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United Nations Financing of the Law of the Sea Preparatory Commission: May the United States Withhold Payment?

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Abstract

In this Note, the legal basis of the United States position will be evaluated. After an overview of the events surrounding the controversy, the sources of the General Assembly's budgetary and apportioning authority and the United Nations' budget procedures will be considered. There will follow a discussion of an International Court of Justice advisory opinion upon which both the United States and its opponents rely. Finally, the financial arrangement between the United Nations and the Preparatory Commission (Commission) will be examined in light of the formal relationship between those two bodies.

UNITED NATIONS FINANCING OF THE LAW OF THE SEA PREPARATORY COMMISSION: MAY THE UNITED STATES WITHHOLD PAYMENT?

INTRODUCTION

For the second time in United Nations history, a significant legal challenge has been made to the General Assembly's authority to compel a member to help finance an approved expenditure.¹ In an effort to promote its policy agenda² by using its leverage as the United Nations' largest contributor,³ the United States has refused to pay its assessed share of the costs of a preparatory commission which will begin to implement controversial parts of the United Nations Convention on the Law of the Sea (Convention).⁴ The United States position was announced in a statement by President

1. On numerous occasions, nations have refused to pay validly apportioned charges to the United Nations or its specialized agencies for policy reasons. A recent example is the United States withholding of funds from the International Atomic Energy Agency, which was prompted by that agency's refusal to recognize Israel's credentials. Statement of Secretary of State George Shultz (Oct. 16, 1982), *reprinted in* DEP'T ST. BULL., Dec. 1982, at 63. In this instance, however, the legal authority of the United Nations to compel payment was not challenged. *Id.* The only precedent for such a challenge on legal grounds is a refusal by France and the Soviet Union to pay an assessment for United Nations peacekeeping forces in the late 1950's and early 1960's. *See infra* notes 79-85 and accompanying text.

2. Withholding and deferral of payments to the United Nations and related agencies have been used by the United States to promote fiscal restraint in the United Nations budget, *see* Wall St. J., May 1, 1981, at 29, col. 3, and to thwart Arab efforts to oust Israel from the General Assembly, the International Telecommunication Union, and the International Atomic Energy Agency. Statement of Secretary of State George Shultz, *supra* note 1. *See also* Marshall, *Rattling the Purse at the United Nations*, 218 SCIENCE 456 (Oct. 29, 1982); Wall St. J., Oct. 18, 1982, at 3, col. 2; N.Y. Times, Oct. 17, 1982, at 1, col. 6.

Such tactics by the United States are not unprecedented. In 1976, the United States suspended payments to the United Nations Educational, Scientific and Cultural Organization (UNESCO) when that body cut off funding to Israel. *See* Russell, *Playing International Hardball*, TIME, Nov. 1, 1982, at 47. The American delegation to the International Labor Organization (ILO) withdrew from 1977 until 1979 in response to criticism of United States Mideast policy. *Id.*

3. The United States regularly contributes 25% of the United Nations' budget. *See, e.g.*, Report of the Committee on Contributions, 37 U.N. GAOR Supp. (No. 11) at 55, U.N. Doc. A/37/11 (1982). The next largest contributor is the Soviet Union with 11.1% for the years 1980-1982. *Id.* Seventy-one nations paid the minimum 0.01% for the same period. *Id.* at 52-55. *See also* Advances to the Working Capital Fund and Contributions to the United Nations Regular Budget for 1982 and of New Member States' Contributions for 1980 and 1981, U.N. Doc. ST/ADM/SER.B/258, at 8-11 (1982).

4. United Nations Convention on the Law of the Sea, *opened for signature* Dec. 10, 1982, 21 I.L.M. 1261 (1982) [hereinafter cited as Convention].

Reagan,⁵ who declared that the assessment is improper under the United Nations Charter and not legally binding on members.⁶

In this Note, the legal basis of the United States position will be evaluated. After an overview of the events surrounding the controversy,⁷ the sources of the General Assembly's budgetary and apportioning authority⁸ and the United Nations' budget procedures⁹ will be considered. There will follow a discussion of an International Court of Justice advisory opinion upon which both the United States and its opponents rely.¹⁰ Finally, the financial arrangement between the United Nations and the Preparatory Commission (Commission) will be examined in light of the formal relationship between those two bodies.¹¹

I. THE PREPARATORY COMMISSION

The Preparatory Commission was established simultaneously with the adoption of the United Nations Convention on the Law of the Sea,¹² a multilateral treaty negotiated over a nine year period at the Third United Nations Conference on the Law of the Sea (Conference).¹³ The Conference was convened in 1973 by resolution of

5. Statement of President Ronald W. Reagan (Dec. 30, 1982), *reprinted in* United States Mission to the United Nations, Press Release No. USUN 1-(83) (Jan. 3, 1983). *See* N.Y. Times, Dec. 31, 1982, at 1, col. 5.

6. Statement of President Ronald W. Reagan, *supra* note 5. A fact sheet accompanying President Reagan's statement framed the issue in these terms:

The expenses of the Law of the Sea Preparatory Commission are not expenses [of the United Nations] since that commission is legally independent of and distinct from the UN Organization.

....

The [Law of the Sea] Preparatory Commission is established pursuant to a treaty regime separate from the UN Charter [It] is not a subsidiary organ of the UN. It is not answerable to the United Nations. Membership in the UN does not obligate any member to finance or to otherwise support any other organization.

Fact Sheet accompanying United States Mission to the United Nations, Press Release No. USUN 1-(83) (Jan. 3, 1983) [hereinafter cited as Fact Sheet].

7. *See infra* notes 12-42 and accompanying text.

8. *See infra* notes 44-47, 57-60 and accompanying text.

9. *See infra* notes 48-56, 61-74 and accompanying text.

10. *See infra* notes 78-144 and accompanying text.

11. *See infra* notes 145-206 and accompanying text.

12. *See* Draft Final Act of the Third United Nations Conference on the Law of the Sea, para. 42, 21 I.L.M. 1245, 1252 (1982) (resolution integral part of Convention) [hereinafter cited as Final Act]; *id.* annex I, res. I, at 1253-54 (establishing Preparatory Commission) [hereinafter cited as Conference Resolution I].

13. For a summary of the work of the Conference, *see* Final Act, *supra* note 12.

the General Assembly¹⁴ with a mandate to adopt a convention addressing all matters relating to the law of the sea.¹⁵ The Assembly provided financing for the Conference by authorizing the Secretary-General to provide facilities, servicing and staff, utilizing "to the fullest extent possible the resources at his disposal."¹⁶ Conference expenses were assessed to United Nations members as part of the regular United Nations budget,¹⁷ and special provision was made for assessment to states not members of the United Nations that participated in the Conference.¹⁸

As the negotiations neared completion, the Conference President proposed that a preparatory commission be established to enable organs created by the Convention to function as soon as possible upon its entry into force.¹⁹ The earliest discussions regard-

14. G.A. Res. 3067, para. 2, 28 U.N. GAOR Supp. (No. 30) at 13, 14, U.N. Doc. A/9030 (1973).

15. *Id.* para. 3. The original timetable called for the Conference to end no later than 1975, *id.* para. 4, but owing to the enormity of the undertaking, see G.A. Res. 2750C, para. 2, 25 U.N. GAOR Supp. (No. 28) at 26, 26, U.N. Doc. A/8028 (1970); Report of the Committee on the Peaceful Uses of the Sea-Bed and the Ocean Floor Beyond the Limits of National Jurisdiction, 27 U.N. GAOR Supp. (No. 21) para. 23, U.N. Doc. A/8721 (1972) (agenda of the Conference), and the difficulty of achieving consensus, see, e.g., Report of the Chairman of the First Committee, U.N. Doc. A/Conf.62/L.91 (1982) (describing difficulty of United States negotiating position), the Conference required nine years (11 sessions) of substantive negotiation. See G.A. Res. 36/79, 36 U.N. GAOR Supp. (No. 51) at 23, U.N. Doc. A/36/51 (1981); G.A. Res. 35/116, 35 U.N. GAOR Supp. (No. 48) at 19, U.N. Doc. A/35/48 (1980); G.A. Res. 34/20, 34 U.N. GAOR Supp. (No. 46) at 14, U.N. Doc. A/34/46 (1979); G.A. Res. 33/17, 33 U.N. GAOR Supp. (No. 45) at 14, U.N. Doc. A/33/45 (1978); G.A. Res. 32/194, 32 U.N. GAOR Supp. (No. 45) at 42, U.N. Doc. A/32/45 (1977); G.A. Res. 31/63, 31 U.N. GAOR Supp. (No. 39) at 23, U.N. Doc. A/31/39 (1976); G.A. Res. 3483, 30 U.N. GAOR Supp. (No. 34) at 9, U.N. Doc. A/10,034 (1975); G.A. Res. 3334, 29 U.N. GAOR Supp. (No. 31) at 10, U.N. Doc. A/9631 (1974) (convening additional sessions).

16. G.A. Res. 3067, *supra* note 14, para. 9.

17. See, e.g., Programme Budget for the Biennium 1982-1983, 36 U.N. GAOR Supp. (No. 6A) annex II, at 2, U.N. Doc. A/36/6/Add.1 (1982); Programme Budget for the Biennium 1980-1981, 34 U.N. GAOR Supp. (No. 6A) at 7, U.N. Doc. A/34/6/Add.2 (1980); Proposed Programme Budget for the Biennium 1980-1981, 34 U.N. GAOR Supp. (No. 6) at 128-32, U.N. Doc. A/34/6 (1979). For a description of the process by which appropriations provided in the regular budget are assessed to member states, see *infra* notes 62-71 and accompanying text.

18. G.A. Res. 31/407, 31 U.N. GAOR Supp. (No. 39) at 201, U.N. Doc. A/31/39 (1976). United Nations financial regulations provide that nonmember states which participate in conferences financed from United Nations appropriations shall contribute to such conferences at rates to be determined by the General Assembly. Financial Regulations and Rules of the United Nations, reg. 5.9, U.N. Doc. ST/SCB/Financial Rules/1/Rev.2/Amend.2, at 16 (1980), *reprinted in* UNITED NATIONS FINANCE MANUAL § 1.00, at 13 (1981).

19. Note by the President (March 3, 1980), para. 3(a), U.N. Doc. A/Conf.62/PC/1, *reprinted in* Report of the President on the Work of the Informal Plenary on the Preparatory Commission, annex I, U.N. Doc. A/Conf.62/L.55 (1980).

ing creation of the commission involved two matters pertinent to the present discussion. First, some nations objected to a proposal to limit membership on the commission to states ratifying or signing the Convention.²⁰ Second, it was recognized that according to United Nations practice, the appropriate means of financing the commission would be with a loan provided by the United Nations, to be repaid by the new organization.²¹ By the end of the ninth session, the draft Conference Resolution²² provided that membership on the Preparatory Commission should be limited to states signing or acceding to the Convention.²³ Provision was also made for financing the Commission through a United Nations loan.²⁴

Before the tenth session began, the Reagan administration assumed office in the United States.²⁵ The new administration opposed major portions of the draft Convention,²⁶ and refused to

20. Report of the President on the Work of the Informal Plenary on the Preparatory Commission, para. 4(c), U.N. Doc. A/Conf.62/L.55 (1980) ("Some felt that composition based on signature to the Final Act was important to ensure broad and representative membership in the preparatory commission."). See First Committee, 15 Third United Nations Conference on the Law of the Sea Official Records [UNCLOS III OR] (50th mtg.), U.N. Doc. A/Conf.62/C.1/SR.50 (prov. ed. 1981).

21. Report of the President on the Work of the Informal Plenary on the Preparatory Commission, *supra* note 20, annex I, para. 3(i) ("According to United Nations practice, such expenses are met by a loan provided by the United Nations . . ."); *id.* para. 4(j) ("the financing . . . should be in conformity with United Nations practice").

22. Informal Proposal of the President of the Conference, U.N. Doc. A/Conf.62/PC/2 (1980), *reprinted in* Report of the President, *supra* note 20, annex II.

23. *Id.* para. 2.

24. *Id.* para. 12.

25. President Reagan was sworn into office on January 20, 1981. The tenth session convened on March 9, 1981. G.A. Res. 35/116, para. 3, 35 U.N. GAOR Supp. (No. 48) at 19, 19, U.N. Doc. A/35/48 (1980).

26. See *Law of the Sea—Tenth Session: Miscellaneous Hearings Before the Subcomm. on Oceanography of the House Comm. on Merchant Marine and Fisheries, Part 1*, 97th Cong., 1st Sess. 633, 640-52 (1981) (statement of James L. Malone, Assistant Secretary of State Designate for Oceans and International Environmental and Scientific Affairs), *reprinted in* DEP'T ST. BULL., July 1981, at 48.

Opposition centered on part XI of the Convention, which provides that the area "at or beneath the sea-bed" and minerals found therein "are the common heritage of mankind," Convention, *supra* note 4, arts. 133, 136, and establishes an International Sea-Bed Authority with exclusive jurisdiction to organize and control all activity in such areas. See *id.* arts. 137, para. 3 & 156-157. See Statement of President Ronald Reagan (July 9, 1982), *reprinted in* DEP'T ST. BULL., Aug. 1982, at 71.

The head of the American delegation to the ninth session of the Conference (held in 1980 under the Carter administration) had stated that it would "support provisions that encourage the earliest practicable entry into force of the convention." Letter dated 30 July 1980 from the representative of the United States of America to the President of the Conference, 14

continue negotiations until it had completed a comprehensive review of the document.²⁷ As a result, the substantive work of the Conference was virtually suspended through the tenth session.²⁸ However, the tenth session did receive the report of the Secretary-General on financial implications of the proposed Convention, which included the projected cost of the Preparatory Commission.²⁹

Work on the draft Conference Resolution continued between the tenth and eleventh sessions of the Conference.³⁰ During this period, financing of the Commission from the regular budget of the United Nations was inserted as an alternative to the loan provision.³¹ This scheme would shift the major burden of funding the Commission from the Convention signatories directly to the largest contributors to the United Nations.³² The industrialized nations would thus bear the bulk of the Preparatory Commission's costs regardless of whether they signed the Convention.³³ Some of the

UNCLOS III OR 109, U.N. Doc. A/Conf.62/103 (1982). The Reagan administration supported the bulk of the Convention, *see* Statement of President Ronald Reagan, *supra*, but ratification with reservation was expressly prohibited. Convention, *supra* note 4, art. 309.

27. Report of the Chairman of the First Committee, para. 22, U.N. Doc. A/Conf.62/L.91 (1982). *See also* Statement of James L. Malone, *supra* note 26.

28. Report of the Chairman of the First Committee, *supra* note 27, para. 23.

29. Potential Financial Implications for States Parties to the Future Convention on the Law of the Sea, U.N. Doc. A/Conf.62/L.65 (1981). A partial estimate of the cost of the proposed Preparatory Commission exceeded U.S.\$1.2 million. *Id.* para. 58 n.c and accompanying text. The U.S.\$1.2 million estimate does not include provision for subsidiary committees, *id.* para. 54, and does not account for the additional expenses involved in conducting the meetings away from United Nations Headquarters in New York. *Id.* paras. 55-56. The Commission was convened at Kingston, Jamaica. Provisional Verbatim Record (193d plen. mtg.), U.N. Doc. A/Conf.62/PV.193, at 21 (1983). The estimate was based on a total of 20 weeks of meetings. Potential Financial Implications for States Parties to the Future Convention on the Law of the Sea, *supra*, para. 53 n.*.

It is noteworthy that new funding provisions were inserted just a few months after these expense projections were received. *See infra* notes 32-36 and accompanying text.

30. The draft resolution was developed between sessions by the Working Group of 21, co-chaired by the President of the Conference and the Chairman of the First Committee. Their work is summarized in the Report of the Co-ordinators of the Working Group of 21, U.N. Doc. A/Conf.62/C.1/L.30 (1982) [hereinafter cited as Working Group of 21 Report].

31. Draft Resolution Establishing the Preparatory Commission for the International Sea-Bed Authority and the International Tribunal for the Law of the Sea, para. 11, U.N. Doc. A/Conf.62/WG.21/Informal Paper 15 (1981). The important difference between the new financing plan and the loan scheme is that the former results in a net expense requiring increased funding; the latter, though raising contribution requirements in the short term, will lower them in future years by requiring repayments that will be counted as United Nations income. *See infra* notes 61-64 and accompanying text.

32. *See infra* notes 62-74 and accompanying text (discussion of apportionment process); Report of the Committee on Contributions, *supra* note 3 (scale of assessments).

33. The industrialized nations as a group bear the largest share of United Nations expenses. *See* Report of the Committee on Contributions, *supra* note 3, annex IV (official

industrialized nations saw a link between the new funding scheme and the criteria governing membership on the Commission,³⁴ apparently taking the view that their financial contributions should entitle them to participate in the Commission's decision-making process. They accordingly pressed for signature to the Final Act of the Conference as appropriate qualification for membership.³⁵ Before the eleventh and final negotiating session convened, however, both the broad membership provision and the loan scheme were dropped from the draft resolution.³⁶

The United States returned to the negotiations at the eleventh session,³⁷ but when efforts to meet the American objections to the draft Convention failed,³⁸ President Reagan announced that the United States would not sign the Convention.³⁹ The resolution establishing the Preparatory Commission, adopted by the Conference at the end of the eleventh session, provided that membership on the Commission would be open only to Convention signatories,⁴⁰ and that the Commission would be financed from the regular budget of the United Nations.⁴¹ Subsequently, the General Assembly formally approved this financial arrangement.⁴²

contribution scale for 1980-82). The five largest contributors accounted for 61.1% of total assessments: United States, 25.00%; U.S.S.R. (including Byelorussian S.S.R. and Ukrainian S.S.R.), 12.95%; Japan, 9.58%; West Germany, 8.31%; France, 6.26%. *Id.*

34. Working Group of 21 Report, *supra* note 30, paras. 5, 14.

35. *Id.* para. 5. *See also* First Committee, *supra* note 20, at 6-7 (statement of delegate of the United Kingdom). Signature to the Final Act of the Conference did not constitute approval of the Convention.

36. Draft Resolution Establishing the Preparatory Commission for the International Sea-Bed Authority and the International Tribunal for the Law of the Sea, paras. 2, 11, U.N. Doc. A/Conf.62/WG.21/Informal Paper 17 (1981).

37. Statement of President Ronald Reagan (Jan. 29, 1982), *reprinted in* DEP'T ST. BULL., Mar. 1982, at 54. *See also* Report of the Chairman of the First Committee, *supra* note 27, paras. 25-27.

38. 17 UNCLOS III OR (174th plen. mtg.) at 13, U.N. Doc. A/Conf.62/SR.174 (prov. ed. 1982). *See* Report of the Chairman of the First Committee, *supra* note 27, paras. 32-34 (description of Conference reaction to United States objections).

39. Statement of President Ronald Reagan (July 9, 1982), *reprinted in* DEP'T ST. BULL., Aug. 1982, at 71.

40. Conference Resolution I, *supra* note 12, para. 2.

41. *Id.* para. 14.

42. G.A. Res. 37/66, para. 9, U.N. Doc. A/Res/37/66 (1982). It is noteworthy that if this resolution had failed, the Preparatory Commission would have been left entirely without funds because no alternative source of financing was provided in the Conference Resolution. *See* Conference Resolution I, *supra* note 12. Passage of the resolution was never in doubt, however, because an overwhelming number of United Nations members had already voted for the Convention, *see* G.A. Res. 37/66, *supra*, preambular para. 2, and the 21 members

II. UNITED NATIONS FINANCING UNDER ARTICLE 17

The budgetary and revenue raising authority of the United Nations⁴³ is vested in the General Assembly by article 17 of the United Nations Charter.⁴⁴ Except for two articles in the Statute of the International Court of Justice which pertain solely to that organ,⁴⁵ article 17 is the only Charter provision which refers to budgetary authority or the power to apportion expenses or otherwise raise revenue.⁴⁶ The first two paragraphs of article 17 provide:

1. The General Assembly shall consider and approve the budget of the Organization.

2. The expenses of the Organization shall be borne by the Members as apportioned by the General Assembly.⁴⁷

Paragraph 1 gives the Assembly control over the budget process as well as authority to make the policy decisions that determine the level of funding for each United Nations program.⁴⁸ The budget process is governed by financial regulations adopted by the General Assembly.⁴⁹ Briefly, the regulations call for the Secretary-General

voting against or abstaining accounted for more than 60% of contributions to the United Nations regular budget. See Statement of President Ronald Reagan, *supra* note 39. Thus, the United Nations financing scheme provided an opportunity for states favoring the Convention to vote themselves a substantial cost reduction at the expense of opposing and abstaining members.

43. For detailed studies of United Nations financing, see generally CARNEGIE ENDOWMENT FOR INTERNATIONAL PEACE, *THE BUDGET OF THE UNITED NATIONS* (1947); J. D. SINGER, *FINANCING INTERNATIONAL ORGANIZATION: THE UNITED NATIONS BUDGET PROCESS* (1961); J. STOESSINGER, *FINANCING THE UNITED NATIONS SYSTEM* (1964).

44. J. STOESSINGER, *supra* note 43, at 79-80.

45. I.C.J. STAT. arts. 33, 35 para. 3. The International Court of Justice is a principal organ of the United Nations. U.N. CHARTER art. 7, para. 1.

46. See J. STOESSINGER, *supra* note 43, at 79-80.

47. U.N. CHARTER art. 17.

48. See CARNEGIE ENDOWMENT FOR INTERNATIONAL PEACE, *supra* note 43, at 12-14; J. D. SINGER, *supra* note 43, at 8.

49. The financial regulations of the United Nations were adopted by resolution of the General Assembly in 1950. G.A. Res. 456, 5 U.N. GAOR Supp. (No. 20) at 59, U.N. Doc. A/1775 (1950). The regulations have been often amended. See, e.g., G.A. Res. 3371 B, 30 U.N. GAOR Supp. (No. 34) at 124, U.N. Doc. A/10,034 (1975) (to require contributions from nonmember states participating in activities financed by the United Nations); G.A. Res. 973 B, 10 U.N. GAOR Supp. (No. 19) at 36, U.N. Doc. A/3116 (1955) (to account for initiation of the Staff Assessment Plan and the Tax Equalization Fund). The regulations authorized the Secretary-General to establish detailed financial rules and procedures. Financial Regulations of the United Nations, Annex to G.A. Res. 456, reg. 10.1(a), 5 U.N. GAOR Supp. (No. 20) at 59, 61, U.N. Doc. A/1775 (1950). The regulations, along with the rules established thereunder, appear in U.N. Doc. ST/SGB/Financial Rules/1/Rev.2/Amend.2 (1980), *reprinted in UNITED NATIONS FINANCE MANUAL* § 1.00 (1981) [hereinafter cited as U.N. FINANCE MANUAL]. For a thorough analysis of the United Nations' budget process, see J. D. SINGER, *supra* note 43.

to present estimates⁵⁰ for the following biennium⁵¹ to an expert advisory committee appointed by the General Assembly.⁵² The Secretary-General's estimates and the report of the advisory committee are then referred to the Administrative and Budgetary Committee,⁵³ which forwards a recommended budget to the General Assembly.⁵⁴ Approval of the budget requires a two-thirds majority in the Assembly.⁵⁵ The General Assembly enjoys broad discretion in determining the amount to be appropriated for each program.⁵⁶

Paragraph 2 contains three clauses which pertain to the General Assembly's authority to raise revenue. The purpose of this

50. Financial regs. 3.1, 3.2, and accompanying rules, U.N. FINANCE MANUAL, *supra* note 49, at 2-3. See J. STROESSINGER, *supra* note 43, at 91.

51. The United Nations operated on an annual budget until 1973; a biennial budget cycle was introduced for the years 1974-1975. G.A. Res. 3043, 27 U.N. GAOR Supp. (No. 30) at 102, U.N. Doc. A/8730 (1972).

52. Financial reg. 3.5, U.N. FINANCE MANUAL, *supra* note 49, at 3. The Advisory Committee on Administrative and Budgetary Questions (ACABQ) is appointed by the General Assembly to examine and report on the Secretary-General's budget estimates, J. STROESSINGER, *supra* note 43, at 92; to advise the Fifth Committee and the Assembly on any budgetary or administrative matters referred to it, *id.*; to examine for the Assembly the administrative budgets of the specialized agencies, *id.*; and to examine and report to the General Assembly on the auditor's reports concerning the accounts of the United Nations as well as on those of the specialized agencies. *Id.* See Rules of Procedure of the General Assembly, rules 155-157, U.N. Doc. A/520/Rev.14, at 34-35 (1981) [hereinafter cited as G.A. Rules of Procedure].

The Secretary-General is required to submit his estimates to the ACABQ 12 weeks before the opening of the regular session of the General Assembly. Financial reg. 3.5, *supra*. Regular sessions of the General Assembly are convened annually on the third Tuesday in September. G.A. Rules of Procedure, *supra*, rule 1. This means that the estimates are forwarded to the ACABQ approximately in mid-June of each year.

53. See Financial reg. 3.5, U.N. FINANCE MANUAL, *supra* note 49, at 3. The Administrative and Budgetary Committee (the Fifth Committee) is one of the main committees of the General Assembly. G.A. Rules of Procedure, *supra* note 52, rule 98. Each member of the United Nations has one representative on the Fifth Committee. *Id.* rule 100. The Fifth Committee considers and reports on matters referred to it by the General Assembly relating to administrative and budgetary questions. *Id.* rule 97. It is noteworthy that decisions of the Fifth Committee are made by majority vote, *id.* rule 125, while budgetary decisions of the General Assembly require a two-thirds majority. U.N. CHARTER art. 18, para. 2. For a general discussion of the Fifth Committee's budgetary functions, see J. D. SINGER, *supra* note 43, at 96-119.

54. Financial reg. 3.7, U.N. FINANCE MANUAL, *supra* note 49, at 4.

55. U.N. CHARTER art. 18, para. 2. Consideration of the budget by the General Assembly is not purely formal, although the budget is rarely scrutinized in detail before that body. J. STROESSINGER, *supra* note 43, at 93. A typical budget resolution appears at G.A. Res. 34/230 A, 34 U.N. GAOR Supp. (No. 46) at 232, U.N. Doc. A/34/46 (1979) (for 1980-81 biennium).

56. See J. D. SINGER, *supra* note 43, at 30.

paragraph is to provide a means of funding the "expenses of the Organization."⁵⁷ A statement of the obligation of all members to contribute is contained in the phrase "shall be borne by the Members."⁵⁸ Authority to determine the amount each nation is obliged to pay is vested solely in the General Assembly by the words "as apportioned by the General Assembly."⁵⁹ Stated differently, paragraph 2 provides that members of the United Nations are obligated to contribute to the expenses of the Organization in the amounts assessed by the General Assembly. The United States now questions the applicability of this paragraph to the Preparatory Commission financing plan.⁶⁰

To determine the effect of the American refusal to pay assessed amounts for the Preparatory Commission, the apportionment process will be briefly described. The financial regulations adopted by the General Assembly govern the apportionment procedure as well as the budget process.⁶¹ To calculate the amount to be apportioned to member states, the total projected expenditure for each year⁶² is reduced by estimates of income from sources other than member contributions.⁶³ This procedure has the effect of reducing the total apportionable amount, which in turn reduces each nation's assessment.⁶⁴ The other sources of United Nations income include net income from various income producing activities, including the Visitor's Service, sale of publications, the United Nations book and

57. There is some doubt whether an obligation to contribute accrues with respect to every "expense of the Organization." See *Certain Expenses of the United Nations*, 1962 I.C.J. 151, 198 (Advisory Opinion of July 20) (Fitzmaurice, J., separate opinion).

58. The phrase "shall be borne" was drafted for the express purpose of providing a clear statement of obligation. Doc. 1094, II/1/40, 8 U.N.C.I.O. Docs. 487 (1945). See also *Certain Expenses*, 1962 I.C.J. at 210 (Fitzmaurice, J., separate opinion) (language adopted with a view to embodying a clear statement of financial obligation).

59. The "apportionment" power is the power to determine the amount that each nation must contribute to defray the expenses of the Organization. The practice at the United Nations has been apportionment on the basis of capacity to pay. G.A. Res. 36/231 A, 36 U.N. GAOR Supp. (No. 51) at 221, U.N. Doc. A/36/51 (1981).

60. See Fact Sheet, *supra* note 6, at 1.

61. Financial regs. 5.1-5.10 and rules established thereunder, U.N. FINANCE MANUAL, *supra* note 49, at 8-14.

62. Although the budget period is two years, see *supra* note 51, apportionment occurs on an annual basis. Financial reg. 5.2, U.N. FINANCE MANUAL, *supra* note 49, at 9. To determine the projected expenditure for each year, the total appropriation for the budget period is simply divided by two. *Id.*

63. Financial reg. 5.2(b)-(e), U.N. FINANCE MANUAL, *supra* note 49, at 9.

64. J. STOEISSINGER, *supra* note 43, at 90.

gift shops, and the United Nations garage service,⁶⁵ as well as unspent appropriations from the previous budget periods⁶⁶ and contributions from nonmembers that participate in United Nations activities.⁶⁷ A set-off is also made against each member's assessment for credits it may have as a result of staff assessments.⁶⁸

The amount each nation must pay is calculated by the Committee on Contributions,⁶⁹ following guidelines approved by the General Assembly.⁷⁰ A percentage of the total to be apportioned is assigned to each member on the basis of capacity to pay.⁷¹ The United States typically shoulders 25% of the total,⁷² while several of the smallest and least developed nations are assessed the minimum 0.01%.⁷³ The Charter provides that any member more than two years in arrears on these assessments loses its vote in the General Assembly.⁷⁴

Because members are not assessed separately for each budget item, refusal to contribute to a particular activity does not result in a direct loss of funds for that activity. For example, in the present controversy the United States will "withhold" payments for the Preparatory Commission simply by subtracting its share of the Commission's cost from its annual general payment;⁷⁵ the United States cannot " earmark" its arrears to the Preparatory Commission's budget line. Still, the requirement that all other sources of income be exhausted before any apportionment occurs⁷⁶ means that any withheld payment will result in a loss of funds that can be replaced only by voluntary contributions.⁷⁷

65. Financial rule 107.3, U.N. FINANCE MANUAL, *supra* note 49, at 17.

66. Financial rule 107.2(a), U.N. FINANCE MANUAL, *supra* note 49, at 17.

67. Financial reg. 5.9, U.N. FINANCE MANUAL, *supra* note 49, at 13.

68. Financial rule 105.5, U.N. FINANCE MANUAL, *supra* note 49, at 10.

69. The Committee on Contributions is an expert committee appointed by the General Assembly to give advice on the scale of assessments and arrearages. G.A. Rules of Procedure, *supra* note 52, rules 158-160.

70. The guidelines are set forth in G.A. Res. 36/231 A, 36 U.N. GAOR Supp. (No. 51) at 221, U.N. Doc. A/36/51 (1981).

71. G.A. Rules of Procedure, *supra* note 52, rule 160. Particular factors for consideration include: dependence of the member's earnings on one or a few products, inability to secure foreign currency, and the "concept of accumulated national wealth." G.A. Res. 36/231 A, 36 U.N. GAOR Supp. (No. 51) at 221, U.N. Doc. A/36/51 (1981).

72. See materials cited *supra* note 3.

73. *Id.*

74. U.N. CHARTER art. 19.

75. See Fact Sheet, *supra* note 6, at 2.

76. See *supra* text accompanying notes 62-64.

77. A voluntary contribution accepted by the United Nations for purposes specified by the donor may be credited to a special account for such purposes. Financial reg. 7.3, U.N.

III. INTERPRETING THE GENERAL ASSEMBLY'S POWERS UNDER ARTICLE 17: THE CERTAIN EXPENSES OPINION

By basing its refusal to contribute to the costs of the Preparatory Commission on legal grounds, the United States puts in issue the authority of the General Assembly under article 17. The International Court of Justice considered a similar challenge in a 1962 advisory opinion.⁷⁸ There the Court outlined the relevant factors for determining the meaning of article 17, paragraph 2.

A. The Advisory Opinion

In 1961, the United Nations was brought close to bankruptcy⁷⁹ when many members failed to pay assessments for costly peacekeeping operations⁸⁰ performed by United Nations subsidiary organs⁸¹ in Egypt (UNEF)⁸² and the Congo (ONUC).⁸³ Although a portion of the arrearage was attributable to the inability of some

FINANCE MANUAL, *supra* note 49, at 18. Voluntary contributions received by the United Nations for unspecified purposes are taken into account as miscellaneous income. Financial reg. 7.4, U.N. FINANCE MANUAL, *supra* note 49, at 18. The former type of gift results in added income for the United Nations; the latter simply reduces each nation's assessment.

78. Certain Expenses of the United Nations, 1962 I.C.J. 151 (Advisory Opinion of July 20); *see* J. STOESSINGER, *supra* note 43, at 121-22.

79. *Id.* at 121.

80. The only major peacekeeping operation before 1961 was the action in Korea between 1950 and 1953. This operation had been financed through voluntary contributions. *Id.* at 101-04. The peacekeeping operations at issue before the International Court of Justice were the first substantial programs in which an effort was made to cover a major portion of the expense by apportionment. *Id.* at 19.

81. *See infra* notes 146-53 for the distinctions between subsidiary organs and other bodies.

82. The United Nations Emergency Force (UNEF) was created by act of the General Assembly, G.A. Res. 1000 (ES-I), ES-I U.N. GAOR Supp. (No. 1) at 2-3, U.N. Doc. A/3354 (1956), to restore peace after a French-British-Israeli action in the Suez area. J. STOESSINGER, *supra* note 43, at 107. It was decided that the first U.S.\$10 million of the cost of this force would be apportioned among the members of the United Nations according to the scale adopted for contributions to the regular budget. G.A. Res. 1089, para. 1, 11 U.N. GAOR Supp. (No. 17) at 46, U.N. Doc. A/3572 (1956). For various reasons, over one third of the member states regularly defaulted on their assessments. J. STOESSINGER, *supra* note 43, at 110. By 1960, arrears totalled nearly 25% of the UNEF budget. *Id.* at 121.

83. The United Nations Congo Force (ONUC) was established by the Security Council and placed under the direction of the Secretary-General. 15 U.N. SCOR Supp. (July-Sept. 1960) at 16, U.N. Doc. S/4387 (1960). Intervention was necessary when the security forces of the newly-independent Congo found they were unable to maintain order. J. STOESSINGER, *supra* note 43, at 113. Once again, the General Assembly decided to apportion the bulk of the expense. *See, e.g.*, G.A. Res. 1732, 16 U.N. GAOR Supp. (No. 17) at 55, U.N. Doc. A/5100 (1961) (apportioning U.S.\$80 million for ONUC expenses for the period Nov. 1, 1961 to June 30, 1962). As in the case of UNEF, *see supra* note 82, substantial arrearages caused a shortfall of almost 40% in the ONUC budget for 1960. J. STOESSINGER, *supra* note 43, at 121.

members to meet the large expense,⁸⁴ several nations challenged the legal basis of the assessment.⁸⁵ The General Assembly decided to seek an advisory opinion from the International Court of Justice⁸⁶ on the question whether the expenditures authorized by the General Assembly for UNEF and ONUC constituted "expenses of the Organization" within the meaning of article 17, paragraph 2, of the Charter.⁸⁷ The Court answered in the affirmative,⁸⁸ but the United

84. J. STOESSINGER, *supra* note 43, at 110, 122. UNEF expenses averaged U.S.\$20 million per year from 1957 to 1963. *See id.* at 109. ONUC expenses totalled U.S.\$66.6 million in 1960, *id.* at 114, and were estimated at U.S.\$135 million for 1961. *Id.* at 116. If the entire amount had been assessed to the poorest nations at the then minimum 0.04% share, they would have been obliged to pay over U.S.\$136,000 each over the seven year period. The actual assessments were much smaller, due to large voluntary contributions by the United Kingdom (UNEF) and the United States (UNEF and ONUC). *Id.* at 109, 120.

85. *Id.* at 110, 121-22. Some Latin American nations argued that peacekeeping operations should be viewed as extraordinary expenses not apportionable under article 17. *Id.* France and the Soviet Union took the position that the Assembly lacked authority to create binding financial obligations in matters affecting peace and security. *Id.* at 121. In the Soviet view, apportionment of such expenses was the sole province of the Security Council. *Id.* at 117.

86. G.A. Res. 1731, 16 U.N. GAOR Supp. (No. 17) at 54, U.N. Doc. A/5100 (1961); *Certain Expenses*, 1962 I.C.J. at 152-53. The Charter authorizes the General Assembly to request an advisory opinion on any legal question. U.N. CHARTER art. 96, para. 1. The Court is not required to render an opinion. I.C.J. STAT. art. 65, para. 1.

87. *See supra* text accompanying note 47 for the full text of article 17, paragraph 2.

88. *Certain Expenses*, 1962 I.C.J. at 179-80. The Court was divided by nine votes to five, *id.*, and only five judges could join the opinion of the Court without some reservation (Alfaro, Badawi, Wellington Koo, Tanaka and Jessup, JJ.). *See id.* at 151, 180-81. Judge Spiropoulos stated in a separate declaration that the Court's discussion of whether the resolutions relating to UNEF and ONUC conformed to the Charter was unnecessary and unauthorized. *See id.* at 180-81 (Spiropoulos, J., declaration). Judge Sir Percy Spender agreed with Judge Spiropoulos and went on to criticize the Court's use of subsequent United Nations practice in interpreting Charter provisions. *Id.* at 182-97 (Spender, J., separate opinion). Judge Morelli presented an analysis which linked "expenses" to the "budget" provision of article 17, paragraph 1. *Id.* at 216-26 (Morelli, J., separate opinion). A third separate opinion, of great interest in the present discussion, was filed by Judge Sir Gerald Fitzmaurice. *Id.* at 198-215 (Fitzmaurice, J., separate opinion). Sir Gerald thought the Court had not provided sufficient guidance because it had not treated the question of obligation to pay as distinct from the scope of "expenses of the Organization." *Id.* at 198. He then indicated general limitations on the Assembly's power over expenditures and apportionment. *Id.* at 206-15. Of the five dissenting judges, two thought the Court was unable to render an opinion for procedural reasons, *id.* at 235-38 (Basdevant, J., dissenting); *id.* at 239-52 (Moreno Quintana, J., dissenting), and three dissented on the merits. *Id.* at 227 (Winiarski, C.J., dissenting), 253 (Koretsky, J., dissenting), 288 (Bustamante, J., dissenting).

The opinion is analyzed in Gross, *Expenses of the United Nations for Peace-Keeping Operations: The Advisory Opinion of the International Court of Justice*, 17 INT'L ORG. 1 (1962); Hogg, *Peace-Keeping Costs and Charter Obligations—Implications of the International Court of Justice Decision on Certain Expenses of the United Nations*, 62 COLUM. L.

States nevertheless relies upon the opinion to support its current anti-apportionment position.⁸⁹

The Court began its analysis by interpreting the question before it narrowly, noting that it had not been called upon to determine issues involving the apportionment power or the obligation of members to pay.⁹⁰ Having limited the issue to the interpretation of "expenses of the Organization," the Court stated that it had not been asked "to give an abstract definition of the words 'expenses of the Organization'. It ha[d] been asked to answer a specific question related to certain identified expenditures which have actually been made"⁹¹ The Court then addressed three arguments which purported to find a basis in the Charter for interpreting "expenses" in a way that would exclude amounts disbursed to cover the costs of UNEF and ONUC.⁹²

The first of these arguments was that both "budget" in paragraph 1 and "expenses" in paragraph 2 of article 17 should be read as impliedly qualified by the word "regular" or "administrative."⁹³ Under this view, expenses which were described as "operational," including those for UNEF and ONUC, would lie entirely outside the ambit of article 17, and apportionment would not be autho-

REV. 1230 (1962); Jackson, *The Legal Framework of United Nations Financing: Peacekeeping and Penury*, 51 CAL. L. REV. 79 (1963).

The pleadings, oral arguments and other documents relating to the opinion are published in a separate volume. 1962 I.C.J. Pleadings (Certain Expenses).

The opinion was accepted by the General Assembly. G.A. Res. 1854, 17 U.N. GAOR Supp. (No. 17) at 54-55, U.N. Doc. A/5217 (1962). This action was viewed as giving legal force to the opinion. Statement of Abram Chayes before the World Peace Through Law Conference (July 3, 1963), *reprinted in* 57 AM. J. INT'L L. 912, 915 (1963). Nevertheless, payment was not forthcoming from many of the nations which had refused to pay. *Id.* at 917-18. The United States urged application of the article 19 sanction: loss of vote in the General Assembly for nations more than two years in arrears. *Id.* Article 19 was not applied, *see* Statement of Ambassador Arthur Goldberg Before the United Nations Special Committee on Peacekeeping Operations, U.N. Doc. A/AC.121/SR.15 (1965), *reprinted in* 60 AM. J. INT'L L. 104, 105 (1965), and the United States announced that it would reserve "the same option to make exceptions [to the principle of collective financial responsibility] if . . . strong and compelling reasons exist for doing so." *Id.* at 106.

For an appraisal of the continued vitality of the article 19 sanction, *see* Rosenstock, *Article 19: The Caribbean Contribution—A Note*, 64 AM. J. INT'L L. 919 (1970).

89. *See* Statement of President Ronald W. Reagan, *supra* note 5; Fact Sheet, *supra* note 6. *See also* N.Y. Times, Dec. 31, 1982, at 1, col. 5 (both United States and United Nations cite opinion to support their opposed positions).

90. 1962 I.C.J. at 157-58.

91. *Id.* at 158

92. *Id.* at 159-70.

93. *Id.* at 159-61.

rized.⁹⁴ The Court analyzed the intent of the drafters of the Charter and found no justification for distinguishing between “administrative” and “operational” budgets.⁹⁵ It similarly concluded that “‘expenses of the Organization’ means all the expenses and not just certain types of expenses which might be referred to as ‘regular expenses’.”⁹⁶

Next, the Court considered an argument that operations for the maintenance of international peace and security are not “expenses of the Organization” within the meaning of article 17 because such expenses should be independently financed through agreements formed by the Security Council under article 43.⁹⁷ The Court looked at the place of article 17 in the general structure and scheme of the Charter, and stated:

The general purposes of Article 17 are the vesting of control over the finances of the Organization, and the levying of apportioned amounts of the expenses of the Organization in order to enable it to carry out the functions of the Organization as a whole acting through its principal organs and such subsidiary organs as may be established under the authority of Article 22 or Article 29.⁹⁸

UNEF and ONUC had the appropriate nexus with the United Nations, because both were subsidiary organs.⁹⁹ The Court concluded that expenditures for peace and security that are not otherwise financed fall within the General Assembly’s apportioning

94. *Id.*

95. *See id.* at 161. The passage under discussion construes article 17, paragraph 1, which is set forth *supra* at text accompanying note 47.

96. 1962 I.C.J. at 161.

97. *Id.* at 162-67. The Soviet Union had argued that article 43, paragraph 2 (authorizing the Security Council to enter into agreements with member states governing “the nature of facilities and assistance to be provided”), carved out an exception to article 17, paragraph 2, and that it was for the Security Council to apportion such expenses. Statement of the Union of Soviet Socialist Republics, 1962 I.C.J. Pleadings (Certain Expenses) 404 (Statement delivered May 21, 1962); *see* 1962 I.C.J. at 166 (Court’s discussion of the argument). The Court found first that UNEF and ONUC did not constitute article 43 enforcement actions. 1962 I.C.J. at 166. Then it stated that even if article 43 were applicable, any expenses incurred pursuant to article 43 agreements would constitute “expenses of the Organization” to the extent the agreements failed to provide for them. *Id.*

98. 1962 I.C.J. at 162.

99. UNEF was a subsidiary organ established by the General Assembly under article 22 of the United Nations Charter. *See supra* note 82. ONUC was a subsidiary organ established by the Security Council under article 29. *See supra* note 83.

power,¹⁰⁰ and that the costs of actions which the Security Council is authorized to take constitute "expenses of the Organization."¹⁰¹

The third argument addressed by the Court was that the activities of UNEF and ONUC were ultra vires the United Nations because they had not been initiated and carried out in conformity with the division of functions prescribed in the Charter.¹⁰² The Court applied a negative functional test:¹⁰³ "[I]f an expenditure were made for a purpose which is not one of the purposes of the United Nations, it could not be considered an 'expense of the Organization'."¹⁰⁴ The Court explained that the costs of actions within the scope of the United Nations' power may be considered "expenses of the Organization" even if carried out by the wrong organ.¹⁰⁵ This conclusion was based on a maxim of the law of agency that a principal is bound by the ultra vires act of his agent if the act is within the scope of the agent's authority.¹⁰⁶

100. 1962 I.C.J. at 164.

101. *Id.* at 167.

102. *Id.* at 167-70. See Written Statement of Czechoslovakia, 1962 I.C.J. Pleadings (Certain Expenses) 178 (Statement dated Feb. 20, 1962) (asserting that the General Assembly acted ultra vires in approving UNEF and ONUC financing); Written Statement of South Africa, *id.* at 263 (declaring that the approved activities were ultra vires); Memorandum of the Union of Soviet Socialist Republics Government, *id.* at 272 (stating that the appropriating resolution was "illegitimate" and not binding).

The rights and obligations of members of an international organization which acts ultra vires are not clearly defined. For example, there is disagreement about whether an ultra vires act is void *ab initio*, or merely voidable upon a finding of ultra vires by the organization itself or a competent tribunal. Oseike, *The Legal Validity of Ultra Vires Decisions of International Organizations*, 77 AM. J. INT'L L. 239 (1983). In addition, "substantive" and "procedural" ultra vires acts may be treated differently. *Id.* at 243-47. For a detailed discussion of several thorny aspects of the ultra vires problem, see *id.*

103. See Gross, *supra* note 88, at 4.

104. 1962 I.C.J. at 167.

105. *Id.* at 168. The Court observed that the financial regulations state that appropriations voted by the General Assembly constitute an authorization to the Secretary-General to incur obligations on behalf of the Organization. *Id.* at 168-69. See reg. 4.1, U.N. FINANCE MANUAL, *supra* note 49, at 7. The Court stated that the Organization has no alternative but to honor such obligations, which therefore constitute "expenses of the Organization." 1962 I.C.J. at 168-70.

106. 1962 I.C.J. at 168. Judge Sir Gerald Fitzmaurice offered a telling criticism of this line of reasoning. *Id.* at 199-200. He stated that the Court's analysis

is certainly correct in one sense, namely, that internal irregularities would not affect liabilities definitely incurred by or on behalf of the Organization, in relation to third parties outside the Organization or its membership. But what is really in question here is the relationship of the Member States *inter se*, and *vis-à-vis* the Organization as such

Id. (footnote omitted).

To summarize, the Court applied two separate tests in determining that UNEF and ONUC expenditures constituted "expenses of the Organization." First, the expenditures were within the purposes of article 17 because they arose from the activities of principal and subsidiary organs,¹⁰⁷ bodies which have the closest nexus with the United Nations.¹⁰⁸ Second, they were not ultra vires because the "purposes of the Organization" include maintenance of peace and security.¹⁰⁹ The Court did not purport to render a definition of "expenses of the Organization" that would apply in every situation,¹¹⁰ but it did indicate that both the *purpose* of the activity and the *nexus*¹¹¹ between the United Nations and the body performing the activity are to be considered.

B. *Applicability of the Opinion to the Preparatory Commission Dispute*

Although the *Certain Expenses* opinion contains useful observations about article 17 and its interpretation, there is no explicit treatment of perhaps the most fundamental point in interpreting the phrase "expenses of the Organization": This language is to be construed as a limitation on both the General Assembly's apportioning power and the obligation of members to pay assessments.¹¹² Thus, an obligation to contribute to the expenses of the Preparatory Commission arises only if such expenditures constitute "expenses of the Organization" within the meaning of article 17.¹¹³ It is also noteworthy that paragraph 1 contains no provision to the effect

107. *Id.* at 162. See *supra* notes 98-101 and accompanying text.

108. See *infra* notes 146-53 and accompanying text.

109. 1962 I.C.J. at 167-68. See *supra* notes 102-06 and accompanying text.

110. 1962 I.C.J. at 157-58. See *supra* note 91 and accompanying text.

111. See *infra* notes 141-43 and accompanying text.

112. It appears that this proposition was so universally recognized that there was no need to state it. An understanding that the Assembly may not apportion amounts other than "expenses" is implicit in the phrasing of the question presented to the Court by the General Assembly. The Assembly stated that it sought guidance as to obligations of member states, but framed the question: "Do the expenditures . . . constitute 'expenses of the Organization' within the meaning of Article 17, paragraph 2 . . . ?" G.A. Res. 1731, 16 U.N. GAOR Supp. (No. 17) at 54, U.N. Doc. A/5100 (1961). The implication is that the obligation to contribute depends on whether the amount in question constitutes an "expense."

Even nations favoring apportionment of UNEF and ONUC expenses recognized that only "expenses" could be apportioned. See, e.g., Written Statement of the Kingdom of Denmark, 1962 I.C.J. Pleadings (Certain Expenses) 138 (Statement dated Feb. 20, 1962).

113. But see *infra* note 120 and accompanying text (not all "expenses" give rise to obligations to pay).

that only "expenses of the Organization" may comprise the "budget of the Organization." The General Assembly's budgetary authority may thus be broader than its apportioning authority. In some cases, therefore, the Assembly may not be authorized to apportion an expenditure that is within its power to approve.¹¹⁴

Proponents of Preparatory Commission funding from the regular United Nations budget contend that the *Certain Expenses* opinion supports their position,¹¹⁵ citing broad language defining "expenses" as "amounts paid out to defray the costs of carrying out [United Nations] purposes."¹¹⁶ It is argued that because the Preparatory Commission helps "achieve international co-operation in solving international problems of an economic . . . character,"¹¹⁷ expenditures to finance the Commission are expenditures for United Nations purposes, and are therefore "expenses of the Organization." The argument is based on the assumption that once an expenditure is classified as an "expense," the General Assembly is authorized to apportion it and members are obligated to pay their assessed shares.¹¹⁸

In evaluating this position, it must first be observed that the Court carefully parsed the question presented to it by the General Assembly and flatly declared that only the construction of the phrase "expenses of the Organization," and not questions involving the financial obligations of members, was before the Court.¹¹⁹ In fact, one of the concurring judges outlined two categories of "expenses" that may not give rise to financial obligations.¹²⁰ Second,

114. See, e.g., *infra* notes 195-206 and accompanying text.

115. See *N.Y. Times*, Dec. 31, 1982, at 1, col. 5.

116. *Id.* See 1962 I.C.J. at 158.

117. U.N. CHARTER art. 1, para. 3. See also *id.* art. 13, para. 1(b) (functions of the General Assembly).

118. Sir Gerald attacked this presumption, 1962 I.C.J. at 207, which was evidently embraced by the Court. See *id.* at 164.

119. *Id.* at 157-58. See *supra* notes 90-91 and accompanying text. But see 1962 I.C.J. at 164 (discussing apportionment and obligation to pay).

120. 1962 I.C.J. at 212-14 (Fitzmaurice, J., separate opinion). The two classes of cases are those in which the "action" to be taken under a resolution consists solely of provision for making a payment, see *infra* notes 201-06 and accompanying text, and those in which the activity to be financed is permissive (mostly social and economic activities) rather than obligatory. 1962 I.C.J. at 213.

The expenditure for the Preparatory Commission fits under both categories. The resolution authorizing the financing of the Preparatory Commission from the United Nations budget contains nine other operative paragraphs. See G.A. Res. 37/66, U.N. Doc. A/Res/37/66 (1982). Five of these do not authorize any United Nations action. *Id.* paras. 1-4, 6. The

the broad language relied upon to support Preparatory Commission funding from the regular budget of the United Nations¹²¹ appears in a passage where the Court spoke hypothetically about a possible starting point for its analysis.¹²² Furthermore, so broad a definition of "expenses of the Organization" was not necessary to render an opinion on the General Assembly's question as construed by the Court.¹²³

Nonetheless, two passages in the Court's opinion may indicate that a broad reading of "expenses" is appropriate. The first appears as the Court considered whether the budget and the expenses of the organization should include operational expenditures or should be limited to administrative expenditures.¹²⁴ There, the Court stated that the term 'expenses of the Organization' means all the expenses and is not limited to certain types.¹²⁵ This language, however, does not support the position that funding of the Preparatory Commission is permitted under the Charter. Expenditures for the Preparatory Commission are neither administrative nor operational expenses of the United Nations.¹²⁶ They are subsidies¹²⁷ used to

others require the Secretary-General: to enter into an agreement with Jamaica for hosting the Final Act ceremonies (an activity of the Conference as opposed to the Commission), *id.* para. 5; to assume responsibilities assigned to him by the Convention, *id.* para. 7; to convene the Preparatory Commission and provide services, *id.* para. 8; and to submit a report to the General Assembly. *Id.* para. 10. These provisions are sufficiently separate from the financing provision of paragraph 9 to permit the conclusion that the subsidy was an end in itself rather than a means to effectuate the rest of the resolution. Thus, the "sole object" analysis comes into play.

The Preparatory Commission is manifestly part of a "social or economic" undertaking in which the United Nations is not obliged by its Charter to participate.

121. *See supra* text accompanying note 116.

122. The quoted passage, placed in context, reads:

It would be possible to begin with a general proposition to the effect that the "expenses" of any organization are the amounts paid out to defray the costs of carrying out its purposes . . . [o]r, it might simply be said that the "expenses" of an organization are those which are provided for in its budget.

1962 I.C.J. at 158.

123. *Id.* *See supra* notes 90-91 and accompanying text.

124. 1962 I.C.J. at 159-62. *See supra* notes 93-96 and accompanying text.

125. 1962 I.C.J. at 161.

126. The administrative costs and the operational costs of *the United Nations* are not defrayed by payment to an outside organization. *See infra* notes 141-67 and accompanying text.

127. The term "subsidy" as used herein means a transfer of United Nations funds to another agency to finance the agency's activities under the agency's direction. Provision of services, *see* U.N. CHARTER art. 66, para. 2, on a reimbursable or reciprocal basis, *see* Financial rule 114.2, U.N. FINANCE MANUAL, *supra* note 49, at 53-54, does not constitute a

finance the operation and administration of the Preparatory Commission, an entity separate from the United Nations.¹²⁸ Subsidies are wholly outside the scope of the Court's discussion.¹²⁹ Indeed, Judge Sir Gerald Fitzmaurice, who attempted in his separate opinion¹³⁰ to define "expenses of the Organization" more precisely than had the Court,¹³¹ stated that such expenses would include "expenditures arising in the course, or out of the performance *by the Organization* of its functions under the Charter."¹³²

The second passage which might be read as a broad construction of "expenses of the Organization" is the test applied to determine whether expenditures are *ultra vires*: an expenditure made for a purpose which is not one of the purposes of the United Nations is not an "expense of the Organization."¹³³ This test, however, offers a standard only for excluding expenditures from the category "expenses." There is no basis for the inference that every expenditure in furtherance of a purpose of the United Nations is an "expense" within the meaning of article 17. The test suggests only that an expenditure for a United Nations purpose is not *ultra vires*.¹³⁴

Those who contend that the *Certain Expenses* opinion confirms the obligation of United Nations members to finance the Preparatory Commission not only invert the "purposes of the United Nations" test, but ignore altogether the "nexus" test.¹³⁵ The

"subsidy" in this sense, because the premises and personnel involved are still under direct United Nations control.

128. See *infra* notes 161-65 and accompanying text.

129. See 1962 I.C.J. at 159-62. Subsidies granted by the United Nations may have been unknown in 1962. Two years after the *Certain Expenses* opinion was rendered, a commentator stated that the specialized agencies are financed in all cases by assessments of their own members, with additional funds coming from the Expanded Programme of Technical Assistance (EPTA) and voluntary contributions. J. STOESSINGER, *supra* note 43, at 216. (EPTA was a United Nations program financed by voluntary contributions. *Id.* at 202.) The history of major economic and social programs at the United Nations shows they were built on voluntary contributions. *Id.* at 19.

130. 1962 I.C.J. at 198-215.

131. *Id.* at 206-07.

132. *Id.* at 206 (emphasis added).

133. *Id.* at 167. See *supra* notes 102-06 and accompanying text.

134. This is not a legal analysis, but a grammatical one; there is no double negative. See 1962 I.C.J. at 162. If the holding had been that every expenditure for a United Nations purpose constituted an expense of the Organization, discussion of the purposes of article 17 would have been superfluous. It was in this context that the "nexus" text was applicable. See *id.*

135. See *supra* notes 97-101 and accompanying text.

Court found that the purpose of article 17 (presumably paragraphs 1 and 2) is to enable the Organization to finance the activities of its principal and subsidiary organs.¹³⁶ Proponents of the Preparatory Commission funding scheme overlook the requirement of a nexus between the United Nations and the Preparatory Commission.

Although the Court did not unnecessarily extend the reach of article 17, neither did it use any limiting language that would evince an intention to restrict the application of article 17 to expenses of United Nations organs.¹³⁷ The United States relies on such a restrictive reading to support its position that only organizations which are "answerable" to the United Nations can incur expenses apportionable to United Nations members.¹³⁸ The Court set out to determine whether UNEF and ONUC expenditures constituted "expenses of the Organization";¹³⁹ the ruling did not encompass agencies other than United Nations organs.

The advisory opinion is instructive in that it outlines a framework for determining the meaning of "expenses of the Organization." Expenditures which are not made for Charter purposes are *ultra vires* the Organization and therefore not valid "expenses."¹⁴⁰ Other expenditures constitute "expenses," at least with respect to activities of the principal and subsidiary organs.¹⁴¹ However, the Opinion is neither broad enough to sustain the apportionment of Preparatory Commission expenditures¹⁴² nor narrow enough to support the United States opposition.¹⁴³ Thus, determination of the Preparatory Commission dispute requires analysis of the General Assembly's budgetary and apportionment authority with respect to bodies other than United Nations organs.¹⁴⁴

136. 1962 I.C.J. at 162.

137. The Court consciously narrowed its approach, *id.* at 158, but in doing so it did not find that any types of expenditures were *not* "expenses of the Organization." It simply limited its consideration to the expenses of the UNEF and ONUC. *See id.*

138. Statement by President Ronald W. Reagan, *supra* note 5. *See also* Fact Sheet, *supra* note 6, at 1.

139. *See* 1962 I.C.J. at 158.

140. *Id.* at 167; *see supra* notes 102-14 and accompanying text.

141. 1962 I.C.J. at 162; *see supra* notes 97-101 and accompanying text.

142. *See supra* notes 115-36 and accompanying text.

143. *See supra* notes 137-39 and accompanying text.

144. The Preparatory Commission is not a United Nations organ. Under the Charter, organs may be established only by the Charter itself, U.N. CHARTER art. 7, para. 1 (principal organs); *see infra* note 147, or by the General Assembly or the Security Council, U.N. CHARTER arts. 22, 29 (subsidiary organs); *see infra* notes 148-50. The Preparatory Commis-

IV. EFFECT OF NEXUS ON OBLIGATION TO CONTRIBUTE

The United States contends that "expenses of the Organization" are incurred only when the activity funded is under the direct control of the United Nations.¹⁴⁵ The extent to which an activity is under United Nations control depends on the formal relationship between the United Nations and the agency that performs the activity. The Charter distinguishes three categories of formally recognized bodies: principal organs, subsidiary organs and specialized agencies.¹⁴⁶ The principal organs of the United Nations are established by article 7.¹⁴⁷ The same article authorizes the creation of subsidiary organs¹⁴⁸ by the General Assembly¹⁴⁹ or the Security Council.¹⁵⁰ Specialized agencies are defined as organizations established by intergovernmental agreement, having wide international responsibilities,¹⁵¹ and brought into relationship with the United Nations by formal agreement with the Economic and Social Council (ECOSOC).¹⁵² Other organizations may have a "consultative" relationship with ECOSOC,¹⁵³ but there is no provision for any broader formal relationship between the United Nations and these organizations.

sion was established by a Conference Resolution. Conference Resolution I, *supra* note 12, para. 1. See *infra* notes 151-54 and accompanying text.

145. Statement of President Ronald W. Reagan, *supra* note 5; see also *supra* note 6.

146. U.N. CHARTER arts. 7, 57.

147. Article 7, para. 1 provides:

There are established as the principal organs of the United Nations: a General Assembly, a Security Council, an Economic and Social Council, a Trusteeship Council, an International Court of Justice, and a Secretariat.

Id. art. 7, para. 1. The list of principal organs may be modified only by amendment. *Id.* art. 108.

148. *Id.* art. 7, para. 2 ("Such subsidiary organs as may be found necessary may be established in accordance with the present Charter."). Articles 22 and 29 are the only Charter provisions authorizing establishment of subsidiary organs. *Id.* arts. 22, 29.

149. *Id.* art. 22 ("The General Assembly may establish such subsidiary organs as it deems necessary for the performance of its functions."). An article 22 subsidiary organ can perform only functions that the Assembly is authorized to perform directly. See *id.* art. 10 (functions of the General Assembly).

150. *Id.* art. 29 ("The Security Council may establish such subsidiary organs as it deems necessary for the performance of its functions."). An article 29 subsidiary organ can only perform functions that the Security Council is authorized to perform directly. See *id.* arts. 24, 26 (functions of the Security Council).

151. *Id.* art. 57.

152. *Id.* art. 63, para. 1.

153. *Id.* art. 71.

Expenditures for activities of principal and subsidiary organs of the United Nations that are consistent with the Charter constitute "expenses of the Organization" within the meaning of article 17¹⁵⁴ as construed in *Certain Expenses*. However, that opinion did not involve financial arrangements between the United Nations and specialized agencies or other organizations. Therefore, it must be determined by other means whether the General Assembly is empowered to finance the activities of these bodies¹⁵⁵ and, if so, whether it is authorized to apportion the expense among members.¹⁵⁶ To that end it will be useful to describe the present relationship between the United Nations and the Preparatory Commission, as well as changes in that relationship that might occur as a result of future action.

A. *Status of the Preparatory Commission*

The Preparatory Commission was established by a Conference resolution¹⁵⁷ that was an integral part of the Convention.¹⁵⁸ Its mandate is to ensure the timely entry into effective operation of the International Sea-Bed Authority and the International Tribunal for the Law of the Sea,¹⁵⁹ and to make the necessary arrangements for the commencement of their functions.¹⁶⁰ It would seem possible under these circumstances to view the Commission as either an extension of the Conference, an extension of the Authority, or an independent entity.

If the Commission were viewed as an extension of the Conference, its continued funding would be authorized under the Charter provisions permitting the Organization to convene conferences.¹⁶¹

154. See *supra* notes 107, 109 and accompanying text.

155. Expenditure is "a moment logically anterior to apportionment," 1962 I.C.J. at 158, and will be considered as a threshold matter.

156. It does not necessarily follow that every valid expenditure may be validly apportioned. 1962 I.C.J. at 198 (Fitzmaurice, J., separate opinion). Validity is a condition of the obligation to pay, but it is not necessarily a sufficient condition. *Id.* at 206. The Court observed that not all valid expenses are apportioned, since the Organization has sources of income other than member contributions. *Id.* at 158; see *supra* text accompanying notes 65-68.

157. Conference Resolution I, *supra* note 12, para. 1.

158. Final Act, *supra* note 12, para. 42.

159. The Authority and the Tribunal were both established by the Convention. Convention, *supra* note 4, art. 156 (Authority established); *id.* annex VI (Statute of the International Tribunal for the Law of the Sea).

160. Conference Resolution I, *supra* note 12, preambular para. 2.

161. U.N. CHARTER arts. 59, 62(4).

Article 59 authorizes the Organization to "initiate negotiations"; as the sea law negotiations have already concluded, this provision cannot serve as a basis for considering the Commission an extension of the Conference. Article 62 refers more generally to calling international conferences "on matters falling within [ECOSOC's] competence." In addition, there is some precedent for the "adoption" by the General Assembly of a Conference it has established, making it a permanent subsidiary organ under article 22.¹⁶² Both of these approaches fail with respect to the Preparatory Commission because the Commission has powers the General Assembly does not have and cannot grant.¹⁶³ Furthermore, membership on the Commission is limited to signatories of the Convention;¹⁶⁴ the General Assembly has no authority to impose the Convention's terms on its members.¹⁶⁵ For these reasons, it is inappropriate to consider the Commission an extension of the Conference.

If the Commission were to be viewed as an extension of the Authority, it might be granted whatever status the Authority would be entitled to acquire under the Convention. The Convention provides that the Council (the executive organ of the Authority)¹⁶⁶

162. This was the case with the United Nations Conference on Trade and Development (UNCTAD), a pre-existing United Nations Conference which was established as a subsidiary organ by G.A. Res. 1995, 19 U.N. GAOR Supp. (No. 15) at 1, U.N. Doc. A/5815 (1964). Membership in UNCTAD is open to all members of the United Nations and all members of any specialized agency or of the International Atomic Energy Agency. *Id.* para. 1; *cf.* Conference Resolution I, *supra* note 12, para. 2 (membership on Preparatory Commission). The functions of UNCTAD, *id.* para. 3, conform to those of the General Assembly. *See* U.N. CHARTER art. 10. The stated functions of UNCTAD are: to promote international trade, G.A. Res. 1995, *supra*, para. 3(a); to formulate principles and policies on international trade, *id.* para. 3(b); to make proposals for putting those principles and policies into effect, *id.* para. 3(c); to review and facilitate the coordination of activities of other institutions within the United Nations system, *id.* para. 3(d); to initiate action in cooperation with the competent organs of the United Nations, *id.* para. 3(e); and to be available as a center for harmonizing trade and related development policies. *Id.* para. 3(f). *Cf. infra* note 163 and materials cited therein (functions of Preparatory Commission).

163. Conference Resolution I, *supra* note 12, para. 5(h); Final Act, *supra* note 12, annex I, res. II, paras. 3(b) (Preparatory Commission granted power to allocate sea-bed areas to states making mining applications), 7(c) (Commission determines amount each nation must spend to develop assigned sea-bed areas), 11 (Commission certifies eligibility of nations to receive allocated sea-bed areas), 13 (Authority bound by the decisions of the Commission). *Cf.* U.N. CHARTER art. 10 (functions of General Assembly); *id.* art. 22 (Assembly granted power to create subsidiary organs as necessary "for the performance of its functions").

164. Conference Resolution I, *supra* note 12, para. 2.

165. The General Assembly can only recommend such terms to its members. U.N. CHARTER arts. 10-14.

166. Convention, *supra* note 4, art. 162, para. 1.

"shall . . . enter into agreements with the United Nations . . . subject to approval by the [Sea-Bed] Assembly."¹⁶⁷ This provision indicates that the Authority is expected to become a specialized agency.¹⁶⁸ The Preparatory Commission, in contrast, has only the power to "make recommendations concerning the relationship between the Authority and the United Nations."¹⁶⁹ The Commission has no power to enter into agreements with the United Nations on behalf of the Authority.¹⁷⁰ Yet, neither the Authority nor the Commission can become a specialized agency without some formal agreement.¹⁷¹ Because the Preparatory Commission is not authorized to enter into the necessary agreements on behalf of the Authority, the Authority cannot acquire specialized agency status until it is convened.¹⁷² Therefore, the Commission cannot be considered an extension of the Authority.

The Preparatory Commission is neither an extension of the Authority nor of the Conference; it is to be considered an independent entity. As such, it is currently an outside organization without special status under the Charter.¹⁷³ The Commission seems technically to possess the article 57 qualifications¹⁷⁴ to enter into an agreement for specialized agency status.¹⁷⁵ However, the Preparatory Commission is not expressly empowered to enter into agreements with the United Nations on its own behalf,¹⁷⁶ and an international body with such a short life has never become a specialized agency.¹⁷⁷ Still, the United Nations and the Preparatory Commis-

167. *Id.* para. 2(f) (emphasis added).

168. Entering into an agreement with the United Nations through ECOSOC is a prerequisite for specialized agency status. See U.N. CHARTER arts. 57, 63.

169. Conference Resolution I, *supra* note 12, para. 5(d) (emphasis added).

170. See *id.*

171. See *supra* note 168.

172. The Preparatory Commission cannot acquire specialized agency status through the Authority after the latter convenes because the Commission remains in existence only until the conclusion of the first session of the Assembly. Conference Resolution I, *supra* note 12, para. 13. The Assembly is the sole plenary organ of the Authority. Convention, *supra* note 4, art. 160, para. 1.

173. See *supra* notes 146-53 and accompanying text.

174. Specialized agencies are "established by intergovernmental agreement and hav[e] wide international responsibilities, as defined in their basic instruments, in economic, social, cultural, educational, health, and related fields." U.N. CHARTER art. 57, para. 1.

175. See *supra* note 168.

176. See Conference Resolution I, *supra* note 12.

177. Since the initial round of agreements between 1946 and 1951, there have been few additions to the list of specialized agencies. See generally M. HILL, THE UNITED NATIONS

sion may find it expedient to establish such a relationship if it will help give effect to the financing scheme.¹⁷⁸ Therefore, it is necessary to examine the General Assembly's budgetary and apportioning authority with respect to both outside organizations¹⁷⁹ and specialized agencies.¹⁸⁰

B. *Outside Organizations*

The General Assembly has authority under article 17, paragraph 3, to approve financial arrangements with specialized agencies.¹⁸¹ The Charter makes no reference to the possibility of such arrangements with other outside organizations. Two inferences may be drawn. First, the general budgetary authority of the General Assembly¹⁸² does not encompass agencies other than United Nations organs.¹⁸³ Second, although the special provision in article 17 gives the Assembly authority to make financial arrangements with specialized agencies, the Organization is without power to make such arrangements with outside organizations.¹⁸⁴

Reference to documents of the United Nations Conference on International Organization (UNCIO), at which the United Nations Charter was negotiated and drafted,¹⁸⁵ confirms these conclusions.

SYSTEM: COORDINATING ITS ECONOMIC AND SOCIAL WORK 14-15 (1978). The only specialized agency to go out of existence was the International Relief Organization in 1952. *See id.* at 33.

178. *See infra* notes 195-96 and accompanying text.

179. *See infra* notes 181-94 and accompanying text.

180. *See infra* notes 195-206 and accompanying text.

181. Article 17, para. 3 provides: "The General Assembly shall consider and approve any financial and budgetary arrangements with specialized agencies referred to in Article 57 and shall examine the administrative budgets of such specialized agencies with a view to making recommendations to the agencies concerned." U.N. CHARTER art. 17, para. 3.

182. *Id.* para. 1. *See supra* text accompanying note 47.

183. *See supra* notes 146-53 and accompanying text (differences between United Nations organs and other bodies). A system of independent, separately financed specialized agencies was created under the Charter so that the United Nations might remain flexible as a security organization, CARNEGIE ENDOWMENT FOR INTERNATIONAL PEACE, COORDINATION OF ECONOMIC AND SOCIAL ACTIVITIES 9 (1948), and avoid the fiscal problems that centralization had caused for the League of Nations. J. STOESSINGER, *supra* note 43, at 41-42.

184. Article 17 is the sole Charter provision granting any budgetary authority. *See supra* note 46 and accompanying text.

185. The United Nations Conference on International Organization (also known as the San Francisco conference) was convened in 1945. Conference documents are collected in UNITED NATIONS CONFERENCE ON INTERNATIONAL ORGANIZATION DOCUMENTS (U.N.C.I.O. Docs.) (1945).

At the conference, a question arose whether existing budgetary provisions¹⁸⁶ were "broad enough to cover various financial and budgetary arrangements which it may be necessary for the Organization to make with existing and future specialized international agencies."¹⁸⁷ One delegate suggested that the general budgetary authority was sufficiently broad to include approval of "subsidies to social and economic organizations."¹⁸⁸ This view was rejected.¹⁸⁹ The present express grant of authority to "approve any financial and budgetary arrangements with specialized agencies"¹⁹⁰ was the direct result.¹⁹¹

As the Assembly is without power, express or implied, to finance the activities of outside organizations other than specialized agencies, it may not grant subsidies to the Preparatory Commission so long as the Commission remains an outside organization.¹⁹² This restriction is not connected to the General Assembly's apportioning authority;¹⁹³ the Assembly simply has no power to disburse United Nations funds for such a purpose.¹⁹⁴

186. The provisions contained in article 17, paragraph 1 had already been substantially settled. See Doc. 471, II/1/A.1, 8 U.N.C.I.O. Docs. 531, 534 (1945) ("The budgets of the Organization shall be submitted to the General Assembly for consideration and approval."). Cf. *supra* text accompanying note 47 (text of article 17, paragraph 1).

187. Doc. 594, II/1/28, 8 U.N.C.I.O. Docs. 398, 400 (1945). The question was raised by the drafting subcommittee of the Committee on Economic and Social Cooperation, which recommended that the General Assembly be empowered "to grant subsidies to specialized organizations." Doc. WD 10, II/3/A/2, 10 U.N.C.I.O. Docs. 376, 377 (1945). The full committee referred the matter to the Committee on Structure and Procedure. Doc. WD 18, II/3/A/3, 10 U.N.C.I.O. Docs. 380, 381 (1945).

188. *Id.* at 401 (statement of the delegate of Belgium). Another delegate expressed the view that the United Nations should have no power to grant subsidies. *Id.* (statement of the delegate of Australia).

189. Committee II/1 referred the matter to its drafting subcommittee, *id.*, which altered the text to specifically provide that the General Assembly could make "financial and budgetary arrangements" with specialized agencies. See Doc. 631, II/1/30, 8 U.N.C.I.O. Docs. 418, 418 (1945).

190. U.N. CHARTER art. 17, para. 3. See *supra* note 181 (text of article 17, paragraph 3).

191. Doc. 631, II/1/30, 8 U.N.C.I.O. Docs. 418 (1945). The amended text was adopted without further comment by the Coordination Committee. Doc. WD/437, CO/201, 17 U.N.C.I.O. Docs. 306, 322 (1945).

192. See *supra* notes 157-80 and accompanying text.

193. U.N. CHARTER art. 17, para. 2. Disbursement is a matter anterior to apportionment. See *Certain Expenses*, 1962 I.C.J. at 158.

194. This is a limitation of the General Assembly's budgetary power. See U.N. CHARTER art. 17, para. 1.

C. Specialized Agencies

Even if the Preparatory Commission should enter into an agreement with ECOSOC for specialized agency status, the United States obligation is doubtful. The General Assembly is expressly authorized to make financial arrangements with specialized agencies,¹⁹⁵ and these arrangements may include direct subsidies.¹⁹⁶ But this is not the end of the inquiry; it must still be determined whether such subsidies constitute "expenses of the Organization."¹⁹⁷ Again, the UNCIO documents are significant because they reveal awareness of a distinction in principle between regularly budgeted expenses of the Organization and subsidies to specialized agencies.¹⁹⁸ The latter are not "expenses of the Organization," but simply expenditures to finance the "expenses" of the agency which authorizes and directs the funded activities.¹⁹⁹ The Assembly used the phrase "expenses of the Preparatory Commission" even as it approved the subsidy.²⁰⁰

The same result was reached by Sir Gerald Fitzmaurice in his separate opinion in *Certain Expenses*.²⁰¹ He noted that a resolution usually provides for some action to be taken. Although member states are obliged to contribute financially, the resolution retains its

195. *Id.* art. 17, para. 3. See *supra* notes 181-84 and accompanying text.

196. See *supra* notes 186-91 and accompanying text.

197. U.N. CHARTER art. 17, para. 2. See *supra* notes 113-14 and accompanying text.

198. The budgetary arrangements with specialized agencies were originally to be made with ECOSOC along with the other arrangements agreed upon for specialized agency status. See Doc. 823, II/3/55, 10 U.N.C.I.O. Docs. 228, 233-34 (1945); see also U.N. CHARTER arts. 57, 63; Doc. WD 427, CO/191, 17 U.N.C.I.O. Docs. 192 (1945) (transfer from ECOSOC section of draft Charter to General Assembly section). It was decided that it would be more logical to vest such authority in the General Assembly because the Assembly was to have all other financial authority. See Doc. 823, *supra*, at 233. Furthermore, the Belgian delegate's expectation that subsidies to specialized agencies would be included in the regular budget of the Organization without special provision in the Charter was not realized. See *supra* notes 188-89. Inclusion of article 17, paragraph 3 served to authorize subsidies but did not make them "expenses of the Organization."

199. This approach to defining "expenses of the Organization" is consistent with the *Certain Expenses* nexus test as expressed by the Court, see 1962 I.C.J. at 162, and by Sir Gerald. See *id.* at 206 (Fitzmaurice, J., separate opinion). Both indicate that costs incurred in the performance by the Organization of its functions under the Charter constitute "expenses of the Organization." *Id.* at 162, 206.

200. "The General Assembly . . . [a]pproves the financing of the expenses of the Preparatory Commission from the regular budget of the United Nations" G.A. Res. 37/66, para. 9, U.N. Doc. A/Res/37/66 (1982).

201. 1962 I.C.J. at 212-13.

fundamentally nonobligatory character²⁰² because they need not participate in the execution of the substantive action recommended.²⁰³ But the resolution becomes wholly obligatory, Sir Gerald reasoned, if member states are bound to contribute where the "action" consists solely of making a payment or other financial contribution.²⁰⁴ Sir Gerald concluded that there is "real doubt whether any financial obligation can arise" in such a case,²⁰⁵ and pointed out that United Nations practice was to finance such expenditures through voluntary contributions.²⁰⁶ Although the General Assembly may authorize disbursement of United Nations funds to subsidize specialized agencies, the expenditures do not constitute "expenses of the Organization" and are therefore not apportionable.

CONCLUSION

Article 17 vests the financial power of the United Nations exclusively in the General Assembly,²⁰⁷ but that power is not unlimited. The budgetary power provided in paragraph 1 extends only to expenditures for functions of the principal organs, subsidiary organs, and specialized agencies as defined in the Charter.²⁰⁸ The apportioning authority granted in paragraph 2 reaches only "expenses of the Organization,"²⁰⁹ defined as expenditures incurred by principal and subsidiary organs in the performance of their functions under the United Nations Charter.²¹⁰ Subsidies to specialized agencies, although expenditures within the budgetary power,²¹¹ are not within the apportioning power of the General Assembly.²¹²

The Preparatory Commission is currently an outside organization.²¹³ Consequently, it is beyond the Assembly's budgetary power

202. In general, the Assembly's resolutions may only recommend contributions. See U.N. CHARTER art. 10.

203. 1962 I.C.J. at 212-13.

204. *Id.* at 213.

205. *Id.* at 212.

206. *Id.* at 213. See J. STOESSINGER, *supra* note 43, at 19.

207. See *supra* notes 43-77 and accompanying text.

208. See *supra* notes 181-94 and accompanying text.

209. See *supra* notes 112-14 and accompanying text.

210. See *supra* notes 97-101, 199 and accompanying text.

211. See *supra* notes 181, 185-91 and accompanying text.

212. See *supra* notes 195-206 and accompanying text.

213. See *supra* notes 157-80 and accompanying text.

to approve financing of the Commission's expenses from the regular budget of the United Nations.²¹⁴ If the Commission should acquire specialized agency status,²¹⁵ the Assembly would be authorized to approve the expenditures,²¹⁶ but member nations would still not be under an obligation to contribute.²¹⁷ In either case, the United States may properly refuse to pay its share of the Preparatory Commission's cost.

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214. *See supra* notes 192-94 and accompanying text.

215. *See supra* notes 174-78 and accompanying text.

216. *See supra* notes 195-96 and accompanying text.

217. *See supra* notes 197-206 and accompanying text.