



GC

GC(XXXIV)/912/Add.1  
21 June 1990

International Atomic Energy Agency

GENERAL Distr.  
Original: ENGLISH

# GENERAL CONFERENCE

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Thirty-fourth regular session  
Item 22 of the provisional agenda  
(GC(XXXIV)/914)

REQUEST FOR THE INCLUSION OF AN ITEM ENTITLED  
"PURCHASE OF RECREATIONAL FACILITIES BY THE AGENCY  
ON BEHALF OF THE STAFF ASSOCIATION"  
IN THE PROVISIONAL AGENDA FOR THE THIRTY-FOURTH  
REGULAR SESSION OF THE GENERAL CONFERENCE

Explanatory memorandum submitted by the Philippines

The summary record of the proceedings in the Board of Governors on 22 February 1990 under the item "Purchase of a recreational facility on behalf of the Staff Association" is reproduced in the Annex hereto.

90-02487

3445Y/202Y



Excerpt from the record of the seven hundred and twenty-third meeting  
of the Board of Governors, held on Thursday, 22 February 1990

PURCHASE OF A RECREATIONAL FACILITY ON BEHALF OF THE STAFF ASSOCIATION

1. The CHAIRMAN invited the Board, under the next agenda item, to consider document GOV/2432, paragraph 16 of which recommended that the Board authorize the Director General to enter into a contract for the purchase, on behalf of the Staff Association, of the recreational facility described in the document, using Staff Welfare Fund resources, and to conclude with the Staff Association the trust agreement set forth in Annex II to the document.
2. The matter had been the subject of consultations for some time. For example, the Director General had referred to it during the informal consultations he had held with Board members in December 1989, at the time of the meetings of the Technical Assistance and Co-operation Committee. An informal consensus had been reached at those consultations to authorize the Director General to take some preliminary steps pending formal approval by the Board. Those steps were outlined in the document under consideration.
3. In addition, the President of the Agency's Staff Council had provided further information to interested Board members, and he (the Chairman of the Board) himself had discussed the matter with Board members in the consultations which he had held during the past two weeks. It was clear from those consultations that a few Board members still had reservations about some aspects of the proposed arrangements. On the other hand, the overwhelming majority of Board members supported the recommended action. As every effort had been made to clarify the situation and to accommodate the concerns of members, he hoped that the Board would be able to take a positive decision.
4. Mr. van GORKOM (Netherlands) said that he fully supported the measures proposed in paragraph 16 of the document. The explanations and arguments provided by the Director General and the Legal Adviser on the legal and financial implications of the project had convinced him entirely, and the Austrian authorities had given their full agreement to the transaction and expressed the hope that the Agency would effect it. Finally, the purchase of the recreational facility would be in line with International Civil Service Commission (ICSC) recommendations concerning United Nations organizations.

5. Mr. LAVINA (Philippines) wished to apologize to the interested parties, and in particular to the Director General and the Agency's Staff Association, for being unable to support a transaction which appeared to be simple, but in fact raised a number of extremely complex issues. His position, which had remained the same from the outset, was based exclusively on legal and moral considerations. His statement, while expressing disagreement, would therefore be fair and constructive.

6. The proposal before the Board concerned a real estate transaction in which the Agency, represented by the Director General (or the Director General representing the Agency), would buy a piece of property, including a building and other facilities. The Director General would at the same time enter into a trust agreement with the Staff Association, represented by the Staff Council (or the Staff Council representing the Staff Association). That arrangement would make the Agency the legal owner, merely holding the title to the property in trust for and on behalf of the Staff Association, the real owner.

7. In order to gain a clear picture of the situation, the right of the Staff Association to acquire the property should first be examined. Document GOV/2432 stated that the Staff Association had no legal personality - and yet it was able to enter into a contract with the Director General. The document also suggested that the facility in question was an excellent piece of property, which he personally was convinced that it was, judging by the statements made by the Director General in December during informal consultations with Board members and supported by the legal arguments of the Agency's Legal Adviser, and judging also by the advertisements which had appeared, particularly in the Staff Association journal "Echo" and on the notice-boards in the lobby to the Agency's buildings in the Vienna International Centre (VIC).

8. If the recreational facility was such an excellent purchase, the Staff Association should use all legal and other appropriate means to acquire it. The question then arose: if the Staff Association was really convinced that the recreational facility should be acquired, why had it not applied to have legal personality for that purpose? The property had been visited in September 1989, and the Staff Association had decided to purchase it in

October of the same year. One might ask why the Staff Association had not, since that date, registered as a society under Austrian law in order to obtain legal personality.

9. As he had pointed out in December, the Austrian Government had a very positive attitude towards the international organizations based in Vienna and would have supported such a request and acted on it in time for the conclusion of a contract of sale with the present owner of the Gugging/Klosterneuburg facility. Why, therefore, had the Staff Association been unwilling to make such a request and to enter into a contract in its own name? Clearly, there was a more economical way to acquire the property, namely to purchase it through the Agency, represented by the Director General. However, it was legally and morally questionable whether the Director General could do that - for various reasons.

10. Assuming it would be the Agency, as an international organization represented by the Director General, which would purchase the facility, the question must be examined whether it had the capacity or right to do so under the relevant provisions of the Statute. Firstly, such a purchase should be germane to the objectives and functions of the Agency. According to Article II of the Statute, which defined the Agency's objectives, "the Agency shall seek to accelerate and enlarge the contribution of atomic energy to peace, health and prosperity throughout the world ..." Clearly, the purchase of a recreational facility did not really serve those objectives. Nor would a reading of Article III of the Statute, which defined the Agency's functions, warrant the conclusion that the purchase of the recreational facility would further those functions.

11. There was nothing in the document even to hint that such a purchase would serve the interests of the Agency, as an international organization composed of Member States. However, it was indicated there that the purchase was necessary to the Staff Association, in connection with Article VII.E of the Statute. It was therefore clear that the Agency itself did not need the facility. It was the Staff Association, an entity entirely separate from the Agency, which required it. Legally, the Staff Association should not be confused either with the staff of the Agency (covered by Article VII of the Statute) or the Secretariat of the Board (mentioned in Rule 10 of the Board's Provisional Rules of Procedure).

12. However, even the provisions of Article VII.E of the Statute did not support the proposal to purchase the facility, as they related only to the "terms and conditions on which the staff shall be appointed, remunerated, and dismissed", which should be in accordance with regulations made by the Board. A subtle connection was made in document GOV/2432 between the Provisional Staff Regulations and the primary purpose of the Staff Association, which was, inter alia, "... to organize and maintain recreational and other activities, facilities and services designed to meet the needs of the staff". But that was the duty of the Staff Association to its members, and not an obligation of the Agency to the members of the Staff Association. There was no question of preventing the Staff Association from performing that duty to its members. It could do so, with the encouragement and support of the Board, but it was quite another matter to involve the Agency in some legally dubious transaction.

13. Even the ICSC recommendation mentioned in the document to the effect that international organizations should provide recreational facilities for staff associations "to the extent possible" was, under the present circumstances, legally impossible to implement, and indeed it would be morally inappropriate to do so.

14. The draft trust agreement between the Agency, represented by the Director General, and the Staff Association, represented by the Staff Council, made provision for the Staff Association to hold the Agency harmless from any claims or liabilities arising from the arrangement. But in the case of default or bankruptcy of the Staff Association - and that could happen even to the most solid multinational corporations - the Agency, as the buyer and legal owner of the property, insofar as the seller was concerned, would have to pay. It would have no means of defence, and no insurance could be of assistance.

15. In the circumstances, would not each Member State of the Agency be individually committed, as the Agency would ultimately have to pay? How could Member States of the Agency adjust their budgets, when the trust agreement assured them that the Staff Association would hold them harmless from any claims or liabilities? How could the Staff Association give such an assurance, when the transaction was commercial and not official, and the

seller could therefore, contend that no immunity accrued to the Agency or the Director General as the buyer under international law? Would the Director General be sued in his personal capacity? And why should a representative of his have to keep attending meetings of the facility's Management Board? Although the answer might seem obvious, the implications were not.

16. The Director General had no authority to acquire the property. The proposition that the Director General himself, in his capacity as head of the Secretariat, should purchase the property in the Agency's name, but on behalf of the Staff Association, had no legal basis in the Agency's Statute. All of the Director General's responsibilities with regard to the staff were defined in Article VII of the Statute, which referred to him as the "chief administrative officer of the Agency" and as "responsible for the appointment, organization, and functioning of the staff". There was absolutely nothing in those provisions to warrant the conclusion that the Director General must provide a recreational facility for the staff or its association.

17. Thus, it was clear that the proposed transaction - a commercial activity, incidentally - was not part of the official duties of the Director General. He had already shown that there was nothing in the Agency's Statute to indicate that such a transaction was in line with the objectives and functions of the Agency. Nor was there anything in the Statute to authorize the Agency, whose activity was primarily concerned with nuclear energy, to purchase, through the intermediary of the Director General or any one else, real estate - however excellent it might be - for itself or on behalf of another for business or profit.

18. It followed that the purchase of the facility by the Director General would simply be, in law, a transaction ultra vires - an act which went beyond the Statute, which purely and simply exceeded the authority given to him by the Member States composing the Agency. Legally and logically, the Director General could not represent the Agency in such a transaction ultra vires. In other words, the Director General could not, under the Statute, claim to act and purchase the facility in the name and on behalf of all the Member States composing the Agency. If he did so, it would, in law, be a personal act for

which he alone would be responsible. If the Staff Association, for which he would have acted as an agent, failed to meet its financial obligations, the Director General would be personally responsible for them.

19. The situation was made more serious by the fact that, as proposed by the Legal Adviser and admitted by the Director General himself, the property and improvements, to a total value of 16.5 million Austrian schillings, would be acquired by the Director General in the name of the Agency, but on behalf of another entity which did not have legal personality to acquire the property itself and apparently did not enjoy certain immunities and privileges, such as tax exemption. In the final analysis, therefore, the Staff Association would be using the Director General, and he would be using the Agency, to confer privileges and immunities, facilities and benefits upon an entity which had no right to them. In such a transaction, the Director General would be allowing himself to be used as a dummy.

20. The arrangement had been confirmed and publicly announced in document GOV/2432 itself. Such openness was daring, but much was hidden in its shade. The whole transaction was clearly illegal. The Staff Association not only had no right to purchase the property for lack of legal personality, but it also had no right to benefit from the immunities, privileges and facilities mentioned in the Agency's Statute of 1956, the Agreement on the Privileges and Immunities of the Agency of 1959, and the Headquarters Agreement concluded with Austria in 1957.

21. In fact, the members of the Board of Governors were being asked to approve a clear circumvention not only of the international instruments just mentioned, but also of Austrian law. That law imposed taxes, fees and other dues on real estate transactions. If the Staff Association were to purchase the facility, either directly or through the intermediary of the Staff Council, those taxes and dues, among others, would have to be paid to the Austrian Government - regardless of whether or not the Staff Association had legal personality. On the other hand, if the Agency represented by the Director General, or the Director General representing the Agency, purchased the facility, then no taxes or other dues would be imposed or charged by the Austrian Government. That was presumably what was implied in document GOV/2432, which indicated that the Austrian authorities were considering the proposed transaction.

22. As it was a real estate transaction, various parties were involved - seller, buyer and agent - and so were various considerations such as the purchase price, taxes, dues and fees. Those fees, of course, included the "finder's fees" which were the usual practice in a transaction involving millions of Austrian schillings. Commissions also were usually payable. The agent or the outside lawyer involved in the transaction would perhaps receive part of those fees as well. The issue of fees was also related to the ethical issue raised by the proposal.

23. With regard to the violation of legal instruments, he wished to refer to the 1959 Agreement on the Privileges and Immunities of the International Atomic Energy Agency[1] and also to the Headquarters Agreement of 1957 between the Agency and the Republic of Austria and the related agreements[2]. All those international instruments were based on the principle that privileges and immunities, facilities and benefits were granted in connection with the performance of the official duties of the Agency or the Director General. In other words, tax exemption was granted to the Agency or the Director General, or both, in recognition of the fact that such exemption was indispensable or at least necessary to the exercise of their official functions (see 1959 Agreement, Article VI, Sections 18(b) and 21). Article III, Section 8 of the 1959 Agreement exempted the Agency, its assets, income and other property from taxation. Article VI of that agreement conferred privileges and immunities on Agency officials, in particular the Director General, who enjoyed the privileges, immunities, exemptions and facilities accorded to diplomatic envoys (Section 20). In addition, the Headquarters Agreement provided that the "IAEA and its property shall be exempt from all forms of taxation" (Article VIII, Section 22) and granted immunities, privileges, exemptions and facilities to officials of the Agency (Article XV), and more particularly to the Director General, who "shall be accorded the privileges and immunities, exemptions and facilities accorded to Ambassadors who are heads of mission" (Section 39(a)).

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[1] Reproduced in document INFCIRC/9/Rev.2 and Add.1 to 7.

[2] Reproduced in document INFCIRC/15/Rev.1 and Add.1.

24. Those privileges, immunities, exemptions and facilities were granted on condition that they would not be abused, as indicated in Article VIII of the Agreement on the Privileges and Immunities of the Agency and in Article XVIII, Section 48, of the Headquarters Agreement. Procedures existed to redress any abuse of privileges in the case of Agency officials, including the Director General, since their status was comparable with that of members of diplomatic missions. In the case of a serious abuse of privileges - as in the present case - the host State might find it appropriate to declare the offender *persona non grata*. That was also the idea behind the relevant provisions of the 1961 Vienna Convention on Diplomatic Relations, which specified more clearly that exemptions were granted to ensure the efficient performance of official duties (preambular paragraph 4) and provided sanctions against the abuse of privileges in stronger terms (Article 9).

25. That brief review of the relevant provisions of international instruments made it quite clear that the tax exemption privilege was granted only to the Agency, as an international organization, in recognition of its official interests, or to the Director General, as an international civil servant with the same privileges as an ambassador, in the exercise of his official duties.

26. The question then, was whether the purchase of a recreational facility served the official interests or main objectives of the Agency, or whether it bore any relation to the performance by the Director General of his official duties. Would that purchase enhance the official interests, objectives or functions of the Agency? Was there any connection with the performance of the official functions of the Director General, or was it vital, indispensable or even necessary to the exercise of his functions? The answer to those rhetorical questions was clearly negative. The Agency did not require the property in question to serve its interests, objectives or functions. Nor did the Director General need to purchase the property to support the exercise of his official functions. It went without saying that, even if the purchase of a country club could help the members of the Staff Association to keep healthier or more physically fit and relaxed, that was irrelevant to the exercise of the official duties of the Director General, and of those of the Agency, as defined in the Statute.

27. Thus, a real estate transaction involving the purchase of a recreational facility, a proposal for a commercial activity - given that fees were to be charged to cover the operation, purchase and use of the facility - and one, moreover, involving a non-official profit-making activity, clearly had nothing to do with the official functions and position of the Director General. In fact, by its very nature, the transaction had no right to tax exemption under the international instruments and under diplomatic law (see Article 42 of the 1961 Vienna Convention on Diplomatic Relations).

28. If those legal obstacles were insufficient to dissuade the Director General and the Board from involvement in that highly controversial operation, the ethical aspect of the affair could be mentioned. The question was whether the Director General should be authorized to make such a purchase and whether the proposed operation was compatible with his functions or those of the Board. There again, the reply was clearly negative, as the transaction was an unethical one which would constitute a grossly improper act by the Director General.

29. The Director General's authority was based on trust, public or international. Any act which could be considered improper should therefore be avoided at all costs. Prudence dictated that such international trust should not be diminished through initiatives of a legally or morally dubious nature. That did not mean that the Philippines delegation was calling for the establishment of another committee of the Board, perhaps an ethics committee, as that was plainly unnecessary.

30. Nevertheless, ethics was an important consideration in the behaviour of a public or international civil servant such as the Director General. If mistakes were to be made, it was better to err on the side of prudence. It was clear that the proposed transaction was highly questionable. The legal problems involved had not been settled. From the ethical point of view, tax evasion, circumvention of the law and violation of international agreements were issues requiring consideration.

31. Many doubts persisted on that score. In a national setting, such a transaction - which was a flagrant example of circumvention of the law and tax evasion - would justify a parliamentary inquiry or even a court action. If convicted, the person or official concerned would be punished in a criminal

court by a fine and a prison sentence. A parliamentary inquiry would lead to the dismissal or at least the resignation of certain persons. Worse was possible: under the Philippine Constitution, and no doubt that of other countries too, such an offence could be valid grounds for impeachment, along with other offences or serious crimes including treason.

32. If only for the reasons already mentioned, both legal and ethical, the proposal was indefensible: it was clearly against the interests of the Agency, its Member States, the Director General and the Board of Governors. The Director General should therefore not be encouraged to involve himself in such a controversial affair, at the risk of undermining his authority and doing irremediable damage to his position of trust.

33. The transaction should not have been suggested to the Director General in the first place. The Director General had received poor advice and should have resisted the infectious enthusiasm of his colleagues. His sole guiding motive in that affair had clearly been the interests of the staff. But now that the various issues had been clarified, there was still time for him to change his mind. Otherwise, his office, his prestige and his very reputation - the position of trust he enjoyed - would suffer irremediable damage from which the Director General, in both his personal and his official capacities might not be able to recover.

34. It was not only the Director General who would suffer personally from involvement in a commercial activity violating Article 42 of the 1961 Vienna Convention. The transaction would compromise the special status of the Agency as an international organization with the mandate to concern itself exclusively with problems of nuclear energy and certainly not with real estate transactions: the Agency also would suffer an irremediable loss of trust in the international community.

35. Those who were not convinced should stretch their imaginations a little. The present proposal was to buy a recreation centre, but in the future it could be a restaurant outside the VIC, a floating facility on the Danube or even a ski club in the Tyrol. Would that not contribute to the well-being of the staff? Would they not be economically viable facilities operating on a commercial basis, like the recreation centre? Could those facilities not be purchased by the Agency through the Director General, again

like the Gugging centre? The list could be continued to the point of absurdity, and each time the same legal and ethical objections could be raised against which no defence could be offered. Also, the present issue involved the Agency. In the future, why not UNIDO or the United Nations Office at Vienna?

36. Nor was it possible to compare the purchase of the recreational facility by the Director General representing the Agency for and on behalf of the Staff Association to purchases made in the VIC Commissary, as had been done during the December consultations with Board members, for purchases were made in the Commissary by private persons who were perfectly entitled to do so, each being individually tax-exempt. Moreover, the Commissary operation - which appeared to be a specifically Viennese arrangement, since other headquarters cities such as Geneva had not authorized such an arrangement - was not advertised in the same forceful manner as the purchase of the recreation centre. Nor could one invoke the example of a company offering recreational facilities to its employees, as that would be a private company which paid taxes.

37. On the other hand, a comparison could be made to the tax exempt purchase by a diplomat of a luxury car on behalf of and using the funds of a third party who was not entitled to the tax exemption. No one would deny that such brazen abuse and flagrant violation of diplomatic privileges by a diplomat would justify a request for him to leave Vienna as persona non grata.

38. If the Director General, an international civil servant entitled to tax exemption, were to purchase a recreational facility for and on behalf of the Staff Association, which did not enjoy the same privilege, would he accordingly be declared persona non grata by the Austrian Government? He hoped not. The Austrian authorities had apparently been informed of the proposed transaction. But, given that a violation of the law and of international agreements was evidently involved, he wondered whether the Austrian Government's attitude could be interpreted as an offer of a waiver or as a misunderstanding of the problem, if indeed it did accept the principle of tax exemption.

39. Those arguments seemed more than sufficient for the Director General to reconsider his position and refrain from purchasing the recreation centre. Those arguments should also be sufficient to persuade the Board not to encourage the Director General to proceed with that highly controversial transaction. There was still time. If, however, the majority of the Board decided to give the green light in spite of all the red signals lighting up, he would also put forward the argument of precedent. An aberrant decision taken in Vienna by the Board in the name of the Director General representing the Agency (or the Agency represented by the Director General) to sign a contract with a private individual for the purchase of a recreation centre for and on behalf of the real owner, namely the Staff Association, should not set an example for other international organizations in the United Nations system and other intergovernmental organizations. In other words, it should not become a precedent which would enable other international organizations to go astray in the same manner.

40. It would be difficult to imagine Mr. Pérez de Cuéllar, the Secretary-General of the United Nations, for instance, purchasing Madison Square Garden as a recreational facility for and on behalf of the Staff Association of the United Nations Secretariat in New York, which would undertake to manage it on a commercial basis. The President of the Asian Development Bank in Manila would not for example purchase a floating casino in Manila Bay, in view of the loss of prestige that would cause for him and the loss of revenue for the Philippine Government. That would certainly not be a reasonable act.

41. Finally, there was one last and vital point. As the property in question would legally be in the Agency's name - if the deal went ahead - it would enjoy "immunity from every form of legal process" (see Article III, Section 3 of the 1959 Agreement on the Privileges and Immunities of the Agency). Similarly, the premises would be inviolable and "immune from search, requisition, confiscation, expropriation and any other form of interference, whether by executive, administrative, judicial or legislative action" (Article III, Section 4).

42. Ms. TALLAWY (Egypt), apologizing for interrupting the Governor from the Philippines, inquired when he would be finishing his statement, as she had to take the floor at two other meetings being held at the VIC.

43. Mr. LAVINA (Philippines) replied that he had almost finished. He merely wished to add that the immunity from legal process which he had just mentioned would mean that the Austrian authorities would be completely helpless if disorderly behaviour took place at the recreation centre, such as for example the taking of illegal drugs, or that in the event of insolvency or default by the Staff Association, the seller of the property would have no recourse, even in the Austrian courts.

44. That, however, was the legal situation. In fact, under the Headquarters Agreement, Austria recognized the extraterritoriality of the "headquarters seat", which could be interpreted under the terms of Article I, together with Article II, of the 1957 Headquarters Agreement as including the centre in question. But, that was a unique provision which was not included in other headquarters agreements. It was too clearly a negation of the sovereign prerogatives of the host State in favour of an international organization which now appeared altogether too uncaring and whose officials seemed quite insensitive. He hoped that Governors would show more concern.

45. In conclusion, he was convinced that the discussion on the present item would have made the situation quite clear to everyone, including the Staff Association, the Director General and his legal staff, the Agency and Member States, and in particular the seller and the Austrian authorities. As Governor from the Philippines, an Agency Member State, he was unable, for all the reasons he had given, to agree to the proposal before the Board. He reserved the right to speak again, after all interested parties had given their views, in order to request, if necessary, that a vote be taken on the issue.

46. Mr. MGBOKWERE (Nigeria) said that his delegation attached great importance to the item under discussion, as it fundamentally affected the welfare of the staff, and that due account should be taken of the ICSC's recommendation that international organizations should provide their staff with recreational facilities to serve as motivators for their work. The Director General and his staff should therefore be thanked for the assistance which they had given to the Staff Association in connection with the purchase of an ideal recreation centre which was ready for immediate use. The transaction should be concluded without delay, for the price asked was very reasonable.

47. The question which remained was to what extent the Agency was or should be involved in the purchase. The Agency was only being asked to buy the facility on behalf of, and to hold it in trust for, the Staff Association. Sections 3 and 5 of the trust agreement absolved the Agency from any financial responsibility or liability for death or injury or for damage associated with the management or use of the centre. Furthermore, the centre would be insured for 200 million schillings, which was more than ten times its value. The Agency being thus absolved from all responsibility, it had not only the right, but the duty to provide its staff with recreational facilities in the same way as other firms or institutions did. Even if there was a risk, it was justified to bear it in the interests of staff welfare.

48. The fears expressed concerning a possible abuse of privileges or immunities did not seem justified in the light of Section 7 of the trust agreement. The arrangements were being made openly and would have to be approved by the Austrian authorities. Moreover, diplomatic privileges and immunities derived not only from international agreements or treaties, but also from the law of the host State, which only the Austrian authorities were competent to interpret. Article 47 of the Vienna Convention on Diplomatic Relations gave States' Governments the freedom to extend, by custom or by agreement, more favourable treatment than was required under the Convention. Austria was therefore perfectly entitled, if it so wished, to grant the recreation centre a privileged status. It was true that Austria was not represented on the Board, but the Director General would be aware of the reactions of the Austrian Government and could keep members of the Board informed of them.

49. In conclusion, his delegation believed that the present opportunity of demonstrating the Board's interest in staff welfare should not be missed. He therefore enthusiastically supported the recommendation contained in paragraph 16 of document GOV/2432, which seemed perfectly justified both legally and morally.

50. Ms. TALLAWY (Egypt) regretted that circumstances did not enable her to be as brief as she had hoped, given that her delegation approved the action recommended in paragraph 16 of document GOV/2432. The purchase of a recreational facility did not constitute a precedent in the United Nations

system and did not in any way conflict with the Agency's Statute. Moreover, it was in line with ICSC recommendations, following which the Board had already, the previous year, taken a far more onerous decision relating to salaries. Furthermore, contrary to what had been said, the purchase of the recreation centre would not involve the Agency in any legal liability. On the other hand, the Agency and its Director General were certainly responsible for the welfare and morale of its staff, who should not be treated like robots. Also, it was not a commercial transaction, since the Agency would be purchasing the property in question without any speculative motives and only on behalf of the Staff Association. That notwithstanding, the property in question was obviously very good value, as several potential buyers were interested in it and the Egyptian mission itself would probably have bid for it if the Staff Association had not got in first.

51. In any case, anyone who had objections to make about the purchase should address them directly to the Director General and not slow down the Board's work any further. It was preposterous to spend more time on the present agenda item than on the discussions relating to safety or technical assistance. She therefore hoped that a decision would be taken soon and requested that a vote be taken on the matter if no consensus could be reached.

52. Mr. LOOSCH (Federal Republic of Germany) said that the documentation on the present agenda item had caused him some confusion which the discussions on the matter had in no way clarified. It had been claimed that the Staff Association did not have legal personality under Austrian law. However, it would seem from the proposed trust agreement that the Staff Association did have legal personality, both under the provisions of the Agency's Statute and under civil law, since it was able for example to purchase and maintain insurance cover.

53. Furthermore, the preamble to the trust agreement indicated that the Staff Council had recommended that no subsidy be granted from the Staff Welfare Fund for the running costs of the facility. On the other hand, paragraph 14 of document GOV/2432 said that the financial operation of the facility would be backed, inter alia, by the resources of the Staff Welfare Fund.

54. Under those conditions, his delegation, while not wishing to oppose an agreement which had been negotiated by the Staff Association and the Director General, nevertheless felt a need for the Director General to give a clear statement that the Agency would in all circumstances be held harmless in respect of any claims for damages which might result from the purchase, management, operation and use of the facility, including any liabilities arising from operating deficits. Provided the Director General was in a position to give such assurances, his delegation hoped that a consensus would be reached in favour of the purchase of the recreation centre and he would be very happy to join such a consensus.

55. Mr. VILAIN XIII (Belgium) said that the request for authorization to make a purchase and the draft trust agreement submitted to the Board caused him concern. That concern had nothing to do with the principle of purchasing a recreation centre but only with the legal form used. There was reason to fear that, under certain exceptional circumstances, the Agency could be held responsible in the event of serious mismanagement or compensation for damage suffered by a third party. Another point which was not clear was the status of the staff who would be employed to run the centre. In his delegation's view, the hiring of such staff should be completely independent of the Agency. Finally, he agreed with the Governor from the Philippines that the extension of the Agency's privileges and immunities to a recreational facility for the staff could be regarded as an abuse and was in any case a doubtful procedure which would be very difficult to defend in a court of law.

56. In conclusion, he said that such concerns could be dispelled if the Director General would give a formal assurance that the Agency could under no circumstances be held liable and that it could not be forced to take over from the Staff Association any responsibility for dealing with management deficits or claims from third parties, including staff hired to work at the facility.

57. Ms. HYDER (Pakistan) said that as an employer the Agency was responsible for the welfare of its staff and that any measures to improve the living conditions of the staff were welcome. Indeed, the proposed measure was in line with ICSC recommendations. Moreover, the purchase of land by an international organization with the knowledge of the host country authorities

did not in any way set a precedent. Since the decision would have no financial implications for the Agency and since all the necessary legal precautions had been taken, her delegation had no reservations about the transaction. In any case, as head of the Secretariat, the Director General was perfectly entitled to act on behalf of the Staff Association - in fact it was his duty to look after the welfare of the staff and to take the necessary steps to promote it, for example by making recreational facilities available. Her delegation was therefore ready to support the action recommended in paragraph 16 of document GOV/2432.

58. Mr. PROTSENKO (Union of Soviet Socialist Republics) said that his delegation was not opposed to the purchase of a recreation centre by the Agency on behalf of the Staff Association, provided that the transaction did not lead to any financial implications for the Agency. It was to be hoped that the purchase would help to improve the welfare of the staff, thereby encouraging them to do better work and thus enhancing the Agency's efficiency.

59. Ms. GARZA SANDOVAL (Mexico) said she did not think the present item should have been included in the Board's agenda at all. Since it had been decided to discuss it all the same, she considered that the well-thought-out and detailed arguments put forward by the Governor from the Philippines should be taken into account. She therefore suggested that the Board ask the Director General and the Secretariat to find an alternative solution for the purchase of a recreational facility.

60. Mr. AHAFIA (Ghana) said that the issue under discussion had two aspects, a legal one and a moral one. In his view the moral aspect should be left out of account, as morality was such a relative matter depending on the customs of different nations. The legal aspect should be governed by the laws of the host country. It would therefore be desirable for the Director General to consult the authorities of the host country, if indeed he had not already done so, and to inform the Board of their views. With regard to any financial liability of the Agency, there was no cause for concern, since the value of the property could only increase, and in the event of any difficulties it could always be resold. His delegation therefore approved the proposal in paragraph 16 of document GOV/2432.

61. Mr. CHERIF (Algeria) pointed out that staff welfare was a legitimate concern. He therefore saw no reason to object to the proposed transaction by the Agency on behalf of the Staff Association. Paragraph 14 of document GOV/2432 clearly indicated that the Agency would not be liable in any way. Furthermore, the trust agreement between the Agency and the Staff Association explicitly absolved the Agency of any responsibility for expenses related to the purchase or operation of the future centre. His delegation thus had no objection to adopting the measures proposed in paragraph 16 of the document.

62. Mr. WILSON (Australia) said that he was in favour of the proposed purchase. The planned insurance cover would protect the Agency against all extraordinary risks which could be reasonably imagined, and Sections 3 and 5 of the draft trust agreement seemed to provide all the necessary financial guarantees. The proposed transaction would be in the interests of staff and would be a good buy. It would, however, be desirable for the Director General or the representative of Austria to confirm that the Austrian Government had indeed examined the matter as indicated in paragraph 2 of the document under discussion, since that statement seemed to have been called into question.

63. He concluded by saying that, provided the Director General was in a position to give the Governors from the Federal Republic of Germany and Belgium the assurances they had requested regarding the Agency's liability, he would be glad to support the proposed purchase of the recreation centre. At all events, the decision should be taken during the present Board meetings, and preferably by consensus so as to avoid a vote.

64. Mr. ALER (Sweden) said that, since he had no doubt that the Director General was in a position to provide the assurances first requested by the Governor from the Federal Republic of Germany, he was ready to approve the measures proposed in paragraph 16 of document GOV/2432.

65. Mr. ASHIRI (Saudi Arabia) said that the Agency was right to concern itself with staff welfare and that the proposed agreement with the Staff Association was compatible with the Agency's Statute and with the Provisional Staff Regulations and Staff Rules. Furthermore, since the proposed transaction would have no financial implications for the Agency, his

delegation had no difficulty in approving the proposed measures whereby the Board would authorize the purchase of the recreation centre on behalf of the Staff Association using resources from the Staff Welfare Fund.

66. Mr. AMMAR (Tunisia) too was in favour of purchasing the recreation centre, provided that there were no financial implications for the Agency's budget. Under those conditions, his delegation could join a consensus which would demonstrate to the staff the Board's concern for its welfare, and he thanked the Director General for his efforts in the matter.

67. Mr. KENNEDY (United States of America) associated himself with the remarks made by the Governor from Australia and with his request for clear assurances on the various points raised. If those assurances were given explicitly and unequivocally, he would be ready to join a consensus on the matter - which he believed very strongly could, and should, be decided without a vote in the interests of the efficiency of the Board's work.

68. Mr. TALIANI (Italy) felt that the question should be dealt with pragmatically, without getting embroiled in legal quibbles. Provided the Director General could assure the Board that the Agency would not be held liable in any way as a result of the purchase of the recreation centre, and provided he could be more specific about the official nature of the consultations with the Austrian Ministries of Finance and Foreign Affairs, his delegation would be ready to join a consensus or to vote in favour of purchasing the recreation centre.

69. Mr. BRADY ROCHE (Chile) was convinced that it was one of the duties of any organization to ensure the welfare of its staff. He saw no obstacle to joining a consensus on a solution to those aspects which were matters of personnel administration, but reiterated the reservations which his delegation had already expressed regarding the Board's competence in the matter. His doubts seemed confirmed by the concern shown by all Governors as to the possible financial implications of the transaction. Lastly, he endorsed the comments made by the Governor from Australia.

70. Mr. ALVAREZ GORSIRA (Venezuela) repeated that his delegation, as it had indicated during the informal consultations held by the Director General, was not opposed to the Agency using the resources of the Staff

Welfare Fund to purchase a recreation centre on behalf of, and holding it in trust for, the Staff Association, on the clear understanding that the purchase and operation of that centre would have no financial or other implications for the Agency and would in no way affect the Agency's privileges and immunities.

71. Mr. CLARK (United Kingdom) also subscribed to the views expressed by the Governor from Australia. Important questions had been raised and assurances were needed. He had no doubt that the Director General and the Legal Adviser could provide those assurances. On that assumption, he was willing to join a consensus in favour of the proposed purchase, which would be a good buy in the interests of the staff and should not be delayed any further. The matter should be settled by consensus and not by a vote.

72. Mr. AL-KITAL (Iraq) was surprised that the discussion on the matter was taking so long. The informal consultations held by the Director General in December and the detailed explanations which he had provided with the assistance of the Legal Adviser had already answered all the questions regarding approval of the purchase by the Austrian authorities and the other points raised during the present discussion. Convinced that the purchase was in the interests of the staff, he strongly supported the action proposed in paragraph 16 of document GOV/2432.

73. In his opinion, what should be checked in the Agency's Statute was not whether it contained a clause authorizing the Director General to conclude such a transaction, but whether there was any provision prohibiting him from doing so. Staff welfare was one of the Director General's responsibilities, and on that account he was entitled to purchase the recreation centre. He was sure the Director General and his staff had examined all aspects of the transaction and that it would have no financial or legal implications for the Agency.

74. Mr. SCHEEL (German Democratic Republic) was ready to support a consensus to approve the action recommended in paragraph 16 of document GOV/2432.

75. Mr. AL-SAIED (Kuwait)[\*] could only share the concerns and legal reservations expressed by the Governor from the Philippines. The Board should

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[\*] Member States not members of the Board of Governors are indicated by an asterisk.

not rush into a decision that would involve the Agency in a host of very complex problems which were better avoided, particularly since the matter did not come within the Director General's purview.

76. The DIRECTOR GENERAL had no doubt that the Governor from the Philippines was motivated by the noblest intentions in seeking to protect him from the direct consequences, and he also did not wish to disregard the concerns expressed by the delegations of the Federal Republic of Germany, Belgium, Mexico and Kuwait. However, he did not think Board meetings should be turned into legal seminars. Like many Governors, he was himself a lawyer and could discuss at length the jurisprudence of the International Court of Justice, which clearly established that international organizations possessed such legal personality as they needed to function properly and to ensure the welfare of their staff. There was no doubt that the Agency's legal personality covered such action on behalf of the staff. That fact was confirmed both by the ICSC's recommendations and by precedents such as the purchase of property by the International Monetary Fund for its staff.

77. The Agency was thus undoubtedly entitled to purchase in its own name property for its staff. However, it could not afford to do so, since it already had difficulties in obtaining enough resources, and he was sure that the Board would not have reacted favourably to the Agency's using its budget for such a purpose. The Staff Association, which had the money and did not wish to register as a society under Austrian law, was simply asking the Agency to act as purchaser on its behalf. That did not mean, however, that it could not have legal personality under international law.

78. There was nothing inappropriate about the purchase and trust agreement. The transaction had been negotiated with the knowledge of the Austrian authorities and they had not raised any objections to it. They were eager to see more organizations established in Vienna and were therefore themselves very concerned for the welfare of the Agency's staff.

79. Regarding the financial aspect of the matter, he could assure the Board, firstly, that the Staff Association was a very responsible organization and there was no reason to believe that it would not be a prudent manager; secondly, that the Staff Association would be required to take out insurance

for a sum of ten times the value of the property to be purchased, which should easily cover all possible risks for the Agency; and thirdly, that the property concerned, of which the Agency would remain the owner, was not likely to depreciate and would therefore also serve as a security against such risks in the last resort. He could therefore not imagine any situation in which the transaction could have the slightest adverse financial consequences for the Agency.

80. Mr. LAVINA (Philippines), exercising his right of reply, regretted that the Governor from Egypt had made insinuations in her statement which he could not accept; they were gratuitous and unwarranted. Referring to Rule 40 of the Provisional Rules of Procedure, he requested the Chairman not to attempt to force the Board to adopt by consensus a decision on which the Board was no closer to general agreement at the present stage than it had been during the consultations in December. The matter should be decided without further delay by the democratic and unequivocal procedure of a vote.

81. Mr. KENNEDY (United States of America) pointed out that his delegation was prepared to join a consensus provided it received from the Director General the categorical assurances which it had requested. Unless he was much mistaken, he had not heard the Director General state that the Agency would incur no liability as a result of the proposed purchase. He would therefore welcome further clarifications on that point.

82. The DIRECTOR GENERAL repeated that he could not imagine any situation in which the Agency would bear the slightest financial liability as a result of purchasing the recreation centre given the agreement which would be signed with the Staff Association, the insurance which the Staff Association would take out, and lastly the value of the property which was to be purchased.

83. Mr. VILAIN XIII (Belgium) pointed out that the question was not whether there was a greater or smaller probability that the Agency would have to pay anything, but whether it could incur financial liability. The Director General had also not replied to his second question concerning the status of the staff hired for the recreation centre and whether they would be able to

bring financial claims or demands regarding their status against the Agency. He would be grateful if the Director General would reply clearly on those two points.

84. Mr. LOOSCH (Federal Republic of Germany) associated himself with the remarks made by the Governor from Belgium.

85. The DIRECTOR GENERAL explained that under the proposed arrangements the Agency would be the owner of the recreation centre. If the Agency could incur no legal liability as a consequence of owning the property, there would be no point in asking the Staff Association to take out insurance. That insurance was intended to cover such financial risks as the Agency might incur, and the value of the property would provide additional security.

86. Ms. TALLAWY (Egypt), addressing herself to the Governor from the Philippines, said that her remarks had been directed mainly at the, in her opinion, excessive length of his statement. The issue at stake under item 5 of the agenda, which was of concern to all Governors, was whether the Agency would have to bear any costs as a result of the proposed purchase. The issues raised by the Governor from the Philippines went beyond that concern and should perhaps be taken up directly with the Director General. It was neither good for the Board's or the Agency's reputation nor in line with the practice of the Board to discuss such matters in detail at official meetings, particularly since the Director General had just received a further vote of confidence by Member States in the renewal of his appointment. Some Members even thought that the item should not have been placed on the Board's agenda at all. For her part, she would prefer to see the Board devote more time to substantial questions which were of greater concern to her. She was calling for a vote on the matter because she believed that the desire to reach a consensus should not obstruct the decision-making process and she did not want to see the matter brought up on the agenda again. However, if a consensus could be reached, she would withdraw her request for a vote.

87. Mr. MGBOKWERE (Nigeria) endorsed the remarks made by the Governor from Egypt.

88. Mr. SHENSTONE (Canada) said that he strongly supported the recommended action. Without being a legal expert, he considered that the Director General had provided as clear and precise assurances regarding the Agency's liability as could reasonably be expected. He hoped that those assurances would dispel any doubts and concerns.

89. Mr. STRULAK (Poland) said that he too was entirely satisfied with the explanations given by the Director General as to the unlikelihood of adverse financial or other consequences resulting from the proposed purchase by the Agency. Those explanations were reasonable and complete and should dispel any doubts. It would therefore be a good idea to seek a consensus to approve the transaction, which his own delegation supported and which, despite its legal and other ramifications, was after all a matter of relatively minor importance. He trusted that those who had asked for a vote would not insist on their request and would join a consensus so that the Board would not deviate from its usual working practices.

90. Mr. QIN (China) expressed his satisfaction with the clarifications provided by the Director General, which, in his view, dispelled any doubts. His delegation therefore approved the proposed measures. Anxious to continue the Board's tradition, he hoped that the recommendation could be adopted by consensus.

91. Mr. BAEYENS (France) supported unreservedly the remarks made by the representatives of Poland and China. It would be extremely regrettable if the Board could not reach a decision on the matter without having a vote. The Director General's statements were perfectly satisfactory and ought to reassure members of the Board on all the points raised.

92. Mr. LOOSCH (Federal Republic of Germany) said that he was prepared to join a consensus, even though the Director General had not replied clearly to the questions which he had raised. He suggested that the Chairman should ask the Board whether there was a consensus on the recommended action.

93. Mr. VILAIN XIIII (Belgium) said that he would have been ready to join a consensus in favour of the proposed decision, but the Director General had unfortunately not fully answered his questions, in particular that concerning the status of staff hired for the recreation centre and the risk of such staff bringing claims against the Agency in the event of a dispute.

94. The CHAIRMAN noted that the Governors from Egypt and the Philippines had requested a vote on the present agenda item. The Provisional Rules of Procedure clearly authorized them to do so. However, he was unwilling to depart from the established tradition of many years whereby the Board took its decisions without resorting to a vote.

95. The strongly held views would be duly reflected in the summary records. Moreover, the fact that a decision was taken without a vote did not necessarily mean that all members of the Board had approved it and did not in any way affect the deeply felt convictions of any members. He therefore appealed to the Governors from Egypt and the Philippines not to insist on a vote and to accept the general view.

96. Ms. TALLAWY (Egypt) repeated that if there was a consensus, she would be happy to join it.

97. Mr. LAVINA (Philippines) said that he would not insist on a vote if there was a consensus to postpone a decision on the matter. If that were not the case, he requested that Rule 40 of the Provisional Rules of Procedure be applied and that the question be decided immediately by a roll-call vote.

98. The CHAIRMAN recalled that the consensus in question would involve approval of the action recommended in paragraph 16 of document GOV/2432. He appealed once again to the Governor from the Philippines not to insist on a vote.

99. Mr. LAVINA (Philippines) insisted that a vote be taken.

100. At the request of the Governor from the Philippines, a roll-call vote was taken.

101. Chile, having been drawn by lot by the Chairman, was called upon to vote first.

The result of the vote was as follows:

In favour: Algeria, Australia, Brazil, Canada, Chile, China, Czechoslovakia, Denmark, Egypt, France, German Democratic Republic, Federal Republic of Germany, Ghana, India, Iraq, Italy, Japan, Malaysia, Netherlands, Nigeria, Pakistan, Poland, Saudi Arabia, Sweden, Tunisia, Union of Soviet Socialist Republics, United Kingdom of Great Britain and Northern Ireland, United States of America, Venezuela.

Against: Mexico, Philippines.

Abstaining: Belgium.

102. The action recommended in paragraph 16 of document GOV/2432 was adopted by 29 votes to 2, with 1 abstention.

103. Ms. GARZA SANDOVAL (Mexico), explaining her vote, said her delegation had voted against the recommended action in view of the reservations which it had expressed on the matter. In approving that action, the Board had decided that the Agency would assume its liabilities as owner of the property and would therefore have to bear any consequences, even though it would not have direct control over the property in question.