Questionnaire of the International Law Commission

–

"Settlement of international disputes to which international organizations are parties"

-

World Health Organization

1) What types of disputes/issues (cf. paras. 6 and 7 above) have you encountered?

WHO has encountered disputes with private parties, including goods suppliers and service providers (both juridical and natural persons such as individual contractors); active or former staff members; and persons with no contractual relationship with WHO (either juridical or natural), for instance in the context of tort claims resulting from traffic accidents involving WHO or other harmful occurrences, or in the context of disputes of a constitutional nature related to the exercise of WHO's mandate, operations and activities.

WHO has not encountered disputes with other international organizations or States (either member or non-member States).

While it is not a case of a dispute between WHO and a Member State, WHO would nonetheless refer to the advisory opinion of 20 December 1980 rendered by the International Court of Justice on the interpretation of the Agreement of 25 March 1951 between WHO and Egypt (advisory opinion attached as **Annex 1**). Having considered a possible transfer from Alexandria of the WHO's Regional Office for the Eastern Mediterranean Region and taking note of the differing views having been expressed among Member States on the applicability of a provision of the Agreement of 25 March 1951 between WHO and Egypt, the World Health Assembly in May 1980 submitted a request to the Court for an advisory opinion on questions related to the interpretation of the said Agreement, in accordance with Article 96, paragraph 2[1], of the Charter of the United Nations, Article 76 of the Constitution of the WHO[2] and Article X, paragraph 2, of the Agreement between the United Nations and the WHO[3]. Rather than a dispute between WHO and a Member State, this case illustrates how a disagreement among Member States concerning the conduct of WHO's operations was resolved.

---

[1] "Other organs of the United Nations and specialized agencies, which may at any time be so authorized by the General Assembly, may also request advisory opinions of the Court on legal questions arising within the scope of their activities."

[2] "Upon authorization by the General Assembly of the United Nations or upon authorization in accordance with any agreement between the Organization and the United Nations, the Organization may request the International Court of Justice for an advisory opinion on any legal question arising within the competence of the Organization."

[3] "The General Assembly authorizes the World Health Organization to request advisory opinions of the International Court of Justice on legal questions arising within the scope of its competence other than questions concerning the mutual relationships of the Organization and the United Nations or other specialized agencies."

2) What methods of dispute settlement (cf. para. 9 above) have been resorted to in cases of disputes with other international organizations, states or private parties? Please provide any relevant case law, or a representative sample thereof. If you cannot provide such information for confidentiality reasons, could you provide any such decisions or awards in redacted form, or a generic description/digest of such decisions?

Disputes with goods suppliers and service providers (juridical and natural persons)

The terms of the contract between goods suppliers/service providers and WHO provide that in case of a dispute there should be first an attempt to try to settle the matter amicably. Should this fail, the dispute would then be subject to conciliation. If the conciliation is unsuccessful, the dispute would be settled by arbitration.

In practice, WHO is successful in most cases in solving disputes with goods suppliers and service providers either through amicable discussions or conciliation. In such cases, and depending on the outcome of the amicable or conciliation discussions, a settlement agreement may be signed with the goods supplier(s) or service provider(s). For confidentiality reasons, WHO cannot disclose examples of a signed settlement agreement, but is in a position to share the template generally used within WHO (template attached as **Annex 2**).

The disputes rarely escalate to arbitration and often arbitration is not an appropriate tool to solve disputes between the Organization and individual parties. WHO has however been involved in arbitral proceedings in a few cases in the past as follows:

- One example relates to the construction of one of WHO buildings in the early 1990s in Geneva, Switzerland. WHO had selected a Swiss contractor for the construction of a building following a competitive exercise (i.e. a request for proposals, hereinafter "RFP") and the parties agreed on a contract amount for the work and on a payment schedule. WHO applied a 2% deduction on the last instalment in accordance with a provision of the specifications of the contract (*cahier des charges*) which prescribed that a 2% deduction could be applied in the event of a payment within thirty days upon receipt of an invoice. This deduction was disputed by the contractor who claimed that the full amount was due as prescribed by the provisions of the contractor's standard contract annexed to its initial offer. The amicable discussions having failed, the parties initiated the arbitration process in 1992 and selected one arbitrator. In 1994, the arbitrator ruled that, although not expressly signed by both parties, WHO consented to the provisions contained in the contractor's standard contract which were annexed to the offer approved by WHO (such approval being evidenced by a purchase order referring to the contractor's offer). As a result, the parties were bound by the schedule of payment. It was also ruled that agreement on a payment schedule with precise payment dates released the contractor from the obligation of sending invoices, which therefore excluded the right for WHO to apply a 2% deduction as per the specifications (*cahier des charges*). WHO was condemned to pay the full contract amount

with interest, including all costs and expenses resulting from the arbitration proceedings (arbitration award of 5 March and 19 February 1994 attached as **Annex 3**[4]).

- Another example relates to a dispute concerning an alleged breach of contract by WHO in relation to security services in a sub-office of WHO in Nigeria. Following unsuccessful attempts made by the security services provider to sue WHO before local courts and unsuccessful attempts to resolve the matter amicably, arbitration proceedings were initiated by the company in Nigeria under the Nigerian Arbitration and Conciliation Act, as provided for in the agreement concluded between the parties, and eventually resulted in the dismissal of the claims made by the security services provider (arbitration award of 8 September 2018 attached as **Annex 4**[5]).

Goods suppliers and service providers may also try to sue WHO before national jurisdictions, in which case WHO would claim its immunity from jurisdiction, normally through the ministry of foreign affairs of the country concerned, and recall the applicable recourses available to the goods suppliers and service providers as per the terms of their contract with WHO.

Only in exceptional circumstances would WHO appear before a national jurisdiction, normally through a local legal representative, and then it would do so to assert its immunity from jurisdiction. An example in this regard is the ruling delivered by the High Court of Abuja in Nigeria on 3 November 2014 in the context of a dispute between WHO and the owner of a building where WHO had some of its premises over the implementation of the tenancy agreement and where the Court recognized WHO's immunity from legal process and its lack of jurisdiction in cases where WHO has not waived its immunity (ruling attached as **Annex 5**).

Disputes with staff members

In case of a dispute with staff members, informal and formal resolution of disputes mechanisms are open to the individuals pursuant to WHO established rules and policies.

- Informal

  Staff members may use mediation to resolve a work-related concern, including a final administrative decision, which the staff member concerned considers to be in non-observance of the terms of his/her appointment.

- Formal

[4] The attached arbitral award is to be kept confidential and for the exclusive use of the Office of the Legal Affairs of the United Nations and the International Law Commission in the context of the latter's study on the "Settlement of international disputes to which international organizations are parties".
[5] The attached arbitration award is to be kept confidential and for the exclusive use of the Office of the Legal Affairs of the United Nations and the International Law Commission in the context of the latter's study on the "Settlement of international disputes to which international organizations are parties".

Should the staff member decide to use formal channels of resolution of dispute, he/she must first introduce before the Director of Human Resources a request for the administrative review of the contested final administrative decision.

The administrative review decision of the Director of Human Resources may then be appealed before the WHO Global Board of Appeal which sits in Budapest, Hungary.

The Global Board of Appeal is an advisory body composed of a standing chair and vice-chair and WHO staff members (half appointed by the Director-General and the other half elected by staff members). The Global Board of Appeal will examine the appeal and submit its findings and recommendations to the Director-General, with whom the final decision on the appeal rests.

Should the staff member wish to contest the decision of the Director-General, he/she would have to file a complaint with the Administrative Tribunal of the International Labour Organization (ILOAT).

For confidentiality reasons, WHO cannot share the administrative review decisions, reports of the Global Board of Appeal or the decisions of the Director-General thereon. However, the ILOAT case law related to WHO may be found on the ILOAT website (TRIBLEX).

In some instances, staff members may also try to sue WHO before national jurisdictions in which case WHO would assert its immunity, normally through the ministry of foreign affairs of the country concerned, and recall the applicable recourses available to the staff member. An example in this regard is the judgment rendered by the Delhi High Court in India on 4 December 2001 in the context of claims brought forward against WHO by a former staff member for breach of contract and where the Court recognized its lack of jurisdiction in cases where WHO has not waived its immunity (P.S. Ochani v. WHO, judgment attached as **Annex 6**).

Disputes with persons with no contractual relationship with WHO, either juridical or natural persons

- Disputes of a constitutional nature related to the exercise of WHO's mandate, operations and activities

  In such cases where WHO is sued before national jurisdictions for disputes of a constitutional nature related to the exercise of its mandate, operations and activities, the Organization would claim immunity, normally through the ministry of foreign affairs of the country concerned.

  Only in exceptional circumstances would WHO appear before a national jurisdiction and then it would do so to assert its immunity from jurisdiction. An example in this regard is the opinion & order delivered by the United States District Court, Southern District of New-York, on 5 April 2021 in re Kling v. WHO (opinion & order attached as **Annex 7**). This case originated from a civil lawsuit filed against WHO in United States federal court (the Southern District of New York) by three individuals (as a putative class action) who

claimed that they suffered damages related to the COVID-19 pandemic caused by WHO's alleged gross negligence including by WHO's allegedly failing to timely declare COVID-19 a public health emergency of international concern under the International Health Regulations (2005) and failing to provide "correct treatment guidelines" to WHO's Member States. In its opinion and order granting WHO's motion to dismiss the case, the Court found that WHO did not waive its immunity and that it was immune from the suit under the United States International Organizations Immunities Act of 1945.

- Tort claims

  Such claims would normally be handled by WHO insurance providers. In very few cases, WHO did not have adequate insurance in place and therefore resolved the matter amicably either directly with the victims or through the mediation of local authorities.

- "Hold harmless clause"

  In countries where WHO is present, it has concluded bilateral agreements for the provision of technical assistance with the governments. Such agreements contain a clause whereby the Government shall be responsible for dealing with any claims which may be brought by third parties against WHO and its advisers, agents and employees and shall hold harmless the Organization and its advisers, agents and employees in case of any claims or liabilities resulting from operations under the agreement, except where it is agreed by the Government and the Organization that such claims or liabilities arise from the gross negligence or willful misconduct of such advisers, agents or employees.

  When the circumstances so require, WHO would invoke such a clause.

3) In your dispute settlement practice, for each of the types of disputes/issues arising, please describe the relative importance of negotiation, conciliation or other informal consensual dispute settlement and/or third-party dispute resolution, such as arbitration or judicial settlement.

Disputes with goods suppliers and service providers (juridical and natural persons)

Informal consensual mechanisms are paramount and most of the time allow for a successful closing of the case without reaching the stage of arbitration. Given the procedural complexity and cost, arbitration is often not a viable resolution mechanism for such disputes.

Disputes with staff members

Both informal and formal mechanisms play an essential role in the resolution of the dispute. Depending on the specific circumstances of the dispute, one or the other may play a more significant role. The majority of cases, however, go to formal mechanisms, including the ILOAT.

Disputes with persons with no contractual relationship with WHO

To the extent WHO would enter into the substance of such disputes, informal consensual methods of settlements are deemed essential as they may prevent the case from escalating to third-party dispute resolution.

4) Which methods of dispute settlement do you consider to be most useful? Please indicate the preferred methods of dispute settlement (cf. para. 9 above) for different types of disputes/issues (cf. paras. 6 and 7 above).

For disputes with all type of private parties, informal consensual resolution is generally very useful as it may help prevent the case escalating to potentially lengthy and heavy third-party litigation, especially arbitration.

In the case of disputes with goods suppliers and service providers (juridical and natural persons), WHO favours an informal consensual resolution of the dispute since arbitration, which is the last recourse should amicable discussions and conciliation fail, can be a very complex and time- and resource-consuming process for both parties.

For disputes with staff members, informal or formal dispute resolution may be best suited depending on the specific circumstances of the dispute.

As for disputes with persons with no contractual relationship with WHO, third-party litigation before a national jurisdiction is not deemed to be appropriate considering WHO's applicable immunities and potential interferences in WHO's independent exercise of its mandate at local level. When the circumstances so require (such as tort claims), WHO will instead favour an amicable resolution of the dispute, without prejudice to its privileges and immunities.

5) From a historical perspective, have there been any changes or trends in the types of disputes arising, the numbers of such disputes and the modes of settlement used?

There is an upward trend in the number of disputes with service providers. The latter is mainly due to the fact that WHO is contracting more and more individuals as external contractors to provide services and specific specialized tasks to WHO.

There is also an increase in disputes with staff members and, consequently, an increase in cases that come before the ILOAT.

The number of disputes with other private parties remain generally stable.

In general, the modes of settlement used remain the same, as explained under question 2).

6) Do you have suggestions for improving the methods of dispute settlement (that you have used in practice)?

In its report to the 67th United Nations General Assembly (UNGA) on the administration of justice at the United Nations (A67/265), the Secretary-General submitted a proposal for implementing a mechanism for expedited arbitration procedures for consultants and individual contractors. In its resolution A/RES/67/241, the UNGA took note of the proposal, and it is WHO's understanding that no further action has been taken since then.

WHO considers that it may be worth revisiting the option of putting in place within the UN system an expedited arbitration process for consultants and individual contractors.

7) Are there types of disputes that remain outside the scope of available dispute settlement methods?

N/A

8) Does your organization have a duty to make provision for appropriate modes of settlement of disputes arising out of contracts or other disputes of a private law character under the 1946 Convention on the Privileges and Immunities of the United Nations, the 1947 Convention on the Privileges and Immunities of the Specialized Agencies, or an equivalent treaty? How in practice has your organization interpreted and applied the relevant provisions?

Under section 31 of the 1947 Convention on the Privileges and Immunities of the Specialized Agencies, WHO shall make provision for appropriate modes of settlement of disputes arising out of contracts or other disputes of private character to which WHO is a party.

WHO has interpreted such a provision as meaning that it should provide dispute resolution mechanisms for disputes regarding its staff members, other parties with which it enters into a contractual relationship, as well as in relation to alleged tortious acts. WHO considers that disputes of a constitutional nature related to the exercise of WHO's mandate, operations and activities do not fall under section 31 of the 1947 Convention.

For the modes of settlement of disputes put in place as a result of such provision, please refer to the answer provided under question 2.

9) Are there standard/model clauses concerning dispute settlement in your treaty and/or contractual practice? Please provide representative examples.

Staff members

Dispute settlement is regulated under the WHO Staff Regulations and Staff Rules (relevant parts attached as **Annex 8**).

Goods suppliers and service providers (juridical and natural persons)

The contracts concluded with goods suppliers and service providers typically provide for the following:

> ***"Settlement of disputes****. Any matter relating to the interpretation or application of this agreement which is not covered by its terms shall be resolved by reference to Swiss law. Any dispute relating to the interpretation or application of this agreement shall, unless amicably settled, be subject to conciliation. In the event of failure of the latter, the dispute shall be settled by arbitration. The arbitration shall be conducted in accordance with the modalities to be agreed upon by the parties or, in the absence of agreement, with the Rules of Arbitration of the International Chamber of Commerce. The parties shall accept the arbitral award as final."*

In some cases, the resolution of disputes clause instead refers to the UNCITRAL arbitration rules.

Governments of Member States

Agreements concluded with governments may refer to amicable settlement through negotiations and/or arbitration for the resolution of disputes.

Below are few samples of settlement of disputes clauses used in agreements concluded between WHO and governments:

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

- *"All disputes concerning the interpretation or application of the present Agreement shall be settled amicably through negotiation between the Parties."*

- *"Any difference arising out of the interpretation or application of this Agreement or any Supplementary Agreement hereto which is not otherwise settled by the parties shall be referred to arbitration. In that case each party shall appoint one arbitrator. Any differences that these cannot settle between themselves shall be submitted to a third arbitrator appointed by them to decide without further recourse."*

- *"Any difference or dispute between WHO and the Government arising our of or relating to this Agreement or any Supplementary Agreement shall be settled amicably through consultation and/or by negotiation between the parties through diplomatic channels."*

International Organizations

- Between a United Nations agency and WHO

  "*The Parties will use their best efforts to promptly settle through direct negotiations any dispute, controversy or claim arising out of or in connection with this Agreement or any breach thereof. Any such dispute, controversy or claim which is not settled within sixty (60) days from the date either Party has notified the other Party of the nature of the dispute, controversy or claim and of the measures which should be taken to rectify it, will be resolved through consultation between the Executive Heads of each of the Parties*".

- Between WHO and the European Commission

  "*13.1. The Parties shall endeavour to settle amicably any disputes or complaints relating to the interpretation, application or validity of the Agreement, including its existence or termination.*
  [.....]
  13.4 Where the Organisation is an International Organisation: a) nothing in the Agreement shall be interpreted as a waiver of any privileges or immunities accorded to any Party by its constituent documents, privileges and immunities agreements or international law; b) in the absence of an amicable settlement pursuant to Article 13.1 above, any dispute, controversy or claim arising out of or in relation to this Agreement, or the existence, interpretation, application, breach, termination, or invalidity thereof, shall be settled by final and binding arbitration in accordance with the 2012 Permanent Court of Arbitration Rules for Arbitration, as in effect on the date of entry into force of this Agreement. The appointing authority shall be the Secretary General of the Permanent Court of Arbitration. The arbitration proceedings must take place in the Hague and the language used in the arbitral proceedings will be English. The arbitrator's decision shall be binding on all Parties and there shall be no appeal".

10) Does “other disputes of a private law character” (see 8) above) encompass all disputes other than those arising from contracts? If not, which categories are not included? What has been the practice of your organization in determining this? What methods of settlement have been used for “other disputes of a private law character” and what has been regarded as the applicable law?

Please refer to the responses provided under questions 2, 8 and 9.

11) Have you developed a practice of agreeing ex post to third-party methods of dispute settlement (arbitration or adjudication) or waiving immunity in cases where disputes have already arisen and cannot be settled otherwise, e.g. because no treaty/contractual dispute settlement has been provided for?

WHO accepted to appear ex post before national jurisdictions in exceptional cases to invoke its immunity from jurisdiction because legal proceedings were already initiated and it did not have any other option. An example in this regard is the order rendered by the Supreme Court of Pakistan on 15 December 2021 in re WHO v. Muhammad Ansar Iqbal (order attached as **Annex 9**). In this case, the dispute originated from claims of alleged non-payment of services made by a WHO supplier which led to a judgment from the High Court of Islamabad in Pakistan. The parties subsequently reached an out of court settlement. However, considering that the High Court of Islamabad had refused in its judgment to recognize WHO’s immunity, the Organization decided to pursue the case before the Supreme Court of Pakistan which eventually set aside the judgment of the High Court of Islamabad, though without pronouncing itself on the issue of immunity, and held that said judgment shall have no precedential value.

INTERNATIONAL COURT OF JUSTICE

REPORTS OF JUDGMENTS,
ADVISORY OPINIONS AND ORDERS

INTERPRETATION OF THE AGREEMENT OF 25 MARCH 1951 BETWEEN THE WHO AND EGYPT

ADVISORY OPINION OF 20 DECEMBER 1980

1980

COUR INTERNATIONALE DE JUSTICE

RECUEIL DES ARRÊTS,
AVIS CONSULTATIFS ET ORDONNANCES

INTERPRÉTATION DE L'ACCORD DU 25 MARS 1951 ENTRE L'OMS ET L'ÉGYPTE

AVIS CONSULTATIF DU 20 DÉCEMBRE 1980

Official citation :

Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt, Advisory Opinion, I.C.J. Reports 1980, p. 73.

Mode officiel de citation :

Interprétation de l'accord du 25 mars 1951 entre l'OMS et l'Egypte, avis consultatif, C.I.J. Recueil 1980, p. 73.

Sales number
N° de vente : 457

20 DECEMBER 1980

ADVISORY OPINION

INTERPRETATION OF THE AGREEMENT OF 25 MARCH 1951 BETWEEN THE WHO AND EGYPT

INTERPRÉTATION DE L'ACCORD DU 25 MARS 1951 ENTRE L'OMS ET L'ÉGYPTE

20 DÉCEMBRE 1980

AVIS CONSULTATIF

INTERNATIONAL COURT OF JUSTICE

1980
20 December
General List
No. 65

YEAR 1980

20 December 1980

INTERPRETATION OF THE AGREEMENT OF 25 MARCH 1951 BETWEEN THE WHO AND EGYPT

Determination by the Court of the meaning and implications of question submitted for advisory opinion — Need for Court to ascertain and formulate legal questions really in issue.

International organizations and host States — Respective powers of the organization and the host State with regard to seat of headquarters or regional offices of organization — Mutual obligations of co-operation and good faith resulting from a State's membership of organization as well as from relations between organization and host State — Legal principles and rules applicable on transfer of office of organization from territory of host State concerning conditions and modalities for effecting transfer — Duty to consult — Consideration of provisions of host agreements and of Vienna Convention on the Law of Treaties — Application of principles and rules of general international law — Mutual obligation to co-operate in good faith to promote the objectives and purposes of the Organization.

ADVISORY OPINION

Present : *President* Sir Humphrey WALDOCK ; *Vice-President* ELIAS ; *Judges* FORSTER, GROS, LACHS, MOROZOV, NAGENDRA SINGH, RUDA, MOSLER, ODA, AGO, EL-ERIAN, SETTE-CAMARA ; *Registrar* TORRES BERNÁRDEZ.

Concerning the interpretation of the Agreement signed on 25 March 1951 between the World Health Organization and the Government of Egypt,

THE COURT,

composed as above,

gives the following Advisory Opinion :

1. The questions upon which the advisory opinion of the Court has been requested were laid before the Court by a letter dated 21 May 1980, received in the Registry on 28 May 1980, addressed by the Director-General of the World

Health Organization to the Registrar. In that letter the Director-General informed the Court of resolution WHA33.16 adopted by the World Health Assembly on 20 May 1980, in accordance with Article 96, paragraph 2, of the Charter of the United Nations, Article 76 of the Constitution of the World Health Organization, and Article X, paragraph 2, of the Agreement between the United Nations and the World Health Organization, by which the Organization had decided to submit two questions to the Court for advisory opinion. The text of that resolution is as follows :

> "The Thirty-third World Health Assembly,
>
> Having regard to proposals which have been made to remove from Alexandria the Regional Office for the Eastern Mediterranean Region of the World Health Organization,
> Taking note of the differing views which have been expressed in the World Health Assembly on the question of whether the World Health Organization may transfer the Regional Office without regard to the provisions of Section 37 of the Agreement between the World Health Organization and Egypt of 25 March 1951,
> Noting further that the Working Group of the Executive Board has been unable to make a judgment or a recommendation on the applicability of Section 37 of this Agreement,
>
> *Decides,* prior to taking any decision on removal of the Regional Office, and pursuant to Article 76 of the Constitution of the World Health Organization and Article X of the Agreement between the United Nations and the World Health Organization approved by the General Assembly of the United Nations on 15 November 1947, to submit to the International Court of Justice for its Advisory Opinion the following questions :
>
> '1. Are the negotiation and notice provisions of Section 37 of the Agreement of 25 March 1951 between the World Health Organization and Egypt applicable in the event that either party to the Agreement wishes to have the Regional Office transferred from the territory of Egypt?
> 2. If so, what would be the legal responsibilities of both the World Health Organization and Egypt, with regard to the Regional Office in Alexandria, during the two-year period between notice and termination of the Agreement?' "

2. By letters dated 6 June 1980, the Registrar, pursuant to Article 66, paragraph 1, of the Statute of the Court, gave notice of the request for advisory opinion to all States entitled to appear before the Court.

3. The President of the Court, having decided pursuant to Article 66, paragraph 2, of the Statute, that those States Members of the World Health Organization who were also States entitled to appear before the Court, and the Organization itself, were likely to be able to furnish information on the question submitted to the Court, made an Order on 6 June 1980 fixing 1 September 1980 as the time-limit within which written statements might be submitted by those States. Accordingly, the special and direct communication provided for in

Article 66, paragraph 2, of the Statute was included in the above-mentioned letters of 6 June 1980 addressed to those States, and a similar communication was addressed to the WHO.

4. The following States submitted written statements to the Court within the time-limit fixed by the Order of 6 June 1980 ; Bolivia, Egypt, Iraq, Jordan, Kuwait, Syrian Arab Republic, United Arab Emirates, United States of America. The texts of these statements were transmitted to the States to which the special and direct communication had been sent, and to the WHO.

5. Pursuant to Article 65, paragraph 2, of the Statute and Article 104 of the Rules of Court, the Director-General of the WHO transmitted to the Court a dossier of documents likely to throw light upon the questions. This dossier was received in the Registry on 11 June 1980 ; it was not accompanied by a written statement, a synopsis of the case or an index of the documents. In response to requests by the President of the Court, the WHO supplied the Court, for its information, with a number of additional documents, and the International Labour Organisation supplied the Court with documents of that Organisation regarded as likely to throw light on the questions before the Court.

6. By a letter of 15 September 1980, the Registrar requested the States Members of the WHO entitled to appear before the Court to inform him whether they intended to submit an oral statement at the public sittings to be held for that purpose, the date fixed for which was notified to them at the same time.

7. Pursuant to Article 106 of the Rules of Court, the Court decided to make the written statements submitted to the Court accessible to the public, with effect from the opening of the oral proceedings.

8. In the course of three public sittings held on 21, 22 and 23 October 1980, oral statements were addressed to the Court by the following representatives :

For the *United Arab Emirates* : Mr. Mustafa Kamil Yasseen, Special Counsellor of the Mission of the United Arab Emirates at Geneva.

For the *Republic of Tunisia* : Mr. Abdelhawab Chérif, Counsellor, Embassy of Tunisia at The Hague.

For the *United States of America* : Mr. Stephen M. Schwebel, Deputy Legal Adviser, Department of State.

For the *Syrian Arab Republic* : Mr. Adnan Nachabé, Legal Adviser to the Ministry of Foreign Affairs.

For the *Arab Republic of Egypt* : H.E. Mr. Ahmed Osman, Ambassador of Egypt to Austria.

In reply to a question by the President, Mr. Claude-Henri Vignes, Director of the Legal Division of the WHO, stated at the public sitting that the WHO did not intend to submit argument to the Court on the questions put in the request for Opinion, but that he would be prepared, on behalf of the Director-General, to answer any question that the Court might put to him. Questions were put by Members of the Court to the Government of Egypt and to the WHO ; replies were given by the representative of Egypt and by the Director of the Legal Division of the WHO, and additional observations were made by the representatives of the United States of America and the United Arab Emirates.

9. At the close of the public sitting held on 23 October 1980, the President of the Court indicated that the Court remained ready to receive any further observations which the Director of the Legal Division of the WHO or the representatives of the States concerned might wish to submit in writing within a stated time-limit. In pursuance of this invitation, the Governments of the United States of America and Egypt transmitted certain written observations to the Court on 24 October and 29 October 1980 respectively ; copies of these were supplied to the representatives of the other States which had taken part in the oral proceedings, as well as to the WHO. Certain further documents were also supplied to the Court by the WHO after the close of the oral proceedings, in response to a request made by a Member of the Court.

* * *

10. The first, and principal, question submitted to the Court in the request is formulated in hypothetical terms :

> "1. Are the negotiation and notice provisions of Section 37 of the Agreement of 25 March 1951 between the World Health Organization and Egypt applicable in the event that either party to the Agreement wishes to have the Regional Office transferred from the territory of Egypt ?"

But a rule of international law, whether customary or conventional, does not operate in a vacuum ; it operates in relation to facts and in the context of a wider framework of legal rules of which it forms only a part. Accordingly, if a question put in the hypothetical way in which it is posed in the request is to receive a pertinent and effectual reply, the Court must first ascertain the meaning and full implications of the question in the light of the actual framework of fact and law in which it falls for consideration. Otherwise its reply to the question may be incomplete and, in consequence, ineffectual and even misleading as to the pertinent legal rules actually governing the matter under consideration by the requesting Organization. The Court will therefore begin by setting out the pertinent elements of fact and of law which, in its view, constitute the context in which the meaning and implications of the first question posed in the request have to be ascertained.

*

11. The existence at the present day of a Regional Office of the World Health Organization located at Alexandria has its origin in two main circumstances. One is the policy adopted by the WHO in 1946, which is expressed in Chapter XI of the text of its Constitution, of establishing regional health organizations designed to be an integral part of the Organization. The other is the fact that at the end of the Second World War there existed at Alexandria a health Bureau which, pursuant to that policy

and by agreement between Egypt and the WHO, was subsequently incorporated in the Organization in the manner hereafter described.

12. Article 44 of the WHO Constitution empowers the World Health Assembly to define geographical areas in which it is desirable to establish a regional organization and, with the consent of a majority of the members of the Organization situated within the area, to establish the regional organization. It also provides that there is not to be more than one regional organization in each area. Articles 45 and 46 proceed to lay down that each such regional organization is to be an integral part of the Organization and to consist of a regional committee and a regional office. Articles 47-53 then set out rules to regulate the composition, functions, procedure and staff of regional committees. Finally, Article 54, which contains special provisions regarding the "integration" of pre-existing inter-governmental regional health organizations, reads as follows :

> "The Pan American Sanitary Organization represented by the Pan American Sanitary Bureau and the Pan American Sanitary Conferences, and all other inter-governmental regional health organizations in existence prior to the date of signature of this Constitution, shall in due course be integrated with the Organization. This integration shall be effected as soon as practicable through common action based on mutual consent of the competent authorities expressed through the organizations concerned."

The above-mentioned provisions of Chapter XI are thus the constitutional framework within which the WHO came to establish its regional office in Egypt.

13. The existence of a health bureau in Alexandria dates back to the creation of a general Board of Health in Egypt in 1831 for the purpose of preventing the spread of cholera and other diseases by and among pilgrims on the way to and from Mecca. This Board subsequently acquired a certain international character as a result of the association with its quarantine work of seven representatives of States having rights in Egypt under the capitulations régime ; and in 1892 its character as an international health agency became more pronounced as a result of changes in the structure of its council effected by the International Sanitary Convention of Venice of that year. In this form the *Conseil sanitaire maritime et quarantenaire d'Egypte* operated successfully for over forty years, during which, by arrangement with the *Office international d'hygiène publique* and pursuant to the International Sanitary Convention of 1926, it also functioned as the Regional Bureau of Epidemiological Intelligence for the Near East. In 1938, at the request of the Egyptian Government, it was decided, at the International Sanitary Conference of that year that the *Conseil sanitaire* should be abolished and its functions assumed by the governments of Egypt and the other countries concerned, but this did not involve the suppression of the Regional Bureau of Epidemiological Intelligence. The new Bureau, although placed under the authority of the Egyptian Gov-

ernment, was to have the same international character as the former Bureau ; the Egyptian Government was to set up a commission including technical representatives of the affiliated countries. From 1938 onwards the expenses of the Bureau were wholly borne by the Egyptian Government. The Second World War broke out before the projected commission had been constituted, and from December 1940 until the end of hostilities the work of the Alexandria Bureau was taken over by a special wartime service under the Quarantine Department of the Egyptian Ministry of Public Health. After the hostilities had ended, the Bureau resumed its operations.

14. It has not been made entirely clear to the Court what was the exact situation in regard to the Alexandria Sanitary Bureau as a result of the events just described. But it was operating under Egypt's Ministry of Public Health when in 1946, and before the WHO Constitution had been adopted, Egypt raised the question of the relation of the Bureau to the Organization. Even before that, the members of the newly created League of Arab States had taken a decision in favour of using the Alexandria Bureau as their regional sanitary bureau. Meanwhile, however, the Alexandria Bureau was continuing to operate under the Egyptian sanitary authorities rather than as an inter-governmental institution. On the other hand, the projected association of the Bureau with the League of Arab States, the international character of its functions and its previous status may have led to the Bureau being regarded as an inter-governmental institution. This no doubt explains why, as will now be seen, the Alexandria Sanitary Bureau, despite any question there may have been as to its inter-governmental character, was in fact dealt with by the Organization as a case of integration under Article 54 of the WHO Constitution.

15. On 6 March 1947, at the direction of the WHO Interim Commission, the Executive Secretary of the Commission sent a circular letter to member governments enquiring as to whether they might wish to have either the headquarters of the organization or the seat of a regional office located on their territory and as to the facilities they could offer. Soon afterwards he was also directed to get in touch with the authorities "of the Pan Arab Sanitary Organization", and wrote on 2 May 1947 for information to the Egyptian Minister of Public Health. Replying on 26 July 1947, the Egyptian Minister supplied him with a memorandum giving an account of the history and activities of the "Pan Arab Regional Health Bureau" from 1926 onwards. When, on the basis of the memorandum, a recommendation was made by the Committee on Relations to the Interim Commission in September 1947 that negotiations should be started with the "Pan Arab Sanitary Organization", objection was taken that the Pan Arab Sanitary Bureau did not really exist. Some delegates observed that the negotiations should rather be with the Egyptian Government and, ultimately, it was with the Egyptian Government that the negotiations concerning the Bureau took place. In fact, the next development was a reply from the Egyptian Government to the Executive Secretary's circular

letter in which the Government stated that the competent authorities had declared that they were most anxious to see a regional bureau established at Alexandria, which could deal with all questions coming within the scope of the WHO for the entire Middle East.

16. Matters then began to move more quickly. It appears from a report submitted to the Interim Commission in May 1948, mentioned below, that early in January 1948 quarantine experts of the Arab countries met in Alexandria and passed a number of resolutions in favour of establishing a regional organization. This was to be composed of the member States of the League of Arab States and, it was contemplated, certain other States in the region ; it was to have a regional committee similarly composed ; and it was to use the Alexandria Bureau as its regional office. These resolutions were adopted in the light of the fact that the WHO was to take over the functions of pre-existing regional health organizations. The next step was an invitation from the Egyptian Ministry of Public Health to Dr. Stampar, Chairman of the Interim Commission, to visit Egypt and study on the spot the conditions for setting up the proposed regional organization. In May 1948 a substantial report, referred to above, was duly submitted by the Chairman of the Interim Commission in which he gave a detailed account of the past history and current activities of the Alexandria Bureau and set out the arguments in favour of it as the regional health centre for the Near and Middle East. He ended the report with the conclusion :

> "we are bound to admit that the conditions which predestinate Alexandria to be the centre of the future regional health organization for the Near and the Middle East are literally unique".

The Constitution of the WHO had now come into force and the question of the Alexandria Bureau was discussed in the Committee on Headquarters and Regional Organization at the first session of the new World Health Assembly. Mention was made of the facts that most of the member States of the Eastern Mediterranean area had agreed to the proposal for the establishment of a regional organization in that area, that the Alexandria Bureau was a pre-existing sanitary bureau, and that preliminary steps had already been taken for the final integration of this bureau with the WHO. Taking those facts into account the Committee recommended that the Executive Board should be instructed to integrate the Bureau with the WHO as soon as practicable, through common action, "in accordance with Article 54 of the WHO Constitution", and this recommendation was approved by the World Health Assembly on 10 July 1948 (resolution WHA1.72).

17. The Director-General of the WHO then proceeded to organize the setting up of a Regional Committee for the Eastern Mediterranean and an agenda was drawn up for its inaugural meeting due to take place on 7 February 1949. Earlier, the Executive Secretary of the Interim Commission had negotiated successfully with the Swiss Government the text of an

agreement for the WHO's headquarters in Geneva which had been approved by the First World Health Assembly on 17 July 1948 and by Switzerland on 21 August 1948 ; and a model host agreement had been prepared in the WHO for use in negotiations concerning the seats of regional or local WHO offices. Accordingly, when the agenda was drawn up for the Regional Committee's inaugural meeting on 7 February 1949, included in it was the question of a "Draft Agreement with the Host Government of the Regional Office".

18. At the Regional Committee's meeting the Egyptian Delegation informed the Committee on 7 February 1949 that the Egyptian Council of Ministers had just

> "agreed, subject to approval of the Parliament, to lease to the World Health Organization, for the use of the Regional Office for the Eastern Mediterranean area, the site of land and the building thereon which are at present occupied by the Quarantine Administration and the Alexandria Health Bureau, for a period of nine years at a nominal annual rent of P.T.10".

The Committee next took up the question of the location of the Regional Office for the Eastern Mediterranean area. A motion was introduced, which the Committee at once approved, "to recommend to the Director-General and the Executive Board, subject to consultation with the United Nations, the selection of Alexandria as the site of the Regional Office". The recitals in the formal resolution to that effect, adopted the following day referred, *inter alia,* to "the desirability of the excellent site and buildings under favourable conditions generously offered by the Government of Egypt".

19. The Regional Committee also addressed itself to the question of the integration of the Alexandria Sanitary Bureau with the WHO. After recalling that a Committee of the Arab States had previously voted in favour of the integration, the Egyptian delegate observed that, should this happen, "the WHO would have to take over expenses from the date of opening of the Regional Office". A few brief explanations having been given, the Committee adopted a resolution recommending the integration of the Bureau in the following terms :

> "Resolves to recommend to the Executive Board that in establishing the Regional Organization and the Regional Office for the Eastern Mediterranean the functions of the Alexandria Sanitary Bureau be integrated within those of the Regional Organization of the World Health Organization."

The Egyptian delegate responded by presenting a written statement to the Committee to the effect that, taking into account the resolution just adopted, his Government was pleased to transfer to the World Health Organization the functions and all related files and records of the Alexandria Sanitary Bureau. The statement went on to say that this transfer

would be made on the date on which the Organization notified the Government of Egypt of the commencement of operations in the Regional Office for the Eastern Mediterranean Region. That statement having met with warm thanks from the Committee, the Egyptian delegate proposed that the work of the Regional Office should begin in July 1949 and this proposal was adopted.

20. The Director-General now raised the question of the "Draft Agreement with the Host Government" which he had included in the Agenda. He said he wished to inform the Committee that "such a draft agreement had been produced and handed to the Egyptian Government where it was under study in the legal department". He also stated that the WHO, "though always considering necessary formalities, never allowed them to interfere with Health Work", and the Egyptian delegate then added the comment that, should there be any difference of opinion between the WHO and the legal expert, this could be settled by negotiation.

21. The question passed to the Executive Board of the WHO which, in March 1949, adopted resolution EB3.R30 "conditionally" approving selection of Alexandria as the site of the Regional Office, "subject to consultation with the United Nations". That resolution went on to request the Director-General to thank Egypt for "its generous action" in placing the site and buildings at Alexandria at the disposal of the Organization for nine years at a nominal rent. Next, it formally approved the establishment of the Regional Office for the Eastern Mediterranean and the commencement of its operations on or about 1 July 1949. The resolution then endorsed the Regional Committee's recommendation that the "functions" of the Alexandria Sanitary Bureau be "integrated" within those of the Regional Organization. It further authorized the Director-General to express appreciation to the Egyptian Government for the transfer of the "functions, files and records of the Alexandria Sanitary Bureau to the Organization upon commencement of operations in the Regional Office". The resolution did not deal with the projected host agreement still under negotiation with the Egyptian Government. Pursuant to the Agreement between the WHO and the United Nations which came into force on 10 July 1948 (Article XI), the consultation with the United Nations referred to in the resolution was effected in May 1949. This confirmed the selection of Alexandria as the site of the Regional Office.

22. However the draft host agreement, which necessarily had implications not only for the Ministry of Public Health but for other departments of the Egyptian administration, it would seem, had been undergoing close examination. As appears from a letter of 4 May 1949 from the Ministry of Foreign Affairs to Sir Ali Tewfik Shousha Pasha, then Under-Secretary of State for Public Health but already designated as the first WHO Regional Director for the Eastern Mediterranean, he had been discussing the draft agreement with the Foreign Ministry during April. In that letter the Foreign Ministry referred to the draft agreement as one

> "which the World Health Organization intends to conclude with the Egyptian Government on the privileges and immunities to be enjoyed by its regional office which will be established in Alexandria as well as the staff of that office".

It explained that it was enclosing a copy of the memorandum prepared by the Contentieux (legal department) of the Ministries of Foreign Affairs and Justice, setting out their comments on the draft agreement, together with a revised draft. The memorandum stated that, in studying the provisions of the draft, the Contentieux had also had regard to various other agreements concluded, or in course of conclusion, between individual States and specialized agencies on the occasion of the latter establishing headquarters or regional offices in their territories. In this connection, it made mention of the headquarters agreements already concluded by France with the United Nations Educational, Scientific and Cultural Organization, and by Switzerland with WHO itself, as well as draft agreements still under negotiation by France and Peru with the International Civil Aviation Organization regarding the seats of regional offices to be established in their territories. The memorandum went on to suggest numerous changes in the provisions of the agreement and gave detailed explanations of the amendments which the Contentieux wished to see in the draft. The memorandum and revised draft, it appears from a later note of Sir Ali Tewfik Shousha Pasha, were then transmitted to the Director-General of the WHO. It also appears from letters of 29 May and 4 June 1949 supplied to the Court by the WHO that some further exchanges took place between him and the Contentieux concerning the draft agreement at this time.

23. Meanwhile, however, the whole question of privileges and immunities for regional offices of international organizations had become at once more complicated and more pressing for the Egyptian administration. This was because by now Regional Bureaux for the Middle East had already been established in Cairo by the Food and Agriculture Organization of the United Nations, by ICAO and by Unesco, and because in any event it was becoming necessary to consider the question of Egypt's adherence to the Convention on the Privileges and Immunities of the Specialized Agencies. The general situation was laid before Egypt's Council of Ministers by the Foreign Minister in a Note of 25 May 1949. His Note ended with a proposal that, as a provisional measure the Council should grant to the staff of FAO, Unesco and WHO in their Regional Offices the same temporary exemption from customs dues on any articles and equipment imported from abroad and relating to their official work as was already enjoyed by ICAO. This proposal was endorsed by the Council of Ministers at a meeting four days later, and the Regional Director was so informed on 23 June. The operations of the Regional Office being due to commence on 1 July, the need to complete the negotiations for the host agreement had been under consideration by the World Health Assembly itself which passed a resolution on the subject on 25 June at its Second

Session. The Director-General was requested to continue the negotiations with the Government of Egypt in order to obtain an agreement extending privileges and immunities to the Regional Organization and to report to the next session. Pending the coming into force of that agreement, the Assembly invited the Government of Egypt to extend to the Organization the privileges and immunities set out in the Convention on the Privileges and Immunities of the Specialized Agencies. Egypt, however, had not yet adhered to that Convention, and it was only the Council of Ministers' decision authorizing, temporarily, exemption from customs dues that applied when the Regional Office commenced operations, as it did on the agreed date, 1 July 1949.

24. The Director-General continued the negotiations and on 26 July 1949 the WHO's comments on the Contentieux' memorandum were transmitted to the Egyptian Government, together with a revised draft of the host agreement and a draft lease of the site and buildings. On 9 November 1949, a host agreement on the same lines as the draft transmitted to Egypt was signed with the Government of India. In February 1950 the Executive Board noted the state of the negotiations ; a letter of 23 March 1950 to the WHO Regional Director from the Contentieux of the Egyptian Government Ministries gave the impression that, subject to minor modifications, WHO's draft was acceptable to Egypt. In that belief the Third World Health Assembly passed a resolution in the following May affirming the Agreement in the form of the WHO's revised draft. Subsequently, however, the Regional Office reported that the Egyptian authorities were, in fact, asking for a number of fairly substantial alterations. As the Director-General considered the amendments requested to touch fundamental points of principle and therefore to be unacceptable, he went himself to Egypt and, in negotiations with the Egyptian authorities on 19 and 20 December 1950, persuaded them to drop the amendments which were the cause of the disagreement. The Egyptian authorities then expressed themselves as ready to accept the host agreement, subject to the approval of the Egyptian Parliament and to certain points being set out in an accompanying Exchange of Notes. Eventually, the Agreement was signed in Cairo on 25 March 1951 and was approved by the Fourth World Health Assembly in May, although one of the points in the Exchange of Notes had given rise to some discussion in the Legal Sub-Committee. The Egyptian Parliament gave its approval towards the end of June and the long-negotiated host agreement finally entered into force on 8 August 1951. As to the lease of the site and buildings of the former Sanitary Bureau to the WHO, which under an Egyptian law also required Parliamentary approval, its execution was not completed until 1955, the operation of the lease then being expressed to have begun several years earlier on 1 July 1949.

25. Mention has finally to be made of an Agreement for the provision of services by the WHO in Egypt, signed on 25 August 1950. At the same time the Court notes that, according to the Director of the Legal Division of the

Organization, this Agreement does not have any particular connection with the setting up of the Regional Office in Egypt. The 1950 Agreement, he explained, is simply a standard form of agreement for the execution of technical co-operation projects, similar to Agreements concluded with other member States which have no WHO office situated on their territories.

26. The position appearing from the events which the Court has so far set out may be summarized as follows. During the early years of the WHO, Egypt raised the question of the relation to the new Organization of the existing long-established Alexandria Sanitary Bureau, and the Interim Commission of the WHO in turn approached Egypt regarding the integration of the existing Bureau with the Organization and the location of the WHO's Regional Office for the Eastern Mediterranean in Alexandria. Agreement was then reached between the WHO and Egypt early in 1949 that the operation of the Alexandria Bureau should be taken over by the WHO in July of that year. That agreement was arrived at on the basis of offers by the Egyptian Government to lease to the Organization for the use of the Regional Office for the Eastern Mediterranean the site and buildings of the existing Alexandria Bureau, and to transfer to the Organization the functions and all related files and records of the Bureau. Egypt's offers were accepted by the Organization which, on its part, undertook to assume financial responsibility for the Bureau on the date of the opening of the Regional Office ; and it was then decided that the date should be 1 July 1949. These arrangements were approved by the Egyptian Government and were endorsed by the Organization specifically as an integration of a pre-existing institution under Article 54 of its Constitution. Temporary exemption from customs dues having been provided by Egypt's Council of Ministers, the WHO's Regional Office commenced operating at the seat of the former Sanitary Bureau on 1 July 1949.

27. Meanwhile, negotiations for the conclusion of a host agreement for the Regional Office, begun at least five months earlier, had been making slow progress and were not completed until nearly two years later. On 25 March 1951, however, the Agreement, Section 37 of which is the subject of the present request, was signed and ultimately entered into force on 8 August of that year. That agreement, in the words of its preamble, was concluded :

> "for the purpose of determining the privileges, immunities and facilities to be granted by the Government of Egypt to the World Health Organization, to the representatives of its Members and to its experts and officials in particular with regard to its arrangements in the Eastern Mediterranean Region, and of regulating other related matters".

Its provisions followed closely those of the model host agreement prepared in the WHO, and are for the most part typical of those found in host agreements of headquarters or regional or local offices of international

organizations. These provisions are on the lines of the Convention of 21 November 1947 on the Privileges and Immunities of the Specialized Agencies, to which Egypt became a party on 28 September 1954. Under Section 39 of that Convention, however, the Agreement of 25 March 1951 continued to be the instrument defining the legal status of the Regional Office in Alexandria as between the WHO and Egypt.

*

28. The Court must now turn to the circumstances which have led to the submission of the present request to the Court. Ever since beginning its activities in Egypt on 1 July 1949, the WHO's Regional Office has operated continuously at the site of the former Sanitary Bureau in Alexandria. In doing so, however, it has encountered certain difficulties stemming from the tense political situation in the Middle East. Those difficulties are reflected in the fact that in 1954 the World Health Assembly found it necessary to divide the Committee into two sub-committees : Sub-Committee A in which Israel was not, and Sub-Committee B in which it was, represented.

29. On 7 May 1979 the Regional Director received a letter from the governments of five member States of the Region requesting the convening of an extraordinary meeting of the Regional Committee to discuss transferring the Regional Office from Alexandria to one of the other Arab member States. A special session of Sub-Committee A was held on 12 May 1979, attended by representatives of 20 States, but not by Egypt which had asked for the session to be postponed. Sub-Committee A adopted a resolution reciting the wish of the majority of its members that the Regional Office should be transferred to another State in the Region and recommending its transfer. Meanwhile, the question had also been placed on the agenda for the thirty-second Session of the World Health Assembly ; and on 16 May 1979 the Egyptian delegation submitted a Memorandum alleging certain procedural irregularities and objecting that the request for transfer was "politically motivated". The question was referred to a Committee which expressed the view that the effects of the implementation of such a decision by the Assembly needed study and recommended that the study be undertaken by the Executive Board.

30. The World Health Assembly adopted the recommendation of the Committee and, on 28 May 1979, the Executive Board set up a Working Group to study all aspects of the matter and report back in January 1980. The Working Group's report, dated 16 January 1980 (which is in the dossier of documents supplied to the Court), included a section entitled "Question of denunciation of the existing Host Agreement", as to which it said :

> "The Group considered that it was not in a position to decide whether or not Section 37 of the Agreement with Egypt is applicable. The final position of the Organization on the possible discrepancies of

> views will have to be decided upon by the Health Assembly . . . the International Court of Justice could also possibly be requested to provide an advisory opinion under Article 76 of the WHO Constitution."

The Executive Board accordingly transmitted the Working Group's report to the World Health Assembly for consideration and decision.

31. A further special session of Sub-Committee A of the Regional Committee for the Eastern Mediterranean was held in Geneva on 9 May 1980, attended by representatives of 20 States, including Egypt. A resolution was adopted, by 19 votes to 1 (that of Egypt) whereby the Sub-Committee decided to recommend the transfer of the Regional Office for the Eastern Mediterranean to Amman, Jordan, as soon as possible. The representative of Egypt objected that the recommendation was, in his view, based on purely political considerations. The question was again referred to the World Health Assembly at its thirty-third session, and at Egypt's request the text of the 1951 Host Agreement was distributed to member States. At its meeting on 16 May 1980, the Committee concerned had before it a draft resolution submitted by 20 Arab States under which the Health Assembly would decide to transfer the Regional Office to Amman, Jordan, as soon as possible. Before it also was a draft resolution submitted by the United States under which the Assembly would decide, "prior to taking any decision on removal of the Regional Office" to request an advisory opinion of the Court in the terms in which the request has been submitted to the Court. In the course of the debate the Arab States stressed the wish of the great majority of the member States of the Region to transfer the office from Egypt and the harm which they considered its retention in Alexandria would do to the work of the Organization. A number of other States, on the other hand, questioned the desirability of transferring a regional health office for political reasons and expressed doubts regarding the practical aspects of the transfer. The Egyptian delegate, *inter alia*, invoked Section 37, pointing out problems involved in its interpretation. The United States resolution was endorsed by the Committee which recommended its adoption to the World Health Assembly. Three days later, on 19 May, the representatives of 17 Arab States addressed a letter to the Director-General of the Organization informing him of their decision completely to "boycott" the Regional Office in its present location, not to have any dealings with it as from that date, and to deal directly with Headquarters in Geneva.

32. When the Committee's recommendation was considered by the World Health Assembly at a Plenary Meeting on 20 May, the delegate of Jordan disputed the relevance of Section 37 to the question of the transfer of the Regional Office from Egypt, and called for an opinion to be given by the Director of the Legal Division of the Organization. The latter then gave certain explanations as to the problems which he considered to be involved in the interpretation of Section 37 and added that he was not for the moment able to enlighten it further. The Assembly thereupon adopted the

draft resolution recommended by the Committee, the full text of which has been given in the opening paragraph of this Opinion. The resolution, the Court observes, in setting out the Assembly's decision to submit the present request to the Court, explained in recitals the reasons why the Assembly found it necessary to do so. In those recitals the Assembly took note of "the differing views" which had been expressed on the question of whether the Organization "may transfer the Regional Office without regard to the provisions of Section 37 of the Agreement between the World Health Organization and Egypt of 25 March 1951" ; and it further noted that the Working Group of the Executive Board had been "unable to make a judgment or a recommendation on the applicability of Section 37 of this Agreement".

*

33. In the debates in the World Health Assembly just referred to, on the proposal to request the present opinion from the Court, opponents of the proposal insisted that it was nothing but a political manoeuvre designed to postpone any decision concerning removal of the Regional Office from Egypt, and the question therefore arises whether the Court ought to decline to reply to the present request by reason of its allegedly political character. In none of the written and oral statements submitted to the Court, on the other hand, has this contention been advanced and such a contention would in any case, have run counter to the settled jurisprudence of the Court. That jurisprudence establishes that if, as in the present case, a question submitted in a request is one that otherwise falls within the normal exercise of its judicial process, the Court has not to deal with the motives which may have inspired the request (*Conditions of Admission of a State to Membership in the United Nations (Article 4 of Charter), Advisory Opinion, 1948, I.C.J. Reports 1947-1948,* pp. 61-62 ; *Competence of the General Assembly for the Admission of a State to the United Nations, Advisory Opinion, I.C.J. Reports 1950,* pp. 6-7 ; *Certain Expenses of the United Nations (Article 17, paragraph 2, of the Charter), Advisory Opinion, I.C.J. Reports 1962,* p. 155). Indeed, in situations in which political considerations are prominent it may be particularly necessary for an international organization to obtain an advisory opinion from the Court as to the legal principles applicable with respect to the matter under debate, especially when these may include the interpretation of its constitution.

* *

34. Having thus examined the factual and legal context in which the present request for an advisory opinion comes before it, the Court will now consider the full meaning and implications of the hypothetical questions on which it is asked to advise. Since those are formulated in the request by reference to the applicability of Section 37 of the Agreement of 25 March 1951 to a transfer of the Regional Office from Egypt, it is necessary at once

to turn to the provisions of that Section. Included in the 1951 Agreement as one of its "Final Provisions", Section 37 reads :

> "*Section 37.* The present Agreement may be revised at the request of either party. In this event the two parties shall consult each other concerning the modifications to be made in its provisions. If the negotiations do not result in an understanding within one year, the present Agreement may be denounced by either party giving two years' notice."

The "differing views" in the World Health Assembly as to the applicability of these provisions to a transfer of the Regional Office from Egypt, which are mentioned in the recitals to the resolution, concerned various points. One of these was whether a transfer of the seat of the Regional Office from Egypt is or is not covered by the provisions of the 1951 Agreement which to a large extent deal with privileges, immunities and facilities. Another was whether the provisions of Section 37 relate only to the case of a request by one or other party for revision of provisions of the Agreement relating to the question of privileges, immunities and facilities or are also apt to cover its total revision or outright denunciation. But the differences of view also involved further points, as appears from the debates and from the explanations given by the Director of the Legal Division of the WHO at the World Health Assembly's meeting of 20 May. Dealing with a question from the delegate of Jordan about the two years' notice provided for in Section 37, the Director of the Legal Division referred to the enlightenment to be obtained on the point by comparing the provisions in other host agreements. He also drew attention to the possibility of referring to the applicable general principles of international law, emphasizing the relevance in this connection of Article 56 of the International Law Commission's draft articles on treaties concluded between States and international organizations or between international organizations.

35. Accordingly, it is apparent that, although the questions in the request are formulated in terms only of Section 37, the true legal question under consideration in the World Health Assembly is : What are the legal principles and rules applicable to the question under what conditions and in accordance with what modalities a transfer of the Regional Office from Egypt may be effected ? This, in the Court's opinion, must also be considered to be the legal question submitted to it by the request. The Court points out that, if it is to remain faithful to the requirements of its judicial character in the exercise of its advisory jurisdiction, it must ascertain what are the legal questions really in issue in questions formulated in a request (cf. *Admissibility of Hearings of Petitioners by the Committee on South West Africa, Advisory Opinion, I.C.J. Reports 1956*, p. 26, and see also p. 37 ; *Certain Expenses of the United Nations (Article 17, paragraph 2, of the*

Charter), Advisory Opinion, I.C.J. Reports 1962, pp. 156-158). It also points out in this connection that the Permanent Court of International Justice, in replying to requests for an advisory opinion, likewise found it necessary in some cases first to ascertain what were the legal questions really in issue in the questions posed in the request (cf. *Jaworzina, Advisory Opinion, 1923, P.C.I.J., Series B, No. 8,* p. 282 ; *Interpretation of the Greco-Turkish Agreement of 1 December 1926, Advisory Opinion, 1928, P.C.I.J., Series B, No. 16,* pp. 5-16). Furthermore, as the Court has stressed earlier in this Opinion, a reply to questions of the kind posed in the present request may, if incomplete, be not only ineffectual but actually misleading as to the legal rules applicable to the matter under consideration by the requesting Organization. For this reason, the Court could not adequately discharge the obligation incumbent upon it in the present case if, in replying to the request, it did not take into consideration all the pertinent legal issues involved in the matter to which the questions are addressed.

36. The Court will therefore now proceed to consider its replies to the questions formulated in the request on the basis that the true legal question submitted to the Court is : What are the legal principles and rules applicable to the question under what conditions and in accordance with what modalities a transfer of the Regional Office from Egypt may be effected ?

* * *

37. The Court thinks it necessary to underline at the outset that the question before it is not whether, in general, an organization has the right to select the location of the seat of its headquarters or of a regional office. On that question there has been no difference of view in the present case, and there can be no doubt that an international organization does have such a right. The question before the Court is the different one of whether, in the present case, the Organization's power to exercise that right is or is not regulated by reason of the existence of obligations vis-à-vis Egypt. The Court notes that in the World Health Assembly and in some of the written and oral statements before the Court there seems to have been a disposition to regard international organizations as possessing some form of absolute power to determine and, if need be, change the location of the sites of their headquarters and regional offices. But States for their part possess a sovereign power of decision with respect to their acceptance of the headquarters or a regional office of an organization within their territories ; and an organization's power of decision is no more absolute in this respect than is that of a State. As was pointed out by the Court in one of its early Advisory Opinions, there is nothing in the character of international organizations to justify their being considered as some form of "super-State" (*Reparations for Injuries Suffered in the Service of the United Nations, Advisory Opinion, I.C.J. Reports 1949,* p. 179). International organizations are subjects of international law and, as such, are bound by

any obligations incumbent upon them under general rules of international law, under their constitutions or under international agreements to which they are parties. Accordingly, it provides no answer to the questions submitted to the Court simply to refer to the right of an international organization to determine the location of the seat of its regional offices.

*

38. The "differing views" expressed in the World Health Assembly regarding the relevance of the Agreement of 25 March 1951, and regarding the question whether the terms of Section 37 of the Agreement are applicable in the event of any transfer of the Regional Office from Egypt, were repeated and further developed in the written and oral statements submitted to the Court. As to the relevance of the 1951 Agreement in the present connection, the view advanced on one side has been that the establishment of the Regional Office in Alexandria took place on 1 July 1949, pursuant to an agreement resulting either from Egypt's offer to transfer the operation of the Alexandria Bureau to the WHO and the latter's acceptance of that offer, or from Egypt's acceptance of a unilateral act of the competent organs of the WHO determining the site of the Regional Office. Proponents of this view maintain that the 1951 Agreement was a separate transaction concluded after the establishment of the Regional Office in Egypt had been completed and the terms of which only provide for the immunities, privileges and facilities of the Regional Office. They point to the fact that some other host agreements of a similar kind contain provisions expressly for the establishment of the seat of the Regional Office and stress the absence of such a provision in the 1951 Agreement. This Agreement, they argue, although it may contain references to the seat of the Regional Office in Alexandria, does not provide for its location there. On this basis, and on the basis of their understanding of the object of the 1951 Agreement deduced from its title, preamble, and text, they maintain that the Agreement has no bearing on the Organization's right to remove the Regional Office from Egypt. They also contend that the 1951 Agreement was not limited to the privileges, immunities and facilities granted only to the Regional Office, but had a more general purpose, namely, to regulate the above-mentioned questions between Egypt and the WHO in general.

39. Proponents of the opposing view say that the establishment of the Regional Office and the integration of the Alexandria Bureau with the WHO were not completed in 1949 ; they were accomplished by a series of acts in a composite process, the final and definitive step in which was the conclusion of the 1951 host agreement. To holders of this view, the act of transferring the operation of the Alexandria Bureau to the WHO in 1949 and the host agreement of 1951 are closely related parts of a single transaction whereby it was agreed to establish the Regional Office at Alexandria. Stressing the several references in the 1951 Agreement to the location of the Office in Alexandria, they argue that the absence of a specific provision regarding its establishment there is due to the fact that this

Agreement was dealing with a pre-existing Sanitary Bureau already established in Alexandria. In general, they emphasize the significance of the character of the 1951 Agreement as a headquarters agreement, and of the constant references to it as such in the records of the WHO and in official acts of the Egyptian State.

40. The differences regarding the application of Section 37 of the Agreement to a transfer of the Regional Office from Egypt have turned on the meaning of the word "revise" in the first sentence and on the interpretation then to be given to the two following sentences of the Section. According to one view the word "revise" can cover only modifications of particular provisions of the Agreement and cannot cover a termination or denunciation of the Agreement, such as would be involved in the removal of the seat of the Office from Egypt ; and this is the meaning given to the word "revise" in law dictionaries. On that assumption, and on the basis of what they consider to be the general character of the 1951 Agreement, they consider all the provisions of the Section, including the right of denunciation in the third sentence, to apply only in cases where a request has been made by one or other party for a partial modification of the terms of the Agreement. They conclude that, in consequence, the 1951 Agreement contains no general right of denunciation and invoke the general rules expressed in the first paragraph of Article 56 of the Vienna Convention on the Law of Treaties and the corresponding provision of the International Law Commission's draft articles on treaties concluded between States and international organizations or between international organizations. Under those articles a treaty, "which contains no provision regarding its termination and which does not provide for denunciation or withdrawal" is not subject to denunciation or withdrawal unless, *inter alia,* such a right may be implied by the nature of the treaty. Referring to opinions expressed in the International Law Commission that headquarters agreements of international organizations are by their nature agreements in which a right of denunciation may be implied under the articles in question, they then maintain that such a general right of denunciation is to be implied in the 1951 Agreement. The proponents of this view go on to argue that in any case the transfer of the Regional Office from Egypt is not a matter which can be said to fall within the provisions of Section 37, and that the removal of the seat of the Office from Egypt would not necessarily mean the denunciation of the 1951 Agreement.

41. Opponents of the view just described insist, however, that the word "revise" may also have the wider meaning of "review" and cover a general or total revision of an agreement, including its termination. According to them, the word has not infrequently been used with that meaning in treaties and was so used in the 1951 Agreement. They maintain that this is confirmed by the *travaux préparatoires* of Section 37, which are to be found in negotiations between representatives of the Swiss Government and the ILO concerning the latter's headquarters agreement with Switzerland. These negotiations, they consider, concern the specific question of the

establishment of the ILO's seat in Geneva and, while Switzerland wished in this connection to include a provision for denunciation in the agreement, the ILO did not. The result, they say, was the compromise formula, subsequently introduced into WHO host agreements, which provides for the possibility of denunciation, but only after consultation and negotiation regarding the revision of the instrument. In their view, therefore, the *travaux préparatoires* confirm that the formula in Section 37 was designed to cover revision of the location of the Regional Office's seat at Alexandria, including the possibility of its transfer outside Egypt. They further argue that this interpretation is one required by the object and purpose of Section 37 which, they say, was clearly meant to preclude either of the parties to the Agreement from suddenly and precipitately terminating the legal régime it created. The proponents of this view of Section 37 also take the position that, even if it were to be rejected and the Agreement interpreted as also including a general right of denunciation, Egypt would still be entitled to notice under the general rules of international law. In this connection, they point to Article 56 of the Vienna Convention on the Law of Treaties and the corresponding article in the International Law Commission's draft articles on treaties concluded between States and international organizations or between international organizations. In both articles paragraph 2 specifically provides that in any case where a right of denunciation or withdrawal is implied in a treaty a party shall give not less than twelve months' notice of its intention to exercise the right.

42. The Court has described the differences of view regarding the application of Section 37 to a transfer of the Regional Office from Egypt only in a broad outline which does not reproduce all the refinements with which they have been expressed nor all the considerations by which they have been supported. If it has done this, it is because it considers that the emphasis placed on Section 37 in the questions posed in the request distorts in some measure the general legal framework in which the true legal issues before the Court have to be resolved. Whatever view may be held on the question whether the establishment and location of the Regional Office in Alexandria are embraced within the provisions of the 1951 Agreement, and whatever view may be held on the question whether the provisions of Section 37 are applicable to the case of a transfer of the Office from Egypt, the fact remains that certain legal principles and rules are applicable in the case of such a transfer. These legal principles and rules the Court must, therefore, now examine.

* *

43. By the mutual understandings reached between Egypt and the Organization from 1949 to 1951 with respect to the Regional Office of the Organization in Egypt, whether they are regarded as distinct agreements or as separate parts of one transaction, a contractual legal régime was created

between Egypt and the Organization which remains the basis of their legal relations today. Moreover, Egypt was a member – a founder member – of the newly created World Health Organization when, in 1949, it transferred the operation of the Alexandria Sanitary Bureau to the Organization ; and it has continued to be a member of the Organization ever since. The very fact of Egypt's membership of the Organization entails certain mutual obligations of co-operation and good faith incumbent upon Egypt and upon the Organization. Egypt offered to become host to the Regional Office in Alexandria and the Organization accepted that offer ; Egypt agreed to provide the privileges, immunities and facilities necessary for the independence and effectiveness of the Office. As a result the legal relationship between Egypt and the Organization became, and now is, that of a host State and an international organization, the very essence of which is a body of mutual obligations of co-operation and good faith. In the present instance Egypt became host to the Organization's Regional Office, with its attendant advantages, and the Organization acquired a valuable seat for its office by the handing over to the Organization of an existing Egyptian Sanitary Bureau established in Alexandria, and the element of mutuality in the legal régime thus created between Egypt and the WHO is underlined by the fact that this was effected through common action based on mutual consent. This special legal régime of mutual rights and obligations has been in force between Egypt and WHO for over thirty years. The result is that there now exists in Alexandria a substantial WHO institution employing a large staff and discharging health functions important both to the Organization and to Egypt itself. In consequence, any transfer of the WHO Regional Office from the territory of Egypt necessarily raises practical problems of some importance. These problems are, of course, the concern of the Organization and of Egypt rather than of the Court. But they also concern the Court to the extent that they may have a bearing on the legal conditions under which a transfer of the Regional Office from Egypt may be effected.

44. The problems were studied by the Working Group set up by the Executive Board of WHO in 1979, and it is evident from the report of that Working Group that much care and co-operation between the Organization and Egypt is needed if the risk of serious disruption to the health work of the Regional Office is to be avoided. It is also apparent that a reasonable period of time would be required to effect an orderly transfer of the operation of the Office from Alexandria to the new site without disruption to the work. Precisely what period of time would be required is a matter which can only be finally determined by consultation and negotiation between WHO and Egypt. It is, moreover, evident that during this period the Organization itself would need to make full use of the privileges, immunities and facilities provided in the Agreement of 25 March 1951 in order to ensure a smooth and orderly transfer of the Office from Egypt to its new site. In short, the situation arising in the event of a transfer of the

Regional Office from Egypt is one which, by its very nature, demands consultation, negotiation and co-operation between the Organization and Egypt.

*

45. The Court's attention has been drawn to a considerable number of host agreements of different kinds, concluded by States with various international organizations and containing varying provisions regarding the revision, termination or denunciation of the agreements. These agreements fall into two main groups : (1) those providing the necessary régime for the seat of a headquarters or regional office of a more or less permanent character, and (2) those providing a régime for other offices set up *ad hoc* and not envisaged as of a permanent character. As to the first group, which includes agreements concluded by the ILO and the WHO, their provisions take different forms. The headquarters agreement of the United Nations itself, with the United States, which leaves to the former, the right to decide on its removal, provides for its termination if the seat is removed from the United States "except for such provisions as may be applicable in connection with the orderly termination of the operations of the United Nations at its seat in the United States and the disposition of its property therein". Other agreements similarly provide for cessation of the host agreement upon the removal of the seat, subject to arrangements for the orderly termination of the operations, while others, for example, provide for one year's or six months' notice of termination or denunciation, and there are other variants. The *ad hoc* type of agreement, on the other hand, commonly provides for termination on short periods of notice or by agreement or simply on cessation of the operations subject to orderly arrangements for bringing them to an end.

46. In considering these provisions, the Court feels bound to observe that in future closer attention might with advantage be given to their drafting. Nevertheless, despite their variety and imperfections, the provisions of host agreements regarding their revision, termination or denunciation are not without significance in the present connection. In the first place, they confirm the recognition by international organizations and host States of the existence of mutual obligations incumbent upon them to resolve the problems attendant upon a revision, termination or denunciation of a host agreement. But they do more, since they must be presumed to reflect the views of organizations and host States as to the implications of those obligations in the contexts in which the provisions are intended to apply. In the view of the Court, therefore, they provide certain general indications of what the mutual obligations of organizations and host States to co-operate in good faith may involve in situations such as the one with which the Court is here concerned.

47. A further general indication as to what those obligations may entail is to be found in the second paragraph of Article 56 of the Vienna Con-

vention on the Law of Treaties and the corresponding provision in the International Law Commission's draft articles on treaties between States and international organizations or between international organizations. Those provisions, as has been mentioned earlier, specifically provide that, when a right of denunciation is implied in a treaty by reason of its nature, the exercise of that right is conditional upon notice, and that of not less than twelve months. Clearly, these provisions also are based on an obligation to act in good faith and have reasonable regard to the interests of the other party to the treaty.

* *

48. In the present case, as the Court has pointed out, the true legal question submitted to it in the request is : What are the legal principles and rules applicable to the question under what conditions and in accordance with what modalities a transfer of the Regional Office from Egypt may be effected ? Moreover, as it has also pointed out, differing views have been expressed concerning both the relevance in this connection of the 1951 Agreement and the interpretation of Section 37 of that Agreement. Accordingly, in formulating its reply to the request, the Court takes as its starting point the mutual obligations incumbent upon Egypt and the Organization to co-operate in good faith with respect to the implications and effects of the transfer of the Regional Office from Egypt. The Court does so the more readily as it considers those obligations to be the very basis of the legal relations between the Organization and Egypt under general international law, under the Constitution of the Organization and under the agreements in force between Egypt and the Organization. The essential task of the Court in replying to the request is, therefore, to determine the specific legal implications of the mutual obligations incumbent upon Egypt and the Organization in the event of either of them wishing to have the Regional Office transferred from Egypt.

49. The Court considers that in the context of the present case the mutual obligations of the Organization and the host State to co-operate under the applicable legal principles and rules are as follows :

- In the first place, those obligations place a duty both upon the Organization and upon Egypt to consult together in good faith as to the question under what conditions and in accordance with what modalities a transfer of the Regional Office from Egypt may be effected.
- Secondly, in the event of its being finally decided that the Regional Office shall be transferred from Egypt, their mutual obligations of co-operation place a duty upon the Organization and Egypt to consult together and to negotiate regarding the various arrangements needed to effect the transfer from the existing to the new site in an orderly manner and with a minimum of prejudice to the work of the Organization and the interests of Egypt.
- Thirdly, those mutual obligations place a duty upon the party which

wishes to effect the transfer to give a reasonable period of notice to the other party for the termination of the existing situation regarding the Regional Office at Alexandria, taking due account of all the practical arrangements needed to effect an orderly and equitable transfer of the Office to its new site.

Those, in the view of the Court, are the implications of the general legal principles and rules applicable in the event of the transfer of the seat of a Regional Office from the territory of a host State. Precisely what periods of time may be involved in the observance of the duties to consult and negotiate, and what period of notice of termination should be given, are matters which necessarily vary according to the requirements of the particular case. In principle, therefore, it is for the parties in each case to determine the length of those periods by consultation and negotiation in good faith. Some indications as to the possible periods involved, as the Court has said, can be seen in provisions of host agreements, including Section 37 of the Agreement of 25 March 1951, as well as in Article 56 of the Vienna Convention on the Law of Treaties and in the corresponding article of the International Law Commission's draft articles on treaties between States and international organizations or between international organizations. But what is reasonable and equitable in any given case must depend on its particular circumstances. Moreover, the paramount consideration both for the Organization and the host State in every case must be their clear obligation to co-operate in good faith to promote the objectives and purposes of the Organization as expressed in its Constitution ; and this too means that they must in consultation determine a reasonable period of time to enable them to achieve an orderly transfer of the Office from the territory of the host State.

50. It follows that the Court's reply to the second question is that the legal responsibilities of the Organization and Egypt during the transitional period between the notification of the proposed transfer of the Office and the accomplishment thereof would be to fulfil in good faith the mutual obligations which the Court has set out in answering the first question.

* * *

51. For these reasons,

THE COURT,

1. By twelve votes to one,

Decides to comply with the request for an advisory opinion ;

IN FAVOUR : *President* Sir Humphrey Waldock ; *Vice-President* Elias ; *Judges* Forster, Gros, Lachs, Nagendra Singh, Ruda, Mosler, Oda, Ago, El-Erian and Sette-Camara ;

AGAINST : *Judge* Morozov ;

2. With regard to Question 1,

By twelve votes to one,

Is of the opinion that in the event specified in the request, the legal principles and rules, and the mutual obligations which they imply, regarding consultation, negotiation and notice, applicable as between the World Health Organization and Egypt are those which have been set out in paragraph 49 of this Advisory Opinion and in particular that :

(a) their mutual obligations under those legal principles and rules place a duty both upon the Organization and upon Egypt to consult together in good faith as to the question under what conditions and in accordance with what modalities a transfer of the Regional Office from Egypt may be effected ;

(b) in the event of its being finally decided that the Regional Office shall be transferred from Egypt, their mutual obligations of co-operation place a duty upon the Organization and Egypt to consult together and to negotiate regarding the various arrangements needed to effect the transfer from the existing to the new site in an orderly manner and with a minimum of prejudice to the work of the Organization and the interests of Egypt ;

(c) their mutual obligations under those legal principles and rules place a duty upon the party which wishes to effect the transfer to give a reasonable period of notice to the other party for the termination of the existing situation regarding the Regional Office at Alexandria, taking due account of all the practical arrangements needed to effect an orderly and equitable transfer of the Office to its new site ;

IN FAVOUR : *President* Sir Humphrey Waldock ; *Vice-President* Elias ; *Judges* Forster, Gros, Lachs, Nagendra Singh, Ruda, Mosler, Oda, Ago, El-Erian and Sette-Camara ;

AGAINST : *Judge* Morozov ;

3. With regard to Question 2,

By eleven votes to two,

Is of the opinion that, in the event of a decision that the Regional Office shall be transferred from Egypt, the legal responsibilities of the World Health Organization and Egypt during the transitional period between the notification of the proposed transfer of the Office and the accomplishment thereof are to fulfil in good faith the mutual obligations which the Court has set out in answering Question 1 ;

IN FAVOUR : *President* Sir Humphrey Waldock ; *Vice-President* Elias ; *Judges* Forster, Gros, Nagendra Singh, Ruda, Mosler, Oda, Ago, El-Erian and Sette-Camara ;

AGAINST : *Judges* Lachs and Morozov.

Done in English and in French, the English text being authoritative, at the Peace Palace, The Hague, this twentieth day of December, one thousand nine hundred and eighty, in three copies, of which one will be placed in the archives of the Court, and the others transmitted to the Secretary-General of the United Nations and to the Director-General of the World Health Organization, respectively.

(Signed) Humphrey WALDOCK,
President.

(Signed) Santiago TORRES BERNÁRDEZ,
Registrar.

Judges GROS, LACHS, RUDA, MOSLER, ODA, AGO, EL-ERIAN, and SETTE-CAMARA append separate opinions to the Opinion of the Court.

Judge MOROZOV appends a dissenting opinion to the Opinion of the Court.

(Initialled) H.W.

(Initialled) S.T.B.

[TEMPLATE]

Letter of Agreement

This Letter of Agreement is further to discussions which have recently taken place regarding an amicable settlement in connection with claims related to your Special Service Agreement concluded with the World Health Organization ("WHO") for the period [xxx], [as summarized in the attached Final Payment Summary dated xxx].

I am pleased to inform you that WHO has agreed to the following terms and conditions in full and final settlement of all aspects of the aforesaid claims contained therein:

1. To pay an all-inclusive lump sum of USD xxxxxx (*Add full amount*) to your bank account within 15 days following your signature of this Letter of Agreement.

2. By signing this Letter of Agreement you certify that you have not filed, before any person or in any forum any claim against WHO or against any serving or former staff members and agent of WHO. You also agree to immediately, unconditionally and irrevocably withdraw your application for xxx. You further irrevocably agree that you will not in the future file before any person or forum any further claim against WHO or against any serving or former staff member and agent of WHO.

3. By signing this Letter of Agreement, you agree to provide WHO within 15 days upon receipt of the payment mentioned in §1 above a written undertaking certifying that you have unconditionally and irrevocably withdraw your application for xxx.

4. By signing this Letter of Agreement you further undertake that you will not release any information, orally or in writing, on the terms of this Letter of Agreement or the decisions, actions and events leading to it.

5. Nothing in this Letter of Agreement shall be deemed to constitute a waiver, express or implied, of any of WHO's privileges and immunities.

Please confirm your agreement by signing and returning to me the attached copy of this Letter of Agreement by xxx. Kindly provide us also your bank account details.

Xxx
Title

I have read and understood the terms and conditions set out in this Letter of Agreement, and agree to them unequivocally.

Date/place:

Signature:

DRAFT

IN THE HIGH COURT OF THE FEDERAL CAPITAL TERRITORY
IN THE ABUJA JUDICIAL DIVISION
HOLDEN AT JABI, ABUJA
BEFORE THE HIS LORDSHIP, HON. JUSTICE A. B. MOHAMMED
ON THE 3RD DAY OF NOVEMBER, 2014.

SUIT. NO. FCT/HC/CV/660/14

MOTION NO. M/6618/14

BETWEEN:

JOSHUA IDOKO ESQ
(SUING AS LAWFUL ATTORNEY
OF ALHAJI HAMZA ABDULLAHI)

PLAINTIFF

AND

1. WORLD HEALTH ORGANISATION
2. DR. RUI GAMA VAZ
   (The Country Representative
   World Health Organization)

DEFENDANTS

Parties: Parties absent

Appearances: Ikechukwu Kanu Esq, for the Plaintiff
Dr. E. O. Okebukola, for the Defendants.

RULING

This is a ruling in respect of the Preliminary Objection filed by the Defendants/Applicants on 4th of August, 2014 and brought pursuant to Order 46 Rule 1 of the High Court of the Federal Capital Territory (Civil Procedure) Rules, 2004; Section 11, Item 1 of the First Schedule of the Diplomatic Immunities and Privileges Act; Paragraph 11 of the Diplomatic Privileges

F.C.T. JUDICIARY
CERTIFIED TRUE COPY
Date 4/11/14
ODOMA ABDUL
PRINCIPAL REGISTRAR
High Court of Justice, F.C.T. Abuja

(World Health Organisation) Order; and under the inherent jurisdiction of the Court. The Defendants/Applicants pray the Court for the following:

1. An order striking out the name of the 2nd Defendant from this suit;
2. An order striking out this suit for want of jurisdiction; and
3. Any other or further order(s) that this Court may deem fit to make in the circumstances.

The grounds upon which the application is brought were as follows:

1. The 1st Applicant is an International Organisation that enjoys immunity from legal process in the Federal Republic of Nigeria.
2. The 1st Applicant is a Specialised Agency of the United Nations Organisation and enjoys immunity from legal process in the Federal Republic of Nigeria.
3. The immunity conferred on the 1st Applicant includes the 2nd Applicant for the purposes of actions, deeds and conduct attributable to the 1st Applicant.
4. The 2nd Applicant is an employee and Head of Mission of the 1st Applicant and enjoys immunity from suit and legal process in respect of words spoken or written and all acts done by him in the course of the performance of his official duties.
5. The Plaintiff's action discloses no cause of action against the 2nd Defendant/Applicant.
6. The tenancy agreement filed in court by the Plaintiff/Respondent discloses a yearly tenancy but the Plaintiff/Respondent did not serve or file the statutory notice to quit for yearly tenancies.
7. The suit of the Plaintiff/Respondent is an abuse of court process.
8. Although not submitting to the jurisdiction of the Court, the 1st Defendant/Applicant is willing to pay rent at the rate of last payment as well as vacate the premises.

F.C.T. JUDICIARY
CERTIFIED TRUE COPY
Date 4/11/14
ODOMA ABU
PRINCIPAL REGISTRAR
High Court of Justice, F.C.T. Abuja

In his adopted Written Address in support of the Objection, learned Counsel for the Applicant, Dr. Elijah Oluwatoyin Okebukola, raised two issues for determination, which were:

a. Whether the 2nd Defendant/Applicant is properly joined as a party to this suit.
b. Whether this Honourable Court has jurisdiction to hear and determine this suit against the Defendants/Applicants.

On the first issue, learned Counsel submitted that in the determination whether the 2nd Defendant is a proper, desirable or necessary party to this suit, recourse must be made to the Plaintiff's pleadings. Counsel pointed out that the 2nd Defendant is not mentioned in any of the 12 paragraphs of the Plaintiff's Statement of Claim, and the 2nd Defendant is also not a party to the tenancy agreement filed in this Court by the Plaintiff. Learned Counsel submitted that the Plaintiff's pleadings have also not stated that the 2nd Defendant is in occupation of the premises in issue or that the Defendant has any legal, equitable or other interest in the premises in question. Counsel argued that it is the interest of the 2nd Defendant in the subject matter or cause of action that determines whether he is a proper, desirable or necessary party to the proceeding. He relied on OSUN STATE GOVERNMENT v DANLAMI (NIG.) LTD. (2003) 7 NWLR (Pt. 818) 72 at 102.

Learned Counsel also submitted that there is nothing in the pleadings of the Plaintiff to show that the 2nd Defendant will be affected by the result of this action and argued that this matter can be effectively dealt with in the absence of the 2nd Defendant. Counsel added that the 2nd Defendant does not fall into the recognized parties categorized in the cases of GREEN v GREEN (1987) 3 NWLR (Pt. 61) 480 at 493; and DAPIALONG v LALONG (2007) 5 NWLR (Pt. 1026)

F.C.T. JUDICIARY
CERTIFIED TRUE COPY
Date 7/11/14
ODOMA ABDUL
PRINCIPAL REGISTRAR
High Court of Justice, F.C.T. Abuja

.199. Counsel urged the Court to hold that the 2nd Defendant has been improperly joined in this suit and strike out its name from the suit.

Turning to his issue two, learned Counsel drew the Court's attention to the legal personality of the 1st Defendant as an international organization of which the Federal Republic of Nigeria is a member and which is duly recognized by Nigerian laws. Counsel also referred the Court to Paragraph 2 of the Diplomatic Privileges (World Heath Organisation) Order and Item 4 of the Diplomatic Privileges (Specialised Agencies) Declaration of Application Notice; and Diplomatic Privileges (United Nations) Declaration of Application Notice. Counsel submitted that the status of the 1st Defendant is not only an International Organisation but also a specialised agency of the United Nations Organisation. Counsel submitted that by virtue of Section 124 of the Evidence Act, these facts require no further proof. Learned Counsel submitted that the 1st Defendant has immunity from legal process in Nigeria, and relied on Section 11(2) of the Diplomatic Immunities and Privileges Act, Items 1 of the First Schedule to the Act; Item E of the Fifth Schedule of the same Act; and Item 4 of the Diplomatic Privileges (Specialised Agencies) Declaration of Application Notice.

Learned Counsel urged the Court to hold that in his capacity as an employee and Head of Mission to the 1st Defendant, the 2nd Defendant also enjoys immunity from legal process by virtue of Paragraph 11(b) of the Diplomatic Privileges (World Health Organisation) Order. Counsel urged the Court to strike out the suit on the ground that all the defendants enjoy immunity from any legal process.

It was also the submission of learned Counsel for the Defendants that there is nothing in the Plaintiff's pleading to show that he served the statutory notice

F.C.T. JUDICIARY
CERTIFIED TRUE COPY
Date 4/11/14
ODIOMA ABU...
PRINCIPAL REGISTRAR
High Court of Justice, F.C.T. Abuja

to quit on the 1st Defendant before issuing a notice of intention of recover possession and as such the suit is premature and incompetent. He cited OSSAI v WAKWAH (2006) 4 NWLR (Pt. 969) 208 at 235. Counsel finally submitted that the Defendants are willing to vacate the premises and pay for the time they stayed at the rent they paid the previous years. He argued that this demonstrates the Defendants' good faith. He urged the Court to grant the Defendants/Applicants' prayers and strike out the suit in its entirety.

In opposition to the Objection, learned Counsel for the Plaintiff, Kanu Ikechukwu Esq, filed and adopted a Reply on Points of Law dated 12th September, 2014 and filed on 19th September, 2014. Counsel submitted that the Defendants' preliminary objection is incompetent, an abuse of process and a waste of time. He argued that the preliminary objection is incompetent for the failure of the Defendants to file their Statement of Defence alongside the preliminary objection since it bothers on issues of facts. He relied on Order 22 Rule 1 of the Rules of this Court and the cases of SHELL PETROLEUM DEVELOPMENT & 1 OR. V E.N. NWAKA & 1 OR. (2001) 10 NWLR (Pt. 720) 80; JULIUS BERGER (NIG) PLC v T.R.C. BANK LTD. (2010) 9 NWLR (Pt. 1198) 99; EGUONU v B.R.T.C. (1997) 12 NWLR (Pt. 531).

Counsel expressed that issues raised by the Defendants in their preliminary objection are issues that can be clarified by filing of pleadings and calling of witnesses since the Defendants are not challenging the jurisdiction of the court simpliciter, but rather contending that the Defendants are not proper parties to the suit and that there is no cause of action against the 2nd Defendant. He argued that whether or not there is a cause of action is not a matter to be determined at any interlocutory stage by way of preliminary objection. Learned Counsel further submitted that the Defendants' preliminary objection

F.C.T. JUDICIARY
CERTIFIED TRUE COPY
Date: 4/11/14
DOOMA ABDUL
PRINCIPAL REGISTRAR
High Court of Justice F.C.T. Abuja

is incompetent for the Defendants' failure to support same with an affidavit. He cited AMEH v NWANKWO (2007) 12 NWLR (Pt. 1049) 578.

On the submissions of the Defendants over their immunity, learned Counsel argued that both the 1st and 2nd Defendants can be sued in their professional and commercial activities. Relying on the case of ZABUSKY v ISRAEL AIR IND. (2008) 2 NWLR (Pt. 1070) 139-140, he submitted that the Defendants having entered into a commercial agreement with the Plaintiff can be sued on such a professional or commercial activity. He urged the Court to so hold. Counsel pointed out that the Defendants' tenancy having expired since 30th of October, 2013 the Defendants are only entitled to seven day notice of owner's intention to recover possession. He relied on Section 7 of the Recovery of Premises Act (Abuja).

Counsel finally submitted that the Defendants have been duly issued with the requisite statutory notice and the condition precedent to the institution of the suit has been complied with. He urged the Court to dismiss the preliminary objection with substantial cost.

In the Reply on Points of Law to the Plaintiff/Respondent's Address, it was submitted on behalf of the Defendants/Applicants, with regard to the Plaintiff's argument over demurrer, that the established position of law that jurisdiction is so fundamental that it can be raised at any stage of the proceedings and even after judgment. Reliance was placed on the Supreme Court decision in OMOKHAFE v MILITARY ADMINISTRATOR, EDO STATE (2005) 2 MJSC 173 at 183-184, paras. G – A, where it was held that whenever the issue of jurisdiction is raised, the Court has a duty to consider it timeously before taking any further step in the matter. He also referred to LAKANMI v ADENE (2003) 12 MJSC 99 at 115, paras. F – G; OLUTOLA v UNIILORIN (2005) 3

F.C.T. JUDICIARY
CERTIFIED TRUE COPY
Date 4/11/14
ODOMA ABDUL
PRINCIPAL REGISTRAR
High Court of Justice F.C.T. Abuja

MJSC 151 at 164, paras. G – F; and AJAYI v ADEBIYI (2012) 11 NWLR (Pt. 1310) 137 at 180, para. B.

On the argument that the issues raised by the Defendants in this objection demand the filing of pleadings and calling of witnesses, learned Counsel for the Defendants submitted that the arguments over the Diplomatic Immunities and Privileges Act and other legal provisions are not matters that will be clarified by calling of witnesses but purely matters of law. He submitted that only matters of customary law or foreign law require proof of witnesses. He urged the Court to so hold. Learned Counsel argued that the case of ZABUSKY v ISRAEL AIR IND. cited by the Plaintiff is not applicable to this case because the Defendants are not sued in their personal capacity, but rather in their official capacity and none of the parties in that case had diplomatic immunity. He also argued that the contract in this case is not one that relates to a commercial activity. He referred to the definition of commercial activity in Black's Law Dictionary, 9th Edition at page 304 and urged the Court to hold that the tenancy agreement between the 1st Defendant and the Plaintiff's principal for the purpose of using the demised premises as residence or office does not amount to a commercial activity. He drew the attention of the Court to paragraph 6(ii) of the tenancy agreement where the purpose of the demised premises was stated as residence/office.

Counsel urged the Court to take judicial notice of the nature of the 1st Defendant as an international organization ans specialized agency of the United Nations, as well as the work of the 1st Defendant as a non-profit and humanitarian organization involved in health matters and as such is not engaged in profit making ventures. Learned Counsel also argued that the Diplomatic Immunities and Privileges Act and related legal documents relied upon by the Defendants do not provide any exception to the immunity from

F.C.T. JUDICIARY
CERTIFIED TRUE COPY
4/11/14

legal process except express waiver. He urged the Court not to import any exception which is not clearly provided by statute.

Learned Counsel submitted that once the Court resolves the issue of immunity in favour of the Defendants the question of statutory notice to quit is subsumed. He argued that as stipulated in Section 8 of the Recovery of Premises Act, a yearly tenant is to be given half a year's notice which must determine on the eve of the anniversary of the tenancy. Counsel submitted that no such notice has been issued or laid before the Court by the Plaintiff as required by law for yearly tenancies. He urged the Court to uphold the Objection and grant the Defendants/Applicants' reliefs.

I have examined the submissions of the parties in this application and I think that the issues that call for determination are:

1. Whether this Honourable Court has the jurisdiction to hear and determine this suit against the 1st and 2nd Defendants/Applicants; and
2. If issue 1 is in the affirmative, whether the suit itself is properly constituted as to confer jurisdiction on this Court to hear and determine same.

Before I proceed to consider the two issues however, I must first address the objection as to the propriety of this application which was raised in the Plaintiff's submission. In raising the objection, the Plaintiff has relied on Order 22 Rule 1 of the Rules of this Court and the cases of SHELL PETROLEUM DEVELOPMENT & 1 OR. V E.N. NWAKA & 1 OR.; JULIUS BERGER (NIG) PLC v T.R.C. BANK LTD.; and EGUONU v B.R.T.C. (supra), to argue that the rules of Court forbid demurrer. But the Defendants have countered that the issues raised by them relate to the jurisdiction of the Court and as such the issues could be raised at any stage of the proceedings even by way of preliminary

F.C.T. JUDICIARY
CERTIFIED TRUE COPY
Date 4/11/14
ODOMA ABU...
PRINCIPAL REGISTRAR
HIGH COURT ... F.C.T. Abuja

objection. They placed reliance on OMOKHAFE v MILITARY ADMINISTRATOR, EDO STATE; LAKANMI v ADENE; OLUTOLA v UNIILORIN; and AJAYI v ADEBIYI (supra).

On this, the law is very clear. In Nigeria Deposit Insurance Corporation v. Central Bank of Nigeria & Anor. (2002) 7 NWLR (Pt.766) 272, the Supreme Court made a clear distinction between a demurrer and an objection to the jurisdiction of the court. In so doing, His Lordship Uwaifo, JSC stated that -

> "The tendency to equate demurrer with objection to jurisdiction could be misleading. It is a standing principle that in demurrer, the Plaintiff must plead and it is upon that pleading that the Defendant will contend that accepting all the facts pleaded to be true' the Plaintiff has no cause of action, or, where appropriate, no locus standi ... But as already shown, the issue of jurisdiction is not a matter for demurrer proceedings. It is much more fundamental than that and does not entirely depend as such on what a Plaintiff may plead as facts to prove the reliefs he seeks, What it involves is what will enable the Plaintiff to seek a hearing in court over his grievance and get it resolved because he is able to show that the court in empowered to entertain the subject matter. It does not always follow that he must plead first in order to raise the issue of jurisdiction.

See also on this issue: AJAYI v ADEBIYI & ORS (2012) LPELR-7811(SC), per Adekeye, JSC at page 50, paras B – G; LIVERPOOL AND LONDON STEAMSHIP PROTECTION AND INDEMNITY ASSOCIATION LTD. v M/T TUMA & ORS (2011) LPELR-8979(CA), per Okoro, JCA at pages 16 – 17, paras. C – G; MICROSOFT CORPORATION v FRANIKE ASSOCIATES LTD. (2011) LPELR-8987(CA), per. Pemu, JCA at page 18, paras. B – D. Indeed in AJAYI v ADEBIYI (supra), Adekeye, JSC abtly captured a similar scenario to the one in the instant case when she held that an application or preliminary objection seeking an order to strike out a

F.C.T. JUDICIARY
CERTIFIED TRUE COPY
4/11/14

suit for being incompetent on the ground of absence of jurisdiction is not a demurrer and therefore can be filed and taken even before the defendant files his statement of defence or without the defendant filing a statement of defence. (See: page 49, paras E-G).

From the foregoing, I have no hesitation in discountenancing the Plaintiff's argument over the propriety of this application on the ground of demurrer, since the Defendants' objection relates to the jurisdiction of this court to determine the suit. I hold that Order 22 Rule 1 relied upon by the Plaintiff is inapplicable to this application and the preliminary objection is proper before the Court.

Having determined the propriety of the Preliminary Objection, I shall now consider the two issues I formulated for its determination. On issue one, the central argument of the Defendants is that they are covered by the Diplomatic Immunities and Privileges Act, Cap. D9, Laws of the Federation of Nigeria, 2004 and the Diplomatic Immunities (World Health Organisation) Order No. 34 of 1949. The Plaintiff has however countered that the Defendants are not covered by such immunity because the transaction entered into by the Defendants with the Plaintiff is a commercial transaction.

Section 11 (1) and (2) of the Diplomatic Immunities and Privileges Act, Cap. D9, LFN, 2004 which is relied upon by the Defendants provides:

(1) This section shall apply to any organization declared by the Minister by order to be an organization the members of which are sovereign powers (whether foreign sovereign powers or Commonwealth countries) or the government thereof.

(2) The Minister may, from time to time, by Order in the Federal Gazzette –

F.C.T. JUDICIARY
CERTIFIED TRUE COPY
4/11/14
ODOMA ABLA
PRINCIPAL REGISTRAR
High Court of Justice, FCT Abuja

(a) provide that any organization to which this section applies (hereinafter referred to as "the organisation") shall, to such extent as may be specified in the Order, have the immunities and privileges set out in the First Schedule to this Act, and shall also have the legal capacities of a body corporate;

(b) confer upon –

(i) any person who are representatives (whether of government or not) of any organ of the organization or at any conference convened by the organization or of any organ thereof;

(ii) such officers or classes of officers of the organization as are specified in the Order, being the holders of such high offices in the organization as are specified;

(iii) such persons employed on missions on behalf of the organization as are specified in the order,

to such extent as are specified in the Order, the immunities and privileges specified in the Second Schedule to this Act;

(c) confer upon such other classes of officers and servants of the organization as specified in the Order, the immunities and privileges specified in the Third Schedule to this Act to such extent as are so specified,

and the Fourth Schedule to this Act shall have effect for the purpose of extending to the staff of such representatives and members as are mentioned in sub-paragraph (i) of paragraph (b) of this subsection and to the families of officers of the organization any immunities and privileges conferred on the representatives, members, or officers under that paragraph, except in so far as the operation of the said Fourth Schedule is excluded by the Order conferring the immunities and privileges.

F.C.T. JUDICIARY
CERTIFIED TRUE COPY
4/11/14
ODOMA ABDUL
PRINCIPAL REGISTRAR
HIGH COURT OF JUSTICE, F.C.T. ABUJA

In addition, Sections 3 and 9(1)(a) and (b) of the Diplomatic Privileges (World Health Organisation) Order, which is made pursuant to the Act, and which is also relied upon by the Defendants, provide that:

3. The Organisation shall have legal capacities of a body corporate and, except in so far as in any particular case it has expressly waived its immunity, immunity from suit and legal process. No waiver of immunity shall be deemed to extend to any measure of execution.

9. (1) Except in so far as in any particular case any privilege or immunity is waived, in the case of representatives of member governments, by the member governments whom they represent, and in the case of persons designated to serve on the Executive Board of the Organisation and their alternates and advisers, by the Executive Board, representatives of member governments and persons designated to serve on the Executive Board of the Organisation and their alternates and advisers shall enjoy –

   (a) while exercising their functions as such, and during their journey to and from the place of meeting, immunity from personal arrest or detention and from seizure of their personal baggage and inviolability of all papers and documents;

   (b) immunity from legal process of every kind in respect of words spoken or written and all acts done by them in their capacity as representatives.

From the above express provisions, it is incontrovertibly clear that both the 1st and 2nd Defendants in this case have been conferred with immunities against suit or legal process unless such immunities have been expressly waived by them. This statutory position is reinforced by the Supreme Court in the case of AFRICAN REINSURANCE CORPORATION V. ABATE FANTAYE (1986) LPELR-214(SC) or (1986) NWLR (Pt. 32) 811 where it was held that:

It is in pursuance of the principle of Omnis coactio abesse a legato debet, that a public Minister does not owe even temporary allegiance to

F.C.T. JUDICIARY CERTIFIED TRUE COPY 4/11/24 Date ODOMA ABUJE PRINCIPAL REGISTRAR High Court of Justice, F.C.T. Abuja

the sovereign to whom he is accredited. Of course, this immunity could be waived even at common law...Waiver is not to be presumed against a sovereign or an organisation that enjoys immunity. If anything, the presumption is that there is no waiver until the evidence shows to the contrary. And that evidence must show positively to the contrary. (Per Eso, JSC at page 38, paras. C -- F).

See also: ALHAJI KEHINDE ASAFA OLUWALOGBON & ORS V. THE GOVERNMENT OF UNITED KINGDOM & ANOR (2005) LPELR-11319(CA) or (2005) 14 NWLR (Pt.946)760, per Muhammad, JCA (as he then was) at pages 23-24, paras. G-C.

From the foregoing, it is evident that this Court can only assume jurisdiction over the Defendants in this case if they submit to the jurisdiction of the Court, such as by appearing and pleading otherwise than to the jurisdiction of this Court or if it can be expressly shown that the Defendants have waived their immunity. In AFRICAN REINSURANCE CORPORATION V. ABATE FANTAYE (supra), it was held that

> ...the right to the immunities or privileges may be claimed at any time and, in the case of legal processes, at any stage of the proceedings. It is clear also waiver of right of any immunity must be express and clear and cannot be implied or inferred by conduct of the person or organisation. (Per Coker, JSC at page 49, paras. C-E).

I have examined the Tenancy Agreement which gave rise to this suit. There are no express provisions contained in it where the 1st and 2nd Defendants have waived their immunity.

Indeed in AFRICAN REINSURANCE CORPORATION V. ABATE FANTAYE (supra), the facts were such that the transaction was not only commercial in nature (the contract for building of the Lagos Headquarters of African Reinsurance Corporation), but there was a specific provision in the contract agreement to

F.C.T. JUDICIARY CERTIFIED TRUE COPY Date 4/11/14 ODOMA ABDUL- PRINCIPAL REGISTRAR High Court of Justice, F.C.T. Abuja

the effect that any dispute arising from the contract could be litigated upon in a Lagos High Court. In other words, there was an express provision in which the Corporation submitted itself to the jurisdiction of the Court.

In the instant case, the provisions of Section 3 and 9(1)(a) and (b) of the Diplomatic Privileges (World Health Organisation) Order are clear as to the requirement of an express waiver for legal processes to be commenced against the Defendants. As stated by the Supreme Court in AFRICAN REINSURANCE CORPORATION v ABATE FANTAYE (supra), the waiver of such immunity from legal processes cannot be implied or inferred from the mere conduct of the Defendants (in executing the tenancy agreement). In view of these legal requirements, it is expected that the Plaintiff should have incorporated an express waiver of immunity of the Defendants in the tenancy agreement instead of leaving same to inference or implication. As to whether the Defendants have submitted to the jurisdiction of this Court by putting up appearance in this case, the Defendants have only entered conditional appearance before this Court and filed this objection to the jurisdiction of the Court.

In view of the foregoing, I must discountenance the submissions of learned Counsel for the Plaintiff on the issue of commercial transaction. The case of ZABUSKY v ISRAELI AIRCRAFT IND. (2008) 2 NWLR (Pt. 1070) 109, which was cited by the learned Counsel for the Plaintiff, only deals with the extent of diplomatic immunities and privileges granted to foreign envoys and consular officers. It states that such does not extend to suits that brother on professional and commercial interest. In the instant case, the provisions conferring immunity upon the Defendants as in Section 3 and 9(1) and (2) of the Diplomatic Privileges (World Health Organisation) Order which I have reproduced above, are clear as to the requirement of an express waiver. It categorically provides that no waiver of immunity shall be deemed to extend

F.C.T. JUDICIARY
CERTIFIED TRUE COPY
Date 4/11/14
Principal Registrar
High Court of the F.C.T. Abuja

to any measure of execution. In this case no such express waiver has been shown by the Plaintiff in this regard. The Plaintiff who entered into the tenancy transaction with the Defendants did not take it upon himself to ensure that such an express waiver was provided in the tenancy agreement as contained in the contract agreement in AFRICAN REINSURANCE CORPORATION v ABATE FANTAYE (supra). As stated by the Apex Court in that case, such a waiver cannot be inferred or implied into the agreement.

In view of this and relying on the cases of AFRICAN REINSURANCE CORPORATION V. ABATE FANTAYE (supra) and ALHAJI KEHINDE ASAFA OLUWALOGBON & ORS V. THE GOVERNMENT OF UNITED KINGDOM & ANOR (supra), I hereby hold that the Defendants in this case are immune from the legal processes commenced by the Plaintiff before this Court. Hence, I resolve issue one in the negative and hold that this Court does not have jurisdiction to hear and determine this suit against the 1st and 2nd Defendants, as they are covered by the Diplomatic Immunities and Privileges Act, Cap. D9, LFN, 2004 and the Diplomatic Immunities (World Health Organisation) Order No. 34 of 1949 (L.N. 71 of 1956).

Having resolved issue 1 in the negative, I hold that the two Defendants in this case are covered by the Diplomatic Immunities and Privileges Act, Cap. D9, LFN, 2004 and the Diplomatic Privileges (World Health Organisation) Order and as such are immune from the legal processes commenced by the Plaintiff. Hence, this Court has no jurisdiction over them and accordingly the names of the 1st and 2nd Defendants are hereby struck out.

As the names of the 1st and 2nd Defendants have been struck out, this suit itself becomes incompetent because there are no other defendants against which it can be sustained. I therefore must resolve the second issue also in the negative

F.C.T. JUDICIARY
CERTIFIED TRUE COPY
Date 4/11/14
ODOMA ABDUL
PRINCIPAL REGISTRAR

and hold that this suit is not properly constituted as there are no other defendants against which it can be sustained. The suit is therefore incompetent. This preliminary objection therefore succeeds, this suit is accordingly hereby struck out for want of jurisdiction and for being incompetent.

HON. JUSTICE A. B. MOHAMMED
JUDGE
3RD NOVEMBER, 2014.

F.C.T. JUDICIARY
CERTIFIED TRUE COPY
Date 4/11/14
ODOMA ABDUL
PRINCIPAL REGISTRAR
High Court of Justice, F.C.T Abuja

Delhi High Court
Delhi High Court
P.S. Ochani vs World Health Organisation And ... on 4 December, 2001
Equivalent citations: 95 (2002) DLT 680, 2002 (61) DRJ 672
Author: J Kapoor
Bench: J Kapoor
JUDGMENT

J.D. Kapoor, J.

1. Through this application, defendants have sought dismissal of the suit as being barred by law.

2. Defendant No. 1 is a Specialised Agency of the United Nations within the meaning of the Charter of the United Nations. According to defendant No. 1, it enjoy complete immunity from every form of legal process under Article III Section 4 of the Convention on the Privileges and Immunities of the Specialised Agencies of the United Nations.

3. Mr. Rajeev Nayar, learned senior counsel for defendants contends that these immunities have been specifically recognised and conferred upon the defendants by virtue of the United Nations Privileges & Immunities Act, 1947. By virtue of notification dated 16th December, 1948. By virtue of notification dated 16th December, 1948, the provisions of the said Act were extended to the defendants. This immunity is further fortified by an agreement dated 9th November, 1949 between the defendants and Government of India which specifically confers immunity upon the defendants from every form of legal process except in so far as in any particular case this immunity is expressly waived by the Director General of the defendant organisation. Admittedly, the Director General of defendant - organisation has not till date waived this immunity.

4. In response to the summons served upon the defendants through Ministry of External Affairs, a communication was received from defendant No. 1 to the effect that defendant No. 1 enjoys immunity from every form of legal process as the organization has not expressly waived its immunity following a request made through appropriate channels. The defendant also requested the External Affairs Ministry to take all necessary steps to ensure that the Court recognizes the immunity of the Organization. However, defendant No. 1 made it clear on number of occasions that it was not waiving immunity form legal process which is available by virtue of Section 4 of the Convention on the Privileges and Immunities of the Specialized Agencies ("the Convention") to which India acceded with respect to the Organization in February 1949 as well as by virtue of Article IV of the Agreement signed in November 1949 between the Organization and the Government of India concerning the privileges, immunities and facilities to be granted by the Government of India to defendant No. 1.

5. According to Mr. Nayar, Section 86 of Code of Civil Procedure does not apply to the defendant and so does the communication of 11.4.2001. This fact was accepted by UOI vide letter dated 11.4.2001 wherein they informed the plaintiff that Section 86 of CPC is not applicable in respect of defendant No. 1 as it relates to foreign state. At the same time, UOI also informed the plaintiff that defendant No. 1 has been requested to cooperate and assist the High Court in the matter.

6. On the contrary, Dr. D.C. Vohra, learned counsel for the plaintiff contends that there is no dispute that defendant NO. 1 enjoys status of foreign State and it was on the advice of the Central Government that plaintiff made a petition to the Central Government for the grant of consent to sue the defendants. It was in response to this petition that the Government of India informed that plaintiff through letter dated 11.4.2001 that the privileges and immunities of the international organizations are regulated in India under the UN (Privileges and Immunities) Act, 1947. The Government of India also informed that article II (Section 3) of UN Convention provides that the UN "shall be inviolable, located and by whomsoever held, shall enjoy

immunity from every form of legal process, except in so far as in any particular case, it has expressly waived its immunity. Plaintiff was also informed that the officials of the UN are "immune from legal process in respect of words spoken or written and all acts performed by them in their official capacity."

7. On the other hand, Dr.D.C. Vohra, learned counsel for the plaintiff has contended that it is the Central Government which is the sovereign authority to legal matters relating to specialized agencies having the status of foreign State and since the Central Government has not refused the request of the plaintiff, it amounts to conferring the jurisdiction upon the High Court to adjudicate the matter in dispute. It is further contended by Mr. Vohra that the expression used by the Central Government in the aforesaid letter that "defendant No. 1 has been requested to cooperate and assist the High Court in the matter" itself shows that the Central Government had granted consent referred to in Sub-section (1) of Section 86 of CPC.

8. Relevant extracts of Section 86 of CPC are as under:-

"86. Suits against foreign Rulers, Ambassadors and Envoys:-

(1). No foreign State may be sued in any Court otherwise competent to try the suit except with the consent of the Central Government certified in writing by a Secretary to that Government:

xxxx

(6) Where a request is made to the Central Government for the grant of any consent referred to in Sub-section (1), the Central Government shall, before refusing to accede to the request in whole or in part, give to the person making the request a reasonable opportunity of being heard."

9. Even if it is presumed that Section 86 is applicable in respect of defendants still the requirement of Section 86 is that until and unless the Central Government gives a consent certificate in writing though its Secretary, no foreign State may be sued in any Court and that consent must be given with respect to a specified suit. Sub-section (6) of Section 86 provides that where a request is made to the Central Government for the grant of any consent referred to in Sub-section (1), the Central Government shall, before refusing to accede to the request in whole or in part, give to the person making the request a reasonable opportunity of being heard.

10. Defendant No. 1 figures in Sub-clause (g) of Clause (ii) of Section 1 of Article I of the Convention on the Privileges and Immunities of the Specialized Agencies adopted by the First World Health Assembly on 17th July, 1948 which relates to Property, Funds and Assets and is as under:-

"The specialized agencies, their property and assets, wherever located and by whomsoever held, shall enjoy immunity from every form of legal process except in so far as in any particular case they have expressly waived the immunity. It is, however, understood that no waiver of immunity shall extend to any measure of execution."

11. Article IV Section 5 of the Agreement between the Government of India and defendant No. 1 provides as under:-

"The Organization and its property and assets located in India shall enjoy immunity from every form of legal process except in so far as in any particular case this immunity is expressly waived by the Director General of the Organization or the Regional Director as his duly authorized representative. It is, however, understood that no waiver of immunity shall extend to any measure of execution."

12. Section 3 of United Nations (Privileges & Immunities) Act, 1947 provides as under:-

3. Power to confer certain privileges and immunities on other international organizations and their representatives and Officers:-

Where in pursuance of any international agreement, convention or other instrument it is necessary to accord to any international organisation and its representatives and officers privileges and immunities in India similar to those contained in the provisions set out in the Schedule, the Central Government may, by notification in the official Gazette, declare that the provisions set out in the Schedule shall, subject to such modification, if any, as it may consider necessary or expedient for giving effect to the said agreement, convention or other instrument, apply mutates mutants to the international organisation specified in the notification and its representatives and officers, and thereupon the said provisions shall apply accordingly and, notwithstanding anything to the contrary contained in any other law, shall in such application have the force of law in India."

13. Section 2 of Article II of the Schedule reads as under:-

"The United Nations, its property and assets wherever located and by whomsoever held, shall enjoy immunity from every form of legal process except in so far as in any particular case it has expressly waived its immunity. It is, however, understood that no waiver of immunity shall extend to any measure of execution."

14. The notification dated 16th December, 1948 issued by Government of India extending the Act of 1947 to the defendant No. 1 reads as follows:-

"In exercise of the powers conferred by Section 3 of the United Nations (Privileges and Immunities) Act, 1947 (XLVI OF 1947), the Cental Government is pleased to direct that the provisions of the Schedule to the said Act shall apply mutates mutants to the (i) International Civil Aviation Organisation (ii) the World Health Organization and (iii) International Labour Organisation and their representatives and officers."

15. As is apparent from the conjoint reading of the aforesaid provisions, defendant No. 1 enjoys immunity from every legal process except in so far as it has expressly waived its immunity. In the instant case, defendant No. 1 has made it clear that at no stage, it has waived its immunity.

16. Merely because the Central Government informed the plaintiff that it has requested defendant No. 1 to cooperate and assist the High Court in the matter does not tantamount to granting permission to the plaintiff to sue the defendant. Any immunity provided by any statutory provision cannot be waived or abridged either by requesting the party to cooperate or assist the court nor can it be taken away except by way of legal authority. The fact that the Central Government accepted the position that Section 86 CPC is not applicable shows that neither has the Central Government granted permission to the plaintiff to sue defendant nor has the immunity been waived. The tenor of the communication dated 1.4.2001 rather demonstrates that the request of the plaintiff was not acceded to and rejected by the Central Government.

17. However, to be fair to the plaintiff and on the premise of equity and natural justice coupled with the nature of suit which arises out of contract between the parties, the Central Government is requested to settle the matter amicably by using its offices and getting the grievance of the plaintiff redressed, if any.

18. With this observation, this application is allowed and the suit is dismissed being not maintainable.

19. The court free be remitted to the plaintiff if he makes such a request.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
---x
RICHARD O. KLING, M.D., BRENDA SUTTON, SHIRLEY MORTON, KENYA TUCKER, HAROLD WIMBUSH, SIMON ALLISON, PATRICIA HULL, Individually and On Behalf of All Others Similarly Situated,

Plaintiffs,

- against -

THE WORLD HEALTH ORGANIZATION,

Defendant.
---x

OPINION & ORDER

No. 20-CV-3124 (CS)

Appearances:

Steven Bennett Blau
Shelly A. Leonard
Blau Leonard Law Group LLC
Huntington, New York
Counsel for Plaintiffs

Donald Francis Donovan
Catherine Amirfar
Natalie L. Reid
Elizabeth Nielsen
Matthew D. Forbes
Alyssa T. Yamamoto
Sebastian Dutz
Debevoise & Plimpton LLP
New York, New York
Counsel for Defendant

Seibel, J.

Before the Court is Defendant's Motion to Dismiss all claims in Plaintiffs' Second Amended Complaint. For the following reasons, the motion is GRANTED.

I. BACKGROUND

For purposes of this motion, I accept as true the facts, but not the conclusions, set forth in Plaintiffs' Second Amended Complaint. (Doc. 31 ("SAC").)

A. Facts

Plaintiffs commenced this action against Defendant World Health Organization (the "WHO"), alleging negligence in responding to the COVID-19 pandemic. The WHO "is a specialized agency of the United Nations responsible for international public health." (SAC ¶ 12.) It acts within the United Nations system to promote human health and well-being, monitor public health risks, and coordinate responses to health emergencies. (*Id.* ¶¶ 32, 33.) The United States is a member nation of the WHO, providing financial and technical support and participating in the WHO's governance structure. (*Id.* ¶¶ 44, 95.) The WHO maintains regional and country offices throughout the world, including one at the United Nations headquarters in Manhattan. (*See id.* ¶¶ 14, 58, 125.)

In December 2019, the first patients exhibiting symptoms of COVID-19 were hospitalized in Wuhan, China. (*See id.* ¶ 48.) According to one study, "laboratory testing was being done on patients" who exhibited these symptoms in mid-to-late December. (*Id.* ¶ 52.) As early as December 27, 2019, "a Guangzhou-based genomics company had sequenced most of the virus," and it was similar to the deadly SARS coronavirus that caused nearly 800 deaths between 2002 and 2003. (*Id.* ¶ 53.) The Wuhan Municipal Health Commission ("WMHC") released a notice about the virus to medical institutions on December 30, 2019. (*Id.* ¶ 55.)

The WHO claims it received its first notice of COVID-19's existence on December 31, 2019, when its country office in China picked up on a media statement on the WMHC website. (*Id.* ¶ 57.) The WHO China country office then notified the International Health Regulations

("IHR") focal point in the WHO Western Pacific Regional Office. (*Id.* ¶ 58.) On December 31, 2019, the WMHC declared that investigations had not, thus far, "found any obvious human-to-human transmission and no medical staff infection." (*Id.* ¶ 60.) Plaintiffs allege that this declaration from the Wuhan health authorities was contrary to "the belief of the doctors working on patients in Wuhan." (*Id.*)

On January 2, 2020, the Wuhan Institute of Virology completed a map of the virus's genome. (*Id.* ¶ 68.) The next day, China's National Health Commission ("NHC") "ordered institutions not to publish any information" related to the virus and "ordered labs to transfer any samples they had to designated testing institutions, or to destroy them." (*Id.* ¶ 69.) Despite these orders, sources in China notified the U.S. government about the virus on January 3. (*Id.* ¶ 70.)

The WHO "released a statement on its website" on January 5, stating that, "[b]ased on the preliminary information from the Chinese investigation team, no evidence of significant human-to-human transmission and no health care worker infections have been reported." (*Id.* ¶ 71.) Plaintiffs allege that the "WHO had actual or constructive notice that China was wrongfully denying or downplaying the risk of human-to-human transmission in the critical weeks while the virus was first spreading." (*Id.* ¶ 63.) Plaintiffs state, without elaboration, that such knowledge came from "warnings from Taiwan and Hong Kong about the risk of human-to-human transmission." (*Id.* ¶ 64.) On January 6, the U.S. Centers for Disease Control ("CDC") asked to study COVID-19 within China "but was barred by the Chinese Government from entering the country until mid-February," and "[the] WHO did not intervene." (*Id.* ¶ 72.)

Authorities in China publicly confirmed that the outbreak originated from a novel coronavirus on January 9, 2020. (*Id.* ¶ 73.) On January 12, "Chinese authorities and the WHO shared the genetic sequence of COVID-19 with the international community." (*Id.* ¶ 76.) Two

days later, the WHO stated on Twitter that "[p]reliminary investigations conducted by the Chinese authorities have found no clear evidence of human-to-human transmission of the novel coronavirus (2019-nCoV) identified in Wuhan, China." (*Id.* ¶ 78.)

On January 20 and 21, 2020, a WHO delegation "conducted a field visit to Wuhan to learn about the response to 2019 novel coronavirus." (*Id.* ¶ 80.) The WHO issued a statement on January 22 that "there was evidence of human-to-human transmission in Wuhan, but more investigation was needed to understand the full extent of transmission." (*Id.* ¶ 81.) From January 22 through 23, the WHO convened an Emergency Committee to "assess whether the outbreak constituted a public health emergency of international concern," but did not reach a consensus based on the evidence available. (*Id.* ¶ 82.)

A WHO delegation traveled to Beijing on January 28 to "learn more about China's response, and to offer any technical assistance." (*Id.* ¶ 83.) The next day, WHO's Director-General addressed journalists at a press conference in Geneva, thanking "the Chinese government for the extraordinary steps it had taken to prevent the spread of the new coronavirus." (*Id.* ¶ 84.) Plaintiffs describe these statements as part of a pattern of "praise heaped on the [Chinese Communist Party]'s handling of the pandemic, reveal[ing] a disturbing willingness to ignore science and alternative credible sources." (*Id.* ¶ 65.) On January 30, the WHO declared that COVID-19 "constituted a Public Health Emergency of International Concern," but "did not recommend any travel or trade restriction." (*Id.* ¶ 85.) After the United States imposed travel restrictions on January 31, 2020, the WHO opined that widespread restrictions were not needed and could increase "fear and stigma, with little public health benefit." (*Id.* ¶ 93.)

On March 11, 2020, the WHO concluded that "COVID-19 can be characterized as a pandemic." (*Id.* ¶ 88.)

Plaintiffs allege that the WHO's response to the pandemic between December 2019 and March 2020 as described above was negligent and reckless. (*Id.* ¶ 89.) Specifically, they assert that the WHO negligently failed to (1) "timely declare [COVID-19] a public health emergency of international concern," (2) "properly monitor the response to the Coronavirus pandemic in China," (3) "timely promulgate the correct treatment guidelines to its members," (4) "timely and properly issue appropriate guidance to its members on how they should respond to the Coronavirus pandemic emergency," and (5) "act as a global coordinator." (*Id.* ¶ 1.) As a result, Plaintiffs allege that the WHO "proximately caused injury and incalculable harm to Plaintiffs and Class Members." (*Id.* ¶ 4.) Plaintiffs are residents of Westchester County, New York, and bring this action on behalf of "[a]ll adult persons in the County of Westchester, State of New York who have suffered injury, damage and loss related to the outbreak of the [*sic*] COVID-19," as well as "[a]ll adult persons in the County of Westchester, State of New York who have been diagnosed with, treated for and/or died from COVID-19." (*Id.* ¶ 103.)

B. <u>Procedural History</u>

Plaintiffs filed their Complaint on April 20, 2020, (Doc. 1), and their First Amended Complaint on May 4, 2020, (Doc. 7). On August 14, Defendant submitted a letter requesting a pre-motion conference concerning its anticipated motion to dismiss on grounds of immunity, (Doc. 20), and Plaintiffs submitted a letter in opposition to Defendant's request, arguing that the Court should not hear the motion until after discovery, during which Plaintiffs could gather facts necessary for their opposition. (Doc. 21).

The Court held a pre-motion conference on September 9, 2020, in which it denied Plaintiffs' request to defer adjudication of Defendant's proposed motion under Federal Rule of Civil Procedure 12(b)(1) but granted Plaintiffs the opportunity to submit another amended complaint with any additional facts which might address Defendant's immunity defense. (Minute Entry dated September 9, 2020.) On October 1, Plaintiffs filed their Second Amended Complaint. (Doc. 31.) Defendant filed its Motion to Dismiss, (Doc. 32), and Memorandum of Law, (Doc. 33), on November 2, 2020. Plaintiffs filed their Memorandum in Opposition on December 18, 2020. (Doc. 37.) Defendant filed its Reply Memorandum on January 8, 2021. (Doc. 38.)

II. LEGAL STANDARD

Under Federal Rule of Civil Procedure 12(b)(1), a district court may properly dismiss an action "for lack of subject matter jurisdiction if the court 'lacks the statutory or constitutional power to adjudicate it.'" *Cortlandt St. Recovery Corp. v. Hellas Telecomms., S.A.R.L.*, 790 F.3d 411, 416-17 (2d Cir. 2015) (quoting *Makarova v. United States*, 201 F.3d 110, 113 (2d Cir. 2000)). "The issue of [the WHO's] immunity from suit implicates this Court's subject matter jurisdiction and is properly addressed under the standards governing a Rule 12(b)(1) motion." *Sadikoglu v. United Nations Dev. Programme*, No. 11-CV-294, 2011 WL 4953994, at *2 (S.D.N.Y. Oct. 14, 2011). "A plaintiff asserting subject matter jurisdiction has the burden of proving by a preponderance of the evidence that it exists." *Makarova*, 201 F.3d at 113. In determining whether subject matter jurisdiction exists, the district court "must take all facts alleged in the complaint as true and draw all reasonable inferences in favor of plaintiff, but jurisdiction must be shown affirmatively, and that showing is not made by drawing from the pleadings inferences favorable to the party asserting it." *Morrison v. Nat'l Austl. Bank Ltd.*, 547

F.3d 167, 170 (2d Cir. 2008) (citation and internal quotation marks omitted), *aff'd*, 561 U.S. 247 (2010). The Court may "rely on evidence outside the complaint" when deciding a Rule 12(b)(1) motion. *Cortlandt St. Recovery Corp.*, 790 F.3d at 417.

III. DISCUSSION

A. Immunity Pursuant to the WHO Constitution

Defendant first argues that Plaintiffs' claims are barred by absolute immunity under the WHO constitution. That document, which came into effect in 1948, provides that the WHO "shall enjoy in the territory of each Member such privileges and immunities as may be necessary for the fulfilment of its objective and for the exercise of its functions." WHO Const., art. 67. It further provides that "privileges and immunities shall be defined in a separate agreement." *Id.* art. 68. This "separate agreement" refers to the Special Convention on the Privileges and Immunities of the Specialized Agencies of November 21, 1947. 33 U.N.T.S. 261 ("Special Convention"). The Special Convention explicitly states that "specialized agencies," including the WHO, "shall enjoy immunity from every form of legal process except in so far as in any particular case they have expressly waived their immunity." Special Convention, art. III, § 4. Defendant argues that it is immune from this suit because it has not expressly waived this immunity. (*See* Doc. 33 at 12-16.)

As a "constituent instrument of an international organization," the WHO's constitution is an international treaty. Vienna Convention on the Law of Treaties, arts. 2(1)(a), 5, *opened for signature* May 23, 1969, 1155 U.N.T.S. 331. "But not all international law obligations automatically constitute binding federal law enforceable in United States courts." *Medellín v. Tex.*, 552 U.S. 491, 504 (2008). The Supreme Court "has long recognized the distinction" between self-executing and non-self-executing treaties. *Id*. The former "'operates of itself

without the aid of any legislative provision.'" *Id.* at 505 (quoting *Foster v. Neilson*, 27 U.S. 253, 314 (1829)). The latter "'can only be enforced pursuant to legislation to carry them into effect.'" *Id.* (quoting *Whitney v. Robertson*, 124 U.S. 190, 194 (1888)). Essentially, "while treaties may comprise international commitments, they are not domestic law unless Congress has either enacted implementing statutes or the treaty itself conveys an intention that it be 'self-executing' and is ratified on these terms." *Id.* at 505 (cleaned up).

Congress passed a Joint Resolution in 1948 "accept[ing] membership for the United States in [the WHO], the constitution of which was adopted in New York on July 22, 1946." 22 U.S.C. § 290. This 1948 Joint Resolution constituted an *ex post* congressional-executive agreement. *See* Restatement (Third) of Foreign Relations Law, § 303, cmt. e (1987).[1] Generally, such congressional-executive agreements can be "presumed self-executing unless specified otherwise." Oona A. Hathaway, *Treaties' End: The Past, Present, and Future of International Lawmaking in the United States*, 117 Yale L.J. 1236, 1321 (2008); *see New York Chinese TV Programs, Inc. v. U.E. Enters., Inc.*, No. 88-CV-4170, 1989 WL 22442, at *12 (S.D.N.Y. Mar. 8, 1989) (noting that congressional-executive agreements are "as binding in United States law as treaties") (collecting cases).

---

[1] Comment E reads as follows:

Congress may enact legislation that requires, or fairly implies, the need for an agreement to execute the legislation. Congress may authorize the President to negotiate and conclude an agreement, or to bring into force an agreement already negotiated, and may require the President to enter reservations. *See*, *e.g.*, § 468, Reporters' Note 6. Congress may also approve an agreement already concluded by the President. Congress cannot itself conclude such an agreement; it can be concluded only by the President, who alone possesses the constitutional power to negotiate with other governments.

While Plaintiffs do not directly contest that the Joint Resolution conferred treaty immunity on the WHO,[2] Defendant notes, candidly, that at least one other court has cast doubt on whether the WHO constitution is self-executing and binding U.S. law. (*See* Doc. 38 at 4 n.1 (citing *Rodriguez v. Pan Am. Health Org.*, No. 20-CV-928, 2020 WL 6561448, at *18 (D.D.C. Nov. 9, 2020).) While Defendant argues that the reasoning in *Rodriguez* is flawed, and presents several arguments as to why the WHO constitution is in fact self-executing and conveys absolute immunity on the Defendant, it is not necessary for me to weigh in on this issue. Regardless of whether the WHO constitution is a self-executing treaty, the WHO is independently immune from suit under the International Organization Immunities Act ("IOIA").

B. Immunity Pursuant to the IOIA

Immunity under the IOIA is concurrent with and separate from any treaty-based immunity the WHO may have. *See* Exec. Order No. 10,025, 13 Fed. Reg. 9361 (Dec. 31, 1948); *see also Polak v. Int'l Monetary Fund*, 657 F. Supp. 2d 116, 120 (D.D.C. 2009) ("The IOIA serves as a separate and independent source of immunity for international organizations such as the defendant."), *aff'd*, No. 09-7114, 2010 WL 4340534 (D.C. Cir. Oct. 20, 2010). The IOIA grants international organizations "the same immunity from suit and every form of judicial

---

[2] Plaintiffs instead argue in their Memorandum in Opposition that there is no constitutional immunity because President Trump withdrew the United States from the WHO by terminating the 1948 congressional-executive agreement, and that the issues thereby raised present non-justiciable political questions. (Doc. 37 at 5-6.) President Trump's action occurred on July 7, 2020, after the events underlying Plaintiffs' complaint, and was not to be effective until July 6, 2021, *see* Cong. Research Serv., R46575, *U.S. Withdrawal from the World Health Organization: Process and Implications* 1 (2020), so the Court is dubious that the withdrawal would affect the immunity analysis. In any event, President Biden confirmed on the day of his inauguration, via a letter to the U.N. Secretary General, that the United States has not withdrawn and will not withdraw from the WHO. (Doc. 39-1.) Accordingly, this Court need not address Plaintiffs' argument that the implications of the termination of the agreement present a non-justiciable political question.

process as is enjoyed by foreign governments, except to the extent that such organizations may expressly waive their immunity for the purpose of any proceedings or by terms of any contract." 22 U.S.C. § 288a(b). "Today, that means that the Foreign Sovereign Immunities Act [("FSIA")] governs the immunity of international organizations." *Jam v. Int'l Fin. Corp.*, 139 S. Ct. 759, 772 (2019).

The defendant must first "present[] a prima facie case that it is a foreign sovereign." *Cargill Int'l S.A. v. M/T Pavel Dybenko*, 991 F.2d 1012, 1016 (2d Cir. 1993) (citing *Baglab Ltd. v. Johnson Matthey Bankers Ltd.*, 665 F. Supp. 289, 293-94 (S.D.N.Y. 1987)). The plaintiff then "has the burden of going forward with evidence showing that, under exceptions to the FSIA, immunity should not be granted." *Id.* (citing *Baglab Ltd.*, 665 F. Supp. at 293-94). The ultimate burden of persuasion, however, "remains with the alleged foreign sovereign." *Id.* (citing *Forsythe v. Saudi Arabian Airlines Corp.*, 885 F.2d 285, 289 n.6 (5th Cir. 1989)). To determine jurisdiction under the FSIA, "the district court must look at the substance of the allegations." *Id.* at 1019.

The WHO was designated as a "public international organization[] entitled to enjoy the privileges, exemptions, and immunities conferred by the [IOIA]" by President Truman via executive order in 1948. *See* Exec. Order 10,025, *supra*. Plaintiffs do not dispute that the FSIA applies to the WHO but argue instead that an exception to FSIA's immunity applies. (*See* Doc. 37 at 10.)

1. The Non-Commercial Tort Exception

First, under 28 U.S.C. § 1605(a)(5), known colloquially as FSIA's "non-commercial tort exception," immunity does not apply in any case "in which money damages are sought against a foreign state for personal injury or death, or damage to or loss of property, occurring in the

United States and caused by the tortious act or omission of that foreign state." 28 U.S.C. § 1605(a)(5). "Courts read this exception narrowly," *Democratic Nat'l Comm. v. Russian Fed'n*, 392 F. Supp. 3d 410, 427 (S.D.N.Y. 2019), and the exception applies only when the "entire tort" occurs "within the territorial jurisdiction of the United States." *In re Terrorist Attacks on Sept. 11, 2001*, 714 F.3d 109, 116 (2d Cir. 2013) (quoting *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 441 (1989)). Further, the exception does not apply to any claims predicated on the exercise or failure to exercise a discretionary function, regardless of whether that discretion was abused. *See Democratic Nat'l Comm.*, 392 F. Supp. 3d at 427.

a. The "Entire Tort" Rule

The "entire tort" rule means that to be within the non-commercial tort exception, "not only the injury but also the act precipitating that injury" must occur within the territorial jurisdiction of the United States. *Jerez v. Republic of Cuba*, 775 F.3d 419, 424 (D.C. Cir. 2014) (citing *Asociacion de Reclamantes v. United Mexican States*, 735 F.2d 1517, 1525 (D.C. Cir 1984)); *accord In re Terrorist Attacks*, 714 F.3d at 116.

Plaintiffs contend in the SAC that the WHO's "negligent commissions and omissions . . . have proximately caused injury and incalculable harm to Plaintiffs and Class Members," (SAC ¶ 4), but they do not allege that any of the relevant WHO conduct occurred in the United States.[3]

[3] In Plaintiffs' Memorandum in Opposition, Plaintiffs state that the Pan American Health Organization ("PAHO") in Washington, D.C. "engaged in evidence-based decision-making in connection with COVID-19" and that the "gravamen of plaintiffs' claims is, in part, that the WHO negligently failed to follow and comply" with WHO Outbreak Communications Guidelines that are posted on the PAHO website. (Doc. 37 at 13-14.) Although these allegations do not appear in the SAC, I am permitted to consider evidence outside the complaint on a motion under Rule 12(b)(1). But the only evidence to which Plaintiffs point does not support their contentions. As for "decision-making in connection with COVID-19," they specify nothing regarding the pandemic and cite only the general statement on the PAHO website that "[f]rom its Washington, D.C., headquarters, 27 country offices and three specialized centers in the region,

Instead, Plaintiffs point to actions taken by the WHO in China, the WHO Western Pacific Regional Office in the Philippines,[4] and the WHO world headquarters in Geneva, Switzerland. (*Id.* ¶¶ 57, 58, 81, 83, 84.) Plaintiffs also refer to actions taken by the WHO in unspecified countries, stating that the WHO negligently disseminated information online, (*see id.* ¶¶ 61, 71, 78), "ignored warnings from Taiwan and Hong Kong," (*id.* ¶ 64), and "did not intervene" after the Chinese Government barred the CDC from studying COVID-19 within China, (*id.* ¶ 72). There is no information provided, however, to indicate that WHO personnel in the United States were responsible for these actions or inactions.

In their Opposition to Defendant's Motion to Dismiss, Plaintiffs argue that the WHO's online COVID-19 information "emanated from and was facilitated by the digital based media on the internet in the United States." (Doc. 37 at 15.) To support the claim that such information "emanated from" the United States, Plaintiffs argue that the "internet information campaign could not have originated in China" because that country blocks social media. (*Id.*) This alone, however, does not plausibly show that the information originated from the United States, given that the WHO has offices in countries other than the United States and China.[5] Plaintiffs allege

---

PAHO promotes evidence-based decision-making to improve and promote health as a driver of sustainable development." (*Id.* at 13.) And that WHO guidelines applicable worldwide appear on that website hardly supports the conclusion that the challenged decisions were made in the United States. These website statements are far too vague and general to constitute even an allegation, let alone evidence, of conduct in the United States injurious to Plaintiffs.

[4] The website of the Western Pacific Regional Office states that it is based in the Philippines. *See* World Health Org., Western Pacific, *About WHO in the Western Pacific*, https://www.who.int/westernpacific/about (last visited Apr. 1, 2021) ("[W]e are located in the Philippines, where we have been since 1951.")

[5] This allegation is also puzzling, as one of Plaintiffs' main accusations is that the WHO unquestioningly accepted false information provided by China, (*see, e.g.*, SAC ¶¶ 63-64, 78, 84, 96, 134, 140-45), so it is not clear why it could not have done so from China.

no facts from which this Court could reasonably infer that the WHO disseminated these statements from within the United States, as opposed to, say, its headquarters in Geneva, Switzerland or any other country besides China.

Plaintiffs also argue that the negligent conduct occurred in the United States because the WHO's dissemination of information was "facilitated by digital based media on the internet in the United States." (*Id.*) Plaintiffs argue that the "WHO heavily utilized Twitter and other American microblogging and social networking services . . . to publish and communicate [COVID-19] notices, guidance, warnings and medical advice top [*sic*] plaintiffs and putative Class members." (*Id.*) That a statement may have been disseminated using the internet or a platform created by an American company does not suffice to show that the entire tort occurred in the United States. The internet is everywhere, and courts have consistently held that an entire tort is not committed in the United States simply because it involved use of technology accessible in the United States. *See Doe v. Fed. Democratic Republic of Eth.*, 851 F.3d 7, 11 (D.C. Cir. March 14, 2017) (entire tort was not committed in United States when plaintiff opened in United States a computer virus emailed from Ethiopia); *Democratic Nat'l Comm.*, 392 F. Supp. 3d at 427-28 (entire tort was not committed in United States when computers in United States were hacked by person in Russia); *Park v. Korean Broad. Sys.*, No. 07-CV-2233, 2008 WL 4724374, at *3 (C.D. Ill. Oct. 24, 2008) (entire tort not committed in United States when South Korean company prepared and broadcast inadequate information to U.S. viewers through internet); *cf. HB Prods., Inc. v. Faizan*, No. 19-CV-487, 2020 WL 6784347, at *6 (D. Haw. Nov. 18, 2020) ("Defendant's use of United States companies with global reach" insufficient for personal jurisdiction). Thus, in the absence of facts plausibly showing that the statements were published by the WHO from within the United States, the WHO's use of the internet and media

platforms based in the United States cannot constitute an "entire tort" committed by the organization in the United States.[6]

b. The "Discretionary Acts" Exception

Even if Plaintiffs could satisfy the entire tort rule, the WHO nevertheless retains its immunity if "the acts alleged to be negligent [are] discretionary, in that they involve an element of judgment or choice and are not compelled by statute or regulation," and "the judgment or choice in question [is] grounded in considerations of public policy or susceptible to policy analysis." *USAA Cas. Ins. Co. v. Permanent Mission of Republic of Namib.*, 681 F.3d 103, 111-12 (2d Cir. 2012).

Plaintiffs state in their complaint that "[t]he discretionary function exception does not apply . . . because [the] WHO negligently failed to perform its clear duty or to act in accord with specific mandatory directives contained in the [IHR]." (SAC ¶ 28.) Even if the IHR creates mandatory directives for the WHO, however, these regulations do not support Plaintiffs' contention. While Plaintiffs cite to Articles 6 through 8 of the IHR in their Memorandum in Opposition, (Doc. 37 at 25), the only relevant provisions in these articles specify obligations of State Parties, not the WHO. *See* Int'l Health Regulations (3d ed. 2005) ("IHR 2005"), arts. 6-8. Articles 7 and 8 do not specify any obligation of the WHO, and the only directive given to the

[6] Further, even if it could be said that the WHO's dissemination of information occurred in the United States, that dissemination is not the "entire tort." Rather, to the extent Plaintiffs specify a location for the failings between December 2019 and March 2020 that they challenge, they occurred mostly in China. At best Plaintiffs allege "a transnational tort over which [the Court] lack[s] subject matter jurisdiction." *Doe*, 851 F.3d at 11.

WHO under Article 6 is to "immediately notify the [International Atomic Energy Agency]" if notification received by WHO involves this agency. *Id.*[7]

Plaintiffs also allege that the "WHO had the duty to request, in accordance with Article 9 [of the IHR], verification from China, of sources" of COVID-19 information. (SAC ¶ 140.)[8] But the SAC does not allege that the WHO failed to make such a request, but instead makes only the general and vague assertion that the "WHO negligently failed to provide effective leadership and implementation of its core global functions under IHR." (*Id.*) And in any event, this function does not pertain to the WHO's dissemination of information in the United States. IHR 2005 art. 9. Article 10 of the IHR, a portion of which *does* pertain to the WHO's dissemination of information in the United States, makes plain that this function is discretionary, stating that if the relevant country declines to collaborate with the WHO, the "WHO *may*, *when justified by the magnitude of the public health risk*, share with other States Parties the information available to it." *Id.* art. 10 (emphasis added). A judgment grounded in assessment of public health risk is a consideration of public policy. *USAA Cas Ins. Co.*, 681 F.3d at 111-12; *see Mahon v. United States*, 742 F.3d 11, 15-16 (1st Cir. 2014) (decision involving choice as to how to manage risk is product of discretion, and determining what precautions to take based on competing values is "the stuff of policy analysis," so discretionary function exception applied).

---

[7] Plaintiffs allege that the "WHO was negligent and recklessly failed to enforce these IHR core capacity requirements against China," (SAC ¶ 134), but they do not identify any enforcement mechanism in the IHR or elsewhere, or otherwise suggest how the WHO might have done so.

[8] Article 9 provides that when the WHO takes into account reports from sources other than notifications and consultations from or with member countries, it shall – after assessing them "according to established epidemiological principles" and "communicat[ing] information on the event to the State Party in whose territory the event is allegedly occurring" – "consult with and attempt to obtain verification from the State Party in whose territory the event is allegedly occurring in accordance with the procedure set forth in Article 10." IHR 2005 art. 9.

Finally, Plaintiffs allege that the IHR "outline the criteria to determine whether or not a particular event constitutes a 'public health emergency of international concern,'" (SAC ¶ 130 (referring to IHR 2005 art. 12)), and allege that the WHO waited too long to make such a declaration regarding COVID-19, (*id.* ¶¶ 1, 89, 92, 144). The factors set forth in Article 12 include, among other things, committee advice, available scientific evidence and an "assessment of the risk to human health, of the risk of international spread of the disease and of the risk of interference with international traffic." IHR 2005 art. 12. These criteria, far from presenting a situation where "there is no room for choice," *United States v. Gaubert*, 499 U.S. 315, 324 (1991), present a quintessential judgment call that may not be second-guessed in court through hindsight, *see Chen v. United States*, No. 09-CV-2306, 2011 WL 2039433, at *10 (E.D.N.Y. May 24, 2011), *aff'd sub nom. Qin Chen v. United States*, 494 F. App'x 108 (2d Cir. 2012) (summary order); *see also Lockett v. United States,* 938 F.2d 630, 639 (6th Cir. 1991) (finding EPA's response to PCB spill within discretionary function exception, because "these discretionary decisions, based upon 'judgment calls' concerning the sufficiency of evidence of violations of applicable regulations, the allocation of limited agency resources, and determinations about priorities of serious threat to public health, are the very 'public policy' discretionary judgments Congress intended to shield from liability . . . .").[9]

As Plaintiffs recognize, (Doc. 37 at 20-21), "[w]here there is room for policy judgment and decision there is discretion," *Dalehite v. United States*, 346 U.S. 15, 36 (1953). The WHO's decisions regarding its handling of COVID-19 involved policy judgments. Thus, even if the

---

[9] *Chen* and *Lockett* arose under the Federal Tort Claims Act ("FTCA"), but the discretionary function exception of that statute and of the FSIA are construed consistently. *USAA Cas. Ins. Co.*, 681 F.3d at 112 n.43.

entire tort rule did not bar Plaintiffs' claim, the WHO would still retain its immunity under the discretionary acts exception to the non-commercial tort exception.

2. Waiver of Immunity

In an argument Plaintiffs have abandoned in their brief, they alleged in the SAC that even if the WHO is immune, it "impliedly waived its immunity under FSIA by violating the jus cogens norms of international law condemning human rights health violations in connection with global communicable disease surveillance and governance." (SAC ¶ 23.)[10] The Second Circuit, however, has explicitly rejected "the claim that a jus cogens violation constitutes an implied waiver within the meaning of the FSIA." *Smith v. Socialist People's Libyan Arab Jamahiriya*, 101 F.3d 239, 245 (2d Cir. 1996). While the WHO may expressly waive its immunity under the IOIA, 28 U.S.C. § 1605(a)(1), there is nothing in the record that plausibly suggests it has done so. Thus, the WHO is immune from the present suit under the IOIA, and the complaint must be dismissed.

C. <u>Leave to Amend</u>

Finally, I consider whether Plaintiff should be granted leave to amend, which should be freely given "when justice so requires." Fed. R. Civ. P. 15(a)(2). "[I]t is within the sound

---

[10] "A *jus cogens* norm, also known as a peremptory norm of international law, is a norm accepted and recognized by the international community of states as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character." *Carpenter v. Republic of Chile*, 610 F.3d 776, 779 n.4 (2d Cir. 2010) (internal quotation marks omitted). "*Jus cogens* embraces customary laws considered binding on all nations, and is derived from values taken to be fundamental by the international community, rather than from the fortuitous or self-interested choices of nations." *Kashef v. BNP Paribas S.A.*, 925 F.3d 53, 61 (2d Cir. 2019) (internal quotation marks omitted).

discretion of the district court to grant or deny leave to amend." *Kim v. Kimm*, 884 F.3d 98, 105 (2d Cir. 2018) (internal quotation marks omitted). "Leave to amend, though liberally granted, may properly be denied for: 'undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of amendment, etc.'" *Ruotolo v. City of N.Y.*, 514 F.3d 184, 191 (2d Cir. 2008) (quoting *Foman v. Davis*, 371 U.S. 178, 182 (1962)).

Plaintiffs have already amended their complaint twice, once after having the benefit of a pre-motion letter from Defendant outlining the proposed grounds for dismissal, (Doc. 20), and the discussion at the September 9, 2020 pre-motion conference. In general, a plaintiff's failure to fix deficiencies in the previous pleading, after being provided notice of them, is alone sufficient ground to deny leave to amend. *See Nat'l Credit Union Admin. Bd. v. U.S. Bank Nat'l Ass'n*, 898 F.3d 243, 257-58 (2d Cir. 2018) ("When a plaintiff was aware of the deficiencies in his complaint when he first amended, he clearly has no right to a second amendment even if the proposed second amended complaint in fact cures the defects of the first. Simply put, a busy district court need not allow itself to be imposed upon by the presentation of theories *seriatim*.") (cleaned up); *In re Eaton Vance Mut. Funds Fee Litig.*, 380 F. Supp. 2d 222, 242 (S.D.N.Y. 2005) (denying leave to amend because "the plaintiffs have had two opportunities to cure the defects in their complaints, including a procedure through which the plaintiffs were provided notice of defects in the Consolidated Amended Complaint by the defendants and given a chance to amend their Consolidated Amended Complaint," and "plaintiffs have not submitted a proposed amended complaint that would cure these pleading defects"), *aff'd sub nom. Bellikoff v. Eaton Vance Corp.*, 481 F.3d 110, 118 (2d Cir. 2007) (*per curiam*) ("[P]laintiffs were not

entitled to an advisory opinion from the Court informing them of the deficiencies in the complaint and then an opportunity to cure those deficiencies.") (internal quotation marks omitted).

Second, dismissal with prejudice is appropriate when "the flaws in pleading are incurable." *Fort Worth Employers' Ret. Fund v. Biovail Corp.*, 615 F. Supp. 2d 218, 233 (S.D.N.Y. 2009); *see Cuoco v. Moritsugu*, 222 F.3d 99, 112 (2d Cir. 2000) (affirming dismissal of *pro se* complaint without leave to replead because "[t]he problem with [Plaintiff's] causes of action is substantive; better pleading will not cure it"). Courts regularly dismiss complaints with prejudice where the defendant is immune from suit. *See, e.g.*, *MMA Consultants 1, Inc. v. Republic of Peru*, 245 F. Supp. 3d 486, 520 (S.D.N.Y. 2017) (dismissing complaint with prejudice due to FSIA immunity); *Schermerhorn v. Israel*, 235 F. Supp. 3d 249, 262 (D.D.C. 2017) (same); *Kettey v. Saudi Ministry of Educ.*, 53 F. Supp. 3d 40, 49 (D.D.C. 2014) (same).

Further, Plaintiffs have not requested leave to amend or otherwise suggested that they are in a position to cure the deficiencies identified in this decision. *See TechnoMarine SA v. Giftports, Inc.*, 758 F.3d 493, 505 (2d Cir. 2014) (plaintiff need not be given leave to amend if plaintiff fails to specify how amendment would cure pleading deficiencies in complaint); *Gallop v. Cheney*, 642 F.3d 364, 369 (2d Cir. 2011) (district court did not err in dismissing claim with prejudice in absence of any indication plaintiff could or would provide additional allegations leading to different result); *Horoshko v. Citibank, N.A.*, 373 F.3d 248, 249-50 (2d Cir. 2004) (*per curiam*) (district court did not abuse discretion by not granting leave to amend where no indication as to what might have been added to make complaint viable and plaintiffs did not request leave to amend). Accordingly, I decline to grant leave to amend *sua sponte*.

IV. CONCLUSION

For the foregoing reasons, Defendant's Motion to Dismiss is GRANTED and Plaintiffs' Second Amended Complaint is dismissed with prejudice. The Clerk of Court is respectfully directed to terminate the pending motion, (Doc. 32), and close the case.

SO ORDERED.

Dated: April 5, 2021
White Plains, New York

CATHY SEIBEL, U.S.D.J.

STAFF REGULATIONS

ARTICLE XI

Dispute Resolution

11.1 *The Director-General shall establish administrative machinery with staff participation to advise him in case of any appeal by staff members against an administrative decision alleging the non-observance of their terms of appointment, including all pertinent regulations and rules, or against disciplinary action.*

11.2 *Any dispute which cannot be resolved internally, arising between the Organization and a member of the staff regarding the fulfillment of the contract of the said member, shall be referred for final decision to the Administrative Tribunal of the International Labour Organization.*

STAFF RULES

SECTION 12

Dispute Resolution

1205. APPLICABILITY

The Rules in this section apply to staff members and former staff members. In this section, the term “staff member” includes former staff members, except with respect to membership in Boards of Appeal and the election of such members under Staff Rules 1230.4 and 1230.5.

1215. INFORMAL RESOLUTION

1215.1 A staff member may use informal channels to resolve a work-related concern, including a final administrative decision, which he considers to be in non-observance of the terms of his appointment, including pertinent Staff Regulations or Staff Rules.

1215.2 The Director-General shall encourage and facilitate the use of informal channels to resolve work-related concerns.

1215.3 Staff members are encouraged to initiate or participate in informal means of resolution and to make good faith efforts to take action to address and resolve concerns as early as possible.

1215.4 Informal resolution of a work-related concern may be initiated at any time, including before or after the initiation of a formal resolution process.

1215.5 A staff member may seek the assistance of an Ombudsman, who is an independent and neutral interlocutor who provides confidential impartial assistance. A staff member may also use other available informal channels to resolve a work-related concern.

1215.6 Participation in informal resolution efforts shall not affect any right to pursue the work-related concern formally in accordance with the provisions of the Staff Rules.

1215.7 The conduct of informal resolution, including mediation, by an Ombudsman or through other informal channels, may result in the extension of time limits, including those applicable to the appeals process under Section 12 of the Staff Rules.

STAFF RULES

Section 12

1225. ADMINISTRATIVE REVIEW

1225.1 A staff member wishing to contest formally a final administrative decision alleging non-observance of his or her terms of appointment, including pertinent Staff Regulations or Staff Rules, shall, as a first step, submit a request in writing for an administrative review of that final administrative decision. A staff member shall not request an administrative review until all the existing administrative channels have been exhausted and the administrative decision has become final. An administrative decision is to be considered as final when it has been taken by a duly authorized official and the staff member has received written notification of the decision. The Director-General shall establish which categories of final administrative decisions shall not be subject to review under this Staff Rule.

1225.2 If a staff member has submitted a written request relating to the terms of his appointment, the request shall be deemed to have been rejected if no definitive reply is received within:

1225.2.1 sixty (60) calendar days for staff assigned to headquarters and to regional offices;

1225.2.2 ninety (90) calendar days for staff assigned to other duty stations.

1225.3 A request for administrative review must be filed no later than sixty (60) calendar days from the date on which the staff member received written notification of the contested final administrative decision or within sixty (60) calendar days of a deemed rejection under Staff Rule 1225.2.

1225.4 The final decision on a request for administrative review (the Administrative Review Decision) shall be communicated in writing to the staff member within sixty (60) calendar days of receipt of the complete request for administrative review. The deadline may be extended, including to allow for informal resolution.

1225.5 If a staff member has filed a request for administrative review, the request shall be deemed to have been rejected if no final decision is received within the sixty (60) calendar day deadline or the extended deadline referred to in Staff Rule 1225.4.

1225.6 A request for administrative review shall not have the effect of delaying the final administrative decision which is the subject of the review.

1225.7 Requests for administrative review shall be dealt with in accordance with the provisions of this Staff Rule and under conditions established by the Director-General.

STAFF RULES

Section 12

1230. GLOBAL BOARD OF APPEAL[2]

1230.1 Subject to Staff Rule 1230.5, a staff member may appeal before the Global Board of Appeal (the Board) against an Administrative Review Decision or against a deemed rejection under Staff Rule 1225.5 or against a final administrative decision not subject to review under Staff Rule 1225.

Membership

1230.2 In accordance with procedures established by the Director-General, the Board shall be composed of:

1230.2.1 one chair and one deputy chair appointed by the Director-General in consultation with representatives of staff; and

1230.2.2 an equal number of members and alternate members appointed respectively by the Director-General and elected by staff.

Panels

1230.3 Subject to Staff Rule 1230.4, an appeal shall normally be heard by a Panel of three members of the Board. Each Panel shall be composed of:

1230.3.1 a chair, who shall be the chair or deputy chair of the Board;

1230.3.2 one member appointed to the Board by the Director-General and assigned to the Panel by its chair; and

1230.3.3 one member elected to the Board by staff and assigned to the Panel by its chair.

1230.3.4 In exceptional circumstances as determined by the chair and deputy chair, an appeal may be heard by a Panel of five members of the Board, including two additional members appointed by the chair under Staff Rules 1230.3.2 and 1230.3.3.

1230.3.5 If the appellant was assigned to a region at the time of the appealed decision, there shall be at least one member assigned to that region on the Panel. If the appellant was assigned to headquarters, including offices administered by headquarters, at the time of the

[2] All pending appeals filed with either the headquarters Board of Appeal or a regional Board of Appeal shall be dealt with under the Staff Rules in effect at the time the appeal was filed, unless the staff member having filed the appeal requests, and the Organization agrees, that the Staff Rules amended with effect from the entry into force of internal justice reform policies shall apply. If a pending appeal before a regional Board of Appeal is concluded at the regional level, any appeal of the decision of the Regional Director concerned shall be filed with the Global Board of Appeal under these amended Staff Rules.

STAFF RULES

Section 12

appealed decision, there shall be at least one member assigned to headquarters on the Panel.

1230.3.6 The appellant may object to no more than one member of a three member Panel, and two members of a five member Panel, assigned to hear the appeal, under conditions established by the Director-General.

Board chair and deputy chair

1230.4 The authorities of the chair and deputy chair shall be determined by the Director-General, and shall include making recommendations to the Director-General on the receivability of an appeal.

Conditions of appeal

1230.5 The following provisions shall govern the conditions of appeal against an Administrative Review Decision, a deemed rejection under Staff Rule 1225.5 or against a final administrative decision not subject to review under Staff Rule 1225.

1230.5.1 A staff member wishing to appeal must file with the Board, within ninety (90) calendar days after receipt of an Administrative Review Decision, within ninety (90) calendar days of the expiration of the deadline or extended deadline referred to in Staff Rule 1225.5, or within ninety (90) calendar days after receipt of a final administrative decision that is not subject to review under Staff Rule 1225, a complete statement of appeal specifying the decision against which the appeal is made and stating the facts of the case and the pleas. The Board shall open its proceedings upon receipt of the appellant's complete statement of appeal.

1230.5.2 A request to suspend proceedings before the Board may be made at any time, in particular with a view to pursuing an informal resolution. The suspension may be granted by the chair of the Panel concerned. Such suspension shall normally not exceed ninety (90) calendar days.

Reporting and decision-making

1230.6 A Panel of the Board reviewing an appeal shall report its findings and recommendations to the Director-General within ninety (90) calendar days of the date of the Panel's receipt of the final written pleadings of both parties. This period may be extended by the chair of the Panel concerned in accordance with conditions established by the Director-General.

1230.6.1 The Director-General shall make the final decision on appeals. If the appellant was assigned to a region at the time of the final

STAFF RULES

Section 12

administrative decision, the Director-General shall consult with the Regional Director before making a final decision.

1230.6.2 The Director-General shall inform the parties to the appeal and the chair of the Board of his decision within sixty (60) calendar days of the date of the receipt by him of the findings and recommendations of the Panel concerned.

General

1230.7 Secretariat services to the Board shall be provided by the Organization.

1230.8 The work of the Board shall be carried out in accordance with rules of procedure to be established by the Director-General.

1230.9 In discharging their duties, members of the Board shall act independently and respect confidentiality. Parties to an appeal and all persons involved in Board proceedings shall also respect confidentiality.

1240. ADMINISTRATIVE TRIBUNAL

1240.1 Disputes between the Organization and a staff member which cannot be resolved internally may be referred to the Administrative Tribunal of the International Labour Organization, in accordance with the provisions of the Statute of the Tribunal.

1240.2 A complaint may be made to the Tribunal when the decision contested is a final decision further to Staff Rule 1230.6.1 and the person concerned has exhausted such other means of challenging it as are open to him under these Rules.

1245. EFFECT OF APPEALS ON ADMINISTRATIVE DECISION

The filing of an appeal under any of the procedures described in this section shall not constitute grounds for delaying the final administrative decision against which the appeal is made.

1250. AVAILABILITY OF RULES OF PROCEDURE

Copies of the rules of procedure of the Global Board of Appeal and the Statute of the Tribunal shall be available from the Global Board of Appeal Secretariat and on the WHO intranet.

SUPREME COURT OF PAKISTAN
(Appellate Jurisdiction)

Present:
MR. JUSTICE AMIN-UD-DIN KHAN
MR. JUSTICE JAMAL KHAN MANDOKHAIL

Civil Petition No. 1840 of 2016

(Against the judgment dated 22.03.2021 passed by the Islamabad High Court, Islamabad in Civil Revision No. 349 of 2015)

World Health Organization, (WHO), Islamabad *...Petitioner (s)*

Versus

Muhammad Ansar Iqbal *...Respondent(s)*

For the Petitioner(s): Ch. Muhammad Ashraf Gujjar, ASC

On Court Notice: Mr. Sajid Ilyas Bhatti, Addl. AG
Asad Burki, Legal Advisor MOFA
Syed Faraz Raza, Legal Advisor

For the Respondent(s): N.R.

Date of Hearing: 15.12.2021

ORDER

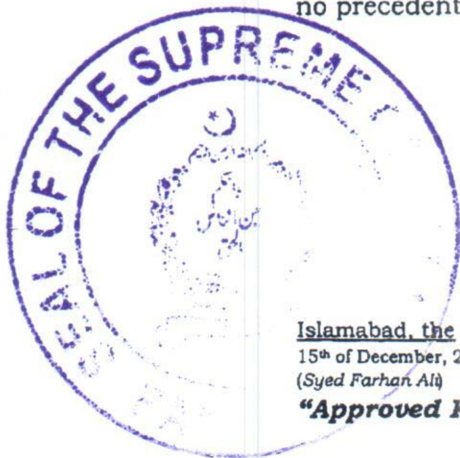
AMIN-UD-DIN KHAN, J.- We have heard learned counsel for the petitioner as well as Mr. Sajid Ilyas Bhatti, Additional Attorney General present before us. Learned counsel for the petitioner states that actually the matter has been settled out of the Court and the plaintiff/respondent has withdrawn his suit on 10.12.2016. The only question for which this Court has been approached is that the learned High Court has wrongly applied the State Immunity Ordinance No.VI of 1981 and section 4 thereof. The case of the petitioner before the trial court as well as High Court and this Court is that the civil court was having no jurisdiction to entertain and try the suit against the petitioner,

ATTESTED
Senior Court Associate
Supreme Court of Pakistan
Islamabad

under the contract between the parties in the light of Clause 16 of General Conditions of Contract which contains amicable settlement between the parties in accordance with the practice and through conciliation in accordance with the conciliation rules of the United Nations Commission on International Trade Law ("UNCITRAL") and through the mode of arbitration in accordance with the UNCITRAL Arbitration Rules, therefore, the civil court was having no jurisdiction.

2. We have considered the arguments advanced by the learned counsel for the parties. The stance of the petitioner holds ground that the law has incorrectly been applied while dismissing the petition filed before the High Court is correct in the facts and circumstances of this case. The determination of scope, limits and extent of diplomatic and state immunity clauses of various statutes need further deliberations. However, since the matter between the parties stand resolved out of court, it would become an academic exercise to give any finding on the issue of state/diplomatic immunity. In this view of the matter we convert this petition into appeal and allow the same. We set aside the judgment passed by the High Court and hold further that the said judgement shall have no precedential value in term of Article 201 of the Constitution.

Sd/-J
Sd/-J



Certified to be True Copy

Senior Court Associate
Supreme Court of Pakistan
Islamabad

Islamabad, the
15th of December, 2021
(*Syed Farhan Ali*)
"Approved For Reporting"

CR No: 4342/22 Civil/Criminal
Date of Presentation: 28-2-22
No of Words: 600
No of Folios: 6
Requisition Fee Rs: 5.00
Copy Fee in: 3.72
Court Fee Stamps: 8.72
Date of Completion of Copy: 1/3/22
Date of Delivery of Copy:
Compared by/Prepared by:
Received by: