the request, except to the extent necessary to execute the request. If the requested Party cannot comply with the requirement of confidentiality, it shall promptly inform the requesting Party.

15. Mutual legal assistance may be refused:

(a) If the request is not made in conformity with the provisions of this article;

(b) If the requested Party considers that execution of the request is likely to prejudice its sovereignty, security, *ordre public* or other essential interests;

(c) If the authorities of the requested Party would be prohibited by its domestic law from carrying out the action requested with regard to any similar offence, had it been subject to investigation, prosecution or proceedings under their own jurisdiction;

(d) If it would be contrary to the legal system of the requested Party relating to mutual legal assistance for the request to be granted.

16. Reasons shall be given for any refusal of mutual legal assistance.

17. Mutual legal assistance may be postponed by the requested Party on the ground that it interferes with an ongoing investigation, prosecution or proceeding. In such a case, the requested Party shall consult with the requesting Party to determine if the assistance can still be given subject to such terms and conditions as the requested Party deems necessary.

18. A witness, expert or other person who consents to give evidence in a proceeding or to assist in an investigation, prosecution or judicial proceeding in the territory of the requesting Party, shall not be prosecuted, detained, punished or subjected to any other restriction of his personal liberty in that territory in respect of acts, omissions or convictions prior to his departure from the territory of the requested Party. Such safe conduct shall cease when the witness, expert or other person having had, for a period of fifteen consecutive days, or for any period agreed upon by the Parties, from the date on which he has been officially informed that his presence is no longer required by the judicial authorities, an opportunity of leaving, has nevertheless remained voluntarily in the territory or having left it, has returned of his own free will.

19. The ordinary costs of executing a request shall be borne by the requested Party, unless otherwise agreed by the Parties concerned. If expenses of a substantial or extraordinary nature are or will be required to fulfil the request, the Parties shall consult to determine the terms and conditions under which the request will be executed as well as the manner in which the costs shall be borne.

20. The Parties shall consider, as may be necessary, the possibility of concluding bilateral or multilateral agreements or arrangements that would serve the purposes of, give practical effect to, or enhance the provisions of this article.

#### *Article 8*

##### TRANSFER OF PROCEEDINGS

The Parties shall give consideration to the possibility of transferring to one another proceedings for criminal prosecution of offences established in accordance with article 3, paragraph 1, in cases where such transfer is considered to be in the interests of a proper administration of justice.

#### *Article 9*

##### OTHER FORMS OF COOPERATION AND TRAINING

1. The Parties shall cooperate closely with one another, consistent with their respective domestic legal and administrative systems, with a view to enhancing the effectiveness of law enforcement action to suppress the commission of offences established in accordance with article 3, paragraph 1. They shall, in particular, on the basis of bilateral or multilateral agreements or arrangements:

(a) Establish and maintain channels of communication between their competent agencies and services to facilitate the secure and rapid exchange of information concerning all aspects of offences established in accordance with article 3, paragraph 1, including, if the Parties concerned deem it appropriate, links with other criminal activities;

(b) Cooperate with one another in conducting enquiries, with respect to offences established in accordance with article 3, paragraph 1, having an international character, concerning:

- (i) The identity, whereabouts and activities of persons suspected of being involved in offences established in accordance with article 3, paragraph 1;
- (ii) The movement of proceeds or property derived from the commission of such offences;
- (iii) The movement of narcotic drugs, psychotropic substances, substances in table I and table II of this Convention and instrumentalities used or intended for use in the commission of such offences;

(c) In appropriate cases and if not contrary to domestic law, establish joint teams, taking into account the need to protect the security of persons and of operations, to carry out the provisions of this paragraph. Officials of any Party taking part in such teams shall act as authorized by the Party in whose territory the operation is to take place; in all such cases, the Parties involved shall ensure that the sovereignty of the Party on whose territory the operation is to take place is fully respected;

(d) Provide, when appropriate, necessary quantities of substances for analytical or investigative purposes;

(e) Facilitate effective coordination between their competent agencies and services and promote the exchange of personnel and other experts, including the posting of liaison officers.

2. Each Party shall, to the extent necessary, initiate, develop or improve specific training programmes for its law enforcement and other personnel, including customs, charged with the suppression of offences established in accordance with article 3, paragraph 1. Such programmes shall deal, in particular, with the following:

(a) Methods used in the detection and suppression of offences established in accordance with article 3, paragraph 1;

(b) Routes and techniques used by persons suspected of being involved in offences established in accordance with article 3, paragraph 1, particularly in transit States, and appropriate countermeasures;

(c) Monitoring of the import and export of narcotic drugs, psychotropic substances and substances in table I and table II;

(d) Detection and monitoring of the movement of proceeds and property derived from, and narcotic drugs, psychotropic substances and substances in table I and table II, and instrumentalities used or intended for use in, the commission of offences established in accordance with article 3, paragraph 1;

(e) Methods used for the transfer, concealment or disguise of such proceeds, property and instrumentalities;

(f) Collection of evidence;

(g) Control techniques in free trade zones and free ports;

(h) Modern law enforcement techniques.

3. The Parties shall assist one another to plan and implement research and training programmes designed to share expertise in the areas referred to in paragraph 2 of this article and, to this end, shall also, when appropriate, use regional and international conferences and seminars to promote cooperation and stimulate discussion on problems of mutual concern, including the special problems and needs of transit States.

### *Article 10*

#### INTERNATIONAL COOPERATION AND ASSISTANCE FOR TRANSIT STATES

1. The Parties shall cooperate, directly or through competent international or regional organizations, to assist and support transit States and, in particular, developing countries in need of such assistance and support, to the extent possible, through programmes of technical cooperation on interdiction and other related activities.

2. The Parties may undertake, directly or through competent international or regional organizations, to provide financial assistance to such transit States for the purpose of augmenting and strengthening the infrastructure needed for effective control and prevention of illicit traffic.

3. The Parties may conclude bilateral or multilateral agreements or arrangements to enhance the effectiveness of international cooperation pursuant to this article and may take into consideration financial arrangements in this regard.

### *Article 11*

#### CONTROLLED DELIVERY

1. If permitted by the basic principles of their respective domestic legal systems, the Parties shall take the necessary measures, within their possibilities, to allow for the appropriate use of controlled delivery at the international level, on the basis of agreements or arrangements mutually consented to, with a view to identifying persons involved in offences established in accordance with article 3, paragraph 1, and to taking legal action against them.

2. Decisions to use controlled delivery shall be made on a case-by-case basis and may, when necessary, take into consideration financial arrangements and understandings with respect to the exercise of jurisdiction by the Parties concerned.

3. Illicit consignments whose controlled delivery is agreed to may, with the consent of the Parties concerned, be intercepted and allowed to continue with the narcotic drugs or psychotropic substances intact or removed or replaced in whole or in part.

### *Article 12*

#### SUBSTANCES FREQUENTLY USED IN THE ILLICIT MANUFACTURE OF NARCOTIC DRUGS OR PSYCHOTROPIC SUBSTANCES

1. The Parties shall take the measures they deem appropriate to prevent diversion of substances in table I and table II used for the purpose of illicit manufacture of narcotic drugs or psychotropic substances, and shall cooperate with one another to this end.

2. If a Party or the Board has information which in its opinion may require the inclusion of a substance in table I or table II, it shall notify the Secretary-General and furnish him with the information in support of that notification. The procedure described in paragraphs 2 to 7 of this article shall also apply when a Party or the Board has information justifying the deletion of a substance from table I or table II, or the transfer of a substance from one table to the other.

3. The Secretary-General shall transmit such notification, and any information which he considers relevant, to the Parties, to the Commission, and, where notification is made by a Party, to the Board. The Parties shall communicate their comments concerning the notification to the Secretary-General, together with all supplementary information which may assist the Board in establishing an assessment and the Commission in reaching a decision.

4. If the Board, taking into account the extent, importance and diversity of the licit use of the substance, and the possibility and ease of using alternate substances both for licit purposes and for the illicit manufacture of narcotic drugs or psychotropic substances, finds:

(a) That the substance is frequently used in the illicit manufacture of a narcotic drug or psychotropic substance;

(b) That the volume and extent of the illicit manufacture of a narcotic drug or psychotropic substance creates serious public health or social problems, so as to warrant international action, it shall communicate to the Commission an assessment of the substance, including the likely effect of adding the substance to either table I or table II on both licit use and illicit manufacture, together with recommendations of monitoring measures, if any, that would be appropriate in the light of its assessment.

5. The Commission, taking into account the comments submitted by the Parties and the comments and recommendations of the Board, whose assessment shall be determinative as to scientific matters, and also taking into due consideration any other relevant factors, may decide by a two-thirds majority of its members to place a substance in table I or table II.

6. Any decision of the Commission taken pursuant to this article shall be communicated by the Secretary-General to all States and other entities which are, or which are entitled to become, Parties to this Convention, and to the Board. Such decision shall become fully effective with respect to each Party one hundred and eighty days after the date of such communication.

7. (a) The decisions of the Commission taken under this article shall be subject to review by the Council upon the request of any Party filed within one hundred and eighty days after the date of notification of the decision. The request for review shall be sent to the Secretary-General, together with all relevant information upon which the request for review is based.

(b) The Secretary-General shall transmit copies of the request for review and the relevant information to the Commission, to the Board and to all the Parties, inviting them to submit their comments within ninety days. All comments received shall be submitted to the Council for consideration.

(c) The Council may confirm or reverse the decision of the Commission. Notification of the Council's decision shall be transmitted to all States and other entities which are, or which are entitled to become, Parties to this Convention, to the Commission and to the Board.

8. (a) Without prejudice to the generality of the provisions contained in paragraph 1 of this article and the provisions of the 1961 Convention, the 1961 Convention as amended and the 1971 Convention, the Parties shall take the measures they deem appropriate to monitor the manufacture and distribution of substances in table I and table II which are carried out within their territory.

(b) To this end, the Parties may:

- (i) Control all persons and enterprises engaged in the manufacture and distribution of such substances;
- (ii) Control under licence the establishment and premises in which such manufacture or distribution may take place;

- (iii) Require that licensees obtain a permit for conducting the aforesaid operations;
- (iv) Prevent the accumulation of such substances in the possession of manufacturers and distributors, in excess of the quantities required for the normal conduct of business and the prevailing market conditions.

9. Each Party shall, with respect to substances in table I and table II, take the following measures:

(a) Establish and maintain a system to monitor international trade in substances in table I and table II in order to facilitate the identification of suspicious transactions. Such monitoring systems shall be applied in close cooperation with manufacturers, importers, exporters, wholesalers and retailers, who shall inform the competent authorities of suspicious orders and transactions.

(b) Provide for the seizure of any substance in table I or table II if there is sufficient evidence that it is for use in the illicit manufacture of a narcotic drug or psychotropic substance.

(c) Notify, as soon as possible, the competent authorities and services of the Parties concerned if there is reason to believe that the import, export or transit of a substance in table I or table II is destined for the illicit manufacture of narcotic drugs or psychotropic substances, including in particular information about the means of payment and any other essential elements which led to that belief.

(d) Require that imports and exports be properly labeled and documented. Commercial documents such as invoices, cargo manifests, customs, transport and other shipping documents shall include the names, as stated in table I or table II, of the substances being imported or exported, the quantity being imported or exported, and the name and address of the exporter, the importer and, when available, the consignee.

(e) Ensure that documents referred to in subparagraph (d) of this paragraph are maintained for a period of not less than two years and may be made available for inspection by the competent authorities.

10. (a) In addition to the provisions of paragraph 9, and upon request to the Secretary-General by the interested Party, each Party from whose territory a substance in table I is to be exported shall ensure that, prior to such export, the following information is supplied by its competent authorities to the competent authorities of the importing country:

- (i) Name and address of the exporter and importer and, when available, the consignee;
- (ii) Name of the substance in table I;
- (iii) Quantity of the substance to be exported;
- (iv) Expected point of entry and expected date of dispatch;
- (v) Any other information which is mutually agreed upon by the Parties.



(b) A Party may adopt more strict or severe measures of control than those provided by this paragraph if, in its opinion, such measures are desirable or necessary.

11. Where a Party furnishes information to another Party in accordance with paragraphs 9 and 10 of this article, the Party furnishing such information may require that the Party receiving it keep confidential any trade, business, commercial or professional secret or trade process.

12. Each Party shall furnish annually to the Board, in the form and manner provided for by it and on forms made available by it, information on:

(a) The amounts seized of substances in table I and table II and, when known, their origin;

(b) Any substance not included in table I or table II which is identified as having been used in illicit manufacture of narcotic drugs or psychotropic substances, and which is deemed by the Party to be sufficiently significant to be brought to the attention of the Board;

(c) Methods of diversion and illicit manufacture.

13. The Board shall report annually to the Commission on the implementation of this article and the Commission shall periodically review the adequacy and propriety of table I and table II.

14. The provisions of this article shall not apply to pharmaceutical preparations, nor to other preparations containing substances in table I or table II that are compounded in such a way that such substances cannot be easily used or recovered by readily applicable means.

### *Article 13*

#### MATERIALS AND EQUIPMENT

The Parties shall take such measures as they deem appropriate to prevent trade in and the diversion of materials and equipment for illicit production or manufacture of narcotic drugs and psychotropic substances and shall cooperate to this end.

### *Article 14*

#### MEASURES TO ERADICATE ILLICIT CULTIVATION OF NARCOTIC PLANTS AND TO ELIMINATE ILLICIT DEMAND FOR NARCOTIC DRUGS AND PSYCHOTROPIC SUBSTANCES

1. Any measures taken pursuant to this Convention by Parties shall not be less stringent than the provisions applicable to the eradication of illicit cultivation of plants containing narcotic and psychotropic substances and to the elimination of illicit demand for narcotic drugs and psychotropic substances under the provisions of the 1961 Convention, the 1961 Convention as amended and the 1971 Convention.

2. Each Party shall take appropriate measures to prevent illicit cultivation of and to eradicate plants containing narcotic or psychotropic substances, such as opium poppy, coca bush and cannabis plants, cultivated illicitly in its territory. The measures adopted shall respect fundamental human rights and

shall take due account of traditional licit uses, where there is historic evidence of such use, as well as the protection of the environment.

3. (a) The Parties may cooperate to increase the effectiveness of eradication efforts. Such cooperation may, *inter alia*, include support, when appropriate, for integrated rural development leading to economically viable alternatives to illicit cultivation. Factors such as access to markets, the availability of resources and prevailing socio-economic conditions should be taken into account before such rural development programmes are implemented. The Parties may agree on any other appropriate measures of cooperation.

(b) The Parties shall also facilitate the exchange of scientific and technical information and the conduct of research concerning eradication.

(c) Whenever they have common frontiers, the Parties shall seek to cooperate in eradication programmes in their respective areas along those frontiers.

4. The Parties shall adopt appropriate measures aimed at eliminating or reducing illicit demand for narcotic drugs and psychotropic substances, with a view to reducing human suffering and eliminating financial incentives for illicit traffic. These measures may be based, *inter alia*, on the recommendations of the United Nations, specialized agencies of the United Nations such as the World Health Organization, and other competent international organizations, and on the Comprehensive Multidisciplinary Outline adopted by the International Conference on Drug Abuse and Illicit Trafficking, held in 1987, as it pertains to governmental and non-governmental agencies and private efforts in the fields of prevention, treatment and rehabilitation. The Parties may enter into bilateral or multilateral agreements or arrangements aimed at eliminating or reducing illicit demand for narcotic drugs and psychotropic substances.

5. The Parties may also take necessary measures for early destruction or lawful disposal of the narcotic drugs, psychotropic substances and substances in table I and table II which have been seized or confiscated and for the admissibility as evidence of duly certified necessary quantities of such substances.

### Article 15

#### COMMERCIAL CARRIERS

1. The Parties shall take appropriate measures to ensure that means of transport operated by commercial carriers are not used in the commission of offences established in accordance with article 3, paragraph 1; such measures may include special arrangements with commercial carriers.

2. Each Party shall require commercial carriers to take reasonable precautions to prevent the use of their means of transport for the commission of offences established in accordance with article 3, paragraph 1. Such precautions may include:

(a) If the principal place of business of a commercial carrier is within the territory of the Party:

(i) Training of personnel to identify suspicious consignments or persons;

- (ii) Promotion of integrity of personnel;
- (b) If a commercial carrier is operating within the territory of the Party:
  - (i) Submission of cargo manifests in advance, whenever possible;
  - (ii) Use of tamper-resistant, individually verifiable seals on containers;
- (iii) Reporting to the appropriate authorities at the earliest opportunity all suspicious circumstances that may be related to the commission of offences established in accordance with article 3, paragraph 1.

3. Each Party shall seek to ensure that commercial carriers and the appropriate authorities at points of entry and exit and other customs control areas cooperate, with a view to preventing unauthorized access to means of transport and cargo and to implementing appropriate security measures.

#### *Article 16*

##### COMMERCIAL DOCUMENTS AND LABELLING OF EXPORTS

1. Each Party shall require that lawful exports of narcotic drugs and psychotropic substances be properly documented. In addition to the requirements for documentation under article 31 of the 1961 Convention, article 31 of the 1961 Convention as amended and article 12 of the 1971 Convention, commercial documents such as invoices, cargo manifests, customs, transport and other shipping documents shall include the names of the narcotic drugs and psychotropic substances being exported as set out in the respective Schedules of the 1961 Convention, the 1961 Convention as amended and the 1971 Convention, the quantity being exported, and the name and address of the exporter, the importer and, when available, the consignee.

2. Each Party shall require that consignments of narcotic drugs and psychotropic substances being exported be not mislabelled.

#### *Article 17*

##### ILLICIT TRAFFIC BY SEA

1. The Parties shall cooperate to the fullest extent possible to suppress illicit traffic by sea, in conformity with the international law of the sea.

2. A Party which has reasonable grounds to suspect that a vessel flying its flag or not displaying a flag or marks of registry is engaged in illicit traffic may request the assistance of other Parties in suppressing its use for that purpose. The Parties so requested shall render such assistance within the means available to them.

3. A Party which has reasonable grounds to suspect that a vessel exercising freedom of navigation in accordance with international law and flying the flag or displaying marks of registry of another Party is engaged in illicit traffic may so notify the flag State, request confirmation of registry and, if confirmed, request authorization from the flag State to take appropriate measures in regard to that vessel.

4. In accordance with paragraph 3 or in accordance with treaties in force between them or in accordance with any agreement or arrangement otherwise reached between those Parties, the flag State may authorize the requesting State to, *inter alia*:

- (a) Board the vessel;
- (b) Search the vessel;
- (c) If evidence of involvement in illicit traffic is found, take appropriate action with respect to the vessel, persons and cargo on board.

5. Where action is taken pursuant to this article, the Parties concerned shall take due account of the need not to endanger the safety of life at sea, the security of the vessel and the cargo or to prejudice the commercial and legal interests of the flag State or any other interested State.

6. The flag State may, consistent with its obligations in paragraph 1 of this article, subject its authorization to conditions to be mutually agreed between it and the requesting Party, including conditions relating to responsibility.

7. For the purposes of paragraphs 3 and 4 of this article, a Party shall respond expeditiously to a request from another Party to determine whether a vessel that is flying its flag is entitled to do so, and to requests for authorization made pursuant to paragraph 3. At the time of becoming a Party to this Convention, each Party shall designate an authority or, when necessary, authorities to receive and respond to such requests. Such designation shall be notified through the Secretary-General to all other Parties within one month of the designation.

8. A Party which has taken any action in accordance with this article shall promptly inform the flag State concerned of the results of that action.

9. The Parties shall consider entering into bilateral or regional agreements or arrangements to carry out, or to enhance the effectiveness of, the provisions of this article.

10. Action pursuant to paragraph 4 of this article shall be carried out only by warships or military aircraft, or other ships or aircraft clearly marked and identifiable as being on government service and authorized to that effect.

11. Any action taken in accordance with this article shall take due account of the need not to interfere with or affect the rights and obligations and the exercise of jurisdiction of coastal States in accordance with the international law of the sea.

## *Article 18*

### FREE TRADE ZONES AND FREE PORTS

1. The Parties shall apply measures to suppress illicit traffic in narcotic drugs, psychotropic substances and substances in table I and table II in free trade zones and in free ports that are no less stringent than those applied in other parts of their territories.

2. The Parties shall endeavour:

- (a) To monitor the movement of goods and persons in free trade zones and free ports, and, to that end, shall empower the competent authorities to

search cargoes and incoming and outgoing vessels, including pleasure craft and fishing vessels, as well as aircraft and vehicles, and, when appropriate, to search crew members, passengers and their baggage;

(b) To establish and maintain a system to detect consignments suspected of containing narcotic drugs, psychotropic substances and substances in table I and table II passing into or out of free trade zones and free ports;

(c) To establish and maintain surveillance systems in harbour and dock areas and at airports and border control points in free trade zones and free ports.

#### *Article 19*

##### THE USE OF THE MAILS

1. In conformity with their obligations under the Convention of the Universal Postal Union, and in accordance with the basic principles of their domestic legal systems, the Parties shall adopt measures to suppress the use of the mails for illicit traffic and shall cooperate with one another to that end.

2. The measures referred to in paragraph 1 of this article shall include, in particular:

(a) Coordinated action for the prevention and repression of the use of the mails for illicit traffic;

(b) Introduction and maintenance by authorized law enforcement personnel of investigative and control techniques designed to detect illicit consignments of narcotic drugs, psychotropic substances and substances in table I and table II in the mails;

(c) Legislative measures to enable the use of appropriate means to secure evidence required for judicial proceedings.

#### *Article 20*

##### INFORMATION TO BE FURNISHED BY THE PARTIES

1. The Parties shall furnish, through the Secretary-General, information to the Commission on the working of the Convention in their territories and, in particular:

(a) The text of laws and regulations promulgated in order to give effect to this Convention;

(b) Particulars of cases of illicit traffic within their jurisdiction which they consider important because of new trends disclosed, the quantities involved, the sources from which the substances are obtained, or the methods employed by persons so engaged.

2. The Parties shall furnish such information in such a manner and by such dates as the Commission may request.

## Article 21

### FUNCTIONS OF THE COMMISSION

The Commission is authorized to consider all matters pertaining to the aims of this Convention and, in particular:

(a) The Commission shall, on the basis of the information submitted by the Parties in accordance with article 20, review the operation of this Convention;

(b) The Commission may make suggestions and general recommendations based on the examination of the information received from the Parties;

(c) The Commission may call the attention of the Board to any matters which may be relevant to the functions of the Board;

(d) The Commission shall, on any matter referred to it by the Board under article 22, paragraph 1(b), take such action as it deems appropriate;

(e) The Commission may, in conformity with the procedures laid down in article 12, amend table I and table II;

(f) The Commission may draw the attention of non-Parties to decisions and recommendations which it adopts under this Convention, with a view to their considering taking action in accordance therewith.

## Article 22

### FUNCTIONS OF THE BOARD

1. Without prejudice to the functions of the Commission under article 21, and without prejudice to the functions of the Board and the Commission under the 1961 Convention, the 1961 Convention as amended and the 1971 Convention:

(a) If, on the basis of its examination of information available to it, to the Secretary-General or to the Commission, or of information communicated by United Nations organs, the Board has reason to believe that the aims of this Convention in matters related to its competence are not being met, the Board may invite a Party or Parties to furnish any relevant information;

(b) With respect to articles 12, 13 and 16:

(i) After taking action under subparagraph (a) of this article, the Board, if satisfied that it is necessary to do so, may call upon the Party concerned to adopt such remedial measures as shall seem under the circumstances to be necessary for the execution of the provisions of articles 12, 13 and 16;

(ii) Prior to taking action under (iii) below, the Board shall treat as confidential its communications with the Party concerned under the preceding subparagraphs;

(iii) If the Board finds that the Party concerned has not taken remedial measures which it has been called upon to take under this subpara-

graph, it may call the attention of the Parties, the Council and the Commission to the matter. Any report published by the Board under this subparagraph shall also contain the views of the Party concerned if the latter so requests.

2. Any Party shall be invited to be represented at a meeting of the Board at which a question of direct interest to it is to be considered under this article.

3. If in any case a decision of the Board which is adopted under this article is not unanimous, the views of the minority shall be stated.

4. Decisions of the Board under this article shall be taken by a two-thirds majority of the whole number of the Board.

5. In carrying out its functions pursuant to subparagraph 1(a) of this article, the Board shall ensure the confidentiality of all information which may come into its possession.

6. The Board's responsibility under this article shall not apply to the implementation of treaties or agreements entered into between Parties in accordance with the provisions of this Convention.

7. The provisions of this article shall not be applicable to disputes between Parties falling under the provisions of article 32.

#### *Article 23*

##### REPORTS OF THE BOARD

1. The Board shall prepare an annual report on its work containing an analysis of the information at its disposal and, in appropriate cases, an account of the explanations, if any, given by or required of Parties, together with any observations and recommendations which the Board desires to make. The Board may make such additional reports as it considers necessary. The reports shall be submitted to the Council through the Commission which may make such comments as it sees fit.

2. The reports of the Board shall be communicated to the Parties and subsequently published by the Secretary-General. The Parties shall permit their unrestricted distribution.

#### *Article 24*

##### APPLICATION OF STRICTER MEASURES THAN THOSE REQUIRED BY THIS CONVENTION

A Party may adopt more strict or severe measures than those provided by this Convention if, in its opinion, such measures are desirable or necessary for the prevention or suppression of illicit traffic.

#### *Article 25*

##### NON-DEROGATION FROM EARLIER TREATY RIGHTS AND OBLIGATIONS

The provisions of this Convention shall not derogate from any rights enjoyed or obligations undertaken by Parties to this Convention under the 1961 Convention, the 1961 Convention as amended and the 1971 Convention.

## Article 26

### SIGNATURE

This Convention shall be open for signature at the United Nations Office at Vienna, from 20 December 1988 to 28 February 1989, and thereafter at the Headquarters of the United Nations at New York, until 20 December 1989, by:

- (a) All States;
- (b) Namibia, represented by the United Nations Council for Namibia;
- (c) Regional economic integration organizations which have competence in respect of the negotiation, conclusion and application of international agreements in matters covered by this Convention, references under the Convention to Parties, States or national services being applicable to these organizations within the limits of their competence.

## Article 27

### RATIFICATION, ACCEPTANCE, APPROVAL OR ACT OF FORMAL CONFIRMATION

1. This Convention is subject to ratification, acceptance or approval by States and by Namibia, represented by the United Nations Council for Namibia, and to acts of formal confirmation by regional economic integration organizations referred to in article 26, subparagraph (c). The instruments of ratification, acceptance or approval and those relating to acts of formal confirmation shall be deposited with the Secretary-General.

2. In their instruments of formal confirmation, regional economic integration organizations shall declare the extent of their competence with respect to the matters governed by this Convention. These organizations shall also inform the Secretary-General of any modification in the extent of their competence with respect to the matters governed by the Convention.

## Article 28

### ACCESSION

1. This Convention shall remain open for accession by any State, by Namibia, represented by the United Nations Council for Namibia, and by regional economic integration organizations referred to in article 26, subparagraph (c). Accession shall be effected by the deposit of an instrument of accession with the Secretary-General.

2. In their instruments of accession, regional economic integration organizations shall declare the extent of their competence with respect to the matters governed by this Convention. These organizations shall also inform the Secretary-General of any modification in the extent of their competence with respect to the matters governed by the Convention.



## *Article 29*

### ENTRY INTO FORCE

1. This Convention shall enter into force on the ninetieth day after the date of the deposit with the Secretary-General of the twentieth instrument of ratification, acceptance, approval or accession by States or by Namibia, represented by the Council for Namibia.

2. For each State or for Namibia, represented by the Council for Namibia, ratifying, accepting, approving or acceding to this Convention after the deposit of the twentieth instrument of ratification, acceptance, approval or accession, the Convention shall enter into force on the ninetieth day after the date of the deposit of its instrument of ratification, acceptance, approval or accession.

3. For each regional economic integration organization referred to in article 26, subparagraph (c), depositing an instrument relating to an act of formal confirmation or an instrument of accession, this Convention shall enter into force on the ninetieth day after such deposit, or at the date the Convention enters into force pursuant to paragraph 1 of this article, whichever is later.

## *Article 30*

### DENUNCIATION

1. A Party may denounce this Convention at any time by a written notification addressed to the Secretary-General.

2. Such denunciation shall take effect for the Party concerned one year after the date of receipt of the notification by the Secretary-General.

## *Article 31*

### AMENDMENTS

1. Any Party may propose an amendment to this Convention. The text of any such amendment and the reasons therefor shall be communicated by that Party to the Secretary-General, who shall communicate it to the other Parties and shall ask them whether they accept the proposed amendment. If a proposed amendment so circulated has not been rejected by any Party within twenty-four months after it has been circulated, it shall be deemed to have been accepted and shall enter into force in respect of a Party ninety days after that Party has deposited with the Secretary-General an instrument expressing its consent to be bound by that amendment.

2. If a proposed amendment has been rejected by any Party, the Secretary-General shall consult with the Parties and, if a majority so requests, he shall bring the matter, together with any comments made by the Parties, before the Council which may decide to call a conference in accordance with Article 62, paragraph 4, of the Charter of the United Nations. Any amendment resulting from such a Conference shall be embodied in a Protocol of Amendment. Consent to be bound by such a Protocol shall be required to be expressed specifically to the Secretary-General.

## *Article 32*

### SETTLEMENT OF DISPUTES

1. If there should arise between two or more Parties a dispute relating to the interpretation or application of this Convention, the Parties shall consult together with a view to the settlement of the dispute by negotiation, enquiry, mediation, conciliation, arbitration, recourse to regional bodies, judicial process or other peaceful means of their own choice.

2. Any such dispute which cannot be settled in the manner prescribed in paragraph 1 of this article shall be referred, at the request of any one of the States Parties to the dispute, to the International Court of Justice for decision.

3. If a regional economic integration organization referred to in article 26, subparagraph (c), is a Party to a dispute which cannot be settled in the manner prescribed in paragraph 1 of this article, it may, through a State Member of the United Nations, request the Council to request an advisory opinion of the International Court of Justice in accordance with article 65 of the Statute of the Court, which opinion shall be regarded as decisive.

4. Each State, at the time of signature or ratification, acceptance or approval of this Convention or accession thereto, or each regional economic integration organization, at the time of signature or deposit of an act of formal confirmation or accession, may declare that it does not consider itself bound by paragraphs 2 and 3 of this article. The other Parties shall not be bound by paragraphs 2 and 3 with respect to any Party having made such a declaration.

5. Any Party having made a declaration in accordance with paragraph 4 of this article may at any time withdraw the declaration by notification to the Secretary-General.

## *Article 33*

### AUTHENTIC TEXTS

The Arabic, Chinese, English, French, Russian and Spanish texts of this Convention are equally authentic.

## *Article 34*

### DEPOSITARY

The Secretary-General shall be the depositary of this Convention.

IN WITNESS WHEREOF the undersigned, being duly authorized thereto, have signed this Convention.

DONE at Vienna, in one original, this twentieth day of December, one thousand nine hundred and eighty-eight.

## ANNEX

*Table I*

Ephedrine  
Ergometrine  
Ergotamine  
Lysergic acid  
1-phenyl-2-propanone  
Pseudoephedrine  
  
The salts of the substances listed in this Table whenever the existence of such salts is possible.

*Table II*

Acetic anhydride  
Acetone  
Anthranilic acid  
Ethyl ether  
Phenylacetic acid  
Piperidine  
  
The salts of the substance listed in this Table whenever the existence of such salts is possible

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### **B. Treaties concerning international law concluded under the auspices of intergovernmental organizations related to the United Nations**

#### **1. INTERNATIONAL CIVIL AVIATION ORGANIZATION**

PROTOCOL FOR THE SUPPRESSION OF UNLAWFUL ACTS OF VIOLENCE AT AIRPORTS SERVING INTERNATIONAL CIVIL AVIATION, SUPPLEMENTARY TO THE CONVENTION FOR THE SUPPRESSION OF UNLAWFUL ACTS AGAINST THE SAFETY OF CIVIL AVIATION.<sup>7</sup> DONE AT MONTREAL ON 24 DECEMBER 1988

*The States Parties to this Protocol,*

*Considering* that unlawful acts of violence which endanger or are likely to endanger the safety of persons at airports serving international civil aviation or which jeopardize the safe operation of such airports undermine the confidence of the peoples of the world in safety at such airports and disturb the safe and orderly conduct of civil aviation for all States;

*Considering* that the occurrence of such acts is a matter of grave concern to the international community and that, for the purpose of deterring such acts, there is an urgent need to provide appropriate measures for punishment of offenders;

*Considering* that it is necessary to adopt provisions supplementary to those of the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation,<sup>8</sup> done at Montreal on 23 September 1971, to deal with such unlawful acts of violence at airports serving international civil aviation.

*Have agreed* as follows:

### *Article I*

This Protocol supplements the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, done at Montreal on 23 September 1971 (hereinafter referred to as “the Convention”), and, as between the Parties to this Protocol, the Convention and the Protocol shall be read and interpreted together as one single instrument.

### *Article II*

1. In article I of the Convention, the following shall be added as new paragraph 1 *bis*:

“1 *bis*. Any person commits an offence if he unlawfully and intentionally, using any device, substance or weapon:

(a) Performs an act of violence against a person at an airport serving international civil aviation which causes serious injury or death; or

(b) Destroys or seriously damages the facilities of an airport serving international civil aviation or aircraft not in service located thereon or disrupts the services of the airport, if such an act endangers or is likely to endanger safety at that airport.”

2. In paragraph 2(a) of article I of the Convention, the following words shall be inserted after the words “paragraph 1”: “or paragraph 1 *bis*”.

### *Article III*

In article 5 of the Convention, the following shall be added as paragraph 2 *bis*:

“2 *bis*. Each Contracting State shall likewise take such measures as may be necessary to establish its jurisdiction over the offences mentioned in article I, paragraph 2, insofar as that paragraph relates to those offences, in the case where the alleged offender is present in its territory and it does not extradite him pursuant to article 8 to the State mentioned in paragraph 1(a) of this article.”

### *Article IV*

This Protocol shall be open for signature at Montreal on 24 February 1988 by States participating in the International Conference on Air Law held at Montreal from 9 to 24 February 1988. After 1 March 1988, the Protocol shall be open for signature to all States in London, Moscow, Washington and Montreal, until it enters into force in accordance with article VI.

### *Article V*

1. This Protocol shall be subject to ratification by the signatory States.

2. Any State which is not a Contracting State to the Convention may ratify this Protocol if at the same time it ratifies or accedes to the Convention in accordance with article 15 thereof.

3. Instruments of ratification shall be deposited with the Governments of the Union of Soviet Socialist Republics, the United Kingdom of Great Britain and Northern Ireland and the United States of America or with the International Civil Aviation Organization, which are hereby designated the Depositories.

#### *Article VI*

1. As soon as ten of the signatory States have deposited their instruments of ratification of this Protocol, it shall enter into force between them on the thirtieth day after the date of the deposit of the tenth instrument of ratification. It shall enter into force for each State which deposits its instrument of ratification after that date on the thirtieth day after deposit of its instruments of ratification.

2. As soon as this Protocol enters into force, it shall be registered by the Depositories pursuant to Article 102 of the Charter of the United Nations and pursuant to article 83 of the Convention on International Civil Aviation (Chicago, 1944).<sup>9</sup>

#### *Article VII*

1. This Protocol shall, after it has entered into force, be open for accession by any non-signatory State.

2. Any State which is not a Contracting State to the Convention may accede to this Protocol if at the same time it ratifies or accedes to the Convention in accordance with article 15 thereof.

3. Instruments of accession shall be deposited with the Depositories and accession shall take effect on the thirtieth day after the deposit.

#### *Article VIII*

1. Any Party to this Protocol may denounce it by written notification addressed to the Depositories.

2. Denunciation shall take effect six months following the date on which notification is received by the Depositories.

3. Denunciation of this Protocol shall not of itself have the effect of denunciation of the Convention.

4. Denunciation of the Convention by a Contracting State to the Convention as supplemented by this Protocol shall also have the effect of denunciation of this Protocol.

#### *Article IX*

1. The Depositories shall promptly inform all signatory and acceding States to this Protocol and all signatory and acceding States to the Convention:

(a) Of the date of each signature and the date of deposit of each instrument of ratification of, or accession to, this Protocol; and

(b) Of the receipt of any notification of denunciation of this Protocol and the date thereof.

2. The Depositaries shall also notify the States referred to in paragraph 1 of the date on which this Protocol enters into force in accordance with article VI.

IN WITNESS WHEREOF the undersigned Plenipotentiaries, being duly authorized thereto by their Governments, have signed this Protocol.

DONE at Montreal on the twenty-fourth day of February of the year One Thousand Nine Hundred and Eighty-eight, in four originals each being drawn up in four authentic texts in the English, French, Russian and Spanish languages.

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## 2. INTERNATIONAL MARITIME ORGANIZATION

CONVENTION FOR THE SUPPRESSION OF UNLAWFUL ACTS AGAINST THE SAFETY OF MARITIME NAVIGATION AND PROTOCOL FOR THE SUPPRESSION OF UNLAWFUL ACTS AGAINST THE SAFETY OF FIXED PLATFORMS LOCATED ON THE CONTINENTAL SHELF.<sup>10</sup>  
DONE AT ROME ON 10 MARCH 1988

*The States Parties to this Convention,*

*Having in mind* the purposes and principles of the Charter of the United Nations concerning the maintenance of international peace and security and the promotion of friendly relations and cooperation among States,

*Recognizing* in particular that everyone has the right to life, liberty and security of person, as set out in the Universal Declaration of Human Rights<sup>11</sup> and the International Covenant on Civil and Political Rights,<sup>12</sup>

*Deeply concerned* about the worldwide escalation of acts of terrorism in all its forms, which endanger or take innocent human lives, jeopardize fundamental freedoms and seriously impair the dignity of human beings,

*Considering* that unlawful acts against the safety of maritime navigation jeopardize the safety of persons and property, seriously affect the operation of maritime services, and undermine the confidence of the peoples of the world in the safety of maritime navigation,

*Considering* that the occurrence of such acts is a matter of grave concern to the international community as a whole,

*Being convinced* of the urgent need to develop international cooperation between States in devising and adopting effective and practical measures for the prevention of all unlawful acts against the safety of maritime navigation, and the prosecution and punishment of their perpetrators,

*Recalling* United Nations General Assembly resolution 40/61 of 9 December 1985, which, *inter alia*, “urges all States, unilaterally and in cooperation with other States, as well as relevant United Nations organs, to contribute to the progressive elimination of causes underlying international terrorism and to pay

special attention to all situations, including colonialism, racism and situations involving mass and flagrant violations of human rights and fundamental freedoms and those involving alien occupation, that may give rise to international terrorism and may endanger international peace and security”,

*Recalling further* that resolution 40/61 “unequivocally condemns, as criminal, all acts, methods and practices of terrorism wherever and by whomever committed, including those which jeopardize friendly relations among States and their security,”

*Recalling also* that by resolution 40/61, the International Maritime Organization was invited to “study the problem of terrorism aboard or against ships with a view to making recommendations on appropriate measures,”

*Having in mind* resolution A.584(14) of 20 November 1985, of the Assembly of the International Maritime Organization, which called for development of measures to prevent unlawful acts which threaten the safety of ships and the security of their passengers and crews,

*Noting* that acts of the crew which are subject to normal shipboard discipline are outside the purview of this Convention,

*Affirming* the desirability of monitoring rules and standards relating to the prevention and control of unlawful acts against ships and persons on board ships, with a view to updating them as necessary, and, to this effect, taking note with satisfaction, of the Measures to Prevent Unlawful Acts against Passengers and Crews on Board Ships, recommended by the Maritime Safety Committee of the International Maritime Organization,

*Affirming further* that matters not regulated by this Convention continue to be governed by the rules and principles of general international law,

*Recognizing* the need for all States, in combating unlawful acts against the safety of maritime navigation, strictly to comply with rules and principles of general international law,

*Have agreed as follows:*

#### *Article 1*

For the purposes of this Convention, “ship” means a vessel of any type whatsoever not permanently attached to the seabed, including dynamically supported craft, submersibles, or any other floating craft.

#### *Article 2*

1. This Convention does not apply to:
  - (a) A warship; or
  - (b) A ship owned or operated by a State when being used as a naval auxiliary or for customs or police purposes; or
  - (c) A ship which has been withdrawn from navigation or laid up.
2. Nothing in this Convention affects the immunities of warships and other Government ships operated for non-commercial purposes.

### Article 3

1. Any person commits an offence if that person unlawfully and intentionally:

(a) Seizes or exercises control over a ship by force or threat thereof or any other form of intimidation; or

(b) Performs an act of violence against a person on board a ship if that act is likely to endanger the safe navigation of that ship; or

(c) Destroys a ship or causes damage to a ship or its cargo which is likely to endanger the safe navigation of that ship; or

(d) Places or causes to be placed on a ship, by any means whatsoever, a device or substance which is likely to destroy that ship, or cause damage to that ship or its cargo which endangers or is likely to endanger the safe navigation of that ship; or

(e) Destroys or seriously damages maritime navigational facilities or seriously interferes with their operation, if any such act is likely to endanger the safe navigation of a ship; or

(f) Communicates information which he knows to be false, thereby endangering the safe navigation of a ship; or

(g) Injures or kills any person, in connection with the commission or the attempted commission of any of the offences set forth in subparagraphs (a) to (f).

2. Any person also commits an offence if that person:

(a) Attempts to commit any of the offences set forth in paragraph 1; or

(b) Abets the commission of any of the offences set forth in paragraph 1 perpetrated by any person or is otherwise an accomplice of a person who commits such an offence; or

(c) Threatens, with or without a condition, as is provided for under national law, aimed at compelling a physical or juridical person to do or refrain from doing any act, to commit any of the offences set forth in paragraph 1, subparagraphs (b), (c) and (e), if that threat is likely to endanger the safe navigation of the ship in question.

### Article 4

1. This Convention applies if the ship is navigating or is scheduled to navigate into, through or from waters beyond the outer limit of the territorial sea of a single State, or the lateral limits of its territorial sea with adjacent States.

2. In cases where the Convention does not apply pursuant to paragraph 1, it nevertheless applies when the offender or the alleged offender is found in the territory of a State Party other than the State referred to in paragraph 1.

### Article 5

Each State Party shall make the offences set forth in article 3 punishable by appropriate penalties which take into account the grave nature of those offences.



## *Article 6*

1. Each State Party shall take such measures as may be necessary to establish its jurisdiction over the offences set forth in article 3 when the offence is committed:

(a) Against or on board a ship flying the flag of the State at the time the offence is committed; or

(b) In the territory of that State, including its territorial sea; or

(c) By a national of that State.

2. A State Party may also establish its jurisdiction over any such offence when:

(a) It is committed by a stateless person whose habitual residence is in that State; or

(b) During its commission a national of that State is seized, threatened, injured or killed; or

(c) It is committed in an attempt to compel that State to do or abstain from doing any act.

3. Any State Party which has established jurisdiction mentioned in paragraph 2 shall notify the Secretary-General of the International Maritime Organization (hereinafter referred to as “the Secretary-General”). If such State Party subsequently rescinds that jurisdiction, it shall notify the Secretary-General.

4. Each State Party shall take such measures as may be necessary to establish its jurisdiction over the offences set forth in article 3 in cases where the alleged offender is present in its territory and it does not extradite him to any of the States Parties which have established their jurisdiction in accordance with paragraphs 1 and 2 of this article.

5. This Convention does not exclude any criminal jurisdiction exercised in accordance with national law.

## *Article 7*

1. Upon being satisfied that the circumstances so warrant, any State Party in the territory of which the offender or the alleged offender is present shall, in accordance with its law, take him into custody or take other measures to ensure his presence for such time as is necessary to enable any criminal or extradition proceeding to be instituted.

2. Such State shall immediately make a preliminary enquiry into the facts, in accordance with its own legislation.

3. Any person regarding whom the measures referred to in paragraph 1 are being taken shall be entitled to:

(a) Communicate without delay with the nearest appropriate representative of the State of which he is a national or which is otherwise entitled to establish such communication or, if he is a stateless person, the State in the territory of which he has his habitual residence;

(b) Be visited by a representative of that State.

4. The rights referred to in paragraph 3 shall be exercised in conformity with the laws and regulations of the State in the territory of which the offender or the alleged offender is present, subject to the proviso that the said laws and regulations must enable full effect to be given to the purposes for which the rights accorded under paragraph 3 are intended.

5. When a State Party, pursuant to this article, has taken a person into custody, it shall immediately notify the States which have established jurisdiction in accordance with article 6, paragraph 1, and, if it considers it advisable, any other interested States, of the fact that such person is in custody and of the circumstances which warrant his detention. The State which makes the preliminary enquiry contemplated in paragraph 2 of this article shall promptly report its findings to the said States and shall indicate whether it intends to exercise jurisdiction.

#### *Article 8*

1. The master of a ship of a State Party (the “flag State”) may deliver to the authorities of any other State Party (the “receiving State”) any person who he has reasonable grounds to believe has committed one of the offences set forth in article 3.

2. The flag State shall ensure that the master of its ship is obliged whenever practicable, and if possible before entering the territorial sea of the receiving State carrying on board any person whom the master intends to deliver in accordance with paragraph 1, to give notification to the authorities of the receiving State of his intention to deliver such person and the reasons therefor.

3. The receiving State shall accept the delivery, except where it has grounds to consider that the Convention is not applicable to the acts giving rise to the delivery, and shall proceed in accordance with the provisions of article 7. Any refusal to accept a delivery shall be accompanied by a statement of the reasons for refusal.

4. The flag State shall ensure that the master of its ship is obliged to furnish the authorities of the receiving State with the evidence in the master’s possession which pertains to the alleged offence.

5. A receiving State which has accepted the delivery of a person in accordance with paragraph 3 may in turn request the flag State to accept delivery of that person. The flag State shall consider any such request, and if it accedes to the request it shall proceed in accordance with article 7. If the flag State declines a request, it shall furnish the receiving State with a statement of the reasons therefor.

#### *Article 9*

Nothing in this Convention shall affect in any way the rules of international law pertaining to the competence of States to exercise investigative or enforcement jurisdiction on board ships not flying their flag.

### *Article 10*

1. The State Party in the territory of which the offender or the alleged offender is found shall, in cases in which article 6 applies, if it does not extradite him be obliged, without exception whatsoever and whether or not the offence was committed in its territory, to submit the case without delay to its competent authorities for the purpose of prosecution, through proceedings in accordance with the laws of that State. Those authorities shall take their decision in the same manner as in the case of any other offence of a grave nature under the law of that State.

2. Any person regarding whom proceedings are being carried out in connection with any of the offences set forth in article 3 shall be guaranteed fair treatment at all stages of the proceedings, including enjoyment of all the rights and guarantees provided for such proceedings by the law of the State in the territory of which he is present.

### *Article 11*

1. The offences set forth in article 3 shall be deemed to be included as extraditable offences in any extradition treaty existing between any of the States Parties. States Parties undertake to include such offences as extraditable offences in every extradition treaty to be concluded between them.

2. If a State Party which makes extradition conditional on the existence of a treaty receives a request for extradition from another State Party with which it has no extradition treaty, the requested State Party may, at its option, consider this Convention as a legal basis for extradition in respect of the offences set forth in article 3. Extradition shall be subject to the other conditions provided by the law of the requested State Party.

3. States Parties which do not make extradition conditional on the existence of a treaty shall recognize the offences set forth in article 3 as extraditable offences between themselves, subject to the conditions provided by the law of the requested State.

4. If necessary, the offences set forth in article 3 shall be treated, for the purposes of extradition between States Parties, as if they had been committed not only in the place in which they occurred but also in a place within the jurisdiction of the State Party requesting extradition.

5. A State Party which receives more than one request for extradition from States which have established jurisdiction in accordance with article 7 and which decides not to prosecute shall, in selecting the State to which the offender or alleged offender is to be extradited, pay due regard to the interests and responsibilities of the State Party whose flag the ship was flying at the time of the commission of the offence.

6. In considering a request for the extradition of an alleged offender pursuant to this Convention, the requested State shall pay due regard to whether his rights as set forth in article 7, paragraph 3, can be effected in the requesting State.

7. With respect to the offences as defined in this Convention, the provisions of all extradition treaties and arrangements applicable between States Parties are modified as between States Parties to the extent that they are incompatible with this Convention.

#### *Article 12*

1. States Parties shall afford one another the greatest measure of assistance in connection with criminal proceedings brought in respect of the offences set forth in article 3, including assistance in obtaining evidence at their disposal necessary for the proceedings.

2. States Parties shall carry out their obligations under paragraph 1 in conformity with any treaties on mutual assistance that may exist between them. In the absence of such treaties, States Parties shall afford each other assistance in accordance with their national law.

#### *Article 13*

1. States Parties shall cooperate in the prevention of the offences set forth in article 3, particularly by:

(a) Taking all practicable measures to prevent preparations in their respective territories for the commission of those offences within or outside their territories;

(b) Exchanging information in accordance with their national law, and coordinating administrative and other measures taken as appropriate to prevent the commission of offences set forth in article 3.

2. When, due to the commission of an offence set forth in article 3, the passage of a ship has been delayed or interrupted, any State Party in whose territory the ship or passengers or crew are present shall be bound to exercise all possible efforts to avoid a ship, its passengers, crew or cargo being unduly detained or delayed.

#### *Article 14*

Any State Party having reason to believe that an offence set forth in article 3 will be committed shall, in accordance with its national law, furnish as promptly as possible any relevant information in its possession to those States which it believes would be the States having established jurisdiction in accordance with article 6.

#### *Article 15*

1. Each State Party shall, in accordance with its national law, provide to the Secretary-General, as promptly as possible, any relevant information in its possession concerning:

(a) The circumstances of the offence;

(b) The action taken pursuant to article 13, paragraph 2;

(c) The measures taken in relation to the offender or the alleged offender, and, in particular, the results of any extradition proceedings or other legal proceedings.

2. The State Party where the alleged offender is prosecuted shall, in accordance with its national law, communicate the final outcome of the proceedings to the Secretary-General.

3. The information transmitted in accordance with paragraphs 1 and 2 shall be communicated by the Secretary-General to all States Parties, to members of the International Maritime Organization (hereinafter referred to as “the Organization”), to the other States concerned, and to the appropriate international inter-governmental organizations.

#### *Article 16*

1. Any dispute between two or more States Parties concerning the interpretation or application of this Convention which cannot be settled through negotiation within a reasonable time shall, at the request of one of them, be submitted to arbitration. If within six months from the date of the request for arbitration, the parties are unable to agree on the organization of the arbitration any one of those parties may refer the dispute to the International Court of Justice by request in conformity with the Statute of the Court.

2. Each State may, at the time of signature or ratification, acceptance or approval of this Convention or accession thereto, declare that it does not consider itself bound by any or all of the provisions of paragraph 1. The other States Parties shall not be bound by those provisions with respect to any State Party which has made such a reservation.

3. Any State which has made a reservation in accordance with paragraph 2 may at any time withdraw that reservation by notification to the Secretary-General.

#### *Article 17*

1. This Convention shall be open for signature at Rome on 10 March 1988 by States participating in the International Conference on the Suppression of Unlawful Acts against the Safety of Maritime Navigation and at the headquarters of the Organization by all States from 14 March 1988 to 9 March 1989. It shall thereafter remain open for accession.

2. States may express their consent to be bound by this Convention by:

(a) Signature without reservation as to ratification, acceptance or approval;  
or

(b) Signature subject to ratification, acceptance or approval, followed by ratification, acceptance or approval; or

(c) Accession.

3. Ratification, acceptance, approval or accession shall be effected by the deposit of an instrument to that effect with the Secretary-General.

#### *Article 18*

1. This Convention shall enter into force ninety days following the date on which fifteen States have either signed it without reservation as to ratification, acceptance or approval, or have deposited an instrument of ratification, acceptance, approval or accession in respect thereof.

2. For a State which deposits an instrument of ratification, acceptance, approval or accession in respect of this Convention after the conditions for entry into force thereof have been met, the ratification, acceptance, approval or accession shall take effect ninety days after the date of such deposit.

#### *Article 19*

1. This Convention may be denounced by any State Party at any time after the expiry of one year from the date on which this Convention enters into force for that State.

2. Denunciation shall be effected by the deposit of an instrument of denunciation with the Secretary-General.

3. A denunciation shall take effect one year, or such longer period as may be specified in the instrument of denunciation, after the receipt of the instrument of denunciation by the Secretary-General.

#### *Article 20*

1. A conference for the purpose of revising or amending this Convention may be convened by the Organization.

2. The Secretary-General shall convene a conference of the States Parties to this Convention for revising or amending the Convention, at the request of one third of the States Parties, or ten States Parties, whichever is the higher figure.

3. Any instrument of ratification, acceptance, approval or accession deposited after the date of entry into force of an amendment to this Convention shall be deemed to apply to the Convention as amended.

#### *Article 21*

1. This Convention shall be deposited with the Secretary-General.

2. The Secretary-General shall:

(a) Inform all States which have signed this Convention or acceded

(i) Each new signature or deposit of an instrument of ratification, acceptance, approval or accession together with the date thereof;

(ii) The date of the entry into force of this Convention;

(iii) The deposit of any instrument of denunciation of this Convention together with the date on which it is received and the date on which the denunciation takes effect;

(iv) The receipt of any declaration or notification made under this Convention;

(b) Transmit certified true copies of this Convention to all States which have signed this Convention or acceded thereto.

3. As soon as this Convention enters into force, a certified true copy thereof shall be transmitted by the Depositary to the Secretary-General of the United

Nations for registration and publication in accordance with Article 102 of the Charter of the United Nations.

#### *Article 22*

This Convention is established in a single original in the Arabic, Chinese, English, French, Russian and Spanish languages, each text being equally authentic.

IN WITNESS WHEREOF the undersigned, being duly authorized by their respective Governments for that purpose, have signed this Convention.

DONE at Rome this tenth day of March one thousand nine hundred and eighty-eight.

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### PROTOCOL FOR THE SUPPRESSION OF UNLAWFUL ACTS AGAINST THE SAFETY OF FIXED PLATFORMS LOCATED ON THE CONTINENTAL SHELF

*The States Parties to this Protocol,*

*Being parties* to the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation,

*Recognizing* that the reasons for which the Convention was elaborated also apply to fixed platforms located on the continental shelf,

*Taking account* of the provisions of that Convention,

*Affirming* that matters not regulated by this Protocol continue to be governed by the rules and principles of general international law,

*Have agreed as follows:*

#### *Article 1*

1. The provisions of articles 5 and 7 and of articles 10 to 16 of the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation (hereinafter referred to as “the Convention”) shall also apply *mutatis mutandis* to the offences set forth in article 2 of this Protocol where such offences are committed on board or against fixed platforms located on the continental shelf.

2. In cases where the Protocol does not apply pursuant to paragraph 1, it nevertheless applies when the offender or the alleged offender is found in the territory of a State Party other than the State in whose internal waters or territorial sea the fixed platform is located.

3. For the purposes of this Protocol, “fixed platform” means an artificial island, installation or structure permanently attached to the seabed for the purpose of exploration or exploitation of resources or for other economic purposes.

## Article 2

1. Any person commits an offence if that person unlawfully and intentionally:

(a) Seizes or exercises control over a fixed platform by force or threat thereof or any other form of intimidation; or

(b) Performs an act of violence against a person on board a fixed platform if that act is likely to endanger its safety; or

(c) Destroys a fixed platform or causes damage to it which is likely to endanger its safety; or

(d) Places or causes to be placed on a fixed platform, by any means whatsoever, a device or substance which is likely to destroy that fixed platform or likely to endanger its safety; or

(e) Injures or kills any person in connection with the commission or the attempted commission of any of the offences set forth in subparagraphs (a) to (b).

2. Any person also commits an offence if that person:

(a) Attempts to commit any of the offences set forth in paragraph 1; or

(b) Abets the commission of any such offences perpetrated by any person or is otherwise an accomplice of a person who commits such an offence; or

(c) Threatens, with or without a condition, as is provided for under national law, aimed at compelling a physical or juridical person to do or refrain from doing any act, to commit any of the offences set forth in paragraph 1, subparagraphs (b) and (c), if that threat is likely to endanger the safety of the fixed platform.

## Article 3

1. Each State Party shall take such measures as may be necessary to establish its jurisdiction over the offences set forth in article 2 when the offence is committed:

(a) Against or on board a fixed platform while it is located on the continental shelf of that State; or

(b) By a national of that State.

2. A State Party may also establish its jurisdiction over any such offence when:

(a) It is committed by a stateless person whose habitual residence is in that State;

(b) During its commission a national of that State is seized, threatened, injured or killed; or

(c) It is committed in an attempt to compel that State to do or abstain from doing any act.

3. Any State Party which has established jurisdiction mentioned in paragraph 2 shall notify the Secretary-General of the International Maritime Orga-



nization (hereinafter referred to as “the Secretary-General”). If such State Party subsequently rescinds that jurisdiction, it shall notify the Secretary-General.

4. Each State Party shall take such measures as may be necessary to establish its jurisdiction over the offences set forth in article 2 in cases where the alleged offender is present in its territory and it does not extradite him to any of the States Parties which have established their jurisdiction in accordance with paragraphs 1 and 2 of this article.

5. This Protocol does not exclude any criminal jurisdiction exercised in accordance with national law.

#### *Article 4*

Nothing in this Protocol shall affect in any way the rules of international law pertaining to fixed platforms located on the continental shelf.

#### *Article 5*

1. This Protocol shall be open for signature at Rome on 10 March 1988 and at the Headquarters of the International Maritime Organization (hereinafter referred to as “the Organization”) from 14 March 1988 to 9 March 1989 by any State which has signed the Convention. It shall thereafter remain open for accession. [cf-see good ms 333]

2. States may express their consent to be bound by this Protocol by:

(a) Signature without reservation as to ratification, acceptance or approval;  
or

(b) Signature subject to ratification, acceptance or approval, followed by ratification, acceptance or approval; or

(c) Accession.

3. Ratification, acceptance, approval or accession shall be effected by the deposit of an instrument to that effect with the Secretary-General.

4. Only a State which has signed the Convention without reservation as to ratification, acceptance or approval, or has ratified, accepted, approved or acceded to the Convention, may become a Party to this Protocol.

#### *Article 6*

1. This Protocol shall enter into force ninety days following the date on which three States have either signed it without reservation as to ratification, acceptance or approval, or have deposited an instrument of ratification, acceptance, approval, or accession in respect thereof. However, this Protocol shall not enter into force before the Convention has entered into force.

2. For a State which deposits an instrument of ratification, acceptance, approval or accession in respect of this Protocol after the conditions for entry into force thereof have been met, the ratification, acceptance, approval or accession shall take effect ninety days after the date of such deposit.

### *Article 7*

1. This Protocol may be denounced by any State Party at any time after the expiry of one year from the date on which this Protocol enters into force for that State.

2. Denunciation shall be effected by the deposit of an instrument of denunciation with the Secretary-General.

3. A denunciation shall take effect one year, or such longer period as may be specified in the instrument of denunciation, after the receipt of the instrument of denunciation by the Secretary-General.

4. A denunciation of the Convention by a State Party shall be deemed to be a denunciation of this Protocol by that Party.

### *Article 8*

1. A conference for the purpose of revising or amending this Protocol may be convened by the Organization.

2. The Secretary-General shall convene a conference of the States Parties to this Protocol for revising or amending the Protocol, at the request of one third of the States Parties, or five States Parties, whichever is the higher figure.

3. Any instrument of ratification, acceptance, approval or accession deposited after the date of entry into force of an amendment to this Protocol shall be deemed to apply to the Protocol as amended.

### *Article 9*

1. This Protocol shall be deposited with the Secretary-General.

2. The Secretary-General shall:

(a) Inform all States which have signed this Protocol or acceded thereto, and all members of the Organization, of:

(i) Each new signature or deposit of an instrument of ratification, acceptance, approval or accession, together with the date thereof;

(ii) The date of entry into force of this Protocol;

(iii) The deposit of any instrument of denunciation of this Protocol together with the date on which it is received and the date on which the denunciation takes effect;

(iv) The receipt of any declaration or notification made under this Protocol or under the Convention, concerning this Protocol;

(b) Transmit certified true copies of this Protocol to all States which have signed this Protocol or acceded thereto.

3. As soon as this Protocol enters into force, a certified true copy thereof shall be transmitted by the Depositary to the Secretary-General of the United Nations for registration and publication in accordance with Article 102 of the Charter of the United Nations.

### Article 10

This Protocol is established in a single original in the Arabic, Chinese, English, French, Russian and Spanish languages, each text being equally authentic.

IN WITNESS WHEREOF the undersigned, being duly authorized by their respective Governments for that purpose, have signed this Protocol.

DONE at Rome this tenth day of March one thousand nine hundred and eighty-eight.

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### NOTES

<sup>1</sup>*International Legal Materials*, vol. XXVII, No. 5 (September 1988), p. 1204.

<sup>2</sup>*Ibid.*, vol. XXVIII, No. 1 (January 1989), p. 212.

<sup>3</sup>E/ECE (XXXIV)/L.18.

<sup>4</sup>Not yet published.

<sup>5</sup>*International Legal Materials*, vol. XXVIII, No. 2 (March 1989), p. 493.

<sup>6</sup>See chap. III.A3(g) of this *Yearbook*.

<sup>7</sup>United Nations *Treaty Series*, vol. 1589, p.

<sup>8</sup>*Ibid.*, *Treaty Series*, vol. 974, p. 177.

<sup>9</sup>*Ibid.*, vol. 15, p. 295.

<sup>10</sup>*International Legal Materials*, vol. XXVII, No. 3 (May 1988), p. 668.

<sup>11</sup>United Nations, *Treaty Series*, vol. 999, p. 17.

<sup>12</sup>General Assembly resolution 217 A III.

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## Chapter V<sup>1</sup>

### DECISIONS OF ADMINISTRATIVE TRIBUNALS OF THE UNITED NATIONS AND RELATED INTERGOVERNMENTAL ORGANIZATIONS

#### A. Decisions of the United Nations Administrative Tribunal<sup>2</sup>

1. JUDGEMENT NO. 409 (11 MAY 1988): TRENNER V. THE SECRETARY-GENERAL OF THE INTERNATIONAL CIVIL AVIATION ORGANIZATION<sup>3</sup>

*Personal upgrading is within discretion of the Secretary-General — Any faults in the procedure leading to the decision not to reclassify post are irrelevant to the refusal to grant a personal upgrading — Tribunal cannot substitute its judgement for that of the Secretary-General in the reclassification of posts*

The Applicant, who had worked with the International Civil Aviation Organization (ICAO) in the past, was offered a job at the ICAO Regional Office in Paris as a Language Officer, at the P-3, Step V, level, but did not accept it. Upon further consideration, bearing in mind the Applicant's experience, the Secretary-General amended the initial offer changing the entry level to P-3, Step X, which the Applicant accepted, and she re-entered the service of ICAO on 26 August 1985.

In December 1985, the P-3 post encumbered by a Russian Language officer, who worked in the European Regional Office, with responsibilities similar to the Applicant's, was upgraded to P-4. Subsequently, on 18 December 1985, the Applicant was recommended for promotion to P-4, and on 24 January 1986, the Applicant submitted a request for reclassification of her post to the P-4 level. On 28 April 1986, the Establishment Officer confirmed to the Secretary-General that her position had been graded correctly at the P-3 level in accordance with the standards set forth by the International Civil Service Commission for the common system. The Applicant was informed verbally on 13 May 1986 of this decision.

On 12 June 1986, the Applicant requested a personal upgrading to P-4, which was also rejected. She appealed this decision.

The Tribunal noted that a personal upgrading was a matter wholly within the discretion of the Secretary-General, the exercise of which could not be interfered with by the Tribunal in the absence of mistake of law or fact on his part, omission to consider essential facts, or consideration of extraneous matters.

The Tribunal observed that the Applicant had attempted to link her present claim with alleged faults in the procedure leading to the decision not to reclassify her post, but any such faults would not be relevant to the Secretary-General's decision to refuse personal upgrading. The Tribunal, however, stated that even if the present appeal had been against refusal to reclassify the Applicant's post, it was not the function of the Tribunal to substitute its judgement for that of the

Secretary-General in job classification matters, even if the Tribunal had acquired expertise in that area. Instead, the function of the Tribunal would have been to determine whether the Respondent had acted within his “reasonable discretion”. (See Judgement No. 396, *Waldegrave* (1987), paragraph XV.) The Tribunal further noted that the Applicant’s post had been re-evaluated by two independent experts from the ICSC who confirmed the P-3 level classification. Presumably, the Applicant would bring her concerns to the attention of the appropriate review body.

For the foregoing reasons, all pleas of the Applicant were rejected.

## 2. JUDGEMENT NO. 410 (17 MAY 1988): NOLL-WAGENFELD V. THE SECRETARY-GENERAL OF THE UNITED NATIONS<sup>4</sup>

*Recovery of overpayment in respect of dependency benefits — Staff rule 104.10(d) — Rule-making authority invested in the Secretary-General — No retroactive effect of staff rules — Question of interpretation of staff rule — Incumbent on staff member to request an authoritative determination of eligibility for benefits since her interpretation of staff rule differed from the Administration’s — Higher standard of conduct for staff members who are attorneys — Effect of negligence on part of the Administration*

The Applicant appealed the decision to recover overpayments of dependency benefits she had received in respect of her twins. The Respondent had contended that the Applicant was not eligible for dependency benefits because her husband, who worked for the International Telecommunication Union (ITU), a United Nations specialized agency, was receiving dependency benefits in respect of their first child, and only one spouse could receive such benefits under the Staff Regulations and Rules.

The Tribunal pointed out that the central substantive question turned on the applicability and meaning of the United Nations staff rule 104.10(d) which provided that:

“The marriage of one staff member to another shall not affect the contractual status of either spouse but their entitlements and other benefits shall be modified as provided in the relevant Staff Regulations and Rules. The same modifications shall apply in the case of a staff member whose spouse is a staff member of another organization participating in the United Nations common system ...”

The Applicant had raised the question as to whether the rule could have validly imposed anything on any other organization such as the ITU, or the latter’s staff members. However, the Tribunal considered that the ITU and the United Nations participate in the United Nations common system. Furthermore, staff rule 104.10(d) had been authorized by General Assembly legislative action as a valid exercise of the Secretary-General’s authority, and was consistent with the broad principles of personnel policy, one of which disfavoured duplication of benefits and inequality as between staff members regarding dependency benefits. Moreover, it was not for the Tribunal to impose artificial restrictions on the rule-making authority invested in the Secretary-General by the General As-

sembly in this regard. The Tribunal, therefore, rejected the Applicant's notion that before the Secretary-General could properly adopt staff rule 104.10(d), it was necessary for the General Assembly to have included in the Staff Regulations a specific principle relating to the effect of marriage between United Nations staff members and staff members of other organizations in the common system.

The Tribunal also rejected the Applicant's contention that staff rule 104.10(d) would not apply to her because her marriage occurred prior to 1 January 1980, the effective date of the provision in question. However, the Tribunal disagreed, finding no evidence of any intention by the Secretary-General to create a privileged group of staff members entitled to continuation of duplicate dependency benefits because of the happenstance that their marriage occurred before 1 January 1980. Moreover, in the Applicant's situation, the duplicate benefits payments which she sought to perpetuate were directly occasioned, not by her marriage, but by the birth of her twins in late 1981. There was no improper retroactive application of the staff rule.

The Applicant also raised questions of the interpretation of staff rule 104.10(d). However, the Tribunal disagreed with the Applicant's interpretation of the words "some modifications," preferring the plain meaning and intention of the staff rule. Moreover, the Tribunal stated that if there were even the slightest question as to how the Administration interpreted staff rule 104.10(d), it was dispelled by administrative instruction ST/AI/273, which clearly and unequivocally placed the Applicant on notice that her view regarding entitlement to dependency benefits was not shared by the Administration.

In the Tribunal's view, in all circumstances of this case, the Applicant could not have been unaware that she was not entitled to dependency benefits and that it was inappropriate for her to claim them before having requested from the Administration an authoritative written determination, upon which she could have appealed if unfavourable. There was no valid reason for the Applicant to have had the free use of United Nations funds prior to such a determination. Equally inappropriate was the Applicant's apparent theory that if there were some impropriety in her seeking and obtaining benefits, it was up to the Administration to discover this and notify her. (Cf. Judgement No. 346, *Chojnacka* (1985).) The Organization was entitled to a higher standard of conduct from the staff, particularly attorneys.

The Applicant also advanced a number of procedural arguments. The Tribunal noted preliminarily that when, as here, a staff member had received funds from the Organization to which the staff member was not entitled because of a staff rule such as 104.10(d), and had done so on the basis of her own interpretation of the rule, which was in conflict with an official interpretation of the Administration, the right of the Organization to recover overpayments under staff rule 103.18 would not be defeated by purely technical procedural arguments in the absence of a compelling showing of substantial prejudice resulting from the alleged procedural deficiency. The Tribunal did take note of the negligence on the part of the Administration, describing it as reaching "an astonishing level," but stated that this negligence did not absolve the Applicant of responsibility. The Administration could recover the overpayments paid to the Applicant.

### 3. JUDGEMENT NO 415 (24 MAY 1988): MIZUNO V. THE SECRETARY-GENERAL OF THE UNITED NATIONS<sup>5</sup>

*Non-renewal of fixed-term appointment because of refusal to accept a field posting — Competency of Joint Appeals Board — Question of discrimination — Due process rights of staff member must be fully protected even when he is annoying and suspected of dissimulation and lack of candour — Question of reasonable expectation of continuous employment — Requirement of a formal warning*

In 1983, the United Nations High Commissioner for Refugees (UNHCR) announced to the staff new guidelines for the reassignment of staff in the Professional category to be applied with immediate effect. Under the new policy, staff members could express preferences among duty stations, but in the absence of such preferences, the Administration could assign any staff member to any field station it considered appropriate.

On 21 September 1983, the Applicant, a Legal Officer at the P-3 level, was requested to exercise his choice among seven posts, but the Applicant declined to do so, and after several requests for the reasons for his refusal he stated that he wished to complete the work that had been currently assigned to him. Later he claimed illness as the basis for his refusal, as well as misunderstandings regarding his unwillingness to take up one of the field postings. In a memorandum dated 30 January 1984, the Applicant was informed that because of his repeated refusals to accept field posts and in view of the unacceptable arguments he had advanced, the High Commissioner had decided not to extend his appointment beyond the expiration date on 26 July 1984. On 26 October 1984, the Applicant was separated from the service of UNHCR, and the Applicant appealed.

As to the Applicant's complaint that he had not been given a full opportunity for an "open hearing" and of unduly protracted proceedings, the Tribunal did not find that there had been material irregularities in the proceeding of the first Appeals Board. In the Tribunal's view, the Board was competent to decide what was the best procedure to follow, and the delay in the disposal of the case was not of an unusual nature given the plethora of details which had to be carefully considered.

Additionally, the Tribunal found no evidence of discrimination. The rules about rotation had to be applied at the discretion of the Respondent and in the interest of the Organization and after suitable consultation. The question was not how the other staff members were dealt with, but whether the Applicant was deprived of due process or was treated unjustly or became a victim of prejudice, and here there was no such evidence.

The Tribunal noted that the Respondent was not free of traces of annoyance and of suspicion of dissimulation and lack of candour on the part of the Applicant at some of the actions he had taken, but such an impression would not exempt the Respondent from fully respecting and protecting those rights of the Applicant to which he was entitled. The offer of the seven posts was the Administration's only offer and was made by telephone, and the Applicant was requested to give an immediate reply for reasons which had not been made clear. The Tribunal concluded that the haste with which the Applicant was asked to make up his mind was not in full conformity with the requirements of due process, even after making allowances for the part played by the Applicant himself. The Tribunal further noted that the Respondent refused without any justifi-

cation to extend the Applicant's contract, even by a short time, when the conciliatory procedure was undertaken and when the Director of the Division of Personnel and Administration in New York had requested such an extension.

On the other hand, the Tribunal was of the view that the Applicant could have no reasonable or legal expectation for the renewal of his contract. An essential element in the General Assembly's resolution 37/126, part IV, providing "for every reasonable consideration" after five years of continuing good service by staff members holding fixed-term contracts, was missing. The Applicant's service was under five years.

Furthermore, only two Performance Evaluation Reports (PERs) on the Applicant existed. The Report for the period 1 August 1981 to 26 July 1984 was not signed by the Applicant, and no explanation was forthcoming why the PERs were not prepared regularly and on time. The Tribunal concluded that, in the absence of valid PERs, the Tribunal had little option but to reject the plea that the Applicant had claim to or reasonable expectation for continuous employment either under General Assembly Resolution 37/126 or by application of the Tribunal's past decisions. At the same time, the Tribunal pointed out that, while the relevant resolution provided for "every reasonable consideration" after five years of satisfactory continuous service on fixed-term contract, it did not prescribe that such consideration would automatically mean renewal of the contract or that fixed-term contracts could not be terminated on due dates.

The Tribunal took the view that although the Applicant had ample opportunity to realize what the consequences of his actions could be, he did not receive any formal warning that his current contract would not be extended because of his refusal to accept any of the seven posts. The regulations and the repeated advice of the senior officers should have been enough of a warning, but considering that UNHCR circulars regarding field postings were issued in 1983 and that the Applicant had only a few years' service with UNHCR, it would have been more appropriate to have given him some formal warning. Moreover, the Tribunal did not consider the lack of a formal warning before terminating the Applicant as a veiled disciplinary measure as the Applicant had contended.

The Tribunal awarded monetary compensation in the amount of US\$3,000 to the Applicant for the Respondent's lack of full application of all the requirements of due process and other aspects of the Respondent's handling of the case. All other pleas were rejected.

#### 4. JUDGEMENT NO. 418 (25 MAY 1988): WARNER V. THE SECRETARY-GENERAL OF THE UNITED NATIONS<sup>6</sup>

*Non-promotion to the Professional category — Treatment of an outstanding staff member — Question of the existence of an agreement — Question of commitments made to a staff member — Remedy for not honouring commitments*

The Applicant, who had entered the service of the United Nations on 12 April 1961, and who was functioning as "Supervisor of the Secretarial Unit" at the G-5 level since 1 April 1972, was recommended by the Director of the Departmental Administrative and Finance Office of the Department of Economic and Social Affairs to head a new Unit in the Office of Personnel Services for the purpose of providing secretarial training to the Organization as a whole, at the



P-2 level. A year later, the Applicant was transferred with her G-5 post on a non-reimbursable loan basis for six months, to the Office of Personnel Services. Although the administrative measure was effective for six months, neither Department issued further personnel action forms to extend the Applicant's assignment or transfer her officially to the Office of Personnel Services.

In December 1978, the General Assembly established a competitive examination for the selection of General Service staff members for posts in the Professional category. Subsequently, the Office of Personnel Services did not recommend the Applicant for promotion to the P-2 level during the 1979 promotion review, nor did they initiate any procedure to reclassify her post. The Applicant in 1981 appealed the decision not to reclassify her post and not to promote her to the P-2 level.

The Tribunal noted that the Applicant was considered to be an outstanding staff member by her supervisor and was a credit to the United Nations. Unfortunately, the Administration had not treated the Applicant in a reciprocal manner. The Tribunal noted in this regard that it was not until March 1982 that an official date to transfer the Applicant to the Office of Personnel Services, effective 1 January 1982, was taken, even though the Applicant had performed her duties in Personnel since 16 October 1978, i.e., for 41 months. This confused situation, resulting from the Administration's own actions, was all the more unfortunate, in the view of the Tribunal, because it permitted the Applicant and the Respondent to draw opposing inferences from it.

The Tribunal disagreed with the Respondent's contention that the Applicant had not established the existence of an agreement whereby the Respondent undertook to upgrade her post or grant her a promotion to the P-2 level. The Tribunal noted the insistence with which the Director of the Departmental Administration and Finance Office imposed her promotion to the P-2 level as a condition for transferring the Applicant to the Office of Personnel Services, and when the Director of Personnel accepted this transfer after careful consideration, he implicitly accepted this condition which was never revoked. Furthermore, in the opinion of the Tribunal, the confusion attending the transfer procedure could not be invoked by the Respondent to support his own interpretation.

The Tribunal in its jurisprudence had on a number of occasions — most recently in its Judgement No. 342, *Gomez* (1980), paragraph V — defined the conditions for the existence of the Administration's commitments to staff members and their scope. As early as 1965, in the *Sikand* case (Judgement No. 95, paragraph III), the Tribunal noted:

“The Tribunal in its jurisprudence has established that the terms and conditions of employment of a staff member with the United Nations may be expressed or implied and may be gathered from correspondence and surrounding facts and circumstances.”

In 1969, in the *Fürst* case (Judgement No. 134, paragraph III), the Tribunal stated the following:

“Appointments and promotions are within the discretion of the Secretary-General and, unless there is a legal obligation binding on the Secretary-General, the Tribunal cannot enter into the merits of the same.”

Such commitments became null and void if the staff member to whom they were made did not meet the legitimate expectations of the Administration. In this case, however, the Applicant did not fall short of these expectations. She set up the new unit as planned, and supervised it in a way deemed excellent by all those called upon to evaluate it. The decision to appoint or promote a staff member to whom commitments have been made is the sole prerogative of the Administration. If this decision was not taken, however, the attendant circumstances may well entail the responsibility of the Administration.

In the present case, the Tribunal observed that the Administration failed to grant the Applicant the benefit of the transitional measures envisaged at the time of the establishment of a competitive examination as the only means of moving from the General Service category to the Professional category. Despite its commitments, the Administration did not recommend the Applicant for a promotion to the P-2 level at the time of the 1979 promotion review. Notwithstanding the outstanding services rendered by the Applicant, the Administration took no concrete steps to initiate any procedure whatsoever, in accordance with established rules, to make it possible to promote the Applicant. It did not make all the efforts which the Department of Economic and Social Affairs and the Applicant were entitled to expect following the Applicant's transfer to the Office of Personnel Services.

In those circumstances, the Tribunal was of the belief that the responsibility of the Administration was entailed and that it should compensate for injury sustained by the Applicant. In determining that the Applicant should be paid US\$25,000, the Tribunal also took into account the long and inadmissible delays on the part of the Administration in the appeals process.

On the other hand, the Tribunal could not order the Respondent to ensure that the Applicant's assignments were at the P-2 level, nor decide that her post should be classified to the P-2 level or that she should be promoted to the P-2 level without having to participate in a competitive examination.

5. JUDGEMENT NO. 421 (27 MAY 1988): CHATWANI AND PETTINICCHI V. THE COMMISSIONER-GENERAL OF THE UNITED NATIONS RELIEF AND WORKS AGENCY FOR PALESTINE REFUGEES IN THE NEAR EAST; DUGUERNY AND VETERE V. THE SECRETARY-GENERAL OF THE UNITED NATIONS<sup>7</sup>

*Complaint against deferment at Geneva and Vienna of the introduction of the remuneration correction factor (RCF) in the calculation of Professional salaries — Nature of International Civil Service Commission rules — Competency of Executive Heads to modify or rescind ICSC decisions — Question of justification based on financial crisis*

In July 1986, the International Civil Service Commission (ICSC) noted that, since exchange rate fluctuations directly affected take-home pay, it was necessary to find a solution that would minimize any future gains or losses to staff, and, therefore, decided that a new procedure for implementing the remuneration correction factor (RCF) be applied on an interim basis with effect from

1 September 1986 to the post adjustment portion of Professional salaries. However, the Commissioner-General of UNRWA and the United Nations Secretary-General applied the RCF arrangements, at Geneva and Vienna, only from 1 January 1987 because of the financial crisis and in consistency with other economy measures taken.

The Applicants appealed those decisions, requesting that they be paid the amount in salary they lost as a result of the ICSC's decision being deferred to 1 January 1987.

The Tribunal was of the view that the observance of the rules duly adopted by ICSC was of the utmost importance. The Tribunal noted that the Respondent did not contest the fact that the measure in question was of a mandatory nature and must be adopted by all organizations that form part of the United Nations common system of salaries, allowances and other benefits payable to international staff members. The Tribunal further noted that it was not for the United Nations Secretary-General or for the Secretaries-General or Directors-General of the other organizations in the common system to revise, modify or rescind a decision adopted by ICSC in accordance with its statute.

In view of the above, the Tribunal considered that the decisions by the Secretary-General and the Commissioner-General of UNRWA to defer the implementation of the RCF procedures with effect from 1 September 1986 were tainted with illegality, and, therefore, must be rescinded.

The Respondent's invoking the financial crisis to justify the suspension of the ICSC decision could not be considered because, in the opinion of the Tribunal, the Secretary-General did not have the authority to do so, whatever the reasons for his actions. It was not for the Tribunal to substitute for the erroneous decision by the Secretary-General another decision he could have adopted in the exercise of the power conferred on him by virtue of which authorized him to take the initiative in adopting measures to guarantee the Organization's survival in the event of a serious financial crisis: for example, by calling on staff members to make financial sacrifices or by obtaining appropriate guidance from the General Assembly. It was, therefore, not necessary for the Tribunal to pronounce on the existence and scope of that power.

For these reasons, the Tribunal rescinded the measures adopted by the Commissioner-General of UNRWA and the United Nations Secretary-General, which deferred the application of the RCF to the calculation of their post adjustment from 1 September 1986 to 1 January 1987. The Tribunal further ordered payments to the Applicants, with effect from 1 September 1986 to 31 December 1986, of an amount representing the difference between the two amounts of post adjustment.

## 6. JUDGEMENT NO. 424 (27 OCTOBER 1988): YING V. THE SECRETARY-GENERAL OF THE UNITED NATIONS<sup>8</sup>

*Summary dismissal for serious misconduct — Question of delegated authority in personnel matters — Conditions attached to appearance of a witness — Judgement No. 104 (Gillead) — Question of referring serious misconduct to Joint Disciplinary Committee — Broad discretionary power of the Secretary-General in disciplinary matters — Personal responsibility regarding certifications of accuracy of income tax reimbursements*

The Applicant had served since 1969 with the United Nations Children's Fund (UNICEF), and was a permanent resident of the United States and, therefore, subject to the payment of United States taxes on his United Nations earnings. The Applicant's wife, who had worked in the United Nations Tax Unit, and who had been under investigation by the United Nations Internal Audit Division (IAD), had resigned in June 1985.

During 1985, the United Nations Accounts Division conducted a review of cancelled cheques issued by the United Nations to United States citizens and United States permanent residents for the purpose of tax reimbursement. These cheques are made payable jointly to the staff member and to the pertinent tax authority. In practice, when the staff member endorses the cheque, he or she should promptly forward it to the tax authorities. During the course of its review, the Accounts Division verified that cheques issued to the Applicant had been deposited in his wife's bank account, or in their joint account, and had not been forwarded to the taxing authorities, as required by the procedures established by the Organization. The Accounts Division referred the matter to the IAD and it proceeded to audit the Applicant's tax records. It developed that over a four-year period, tax returns that the Applicant had filed with the U.S. Internal Revenue Service and the New York State Tax Department were different from the copies of the returns that he had submitted to the United Nations in order to obtain reimbursement and in respect of which he had made all the certifications required by the Organization. The Applicant's explanations in the matter were found unsatisfactory, and effective 21 October 1985, he was summarily dismissed for alleged tax fraud. The Applicant appealed that decision.

The Tribunal rejected the Applicant's contention that the Executive Director was a "junior officer" and that because the dismissal decision was made at that level, the Applicant was denied due process. Likewise, the Tribunal rejected the apparent claim that the Secretary-General was not authorized to act in personnel matters through subordinates to whom he had duly delegated authority.

The Tribunal considered that the alleged fraud consisted of joint income tax returns having been filed by the Applicant and his wife with the taxing authorities which indicated that their tax liability was significantly less than the tax liability shown on purported (but not actual) copies of the tax returns which were submitted to the United Nations for the purpose of reimbursement of taxes paid by the Applicant and his wife. In addition, for several years, tax reimbursement cheques given by the United Nations to the Applicant and his wife which were supposed to have been endorsed over to the taxing authority were instead deposited in either the wife's bank account or in their joint account.

The Tribunal further noted that the course of conduct attributed to the Applicant was squarely in violation of certifications signed by the Applicant that (1) the copy of the tax returns submitted to the United Nations was a true copy of that submitted to the tax authorities; (2) tax liabilities had been minimized by filing joint returns and claiming all allowable exemptions and deductions; (3) proper use had been made of the United Nations tax reimbursement cheques received; and (4) the amounts received for the purpose of meeting income tax liabilities had been paid to the appropriate tax authorities.

The Applicant, on the other hand, had maintained that since 1974, his wife had handled all aspects of their joint return and he professed a lack of knowl-

edge of the whole affair. In this regard, the Tribunal noted that, in the proceeding before the Joint Appeals Board (JAB), it was represented that the Applicant's wife would be willing to testify to explain the details of the fraud she had perpetrated and the innocence of her husband. However, her willingness to testify was conditioned on her testimony being heard without the presence of her husband which the JAB did not accept. The Tribunal agreed that a potential witness was not entitled to attach such conditions to appearance as a witness, and this was particularly true of someone in the position of the Applicant's wife whose credibility would be highly suspect in any event.

The JAB declined to reach the merits in the case, and recommended that the summary dismissal be rescinded and the case referred to a Joint Disciplinary Committee (JDC). Citing Judgement No. 104, *Gillead* (1967), the JAB believed that because the UNICEF Director of Personnel, in suspending the Applicant, had invited the Applicant to make any further written statement or explanation he might wish to make on the matter prior to a final decision, that as a matter of law, this signified that the Applicant's culpability was not patent and, therefore, summary dismissal was improper. The Secretary-General, however, maintained the decision to summarily dismiss the Applicant, based on his conclusion that the Applicant's misconduct was serious and warranted summary dismissal.

The Tribunal found that the JAB had read into the *Gillead* case more than the judgement itself stood for. In *Gillead*, the Tribunal pointed out that "... the conception of serious misconduct ... was introduced ... to deal with acts obviously incompatible with continued membership of the staff", and "the disciplinary procedure should be dispensed with only in those cases where the misconduct is patent, and where the interest of the service requires immediate and final dismissal". That principle remained unchanged here and tax fraud, as well as wrongful certifications associated with tax reimbursement, was plainly covered by it. Nothing in *Gillead* held that the obvious or reprehensible degree of misconduct necessarily disappeared or was diminished because a staff member was given another opportunity to provide a further explanation, or further information. Here, nothing further was presented by the Applicant that differed materially from what he had presented previously.

The Tribunal rejected, as it had in the past, the contention that in a case involving summary dismissal for serious misconduct, the Secretary-General must refer the matter to the JDC. Neither staff regulation 10.2 nor staff rule 110.3(a) required such a referral. (See also Judgement No. 104, *Gillead* (1967).) Indeed, even if a matter was referred to the JDC, the Secretary-General may have reasonable grounds for declining to follow its recommendation. (See Judgement No. 210, *Reid* (1976).) Nor was there any validity in the Applicant's claim that under staff rule 111.2(a) the Secretary-General was obliged to review the summary dismissal decision before the case may be taken by the Applicant to the JAB. Here again it was clear that this was a matter which the staff rule reserved to the discretion of the Secretary-General.

As regards the question whether the Secretary-General acted within bounds of his reasonable discretion in determining that the Applicant's conduct was tantamount to serious misconduct warranting summary dismissal, the Tribunal has consistently emphasized the broad discretion of the Secretary-General in disciplinary matters. This included judgements as to what constitutes serious

misconduct, as well as the nature of the discipline to be imposed for it. In this case, the Tribunal concluded that there was not the slightest question as to the propriety of viewing the Applicant's actions as misconduct of the most serious nature and deserving of the most serious punishment including summary dismissal.

Furthermore, there was no evidence of material mistake of fact, prejudice or other extraneous considerations that would vitiate the decision in the present case.

The Tribunal also pointed out that even if the UNICEF Executive Director and the Secretary-General had believed the Applicant's story that he was ignorant of his wife's fraudulent behaviour, it still could have been reasonably concluded that the Applicant was guilty of serious misconduct warranting summary dismissal. Every United Nations staff member had an absolute personal and non-transferable responsibility to see to it that each and every certification furnished to the United Nations in connection with United Nations reimbursement of income taxes was accurate, and it was no answer, in the view of the Tribunal, that the staff member acted in good faith by trusting another, no matter what the apparent justification for the trust.

For the foregoing reasons, the application was rejected in its entirety.

## **B. Decisions of the Administrative Tribunal of the International Labour Organization<sup>9</sup>**

1. JUDGEMENT NO. 883 (30 JUNE 1988): IN RE LARGHI V. PAN AMERICAN HEALTH ORGANIZATION (WORLD HEALTH ORGANIZATION)<sup>10</sup>

*Complaint against transfer — Organization's interests are paramount in reassigning staff — Limited power of review of discretionary decision — Question of personal prejudice*

The complainant, who was in charge of the Viral Zoonoses Section at the Panamerican Zoonoses Center (CEPANZO) of the Pan American Health Organization (PAHO), and who had the grade P-4 as a virologist, was ordered by the Acting Director of CEPANZO and the PAHO's Coordinator of Veterinary Public Health to transfer to the National Health Institute of Peru, in Lima, in order to help in producing vaccine against rabies, a subject he was expert in. The complainant objected to this transfer, contending that the transfer would have broken up his family at the time when he was only six years short of retirement, and that the transfer was unlawful because of breach of rules on transfer and personal prejudice against him.

The Tribunal held that there was no breach of rules on transfer. According to the relevant staff regulations and rules, while a staff member's particular abilities and interests are to be taken into consideration, the interests of the Organization are paramount. This also was reflected in Judgement No. 447 (*in re Quinones*) where, in paragraph 4, it was stated "... It is true that if the Organization's interests carry greater weight, the Division will act accordingly." Furthermore, the Tribunal pointed out that in accordance with the Staff Rules,

provided the correct procedure was followed the Director had wide discretion in determining transfers of Professional category staff. In the case of such a discretionary decision, the Tribunal had a limited power of review, and could set it aside only if the decision were taken without authorization or in breach of a rule of form or procedure, or was based on an error of fact or of law or if some essential fact was overlooked, or if there were misuse of authority, or if a mistaken conclusion were drawn from the facts.

As regards the complainant's contention that personal prejudice motivated the transfer, the Tribunal did not find any evidence. The Tribunal noted that while he had been working with people of high calibre and had had access to certain facilities in Argentina, the purpose of his transfer to Peru was to enable him to pass on his knowledge and experience in a country which needed them badly. Indeed, the Tribunal further noted the Organization had granted him at the same time of the transfer a five-year extension of his appointment.

The complaint was, therefore, dismissed.

## 2. JUDGEMENT NO. 885 (30 JUNE 1988): IN RE WEST (NO. 10) V. EUROPEAN PATENT ORGANIZATION<sup>11</sup>

*Reprimand for abuse of right of appeal — Purpose of right of appeal — Annoyance of appeal cannot negate right — Jurisdiction of Tribunal and the Organization in such matters*

The complainant, who had been employed by the European Patent Organization (EPO) since 1982, lodged his first appeal in 1984 against the determination of his starting grade. Thereafter, he lodged a number of appeals which were rejected, when in August 1986, the President of the EPO wrote to the complainant observing that, though repeatedly told since April 1985 that the matter was *res judicata*, he had persisted in his claims. He had thereby abused his right of appeal and acted in breach of his duty to respect the EPO's interests, and the President imposed a disciplinary sanction under article 93(1) of the Service Regulations. Thereafter, the complainant lodged an appeal against the reprimand.

The Tribunal noted that an EPO staff member who alleged non-observance of the terms of his appointment or of the applicable staff rules and regulations had the right to submit an internal appeal and, if still dissatisfied, to appeal ultimately to the Tribunal. As the Tribunal pointed out, the existence of this right was in the interests of both sides since it served to maintain harmony, general efficiency and good morale in the Organization.

The Tribunal acknowledged that most staff members exercised the right of appeal sensibly. However, even though a few abused it and caused annoyance to the Administration, as in the present case, the Tribunal was of the view that the interests of both justice and sound administration demanded the Organization endure litigation.

The Tribunal further stated that it was for the Tribunal itself to determine whether the complainant had abused his right of appeal. The Organization would simply decide whether the appeal was receivable and, if so, whether there was merit to it.

For the foregoing reasons, the Tribunal held that it was wrong to have imposed the reprimand on the complainant, and it was quashed.

### 3. JUDGEMENT NO. 891 (30 JUNE 1988): IN RE MORRIS V. THE WORLD HEALTH ORGANIZATION<sup>12</sup>

*Abolition of post — Question of post of indefinite or limited duration — Delay in following reduction-in-force procedure not a good reason for refusing to implement it — Question of expectation of continuity of employment*

The complainant, a dentist, was appointed to the World Health Organization (WHO) in 1975 and assigned to the staff of the Pan American Health Organization (PAHO), the WHO's Regional Office for the Americas, where he held a series of appointments. In May 1982, he was assigned as a Dental Officer to a P-4 post under a project in Guyana, his appointment to expire on 31 December 1984. In August, he was informed that there would be no funds for the project after 31 December 1984 and that his appointment would therefore expire under WHO staff rule 1040, on the completion of temporary appointments.

The complainant appealed this decision seeking the application of rule 1050, on abolition of post and reduction in force. Rule 1050.2 states that when a post "of indefinite duration" was abolished there shall be a "reduction in force" and the incumbent shall be given "priority for retention" on the staff. Under rule 1050.4 he shall be awarded an indemnity if his appointment is nevertheless terminated. The Administration agreed that the complainant be paid the indemnity under rule 1050.4, but refused to apply the reduction-in-force procedure to the complaint contending that it was too late.

The Tribunal noted that the rules governing departure from service differed according to the reason for separation, and here the Organization had treated the complainant's case under the provisions on expiry of contract in rule 1040, which was less favourable than those on abolition of post in rule 1050. When he complained, the Organization conceded that he should have come under rule 1050 and offered him compensation. The complainant, however, claimed the application of the reduction-in-force procedure provided for in rule 1050.2, under which he could have been entitled to compete for retention in the Organization with others holding similar posts. Only if he were not successful would an indemnity be payable under rule 1050.4.

The Tribunal considered that the matter at issue was whether the abolished post was one of indefinite or limited duration. If it were of limited duration, the reduction-in-force procedure would not have applied under the rules. On review of the facts, the Tribunal concluded that, in the absence of a definition of either indefinite or limited duration, the post though a post of limited duration of 24 months at the start became one of indefinite duration because of the possibility of additional funding for the project. Therefore, the complainant was entitled to the application of the reduction-in-force procedure.

The Tribunal also concluded that the delay, which was the fault of the Organization, in following the procedure was not a good reason for refusing to implement it.



Regarding the Organization's contention that the complainant could not have expected continuity, the Tribunal considered that the legitimate expectations could exist only in the context of the Staff Regulations and Rules, and it was not the type of appointment but the type of post held by a staff member that determined his entitlement to the application of the reduction-in-force procedure. The complainant, too, had legitimate expectations that his right under the rules would be respected.

The Tribunal ordered the Organization to apply the reduction-in-force procedure in accordance with staff rule 1050.2.

4. JUDGEMENT NO. 911 (30 JUNE 1988): IN RE DE PADIRAC (NO. 2) V. UNITED NATIONS EDUCATIONAL, SCIENTIFIC AND CULTURAL ORGANIZATION<sup>13</sup>

*Complaint against violation of freedom of association — Question of receivability — Standards that govern freedom of association — Status of President of the Conference — Question of administrative action free from judicial review — Nature of facilities granted to a staff association — Executive Head's consultation with staff association — Question of damages*

The complainant was a staff member of the United Nations Educational, Scientific and Cultural Organization (UNESCO), since 1976, and was President of the Staff Union Association (STA) from March 1984 until March 1987, and filed the present appeal both as a staff member and staff representative. Firstly, he contested the decision by the Assistant Director-General for General Administration refusing permission to reproduce and distribute the text of a supplement to the STA bulletin. The supplement was to say that at a meeting on 24 October 1985, regarding staff retrenchment, recruitment and renewal of appointments, the President of the General Conference of UNESCO had promised the presidents of the STA and the other staff association he would recommend letting them make their joint statement but that in a letter to them of 30 October 1985 he had said he had made no such promise; that on 4 November 1985 he had told them that after speaking to the Director-General he had recommended that the officers of the Conference should refuse permission; and that the statement had been thwarted by the President's dilatory tactics and his fear of offending the Director-General.

Secondly, the complainant lodged a second appeal against the decision of 28 March 1986 that reduced the STA's allotted print run for 1986 from the 1985 figure of 2\_ million to 2 million pages and that the STA would be charged for any printing over and above the lower figure.

The Organization raised the issue of receivability as regards the appeal being filed on behalf of the Staff Association. The Tribunal agreed, citing Article II(6) of the Statute of the Tribunal, which precluded bodies having legal personality to bring an appeal. The Organization further submitted that the complainant as a member of the staff bringing the complaint was irreceivable because he had suffered no injury as a staff member and because the decision he was challenging was not directed at him as an individual. The Tribunal noted that the claims advanced by the complainant as a member of the staff rested solely on the Organization's alleged failure to abide by staff regulations 8.1 and

8.2 and staff rules 108.1 and 108.2, which acknowledged the staff's right of association. The Tribunal further noted that regulation 8.1 read: "Machinery shall be provided by the Director-General to ensure continuous contact between the staff and himself through duly elected officials of the association or associations representative of the staff." Regulation 8.2 stated that the Director-General shall set up an administrative body with staff participation. The Organization thus accepted as a term of every contract of appointment its duty to respect freedom of association, and anyone who had such a contract may challenge any decision that impaired that freedom. His complaint was, therefore, receivable insofar as he was suing in his own name.

As regards the complainant's first appeal, the Tribunal pointed out that earlier judgements of the Tribunal have set forth the principles that govern freedom of association. According to precedent, a staff association enjoyed special rights that included broad freedom of speech and the right to take to task the administration of the organization whose employees it represented. Like any other freedom, however, freedom of speech had its bounds. A staff association may not resort in public to action that impaired the dignity of the international civil service, save that the degree of discretion required to it was not as great as was expected of an individual staff member: both law and practice allowed it wider freedom of speech and only gross abuse would be inadmissible.

The Organization had two objections to the bulletin supplement, the first being that the text contained mistakes of fact. In the view of the Tribunal, such a plea was in itself inadmissible. Judgement 496 (*in re Garcia and Marquez*) of 3 June 1982 read: "This has from time immemorial been the standard excuse for censorship; the alleged object is never to suppress the truth but just to make sure that only the truth is told. Freedom of association is destroyed if communication between the members is allowed only under supervision." Besides, more than one construction might be given to the talks with the President, and without casting doubt on anyone's integrity or good faith. Without saying which interpretation was right and which was wrong, the Tribunal held that the Organization committed an unlawful act of censorship.

The Organization's other objection was that the term "dilatatory tactics" was insulting or even libelous. The Tribunal observed that the President of the Conference, who did not belong to the Administration, exerted no direct authority over the staff, and that was why they had a duty to show great discretion in any criticism of him. Yet while the Conference was in session he had authority that went beyond the mere direction of business and his position was not neutral. When he turned down a request from a staff association he was not acting as the political representative of a sovereign Member State but was on par with a senior official and as such was not immune to criticism. The language may have been ill-chosen but taking it out of context lent it undue weight. The text of the supplement did not go beyond the proper bounds of a dispute over matters the Staff Association believed to have threatened the essential interests it safeguarded. It had not acted from malice or bad faith.

As to the first part of the complainant's case, the Tribunal concluded that in denying the Association its customary privilege of having a text printed and issued the Organization infringed its rights as representative and defender of the staff's interests. The impugned decision could not stand.

In connection with the complainant's second appeal, the Tribunal considered that the STA was customarily granted facilities that helped it to function, and one of them was an allotment of paper and a print run. The Organization had contended that the complaint was irreceivable because in allotting the resources at his disposal, the Director-General took a merely administrative measure which afforded no cause of action and was not subject to review by the Tribunal.

In Judgement No. 496 and others, the Tribunal recalled that it had held that the executive head of an organization did enjoy some degree of discretion and in exercising it was immune to judicial review. Thus, while the Tribunal would not entertain any claim from the Staff Association arising out of the alleged breach of an agreement with the Organization for the supply of facilities, the Tribunal would consider whether the Organization was guilty of an actionable breach of freedom of association. The Tribunal observed that the impugned decision seriously curtailed the facilities at the STA's disposal and made a real difference. What was more, the facilities were not of the lesser kind that might have been withdrawn without detriment to the running of the Association. In the view of the Tribunal, it was therefore competent to rule on the lawfulness of the duration.

In this regard, the Tribunal noted that the grant of facilities to a staff association was not a privilege the Organization at any time may withdraw as it pleased. The Tribunal further noted that Chapter VIII of the Staff Regulations and Rules provided among other things for a top-level administrative body with staff participation to advise the Director-General on staff matters in general, and in this connection, one of an executive head's duties was to consult the staff association on such matters. The Tribunal concluded that since the Organization acted unlawfully in taking a decision which seriously disrupted the Staff Association's work and in failing to let the Association state its views, the impugned decision must be set aside.

Finally, as to the claims to damages, the Tribunal observed that the two decisions that were quashed and which caused the Staff Association moral injury were afforded full redress by the publication of this judgement. No damages were awarded for material injury. The complainant himself had stated that the STA had kept within its allotted print run. The other claims were dismissed.

## 5. JUDGEMENT NO. 937 (8 DECEMBER 1988): IN RE FELLHAUER V. THE FOOD AND AGRICULTURE ORGANIZATION OF THE UNITED NATIONS<sup>14</sup>

*Termination as a disciplinary measure — Conduct that constitutes misconduct — Principle of proportionality — Question of abuse of authority*

The complainant, who had been a staff member of the Food and Agriculture Organization of the United Nations (FAO) since March 1968, was at the P-4 level when he was terminated from service after disciplinary proceedings. He was paid compensation in lieu of notice and the sums he owed the Organization would be deducted from his final emoluments.

The Tribunal noted that the complainant was dismissed under staff regulation 301.102, which stated that the Director-General “may impose disciplinary measures on staff members whose conduct is unsatisfactory”. Furthermore, in the Staff Rules and the Manual, “dismissal for misconduct” was defined as termination for conduct that jeopardized the reputation of the Organization.

FAO had charged fraud in connection with duty travel and sick leave. The Tribunal observed that on four separate occasions, the complainant was absent from duty without permission and that the submissions offered by the complainant were implausible. The Tribunal further noted that as regards home leave travel, he was twice in breach of the letter and spirit of the rules, as well as the misuse of an airline ticket issued in 1983 for the repatriation of his son.

The complainant contended that his conduct did not warrant dismissal, the improprieties he was charged with not being tantamount in themselves to misconduct. The Tribunal agreed that none of the charges against the complainant amounted in itself to misconduct, but what was serious was that there were several. The complainant had failed to prove his own good faith and his answers to each of them were unsound. The Tribunal was satisfied on the evidence that he was in gross breach of duty.

The complainant also alleged breach of proportionality, claiming that when disciplinary action was out of proportion to the offence, there was a mistake of law that warranted setting the impugned decision aside. The Tribunal considered that there must be the closest scrutiny of the evidence when the measure taken was dismissal, and on scrutiny of the evidence before it in this case the Tribunal could not regard the complainant’s behaviour over the years as just carelessness that was partly excusable and did not call for dismissal. Here, the complainant was guilty of cheating, and the Director-General had not drawn the wrong conclusions from the evidence or exceeded his discretionary authority in imposing a severe sanction.

The complainant also alleged abuse of authority. He claimed that what had prompted FAO to terminate his services were the Director-General’s suspicions that he had given confidential information to a journalist friend who had written articles taking FAO and its Director-General to task. The Tribunal noted that to prove abuse of authority, the complainant must show that the reason for his dismissal had nothing whatever to do with serving the Organization’s interests. The Tribunal considered that the complainant had adduced no substantive evidence in support of his allegations. Moreover, the charges against him were proven, whatever the motives may have been.

The complaint was dismissed.

## 6. JUDGEMENT NO. 939 (8 DECEMBER 1988): IN RE NOOR V. THE INTERNATIONAL LABOUR ORGANIZATION<sup>15</sup>

*Complaint against transfer — Circular 180 — Question of procedural irregularity — Election to staff committee did not immune staff member from transfer*

The complainant, a citizen of Somalia, had joined the International Labour Organization (ILO) in 1966 and served at Geneva headquarters until 1973 when

he was assigned to various field posts. Thereafter, he made many attempts to return to headquarters in Geneva, and was eventually assigned there temporarily for intensive retraining with a view to his transfer to administrative work in Africa. He had reached the level P-4. On 24 March 1986, he was informed of his appointment to the post of Deputy Director of ILO's office at Lagos, effective 1 July 1986. He objected and requested an appointment to a post at headquarters. He then obtained on grounds of health the suspension of his transfer for 12 months. In October 1986, he stood for election to the Committee of the ILO Staff Union and was co-opted as a member of the Committee on the departure of one of the elected members. The same month, the Director of the Joint Medical Service in Geneva gave his opinion that there was no medical reason why he should not be posted to a developing country. He again protested, complaining that the humid climate in Lagos posed a health risk to him. Subsequently, he was notified of his transfer to the post of Deputy Director of the ILO office at Dar es Salaam, effective 1 January 1988.

The first ground on which the complainant challenged the decision was breach of circular 180. The circular, as the Tribunal pointed out, did not promise that service in the field would be limited to a specific number of years for any official, nor did it make an unqualified promise to bring back to headquarters an official who had spent a substantial period in the field: all it promised was intensive effort to do so. In this regard, the Tribunal observed that the Organization had made considerable efforts to find a suitable post for him at headquarters as he had done himself, but these efforts were unsuccessful. Furthermore, the decision to send him to Africa was made because only there were there vacant posts corresponding to his qualifications. In the circumstances, the Tribunal concluded there was no breach of circular 180.

As to the complainant's plea that the Organization breached article 4.2(f), which read: "The method of filling any other vacancy below the grade of D-1 shall be decided by the Director-General after consulting the Selection Board ...". The ILO had contended that since the complainant had not advanced this plea in the internal proceedings, he could not put it to the Tribunal. The Tribunal disagreed with this assertion stating that a complainant could submit new pleas in support of the same claim. What he may not do is address to the Tribunal new claims. Here, it was not in dispute that the Selection Board was not consulted before the transfer was decided on, and the Organization did not plead urgency. The Tribunal therefore held that the impugned decision was flawed, but a minor procedural flaw, for which the Tribunal awarded the complainant 4,000 Swiss francs.

The complainant also had submitted that since he was a member of the Staff Union Committee his transfer to the field was in breach of article 10.1 of the Staff Regulations, which related to staff relations, and of the general principle of freedom of association. However, the Tribunal stated that there was no rule which forbade the transfer of a member of the Staff Union Committee outside Geneva, and election to the Committee conferred no immunity from transfer.

His other claims were dismissed.

7. JUDGEMENT NO. 946 (8 DECEMBER 1988): IN RE FERNANDEZ-CABALLERO V. THE UNITED NATIONS EDUCATIONAL, SCIENTIFIC AND CULTURAL ORGANIZATION<sup>16</sup>

*Non-renewal of fixed-term appointment — Judicial review of discretionary decision — Duty to inform of reason for non-renewal — Misstatements of facts surrounding the recommendation — Tainted decision — Financial straits give no excuse for breach of principles that protect staff — Question of damages*

The complainant joined the staff of the United Nations Educational, Scientific and Cultural Organization (UNESCO) on 1 July 1982 under a fixed-term appointment for two years. He was assigned as a grade P-4 expert in educational information and documentation to the Regional Office for Education in Latin America and the Caribbean (OREALC) in Santiago, Chile. He had his appointment extended by two years from 1 July 1984.

At the end of 1985, the Organization wanted to make savings. As a result, the complainant's post was downgraded to P-3, to which the complainant had agreed. On 25 June 1986, his records were passed on to the Committee on Redeployment which identified two posts for the complainant. However, on 8 July, the Chief of the Staff Administration Division sent a telex to the Acting Director of the Regional Office requesting that he inform the complainant that his contract was extended by two months to 31 August 1986 at which time the complainant would leave the Organization. This telex was confirmed by a letter to the complainant which he claimed he never received. The complainant appealed the decision not to renew his appointment by a further period of two years from July 1986.

The Tribunal pointed out that, according to rule 104.6(b), a fixed-term appointment does not imply any right to extension or conversion to an indeterminate appointment and shall, unless extended or converted, expire according to its terms, without notice or compensation. Although renewal of a fixed-term appointment was at the Director-General's discretion and the Tribunal would not replace his judgement with its own, his decision was not immune to review. The Tribunal would consider whether it was taken without authority, whether it was tainted with any procedural or formal flaw or with a mistake of law or of fact, whether any essential fact was ignored, whether any mistaken conclusion was drawn from the evidence, and whether there was abuse of authority.

In this case, the decision not to renew the complainant's appointment was tainted with several fatal flaws. First, the decision was not taken by the competent authority, in accordance with the UNESCO Manual.

Even more serious, in the view of the Tribunal, was the failure to inform the complainant of the reasons for the decision. Although the Director-General was free to make his own assessment of the material facts, the staff member was entitled to know the reasons for the Director-General's conclusion, in order to appeal if he so chose. In the instant case, the complainant was not given the reasons for the non-renewal — not in the telex to his supervisor, nor was it proven that an explanatory letter addressed to him was ever delivered or that he was given the information in any other way.

Thirdly, as the Tribunal noted, the Organization, not having informed the complainant, was in breach of the duty of consideration it owed its staff, of the principle of good faith and of the rule that the staff member had a right to be kept informed of any action that may have affected his rights or legitimate interests.

There were also the misstatements of fact, particularly the statement by a representative of the Administration that the Committee on Redeployment had not taken up the complainant's case, whereas in fact the Committee had not only seen his file but identified two posts and recommended putting him on one of them. The Tribunal held that the mistakes of fact influenced the Board's recommendations. Since the Director-General relied solely, in taking his final decision, on a recommendation that was tainted with mistakes of that kind, his decision too was flawed with the same mistakes.

It was true that at the time UNESCO was in sore financial straits, largely because Singapore, the United Kingdom and the United States had withdrawn from membership and, in pursuance of decisions by its General Conference and Executive Board, it had to make drastic cuts in staff costs. But the need for savings afforded no proper excuse for breach of the principles that protected the staff against arbitrary decision-making.

Because of the four flaws identified above the impugned decision could not stand. In the circumstances of the case there were no grounds for reinstatement, but in accordance with Article VIII of its Statute, the Tribunal would award damages for material injury. Since the complainant had served UNESCO for only four years and the renewal he might have expected would not have been for more than two years, the Tribunal set the amount at the equivalent of six months' full pay at grade P-4 at the rate applicable at the date of his separation.

In the opinion of the Tribunal, there was no award of moral damages. Since the Organization was applying a policy of staff retrenchment required by financial constraints the non-renewal could not have been deemed to have harmed the complainant's professional reputation. Nor indeed did he offer any evidence of moral injury.

### **C. Decisions of the World Bank Administrative Tribunal<sup>17</sup>**

#### **DECISION NO. 56 (26 MAY 1988): LYRA PINTO V. THE INTERNATIONAL BANK FOR RECONSTRUCTION AND DEVELOPMENT<sup>18</sup>**

*Complaint against regrading — Review of discretionary exercise — Freezing of staff member's salary violated fundamental element of employment*

In 1982, the Job Grading Program was instituted at the World Bank, and on 26 September 1985 the Applicant, employed in the Bank since 1973, was notified that her position was regraded. Her post of Staff Assistant was graded at level 15; level 15 was approximately the equivalent of grade "E" under the former grade structure. Prior to the grading exercise, the Applicant's position was at grade "G", which was considered to be of equal value to grade 16 in the new grade structure. Because the salary range for grade 15 was lower than the salary range for her former grade "G", the Applicant was entitled to salary pro-

tection for two years starting 1 October 1985. The Applicant's salary was already about \$1,000 above the maximum in grade 15. Hence, the Applicant could not have shared in merit or structural adjustment increases after 30 September 1987.

The Applicant appealed contending that the regrading was a transparent attempt to deny access to promotions, to negate the value of experience, skills and career development and to renege on previous standards. She further contended that the decision to abolish certain grade levels and collapse all staff assistants' grades into one E level grade was entirely arbitrary. The Respondent, on the other hand, pointed out that these grievances were addressed to the design of the new grading and salary structure itself, rather than specifically to the correctness of the grading decision with respect to the Applicant's position. On those grounds, the Job Grading Appeals Board concluded that it was not competent to judge the adequacy or otherwise of the new grading system and methodology, but only their application to specific cases.

The Tribunal agreed that the Job Grading Programme constituted an exercise of discretionary authority by the Respondent and, as such, was not subject to review by the Tribunal, unless it was shown that there had been an abuse of discretion by reason of the action taken in a concrete case "being arbitrary, discriminatory, improperly motivated or carried out in violation of a fair and reasonable procedure". (See *Saberi*, Decision No. 5 (1982), paragraph 24.) No such abuse of discretion had been shown.

The Applicant's principal contention was that her salary review increases after the effective date of her job regrading should not have been limited by the two-year grandfathering provision. In support of her claim, the Applicant cited the Principle of Staff Employment, paragraph 5(1)f, which stated that the Respondent shall:

"establish procedures and conditions under which staff members may be assigned to positions graded at various levels, while providing reasonable measures to alleviate adverse effects on staff members assigned to positions graded or regraded at a lower level."

The Tribunal agreed with the Applicant. Citing *de Merode* (Decision No. 1 (1981), paragraphs 111 and 112), the Tribunal concluded that the freezing of the Applicant's salary, from 30 September 1987, would deprive her, without justifiable cause, of the right to benefit from periodic adjustments reflecting changes in the cost of living and other factors, which the Tribunal had found to be a fundamental element in the Applicant's conditions of employment which the Bank did not have the right to change unilaterally.

For the above reasons, the Tribunal decided that the decision was rescinded so far as it did not provide for the payment to the Applicant, as from 30 September 1987, of the periodic salary review increases approved by the Respondent for staff members in grade 16.



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## NOTES

<sup>1</sup>In view of the large number of judgements which were rendered in 1988 by administrative tribunals of the United Nations and related intergovernmental organizations, only those judgements which are of general interest have been summarized in the present edition of the *Yearbook*. For the integral text of the complete series of judgements rendered by the three Tribunals, namely, Judgements Nos. 409 to 438 of the United Nations Administrative Tribunal, Judgements Nos. 879 to 951 of the Administrative Tribunal of the International Labour Organization and Decision No. 56 of the World Bank Administrative Tribunal, see, respectively: documents AT/DEC/371-438; *Judgements of the Administrative Tribunal of the International Labour Organization: 64th and 65th Ordinary Sessions*; and *World Bank Administrative Tribunal Reports*, May 1988.

<sup>2</sup>Under article 2 of its statute, the Administrative Tribunal of the United Nations is competent to hear and pass judgement upon applications alleging non-observance of contracts of employment of staff members of the Secretariat of the United Nations or of the terms of appointment of such staff members.

The Tribunal shall be open: (a) to any staff member of the Secretariat of the United Nations even after his employment has ceased, and to any person who has succeeded to the staff member's rights on his death; and (b) to any other person who can show that he is entitled to rights under any contract or terms of appointment, including the provisions of staff regulations and rules upon which the staff member could have relied.

Article 14 of the statute states that the competence of the Tribunal may be extended to any specialized agency brought into relationship with the United Nations in accordance with the provisions of Articles 57 and 63 of the Charter of the United Nations upon the terms established by a special agreement to be made with each such agency by the Secretary-General of the United Nations. Such agreements have been concluded, pursuant to the above provisions, with two specialized agencies: International Civil Aviation Organization and International Maritime Organization. In addition, the Tribunal is competent to hear applications alleging non-observance of the Regulations of the United Nations Joint Staff Pension Fund.

<sup>3</sup>Mr. Arnold Kean, Vice-President; Messrs Jerome Ackerman and Francisco A. Forteza, Members.

<sup>4</sup>Mr. Roger Pinto, Vice-President; Messrs Jerome Ackerman and Ahmed Osman, Members.

<sup>5</sup>Mr. Samar Sen, President; Messrs Francisco A. Forteza and Ioan Voicu, Members.

<sup>6</sup>Mr. Roger Pinto, Vice-President; Messrs Jerome Ackerman and Ahmed Osman, Members.

<sup>7</sup>Mr. Samar Sen, President; Mr. Roger Pinto, First Vice-President; Mr. Arnold Kean, Second Vice-President; and Mr. Jerome Ackerman, Alternate Member designated pursuant to article 6, paragraph 1, of the Rules of the Administrative Tribunal.

<sup>8</sup>Mr. Roger Pinto, Vice-President, Presiding; Messrs Jerome Ackerman and Francisco A. Forteza, Members.

<sup>9</sup>The Administrative Tribunal of the International Labour Organization is competent to hear complaints alleging non-observance, in substance or in form, of the terms of appointment of officials and of the staff regulations of the International Labour Organization and of the other international organizations that have recognized the competence of the Tribunal, namely, as at 31 December 1988, the World Health Organization (including the Pan American Health Organization), the United Nations Educational, Scientific and Cultural Organization, the International Telecommunication Union, the World Meteorological Organization, the Food and Agriculture Organization of the United Nations, the European Organization for Nuclear Research, the General Agreement on Tariffs and Trade, the International Atomic Energy Agency, the World Intellectual Property Organization,

the European Organization for the Safety of Air Navigation, the Universal Postal Union, the European Patent Organization, the European Southern Observatory, the Intergovernmental Council of Copper Exporting Countries, the European Free Trade Association, the Inter-Parliamentary Union, the European Molecular Biology Laboratory, the World Tourism Organization, the African Training and Research Centre in Administration for Development, the Central Office for International Railway Transport, the International Center for the Registration of Serials, the International Office of Epizootics and the United Nations Industrial Development Organization. The Tribunal is also competent to hear disputes with regard to the execution of certain contracts concluded by the International Labour Organization and disputes relating to the application of the regulations of the former Staff Pension Fund of the International Labour Organization.

The Tribunal is open to any official of the above-mentioned organizations, even if his employment has ceased, to any person on whom the official's rights have devolved on his death and to any other person who can show that he is entitled to some right under the terms of appointment of a deceased official or under provisions of the staff regulations upon which the official could rely.

<sup>10</sup>Mr. Jacques Ducoux, President; Tun Mohamed Suffian, Vice-President; Mr. Edilbert Razafindralambo, Deputy Judge.

<sup>11</sup>Mr. Jacques Ducoux, President; Tun Mohamed Suffian, Vice-President; Mr. Edilbert Razafindralambo, Deputy Judge.

<sup>12</sup>Mr. Jacques Ducoux, President; Tun Mohamed Suffian, Vice-President; and Miss Mella Carroll, Judge.

<sup>13</sup>Mr. Jacques Ducoux, President; Tun Mohamed Suffian, Vice-President; and Miss Mella Carroll, Judge.

<sup>14</sup>Mr. Jacques Ducoux, President; Miss Mella Carroll, Judge; and Mr. Pierre Pescatore, Deputy Judge.

<sup>15</sup>Mr. Jacques Ducoux, President; Tun Mohamed Suffian, Vice-President; and Miss Mella Carroll, Judge.

<sup>16</sup>Mr. Jacques Ducoux, President; Tun Mohamed Suffian, Vice-President; and Mr. Hector Gros Espiell, Deputy Judge.

<sup>17</sup>The World Bank Administrative Tribunal is competent to hear and pass judgement upon any applications alleging non-observance of the contract of employment or terms of appointment, including all pertinent regulations and rules in force at the time of the alleged non-observance, of members of the staff of the International Bank for Reconstruction and Development, the International Development Association and the International Finance Corporation (referred to collectively in the statute of the Tribunal as "the Bank Group").

The Tribunal is open to any current or former member of the staff of the Bank Group, any person who is entitled to a claim upon a right of a member of the staff as a personal representative or by reason of the staff member's death and any person designated or otherwise entitled to receive a payment under any provision of the Staff Retirement Plan.

<sup>18</sup>Mr. Eduardo Jimenez de Aréchaga, President; Messrs Prosper Weil and A. Kamal Abul-Magd, Vice-Presidents; and Messrs Robert A. Gorman, Elihu Lauterpacht, Charles D. Onyeama and Tun Mohamed Suffian, Judges.

## Chapter VI

### SELECTED LEGAL OPINIONS OF THE SECRETARIATS OF THE UNITED NATIONS AND RELATED INTERGOVERN- MENTAL ORGANIZATIONS

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

(Issued or prepared by the Office of Legal Affairs)

#### Contracts

1. DETERMINATION OF THE APPLICABLE LAW TO CONTRACTS CONCLUDED BETWEEN THE UNITED NATIONS AND PRIVATE PARTIES — “SERVICE CONTRACTS” AND “FUNCTIONAL CONTRACTS” — UNCITRAL ARBITRAL RULES

*Letter to the Legal Counsel, Organization for Economic Cooperation and Development*

1. Your letter of 2 December 1987, to which this responds, requested our views and the experience of the Organization on the determination of the applicable law to contracts concluded between the United Nations and private parties.

2. The particular questions in that letter to which you requested our response do raise, as you will appreciate, a number of issues which are not only of a fundamental legal nature but also are highly controversial.<sup>1</sup> I am sure, therefore, that you will understand and excuse the delay in replying to your letter.

#### *Issues*

3. In the absence of some indication of the facts which have given rise to the dispute under arbitration by the Organization for Economic Cooperation and Development (OECD), and the particular law that you are concerned about, it is difficult to be very specific in response to your questions. We have, therefore, attempted to deal with the issues you raised below in a general way in the light of the United Nations experience in this area.

4. Your letter states that the arbitration against the OECD arises from a contract concluded with a French firm for provision of travel agency services, presumably at OECD headquarters in Paris. The United Nations treats such contracts, which are concluded for provision of services, materials and equipment incidental to performance of its functions, as “service contracts” and distinguishes them from “functional contracts”, which are concluded for the fulfilment, directly, of its mandate.<sup>2</sup>

5. Functional contracts include, *inter alia*, contracts for employment of United Nations staff members and contracts for the direct delivery of United Nations assistance. The position of the Organization is that such contracts must be interpreted and applied consistently with the internal law of the Organization and the agreements concluded with Governments and other intergovernmental organizations which may be involved in the delivery of United Nations assistance.

#### *Applicable law in United Nations service contracts*

6. The United Nations legal opinion cited in your letter was itself based substantially on a study of the subject conducted in 1967 by the International Law Commission.<sup>3</sup> Since that time, there have been a number of developments in the area of international trade law, and in the contract practices of the Organization.<sup>4</sup> The experience of the Organization is derived, essentially, from negotiations with contractors and in the course of settlement of contract claims through the internal mechanism evolved by this Office for negotiated settlement of claims and, only occasionally, arbitration.<sup>5</sup>

#### *UNCITRAL Arbitration Rules*

7. The most significant development was the decision of the Organization some six years ago to propose the UNCITRAL Arbitration Rules for insertion into contractual instruments to govern arbitration of claims with private contractors; these Rules assume that a national law determined to be the proper law of the contract will be applicable in the settlement of disputes.<sup>6</sup> However, while the applicable law would be certain where the parties include a choice-of-law clause in the contract, or do so later in an arbitration agreement, the situation is less clear where no law is chosen by the parties.<sup>7</sup> According to the UNCITRAL Rules, the arbitrators, in absence of a choice of law by the parties, determine the applicable law in accordance with the conflict of laws rules which the arbitrators deem applicable.<sup>8</sup> But, again, since the conflict of laws rules are a part of municipal law, the arbitrators must of necessity select a-national law, normally the proper law of the contract, whose conflict rules are to be applied.<sup>9</sup>

#### *Choice-of-law clause*

8. It is still true that in the majority of cases, contracts concluded between the United Nations and private parties do not, as a matter of principle, contain a choice-of-law clause.<sup>10</sup> However, this deliberate omission has to do more with our concern that parties or courts seized of the matter could form the mistaken view that, despite its immunity from judicial process, the Organization intended, by the choice-of-law clause, to submit to the jurisdiction of the State of the chosen law.<sup>11</sup> An additional reason might be that it is difficult for an international organization to choose a particular national law to govern its contractual relations, and quite often contractors are reluctant to agree on application, exclusively, of a-national law or general principles of law, the precise nature of which is still uncertain and with which they or their attorneys may not be too familiar.<sup>12</sup>

### *International law*

9. By virtue of the public international law character of the Organization, a contract concluded by the United Nations cannot be subjected exclusively to national law, as the jurisprudence of international commercial arbitration indicates, particularly in the case of contracts between States and foreign private parties.<sup>13</sup> In the event of an arbitration, we consider that the inclusion in United Nations contracts of such provisions as are derived from the internal law of the Organization and general principles derived from general conventions in the commercial law area, uniform rules and international commercial usage, otherwise referred to as *lex mercatoria*, is sufficient expression of the United Nations' intent to rely on international law, in its widest sense.<sup>14</sup>

### A-national law

10. Furthermore, it has been argued that an arbitrator may select a-national law as the proper law of the contract, to supplement and even supplant any otherwise applicable national law. Once selected by the arbitrator, such a-national law could be applied for the interpretation and application of the contract, as a whole or certain aspects of it, based on a principle generally referred to as *depeçage*.<sup>15</sup> This argument has been advanced by a number of scholars and some arbitrators in the case of international commercial arbitration and can, arguably, be adopted in arbitration proceedings involving an international organization and a private party.<sup>16</sup>

### *Arbitration based on law*

11. In our experience, in the course of negotiations with private contractors, we have found an almost universal desire by contractors for certainty of result in the event of arbitration of a claim, which can only be attained if arbitration is based on law. This does not mean, however, that an arbitrator has to adjudicate the dispute as if it were a dispute of a purely domestic nature. It seems undesirable, on the other hand, that an arbitrator should be entirely free to settle a dispute as if he were a conciliator.<sup>17</sup> There must be in this respect a distinction between arbitration at law and arbitration *ex aequo et bono*.<sup>18</sup>

### *National law*

12. We do, therefore, in the formulation of contracts, consult national law and often attempt to follow the substantive requirements of the national law where the contract is formed or will be executed. At times, we have expressly referred to national legislation in specialized fields such as banking, and have even relied on national legislation or case law where this appeared particularly necessitated by the nature of the contract.<sup>19</sup> We do this because we recognize that a contract cannot exist *in vacuo*. On the other hand, we seek to expressly exclude national law where it is to our disadvantage or where it seems to contradict the terms of the contract or infringe on the privileges and immunities of the Organization.

13. There is a growing opinion for a-national law to govern international arbitration, and there would be even more reason for so doing where one of the parties is an international legal person. It seems, however, that there is as yet no

universal acceptance for the notion, expressed by many scholars and international arbitrators over the last two decades, that a new body of law independent of the national and public international legal systems, generally *lex mercatoria*, has emerged and would be applicable to international arbitration.<sup>20</sup>

#### *Settlement of claims*

14. We have not had any arbitration conducted under the UNCITRAL Arbitration Rules although many cases arise which have been settled amicably through negotiations on the basis of a review of the merits of the dispute by this Office. In practice, we review the claims on the basis of the contract terms,<sup>21</sup> which we interpret in the light of the proper law of the contract, the internal legal rules of the Organization, where these have been referred to expressly or by implication in the contract, and by application of the general principles of law and commercial practice and usage applicable to the transaction.<sup>22</sup>

#### *Conclusion*

15. In the particular case you referred to, relating to a service contract between OECD and a travel agency incorporated in France for provision of services in France, determination of the applicable law may very well depend on the arbitration procedure provided for in the contract and the view an arbitration tribunal might take regarding the relevance of article 1496 of the French International Arbitration Law of 1981.<sup>23</sup> However, it might be possible for OECD to successfully argue for exclusion of the whole or certain provisions of French law (even if this were found to be the proper law of the contract), based on the arguments advanced in paragraph 10 above.

5 February 1988

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2. CONTRACT BETWEEN UNITED NATIONS INSTITUTE FOR DISARMAMENT RESEARCH AND THE INSTITUT FRANÇAIS DES RELATIONS INTERNATIONALES — FINANCIAL RULES 110.10, 110.18 AND 110.19 — DISTINCTION OF CONTRACTS — OBLIGATION TO CALL FOR BIDS AND PROPOSALS PRIOR TO CONTRACTING — FINANCIAL REGULATION 10.5

#### *Memorandum to the Senior Legal Officer, Legal Liaison Office, United Nations Office at Geneva (UNOG)*

1. This responds to your memorandum of 29 April 1988 concerning the above-captioned subject. We have considered your memorandum and the documents attached thereto, and our views on the issues raised in the memorandum are as follows.

*Whether the proposed contract has to be submitted to the United Nations Office at Geneva (UNOG) Committee on Contracts*

2. As you have noted, the Financial Regulations and Rules of the United Nations are made applicable to UNIDIR by article VII, paragraph 7, of its Statute. Since the proposed contract provides for a payment of \$40,000 by the United Nations to the Institut français des relations internationales (IFRI) for the preparation of the intended study, the contract would have to be submitted to the Committee on Contracts at the United Nations Office at Geneva by reason of United Nations Financial Rule 110.17(d)(I).

*Whether it is necessary to call for bids or proposals in respect of the proposed contract (Rule 110.18)*

3. We agree with your view that, in terms of financial rule 110.18, bids or proposals should be called for in respect of the proposed contract, unless an exception were to apply under rule 110.19. As you point out, the exceptions which might apply in the instant case are those specified in rule 110.19(f) and (h).

*Applicability of rule 110.19(f)*

4. As regards the applicability of financial rule 110.19(f) to the proposed contract, we are unable to endorse your view that that subsection is inapplicable because the proposed contract is not a contract which “relates professional services”, but is “a contract for a work to be delivered”. We appreciate that, when a contract provides for an interconnected supply by a contractor both of professional services and goods, there is sometimes considerable difficulty in determining whether the contract is one for the supply of professional services within the meaning of rule 110.19(f). The difficulty is particularly great when the entirety of the services to be supplied has as its output a physical item to be delivered (in this case, the written study in question). We do not feel it useful to refer to national legal rules as an aid to the resolution of this problem, because of the different tests adopted by those systems (these differences are indicated in the *International Encyclopedia of Comparative Law, vol. VIII, chapter 8, “Contracts for Work on Goods and Building Contracts”* (Werner Lorenz, II, “Types of Contract”, A,2). If on a practical assessment of the circumstances it is unclear whether a contract is to be categorized as one for the supply of professional services, we suggest the application of the test contained in article 3(2) of the 1980 Vienna Convention on Contracts for the International Sale of Goods,<sup>24</sup> which test is intended to identify non-sales contracts to which the Convention does not apply. That provision is as follows:

“This Convention does not apply to contracts in which the preponderant part of the obligations of the party who furnishes the goods consists in the supply of labour or other services.”

5. Applying this test, we are of the view that the preponderant part of the obligations of IFRI consists in the research and analysis required to produce the study (which in our view are professional services), and not in the supply of the document embodying in written form the results of those activities. Consequently, rule 110.19(f) would be applicable.

6. We are also unable to agree that services which would be classified as professional services when supplied by an individual or individuals would cease to be so classifiable if supplied by an entity with legal personality. In our view, the classification of the services would depend on their nature, and on the legal character of their supplier.

7. The above paragraphs reflect the practice of the Headquarters Committee on Contracts.

*Whether it is necessary to call for bids or proposals despite the applicability of rule 110.19(f)*

8. In considering this question, it should be noted that one of the main objectives of financial regulation 10.5, dealing with contracts and purchases, and of the rules promulgated to implement that regulation, is that the Organization should obtain for its contracts the most advantageous terms available, and in particular, goods or services of high quality at a fair price. The principal mechanism employed in the Rules to secure this objective is the obligation to call for bids or proposals prior to contracting, and the award of the contract on a comparison of the bids or proposals received (rules 110.18, 110.20, and 110.21). While rule 110.19 in specified cases allows exceptions to the obligation to call for bids or proposals, it should not in our view be interpreted as derogating from the obligation to secure for the Organization the most advantageous terms available in relation to contracts covered by the exceptions. Authorized officials engaged in purchasing, renting or selling activities (rule 110.16) should, therefore, adopt procedures appropriate to circumstances of each contract directed to securing such terms. Those procedures may range from calling for bids or proposals (which is not excluded by rule 110.19 — see the opening words of that rule) to informal market surveys. Where a contract has to be submitted to a Committee on Contracts in terms of rule 110.17, the procedures adopted and the proposed terms of the contract would be subject to review by that Committee, which would thereafter make a recommendation to the Assistant Secretary-General for General Services pursuant to that rule. The above account reflects the understanding and practice at Headquarters, where, in addition, when the calling of bids or proposals is dispensed with, the Committee on Contracts always records the reasons therefor, why the chosen Contractor was selected, and why the price or fee charged is considered reasonable.

9. In relation to the contract under consideration, therefore, while UNIDIR is not obliged to call for bids or proposals, it would have to satisfy the Committee on Contracts at the United Nations Office at Geneva that it would be unproductive to call for bids or proposals in respect of the professional services in question, and that the proposed contract with IFRI is the most advantageous which is available to the Organization.

*Applicability of rule 110.19(h)*

10. We agree that it would be possible to award the contract in question without calling for bids or proposals if the Director-General of the United Nations Office at Geneva or an official duly authorized by him (Financial Rule 110.10) determines that competitive bidding or calling for proposals will not give satisfactory results. The reasons for that determination must, under rule 110.19(h), be recorded.

16 May 1988



### 3. STANDARDS OF EVALUATION OF THE WORK OF AN EXTERNAL CONTRACTOR — ISSUE OF PAYMENT TO CONSULTANTS

*Memorandum to the Deputy Executive Director, United Nations Fund for Population Activities*

1. This responds to your memorandum of today's date on this subject.

2. For a legal point of view, in evaluating the work of an external contractor, such as a consultant engaged on Special Service Agreement, a distinction must be made among three separate standards:

(a) Whether the contractor did what he was obliged to do under the terms of the contract, which is relevant to whether he should be paid;

(b) Whether, in performing his obligations, a contractor's level of performance was as high as the Organization expected it would be, which is relevant to whether he should be employed again, for the same sort of work or for any work;

(c) Whether the product is usable for the purpose intended, which is relevant to whether and how it is to be utilized.

3. Obviously, these three standards are related, and in an ideal world they would be identical. However, a contractor may have fulfilled his contractual requirements and his product may still not be usable, either because he was not really suitable for the project (in which case he should not be employed again on a similar task), or because the contract may not have specified his task properly, or because the task may have been misconceived. In all these situations the contractor must be paid, because the contract so requires, but it would be appropriate to engage in some internal investigation to determine the cause of the revealed discrepancy among the various standards, i.e., why an unsuitable contractor was selected or why the task given to him was not appropriately specified or was otherwise faulty.

4. There is yet another legal/practical reason why a contractor should be paid in full whenever he arguably has fulfilled the terms of his contract, or at least partially if there is substantial performance. In this connection, it should be noted that the risk of selecting an inappropriate contractor falls on the Organization, unless the former misled us as to his qualifications. If full payment is not made and the contractor insists, the Organization is required to offer some means of settling the resulting dispute — usually ad hoc arbitration; however, such a procedure (and the preceding negotiations) is inherently expensive, and an arbitrator is most unlikely to find entirely against a contractor so that at least a partial award is likely to be made in his favour. This is aside from the question of whether the Organization desires to get a reputation, in some circles, of being unreasonable in settling contractual obligations.

5. All this does not mean, however, that the Organization must or should accept clearly unsatisfactory work, e.g., work that manifestly does not come up to contractual standards, or work that does not come up to the abilities of the

contractor because he did not apply himself sufficiently. As a counterpart to the caution at the end of the last paragraph, it should be said that the Organization should also not get the reputation of uncritically accepting and paying for unsatisfactory services.

6. To sum up, our view is that the most advisable procedure when a contractor submits his work is to determine, in the light of the relevant circumstances (many of which have been mentioned above), whether it should be rejected, in which case of course no payment at all should be made. If the work is not rejected outright, full or appropriate partial payment must be made. It would appear that in at least some of the cases highlighted by the Board of Auditors, on a proper evaluation the work submitted should have been rejected.

20 October 1988

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## Copyright

### 4. QUESTION OF WHETHER A MAGAZINE OF THE UNITED NATIONS DEVELOPMENT PROGRAMME CONSTITUTES A TRADE MARK INFRINGEMENT — COPYRIGHT ISSUES — TRADE MARK LAW IN THE UNITED STATES

#### *Memorandum to the Officer-in-Charge, Office of the Administrator, United Nations Development Programme*

1. Your memorandum of 20 June, with which you attached a letter addressed to the Administrator dated 15 June by a firm on behalf of a publishing company, requested our opinion on the validity of the grounds advanced by this Company for objecting to publication of the United Nations Development Programme *World Development* magazine. In this connection, you will find enclosed a Memorandum of Law on the applicability of the United States Trade-mark Act (The Lanham Act) (15 U.S.C. 1114 and 15 U.S.C. 1125), upon which the Company relies for its objections.

#### *Background*

2. We note from the information you supplied us that the Division of Information of UNDP began sometime this year publication of the UNDP *World Development* magazine, and that the first two issues appeared in March and May 1988. In June, UNDP received the letter from the law firm on behalf of the Publishing Company, objecting to the use by UNDP of the title “World Development”, on the grounds that the Company publishes a monthly journal with this title, since 1973, which is devoted to the study and promotion of development among nations. The Publishing Company claims that its title is a trade mark and the use of this title by UNDP infringes on its rights.

*Opinion*

3. As you will note from the memorandum of law, our conclusion is that the Company has no legal grounds to object to continued publication of the *World Development* magazine by UNDP on the following grounds:

(a) While the *World Development* journal is copyrighted, its title is not covered by the copyright protection, since words and short phrases such as names, titles, and slogans are not protected by copyright under United States law [37 CFR Sec. 202.1(a) (1987)];

(b) The words “World Development” are merely descriptive of the contents of the journal published by the Company, and have not acquired a secondary meaning identifying them with the Company; the Company cannot therefore claim statutory protection;<sup>25</sup>

(c) The UNDP magazine is essentially for the propagation of the work of UNDP and is distributed free of charge to the public at large; it is not a scholarly journal, which the Company’s publication is, and cannot therefore be the subject of a valid statutory claim for infringement of trade mark on the basis of unfair competition (The Lanham Act);

(d) The design of the magazine and the presentation of its title are distinctively different from the *World Development* journal published by the Company and there can therefore be no common-law claim for infringement of the trade mark based on possible confusion between the two in the minds of the readers, since in any case both magazines are aimed at different audiences.

4. In the light of our above conclusion, we consider that the objections by the Company to continued publication by UNDP of the *World Development* magazine cannot be sustained. However, we feel uncomfortable that the title of the UNDP magazine and the journal published by the Company are identical. In the decided cases we have reviewed and where allegations of trade mark infringement based on similarity of titles have been denied, there have always been certain variations in those titles so that though similar they were not identical. For this latter reason, UNDP may wish to consider whether, while retaining the words *World Development*, the title of the magazine could be varied so as to avoid the charge of possible confusion, though such a change in this case might be difficult to prove. For example, the UNDP magazine could be entitled “UNDP and World Development”, as already appears to be the case; presently UNDP is divorced from the actual title block “World Development”.

5. However, should it be decided to retain the present title, you may wish to consider a reply to the law firm representing the Company along the lines of the attached text.

28 July 1988

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Dear ...

This responds to your letter of 15 June, regarding the UNDP publication *World Development*, in which it is alleged that the use of the title “World Development” on the UNDP magazine could lead to confusion between that publica-

tion and the monthly journal of the same title published by the (name of the Company), and thus constitutes an infringement of the rights of the Company.

UNDP does not accept the allegations contained in your letter regarding its publication. The title “World Development” was selected by UNDP to appropriately describe the subject matter of the magazine articles, which are devoted to propagating the activities of UNDP within its mandate, granted by the General Assembly of the United Nations, to promote world development. In fact, unlike the journal published by your Company, the UNDP magazine is a journalistic feature-type publication, principally staff written, freely distributed to the public at large and its design and title logo are different. Therefore, we see no likelihood of confusion between the two publications.

Furthermore, UNDP disputes that the title “World Development” can be claimed as a valid trade mark. The words “World Development” in themselves in the title are merely descriptive of the contents of the journal and in absence of proof of a secondary meaning identifying the title with the publisher, no protection as a trade mark is possible under United States law. Accordingly, UNDP does not accept that continued use of the title “World Development” on the UNDP magazine causes confusion between the two publications, or that it constitutes any infringement of the rights of the Company.

*UNDP World Development Magazine Memorandum of Law on Claim of  
Trade Mark Infringement*

I. INTRODUCTION

This memorandum concerns the use of the title “World Development” for an information magazine published by United Nations Development Programme. UNDP has published two issues of the magazine, one in March and the other in May 1988, in an effort to educate the public about UNDP projects worldwide. On 15 June 1988, UNDP received a letter written on behalf of the English publishing company (the Company), objecting to the use of the magazine’s title. The Company asserts that it has published a monthly journal since 1973 entitled *World Development*, which is devoted to the study and promotion of development among nations. The Company claims that the title is a trade mark and that UNDP’s use of the title constitutes an infringement of that trade mark.

II. SCOPE OF MEMORANDUM

This memorandum is limited to an analysis of the substantive elements of trade mark law in the United States.

There are two provisions of the United States Trademark Act (The Lanham Act) which provide protection to a title — 15 U.S.C. 1114 and 15 U.S.C. 1125.<sup>26</sup> Section 1114 protects registered trade marks, while section 1125 protects registered or unregistered trade marks alike. There is, however, no greater substantive protection granted a registered trade mark — registration confers only procedural advantage.<sup>27</sup> Because of this, the elements of proof required to establish a trade mark infringement under either section are essentially the same. Therefore, the following analysis will determine the probability of a successful suit under section 1114, and then apply that reasoning to an action if maintained under section 1125. The memorandum will then conclude with an opinion that a suit filed by the Company under either provision would be difficult to maintain,

and that UNDP can likely continue to publish the magazine *World Development* without legal repercussions.

### III. ANALYSIS OF CASE UNDER 15. U.S.C. 1114

Section 1114 grants protection for trade marks which are registered as provided in the Lanham Act. Because the Company does not maintain that the title “World Development” has been registered, nor claim any protection under section 1114, there is every reason to believe that the title has not been registered. However, because there is no assurance that the title is not registered, the following analysis will start with the assumption that the Company did in fact register the title.<sup>28</sup>

#### *Trade marks*

A trade mark is anything which is adopted and used to identify the source of origin, and which is capable of distinguishing that source from goods emanating from a competitor. A trade mark may consist of a word (e.g., a brand name), or a group of words (e.g., a slogan or a jingle) or a pictorial representation or other symbol or some other device (e.g., the shape of a container), or of a combination thereof.<sup>29</sup> The title “World Development” does have characteristics which could satisfy the definition of a trade mark.

#### *Valid registration of trade marks*

To succeed in a case against UNDP, the Company has first to establish that it has valid trade mark rights.<sup>30</sup> Even if the title has been registered, that does not automatically mean that the registration is valid; registration provides only prima facie evidence of a trade mark.<sup>31</sup> A registration is considered invalid if it does not fall into specific categories or fulfill certain necessary assumptions, and although registered, an invalid registration receives no protection under trade mark law.<sup>32</sup>

#### *Trade mark protection for a title*

There are four categories of terms for a title: generic, descriptive, suggestive, and arbitrary or fanciful.<sup>33</sup> A generic term is one which is commonly used as the name or description of a kind of goods and receives no trade mark protection. A descriptive term conveys an immediate idea of the ingredients, qualities, or characteristics of the goods and is entitled to trade mark protection only if the descriptive term has acquired secondary meaning in the public’s mind. A suggestive term falls between the merely descriptive category and the arbitrary or fanciful category. Suggestive terms are entitled to trade mark protection without a showing of secondary meaning. The strongest trade mark protection is granted to arbitrary or fanciful terms — terms which have no relation to the nature of the product they represent.

The title “World Development” falls into the category of descriptive terms because it only gives the reader literal information about the contents of the magazine. There is no “suggestive” inference to be made from the terms “World Development” beyond that which ordinarily accompanies the terms in everyday usage. Because the title is a descriptive term, the Company has to show that the title has acquired a secondary meaning in order to establish it as a valid trade mark.

To satisfy their burden of proving that “World Development” has acquired a secondary meaning, the Company must show that the relevant buyer class associates the name with the product or the source.<sup>34</sup> Since the existence of secondary meaning is a factual question, there can be no abstract test, quantitative or qualitative, to determine what level of consumer association is sufficient. The court in *American Association*, however, considered the following factors relevant on this question: (a) the duration and continuity of use of the mark; (b) the extent of advertising and promotion and amount of money spent thereon; (c) figures showing sales of plaintiff’s product or number of people who have viewed it; and (d) identification of plaintiff’s and defendant’s respective markets.<sup>35</sup> It is impossible to determine whether the Company periodical has acquired a secondary meaning without further information. It can be said in general, however, that establishing a secondary meaning for the title of a periodical presents special problems. In most cases, the repetitious use of similar titles by competing publishers prevents the establishment of a secondary meaning for a descriptive title.<sup>36</sup> It is in fact more likely that the public would associate the United Nations with a periodical entitled “World Development”, than with an academic institution.

### *Infringement*

Assuming the Company could claim that the title “World Development” has acquired a secondary meaning and therefore has valid trade mark protection, there still is infringement only if the words or designs used by UNDP are so identical with, or so similar to, the Company’s that they are likely to cause confusion.<sup>37</sup> The protection against confusion is not intended to create exclusive rights in the use of words; rather it is designed to prevent a competitor from taking away a business’s goodwill trade by deceiving the consuming public into buying another product. “A trade mark only gives the right to prohibit the use of it so far as to protect the owner’s goodwill against the sale of another’s product as his. It does not confer a right to prohibit the use of the word or the words. It is not a copyright.”<sup>38</sup> Therefore, because UNDP does not sell its product, and does not present a threat to the Company-buying public, the Company cannot successfully allege any infringement of its trade mark by UNDP.

### *Likelihood of confusion*

The test at common law has sometimes been predicated in terms of likelihood of consumers being deceived by use of a mark similar to that of another.<sup>39</sup> It is perhaps on the basis of this that the Company asserts in their letter that UNDP’s use of the title identical to the Company’s could cause “readers to confuse these publications or mistakenly assume both have the same publisher or common sponsorship”. We have found no case on this point, but in a case filed to prevent the *registration* (not *infringement*) of an “identically named product” (under 15 U.S.C. 83), the Circuit Court held that the identity of the words rendered a showing of likelihood of confusion “irrelevant”.<sup>40</sup> However, there are strong factual arguments against this allegation. Although the words used for titles are identical, the question of whether there is confusion cannot be judged only by looking at the words. One has to look at how the mark (the title) ap-

pears.<sup>41</sup> A close look at the titles reveals significant differences. The logo of the United Nations appears in the “o” of UNDP’s “World Development”, while the Company has placed a different, distinctive mark to the side of the title words. These differences may be sufficient to defeat a claim of “identity.”

To determine the likelihood of confusion, the court considers the general impression of the ordinary purchaser, buying under the normally prevalent conditions of the market in buying that class of goods.<sup>42</sup> To determine if the words or design create probable confusion, two methods have been utilized: the marks themselves may be compared and contrasted, or evidence may be introduced to show actual instances of confusion in the purchase of goods.<sup>43</sup>

#### *Comparing and contrasting the marks*

The court in *Scott* identified the following factors as necessary in an analysis of comparative marks to determine the likelihood of confusion: (a) strength of plaintiff’s designation; (b) the degree of similarity between the plaintiff’s and defendant’s marks; (c) the relative nature of products involved; (d) the marketing of the products; (e) the degree of care exercised by the consumer; and (f) frequency of purchase. The principal focus in analysis is whether the consuming public is likely to be confused as to the origin or sponsorship of goods.<sup>44</sup>

##### (1) *Strength of designation*

Common law has established that where trade marks are merely suggestive or descriptive, they are “weak marks” affording protection to the owners only in the narrow and restricted field in which they have been applied.<sup>45</sup> As discussed previously, the Company’s mark is descriptive and thus gets only “weak” protection.<sup>46</sup> As a result, it can be said that if there is a trade mark protection for the Company, this protection cannot reach a high level.

##### (2) *The degree of similarity between the marks*

As the court distinguished in *McGraw-Hill Pub. Co. v. American Aviation Association*, 117 F.2d 293, 295 (1940), differences in titles can be established by regarding the size and shape of the letters used. In *McGraw*, the court decided that there was no likelihood of confusion because the registered title had all capital letters and the opponent title had capitalized only the first letter. Further differences were seen in that the registered title’s first letter had a pointed top while the other title was flat. Analysing the title “World Development” on the respective periodicals reveals an even greater disparity than that found sufficient by the court in *McGraw*. The Company’s title uses bigger letters for “World” than for “Development.” Furthermore, each word of UNDP’s title fills the entire line, while the Company’s title centres the word “World” over the word “Development”. Additionally, UNDP’s title is printed on a distinctive yellow tag, while the Company simply prints the title on the white cover of the periodical. Another factor which could weigh in favour of distinguishing the periodicals through a comparison is that the respective sources are mentioned on the front side of each periodical.

### (3) *Relative nature of the products*

When considering the relative nature of the products, the court determines whether the item is used by different groups of purchasers for different purposes.<sup>47</sup> In the present case, beyond the fact that both periodicals deal with the same topic of world development, they have little in common. The Company's "World Development" is a highly specific, scientific magazine, written in small type, and containing articles of a high intellectual grade. In contrast, UNDP's "World Development" is a public information outlet for UNDP projects. The pages contain many large pictures and more spacious typesetting, and the intent is not to inform a scholarly audience of the technical issues of development, but rather to allow "decision-makers, teachers, citizens' groups, non-governmental organizations and the media ... [to] better understand what UNDP does, how it works and why it makes a difference."<sup>48</sup> Because of the differing intent, intellectual grade and format of the periodicals, the "purchasers" are vastly different. There is little likelihood of purchaser confusion between the two sources — even the most cursory review of the content, format or titles would reveal the difference.

### (4) *Marketing of the products*

It is likely that the Company markets its periodical mainly through paid subscriptions. UNDP, however, does not sell its periodical and therefore has no provisions for paid subscription. Even if the Company in fact sells a large portion of their periodicals at bookstores or other similar outlets, the fact that UNDP's publication is free would make any confusion between the two unlikely. The only place the marketing channels can cross would be at libraries where both periodicals are available. In that situation, however, there would be no *purchasing* public who could be misled.

Furthermore, the distribution channels utilized by UNDP are unique. UNDP distributes its *World Development* through its information offices in the countries where it is engaged. The periodicals are also sent to agencies, organizations, etc., which are interested in the work of UNDP and request information. There is little possibility of this periodical crossing into the traditional trade channels of a "for profit" publication. Because there is little possibility of a mix between the channels of trade, there is little possibility of the consumer confusion that trade mark law seeks to prevent.

### (5) *Degree of care exercised by consumer*

In *Scott*, the court made a distinction between sophisticated and normal purchasers, finding that sophisticated purchasers were less easily confused and more able to determine the difference between similar items.<sup>49</sup> The Company's periodical is, as previously discussed, a highly scientific magazine with a subsequently sophisticated readership. The [Company] readers, therefore, will be able to recognize the differences between the two periodicals and suffer minimal confusion.

Furthermore, the purchasers of the Company's periodical take a decisive choice when purchasing the periodical — the purchasing of the magazine is the result of a well-considered decision. The present case, therefore, is distin-



guished from the case of *Playboy Enterprises, Inc. v. Chuckleberry Pub., Inc.*, 687 F.2d 563, 566 (1982), in which the court saw a likelihood of confusion because the “ultimate decision to buy is typically impulsive”. Moreover, the court in *McGraw* determined that an audience comprised of mail subscribers is not highly susceptible to confusion.<sup>50</sup> This is likely to be the case with the purchases of the Company periodical.

(6) *Frequency of purchase*

Another argument that serves to differentiate the two periodicals and mitigate against confusion is that the magazines are published in different periods: the Company’s *World Development* is published monthly while UNDP’s is published every second month.

*Summary*

Gathering together all the elements involved in a comparison of the marks, there are not enough points of similarity between the UNDP periodical and the Company’s to support an inference of confusion to justify a finding of trade mark infringement.

*Evidence of Actual Instances of Confusion*

The second method by which the Company could prove the existence of a likelihood of confusion is to introduce evidence showing actual instances of confusion in the purchase of goods.<sup>51</sup> The Company did not mention any actual case of confusion in their communication, and because of the previously discussed differences between both periodicals, there probably will be no actual case of confusion. Even if, however, there is one actual case of confusion, this will not necessarily be convincing evidence. In the *McGraw* case, there was an affirmative showing in evidence of mistakes in personnel and in addressing letters between the two companies involved. The court found that both types of mistakes are often made even with old, well-established concerns, and that “a publisher though he has a registered trade mark cannot be protected from all of the inadequacies of human thought and memory ... Probable confusion cannot be shown by pointing out that at some place, at some time, someone made out a false identification.”<sup>52</sup> Using this analysis, it is not probable that the Company will be able to show sufficient evidence to sustain a finding of likelihood of confusion between the two periodicals at issue.

*UNDP’s Intent*

Although intent is not an element of trade mark infringement, intent to pass off goods as the product of another “raises an inference of likelihood of confusion”.<sup>53</sup> UNDP has no intent to deceive the public into thinking its mark represents the Company publication. First, UNDP’s reputation is outstanding, and it does not need to steal another organization’s goodwill. Second, because UNDP distributes its magazine for free, and is seeking no profit from such distribution, it cannot be said that UNDP’s periodical is “parasitic upon plaintiff’s goodwill”, much less manifesting any attempt to “palm off its wares” for those of the Company.<sup>54</sup>

The reason that UNDP uses the title “World Development” is that this is a descriptive way of informing the public of the work of UNDP and the contents of the magazine. As the court in *McGraw* held: “That magazines may be described by their subject matter is too clear to be doubted”.<sup>55</sup> UNDP’s intent in using the title for its magazine was not to traffic in the Company’s market, to infringe its trade mark, to confuse the trade or public, or to exploit any goodwill associated with the Company’s mark, and thus will not create any inference of trade mark infringement in a suit by the Company.<sup>56</sup>

The fact that a defendant has continued to use a mark after an objection has been construed as evidence of bad faith in some instances.<sup>57</sup> Despite this fact, the letter the Company has sent to UNDP does not necessarily mean that the latter must cease use of the name to show goodwill to the former. An exception to the inference of bad faith occurs when the defendant is advised and believes that no infringement exists and is standing on his rights.<sup>58</sup>

### *Result*

UNDP’s use of the title “World Development” does not in our view infringe the rights of the Company under 15 U.S.C. 1114, even if one assumes that the Company’s title is a registered, valid trade mark.

#### IV INFRINGEMENT UNDER 15 U.S.C. 1125

Section 1125 contains a provision that prohibits false designations of origin and false descriptions of goods and services even when federally registered trade marks are not involved. The Company alleges that UNDP’s use of the same title results in a false designation of origin. To maintain a suit under this claim, the Company would have to first establish that the use of their title has resulted in a protectible, valid trade mark. The assumptions for establishing this are the same as under section 1114, and the weakness of the mark discussed earlier would have the same negative repercussions for the Company if they file a suit under section 1125. Even assuming that the Company has a valid trade mark, the publishing company bears the same burden as under section 1114 in showing likelihood of confusion by comparing the marks or by putting into evidence actual instances of confusion of purchases. The difficulties this showing would entail, as detailed in the discussion under section 1114, suggest that an action under this section would also fall short of success. In sum, because of the reasons discussed under section 1114, UNDP’s use of the title “World Development” does not infringe upon the Company’s periodical under the provisions of 15 U.S.C. 1125.

#### V. TRADE MARK DILUTION CLAIM

The Company claims that the UNDP periodical will have a negative impact on the reputation of their trade mark. Common law provides a cause of action for “trade mark dilution” if the use of a mark similar to the plaintiff’s has an adverse effect on the value of plaintiff’s mark by potentially depriving it of all distinctiveness.<sup>59</sup> In a case of a trade mark dilution, there is no required showing of actual confusion or the likelihood of confusion. Instead, the plaintiff must establish the mark’s distinctiveness. The distinctiveness may be the result of the mark’s extraordinary uniqueness or a considerable advertising effort.<sup>60</sup>

As previously discussed, the Company's mark may not even be protectible, but if it is, it is "weak" and therefore gets only weak protection. Even in the *Scott* case, the court rejected the notion of extraordinary uniqueness for the mark "Micro Nauts" (which is more fanciful than the title "World Development"), because the prefix "micro" is used by many other trade marks in the same business, and the term "nauts" is merely a shortened version of the term "nautical".<sup>61</sup> Such a challenge could also be launched against a similar claim by the Company.

Additionally, a dilution of the advertising value of a mark is only possible when there is wide or extensive advertising.<sup>62</sup> It is doubtful whether the advertising the Company maintains is sufficient to satisfy this assumption. Moreover, the Company has the burden of establishing that the use of the title "World Development" by UNDP could tarnish the "affirmative associations" that a mark of the Company may convey. Considering the stature of UNDP, and the great differences in the periodicals themselves, this would be difficult if not impossible.

#### VI. POSSIBLE RECOVERY OF DAMAGES IN AN INFRINGEMENT ACTION

If the Company is successful in a suit against UNDP, 15 U.S.C. 1117 provides remedies. The majority of infringement suits are equity actions and an injunction against the infringing party is the most common remedy. In an action seeking injunctive relief, the plaintiff does not need to show actual damage, but needs only to show likelihood of damage.<sup>63</sup> Section 1117 does, however, provide for damages of lost profits resulting from infringement. As a general rule, the plaintiff must show lost sales to be awarded damages; other courts have refused an award of damages on the ground that there was no competition between the parties.<sup>64</sup> Since it is likely that distribution of UNDP's free magazine will not result in any lost profits for the Company, and is not really a "competitor", damages are probably not to be awarded.

Exemplary damages have been awarded, but the infringement must be wilful and wanton to justify the award.<sup>65</sup> There is, therefore, little fear of such damages being assessed against UNDP. Finally, the Supreme Court has held in *Fleischmann Corp. v. Maier Brewing*, 386 U.S. 714, 721 (1966), that attorney's fees are not granted in trade mark infringement cases.

#### VII. PRIVILEGES AND IMMUNITIES

The United Nations, including UNDP, is, by virtue of section 2 of the Convention on the Privileges and Immunities of the United Nations, immune from every form of legal process, except where expressly waived in a particular case.<sup>66</sup> However, section 29 of the Convention requires the Organization to make provisions for appropriate modes of settlement of, among others, disputes of a private law character to which the United Nations is a party. In the event of a formal claim by the Company, therefore, the United Nations would be obligated to offer arbitration as a possible mode of settlement of the dispute or to waive its immunity for the purpose of adjudicating that particular case.

27 July 1988

## Personnel issues

### 5. LEGAL STATUS OF NATIONALLY RECRUITED PROJECT PROFESSIONAL PERSONNEL — SECTION 18 OF THE 1946 CONVENTION ON THE PRIVILEGES AND IMMUNITIES OF THE UNITED NATIONS — STANDARD BASIC ASSISTANCE AGREEMENTS

*Memorandum to the Principal Advisor, Project Personnel, Policy Division,  
Bureau for Programme Policy and Evaluation (BPPE)*

1. This is in reply to your memorandum of 21 January 1988 requesting our advice on the legal status of nationally recruited project Professional personnel (NPPP) in the light of the proposed revision of chapter 4500 (Project Personnel) of the United Nations Development Programme Manual and the Model Service Contract therein.

2. The present legal status of NPPP is regulated by the relevant provisions of the Standard Basic Assistance Agreement (SBAA), the Manual and the Model Service Contract. None of these documents, in their present form, contains or could be interpreted as providing the ground for NPPP to be entitled to a status of staff members or officials of the United Nations and organizations of its system.

3. The legal status of officials of the Organization is governed by Article 105 of the Charter which, *inter alia*, prescribes that they "... shall similarly enjoy such privileges and immunities as are necessary for the independent exercise of their functions in connection with the Organization".

4. Some detailed provisions on privileges and immunities are incorporated in the 1946 Convention on the Privileges and Immunities of the United Nations. Section 18 of that Convention provides that "officials" of the United Nations, among other matters, shall be immune from legal process in respect to words spoken or written and all acts performed by them in their official capacity be exempt from national taxation, be immune from national service obligations, and be accorded the same privileges in respect of exchange facilities as are accorded to the officials of comparable ranks forming part of diplomatic missions, etc. The General Assembly has officially interpreted "official" to mean all staff members of the United Nations with the exception of those who are locally recruited and paid on hourly rates.<sup>67</sup>

5. These privileges and immunities are granted to officials in the interests of the United Nations and not for the personal benefit of the individuals themselves. Such facilities constitute the so-called functional immunities as they are applied only during the performance by staff members of their official functions. In addition, the Convention also contains the provisions regulating the legal status, privileges and immunities of experts performing missions for the United Nations (this category is called "experts on mission").

6. Article IX, entitled "Privileges and immunities", of the Standard Basic Assistance Agreement, provides for an obligation of the Government con-

cerned to apply the provisions of the 1946 Convention to "... the United Nations and its organs, including UNDP and United Nations subsidiary organs acting as UNDP Executing Agencies ... and to their officials ...". Paragraph 4(a) of the article contains a special exception related to locally recruited personnel. It derives from this provision that privileges and immunities of the 1946 Convention should be accorded to all persons performing services on behalf of the UNDP, "...other than Government nationals employed locally". It is understood that the term "Government nationals employed locally" includes NPPP.

7. Pursuant to the Manual, NPPP do not have the status of staff members of the United Nations. Therefore, they are not covered by the staff rules of the Organizations of the United Nations system.

On the basis of the provisions of the SBAA and the Manual cited above, the Model Service Contract in section V correctly requires that the subscriber shall not be considered in any respect as being a staff member of the executing agency and shall neither be covered by the Executing Agency Staff Rules and Regulations nor by the Convention on the Privileges and Immunities of the United Nations.

8. Negotiations with various countries on the Standard Basic Assistance Agreement clearly show that the Governments are highly reluctant, if not expressly opposed, to granting any privileges and immunities to their nationals employed locally for assisting UNDP in carrying out its projects. According to our files, none of the existing Standard Basic Assistance Agreements accords any such immunities, facilities or privileges to locally recruited nationals.

9. The 1987 Report of the Consultative Committee on Substantive Questions (CCSQ) (section VI of which you kindly provided us with) clearly indicates that governments were frequently not in agreement to providing NPPP even with limited functional immunity by including the relevant provision to this effect in the project document. It seems that to negotiate such a provision on limited functional immunity of NPPP in project documents would require the relevant substantive changes in the text of the Standard Basic Assistance Agreement with all related implications.

10. Therefore, at this stage it does not appear desirable to single out NPPP as a new category of "staff". However, if in some cases there is a strong necessity to extend several functional immunities to certain NPPP, that could be done on an ad hoc basis. Such a possibility is not completely ruled out by the Standard Basic Assistance Agreement itself. In accordance with article IX, paragraph 4(a), the government indeed is not obligatorily required to grant privileges and immunities to its nationals employed locally. However, there is a condition in the Agreement that that shall be done "... except as the Parties may otherwise agree in project documents relating to specific projects...".

11. As to the Service Agreement used by the International Labour Organization, please be advised that the Agreement contains certain inconsistencies and, in our opinion, requires several clarifications. For example, paragraph 4 provides for a non-applicability of the Staff Regulations of ILO. At the same time, in paragraph 12 it is mentioned that the provisions of annex II to the ILO Staff Regulations could be applied to the signatory as if he were a fixed-term official. In addition, we believe that such terms as "reasonable period" (paras. 15 and 18), "serious misconduct" (para. 17) and "any favour" (para. 20) should be specified from the legal point of view.

12. The foregoing comments and remarks constitute our preliminary views on the matter, pending specific proposals in this regard.

11 February 1988

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### **Privileges and immunities**

#### **6. STATUS OF THE UNITED NATIONS AND UNITED NATIONS AGENCIES IN RELATION TO CONVERSION TAX — SECTIONS 5(B), 7(A) AND 18(E) OF THE CONVENTION ON THE PRIVILEGES AND IMMUNITIES OF THE UNITED NATIONS — ARTICLE 34 OF THE VIENNA CONVENTION ON DIPLOMATIC RELATIONS OF 1961**

##### *Note verbale to the Permanent Representative of a Member State*

The Legal Counsel of the United Nations presents his compliments to the Permanent Representative of (name of State) and has the honour to refer to the question of the thirty percent currency conversion tax which has, since May 1987, been applied in (name of State) to the United Nations including the United Nations Development Programme and other agencies of the United Nations with programmes in that State.

The Legal Counsel has been advised that the official accounts located in (name of State) of the United Nations, UNDP and other United Nations agencies, as well as project accounts and the personal accounts of staff, have been affected.

In the view of the Legal Counsel the status of the United Nations, UNDP and other United Nations agencies located in (name of State), in relation to the matter of tax and the convertibility of currency, may not have been fully appreciated and should be urgently clarified.

As the Permanent Representative of (name of State) is aware, the Agreement of 29 April 1977 between UNDP and (name of State) deals in article IX with privileges and immunities and provides, in particular, that the Government “shall apply to the United Nations and its organs including the UNDP and ... their property, funds, and assets, and to their officials ... the provisions of the Convention on the Privileges and Immunities of the United Nations.”

The Convention on the Privileges and Immunities of the United Nations states, in section 7(a), that the United Nations and its assets shall be exempt from all direct taxes and, in section 18(b), that officials of the Organization shall be exempt from taxation on the salaries and emoluments paid to them by the United Nations.

The Convention also provides, in section 5(b), that the United Nations “... shall be free to transfer its funds, gold or currency from one country to another or within the country and to convert any currency held by it into any other

currency". The Convention states, in section 18(e), that officials of the United Nations shall be accorded "the same privileges in respect of exchange facilities as are accorded to the officials of comparable ranks forming part of diplomatic missions to the Government concerned". It should be noted in this connection that the Vienna Convention on Diplomatic Relations of 1961,<sup>68</sup> to which this State is a party, provides in article 34 that a diplomatic agent shall be exempt by the receiving State "... from all dues and taxes, personal or real, national, regional or municipal".

It is the opinion of the Legal Counsel that the 30 per cent currency conversion tax, if applied to the United Nations, UNDP and other United Nations agencies with programmes in (name of State) and their staff, would constitute a direct tax within the meaning of section 7(a) of the Convention on the Privileges and Immunities of the United Nations. It also would be contrary to the intent of the provisions of section 18(e) of the Convention on the Privileges and Immunities of the United Nations as read with article 34 of the Vienna Convention on Diplomatic Relations.

The Legal Counsel trusts that the appropriate adjustments will be made in the implementation of the currency conversion tax by the competent authorities in (name of State) to ensure concordance with the international obligations noted above.

9 February 1988

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## General Assembly

### 7. STATEMENT BY THE LEGAL COUNSEL CONCERNING THE DETERMINATION BY THE SECRETARY OF STATE OF THE UNITED STATES OF AMERICA ON THE VISA APPLICATION OF MR. YASSER ARAFAT, MADE AT THE 136TH MEETING OF THE COMMITTEE ON RELATIONS WITH THE HOST COUNTRY, ON 28 NOVEMBER 1988\*

1. In the meeting which took place this morning, a number of representatives referred to the statements issued by the Secretary-General and by the President of the General Assembly regarding the denial of the visa application of Mr. Yasser Arafat. It had not been my intention, therefore, to make a statement in the meeting, but in the light of the statements made by a number of representatives, and in particular that of the host country, I wish to make the following remarks.

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\*Originally appeared as a document of the Sixth Committee on Relations with the Host Country of the General Assembly (A/C.6/43/7). Circulated pursuant to a decision of the Sixth Committee at its 51st meeting, on 29 November 1988.

2. First of all, I should like to confirm that as the Permanent Observer of the Palestine Liberation Organization (PLO) stated this morning, a visa request for Mr. Yasser Arafat, Chairman of the Executive Committee of the PLO, was presented to the Secretary-General on the afternoon of 8 November 1988. The visa request stated explicitly that the purpose of Mr. Arafat's visit was to participate in the work of the forty-third session of the General Assembly. The note was transmitted by me to the United States Mission on 9 November; in view of the fact that the visa was requested for the Chairman of the Executive Committee of the PLO, I handed the note personally to Ambassador Herbert S. Okun of the United States Mission. In transmitting the request on 9 November, I drew the attention of Ambassador Okun to the fact that the note was worded in exactly the same way as the normal PLO visa requests, that Mr. Arafat was designated therein as the Chairman of the Executive Committee of the PLO and that the purpose of his visit was to participate in the work of the forty-third session of the General Assembly; therefore, in my view, the request fell under sections 11, 12 and 13 of the Headquarters Agreement. As you know, sections 11, 12 and 13 of the Headquarters Agreement provide, *inter alia*, that invitees of the United Nations shall not be impeded in their access to the Headquarters district, that this applies irrespective of the state of bilateral relations of the host country and that the necessary visas "shall be granted ... as promptly as possible".

3. I note from the statement of the Department of State dated 27 November 1988 on the determination by the Secretary of State on the visa application of Mr. Arafat that the United States recognizes that it is obligated to provide certain rights of entry, transit and residence to persons invited to the United Nations Headquarters district in New York. The statement of the Department of State goes on to say that "The Congress of the United States conditioned the entry of the United States into the Headquarters Agreement on the retention by the United States Government of the authority to bar the entry of aliens associated with or invited by the United Nations 'in order to safeguard its own security'." On page 3 of the statement of the Department of State, it is said that "the Headquarters Agreement contained in Public Law 80-357 reserves to us [i.e., the United States] the right to bar the entry of those who represent a threat to our security". This is the so-called security reservation which was referred to by the representative of the host country this morning.

4. In this respect, I note that the Headquarters Agreement states in section 13(d) that "Except as provided above in this section and the General Convention, the United States retains full control and authority over the entry of persons...into the territory of the United States". Thus, the Headquarters Agreement makes it clear that there is an unrestricted right of the persons mentioned in section 11 to enter the United States for the purpose of proceeding to the Headquarters district.

5. The Agreement does not contain a reservation of the right *to bar* the entry of those who represent, in the view of the host country, a threat to its security. What is referred to in the statement of the Department of State is, apparently, section 6 of Public Law 80-357 which reads as follows:

"Nothing in the Agreement shall be construed as in any way diminishing, abridging or weakening the right of the United States to safeguard its own security and completely to control the entrance of aliens into any territory



of the United States other than the Headquarters district and its immediate vicinity ... and such areas as it is reasonably necessary to traverse in transit between the same and foreign countries.”

6. There is a difference of opinion between the United Nations and the United States on the legal character and validity in international law of that proviso. That difference has surfaced occasionally, but I do not think that it is necessary to go into that difference of opinion on which the position of the United Nations was firmly established in a memorandum of the United Nations Legal Department reproduced in Economic and Social Council document E/2397 of 10 April 1953, in particular paragraphs 9 to 11. In the present circumstances, it suffices to refer to the wording of section 6, whatever the international legal character of that proviso might be, which speaks of the need to “safeguard its own security and completely to control the entry of aliens into any territory of the United States *other than the Headquarters district and its immediate vicinity* [emphasis added] ... and such areas as it is reasonably necessary to traverse in transit between the same and foreign countries”.

7. Mr. Arafat’s visa application is precisely to visit the Headquarters district and nothing else. The application thus situates itself precisely within the scope of section 11, precisely within the scope of the exception provided for in section 13(d) of the Headquarters Agreement and precisely within the area left open by section 6 of Public Law 80-357.

8. I would like to recall, moreover, that in 1953 when a problem arose concerning the denial of a visa to an invitee of the Economic and Social Council on the grounds of national security, the then Secretary-General, Dag Hammarskjöld, engaged in negotiations with the host country in an effort to find a way in which such difficulties could be handled and dealt with. On these negotiations, the Secretary-General published a progress report in document E/2492 of 27 July 1953 and a chapter in his annual report for 1953/54 (A/2663) dealt with this matter. In these reports, he stated that the right to transit to and from the Headquarters district had not been made the subject of any reservation. He added also that from the United Nations point of view, it should be recognized that a person should be excluded from the host country if there was clear and convincing evidence that a person intended in bad faith to use his or her trip as a cover for activities against that country’s security. He informed Member States that the United States representatives had assured him that if in the future there should arise any serious problems with respect to the application in special cases of provisions concerning access to the Headquarters district or to sojourn in its vicinity, the latter would consult him and keep him as fully informed as possible in order to ensure that the decision made was in accordance with the rights of the parties concerned. I note that no consultation took place nor was the Secretary-General kept fully informed in this manner.

9. In her statement this morning, the representative of the United States referred to, and I quote, “rare occasions” on which the United States had declined to issue visas to persons entering the United States for United Nations purposes in order to protect national security. The United States representative went on to assert that United Nations practice confirms that the United States had the right to decline the issuance of visas and the United Nations had, on a number of occasions since 1954, acquiesced in such a practice.

10. For the record, I wish to state that the United Nations has not acquiesced in such a practice. It is true that, on certain occasions, the United States has declined to issue visas to representatives of States or to persons invited to the United Nations, and the United Nations has not insisted where the requesting State itself, for reasons of its own, did not pursue the matter. The United Nations legal position regarding the obligation of the host country to grant visas has at all times been perfectly clear to the host country, as was the United Nations position with respect to the so-called security reservation.

11. As to the reasons given by the host country in the present case, I would like to indicate, finally, that the statement of the Department of State does not make the point that the presence of Mr. Arafat, Chairman of the Executive Committee of the PLO, at the United Nations would per se in any way threaten the security of the United States. In other words, the host country did not allege that there was apprehension that Mr. Arafat, once in the United States, might engage in activities outside the scope of his official functions directed against the security of the host country. The reasoning given in the statement of the State Department of 27 November 1988 does not meet the standard laid down in the talks between Secretary-General Hammarskjöld and the United States authorities and reported back by Mr. Hammarskjöld in the report cited above.

12. To sum up, I am of the opinion that the host country was and is under an obligation to grant the visa request of the Chairman of the Executive Committee of the PLO, an organization which has been granted observer status by the General Assembly.

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### **Procedural and institutional issues**

#### **8. QUESTION OF WHETHER A STATE NOT A MEMBER OF AN ECONOMIC AND SOCIAL COUNCIL FUNCTIONAL COMMISSION PARTICIPATING IN ITS DELIBERATIONS MAY RAISE POINTS OF ORDER OR MAKE PROPOSALS OF A PROCEDURAL NATURE — RULE 69, PARAGRAPH 3, OF THE RULES OF PROCEDURE OF FUNCTIONAL COMMISSIONS — “POINTS OF ORDER” — PARAGRAPH 79 OF ANNEX V TO GENERAL ASSEMBLY RULES OF PROCEDURE**

*Cable to the Director-General, United Nations Office at Geneva*

Regarding our cable on whether a State not a member of an Economic and Social Council functional commission participating in its deliberations may “raise points of order or make proposals of a procedural nature”:

Rules of Procedure of Functional Commissions<sup>69</sup> do not provide expressly for this matter.

It is true that rule 69, paragraph 3, of the Rules of Procedure of Functional Commissions provides that “a State thus invited shall not have the right to vote, but may submit proposals which may be put to the vote on request of any member of the Commission or of the subsidiary organ concerned”. However, having regard to clear differentiation in the rules of procedure between “procedural motions” and “substantive proposals and amendments” (see in particular rules 43, 48 to 55, 57 to 65 and 68), and provisions of rules immediately preceding Rule 69 which distinguish between substantive proposals and procedural motions, it seems reasonable to conclude that the expression “proposals” in rule 69, paragraph 3, should be interpreted to mean substantive proposals (including amendments) and not procedural motions which thus cannot be made by States not members of the functional commission in question.

Such an interpretation would also accord with United Nations practice of reserving procedural motions, which concern conduct of business, for full members of the body.

Concerning “points of order”, please see description of “point of order” in paragraph 79 of annex V to the General Assembly rules of procedure,<sup>70</sup> which is equally valid, with reference to points of order raised in functional commissions. Thus, points of order raised under rule 42 of functional commission rules would be questions which require a ruling by the presiding officer, subject to possible appeal, relating to conduct of business and consequently are reserved solely for full members of the body.

The following further points should also be noted. As explained in paragraph 79 of annex V to the General Rules, United Nations practice by which participants rise to a “point of order”, a means of obtaining the floor in order to seek information or clarification, should not be confused with raising “true” points of order under rule 42 and may be entertained by presiding officer when raised by non-members.

Non-members of functional commissions may, however, make statements or comments on procedural matters which are not in fact procedural motions or points of order under rule 42.

29 January 1988

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9. DESIGNATION OF SUBSIDIARY ORGANS OF THE UNITED NATIONS AS EXECUTING AGENCIES FOR UNITED NATIONS DEVELOPMENT PROGRAMME PROJECTS — STATUS OF THE INTERNATIONAL RESEARCH AND TRAINING INSTITUTE FOR THE ADVANCEMENT OF WOMEN

*Memorandum to the Principal Officer, Office of the Director-General,  
Development and International Economic Cooperation*

1. This refers to your memorandum of 10 February, in which you requested our advice on the questions regarding the application made to the Ad-

ministrator of the United Nations Development Programme by the International Research and Training Institute for the Advancement of Women to be designated as an Executing Agency of UNDP. Below are our views regarding INSTRAW's application.

#### A. STATUS OF INSTRAW

2. INSTRAW was established, pursuant to General Assembly resolution 3520 (XXX) of 15 December 1975, by the Economic and Social Council resolution 31/135 of 16 December 1976. The Statute of the Institute was approved by Council decision 1984/124 of 24 May 1984, and endorsed by General Assembly resolution 39/249 of 9 April 1985. Under article 1 of the statute of INSTRAW, the Institute is "an autonomous institution within the framework of the United Nations established in accordance with the Charter of the United Nations". The Institute has its own governing body — the Board of Trustees — which formulates principles, policies and guidelines for the activities of the Institute. The Institute would thus seem to be, as a matter of law, a subsidiary organ of the United Nations in terms of Article 7(2) of the Charter.

#### B. DESIGNATION OF SUBSIDIARY ORGANS OF THE UNITED NATIONS AS EXECUTING AGENCIES FOR UNDP PROJECTS

3. The practice of UNDP in respect to executing agencies has been to designate an international organization as a whole. This practice is based on the several Economic and Social Council and General Assembly resolutions constituting the statute of UNDP.<sup>71</sup> UNDP has designated subsidiary organs of the United Nations as executing agencies only when a decision of a competent intergovernmental body expressly conferred that status on the organ concerned, or expressly requested the Administrator to utilize the services of that organ as an executing agency. This is true of the United Nations Conference on Trade and Development,<sup>72</sup> United Nations Industrial Development Organization<sup>73</sup> before it became a specialized agency, and the regional economic commissions.<sup>74</sup>

#### C. CONCLUSION

4. Since INSTRAW is a subsidiary organ of the United Nations and not an organization eligible to be selected as executing agency for UNDP projects within the meaning of the relevant resolutions, and neither the General Assembly nor the Economic and Social Council, which are the competent intergovernmental bodies in the case of INSTRAW, has conferred executing agency status on the Institute, or has requested the Administrator to utilize its services, we are, therefore, of the opinion that a decision either by the General Assembly or by the Economic and Social Council conferring such status on the Institute would be necessary before the Institute can be selected as a UNDP executing agency.

18 March 1988

10. POSSIBILITY OF A UNITED NATIONS FUND PARTICIPATING IN THE EQUITY OF PRIVATE ENTERPRISES AS A SHAREHOLDER — UNITED NATIONS CAPITAL DEVELOPMENT FUND MANDATE — GENERAL ASSEMBLY RESOLUTION 2186 (XXI) OF 13 DECEMBER 1966

*Memorandum to the Executive Secretary, United Nations  
Capital Development Fund*

1. This responds to your memorandum of 3 March 1988 (CDF/PROG/POL/6-CDF/FIN/LOAN PROG) in which you requested our views on the possibility of the United Nations Capital Development Fund (UNCDF) participating in the equity of private enterprises, as a shareholder, as part of the development assistance provided to recipient countries. You requested us, in particular, to review the legal ramifications entailed in such participation, such as UNCDF's "responsibilities and legal liabilities as a Board of Directors member, tax situation of a United Nations Agency, handling of profits, divestiture, etc.". You provided us, as an example of the type of operation envisaged, a proposed UNCDF project in a Member State, under which UNCDF would participate, with other local and foreign institutions, in the share capital of a company called Small Enterprise and Advisory Company, which would be incorporated under the laws of that Member State for the purpose of providing credit to selected small-scale entrepreneurs of that Member State.

A. CAPACITY OF UNCDF TO ACQUIRE SHARES IN THE CAPITAL OF PRIVATELY  
INCORPORATED COMPANIES

2. The question of participation in the ownership of the share capital of a company or corporation by a subsidiary organ of the United Nations involves a number of policy and legal issues going far beyond the limited questions you raised. While not all such questions need be dealt with here, it might be useful for purposes of responding to your request to examine, in this regard, the mandate granted to UNCDF by the General Assembly.

*UNCDF Mandate*

3. UNCDF was established by General Assembly resolution 2186 (XXI) of 13 December 1966, which also contains its Statute. Article 1 of the Statute defines the purpose of UNCDF as follows:

"The purpose of the Capital Fund shall be to assist developing countries in the development of their economies by supplementing existing sources of capital assistance *by means of grants and loans*, particularly long-term loans made free of interest or at low interest rates ...". (Emphasis added.) (See also article V of the Statute and Regulation 8.8 of the UNCDF Financial Regulations and Rules.)

4. Article III, paragraph 1, of the same resolution provides that:

“Assistance from the Capital Development Fund may be given to the Government of a State Member of the United Nations or member of a specialized agency or of the International Atomic Energy Agency or to a group of Governments of such States or, at the request of the Government of one of these States, to an entity having juridical personality within the territory of that State ...”

5. Article V provides that:

“1. The Capital Development Fund shall extend both grants and loans.

“2. ...

“3. Assistance shall be extended after the conclusion of an agreement between the Capital Development Fund and the recipient Government. In the case of loans, the agreement shall specify the date of maturity, rate of interest and currency of repayment of the loan, taking into consideration the recipient State’s economic position, as shown, for example, by its balance of payments.”

4. ...

6. It would seem from the statutory mandate of UNCDF as outlined above, that while it is authorized to provide grants and loans for capital development, to Governments and, at their request, to both public and private enterprises, participation in the ownership and management of such enterprises has not been authorized by the General Assembly. Equity participation in private enterprises by UNCDF would thus seem to be inconsistent with the purposes and objectives for which UNCDF was established, which are, according to General Assembly resolution 2186 (XXI), to provide an alternative institutional set-up to existing financial institutions (International Bank for Reconstruction and Development, International Finance Corporation, International Monetary Fund, etc.) for promotion of capital development in developing countries.

7. If it is decided to seek the requisite legislative mandate for the proposed participation in the ownership and management of the private enterprises assisted by UNCDF, this Office will be happy to examine further this question and any specific proposals in this regard.

B. SUGGESTED ARRANGEMENTS FOR THE PROPOSED UNCDF PROJECT  
IN A MEMBER STATE

8. For the limited purpose of implementing the project, we suggest the following solution, in lieu of the proposed arrangements in the draft project document attached to your memorandum:

An agreement could be concluded, between the government of the Member State and UNCDF, outlining the nature of the project envisaged and the extent of UNCDF assistance. UNCDF, pursuant to the agreement with the government, could then extend grants and/or loans, as appropriate, to assist in the capitalization and operation of proposed company, as well as in the establishment of the guarantee scheme and the revolving fund envis-

aged. The agreement could also contain a provision providing for the level and nature of participation in the project of the other local and foreign financing parties, e.g., the Dutch Development Bank.

17 May 1988

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11. COMPETENCE OF THE UNITED NATIONS ADMINISTRATIVE TRIBUNAL TO DEAL WITH AN APPLICATION IF THE APPLICANT IS NOT A STAFF MEMBER OF THE ORGANIZATION

*Memorandum to the Presiding Officer, Joint Appeals Board, Geneva*

1. Please refer to your memorandum of 30 May 1988 requesting our views on the above case, in which the Geneva Joint Appeals Board decided on 10 May 1988 that it has no competence and jurisdiction as Mr. X was never appointed as a staff member of the United Nations. The Board also decided to request us to advise Mr. X about which forum in the United Nations could consider his appeal. Mr. X wrote to me on 24 June 1988 about that matter.

2. It appears that on 17 September 1985, while Mr. X was employed by the Office of the United Nations High Commissioner for Refugees in a Member State as a consultant, UNHRC offered him a one year appointment at the L-3 level, step 8. According to the Head of the Personnel Services, he accepted the offer and later changed his mind and explained that he was only willing to accept a contract at the L-4, step 8. According to the Head of the Personnel Services this refusal led to rejection of the offer. According to Mr. X a valid contract was concluded.<sup>75</sup> Therefore, the issue is whether a contract was concluded between the parties.

3. According to its jurisprudence, the United Nations Administrative Tribunal considers itself competent to deal with an application even if the applicant is not a staff member of the Organization, provided that an *offer of employment* has been made by the competent authority (emphasis added).<sup>76</sup> When asked to resolve the legal situation arising out of an offer of a contract made by the Administration, the Tribunal declared that "It is not open to dispute...that the issue is one which must be resolved essentially on the basis of rules of law which it is the responsibility of the United Nations Administrative Tribunal to apply. The question whether or not the Applicant must be regarded as the holder of a contract of employment with the United Nations can therefore be decided only after a substantive consideration of the case, which it is incumbent on the Tribunal to carry out".<sup>77</sup> Thus, the Tribunal would be an appropriate forum to hear the case.

21 July 1988

12. STATUS OF SHORT-TERM STAFF MEMBERS AS INTERNATIONAL CIVIL SERVANTS — AUTHORITY OF THE SECRETARY-GENERAL TO DETERMINE WHO IS A STAFF MEMBER

*Memorandum to the Secretary-General*

A problem has arisen which makes your intercession with the President of the State concerned necessary. I concur.

The Foreign Ministry of the State concerned has informed the United Nations that it backs a decision of the authorities of the city where it is located that, while not imposing any direct tax on the international emoluments of certain short-term staff members, these emoluments are taken into account for the purpose of calculating the rate of tax to be applied to their other income (*taux global*). This is justified by the assertion that the authorities do not regard these short-term staff members as international civil servants. The persons in question are freelance translators and interpreters employed by the United Nations not full time but for certain periods of increased activities and meetings and sessions only. The translators and interpreters are not dealt with as contract employees; their link with the United Nations is of such close and confidential nature that it seems necessary to extend the disciplinary power of the Secretary-General over them and they are therefore given fixed-term appointments under the 300 Series of the Staff Rules and Regulations.

The refusal of the authorities to recognize these staff members as such constitutes a hardship for the translators and interpreters concerned; their professional unions are up in arms against both the authorities and the international organizations. The question of reimbursement by the organizations under the unionized contracts of the staff members in question arises. Even more importantly, the State's refusal to recognize these persons as staff members raises a fundamental problem in that it draws into question the authority of the Secretary-General and the executive heads of the other organizations concerned to determine who is a staff member.

This second aspect seems so important that after all other approaches have failed, it seems indicated that you write to the President of the State concerned, explain the situation and ask for his intervention. The attached letter is to serve this purpose.

11 August 1988

Mr. President,

I am writing to you to raise a question concerning a fundamental principle relating to the status and functioning of the United Nations and its specialized agencies.

The United Nations offices were informed by some of their staff members of the decision of the Council of State and the local authorities to apply the "aggregate rate" system to the taxable income of staff members in a certain category, namely, those with short-term contracts, such as translators and inter-



preters. This means that the tax-exempt income paid to these staff members by their organizations will not be disregarded but rather taken into account in establishing the tax rate applicable to income from other sources. Indeed, the Permanent Mission of (name of the State) has confirmed that, in establishing tax rates, the local tax administration would take into consideration the emoluments of these staff members under contracts with international organizations, on the grounds that they were not regarded as international civil servants during the periods in which they were “bound to the organizations by contract”.

First of all, this position calls into question the prerogative of the executive heads of these organizations to freely determine the categories of personnel regarded as civil servants solely within the limits of the relevant Constitutions and staff regulations, and subject only to the approval of the Member States collectively represented in the governing bodies.

It is therefore my duty, as Secretary-General of the United Nations, to intervene in order to reaffirm to the Government this essential principle of the functioning of the organizations concerned.

The prerogative of the executive heads of organizations in this regard is indeed embodied in the Constitutions, in the Headquarters Agreements and in long-standing practice. It is inherent in the special status granted to the organizations concerned in order to enable them to pursue their constitutional objectives in complete independence. It is indeed imperative that these organizations be able to accord civil-servant status not only to their permanent or regular staff members but also to other categories of employees called upon to fulfil, under the authority of the executive heads, tasks that are often of a confidential nature and which, in any case, where interpreters are concerned, are absolutely essential to their operations, even if it is only for short periods.

The only means available to the organizations to guard against any abuse is to take disciplinary measures applicable exclusively to *civil servants* of organizations. Thus, in its own interest, each organization must grant the status of international civil servant to this category of personnel.

It goes without saying that, if this argument were accepted, application of the aggregate rate would become a non-issue since, as civil servants, the interested persons should derive the full benefit of the tax-exempt regime applicable to them. Moreover, in 1979, the authorities, at the request of the United Nations, recognized that the aggregate rate system could not be legitimately applied in the absence of express provisions in the Headquarters Agreements concluded between ... and ...

I am convinced that the Government of (name of State), as a party to the Headquarters Agreement, would wish to confirm that it shares this point of view. Thanking you in advance,

15 August 1988

13. STATUS OF THE ENVIRONMENT FUND AND HABITAT FOUNDATION — FINANCIAL RULES 206.1 AND 210.1 — ARTICLE 97 OF THE CHARTER — GENERAL ASSEMBLY RESOLUTION 2997 (XXVII) OF 15 DECEMBER 1972 — ROLE OF THE EXECUTIVE DIRECTOR AND GOVERNING BODIES OF THE UNITED NATIONS ENVIRONMENT PROGRAMME AND THE UNITED NATIONS CENTRE FOR HUMAN SETTLEMENTS (HABITAT)

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

1. This responds to your memorandum of 17 August, requesting a legal opinion on the status of the Environment Fund and the Habitat Foundation and, in connection therewith, the specific authority of the Secretary-General and the Executive Directors of UNEP and Habitat.

A. THE ENVIRONMENT FUND

2. The Environment Fund was established pursuant to General Assembly resolution 2997 (XXVII) of 15 December 1972, by which (in section III, paragraph 1) the General Assembly decided that, "in order to provide for additional financing for environmental programmes, a voluntary fund shall be established, with effect from 1 January 1973, in accordance with existing United Nations financial procedures".

3. The resolution also established (in section I) a Governing Council (in section II) and provided for the establishment of an Environment Secretariat in the United Nations, "to serve as a focal point for environmental action and coordination within the United Nations system in such a way as to ensure a high degree of effective management". In accordance with paragraph 3 of section II of the resolution, the costs of servicing the Governing Council and providing the Environment Secretariat are to be met from the regular budget of the United Nations, and the operational programme costs, programme support and administrative costs of the Environment Fund are to be met from that Fund.

4. The Governing Council was charged with the functions and responsibilities, among others:

"(g) to review and approve annually the programme of utilization of resources of the Environment Fund referred to in section III below."

The Governing Council was also charged with the responsibility to formulate "such general procedures as are necessary to cover the operations of the Environment Fund". The General Procedures were adopted by the Governing Council by its decision 2(1) on 22 June 1973. Article IV of the Procedures provides that the financial resources of the Fund shall be acquired, authorized, administered, used and disposed of in conformity with the Financial Rules of the Environment Fund of UNEP.

The UNEP Financial Rules were promulgated by the Secretary-General under the United Nations Regulations, pursuant to resolution 3192 (XXVIII) of 18 December 1973, and became effective on 1 January 1976.

5. As regards the administration of the resources of the Environment Fund, financial rules 206.1, 209.1, and 210.1 are relevant. These rules read as follows:

*Rule 206.1.* The Secretary-General shall act as custodian of the funds in the Fund account and shall designate the bank or banks in which such funds shall be kept.

*Rule 209.1.* The financial resources of the Fund are to be available at all times to the maximum extent possible for Fund programme purposes, subject only to the maintenance on a continuous basis of a financial reserve. *After provision has been made annually for the programme support costs and administrative costs of the Fund*, all resources not otherwise committed or reserved can be utilized for project activities. (emphasis added.)

*“Rule 210.1. The Executive Director shall prepare a budget to cover all anticipated programme and programme support costs (other than those borne by the regular budget of the United Nations) of the Fund in the form consistent with relevant United Nations budgetary regulations, rules, policies and practices. The budget may include provision for contingencies.”* (emphasis added)

6. The powers of the Secretary-General of the United Nations are derived, in part, from Article 97 of the Charter, which states that he shall be “the chief administrative officer of the Organization”. In pursuance of that authority, the Secretary-General appoints staff, under the Staff Regulations, and acts as custodian of all funds of the Organization, in accordance with the Financial Regulations. Thus, it is the Secretary-General who appoints the Executive Director of UNEP, under the Staff Regulations (Article 101 of the Charter), upon his election by the General Assembly. As regards the UNEP Fund, the Secretary-General exercises his authority, under the Financial Regulations, through the promulgation of rules for its management and, by which rules, he retains custody of the Fund (General Assembly resolution 3192 (XXVIII) and UNEP financial rule 206.1).

7. Much of the authority vested in the Secretary-General has, of course, been delegated by the Secretary-General to the Executive Director, and the General Assembly has delegated to the Governing Council the functions relative to the programme activities of UNEP. However, such delegation does not derogate from the ultimate responsibility and authority of the Secretary-General or the General Assembly.

8. It should be noted in this respect that, in General Assembly resolution 2997 (XXVII), a distinction is drawn between costs associated with administrative and programme support of the activities financed from the Environment Fund and the costs associated with the financing of the programme activities themselves. In respect of the programme activities themselves, the Governing Council has been given authority under paragraph 2(g) of section I of the resolution “to review and approve annually the programme of utilization of resources of the Environment Fund referred to in section III below”. Section III, paragraph 3, of the resolution defines the scope of the programme activities to be financed from the Fund as may be decided by the Governing Council.

9. The expenses of the Environment Secretariat, whether borne by the regular budget or the Fund, are covered by the administrative arrangements incorporated in the note by the Secretary-General of 19 October 1973 to the General Assembly (A/C.5/1505/Rev.1). The financial and personnel arrangements envisaged under that Note were that the Executive Director would be delegated a maximum degree of decentralized authority to administer the funds from the Environment Fund and to utilize them for programme support and administrative costs.

10. However, in view of his overall authority as Chief Administrative Officer of the Organization, the Secretary-General retains the ultimate authority to establish arrangements for the common services at Nairobi and to make budget proposals to the General Assembly, including the allocations to be made from the Environment Fund to finance those services. This is particularly so when the Secretary-General acts in implementation of a General Assembly mandate, such as in its resolution 41/213 which requires the Secretary-General "to institute measures to improve the efficiency of the administrative and financial functioning of the United Nations with the view of strengthening its effectiveness in dealing with the political, economic and social issues". Once the General Assembly has acted on such proposals, it would then be for the Executive Director, in compliance with the decision of the General Assembly, to include the necessary expenditures from the Fund in the budget called for by financial rule 210.1, for authorization by the Governing Council under article VI of the General Assembly Procedures covering the operations of the Fund.

#### B. HABITAT FOUNDATION

11. The United Nations Habitat and Human Settlements Foundation was established by the General Assembly in its resolution 3327 (XXIX) of 16 December 1974 on the basis of decision 16(A)(II) of the Governing Council of the United Nations Environment Programme. The Executive Director of UNEP was charged under the resolution with the responsibility, under the authority and guidance of the Governing Council of UNEP, of administering the Foundation and providing the technical and financial services related to that institution. By General Assembly resolution 32/162, the responsibilities of the Governing Council were transferred to the Commission on Human Settlements, and provision was made for the establishment of the United Nations Centre for Human Settlements (Habitat) to be headed by its own Executive Director. Under that resolution, the Commission is charged with the responsibilities:

“(d) To give overall policy guidance and carry out supervision of the operations of the United Nations Habitat and Human Settlements Foundation;

“(e) To review and approve periodically the utilization of funds at its disposal for carrying out human settlement activities at the global, regional and subregional levels; and

“(f) to provide overall direction to the secretariat of the Centre referred to in section III below”.

The Executive Director of the Centre was given the responsibility to administer the Habitat Foundation and to exercise the functions previously per-

formed by the Executive Director of UNEP over the Foundation under General Assembly resolution 3327 (XXIX).

12. In this note by the Secretary-General to the General Assembly regarding the administrative arrangements of the Habitat Foundation (A/C.5/32/24 of 17 October 1977), the Secretary-General proposed as follows:

“The financial operations of the Foundation are to be governed by the Financial Regulations and Rules of the United Nations, including any necessary special or clarifying rules required to meet the authorized purposes of the Foundation. These will be promulgated by the Secretary-General, including such additional financial rules as may be required to further control the activities under the Financial Regulations described in paragraph 42 and annex II, if they should be approved by the General Assembly. While it would be the intention of the Secretary-General to delegate much of the authority so provided, he would retain custody of the funds of the Foundation and the right to further amend or change the relevant financial rules as conditions may require.”

Following acceptance of those proposals by the General Assembly, the Secretary-General promulgated special financial rules applicable to the Foundation (300 Series to the United Nations Financial Regulations and Rules).

13. In the light of the above, we consider that the Secretary-General has the authority, even more directly than in respect of the Environment Fund, to propose to the General Assembly for its approval in accordance with the Financial Regulations of the United Nations, the allocation of resources from the Foundation to cover the programme support and administrative expenses of the Foundation, including any common services.

#### C. ROLE OF THE EXECUTIVE DIRECTORS AND THE GOVERNING BODIES OF UNEP AND HABITAT

14. The exercise by the Secretary-General or the General Assembly of the residual authority under the United Nations constitutive instruments as outlined in the preceding paragraphs does not take away the respective roles of the Executive Directors or the Governing Council (Council) of UNEP and the Habitat Commission on Human Settlements (Commission). For, when the Secretary-General or the General Assembly act in accordance with their respective competences, they establish only the framework within which further action is to be taken, in accordance with the applicable rules and procedures, by the Executive Directors in the case of a decision by the Secretary-General, or by the Council or the Commission in the case of action by the General Assembly. Thus, once the General Assembly has acted on a proposal by the Secretary-General regarding allocations of funds from the Environment Fund and the Habitat Foundation for the common services, it would still be for the Executive Directors to work out the details, and to obtain the necessary authorizations from the Council and the Commission for the expenditures included in the budget approved by the General Assembly.

15 September 1988

14. QUESTION OF WHETHER THE SECRETARY-GENERAL CAN RECEIVE NOMINATIONS FOR ELECTION OF MEMBERS TO THE COMMISSION AGAINST APARTHEID IN SPORTS AFTER THE DESIGNATED PERIOD OF TIME — ISSUES RELATING TO THE REGIONAL DISTRIBUTION OF COMMISSION SEATS AMONG THE STATES PARTIES — ARTICLE 11, PARAGRAPHS 1 AND 3, OF THE INTERNATIONAL CONVENTION AGAINST APARTHEID IN SPORTS

MEMORANDUM TO THE ASSISTANT SECRETARY-GENERAL, CENTRE AGAINST APARTHEID, DEPARTMENT OF POLITICAL AND SECURITY COUNCIL AFFAIRS

1. I wish to refer to a memorandum of 9 September 1988 on the above-mentioned subject.

2. In that memorandum the following questions were raised:

(a) Can the Secretary-General, in his capacity as depositary of the International Convention against Apartheid in Sports,<sup>78</sup> legally receive nominations for election of members to the Commission against Apartheid in Sports after a two-month period within which submission of nominees was invited (8 August 1988), referred to in article 11, paragraph 3, of the Convention?

(b) In the light of the fact that fewer nominations than the number of Commission members have been received so far, could the meeting of the States Parties to be convened by the Secretary-General pursuant to article 11, paragraphs 3 and 4, of the Convention, be postponed?

(c) If the States Parties decided on a pattern for the regional distribution of Commission seats among the States Parties, what would happen if the nominees from a regional group were fewer than the number of seats allocated to that group?

3. The views of the Office of Legal Affairs are set out below and correspond to the questions above:

(a) The text of the article provides that nominations are invited to be submitted within a two-month period; it does not prohibit receipt of nominations after that date. In the light of the foregoing and of the Secretary-General's practice with regard to the submission of nominees to the General Assembly in Assembly elections, it is our view that the Secretary-General should receive all nominations sent to him by the States Parties up to the date of convening of the meeting of the States Parties. He should in his report to the States Parties (and, if necessary, addenda thereto) inform them of the nominations which were received between 8 June and 8 August 1988 and nominations received thereafter. It would then be for the States Parties to decide on the receivability of the nominations received after 8 August 1988. The practice of the General Assembly in such circumstances is to normally agree to receive such "late" nominations.

(b) The provisions of article 11, paragraph 3, state unambiguously that "the initial election shall be held six months after the date of the entry into force of the present Convention". The convening of the meeting of the States Parties

to elect the members of the Commission is not made subject to any condition. The meeting should be convened as required by the Convention. The Secretary-General should report to the States Parties at that meeting if there are circumstances which prevent proceeding to the election of the Commission as envisaged by the Convention, such as too few nominees to fill the posts to be elected. The States Parties would then decide on what course of action would be most appropriate. We have not been able to ascertain in the practice of the General Assembly that such situations have arisen in the past or how they might be resolved. However, one way of dealing with the matter would be to suspend the meeting of the States Parties and request the States Parties which have not yet done so to submit nominations. This procedure can be followed with or without a partial filling of the Commission seats during the initial part of the meeting of the States Parties.

(c) (1) The Convention provides, in article 11, paragraph 1, that in the election of the members of the Commission, the States Parties should have “regard to the most equitable geographical distribution and the representation of the principal legal system”. If the States Parties agree *inter se* that the most effective way of implementing that provision is by allocating seats to regional groups of the States Parties based on a particular pattern of distribution, such agreement would constitute a “gentlemen’s agreement” among the States Parties. The geographical distribution and representation of the principal legal systems on the Commission would clearly be based upon the States Parties to the Convention and, logically, would be proportionate to the geographical distribution and principal legal systems representation that exists among the States Parties at the time of election. As the term of Commission members is limited, pursuant to article 11, paragraph 5, the States Parties may make adjustments if they wish in the distribution of seats among geographical regions or principal legal systems by agreeing on further “gentleman’s agreements” at subsequent elections to reflect changes in the geographical distribution and principal legal systems representation among the States Parties.

(2) If, after agreement has been reached on the geographical distribution, there are too few nominees for a particular region to fill its allocated seats, there is no legal obstacle to filling them with nominees from other groups. Indeed, the specific treaty obligation of the States Parties is to elect a 15-member Commission. On the other hand, it is for the States Parties to ascertain whether any deviations from an agreed distribution of seats pattern would run counter to the treaty obligation that Commission members are to be elected by the States Parties “having regard to the most equitable geographical distribution and the representation of the principal legal systems”. Alternatively, the States Parties could, as stated in paragraph 3(b) above, suspend the meeting and, with or without a partial filling of the Commission seats, invite more nominations.

23 September 1988

## 15. POSSIBILITY OF SUBMISSION OF DRAFT RESOLUTIONS BY THE PRESIDENT OF THE GENERAL ASSEMBLY

MEMORANDUM TO THE UNDER-SECRETARY-GENERAL, OFFICE FOR POLITICAL AND GENERAL ASSEMBLY AFFAIRS

1. As is well known, draft resolutions are normally submitted by Member States. Other possibilities exist, however. Subsidiary organs reporting to the General Assembly have been urged to make every effort to submit draft resolutions in order to facilitate the consideration of the items in question. (See paragraph 31 of annex VI to the Assembly's rules of procedure.) Furthermore, the Chairman or a Vice-Chairman of the Main Committees have, following consultations on a particular draft, submitted draft resolutions on the theory that such drafts represented "consensus" or "no objection" drafts. (For example, in 1985 the Chairman of the Sixth Committee submitted a draft resolution on the "Terrorism" item.)<sup>79</sup>

2. As far as the plenary practice is concerned, we are not aware of instances of the President formally submitted and circulating a draft resolution (i.e., a document with the heading "Draft resolution submitted by the President"). There have, on the other hand, been examples of the President proposing decisions to be taken by the General Assembly. These normally relate to organizational or procedural matters, such as the appointment of members to certain subsidiary organs.<sup>80</sup>

3. The rules of procedure of the General Assembly not containing any provision to the contrary, there would be no legal obstacle to the President of the Assembly submitting a draft resolution to the plenary, just as Chairmen of Main Committees have done.

11 October 1988

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## 16. STATUS OF THE FEDERATION OF INTERNATIONAL CIVIL SERVANTS' ASSOCIATIONS — ISSUE OF FICSA ACQUIRING CONSULTATIVE STATUS WITH THE ECONOMIC AND SOCIAL COUNCIL — COUNCIL RESOLUTION 1298 (XLIV) OF 23 MAY 1968

*Memorandum to a Social Affairs Officer, Non-Governmental Organizations Unit, Department of International Economic and Social Affairs*

1. This responds to your inquiry concerning whether the application of the Federation of International Civil Servants' Associations (FICSA) for consultative status with the Economic and Social Council, set out in its letter of 21 April 1988, can legally be considered.



## A. IS FICSA A NON-GOVERNMENTAL ORGANIZATION?

2. The first question is whether FICSA is a “non-governmental organization” within the meaning of United Nations Charter Article 71, on which NGO consultative status with the Economic and Social Council is based. In this connection, it should be noted that the Council, in paragraph 7 of its resolution 1296 (XLIV) of 23 May 1968 (which in this respect is based on resolution 288 B (X) of 27 February 1950), has specified that “any international organization which is not established by intergovernmental agreement shall be considered as a non-governmental organization for the purpose of [the arrangements for consultations with NGOs]”. Since FICSA was plainly not established by a treaty, it would seem to qualify.

3. It might, however, be noted that the legal status or rather nature of FICSA is quite obscure — i.e., it might be questioned whether it is an “organization” at all. First, it is plainly not a legal person created by a national law. Second, its members are staff associations of United Nations family intergovernmental organizations (article 6 of the FICSA statutes of 13 February 1986), and these in turn are quasi-organs of their respective intergovernmental organizations, which derive their legal personality from these organizations. The Federation, however, was not created by an agreement among those intergovernmental organizations themselves, but among the staff associations — an agreement that was concluded neither under any national law, nor as a treaty under international law, nor yet under the law of a particular organization (e.g., the United Nations). It has, however, achieved recognition from the competent United Nations and inter-agency organs (e.g., United Nations General Assembly, International Civil Service Commission, United Nations Joint Staff Pension Fund, Consultative Office on Administrative Questions of the Administrative Committee on Coordination, etc.) — but it is not known whether it has ever been “recognized” by any national government or organ.

4. Finally, it is listed in the authoritative *Yearbook of International Organizations*, in the 1987/88 edition under number CCO946y (i.e., as an “Intercontinental Membership Organization”). (N.B.: the Coordinating Committee for Independent Staff Unions and Associations of the United Nations System (CCISUA) is listed under number EEO236y, as an “Organization emanating from places, persons, other bodies”.)

5. From all this it follows that FICSA may be considered to be an NGO within the loose definition established and used by the Economic and Social Council for this purpose.

## B. IS FICSA'S PURPOSE COMPATIBLE WITH CONSULTATIVE STATUS WITH THE ECONOMIC AND SOCIAL COUNCIL?

6. Paragraphs 1 and 2 of Economic and Social Council resolution 1298 (XLIV) require NGOs with which consultative status is to be established to “be concerned with matters falling within the competence of the Council with respect to international economic, social, cultural, educational, health, scientific, technological and related matters and to questions of human rights” and to have aims and purposes “in conformity with the spirit, purposes and principles” of the Charter of the United Nations. On the face of it, the “Purposes and func-

tions” of FICSA as set out in chapter II of its statutes would seem to satisfy these requirements, though evidently it is up to the Council, acting on the recommendation of its Committee on NGOs, to determine whether the Council agrees that this is so.

7. However, the actual purposes and activities of FICSA, as appears both from its statutes and its reports, is to represent the staff of the United Nations system organizations in various organizations and organs that are capable of affecting these interests. It might therefore appear anomalous for such an organization, which is principally engaged in consultations and negotiations with various United Nations organs (though not the Economic and Social Council) on staff working conditions (i.e., the classical functions of a labour union with a relatively restricted membership), to seek a status that would enable it to intervene with various United Nations organs (the Economic and Social Council and its Commissions, the Secretariat and in particular the Department of Public Information, and even the General Assembly) — though generally speaking only on matters within its field of competence, i.e., the representation of the staff of intergovernmental organizations. Again, it is primarily for the Economic and Social Council to decide whether this anomaly should prevent the achievement of consultative status, though conceivably the General Assembly, which directly or through intra- and interorganizational organs created by it, deals with FICSA as an agent for the staff, might express its views on this question.

8. On the other hand, if it is assumed that FICSA’s purpose in applying for consultative status is not in connection with its primarily union-like activities, but to bring to bear on international political processes and problems the collective experience and good will of its membership, then an even graver problem arises. How can an organization whose real members (i.e., the individual staff members represented by the staff associations that constitute FICSA), who are individually precluded as international civil servants from intervening in the proceedings of the representative organs of intergovernmental organizations, do so itself on their collective behalf? In this connection, it should be noted that in recent years we have several times advised that staff should not establish NGOs (e.g., Anti-Apartheid Group at United Nations Office at Geneva; “Africa Rights”, a Pan-African NGO for the promotion and protection of human rights in Africa; International Association of Political Scientists for the United Nations (IAPSUN)) to carry out even activities that would seem praiseworthy and consonant with decisions of high political organs such as the United Nations General Assembly, if these NGOs are to have primarily political functions — for staff members are supposed to further the purposes of the organizations for which they work through their official activities carried out under the direction of their respective supervisors and executive heads, and not in an individual capacity.

9. This then is the essential dilemma in considering an application for consultative status from FICSA:

(a) Either FICSA wishes merely to expand its union-like activities by gaining access to United Nations organs in which it now has no standing and which have no competence for staff regulations — and this is undesirable as tending to confuse the management/staff relations in the United Nations and other common systems organizations;

(b) Or, FICSA wishes to transcend to some extent its narrow representative functions to enable its membership to make a different and substantive contribution to the work of the United Nations — but this would seem to be inconsistent with how international officials are supposed to bring their talents and efforts to bear on the international community.

### C. CONCLUSION

10. Thus, though FICSA can, of course, apply for consultative status with the Economic and Social Council and the decision on whether to grant that status would be up to the Council (acting on the advice of its NGO Committee), we might advise that, while there is no clear legal obstacle that would prevent such a grant, important policy considerations suggest that such a step would be anomalous and undesirable.

12 October 1988

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## 17. ISSUE OF MEDALS BY THE UNITED NATIONS — POSSIBILITY OF ISSUING A COMMEMORATIVE MEDAL SERVICE RIBBON IN RECOGNITION OF THE 1988 NOBEL PEACE PRIZE AWARD TO UNITED NATIONS PEACEKEEPING FORCES

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

1. This refers to the 7 October cable from the United Nations Peacekeeping Force in Cyprus Force Commander to you (UNFICYP No. 1455), proposing that the United Nations issue a special commemorative medal to mark the 1988 award of the Nobel Peace Prize to the United Nations peacekeeping forces. In this regard, the Force Commander suggests that “the peacekeepers serving on 29 September 1988, the date of the announcement, should be awarded the medal as representatives of those past and future peacekeepers”.

### *Precedents regarding the issue of medals by the United Nations*

2. Up to now, three medals have been established by the United Nations for award to military personnel who have served on behalf of the Organization.

(a) *The United Nations Service Medal (Korea)* was specifically authorized by the General Assembly in resolution 483 (V) of 12 December 1950, and regulations relating to the issue of the medal to personnel of the United Nations forces in Korea were prescribed by the Secretary-General on 25 September 1951,<sup>81</sup> and supplemented by an annex dated 17 October 1955,<sup>82</sup> pursuant to that resolution.

(b) *The United Nations Emergency Force Medal* was established for award to military personnel serving on assignment to the Force (1956-1967) on

the basis of regulations prescribed by the Secretary-General on 30 November 1957,<sup>83</sup> pursuant to the authority of General Assembly resolution 1001 (ES-1) of 7 November 1956.<sup>84</sup>

(c) *The United Nations Medal* was established on the basis of regulations prescribed by the Secretary-General on 30 July 1959<sup>85</sup> and revised in 1963,<sup>86</sup> which provide that the Secretary-General is to designate the United Nations organs in respect of which the medal shall be awarded.

3. At the time when the possibility of issuing a United Nations Medal was raised, this Office advised that the Secretary-General had the authority to establish such a special medal and award it to military personnel serving in any United Nations operation. In advancing this view, we focused on the Secretary-General's administrative and executive powers in respect of subsidiary organs, such as the United Nations peacekeeping missions concerned, in stating:

“... [T]he Secretary-General, as chief administrative officer of the Organization and in accordance with the appropriate resolutions creating the subsidiary organs in question, has the authority to establish and award a United Nations medal for military personnel as a recognition of their services in a particular operation. There is no doubt that he can send letters to any personnel under his authority, recognizing their services ... [C]ommemorative medals for military personnel can be considered similar to such letters. When the question first arises of awarding the medal to the members of any particular organ it will, of course, be necessary to ascertain from the terms of the resolution creating that organ, that the Secretary-General has administrative and executive power in relation to that organ of the nature outlined ...”

4. In concluding that the Secretary-General had the power to issue the United Nations Medal without express General Assembly authorization, we referred to an opinion given by this Office to Mr. Ralph Bunche, distinguishing between the two precedent cases of Korea and United Nations Emergency Force and explaining why a specific General Assembly resolution was required in the first situation and not in the other. The opinion pointed out that, in the case of Korea, forces and other assistance were made available, under Security Council resolution 84 (1950) of 7 July 1950, to a Unified Command under the United States, and that the Secretary-General was not given any authority over the Command or the forces under it.<sup>87</sup> In respect of UNEF, however, the position of the Secretary-General was different, as he was specifically authorized to issue regulations and instructions, and to take all other administrative and executive action in connection with the Force. The issue of a medal to military members of the Force was therefore considered to come within the terms of authority conferred on the Secretary-General.

*Possibility of issuing a Commemorative Medal/Service Ribbon in recognition of the 1988 Nobel Peace Prize award to United Nations peacekeeping forces*

5. On the basis of the above, it is our opinion that if the Secretary-General wished to issue a special medal commemorating the award of the 1988 Nobel Peace Prize to the United Nations peacekeeping forces, he has the authority to establish such a commemorative medal and to prescribe regulations governing the award thereof. Alternatively, instead of issuing a special medal,

the Secretary-General might consider designating a distinctive service ribbon, with features reflecting the Nobel Peace Prize award, to be attached to the United Nations Medal when issued to military personnel serving on the qualifying date in the respective peacekeeping missions.

6. If the Secretary-General decides to establish a special commemorative medal, the regulations to be prescribed for its issuance would need to specify, *inter alia*, the following:

(a) The United Nations peacekeeping operations in respect of service with which the medal shall be awarded (i.e., the particular observer missions and peacekeeping forces);

(b) The qualifying date or dates to serve as the basis for establishing eligibility to receive the medal (e.g., announcement of the Nobel Peace Prize award on 29 September 1988, conferral of the prize on 10 December 1988);

(c) Whether there need be a minimum period of service with any such peacekeeping operation in order to be eligible to receive the medal (e.g., 90 days, 6 months);

(d) The personnel of each such organ who shall be deemed to be eligible to receive the medal;<sup>88</sup> and

(e) The specifications for the form and other features of the medal.

7. If it is instead decided to commemorate the award of the Nobel Peace Prize by specifying a special service ribbon from which the regularly issued United Nations Medal will be suspended, the Secretary-General would need to determine the specifications of the ribbon, pursuant to the provisions of article II of the Regulations for the United Nations Medal, as well as the eligibility requirements referred to in subparagraphs 6(a) to (d) above.

10 November 1988

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## 18. ISSUE OF ACCOUNTABILITY OF EXECUTING AGENCIES — RELATIONSHIPS BETWEEN UNITED NATIONS DEVELOPMENT PROGRAMME AND THE EXECUTING AGENCIES

*Memoranda to the Officer-in-Charge, Bureau for Programme Policy and Evaluation*

1. This responds to your memorandum of 2 March on the accountability of executing agencies, the delay of which is greatly regretted.

2. We note that at the last Session of the Governing Council, a document entitled DP/1988/19/Add.4 was circulated for consideration by the Council on this subject. Paragraphs 12 and 13 of the document read as follows:

“12. The case can probably be made, if on no other ground than by analogy to the common law of principal/agency relations, that agencies have the duty to be accountable towards the United Nations Development Programme (UNDP) for funds entrusted to them. The real question is not whether agencies have a duty to account to UNDP, either based on signed agreements or common law principles, but rather what such accountability means in practice. The answer to this question, in turn, is one of practical, administrative reality. It is not a truly legal issue.

“13. It also appears that it would be difficult to apply penalties in the traditional type of UNDP project. Penalty schemes are normally associated with large-scale construction and civil works.”

3. We, of course, share your appraisal of the question of accountability of executing agencies as important in the implementation of UNDP projects, and while we do not dispute that it is not just legal, we believe, however, that in order to engage the responsibility of executing agencies, financially, operationally or otherwise, a legal obligation must first be demonstrated. It is for this reason that we have taken some time to research the questions you raised and also to make attempts, unsuccessfully, to meet with you and obtain more information on the policy aspects of the matter.

4. There have been a number of cases in the past, which we are reviewing, in which the question of accountability has arisen, mainly as a result of the failure of the executing agency concerned to perform in accordance with: (a) the agreement between the executing agency and UNDP, (b) the agreement between the government, UNDP and the executing agency, or (c) the contractual arrangements made by the executing agency with third parties. This Office has, in fact, successfully assisted in resolving some of these cases and we consider that they can serve as precedents in the formulation of general principles to be applied in the future.

5. In this context, we wish to clarify that the relationship between UNDP and the executing agencies is governed primarily by: (a) the executing agency agreements; (b) the project documents signed between UNDP, the Governments and the executing agencies concerned; (c) the mandate accorded to the various organizations concerned, by their constitutive organs; and, generally, (d) the general principles of private and public international law. Therefore, the analogy merely to common law principles or individual national law regimes would in our view only lead to misconceptions as to the legal status of executing agencies and their role in execution of UNDP projects.

11 August 1988

1. This is further to our memorandum of 11 August, in response to yours of 2 March, and the meetings held recently between...representatives of our two offices, on the question of accountability of executing agencies.

2. In your memorandum of 2 March you requested advice on the interpretation and application of article VII of the United Nations Development Programme (UNDP) Agreement with Executing Agencies, which reads as follows:

In the execution of technical cooperation activities, the Executing Agencies shall have the status of an independent contractor vis-à-vis UNDP. *The executing agency shall be accountable to UNDP for its execution of such activities.* (emphasis added)

You wanted to know, more specifically:

(a) Whether the executing agencies that are parties only to the Special Fund Agreement and have not signed the UNDP agreement with executing agencies are bound by the same obligation of accountability specified by article VII above;

(b) The meaning of “accountability” in the context of the execution of development projects by the executing agencies with UNDP funds;

(c) Whether executing agencies are legally accountable to the UNDP for project funds entrusted to them by UNDP;

(d) The extent to which the obligation of accountability encompasses responsibility for the “good or bad” performance of the project; and lastly

(e) The sanctions at the disposal of UNDP if the executing agency fails in its duty of accountability to UNDP.

#### A. SPECIAL FUND

3. Article XII of the Special Fund Agreement with Executing Agencies provides in paragraph 2 that “any matter for which no provision is made in this Agreement shall be settled by the Parties in keeping with the *relevant resolutions and decisions of the appropriate organs of the United Nations*”.

4. Furthermore, the Special Fund Agreement provides that each project shall be implemented in accordance with a plan of operation (Project Document), as shall be agreed to by the Special Fund (now UNDP), the Government and the executing agency. The plan of operation normally provides that the project shall be carried out in accordance with the UNDP Standard Basic Assistance Agreement (SBAA) which states, in article I, that the assistance given to the Government shall be furnished and received in accordance with, *inter alia*, the relevant and applicable resolutions and decisions of the competent UNDP organs. A similar provision is to be found in article I(3) of the Special Fund Agreement with Governments.

5. The concept of accountability is contained in paragraph 43 of the annex to General Assembly resolution 2688 (XXV). It reads: “Every executing agent will be accountable to the Administrator for the implementation of programme assistance to projects”. The General Assembly has also reiterated this in its more recent resolution 42/196 of 11 December 1987, which states, in paragraph 32, as follows:

“[The General Assembly] ... *requests* United Nations funding organizations, especially the United Nations Development Programme, to adhere rigorously to established criteria and procedures in the selection of executing agencies to be recommended to recipient Governments so as to ensure

the provision of technical expertise and appropriate project support, *including technical backstopping, as well as the reliability and accountability of the executing agencies*". (emphasis added)

6. Furthermore, the Governing Council has on many occasions, similarly, urged that executing agencies should be "fully accountable" for the fulfilment of their obligations to UNDP.<sup>89</sup> In the most recent of these decisions (decision 87/13 of 18 June 1987), the Governing Council urged "the Administrator to initiate appropriate measures to ensure improved performance by the executing agencies so that they are fully accountable for the fulfilment of their obligations in the execution of projects supported by the United Nations Development Programme".

7. It is considered, therefore, that the basic principles of General Assembly resolution 2688 (XXV), and in particular paragraph 43 of its annex, bind all executing agencies, including those which have not concluded an agreement with UNDP that incorporates article VII referred to in paragraph 2 above.

#### B. ACCOUNTABILITY

8. The expression "accountable" or "accountability" was first used, without definition, in the Jackson report, entitled "A Study of the Capacity of the United Nations Development System" (Capacity Study),<sup>90</sup> and has not been expressly defined either by the General Assembly in its resolutions on the matter, or by the Governing Council. Black's *Law Dictionary* (fifth edition, 1979) defines "accountable" to mean "subject to pay, responsible, liable".

9. In the context in which the expression was used in the Capacity Study, it would seem that agencies, though recognized as partners with UNDP in the development field, were expected when implementing UNDP-funded projects to be answerable to the Administrator, who would in turn be answerable to the Governing Council, for the proper implementation of the project, in accordance with the provisions of the project document. The study states:

"The Administrator of UNDP would thus be accountable to individual Governments for operations which UNDP undertook to conduct in agreement with them and to the Governing Council for the entire programme and its implementation. This would have implications for the relationship between UNDP and each Agency. The latter would be accountable to the Administrator of UNDP for any project operations that it undertook to execute on behalf of UNDP. It would thus act as an agent of UNDP at the request of the Administrator, under the terms of an agreement which might be called a contract."<sup>91</sup>

#### C. OBLIGATIONS

10. Resolution 2688 (XXV) was adopted by the General Assembly following the recommendations contained in the Capacity Study. The Capacity Study envisaged that projects funded by UNDP would be executed by an agency on the basis of a contract containing the respective obligations of the parties. The agency would have a contractual obligation to UNDP for the proper performance of the project entrusted to it.



11. The Capacity Study recommended in paragraph 116, chapter V, that an executing agency should always be responsible to the Administrator for implementing the project in accordance with the contract, and the Administrator would in turn be responsible to the Governing Council for administering the contract. The Administrator would be responsible to ensure that the project was being carried out satisfactorily and that the terms of the agreement with the Government were being met.

12. In paragraph 118, chapter V, the Capacity Study states that among the obligations to be contained in the contract, which the Administrator would be responsible to enforce, would be to ensure that:

- (a) Target dates were being met in accordance with the network analysis;
- (b) Costs were as agreed;
- (c) Personnel provided were effective and adaptable to local sensitivities; and
- (d) Technical specifications were being adhered to.

13. The responsibilities of the executing agencies referred to in paragraph 116, chapter V, of the Capacity Study have been incorporated in the UNDP Agreement with Executing Agencies.<sup>92</sup> They are also contained in the UNDP Financial Regulations and Rules.<sup>93</sup>

However, it is normally the project document which defines the precise obligations of the parties to the project.<sup>94</sup>

#### *Project document*

14. The contract envisaged by the Capacity Study, to contain the obligations of executing agencies and of the other parties to the project: the Government and UNDP, is the project document, which is prepared for all UNDP projects and services as the obligating document for release of funds. The Study envisaged that once a project is approved, a project document would be concluded by the parties, and that it would form the basis for project implementation. The Study stated:

“This document, which would be based on the project description outlined in paragraph 88, would first define clearly both the general objectives of the project and the overall responsibilities assumed by the Government and the Administrator of UNDP, respectively, for the attainment of those goals. The agreement would then specify in sufficient detail the actions to be performed by all concerned — notably the bodies designated to execute the project, both within the country and on the international side — to enable a network analysis to be prepared by which later performance could be measured against time and accomplishment targets. The joint responsibility of the parties would not end until appropriate follow-up action (e.g., investment, where relevant) had been achieved.

“133. In cases where execution was assigned to a specialized agency, the agency’s contractual obligations to the Administrator would be specified. The agency would also be a signatory to the agreement with the Government. Where the Administrator had contracted the project to an agent outside the United Nations system, or was directly executing the project himself, he alone would sign the agreement with the Government. In the former case, a separate contract would be signed between the Administrator and the executing agent. Likewise, when responsibility for execution was assigned within the United Nations system, with the proviso that all or part of the work should be subcontracted outside, the specialized agency would sign a similar contract with the subcontracted agent or agents. Provision for the expeditious amendment of these documents by agreement between the parties concerned would be essential since changing conditions may invalidate earlier assumptions.

“134. In these documents, the responsibilities of each party would be defined as follows:

— The *Government* would undertake to fulfill its obligations in accordance with the agreed plan of operation.

— The *Administrator* would be fully responsible for those actions which he had undertaken to perform under agreement with the Government. If he had contracted with a specialized agency or agent to carry out some of these functions on his behalf, he would have to administer the contract to ensure that the functions were executed in accordance with the terms of the contract. He should delegate the authority for administering the contract in the field to the Resident Representative, assisted by appropriate staff.

— The *executing agency or agent*, in accordance with its contractual responsibilities to the Administrator, would implement those functions for which the Administrator had accepted responsibility towards the Government and would report on the progress of implementation to whomever the Administrator had delegated authority to administer the contract. In most cases, the Resident Representative would have this responsibility and, accordingly, authority should be given to the project manager to report to the Resident Representative. The project manager would naturally maintain direct contact with his employer, specialized agency or otherwise.

— The *Resident Representative* would have to ensure that the project was being implemented in accordance with the plan of operation, including the network analysis.” (chapter five, “A Study of Capacity of the United Nations Development System”)

15. In the circumstances, it would be correct to state that executing agencies are legally and operationally answerable to the Administrator for the proper implementation of the project entrusted to them for execution. This would encompass being responsible for the proper utilization of the funds budgeted for the project, timely completion of the project activities and accomplishing targeted objectives in the project specifications.

16. The main problem which seems to have arisen, assuming that the obligations of the parties are clearly defined in the relevant legal documents governing a project, is how the Administrator can enforce compliance of such obligations by the executing agency concerned. It is in this context, we note, that suggestions have been made regarding instituting sanctions or penalties, and even adopting further measures such as reducing the use of executing agencies in favour of government execution and encouraging competition among agencies (DP/1988/19/Add.4).<sup>95</sup>

#### D. COMPLIANCE

17. The question of compliance must be examined in the context of the imperfect international legal system which governs the relationship between international organizations among themselves or with Governments, in the execution of their respective mandates.<sup>96</sup> While in the national legal system, a state possesses the authority to impose sanctions or penalties for violations of the public order and compensatory schemes are established to enforce obligations arising from inter-personnel relations, such authority is at best deficient in the international legal order for lack of a sovereign power and enforcement procedures.

18. However, the lack of a sovereign authority or of a mechanism for enforcement of sanctions or penalties in the international legal order does not mean that legal obligations cannot be created, and that where created cannot be relied upon. On the contrary, in all international legal relations, *pacta sunt servanda* is recognized as an elementary and universally accepted principle,<sup>97</sup> and by and large the system functions relatively well on the basis that obligations freely entered into will be observed.<sup>98</sup>

19. *Pacta sunt servanda* is also incorporated in the 1986 Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations,<sup>99</sup> as article 26 of the Convention. The executing agencies are therefore bound to observe in good faith the obligations freely entered into with UNDP in execution of projects entrusted to them. The non-existence of sanctions does not change this obligation.

20. In the UNDP Agreement with Executing Agencies, article XIV(2) provides that “*any relevant matter for which no provision is made in this agreement or any controversy between the Parties shall be settled in keeping with the relevant resolutions and decisions of the appropriate organs of the United Nations. Each Party shall also give full and sympathetic consideration to any proposal advanced by the other under this paragraph*”.

21. The procedure for resolving disputes outlined in article XIV(2) of the UNDP Agreement with Executing Agencies has, in fact, been used effectively in the past when disputes have arisen. We consider that this procedure, together with the existing interagency forums such as the Administrative Committee on Coordination, the Consultative Committee on Administrative Questions (financial and budgetary), etc., established for review of development assistance questions, as well as the deliberative bodies such as the Governing Council, the Economic and Social Council and the General Assembly, are adequate to ensure that redress of any major problems which might arise in the course of project implementation are satisfactorily resolved.

22. In addition to the modes of settlement of disputes which might arise in the course of project execution involving United Nations system organizations as discussed in the paragraphs above, UNDP is, of course, entitled to take other action as provided in the UNDP agreement with executing agencies. Such action may not be equivalent to sanctions or penalties which are available within the national legal system but could, in appropriate cases, be used effectively as shown in the attached case studies, to ensure future compliance.

23. They could, for example, be held responsible for payment of compensation in case of breach of their contractual obligations under the subcontract or to pay compensation for injury to third parties, or to take remedial action in case of deficiencies in execution of the project. Steps can also be taken to monitor the performance of the executing agency on the project and take corrective action prior to extension or renewal of project funds, by withholding approval of additional funds for the extensions of project activities.

24. Finally, the alternative remedies available to UNDP include suspension or termination of execution of the project by the particular executing agency, as provided in article I of the Special Fund Agreement and article XII of the UNDP Agreement with Executing Agencies. UNDP can, of course, also decide to terminate the Executing Agency Agreement altogether in accordance with article XII (3) of the Special Fund Agreement and article XIV (3) of the UNDP Agreement with Executing Agencies.

### *Conclusion*

25. On the basis of the above review of the various aspects of accountability, it is clear that the General Assembly intended that executing agencies should be held responsible for the proper management of funds entrusted to them by UNDP and the efficient implementation of the project activities agreed to between the Government, UNDP and the executing agency as specified in the project document.

26. The Administrator has the responsibility to monitor the performance of executing agencies and to report thereon to the Governing Council. The Governing Council in turn would have the option to take such action as is necessary to effect corrective measures to ensure proper performance of project activities by the agencies either on its own or through recommendations for appropriate action to be taken by the Economic and Social Council or the General Assembly.

27. In addition to such action as the deliberative bodies may decide to take, the Administrator has been accorded adequate administrative authority to enforce agreements entered into between UNDP and the executing agencies. The administrative action open to the Administrator consists, essentially, of enforcing the obligations undertaken by the executing agencies in their agreements with UNDP as well as in the project documents, through the settlement of disputes provisions or by taking the unilateral measures of suspension or termination, of the withholding of inadequately or improperly justified payments.

28. As can be seen from the case studies, there are adequate means for enforcing the obligations undertaken by the parties to a project on a case-by-case basis, and, in fact, this has been achieved in the past very successfully

through amicable settlement of disputes. It is our considered opinion that the existing procedures are sufficient to ensure enforcement of the obligations undertaken by the executing agencies and that most of what needs to be done to improve project execution is essentially operational and not legal.

21 November 1988

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19. DEFINITION OF THE TERM “UNFORESEEN AND EXTRAORDINARY EXPENSES” — GENERAL ASSEMBLY RESOLUTION 42/227

*Memorandum to the Assistant Secretary-General for Programme Planning, Budget and Finance, Department of Administration and Management*

1. I refer to your memorandum of 24 October 1988 requesting our interpretation of General Assembly resolution 42/227, which authorizes the Secretary-General, under specific conditions, to enter into financial commitments for which no provision has been made in the budget. With reference to paragraph 1(a) of the resolution, you specifically ask whether the Secretary-General may exercise the power to make the commitments referred to therein while the General Assembly is in session.

2. Under current practice, the General Assembly biennially adopts a resolution authorizing the Secretary-General to make commitments in respect of unforeseen and extraordinary expenses of certain kinds not contemplated in the budget appropriations approved by the General Assembly. The purpose of the resolution is to give the Secretary-General the financial means to respond immediately to certain needs, including certain emergency situations, while reserving ultimate control in financial matters to the General Assembly. Such expenditures may be needed, in particular, as a result of Security Council decisions relating to the maintenance of peace and security.

3. The scope of the present General Assembly resolution on unforeseen and extraordinary expenses was determined in 1961, after a review by the Advisory Committee on Administrative and Budgetary Questions (ACABQ) and the Fifth Committee of the scope of previous resolutions on this subject. The report of ACABQ at that time (A/4715) conveyed the impression that ACABQ was considering the issue of unforeseen and extraordinary expenses in the context of expenses arising between sessions of the General Assembly.

Although the fact that the Secretary-General has not, as far as we are aware, exercised the power to make commitments as authorized by paragraph 1(a) of the resolution while the General Assembly is in session suggests an understanding that those powers might be exercised only during the period between regular sessions, no firm conclusion can be drawn from this practice, as there is no evidence that a need to enter into such commitments ever arose during an Assembly session.

4. A far stronger case can be made for interpreting paragraph 1 as empowering the Secretary-General to make the commitments therein described even when the General Assembly is in session. In the first place, no temporal limitation on the exercise of the power is explicitly specified, even though an explicit limitation could easily have been included. Secondly, the opening words of the paragraph, which govern subparagraph (a), authorize the Secretary-General to “enter into commitments in the biennium 1988-1989”, while subparagraph (a) authorizes the Secretary-General to enter into the commitments described therein “in any one year of the biennium 1988-1989”. This language appears to empower the Secretary-General to enter into the commitments at any time during 1988 or 1989, even at periods when the General Assembly is in session.

5. This view is fortified by the following considerations. If subparagraph (a) were to be interpreted as not empowering the Secretary-General to enter into commitments described in the subparagraph at times when the General Assembly is in session, the Secretary-General would at such times have to obtain General Assembly authorization for such commitments, leading to a possibly unacceptable delay in dealing with emergency situations. In addition, since subparagraphs (a), (b) and (c) stand on the same footing within the paragraph, the same interpretation would have to be placed on subparagraphs (b) and (c). It is unlikely that the General Assembly would have intended its authorization to be necessary for, e.g., an unforeseen commitment of a small amount relating to expenses incurred in the appointment of assessors, or the calling of witnesses or the appointment of experts, in a proceeding before the International Court of Justice (subparagraph (b)(ii)), just because it happened to be in session.

6. Furthermore, paragraph 3 of the resolution clearly states or implies that, in respect of the commitments therein described, consideration by the General Assembly is necessary. The absence of any corresponding reference to the General Assembly in paragraph 1 suggests that Assembly consideration was not considered necessary for the smaller commitments therein described.

7. While, therefore, the question is not free from doubt, we favour the view that the Secretary-General can act in terms of paragraph 1 without authorization from the General Assembly, even when the Assembly is in session. The provisions of paragraph 2 would, however, have to be observed.

2 December 1988

20. FORM OF CREDENTIALS — QUESTION OF WHETHER REPRESENTATIVES OF STATES NOT HOLDING FORMAL CREDENTIALS OR INTERNATIONAL ORGANIZATIONS PARTICIPATING AS OBSERVERS MAY SIGN THE FINAL ACT OF A CONFERENCE

*Cable to the United Nations Office at Vienna*

Reference is made to your telephone inquiry of 15 December 1988 requesting our urgent response on the following questions:

(a) Whether representatives of States not holding credentials issued by the Head of State or Government or Minister for Foreign Affairs as provided for in rule of procedure 3, but nevertheless entitled under rule of procedure 5 to participate in the conference may sign the Final Act of the conference.

At the 1986 Vienna Conference on the Law of Treaties between States and International Organizations or between International Organizations, representatives of States who held letters or notes verbales from the permanent representative of the permanent mission of the State concerned signed the Final Act of the Conference. The Director of the Codification Division and the Chief of the Treaty Section are in agreement that as the Final Act is essentially a brief record in "journal form" of what transpired at a conference, representatives who participated in the conference under applicable rules of procedure should be entitled to sign the Final Act. As you know, of course, credentials from the Head of State or Government or the Minister for Foreign Affairs are necessary for signature of the Convention.

(b) Whether organizations participating in the conference as observers may sign the Final Act. Organizations participating as observers signed the Final Acts at the 1986 Vienna Conference on the Law of Treaties Between States and International Organizations or between International Organizations, at the 1983 Conference on Succession of States in Respect of State Property, Archives and Debts, and at the 1982 Third United Nations Conference on the Law of the Sea. In all such cases, the European Economic Community signed the Final Acts.

16 December 1988

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## Procurement

### 21. PROCUREMENT OF GOODS — FINANCIAL REGULATION 15.1 — UNITED NATIONS SPECIAL CONDITION ON COL- LABORATION WITH SOUTH AFRICA — MEANING OF THE EXPRESSION “ACCEPTABLE BIDDER”

*Memorandum to the Chief, Contracts and Procurement Service, United Nations Department for Transnational Corporations Development*

1. Reference is made to your memorandum of 27 June, seeking advice on the United Nations Population Fund's request that, as in the case of South Africa, goods made in State A should not be supplied to State B under United Nations purchase orders.

#### *Background*

2. UNFPA's request seems to stem from purchase order No. 7-21-72119B issued by United Nations Department for Transnational Corporations Development (UNDTCD) on 30 December 1987 to a corporation for provisions of office supplies, including stencils which are said to originate from State A. The purchase order contained the United Nations Special Condition on Collaboration with South Africa, on the basis of which the UNFPA representative in State B requested that a similar provision should be adopted by the United Nations so that State A made goods are not supplied to State B, in view of that country's policy towards State A. His letter, dated 18 May 1988, reads as follows:

“As you may know State B has no diplomatic or commercial ties with State A and bans all its products from being imported into the country.

Therefore as in the case of South Africa, a special condition should be established so as no products made in State A be purchased for delivery under headquarters purchases for projects in State B. This is imperative in order to preserve the Fund's image in State B and avoid embarrassing situations with the national authorities.”

#### *Executing agency*

3. UNDTCD acts in this case as executing agency of UNFPA and, under UNFPA financial regulation 15.1, the funds obtained from UNFPA are to be administered in accordance with the United Nations financial regulations, rules, practices and procedures. The regulation states:

“The administration by executing agencies of funds obtained from or through UNFPA shall be carried out under their respective financial regulations, rules, practices and procedures to the extent that they are appropriate. Where the financial governances of an executing agency do not provide the required guidance, those of UNFPA shall apply.”



### *Cancellation of the order*

4. The Special Condition on Collaboration with South Africa, to which the UNFPA representative refers and on the basis of which he requested that a similar provision be incorporated in United Nations purchase orders for products made in State A, was adopted in compliance with the specific request of the General Assembly to the Secretary-General “to refrain from any purchase, direct or indirect, of South African products” and “to deny any contracts or facilities to transnational corporations and financial institutions collaborating with South Africa”.<sup>100</sup> The condition is of general application and is incorporated in all United Nations General Conditions and purchase orders; it applies to all United Nations purchases worldwide irrespective of use or country of destination.

In the absence of an unequivocal legislative mandate, therefore, a Special Condition similar to that on South Africa cannot be incorporated in a United Nations purchase order to exclude purchases, or contractors, from a State Member of the United Nations.

5. Furthermore, United Nations contracts are awarded on the basis of competitive tenders to the lowest acceptable bidder. The expression “acceptable bidder” in financial rule 110.21 has in the past been interpreted to refer only to the responsiveness of the bid to the technical specifications in the advertisement or request for proposals. It has not been applied to take account of considerations extraneous to the tender process, except in compliance with a mandatory norm of the United Nations to exclude certain bidders or products. Accordingly, since no condition was incorporated in the contract with the vendor regarding State A products, we consider that there is no legal basis, without incurring substantial damages, for cancelling the order at this stage. We note, in this respect, that the purchase order has already been accepted by the vendor and the company’s invoice (\$2,295.20) submitted on 17 March 1988 awaits payment.

14 July 1988

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## **Treaties**

### **22. SIGNATURE OF TREATIES OR AGREEMENTS BY THE UNITED NATIONS — 1986 VIENNA CONVENTION ON THE LAW OF TREATIES BETWEEN STATES AND INTERNATIONAL ORGANIZATIONS OR BETWEEN INTERNATIONAL ORGANIZATIONS**

#### *Letter to the Legal Counsel, World Intellectual Property Organization*

With reference to your letter of 26 November concerning the 1986 Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations, I regret the delay in replying, which was attributable to the press of business at the end of the General Assembly and then the holiday season.

In our view, the conclusion of this Convention was a very significant event in the process of the codification of international law in the field of treaty relations of international organizations. It is worth mentioning in this regard that the Administrative Committee on Coordination, at its second regular session held on 22 and 23 October 1986, took note of the outcome of the Vienna Conference at which the Convention was adopted and “urged the organizations of the United Nations system to give favourable consideration to seeking authorization from competent organs to sign the Convention in accordance with article 82, paragraph (c), thereof and, in due course, to deposit instruments relating to acts of formal confirmation in accordance with article 83 of the Convention”.

As you know, under the Final Provisions of the Convention, namely, article 82, it was open to the international organizations invited to participate in the 1986 Vienna Conference, including the World Intellectual Property Organization, to sign the Convention until 30 June 1987. In a letter dated 19 February 1987, I informed you that pursuant to a General Assembly decision, the Secretary-General authorized myself and my deputy to sign the Convention for the United Nations and we did so on 12 February 1987.

The signature of treaties or agreements by the United Nations is one of the inherent powers of the Secretary-General and is, particularly as far as very technical matters are concerned, often delegated to the head of the department which has the operational responsibility for the instruments to be signed. Normally, therefore, the authorization of the General Assembly is not required. However, the Organization has never been in a position to sign a codification convention. Consequently, due to the nature of this Convention, it was decided that a request for authorization for the Organization to sign the Convention should be submitted to the General Assembly. This was done at the forty-first session and the required decision (41/420) was obtained on 3 December 1986.

...

With the time limit prescribed by article 82 of the Convention, it was signed by 27 States and 10 international organizations. It was subsequently ratified under article 83 of the Convention by two States.

Signature of the 1986 Vienna Convention by an international organization does not have the effect of expressing the consent of that Organization to be bound by the Convention. That would require a separate “act of formal confirmation” as foreseen in article 83 of the Convention. Therefore, the signature of the Convention by a sufficient number of international organizations was mainly sought for two purposes — first of all, to demonstrate the interest of organizations in the Convention and thus to help generate support from States to bring the Convention into force. Secondly, by signing the Convention the organization, in order to become a party to it, will later only have to submit an instrument of an act of formal confirmation and need not provide a declaration of its capacity to conclude treaties, which is required of organizations that accede to the Convention.

In this regard, it should be noted that under article 84 of the Vienna Convention, those organizations which failed to sign the Convention within the specified time limits may accede to it but must submit a declaration in the instrument of accession that the organization has the capacity to conclude treaties.

The question of the United Nations submitting an instrument relating to an act of formal confirmation does not arise at the current stage. Such a step is to be considered in the light of relevant developments, including the increase in the number of United Nations Member States ratifying or acceding to the Convention.

20 January 1988

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23. INTERPRETATION OF THE PROVISIONS OF ARTICLE 57, PARAGRAPH 1, OF THE AGREEMENT ESTABLISHING THE COMMON FUND FOR COMMODITIES — CONDITIONS FOR ENTRY INTO FORCE OF THE AGREEMENT

*Memorandum to the Secretary-General of the United Nations Conference on Trade and Development*

1. This is in reply to your request of 26 February 1988 for a legal opinion on the questions that have been raised in recent months as to the interpretation of the provisions of article 57, paragraph 1, of the Agreement Establishing the Common Fund for Commodities.<sup>101</sup>

I

2. The Agreement Establishing the Common Fund for Commodities was adopted on 27 June 1980 at a Negotiating Conference convened by the United Nations Conference on Trade and Development. The Secretary-General of the United Nations in article 55 of the Agreement was designated depositary and the Agreement was opened for signature on 1 October 1980. Article 57, paragraph 1, of the Agreement provides that it shall enter into force:

(a) on deposit of instruments of ratification, acceptance or approval from at least 90 States;

(b) *provided* “their total subscriptions of Shares of Directly Contributed Capital comprise not less than two thirds of the total subscriptions of Shares of Directly Contributed Capital allocated to all States specified in Schedule A and that not less than 50 per cent of the target for pledges of voluntary contributions to the Second Account ... has been met”; and

(c) *provided further* “that the foregoing requirements have been fulfilled by 31 March 1982 or by such later date as the States that have deposited such instruments by the end of that period may decide by a two-thirds majority vote of those States;

(d) *and if* “the foregoing requirements have not been fulfilled by that later date, the States that have deposited such instruments by that later date may decide by a two-thirds majority vote of those States on a subsequent date”.

For convenience of reference, subsequent paragraphs of this memorandum use the expressions: “*ratifying States*” to denote States that have deposited instruments of ratification, acceptance or approval; “*basic requirements*” to denote the requirements in (a) and (b) above; and “*date(s)*” to refer to the date 31 March 1982 and subsequent dates for fulfilment of the “*basic requirements*” in (a) and (b) above.

3. The basic requirements in (a) and (b) above were not fulfilled by the stipulated date *31 March 1982* and, as required by article 57, paragraph 1, the ratifying States by a two-thirds majority vote decided on a second date: *30 September 1983*.

4. The basic requirements were not fulfilled by the second date 30 September 1983; but a third date was not subsequently established as it was uncertain whether the basic requirements would in fact be fulfilled by such a third date if it was established.

5. The possibility of the basic requirements being fulfilled now seems probable and, consequently, the question of the conditions for the entry into force of the Agreement and, in particular, the matter of the establishment of the third date are presently under review.

## II

6. Among the various matters that have been raised in the discussions, the following appear to be the essential questions.

- (1) Whether establishment of a third date is, under article 57, paragraph 1, necessary for the entry into force of the Agreement?

This question has to be answered in the affirmative. The natural and usual meaning of the language of the provisions of article 57, paragraph 1, leaves no room for another interpretation. The relevant provisions of article 57, paragraph 1, read:

“This Agreement shall enter into force upon receipt by the Depositary of instruments of ratification, acceptance or approval from at least 90 States, provided that ... and further provided that the foregoing requirements have been fulfilled by 31 March 1982 or by such later date as the States that have deposited such instruments by the end of that period may decide by a two-thirds majority vote of those States. If the foregoing requirements have not been fulfilled by that later date, the States that have deposited such instruments by that later date may decide by a two-thirds majority vote of those States on a subsequent date ...”

Had the intention of the Negotiating Conference in 1980 been otherwise it would have been clearly necessary to formulate article 57, paragraph 1, in a different manner.

- (2) If the establishment of such a third date is necessary, whether such a third date is under article 57, paragraph 1, the only further date that may be established?

This question has also to be answered in the affirmative. Such a conclusion follows, necessarily, from the language of the provisions of article 57, paragraph 1. If such was not the intention of the Negotiating Conference, the provisions of article 57, paragraph 1, would clearly have had to be formulated in a different manner. Furthermore, we understand that the very reason why a third date was not established in 1983 was because the ratifying States believed that if the basic requirements were not met by such a third date the establishment of a still further date would not under article 57, paragraph 1, be possible.

- (3) A further matter that has been raised with us is as to when the Agreement would enter into force if a third date is established only after the basic requirements happen to be fulfilled. As it is an essential condition under article 57, paragraph 1, that a third date be “established”, in order that the Agreement enter into force, it follows that the “establishment” of the third date would constitute fulfilment of such a condition; and would be the occasion on which the Agreement would enter into force as provided in article 57, paragraph 1.
- (4) Whether the decision of the ratifying States on the establishment of the third date should be reached at a meeting of the ratifying States *or* through written communications between the depositary of the Agreement and the ratifying States?

The possibility of the convening of a meeting of the ratifying States should be given serious consideration. A meeting should not be convened only if practical difficulties make the convening of a meeting an unrealistic alternative and provided the ratifying States entitled to participate in the establishment of the third date are consulted on the written communication procedure and have no objection thereto.

It seems to me that such a course is necessary because of: the use of the expression “two-thirds majority vote” in article 57, paragraph 1; the fact that no reference is made in article 57, paragraph 1, to a written-communication alternative; and that a meeting of ratifying States was convened in 1983 for the purpose of establishing the second date: 30 September 1983.

If, notwithstanding, the written communication alternative is to be used, it should be noted that it would be obligatory on the depositary to conform as closely as practicable to the provisions of the penultimate sentence of article 57, paragraph 1: “If the foregoing requirements have not been fulfilled by that later date, the States that have deposited such instruments by that later date may decide by a two-thirds majority vote of those States on a subsequent date.” This would require that the written communications should request States to respond by an affirmative vote, a

negative vote or by abstention, on whether the deadline proposed by the Secretary-General of UNCTAD, after appropriate consultations, is acceptable. Also, as will be noted, article 57, paragraph 1, does not refer to a two-thirds majority of “the States voting,” but rather requires a two-thirds majority of “the States that have deposited instruments of ratification, acceptance or approval by 30 September 1983”.

7. Finally, we must remember, in our consideration of the entire question of the entry into force of the Agreement, that the responsibilities of the Secretary-General as “depository” of the Agreement require that he conform as closely as practicable to the provisions of article 57, paragraph 1.

11 March 1988

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#### 24. PREAMBLE TO TREATIES — INCLUSION OF INTERPRETATIVE STATEMENTS IN “TRAVAUX PRÉPARATOIRES”

*Facsimile to the Senior Legal Officer, Legal Liaison Office,  
United Nations Office at Geneva*

Reference is made to your facsimile of 30 November 1988 on whether the Chairman of the Working Group preparing a Draft Convention on the Rights of the Child may, on behalf of the entire Working Group, include a statement in the *travaux préparatoires* which would read: “in adopting this preambular paragraph, the Working Group does not intend to prejudice the interpretation of article 1 or any other provision of the Convention by States parties”. We have not, of course, seen the text of the preambular paragraph in question or the text of any of the provisions of the draft conventions and, thus, our views set out below are somewhat abstract in nature.

(a) The preamble to a treaty serves to set out the general considerations which motivate the adoption of the treaty. Therefore, it is at first sight strange that a text is sought to be included in the *travaux préparatoires* for the purpose of depriving a particular preambular paragraph of its usual purpose, i.e., to form part of the basis for the interpretation of the treaty. Also, it is not easy to assess what conclusions States may later draw, when interpreting the treaty, from the inclusion of such a text in the *travaux préparatoires*. Furthermore, seeking to establish the meaning of a particular provision of a treaty through an inclusion in the *travaux préparatoires* may not optimally fulfill the intended purpose; because, as you know, under article 32 of the Vienna Convention on the Law of the Treaties,<sup>102</sup> *travaux préparatoires* constitute a “supplementary means of interpretation” and hence recourse to *travaux préparatoires* may only be had if the relevant treaty provisions are in fact found by those interpreting the treaty to be unclear.

(b) Nevertheless, there is no prohibiting in law or practice against inclusion of an interpretative statement in *travaux préparatoires*. Though this is better done through the inclusion of such interpretative statement in the Final Act or in an accompanying resolution or other instrument. (Inclusion in the Final Act, etc., would be possible under article 31 of the Vienna Convention on the Law of the Treaties). Nor is there a prohibition in law or practice from making an interpretative statement, in the negative sense, intended here as part of the *travaux préparatoires*.

9 December 1988

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

UNITED NATIONS INDUSTRIAL DEVELOPMENT ORGANIZATION

### **1. STATUTES OF THE INTERNATIONAL CENTRE FOR GENETIC ENGINEERING AND BIOTECHNOLOGY — SOME PROCEDURAL ASPECTS OF RESERVATIONS AND ACCEPTANCE OF RESERVATIONS — LEGAL EFFECTS OF THE RESERVATIONS — LEGAL EFFECTS OF THE RESERVATIONS MADE BY THE GOVERNMENT OF CHILE ON THE APPLICABILITY OF THE STATUTES**

*Memorandum to H.E. R. Taylhardat, Ambassador Plenipotentiary, Chairman, Preparatory Committee for the Establishment of the ICGEB with legal opinion*

1. On 19 November 1987, the Depositary of the Statutes of the International Centre for Genetic Engineering and Biotechnology (ICGEB) received from the Government of Chile an instrument of ratification, to which reservations to article 13, paragraphs 3, 5, 6 and 7, were attached.

2. Pursuant to your request for my legal opinion on the issues raised by the reservations attached by the Government of Chile to its instrument of ratification of the Statutes of the International Centre for Genetic Engineering and Biotechnology, I have prepared the analysis and opinion set out below. In view of the procedural and substantive issues to which the reservations give rise, it would in my view be appropriate for you to inform the members of the Preparatory Committee and the Depositary of the Statutes thereof as soon as possible.

3. The present opinion will comment, in the first place, on the procedural aspects of the reservations, including the right of member States to accept the reservations through the competent organ of the ICGEB. In the second place, the opinion will analyze the legal effects of the reservations on the applicability of the Statutes to Chile.

## LEGAL OPINION

### Concerning reservations attached by government of Chile to its instrument of ratification of statutes of ICGEB

#### I. THE PROCEDURE FOR EXPRESSING RESERVATIONS AND THE ACCEPTANCE OF RESERVATIONS

1. It is recalled that the Statutes of the ICGEB contain no provision on the subject of reservations, acceptance and objections thereto.

2. The applicable rules relating to reservations, acceptance and objections to reservations are to be found in the 1969 Vienna Convention on the Law of Treaties and in the established practice of the Secretary-General of the United Nations as depositary of multilateral treaties.

3. According to article 20.3 of the Vienna Convention on the Law of Treaties and the practice of the Secretary-General, in the case of a treaty which is a constituent instrument of an international organization — such as the Statutes of the ICGEB — a reservation requires the acceptance of the competent organ of the organization unless the treaty otherwise provides. The depositary will transmit the text of the reservation to the international organization and will inform the State concerned accordingly. In this respect, the depositary shall act in conformity with the decision of the competent organ of the international organization.

4. As regards instruments which form the constituent instruments of international organizations “the integrity of the instrument is a consideration which outweighs other considerations ... and it must be for the members of the organization, acting through its competent organ, to determine how far any relaxation of the integrity of the instrument is acceptable” (*Yearbook of the International Law Commission, 1966*, vol. II, para. 20, p. 207). When this question has arisen, the Secretary-General has referred it to the body having authority to interpret the instrument in question.

5. Concerning the entry into force of the Statutes, article 21.1 states that the Statutes shall enter into force “when at least 24 States, including the Host State of the Centre, have deposited instruments of ratification or acceptance and ...” In the present case, unaccepted reservations will preclude the definitive deposit of the instrument of ratification by Chile. Therefore, Chile may not presently be counted among the parties required for the entry into force of the Statutes.

6. I would like to turn the question of the determination of which organ of the Centre is competent to accept or object to the reservations made by Chile. Once the Statutes will be in force, the Board of Governors, which according to article 6.2 of the Statutes is the supreme organ of the Centre with authority to decide on basic matters, will have the power to decide on the reservations. For this purpose and in accordance with article 6.5 of the Statutes, the presence of a majority of the members of the Board is required in order to constitute a quorum. Furthermore, the Board shall decide preferably by consensus, otherwise by a majority of the members present and voting, as stated in article 6.6 of the Statutes. The resolution establishing a Preparatory Committee adopted at Madrid,



9-13 September 1983, by the Plenipotentiary Meeting on the Establishment of ICGEB, did not entrust the Preparatory Committee with the legal capacity to accept or object to reservations to the Statutes. However, I would see no legal objection if the Plenipotentiary Meeting which established ICGEB were to entrust the Preparatory Committee with the authority to decide on reservations before the Statutes have entered into force.

II. THE EFFECT OF THE RESERVATIONS MADE BY THE GOVERNMENT OF CHILE WITH RESPECT TO THE APPLICABILITY OF THE STATUTES TO CHILE

A. Article 13, paragraph 3

7. Article 13.3 of the Statutes, which reads as follows:

“3. All premises of the Centre shall be inviolable. The property and assets of the Centre wherever located shall be immune from search, requisition, confiscation, expropriation and any other form of interference, whether by executive, administrative, judicial or legislative actions.”

has been the object of the following reservation:

“The Government of Chile formulates a reservation to article 13, paragraph 3, of the Statutes, to the effect that, in accordance with the constitutional norms and internal law of Chile, the property and assets of the Centre may be expropriated under a general or special law authorizing expropriation for public purposes or in the national interest, as determined by the legislature.”

8. The purpose of the inviolability of the property and assets of the Centre from any form of execution is to prevent the Centre from being deprived by member States, i.e., any organ of the State, of its property and assets. The integrity of the property and assets is necessary for the independent exercise of the functions of the Centre and for the fulfilment of its objectives. In this connection, treaty practice shows that the pertinent multilateral conventions and the headquarters agreements concluded between international organizations and host States invariably provide that intergovernmental organizations shall enjoy this immunity.

9. Article 13.3 of the Statutes repeats, *mutatis mutandis*, the provision of article II, section 3, of the Convention on the Privileges and Immunities of the United Nations and article III, section 5, of the Convention on the Privileges and Immunities of the Specialized Agencies.<sup>103</sup> In the practice of the United Nations and the specialized agencies, it is considered that the inviolability of property and assets has an absolute and mandatory character. This inviolability is absolute since the only acceptable limitations would be those which are expressly provided in the applicable convention or headquarters agreement; and it is mandatory since no waiver of immunity from jurisdiction may extend to any measure of execution.

10. The present reservation subordinates the integrity of the property and assets of the Centre in Chile to the internal law of Chile. Actually, the Centre will be protected by immunity from expropriation only until such time as the

national legislature decides to expropriate the Centre's property and assets. The unilateral condition attached to the reservation — the enactment of a law of expropriation by the member State — will place the Centre's property and assets in Chile under a constant threat of seizure or attachment, prejudicing the Centre's independence and the performance of its activities in the country, and neutralizing the intent and purpose of article 13.3 of the Statutes.

11. If implemented, the measure of expropriation would have a direct effect on the funds and property for which the Centre is accountable to its members.

12. The reservation might concern also the archives and documents of the Centre. The Statutes, unlike certain other conventions, do not expressly provide for the protection of the archives and documents of the Centre. Since, however, archives and documents can be taken to constitute a special kind of "property and assets" and since the reservation as well as the Statutes employ only this expression, it follows that the reservation is applicable to any archives and documents of the Centre to the same extent as the Statutes are deemed to be so applicable.

13. It is recalled that while the Statutes in article 12 call for the conclusion of headquarters agreements with the Host Government, no further bilateral agreements on privileges and immunities are foreseen. This seems pertinent since it follows that the intent of the Statutes is that the Centre in all member States shall enjoy a legal status and privileges and immunities at least to the extent described in Article 13 of the Statutes themselves.

14. The present reservation may be analysed also in the light of article 6.8, which provides that "the Board may establish subsidiary organs on a permanent or ad hoc basis, as may be necessary for the effective discharge of its functions ...". Should the Board of Governors decide to establish a subsidiary organ in Chile, the reservations discussed above certainly would apply. Analysing the consequences of this reservation in this general perspective might cause member States to reflect on the desirability of setting such a precedent through acceptance of the reservation.

15. In view of the foregoing, there can be no doubt that the present reservation is incompatible with the object and the purpose of the Statutes.

#### B. *Article 13, paragraphs 5, 6 and 7*

16. Article 13.5, 6 and 7 has incorporated by reference important provisions of the Convention on the Privileges and Immunities of the United Nations, and to this article the Government of Chile has attached the following reservation:

The Government of Chile formulates a reservation to article 13, paragraphs 5, 6 and 7, of the Statutes, to the effect that the privileges and immunities of representatives of the members and of officials and experts of the Centre shall be granted as stipulated therein, except when such persons are Chilean nationals."

*Article 13.5 of the Statutes*

17. This part of the reservation presents no problem. In accordance with article IV, section 15, of the Convention on the Privileges and Immunities of the United Nations the provisions relating to privileges and immunities of representatives of members “are not applicable as between a representative and the authorities of the State of which he is a national ...” Consequently, the reservation of the Government of Chile would be without object and in this sense not contrary to the Statutes.

PRIVILEGES AND IMMUNITIES OF THE OFFICIALS AND OF THE EXPERTS OF THE CENTRE

*Article 13.6 and 7 of the Statutes*

18. Article 13, paragraphs 6 and 7, of the Statutes reads as follows:

- “6. Officials of the Centre shall enjoy such privileges and immunities as are provided for by article V of the Convention on the Privileges and Immunities of the United Nations.
- “7. Experts of the Centre shall enjoy the same privileges and immunities as are provided for officials of the Centre in paragraph 6 hereinbefore.”

19. The Convention on the Privileges and Immunities of the United Nations does not contemplate discriminatory treatment of officials based solely on distinctions between the nationalities of the officials concerned. There is a well established practice of the Secretariat of the United Nations upholding the inacceptability of such reservations to this article (or the corresponding article VI, section 19, of the Convention on the Privileges and Immunities of the Specialized Agencies).

20. Concerning official acts of experts and officials, the Convention on the Privileges and Immunities of the United Nations requires that the privileged persons “be immune from legal process in respect of words spoken or written and all acts performed by them in their official capacity”. This immunity is limited to acts carried out in an official capacity, and the practice of the United Nations and the specialized organizations shows that they have not agreed to any derogation from this provision regardless of the nationality of the official concerned (*Juridical Yearbook, 1965, p. 223*).

21. In addition, the reservation raises the question of tax exemption. Section 18(b) of the Convention on the Privileges and Immunities of the United Nations states that officials shall “be exempt from taxation on the salaries and emoluments paid to them by [the Centre]”. According to the reservation, Chilean officials and experts would not be entitled to exemption from taxation of official salaries and emoluments and this would place an additional economic burden on the Centre and/or the Chilean officials and experts while permitting the Government to derive an economic gain not available under the Statutes themselves.

22. Based on the foregoing considerations, it is my opinion that the reservations made to article 13.5, 6 and 7 would have the effect of discriminating between the Centre's officials and experts on the ground of nationality in a manner not compatible with the Statutes.

26 January 1988

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## 2. OBLIGATION TO SURRENDER BALANCE OF APPROPRIATIONS TO MEMBER STATES — FINANCIAL REGULATIONS 4.2(B) AND (C)

### *Memorandum to the Director-General*

1. You have asked my opinion on the legal meaning of the provisions contained in financial regulations 4.2(b) and (c), which state an obligation for the Organization to surrender to member States "the then remaining balance of any regular budget appropriations retained" at the end of a period of twelve months following the end of each fiscal period. As also requested by yourself I have consulted the Treasurer, Mr. E. Whiting, on this question, in particular as far as it relates to the formulation of the annual assessment letters addressed to all member States by the Treasury. Finally, I have had the benefit of discussing with Mr. T. Verma some of the questions raised by the decision by the General Conference (see GC.2/Dec. 22) that under certain conditions 15 per cent of the 1988-1989 appropriations should be kept in reserve.

2. The first issue to be addressed in this memorandum is the nature of the "remaining balance of any regular budget appropriation", with respect to which financial regulation 4.2(b) and (c) imposes on the Organization an obligation to surrender within 30 days following the end of the first year of each fiscal period. In particular, the question has been raised whether the balance includes the "savings" realized during 1986/87 owing to the fact that actual expenditure has been less than the appropriated amount. In this connection, it seems clear that to the extent that such "savings" have been forced owing to a lack of cash stemming from non-payment of assessed contributions, and provided that non-payment continues through several fiscal periods, to surrender such "savings" — or amounts equalling the "savings" — would result in a continuous decline of cash availability in each biennium.

3. I have carefully read paragraphs (b) and (c) of UNIDO's financial regulation 4.2, and also the corresponding provisions in United Nations Financial Regulations 4.3 and 4.4, and I do not find any basis in the formulation of these Regulations for the assumption that they should refer to the so-called "savings".

4. Actually, any analysis of UNIDO regulation 4.2 should start with the main rule, which is stated in UNIDO regulation 4.2(a) as follows:

"(a) Regular budget appropriations shall be available for obligation during the fiscal period to which they relate".

The *ratio* of this rule is so obvious that it hardly needs to be stated here. Suffice it to say that regulation 4.2 clearly rests on the assumption that there will be a series of two-year fiscal periods, each with a set of appropriations. In view of this, paragraphs (b) and (c) modify the main rule in paragraph (a) by extending for 12 months the period of availability of the appropriations for financing obligations raised during the immediately preceding fiscal period.

5. In consequence of the main rule in paragraph (a), as extended by paragraph (b), it is then provided in the last sentence of paragraph (b) and in more detail in paragraph (c) that any balance of a regular budget appropriation remaining after the 12-month extension beyond the fiscal period to which the appropriation relates, shall be surrendered.

6. The *ratio* of the obligation to surrender may safely be assumed to be the wish to ensure member States' budgetary control over the activities of the Organization. If, namely, the Director-General were to be permitted to accumulate funds stemming from regular budget contributions — whether by not implementing authorized activities or simply because implementation proved to be less costly than estimated in the relevant appropriation — the control over the Organization by member States through their authority over the budget would be frustrated. This interpretation of the underlying purpose of the regulation is also borne out by the last sentence of paragraph (c), which provides the same cut-off date — namely, the end of the twelve months following the fiscal period in question — beyond which any still unliquidated obligation shall be either cancelled or transferred to the next (current) fiscal period.

7. The remaining balance, referred to above, is not the same as the so-called “savings”, however. The term “savings” as frequently used in recent UNIDO documents is not defined in the Financial Regulations for the simple reason that the Regulations rest on the assumption that all assessed contributions will normally be paid, and the Regulations therefore do not, except for the mentioning of “outstanding regular budget obligations to the Organization” in regulation 4.2(c), explicitly address the issues that arise when member States dishonour their obligation to pay assessed contributions.

8. In order to understand the meaning of the term “savings”, as used during the fiscal period 1986/1987, it is relevant to turn first to an analysis of the statement in financial regulation 4.1(a) that:

“(a) Approval by the Conference of the programme of work and corresponding regular budget shall constitute an authorization to the Director-General to incur obligations and to make payments for the purposes thus approved and within the appropriations approved therefor.”

Prima facie, this appears to simply authorize the Director-General to commit up to the total amount of appropriations for each fiscal period. However, this conclusion is only possible if regulation 4.1(a) is applied without taking into account the context as represented by other Regulations and by the actual behaviour of member States in meeting their obligation to pay assessed contributions. Since the Director-General is not authorized to borrow to finance appropriations, he can cover a shortfall in receipt of assessed contributions only from balances available in the Working Capital Fund — or as was the case in

1986/1987 from the United Nations loan. It follows that it is not enough that an adequate appropriation is contained in the approved budget; it is also necessary that adequate funds to finance the appropriation are available, normally from receipt of regular budget assessed contributions or, pending the receipt of contributions, from the Working Capital Fund.

9. It follows that if payments of assessed contributions are inadequate to finance all the appropriations, reductions in budgeted expenditures must be implemented so as to avoid a deficit. Such reductions have in UNIDO documents been described as “savings”. They do not constitute a “balance” that can be surrendered, however, since in essence they express the absence rather than the presence of funds. This is clearly different from the situation addressed in paragraphs (b) and (c) of regulation 4.2.

10. The conclusion that the “savings” are not amounts to be surrendered is firmly supported by an examination of the apportionment rules for surrender. The key for distributing the amount to be surrendered among member States (“in proportion to their assessed contributions”, see financial regulation 4.2(c)) is clearly appropriate if the amount is derived from funds actually contributed. It is further clearly appropriate that any member State in arrears with its mandatory contributions should not share in the distribution, and this is also stated in paragraph (c), namely, in the part which reads “before the respective share of the balance is surrendered to any member that has outstanding regular budget obligations to the Organization, those obligations shall first be brought to account”. It would be contrary to these principles to also require not merely the surrender of an amount equalling the “savings” stemming from non-payment of mandatory contributions, but the distribution of such an amount among all member States. The effect would be absurd since a delinquent member State in principle would share in the distribution and since the obligation would increase to equal the total of the arrears. Finally, it would be incompatible with the fact that the Regulations do provide that arrears constitute a continuing obligation of the member State or States concerned, which cannot be written off; see financial regulation 9.4.

11. I shall now turn to the second question which concerns the effect of paragraph (e) of the Conference’s decision of 12 November 1987 (GC.2/Dec.22), reading:

“(e) Decided that from the total amount of the 1988-1989 appropriations, an amount representing 15 per cent of those appropriations should be kept in reserve by the Director-General, pending receipt from member States of their assessed contributions.”

12. This decision is not incompatible with the reasoning developed above to the effect that while an appropriation is a requirement for the Director-General to make payments and to enter into commitments, it is further required that funds are available to actually make the payments/liquidate obligations. The decision apparently goes further than expressing a general condition, however, in that it stipulates an exact percentage which shall be kept in reserve — or not committed — and this gives rise to certain questions of interpretation about the correct application of the decision.

13. While the decision's reference to the appropriations is expressly limited to those for 1988/89, the reference to the receipt of contributions is not so limited and therefore encompasses also receipt in 1988/89 of contributions assessed for 1986/87 or earlier. Similarly, in view of the 12 months' extension of the availability of the appropriations for 1988/89 to finance during 1990 unliquidated obligations raised in 1988/89, a contribution received in 1990 but credited against arrears for 1988/89 or earlier also may be used to finance unliquidated obligations raised in 1988/89. The fact that one is dealing with a dynamic, rather than a static situation both on the expenditure and on the income side inevitably introduces an element of uncertainty. By this I mean that certain commitments of a contractual nature, such as appointments of permanent staff or leases of premises, often must be undertaken for periods that go well beyond the end of a two-year fiscal period. Similarly, it is not possible to have absolute certainty regarding when and to which extent member States will pay assessed contributions. In actual fact, therefore, both income and expenditure levels must be projected by the Director-General on the basis of certain assumptions. In view of Conference decision GC.2/Dec. 22, para (e), however, the Director-General may not, for the purpose of authorizing expenditures/entering into commitments, assume that member States will contribute more than what is required to finance 85 per cent of the total amount of the appropriations. Only if the actual receipts exceed this level, may such excess receipts be used to finance the appropriations kept in reserve.

14. The foregoing does not in a strictly legal sense abrogate the procedure available under the Constitution and the Financial Regulations for seeking approval of supplementary estimates to meet a shortfall in contributions received. From a practical viewpoint it may nevertheless be less likely that the required two-thirds majority can be mustered in the Board and the Conference for a proposal that would neutralize the effect of the Conference's decision regarding the 15 percent reserve requirement.

25 March 1988

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### 3. THE BUDGETS OF UNIDO

#### *Memorandum to the Director-General*

1. I wish to refer to your request for my legal opinion on the question, which has been posed by certain members of the Programme and Budget Committee, whether there are any obstacles of a legal nature to "merging" or "integrating" UNIDO's regular and operational budgets.

2. The principal, applicable legal rules are contained in article 13 of the Constitution of UNIDO, as supplemented by annex II to the Constitution. Already paragraph 1 of article 13 uses the plural form "budgets" and thus anticipates that while there shall be one programme of work, there will be several budgets. Paragraph 1 reads:

- “1. The activities of the Organization shall be carried out in accordance with its approved programme of work and budgets.”

Paragraph 2 of article 13 requires all expenditures to be divided into those financed from the regular budget and those financed from the operational budget. Paragraph 2 further provides that regular budget expenditures shall “be met from assessed contributions” and that operational budget expenditures shall “be met from voluntary contributions to the Organization, and such other income as may be provided for in the financial regulations”. The income that may thus be “provided for in the financial regulations” can, of course, not include assessed contributions, since that would be contrary to the just mentioned provision in paragraph 2 concerning the financing of the regular budget and since a financial regulation could not contravene a constitutional provision.

3. Paragraphs 3 and 4 of article 13, and annex II to the Constitution, stipulate the categories of expenditures, which may be met from, on the one hand, the regular budget, and on the other hand, the operational budget. Thus paragraph 4 stipulates:

- “4. The operational budget shall provide for expenditures for technical assistance and other related activities.”

Paragraph 4 constitutes, at the level of the Constitution, a comprehensive statement of those expenditures that may be financed from the operational budget.

Paragraph 3 similarly contains a comprehensive statement of those expenditures that may be met from the regular budget, namely: (i) administration; (ii) research; (iii) other regular expenses of the Organization; (iv) other activities as provided for in Annex II.

4. From the foregoing, it can be seen that the Constitution of UNIDO does not permit a “merger” or “integration” of the regular and the operational budgets of the Organization. Not only does paragraph 1 of Article 13 call for budgets in the plural form, but Article 13 also stipulates in detail the legally distinct manner of financing the two budgets as well as the distinct categories of expenditures that may be met from either budget. An assessed contribution constitutes a mandatory legal obligation and cannot conceptually or legally be merged or integrated with a voluntary contribution. Nor is there — except to a certain extent in paragraph B of annex II — any coincidence or overlap between the categories of expenditures permitted under the regular budget and those permitted under the operational budget.

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## 4 SUSPENSION OF RIGHT TO VOTE OWING TO ARREARS

### *Note to the Director-General*

1. In view of the information presented in PBC.4/9 on the arrears of member States with respect to assessed contributions to the regular budget, I wish to bring to your attention the provision in the first sentence of article 5.2 of the Constitution, which reads:

“Any Member that is in arrears in the payment of its financial contributions to the Organization shall have no vote in the Organization if the amount of its arrears equals or exceeds the amount of the assessed contributions due from it for the preceding two fiscal years.”

2. You will recall that on the occasion of Australia’s withdrawal from UNIDO, it was necessary to determine the exact meaning of the expression “fiscal year” in order to determine Australia’s obligation under article 6.2 of the Constitution to pay a contribution also for “the fiscal year following that during which” Australia would deposit its instrument of denunciation of the Constitution. A legal opinion dated 21 September 1987, which analysed this matter in the light of the terms used in the six authentic language versions of the Constitution, came to the conclusion that “fiscal year” meant “12 months” both in article 6 regarding withdrawal by a Member and in article 5 concerning the suspension of a member’s right to vote due to arrears. In particular, paragraph 4 of the legal opinion states that this conclusion “is compatible with the use of ‘fiscal year’ in the Arabic, Chinese, English and Russian versions of article 5.2 of the Constitution, which defines the amount of arrears necessary before a Member may lose its right to vote.”

3. The French and Spanish texts of the Constitution do not distinguish (as do the other language versions) between “fiscal year” in articles 5.2 and 6.2 and “fiscal period” in article 14.1, but use the same term “*exercice financier*” and “*ejercicio económico*” in all these articles. The fiscal period is, of course, defined by the Financial Regulations as being two calendar years, but this definition is only aimed at article 14 regarding the cycle for the programme and budgets and not at articles 5.2 and 6.2.

4. Over and above the legal arguments and conclusion in the legal opinion is the fact that Australia has been informed and has accepted that “fiscal year” means “12 months”. It therefore would not seem defensible to maintain a different interpretation for other members that are now in arrears.

5. If the foregoing is accepted, the only manner in which the issue might be avoided during the current sessions of the Programme and Budget CHCE and the Industrial Development Board would be if all decisions are taken by consensus, thereby avoiding voting. To be prepared for voting, which would seem quite advisable, I would recommend that the Treasurer, Mr. Whiting, be requested by you to prepare a list of those member States that are presently in arrears with an amount equalling or exceeding their assessed contributions for 1986 and 1987 combined.

20 June 1988

*Memorandum to the Director-General*

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

2. According to article 6.1 of the Constitution, a member may withdraw "by depositing an instrument of denunciation of this Constitution with the depositary". The depositary being the Secretary General of the United Nations, the instrument must be deposited with him. According to article 6.2 of the Constitution, "withdrawal shall take effect on the last day of the fiscal year, following that during which such instrument was deposited." This means, on the assumption that the expression "fiscal year" equals 12 months, that if for example a member State should deposit its instrument of denunciation between today and the end of 1987, the withdrawal would take effect on 31 December 1988, and membership rights and obligations would continue until that date.

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

4. The above conclusion is compatible with the use of "fiscal year" in the Arabic, Chinese, English and Russian versions of article 5.2 of the Constitution, which defines the amount of arrears necessary before a member may lose its right to vote. Article 5.2 provides that the arrears shall equal or exceed the assessed contributions due "for the preceding two fiscal years". Although the French and Spanish versions also in article 5.2 use the expressions "*exercice financier*" and "*ejercicio económico*", the divergence between the authentic texts can be conciliated in the same manner as discussed above for article 6.2.

5. Article 14.1 of the Constitution concerns the preparation of the budget and the programme of work and in this connection all the authentic versions employ the same expression, namely "fiscal period", "*exercice financier*", and "*ejercicio económico*" in English, French and Spanish, respectively. The Constitution does not itself define the length of the fiscal period but a definition is contained in the Draft Financial Regulations, namely regulation II.1, according to which "the fiscal period" shall consist of two consecutive calendar years, the

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

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

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

8. With respect to the Working Capital Fund, the withdrawing member’s obligation to make advances continues until its membership has lapsed. Since in accordance with Draft Financial Regulation 5.4(b) advances “shall be made in the proportion of the scale of assessments established by the Conference for the contributions of Members to the regular budget”, the obligation for the last year of membership should be adjusted in the same manner as the contribution to the regular budget for that year is adjusted in accordance with article 6.3 of the Constitution.

21 September 1987

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## 5. UNITED NATIONS INDUSTRIAL DEVELOPMENT ORGANIZATION/SOUTH ASIA COOPERATIVE ENVIRONMENT PROGRAMME RELATIONSHIP AGREEMENT

*Memorandum to Mr. K. Goldschwend, Officer-in-Charge, Section for Relations with Governments, Intergovernmental Organizations and United Nations Agencies, Department of External Relations, Public Information, Language and Documentation Services*

1. Reference is made to your memorandum of 28 September 1988 asking for my views on the request of the South Asia Cooperative Environment Programme (SACEP) in connection with the above-mentioned draft Agreement that UNIDO accept the responsibility of acting as SACEP’s focal point for the subject matter area “Technology for the Development of Renewable and Reusable Resources.”

2. It is stated in the letter of 22 July 1988 from SACEP that the Consultative Committee of SACEP recommended to the Governing Council of SACEP to designate UNIDO as the focal point in this subject matter area (there being 13 others comprising the programme activities of SACEP) and that the 4th Governing Council meeting unanimously accepted the recommendation. SACEP in its letter further indicates that acceptance by UNIDO of this responsibility would be greatly appreciated. The Terms of Reference for the formulation of activities in this subject matter area as well as a copy of the Modalities of Focal Points of SACEP were attached.

3. Regarding the “Modalities of Focal Points of South Asia Cooperative Environment Programme” my comments are as follows:

By accepting the designation to be a focal point for SACEP, UNIDO would implicitly also recognize the rules contained in the Modalities which would provide the structure for the relationship SACEP/UNIDO. Rule 1.1. states that “as provided in article 6 of the Articles of Association, the focal point shall work towards the implementation of its programmes and shall cooperate with the SACEP Secretariat in programme implementation”. Then: “The National Focal Point shall, in consultation with all concerned member countries, identify the priority areas in which project proposals should be initiated ...” It seems to me, however, that the National Focal Point is distinct from the Focal Point for a subject matter area such as UNIDO would be, so that this sentence does not concern UNIDO. According to paragraph 1.1, sentence 3, the Focal Point (= UNIDO) shall then circulate the brief outline among the member countries and consult with them directly, etc.

4. Already at this point it is evident that UNIDO as a focal point would act in a strict framework of clearly distributed and prescribed tasks with no executive responsibilities. The limitation to member States of SACEP would also be in possible conflict with UNIDO’s constitutional, global mandate.

5. Paragraph 1.2 reads: “The matter will then be put before the Consultative Committee, who will authorize the project proposals to be taken up or give other instructions as they deem fit.” It is clearly against the mandate of UNIDO’s Secretariat to receive instructions from entities other than its governing bodies. Cooperation with other intergovernmental organizations must be based on the principle of equality and agreement regarding common projects. In such cooperation, therefore, UNIDO cannot become part of the institutional structure of another organization, subject to the instructions of its governing bodies.

6. In view of the above UNIDO is not in a position to accept the designation as a Focal Point for SACEP. The reasons advanced should be explained to SACEP, in particular that UNIDO cannot become part of the structure of another organization, in a subordinate position to its governing organs. There is, of course, no impediment to cooperation in the usual ways in the areas foreseen in the agreement.

1 December 1988

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## NOTES

<sup>1</sup>See vol. 57, tome 1, *Annuaire de L'Institut de Droit International*, Session d'Oslo 1977, Travaux préparatoires. For a discussion of the applicable law in the absence of a stipulation by the parties, see *ibid.*, p. 48. See also *International Legal Materials* XXIV, No. 5 (September 1985), pp. 1350-1352, for the views of the UNCITRAL.

<sup>2</sup>See Dr. Karl Zemanek, *Das Vertragsrecht der Internationalen Organisationen* (Vienna, Springer-Verlag, 1957), in which a similar distinction is drawn.

<sup>3</sup>See *Juridical Yearbook*, 1976, p. 159. The opinion was in response to a questionnaire from the Institut de Droit International. The materials used in the opinion were derived from a study of the International Law Commission published in the *Yearbook of the International Law Commission*, 1967, vol. II, document A/CN.4/L.118 and Add.1 and 2, p. 207.

<sup>4</sup>See also *Annuaire de L'Institut de Droit International*, *op. cit.*, note 1; The Hague Convention on the Law Applicable to Contracts for the International Sale of Goods, *International Legal Materials* XXIV, No. 6 (November 1985), 1573; the Conventions prepared by the United Nations Commission on International Trade Law on Arbitration Rules, Contracts for International Sale of Goods, etc.; for a list see: *United Nations Multilateral Treaties Deposited with the Secretary-General: Status as at 31 December 1986* (United Nations publication, Sales No. E.86.V.8).

<sup>5</sup>In the last 10 years, this Office has been involved in only two commercial arbitrations, both under the auspices of the American Association of Arbitration (AAA): *Canvas and Leather v. United Nations Children's Fund (UNICEF)*, decided on 1 February 1982, and *Reliable Van and Storage v. United Nations*, decided on 18 February 1982.

<sup>6</sup>See article 33 of the UNCITRAL Arbitration Rules. See also Dr. Karl Zemanek, *op. cit.*, note 2 above, p. 135, where it is argued that contracts concluded by intergovernmental organizations with private suppliers of goods are governed by national law, determined to be the proper law of the contract, and not by the internal law of the organization concerned.

<sup>7</sup>See "Report on Possible Conflicts of Laws Rules and the Rules Applicable to the Substance of the Dispute" (Yves Derains — Rapporteur; Prof. Pierre Lalive — Chairman), in: *UNCITRAL's Project for a Model Law on International Commercial Arbitration* (Kluwer Law and Taxation Publishers, 1984), p. 169.

<sup>8</sup>The same solution is adopted in article 28 of the UNCITRAL Model Law on International Commercial Arbitration, *International Legal Materials*, vol. XXIV, No. 5 (September 1980), p. 1309, and the International Chamber of Commerce (ICC) Arbitration Rules. But see the European Convention on International Commercial Arbitration (1961), United Nations, *Treaty Series*, vol. 484, p. 364, which provides in article VII(1): "The parties shall be free to determine, by agreement, the law to be applied by the arbitrators to the substance of the dispute. Failing any indication by the parties as to the applicable law, the arbitrators shall apply the proper law under the rule of conflict that the arbitrators deem applicable." See also, in this respect, article 1496 of the new French Code of Civil Procedure, which provides: "The arbitrator shall decide (in the case of an international commercial arbitration) the dispute in accordance with the legal rules chosen by the parties; failing such choice, in accordance with the legal rules which he considers appropriate in the case. In all cases he shall take account of commercial usage." René David, *Arbitration in International Trade* (1985), p. 342.

<sup>9</sup>For the view that an arbitrator need not select the conflict rules of a particular national law but, instead, "a conflict rule which receives a large consensus internationally", see Report on *Possible Conflict of Laws Rules and the Rules Applicable to the Disputes*, *op. cit.*, note 7.

<sup>10</sup>See *Juridical Yearbook*, 1976, p. 162.

<sup>11</sup>See *Standard Chartered Bank v. The International Tin Council*, *International Le-*

*gal Materials* XXV, No. 3 (May 1986), p. 650. The United Kingdom High Court of Justice (Queen's Bench Division) found that a Letter of Agreement with the plaintiff bank amounted to a waiver of the privileges and immunities of the Council and thus asserted jurisdiction in the case. While admittedly the clause on which the Court relied was outrageously broad, we do not normally wish to take any chances.

<sup>12</sup>Attorneys specializing in international trade law consider agreement on a choice-of-law clause particularly advantageous to their clients and will often strongly argue for application of a law of one of the major legal systems: English or French law or the law of one of the States of the United States of America. The United Nations has thus been more successful in excluding references to a particular municipal law by electing for non-inclusion of a choice-of-law clause altogether.

<sup>13</sup>See *In the matter of the arbitration between AMCO Asia Corp. and other and the Republic of Indonesia*, *International Legal Materials* XXIV, No. 4 (July 1985), p. 1026, where the ICSID Arbitral Tribunal, which by virtue of article 42 of the ICSID Convention is required to apply the law of the State party to the dispute and such rules of international law as are applicable, stated, in declining to be bound by a decision of a national court: "... an international Tribunal is not bound to follow the result of a national court ... If a national judgement was binding on an international Tribunal such a procedure could be rendered meaningless."

<sup>14</sup>*Reliable Van and Storage Inc. v. United Nations* was an arbitration conducted under AAA, decided on 18 February 1982. In that case the Court fixed the price payable by the United Nations for shipment of a staff member's goods, based on estimates supplied by the Contractor. Condition 2 of the Contract expressly required the Contractor to notify the United Nations when the weight of the goods to be shipped, on the basis of which the price was fixed, was exceeded. This was not done. Relying on New York court decisions and trade usage, by which the transporter is entitled to payment on the basis of the actual weight of the goods shipped, the Contractor claimed payment from the United Nations for the excess weight (see D.C.N.Y. 1972 UCC Section 1-205(5)). However, the United Nations successfully argued that the United Nations "Conditions for Contracts for Removal and Shipment of Household Effects", which were made part of the Contract, prevailed over the usage of trade adopted by American court decisions.

<sup>15</sup>See "Report on Possible Conflicts of Laws Rules and the Rules Applicable to the Substance of the Dispute", op. cit. note 7, p. 186.

<sup>16</sup>See *DST v. Rahnoc (Donaldson MR)*, *All England Law Reports*, 17 July 1987. In that case, relying on article 13(3) of the ICC rules, which is similar to article 33(3) of the UNCITRAL Arbitration rules, the arbitrators determined the proper law as the "internationally accepted principles of law governing contractual relations". The arbitration decision was upheld by the court. See also decisions on application of *lex mercatoria*, as the proper law of the contract, reported in *International Legal Materials*, vol. XXIV, No. 2 (January 1985), p. 360.

<sup>17</sup>One of the reasons why the Organization decided to abandon use of the American Association of Arbitration procedure was the experience encountered in the case of *Canvas and Leather v. UNICEF* decided on 1 February 1982, where the arbitral award constituted no more than a few paragraphs on a page, completely ignoring the legal arguments advanced by the Organization.

<sup>18</sup>Indeed, under article 33(2) of the UNCITRAL Rules, the parties must agree specifically to give the arbitrators this power.

<sup>19</sup>We, however, expressly provide in all cases that disputes shall be resolved exclusively by arbitration and that neither the choice of an applicable law, where this is done, nor the submission to arbitration shall be construed as a waiver, express or implied, of the privileges and immunities of the United Nations.

<sup>20</sup>See René David, op. cit., note 8, p. 350, and Berthold Goldman, "La *lex mercatoria* dans les Contrats et l'arbitrage international: réalité et perspective", *Journal du droit international*, 1979, No. 3, p. 475. See also J. Gillis Wetter, *The Legal Framework of*

*International Arbitral Tribunals — Five Tentative Markings* (1981), International Contracts, by Columbia University. For cases upholding arbitration based on the *lex mercatoria*, see *International Legal Materials*, vol. XXIV, No. 2 (March 1985), p. 360.

<sup>21</sup>Article 33(3) of the UNCITRAL Arbitration Rules provides: “In all cases, the arbitral tribunal shall decide in accordance with the terms of the contract and shall take into account the usages of the trade applicable to the transaction.”

<sup>22</sup>Generally, we apply the comparative law method to determine the rules most commonly accepted in the national laws to which the contract is closely connected and the commercial rules and usage accepted internationally, taking into account also rules developed by application of Article 38(1)(c) of the Statute of the International Court of Justice. See also a discussion of this subject by René David, *op. cit.*, note 8, p. 347; *ibid.*, note 12.

<sup>23</sup>See note 8, above.

<sup>24</sup>United Nations, *Treaty Series*, vol. 1489, p. 3.

<sup>25</sup>The Publishing Company does not state whether the title of its journal has been registered as a trade mark, and we assume it has not. However, in the United States, registration of a trade mark merely serves to raise a presumption of validity; non-registration is not a requirement for purposes of maintaining an action for infringement, nor is registration an absolute bar to others using a merely descriptive title. In the United Kingdom, no action for infringement can be brought in respect of unregistered trade marks (see Trade Marks Act 1938, S.2). It might be useful at a later stage to investigate the registration status of the Company title in both the United States and the United Kingdom.

<sup>26</sup>The Trademark Registration Treaty, Misc. 28 (1974), Cmnd. 5749, to which the United States and the United Kingdom have both affixed signatures, does not provide any additional substantive protection of trade marks beyond the protection granted by national legislation. The two U.S.C. sections, therefore, are the only applicable statutory laws to a suit held in United States courts.

<sup>27</sup>*Dell Pub. Co. v. Stanley Pub., Inc.*, 211 N.Y.S.2d 393, 399 (1961).

<sup>28</sup>A confirmation of whether or not the Company has registered “World Development” as a trade mark can be accomplished by an agent or attorney search through the files at the Library of Congress Trademark Office.

<sup>29</sup>See 15 U.S.C. Sec. 1127.

<sup>30</sup>*Frederick Warne and Co. v. Book Sales Inc.*, 481 F. Supp. 1191, 1195 (1979).

<sup>31</sup>*Idem*, p. 1195.

<sup>32</sup>See *McGraw-Hill Publishing Co. v. American Aviation Associates, Inc.*, 117 F.2d 293, 296 (1940).

<sup>33</sup>*Scott v. Mego International Inc.*, 519 F. Supp. 1118, 1126 (1981).

<sup>34</sup>*American Association for Advancement of Science v. Hearst Corp.*, 498 F. Supp. 244, 257.

<sup>35</sup>*Idem*, p. 257.

<sup>36</sup>*Dell Pub. Co. v. Stanley Pub., Inc.*, 211 N.Y.S. 2d 393, 402, 9 N.Y.2d 126 (1961).

<sup>37</sup>See *McGraw-Hill Publishing Co. v. American Aviation Associates, Inc.*, 117 F.2d 294 (1940).

<sup>38</sup>*Bayer Co., Inc., v. Shoyer*, 27 F. Supp. 633, 637 (1939).

<sup>39</sup>*Idem*, p. 1128.

<sup>40</sup>*Philadelphia Inquirer Co. v. Coe*, 133 F. 2d 385, 386 (1942).

<sup>41</sup>See, e.g., *idem*, p. 1129 (analysing the likelihood of confusion by comparing letter size and letter shape).

<sup>42</sup>*Idem*, p. 1133.

<sup>43</sup>See *McGraw-Hill Publishing Co. v. American Aviation Associates, Inc.*, 117 F.2d 294 (1940).

- <sup>44</sup>*Scott v. Mego International Inc.*, 519 F. Supp. 1128 (1981).
- <sup>45</sup>*Majestic Mfg. Co. v. Majestic Elec. Appliance Co.*, 172 F.2d 862 (1949).
- <sup>46</sup>*Scott v. Mego International Inc.*, 519 F. Supp. 1129 (1981) (holding that the weaker the mark, the less protection it will be afforded).
- <sup>47</sup>*Scott v. Mego International Inc.*, 519 F. Supp. 1129 (1981).
- <sup>48</sup>*World Development* (UNDP), March 1988, p. 2.
- <sup>49</sup>*Scott v. Mego International Inc.*, 519 F. Supp. 1133 (1981).
- <sup>50</sup>See *McGraw-Hill Publishing Co. v. American Aviation Associates, Inc.*, 117 F.2d 295 (1940).
- <sup>51</sup>*Idem*, p. 294.
- <sup>52</sup>See *McGraw-Hill Publishing Co. v. American Aviation Associates, Inc.*, 117 F.2d 295 (1940).
- <sup>53</sup>*Scott v. Mego International Inc.*, 519 F. Supp. 1134 (1981).
- <sup>54</sup>*Idem*, p. 1135.
- <sup>55</sup>See *McGraw-Hill Publishing Co. v. American Aviation Associates, Inc.*, 117 F.2d 295.
- <sup>56</sup>*Scott v. Mego International Inc.*, 519 F. Supp. 1135 (1981).
- <sup>57</sup>See *Telechron, Inc. v. Telicon Corp.*, 97 F. Supp. 131 (1951).
- <sup>58</sup>See E. Vandenberg, *Trademark Law and Procedure* (2nd ed.) (Indianapolis, United States, Bobbs-Merrill, 1968).
- <sup>59</sup>*Scott v. Mego International Inc.*, 519 F. Supp. 1137 (1981).
- <sup>60</sup>*Idem*, p. 1138.
- <sup>61</sup>*Ibid.*
- <sup>63</sup>*Johnson & Johnson v. Carte-Wallace, Inc.*, 631 F. 2d 186 (1980).
- <sup>64</sup>See E. Vandenberg, *Trademark Law and Procedure* (2nd ed.) (Indianapolis, United States, Bobbs-Merrill, 1968), p. 505.
- <sup>65</sup>*Idem*, p. 505.
- <sup>66</sup>United Nations, *Treaty Series*, vol. 1, p. 15.
- <sup>67</sup>General Assembly resolution 76 (I).
- <sup>68</sup>United Nations, *Treaty Series*, vol. 500, p. 95.
- <sup>69</sup>E/5975/Rev.1.
- <sup>70</sup>A/520/Rev.15.
- <sup>71</sup>General Assembly resolution 222 (IV), annex I, para. 4; Assembly resolution 1240 B (XIII), para. 39; and Assembly resolution 2688 (XXV), annex, para. 40.
- <sup>72</sup>General Assembly resolution 2401 (XXIII).
- <sup>73</sup>General Assembly resolution 2152 (XXI).
- <sup>74</sup>Economic and Social Council resolution 1952 (LIX).
- <sup>75</sup>If the facts are as stated above, Mr. X is right in that his original acceptance created a contract, at L-3, step 8, from which he could, of course, resign but which he could not unilaterally alter to the L-4 level.
- <sup>76</sup>See UNAT Judgements No. 115, *Kimpton*, para. IV; No. 106, *Vasseur*, para. II; and No. 96, *Camargo*, para. II.
- <sup>77</sup>See UNAT Judgement No. 96, *Camargo*, para. II.
- <sup>78</sup>Not yet published.
- <sup>79</sup>A/C.6/40/L.31.
- <sup>80</sup>See General Assembly decisions 42/309 and 42/310.
- <sup>81</sup>ST/SG/2.
- <sup>82</sup>ST/SG/2/Add.1.
- <sup>83</sup>ST/SGB/UNEF/3.
- <sup>84</sup>General Assembly resolution 1001 (ES-1) did not give express authority for the issuance of such a medal, but authorized the Secretary-General "to issue all regulations



and instructions which may be essential to the executive functioning of the Force ... and to take all other necessary administrative and executive action”.

<sup>85</sup>ST/SGB/119.

<sup>86</sup>ST/SGB/119/Add.1.

<sup>87</sup>See Security Council resolution 85 (1950).

<sup>88</sup>Eligibility for award of the previous commemorative medals has been limited to *military* personnel serving with the respective peacekeeping operations. In this regard, we note the views expressed by Mr. Ralph Bunche in a memorandum to the Director of General Services of 18 June 1964, advising *against* making Field Service Officers and guards serving in field missions eligible for the United Nations Medal.

<sup>89</sup>Governing Council decision 86/17; see also decisions 85/14, 85/15 and 87/13.

<sup>90</sup>The report issued in 1969 in two volumes as DP/5; see *ibid.*, p. 302.

<sup>91</sup>*Ibid.*, p. 302. The expression “agent” in the above paragraph was obviously used without regard to its legal implications, which later necessitated that it be clearly specified agreement with the executing agencies that they act as independent contractors vis-à-vis UNDP.

<sup>92</sup>See articles II and VI of the Agreement with Executing Agencies which establishes the conditions for execution of projects, as well as article XI which establishes financial accounting procedures for project expenditures. See also UNDP financial regulation 8.10.

<sup>93</sup>UNDP financial rule 108.13, which required UNDP to establish arrangements with executing agencies for, *inter alia*:

While the UNDP Financial Regulations and Rules do not apply to executing agencies, the requirements of financial rule 108.13 are normally incorporated in the project document.

<sup>94</sup>See para. 14 below.

<sup>95</sup>The proposed increase of government execution and the encouragement of competition among United Nations organizations, and even with private firms, for execution of UNDP-funded projects will require further review, in the light of their legal and operational implications. The World Bank experience in this regard should be examined; as we know, United Nations agencies opposed such competition among themselves or even with private firms on policy grounds.

<sup>96</sup>It is presumed, as the basis of our legal opinion of 8 October 1987, that the executing agencies referred to here are mostly United Nations system organizations. Government-executed projects could pose even more problems, since monitoring performance and enforcing compliance with agreed goals would be more difficult than with executing agencies.

<sup>97</sup>Lord McNair, *The Law of Treaties* (Oxford, Clarendon 1961), p. 493.

<sup>98</sup>Thomas M. Franck, “Legitimacy in the International System” (1988), vol. 82, No. 4, *American Journal of International Law*, p. 705.

<sup>99</sup>Not yet in force.

<sup>100</sup>General Assembly resolutions 34/93 A, 35/206, 36/172 D, 37/69, 40/64, 41/64 A, 41/35 B, and 42/23 B.

<sup>101</sup>Not yet published.

<sup>102</sup>United Nations, *Treaty Series*, vol. 1155, p. 331.



**Part Three**

**JUDICIAL DECISIONS ON QUESTIONS  
RELATING TO THE UNITED NATIONS  
AND RELATED INTERGOVERNMENTAL  
ORGANIZATIONS**



## Chapter VII

### DECISIONS AND ADVISORY OPINIONS OF INTERNATIONAL TRIBUNALS

#### International Court of Justice

##### ADVISORY OPINION<sup>1</sup>

###### *Applicability of the Obligation to Arbitrate under Section 21 of the United Nations Headquarters Agreement of 26 June 1947<sup>2</sup>*

On 2 March 1988, the General Assembly of the United Nations adopted resolution 42/229 whereby it requested the International Court of Justice to give an advisory opinion on the following question:

“In the light of facts reflected in the reports of the Secretary General [A/42/915 and Add.1], is the United States of America, as a party to the Agreement between the United Nations and the United States of America regarding the Headquarters of the United Nations [resolution 169 (II)], under an obligation to enter into arbitration in accordance with section 21 of the Agreement?”

The letter of the Secretary-General, transmitting to the Court the request for an advisory opinion and certified copies of the English and French texts of the said resolution, was received in the Registry by facsimile on 4 March 1988 and by post on 7 March 1988.

By an Order of 9 March 1988 (*I.C.J. Reports 1988*, p. 3) the Court, having regard to the fact that the decision to request an advisory opinion was made “taking into account the time constraint” (cf. resolution 42/229 B), in accordance with Article 66, paragraph 2, of its Statute, applying Article 103 of its Rules, accelerated its procedure and fixed 25 March 1988 as the time limit for the submission of written statements by the United Nations and the United States, as well as by any other State party to the Statute of the Court which desired to do the same (*ibid.*). By the same Order the Court decided to hold a hearing, opening on 11 April 1988, at which oral comments on written statements might be submitted by the United Nations, the United States and such other States as might have presented written statements. Judge Schwebel appended a separate opinion to the Order (*ibid.*, pp. 6-7).

In accordance with Article 65, paragraph 2, of the Statute, the Secretary-General of the United Nations transmitted to the Court a dossier of documents likely to throw light upon the question.

Written statements were filed, within the time limit fixed, by the United Nations, the United States of America, the German Democratic Republic and the Syrian Arab Republic.

On 11 April 1988, a public sitting was held, at which the United Nations Legal Counsel, Mr. Carl-August Fleischhauer, made an oral statement to the

Court on behalf of the Secretary-General. Certain Members of the Court put questions to Mr. Fleischhauer, which were answered at a further public sitting held on 12 April 1988.

At a public sitting held on 26 April 1988, the Court delivered its advisory opinion (*I.C.J. Reports 1988*, p. 12), of which a summary outline and the complete text of the operative paragraph are given below:

*Submission of the request and subsequent procedure* (paras. 1-6)

The question upon which the Court's advisory opinion had been sought was contained in United Nations General Assembly resolution 42/229 B, adopted on 2 March 1988. This resolution read in full as follows:

*"The General Assembly,*

*"Recalling its resolution 42/210 B of 17 December 1987 and bearing in mind its resolution 42/229 A above,*

*"Having considered the reports of the Secretary-General of 10 and 25 February 1988 [A/42/915 and Add.1],*

*"Affirming the position of the Secretary-General that a dispute exists between the United Nations and the host country concerning the interpretation or application of the Agreement between the United Nations and the United States of America regarding the Headquarters of the United Nations, dated 26 June 1947 [see resolution 169 (II)], and noting his conclusions that attempts at amicable settlement were deadlocked and that he had invoked the arbitration procedure provided for in section 21 of the Agreement by nominating an arbitrator and requesting the host country to nominate its own arbitrator,*

*"Bearing in mind the constraints of time that require the immediate implementation of the dispute settlement procedure in accordance with section 21 of the Agreement,*

*"Noting from the report of the Secretary-General of 10 February 1988 [A/42/915] that the United States of America was not in a position and was not willing to enter formally into the dispute settlement procedure under section 21 of the Headquarters Agreement and that the United States was still evaluating the situation,*

*"Taking into account the provisions of the Statute of the International Court of Justice, in particular Articles 41 and 68 thereof,*

*"Decides, in accordance with Article 96 of the Charter of the United Nations, to request the International Court of Justice, in pursuance of Article 65 of the Statute of the Court, for an advisory opinion on the following question, taking into account the time constraint:*

*"In the light of facts reflected in the reports of the Secretary-General [A/42/915 and Add.1], is the United States of America, as a party to*

the Agreement between the United Nations and the United States of America regarding the Headquarters of the United Nations [see resolution 169 (II)], under an obligation to enter into arbitration in accordance with section 21 of the Agreement?" "

In an Order dated 9 March 1988, the Court found that an early answer to the request would be desirable (Rules of Court, Art. 103), and that the United Nations and the United States of America could be considered likely to furnish information on the question (Statute, Art. 66, para. 2), and, accelerating its procedure, fixed 25 March 1988 as the time limit for the submission of a written statement from them, or from any other State party to the Statute which desired to submit one. Written statements were received from the United Nations, the United States of America, the German Democratic Republic and the Syrian Arab Republic. At public sittings on 11 and 12 April 1988, held for the purpose of hearing the comments of any of those participants on the statements of the others, the Court heard the comments of the Legal Counsel of the United Nations and his replies to questions put by certain Members of the Court. None of the States having presented written statements expressed a desire to be heard. The Court also had before it the documents provided by the Secretary-General in accordance with Article 65, paragraph 2, of the Statute.

*Events material to the qualification of the situation (paras. 7-22)*

In order to answer the question put to it, the Court had first to consider whether there existed between the United Nations and the United States a dispute as contemplated by section 21 of the Headquarters Agreement, the relevant part of which was worded as follows:

“(a) Any dispute between the United Nations and the United States concerning the interpretation or application of this agreement or of any supplemental agreement, which is not settled by negotiation or other agreed mode of settlement, shall be referred for final decision to a tribunal of three arbitrators, one to be named by the Secretary-General, one to be named by the Secretary of State of the United States, and the third to be chosen by the two, or, if they should fail to agree upon a third, then by the President of the International Court of Justice.”

For that purpose the Court set out the sequence of events which led first the Secretary-General and then the General Assembly to conclude that such a dispute existed.

The events in question centred round the Permanent Observer Mission of the Palestine Liberation Organization (PLO) to the United Nations in New York. The PLO had on 22 November 1974 been invited, by General Assembly resolution 3237 (XXIX), to “participate in the sessions and the work of the General Assembly in the capacity of observer”. It had consequently established an Observer Mission in 1974 and maintained an office in New York City outside the United Nations Headquarters District.

In May 1987, a bill had been introduced into the Senate of the United States, the purpose of which was “to make unlawful the establishment and maintenance within the United States of an office of the Palestine Liberation Organization”; section 3 of that bill provided, *inter alia*, that it would be unlawful after

its effective date:

“notwithstanding any provision of the law to the contrary, to establish or maintain an office, headquarters, premises or other facilities or establishments within the jurisdiction of the United States at the behest or direction of, or with funds provided by the Palestine Liberation Organization ...”

The text of that bill became an amendment, presented in the Senate in the autumn of 1987, to the Foreign Relations Authorization Act, Fiscal Years 1988 and 1989. From the terms of that amendment it appeared that the United States Government would, if the bill became law, seek to close the office of the PLO Observer Mission. On 13 October 1987, the Secretary-General accordingly emphasized, in a letter to the United States Permanent Representative to the United Nations, that the legislation contemplated ran counter to obligations arising from the Headquarters Agreement, and the following day the PLO Observer brought the matter to the attention of the United Nations Committee on Relations with the Host Country. On 22 October a spokesman for the Secretary-General issued a statement to the effect that sections 11 to 13 of the Headquarters Agreement placed a treaty obligation on the United States to permit the personnel of the Mission to enter and remain in the United States in order to carry out their official functions.

The report of the Committee on Relations with the Host Country was placed before the Sixth Committee of the General Assembly on 25 November 1987. During consideration of that report the representative of the United States noted:

“that the United States Secretary of State had stated that the closing of that mission would constitute a violation of United States obligation under the Headquarters Agreement, and that the United States Government was strongly opposed to it; moreover the United States representative to the United Nations had given the Secretary-General the same assurances”.

The position taken by the Secretary of State, namely that the United States was

“under an obligation to permit PLO Observer Mission personnel to enter and remain in the United States to carry out their official functions at United Nations Headquarters”,

was also cited by another representative and confirmed by the representative of the United States.

The provisions of the amendment referred to above became incorporated into the United States Foreign Relations Authorization Act, Fiscal Years 1988 and 1989, as Title X, the Anti-Terrorism Act of 1987. At the beginning of December 1987 the amendment had not yet been adopted by Congress. On 7 December, in anticipation of such adoption, the Secretary-General reminded the Permanent Representative of the United States of his view that the United States was under a legal obligation to maintain the longstanding arrangements for the PLO Observer Mission and sought assurances that, in the event the proposed legislation became law, those arrangements would not be affected.

The House and Senate of the United States Congress adopted the Anti-Terrorism Act on 15 and 16 December 1987, and the following day the General



Assembly adopted resolution 42/210 B whereby it called upon the host country to abide by its treaty obligations and to provide assurance that no action would be taken that would infringe on the arrangements for the official functions of the Mission.

On 22 December, the Foreign Relations Authorization Act, Fiscal Years 1988 and 1989, was signed into law by the President of the United States. The Anti-Terrorism Act forming part thereof was, according to its own terms, to take effect 90 days later. In informing the Secretary-General of this development, the Acting Permanent Representative of the United States, on 5 January 1988, stated that:

“Because the provisions concerning the PLO Observer Mission may infringe on the President’s constitutional authority and, if implemented, would be contrary to our international legal obligations under the United Nations Headquarters Agreement, the Administration intends, during the ninety-day period before this provision is to take effect, to engage in consultations with the Congress in an effort to resolve this matter.”

The Secretary-General responded, however, by observing that he had not received the assurance he had sought and did not consider that the statements of the United States enabled full respect for the Headquarters Agreement to be assumed. He went on:

“Under the circumstances, a dispute exists between the Organization and the United States concerning the interpretation and application of the Headquarters Agreement and I hereby invoke the dispute settlement procedure set out in section 21 of the said Agreement.”

The Secretary-General then proposed that negotiations should begin in conformity with the procedure laid down in section 21.

While agreeing to informal discussions, the United States took the position that it was still evaluating the situation which would arise from the application of the legislation and could not enter into the dispute settlement procedure of section 21. However, according to a letter written to the United States Permanent Representative by the Secretary-General on 2 February 1988:

“The section 21 procedure is the only legal remedy available to the United Nations in this matter and ... the time is rapidly approaching when I will have no alternative but to proceed either together with the United States within the framework of section 21 of the Headquarters Agreement or by informing the General Assembly of the impasse that has been reached.”

On 11 February 1988, the Legal Counsel of the United Nations informed the Legal Adviser of the Department of State of the United Nations’ choice of its arbitrator, in the event of an arbitration under section 21, and, in view of the time constraints, urged him to inform the United Nations as soon as possible of the United States’ choice. No communication in that regard was, however, received from the United States.

On 2 March 1988, the General Assembly adopted two resolutions on the subject. In the first resolution 42/229 A, the Assembly, *inter alia*, reaffirmed that the PLO should be enabled to establish and maintain premises and adequate

facilities for the purposes of the Observer Mission; and expressed the view that the application of the Anti-Terrorism Act in a manner inconsistent with that reaffirmation would be contrary to the international legal obligations of the United States under the Headquarters Agreement, and that the dispute-settlement procedure provided for in section 21 should be set in operation. The other resolution, 42/229 B, already cited, requested an advisory opinion of the Court. Although the United States did not participate in the vote on either resolution, its Acting Permanent Representative afterwards made a statement pointing out that his Government had made no final decision concerning the application or enforcement of the Anti-Terrorism Act with respect to the PLO Mission and that it remained its intention “to find an appropriate resolution of this problem in the light of the Charter of the United Nations, the Headquarters Agreement, and the laws of the United States”.

*Material events subsequent to the submission of the request* (paras. 23-32)

The Court, while noting that the General Assembly had requested it to give its opinion “in the light of facts reflected in the reports” presented by the Secretary-General prior to 2 March 1988, did not consider in the circumstances that that form of words required it to close its eyes to relevant events subsequent to that date. It therefore took into account the following developments, which had occurred after the submission of the request:

On 11 March 1988, the United States Acting Permanent Representative informed the Secretary-General that the Attorney General had determined that the Anti-Terrorism Act required him to close the office of the PLO Observer Mission, but that, if legal actions were needed to ensure compliance, no further actions to close it would be taken

“pending a decision in such litigation. Under the circumstances, the United States believes that submission of this matter to arbitration would not serve a useful purpose.”

The Secretary-General took strong issue with that viewpoint in a letter of 15 March. Meanwhile the Attorney General, in a letter of 11 March, had warned the Permanent Observer of the PLO that, as of 21 March, the maintenance of his Mission would be unlawful. Since the PLO Mission took no steps to comply with the requirements of the Anti-Terrorism Act, the Attorney General sued for compliance in the District Court for the Southern District of New York. The United States’ written statement informed the Court, however, that no action would be taken

“to close the Mission pending a decision in that litigation. Since the matter is still pending in our courts, we do not believe arbitration would be appropriate or timely.”

*Limits of the Court’s task* (para. 33)

The Court pointed out that its sole task, as defined by the question put to it, was to determine whether the United States was obliged to enter into arbitration under section 21 of the Headquarters Agreement. It had in particular not to decide whether the measures adopted by the United States in regard to the PLO Observer Mission ran counter to that Agreement.

*Existence of a dispute (paras. 34-44)*

Given the terms of section 21(a), quoted above, the Court was obliged to determine whether there existed a dispute between the United Nations and the United States and, if so, whether that dispute concerned the interpretation or application of the Headquarters Agreement and had not been settled by negotiation or other agreed mode of settlement.

To that end, the Court recalled that the existence of a dispute, that is to say, a disagreement on a point of law or a conflict of legal views or interests, is a matter for objective determination and cannot depend upon the mere assertions or denials of parties. In the present case, the Secretary-General was of the view, endorsed by the General Assembly, that a dispute within the meaning of section 21 existed from the moment the Anti-Terrorism Act was signed into law and in the absence of adequate assurances that the Act would not be applied to the PLO Observer Mission; he had moreover formally contested the consistency of the Act with the Headquarters Agreement. The United States had never expressly contradicted that view, but had taken measures against the Mission and indicated that they were being taken irrespective of any obligations it might have under that Agreement.

However, in the Court's view, the mere fact that a party accused of the breach of a treaty did not advance any argument to justify its conduct under international law did not prevent the opposing attitudes of the parties from giving rise to a dispute concerning the treaty's interpretation or application. Nonetheless, the United States had during consultations in January 1988 stated that it "had not yet concluded that a dispute existed" between it and the United Nations, "because the legislation in question had not yet been implemented", and had subsequently, while referring to "the current dispute over the status of the PLO Observer Mission", expressed the view that arbitration would be premature. After litigation had been initiated in the domestic courts, its written statement had informed the Court of its belief that arbitration would not be "appropriate or timely."

The Court could not allow considerations as to what might be "appropriate" to prevail over the obligations which derived from section 21. Moreover, the purpose of the arbitration procedure thereunder was precisely the settlement of disputes between the United Nations and the host country without any prior recourse to municipal courts. Neither could the Court accept that the undertaking not to take any other action to close the Mission before the decision of the domestic court had prevented a dispute from arising.

The Court deemed that the chief, if not the sole, objective of the Anti-Terrorism Act was the closure of the office of the PLO Observer Mission and noted that the Attorney General considered himself under an obligation to take steps for that closure. The Secretary-General had consistently challenged the decisions first contemplated and then taken by the United States Congress and Administration. That being so, the Court was obliged to find that the opposing attitudes of the United Nations and the United States showed the existence of a dispute, whatever the date on which it might be deemed to have arisen.

*Qualification of the dispute (paras. 45-50)*

As to whether the dispute concerned the interpretation or application of the Headquarters Agreement, the United Nations had drawn attention to the fact that the PLO had been invited to participate in the sessions and work of the General Assembly as an observer; hence the PLO Mission was covered by the provisions of sections 11 to 13 and should be enabled to establish and maintain premises and adequate functional facilities. In the United Nations' view, the measures envisaged by Congress and eventually taken by the United States Administration would thus be incompatible with the Agreement if applied to the Mission, and their adoption had accordingly given rise to a dispute with regard to the interpretation and application of the Agreement.

Following the adoption of the Anti-Terrorism Act, the United States had first contemplated interpreting it in a manner compatible with its obligations under the Agreement, but on 11 March its Acting Permanent Representative had informed the Secretary-General of the Attorney General's conclusion that the Act required him to close the Mission irrespective of any such obligations. The Secretary-General had disputed that view on the basis of the principle that international law prevailed over domestic law. Accordingly, although in a first stage the discussions had related to the interpretation of the Agreement and, in that context, the United States had not disputed that certain of its provisions applied to the PLO Observer Mission, in a second stage the United States had given precedence to the Act over the Agreement, and that had been challenged by the Secretary-General.

Furthermore, the United States had taken a number of measures against the PLO Observer Mission. Those had been regarded by the Secretary-General as contrary to the Agreement. Without disputing that point, the United States had stated that the measures in question had been taken "irrespective of any obligations the United States may have under the Agreement". Those two positions were irreconcilable; thus there existed a dispute between the United Nations and the United States concerning the application of the Headquarters Agreement.

The question might be raised as to whether in United States domestic law the Anti-Terrorism Act could only be regarded as having received effective application when or if, on completion of the proceedings before the domestic courts, the Mission was in fact closed. That was, however, not decisive in regard to section 21, which concerned the application of the Agreement itself, not of the measures within the municipal laws of the United States.

*Condition of non-settlement by other agreed means (paras. 51-56)*

The Court then considered whether the dispute was one "not settled by negotiation or other agreed mode of settlement", in the terms of section 21(a). The Secretary-General had not only invoked the dispute-settlement procedure but also noted that negotiations must first be tried, and had proposed that they begin on 20 January 1988. Indeed, consultations had already started on 7 January and were to continue until 10 February. Moreover, on 2 March, the Acting Permanent Representative of the United States had stated in the General Assembly that his Government had been in regular and frequent contact with the United Nations Secretariat "concerning an appropriate resolution of this matter". The Secretary-General had recognized that the United States did not consider those contacts and consultations to lie formally within the framework of section 21 and had noted that the

United States was taking the position that, pending evaluation of the situation which would arise from application of the Anti-Terrorism Act, it could not enter into the dispute settlement procedure outlined in section 21.

The Court found that, taking into account the United States' attitude, the Secretary-General had in the circumstances exhausted such possibilities of negotiation as were open to him, nor had any "other agreed mode of settlement" been contemplated by the United Nations and the United States. In particular, the current proceedings before the United States courts could not constitute an "agreed mode of settlement" within the meaning of section 21, considering that their purpose was the enforcement of the Anti-Terrorism Act and not the settlement of the dispute concerning the application of the Agreement. Furthermore, the United Nations had never agreed to a settlement in the domestic courts.

*Conclusion* (para. 57)

The Court had therefore to conclude that the United States was bound to respect the obligation to enter into arbitration. That conclusion would remain intact even if it were necessary to interpret the statement that the measures against the Mission were taken "irrespective of any obligations" of the United States under the Headquarters Agreement as intended to refer not only to any substantive obligations under sections 11 to 13 but also to the obligation to arbitrate provided for in section 21. It was sufficient to recall the fundamental principle of international law that international law prevailed over domestic laws, a principle long endorsed by judicial decisions.

*Operative paragraph* (para. 58)

"THE COURT,

Unanimously,

*Is of the opinion* that the United States of America, as a party to the Agreement between the United Nations and the United States of America regarding the Headquarters of the United Nations of 26 June 1947, is under an obligation, in accordance with section 21 of that Agreement, to enter into arbitration for the settlement of the dispute between itself and the United Nations."

\* \* \*

Judge Elias appended a declaration to the Advisory Opinion (*I.C.J. Reports 1988*, p. 36). Separate opinions were appended to the Advisory Opinion by Judges Oda (*ibid.*, pp. 37-41), Schwebel (*ibid.*, pp. 42-56) and Shahabuddeen (*ibid.*, pp. 57-64).

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NOTES

<sup>1</sup>*I.C.J. Yearbook 1987-1988*, p. 137; see also chaps. VI.A.7 and VIII.3(a) of this *Yearbook*.

<sup>2</sup>United Nations, *Treaty Series*, vol. 11, p. 11.

## Chapter VIII

### DECISIONS OF NATIONAL TRIBUNALS

#### 1. South Africa

*Military service extended to non-white inhabitants of South West Africa by Proclamation 198 of 1980 which amended the South Africa Defence Act 44 of 1957 — Mandate for South West Africa and South Africa — Relationship of international law and municipal law*

SOUTH WEST AFRICA, SUPREME COURT<sup>1</sup>

BINGA v. THE ADMINISTRATOR-GENERAL FOR SOUTH WEST AFRICA AND OTHERS,  
JUDGEMENT OF 22 JUNE 1984<sup>2</sup>

(Berker JP; Mouton and Strydom JJ)

SOUTH AFRICA, SUPREME COURT, APPELLATE DIVISION

BINGA v. THE CABINET FOR SOUTH WEST AFRICA AND OTHERS, JUDGEMENT OF 24  
MARCH 1988<sup>2</sup>

(Rabie ACJ; Corbett, Van Heerden, Hefer and Grosskopf JJA)

**SUMMARY:** *The facts* — In 1980 the State President of the Republic of South Africa, acting under Section 38 of the South West Africa Constitution Act 39 of 1968, issued two proclamations relating to the defence of the Republic of South Africa. By Proclamation 198 of 1980 the South African Defence Act 44 of 1957 was amended and provisions relating to eligibility for military service were extended to include the non-white inhabitants of South West Africa. By Proclamation R131 of 1980 the Administrator-General of South West Africa was made responsible for the registration and enrolment of persons eligible for military service in the South West Africa Territory Force. In October 1977 Mr. Binga received notice of Proclamation 198 and was ordered to report for military service for the South West Africa Territory Force/South African Defence Force at the Port of Walvis Bay.

Mr. Binga made an application to the Court joining the Administrator-General for South West Africa, the South African Minister of Defence and the Exemption Board for the South West Africa Territory Force as defendants. He submitted:

- (i) That the legislative powers of the South African Parliament over the territory of South West Africa were qualified by, and subject to, the terms of the Mandate of South West Africa which had been formulated by the Council of the League of Nations in 1920, and which had been incorporated by statute into South African municipal law;

- (ii) That Proclamation 198 and Proclamation R131 were unlawful because they contravened Article 4 of the Mandate which prohibited use of the mandated territory and its indigenous population for military purposes and the applicant was not therefore liable for military service; and
- (iii) That by issuing the notice relating to military service at the Port of Walvis Bay, an area which was outside the mandated territory of South West Africa, the Administrator-General had exceeded the grant of authority conferred by Proclamation R131 and the notice was therefore unlawful and should be set aside.

Mr. Binga also made an alternative submission that the South African Parliament did not have competence to legislate for South West Africa because the United Nations had unilaterally terminated the Mandate for South West Africa by General Assembly resolution 2145 (XXI) of 21 October 1966 and Security Council resolution 276 (1970) of 30 January 1970 and that, following the advisory opinion of the International Court of Justice in 1971,<sup>3</sup> South Africa's continued presence and administration of the area was both illegal and invalid.

*Held* (unanimously): — The application was dismissed.

*Per* Justice Mouton: (1) The testing of legislation enacted by the South African Parliament or of amendments made to existing legislation, by reference to the terms and provisions of the Mandate for South West Africa, went beyond the scope of the judicial function of the municipal courts in South Africa. Responsibility for the supervision and proper enforcement of the Mandate for South West Africa lay with the international political community acting under the aegis of the United Nations General Assembly. The advisory opinion of the International Court of Justice in 1971 supported this view. The Court would, therefore, be prohibited from examining the validity of Proclamation 198 and Proclamation R131, even though judicial scrutiny was not restricted by Section 59(2) of the Republic of South Africa Constitution Act 31 of 1961 (pp. 469-475).

(2) Although the Supreme Court of South West Africa was no longer a division of the Supreme Court of South Africa, the final appeal from the South West African courts was to the Appellate Division of the Supreme Court of South Africa. The Court would, therefore, remain bound by previous decisions of the Appellate Division relating to the Mandate for South West Africa (p. 474).

(3) The Advisory Opinion of the International Court of Justice in 1971 did not provide authoritative guidance on the question of the termination of the Mandate for South West Africa; judicial statements on the lawfulness of South Africa's continued presence in South West Africa were, therefore, to be regarded as *obiter dicta*. The United Nations was not competent to determine or modify unilaterally the international status of South West Africa. This view was reflected in the Advisory Opinion of the International Court of Justice in 1950<sup>4</sup> and in the various resolutions and deliberations of the United Nations Organization which had sought cooperation from the Republic of South Africa in the final settlement of the South West Africa situation, and which had recognized the continuing authority of the Republic over South West Africa pending such settlement (pp. 475-477).

*Per Justice Strydom:* (1) Internal sovereignty was dependent upon the exercise of exclusive and effective control rather than upon international recognition. Although the international community regarded the Mandate for South West Africa as terminated, the Government of South Africa continued to exercise exclusive and effective control over the territory. The Court was, therefore, satisfied that the Government had internal sovereignty and was competent to legislate for the territory. Obligations incurred by international treaties and the resolutions of international organizations could be distinguished from customary international law in that they required incorporation into municipal law by legislative act before the courts of South Africa would give effect to them. General Assembly resolution 2145 (XXI) and Security Council resolution 276 (1970) had not been incorporated into municipal law and therefore could not affect the rights of individuals in South West Africa. The advisory opinions of the International Court of Justice on the status of South West Africa were also not binding upon South Africa. In cases of conflict between municipal law and international law or international opinion the courts must give effect to municipal law. Proclamations 198 and R131 would therefore be upheld (pp. 477-480).

(2) A finding that the Government of South Africa exercised exclusive and effective control was conclusive with regard to the applicant's contention that the Mandate had been terminated. The Court was not competent to determine whether the Government of South Africa still regarded the territory as falling within its sovereignty and it also made it unnecessary for the Court to determine the validity or existence of the Mandate, or whether the Government exercised *de jure* or *de facto* control in South West Africa (p. 481).

(3) The terms of the Mandate for South West Africa had not been incorporated into the municipal law of South Africa. The South African Parliament enjoyed unlimited legislative power over the territory which was in no way curtailed by the terms of the Mandate. The applicant's contention that the Proclamations were in conflict with superior provisions of municipal law must fail (pp. 482-485).

Mr. Binga appealed to the Appellate Division of the Supreme Court of South Africa. On appeal, he maintained:

- (i) That section 38(1) of the South West Africa Constitution Act 39 of 1968 did not confer powers upon the State President to make laws which conflicted with the Mandate for South West Africa. Proclamation 198, he alleged, was contrary to article 4 of the Mandate and was therefore invalid; and
- (ii) That the applicant could not be called for military service at Walvis Bay because section 1(1) of Proclamation 198 restricted liability for non-whites to military service within the territory of South West Africa.

*Held* (unanimously): — The appeal was dismissed.

(1) Under the terms of section 38(1) of the South West Africa Constitution Act 39 of 1968 as amended by section 1 of the South West Africa Constitution Amendment Act 95 of 1977, the South African Parliament had conferred upon the State President of the Republic of South Africa plenary powers of



legislation in respect of South West Africa which were as wide as those possessed by Parliament itself. Even if it was assumed in the appellant's favour, therefore, that the provisions of the Mandate for South West Africa had been incorporated into municipal law by legislative act, these provisions remained subject to repeal or amendment by the State President acting under section 38(1). It was not to be presumed that Parliament when enacting the South West Africa Constitution Act 39 of 1968 had intended to give effect to international obligations arising under the Mandate for South West Africa. Section 38(1) did not indicate an intention to limit the exercise of power by the State President to that which was in conformity with the terms of the Mandate. It was therefore unnecessary to consider whether Proclamation 198 was contrary to Article 4 of the Mandate (pp. 486-495).

(2) The reference to the territory of South West Africa in Section 1(1) of Proclamation 198 related to the class of non-whites who were now eligible for military service. The words were intended to restrict the effects of Proclamation 198 to the non-white inhabitants of the territory of South West Africa; they were not intended to restrict the performance of military service by this class to the territory of South West Africa. Under section 138 of the Defence Act the Minister of Defence could direct the performance of military service anywhere within or outside the Republic. The notice relating to the performance of military service at the Port of Walvis Bay was therefore valid (pp. 495-499).

[The text of the judgements delivered in the Supreme Court of South West Africa follows.]

MOULTON J: This application was originally brought by Eduard Binga in his capacity as father and natural guardian of his son Erick Binga. Erick has in the meantime attained majority and has been substituted as applicant.

By notice of motion the applicant seeks an order, calling upon the respondents to show cause:

(i) (a) Why the above honourable Court should not declare that the said Erick Binga is not liable for national service in the South West Africa Territory Force/South African Defence Force;

(b) Why the notice dated November 1982, directing the said Erick Binga to render national service at Walvis Bay, should not be set aside as wrongful and unlawful.

The further relief prayed for, as set out in the notice of motion, has fallen away and need not to be mentioned.

The first respondent is the Administrator-General for the Territory of South West Africa. This office was established by order of the State President-in-Council in Proc 180 of 1977 issued under s 38 of the South West Africa Constitution Act 39 of 1968. By Proc 181 of 1977 the Administrator-General was empowered by the said State President to make laws by proclamation in the *Official Gazette of the Territory of South West Africa*, for that territory, and in any such law to repeal or amend any legal provisions, including any Act of Parliament insofar as it relates to or applies in the territory or is connected with the administration thereof or the administration of any matter by any authority therein, save the said s 38.

The second respondent is the Minister of Defence.

The first and second respondents do not oppose this application and abide the Court's decision. The third respondent appeared in opposition.

The notice mentioned in prayer (1)(b) above, to call up the applicant for military service, was directed to him and was given in terms of *Government Notice* AG 149 of 17 October 1980. This *Government Notice* published Proc 198 of 1980 for general information in South West Africa.

Proclamation 198 of 1980, issued by the State President of the Republic of South Africa, extended liability for military service in South West Africa to non-white inhabitants of the territory.

By Proc R131 (of the Republic) the State President of the Republic of South Africa transferred authority to the Administrator-General for the administration of certain provisions of the Defence Act 44 of 1957 in South West Africa.

In exercising this power, the State President acted under the powers vested in him by s 38 of the South West Africa Constitution Act 39 of 1968.

By the Schedule to Proc 131 of 1980, the administration of the provisions of the said Defence Act is to be carried out by the Administrator-General in and in respect of the territory concerning the registration and enrolment of persons who are required to register or enrol in any unit of the citizen force or commando forming part of the South West Africa Territory Force.

Consequently, as foreseen by s 68 of the Defence Act 1957, an Exemption Board for the South West Africa Territory Force was established. This Board is the third respondent herein and, as stated, its authority to call up Erick Binga is challenged.

The applicant states in his founding affidavit that the proclamations passed by the State President of the Republic of South Africa, including No 131 of 1980, themselves purport to be authorized by a statute passed in the Republic, namely s 38 of the South West Africa Constitution Act 39 of 1968. He says that the South African Parliament has no power to make laws for the territory of South West Africa.

Furthermore, as Walvis Bay, where he has been ordered to render service, is not part of the mandated territory of South West Africa and does not fall within the area over which the first respondent purports to exercise authority, the said notice is unlawful.

By virtue of art 22, part 1 (Covenant of the League of Nations) of the Treaty of Peace with Germany signed at Versailles on 28 June 1919, the principle to be applied to territories such as the present South West Africa was "that the well-being and development of such people form a sacred trust of civilization and that securities for the performance of this trust should be embodied in this Government."

This article also specifically provides:

There are territories, such as South West Africa ... which owing to the sparseness of their population, of their small size, of their remoteness from the centres of civilization or their geographical contiguity to the territory of the mandatory, and other circumstances, can best be administered under the laws

of the mandatory as integral portions of its territory, subject to the safeguards above mentioned in the interests of the indigenous population.”

In every case of mandate, the mandatory shall render to the Council an annual report in reference to the territory committed to its charge. The degree of authority, control or administration to be exercised by the mandatory shall, if not previously agreed upon by the members of the League, be explicitly defined in each case by the Council.

A permanent commission shall be constituted to receive and examine the annual reports of the mandatories and to advise the Council on all matters relating to the observance of the mandates.

Thereafter, on 17 December 1920, the Council of the League of Nations formulated the mandate for South West Africa. Thereby a mandate is conferred upon His Britannic Majesty to be exercised by the Government of the Union of South Africa, namely to administer the territory on behalf of the League of Nations in accordance with the following provisions which, in terms of art 22 para 8 of the Covenant of the League of Nations, shall be explicitly defined by the Council of the League of Nations.

The terms were so defined, of which the following are relevant:

*Article 2:* The mandatory shall have full power of administration and legislation over the territory subject to the present mandate as an integral portion of the Union of South Africa, and may apply the laws of the Union of South Africa to the territory, subject to such local modifications as circumstances may require.

*Article 3:* The mandatory shall see that the slave trade is prohibited and that no forced labour is permitted, except for essential public works and services, and then only for adequate remuneration.

The mandatory shall also see that the traffic in arms and ammunition is controlled in accordance with principles analogous to those laid down in the Convention relating to the Control of Arms Traffic, signed on 10 September 1919, or in any convention amending the same.

*Article 4:* The military training of the natives, otherwise than for purposes of internal police and local defence of the territory, shall be prohibited. Furthermore, no military or naval bases shall be established or fortifications erected in the territory.

*Article 5:* Subject to the provisions of any local law for the maintenance of public order and public morals, the mandatory shall ensure in the territory freedom of conscience and the free exercise of all forms of worship, and shall allow all missionaries, nationals of any State member of the League of Nations, to enter into, travel and reside in the territory for the purpose of prosecuting their calling.

*Article 6* requires annual reports to be made to the satisfaction of the Council of the League of Nations.

Mr. Farlam, for applicant, says that:

(1) The expression “securities for the performance of this trust should be embodied in this Covenant” and “administered ... subject to the safeguards above mentioned in the interests of the indigenous population ...” in art 22 of the Covenant of the League of Nations;

(2) The following terms formulated in the mandate for South West Africa, viz.

The mandatory shall have full power of administration and legislation over the territory subject to the present mandate ... The mandatory shall promote to the utmost the material and moral well-being and the social progress of the inhabitants of the territory subject to the present mandate.”

indicate that South Africa’s wide legislative powers are always qualified by and subject to the terms of the mandate.

(3) Furthermore, so the argument runs, the South African Parliament has acknowledged that it was bound by the terms of the mandate in the following instances:

(3) (1) The Treaty of Peace and South West Africa Mandate Act 49 of 1919 was issued

“for carrying into effect, insofar as concerns the Union of South Africa, the Treaty of Peace between His Majesty the King and certain other powers; and for carrying into effect any mandate issued in pursuance of the Treaty to the Union of South Africa with reference to the territory of South West Africa ...”

See also Act 32 of 1921 (s 2).

(3) (2) The preamble to the South West Africa Constitution Act 42 of 1925 *inter alia* provides that

the Government of the Union of South Africa possesses full power of administration and legislation over the territory ... as an integral portion of the Union but *subject to the terms of the said mandate* ...” and

“... it is expedient that further authority should be conferred upon the Government of the Union in respect of *giving effect to the said mandate*, in that the Government of the Union is, under the said mandate, to promote to the utmost the material and moral well-being and the social progress of the inhabitants of the territory”;

and for the constitution of a legislative body

“to make laws therefor, *subject always to the provisions* of the said mandate ...”

(4) In further support of his argument, Mr. *Farlam* refers to *R v Offen* 1934 SWA 73 at 78, where VAN DEN HEEVER J said the<sup>3</sup> “full powers of legislation which the Governor-General and his delegate, the Administrator, enjoyed by *virtue of the mandate* and the provisions of Act 49 of 1919 ...”

In this connection reference was also made to *Winter v Minister of Defence and Others*<sup>6</sup> 1940 AD 194 at 197, *R v Christian*<sup>7</sup> 1924 AD 101 at 112, *Verein für Schutzgebietsanleihen EV v Conradie NO* 1937 AD 113 at 133, 148 and 150.<sup>8</sup>

The applicant submitted that the “Grundnorm” or composite constitution of South Africa’s legislative competence in respect of South West Africa were the terms of the mandate, and those statutes which received the mandate into SA municipal law as set out above.

Identical submissions were considered by the Appellate Division, consisting of 11 Judges of Appeal, in *S v Tuhadeleni and Others* 1969 (1) SA 153 (A).<sup>9</sup>

In that case the question of law reserved was whether insofar as the provisions of s 59 (2) of the Republic of South Africa Constitution Act 31 of 1961 may purport to deprive the Courts of their jurisdiction to enquire into or pronounce upon the validity of the Terrorism Act 83 of 1967 and s 5 of the General Law Amendment Act 62 of 1966, they are valid and binding in South West Africa.

In dealing with this subsection, STEYN CJ also dealt with the question whether the mandate was a source for a restrictive construction of the subsection. It was put thus at 171A:<sup>10</sup>

“The contention here is that, by implication arising from the terms of the mandate, the rights conferred by it upon the inhabitants of the territory are entrenched against violation by Act of Parliament; that Parliament has recognized this limitation upon its powers; that the Courts are of necessity the guardians of this entrenchment; that they have accordingly, under the fundamental law of the territory, been vested with jurisdiction to declare invalid any Act passed by Parliament which offends against the mandate, and that Parliament could not have intended to annul this jurisdiction when it enacted s 59 (2).”

The learned Chief Justice dealt with the matter on the basis that the mandate still exists and decided (at 173F) that the mandate did not contemplate

“any such unexpressed limitation upon the powers of Parliament as is contended for. It would rather seem that the parties concerned were content to leave enforcement of the obligations under the mandate to procedures and restraints available in the international field. It was presumably to that intent that provision was made in art 6 for annual reports by the mandatory to the satisfaction of the Council of the League, indicating, *inter alia*, the measures taken to carry out the obligations assumed under arts 2, 3, 4 and 5.”<sup>11</sup>

In the opinion of the Court, the testing of legislation against the terms of the mandate is not in conformity with its judicial function.

In the Court’s opinion “the constitutional impediment urged by counsel for appellants does not exist”.

In my opinion support for the above view that one must look to the international political field for the enforcement of obligations under the mandate is to be found in the judgment of the International Court of Justice of 21 June 1971.

Paragraph 102, dealing with Resolution 2145 and the 1966 judgments, reads:

“On the other hand, the Court declared that: ... ‘any divergences of view concerning the conduct of a mandate were regarded as being matters that had their place in the political field, the settlement of which lay between the

mandatory and the competent organs of the League'. To deny to a political organ of the United Nations which is a successor of the League in this respect the right to act, on the argument that it lacks competence to render what is described as a judicial decision, would not only be inconsistent but would amount to a complete denial of the remedies available against fundamental breaches of an international undertaking."<sup>12</sup>

See also para 103:

"... it was found that the function to call for the due execution of the relevant provisions of the mandate instruments appertained to the League acting as an entity through its appropriate organs. The right of the League 'in the pursuit of its collective, institutional activity, to require the due performance of the mandate in discharge of the sacred trust', was specifically recognized. (Ibid. at 29.) Having regard to this finding, the United Nations as a successor to the League, acting through its competent organs, must be seen above all as the supervisory institution, competent to pronounce in that capacity, on the conduct of the mandatory with respect to its constitutional obligations, and competent to act accordingly."<sup>13</sup>

*Dugard*, in his work on *The South West Africa/Namibia Dispute*, analysed the opinion and at 483 writes:

"The Court then turns to Resolution 2145 (xxi). It holds that the mandate was an agreement in the nature of a treaty"

(in this respect, says the author in a footnote, it relies on the finding of the Court in the 1962 South West Africa proceedings: *1962 ICJ Reports* 330)

"which rendered it liable to termination in the event of a fundamental breach. The principle that treaties may be terminated in this way is a customary rule of international law (now codified in art 60(3) of the Vienna Convention on the Law of Treaties) which was to be considered as impliedly included in the mandates system."<sup>14</sup>

The writer continues at 486:

"The Court finds that the General Assembly, as political successor to the Council for the League, was the appropriate body to decide whether South Africa had violated her obligations under the mandate. This conclusion follows logically from the 1966 decision of the Court to the effect that it was for a political and not a legal body to decide whether the mandate had been violated."

The author says this at 407:

"To this moment there is no judicial finding in existence to the effect that the South African administration of the territory violates the provisions of the mandate."

Looking back into history, one finds that Lord Balfour said in the League Council that

“the machinery of the Mandates Commission, the machinery of the Council of the League of Nations, the machinery of the Assembly of the League are all contrived to make it quite impossible that any transaction of general interest should take place except in full glare of the noonday sun of public opinion”. To the same effect is Lord Lugard, member of the Permanent Mandates Commission. See Cockram *South West African Mandate* at 344-345.

It was argued on behalf of applicant that since this Court is no longer a Division of the Supreme Court of South Africa, it is not bound by the Appeal Court’s decision in the *Tuhadeleni* case as it was pronounced under the old arrangement. Before the change brought about by Proc 222 of 1981, the then Division of the Supreme Court having judicial authority in the territory was bound by the decisions of the said Appellate Division. In terms of s 14(1)(b) of Proc 222 of 1981, the Appellate Division of the Supreme Court of South Africa is still the Court of Appeal in the matters therein mentioned.

As such this Court will be bound by any decision of the Appellate Division which is relevant to the issues on appeal.

The argument was that the Appellate Division now forms part of the South West African judicial system and only judgements of the Appellate Division given under that system should be followed. That is exactly what the Appellate Division did in *Tuhadeleni*’s case, when it came to its decision against the background of the mandate, South African legislation pertaining to South West Africa, and decided cases.

It is therefore my opinion that this Court is bound by the decision in *S v Tuhadeleni* 1969 (1) SA 153 (A).<sup>15</sup>

The Defence Act 44 of 1957 was made applicable to South West Africa by s 153 thereof.

In terms of s 3(2) any member of the SA Defence Force may at all times be employed on service in defence of the Republic.

As set out above by Proc 198 of 1980 of the State President of the Republic of South Africa, the Defence Act was, for purposes of its application in South West Africa, amended to include non-whites as being liable for military service.

The question is whether this amendment is an Act passed by Parliament as envisaged in s 59(2) of Act 32 of 1961.

Obviously it was not passed by Parliament, but is the result of the powers vested in the State President by s 38 of the South West Africa Constitution Act 39 of 1968. It is an amendment of an Act of Parliament by virtue of powers granted by an Act of Parliament. Such an enactment is not covered by the provisions of s 59(2), which leaves it open for scrutiny by the Court. Applicant says this amendment militates against the terms of the mandate and as such is invalid. It has already been pointed out that the testing of legislation against the provisions of the mandate does not fall within this Court’s function.

It follows that the provisions of the Defence Act 44 of 1957, as applied to South West Africa and as amended by Proc 198 of 1980, cannot be tested by this Court against the terms of the mandate for South West Africa.

This, however, does not end the matter, because it was also submitted on behalf of applicant that the mandate conferred by the Council of the League of Nations was terminated by resolution 2145 of the General Assembly of 27 October 1966, duly endorsed by the Security Council in its resolution 276 (1970).

It is further argued that the advisory opinion of the International Court of Justice, of 21 June 1971, was to the effect that the mandate had been terminated by 6A resolution 2145 (XXI), as endorsed by the Security Council in its resolution 276 (1970), and that consequently all acts by South Africa in South West Africa thereafter are illegal and invalid.

In considering the above-mentioned opinion, it must be borne in mind that the Court's opinion was sought on the question what the legal consequences for States were of the continued presence of South Africa in South West Africa, notwithstanding Security Council resolution 276 (1970).

In discussing the legal effects of this opinion, *Dugard* (at 487) observes that

“resolutions of the General Assembly are recommendatory and not legally binding, except in certain exceptional cases”

and, as far as resolution 276 (1970) is concerned:

“in the absence of a finding that the situation in Namibia threatens international peace, the Resolution is only recommendatory: South Africa's legal obligation to withdraw from South West Africa arises from resolution 2145 (xxi) (see note 65 at 489) and States are only obliged to apply the customary rules of non-recognition to South West Africa; resolution 276 may, however, authorize States to (take) up a position in their legal relationships with South Africa which would otherwise have been in conflict with rights possessed by that country.” (1971 *ICJ Reports* at 137.)

This judgement is no authority on the question of the revocation of the mandate and, insofar as it deals with the questions of invalidity and illegality of acts by South Africa, any findings thereon must be considered *obiter*.

The question of the revocation of the mandate has apparently never been submitted to the International Court of Justice for decision.

There was no provision for such revocation under the League of Nations and when that League came to an end, the fate of the mandated territories was a matter for reciprocal agreement. The Charter of the United Nations and its trusteeship system also did not solve the problem. See *Dugard* at 401-408.

*Dugard* (at 404) is of the opinion that the question whether the United Nations is competent, under prevailing provisions of the Charter, to determine and modify, unilaterally, the international status of the territory, must be answered in the negative.

“The position is that none of the opinions of the Court, nor its judgements of 1962 and 1966, give a clear answer to the question of termination of the South West Africa mandate, let alone to the question of United Nations power to terminate or revoke the mandate. As mentioned above, even the very existence of the mandate has been left undecided since the July 1966 decision.”



At 407 this author continues:

The argument is often advanced that the numerous resolutions of the General Assembly on the mandated territory must be considered as authoritative findings. No matter how anxious one may be to read more into the Court's opinions and judgments, the truth is that nothing can be found anywhere to support the supposition that the General Assembly has the power to judge (and condemn) the mandatory's administration of the territory. Even if one accepts the General Assembly's power to discuss the mandate and to make recommendations in terms of art 10 of the Charter, such power does not permit the General Assembly to pass binding decisions on the matter. It would also be wrong, as was indicated above, to consider that the General Assembly's resolutions on South West Africa have acquired legislative force of a supra-national kind. The 'declaration' of 27 October 1966 that South Africa 'has failed to fulfil its obligation of the mandated territory' is based on very doubtful — if on any — authority."

The advisory opinion of the International Court of Justice of 11 July 1950 concludes that

"competence to determine and modify the international status of South West Africa rests with the Union of South Africa acting with the consent of the United Nations". (1950 Opinion at 143.)<sup>16</sup>

This in effect means that the initiative to alter the mandate lay with South Africa, and not with the United Nations, which could not, on its own, alter the status of the territory. See *Cockram* at 356.

After the Security Council passed its resolution in January 1970, the British representative explained the British abstention from voting on the ground that

"the adoption of resolutions which are ineffective or inoperable cannot serve the interests of the people of the territory or of the United Nations".

The British Foreign Secretary, Sir Alec Douglas-Home, told the House of Commons while

"the legal status of South West Africa is still in doubt, and pending clarification on the legal position, we acknowledge that the South African Government continues in practice to exercise *de facto* control over South Africa".

This approach is also increasingly manifest in the subsequent deliberations and resolutions of the United Nations Organization itself.

Thus, on 30 September 1978, by its resolution 435 (1978), the Security Council, taking note, among others, of the relevant communications from the Government of South Africa, calls upon South Africa to cooperate with the Secretary-General in the implementation of this resolution and of the proposal set out in document S/12636 of 10 April 1978.

In a supplementary report by the Secretary-General to the Security Council on 2 December 1978 (S12950) it appears that he was anxious to obtain, *inter alia*, clarification from South Africa on South Africa's willingness to cooperate in the implementation of resolution 435 (1978) and the continuation of the exer-

cise of South Africa's authority in Namibia pending full implementation of the proposal for settlement.

The Secretary-General in this document reports that approval of the SA Government was obtained on, *inter alia*, the following points:

- South Africa reiterates its willingness to cooperate in the implementation of resolution 435 (1978).
- South Africa reaffirms that it will retain authority in Namibia pending the implementation of the proposal.

This to my mind demonstrates clearly that the Security Council of the United Nations deems the cooperation of South Africa necessary for a settlement of the South West African situation and is anxious for South Africa to retain its authority in the territory pending a settlement.

It is common knowledge that Security Council resolution 435 (1978), supplemented by document S12950 among others, is still today the basis of negotiations between the United Nations and the Republic of South Africa for a South West African settlement.

I am under these circumstances therefore of the opinion that the Republic of South Africa acted within the bounds of its authority over the Territory of South West Africa when the State President issued Proc 131 of 1980 and Proc 198 of 1980.

The application therefore is dismissed with costs, which costs include the costs of two counsel.

STRYDOM J: The applicant attacks the validity of Proc 198 of 1980 as published in this territory by Proc AG 149 of 17 October 1980. The said proclamations have the effect of applying the Defence Act 44 of 1957 to all the indigenous people of this territory. Until the publication of such proclamations the said Act was only applicable to the white people of the territory.

Applicant, who, according to the documents filed is a member of SWAPO and who sympathizes with their cause, was called up for national service. In order to escape from the predicament in which he suddenly found himself, application was made to the third respondent in order to obtain exemption from military service. This application was turned down, whereupon the present motion proceedings were instituted.

There was no appearance on behalf of the first and second respondents but the third respondent was represented by Mr. *Roux*, assisted by Mr. *Burger*.

Mr. *Farlam*, assisted by Mr. *Gauntlett* on behalf of the applicant, launched a two-pronged attack on the validity of the said proclamations. Firstly it was contended by him that as the mandate, being part of the "Grundnorm" by which the South African Government derives its competency to administer and hence to legislate for the territory, was terminated, the Government, being thereafter only a *de facto* Government, could not validly legislate for the territory.

Secondly, and if the mandate was still in existence, Mr. *Farlam* argued that the mandate is part of the municipal law of the land and that all legislation applicable to the territory must therefore be subject to the provisions set out in

the mandate. The said proclamations whereby Act 44 of 1957 was extended to the indigenous people of the territory are in conflict with art 4 of the mandate and therefore invalid.

As far as his first line of attack is concerned, namely that the mandate was terminated, Mr. *Farlam* relied on General Assembly resolution 2145 (XXI) as later confirmed by Security Council resolution 276 (1970). Among writers of international law there is great divergence of opinion as to whether such termination of the mandate is valid or not. Some writers seem to accept the situation without commenting on the legality or otherwise thereof. (See, e.g., Booyesen *Volkereg: 'n Inleiding* at 153 *et seq.*; Wiechers *Staatsreg* 3rd ed. at 450 *et seq.*; Dugard *The South West Africa/Namibia Dispute*; Brownlie *Principles of Public International Law* at 466 *et seq.*; Starke *Introduction to International Law* 8th ed.; Akehurst *A Modern Introduction to International Law* 3rd ed. and Solomon Slonim *South West Africa and the United Nations: An International Mandate in Dispute* at 321 footnote 38 and at 338 *et seq.*)

Whatever the position may be, I think that as far as the international community is concerned, it must be accepted that in that sphere the mandate is regarded as being terminated. (See Booyesen (op. cit. at 158).)

That, however, is not the end of the matter. It does not necessarily follow that because externally the South African Government's presence in the territory is regarded as illegal (although the Government is recognized as the *de facto* administrator of the territory by certain states, e.g., America and Britain, see Booyesen (op. cit. at 171)), that internally municipal Courts will give effect to that specific finding. Internal sovereignty, in the sense of the exercising of exclusive and effective control over a particular territory, is in my view not dependent on the recognition by other States. If we, sitting as a municipal Court, are satisfied that the control by the South African Government over the territory is effective and exclusive, we are, in my opinion, obliged to give effect to the Government's will as, *inter alia*, expressed in its legislation, irrespective of what the position may be as far as the international community is concerned. (See *Madzimbamuto v Lardner-Burke*<sup>17</sup> *NO and Another NO* 1968 (2) SA 284 (RAD) at 309ff; Booyesen (op. cit. at 161).)

This, in my opinion, stems from the fact that in South Africa, as in British and other Commonwealth Courts, municipal Courts are obliged, in cases of conflict between municipal law and international law, and for that matter international opinion, to give effect to the former. (See Brownlie (op. cit.) at 45ff; Starke (op. cit. at 89ff) and *Nduli and*<sup>16</sup> *Another v Minister of Justice and Others* 1978 (1) SA 893 (A) at 906.)

Although non-recognition will have consequences on the international plane, this will, however, not directly influence the internal or domestic situation. (See generally, e.g., Booyesen (op. cit. at 167ff); Akehurst (op. cit. at 60ff) and Starke (op. cit. at 149ff).)

Sitting as a municipal Court it is in my opinion therefore necessary to determine to what extent the problem which we are facing is to be determined by the dictates of international law, as was argued before us, or, after all is said and done, whether it falls to be decided purely and simply according to the law of the land. This, again, will in my opinion depend on whether this Court, sitting as

a municipal Court, is bound by decisions and resolutions of the United Nations and other international organizations *mero motu* and therefore obliged to give effect thereto.

Although it was accepted by RUMPF CJ in *Nduli and Another v Minister of Justice and Others* (*supra* at 906) that the rules of customary international law are to be regarded as part of our law “as are either universally recognized or have received the assent of this country ...”, it follows that decisions of the United Nations, of the nature here under discussion, are not part of customary international law. This is perhaps to state the obvious but is necessary because certain decisions of that body may be a source of international law. (*Vide Starke* (op. cit. at 59-61).)

Obligations incurred by international treaty and resolutions by international organizations such as the United Nations stand on a different footing from international customary law and, generally speaking, a South African Court, and for that matter a Court of this territory, will only give effect thereto if such treaty or resolution was incorporated by legislative act into the laws of the land. In *Pan American World Airways Inc. v SA Fire and Accident Ins Co Ltd* 1965 (3) SA 150 (A) at 161, STEYN CJ said the following:

“... the conclusion of a treaty is ... an executive and not a legislative act. As a general rule the provisions of an international instrument so concluded are not embodied in our municipal law except by legislative process. In the absence of any enactment giving their relevant provisions the force of law, they cannot affect the rights of the subject.”<sup>19</sup> (See also *Olivier v Wessels* 1904 TS 235 at 241; *Ex parte Savage and Others* 1914 CPD 827 at 830; *L & H Policansky v Minister of Agriculture* 1946 CPD 860 at 865; *Maluleke v Minister of Internal Affairs* 1981 (1) SA 707 (BSC) at 712F-G and *Booyesen* (op. cit. at 309).)

General Assembly resolution 2145 (XXI) and Security Council resolution 276 (1970), confirming the former, never became part of our law and can therefore not affect the rights, one way or another, of individuals in this territory. Neither is this Court bound by any of the advisory opinions expressed by the International Court of Justice.

That does not mean that this Court, sitting as a municipal Court, is ignoring the opinion of the international community but such opinion should at least prompt the Court to investigate the internal situation. However, once the Court has come to the conclusion that the South African Government is in effective control of the Territory, that is the end of the matter. (See *R v Ndhlovu and Others* 1968 (4) SA 515 (RAD) at 522.)<sup>20</sup>

As far as the internal situation is concerned the position is simply that the Government of South Africa is the only administrator and legislator for this territory. No rival to its authority exists and Mr. *Farlam* was not so bold as to suggest that such authority was in any way challenged. Nor can it be said that the role as a serious challenger is being fulfilled by the United Nations Council for South West Africa established by the General Assembly on 19 May 1967. (*Vide* H. Booyesen and G. E. J. Stephan “Decree No 1 of the United Nations Council for South West Africa” 1975 *SAYIL* 63ff.)

Although the Government of South Africa, because of the nature of the mandate conferred upon it, did not exercise full sovereign power over the territory, the Appellate Division in *R v Christian* 1924 AD<sup>21</sup> 101 came to the conclusion that the Government has internal sovereignty over the inhabitants of the territory. (See also Wiechers *Staatsreg* 3rd ed. at 452.)

In *S v Tuhadeleni and Others* 1969 (1) SA 153 (A) the Appellate<sup>22</sup> Division “placed beyond all doubt the unlimited supremacy of the South African Parliament over South West Africa” (*Dugard* (op. cit. at 423)). Commenting on *S v Tuhadeleni and Others* (*supra*), *Wiechers* (op. cit. at 35) states as follows:

“Alhoewel die Hof nie uitdruklik beslis dat die Parlement die hoogste Wetgewer vir Suidwes-Afrika is nie, moet die gevolgtrekking noodwendig volg. Dit beteken dat die ou vraag na die staatsregtelike soewereiniteit oor Suidwes-Afrika uiteindelik in die guns van die Suid-Afrikaanse Parlement beslis is.”

[“Although the Court did not expressly decide that [the South African] Parliament is the supreme legislative body for South West Africa, that conclusion necessarily follows [from its decision]. This means that the old question of the constitutional sovereignty over South West Africa has eventually been resolved in favour of the South African Parliament.”]

Although a measure of change was brought about by the amendment of s 38 of the South West Africa Constitution Act 39 of 1968, by the granting of extensive powers to the State President, this, in my opinion, did not detract in any way from South Africa’s effective and exclusive control over the territory, and this is so irrespective of whether the mandate still exists or not. In fact Mr. *Farlam* conceded that South Africa is the *de facto* Government of the territory.

I am furthermore of the opinion that once this Court has come to the conclusion that the South African Government is exercising effective and exclusive control over this territory it would not be competent for this Court, sitting as a municipal Court, to determine whether that Government regards this territory as still falling under its sovereignty or not, as that is something which only the South African Government is competent to decide. As there is ample evidence of this fact we are precluded from deciding otherwise notwithstanding the resolutions terminating the mandate and the acceptance thereof by the international community.<sup>23</sup> (See *Post Office v Estuary Radio* [1967] 3 All ER 663 at 682 and *R v Jiouvanni* 1933 SWA 26 at 29.)

I am further of the opinion that the above conclusion, namely that the Government of South Africa has internal sovereignty over the territory, makes it unnecessary and of no practical value for this Court to determine whether such Government is exercising its authority over the territory as a *de facto* or a *de jure* Government.

Sitting as a municipal Court and having come to the conclusion that the South African Government has internal sovereignty over the territory, it does, in my opinion, not take the matter any further to know whether the South African Government itself regards the mandate as still valid and in existence or not. A certificate by the Government could of course have eased the Court’s task in that it would have been a complete answer to the one or the other of Mr. *Farlam*’s

arguments, depending on the attitude expressed therein. (See *Booyesen* (op. cit. at 160ff); *Brownlee* (op. cit. at 54); *Akehrst* (op. cit. at 68); *Starke* (op. cit. at 170ff) and *S v Devoy* 1971 (3) SA 899 (A) at 906E-907A.)<sup>24</sup>

However, because of my findings above, such a course need not be followed.

In my opinion, and for the reasons set out above, it follows that Mr. *Farlam*'s first contention, namely that because of the termination of the mandate by the United Nations the South African Government cannot validly legislate for this territory, must fail.

This brings me to counsel's second line of attack, namely that the mandate, if in existence, is part of our law and the said proclamations, being in conflict with art 4 thereof, are therefore invalid.

To succeed on this basis Mr. *Farlam* had to overcome the hurdle of *S v Tuhadeleni and Others* 1969 (1) SA 153 (A).<sup>25</sup>

In this respect he argued firstly that *Tuhadeleni*'s case is distinguishable; secondly, and in the alternative, that the judgement was delivered *per incuriam* and thirdly, further in the alternative, that the decision is not binding upon this Court and that it is not to be followed.

The first and second arguments set out above concern the application of s 59(2) of the Constitution Act 32 of 1961. In *Tuhadeleni*'s case the Appellate Division held that s 59(2) precluded the Court from pronouncing upon the validity of an Act of Parliament, in this case the Terrorism Act 83 of 1967, which was applicable on the territory.

Section 59(2) of Act 32 of 1961 provides as follows:

“No Court of law shall be competent to enquire into or to pronounce upon the validity of any Act passed by Parliament other than an Act which repeals or amends or purports to repeal or amend the provisions of ss 108 or 118.”

Counsel then argued that the proclamations with which we are concerned are not Acts of Parliament, are therefore not protected by s 59(2) and, that being the case, this Court is not precluded from pronouncing upon the validity, or otherwise, thereof.

In the alternative Mr. *Farlam* argued that in *Tuhadeleni*'s case the Appellate Division was plainly unaware or forgetful of the fact that the predecessor to s 59(2), namely s 2 of the South Africa Act Amendment Act 9 of 1956, did not apply to South West Africa. The significance of this antecedent, so it is argued, is patent, namely that, in enacting Act 9 of 1956 — which gave force of law to the Separate Representation of Voters Act 46 of 1951 — Parliament plainly never intended to legislate for the territory. If that is so, then in the absence of any contrary indication it must follow that in re-enacting s 2 of Act 9 of 1956 in virtually identical terms in s 59(2) of Act 32 of 1961, Parliament's intention remained consistent.

It was submitted by counsel that, had this important consideration not been lost from mind, the Appellate Division's finding in regard to the applicability of s 59(2) to Acts of Parliament in South West Africa would have been otherwise.

Because of the conclusion to which I have come I find it unnecessary to decide these points and will, for purposes of my decision, accept the correctness of counsel's argument.

In *S v Tuhadeleni* (*supra*) STEYN CJ, after considering the ambit of s 59(2) of Act 32 of 1961, came to the conclusion that the said section precluded the Court from pronouncing upon the validity of the Terrorism Act 83 of 1967. That was, however, not the end of the matter. At 171A-B the following was stated:

“The source of other indications advanced for a restrictive construction of the subsection is the mandate. The contention here is that, by implication arising from the terms of the mandate, the rights conferred by it upon the inhabitants of the territory are entrenched against violation by Act of Parliament; that Parliament has recognized this limitation upon its powers; that the Courts are of necessity the guardians of this entrenchment; that they have accordingly, under the fundamental law of the territory, been vested with jurisdiction to declare invalid any Act passed by Parliament which offends against the mandate, and that Parliament could not have intended to annul this jurisdiction when it enacted s 59(2).”<sup>26</sup>

Considering the ambit of such entrenchment, if in existence, STEYN CJ concluded as follows:

“It would amount to a complete and unconditional limitation upon the power of Parliament, present or future and immutable, except with the consent of the Council of the League of Nations under art 7 of the mandate, to legislate in conflict with the terms of the mandate. Because it would be a limitation which Parliament could not remove without such consent, s 59(2) would, to the extent to which it purports to derogate from that limitation, be of no force or effect; and that, indeed, is the alternative submission made on behalf of the appellants.”

(At 171D-E.)<sup>27</sup>

After coming to the conclusion that the mandate did not contemplate “any such unexpressed limitation upon the powers of Parliament as is contended for” (at 173G), STEYN CJ stated the following at 173H:<sup>28</sup>

“I may add that had a further curb been contemplated in the form of an absolute restraint, mentioned above, upon the legislative powers of Parliament, the mandatory would have been bound to introduce such a curb into its Constitution in order to bring it into operation. Even if it had been explicitly provided for in the mandate, that would not have made it part of the law of the land enforceable by our Courts. (*Pan American World Airways Incorporated v SA Fire and Accident Insurance Co Ltd* 1965 (3) SA 150 (A) at 161.)”<sup>29</sup>

In coming to the conclusion that the Terrorism Act 83 of 1967 is valid also in South West Africa, STEYN CJ not only considered the effect of s 59(2) of Act 32 of 1961 in respect of enactments of Parliament which are also applicable to South West Africa, but also whether Parliament's power to legislate for South West Africa is subject to and limited by the terms of the mandate so that an enactment which is in conflict with such terms is not saved by s 59(2).

The decision of the Court on this latter aspect is not *obiter*, as was argued by Mr. *Farlam*, but was given by the Court on submissions made by the appellants in that case, and which, if they were correct, would have had the effect of the appellants succeeding notwithstanding the Court's previous finding on s 59(2).

I have therefore come to the conclusion that even if applicant is correct in saying that *Tuhadeleni*'s case can be distinguished from this case to the extent argued by counsel and accepted by me or that the Court reached its conclusion on s 59(2) *per incuriam*, it does not really assist the applicant because *Tuhadeleni*'s case also decided that the terms of the mandate are not part of our municipal law and that Parliament's power to legislate for South West Africa is not in any way limited by such terms, which, on counsel's second submission, is exactly the point which we must decide in this case.

All that then remains is counsel's final contention, namely that we, sitting as the High Court of South West Africa, are no longer bound by decisions of the Appellate Division of the Supreme Court of South Africa.

It was argued by counsel that the *Tuhadeleni* case was a judgement of the Appellate Division of South Africa at the time when the South West Africa Division was still a constituent part of the Supreme Court of South Africa. This, however, is no longer the case as the Supreme Court of South West Africa has been constituted a separate Court which is no longer part of the South African judicial structure. (*Vide* Proc 222 of 1981.) Although in terms of s 14(1)(b) of the said proclamation the Appellate Division remains as Appeal Court, it now forms part of the South West African judicial system and is the Appellate Division of South West Africa.

We were referred by counsel to cases such as *R v Masuka and Others* 1965 (2) SA 40 (R); *S v Gandu* 1981 (1) SA 997 (Tk) and *Smith v Attorney-General, Bophuthatswana* 1984 (1) SA 196 (BSC). In those specific instances the various Judges held that they were no longer bound by decisions of the Appellate Division of South Africa. All those cases have one factor in common, which is not present in this particular case, and that is that the Appellate Division of South Africa is no longer their Court of Appeal.

Although our judicial structure has to a certain extent undergone a change, such change is more apparent than real. The final say in respect of appeals does not rest with us but is still in the hands of the Appellate Division of South Africa. The common law in this territory is still the Roman Dutch law which is the common law of the Republic of South Africa. (See s 1 (1) of Proc 21 of 1919 and *R v Goseb* 1956 (2) SA 696 (SWA). That decision was given at a time when the Court was still the High Court of South West Africa.) A great part of our statute law originated in the Republic or was South African statute law which was made applicable to the territory. It further follows that our statute law is to be interpreted against the background of our common law which is, as stated above, the same as that of the Republic of South Africa. (See *Estate Wege v Strauss* 1932 AD 76 at 80.) In *S v Moloto* 1980 (3) SA 1081 (BSC), which was decided after the independence of Bophuthatswana but when the Appellate Division of South Africa was still that State's Appeal Court, the following was said by HIEMSTRA CJ at 1084C-E:



“The State contended that, sitting in an independent country, I am not bound to post-independence Appellate Division decisions. It is, however, not disputed that an appeal lies from this Court to the South African Appellate Division. That is the effect of reg 14(1) of Proc R76 of 1977 of the Republic of South Africa, continued after independence by s 91(a) of the Constitution Act of Bophuthatswana. The South African Appellate Division is to this country what the Judicial Committee of the Privy Council up to 1950 was to the Union of South Africa. There is no question that South African Courts, including the Appellate Division, considered themselves bound to Privy Council decisions, at least on Roman Dutch law. (See, *inter alia*, R S Welsh in 1950 *SALJ* at 227.) In any event it stands to reason that no court can apply a law different from that which will in the same case be applied by its Court of appeal if there should be an appeal.”

I respectfully agree with this statement and would imagine that what was said therein in respect of post-independence decisions of the Appeal Court would similarly apply to decisions of that Court prior to independence.

For the reasons set out above we are not in the same position as the Appellate Division was after appeals to the Privy Council were abolished. (See also the cases referred to above.) In this respect, CENTLIVRES CJ stated the following in *John Bell Co Ltd v Esselen* 1954 (1) SA 147 (A) at 154:

“As this Court is now the final Court in respect of appeals from Courts in the Union, it must naturally have the power, which the Privy Council had and which it does not now have in respect of those appeals, of departing from an erroneous decision of the Privy Council.”

In *Acting Master, High Court v Estate Mehta* 1957 (3) SA 727 (SR) MORTON J declined an invitation to differ from the Appellate Division of South Africa even though such Division was no longer his Court of Appeal and states that all decisions by the South African Appellate Division were still binding “until dis-sented from or overruled by the Federal Supreme Court or by the Privy Council or have been avoided by legislation”. (See at 732F-733A.)

In a subsequent appeal to the Federal Supreme Court, that Court claimed for itself the same right as the Appellate Division in *John Bell & Co Ltd v Esselen* (*supra*), namely the right to depart from erroneous decisions by its erstwhile Court of Appeal. (See *Estate Mehta v Acting Master, High Court* 1958 (4) SA 252 (FC).)

As to the basis on which this right was exercised, the following was stated at 255F:

“And this Court, as the successor to the Appellate Division in the system of appeals, should also exercise it. As far as this Court is concerned it would not, in departing from a decision of the Appellate Division, be differing from a decision of a Court which was at one time superior to it.”

For the reasons set out above I have come to the conclusion that we are bound by decisions of the Appellate Division and consequently that we are bound by that Court’s decision in the *Tuhadeleni* case.

It follows, therefore, that, as the terms of the mandate are not part of our municipal law, it cannot be said that legislation which is in conflict therewith must give way thereto.

It further follows that Proc 198 of 1980 and Proc AG149 of 1980, even if they are repugnant to the mandate, which, in the circumstances, it is not necessary to decide, are valid.

As we are bound by *Tuhadeleni*'s case, no useful purpose will be served to discuss further the various cases and legislation to which we were referred by Mr. *Farlam* as authority for his submission that the mandate was incorporated in our municipal law. Most, if not all, of those cases and legislation were discussed by STEYN CJ in giving the Court's decision. As far as legislation subsequent to the decision in *Tuhadeleni*'s case is concerned, this has not in any way changed the situation and neither was it submitted that that was the case.

For the reasons set out above I agree with the order made herein by my Brother MOUTON.

BERKER JP concurred.

[Report: 1984 (3) SA 949.]

[The text of the judgement of the Appellate Division of the Supreme Court of South Africa follows.]

Van Heerden, JA: Section 37(1) of the South West Africa Constitution Act 39 of 1968 provides that nothing in the Act contained shall be construed as in any manner abolishing, diminishing or derogating

“from those full powers of administration and legislation over the territory as an integral portion of the Republic which have hitherto been vested in the Republic.”

In terms of s 37(2) those full powers of administration are expressly reserved to the State President who may exercise them himself or delegate them to be exercised by the Administrator-General. Section 38(1) reads as follows:

“(1) The State President may by proclamation in the *Gazette* make laws for the territory, with a view to the eventual attainment of independence by the said territory, the administration of Walvis Bay and the regulation of any other matter and may in any such law —

(a) repeal or amend any legal provision, including this Act, except for the provisions of ss (6) and (7) of this section, and any other Act of Parliament insofar as it relates to or applies in the territory or is connected with the administration thereof or the administration of any matter by any authority therein; and

(b) repeal or amend any Act of Parliament, and make different provision, to regulate any matter which, in his opinion, requires to be regulated in consequence of the repeal or amendment of any Act in terms of para (a).”

Section 38(6) and (7), read with s 35 of the Republic of South Africa Constitution Fifth Amendment Act 101 of 1980 and s 97 of the Republic of South Africa Constitution Act 110 of 1983, provides that any proclamation issued un-

der s 38 (1) shall be tabled in Parliament which may by resolution disapprove of such proclamation or any provision thereof. Should this happen, the proclamation or provision concerned shall cease to be of force, but not with retrospective effect.

It was under the powers vested in him by s 38 that the State President promulgated the proclamation to which reference is made hereinafter.

Section 153 (1) of the Defence Act 44 of 1957 provides that the Act is also applicable in South West Africa ("the territory"). Of immediate relevance for present purposes is s 2(1)(b) in terms of which the Act does not apply, save for immaterial exceptions, to females or persons who are not White persons defined in s 1 of Act 30 of 1950.

By Proc 198 of 1980 (*Government Gazette* 4300) the State President amended s 2 of the Defence Act as regards its application in the territory. All that need be mentioned is that in terms of s 1(1)(b) of the schedule to the proclamation the words "or persons who are not White persons as defined in s 1 of ... Act 30 of 1950" were deemed not to form part of s 2(1)(b) of the Defence Act. A consequence of the amendment, if valid, was that non-White inhabitants of the territory could also be called up to render national service in terms of the Defence Act.

On 1 August 1980 the Administrator-General by AG 105 (*Official Gazette* 4237) notified for general information that in terms of a determination made by the Minister of Defence under s 7 of the Defence Act certain units of the Defence Force had been organized in and as the South West Africa Territory Force ("SWATF"). On the same date Proc 131 of 1980 was published by the State President. Section 2(1) of the schedule to the proclamation provides for the vesting in the Administrator-General of the administration of the provisions of chaps IV, V, VII, VIII and IX of the Defence Act in and in respect of the territory insofar as those provisions apply or relate to or in respect of, *inter alia*, any unit or member of the SWATF by virtue of the fact that such unit or member is a unit or member of the South African Defence Force, and the registration, enrolment and allotment of persons as contemplated by chap VIII of the Act. For the purposes of s 2(1) any reference to the Minister of Defence in ss 21, 22, 35, 37, 44, 56, 62, 66A, 67, 68 and 70bis, and to the Minister of Labour in ss 68, 69 and 70bis of the Act has to be construed as a reference to the Administrator-General (s 2(2)).

By virtue of the powers conferred upon the Administrator-General by Proc 131 of 1980 he appointed an exemption board for the territory (the third respondent in this appeal). The function of the third respondent was and is to consider in terms of s 69 of the Defence Act applications for deferment of or exemption from service under the Act.

In November 1982 the appellant, an inhabitant of the territory who was still a minor, was notified by the SWATF that he had been allotted to the Second South African Infantry Battalion for the purpose of rendering national service at Walvis Bay from 10 January 1983 to 4 January 1985. The appellant then applied in terms of s 69 of the Defence Act for exemption from service but his application was turned down by the third respondent. This led to the institution of proceedings on behalf of the appellant in the Supreme Court of South West Africa. In the main prayers as set out in the notice of motion orders were sought (a)

declaring that the appellant was not liable for national service in the SWATF or the South African Defence Force, and (b) setting aside the aforesaid notice directing the appellant to render national service at Walvis Bay. The alternative relief sought was a review of the third respondent's decision to reject the appellant's application for exemption. As far as the main prayers were concerned, it was alleged that the South African Parliament was not competent to legislate for the territory and that the laws made for the territory under s 38 of the South West Africa Constitution Act were therefore invalid, and that in any event the appellant was not obliged to render national service at Walvis Bay, which does not form part of the territory. The first and second respondents cited were the Administrator-General and the Minister of Defence, but the application was opposed only by the third respondent.

The application was heard by a Full Bench of the Supreme Court of South West Africa. Judgements were delivered by Mouton J and by Strydom J, in whose judgement Berker JP concurred (1984 (3) SA 949). It appears from the judgement of Mouton J (at 958) that at some stage, probably during the hearing of the application, the appellant abandoned his alternative prayer. It furthermore appears from the judgements that the appellant contended:

(1) that as a result of the adoption of resolution 2145 (XXI) by the General Assembly of the United Nations the mandate for the territory was terminated; that consequently as from the date of revocation of the mandate South Africa has only been in *de facto* control of the territory, and that its powers in this regard do not include the power to conscript residents of the territory for military service;

(2) that if the mandate still exists, Parliament is not competent to legislate in conflict with the mandate and that Proc 198 of 1980, which is repugnant to art 4 of the mandate, is therefore invalid;

(3) that, if the proclamation is valid, the appellant is not obliged to render national service outside the territory.

The Court *a quo* rejected contentions (1) and (2) but, for reasons which are not apparent, did not deal with the third contention. The application was consequently dismissed with costs but the appellant was granted leave to appeal to this Court.

In their original heads of argument in this Court counsel for the appellant advanced the same contentions as in the Court *a quo*. Shortly before the hearing of the appeal, however, this Court was informed that the appellant was abandoning the contentions that the mandate had been terminated and that Parliament may not legislate in conflict with the mandate. In the result the only submissions made in this Court were:

(a) that Parliament did not intend to empower the State President to make laws in conflict with the mandate and that Proc 198 of 1980 was consequently invalid, and

(b) that the appellant could not have been called up to render national service at Walvis Bay.

At the hearing of the appeal a few preliminary points arose. Firstly, because of the transfer of powers from the Administrator-General to the Cabinet for South West Africa effected by s 29 of Proc R101 of 1985, application was made for the substitution of the Cabinet for the Administrator-General as first respondent. There was no objection to this application and there does not appear to be any reason why it should not be granted.

Secondly, the appellant sought leave to supplement the application. Neither the founding nor the supporting affidavit contained a specific allegation that the appellant is a non-White person. In their heads of argument counsel for the third respondent relied upon this *lacuna* and the purpose of the application made to this Court was to adduce evidence that the appellant is in fact a non-White.

Accordingly it was alleged in an affidavit made in support of the application that the appellant is a Black inhabitant of the territory. The application was not opposed by the third respondent and since the main prayers of the original application were clearly based upon the premise that non-White inhabitants of the territory may not validly be called up for military service under the Defence Act, and also because argument in the Court *a quo* proceeded, and the Court's judgement was based, upon the assumption that the appellant was indeed a non-White, the application should in my view be granted.

Thirdly, the question was raised whether the registering officer who had issued the call-up notice should not have been joined as a respondent. Section 62 of the Defence Act provides that the Minister of Defence, or any person acting under his authority, shall appoint an officer of the South African Defence Force ("SADF") as the registering officer for the purposes of chap VIII of the Act. The officer so appointed must prepare selection lists (s 66(1)) and allot each year to the Citizen Force, the Commandos or the South African Police, *inter alios*, persons whose names have been included in a selection list for the year concerned (s 67(2)). Section 2(1), read with s 2(2)(a) of Proc 131 of 1980 and with s 62 of the Defence Act, empowers the Administrator-General, or any person acting under his authority, to appoint a registering officer for the territory, and s 2(2)(e) provides that any reference to a registering officer in chap VIII of the Defence Act shall, in relation to the registration and allotment in terms of that chapter of persons who are resident in the territory, be construed as including a reference to a registering officer appointed by or under the authority of the Administrator-General.

As already stated, the call-up notice in question was issued in the name of the SWATF and at the hearing of the appeal it was assumed that the appellant had been allotted to the Second South African Infantry Battalion by a registering officer appointed by or under the authority of the Administrator-General. The question raised by this Court was consequently whether this officer should have been joined as a respondent.

Subsequent to the hearing of the appeal the appellant's attorneys requested this officer to sign a consent to be joined as a party. In response Colonel Potgieter filed an affidavit from which it appears that on 6 August 1980 he was appointed under the authority of the Minister of Defence as the representative, in the territory, of the registering officer for the SADF; that on 3 October 1980 — i.e., subsequent to the promulgation of Proc 131 of 1980 — he was appointed by the

Administrator-General as registering officer for the SWATF, that he still holds both appointments, and that the notice calling up the appellant was issued under his authority. Colonel Potgieter also stated that he was prepared to abide the judgement of this Court provided that his affidavit was received in amplification of the record. Counsel for the appellant reacted by filing a supplementary note — to which I shall revert — and in effect consented to the evidence set out in the affidavit being placed before this Court. In the result it is unnecessary to decide whether the deponent should have been joined as a respondent.

I now turn to the first main contention advanced by counsel for the appellant in this Court, viz. that Proc 198 of 1980 is invalid because it is in conflict with art 4 of the mandate, the material part of which reads as follows:

“The military training of the natives, otherwise than for the purposes of internal police and the local defence of the territory, shall be prohibited.”

The thrust of the contention was that the mandate became part of the statute law of South Africa; that although Parliament may repeal or amend the law incorporating the mandate, it has not done so, and that in enacting s 38 of the South West Africa Constitution Act the Legislature did not intend to confer upon the State President the power to make laws in conflict with the mandate. In this regard it was argued that in *S v Tuhadeleni and Others* 1969 (1) SA 153 (A),<sup>30</sup> this Court did not find that the mandate had not become part of the constitution of the territory, but merely concluded that the mandate had not become entrenched against repeal or amendment by Act of Parliament.

In *Tuhadeleni's* case the appellants had been arraigned on charges of contravention of provisions of Act 83 of 1967 (the main charges) and of Act 44 of 1950, as amended by Act 62 of 1966 (the alternative charges). They were convicted on the main charges and for present purposes it is unnecessary to refer to the proceedings in regard to the alternative charges. Before the charges were put to the appellants notice had been given that they would plead that the trial Court had no jurisdiction to try them on the main charges. The ground upon which the appellants relied was that Act 83 of 1967 was invalid insofar as it purported to apply in the territory in that it was enacted subsequent to the termination of the mandate by General Assembly resolution 2145 (XXI). In reply the State contended that by virtue of the provisions of s 59(2) of the Republic of South Africa Constitution Act 32 of 1961 (“the Constitution Act”), the trial Court had no jurisdiction to pronounce upon the validity of the statutory provisions under which the charges were framed. This contention was upheld by the trial Court which eventually reserved two questions of law for consideration by this Court. The first question concerned the ambit and effect of s 59(2) of the Constitution Act and the second question the validity of that subsection insofar as it related to legislative provisions applying in the territory.

This Court, *per* Steyn CJ, found that there was nothing ambiguous in the phrases “no court of law” and “any Act passed by Parliament” which were employed in s 59(2) of the Constitution Act and, having considered the context of s 59(2) in the Act as a whole and the historical background of the subsection, came to the conclusion that it was also applicable to Acts of Parliament applying in the territory.

Steyn CJ went on to consider a submission relative to the second question of law which ran along these lines: Parliament recognized the limitation imposed on its legislative powers by the provisions of the mandate; the Courts were consequently vested with jurisdiction to declare invalid any Act of Parliament which offended against the mandate, and hence s 59(2) was, to the extent that it derogated from the above limitation, of no force and effect.

Steyn CJ rejected this submission on two grounds. The first was that the mandate itself did not place an express or implied limitation upon the powers of Parliament to legislate for the territory. (Part of the reasoning of Steyn CJ in this regard was assailed by counsel for the appellant in the present matter but, since it was conceded that Parliament may legislate in conflict with the mandate, nothing appears to turn on the criticism.) The second ground was that, had a curb on the legislative powers of Parliament been contemplated, it would not have been made part of the law of the land enforceable by the Courts unless South Africa as mandatory had introduced the curb into its Constitution, and that had not been done.

Counsel for the appellant submitted that Steyn CJ was dealing only with the question whether the mandate had become incorporated into South African law in such a way that Parliament itself could not repeal or amend its provisions, and that he did not address himself to the further question whether the mandate had become part of the constitution of the territory and therefore applied, unless repealed or amended by Parliament. Relying on Act 49 of 1919, Act 42 of 1925 and *dicta* in the judgements of this Court in *R v Christian* 1924 AD 101,<sup>31</sup> *Verein Für Schutzgebietenanleihen EV v Conradie* NO 1937 AD 113<sup>32</sup> and *Winter v Minister of Defence and Others* 1940 AD 194,<sup>33</sup> counsel went on to submit that the mandate had indeed become part of South African statute law, although not entrenched against conflicting Acts of Parliament.

For reasons which will appear, I find it unnecessary to deal with this submission. I shall therefore assume, in favour of the appellant, that in some way or another the provisions of the mandate became part of the so-called composite constitution of the territory.

On this assumption the real question, as regards the first main contention of counsel for the appellant, is whether s 38(1) of the South West Africa Constitution Act empowers the State President to make laws in conflict with the mandate. It will be recalled that the subsection is couched in very wide terms. It confers upon the State President the power to make laws for the territory not only with a view to the eventual attainment of independence by the territory and the administration of Walvis Bay, but also “the regulation of any other matter”. In particular the State President may repeal or amend *any legal provision*, including the Act (except for the provisions of ss (6) and (7)) and any other Act of Parliament insofar as it relates to or applies in the territory or is connected with the administration thereof or the administration of any matter by any authority therein.

It is instructive to compare the present wording of s 38(1) with that of the subsection as originally enacted. Until it was amended by s 1 of the South West Africa Constitution Amendment Act 95 of 1977, s 38(1) merely empowered the State President to make laws for the territory in relation to any matter in regard to which the Assembly for South West Africa could not make ordinances. Section 38(2) moreover provided that a law so made would have effect in and for the territory so long and as far only as it was not repugnant to or inconsistent with an

Act of Parliament which applied in the territory. These limitations on the powers of the State President were removed by s 1 of Act 95 of 1977 which substituted s 38(1) and (2), as it now reads, for the original subsections. In particular the new s 38(1) expressly empowered the State President to legislate in conflict with Acts of Parliament applying in the territory and authorized him to make laws for the territory with a view to “the regulation of any ... matter”. In short, what Parliament did was to confer upon the State President plenary powers of legislation (in respect of the territory) as wide as those possessed by Parliament itself, or, to adapt the words of Lord Fitzgerald in *Hodge v The Queen* (1883) 9 AC 117 at 132, powers as ample as Parliament in the plenitude of its powers could bestow. It bears repetition to emphasize that those powers include the power to repeal or amend any legal provision or Act of Parliament relating to or applying in the territory, and if the mandate was indeed incorporated in an Act of Parliament or in some legal provision, it may be repealed or amended by the State President. The only relevant curb on these wide powers is to be found in s 38(7) which in effect gives Parliament the right to veto a law made by the State President. But apart from these provisions relating to a disapproval of a proclamation issued by the State President under s 38(1), the section imposes no limitations on the ambit of the State President’s legislative powers in respect of the territory. And, as was stated in *Collins v Minister of the Interior and Another* 1957 (1) SA 552 (A) at 565, if a legislative authority has plenary power to legislate on a particular matter, no question can arise as to the validity of any legislation on that matter.

In *The Queen v Burah* (1887) 3 AC 889, a decision of the Privy Council concerning the legislative powers of the Indian Legislature in terms of an Imperial Act, Lord Selborne said (at 904-5):

“The Indian Legislature has powers expressly limited by the Act of the Imperial Parliament which created it, and it can, of course, do nothing beyond the limits which circumscribe these powers. But, when acting within those limits, it is not in any sense an agent or delegate of the Imperial Parliament, but has, and was intended to have, plenary powers of legislation, as large, and of the same nature, as those of Parliament itself. The established Courts of Justice, when a question arises whether the prescribed limits have been exceeded, must of necessity determine that question; and the only way in which they can properly do so, is by looking to the terms of the instrument by which, negatively, they are restricted. If what has been done is legislation, within the general scope of the affirmative words which give the power, and if it violates no express condition or restriction by which that power is limited (in which category would, of course, be included any Act of the Imperial Parliament at variance with it), it is not for any Court of Justice to inquire further, or to enlarge constructively those conditions and restrictions.”

This passage was quoted with approval in *James v Commonwealth of Australia* 1936 AC 578 at 613-614, and if restrictions on the plenary powers of a Legislature are not constructively to be enlarged, then *a fortiori* in a case where no limitations have been imposed a court should not be astute to find that a restriction is implied.

Counsel for the appellant also sought to rely on a presumption that Parliament does not intend to violate its international obligations, i.e., that Parliament intends to fulfil, rather than to break, such obligations. *In casu*, so it was argued,



there is consequently a presumption that Parliament did not intend to confer upon the State President the power to legislate in conflict with the international obligations created by the mandate. In this regard counsel placed particular reliance on the following *dictum* of Lord Denning in *R v Secretary of State for Home Affairs and Another; Ex parte Bhajan Singh* [1975] 2 All ER 1081 (CA) at 1083, relating to a convention to which the United Kingdom was a party:

“The Court can and should take the convention into account. They should take it into account whenever interpreting a statute which affects the rights and liberties of the individual. It is to be assumed that the Crown, in taking its part in legislation, would do nothing which was in conflict with treaties.”<sup>34</sup>

It is clear, however, from other English cases that in interpreting legislation one does not start with the *a priori* assumption that Parliament intended to fulfil its treaty obligations, i.e., an assumption that can only be displaced by indications of a contrary intention. Thus, in *Salomon v Commissioners of Customs and Excise* [1966] 3 All ER 871 (CA) at 875, Diplock LJ said:<sup>35</sup>

“Where by a treaty Her Majesty’s Government undertakes either to introduce domestic legislation to achieve a specified result in the United Kingdom or to secure a specified result which can only be achieved by legislation, the treaty, since in English law it is not self-operating, remains irrelevant to any issue in the English courts until Her Majesty’s Government has taken steps by way of legislation to fulfil its treaty obligations. Once the government has legislated, which it may do in anticipation of the coming into effect of the treaty as it did in this case, the court must in the first instance construe the legislation, for that is what the court has to apply. If the terms of the legislation are clear and unambiguous, they must be given effect to whether or not they carry out Her Majesty’s treaty obligations, for the sovereign power of the Queen in Parliament extends to breaking treaties ... and any remedy for such a breach of an international obligation lies in a forum other than Her Majesty’s own courts. If the terms of the legislation are not clear, however, but are reasonably capable of more than one meaning, the treaty itself becomes relevant, for there is a *prima facie* presumption that Parliament does not intend to act in breach of international law, including therein specific treaty obligations; and if one of the meanings which can reasonably be ascribed to the legislation is consonant with the treaty obligations and another or others are not, the meaning which is consonant is to be preferred.”

See also *The Andrea Ursula* [1971] 1 All ER 821 (PDA).

In *Salomon’s* case Diplock LJ went on to point out (at 876) that even for the limited purpose of resolving ambiguities in legislation an international convention is to be consulted only if there is cogent evidence that the statute concerned was intended to give effect to the convention.

In the present case there is nothing ambiguous in s 38(1) of the South West Africa Constitution Act. As already pointed out, it confers in clear terms extensive powers of legislation upon the State President in regard to the territory, without imposing any restriction whatsoever on the ambit of the State President’s legislative competence. Moreover, there is no indication that, in enacting the Act, Parliament intended to give effect to such international obligations as the

mandate imposed and may still be in existence. Indeed, the Act contains no reference whatsoever to the mandate. The aforesaid presumption consequently finds no application in this appeal.

Counsel for the appellant also placed some reliance on the decision of the Privy Council in *Jerusalem-Jaffa District Governor and Another v Suleiman Murra and Others* 1926 AC 321 (PC).<sup>36</sup> That case concerned an Order in Council which authorized the High Commissioner for Palestine to make ordinances for the peace, order and good government of Palestine subject to a provision that no order should be passed which should in any way be repugnant to or inconsistent with the provisions of the mandate for Palestine. The question arose whether an ordinance made by the High Commissioner was invalid on the ground that it was an infringement of art 2 of the mandate, and in this regard Viscount Cave said that if the ordinance was in fact inconsistent with the provisions of the mandate it would infringe the conditions of the Order in Council and would therefore be invalid. Now, had s 38 of the South West Africa Constitution Act contained a provision similar to that in the Order in Council — in other words, had it provided that the State President could not make a law in conflict with the mandate for South West Africa — this case would have been in point. But since, as has repeatedly been emphasized, s 38(1) contains no such limitation, the remarks of Viscount Cave have no relevance for the purposes of this appeal.

It follows that the contention that s 38(1) does not empower the State President to legislate in conflict with the mandate cannot be upheld. It is accordingly unnecessary to consider whether Proc 198 of 1980 is repugnant to art 4 of the mandate.

I proceed to deal with the second main contention of counsel for the appellant, viz. that the appellant is in any event not liable to render national service at Walvis Bay which has never been part of the territory and which, since 31 August 1977, has again been administered as part of the Cape Province (Proc R202, *Regulation Gazette* 2525 of that date). The essence of this contention is that Proc 198 of 1980 applies only in the territory and therefore does not have extra-territorial operation.

As already pointed out, s 2(1)(b) of the Defence Act provides that the Act shall not apply to persons who are not White persons as defined in s 1 of Act 30 of 1950. In terms of s 3(2) of the Act any member of the Defence Force may be employed at any time on, *inter alia*, service in defence of the Republic, service in the prevention or suppression of terrorism and service in the prevention or suppression of internal disorder in the Republic. The Republic includes the territory and “service in the defence of the Republic” includes military service for the prevention or suppression of any armed conflict outside the Republic which, in the opinion of the State President, is or may be a threat to the security of the Republic (s 1).

Section 153 provides that the Act shall apply also in the territory and in terms of s 138 any training required to be undergone or and any service to be performed under the Act shall be undergone or performed in such areas or at such places, *whether within or outside the Republic*, as the Minister of Defence may direct.

It seems clear, therefore, that prior to the amendment of s 2 of the Act by Proc 198 of 1980 any White male citizen of South Africa, including an inhabitant of the territory, who had been included in a selection list prepared under s

66, could have been called up to render national service in any area or at any place, in or outside the Republic, designated by the Minister. That much was indeed conceded by counsel for the appellant.

Insofar as Proc 198 of 1980 is material to this appeal, s 1(b) merely provides that, in the application of the Defence Act “in the territory”, the words “or persons who are not White persons as defined in ... Act 30 of 1950” shall be deemed not to form part of s 2(1)(b) of the Defence Act. The effect, and only effect, of this amendment was that from the date of promulgation of the proclamation the Act was applicable to all the male inhabitants of the territory whereas it did not apply to non-White inhabitants of South Africa. Apart from amendments of ss 62, 63 and 64 of the Act, which are not relevant in the present context, the proclamation did not modify any of the other provisions of the Act, and in particular did not amend s 138. It would appear, therefore, that since the promulgation of the proclamation both White and non-White inhabitants of the territory are liable to be called up to render national service at any place designated by the Minister, whether inside or outside the Republic (including the territory).

Counsel for the appellant, however, laid stress on the words “in the territory” which appear in s 1(1) of Proc 198 of 1980, and submitted that there are in effect two Defence Acts, one applying in South Africa and having extra-territorial effect (but not applicable to non-Whites), and another applying only in the territory. In my view the submission is without merit. There is in substance and form only one Defence Act which, however, has a wider application in respect of the inhabitants of the territory than in respect of those of South Africa. Far from restricting the operation of the Act in the territory, Proc 198 of 1980 extended its scope. Insofar as s 1(1)(b) of the proclamation, read with s 2(1)(b) of the Act, is concerned, the only purpose of the qualifying phrase “in the territory” was to restrict the deeming provision to the territory. It was clearly not intended to qualify the other provisions of the Act to which reference has been made above.

The proclamation could have amended s 2(1)(b) of the Act to read as follows:

“(1) This Act shall not apply —

...

(b) except insofar as it relates to any auxiliary or nursing service established under this Act, to females or persons, save inhabitants of South West Africa, who are not White persons ...”

As I understood counsel for the appellant, he conceded that, had s 2(1)(b) been amended to read as above, White and non-White male inhabitants of the territory could have been called up to render military service outside the territory. In essence, however, Proc 198 of 1980 achieved the same effect as the postulated amendment would have had; in other words s 1(1)(b) merely removed, in respect of the territory, the impediment as to race contained in s 2(1)(b) of the Act. It follows that the appellant could validly have been called upon to render service outside the territory.

On the assumption that Proc 198 of 1980 is valid, counsel for the appellant initially conceded that the appellant could have been allotted to a unit of the South African Defence Force, not being a unit of the SWATF, provided that that unit was stationed in the territory. It was only after the attention of counsel for the respondent had been drawn to the provisions of s 2(1)(c) of the schedule to Proc 131 of 1980 that counsel for the appellant, in reply, relied thereon. That subsection reads as follows:

“2 (1) Subject to the provisions of this proclamation, the administration of the provisions of the Defence Act contained in chaps IV, V, VII, VIII and IX thereof shall be carried on by the Administrator-General in and in respect of the territory insofar as those provisions apply or relate to or in respect of —

...

(c) the registration and enrolment, as contemplated in the said chap VIII, of persons who are required to or may apply for such registration or enrolment in terms of the provisions contained in that chapter and are resident in the territory, and the allotment as so contemplated of such persons to any unit of the Citizen Force or the commandos *forming part of the South West Africa Territory Force.*” (my italicizing)

Counsel for the appellant went on to submit that in view of the italicized words a registering officer appointed by the Administrator-General may allot inhabitants of the territory only to a unit of the Citizen Force or the commandos which has been incorporated into the SWATF, and that the Second South African Infantry Battalion is not such a unit. In this regard counsel relied on Proc AG 105 of 1980, the schedule to which contains a list of the units of the South African Defence Force which had been organized in and as the SWATF, and which does not include the said battalion. However, counsel could not give this Court the assurance that further units had not been added to the SWATF subsequent to 1 August 1980.

It will be recalled that in the appellant’s main prayer (*b*) an order was sought setting aside “the notice ... directing the ... (appellant) to render national service at Walvis Bay”. However, nowhere in the appellant’s supporting affidavit was the point made that the notice was invalid on the ground that the appellant had been allotted to a unit which did not form part of the SWATF. Nor did the affidavit contain a specific averment that the said battalion was not a unit of the SWATF. Indeed, in para 4.4 of his affidavit the appellant stated:

“It is a matter of no consequence to me that I have been called up by the South West Africa Territory Force and not the South African Defence Force. In truth and in fact there is no essential difference between the two.”

In setting out the grounds upon which he had been advised that the call-up notice was invalid, the appellant relied on the alleged invalidity of proclamations of the State President issued under s 38 of the South West Africa Constitution Act, and furthermore merely stated that he could not have been ordered to render service at Walvis Bay, which was not part of the territory, and which did not fall within the area over which the Administrator-General purported to exercise authority. It therefore appears that apart from the attack on the validity of the proclamations the only case which the respondents were called upon to meet

was that the appellant could not have been directed to render national service outside the territory. The questions whether the appellant could have been allotted to a unit not forming part of the SWATF and, if so, whether the battalion was such a unit, were simply not raised by the appellant.

It follows that should the appellant now be allowed to rely on the provisions of s 2(1)(c) of Proc 131 of 1980 it would amount not merely to the raising of a new point of law in support of a case made out in the Court *a quo*, but in effect to the introduction of a new cause of action which the respondents, two of whom did not oppose the application, were not called upon to meet. And it is certainly not inconceivable that had the appellant averred that he could not have been allotted to a unit not forming part of the SWATF, and that the Second South African Infantry Battalion was such a unit, the second respondent may have opposed the application. Had he done so, then, apart from the possibility that he may have introduced relevant evidence, his counsel could have advanced argument on the ambit and interpretation of chap VIII of the Defence Act read with Proc 131 of 1980. In my view this Court should consequently refrain from considering the submission in question.

In any event, and as already pointed out, Colonel Potgieter alleged in his affidavit that he was not only appointed as registering officer for the territory by the Administrator-General (“his first capacity”), but that he also held a similar appointment in respect of the territory pursuant to a power exercised under the authority of the Minister of Defence in terms of s 62 of the Defence Act (“his second capacity”). He also alleged that by virtue of his dual capacity he was authorized to allot the appellant to the Second South African Infantry Battalion and that he in fact did so. He did, however, concede that the battalion is not a unit of the SWATF.

In their aforesaid supplementary note counsel for the appellant did not dispute that, acting in his second capacity, Colonel Potgieter could have allotted the appellant to the battalion, but contended that he could not have done so in either his first capacity or in both capacities. In my view, however, Colonel Potgieter merely intended to convey that by virtue of the powers vested in him as a result of the dual appointment, he had the necessary authority to allot the appellant either to a unit of the SWATF or to a SADF unit not forming part of the SWATF, and that in allotting the appellant he exercised that composite authority. He certainly did not say that when he made the allotment he was not invoking the authority conferred by his second appointment.

Counsel for the appellant also sought to place some reliance on the fact that the call-up instructions were issued on a form headed “Suidwes-Afrika Gebiedsmag”, but this in itself does not justify the inference that Colonel Potgieter intended to act only in his first capacity.

It follows that, even if it is assumed that Colonel Potgieter could not have allotted the appellant to the battalion in his first capacity, it would appear that he could have done so — and in fact did so — by virtue of the composite powers conferred upon him. And should there be any doubt in this regard, it cannot be resolved in favour of the appellant who did not in his application advance the proposition that he could not have been allotted to a unit not forming part of the SWATF.

It remains to consider the question of costs. The only function of an exemption board appointed under s 68 of the Defence Act, as it read in 1982 and applied in the territory, was to consider applications for deferment of or exemption from service. Such an application could be made by any person liable to serve in terms of s 21(1) or 35(1) of the Act or any interested person acting on behalf of such person. An exemption board's powers could therefore be exercised only in respect of a person validly required to render service under the Act. In particular, it was no part of the function of such a board to call up a person for military service or to decide whether a call-up notice had validly been issued.

As already stated, the appellant's application for exemption from service was refused by the third respondent. Since the alternative prayer sought a review of this refusal, it was necessary to join the third respondent as a party. And since the abandonment of the alternative prayer in the Court *a quo* was not accompanied by a tender of costs, the third respondent was entitled to be represented for the purpose of procuring an order of costs in its favour. Such an order was in fact made.

The appellant's notice of appeal was directed against the order dismissing the application as well as against the order of costs. The third respondent was consequently entitled to oppose the appeal for the limited purpose of safeguarding the order as to costs. However, the third respondent prepared voluminous heads of argument and presented full argument in this Court on the merits of the appeal. The only justification proffered by counsel for the third respondent for this course of action was that the third respondent, as part of the structure of the Defence Force, has an indirect interest in the outcome of the appeal. Such a nebulous interest is, however, clearly not to be equated with a legal interest in the issues raised in this Court or in the relief sought in the appellant's main prayers. Hence it is necessary to make a special order as to costs.

The following orders are made:

- (1) The Cabinet for South West Africa is substituted for the Administrator-General as first respondent in this appeal.
- (2) The appeal is dismissed with costs which are to include the costs relating to the application for leave to appeal.
- (3) The costs are to be taxed as if the third respondent opposed the appeal, and one counsel appeared, for the limited purpose of defending the order as to costs made by the Court *a quo*.

Rabie ACJ, Corbett JA, Hefer JA and Grosskopf JA concurred.

[Report: 1988 (3) SA 155.]

## 2. United Kingdom of Great Britain and Northern Ireland

### COURT OF APPEALS

(a) *Maclaine Watson & Co. Ltd. v. Department of Trade and Industry; J.H. Rayner (Mincing Lane) Ltd. v. Department of Trade and Industry and Others, and Related Appeals*; (b) *In re International Tin Council*; (c) *Maclaine Watson & Co. Ltd. v. International Tin Council*; and (d) *Maclaine Watson & Co. Ltd. v. International Tin Council (No. 2): Judgements of 27 April 1988*<sup>37</sup>

These four judgements were given by the Court of Appeals regarding the International Tin Council, and involved matters related to international law and international organizations, including the United Nations. The following is a general introduction by the Court to all four judgements:

### MACLAINE WATSON v. DEPARTMENT OF TRADE

#### GENERAL INTRODUCTION

*by the court*

KERR L.J.

#### *Background*

In October 1985 the International Tin Council (“I.T.C.”) announced that it was unable to meet its liabilities and collapsed with debts running into hundreds of millions of pounds. The 17 plaintiffs in the actions from which the present appeals arise are a number of large creditors. Eleven are ring-dealing members — known as brokers — of the London Metal Exchange and six are banks. The brokers had entered into contracts with the I.T.C. for the sale or purchase of tin on the standard Form B of the London Metal Exchange. The I.T.C. defaulted on these contracts and the brokers claim some \_120 million on account of their breach. The banks had made loans to the I.T.C. totalling some \_30 million. None of them has been repaid. It is said that these and other transactions were concluded when it must have been obvious to those in control of the I.T.C. that there were no longer any funds available to meet the resulting liabilities. In other contexts these allegations would be referred to as fraudulent trading on a massive scale. But the court has not seen any evidence on behalf of the defendants dealing with the events which in fact occurred, since the defendants have successfully maintained, on various grounds, that the proceedings are not maintainable. Accordingly, these are not issues with which the present appeals are concerned. Nor are we concerned with any individual transactions or the resulting figures. The claims of the creditors in the present actions appear to be merely a sample from the bulk. But the inference of gross mismanagement, to put it no higher, is overwhelming.

The I.T.C. is an international organization created and continued in force by treaties known as International Tin Agreements ("I.T.A."). The first, I.T.A. 1, was concluded in 1954. The current one, I.T.A. 6, was concluded in 1982. The headquarters of the I.T.C. have been in London throughout. The parties to the treaties and members of the I.T.C. are sovereign states which have changed to some extent from time to time, and the European Economic Community ("E.E.C.") has become a member of the I.T.C. by becoming a party to I.T.A. 6. The members are divided into producers and consumers of tin. The council is composed of the members, and the decisions are taken by a voting system involving distributed majorities between producers and consumers and weighted votes. The objective is to regulate the world production and consumption of tin in an orderly manner, if necessary (as it was after 1982) by the imposition of export controls, and to maintain a measure of stability in the world price of tin. For this purpose the members contribute to a large "buffer stock" in cash or tin for sales or purchases designed to maintain the world price within a bracket of floor and ceiling figures determined by the council from time to time. In addition the council has power to borrow to finance the buffer stock operations with the authority of the members.

In the traditional terms of international law the objectives of the members of the I.T.C. fall to be regarded as *jure imperii*. But the attainment of its objectives also necessarily involved trading — on the London Metal Exchange and the Tin Market in Penang — and loan transactions on a massive scale which would in themselves clearly be regarded as operations conducted *jure gestionis*. And, unlike the practice of states in relation to other treaties creating international organizations whose objectives involve systematic trading, neither I.T.A. 6 nor any of its predecessors contain any exclusion or limitation of the liability of the members for the unpaid debts of the organization, let alone any provision for warning third parties dealing with the organization that the members would not stand behind it. No such warnings appear to have been given at any time.

International organizations have proliferated since the war, and similar ones to the I.T.C. exist for other commodities, such as sugar, cocoa, coffee and wheat, whose headquarters are also in the United Kingdom. But the scale of operations in the present case is staggering, and the outcome without precedent. On the evidence before us the turnover of the I.T.C. in the year of 30 June 1984 was of the order of £3 billion, equivalent to more than 300,000 tonnes of tin, about twice as much as the I.T.C.'s estimate for the total world consumption for 1983. No figures have so far been published for 1984-85. But it seems clear that production levels thereafter exceeded demand to such an extent that the price of tin could only be maintained at or just above the floor price in force, which remained unaltered, by means of vast purchases by the buffer stock manager ("B.S.M.") in order to support the price. This appears to have been a hopeless quest despite being fuelled by large scale borrowings. Trading appears only to have been financed by a provision of capital of some 5 per cent. of sales. In the end, on 24 October 1985, the B.S.M. announced that the I.T.C. was unable to meet its obligations. It has not traded since. Its members have evidently left it to its fate, at any rate so far as these proceedings are concerned.



The financial collapse of the I.T.C. is an unprecedented event on the international scene. Other minor international organizations have run into financial difficulties. But none has been abandoned by its members, let alone with emphatic disclaimers of liability to the creditors and failure to put the organization in funds to meet its undisputed debts. It is said that the present situation is under consideration among the members. But nothing has so far been paid to the creditors, and all attempts at recovery have been strenuously resisted. These have ranged from direct claims against members to applications for the winding up of the I.T.C., for the appointment of a receiver of the I.T.C., and for disclosure of the nature, value and location of the I.T.C.'s assets. Only the last of these has so far succeeded; and the outcome of all of them is now under appeal to this court.

### *The issues in outline*

The legal problems involved in these proceedings are unprecedented, not only in our courts but evidently anywhere. It would be inappropriate to consider them solely by reference to English law in isolation. They concern all international organizations operating in similar circumstances and require analysis on the plane of public international law and of the relationship between international law and the domestic law of this country.

Turning to the latter, in pursuance of the I.T.A. treaties and a "Headquarters Agreement" between the I.T.C. and the United Kingdom concluded in 1972, the I.T.C. was granted "the legal capacities of a body corporate" in this country by an Order in Council made in 1972 which continued in force in relation to I.T.A.6. But the I.T.C. was not incorporated. Its status remained formally unchanged, and it was common ground that in international law it had "legal personality". The conferment of the "the legal capacities of a body corporate" is a time honoured phrase which has been in use for more than 30 years in our domestic legislation in relation to the facilities granted in this country to international organizations created by treaty. But its meaning and effect have never been considered. In the present situation it raises acute problems about the status of the I.T.C. and the claims made directly against its members. Are they under any liability, either concurrently with the I.T.C. or secondarily in the event that the I.T.C. defaults on its obligations? Or can they claim to be in the same position as the shareholders of a limited liability company because the I.T.C. has been given the capacity to contract in its own name and did so? Alternatively, can the members be held liable as undisclosed principals on whose behalf the I.T.C. contracted as agent?

Then there are other problems. The I.T.C. was granted immunities from suit and legal process except (so far as relevant) in respect of the enforcement of arbitration awards. The London Metal Exchange contracts contained arbitration clauses and resulted in large awards in favour of the broker plaintiffs against the I.T.C. But only one of the bank loans was made subject to a provision for arbitration, so that the failure to repay the others can only result in judgements against the I.T.C. It now claims immunity in respect of them, and it resists the application for a winding up order on the ground that this would be inappropriate in relation to an international organization and that such an order would in any event not fall within the exception of enforcement of an arbitration award.

Next, there is the doctrine of the “non-justiciability” in our courts of rights and obligations arising under treaties — such as I.T.A.1 to 6 — which have not been incorporated into our domestic law. The scope and effect of this doctrine is uncertain and poses many problems in the present context. In particular it is invoked as a defence to the receivership application on the ground that a receiver, standing in the shoes of the I.T.C., would be unable to enforce in our courts whatever claims (if any) the I.T.C. might have against its members, since these would require the interpretation and application of I.T.A.6.

Finally, the claims against the members other than the United Kingdom raise problems of sovereign immunity. This doctrine was regarded as absolute when the present technique in our domestic legislation concerning international organizations originated after the last war, and it was still so regarded in 1972, when the relevant Order in Council was made. But the State Immunity Act 1978 created a number of potentially relevant exceptions, in particular in the context of commercial transactions. Are these exceptions applicable to the various ways in which the plaintiffs’ claims are presented, if they can otherwise be maintained? And there is also a claim by the E.E.C., as an appendix to this aspect, that it is equally entitled to sovereign immunity, at any rate in the courts of its member states. This issue had been adjourned below and was argued for the first time in this court.

The proceedings before us occupied some 34 days including the issue concerning the E.E.C., in comparison with 29 days at first instance. The parties were represented by about 30 counsel and 15 firms of solicitors. We were referred to over 200 authorities, statutes and jurisprudential writings, ranging from *Blackstone’s Commentaries* to the present-day publications of international lawyers. Particularly in the direct actions the arguments have been presented far more widely than below. In the judgements which follow we cannot deal with all of the submissions which have been addressed to us. We confine ourselves to those which we consider to be of major relevance for and against our conclusions on the issues which need to be decided, in a forensic scenario which appears to be wholly novel. In this connection we found an echo at the beginning of the famous judgement of Marshal C.J. in *Schooner Exchange v. McFaddon* (1812) 7 Cranch (U.S.) 116, 136, to which we were referred amidst so much other material:

“In exploring an unbeaten path, with few, if any, aids from precedents or written law, the court has found it necessary to rely much on general principles, and on a train of reasoning founded on cases in some degree analogous to this.”

#### *The parties*

The 17 plaintiffs have already been referred to as 11 brokers and six banks. We only mention some of them by name hereafter, mainly for the purpose of the title of the relevant actions. Their names will appear in the orders made in the light of our judgements. But the judgements themselves will not be concerned with the procedural details of the multifarious orders made at first instance.

The defendants to the proceedings, apart from the I.T.C. itself, are its present members as signatories of I.T.A.6. The United States of America and some others withdrew upon the expiry of I.T.A.5 in 1982. Beginning with the host country, they are as follows in the direct actions brought against all the members:

United Kingdom, Australia, Belgium, Canada, Denmark, the European Economic Community (E.E.C.), Finland, France, Federal Republic of Germany, Greece, India, Indonesia, Ireland, Italy, Japan, Luxembourg, Malaysia, Netherlands, Nigeria, Norway, Sweden, Switzerland, Thailand, Zaire. The writs against the foreign states were all served on them outside the jurisdiction pursuant to leave given *ex parte* under R.S.C., Ord. 11. The states are now challenging the jurisdiction to serve them. In the case of the claims against the United Kingdom it was agreed that the proceedings should be brought against the Department of Trade and Industry pursuant to section 17 of the Crown Proceedings Act 1947. In the case of the E.E.C. all but the first proceedings were brought against the European Commission pursuant to articles 210 and 211 of the E.E.C. Treaty and the European Communities Act 1972, and in these actions the Commission was also served within the jurisdiction. For convenience we will nevertheless often refer to the defendants (apart from the I.T.C.) as “the member states”.

### *The proceedings under appeal*

There are before us some 30 appeals, cross-appeals and applications. But at this stage we are not concerned with the details. Effectively there are appeals against five judgements given in relation to a number of combined actions and other proceedings. The defendants’ response to all of them was that the claims should be struck out, either on the ground that they disclosed no reasonable cause of action, etc., or that the defendants were entitled to sovereign immunity, or both. These pleas succeeded in all cases save in regard to an application that the I.T.C. should disclose the nature, value and location of its assets. With that exception all of the plaintiffs’ claims have been struck out. But, as already mentioned, every party has appealed or cross-appealed against every order of substance made against it, including one aspect of an order for costs in favour of the member states with which they were dissatisfied.

Of the five judgements under appeal two dealt with overlapping issues raised in four actions. These were called the “direct actions” because all involved claims made directly against members of the I.T.C. Three of them were brought against all the members (including in one case the I.T.C. itself, but that is of no consequence) and were struck out in a judgement<sup>38</sup> delivered by Staughton J. The fourth was brought against the department<sup>39</sup> alone and was struck out by Millett J. Although these two judgements in part raise differing issues, both in relation to the plaintiffs and the defendants, the principal issues — as to the nature of the I.T.C. and the possible liability of its members on contracts made in the name of the I.T.C. — are common to both. It is therefore convenient to combine the two resulting appeals into one judgement.<sup>40</sup>

The remaining three judgements were all delivered by Millett J., and in each case the I.T.C. was the sole defendant. The resulting appeals are<sup>[5]</sup> conveniently described as the “winding up appeal”,<sup>41</sup> the “receivership Appeal”<sup>42</sup> and the “disclosure of assets appeal”.<sup>43</sup> The plaintiffs are appealing in the first two and the I.T.C. in the latter.

It follows that the convenient course is to deal with all these appeals by means of four judgements given in that order, which was also the order in which we heard the appeals. The order below was different and appears from the dates of the judgements mentioned hereafter. We will deal with the E.E.C.’s claim for sovereign immunity at the end of our judgements in the direct action.

Against this background we now turn to our judgements, which must inevitably be lengthy. But before we do so we would like to express our gratitude to all concerned — in particular the solicitors — in giving us so much help with the logistic arrangements for this unusual series of appeals and for the most helpful way in which the documentation — contained in some 80 ring files — was managed and indexed. We must also record our appreciation of the lucidity of the submissions of counsel, and the invaluable assistance provided by their “skeleton arguments” and additional summaries of their submissions at various stages of this unusual series of appeals.

Finally, we would like to draw attention to the concluding general remarks in the judgement of the court in the disclosure of assets appeal concerning the deplorable history which has brought the I.T.C. and its unfortunate creditors to the present juncture.

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### 3. United States of America

#### (a) United States District Court, Southern District of New York

UNITED STATES OF AMERICA (PLAINTIFF) AGAINST THE PALESTINE LIBERATION ORGANIZATION, ET AL. (DEFENDANTS), JUDGEMENT OF 29 JUNE 1988<sup>44</sup>

*Question of the Palestine Liberation Organization (PLO) to maintain its office in conjunction with its work as a Permanent Observer to the United Nations — United Nations Headquarters Agreement — United States Anti-Terrorism Act of 1987*

*Appearances of Counsel:*

*For The Attorney General:*

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Richard W. Mark, Assistant United States Attorney  
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John R. Bolton, Assistant Attorney General  
Mona Butler  
David J. Anderson  
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United States Department of Justice  
Civil Division  
Washington, D.C. 20530

*For Defendants Palestine Liberation Organization, PLO Mission, Zuhdi Labib Terzi, Riyad H. Mansour, Nasser Al-Kidwa and Veronica Kanaan Pugh:*

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Lawrence W. Schilling  
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*For Defendant Riyad H. Mansour:\**

Leonard B. Boudin  
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*For the United Nations, amicus curiae:\*\**

Keith Highet  
Joseph D. Pizzurro  
Curtis, Mallet-Prevost, Colt & Mosle  
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*For the Association of the Bar of the City of New York, amicus curiae:\*\**

Sheldon Oliensis, President  
Saul L. Sherman  
Stephen L. Kass  
Association of the Bar of the City of New York  
New York

Palmieri, J.:

The Anti-terrorism Act of 1987<sup>45</sup> (the “ATA”), is the focal point of this lawsuit. At the center of controversy is the right of the Palestine Liberation Organization (the “PLO”) to maintain its office in conjunction with its work as a Permanent Observer to the United Nations. The case comes before the court on the government’s motion for an injunction closing this office and on the defendants’ motions to dismiss.

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\*The following counsel moved to dismiss on Mr. Mansour’s behalf and filed a brief. Following that motion, Messrs Clark and Schilling appeared for Mr. Mansour.

\*\*The United Nations and the Association of the Bar of the City of New York both requested leave to appear as *amici curiae*. The court finds that both *amici* have an adequate interest in the litigation, even at the district court level, and that their participation is desirable. Leave to file is therefore granted. See S. & E.D.N.Y. Gen. R. 8; cf. Fed. R. App. P. 29; S. Ct. R. Prac. 36.3. It should be added that Mr. Carl-August Fleischhauer, Under-Secretary-General and Legal Counsel of the United Nations, was permitted to address the court at the outset of the arguments of counsel that took place on June 8, 1988.

### Background

The United Nations' Headquarters in New York were established as an international enclave by the *Agreement Between the United States and the United Nations Regarding the Headquarters of the United Nations*<sup>46</sup> (the "Headquarters Agreement"). This agreement followed an invitation extended to the United Nations by the United States, one of its principal founders, to establish its seat within the United States.<sup>47</sup>

As a meeting place and forum for all nations, the United Nations, according to its Charter, was formed to:

"maintain international peace and security ...; to develop friendly relations among nations, based on the principle of equal rights and self-determination of peoples ...; to achieve international cooperation in solving international problems of an economic, social, cultural or humanitarian character ...; and be a centre for harmonizing the actions of nations in the attainment of these common ends".

Charter of the United Nations, Article 1. Today, 159 of the Members of the United Nations maintain missions to the United Nations in New York. United Nations Protocol and Liaison Service, *Permanent Missions to the United Nations No. 262* 3-4 (1988) (hereinafter "*Permanent Missions No. 262*"). In addition, the United Nations has, from its incipency, welcomed various non-member observers to participate in its proceedings. See *Permanent Missions to the United Nations: Report of the Secretary-General*, 4 U.N. GAOR C.6 Annex (agenda item 50) 16, 17 ¶14, United Nations document A/939/Rev. 1 (1949) (hereinafter *Permanent Missions: Report of the Secretary-General*). Of these, several non-member nations,<sup>48</sup> intergovernmental organizations<sup>49</sup> and other organizations<sup>50</sup> currently maintain "permanent observer missions" in New York.

The PLO falls into the last of these categories and is present at the United Nations as its invitee. See Headquarters Agreement, §11, 61 Stat. at 761 (22 U.S.C. §287 note). The PLO has none of the usual attributes of sovereignty. It is not accredited to the United States<sup>51</sup> and does not have the benefits of diplomatic immunity.<sup>52</sup> There is no recognized State it claims to govern. It purports to serve as the sole political representative of the Palestinian people. See generally Kassim, *The Palestine Liberation Organization Claim to Status: A Juridical Analysis Under International Law*, 9 Den. J. International L. & Policy 1 (1980). The PLO nevertheless considers itself to be the representative of a State, entitled to recognition in its relations with other Governments, and is said to have diplomatic relations with approximately 100 countries throughout the world. *Idem*, at 19.

In 1974, the United Nations invited the PLO to become an observer at the United Nations<sup>53</sup> to "participate in the sessions and the work of the General Assembly in the capacity of observer".<sup>54</sup> The right of its representatives to admission to the United States as well as access to the United Nations was immediately challenged under American law. Judge Costantino rejected that challenge in *Anti-Defamation League of B'nai B'rith v. Kissinger*, Civil Action No.

74 C 1545 (E.D.N.Y. November 1, 1974). The court upheld the presence of a PLO representative in New York with access to the United Nations, albeit under certain entrance visa restrictions which limited PLO personnel movements to a radius of 25 miles from Columbus Circle in Manhattan. It stated from the bench:

“This problem must be viewed in the context of the special responsibility which the United States has to provide access to the United Nations under the Headquarters Agreement. It is important to note for the purposes of this case that a primary goal of the United Nations is to provide a forum where peaceful discussions may displace violence as a means of resolving disputed issues. At times our responsibility to the United Nations may require us to issue visas to persons who are objectionable to certain segments of our society.”

*Idem*, transcript at 37, partially excerpted in Department of State, 1974 *Digest of United States Practice in International Law*, 27, 28.

Since 1974, the PLO has continued to function without interruption as a permanent observer and has maintained its Mission to the United Nations without trammel, largely because of the Headquarters Agreement, which we discuss below.

## II

### *The Anti-Terrorism Act*

In October 1986, members of Congress requested the United States Department of State to close the PLO offices located in the United States.<sup>55</sup> That request proved unsuccessful, and proponents of the request introduced legislation with the explicit purpose of doing so.<sup>56</sup>

The result was the ATA, 22 U.S.C. §§5201-5203. It is of a unique nature. We have been unable to find any comparable statute in the long history of Congressional enactments. The PLO is stated to be “a terrorist organization and a threat to the interests of the United States, its allies, and to international law and should not benefit from operating in the United States.” 22 U.S.C. §5201(b). The ATA was added, without committee hearings,<sup>57</sup> as a rider to the Foreign Relations Authorization Act for Fiscal Years 1988-1989, which provided funds for the operation of the State Department, including the operation of the United States Mission to the United Nations. Pub. L. 100-204 §101, 101 Stat. 1331, 1335. The bill also authorized payments to the United Nations for maintenance and operation. *Idem*, §102(a)(1), 101 Stat. at 1336; see also *idem*, §143, 101 Stat. at 1386.

The ATA, which became effective on March 21, 1988,<sup>58</sup> forbids the establishment or maintenance of “an office, headquarters, premises, or other facilities or establishments within the jurisdiction of the United States at the behest or direction of, or with funds provided by” the PLO, if the purpose is to further the PLO’s interests. 22 U.S.C. §5202(3). The ATA also forbids spending the PLO’s funds or receiving anything of value except informational material from the PLO, with the same *mens rea* requirement. *Idem*, §§5202(1) and (2).

The House version of the spending bill contained no equivalent provision, and the ATA was only briefly discussed during a joint conference which covered the entire spending bill. The House conferees rejected, 8-11, an exemption for the Mission, after which they acceded to the Senate’s version. 133 Cong. Rec. S

18,193 ¶14 (daily ed. December 16, 1987). See 113 *idem*, S 18,186, S 18,189 (statements of Sen. Helms); see also H.R. Conf. Rep. No. 475, 100th Cong., 1st Sess., 170-71 (1987).

Ten days before the effective date, the Attorney General wrote the Chief of the PLO Observer Mission to the United Nations that “maintaining a PLO Observer Mission to the United Nations will be unlawful”, and advised him that upon failure of compliance, the Department of Justice would take action in federal court. This letter is reproduced in the record as item 28 of the Compendium prepared at the outset of this litigation pursuant to the court’s April 21, 1988 request to counsel (attached as Appendix B). It is entitled “Compendium of the Legislative History of the Anti-Terrorism Act of 1987, Related Legislation, and Official Statements of the Department of Justice and the Department of State Regarding This Legislation”. The documents in the Compendium are of great interest.

The United States commenced this lawsuit the day the ATA took effect, seeking injunctive relief to accomplish the closure of the Mission. The United States Attorney for this District has personally represented that no action would be taken to enforce the ATA pending resolution of the litigation in this court.

There are now four individual defendants in addition to the PLO itself.<sup>59</sup> Defendant Zuhdi Labib Terzi, who possesses an Algerian passport but whose citizenship is not divulged, has served as the Permanent Observer of the PLO to the United Nations since 1975. Defendant Riyadh H. Mansour, a citizen of the United States, has been the Deputy Permanent Observer of the PLO to the United Nations since 1983. Defendant Nasser Al-Kidwa, a citizen of Iraq, is the Alternate Permanent Observer of the PLO to the United Nations. And defendant Veronica Kanaan Pugh, a citizen of the United Kingdom of Great Britain and Northern Ireland, is charged with administrative duties at the Observer Mission. These defendants contend that this court may not adjudicate the ATA’s applicability to the Mission because such an adjudication would violate the United States’ obligation under section 21 of the Headquarters Agreement to arbitrate any dispute with the United Nations. Apart from that, they argue, application of the ATA to the PLO Mission would violate the United States’ commitments under the Headquarters Agreement. They assert that the court lacks subject-matter and personal jurisdiction over them and that they lack the capacity to be sued. Fed. R. Civ. P. 12(b)(1) and (2); 17(b). Defendant Riyadh H. Mansour additionally moves to dismiss for failure to state a claim upon which relief can be granted. Fed. R. Civ. P. 12(b)(6).<sup>60</sup> Plaintiff, the United States, moves for summary judgement. Fed. R. Civ. P. 56.

### III

#### *Personal jurisdiction over the defendants*

The PLO maintains an office in New York. The PLO pays for the maintenance and expenses of that office. It maintains a telephone listing in New York. The individuals employed at the PLO’s Mission of the United Nations maintain a continuous presence in New York. There can be little question that it is within the bounds of fair play and substantial justice to hail them into court in New York. *International Shoe Co. v. Washington*, 326 U.S. 310, 320 (1945). The limitations that the due process clause places on the exercise of personal juris-



diction are the only ones applicable to the statute in these circumstances. 22 U.S.C. §5203(b). Cf. *United States v. Aluminum Co. of America*, 148 F.2d 416, 443-44 (2d Cir. 1945) (L. Hand, J.). The PLO does not argue that it or its employees are the beneficiaries of any diplomatic immunity owing to its presence as an invitee of the United Nations. We have no difficulty in concluding that the court has personal jurisdiction over the PLO and the individual defendants.

#### IV

##### *The duty to arbitrate*

Counsel for the PLO and for the United Nations and the Association of the Bar of the City of New York, as *amici curiae*, have suggested that the court defer to an advisory opinion of the International Court of Justice. *Applicability of the Obligation to Arbitrate Under Section 21 of the United Nations Headquarters Agreement of 26 June 1947*, 1988 I.C.J. No. 77 (April 26, 1988) (“*U.N. v. U.S.*”). That decision holds that the United States is bound by Section 21 of the Headquarters Agreement to submit to binding arbitration of a dispute precipitated by the passage of the ATA. Indeed, it is the PLO’s position that this alleged duty to arbitrate deprives the court of subject-matter jurisdiction over this litigation.

In June 1947, the United States subscribed to the Headquarters Agreement, defining the privileges and immunities of the United Nations Headquarters in New York City, thereby becoming the “host country” — a descriptive title that has followed it through many United Nations proceedings. The Headquarters Agreement was brought into effect under United States law, with an annex, by a Joint Resolution of Congress approved by the President on August 4, 1947.<sup>61</sup> The PLO rests its argument, as do the *amici*, on section 21(a) of the Headquarters Agreement, which provides for arbitration in the case of any dispute between the United Nations and the United States concerning the interpretation or application of the Headquarters Agreement. Because interpretation of the ATA requires an interpretation of the Headquarters Agreement, they argue, this court must await the decision of an arbitral tribunal yet to be appointed before making its decision.

Section 21(a) of the Headquarters Agreement provides, in part:

“Any dispute *between the United Nations and the United States* concerning the interpretation or application of this agreement or of any supplemental agreement, which is not settled by negotiation or other agreed mode of settlement, shall be referred for final decision to a tribunal of three arbitrators ...”

61 Stat. at 764 (22 U.S.C. § 287note) (emphasis added). Because these proceedings are not in any way directed to settling any dispute, ripe or not, between the United Nations and the United States, Section 21 is, by the terms, inapplicable.<sup>62</sup> The fact that the Headquarters Agreement was adopted by a majority of both Houses of Congress and approved by the President, see 61 Stat. at 768, might lead to the conclusion that it provides a rule of decision requiring arbitration any time the interpretation of the Headquarters Agreement is at issue in the United States courts. That conclusion would be wrong for two reasons.

First, this court cannot direct the United States to submit to arbitration without exceeding the scope of its article III powers. What sets this case apart from the usual situation in which two parties have agreed to binding arbitration for the settlement of any future disputes, requiring the court to stay its proceedings, cf. 9 U.S.C. §3 (1982),<sup>63</sup> is that we are here involved with matters of international policy. This is an area in which the courts are generally unable to participate. These questions do not lend themselves to resolution by adjudication under our jurisprudence. See generally *Baker v. Carr*, 369 U.S. 186, 211-13 (1962). The restrictions imposed upon the courts forbidding them to resolve such questions (often termed “political questions”) derive not only from the limitations which inhere in the judicial process but also from those imposed by article III of the Constitution. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 170 (1803) (Marshall, C.J.) (“The province of the court is, solely, to decide on the right of individuals, not to inquire how the executive, or executive officers, perform duties in which they have a discretion. Questions in their nature political, or which are, by the Constitution and laws, submitted to the executive can never be made in this Court.”) The decision in *Marbury* has never been disturbed.

The conduct of the foreign relations of our Government is committed by the Constitution to the executive and legislative — the “political” — departments of the Government. As the Supreme Court noted in *Baker v. Carr*, *supra*, 369 U.S. at 211, not all questions touching upon international relations are automatically political questions. Nonetheless, were the court to order the United States to submit to arbitration, it would violate several of the tenets to which the Supreme Court gave voice in *Baker v. Carr*, *supra*, 369 U.S. at 217.<sup>64</sup> Resolution of the question whether the United States will arbitrate requires “an initial policy determination of a kind clearly for nonjudicial discretion”; deciding whether the United States will or ought to submit to arbitration, in the face of a determination not to do so by the executive,<sup>65</sup> would be impossible without the court “expressing lack of the respect due coordinate branches of government”; and such a decision would raise not only the “potentiality” but the reality of “embarrassment from multifarious pronouncements by various departments on one question”. It is for these reasons that the ultimate decision as to how the United States should honour its treaty obligations with the international community is one which has, for at least 100 years, been left to the executive to decide. *Goldwater v. Carter*, 444 U.S. 996, 996-97 (1979) (vacating, with instructions to dismiss, an attack on the President’s action in terminating a treaty with Taiwan); *Clark v. Allen*, 331 U.S. 503, 509 (1947) (“President and Senate may denounce a treaty and thus terminate its life”) (quoting *Techt v. Hughes*, 229 N.Y. 222, 243 (Cardozo, J.), *cert. denied*, 254 U.S. 643 (1920)); *Oetjen v. Central Leather Co.*, 246 U.S. 297, 302 (1918) (redress for violation of international accord must be sought via executive); *Chae Chan Ping v. United States* (The Chinese Exclusion Case), 130 U.S. 581, 602 (“the question whether our Government is justified in disregarding its engagements with another nation is not one for the determination of the courts”) (1889); *accord Whitney v. Robertson*, 124 U.S. 190, 194-95 (1888). Consequently the question whether the United States should submit to the jurisdiction of an international tribunal is a question of policy not for the courts but for the political branches to decide.<sup>66</sup>

Section 21 of the Headquarters Agreement cannot provide a rule of decision regarding the interpretation of that agreement for another reason: treating it as doing so would require the courts to refrain from undertaking their constitutionally mandated function. The task of the court in this case is to interpret the ATA in resolving this dispute between numerous parties and the United States. Interpretation of the ATA, as a matter of domestic law, falls to the United States courts. In interpreting the ATA, the effect of the United States' international obligations — the Charter of the United Nations and the Headquarters Agreement in particular — must be considered. As a matter of domestic law, the interpretation of these international obligations and their reconciliation, if possible, with the ATA is for the courts. It is, as Chief Justice Marshall said, “emphatically the province and duty of the judicial department to say what the law is”. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803). That duty will not be resolved without independent adjudication of the effect of the ATA on the Headquarters Agreement. Awaiting the decision of an arbitral tribunal would be a repudiation of that duty.

Interpreting section 21 as a rule of decision would, at a minimum, raise serious constitutional questions. We do not interpret it in that manner. *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490, 500-01 (1979). It would not be consonant with the court's duties for it to await the interpretation of the Headquarters Agreement by an arbitral tribunal, not yet constituted, before undertaking the limited task of interpreting the ATA with a view to resolving the actual dispute before it.

In view of the foregoing, the court finds that it is not deprived of subject-matter jurisdiction by section 21 of the Headquarters Agreement and that any interpretation of the Headquarters Agreement incident to an interpretation of the ATA must be done by the court.

## V

### *The Anti-Terrorism Act and the Headquarters Agreement*

If the ATA were construed as the Government suggests, it would be tantamount to a direction to the PLO Observer Mission at the United Nations that it close its doors and cease its operations *instanter*. Such an interpretation would fly in the face of the Headquarters Agreement, a prior treaty between the United Nations and the United States, and would abruptly terminate the functions the Mission has performed for many years. This conflict requires the court to seek out a reconciliation between the two.

Under our constitutional system, statutes and treaties are both the supreme law of the land, and the Constitution sets forth no order of precedence to differentiate between them. U.S. Const. art. VI, cl. 2. Wherever possible, both are to be given effect. E.g., *Trans World Airlines, Inc. v. Franklin Mint Corp.*, 466 U.S. 243, 252 (1984); *Weinberger v. Rossi*, 456 U.S. 25, 32 (1982); *Washington v. Washington State Commercial Passenger Fishing Vessel Association*, 443 U.S. 658, 690, *modified*, 444 U.S. 816 (1979); *McCulloch v. Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10, 21-22 (1963); *Clark v. Allen*, *supra*, 331 U.S. at 510-11; *Chew Heong v. United States*, 112 U.S. 536, 550 (1884). Only where a treaty is irreconcilable with a later enacted statute and Congress has

clearly evinced an intent to supersede a treaty by enacting a statute does the later enacted statute take precedence. E.g., *The Chinese Exclusion Case*, *supra*, 130 U.S. at 599-602 (finding clear intent to supersede); *Edye v. Robertson (The Head Money Cases)*, 112 U.S. 580, 597-99 (1884) (same, decided on the same day as *Chew Heong*, *supra*, which found no such intent); *South African Airways v. Dole*, 817 F.2d 119, 121, 125-26 (D.C. Cir.) (Anti-Apartheid Act of 1986, directing the Secretary of State to “terminate the Agreement Between the United States of America and the Government of the Union of South Africa” irreconcilable with that treaty), *cert. denied*, 108 S. Ct. 229, 98 L.E.2d 188 (October 13, 1987); *Diggs v. Shultz*, 470 F.2d 461, 466 (D.C. Cir. 1972), *cert. denied*, 411 U.S. 931 (1973). Compare *Menominee Tribe of Indians v. United States*, 391 U.S. 404, 413 (1968) (finding no clear intent to abrogate treaty); *McCulloch v. Sociedad de Marineros*, *supra*, 372 U.S. at 21-22 (same); *Cook v. United States*, 288 U.S. 102, 119-20 (1933) (same).

The long-standing and well-established position of the Mission at the United Nations, sustained by international agreement, when considered along with the text of the ATA and its legislative history, fails to disclose any clear legislative intent that Congress was directing the Attorney General, the State Department or this Court to act in contravention of the Headquarters Agreement. This court acknowledges the validity of the Government’s position that Congress *has the power* to enact statutes abrogating prior treaties or international obligations entered into by the United States. *Whitney v. Robertson*, *supra*, 124 U.S. 193-95; *The Head Money Cases*, *supra*, 112 U.S. at 597-99. However, unless this power is clearly and unequivocally exercised, this court is under a duty to interpret statutes in a manner consonant with existing treaty obligations. This is a rule of statutory construction sustained by an unbroken line of authority for over a century and a half. Recently, the Supreme court articulated it in *Weinberger v. Rossi*, *supra*, 456 U.S. at 32:

“It has been maxim of statutory construction since the decision in *Murray v. The Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804), that an act of Congress ought never to be construed to violate the law of nations, if any other possible construction remains ...”

Accord *Trans World Airlines*, *supra*, 466 U.S. at 252; *Washington v. Fishing Vessel Association*, *supra*, 443 U.S. at 690; *Menominee Tribe of Indians*, *supra*, 391 U.S. at 412-13; *McCulloch v. Sociedad de Marineros*, *supra*, 372 U.S. at 21-22; *Lauritzen v. Larsen*, 345 U.S. 571, 578 (1953); *Clark v. Allen*, *supra*, 341 U.S. at 510; *Pigeon River Improvement, Slide & Boom Co. v. Charles W. Cox, Ltd.*, 291 U.S. 138, 160 (1934); *Cunard S.S. Co. v. Mellon*, 262 U.S. 100, 132, (1923) (Sutherland, J., dissenting); *Chew Heong*, *supra*, 112 U.S. at 602 (1884).

The American Law Institute’s recently revised *Restatement (Third) Foreign Relations Law of the United States* (1988) reflects this unbroken line of authority:

“§115. Inconsistency Between International Law or Agreement and Domestic Law: Law of the United States.

“(1) (a) An Act of Congress supersedes an earlier rule of international law or a provision of an international agreement as law of the United States if the purpose of the act to supersede the earlier rule or provision is clear and if the act and the earlier rule or provision cannot be fairly reconciled” (emphasis added)

We believe the ATA and the Headquarters Agreement cannot be reconciled except by finding the ATA inapplicable to the PLO Observer Mission.

A. THE OBLIGATIONS OF THE UNITED STATES UNDER  
THE HEADQUARTERS AGREEMENT

The obligation of the United States to allow transit, entry and access stems not only from the language of the Headquarters Agreement but also from forty years of practice under it. Section 11 of the Headquarters Agreement reads, in part:

“The federal, state or local authorities of the United States shall not impose any impediments to transit to or from the Headquarters district of: (1) representatives of Members ..., (5) other persons invited to the Headquarters district by the United Nations ... on official business”. 61 Stat. at 761 (22 U.S.C. §287 note).<sup>67</sup> These rights could not be effectively exercised without the use of offices. The ability to effectively organize and carry out one’s work, especially as a liaison to an international organization, would not be possible otherwise. It is particularly significant that section 13 limits the application of United States law not only with respect to the entry of aliens, but also their residence. The Headquarters Agreement thus contemplates a continuity limited to official United Nations functions and is entirely consistent with the maintenance of missions to the United Nations. The exemptions of section 13 are not limited to members, but extend to invitees as well.

In addition, there can be no dispute that over the 40 years since the United States entered into the Headquarters Agreement it has taken a number of actions consistent with its recognition of a duty to refrain from impeding the functions of observer missions to the United Nations. It has, since the early days of the presence of the United Nations in New York, acquiesced in the presence of observer missions to the United Nations in New York. See *Permanent Missions: Report of the Secretary-General, supra*, at 17 ¶14 (1949).

After the United Nations invited the PLO to participate as a permanent observer, the Department of State took the position that it was required to provide access to the United Nations for the PLO. 1974 *Digest of United States Practice in International Law*, 27-29; 1976 *Digest of United States Practice in International Law*, 74-75. The State Department at no time disputed the notion that the rights of entry, access and residence guaranteed to invitees include the right to maintain offices.

The view that under the Headquarters Agreement the United States must allow PLO representatives access to and presence in the vicinity of the United Nations was adopted by the court in *Anti-Defamation League of B’nai B’rith v. Kissinger, supra*; see also *Harvard Law School Forum v. Shultz*, 633 F. Supp. 525, 526-27 (D. Mass. 1986). The United States has, for 14 years, acted in a manner consistent with a recognition of the PLO’s rights in the Headquarters

Agreement. This course of conduct under the Headquarters Agreement is important evidence of its meaning. *O'Connor v. United States*, 479 U.S. 27 XX, 107 S. Ct. 347, 351, 96 L.E.2d 206, 214 (1986).

Throughout 1987, when Congress was considering the ATA, the Department of State elaborated its view that the Headquarters Agreement contained such a requirement. Perhaps the most unequivocal elaboration of the State Department's interpretation was the letter of J. Edward Fox, Assistant Secretary for Legislative Affairs, to Dante Fascell, Chairman of the House Committee on Foreign Affairs (November 5, 1987):

"The United States has acknowledged that [the invitations to the PLO to become a permanent observer] give rise to United States obligations to accord PLO observers the rights set forth in sections 11 to 13 of the Headquarters Agreement. See, e.g., *1976 Digest of United States Practice in International Law* 74-75. The proposed legislation would effectively require the United States to deny PLO observers the entry, transit, and residence rights required by sections 11-13 and, as a later enacted statute, would supersede the Headquarters Agreement in this regard as a matter of domestic law.

"The proposed legislation would also ... break a 40-year practice regarding observer missions by nations hosting U.N. bodies and could legitimately be viewed as inconsistent with our responsibilities under sections 11 to 13 of the United Nations Headquarters Agreement ..."<sup>68</sup>

Shortly before the adoption of the ATA, during consideration of a report of the Committee on Relations with the Host Country by the General Assembly of the United Nations, the United States representative noted "that the United States Secretary of State had stated that the closing of the mission would constitute a violation of United States obligation under the Headquarters Agreement". United Nations document A/C.6/42/SR.58 (November 25, 1987) at ¶3.

He had previously stated that "closing the mission, in our view, and I emphasize this is the executive branch, is not consistent with our international legal obligations under the Headquarters Agreement". Partial transcript of the 126th Meeting of the Committee on Relations with the Host Country, at 4 (October 14, 1987). And the day after the ATA was passed, State Department spokeswoman Phyllis Oakley told reporters that the ATA, "if implemented, would be contrary to our international legal obligations under the Headquarters Agreement, [so the administration intends] ... to engage in consultations with the Congress in an effort to resolve this matter". Department of State daily press briefing at 8 (December 23, 1987).<sup>69</sup>

It seemed clear to those in the executive branch that closing the PLO mission would be a departure from the United States practice in regard to observer missions, and they made their views known to members of Congress who were instrumental in the passage of the ATA. In addition, United States representatives to the United Nations made repeated efforts to allay the concerns of the United Nations Secretariat by reiterating and reaffirming the obligations of the United States under the Headquarters Agreement.<sup>70</sup> A chronological record of their efforts is set forth in the advisory opinion of the International Court of Justice, *United Nations v. United States*, *supra*, 1988 I.C.J. No. 77 ¶¶11-22, slip op. at 5-11 (April 26, 1988). The United Nations Secretariat considered it nec-

essary to request that opinion in order to protect what it considered to be the United Nations' rights under the Headquarters Agreement.<sup>71</sup> The United Nations' position that the Headquarters Agreement applies to the PLO Mission is not new. 1979 *United Nations Juridical Yearbook* 169-79; see 1980 *United Nations Juridical Yearbook* 188 ¶3.

“Although not conclusive, the meaning attributed to treaty provisions by the Government agencies charged with their negotiation and enforcement is entitled to great weight.” *Sumitomo Shoji America, Inc. v. Avagliano*, 457 U.S. 176, 184-85 (1982). The interpretive statements of the United Nations also carry some weight, especially because they are in harmony with the interpretation given to the Headquarters Agreement by the Department of State. *O'Connor*, *supra*, 479 U.S. at XX 107 S. Ct. at 351, 96 L.E.2d at 214.

Thus the language, application and interpretation of the Headquarters Agreement lead us to the conclusion that it requires the United States to refrain from interference with the PLO Observer Mission in the discharge of its functions at the United Nations.

#### B. RECONCILIATION OF THE ATA AND THE HEADQUARTERS AGREEMENT

The lengths to which our courts have sometimes gone in construing domestic statutes so as to avoid conflict with international agreements are suggested by a passage from Justice Field's dissent in *Chew Heong*, *supra*, 112 U.S. at 560, 560-61 (1884):

“I am unable to agree with my associates in their construction of the act ... restricting the immigration into this country of Chinese laborers. That construction appears to me to be in conflict with the language of that act, and to require the elimination of entire clauses and the interpolation of new ones. It renders nugatory whole provisions which were inserted with sedulous care. The change thus produced in the operation of the act is justified on the theory that to give it any other construction would bring it into conflict with the treaty; and that we are not at liberty to suppose that Congress intended by its legislation to disregard any treaty stipulations.”

*Chew Heong* concerned the interplay of legislation regarding Chinese laborers with treaties on the same subject. During the passage of the statute at issue in *Chew Heong*, “it was objected to the legislation sought that the treaty of 1868 stood in the way, and that while it remained unmodified, such legislation would be a breach of faith to China ...” *Idem* at 569. In spite of that, and over Justice Field's dissent, the Court, in Justice Field's words, “narrow[ed] the meaning of the act so as measurably to frustrate its intended operation”. Four years after the decision in *Chew Heong*, Congress amended the act in question to nullify that decision. Ch. 1064, 25 Stat. 504. With the amended statute, there could be no question as to Congress's intent to supersede the treaties, and it was the later enacted statute which took precedence. *The Chinese Exclusion Case*, *supra*, 130 U.S. at 598-99 (1889).

The principles enunciated and applied in *Chew Heong* and its progeny, e.g., *Trans World Airlines*, *supra*, 466 U.S. at 252; *Weinberger v. Rossi*, *supra*, 456 U.S. at 32; *Menominee Tribe of Indians*, *supra*, 391 U.S. at 413; *McCulloch v. Sociedad de Marineros*, *supra*, 372 U.S. at 21-22; *Pigeon River*, *supra*, 291

U.S. at 160; *Cook v. United States*, *supra*, 288 U.S. at 119-20, require the clearest of expressions on the part of Congress. We are constrained by these decisions to stress the lack of clarity in Congress's action in this instance. Congress's failure to speak with one clear voice on this subject requires us to interpret the ATA as inapplicable to the Headquarters Agreement. This is so, in short, for the reasons which follow.

First, neither the Mission nor the Headquarters Agreement is mentioned in the ATA itself. Such an inclusion would have left no doubt as to Congress's intent on a matter which had been raised repeatedly with respect to this act, and its absence here reflects equivocation and avoidance, leaving the court without clear interpretive guidance in the language of the act. Second, while the section of the ATA prohibiting the maintenance of an office applies "notwithstanding any provision of law to the contrary", 22 U.S.C. §5202(3), it does not purport to apply notwithstanding any *treaty*. The absence of that interpretive instruction is especially relevant because elsewhere in the same legislation Congress expressly referred to "United States law (including any treaty)". 101 Stat. at 1343. Thus Congress failed, in the text of the ATA, to provide guidance for the interpretation of the act, where it became repeatedly apparent before its passage that the prospect of an interpretive problem was inevitable. Third, no member of Congress expressed a clear and unequivocal intent to supersede the Headquarters Agreement by passage of the ATA. In contrast, most who addressed the subject of conflict denied that there would be a conflict: in their view, the Headquarters Agreement did not provide the PLO with any right to maintain an office. Here again, Congress provided no guidance for the interpretation of the ATA in the event of a conflict which was clearly foreseeable. And Senator Claiborne Pell, Chairman of the Senate Foreign Relations Committee, who voted for the bill, raised the possibility that the Headquarters Agreement would take precedence over the ATA in the event of a conflict between the two.<sup>72</sup> His suggestion was neither opposed nor debated, even though it came in the final minutes before passage of the ATA.

A more complete explanation begins, of course, with the statute's language. The ATA reads, in part:

"It shall be unlawful, if the purpose be to further the interests of the PLO ...

\* \* \*

(3) Notwithstanding any provision of law to the contrary, to establish or maintain an office, headquarters, premises, or other facilities or establishments within the jurisdiction of the United States at the behest or direction of, or with funds provided by, the PLO ..." 22 U.S.C. §5202(3).

The Permanent Observer Mission to the United Nations is nowhere mentioned *in haec verba* in this act, as we have already observed. It is nevertheless contended by the United States that the foregoing provision requires the closing of the Mission, and this in spite of possibly inconsistent international obligations. According to the Government, the act is so clear that this possibility is nonexistent. The Government argues that its position is supported by the provision that the ATA would take effect "notwithstanding any provision of law to



the contrary”, 22 U.S.C. §5202(3), suggesting that Congress thereby swept away any inconsistent international obligations of the United States. In effect, the Government urges literal application of the maxim that in the event of conflict between two laws, the one of later date will prevail: *leges posteriores priores contrarias abrogant*.

We cannot agree. The proponents of the ATA were, at an early stage and throughout its consideration, forewarned that the ATA would present a potential conflict with the Headquarters Agreement.<sup>73</sup> It was especially important in those circumstances for Congress to give clear, indeed unequivocal guidance, as to how an interpreter of the ATA was to resolve the conflict. Yet there was no reference to the Mission in the text of the ATA, despite extensive discussion of the Mission in the floor debates. Nor was there reference to the Headquarters Agreement, or to any treaty, in the ATA or in its “notwithstanding” clause, despite the textual expression of intent to supersede treaty obligations in other sections of the Foreign Relations Authorization Act, of which the ATA formed a part.<sup>74</sup> Thus Congress failed to provide unequivocal interpretive guidance in the text of the ATA, leaving open the possibility that the ATA could be viewed as a law of general application and enforced as such, without encroaching on the position of the Mission at the United Nations.

That interpretation would present no inconsistency with what little legislative history exists. There were conflicting voices both in Congress and in the executive branch before the enactment of the ATA. Indeed, there is only one matter with respect to which there was unanimity: condemnation of terrorism. This, however, is extraneous to the legal issues involved here. At oral argument, the United States Attorney conceded that there was no evidence before the court that the Mission had misused its position at the United Nations or engaged in any covert actions in furtherance of terrorism.<sup>75</sup> If the PLO is benefiting from operating in the United States, as the ATA implies, the enforcement of its provisions outside the context of the United Nations can effectively curtail that benefit.

The record contains voices of Congressmen and Senators forceful in their condemnation of terrorism and of the PLO and supporting the notion that the legislation would close the mission.<sup>76</sup> There are other voices, less certain of the validity of the proposed Congressional action and preoccupied by problems of constitutional dimension.<sup>77</sup> And there are voices of Congressmen uncertain of the legal issues presented but desirous nonetheless of making a “political statement”.<sup>78</sup> During discussions which preceded and followed the passage of the ATA, the Secretary of State<sup>79</sup> and the Legal Adviser to the Department of State,<sup>80</sup> a former member of this court, voiced their opinions to the effect that the ATA presented a conflict with the Headquarters Agreement.

Yet no member of Congress, at any point, explicitly stated that the ATA was intended to override any international obligation of the United States.

The only debate on this issue focused not on whether the ATA would do so, but on whether the United States in fact had an obligation to provide access to the PLO. Indeed, every proponent of the ATA who spoke to the matter argued that the United States did not have such an obligation. For instance, Senator Grassley, after arguing that the United States had no obligation relating to the PLO Mission under the Headquarters Agreement, noted in passing that Con-

gress had the *power* to modify treaty obligations. But even there, Senator Grassley did not argue that the ATA would supersede the Headquarters Agreement in the event of a conflict. 133 Cong. Rec. S 15, 621-22 (daily ed. November 3, 1987). This disinclination to face the prospect of an actual conflict was again manifest two weeks later, when Senator Grassley explained, “as I detailed earlier . . . , the United States has *no international legal obligation* that would preclude it from closing the PLO Observer Mission”. 133 Cong. Rec. S 16,505 (daily ed. November 20, 1987) (emphasis added). As the *Congressional Record* reveals, at the time of the ATA’s passage (on December 15 in the House and December 16 in the Senate), its proponents were operating under a misapprehension of what the United States’ treaty obligation entailed. 133 Cong. Rec. S 18,190 (daily ed. December 16, 1987) (statement of Sen. Helms) (closing the Mission would be “entirely within our Nation’s obligations under international law”); 133 Cong. Rec. H 11,425 (daily ed. December 15, 1988) (statement of Rep. Burton) (observer missions have “no — zero — rights in the Headquarters Agreement”).<sup>81</sup>

In sum, the language of the Headquarters Agreement, the long-standing practice under it and the interpretation given it by the parties to it leave no doubt that it places an obligation upon the United States to refrain from impairing the function of the PLO Observer Mission to the United Nations. The ATA and its legislative history do not manifest Congress’s intent to abrogate this obligation. We are therefore constrained to interpret the ATA as failing to supersede the Headquarters Agreement and inapplicable to the Mission.

### C. THE CONTINUED VIABILITY OF THE ATA

We have interpreted the ATA as inapplicable to the PLO Mission to the United Nations. The statute remains a valid enactment of general application. It is a wide gauged restriction of PLO activity within the United States and, depending on the nature of its enforcement, could effectively curtail any PLO activities in the United States, aside from the Mission to the United Nations. We do not accept the suggestion of counsel that the ATA be struck down. The federal courts are constrained to avoid a decision regarding unconstitutionality except where strictly necessary. *Rescue Army v. Municipal Court of the City of Los Angeles*, 331 U.S. 549, 568-72 (1947). In view of our construction of the statute, this can be fairly avoided in this instance. The extent to which the First Amendment to the Constitution and the Bill of Attainder Clause, art. I, §9, cl. 3, guide our interpretation of the ATA is addressed in *Mendelsohn v. Meese, post*.

## VI

### *Conclusions*

The Anti-Terrorism Act does not require the closure of the PLO Permanent Observer Mission to the United Nations, nor do the act’s provisions impair the continued exercise of its appropriate functions as a Permanent Observer at the United Nations. The PLO Mission to the United Nations is an invitee of the United Nations under the Headquarters Agreement and its status is protected by that Agreement. The Headquarters Agreement remains a valid and outstanding treaty obligation of the United States. It has not been superseded by the Anti-Terrorism Act, which is a valid enactment of general application.

We express our thanks to the lawyers in this case, especially those appearing for *amici curiae*, for their professional dedication and their assistance to the court.

The motion of the defendants to dismiss for lack of personal jurisdiction is denied.

The motion of the defendants to dismiss for lack of subject-matter jurisdiction is denied.

The motion of the defendants to dismiss for lack of capacity, which was not briefed, is denied.

Mansour's motion to dismiss for failure to state a claim upon which relief may be granted is treated, pursuant to rule 12(b) of the Federal Rules of Civil Procedure, as a motion for summary judgement, Fed. R. Civ. P. 56, and is granted.

The motion of the United States for summary judgement is denied, and summary judgement is entered for the defendants, dismissing this action with prejudice.

SO ORDERED:

(*signed*) Edmund L. PALMIERI  
United States District Judge

Dated: New York, New York  
June 29, 1988

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## APPENDIX A

### TITLE 22, UNITED STATES CODE (FOREIGN RELATIONS)

#### CHAPTER 61 — ANTI-TERRORISM — PLO

§5201. Findings; determinations

(a) Findings

The Congress finds that:

(1) Middle East terrorism accounted for 60 percent of total international terrorism in 1985;

(2) The Palestine Liberation Organization (hereafter in this title referred to as the "PLO") was directly responsible for the murder of an American citizen on the *Achille Lauro* cruise liner in 1985, and a member of the PLO's Executive Committee is under indictment in the United States for the murder of that American citizen;

(3) The head of the PLO has been implicated in the murder of a United States Ambassador overseas;

(4) The PLO and its constituent groups have taken credit for, and been implicated in, the murders of dozens of American citizens abroad;

(5) The PLO covenant specially states that "armed struggle is the only way to liberate Palestine, thus it is an overall strategy, not merely a tactical phase";

(6) The PLO rededicated itself to the "continuing struggle in all its armed forms" at the Palestine National Council meeting in April 1987; and

(7) The Attorney General has stated that "various elements of the Palestine Liberation Organization and its allies and affiliates are in the thick of international terror".

(b) Determinations

Therefore, the Congress determines that the PLO and its affiliates are a terrorist organization and a threat to the interests of the United States, its allies, and to international law and should not benefit from operating in the United States.

§5202. Prohibitions regarding the PLO

It shall be unlawful, if the purpose be to further the interests of the Palestine Liberation Organization or any of its constituent groups, any successor to any of those, or any agents thereof, on or after March 21, 1988:

(1) To receive anything of value except informational material from the PLO or any of its constituent groups, any successor thereto, or any agents thereof; or

(2) To expend funds from the PLO or any of its constituent groups, any successor thereto, or any agents thereof; or

(3) Notwithstanding any provision of law to the contrary, to establish or maintain an office, headquarters, premises or other facilities or establishments within the jurisdiction of the United States at the behest or direction of, or with funds provided by the Palestine Liberation Organization or any of its constituent groups, any successor to any of those, or any agents thereof.

§5203. Enforcement

(a) Attorney General

The Attorney General shall take the necessary steps and institute the necessary legal action to effectuate the policies and provisions of this chapter.

(b) Relief

Any district court of the United States for a district in which a violation of this chapter occurs shall have authority, upon petition of relief by the Attorney General, to grant injunctive and such other equitable relief as it shall deem necessary to enforce the provisions of this chapter.

**(b) United States Court of Appeals, District of Columbia Circuit**

COMMITTEE OF UNITED STATES CITIZENS LIVING IN NICARAGUA V. REAGAN,  
JUDGEMENT OF 16 DECEMBER 1988<sup>82</sup>

*Question of United States Government abiding by judgment of the International Court of Justice in the Case Concerning Military and Paramilitary Activities In and Against Nicaragua — Nature of the International Court of Justice and its judgments — Fifth Amendment to United States Constitution — Relationship of international law and municipal law*

(Gordon, *Senior District Judge*; Robinson and Mikva, *Circuit Judges*)

SUMMARY: *The facts:* — The Committee of United States Citizens Living in Nicaragua (“the Committee”) was an association composed of several organizations opposed to United States foreign policy relating to Nicaragua. The Committee began proceedings in the United States courts concerning what it saw as the failure of the United States Government to abide by the judgment of the International Court of Justice in the *Case Concerning Military and Paramilitary Activities In and Against Nicaragua (Nicaragua v. United States)* (“the *Nicaragua case*”).<sup>83</sup> The International Court had held that United States support of the “Contra” rebel movement in Nicaragua violated principles of customary international law and treaty obligations arising under a bilateral agreement between Nicaragua and the United States.<sup>84</sup> The United States had denied that the Court had jurisdiction over the action and, before the International Court had given its judgment on the merits in the case, the United States Congress had approved continued financial material support for the rebel movement.

The Committee sought injunctive and declaratory relief against the Government’s policy. The Committee alleged that the refusal of the United States to adhere to the judgment of the International Court was contrary to the obligations arising under Article 94 of the Charter of the United Nations,<sup>85</sup> as well as rules of customary international law. In addition they maintained that the obligation to comply with a decision of the Court was a peremptory norm of international law, or *jus cogens*, prevailing over both customary international law and treaties.

The Committee also asserted that the continued funding of the rebel movement contravened the Administrative Procedure Act and violated their rights under the First and Fifth Amendments to the United States Constitution.

The Government contended that the issues which were raised by the Committee’s action were non-justiciable under the political question doctrine.

Held: — The claim was justiciable. The case was dismissed because it failed to state a claim upon which relief could be granted.

(1) No firm criteria had been established for the application of the political question exception to justiciability. Nevertheless, although certain aspects of the present action fell within the scope of the political question doctrine, the Government’s contention that the entire basis of the litigation was non-justiciable was inappropriate. The claims of the Committee, however, wrongly pre-

sumed that individuals were vested with the right to enforce judgments of the International Court through proceedings in their national courts against their governments. The International Court operated upon the level of governments and its judgments did not vest rights in individuals. The Committee's attempts to circumvent this issue by asserting that the refusal of the United States Government to implement the judgment of the International Court was contrary to the principles of customary international law failed because its members lacked *locus standi* (pp. 253-254).

(2) The claims based upon the Fifth Amendment to the United States Constitution were too important to be rendered non-justiciable. Nevertheless, the Fifth Amendment submissions were dismissed because a claim upon which relief could be granted had not been established (pp. 254-255).

(3) (a) Whether a municipal court could remedy a violation of international law depended upon the nature of that violation. If a rule of customary international law had been violated and the political branches of the State had induced the violation the courts could not grant a remedy. The position as regards *jus cogens* was not so unequivocal but the Court did not resolve this confusion, because the rules which the Committee alleged were peremptory norms of international law were not recognized as such by the community of nations (pp. 255-256).

(b) The claims of the Committee with regard to treaty violations were dismissed on the basis of the principle that subsequent municipal legislation superseded conflicting provisions of preceding treaties. Therefore, the enactment by Congress providing for continued funding for the rebel movement overrode the international obligations of the United States owed under the United Nations Charter. Nevertheless, it was noted that the courts would do their utmost to construe subsequent statutes in a manner intended to minimize conflict with existing treaty obligations. The Committee lacked *locus standi* to enforce the provisions of the United Nations Charter in any event. Article 94 of the Charter did not confer enforceable rights upon individuals. The vesting of rights by treaty required provisions which were self-executing. In order to determine whether a treaty was self-executing, the courts would look to the intention of the parties to that treaty as represented by the language adopted in the treaty. The courts would also look to see whether the onus was placed upon the government or judiciary for the implementation of the treaty within the domestic sphere. Article 94 placed the burden upon governments of the Member States of the United Nations (pp. 256-258).

(c) In accordance with the dualist approach adopted with regard to treaties, it followed that the application of the rules of customary international law as applied by the municipal courts was modified by later statutes adopted by Congress. Therefore, the claim upon this ground failed on the basis that a statute could not be found to violate a rule of customary international law (pp. 258-259).

(d) The claim that *jus cogens* operated within the municipal legal system on the same level as the Constitution of the United States failed. There was no evidence that *jus cogens* had the same binding force in a domestic legal system as it had on the international plane. Furthermore, neither the obligation to abide

by the decision of the International Court of Justice, nor the judgment of the Court itself, were peremptory norms of international law as alleged by the Committee. For a practice to develop into a rule of customary international law it had to enjoy consistent and general acceptance amongst a number of States. When State practice had reached a certain level, a rule of customary international law came into being. The Vienna Convention on the Law of Treaties, 1969, provided that a rule of customary international law had to be accepted and recognized by the whole of the international community to become part of the body of *jus cogens*.<sup>86</sup> That recognition had to include cognizance of the fact that the rule was non-derogable. The decision of the International Court in the *Nicaragua* case was not a peremptory norm of international law and could not be enforced by the municipal courts (pp. 259-262).

(4) The claims under the Administrative Procedure Act and the United States Constitution were dismissed (pp. 262-263).

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#### NOTES

<sup>1</sup>Despite General Assembly Resolution 2372 (XXII) (1968) by which the United Nations changed the name of the territory of South West Africa to "Namibia", the Law Report containing this case describes the Court as being of "South West Africa" and, for convenience, this name has been retained.

<sup>2</sup>*International Law Reports*, vol. 82 (1990), pp. 464-99.

<sup>3</sup>49 *ILR* 2.

<sup>4</sup>17 *ILR* 47.

<sup>5</sup>7 *Ann Dig* 53.

<sup>6</sup>9 *Ann Dig* 44.

<sup>7</sup>2 *Ann Dig* 27.

<sup>8</sup>8 *Ann Dig* 128.

<sup>9</sup>52 *ILR* 29.

<sup>10</sup>*Ibid.* at 35-6.

<sup>11</sup>*Ibid.* at 39.

<sup>12</sup>49 *ILR* 2 at 39.

<sup>13</sup>*Ibid.*

<sup>14</sup>37 *ILR* 3 at 12.

<sup>15</sup>52 *ILR* 29.

<sup>16</sup>17 *ILR* 46 at 60.

<sup>17</sup>39 *ILR* 61 at 208 *et seq.*

<sup>18</sup>69 *ILR* 145 at 149-50.

<sup>19</sup>52 *ILR* 422 at 426.

<sup>20</sup>53 *ILR* 50 at 58.

<sup>21</sup>2 *Ann Dig* 27.

<sup>22</sup>52 *ILR* 29.

<sup>23</sup>43 *ILR* 114.

<sup>24</sup>55 *ILR* 89 at 93-4.

<sup>25</sup>52 *ILR* 29.

<sup>26</sup>52 *ILR* 29 at 36.

<sup>27</sup>*Ibid.* at 36.

<sup>28</sup>*Ibid.* at 39.

<sup>29</sup>52 *ILR* 422 at 426.

<sup>30</sup>52 *ILR* 29.

<sup>31</sup>2 *Ann Dig* 27.

<sup>32</sup>8 *Ann Dig* 128.

<sup>33</sup>9 *Ann Dig* 44.

<sup>34</sup>61 *ILR* 260 at 265.

<sup>35</sup>41 *ILR* 1 at 6-7.

<sup>36</sup>3 *Ann Dig* 46.

<sup>37</sup>See *International Law Reports*, vol. 80 (1989), pp. 47-227.

<sup>38</sup>77 *ILR*. 55.

<sup>39</sup>See p. 39.

<sup>40</sup>See p. 60.

<sup>41</sup>See p. 181.

<sup>42</sup>See p. 191.

<sup>43</sup>See p. 211.

<sup>44</sup>United Nations document A/42/915/Add.5; see also chaps. VI.2.7 and VII of this *Yearbook*.

<sup>45</sup>Title X of the Foreign Relations Authorization Act for Fiscal Years 1988-89. Pub. L. 100-204, §§1001-1005, 101 Stat. 1331, 1406-07; 22 U.S.C.A. §§5201-5203 (West Supp. 1988). It is attached hereto as Appendix A.

<sup>46</sup>G.A. Res. 169 (II), 11 U.N.T.S. 11, No. 147 (1947). 61 Stat. 756, T.I.A.S. No. 1676, authorized by S.J. Res. 144, 80th Cong., 1st Sess., Pub. L. 80-357, set out in 22 U.S.C. §287 note (1982). We refer to the Headquarters Agreement as a treaty, since we are not concerned here with making a distinction among different forms of international agreement. The applicable law implicates all forms, including the Headquarters Agreement. *Weinberger v. Rossi*, 456 U.S. 25, 29-30 (1982).

<sup>47</sup>H. Con. Res. 75, 79th Cong., 1st Sess., 59 Stat. 848 (1945).

<sup>48</sup>The Democratic People's Republic of Korea, the Holy See, Monaco, the Republic of Korea, San Marino and Switzerland. *Permanent Missions No. 262* at 270-77.

<sup>49</sup>The Asian-African Legal Consultative Committee, the Council for Mutual Assistance, the European Economic Community, the League of Arab States, the Organization of African Unity, and the Islamic Conference. *Permanent Missions No. 262* at 278-84.

<sup>50</sup>The PLO and the South West Africa Peoples' Organization (SWAPO). *Permanent Missions No. 262* at 285-86.

<sup>51</sup>Letter from Secretary of State George P. Shultz to Rep. Jack Kemp (October 16, 1986) ("the PLO Observer Mission ... is in no sense accredited to the United States."), reprinted in 133 Cong. Rec. E 1, 635-36 (daily ed. April 29, 1987); accord 1 *Restatement (Third) Foreign Relations Law of the United States* §202, Reporters' Note 6 at 84 (1988).

<sup>52</sup>Without accreditation, no diplomatic immunity ensues. Cf. *United States v. Kostadinov*, 734 F.2d 905 (2d Cir. 1984), cert. denied, 469 U.S. 881 (1985).

<sup>53</sup>General Assembly resolution 3237 (XXIX), 29 U.N. GAOR Supp. 31 (agenda item 108) 4, United Nations document A/9631 (1974).

<sup>54</sup>*Ibid.*; see also General Assembly resolution 3236 (XXIX) and 3210 (XXIX), 29 United Nations GAOR Supp. 31 (agenda items General Assembly 108) 3 & 4, United Nations document A/9631 (1974).

<sup>55</sup>E.g., 133 Cong. Rec. E 1,635 (daily ed. April 29, 1987) (letter from Rep. Jack Kemp to Sec. of State George P. Shultz (dated October 16, 1986)).

<sup>56</sup>*Anti-PLO Terrorism Act of 1987*, H.R. 2211, 100th Cong., 1st Sess., introduced in 133 Cong. Rec. E 1,635 (daily ed. April 29, 1987). *Antiterrorism Act of 1987*, S. 1203 and H.R. 2548, 100th Cong., 1st Sess., introduced in 133 Cong. Rec. S 6,448 (daily ed. May 14, 1987) and H 4,047 (daily ed. May 28, 1987). *Terrorist Organization Exclusion Act of 1987*, H.R. 2587, 100th Cong., 1st Sess., introduced in 133 Cong. Rec. H 4,198 (daily ed. June 3, 1987).



<sup>57</sup>The ATA, known as the Grassley Amendment after its sponsor Senator Grassley of Iowa, was added to the omnibus foreign relations spending bill on the floor of the Senate on October 8, 1987, despite the objections of several Senators. See 133 Cong. Rec. S 13,855 (daily ed. Oct. 8, 1987) (statement of Sen. Kassebaum) (“We do have hearings scheduled in the Foreign Relations Committee ... [and] it is important for us to have a hearing to explore the ramifications of the issues ...”) *idem*, S 13,852 (statement of Sen. Bingaman) (“We need to further explore the issues raised by this amendment. It is an amendment that has not had any hearings, has not been considered in committee, and one that raises very serious issues of constitutional rights ...”).

<sup>58</sup>Pub. L. 100-204, Title X, §1002(a), 101 Stat. 1331, 1407, set out in 22 U.S.C.A. §5201 note (West Supp. 1988).

<sup>59</sup>Two of the original six individual defendants were not served, and the action against them has been dismissed on consent without prejudice. Fed. R. Civ. P. 41(a)(i).

<sup>60</sup>Mansour is also a plaintiff in the related case decided today. *Mendelsohn v. Meese*, 88 Civ. 2005 (S.D.N.Y. June 29, 1988) (filed herewith). The court there addresses his claim that the ATA is an unconstitutional Bill of Attainder. See also *Mendelsohn v. Meese* (S.D.N.Y. April 12, 1988) (denying preliminary injunctive relief).

<sup>61</sup>S.J. Res. 144, 61 Stat. 756 (22 U.S.C. §287 note); see also 1 *Foreign Relations of the United States 1947* 42-46 (1973).

<sup>62</sup>The United Nations has explicitly refrained from becoming a party to this litigation. The International Court of Justice makes a persuasive statement that the proceedings before this court “cannot be an ‘agreed mode of settlement’ within the meaning of section 21 of the Headquarters Agreement. The purpose of these proceedings is to enforce the Anti-Terrorism Act of 1987; it is not directed to settling the [alleged] dispute, concerning the application of the Headquarters Agreement.” *U.N. v. U.S.*, *supra*, 1988 I.C.J. No. 77 ¶56, slip op. at 23.

<sup>63</sup>The Federal Arbitration Act itself, 9 U.S.C. §1-14 (1982), is applicable only to “a written agreement evidencing a transaction involving commerce.” *Idem*, §2; *Bernhardt v. Polygraphic Co. of America*, 350 U.S. 198, 200-01 (1956).

<sup>64</sup>The same is true of the suggestion of *amicus*, the Association of the Bar of the City of New York, that this court decline to exercise its equity jurisdiction before an arbitral tribunal has been convened. By doing so, the court could thereby place the executive department in an awkward position, leaving the impression that the court, rather than the executive, is making the determination of this issue of foreign policy. The court should not do by indirection what it cannot do directly.

<sup>65</sup>It is important to note that we may not inquire into the executive’s reasons for refraining from arbitration, and in fact those reasons are not before us. See Press Conference, Assistant Attorney General Charles Cooper, 16 (March 11, 1988) (“I would not describe any of the deliberations that went into that decision.”); see also Letter of Assistant Attorney General John R. Bolton to Judge Edmund L. Palmieri (May 12, 1988) (docketed at the request of government counsel in 88 Civ. 1962 and 88 Civ. 2005) (“arbitration would not be appropriate or timely”).

<sup>66</sup>The political question doctrine is inapplicable to the court’s duty to interpret the Headquarters Agreement and the ATA. *Japan Whaling Association v. American Cetacean Society*, 478 U.S. 221, 230 (1986). We are interpreting the Agreement, but are unwilling to expand the reach of its arbitration clause to a point which would be inconsistent with the limitations placed upon us by the Constitution.

<sup>67</sup>Section 12 requires that the provisions of section 11 be applicable “irrespective of the relations existing between the Governments of the persons referred to in that Section and the Government of the United States”. 61 Stat. at 761 (22 U.S.C. §287 note).

Section 13 limits the applicability of the United States laws and regulations regarding the entry and residence of aliens, when applied to those affiliated with the United Nations by virtue of Section 11. *Idem*, at 761-62 (22 U.S.C. §287 note).

<sup>68</sup>This letter was reproduced as item 33 of the Compendium submitted by the parties

to the court. See also Letter from Sec. of State George P. Shultz to Sens. Robert J. Dole, Charles E. Grassley, Claiborne Pell and Rep. Jack F. Kemp (July 31, 1987) (“this would be seen as a violation of a U.S. treaty obligation”); Letter from Sec. Shultz to Sen. Dole (January 29, 1987), *reprinted in* 133 Cong. Rec. S 6,449 (daily ed. May 14, 1987) (“while we are therefore under an obligation to permit PLO Observer Mission Personnel to enter and remain in the United States to carry out their official functions at United Nations headquarters, we retain the right to deny entry to, or expel, any individual PLO representative directly implicated in terrorist acts”); Letter from Sec. Shultz to Rep. Kemp (November 12, 1986), *reprinted in* 133 Cong. Rec. E 1,635, 1,636 (daily ed. April 29, 1987) (same language).

<sup>69</sup>This court has no information concerning the nature or content of these consultations, beyond the fact that the Department of Justice and the Department of State both appear to support current efforts to repeal the ATA. See H.R. 4078, 100th Cong., 2d Sess., *introduced in* 134 Cong. Rec. H 696 (daily ed. March 3, 1988) (statement of Rep. Crockett); Letter from Acting Assist. Atty. Gen. Thomas M. Boyd to Rep. Dante B. Fascell (May 10, 1988) (expressing reservations about H.R. 4078, but supporting it, with modifications); Letter from Assist. Sec. of State J. Edward Fox to Rep. Fascell (April 29, 1988) (same).

<sup>70</sup>See Letter from Vernon A. Walters, United States Ambassador to the United Nations, to United Nations Secretary-General Javier Pérez de Cuéllar (October 27, 1987); Letter from Herbert S. Okun to Secretary-General Pérez de Cuéllar (January 5, 1988).

<sup>71</sup>In addition, the United Nations General Assembly has, on several occasions, reaffirmed its position that the PLO Mission is covered by the provisions of the Headquarters Agreement. General Assembly Resolution 42/230 (agenda item 136) (March 23, 1988); General Assembly resolution 42/229 A (agenda item 136) (March 2, 1988); see also General Assembly resolution 42/232 (agenda item 136) (May 18, 1988).

<sup>72</sup>133 Cong. Rec. S 18, 185-86 (daily ed. December 16, 1987).

<sup>73</sup>See pp. 23-25 and notes 68 and 69 above. See also Transcript of Joint Conference on H.R. 1777, p. 208 (December 3, 1987) (statement of State Department representative Jamie Selby: “it is a legal obligation based on practice in interpreting a treaty”); 133 Cong. Rec. H 11,224 (daily ed. December 10, 1987) (statement of Rep. Crockett) (ATA would place United States “in violation of our treaty obligations”).

<sup>74</sup>E.g., Pub. L. 100-204 §215(a), 101 Stat. 1331, 1343 (adding 22 U.S.C. §4315(a)) (“A foreign mission may not allow an unaffiliated alien the use of any premise of that foreign mission which is inviolable under United States law (*including any treaty*) for any purpose which is incompatible with its status as a foreign mission including use as a residence.”) (emphasis supplied); see also *idem*, §806(d)(1)(B), 101 Stat. at 1398 (adding 19 U.S.C. §2492(d)(1)(B)) (abrogating “agreements”, necessarily international).

<sup>75</sup>Transcript of oral argument, p. 18 (June 8, 1988). This concession disposes of the suggestion that the United States’ security reservation to the Headquarters Agreement, annex 2, §6, 61 Stat. at 766, 767-681 (22 U.S.C. §287 note), serves as a justification for the ATA.

<sup>76</sup>E.g., 133 Cong. Rec. H 11, 684-85 (daily ed. December 18, 1987) (statement of Rep. Burton); 133 Cong. Rec. S 15,621 (daily ed. November 3, 1987) (statement of Sen. Grassley); 133 Cong. Rec. S 9,627 (daily ed. July 10, 1987) (statement of Sen. Grassley); 133 Cong. Rec. E 2,249 (daily ed. June 4, 1987) (statement of Rep. Gallegly); 122 Cong. Rec. H 4,047 (daily ed. May 28, 1987) (statement of Rep. Heger); 133 Cong. Rec. S 6,449 (daily ed. May 14, 1987) (statement of Sen. D’Amato); *ibid.*, S 6448 (statement of Senator Dole); 133 Cong. Rec. E 1,635 (daily ed. April 29, 1987) (statement of Rep. Kemp).

<sup>77</sup>133 Cong. Rec. H 12,224 (daily ed. December 10, 1987) (statement of Rep. Crockett); 133 Cong. Rec. S 13,852 (daily ed. October 8, 1987) (statement of Sen. Bingaman); 133 Cong. Rec. E 2,895 (daily ed. July 14, 1987) (statement of Rep. Bonior).

<sup>78</sup>Transcript of Joint Conference on H.R. 1777, pp. 210-11 (December 3, 1987) (statements of Reps. Mica and Kostmayer).

<sup>79</sup>“As far as the closure of the PLO Observer Mission is concerned, this would be

seen as a violation of a United States treaty obligation under the United Nations Headquarters Agreement.” Letter from Secretary of State George P. Shultz to unnamed Senators and Congressmen (July 31, 1987), *partially reprinted in* 133 Cong. Rec. S 16,605 (daily ed. November 20, 1987) (statement of Sen. Grassley).

<sup>80</sup>Hon. Abraham Sofaer: “It is our judgement that the Headquarters Agreement as interpreted and applied would be violated.” *The New York Times*, January 13, 1988 at A3.

<sup>81</sup>Accord 133 Cong. Rec. H 8,790 (daily ed. October 20, 1987) (statement of Rep. Burton); 133 Cong. Rec. S 9,627-28 (daily ed. July 10, 1987) (statement of Sen. Grassley); 133 Cong. Rec. S 6,449-50 (daily ed. May 14, 1987) (statement of Sen. D’Amato); *ibid.*, S 6,449 (statement of Sen. Dole). Indeed, this misapprehension apparently has continued after the passage of the ATA and even during the pendency of this lawsuit. E.g., 134 Cong. Rec. S 3,113 (daily ed. March 25, 1988) (statement of Sen. D’Amato); 134 Cong. Rec. S 1,997 (daily ed. March 4, 1988) (statement of Sen. Grassley).

<sup>82</sup>International Law Reports, vol. 85 (1991), pp. 248-73.

<sup>83</sup>76 *ILR* 1.

<sup>84</sup>Treaty of Friendship, Commerce and Navigation between the United States of America and the Republic of Nicaragua, 1956.

<sup>85</sup>Article 94 provided that each Member of the United Nations that was a party to proceedings before the ICJ undertook to comply with the decision of the Court. See p. 255.

<sup>86</sup>See article 53 of the Vienna Convention on the Law of Treaties, 1969, on p. 261.

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**Part Four**

**BIBLIOGRAPHY**



# LEGAL BIBLIOGRAPHY OF THE UNITED NATIONS AND RELATED INTERGOVERNMENTAL ORGANIZATIONS

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  - World Intellectual Property Organization

A. INTERNATIONAL ORGANIZATIONS AND INTERNATIONAL LAW IN GENERAL

1. *General*

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