Extract from:

UNITED NATIONS JURIDICAL YEARBOOK

1984

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

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

CONTENTS *(continued)*

CONTENTS *(continued)*

CONTENTS *(continued)*

CONTENTS *(continued)*

Chapter VI

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

Legal opinions of the Secretariat of the United Nations (Issued or prepared by the Office of Legal Affairs)

1. PROCEDURES TO BE FOLLOWED WITH REGARD TO THE ACCREDITATION OF REPRESENTATIVES AT UNITED NATIONS OFFICES AWAY FROM HEADQUARTERS

Memorandum to the Executive Assistant to the Secretary-General

You have requested my views on the procedures for accreditation of representatives at United Nations offices away from Headquarters.

A copy of a proposed note to Permanent Missions that is attached for your consideration reflects the approved procedures in this respect

27 April 1984

ANNEX

The Secretariat of the United Nations presents its compliments to the Permanent Missions to the United Nations and has the honour to recall for the benefit of their Governments the procedure to be followed with regard to the accreditation of Permanent Representatives to the different offices of the United Nations at Geneva, Vienna and Nairobi,

The credentials of Permanent Representatives are to be established in the name of the Secretary-General of the United Nations. The new Permanent Representatives are to present their credentials to the Director-General of the Office concerned or to the Executive Director of the United Nations Environment Programme who shall receive them on behalf of the Secretary-General and immediately communicate the relevant information to the Secretary-General. The date of accreditation shall be the date on which the credentials are presented, respectively, to the Director-General or the Executive Director.

The co-operation of the Permanent Missions in bringing this information to the attention of their Governments is highly appreciated and will assist the Secretariat in its efforts to ensure that accreditation procedures at United Nations offices away from Headquarters are uniformly and consistently followed.

The Secretariat of the United Nations avails itself of this opportunity to renew to the Permanent Missions the assurances of its highest consideration.

---

2. QUESTION WHETHER DEBTS RELATED TO THE UNITED NATIONS INTERIM FORCE IN LEBANON MAY BE SET OFF AGAINST UNIFIL ASSESSMENTS

Memorandum to the Assistant Secretary-General, Controller, Office of Financial Services

1. This is in reply to your memorandum of 11 June requesting a legal opinion to assist in preparing a response to a letter from the Permanent Representative of a Member State on the proposed set-off of UNIFIL-related debts against UNIFIL assessments.

2. UNIFIL was established on the basis that "the costs of the Force shall be considered as expenses of the Organization to be borne by the Members in accordance with Article 17, paragraph *2,* of the Charter" (Report of the Secretary-General on the implementation of

Security Council resolution 425 (1978), S/12611, para. 11, endorsed by the Security Council in its resolution 426 (1978) of 19 March 1978). This arrangement was in effect approved by the General Assembly by its resolution S-8/2 of 21 April 1978, its first resolution on the "Financing of the United Nations Interim Force in Lebanon", as well as by its subsequent resolutions on this subject, by all of which it assessed the expenditures of UNIFIL on the Member States according to a special scale.

3. Since the contributions to be made to UNIFIL are assessed contributions, they are governed by article V of the Financial Regulations, and in particular by financial regulation 5.5 specifying that "annual contributions and advances to the Working Capital Fund shall be assessed and paid in United States dollars." Although financial rules 105.6 *(d)* and 105.7 provide for the possibility of paying assessed contributions in other currencies, no regulation or rule or General Assembly decision provides for the payment of contributions in kind—e.g., by providing troops or other assistance to a peace-keeping force.

4. The General Assembly in its latest decisions on this subject (resolutions 38/38 A and B of 5 December 1983) recognized, as it had in earlier resolutions, the problems in financing UNIFIL, especially in the light of the withholding of contributions by certain States, and specifically the difficulties that the Organization consequently faced in meeting its obligations to the Governments of the troop-contributing States. It consequently called again for voluntary contributions for UNIFIL and suspended the application of certain financial regulations (4.3, 4.4, 5.2 *(b)* and *(d))*. However, it did not suspend regulation 5.5, or permit offsets by troop-contributing States, as no doubt it could have done.

5. Consequently the relief sought by the Government in question is one that only the General Assembly could provide. Should the Government proceed with the course announced in its letter, without securing the Assembly's permission, then over a period of time the application of Article 19 of the Charter of the United Nations will arise as in respect of other States withholding contributions for peace-keeping operations.

12 June 1984

---

3. DIFFICULTIES ARISING FROM THE UNAVAILABILITY OF THE CHAIRMAN AND VICE-CHAIRMAN OF A STANDING COMMITTEE OF THE UNITED NATIONS COUNCIL FOR NAMIBIA—PROCEDURE CONSISTENTLY FOLLOWED IN SUCH CASES IN UNITED NATIONS MEETINGS

Memorandum to the Secretary, United Nations Council for Namibia

1. Reference is made to your memorandum dated 22 December 1983 in which you requested advice in connection with difficulties that have arisen at meetings of one of the Standing Committees of the United Nations Council for Namibia whenever its Chairman and Vice-chairman were absent.

2. The absence of both the Chairman and the Vice-chairman should not prevent the Standing Committee concerned from performing the work entrusted to it. In accordance with established procedures consistently followed in United Nations meetings, if a chairman is absent from a meeting and no other officer of the body concerned is available to preside over the meeting, another person from among the representatives attending the meeting may be selected by the members of the body concerned to preside over the deliberations of that body if there is a quorum required. There is absolutely no legal obstacle to such a procedure being followed also at meetings of the Standing Committees of the United Nations Council for Namibia if circumstances so warrant. In such situations as representative of the Secretary-

General should open the meeting and act as temporary chairman until a representative of a member of the Standing Committee concerned is selected to act as presiding officer for that meeting.

6 January 1984

---

4. REQUESTS FROM MEMBER STATES FOR CIRCULATION IN UNITED NATIONS BODIES OF DECLARATIONS OR PROGRAMMES OF ACTION ADOPTED BY INTERGOVERNMENTAL MEETINGS OUTSIDE THE UNITED NATIONS—PRACTICE OF THE SECURITY COUNCIL, THE GENERAL ASSEMBLY AND THE ECONOMIC AND SOCIAL COUNCIL IN THIS RESPECT

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

I refer to your cable concerning requests from Member States for circulation of declarations or programmes of action adopted by intergovernmental meetings outside the United Nations.

(a) In the Security Council practice, any Member State may request circulation of a text as a Security Council document and such requests are routinely acted upon by the Secretariat.

(b) Under General Assembly procedures, any Member State may request circulation of a text as a General Assembly document, provided that the request is expressly linked in writing to an item on the agenda of the current session or on the provisional agenda of the following session. A similar procedure applies in the Economic and Social Council.

(c) To avoid duplication, rules and guidelines in effect on control and limitation of documentation do not permit reproduction of documents that have already been published as official United Nations documents with general distribution.

(d) If the request envisaged in your cable relates to the Quito Declaration, your attention is drawn to the fact that that Declaration has already been published in an official document of the General Assembly and the Economic and Social Council under a joint symbol and given general distribution. In these circumstances we suggest that if certain States in UNCTAD wish to draw attention to the Declaration, they should transmit a letter to that effect to the UNCTAD secretariat linking it to an item on the provisional agenda of the next session of the Trade and Development Board. Such a communication could then be circulated as an official UNCTAD document with a note indicating that the text of the Declaration has been reproduced in an official document of the General Assembly and the Economic and Social Council.

12 March 1984

---

5. WAYS OF ACCOMMODATING THE DELEGATIONS OF A MEMBER STATE WHICH HAS BEEN UNABLE TO PARTICIPATE IN A ROLL-CALL VOTE—IN UNITED NATIONS PRACTICE, THE RESULTS OF A VOTE ARE NEVER ALTERED AFTER THE RESULTS ARE ANNOUNCED

Cable to the Chief, Treaty Implementation and Commission Secretariat Section, Division on Narcotics Drugs

With reference to your telephone query, we would like to inform you that under no condition should the Secretariat agree to change the result of a roll-call vote. United Nations practice is clear that the results of a vote are never altered after the results are announced. If a Member State is not satisfied with an appropriate note in the record (usually a footnote to the tabulation of votes is used, reading along following lines: "Subsequent to the vote, the representative of... announced that he had been unable to participate in the vote but that, if

present, his delegation would have cast an [affirmative] [negative] vote"), it can propose a reconsideration of the vote in question; if a sufficient number of representatives agree, then a new vote is taken in which the Member State concerned can then participate and the result of which supersedes the earlier vote.

9 February 1984

---

6. QUESTION WHETHER THE *AD HOC* COMMITTEE OF THE INTERNATIONAL CONFERENCE ON KAMPUCHEA FALLS WITHIN THE PURVIEW OF PARAGRAPH 34 OF GENERAL ASSEMBLY DECISION 34/401 WHICH PROVIDES THAT SUBSIDIARY ORGANS OF THE GENERAL ASSEMBLY ARE NOT TO MEET DURING A REGULAR SESSION OF THE ASSEMBLY UNLESS EXPLICITLY AUTHORIZED BY THE ASSEMBLY

Memorandum to the Secretary of the Ad Hoc *Committee of the International Conference on Kampuchea*

1. Reference is made to your memorandum of 20 September 1984 requesting legal advice with respect to the meeting of the *Ad Hoc* Committee of the International Conference on Kampuchea during the General Assembly.

2. You have indicated in your memorandum that the *Ad Hoc* Committee of the International Conference on Kampuchea has decided to meet at the end of September to permit consultations to be held when the President of the International Conference on Kampuchea is in New York.

3. You have expressed the view that the *Ad Hoc* Committee was established by the International Conference on Kampuchea and not by the General Assembly and, therefore, that it did not fall within the purview of paragraph 34 of General Assembly decision 34/401 which provides that subsidiary organs of the General Assembly are not to meet during sessions of the General Assembly unless explicitly authorized to do so. Although it is true that the *Ad Hoc* Committee was established by the International Conference on Kampuchea in its resolution 1 (I) of 17 July 1981, it was not until the General Assembly approved the report of the Conference and, in particular, its resolution 1 (I) that the Committee achieved the status of a duly constituted organ of the United Nations.

4. In these circumstances the Committee must be considered as being an organ of the Conference which established it and also an organ of the General Assembly which was the convening authority of the Conference and which approved and gave effect to the Conference's decision to establish the Committee.

5. The purpose for which the General Assembly adopted its decision in paragraph 34 of decision 34/401 was to ensure that during its regular sessions the Assembly and its Main Committees would always have at their disposal the required meeting services and facilities. Clearly, therefore, that decision should apply to all organs which are under the authority of the General Assembly. We have noted that the General Assembly resolutions on Kampuchea authorize *the Ad Hoc* Committee of the International Conference on Kampuchea to convene "when necessary" to carry out the tasks entrusted to it. In our view the wording employed constitutes a general authorization to the Committee to meet whenever it deems it necessary, but in view of the specific decision contained in General Assembly decision 34/401, this authorization does not extend also to periods when the General Assembly is holding its regular sessions. If, as is now the case, the Committee needs to meet when the General Assembly is holding such a session, the explicit authorization of the Assembly is required and this should be requested through the Committee on Conferences in accordance with the practice established after the adoption of decision 34/401.

25 September 1984

---

7. FILLING OF CASUAL VACANCIES ON THE JOINT INSPECTION UNIT—INTERPRETATION OF THE WORDS "FOR THE REMAINDER OF THAT TERM" IN ARTICLE 4 (2) OF THE JIU **STATUTE**[1]

Memorandum to the Special Assistant to the Under-Secretary-General for Administration and Management

1. This is in response to your memorandum of today's date, in effect requesting an interpretation of the words "for the remainder of that term" in article 4 (2) of the statute of the Joint Inspection Unit.

2. In context, these words necessarily have two alternative meanings:

(a) The length of time that the replaced inspector should still have served;

(b) The length of time during which the new inspector is to serve.

Except in the unusual situation in which an opportunity to fill a casual vacancy can be so arranged that the new inspector assumes office immediately after the replaced inspector ceases to occupy it (which would only be possible in case of a resignation), period *(b)* must inevitably be shorter than period *(a)*.

3. The question then is whether the period of three years, which is specified in article 4 (2) as the minimum for a replacement term, is to be measured by the period specified in subparagraph 2 *(a)* or in subparagraph 2 *(b)* above. On the one hand, it can be argued in favour of the period specified in subparagraph 2 *(b)* that the purpose of the provision is to prevent the length of a replacement term to be served by an inspector from ever being substantially less than three years, on the ground that a shorter period would be inefficiently short; although in the case of a resignation the difference between the two periods is unlikely to be extensive (since the six months' notice period required by article 4 (3) should normally permit a new appointment to be made soon after the resignation becomes effective), this would not be true of a vacancy caused by death (especially if it occurred during the latter part of a regular session of the General Assembly). On the other hand, it can be argued in favour of the period specified in subparagraph 2 *(a)* that that period is certain from the time the vacancy arises and thus both the appointing body (the General Assembly and those involved in the prior consultations required by article 3) and potential candidates would know from the beginning whether the replacement term is to be a full or a partial one, if the length of that term is made to depend on when a new inspector actually assumes office (as might be the case in the situation described in your memorandum), then it may not be possible to determine it until the event occurs—and indeed the new inspector might be in a position to manipulate that date and thus the length of his appointment.

4. In the light of the above considerations, it would appear that an interpretation in favour of the definite period specified in subparagraph 2 *(a)* would appear preferable. However, the opposite conclusion would be reached if an element of definiteness were to be introduced for the period specified in subparagraph *2(b)* by having the General Assembly specify, when making a replacement appointment, what the beginning of the new term was to be—which date might be the date of the Assembly's action or in any event one somewhat earlier than that on which the new inspector could actually move to Geneva and assume his functions; if there were to be such an interval, it might be treated as a period of leave, with or without pay.

9 March 1984

8. INVITATION FROM THE GOVERNMENT OF AUSTRIA TO HOST THE EUROPEAN REGIONAL SEMINAR TO REVIEW AND APPRAISE THE ACHIEVEMENTS OF THE UNITED NATIONS DECADE FOR WOMEN—QUESTION WHETHER "ESTABLISHED HEADQUARTERS"

REFERRED TO IN SECTION I OF GENERAL ASSEMBLY RESOLUTION 31/140 OF 17 DECEMBER 1976, GOVERNING FINANCIAL IMPLICATIONS OF MEETINGS HELD AWAY FROM AN ESTABLISHED HEADQUARTERS, IS VIENNA OR GENEVA

Memorandum to the Chief of the Planning and Meetings Servicing Section, Department of Conference Services

1. Reference is made to your memorandum of 15 March 1984 on the invitation from the Government of Austria to host the European Regional Seminar to Review and Appraise the Achievements of the United Nations Decade for Women. In this connection, you have requested an opinion from the Office of Legal Affairs on whether the "established headquarters" referred to in section I of General Assembly resolution 31/140 which governs financial implications of meetings held away from an established headquarters is Vienna or Geneva.

2. The words "established headquarters" in section I of General Assembly resolution 31/140 have been consistently interpreted by the Secretariat to mean the place where the substantive secretariat concerned is based. The seminar here under review is a regional meeting which is part of the preparatory activities for the 1985 World Conference to Review and Appraise the Achievements of the United Nations Decade for Women. The substantive secretariat responsible for servicing all activities relating to the 1985 World Conference, including the preparatory activities therefor, is the Centre for Social Development and Humanitarian Affairs which is based in Vienna. Vienna must, therefore, be considered as being "the established headquarters" for the seminar within the terms of section I of General Assembly resolution 31/140. In these circumstances, if adequate meeting facilities are available at the Vienna International Centre the Austrian Government would not be under an obligation to bear responsibility for any of the costs related to the holding of the seminar at Vienna. It should be noted that, in the past, the headquarters of the regional commissions have been considered to be "the established headquarters" for regional preparatory meetings for United Nations conferences simply because the required conference servicing facilities were available at those sites where, furthermore, meetings could usually be held without an official host country invitation. In the case under review, however, the fact that the Centre for Social Development and Humanitarian Affairs, the substantive servicing unit, is itself based within the region in Vienna is an important factor which leads us to conclude that Vienna rather than Geneva should be deemed to be the established headquarters for the seminar and that consequently the issue of additional costs to the United Nations of holding the seminar away from its established headquarters does not arise.

20 March 1984

---

9. REQUIREMENT UNDER GENERAL ASSEMBLY RESOLUTION 31/140 OF 17 DECEMBER 1976 THAT UNITED NATIONS BODIES MEET AT THEIR ESTABLISHED HEADQUARTERS

Memorandum to the Chief Economic, Social and Human Rights Service, Budget Division, Office of Financial Services

Reference is made to your memorandum of 13 June 1984 concerning the report of the Committee for Development Planning on its twentieth session.

We have noted that in the above-mentioned report the Committee for Development Planning has proposed to the Economic and Social Council that the Committee hold three days of meetings during the first week of November in 1984 in London. We have also noted that the required statement of programme budget implications was not submitted to the Committee at the time that it considered the proposal in question.

We wish to confirm your understanding that the convening of the session in London instead of New York would have to be specifically approved by the General Assembly, since under the provisions of General Assembly resolution 31/140 all United Nations bodies are required to meet at their established headquarters, except when invited to meet elsewhere by a Government prepared to meet the additional expenses involved, or except where specifically authorized to do so under the relevant rules of procedure.

The Committee for Development Planning does indeed have the status of a United Nations body and therefore it is governed by General Assembly resolution 31/140 in matters relating to meetings away from its established headquarters. The fact that the Committee is composed of individual experts is of no relevance whatsoever in this context. There are many United Nations bodies composed of individual experts. The determination of whether or not a particular entity is a United Nations organ depends on the manner in which it was created. Generally speaking, any entity created by decision of a principal deliberative organ, such as the General Assembly or the Economic and Social Council, is a United Nations organ, irrespective of its composition.

3 July 1984

---

10. STATUS OF THE SPECIAL COMMISSION ESTABLISHED UNDER GENERAL ASSEMBLY RESOLUTION 38/161 OF 19 DECEMBER 1983 ENTITLED "PROCESS OF PREPARATION OF THE ENVIRONMENTAL PERSPECTIVE TO THE YEAR 2000 AND BEYOND"

Cable to the Legal Liaison Officer, United Nations Environment Programme

I am replying your letter of 9 May 1984 concerning the status of the Special Commission established under General Assembly resolution 38/161 entitled "Process of Preparation of the Environmental Perspective to the Year 2000 and Beyond".

After careful consideration and largely because the Commission, once established, is to have complete control over its finances, we have come to the conclusion that the Commission, which has adopted the name "World Commission on Environment and Development", should not be considered as having the status of a United Nations organ or as being a part of the United Nations. This view has been communicated to the Chairman of the Commission by the Legal Counsel through the Permanent Representative of her country at Headquarters. The Chairman has accepted this view and on this basis is presenting various proposals relating to its establishment and its terms of reference.

15 May 1984

---

11. UNITED NATIONS POLICY WITH REGARD TO PATENT RIGHTS IN DISCOVERIES OR INVENTIONS DEVELOPED WITH THE ASSISTANCE OF THE UNITED NATIONS DEVELOPMENT PROGRAMME

Memorandum to the Officer-in-Charge, Division for Policy Co-ordination and Procedures, United Nations Development Programme

1. Further to your letter of 29 February 1984,1 refer to a memorandum to the Bureau of Operations and Programming, dated 19 September 1966,[2] in which the Office of Legal Affairs advised the United Nations Development Programme along the following lines.

(a) The United Nations retains for itself proprietary rights, including patent rights, in work which it finances; the retention of those rights is established by agreement with the par-

ties involved in such work; provisions for this purpose are incorporated in contracts of employment for staff members, special service agreements for consultants and other agreements with contractors, including agreements relating to UNDP projects for which the United Nations is the executing agency.

(b) The retention of patent rights in the manner described above is intended to safeguard the interest of the Organization by preserving the Organization's option with respect to the utilization of those rights. In making the assessment as to the utilization of its rights, the Organization is primarily concerned with the discharge of its mandate, namely, to ensure the widest possible dissemination and use of the work which it has supported. Secondary considerations, such as the possibility of acquiring a source of revenue in the form of royalties from the licensing of patents, are subordinated to the Organization's overriding interest in ensuring the general availability of techniques developed under its aegis.

(c) Normally, the Organization itself has no affirmative interest in taking out patents since it achieves its primary purpose by yielding the work into the public domain. Occasionally, the Organization has a defensive interest in taking out patents when it appears that a third party might otherwise acquire exclusive rights to control the exploitation and use of a work which has been developed under the aegis of the Organization. Hypothetically, the Organization might permit an interested collaborator to take out patents either to provide an indispensable financial incentive or to prevent usurpation of rights by a third party, or both.

{d) The practice and policy described above are as valid for UNDP as for the United Nations, if not more so.

2. I also refer to a memorandum dated 27 October 1969, in which the Office of Legal Affairs had occasion to comment on the first (and only) patent taken out by the United Nations, along the following lines.

(a) The policy of the United Nations Development Programme and the United Nations generally is that discoveries and inventions resulting from United Nations-financed efforts should be widely disseminated and freely available; patents should be secured by the United Nations, if necessary, to prevent exclusive rights from being acquired by other parties, if, for any reason, it is not possible to accomplish this by publication.

(b) The decision as to publication, patent or non-action must be made with reference to a number of non-legal as well as legal factors, including the likely commercial importance of the discovery, its innovative significance and the feasibility of publication so as to preclude acquisition of exclusive rights by others.

(c) The decision as to assignment of patents rights and/or registration under the Paris Convention for the Protection of Industrial Property[3] must be with reference to UNDP's purpose, namely, wide and free use within the country concerned as well as outside it.

9 April 1984

---

12. POLICY OF THE UNITED NATIONS DEVELOPMENT PROGRAMME ON PATENT RIGHTS—RELEVANT PROVISIONS OF THE UNDP STANDARD BASIC ASSISTANCE AGREEMENTS AND THE STANDARD SPECIAL FUND AGREEMENTS—STAFF RULE 212.6

Memorandum to the Assistant Administrator and Director, Bureau for Programme Policy and Evaluation, United Nations Development Programme

1. I refer to your memorandum of 2 August 1984 concerning UNDP's policy on patent rights.

2. You asked us to review the correctness in law of the notion that it is not UNDP financing of a project *per se* which gives rise to a patent claim, but rather the contribution of

an international civil servant of "significant ideas" to the development of the item to be patented. You further requested us to examine the ramifications of the above-stated notion, if it is correct, in cases where "projects use 'national experts' and in cases of government execution..."

3. We agree with the notion that rights to patents derive in the first instance from the contribution of ideas to a project and not from the financing or other form of assistance thereto. On the other hand, an inventor can by contract endow some other entity (typically his employer) with patent rights to past or future inventions.

4. Thus, the first above-stated basic principle of patent law is hardly applicable to UNDP-assisted projects; instead, what is applicable is the principle that the allocation *of proprietary rights* in an invention is subject to agreement between the parties. In this respect, it should be noted that UNDP has endeavoured to achieve its policy, namely, encouraging the widest possible dissemination and benefit from UNDP-sponsored research, by regulating intellectual property rights at every stage of the process. Provisions for this purpose are incorporated in the UNDP Standard Basic Assistance Agreements and Standard Special Fund Agreements with Governments, as well as in the regulations governing the employment of staff members, in special service agreements with consultants and in other agreements with contractors.

5. UNDP's policy of retaining patent rights is thus reflected in the provision of article HI, paragraph 8, of the Standard Basic Assistance Agreement (SBAA) with recipient Governments, which provides:

> "Patent rights, copyright rights, and other similar rights to any discoveries or work resulting from UNDP assistance under this Agreement shall belong to UNDP. Unless otherwise agreed by the Parties in each case, however, the Government shall have the right to use any such discoveries or work within the country free of royalty or any charge of similar nature."

The wording of this provision reflects UNDP's long-standing policy of retaining for itself proprietary rights, including exclusive patent rights, in projects which it finances, whatever the amount or the percentage of funds or the value of the ideas it has contributed to the final product. This provision is explained in a note by the Administrator (DP/107,7 April 1973), as follows:

> "The thrust of the present provision is that the benefits of intellectual property resulting from UNDP assistance under the Agreement should be available to all recipient countries in addition, of course, to the signatory recipient country. Since it is obviously impractical to provide in the Agreement that the rights in question should belong jointly to the 149 States eligible to participate in UNDP, it stipulates that such intellectual property should belong to UNDP but that the signatory Government should have the right to use it within the country free of royalty or any charge of similar nature. Under such an arrangement, the interests of other potential users of the discovery among the membership are represented by UNDP, and the latter is placed in a position to take such steps as may be necessary to make the benefits of the discovery available to the others either by yielding such discoveries into the public domain or taking out appropriate legal protection and licensing public or private enterprises to produce and/or distribute the discovery, etc. The Administrator believes that such an arrangement conforms to and might even be deemed required by the spirit and purposes of the technical assistance programmes of the United Nations, which include among their principal aims the promotion of the transfer of technical knowledge to developing countries through international co-operation."

Variations of the standard article III, paragraph 8, have been negotiated with certain countries. For example, article III, paragraph 8 *(a),* of the SBAA with [name of a Member State] reads in pertinent part:

> "The patent rights, copyrights, and other similar rights to any discovery or work which

results *solely* and *specifically* from UNDP assistance under this Agreement shall belong to the UNDP,..."

Similar variations are incorporated in SBAAs with other countries. These variations delineate more clearly the circumstances wherein UNDP may claim intellectual property rights in projects it assists. However, they do not modify UNDP's basic policy of retaining those rights on an exclusive basis.

6. With respect to countries that have not yet signed the SBAA, no clauses governing patent rights appear in the Special Fund Agreements signed with the Governments of those countries. As long as UNDP's long-standing and consistent policy regarding patent rights is maintained, we suggest that UNDP should try to negotiate the inclusion of a provision similar to article III, paragraph 8, of the SBAA in the Project Agreements relating to any assistance with those Governments. It should be noted, however, that such a contractual provision vesting all rights in UNDP does not necessarily mean that UNDP alone would retain, or wish to retain or exercise, all of the rights involved. Thus, it could be the case that the purposes of the Organization would best be served through the vesting and exercising of the rights in question in and by the recipient Government, and in this event, we would assume that this could be negotiated on a case-by-case basis.

7. Staff rule 212.6, which is applicable to technical assistance experts, provides:

"All rights, including title, copyright and patent rights, in any work performed by project personnel as part of their official duties, shall be vested in the United Nations."

Corporate contractors, as well as governmental and intergovernmental institutions, are subject to the requirements set out in paragraph 21 of the United Nations General Conditions of Contract, which provides:

"Copyright, Patents and Other Proprietary Rights

"(2) The Contractor agrees that he will forthwith disclose and assign to UNDP all discoveries, processes, or inventions, made or conceived in whole or in part by him alone or in conjunction with others relating to and arising out of the work, and the said discoveries, processes or inventions, shall become and remain the property of UNDP, whether or not patent applications are filed thereon."

A similar provision is included, for example, in article 16 *(b)* of the General Conditions for UNDP/OPE [Office for Projects Execution] Contractors For Professional Services.

8. In cases where projects use national experts, the manner in which proprietary rights are to be distributed between the Government and UNDP depends on the type of agreement for assistance concluded between the country and UNDP.

9. It now appears that there are occasional problems because the intent of particular Governments in exploiting intellectual property deriving from UNDP-assisted projects may run counter to UNDP's interest in ensuring widespread dissemination of such intellectual property to the developing countries as a whole. Moreover, it is questionable whether UNDP should retain 100 per cent of proprietary rights in Government-assisted projects, where its total contribution to the final product is substantially less than the financial contributions and other forms of assistance received by the Government from other sources. It would seem fair that if UNDP is extensively involved in a project through financing and services provided, especially if staff members contribute directly to the development of an invention, it should receive a major share of the benefits therefrom. On the other hand, if UNDP's assistance is minimal, its entitlement to any intellectual product should be appropriately less.

10. A recent instance of an unusual departure from the United Nations' normal policy on patent rights is found in a letter of understanding between the United Nations Financing System for Science and Technology for Development (UNFSSTD) and the Government of [name of a Member State], acting through its co-operating agency. The agency had started a project for the development of a low-cost building system, long before any United Nations involvement. UNFSSTD recognized that it had only partly developed the final project and that contributions from other sources had been far more substantial than its own. Conse-

quently, it agreed to a 25/75 sharing of royalties outside the State in question and to a full ownership of patent rights by the co-operating agency within the State, notwithstanding the policy stated in the UNDP Standard Basic Assistance Agreement with the State.

11. We suggest that future deviations from the Organization's general policy on patent rights to encourage the widest possible dissemination and use of such works, discoveries and inventions for the benefit of developing countries should be carefully negotiated on an *ad hoc* basis with due regard to the specific circumstances of each case. Moreover, if such a specific arrangement involves a country that has signed the UNDP Standard Basic Assistance Agreement, as has the State in question, it should be the subject of a special Letter of Understanding between the parties, *separate* and *apart* from the UNDP SBAA.

12. The policy of the Organization regarding ownership of patent rights is not embodied in any resolutions of the General Assembly. Until that policy is changed, we are not in a position to differ substantively from that stated in our memorandum of 19 September 1966.[4]

6 December 1984

---

13. APPOINTMENT OF THE MEMBERS OF AN ORGAN WITH LIMITED MEMBERSHIP—QUESTION WHETHER THE APPOINTING AUTHORITY MAY PROCEED WITH THE APPOINTMENT OF MEMBERS NOTWITHSTANDING ABSENCE OF NOMINATIONS FROM ONE REGIONAL GROUP—QUESTION WHETHER THE ORGAN MAY PROCEED WITH ITS WORK WITH LESS THAN ITS FULL COMPLEMENT OF MEMBERS

Memorandum to the Secretary of the Economic and Social Council

1. This is in reply to your memorandum of 9 May 1984 on the composition of the *Ad Hoc* Committee on the Preparations for the Public Hearings on the Activities of Transnational Corporations in South Africa. You requested our views on: *(a)* whether the President of the Economic and Social Council may proceed with the appointment of the candidates nominated so far by four of the five regional groups on the understanding that he would continue his efforts to obtain the fifth regional group's nomination for the remaining vacancy appertaining to that group; and *(b)* whether *One Ad Hoc* Committee could be considered as properly constituted and able to proceed with its work if the group in question indicates that it does not wish to participate in the *Ad Hoc* Committee.

2. With regard to the first point, the establishing resolution[5] does not explicitly require the appointing authority to secure nominations from all five regional groups before proceeding to appoint some members. Nor would such a requirement be consistent with the practice that has been followed in the past in appointing members of United Nations organs. In fact there have been numerous instances where one regional group or another has been unable to submit some or all of the nominations for which it was responsible within the time limits established by the appointing authority. In those circumstances the practice usually followed is for the appointing authority to proceed to the appointment of the candidates whose nominations have been received, on the understanding that the remaining vacancies would be filled at a later stage once the groups concerned had submitted their nominations. There would therefore be no obstacle to the President of the Economic and Social Council proceeding in the same way in the case of the *Ad Hoc* Committee on the understanding that he would continue to seek a nomination for the remaining vacancy from the group in question.

3. On the second point, again, there are several examples in the practice of the General Assembly and of the Economic and Social Council where subsidiary organs have met and proceeded to discharge their mandate even though for one reason or another it was not possible to appoint the full complement of members provided for in the resolution authorizing the establishment of the body concerned. The conclusion that may be drawn from these prece-

dents is that the fact it is not possible to secure the appointment of all the members envisaged in a resolution establishing an organ has not been considered a bar to convening the organs in question and to permitting them to proceed with their work. The fact that a particular group entitled to be represented on a subsidiary organ of the United Nations does not desire to participate in the work of that organ should not have the effect of presenting the organ concerned from being effectively, albeit incompletely, constituted and from carrying out the functions entrusted to it. In our view this in effect constitutes a waiver by the group concerned of its right to be represented on the organ in question. Of course, the parent organ might clearly indicate in a specific instance that it considers that a particular subsidiary organ should only be constituted with representation from all regional groups, but no such clear directive appears in Economic and Social Council decision 1983/104.

4. We therefore feel that, provided that the normal quorum requirements are satisfied, the *Ad Hoc* Committee could meet and transact business even if only four out of the envisaged five members are appointed. If any question arises as to the composition of *the Ad Hoc* Committee, this could be settled in the first instance in the *Ad Hoc* Committee and ultimately by the parent body, the Economic and Social Council.

16 May 1984

---

14. QUESTION WHETHER UNDER THE RULES OF PROCEDURE OF THE FUNCTIONAL COMMISSIONS OF THE ECONOMIC AND SOCIAL COUNCIL A DIFFERENTIATION MAY BE MADE BETWEEN MEMBERS AND NON-MEMBERS OF THE COMMISSION ON HUMAN RIGHTS AS REGARDS LIMITATIONS OF SPEAKING TIME

Cable to the Principal Legal Liaison Officer, United Nations Office at Geneva

We refer to your query concerning the right of the Commission on Human Rights to limit the speaking time of observers. It should be noted that, while in principle such a limit could be imposed pursuant to rule 43 (3) of the rules of procedure of the functional commissions of the Economic and Social Council,[6] in respect of observers that are States covered by rule 69 (1), any differentiation from the time limit imposed on members of the Commission would seem to run contrary to the spirit of rule 69 (3), which is based on Economic and Social Council rule 72 (3),[7] which in turn is based on Article 69 of the Charter of the United Nations. The cited rules, which have been adopted by the Council, seem to foresee only two differences between the participation of members and non-members: (1) the right to vote; (2) the right to require that proposals be voted on. The Economic and Social Council itself has never restricted the speaking time allowed to non-members of the Council differently from that of members.

6 February 1984

---

15. CHAIRMANSHIP OF THE INAUGURAL MEETING OF THE FORTIETH SESSION OF THE ECONOMIC AND SOCIAL COMMISSION FOR ASIA AND THE PACIFIC—EVENTUALITY THAT THE CHAIRMAN OF THE COMMISSION AT ITS THIRTY-NINTH SESSION MIGHT NO LONGER BE A REPRESENTATIVE IN HIS COUNTRY'S DELEGATION TO THE COMMISSION'S FORTIETH SESSION—CHOICE OF A REPLACEMENT

Cable to the Secretary, Economic and Social Commission for Asia and the Pacific

We refer to your query on the chairmanship of the inaugural meeting of the fortieth session of the Economic and Social Commission for Asia and the Pacific.

(a) If the Chairman of the Commission at its thirty-ninth session ceases to be a representative in his country's delegation to the fortieth session, his chairmanship would cease under rule 15 of the ESCAP rules of procedure and the first vice-chairman at the thirty-ninth session would become chairman for the inaugural meeting until the election of the chairman of the fortieth session.

(b) If the person concerned, despite his resignation from a governmental post, remains a representative in his country's delegation to the fortieth session of ESCAP, albeit not in the capacity of leader of that delegation, he could still retain the chairmanship until a new chairman is elected.

(c) Rule 13 of the ESCAP rules of procedure specifically requires that vice-chairmen be designated as first and second, respectively. If this was not done, then the selection of the vice-chairman that might be called upon to open the session should be done by agreement between those two vice-chairmen or, failing that, by lot.

(d) In elections to the post of chairman, a candidate's governmental position is immaterial under rule 13. The only relevant question is whether he is a representative within the meaning of rule 9.

23 February 1984

---

16. QUESTION WHETHER A DRAFT RESOLUTION PROPOSED BY A SUBSIDIARY ORGAN OF THE COMMISSION ON HUMAN RIGHTS IN ITS REPORT TO THE COMMISSION SHOULD HAVE PRIORITY OVER PROPOSALS SUBMITTED LATER IN TIME BY MEMBERS OF THE COMMISSION

Cable to the Assistant Secretary-General for Human Rights, Centre for Human Rights

I refer to your cable concerning the priority of proposals before the Commission on Human Rights. Rule 65 (1) of the rules of procedure of the functional commissions is a standard rule found in the rules of procedure of the General Assembly, the Economic and Social Council and several other United Nations organs. When the question you have raised has arisen in the past, the Office of Legal Affairs has taken the position that a draft resolution proposed by a subsidiary organ and contained in a report to a parent organ is a formal proposal which has priority over other proposals submitted later in time, even though these may have been submitted by the delegations of States members of the parent organ. In the case under consideration, a proposal of the Sub-Commission on Prevention of Discrimination and Protection of Minorities contained in its report to the Commission should similarly be treated as a proposal submitted earlier in time than proposals made by members during the Commission's session and accordingly the Sub-Commission's proposal should be accorded priority unless, on the proposal of one of its members, the Commission decides to follow a different order of voting. A member of the Commission may introduce a proposal and request that it be accorded priority over other proposals relating to the same item. The Commission would then have to settle this matter by a vote under rule 65 (1). A member could also introduce an alternative proposal to that of the Sub-Commission and move under rule 65 (2) that no action be taken on the Sub-Commission's proposal. If this motion is adopted, the Commission would then have to proceed to a vote on the proposal submitted by the member concerned.

7 March 1984

---

17. METHOD OF VOTING IN THE SUB-COMMISSION ON PREVENTION OF DISCRIMINATION AND PROTECTION OF MINORITIES—QUESTION OF SECRET BALLOTING

Memorandum to the Assistant Secretary-General for Human Rights, Centre for Human Rights

1. This is in response to your memorandum of 14 February on the method of voting in the Sub-Commission on Prevention of Discrimination and Protection of Minorities.

2. The Sub-Commission is, pursuant to rule 24 of the rules of procedure of the functional commissions of the Economic and Social Council,[8] bound by the rules applicable to the Commission on Human Rights, i.e., by those same rules. The words "in so far as they are applicable" in the cited rule do not detract in any way from the analysis presented below, since there is no reason why any of the specific rules referred to should not be applicable to the Sub-Commission.

3. The method of voting in the Sub-Commission is thus that specified by rule 59. That rule calls for votes to be taken "normally... by show of hands", except if a roll-call is taken on the request of any representative. This rule is substantially the same as that which applies in most United Nations organs, in particular the Economic and Social Council (rule 61(1)) and the General Assembly (rule 87). All those rules have consistently been interpreted as not permitting secret ballots except for elections. The word "normally" is not meant to permit exceptions, but merely takes account of the exception for roll-calls already provided for in the rule. Consequently, we have advised various organs bound by similar rules, such as Main Committees of the General Assembly, that a secret ballot could only be taken if two conditions were met: the decision to take a secret ballot was reached by general agreement; and the question was akin to an election (e.g., the selection of a site among several proposals).

4. An organ that has the explicit or implicit power (e.g., the plenary of the General Assembly) to suspend its rules can do so for the purpose of holding a secret ballot; this the Sub-Commission can do by following rule 78. However, it is not good practice to suspend any rule as a matter of routine. Therefore, if it is desired to take secret ballots with some regularity this should be allowed by some other mechanism. There should on the other hand be no legal objection to doing so on an *ad hoc* basis, e.g., for the purpose of adopting a recommendation to the Commission and the Council on this subject.

5. The best method of allowing the Sub-Commission to take secret ballots on some questions is to so provide in its rules. This might be accomplished by having the Economic and Social Council adopt an additional paragraph to rule 24 of the rules of procedure of the functional commissions along the following lines:

> "2. Notwithstanding paragraph 1 of rule 59,* the Sub-Commission on Prevention of Discrimination and Protection of Minorities of the Human Rights Commission [may decide to] [shall, at the request of a member,]** take a secret ballot on any matter of substance [relating to...].*** [Such a decision to proceed by a secret ballot shall itself be

---

* By making the proposed new rule an exception from all of rule 59 (1), it is clear that if requests are made for, a roll-call vote under that rule and for a secret ballot under the proposed rule 24 (2), the latter would automatically have precedence.

** The first two brackets present alternative approaches. The first reflects the proposal in E/CN.4/Sub.2/1983/5. The second is formulated by analogy to the provision for taking votes by roll-call under rule 59 (1); naturally one could instead require a request by a specified number of members.

***This bracketed clause is to be added if it is desired to restrict the scope of the provision, for example to matters concerning confidential communications. Incidentally, there appears to be no logical connection between confidential proceedings and secret ballots, and no contradiction between open proceedings and such ballots; the motives for closing proceedings have little to do with those for desiring a confidential franchise.

taken by a secret ballot and require a two-thirds majority of the members present and voting.]****"

16 February 1984

**** Both the conditions stated in this bracketed sentence are optional, and thus either or both could be omitted. Both would become irrelevant if the second alternative referred to in note ** is selected, for in that event no decision would be required for a secret ballot to be taken.

18. WATER PROJECT CONCERNING AN INTERNATIONAL RIVER FLOWING ACROSS NAMIBIA AND SOUTH AFRICA AND CONSTITUTING THE INTERNATIONAL BOUNDARY BETWEEN THEM—EXTENT TO WHICH SOUTH AFRICA'S CONTROL OF NAMIBIA AFFECTS ANY DECISION BY THE UNITED NATIONS COUNCIL FOR NAMIBIA CONCERNING THE RIPARIAN RIGHTS OVER THAT PORTION OF THE RIVER THAT FLOWS ACROSS NAMIBIAN TERRITORY—QUESTION WHETHER A DECISION TAKEN NOW BY THE COUNCIL WOULD BE BINDING ON AN INDEPENDENT NAMIBIA IN THE FUTURE—1978 CONVENTION ON SUCCESSION IN RESPECT OF TREATIES

Memorandum to the Secretary, United Nations Council for Namibia

1. I wish to refer to your memorandum of 12 December 1984 on a proposed water project in Namibia. You request the advice of this Office with regard to (i) the position of South Africa and (ii) the effect of the decisions of the United Nations Council for Namibia upon an independent Namibia, as well as any other comments this Office may deem appropriate.

2. Before addressing the two specific issues raised in your memorandum, some general comments of a prefatory nature may be useful in placing the problem in its international legal context. The general rules for the utilization of international river waters have not yet been codified in a multilateral instrument. The law of the non-navigational uses of international watercourses is a topic under active consideration by the United Nations International Law Commission which has adopted a number of draft articles based on the reports submitted by its Special Rapporteur. The completion of the Commission's work on this topic and the eventual adoption of a multilateral convention is, however, many years away. In the meantime, the sources of rules governing the utilization of international river waters are to be found in international customary law, particularly the rules deriving from the good neighbour principle, and the many bilateral, subregional and regional treaties dealing with particular rivers and river systems. The river in question is an international river, or in the terminology of the Commission an international watercourse, which has a dual characteristic. Not only does it flow across the territory of more than one State, but it also constitutes the international boundary between two States—Namibia and South Africa. Namibia's legal interest in the proposed water project derives, therefore, not only from its situation as a downstream State, but also from the fact that the river in question is also a boundary and that, consequently, any decision taken by or for Namibia must be reconciled with the other boundary State. The basic customary rule with regard to the utilization of the waters of international rivers is that the waters should not be used in a manner which is detrimental to the interests of other riparian States. From the foregoing, and leaving aside the particular issues raised by the situation of Namibia, it can be stated that the type of project which is proposed here must rest on the agreement of all the riparian States without which effective implementation will be impossible.

3. Bearing in mind the foregoing general considerations, the particular issues raised in your memorandum of 12 December 1984 give rise to the following comments.

(i) *The position of South Africa*

The first question raised is the extent to which South Africa's presence in, and control of, Namibia affects any decision by the Council concerning the riparian rights over that portion of the river that flows across Namibian territory. While the General Assembly has vested the legal administering authority over Namibia in the Council for Namibia, such authority remains, at the present time, strictly *dejure.* In view of South Africa's continued *de facto,* albeit illegal, presence in Namibia, it is clear that as long as South Africa exercises physical control over Namibia any decisions by the Council for Namibia affecting the territory of Namibia will remain unenforceable. Given this situation, the issue is what authority, if any, would be ascribed by the World Bank to a letter of "no objection" addressed to it by the Council in a matter directly affecting the territory of Namibia, with full knowledge that the authority expressed by the Council is incomplete. In the final analysis, of course, it is for the World Bank to decide whether or not to accept such a letter. The foregoing remarks naturally do not take into account the substantive bases of the Council's letter of "no objection" which would have to be based on an evaluation of the project as it is likely to affect Namibia. We note that a technical evaluation is to be made by the Department of Technical Co-operation for Development and we would suggest that further consideration of the Council response be deferred until the results of the technical evaluation are known.

(ii) *The effect of the Council's decisions upon independence by Namibia*

The question here is whether a decision taken by the Council now in respect of the utilization of the river in question would be binding on an independent Namibia in the future. By analogy, this may be characterized as a question of State succession. Some indication as to the general principles applicable in such a situation may be derived from the recently concluded, but not yet in force, Vienna Convention on Succession of States in Respect of Treaties of 1978.[9] Since any decision by the Council affecting the utilization of the river is likely to be embodied in some form of an international agreement, such as an exchange of letters, the Convention may be deemed to apply *mutatis mutandis* to the present case. Three provisions of the 1978 Convention would appear to be of particular interest in this connection: articles 11,12 and 13, dealing with boundary régimes, other territorial régimes and permanent sovereignty over natural resources. The texts of those articles are as follows:

"Article 11
"Boundary régimes

"A succession of States does not as such affect:

"(a) a boundary established by a treaty; or

"(b) obligations and rights established by a treaty and relating to the régime of a boundary.

"Article 12
"Other territorial régimes

" 1. A succession of States does not as such affect:

"(a) obligations relating to the use of any territory, or to restrictions upon its use, established by a treaty for the benefit of any territory of a foreign State and considered as attaching to the territories in question;

"(6) rights established by a treaty for the benefit of any territory and relating to the use, or to restrictions upon the use, of any territory of a foreign State and considered as attaching to the territories in question.

"2. A succession of States does not as such affect:

"(a) obligations relating to the use of any territory, or to restrictions upon its use, established by a treaty for the benefit of a group of States or of all States and considered as attaching to that territory;

"(b) rights established by a treaty for the benefit of a group of States or of all States and relating to the use of any territory, or to restrictions upon its use, and considered as attaching to that territory.

"3. The provisions of the present article do not apply to treaty obligations of the predecessor State providing for the establishment of foreign military bases on the territory to which the succession of States relates.

"Article 13

"The present Convention and permanent sovereignty over natural wealth and resources

"Nothing in the present Convention shall affect the principles of international law affirming the permanent sovereignty of every people and every State over its natural wealth and resources."

The Convention, and the foregoing provisions, reflect the view that dispositive or real treaties or agreements, i.e., those which impress the territory with a status which is intended to be permanent and which is independent of the personality of the State exercising sovereignty, form an exception to the so-called clean-slate principle. However, as may be observed, article 13 of the Convention appears to provide a very wide reservation in the form of the primacy of the principles of international law on permanent sovereignty over natural wealth and resources. In view of the fact that the river in question is a natural resource, it would be reasonable to conclude that an independent Namibia would, if it so desired, have a legal basis on which to renegotiate the terms of any agreement relating to the utilization of the waters of that river.

19 December 1984

---

19. INTERNATIONAL COURT OF JUSTICE ELECTION PROCEDURE TO BE FOLLOWED IN THE SECURITY COUNCIL AND THE GENERAL ASSEMBLY—APPLICATION OF RULE 151 OF THE RULES OF PROCEDURE OF THE GENERAL ASSEMBLY AND RULE 61 OF THE PROVISIONAL RULES OF PROCEDURE OF THE SECURITY COUNCIL—MEANING OF THE TERMS "ABSOLUTE MAJORITY" AND "JOINT CONFERENCE" IN ARTICLES 10 AND 12 RESPECTIVELY OF THE STATUTE OF THE INTERNATIONAL COURT OF JUSTICE—EVENTUALITY THAT MORE THAN THE REQUIRED NUMBER OF CANDIDATES RECEIVE AN ABSOLUTE MAJORITY

Internal memorandum

The annexed notes deal with certain specific issues which go beyond the purpose of the memorandum of the Secretary-General (A/39/354) that has set forth the International Court of Justice election procedure to be followed in the Security Council and the General Assembly.

I. APPLICATION OF RULE 151 OF THE RULES OF PROCEDURE OF THE GENERAL ASSEMBLY AND RULE 61 OF THE PROVISIONAL RULES OF PROCEDURE OF THE SECURITY COUNCIL

Meaning of "meeting" and "balloting"

1. Rule 151 of the rules of procedure of the Assembly (rule 61 of the Council) reads:

"Any meeting of the General Assembly held in pursuance of the Statute of the International Court of Justice for the purpose of electing members of the Court shall continue until as many candidates as are required for all the seats to be filled have obtained in one or more ballots an absolute majority of votes."

2. It may be recalled that at the 24th meeting of the General Assembly, on 6 February 1946, a procedural discussion took place on the meaning of the word "meeting" for the purposes of Articles 11 and 12 of the Statute of the International Court of Justice. Some delegates interpreted "meeting" as meaning "ballot"; others argued that it should be interpreted to mean "day" and not simply one ballot.[10] The President of the Assembly made a ruling that a meeting for the purpose of ICJ elections was "a meeting with a single ballot". The ruling was sustained in the Assembly, but was challenged by several Member States. A proposal to request an advisory opinion was first accepted by the Security Council, but was eventually turned down by the General Committee on the ground that that was a procedural question and should be decided by the organ concerned." In November 1946, the Assembly, on the basis of a Sixth Committee report, decided to adopt resolution 88 (I) adding a new rule to its rules of procedure (rule 151). The rule interpreted "meeting" as continuous balloting, rather than one single ballot.

3. The Security Council, on 4 June 1947 (at its 138th meeting), concurred in this action of the General Assembly and adopted a similar rule (rule 61). The report of the Sixth Committee further stressed that the General Assembly, in adopting this rule,[12] contemplated that the communication of the result to the other organ should take place only when "as many delegates as required for all the seats to be filled", no less and no more, had been produced. Consequently, paragraph 15 of the Secretary-General's memorandum points out that neither the Assembly nor the Council should communicate to each other the result of a meeting which did not produce the exact number of candidates to fill the vacancies. This practice has been consistently followed in the United Nations since the adoption of rule 152/61.

II. ABSOLUTE MAJORITY

4. Regarding the practice of the United Nations in interpreting the words "absolute majority" in Article 10, paragraph 1, of the Statute of the International Court of Justice, attention is drawn to paragraph 9 of the memorandum by the Secretary-General on the procedure to be followed in Court elections which appears in document A/39/354. The paragraph reads as follows:

> "The consistent practice of the United Nations has been to interpret the words 'absolute majority' as meaning a majority of all electors, whether or not they vote. The electors in the General Assembly are all the Member States, together with the three non-member States mentioned in paragraph 5 above which are parties to the Statute of the Court. Accordingly, as at the date of the present memorandum, eighty-one (81) votes constitute an absolute majority in the Assembly."

Since the issuance of that document, a new Member has been admitted. Consequently, eighty-two (82) constitutes the required majority.

5. This paragraph does not provide for any reduction in calculating the absolute majority required by reason of inability to vote either because of the application of Article 19 of the Charter or for any other reason. The foregoing interpretation derives from the relevant records of the United Nations Conference on International Organizations held at San Francisco in 1945. The Co-ordinating Committee of the Conference, in reporting on Article 10 of the Statute, stated that "the Committee agreed that [in] line 1, paragraph 1, and [in] line 3, paragraph 3, it was necessary to retain 'absolute' in front of 'majority', since the required majority was one half of the whole membership plus one". The Conference itself endorsed the Co-ordinating Committee's wording.[13]

6. Since Switzerland, San Marino and Liechtenstein are also parties to the Statute of the Court, they are to be added to the total number.

7. The General Assembly and the Security Council have always accepted the foregoing interpretation of the term "absolute majority".

8. Accordingly, on the basis of the text of Article 10, paragraph 1, of the Statute, the interpretation given at the San Francisco Conference, and the consistent practice of the United Nations, eighty-two (82) votes are required for election in the General Assembly and 8 votes are required in the Security Council.

III. JOINT CONFERENCE

9. Article 12, paragraph 1, provides that:

> "If after the third meeting, one or more seats still remain unfilled, a joint conference consisting of six members, three appointed by the General Assembly and three by the Security Council, *may be* formed at any time at the request of either the General Assembly or the Security Council..." (Emphasis added.)

10. The above provision was taken from the Statute of the Permanent Court of International Justice. In 1921, a deadlock was reached after the "third meeting" in the election of the deputy judges. The President of the Assembly then proposed that the procedure for setting up a joint conference be followed. Pursuant to this proposal, a joint conference was formed by the two electoral bodies. The joint conference then recommended a candidate for election. The Assembly and the Council approved his candidature.

11. A deadlock after the third meeting was reached in June 1956 during the occasional election resulting from the death of Judge Hsu Mo. There were eight candidates. One candidate received the absolute majority in the Council at its 757th, 758th and 759th meetings, whereas another received the absolute majority in the General Assembly at its 625th, 626th and 627th meetings.

12. The General Assembly then decided to postpone the election, which was resumed in January 1957. At the 760th meeting of the Council, and at the 637th plenary meeting of the Assembly, one of the candidates received the required majority in both organs.

13. The official records of the two organs do not disclose, however, any attempt to resolve the deadlock by resorting to a joint conference.

14. According to Article 12, paragraph 1, of the Statute, a joint conference is only optional (the word "may" is used). Since a joint conference is not compulsory, it is therefore for each organ to determine which procedure it wishes to follow, e.g., to proceed to a joint conference or to continue to a fourth or, if necessary, a fifth meeting. The wording of the Statute does not give any preference to either method.

15. It is the view of the Office of Legal Affairs that to proceed to a fourth or fifth meeting is a more normal procedure than a joint conference. This seems to be supported by the 1956 case. Moreover, the resort to a joint conference also raises a number of difficult issues on which the relevant provisions of the Statute do not provide any clear solution.

16. The application of Article 12, paragraph 1, involves at least three kinds of decisions of the organs concerned:

(i) a decision by the Assembly or the Council to request that a joint conference be formed under the terms of the Article. Once such a request is made by one organ, the other organ must comply;

(ii) appointment by the Assembly and by the Council of the three members which each organ contributes to the conference;

(iii) decision of the conference on names of candidates to be submitted to the Assembly and the Council for their respective acceptance.

17. There is no express provision in the ICJ Statute regarding the majority required in the Assembly for the request for a conference or the appointment of its members. The *travaux préparatoires* of Article 12, paragraph 1, do not shed any useful light on this question. These decisions therefore fall under Article 18 of the Charter concerning voting in the general Assembly. The question arises whether they are votes on important questions, requiring a two-thirds majority, or on "other questions", which may be decided by a simple majority of

those present and voting. This question, if raised, would be for decision by the General Assembly in the usual manner. It would seem difficult to justify that these questions are "important questions", as those mentioned in paragraph 2 of Article 18. The matter would seem to be that they should be voted on as "other questions".

18. As for voting in the Council, Article 10, paragraph 2, of the Statute states that any vote of the Security Council, whether for the election of judges or for the appointment of members of the conference, shall be taken without any distinction between permanent and non-permanent members of the Security Council. No express reference is, however, made to decisions by the Council to request a conference. Taking into account Article 10, paragraph 2, which was specially added at the San Francisco Conference, and reading it together with Article 27 of the Charter, which refers to the voting in the Council, it would seem that in the Security Council, a vote either to request a joint conference or to appoint its members falls within Article 27, paragraph 1, as a procedural question requiring the affirmative votes of nine members, without distinction between permanent and non-permanent members.

19. The voting in the joint conference is prescribed in Article 12 of the Statute. The term "by the vote of an absolute majority" in paragraph 1 was added at the San Francisco Conference. It was intended[14] to mean four votes, irrespective of the number present and voting.

20. The relevant provisions in Article 12, paragraph 1, do not provide any guideline or criterion for appointing the three representatives. It may be useful to recall that in 1921, the following was suggested: (i) the Assembly representatives should be delegates of States not represented in the Council; (ii) they should represent different systems of law; and (iii) they should not have a direct interest in the outcome.[15]

21. In the light of the above, should a deadlock occur, a joint conference should not automatically be resorted to. It seems more practical that the electoral organs should proceed to further "meetings".

IV. MORE THAN THE REQUIRED NUMBER OF CANDIDATES HAVE RECEIVED AN ABSOLUTE MAJORITY

22. At the 567th meeting of the Security Council, on 6 December 1951, six candidates obtained an absolute majority: three received seven votes and three received more than seven. The President ruled that, in view of Articles 8 and 13 of the Statute of the Court, since the Security Council was responsible for electing five judges of the Court, it would appear incompatible with the Statute for the Council to submit to the General Assembly the names of six candidates.

23. One representative proposed that the Council should wait for the result of the ballot of the General Assembly before taking a vote again. The proposal was rejected. Another representative held the view that the three candidates who had received more votes than the others had already been elected and that a vote needed to be taken on the three candidates who had received seven votes. The third representative was of the opinion that the question was whether there was an absolute majority or not and that the size of the majority did not seem decisive. He proposed to take a ballot on all candidates. His proposal was adopted by 9 votes in favour, 1 against and 1 abstention. The general view was thus that to do otherwise would be inconsistent with the task to elect the exact number of candidates to fill the vacant seats.

24. The same situation also occurred on 7 October 1954, 21 October 1963 and 30 October 1972. The practice followed by the Council has been to hold a new vote on all the candidates.

6 November 1984

20. MEMBERSHIP OF THE COUNCIL OF THE UNITED NATIONS UNIVERSITY—QUESTION WHETHER A PERSON CLOSELY CONNECTED WITH THE SECRETARIAT OF THE UNITED NATIONS OR THAT OF THE UNITED NATIONS EDUCATIONAL, SCIENTIFIC AND CULTURAL ORGANIZATION COULD SERVE AS A MEMBER OF THE COUNCIL

Memorandum to the Under-Secretary-General for International Economic and Social Affairs

1. Reference is made to your memorandum of 30 April 1984 on the membership of the Council of the United Nations University.

2. We have reviewed the relevant provisions of the Charter of the United Nations University[16] regarding the composition of the Council of the University and the appointment of members of the Council, which is the governing organ of the University. The University functions under the joint sponsorship of the United Nations and the United Nations Educational, Scientific and Cultural Organization. As you have indicated in your memorandum, the Secretary-General of the United Nations and the Director-General of UNESCO are *ex officio* members of the Council and are jointly responsible for appointing the other members of the Council, who serve in their individual capacity.

3. In our view, although there are no statutory provisions expressly precluding persons closely connected with the Secretariat of the United Nations or that of UNESCO from serving as members of the UNU Council, it is clear that such persons serving on the Council would be in an anomalous position which could be detrimental to the University, to the United Nations and to UNESCO. In particular, it would be anomalous for a person serving as an official of the United Nations or of UNESCO to be in a superior position as a voting member to his executive head, who is an *ex officio* member (without the right to vote) on the Council, and to be at the same time answerable exclusively to his executive head under the applicable constitutional provisions, staff regulations and rules.

4. With considerations of this nature in mind we have consistently held the view that once a person is appointed to serve as a member of the Secretariat that person is under the exclusive authority of the Secretary-General and no longer in a position to act independently as a member of a United Nations or United Nations-related organ.

5. It appears that since the early years of the University the Council membership has accepted this position and whenever members of the Council accepted appointments associating them closely with the United Nations or UNESCO the persons concerned have correctly resigned from the Council.

6. In order to clarify the situation for the future, the Secretary-General and the Director-General might declare publicly in the Council their policy regarding appointment of members of the Council and address in particular the question of whether persons closely associated with the United Nations or UNESCO may serve as members of the UNU Council. In this regard it could be stated categorically by them that persons employed on a full-time basis by the United Nations or UNESCO are not eligible for appointment as members of the UNU Council. For persons whose association with the United Nations or UNESCO was less close, the two executive heads could declare that if the persons concerned were serving on short-term assignments on a part-time basis they would not be automatically ineligible for appointment as members of the Council but it was to be understood that if so appointed they would not exercise their rights as members during the period that they were performing official functions for the United Nations or UNESCO. If such persons were already members of the Council and subsequently accepted short-term assignments on a part-time basis for the United Nations or UNESCO they need not resign their UNU positions if they accepted the understanding indicated in the preceding sentence. If the Secretary-General and the Director-General find this approach acceptable it would not be difficult for them as the chief administrative officers of their respective secretariats to give effect to the agreed policy since they would be in a position *(a)* to refuse the nominate to the Council persons who are staff

members of the United Nations or UNESCO, *(b)* to require persons newly appointed to serve on the United Nations or UNESCO secretariat to resign from any position on the UNU Council. (Such appointment could also be made conditional upon resignation from the Council.) If it is considered that the question under examination should be expressly covered in the University Charter, the Secretary-General, after consultation with UNESCO and with the Council, could propose an appropriate amendment for adoption by the General Assembly in accordance with article XII of the University Charter.

22 May 1984

---

21. REQUEST FROM THE GOVERNMENT OF A MEMBER STATE THAT THE UNITED NATIONS OBSERVE ELECTIONS TO BE HELD IN THAT MEMBER STATE'S TERRITORY

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

In response to your memorandum of 13 February 1984 concerning the request received from the Government of a Member State to observe the national elections to be held shortly in that State's territory, I am sending to you herewith the draft of a reply to that request. The draft is based on a reply we had prepared in April 1983 for the Secretary-General's Office in connection with a request of a similar nature from the Government of another Member State. In addition, we are attaching a copy of a memorandum dated 10 February 1982 addressed to you on a similar case.[17] We believe that the legal aspects of the United Nations involvement in national elections or referenda in the territory of a Member State are comprehensively dealt with in these materials.

16 February 1984

DRAFT REPLY

The Secretary-General has asked me to thank you for your letter of 9 February 1984 by which you very kindly transmitted to him an official invitation from your Government for a United Nations Secretariat mission to visit your country in order to observe the conduct of the electoral process when the election of members of the National Constituent Assembly takes place. In response, it is first necessary for me to outline United Nations practice in similar matters.

Since its establishment, the United Nations has sent visiting missions to observe or supervise plebiscites or elections in trust and non-self-governing territories. In this regard, the United Nations involvement was on each occasion in the context of a self-determination process and invariably with the specific authorization of the competent deliberative organ of the Organization. A recent example relates to the elections in Zimbabwe preceding its accession to independence where, in response to an invitation from the United Kingdom of Great Britain and Northern Ireland, the Secretary-General informed the members of the Security Council, and the Council acquiesced in a United Nations team being sent to Zimbabwe. There has been only one instance in the practice of the United Nations where the Secretary-General sent personal representatives to witness a referendum in the territory of a sovereign Member State. As you know, that was in response to an invitation to the Secretary-General from the Government of Panama to "see the people of Panama freely decide on 23 December 1977 whether or not to approve the Panama Canal Treaties between Panama and the United States of America". That occasion involved a referendum regarding a bilateral international instrument relating to a matter which had been considered by the Security Council, and the other interested party, the United States of America, was consulted and welcomed the Secretary-General's acceptance of the invitation.

The forthcoming national elections in your country do not come within the limits of the precedents referred to above, as they relate exclusively to the Constitution of your country and are therefore a matter which is essentially within the domestic jurisdiction of a Member State within the terms of Article 2, paragraph 7, of the United Nations Charter. A departure in practice, which would set a precedent for United Nations involvement in internal elections or plebiscites, would be far-reaching, and the Secretary-General does not feel that he could properly involve the United Nations Secretariat as an observer in a national election without authorization for such involvement being granted by a competent deliberative organ of the United Nations.

I should be most grateful to you, dear Mr. Ambassador, if you would express the Secretary-General's deep appreciation to your Government for its kind and generous invitation and, at the same time, explain the reasons why it is not within his power to accede to its request.

---

22. ADVICE TO BE GIVEN TO THE SECRETARY-GENERAL ON WHETHER TO ACCEPT AN AWARD FROM THE GOVERNMENT OF A MEMBER STATE, TAKING INTO ACCOUNT THE NATURE AND RESPONSIBILITIES OF THIS OFFICE AND STAFF REGULATION 1.6

Memorandum to the First Officer, Executive Office of the Secretary-General

1. I refer to your note on the award of the Medal of the President of [name of Member State] to the Secretary-General. Having examined the nature of the award in the light of the responsibilities of the Secretary-General, we are of the view that the Secretary-General should be advised not to accept the proposed award.

2. The award is an honour bestowed from the Government of a Member State. This fact raises, in principle, questions of compatibility with the nature and responsibilities of the Office of the Secretary-General under the Charter of the United Nations (in particular Article 100, paragraph 1).

3. The nature and responsibilities of the Office of the Secretary-General require him to maintain relationships with all Member States on an equal basis. If he accepts honours from one Government, he should not refuse honours from others. Consequently, the acceptance of the present award would constitute a limitation on the freedom of action which he may wish to exercise in future.

4. Furthermore, staff regulation 1.6 provides, in part:

"No staff member shall accept any honour, decoration, favour, gift or remuneration from any Government excepting for war service;___"

Clearly, in the case of honours from Governments, the prohibition is absolute (except for war services). Since the "Staff Regulations embody the fundamental conditions of service and the basic rights, duties and obligations of the United Nations Secretariat" and the Secretary-General is its chief administrative officer, he would wish, no doubt, to abide by the spirit of staff regulation 1.6, if not by the provision itself.

6 July 1984

---

23. APPLICATION BY A STAFF MEMBER FOR A UNITED NATIONS TRAVEL DOCUMENT RECOGNIZING HIM AS A STATELESS PERSON—UNITED NATIONS PRACTICE WITH RESPECT TO PERSONS WHO CONSIDER THEMSELVES STATELESS—DETERMINATION OF THE

Letter to a Resident Representative, United Nations Development Programme

I refer to your letter of 26 January 1984, in which you request advice on a staff member's application for a United Nations travel document recognizing him as a "stateless" person.

Generally speaking, a person who considers himself stateless can apply for assistance to the United Nations High Commissioner for Refugees, the body designated by the General Assembly[18] to receive such applications under the Convention on the Reduction of Statelessness of 1961,[19] which would determine his status and eligibility for assistance under the Convention. However, as you quite correctly advised the interested staff member, it would appear that it might be difficult in his case to establish "stateless" status, since it is still possible for him to acquire Angolan nationality, the country of his birth, and, if subject to meeting the residence requirements, it seems still possible for him to regain his Portuguese nationality, acquired through descent. Besides, as we understand it, he might not meet the criteria to qualify as a refugee, under the 1951 Convention Relating to the Status of Refugees,[20] and be entitled to apply for protection under that Convention.

From the facts outlined in your letter under reference, it appears that the staff member in question was born in Angola, in 1960, of an Angolan mother and a Portuguese father and that he was raised in Gabon where, apart from a brief period of study in France, he has been a resident since he was four years old.

If this is so, he would have acquired, at birth, a right to Angolan nationality although, by virtue of his father's nationality, he also had a right to Portuguese nationality. The latter right would however normally be subject to fulfilling certain conditions, such as residence, and he should have made sure to meet those conditions if he intended to remain a Portuguese national upon attaining majority age, at which time he would have had a choice as between Angolan and Portuguese nationality. This might explain why, despite having been issued a Portuguese national passport in 1982, he did not obtain the renewal of that passport in 1983, and was instead issued an alien passport, giving Angola as his place of birth and nationality. The alien passport issued to him shows that he had not, at any time, resided in Portugal.

It would appear, in this connection, that the Portuguese decision is consistent with the provisions of the Convention on the Reduction of Statelessness of 1961. As an exception to the provisions of article 8, under which Contracting States undertake not to "deprive a person of [his] nationality if such deprivation would render him stateless", article 7 (5) provides that: "In the case of a national of a Contracting State, born outside its territory, the law of that State may make the retention of its nationality after the expiry of one year from his attaining his majority conditional upon residence at that time in the territory of the State or registration with the appropriate authority."

In the circumstances, it would appear to me that the staff member should be advised to establish his right to Angolan nationality, as his place of birth or, in order to reclaim his Portuguese nationality, take steps to fulfil the prescribed residence requirements.

Considering, however, that he has been a resident in Gabon since childhood and holds a job there, he could be assisted to obtain a travel document from the Gabon authorities, as provided under the two above-mentioned Conventions, should he establish eligibility for such assistance. In the latter case, you could refer him to a representative of the United Nations High Commissioner for Refugees in the country, absent which, we take it you would be the right person to help him, as the United Nations representative in the country.

9 February 1984

24. PRACTICE OF THE SECRETARY-GENERAL AS REGARDS ACCEPTANCE OF DEPOSITARY FUNCTIONS

Internal memorandum

1. The question of the categories of multilateral treaties for which the Secretary-General accepts depositary functions has been raised in connection with a cable to the Legal Liaison Officer of UNCTAD concerning the draft arrangement establishing the International Textiles and Clothing Bureau. It was stated in that cable:

> "In view of the steadily increasing number of multilateral treaties, we find it difficult to waive the established practice under which the Secretary-General accepts depositary functions on the basis of universal or, very exceptionally, regional participation."

2. The practice referred to, which, in principle, excludes "restricted" multilateral treaties, is solidly established. It appears that all of the some 350 international treaties and agreements listed in the table of contents of the publication *Multilateral treaties deposited with the Secretary-General** meet this criterion of universal or regional participation.

3. Nevertheless, it has been suggested that the depositary policy described in the cable might not take sufficient account of the Organization's interest in (a) having the depositary functions performed in as accurate and uniform a manner as possible (i.e., by an international organization with general competence rather than by a Government) and *(b)* securing authoritative and up-to-date information on the greatest possible number of multilateral treaties.

4. The above notwithstanding, it appears that the established practice is a wise one and that the Secretary-General should not automatically accept depositary functions in respect of multilateral treaties other than those providing for universal or regional participation. The reasons are the following:

(i) The task of the Secretary-General would be exceedingly burdensome if he were to act as depositary for the numerous multilateral treaties, i.e., treaties concluded by more than two parties, which are being entered into each year;

(ii) For the same reason, the United Nations should not replace the specialized agencies and other international organizations as depositary of multilateral treaties concerning their specialized fields;

(iii) In the case of the most restricted multilateral treaties (that is, the parties to which, generally few in number, are known nominally from the outset, such as the treaties between the five countries of the Nordic Council or the treaties establishing the European Communities), the depositary responsibilities are so closely linked to the application of the substantive clauses that they could hardly be exercised by any entity other than a party to the treaty or an organ established by the treaty;

(iv) Lastly and even more important, one should not exclude the possibility that a treaty—or its application by the parties—may be contrary to United Nations policies, or even to its internal or international obligations or to other treaties of which the Secretary-General is the depositary. The agreement mentioned in paragraph 1 above appears to fall precisely in this category, since according to our understanding it is at variance with the objectives of GATT. Similar problems might also arise as regards participation, since the Secretary-General might, as depositary, find himself obliged to enter into relations with entities not recognized by the United Nations (or vice versa). Such problems are less likely to arise in the case of treaties with universal or regional participation.

5. It has been indicated that acceptance of depositary functions could be extended to treaties which, while not meeting the criterion of universal or regional participation, are concluded under the auspices of the United Nations, i.e., on the basis of the traditional definition inherited from the League of Nations, treaties concluded in the framework of United Nations organs or of diplomatic conferences convened by the United Nations. This second accessory

criterion would, in fact, usefully supplement the first, provided that the Office of Legal Affairs reserves the possibility of making exceptions, taking into account the fact that treaties concluded in the framework of organs away from Headquarters are not always submitted to the Office for prior approval.

6. The above notwithstanding, it is within the discretion of the Secretary-General to accept depositary functions for any multilateral treaty he deems appropriate.

27 March 1984

---

25. REGISTRATION UNDER ARTICLE 102 OF THE CHARTER OF THE UNITED NATIONS OF A FRONTIER TREATY—QUESTION WHETHER ALL ANNEXES SHOULD BE INCLUDED IN THE DOCUMENTATION SUBMITTED FOR THE PURPOSE OF REGISTRATION

Note verbale to the Permanent Representative of a Member State

1. The Secretary-General of the United Nations presents his compliments to the Permanent Representative of [name of a Member State] to the United Nations and has the honour to refer to the Permanent Representative's note of 3 January 1984 relating to the registration, under Article 102 of the Charter, of the frontier treaty.

2. With regard to the frontier documentation mentioned in article 2 of the Treaty as an integral part thereof, the Permanent Mission inquires whether, in view of the bulkiness of the documentation (nine volumes in the size of 1 X 1 metre), a map on the scale of 1:200,000 giving an overall picture of the frontier line in question would be sufficient for the purpose of the registration of the Treaty.

3. The Secretariat is aware of the difficulties involved in reproducing such a voluminous and complex documentation. In fact, for this very reason, certain annexes were not in the past published in the United Nations *Treaty Series*.[22] In such cases, however, a certified true copy of the documents concerned is submitted by the registering authority and is kept at the Secretariat as an integral part of the registration file. While not ideal, the procedure, it is felt, satisfies the main intent behind Article 102 of the Charter and article 5(1) of the General Assembly regulations to give effect thereto,[23] namely, that treaties should not be kept secret. This consideration is, naturally, of particular significance where frontier treaties are involved.

4. The map on the scale 1:200,000 mentioned in the note verbale of 3 January 1984 (while itself subject to registration and publication if it is a part of the Treaty) does not reproduce the entire contents of the frontier documentation, so that it would not suffice to satisfy Article 102 of the Charter and the related General Assembly regulations and allow the Secretariat to proceed with registration.

5. The Permanent Mission's attention is drawn to the fact that the documentation required for registration does not necessarily have to be submitted in the same form as the original; as long as the actual contents are certified to conform to the original, the documentation could be submitted in the form of, for instance, microfilms. Another possibility is that spare copies may be available from the other State party to the Treaty, in which case the Treaty could be registered jointly in the name of both States. In any event, for the Secretariat's purposes, one certified copy would be sufficient, and it could even be returned to the Government concerned, if necessary, after publication. The Secretariat remains at the disposal of the Permanent Mission to assist in any way it can in order to reach the best possible practical solution.

25 January 1984

---

26. QUESTION WHETHER IT IS POSSIBLE FOR A STATE PARTY TO A TREATY HAVING FORMULATED RESERVATIONS AT THE TIME OF DEPOSITING ITS INSTRUMENT OF RATIFICATION TO FORMULATE FURTHER RESERVATIONS AT A SUBSEQUENT STAGE

Letter to governmental official in a Member State

I wish to refer to your letter of 18 April 1984, in which you inquire whether it is possible for a State party to a treaty having formulated reservations at the time of depositing its instrument of ratification to formulate further reservations at a subsequent stage.

Two situations may present themselves in this regard:

(a) The treaty contains express provisions as to when reservations may be formulated; or

(b) There are no such specific provisions.

Case (a) is of course quite clear, since the only possibility is to conform to the specific provisions in the treaty.

In case *(b)*, the Secretary-General follows customary international law as codified in article 19 of the 1969 Vienna Convention on the Law of Treaties[24] and article 20 of the 1978 Vienna Convention on Succession of States in Respect of Treaties,[9] under which reservations may be made when signing, ratifying, accepting, approving, acceding or succeeding.

It is important to note, however, that in case *(a)* as in case *(b)* the parties to a treaty may always decide, *unanimously*, at any time, to accept a reservation in the absence of, or even contrary to, specific provisions in the treaty. Examples—admittedly rare—of that practice concerning treaties deposited with the Secretary-General will be found in the publication *Multilateral treaties deposited with the Secretary-General: status as at 31 December 1982 (ST/LEG/SER.E/2):* see chapters XI.B.21 (page 426, footnote 5: case of a treaty containing specific provisions), II. 11 (pages 700 and 701, footnote 4), III.3 (page 65, footnote 12)—the two latter cases involving acceptance by unanimous consent—and V.3 (pages 168 and 169, footnote 8: new reservation made upon succession).

19 June 1984

---

27. TREATY CONTAINING AN INCOMPLETE PROVISION—PROCEDURES OPEN TO MAKE THE PROVISION OPERATIVE—QUESTION WHETHER THE AMENDMENT PROCEDURE ENVISAGED IN A TREATY MAY BE SET IN MOTION BEFORE THE ENTRY INTO FORCE OF THE TREATY

Cable to the Senior Industrial Development Officer, United Nations Industrial Development Organization

We refer to your cable on the procedure to be followed in order to fill a blank left in article I (2) of the Statutes of the International Centre for Genetic Engineering and Biotechnology,[2]* concerning the seat of the Centre.

(a) Such occurrences are very rare and we have not been able to find exact precedents. However, we would like to refer to the treaties bearing the numbers XI-B-23 and 24 in the publication *Multilateral treaties deposited with the Secretary-General.*[26] In these cases, the Inland Transport Committee of the United Nations Economic Commission for Europe adopted a decision extending the time limit for signature specified in the agreements in question, thus amending, and not merely supplementing, their provisions.

(b) These two precedents could be invoked in support of the adoption by the Plenipotentiary Conference of a resolution rather than of a formal supplementary protocol. The resolution should however not contain any provision to the effect that the test of the completed article be annexed to the Statutes since this could be done only by way of a formal protocol.

The resolution should simply spell out the arrangements relating to the selection of the seat of the Centre and specify that the relevant provisions of the Statutes are to be read accordingly,

(c) To the extent that the issue is settled through the adoption of a resolution rather than through an amendment by way of a formal protocol, the question of the applicability of the amendment procedure set forth in the Statutes should not arise. If it does, the Conference of Plenipotentiaries, to which we assume all participants of the first Conference have been invited, would be competent to decide. We are not aware of precedents in our practice of setting in motion the amendment procedure in relation to a treaty not yet in force. On the other hand, treaties Nos. XIX. 1 and 2 in the above-mentioned publication provide examples of modifications effected by a formal protocol; note, however, that it might be argued that the amendment provisions are part of those provisions contemplated in article 24 (4) of the 1969 Vienna Convention on the Law of Treaties[24] which apply from the adoption of the text.

13 March 1984

---

28. QUESTION OF THE HARMONIZATION OF THE AGREEMENT BETWEEN THE UNITED NATIONS AND THE INTERNATIONAL TELECOMMUNICATIONS SATELLITE ORGANIZATION (INTELSAT) FOR THE LEASE OF A SPACE SEGMENT CAPACITY ON ONE OF INTELSAT'S SATELLITES OF 1984 WITH THE EXISTING ARRANGEMENTS BETWEEN THE UNITED NATIONS AND THE SWISS GOVERNMENT ON THE INSTALLATION AND OPERATION OF RADIOCOMMUNICATIONS IN THE UNITED NATIONS OFFICE AT GENEVA

Memorandum to the Chief of the Communications Services, Office of General Services

1. Your memorandum of 17 August 1984 requests advice on issues raised by the Swiss authorities, particularly, the harmonization of the recently signed Agreement between the United Nations and the International Telecommunications Satellite Organization (INTELSAT),[27] for the lease of a space segment capacity on one of INTELSAT'S satellites, with the existing arrangements between the United Nations and the Swiss Government on the installation and operation of radiocommunications concluded on 9 July 1956.[28] As we understand it, the radiocommunications service is intended to serve as the central control station of the leased INTELSAT facility, and a condition of the lease of the INTELSAT facility is that the host countries in which the United Nations Earth stations are located consent to the use of the leased facility.

2. We note that in giving their consent, in their cable of 29 May, the Swiss authorities state that such consent is tentative and conditional and one of the conditions given is that the operational arrangements concluded between INTELSAT and the United Nations "would not prejudice in any way the intended arrangement between the United Nations and Switzerland". The cable stipulates further that the consent to activation and operation of the Geneva Earth station is valid only until a definitive "agreement" is established but no later than the end of 1984.

3. In view of the existence of an agreement between the United Nations and Switzerland on the establishment of an Earth station at Geneva, we are not exactly sure what the Swiss authorities mean by entering into a definitive agreement for the utilization of the INTELSAT facility. In article 1 of the existing agreement, Switzerland recognizes the right of the United Nations to install and use radiocommunications at Geneva for purposes of liaison between the United Nations Office at Geneva and the Headquarters of the United Nations in New York, as well as other offices of the United Nations. This right is founded on article III, section 9, of the Convention on the Privileges and Immunities of the United Nations,[29] the substance of which is incorporated into article III of the Agreement between the United Nations and Switzerland concluded in April 1946, on the privileges and immunities of the

United Nations.[30] It must be recognized, however, that under the Convention and the 1946 Agreement, the United Nations' right to install and operate official communication is assimilated to the right accorded by the host country to any Government, including its diplomatic mission, and under article 27 of the 1961 Vienna Convention on Diplomatic Relations,[31] the consent of the host country is required.

4. We assume that the 1956 Agreement and its Protocol of the same date constitute the required consent to establish radiocommunications in the United Nations Office at Geneva, including use of the existing facilities as an Earth station for exploitation of the leased INTELSAT space segment. We think, therefore, that the recent Agreement with INTELSAT does not necessitate entering into additional agreements with the Swiss Government. It should be noted, however, that the accompanying Protocol spells out specific terms for the operation of the radiocommunication and requires close co-ordination between the United Nations and the Swiss Office of Director General of Posts, Telecommunications and Telephones, and Radio S.A., especially, in case of any change of frequencies; paragraph 3 of the Protocol requires the United Nations to make known to the Director General of PTT all new frequencies which the United Nations wishes to utilize and to take into account any objections made by the Swiss telecommunications authorities.

5. Accordingly, we think that your Office should carefully examine any deviations in terms of permitted frequencies under the Protocol and the frequencies to be used under the INTELSAT facility, and ensure that the consent of the Swiss authorities is obtained in respect of such deviations.

27 August 1984

---

29. PROCLAMATION OF THE GOVERNMENT OF A MEMBER STATE FOR THE ESTABLISHMENT OF NATIONAL MILITARY SERVICE—IMPLICATIONS OF THE PROCLAMATION FOR UNITED NATIONS OFFICIALS PURSUANT TO THE RELEVANT HEADQUARTERS AGREEMENT, THE CONVENTION ON THE PRIVILEGES AND IMMUNITIES OF THE UNITED NATIONS AND APPENDIX C TO THE STAFF RULES

Cable to the Chief, Administration and Conference Services Division

With reference to the Proclamation of the Government of [name of a Member State] for the establishment of national military service:

(a) The status of members of the United Nations staff *vis-d-vis* the local Government is governed by the relevant headquarters agreement under which officials of the United Nations are immune from national service obligations. The same rule in respect of military service is contained in the Convention on the Privileges and Immunities of the United Nations of 13 February 1946[29] to which the State concerned acceded in 1947. Article V, section 18 (c), provides that officials of the United Nations are "immune from national service obligations". Since privileges and immunities are granted to officials, as stated in section 20 of the Convention, "in the interests of the United Nations", it is in those interests that officials are free from interference by national authorities and free to perform their duties. "National service" has been understood by the United Nations to extend beyond military service to other forms of extended compulsory service. Under the terms of article V, section 18 *(c)*, of the Convention, the Government concerned would be obligated to recognize the immunity of officials holding contracts with the Organization which qualify them as such under the terms of article V, section 17, of the Convention and General Assembly resolution 76 (I). All locally recruited staff who are not assigned to hourly rates are therefore entitled to the full benefits of the Convention. If the Government seeks to apply national service provisions to United Nations staff who qualify as officials, it puts them in a situation where they might find it impossible to continue to serve, with the consequent disruption of the work. This point should be made

strongly to the Government and it should be emphasized that exemption from national service obligations would not be a favour to those individuals but would rather be for the purpose of ensuring that the work of the Organization can be carried out by its officials without disruption. For United Nations purposes, the immunities and privileges of officials of the United Nations deriving from article 18 *(c)* of the Convention on the Privileges and Immunities of the United Nations have been developed in Appendix C, section *(a),* of the Staff Regulations and Rules which provides that staff members who are nationals of those Member States having acceded to the above-mentioned Convention "shall be immune from national service obligations in the armed services of the country of their nationality." Although staff members are exempt from an obligation of national military service, the Secretary-General has been attributed by article V, section 20, of the Convention and the Staff Regulations and Rules discretionary power to waive such exception under certain circumstances. In particular, two situations have to be distinguished. First, under section *(c)* of Appendix C to the Staff Regulations and Rules, a staff member who has completed one year of satisfactory probationary service or who holds a permanent or regular appointment may be granted special leave without pay by the Organization for the duration of military service. This is true even though, under section *(a)* of Appendix C, qualifying staff members are immune from such military service. Section (/) of Appendix C furthermore states that the Secretary-General may apply the provisions of that appendix where a staff member volunteers for military service or requests a waiver of his immunity under article V, section 18 (c), of the Convention. The staff member called for military service who is placed on a special leave without pay shall, in accordance with section *(d)* of Appendix C, have the terms of employment maintained "as they were on the last day of service before the staff member went on leave without pay. The staff member's re-employment in the Secretariat shall be guaranteed, subject only to the normal rules governing necessary reductions in force or abolition of posts." This seems to be in agreement with article 21 (1) of the Proclamation under consideration. Nevertheless, contrary to the requirement specified in article 21 (2) of the Proclamation, section (/) of Appendix C to the Staff Regulations and Rules provides that the United Nations "shall not continue its contribution to the Joint Staff Pension Fund on behalf of the staff member during the staff member's absence on special leave without pay for military service". Similarly, the provision of rule 106.4 relating to death, injury or illness attributable to the performance of official duties on behalf of the United Nations "shall not be applicable during periods of military service", in accordance with section *(J)* of Appendix C to the Staff Regulations and Rules. Secondly, staff members who do not hold a permanent or regular appointment or who have not completed one year of satisfactory probationary service, if called for military service, shall be separated from the Secretariat according-to the terms of their employment (section (c) of Appendix C).

(b) Dependants of staff members are not immune from national service.

16 January 1984

---

30. PROCEDURE TO BE FOLLOWED IN THE EVENT A REQUEST IS MADE FOR UNITED NATIONS OFFICIALS TO TESTIFY AS WITNESSES IN TRIALS OF FORMER MINISTERS OR CIVIL SERVANTS IN A MEMBER STATE

Cable to resident representative, United Nations Development Programme

Reference is made to your query as to the procedure to be followed in the event a request is made for United Nations officials to testify as witnesses in trials of former ministers or civil servants.

(a) From a strictly legal point of view, two sets of provisions should be borne in mind. First of all, section 21 of the Convention on the Privileges and Immunities of the United

Nations, to which the Member State concerned is a party, provides in general terms that the United Nations shall co-operate with the appropriate authorities of Member States to facilitate the proper administration of justice. Under section 21, it would be possible for the United Nations and its personnel to assist police authorities in their inquiries if a request for such assistance were made in due form. Such assistance does not require a waiver. However, in the circumstances, any such requests, unless purely routine in nature, should be referred to Headquarters for advice. The general principle set out in section 21 has to be interpreted in a manner consonant with the second set of relevant provisions referred to in the paragraphs which follow.

(b) Section 18 of the above-mentioned Convention provides that United Nations officials are immune from legal process in respect of their official acts. Requests for officials to testify in court, whether for prosecution or defence in the context of trials of former ministers or civil servants, would almost certainly involve official acts and consequently are subject to the immunity provisions. Section 20 of the Convention provides for the possibility of waiver of immunity by the Secretary-General. However, you should bear in mind that only the Secretary-General may waive the immunity. The waiver must be express and in response to a formal request from the Government indicating the question or questions on which testimony is required. The waiver is normally limited in scope to protect the interests of the Organization and its personnel.

(c) The foregoing provisions apply *mutatis mutandis* to the specialized agencies by virtue of the Convention on the Privileges and Immunities of the Specialized Agencies,[32] to which the State concerned is also a party. These provisions are confirmed, in respect of both of the above-mentioned Conventions, in article IX of the Standard Basic Agreement concerning assistance from the United Nations Development Programme signed by the State concerned.

(d) Requests for testimony of United Nations officials should be referred to the United Nations Legal Counsel. Similar requests for specialized agencies officials should be referred to the legal office of the relevant agency, with copy to the United Nations.

15 February 1984

---

31. DOMESTIC LEGISLATION PROVIDING FOR THE PAYMENT OF CUSTOMS DUTIES ON EQUIPMENT AND SUPPLIES RECEIVED FROM UNICEF—INCOMPATIBILITY OF SUCH LEGISLATION WITH THE RELEVANT AGREEMENT CONCERNING THE ACTIVITIES OF UNICEF

Memorandum to the Assistant Director, Supply Division, United Nations Children's Fund

1. I wish to refer to your letter of 9 February 1984 concerning the legislation promulgated recently in a Member State under which government departments are liable to pay customs duties on equipment and supplies for projects received by them from external agencies, including from UNICEF.

2. The UNICEF representative rightly points out that under the agreement between UNICEF and the Government of [name of a Member State] concerning the activities of UNICEF "no taxes, fees, tolls or duties shall be levied on supplies and equipment furnished by UNICEF so long as they are used in accordance with the Plan of Operations".

3. This provision does not simply exempt UNICEF from paying customs duties or taxes on equipment and supplies; rather, it explicitly exempts the equipment and supplies furnished by UNICEF from taxes or duties whether or not such taxes or duties are payable by UNICEF or by others participating in the operations covered by the Plan of Operations.

4. The rationale behind the provision is that UNICEF assistance is extended solely for the interest and benefit of children in the State in question. It is the Government's obligation to ensure that such assistance is used to its fullest for its intended purpose and not in any way for other governmental purposes. Charging duties or taxes to government departments responsible under the UNICEF Plan of Operations would in effect result in UNICEF assistance going to unintended purposes.

5. Therefore, imposition of any tax or duty on the equipment or supplies furnished by UNICEF, whether or not payable by UNICEF, would be inconsistent with the provision under article VII of the Agreement referred to above and should be resisted on that basis.

16 February 1984

---

32. IMMUNITY OF UNRWA FROM EVERY FORM OF LEGAL PROCESS UNDER THE CONVENTION ON THE PRIVILEGES AND IMMUNITIES OF THE UNITED NATIONS—SYSTEM OF LAW BY WHICH THE QUESTION OF UNRWA'S IMMUNITY FROM JURISDICTION IS TO BE JUDGED—NATURE OF THE IMMUNITY UNDER THAT SYSTEM OF LAW

Memorandum to the Legal Adviser, United Nations Reliefand Works Agency for Palestine Refugees in the Near East

Your letter dated 8 February 1984 regarding the arbitration between UNRWA and a company located in the territory of a Member State has been forwarded to this Office for advice on the questions of immunity raised by the Arbitrator in his letter of 2 November 1983 and the accompanying statement of issues on facts and law.

With regard to the questions raised in the Arbitrator's letter, the principal issue is whether the immunity of UNRWA is a matter to be judged under domestic law or some other system of law. For reasons of principle, as well as on sound practical grounds, we are strongly of the opinion that this matter should not be judged by domestic law except to the extent, of course, that it incorporates relevant international obligations. Domestic law may, therefore, be considered as a secondary but not a primary source of evidence of the law.

Fortunately, there is another, well-established system of law by which this matter may be judged, namely, the public international law governing the status, privileges and immunities of international organizations. The formal sources of the system of law are to be found in the relevant constitutive instruments (of the United Nations and UNRWA), and multilateral and bilateral agreements to which the Member State in question is a party and by which it is, therefore, legally bound *{inter alia,* the Convention on the Privileges and Immunities of the United Nations[29]). It can be pointed out in connection with the above-mentioned Convention that Member States obligate themselves to be in a position under their own laws to give effect to the Convention.

A word about the nature of international organization immunity might also be useful in order to head off any arguments by the company in question based on restrictive immunity. The immunity accorded international organizations under this system of law is an absolute immunity and must be distinguished from sovereign immunity which in some contemporary manifestations, at least, is more restrictive. While international immunities may be and, in some cases, must be waived, such waivers must be express. No such waiver has ever been executed in this case.

Where proceedings are brought by a party in the face of such absolute immunity, this may, in our view, give rise to a legally enforceable cause of action and it would not be necessary to establish that the party bringing the action has acted unreasonably. Since the law of international immunity makes specific provisions for the settlement of disputes of a private nature, a party which nevertheless proceeds against an international organization in the

domestic courts infringes the immunity and the international public policy which underlies the law. Organizations must therefore be in a position to defend themselves from such acts of harassment which clearly interfere with their effective functioning and the fulfilment of their programmes and policies.

Since international organizations are recognized entities in international law, courts are required to recognize their immunities. It is not necessary for international organizations to claim the immunities to which they are entitled since such immunity exists as a matter of law and is a fact of which judicial notice must be taken. In practice, a suggestion of immunity is normally made to a court on behalf of an international organization by the competent executive authorities of the States concerned. It goes without saying that in such cases the international organization is not submitting to the jurisdiction of the court.

In the statement of the issues of law and fact, the Arbitrator raises the question whether the goods were immune from arrest in the courts of the State concerned. Assuming that it can be shown that at the relevant time the goods were the property of UNRWA (about which there seems to be no doubt), it is clear that the proceedings taken by the company in question and the decisions of the local court were in violation of and contrary to sections 2 and 3 of the Convention on the Privileges and Immunities of the United Nations which provide immunity from legal process and from any interference, whether by executive, administrative, judicial or legislative action.

Consequently, the company committed an actionable wrong in causing the goods to be unlawfully arrested and UNRWA suffered material losses for which it is entitled to be compensated.

I trust that these comments and advice will be of assistance to you in your response to the Arbitrator's letter.

28 February 1984

---

33. LIABILITY QUESTIONS WHICH MIGHT ARISE FROM THE USE OF VEHICLES OF THE UNITED NATIONS DISENGAGEMENT OBSERVER FORCE BY LOCAL CIVILIAN PERSONNEL HIRED BY THE CONTINGENT OF A MEMBER STATE

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

1. Please refer to your memorandum of 5 March 1984 in which you requested our advice in connection with the use of United Nations Disengagement Observer Force (UNDOF) vehicles by local civilian personnel hired by the contingent of a Member State.

2. The concern in this case is the Organization's liability in the event of an accident involving an UNDOF vehicle if the driver and/or passengers) are local civilian personnel hired by the contingent in question. Assuming that the driver is authorized to drive the UNDOF vehicle and does so within the scope of his authorization, the Organization and the driver would be covered by insurance against claims by third parties for bodily injury or property damage. For this purpose, passengers would presumably be regarded as third parties and the Organization as well as the driver would be covered by insurance in respect of claims by passengers.

3. The Organization would have no problem with claims *against* the driver, but there could be a problem with claims *by* the driver, against the United Nations as owner. In that connection, we would recommend that the contingent concerned be requested to confirm that it would insure the drivers either through "self-insurance" along the lines of Appendix D to the Staff Rules, or through commercial insurance, and that it would hold the United Nations harmless from any claims by their drivers. If such confirmation is forthcoming, we do not foresee any problem of a legal nature as far as insurance is concerned.

4. We would, however, draw to your attention the fact that the drivers would *not* enjoy any immunity of any kind in the event of an accident. UNDOF may wish to weigh the significance of the drivers* «o«-immunity against the productivity which might be gained from their presence in UNDOF vehicles.

14 March 1984

---

34. ADVICE CONCERNING THE REIMBURSEMENT OF VALUE ADDED TAX ON PURCHASES OF GOODS AND SERVICES BY THE UNITED NATIONS DEVELOPMENT PROGRAMME IN A MEMBER STATE

Memorandum to the Deputy Director, Administration and Management, Office for Project Execution

With reference to your memorandum of 21 May 1984 on difficulties the United Nations Development Programme has encountered in connection with the reimbursement of value added tax on purchases of goods and services in a particular Member State, please find attached an aide-mémoire which may be used in your discussions of this problem with the authorities of the State concerned.

24 May 1984

Aide-mémoire

The United Nations Development Programme has encountered difficulties in connection with the reimbursement of value added tax (VAT) on purchases of goods and services in [name of a Member State]. Under the arrangements in force since 1977, 'VAT is deemed to be an indirect tax within the meaning of section 8 of the Convention on the Privileges and Immunities of the United Nations[29] and administrative arrangements have been made by the competent authorities to reimburse to the United Nations the amount of VAT charged on purchases of goods and services. These arrangements have worked satisfactorily with regard to small or medium-scale purchases and the United Nations has continued to pay VAT subject to reimbursement. The difficulties that have arisen have come to light in connection with the purchase of goods and services relating to large-scale projects involving expenditures of millions of dollars. In such cases VAT chargeable on goods and services may amount to thousands of dollars. Because of the length of time between the payment of VAT by the United Nations and its reimbursement and taking into account fluctuating exchange rates and inflation, the United Nations is incurring substantial losses.

The United Nations believes that this drain on international funds could be prevented if it could be exempted from 'VAT on large-scale purchases of the kind described. Furthermore, the United Nations believes that such exemption could be made within the existing legal framework of section 8 of the Convention on the Privileges and Immunities of the United Nations. That section provides in regard to indirect taxes that when such taxes have been charged or chargeable, Members will, whenever possible, make appropriate administrative arrangements *for the remission or return* of such taxes. While the practical arrangements made in 1977 envisaged the return of 'VAT through a system of reimbursement, the implementation of a system of remission would, in practical terms, amount to an exemption eliminating costly administrative work as well as the gap in time between the payment and refund of VAT. UNDP would be grateful if a system based on remission could be studied by the competent authorities and is ready to discuss with them the practical implementation of such a system, including the establishment of appropriate thresholds for reftind and remission.

---

35. EXEMPTION FROM TAXATION OF LOCALLY RECRUITED STAFF MEMBERS UNDER THE CONVENTION ON THE PRIVILEGES AND IMMUNITIES OF THE UNITED NATIONS

Memorandum to the Ojficer-in-charge, Administrative Services Section, United Nations Children's Fund

1. I wish to refer to the question of exemption from taxation of locally recruited staff members in [name of a Member State] raised in the cable of 1 October 1984.

2. The question of tax exemption must be seen in the context of the legal arrangements in force between the United Nations and the Member State in question which include not only the 1948 Agreement relating to the United Nations Children's Fund but also, more particularly, the Convention on the Privileges and Immunities of the United Nations,[29] to which the State concerned is a party.

3. The 1948 Agreement contained contradictory provisions dealing with the taxation of UNICEF staff members. On the one hand, article VI, paragraph B, appears to exclude from the exemption nationals or permanent residents of the State in question, while on the other hand, article VJ provides that the Government will grant to the Fund and its *personnel* the privileges and immunities contained in the Convention on the Privileges and Immunities of the United Nations. The State concerned acceded to the Convention in 1956 without a reservation on the question of taxation, and consequently from then on any contradictions that may have existed with regard to taxation must be deemed to have been resolved. The controlling legal provision is section 18 *(b)* of the Convention on the Privileges and Immunities of the United Nations which provides that officials of the United Nations shall be exempt from taxation on the salaries and emoluments paid to them by the United Nations.

4. Section 18 *(b)* is the controlling provision as a matter of law because the Convention itself provides in section 34 that Member States when acceding to it must be in a position under their own law to give effect to its terms and because under the law of treaties now codified in the Vienna Convention on the Law of Treaties of 1969, later arrangements supersede earlier arrangements when they deal with the same subject-matter.

5. The remaining legal question which arises is whether General Service staff members who are nationals or permanent residents of the State in question are to be deemed "officials" for the purposes of the Convention. In dealing with the question of the definition of the term "officials", the General Assembly made no distinction as to grade, nationality or residence status when in its resolution 76 (I) of 7 December 1946 it approved the granting of the privileges and immunities referred to in articles V and VII of the Convention on the Privileges and Immunities of the United Nations "to all members of the staff of the United Nations, with the exception of those who are recruited locally and are assigned to hourly rates". It will be noted that the exception related to staff who are *both* locally recruited and assigned to hourly rates. The Secretary-General has, therefore, interpreted the term "officials" in accordance with General Assembly resolution 76 (I) and has never deviated therefrom. Thus, unless the staff members referred to in the above-mentioned cable are both locally recruited and assigned to hourly rates, they are entitled to the privileges and immunities envisaged in the Convention, in particular section 18 *(b)* which provides for exemption from taxation on their salaries and emoluments paid by the Organization.

3 October 1984

36. QUESTION OF THE CLASSIFICATION OF MEMBERS PERMANENT MISSION TO THE UNITED NATIONS AS MEMBERS OF THE DIPLOMATIC STAFF OF THAT MISSION—ROLE OF THE SECRETARY-GENERAL IN THIS RESPECT

Memorandum to the Secretary-General

1. Differences of opinion have arisen between the host country and the Permanent Mission of a Member State on the classification of its members as members of the diplomatic staff of that Mission.

2. According to the 1961 Vienna Convention on Diplomatic Relations,[31] the members of the diplomatic staff of a mission are "the members of the staff of the mission having diplomatic rank" (article 1 *(d))*, while the members of the administrative and technical staff are "the members of the staff of the mission employed in the administrative and technical service of the mission" (article 1 (/)). In principle, it is neither possible nor desirable that the Office of the Legal Counsel or the Protocol Office exercise any control over the classification of members of permanent missions as diplomatic or administrative and technical by their Governments. On the other hand, section 15 (2) of the Headquarters Agreement[33] seems to assign some role to the Secretary-General, the Government of [the host country] and the government of the Member concerned". In practice, however, the role which has fallen to the Secretary-General in such matters has been essentially that of an intermediary between the sending and the host States. This function is normally performed by the Chief of Protocol and, in the rare case of a disagreement like the present one, by the Legal Counsel.

14 May 1984

NOTES

[1] Article 4 (2) reads as follows:

"2. An Inspector appointed to replace one whose term of office has not expired shall hold office for the remainder of that term, provided it is not less than three years. Otherwise the duration of the appointment shall be for a full term."

[2] Reproduced in *Juridical Yearbook, 1966,* p. 225.

The procedure to be followed in securing patent protection for some equipment and software developed in the framework of a project sponsored by UNDP was outlined in a legal opinion of 26 April 1982 which was reproduced in *Juridical Yearbook, 1982,* p. 177.

[3] Martens, *Nouveau recueil général de traités,* Deuxième série, tome X, p. 133.

* Reproduced in *Juridical Yearbook, 1966,* p. 225.

[s] Economic and Social Council resolution 1982/70.

[6] E/5975/Rev.l.

[7] E/5715/Rev.l.

[8] E/5975/Rev.l.

[9] See *Official Records of the United Nations Conference on Succession of States in Respect of Treaties,* vol. Ill, Documents of the Conference (United Nations publication, Sales No. E.79.V.10).

[10] See *Official Records of the General Assembly, First Part of the First Session, Plenary meetings, 10 January-14 February 1946,* 24th meeting, and *Official Records of the Security Council, First Year; First Series,* 9th meeting.

[11] See A/C.6/44 and A/191.

[12] See A/191.

[13] Document WD 438, CO/202, 17 UNCIO, Documents 327, 330 (1945).

[14] See 13 UNCIO, pp. 538 and 539.

[15] Records of the Second Assembly League, p. 258.

[16] The Charter of the United Nations University (see A/9149/Add.2) was adopted by the General Assembly by its resolution 3081 (XXVIII) of 6 December 1973.

[17] The text of the memorandum is reproduced in *Juridical Yearbook, 1982,* p. 188.

[18] General Assembly resolution 31/36.

[19] United Nations, *Treaty Series*, vol. 989, p. 175.
[x] *Ibid.*, vol. 189, p. 137.
[21] ST/LEG/SER.E/2.
[32] See for instance the Treaty concerning the establishment of the Republic of Cyprus, United Nations, *Treaty Series*, vol. 382, p. 10.
[23] General Assembly resolution 97(1). The Regulations were later modified by resolutions 364 B (IV), 482 (V) and 33/141 A. For the text of the Regulations, see United Nations, *Treaty Series*, vol. 859, p. VIII.
[24] United Nations, *Treaty Series*, vol. 1155, p. 331; also reproduced in *Juridical Yearbook, 1969*, p. 140.
[23] ID/WG.397/8.
[26] ST/LEG/SER.E/6.
[27] United Nations, *Treaty Series*, vol. 1365, No. 11-926.
[21] *Recueil officiel des lois et ordonnances de la Confédération Suisse*, 1956, p. 1273.
[29] United Nations, *Treaty Series*, vol. 1, p. 15.
[x] *Ibid.*, vol. 1, p. 163.
[31] *Ibid.*, vol. 500, p. 95.
[32] *Ibid.*, vol. 33, p. 261.
[33] *Ibid.*, vol. 11, p. II.