*Extract from:*

# UNITED NATIONS JURIDICAL YEARBOOK

1980

Part Three. Judicial decisions on questions relating to the United Nations and related intergovernmental organizations

Chapter VIII. Decisions of national tribunals

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# Chapter VIII
# DECISIONS OF NATIONAL TRIBUNALS

## 1. Argentina

*In re* PEDRO DANIEL WEINBERG: DECISION OF 15 JANUARY 1980

*Case referred to the Supreme Court by the judge of first instance because the person concerned was an international civil servant — Conclusions of the Court regarding the legal status of the person concerned in view of his nationality and the limited character of the privileges and immunities granted to international civil servants — Referral of the case to the judge of first instance*

The case concerned an expert of the Inter-American Centre for Research and Documentation on Vocational Training, a body attached to the ILO, against whom criminal proceedings had been instituted. The judge of first instance had declared himself to be incompetent because of the legal status of the person concerned and had referred the case to the Supreme Court.

The Court, referring to the information provided by the ILO Office in Buenos Aires and by the Argentine Ministry of Foreign Affairs, ruled that since the person concerned was an Argentine national employed in a technical post in an international agency and did not have the status of a diplomatic agent *stricto sensu*, did not represent the Organization and did not have full immunity, criminal proceedings instituted against him in connexion with an act unrelated to his professional activities did not fall within the original competence of the Court. It added that, without prejudice to the foregoing, the question of the existence and scope, in the case concerned, of immunity from arrest or any other privilege which the person concerned might claim in accordance with the applicable legal rules[1] should be settled by the competent judge, to whom it therefore referred the case.

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## 2. Switzerland

### (*a*) CANTONAL COURT OF THE CANTON OF VAUD (INSURANCE COURT)

X. *v.* EQUALIZATION FUND OF THE CANTON OF VAUD: JUDGEMENT OF 21 NOVEMBER 1979

*Swiss employee of the United Nations participating in the United Nations Pension Fund — Mandatory participation in the national old-age insurance scheme — Exemption from such participation accorded only when the combined contributions would constitute an excessive burden for the person concerned*

The plaintiff, a Swiss national employed by the United Nations in Geneva and domiciled in the canton of Vaud, had requested the Equalization Fund of the canton of Vaud to exempt him from participation in the Swiss old age and survivors' insurance scheme because the combined contributions to that Fund and the United Nations Pension Fund would constitute an excessive burden for him. In support of his request he had produced a certificate stating that he was a participant in the United Nations Pension Fund and paid to that institution a contribution equal to 7 per cent of his salary. Having been requested by the cantonal Fund to state the amount of the salary from which the 7 per cent contribution was deducted, he had omitted to provide that

information and his request for exemption from payment of his contributions to the old age pension scheme had therefore been rejected.

Before the Court, the plaintiff invoked the practice followed by the Equalization Fund of the canton of Geneva, which automatically exempts international civil servants of Swiss nationality if they present a certificate confirming that they are participants in the pension fund of an international organization. According to the plaintiff, it was unacceptable that a Swiss international civil servant should be treated differently according to whether he had his domicile in the canton of Vaud or the canton of Geneva. He likewise invoked the Headquarters agreement concluded between the Swiss Confederation and the United Nations.[2] Lastly, he submitted to the Court the certificate which the cantonal Fund had requested of him, indicating the amount of his salary and of his contribution to the Pension Fund.

The Court reviewed the legislation and regulations governing the matter. It concluded that the plaintiff, a Swiss national, could not be exempted from the mandatory Swiss insurance scheme unless his contributions to that scheme, combined with his contributions to the United Nations Pension Fund, constituted an excessive burden. With regard to the Agreement between the Swiss Confederation and the United Nations invoked by the plaintiff, the Court concluded that it could not be deduced from any of the provisions of that Agreement that Swiss employees of the United Nations were entitled to exemption from the obligation to contribute to the Swiss old age insurance scheme.

With regard to the concept of an excessive financial burden, the Court recalled that the Federal Insurance Court had had occasion to specify that that concept did not imply a state of want and that the burden could be considered excessive if the simultaneous payment of two contributions involved the insured in serious financial difficulties. According to the judicial practice of the Federal Insurance Court, in 1962, combined contributions representing a total of 17 per cent of the salary of the insured had not constituted an excessively heavy burden provided that the insured was left with an annual income of 29,000 francs for himself and his family. In the present case, the Court concluded that the condition of an excessively heavy double burden had clearly not been fulfilled, since the two contributions combined had represented 16.4 per cent of the plaintiff's salary in 1969 and 15.9 per cent in 1968. In view of the amount of the plaintiff's salary and the fact that he was a bachelor, the Court considered that the combined contributions did not constitute an excessive burden in his case.

With regard to the practice of the Fund of the canton of Geneva invoked by the plaintiff, the Court considered that neither the Fund of the canton of Vaud nor the Court itself was bound by that practice. The Court observed, however, that the guidelines applied in Geneva deviated from normal legal and juridical practice, so that the plaintiff could not invoke that practice in the canton of Vaud to prove that he had been the victim of unequal treatment.

The Court therefore rejected the appeal and confirmed the contested decision.

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## (*b*) CENTRAL COURT OF THE CANTON OF VAUD (CRIMINAL COURT OF CASSATION)

### X. *v. Ministère public:* DECISION OF 19 MAY 1979

*Immunity from criminal jurisdiction accorded to international civil servants and members of their families — Obligation of the judge pronouncing on the merits to consider the status of an accused person falling within that category — Silence of the judgement on this point renders it null and void*

By a judgement of 27 February 1979, the Juvenile Court had fined the son of an international civil servant 50 francs with suspended execution of sentence for causing a fire through negligence. On appeal, the father of the accused had drawn attention to the fact that his son was the holder of

a card issued by the Federal Political Department stating that he had been accorded inviolability and immunity from criminal, civil and administrative jurisdiction.

The Criminal Court of Cassation observed that the judgement stated "the father is an international civil servant employed by the United Nations in Geneva". The Court concluded that in those circumstances, the first judge should have automatically considered the status of the accused and that, since he had not done so, the judgement was tainted by irregularities that rendered it null and void. There were therefore grounds for automatically quashing the judgement and referring the case back to the Juvenile Court so that it could determine whether the accused enjoyed immunity from criminal jurisdiction and, if appropriate, request that that immunity be waived.

The Criminal Court of Cassation thus automatically quashed the judgement of the Juvenile Court and referred the case back to that Court for a new investigation and a new judgement as indicated in the preamble.

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## 3. United States of America

### (*a*) NEW YORK SUPREME COURT: APPELLATE DIVISION SECOND JUDICIAL DEPARTMENT

SHAMSEE *v.* SHAMSEE: DECISION OF 19 MAY 1980[3]

*Appeal of the United Nations Joint Staff Pension Fund* et al. *from orders* inter alia *denying a motion to vacate prior orders holding the Fund and its Secretary in contempt of court for non-compliance with a sequestration order relating to the pension entitlement of a retired employee of the United Nations — Competence of the courts of the United States to decide on questions of immunity from legal process under treaties and statutes of the United States — Immunity of the United Nations Joint Staff Pension Fund and its Secretary from the sequestration order under the applicable federal law*

The case concerned the estranged wife of a retired employee of the United Nations, who had obtained in 1976 a sequestration order against her husband. As a participant in the United Nations Joint Staff Pension Fund, the husband received from the Fund a pension which was his chief remaining asset in the United States. The Fund's Secretary had declined to comply with the sequestration order, invoking immunity from legal process for the Fund and for himself in his official capacity under the Convention on the Privileges and Immunities of the United Nations and under the International Organizations' Immunities Act, and had as a result been held, together with the Fund, in contempt of court.

A stay of the Secretary's arrest had subsequently been granted by the Supreme Court at Special Term pending a determination of the question of immunity. In this connexion two affidavits were submitted to the court, one from the Legal Counsel of the United Nations (attesting to the fact that the Fund is an organ of the United Nations, regulated by the General Assembly, that its assets are the property of the United Nations, immune from process by virtue of treaty and statute and that the Secretary of the Fund is likewise immune for acts performed in his official capacity) and the second from an official of the State Department (certifying that the Secretary of the Fund was and had been employed as such by the United Nations and was thus entitled to immunity for acts performed in his official capacity). The Special Term having ordered the United States Attorney to seek a "formal opinion" from the Department of State on the immunity question, the United States produced a State Department certificate attesting to the status of the Fund's Secretary, as well as a letter from the State Department's Deputy Legal Adviser expressing the view that the Fund and its Secretary are entitled to immunity from the sequestration order. By decision dated 31 August 1979, the Court directed the United States Attorney to seek a ruling from the President of the United States on the immunity question pursuant to section 288 of title 22 of the United States Court.

At several stages during the proceedings described above, the United Nations Joint Staff Pension Fund and its Secretary had moved that the orders holding them in contempt of court and ordering the Secretary's commitment to the County Jail be vacated but their motion had been denied. They were seeking a reversal of the order denying this motion and of the order resulting from the decision of 31 August 1979.

The Appellate Division of the Supreme Court ruled that the order appealed from be reversed and the prior orders of contempt and commitment vacated. It stated that with the discontinuance of the Executive Branch practice of making suggestions of immunity, the question of immunity from legal process under treaties and statutes of the United States lay within the province of the courts which were bound by the Constitution to follow "the supreme Law of the Land". While the Executive Branch continued to advise the courts on matters relating to immunity which were within its unique knowledge and competence and its opinion on the interpretation of treaties was entitled to "great weight", claims of immunity must be resolved by the court on the basis of the facts properly before it (see *Menon* v. *Weil,* 66 Misc 2d 114),[4] and the Special Term had thus erred in its insistence on proof that the State Department had passed upon the immunity claim at bar and in its order to the United States Attorney to obtain a formal opinion.

On the question of immunity, the Appellate Division stated the following:

> "Section 2 of the Convention on the Privileges and Immunities of the United Nations to which the United States became a party on April 29, 1970, confers immunity from 'every form of legal process', except insofar as expressly waived, on '[t]he United Nations, its property and assets wherever located and by whomsoever held'. Section 18 (subd [*a*]) of the same Convention grants functional immunity to officials of the United Nations 'in respect of words spoken or written and all acts performed by them in their official capacity'. In a similar tenor, the International Organizations Immunities Act (US Code, tit 22, § 288 *et seq.*) decrees that international organizations within the statutory definition (§ 288), of which the United Nations is one by virtue of Executive Order 9698 (11 Fed Reg 1809 [1946]), and their property and assets wherever located and by whomsoever held, 'shall enjoy the same immunity from suit and every form of judicial process as is enjoyed by foreign governments', except to the extent that such immunity is expressly waived (§ 288a, subd [*b*]). Officers and employees of international organizations, in the absence of waiver, 'shall be immune from suit and legal process relating to acts performed by them in their official capacity and falling within their functions as such officers, or employees' (§ 288, subd [*b*]) . . .
>
> "The record demonstrates with convincing clarity that the Pension Fund is an organ of the United Nations, subject to regulation by the General Assembly, and that its assets, although held separately from other United Nations property, are the property of that international organization. The funds which [the respondent] seeks to sequester, therefore, are impervious to legal process under both section 2 of the Convention and section 288A of title 22 of the United States Code (the International Organizations Immunities Act). Furthermore, the refusal [of the Fund's Secretary] to pay Pension Fund moneys to [the respondent] under the sequestration order clearly constituted an act undertaken in his official capacity as Secretary of the Fund, and he is thus shielded from a contempt finding and its consequences by section 17 of the Convention and by section 288d of title 22 of the United States Code.[5] Respondent's contention that the Fund is a commercial entity, distinct from the United Nations proper, does not withstand scrutiny. The very facts adduced to support this argument — that the Fund's offices are located at the United Nations Headquarters, that the United Nations deposits moneys into the Fund and that the Fund's operation is regulated by the General Assembly — only underscore the intimate connection between the Fund and its parent organization."

The Court further stated that it was unable to find in section 288 of title 22 of the United States Code any mechanism by which the President might be requested to "rule" on questions of immunity which arise in judicial proceedings.

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## (*b*) UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

### MARVIN R. BROADBENT *et al. v.* ORGANIZATION OF AMERICAN STATES: DECISION OF 8 JANUARY 1980[6]

*Claim brought against an intergovernmental organization of which the United States is a member by former employees of the organization in question — Jurisdictional issue — Question whether the jurisdictional immunity of the organization is restrictive or absolute — The employment by an international organization of internal administrative personnel is not a commercial activity — Existence of a grievance procedure within the organization concerned — Dismissal of the action*

#### I. *Background*

The plaintiffs-appellants were former staff members of the General Secretariat of the Organization of American States. Before their termination, they had been employed at the permanent headquarters of the Organization in Washington, D.C., for periods ranging from 6 to 24 years. They were all United States citizens or foreign nationals admitted to permanent residency in the United States.

The appellants were dismissed from the Secretariat on 31 August 1976, due to a reduction in force mandated by the OAS General Assembly. At various times between 31 October and 8 November 1976, they filed complaints with the Administrative Tribunal of OAS, the internal court created to resolve personnel disputes. On 1 June 1977, the Tribunal held that the discharges had been improper and that the appellants should be reinstated at the grades they held when they were separated from service. In accordance with its governing statute, the Tribunal also fixed an indemnity to be paid to each appellant should the Secretary-General choose to exercise the option of refusing to reinstate them. Subsequently, the Secretary-General denied reinstatement, and each appellant received the indicated indemnity.[7]

On 16 November 1977, the appellants brought an action in the district court, alleging breach of contract and seeking damages totalling three million dollars. OAS moved to quash service and dismiss the complaint, asserting that the district court lacked subject matter jurisdiction and that the OAS was immune from service of process; but the district court denied the motion in an order dated 25 January 1978. On 28 February, OAS filed a request for certification under 28 U.S.C. § 1292 (*b*) so as to take an interlocutory appeal of the January order to the United States Court of Appeals for the District of Columbia Circuit. In a final order dated 28 March 1978, the district court vacated its order of 25 January and dismissed the lawsuit. The 28 March order stated in pertinent part:

> "On January 25, 1978, this Court held that the express language of 22 U.S.C. § 288a (*b*) and the statutory purposes underlying the International Organizations Immunities Act of 1945[8] bring international organizations within the terms of the Foreign Sovereign Immunities Act of 1976, and that pursuant to 28 U.S.C. § 1330, this Court had jurisdiction over the parties and controversy involved in the case. Upon careful review of that decision, the Court finds that it did not properly weigh the facts that international organizations, and particularly the Organization of American States, are creatures of treaty and by virtue of treaty stand in a different position with respect to the issue of immunity than sovereign nations. The Court is persuaded that international organizations are immune from every form of legal process except in so far as that immunity is expressly waived by treaty or expressly limited by statute. The Court is further persuaded that this Court has jurisdiction over lawsuits involving international organizations only in so far as such jurisdiction is expressly provided for by statute.
>
> "The Foreign Sovereign Immunities Act of 1976 makes no mention of international organizations. The jurisdictional grant of 28 U.S.C. § 1330 refers only to foreign States. Nothing in the International Organizations Immunities Act of 1945 provides for jurisdiction in the district courts over civil actions against international organizations."

On 19 April 1978, the appellants filed their notice of appeal from this ruling.[9]

## II. *Analysis*

### A. *Jurisdiction*

In its final order, the district court concluded that it lacked subject matter jurisdiction[10] — a position advanced by OAS on appeals — whereas the appellants — and the district court in its 25 January order — relied upon a conjunctive reading of the International Organizations Immunity Act (IOIA) of 1945, 22 U.S.C. § 288a(*b*)[11] (1979) and the Foreign Sovereign Immunities Act (FSIA) of 1976, 28 U.S.C. § 1330 (1979),[12] to establish jurisdiction. The OAS countered that § 288a(*b*) conferred immunity and jurisdiction, and that § 1330 established jurisdiction over suits against foreign *States*, not international organizations.

The United Nations appeared *amicus curiae* and offered a different approach to the question of jurisdiction.[13]

The Court did not find it necessary to discuss the jurisdictional issues because clear and adequate non-judicial grounds existed for the disposal of the case.

### B. *The immunity of international organizations*

The Court noted that the International Organizations Immunities Act of 1945, 22 U.S.C. §228a(*b*) (1979), granted to international organizations designated by the President[14] "the same immunity from suit and every form of judicial 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 the terms of any contract".[15] As of 1945, the statute granted absolute immunity to international organizations, for that was the immunity then enjoyed by foreign Governments.

The Court further noted that the Foreign Sovereign Immunities Act of 1976, 28 U.S.C. § 1602 *et seq.* (1979), codified what, in the period between 1946 and 1976,[16] had come to be the immunity enjoyed by sovereign States, i.e., *restrictive* immunity the central feature of which was the distinction between the governmental or sovereign activities of a State (acts *jure imperii*) — for which foreign States may not be found liable by American courts — and its commercial activities (acts *jure gestionis*) for which they enjoy no immunity from liability.

The appellants, supported by the general doctrine that, ordinarily, "[a] statute which refers to the law of a subject generally adopts the law on the subject as of the time the law was invoked . . . [including] all the amendments and modifications of the law subsequent to the time the reference statute was enacted",[17] contended that since the IOIA conferred on international organizations the same immunity enjoyed by foreign Governments and since the FSIA indicated that foreign Governments now enjoy only restrictive immunity, international organizations enjoyed only restrictive immunity.[18] The OAS and several other international organizations as *amici curiae* countered that Congress had granted international organizations absolute immunity in the IOIA, and had never modified that grant; they relied on three implications of a legislative intent *not* to apply to international organizations the post-World War II evolutions in the doctrine of sovereign immunity, namely (1) that the FSIA was generally silent about international organizations; (2) that by its own terms the IOIA provided for the modification, where appropriate, of the immunity enjoyed by one or more international organizations, and that it was because Congress had intended to grant absolute immunity to international organizations that it had felt it necessary to give to the President the authority to relax that immunity, including removal or restriction of immunity in cases involving the commercial activities of international organizations, and (3) that Congress might have concluded that the policies and considerations that had led to the development of the restrictive immunity concept for foreign nations did not apply to international organizations like OAS.

The Court did not find it necessary to decide this difficult question of statutory construction inasmuch as on *either* theory of immunity — absolute or restrictive — an immunity existed, sufficient to shield the organization from lawsuit on the basis of acts involved in the case under consideration.

C. *The "commercial activity" concept in the restrictive immunity doctrine*

The Court pointed out that even under the restrictive immunity doctrine there was immunity from lawsuits based on governmental or sovereign activities — the *jure imperii* as distinct from commercial activities. While noting that the narrower standard of restrictive immunity was not necessarily the governing principle, it observed that an organization conducting the activities at issue in this case was shielded even under the restrictive immunity formula, and *a fortiori* on the absolute immunity theory.

In the view of the Court, the employment by a foreign State or international organization of internal administrative personnel — civil servants — was not properly characterized as "doing business", a view which was supported by the legislative history of the FSIA, and the definition of "commercial activity" in § 1603,[19] as well as by the House Report according to which ". . . *public or governmental and not commercial in nature would be the employment of diplomatic, civil service*".[20]

The Court recalled that the United States had accepted without qualification the principles that international organizations must be free to perform their functions and that no member State may take action to hinder the organization[21] and added the following:

> "The unique nature of the *international* civil service is relevant. International officials should be as free as possible, within the mandate granted by the member States, to perform their duties free from the peculiarities of national politics. The OAS charter, for example, imposes constraints on the organization's employment practices.[22] Such constraints may not coincide with the employment policies pursued by its various member states.[23] It would seem singularly inappropriate for the international organization to bind itself to the employment law of any particular member, and we have no reason to think that either the President or Congress intended this result. An attempt by the courts of one nation to adjudicate the personnel claims of international civil servants would entangle those courts in the internal administration of those organizations. Denial of immunity opens the door to divided decisions of the courts of different member States passing judgment on the rules, regulations, and decisions of the international bodies. Undercutting uniformity in the application of staff rules or regulations would undermine the ability of the organization to function effectively."[24]

The Court concluded that the relationship of an international organization with its internal administrative staff was non-commercial and, absent waiver, activities defining or arising out of that relationship could not be the basis of an action against the organization — regardless of whether international organizations enjoy absolute or restrictive immunity.

D. *The activities at issue*

The Court recalled that the appellants were staff members of the General Secretariat of OAS whose appointments, terms of employment, salaries and allowances, and the termination of employment were governed by detailed "Staff Rules of the General Secretariat" promulgated by OAS and that the Staff Rules further established an elaborate grievance procedure within OAS, with ultimate appeal to the Administrative Tribunal of OAS. It pointed out that the Tribunal was competent to determine the lawfulness of an employee's termination of employment. If an employee had been wrongfully discharged, the Tribunal could order reinstatement or the payment of an indemnity in the event the Secretary-General exercised his authority to indemnify the employee rather than effect the reinstatement.

Considering that the employment disputes between the appellants and OAS were disputes concerning the internal administrative staff of the Organization, that the internal administration of OAS was a non-commercial activity shielded by the doctrine of immunity and that there had been no waiver, the Court dismissed the appellant's action.

*
* *

## BRIEF FOR THE UNITED NATIONS AS *AMICUS CURIAE*

### STATEMENT OF ISSUES ON APPEAL

The United Nations will discuss the following questions:

1. Whether intergovernmental organizations are, without their consent, subject to suit in the courts of the United States.

2. Whether, independent of the general immunity from suit of intergovernmental organizations, national courts have jurisdiction over suits concerning the employment relations of such organizations.

3. Whether the federal courts of the United States have jurisdiction over suits against intergovernmental organizations that do not, aside from the nature of the defendants, raise any federal question.

### INTEREST OF *AMICUS*

The interest of *amicus* appears from the memorandum of points and authorities that was submitted in support of the motion for leave to file briefs, *amici curiae*.

### STATEMENT OF THE CASE[25]

Plaintiffs-Appellants, seven former employees of the Organization of American States (OAS), were dismissed from the Secretariat of the Organization due to a reduction in force mandated by the OAS General Assembly and they then appealed to the Administrative Tribunal of the Organization (OASAT).

On 1 June 1977 the Tribunal handed down Judgement No. 29[26] in Complaint No. 42 (*Chrétien* v. *Secretary-General of OAS*), in which it held that the complainant's (one of the Plaintiffs) discharge was improper because, in spite of his request, the OAS Secretariat had not properly put in motion the procedure established by OAS staff rule 110.6 applicable to a reduction in personnel, by forming an advisory committee to survey available vacancies. On the same date the Tribunal handed down Judgement No. 30 in Complaint Nos. 43, 44, 45, 46, 47 and 48 (*Hebblethwaite, Stone, Castro, Findlay, Martinez and Broadbent* v. *Secretary-General of OAS*), in which it held that complainants' (the six other Plaintiffs) discharge was improper because they were entitled to the protection of article 17(*b*) of the General Standards (governing the staff),[27] which would have protected their status on the basis of their seniority, since the General Assembly's suspension of that provision was ineffective in respect of staff employed before that suspension.

The Tribunal therefore resolved that Plantiffs be reinstated at the grades they held when they were separated from service. In accordance with article VII.2 of its statute, the Tribunal was also obliged to determine the amount of indemnification they should be paid if the Secretary-General chose to exercise the option granted to him by that article to refuse to reinstate them; accordingly, it determined the following amounts: $12,000 and $1,000 as attorney's fees in Judgement No. 29 and respectively $11,000, $12,000, $9,000, $9,000, $9,000 and $9,000, in addition to $300 each attorney's fees, in Judgement No. 30. The Secretary-General decided to accept the option of paying indemnities, and Plaintiffs received and accepted the indicated amounts, a total of $73,800, which were in addition to other termination benefits they had received in the normal course.

On 16 November 1977 Plaintiffs filed the present suit against OAS and the General Secretariat of OAS in the United States District Court for the District of Columbia. They asserted a breach of their employment contracts, and claimed damages amounting respectively to $590,000, $575,000, $760,000, $217,000, $309,000, $278,000 and $300,600 (totalling $2,829,600), plus interest, attorney's fees and costs.

The proceedings in the court are summarized in part II of the Statement of the Case in Appellees' Brief.

### SUMMARY ARGUMENT

#### I

Intergovernmental organizations,[28] that is, international organizations created by treaties among their member States, have a character completely different from that of States, and their requirements for and the legal basis of their immunity is consequently entirely different from that of States. These organizations are collective enterprises of their members, whose constituent instruments (i.e., their establishing treaties) define precisely the influence each member is to have on the operation of the organization and the method of exercising such influence; any attempt by a particular member State to govern the organization directly, through legislative, executive or judicial decrees, would violate the reciprocal agreement of all members as to how the organization is to be governed.

While the immunity of States in the courts of another derives from their respective sovereignty, and depends on the possibility of invoking reciprocity and the ability of States to retaliate against violations of their

own immunity, that of intergovernmental organizations is purely functional and designed to protect their ability to function independently of any government. This distinction is well established in international law. Thus changes in the laws and principles governing the sovereign immunity of States are not relevant to the differently based immunity of intergovernmental organizations.

Intergovernmental organizations, which carry out their functions not only in their headquarters State but in the territories of all their members, must, in order to deal equitably with all their members, be able to operate on the basis of uniform, i.e., international, law, rather than on the basis of the diverse laws of particular member States. If any State could, through its courts, bend the operations of an organization to the laws of that State, all other States could do likewise with respect to their laws, thus possibly paralyzing or fragmenting the organization.

The immunity of intergovernmental organizations is consequently specified by treaties, including the constituent instruments of the organizations. Thus the Charters of both the United Nations and OAS require their respective members to accord them the immunities necessary for the fulfilment of their purposes. Both Charters authorize the General Assemblies of the respective organizations to define the details of these necessary immunities, and each has done so in a similar privileges and immunities treaty, both of which specify "immunity from every form of legal process" for the organization. The United States is a party to the United Nations and OAS Charters (respectively 59 Stat. 1031, T.S. No. 993, and 2 U.S.T. 2394, T.I.A.S. No. 2361, amended 21 U.S.T. 607, T.I.A.S. No. 6847) and to the Convention on the Privileges and Immunities of the United Nations (21 U.S.T. 1418, T.I.A.S. No. 6900) and, although not a party to the corresponding Agreement on the Privileges and Immunities of the OAS (Pan-Am T.S. No. 22), cannot argue that it may therefore disregard the immunity provided for in the OAS Charter.

The International Organizations Immunities Act (IOIA) of 1945 (P.L. 79-291, 59 Stat. 669, 22 U.S.C. §§ 288-288f) is merely a legislative device to facilitate the carrying out of the international obligations of the United States towards the intergovernmental organizations designated under the Act and cannot alter these international obligations. In enacting the Foreign Sovereign Immunities Act (FSIA) of 1976 (P.L. 94-583, 90 Stat. 2891, 28 U.S.C. §§ 1602-1611), Congress indicated no intention of modifying the immunities of intergovernmental organizations provided for in the IOIA and in the treaties relating to each organization.

Intergovernmental organizations may not use their immunity from involuntary suit in national courts to escape liability or to refuse to settle disputes. They are required to and do make appropriate provisions for the impartial settlement of disputes with States, with private individuals and with the members of their own staffs.

II

The treaties establishing intergovernmental organizations, such as the United Nations and OAS, explicitly prohibit any interference by member States with the staffs of the organizations.

The international civil service is governed by mechanisms carefully designed to take proper account of the interests of the member States, the organizations themselves and their staffs. These mechanisms include legislative, administrative and judicial organs, altogether constituting a system in which no individual member may intervene through its own governmental organs.

In particular, most intergovernmental organizations, including the United Nations and OAS, have administrative tribunals, which have been recognized (*inter alia* by several opinions of the International Court of Justice) as having a fully judicial character and being empowered to pronounce judgements binding on the respective organizations and all their organs. While it is not for any national court to examine the adequacy of these tribunals, it should be noted that even though their power to require specific performance (for example, the reinstatement of a staff member) is, for reasons important to the organizations, limited by the legislation establishing them, they are empowered to award full monetary compensation.

Because of the special requirements of the international civil service, in particular to establish uniform and equitable conditions for employees from many different backgrounds and serving in various posts throughout the world, it is inappropriate to apply either the substantive or the procedural law of any particular member States to that service. If national courts were permitted to supersede the decisions of the competent international organs (including the administrative tribunals), any possibility of establishing a uniform and impartial international civil service would be destroyed.

Consequently national courts have consistently held, in the few instances in which an intergovernmental organization was not entitled to or had waived its immunity from suit, that such courts nevertheless could not exercise subject matter jurisdiction over disputes relating to the administration of the international civil service.

III

With reference to the jurisdiction of the United States federal courts in respect of intergovernmental organizations, whether as plaintiffs or as defendants, *International Refugee Organization* v. *Republic S.S.*

*Corp.*, 189 F.2d 858 (4th Cir. 1951), states the correct rule that these organizations may, regardless of the absence of any other federal question, invoke federal jurisdiction by virtue of the fact that they are created by a treaty of the United States.

## ARGUMENT

### I. *Intergovernmental organizations are immune from the jurisdiction of national courts, except in so far as they expressly waive that immunity or their constitutions otherwise provide*

*Amicus* considers that the present appeal can be decided entirely on the basis of the question discussed in part II of the Argument below, without reference to the general immunity of intergovernmental organizations. However, a holding concerning that immunity constitutes one of the bases of the District Court's Order and this point is also extensively discussed in the Briefs submitted by the Appellants, the Appellees and the United States, and therefore the question of general immunity is analyzed in this part of the Argument; the conclusion reached is substantially identical to that in part II.A of the Appellees' Brief, and contrary to that in part II of Appellants' Brief and part I of the United States Brief.

#### A. *Intergovernmental organizations have a special nature under international law, which is entirely different from that of States and results in different requirements with regard to immunity*

Intergovernmental organizations are a relatively new phenomenon in international affairs, dating only from the second half of the nineteenth century. They are established by multilateral treaties, which treaties at the same time are the constitutions or charters of these organizations, setting out their purposes and principles and establishing the organs through which these entities are to act. These organizations have legal personalities separate and distinct from those of the individual States that are their members. The legal relations between member States and an organization are largely established by the constituent treaty, though those relations may be further defined by agreements concluded among these States, between the organization and one or more States and even by decisions of the organization made under the authority of its constitution.

Intergovernmental organizations may be considered as collective enterprises of their member States. Their constituent treaties define precisely the influence each member is to have on the operations of the organizations, and how that influence is to be exercised — generally through collective organs. If individual members could then exert additional influence on those organizations, largely through the fortuitous circumstance of where their headquarters, or other offices or officials or assets, happen to be located this could drastically change the constitutionally agreed sharing of power within the organizations. Thus the immunity granted by States to an intergovernmental organization is really their reciprocal pledge that none will attempt to garner unilaterally an undue share of influence over its affairs.

The federal/state analogy lies close at hand. When the individual states created the United States, they did not subject it to suit in their own courts, but allowed Congress to decide to what extent the Union might assert immunity, might permit persons to sue it in its own, federal courts or perhaps might even agree, voluntarily, to suits in a state court.[29] Thus Jenks relies on Alexander Hamilton's defence, in *The Federalist*,[30] of the establishment of a system of federal courts, to indicate:

> "the same reasoning applies with equal force to the exercise of national jurisdiction over international organizations. In many cases, moreover, the independence of municipal courts from political influence is not sufficiently secure to afford adequate guarantees of impartiality and protection to international organizations in time of strain. In these circumstances jurisdictional immunity is a necessary bulwark of the independence of international organizations and an essential safeguard for their opportunities of further growth. The essence of the contrast between the position of States and that of international organizations is that States have too much and international organizations too little authority, and that in these circumstances we are far from the stage at which developments in the law relating to the immunities of States which have become appropriate only because the authority of States is so fully established can wisely be applied to international organizations."

(C. W. Jenks, *International Immunities* (Stevens, London, and Oceana, New York, 1961), p. 41.)

The International Court of Justice, after concluding that the United Nations was an "international person", further held that "that is not the same thing as saying that it is a State, which it certainly is not, or that its legal personality and rights and duties are the same as those of a State. . . . Whereas a State possesses the totality of international rights and duties recognized by international law, the rights and duties of an entity such as the Organization must depend upon its purposes and functions as specified or implied in its constituent documents and developed in practice." (Advisory Opinion on *Reparation for Injuries Suffered in the Service of the United Nations* [1949] I.C.J. 174, at 179-80.)

It is possible to contrast the conceptual bases of the immunity of States and of intergovernmental organizations:

(*a*) States have sovereignty, but international organizations do not.

(*b*) States have territory; international organizations do not, but function within the territories of States.

(*c*) States have citizens, but international organizations merely have officials who are generally citizens of their member States, though freed of certain responsibilities towards such States.

(*d*) States are considerably protected from undue intrusion of other states by their ability to invoke the principle of reciprocity, or can protect themselves by their ability to retaliate; international organizations, not standing on a parity with States, cannot depend on reciprocity, nor are they in a position to retaliate against any violations of their integrity.

(*e*) More particularly, States can grant to or withhold immunity from each other, and generally do so on the basis of agreements or principles of comity embodied in international law; international organizations normally do not exercise jurisdiction over anyone except, and only to a limited extent, their own officials, and thus are not in a position to grant to or withhold immunity from States.

(*f*) States are protected from interference by international organizations in their affairs by provisions in the constitutions of these organizations (for example, United Nations Charter, Article 2(7)) and by the fact that representatives of States constitute the political organs and control the administrative organs of these organizations; international organizations are protected from interference by States principally by the immunities provided for by international law.

(*g*) Consequently the immunities of States are those attributable to sovereigns and thus reflect those that States reserve to themselves, whether absolute or relative; those of intergovernmental organizations are functional and thus reflect their needs, which require complete protection from national jurisdiction.

For all these reasons, the immunities that States grant to international organizations stand in no direct relation to the immunities that States grant to each other. Consequently the considerations that have recently, and in particular since the end of the Second World War (see the first paragraph of part I.D below), led to the restriction of inter-State immunities (or for that matter of intra-State immunities, as States have also made themselves more amenable to suits in their own courts) have no direct relevance to the immunities that are required for the proper functioning of intergovernmental organizations.

The distinction between the immunities enjoyed by States and by intergovernmental organizations is consequently well established in international law. At the 1945 San Francisco Conference on the Charter of the United Nations, Commission IV on Judicial Organization, which formulated Article 105 of the Charter, explained that:

> "In order to determine the nature of the privileges and immunities, the Committee has seen fit to avoid the term 'diplomatic' and has preferred to substitute a more appropriate standard, based, for the purposes of the Organization, on the necessity of realizing its purposes and, in the case of the representatives of its members and the officials of the Organization, on providing for the independent exercise of their functions."

(13 U.N.C.I.O. Docs (Doc. 933, IV/2/42(2)) 703, p. 704).

When the United Nations General Assembly charged its International Law Commission (ILC) with considering the codification of the law of immunities, the latter, in reporting to the Assembly on "Diplomatic intercourse and immunities", stated that:

> "Apart from diplomatic relations between States, there are also relations between States and international organizations. There is likewise the question of the privileges and immunities of the organizations themselves. However, these matters are, as regards most of the organizations, governed by special conventions."

(Report of the International Law Commission, *Official Records of the General Assembly, Thirteenth Session, Supplement No. 9* (A/3859), para. 52 (1958).)[31]

Finally, it may be useful to indicate briefly the special need that intergovernmental organizations have for immunities. Many of these organizations are required to carry out extensive operations not only in the state in which their headquarters is located, but generally in all their member States and sometimes even in non-member States. In order to be able to deal fairly with all their members and with the citizens of the latter, they must be able to carry out transactions on the basis of a uniform law rather than on diverse national legal principles — that is, they must be able to operate as far as possible on the basis of international law, which includes "the general principles of law recognized by civilized nations" (ICJ Statute, Article 38(1) (*c*)). Even as a matter of practicality, an international organization, operating in 151 States (like the United Nations) or in 26 States (like OAS), cannot be familiar with the laws of all these states, and would be put under an intolerable and crippling burden if it had potentially to defend suits based on national laws, in the national courts of all of them. Also, account must be taken of the fact that in an intergovernmental organization not all member States are necessarily in accord with all its activities, even though these may have been mandated by the proper majorities in the competent organs; consequently, disaffected states might, if they could, interfere through their

national organs with such activities, unless these, as well as the organization's assets and officials, are immune from national jurisdiction.

Adjudication by a national court of a dispute involving an intergovernmental organization is also likely to involve the court deeply in the internal administration of the organization. The court might have to consider the validity of decisions taken by various organs composed of the representatives of States, and require information from the records of the organization, placing the latter before the dilemma of either waiving the undoubted inviolability of its archives (as guaranteed by international treaties, such as by section 4 of both the Convention on the Privileges and Immunities of the United Nations and the Agreement on the Privileges and Immunities of OAS (both cited and quoted in the addendum hereto) and in the United States also by a provision of the International Organizations Immunities Act, 22 U.S.C. 288a(*c*)) or of failing to produce evidence required to support its position or ordered by the court to be produced for the benefit of the other party. Thus, the very conduct of such a trial without the consent of the organization would, whatever its outcome, constitute a serious and impermissible disruption of the internal affairs of the organization.

B. *The immunities of intergovernmental organizations are substantially based on treaties or on general principles of international law*

The immunities of most intergovernmental organizations are firmly based on treaties — usually on the treaties that are their constituent instruments and directly bind all member states, which are often supplemented by more detailed privileges and immunities agreements.

In respect of the United Nations, Articles 104 and 105(1) of its Charter provide as follows:

"*Article 104*

"The Organization shall enjoy in the territory of each of its Members such legal capacity as may be necessary for the exercise of its functions and the fulfilment of its purposes.

"*Article 105*

"1. The Organization shall enjoy in the territory of each of its Members such privileges and immunities as are necessary for the fulfilment of its purposes."

With respect to the latter provision, Commission IV on Judicial Organization of the 1945 San Francisco Conference declared that it "sets forth a rule obligatory for all Members as soon as the Charter becomes operative" (13 U.N.C.I.O. Docs (Doc. 933, IV/2/42(2)) 703, at 704) and stated that "the terms 'privileges' and 'immunities' indicate in a general way all that could be considered necessary to the realization of the purposes of the Organization, to the free functioning of its organs and to the independent exercise of the functions and duties of their officials: exemption from tax, *immunity from jurisdiction*, facilities for communication, inviolability of buildings, properties, and archives, etc. ... [N]o Member State may hinder in any way the working of the Organization *or take any measure the effect of which might be to increase its burdens, financial or other*." (*id.*, at 705, emphasis added). It was thus intended and understood by the authors of the Charter that these privileges and immunities, including specifically immunity from jurisdiction, would be available to the United Nations in all its Member States, by the mere fact of their ratification of the Charter.

However, to facilitate the implementation of Article 105(1) of the United Nations Charter, Article 105(3) provides:

"3. The General Assembly may make recommendations with a view to determining the details of the application of paragraphs 1 and 2 of this Article or may propose conventions to the Members of the United Nations for this purpose."

It is clear from the language of this provision that it was intended that such conventions, which were to provide for "the details of ... application", would merely be declaratory of the privileges and immunities already granted by paragraphs 1 and 2 of that Article of the Charter. The United Nations General Assembly, in exercising the authority granted to it in the quoted paragraph, by adopting at its very first session (and only months after the conclusion of the San Francisco Conference) the 1946 Convention on the Privileges and Immunities of the United Nations,[32] also made it clear in the Preamble to that instrument (quoted in the addendum hereto) that it was merely defining the privileges and immunities necessary for the fulfilment of the purposes of the Organization. Thus it is clear that the provisions of the Convention (to which the United States became a party in 1970) are not designed to expand on the obligations established by the Charter, but only to particularize them.

Section 2 of the United Nations Convention provides:

"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."

There can be no doubt that this provision, which also appears in almost identical language in the 1947 Convention on the Privileges and Immunities of the Specialized Agencies[33] also adopted by the United Nations General Assembly, as well as in a great number of other similar instruments, specifies one of the principal immunities "necessary" for the fulfilment of the purposes of the United Nations and of other intergovernmental organizations. In this connection it should also be noted that no reservation (whereby a State declares that it will limit the application of a treaty provision) to section 2 of the United Nations Convention or to the corresponding provisions in other instruments has ever been accepted.

The Charter of the Organization of American States was concluded at the 1948 Ninth International Conference of American States and has entered into force for each of its 26 members, including the United States. Article 139 of the amended Charter provides:

> "The Organization of American States shall enjoy in the territory of each Member such legal capacity, privileges, and immunities as are necessary for the exercise of its functions and the accomplishment of its purposes."

It will be noted that this provision is almost identical to Article 105(1) of the United Nations Charter, the meaning of which, in respect of immunities, is defined by section 2 of the United Nations Convention. Consequently it can be concluded that the United States, for which the OAS Charter constitutes a treaty obligation, is already bound, by that Charter, to grant to OAS all "necessary" immunities, including that "from every form of legal process".

Pursuant to Article 141 of the OAS Charter (which corresponds to Article 105(3) of the United Nations Charter — both quoted in the addendum), the OAS Council in 1949 adopted the Agreement on the Privileges and Immunities of the Organization of American States (the OAS Convention) the Preamble to which recites that it provides for privileges and immunities "substantially identical to those granted to the United Nations". Indeed, its article 2 is almost precisely identical to section 2 of the United Nations Convention and reads as follows:

> "*Article 2.* The Organization and its organs, 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 the immunity has been expressly waived. It is understood, however, that no such waiver of immunity shall make the said property and assets subject to any measure of execution."

Though the United States has not yet become a party to that OAS Agreement, it is clear that its terms, pursuant to article 141 of the OAS Charter, merely constitute the same sort of detailed definition of article 139 as the United Nations Convention is of Article 105(1) of the United Nations Charter.

### C. *Statutory bases of the immunities of intergovernmental organizations in the United States*

The International Organizations Immunities Act (IOIA) (59 Stat. 669, 28 U.S.C. §§ 288-288f) was enacted by Congress in 1945 in view of the increased activities of the United States in international organizations. The fact that the Pan American Union (which became the Secretariat of OAS) already had its headquarters in the United States, that the International Monetary Fund and the World Bank were to establish their seats there and that it was likely that the United Nations would also do so, made it expedient for the host country to enact legislation to assist the United States in implementing its international obligations towards these organizations, and to facilitate the independent functioning of these organizations as well as of others of which the United States would become a member and that might conduct certain activities within its borders. However, as the IOIA constituted merely unilateral legislation, it could not purport to define these obligations vis-à-vis intergovernmental organizations in any way binding on these organizations. Moreover, as to the several treaty instruments discussed in part I.B above that post-date the IOIA (United Nations Convention, OAS Charter), the provisions of these treaties would in any event take precedence over any earlier inconsistent legislation.

This, too, has been the executive's interpretation of the IOIA. For example, in designating OAS as an organization covered by that Act, President Eisenhower specified:

> "The designation of the Organization of American States as a public international organization within the meaning of the International Organizations Immunities Act is not intended to abridge in any respect privileges, exemptions, and immunities which the Organization may have acquired or may acquire by treaty or congressional action."

(Exec. Order No. 10533, 19 Fed. Reg. 3289 (4 June 1954)).

Though section 2 of the IOIA apparently equated international organization immunity with that of foreign states, as that existed in 1945, there is nothing in the history of the Act that would suggest a congressional intent to limit the immunity granted to international organizations in any way inconsistent with their several

charters. Thus, when the United States Senate considered its advice on the ratification of the United Nations Convention, its Committee on Foreign Relations stated:

> "Articles I, II,[34] and III [of the Convention] have the effect of giving the United Nations, as an organization, substantially the same legal capacities and the same privileges and immunities in the United States as are afforded foreign Governments. These articles do not change the present situation since the International Organizations Immunities Act already provides for the same legal capacities, privileges, and immunities."

(S. Exec. Rep. No. 91-17, 91st Cong. 2nd Sess. (to accompany Ex. J) 2 (17 Mar. 1970)).

When the Foreign Sovereign Immunities Act (FSIA) (90 Stat. 2891, 28 U.S.C. §§ 1602-1611) was adopted in 1976, Congress did not consider any possible impact on public international organizations. Although the Act carefully defines "foreign State" (28 U.S.C. § 1603) in terms clearly inapplicable to international organizations, it does not, except collaterally (28 U.S.C. § 1611(*a*)), refer to or define the latter, nor are they mentioned in the House or Senate Reports (H. Rep. No. 94-1487, 94th Cong. 2nd Sess. (to accompany H.R. 11315) (9 Sep. 1976) reprinted in [1976] U.S. Code Cong. and Ad. News 6604; S. Rep. No. 94-1310, 94th Cong. 2nd Sess. (to accompany S. 3553) (27 Sep. 1976)). If it had been Congress' intent to provide for jurisdiction over intergovernmental organizations it would certainly have done so clearly. Instead, nothing in the language of the Act purports to indicate that the FSIA was designed to amend the IOIA, or to limit the immunity from jurisdiction that it grants international organizations. To accept the United States contention that there can be "no question that since the passage two years ago of the [Foreign Sovereign] Immunities Act international organizations are now fully subject to suit in American courts for their acts *jure gestionis*" (United States Brief, p. 8) would be to assume, without any indication of Congressional intent, that with the passage of the FSIA Congress intended to derogate, or at least accepted the possibility of derogation, from the international obligations of the United States in respect of intergovernmental organizations.[35] This, of course, is contrary to the accepted rule of construction (*United States* v. *Gue Lim*, 176 U.S. 459 (1900); *Cook* v. *United States*, 288 U.S. 102 (1933); *Pigeon River Improvement, Slide and Boom Co.* v. *Cox*, 291 U.S. 138 (1934)). Moreover, it is not to be presumed that Congress intended to extend the exercise of jurisdiction in the international arena, unless there "is present the affirmative intention of Congress, clearly expressed" (*Benz* v. *Compania Naviera Hidalgo*, 353 U.S. 138, at 147 (1957); *McCulloch* v. *Sociedad Nacional*, 372 U.S. 10 (1963)).

D. *The immunity of intergovernmental organizations cannot be used by them as a shield from liability*

From the end of the eighteenth century and continuing through the nineteenth century, national courts developed a doctrine of state immunity that was almost unlimited in scope. However, after the First World War, two theories of immunity came to co-exist, that of absolute immunity and that of restricted immunity, the latter allowing States immunity with regard to their sovereign or public acts (*jure imperii*) but not their commercial or private acts (*jure gestionis*); the United States, which still followed the absolute approach at the end of the Second World War, when the IOIA was adopted, has gradually shifted to the restricted approach, as signified by the recent adoption of the FSIA. However, for the reasons indicated in part I.A above, this change in approach is not relevant to intergovernmental organizations, which do not possess the "sovereign" character of States. Unlike States, these organizations are "creatures of treaty". Since they have never been accorded sovereign immunity, they do not and cannot act *jure imperii*. The privileges and immunities they possess have never been as far-reaching as those accorded to States, and have a more rational foundation. They have been granted solely because they are necessary for the independent and effective functioning of these organizations. In particular, their "functional" immunity is never a release from a legal obligation but merely from the jurisdiction of national courts.

To prevent the United Nations from using its immunity from judicial process as a shield from liability, section 29(*a*) of the United Nations Convention requires "the United Nations to make provisions for appropriate modes of settlement of disputes arising out of contracts or other disputes of a private law character to which the United Nations is a party". Identical provisions are contained in section 31(*a*) of the Specialized Agencies Convention and in article 12(*a*) of the OAS Convention. Should these obligations be violated by the organization, a state concerned could, to protect its citizens, itself initiate a disputes settlement procedure with the organization if that is provided for by another provision of the applicable Convention (for example, United Nations Convention, sect. 30), and naturally every member State could also intervene in the competent political organs of the organization; but these are the only methods of redress that can be offered by an individual State, and the imposition of the jurisdiction of its own courts is not permissible.

The United Nations has implemented its obligation to provide an appropriate forum for the settlement of disputes as follows:

(*a*) In all agreements with States, the United Nations offers to include provisions for arbitration, or for settlement by an advisory opinion of the International Court of Justice accepted in advance as binding on the

parties (see, for example, section 30 of the United Nations Convention). If a dispute arises outside such an agreement, the United Nations similarly proposes one of these methods of settlement.

(*b*) In all major contracts with private persons, the United Nations routinely includes or proposes an arbitration clause. If a dispute should arise outside of such a contract, or in tort, the United Nations similarly offers to arbitrate if no negotiated settlement can be reached. To the extent that it insures itself against third-party liability, the insurance carrier is instructed not to raise the immunity of the Organization as a bar to suit in the appropriate jurisdiction.

(*c*) When carrying out activities in countries outside of those where it has an established seat (for example, in conducting a conference or in administering technical assistance), it may require the Government concerned to agree to settle any claims brought against the Organization (see, for example, article VI of the Agreement between the United Nations and Sweden Concerning the Arrangements for the United Nations Conference on the Human Environment).[36]

(*d*) Where situations arise, such as in the conduct of peace-keeping operations, that a multitude of claims are or may be submitted against the Organization, provision is made for the establishment of impartial claims commissions, generally in co-operation with the Governments concerned (see, for example, section 11 of the Agreement Relating to the Legal Status, Facilities, Privileges and Immunities of the United Nations in the Congo[37] and section 38 of the Exchange of Letters Constituting an Agreement Concerning the Status of the United Nations Peace-Keeping Force in Cyprus).[38]

(*e*) In respect of its staff, the procedures for settling disputes are described in detail in part 3 of the annex hereto.

Thus intergovernmental organizations, which for the reasons indicated above require complete immunity from national jurisdiction, may not and do not use that immunity to defeat disputed claims either by individuals or by governments.

II. *National courts have no jurisdiction over disputes between intergovernmental organizations and members of their staffs*

A. *Prohibitions arising from the constitutions of intergovernmental organizations*

Article 100 of the Charter of the United Nations, an international treaty to which the United States and all the other 150 members of the United Nations are parties, provides:

> "1. In the performance of their duties the Secretary-General and the staff shall not seek or receive instructions from any government or from any other authority external to the Organization. They shall refrain from any action which might reflect on their position as international officials responsible only to the Organization.
>
> "2. Each Member of the United Nations undertakes to respect the exclusively international character of the responsibilities of the Secretary-General and the staff and not to seek to influence them in the discharge of their responsibilities."

These provisions are typical of those included in the constitutional instruments of most world-wide and regional intergovernmental organizations[39] and are designed to guarantee the independence and impartiality of the secretariats of these organizations, which are absolute prerequisites to their effective functioning.

It should be noted that these provisions contain several relevant obligations:

(*a*) Members of the United Nations staff are enjoined from any action that might reflect on their position as international officials responsible only to the Organization. Certainly an appeal to a national authority, whether addressed to a legislative, administrative or judicial organ in a matter connected with the official duties or status of an international official, would be inconsistent with his position. An international official, by voluntarily accepting that status, with its benefits and obligations, at the same time surrenders his right to have that status adjudicated by any national organ, whether of his own country, or of the country where he happens to be stationed or where the seat of the Organization happens to be located. He does not, however, give up his right to secure an impartial adjudication of his status, for procedures for doing so are provided by the Organization (see part II.B below).

(*b*) The Secretary-General of the Organization, who is the chief administrative officer pursuant to Article 97 of the United Nations Charter and is responsible for the appointment of the staff pursuant to Article 101(1), is enjoined from receiving instructions "from any Government or from any other authority external to the Organization". In other words, it may be improper for him to conform to certain national judicial mandates, for example, one that might require him to appoint or promote or reimburse a particular staff member.

(*c*) To enable the Secretary-General and members of the staff to obey these constitutional injunctions, all States that are Members of the Organization agree to respect the exclusively international character of the

responsibilities of these officials and not to seek to influence them in their discharge thereof. These obligations are not limited to particular organs of a State, but include all. In this connection it might be noted that States differ in their constitutional structures and to exempt a certain category of governmental organs (e.g., courts) from this prohibition would leave some States (i.e., those with a less independent judiciary) much freer to exert influence than others whose internal powers are differently distributed.

B. *The international civil service is governed by complex mechanisms carefully designed to take proper account of the interests of the member States, of the intergovernmental organizations and of the members of their staffs, and any national interference with such governance is consequently improper and unacceptable*

As described below, the international civil service as a whole, and the secretariat of any particular intergovernmental organization, are governed by carefully structured mechanisms designed to take proper account of the several interests of the individual member States, i.e., in an adequate representation of their qualified nationals (which requires employment conditions that these can accept), as well as in their share of the personnel costs of the organization; of their collective interests as represented by the organization itself, in the quality, efficiency and impartiality of the staff as a whole; and finally of the individual members of the staff who may be committing some years of their working life or more frequently their entire careers to this service.

Sketched below are the mechanisms regulating the United Nations "common system", which applies not only to the staff of the United Nations itself but also to those of a number of its specialized and related agencies, that is, of world-wide organizations such as the Food and Agriculture Organization of the United Nations (headquarters in Rome), the International Atomic Energy Agency (headquarters in Vienna), the International Civil Aviation Organization (headquarters in Montreal), the Inter-Governmental Maritime Consultative Organization (headquarters in London) and the World Health Organization (headquarters in Geneva). The Organization of American States, which does not participate formally in the common system (as that is especially designed for world-wide rather than regional organizations), has for some time voluntarily and unilaterally followed the principal provisions of the system, in particular those specifying remuneration; nevertheless it too has numerous organs corresponding generally to those that deal with personnel matters in the United Nations system. Obviously, still smaller intergovernmental organizations have correspondingly simpler systems, in part because they can and do benefit from the experience and elaborate consideration in the large, universal organizations and more or less closely follow their lead in respect of the governance of the staff.

The mechanisms functioning in respect of the United Nations common system include:

(*a*) *Legislative organs*, such as the General Assembly of the United Nations and the corresponding generally representative bodies of the other common system organizations, which function through plenary (such as the Administrative and Budgetary Committee of the Assembly) and other organs and are assisted by expert bodies such as the International Civil Service Commission (ICSC), the Advisory Committee on Administrative and Budgetary Questions (ACABQ) and the Joint Inspection Unit (JIU), as well as by others consisting in whole or in part of the representatives of the respective administrations or staffs, such as the United Nations Joint Staff Pension Board, the Consultative Committee on Administrative Questions (CCAQ) and the Federation of International Civil Servants Association (FICSA).

It should be noted that these "legislative" organs include political bodies in which some or all states are represented on the diplomatic level, and expert bodies the members of which are either designated directly by the political bodies or by States selected by such bodies. The United States, taking into account its position as the largest financial contributor to most of the organizations and as host country of the headquarters of the United Nations, is represented on all these political and expert organs and is thus assured of an appropriate influence in regulating the common system. It would therefore be particularly inappropriate for the United States, or for any other State, whether or not it is host to one or more organizations, to attempt to enlarge the influence that has been allocated to it by intervening directly, whether through legislative measures, administrative regulations or judicial decisions, in the application of the rules of the common system to particular staff members or to categories of such staff members.

(*b*) *Administrative organs*, such as the United Nations Secretary-General and the executive heads of the other common system organizations, who must consult representatives of the staff in respect of general questions relating to staff welfare and administration and who must have most significant administrative decisions involving individual staff members (such as appointments, promotions, certain terminations, disciplinary matters and disability awards) considered first by standing joint bodies consisting of administration and staff representatives.

(*c*) *Quasi-judicial organs*, such as the Joint Appeals Board (JAB), or *judicial organs*, such as the Administrative Tribunals of the United Nations (UNAT) or of the International Labour Organisation (ILOAT) and, as a final instance, the International Court of Justice (ICJ) itself.

The fully judicial character of the Administrative Tribunals of the United Nations and of the ILO has been established by several explicit decisions of the International Court of Justice, which were accepted by the United Nations General Assembly or the other competent legislative bodies. In 1971, the OAS General Assembly, basing itself on the established models of UNAT and ILOAT, established the OAS Administrative Tribunal (OASAT), with a statute very similar to those of the two older tribunals. In particular, it provides for: independent judges, a fully judicial procedure and for judgements that are final and without appeal (OASAT statute, article VIII.2); though judgements are subject to limited revision by the Tribunal itself (article IX), no further appeal to ICJ (the "World Court") is provided for (as for UNAT and ILOAT) since OAS is a regional agency. The statute also provides (originally as paragraph 2 of the Transitory Provisions and now as article VIII.2) that whenever theTribunal rules that a complainant be reinstated in his post, the Tribunal must, in its judgement, also fix an indemnity that is to be paid if the Secretary-General decides, in the interest of OAS, that the complainant not be reinstated to service;[40] this provision, which is actually a less restrictive version of article 9(1) of the UNAT statute (which covers all types of specific performance), was evidently adopted for the same reasons by OAS as by the United Nations: in a small administration charged with politically delicate tasks, the Secretary-General must have full confidence in every staff member. There can therefore be no doubt that OASAT, like UNAT and ILOAT, is a fully judicial institution.

It is thus evident that international civil servants, and in particular those serving on the staff of the United Nations or the Organization of American States, enjoy extensive administrative and judicial protection of their employment rights. The extent of that protection reflects the deliberate and proper decision of the highest legislative organs of the organizations concerned, including that under certain circumstances staff members (who had voluntarily accepted the status of international civil servants) must be content to receive judicially determined monetary compensation or indemnities for any wrong done to them rather than restoration to a status that the executive head of the organization is unwilling to grant them.

However, the purpose of this presentation is not to invite the Court to scrutinize the adequacy of this system, either in general or in regard to any particular organization, or to examine especially the adequacy of the recourse procedures or remedies (which vary from organization to organization and which may or may not involve resort to judicial[41] or quasi-judicial organs). Rather the intention here is to demonstrate that the mechanisms established for the governance of the international civil service constitute an internationally established autonomous governmental system, in which it is improper for any national Government to intervene individually — though acting collectively, through the competent organs of the organizations concerned, the member Governments can and constantly do regulate the system.

Finally, it should also be noted that the legal system within which these mechanisms operate and which they in turn formulate, is international administrative law and not the law of the host State or of any other member State.

### C. *The special requirements of the international civil service make it inappropriate for any national court to exercise jurisdiction over disputes arising in such service*

The international civil service is subject to numerous constraints and requirements that are different both from those of any national civil service as well as from any private enterprise, whether national or international. In the first place, international officials must be independent of any national authorities or the obligation to further or to conform to national policies and must, in so far as concerns their official duties, even be free from the constraints of national laws. They must be prepared to accept expatriation, not merely for part of their careers but more frequently for all of it. The employing organization must, in fixing their terms of service, observe strict equity among persons of different national backgrounds (e.g., persons coming from countries with very high or very low standards of living), who are serving at or moving between posts throughout the world, sometimes on a long-term basis but sometimes quickly as determined by emergencies, and who may ultimately choose to retire to their home countries, to the host country of their last post or to some third country. Furthermore, statutory requirements regarding non-discrimination on account of gender (e.g., United Nations Charter, article 8, and OAS Charter, article 143)[42] and recruitment of staff on as wide a geographical basis as possible (e.g., United Nations Charter, article 101(3), and OAS Charter, article 126)[43] must be observed.

Consequently, the international civil service cannot bind itself to any national civil service system, or even accept such a system as a strict model. This is true even in relation to the civil service system of the host State of its headquarters, if for no other reason than that most international organizations (especially the United Nations — which also has major establishments in Addis Ababa, Bangkok, Geneva, Nairobi, Santiago and Vienna, as well as smaller ones in almost every Member State) also employ persons in many other posts throughout the world, and that, through the United Nations "common system", an attempt is made to create a considerably unified international civil service by co-ordinating the conditions of service of numerous organizations with headquarters and offices in different countries.

It must also be recognized that the member States of any given organization may differ considerably as to their philosophy concerning employment relations in general and those of civil servants in particular, and that the system that they collectively design for the international service must to an extent be distilled from those divergent practices and necessarily cannot reflect too closely the precepts of any one of them. To take one example, the United States has recently decided that it is generally improper to require any person to retire at a particular age;[44] other countries, on the other hand, consider early retirement an important social goal, both from the point of view of the retirees and from that of the younger persons who can thus advance more rapidly; the United Nations has generally opted for the latter approach, and the General Assembly (in which the United States is represented) has in recent years annually enjoined the Secretary-General to make as few exceptions as possible from the normal retirement age of 60.[45] Another example could be drawn from the field of "affirmative action" designed to correct past incongruities in employment patterns: the General Assembly has for many years concerned itself with the problem of achieving both more extensive geographic distribution as well as a more balanced employment by gender — two goals that may, in practice, be difficult to reconcile; it has consequently adopted some intricate formulae as well as some specific procedures for achieving these goals,[46] which formulae and procedures may very well differ from national standards, such as those evaluated in *Regents of the University of California* v. *Bakke* (438 U.S. 265, 98 S.Ct. 2733 (1978)). Finally, countries differ in their concept of the procedural rights to be granted to civil servants, for example, to bargain collectively for the terms of their employment, the definition and protection of certain "acquired rights" and the possibilities of administratively or judicially reviewing employment disputes.

As a result of all these considerations, no national court could sensibly adjudicate either substantive or procedural disputes arising from the international civil service, which, as pointed out before, are governed by international administrative law formulated on the basis of policy considerations that are beyond the purview of any one country to determine. And should the courts of one country be permitted to intervene, those of others could do so on the same basis, thus subjecting the organizations to quite possibly inconsistent decisions and destroying any possibility of establishing uniform terms of employment for the service as a whole.

D. *National courts have uniformly held that they have no jurisdiction over suits brought against an intergovernmental organization by a member of its staff, a conclusion confirmed by qualified legal scholars*

For the reasons indicated in parts II.A-C of this Argument, national courts in several countries have, as briefly described below, held that they have no jurisdiction over suits brought by staff members against their intergovernmental organization employers: the relative paucity of these cases merely reflects the fact that, for the reasons indicated in part I of this Argument, these organizations are normally considered entirely immune from suits in the courts of their member States — so that the issue of subject-matter jurisdiction generally only arises if a suit is brought in a state not a member of or otherwise required to g immunity to an organization, or if the latter has explicitly or was deemed to have implicitly waived its immunity from suit.

In *International Institute of Agriculture* v. *Profili*, Giur. Ital. I 1931, col. 738; 5 Ann. Dig. 413 (Court of Cassation, Italy, 1930), the highest Italian court declined subject matter jurisdiction in a suit by a staff member of IIA who was dismissed from his post and claimed payment of compensation for dismissal. The Court held that the Institute was an international entity, an autonomous union, free as regards its internal affairs from interference by the sovereign power of the States composing the union except when it consented thereto; its power of self-determination or autonomy ruled out all national interference and all authority of such laws, whether substantive or procedural.

In *Chemidlin* v. *International Bureau of Weights and Measures*, 12 Ann. Dig. 281 (*Tribunal Civil* of Versailles, France, 1945), a French court of first instance dismissed a suit, on the ground of lack of subject matter jurisdiction, by a former employee of IBWM for breach of contract and failure to reinstate. It held that since international civil servants performed their functions outside of the legal system of the State to which they belonged, French law was inapplicable.

In *Mazzanti* v. *Headquarters Allied Forces Southern Europe and Ministry of Defence*, 22 I.L.R. 758 (Tribunal of Florence, Italy, 1955), an Italian court of first instance held that it had no jurisdiction over a suit brought by an Italian national against the HAFSE arising out of a dispute as to the terms of his employment, on the ground that the employer was an international juridical person that had entered into the contract in the exercise of its public law capacity and was thus exempt from local jurisdiction.

In *Diaz-Diaz* v. *United Nations Economic Commission for Latin America* (Supreme Court, Mexico, 1953 — see 1953-54 annual report of the United Nations Secretary-General, *Official Records of the General Assembly, Ninth Session, Supplement No. 1* (A/2663), pp. 105-106) the highest court of Mexico sustained an appeal from a Circuit Court and held that the Arbitration Tribunal of Mexico City had no jurisdiction over a controversy (concerning payment of termination indemnities and overtime to a former staff member) between an organ of the United Nations and its personnel.

In *De Bruyn* v. *European Parliamentary Assembly*, 34 I.L.R. 466 (Employment Arbitration Tribunal, Luxembourg, 1962), a standing arbitral tribunal held that it had no jurisdiction over a complaint demanding annulment of a notice of dismissal and damages, since plaintiff's employment contract with the EPA existed in public law.

In *Giovani Porru* v. *Food and Agriculture Organization of the United Nations* (Labor Section of the Rome Court of First Instance, Italy, 1969),[47] an Italian court of first instance dismissed a claim by an Italian national employed on a short-term basis by FAO for an amount equivalent to certain Italian social security benefits. The Court held that the legal relations between FAO and the plaintiff undoubtedly fell within the category of acts performed in the exercise of the FAO established functions and it therefore enjoyed immunity from jurisdiction.

In *Intergovernmental Committee on European Migration* v. *Di Banella Shirone*, 98 Foro It. I (338:45) 1138, 73/74 Giur. It. I 1919 (Court of Cassation, Italy, 1975), the highest Italian court dismissed a suit by a permanent clerical employee who alleged that ICEM failed to give her the amount of severance pay agreed upon in her employment contract. It held that international agencies have immunity from Italian jurisdiction in controversies involving labor relations with their employees who are part of their permanent staff (even though not on a high level), on the ground that such relations relate to the internal organization of these agencies within the scope of their institutional purposes.

Using similar reasoning and relying on certain of the court decisions referred to above, legal scholars, including "the most highly qualified publicists of the various nations" to whom the International Court of Justice itself is to look for the determination of the rules of law applicable to disputes submitted to it (ICJ Statute, Article 38(1)(*d*)), have uniformly denied the jurisdiction of any national organs and particularly of domestic courts over disputes relating to the international civil service.

III. *28 U.S.C. § 1331*(a) *confers subject matter jurisdiction over suits by or against intergovernmental organizations of which the United States is a member, regardless of the nature of the cause of action*

The United Nations differs with that part of Appellees' Brief which asserts that 28 U.S.C. § 1331(a) does not confer jurisdiction on the federal courts over a complaint such as forms the basis of the present suit, because Plaintiffs' claim states no federal cause of action.

The correct rule is that stated in *International Refugee Organization* v. *Republic S.S. Corp.*, 189 F.2d 858, at 861 (4th Cir. 1951) that "an international organization created by treaties to which the United States is a party may invoke the [federal] jurisdiction because it is created by a treaty of the United States".

Any other interpretation would require intergovernmental organizations to defend suits in contract or tort, assuming they either do not have or waive their immunity, solely in State courts, as even 28 U.S.C. § 1441 would not enable them to remove the action to federal courts. On the other hand, as plaintiffs in cases based on the same causes of action, they could enter federal court pursuant to 22 U.S.C. § 288a(a)(iii), which, according to the above-cited opinion of the Fourth Circuit, in any event grants international organizations "the capacity to institute legal proceedings in federal court" (*op cit.* at 860).

## CONCLUSION

For the foregoing reasons, this Court should affirm the decision of the court below dismissing Plaintiffs' action.

Respectfully submitted,

Erik SUY
Under-Secretary-General, The Legal Counsel

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Principal Officer

United Nations

16 January 1979

## ANNEX

**The governance of the international civil service, as illustrated by the mechanisms established in respect of the United Nations "common system" of personnel administration**[48]

[Not reproduced]

## Notes

[1] The *Ministère public* observed in this connexion that employees of international agencies such as the ILO are covered by the Convention on the Privileges and Immunities of the Specialized Agencies, which accords them privileges and immunities more limited than those accorded to diplomatic agents proper. It recalled that annex I (ILO) to that Convention provides that experts are granted privileges and immunities in so far as necessary for the performance of their functions and that they are granted privileges and immunities not for their personal benefit but in the interests of the agency, which has the right and the duty to waive immunity in any case where, in its opinion, the immunity would impede the course of justice.

[2] United Nations Legislative Series, *Legislative Texts and Treaty Provisions concerning the Legal Status, Privileges and Immunities of International Organizations* (ST/LEG/SER.B/10) (United Nations publication, Sales No. 60.V.2), p. 196.

[3] 428 N.Y.S. 2d 33 (1980).

[4] For a summary of this judgement, see *Juridical Yearbook*, 1971, p. 249.

[5] The Court noted that there had been no waiver of immunity in this case. After being served with the sequestration order, the Fund's Secretary had determined that in the absence of a Pension Fund regulation authorizing the waiver, he lacked the power to consent to subject the Fund to legal process. The United Nations Administrative Tribunal upheld that determination (see Judgement No. 245 of the Administrative Tribunal of the United Nations summarized in the *Juridical Yearbook*, 1979, pp. 138-139), but recommended that the Pension Fund adopt a rule similar to staff rule 103.18 (*b*) (iii), which provides that the United Nations' privileges and immunities "furnish no excuse to the staff members who enjoy them for non-performance of their private obligations or failure to observe laws and police regulations". The Appellate Division stressed that its decision was without prejudice to the respondent's rights under the sequestration order in the event that a rule permitting waiver is adopted by the Pension Fund Board and the Fund in fact waives its immunity from process.

[6] *Broadbent* v. *Organization of Am. States*, 628 F.2d27 (D.C.Cir.1980).

[7] The amounts of the indemnities ranged from $9,000 to $12,000 plus attorney's fees.

[8] United Nations Legislative Series, *Legislative Texts and Treaty Provisions concerning the Legal Status, Privileges and Immunities of International Organizations* (ST/LEG/SER.B/10) (United Nations publication, Sales No. 60.V.2).

[9] See *Broadbent, supra* at pp. 28–29.

[10] *Ibid.*, at 29.

[11] 22 U.S.C. § 288a provides:

"International organizations shall enjoy the status, immunities, exemptions, and privileges set forth in this section, as follows:

"(*a*) International organizations shall, to the extent consistent with the instrument creating them, possess the capacity—

"(i) to contract;

"(ii) to acquire and dispose of real and personal property;

"(iii) to institute legal proceedings.

"(*b*) International organizations, their property and their assets, wherever located, and by whomsoever held, shall enjoy the same immunity from suit and every form of judicial 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 the terms of any contract.

"(*c*) Property and assets of international organizations, wherever located and by whomsoever held, shall be immune from search, unless such immunity be expressly waived, and from confiscation. The archives of international organizations shall be inviolable.

"(*d*) In so far as concerns customs duties and internal revenue taxes imposed upon or by reason of importation, and the procedures in connection therewith; the registration of foreign agents; and the treatment of official communications, the privileges, exemptions, and immunities to which international organizations shall be entitled shall be those accorded under similar circumstances to foreign Governments."

[12] 28 U.S.C. § 1330 provides:

"*Actions against foreign States.*

"(*a*) The district courts shall have original jurisdiction without regard to amount in controversy of any nonjury civil action against a foreign State as defined in section 1603(*a*) of this title as to any claim for relief *in personam* with respect to which the foreign State is not entitled to immunity either under sections 1605–1607 of this title or under any applicable international agreement.

"(*b*) Personal jurisdiction over a foreign State shall exist as to every claim for relief over which the district courts have jurisdiction under subsection (*a*) where service has been made under section 1608 of this title.

"(*c*) For purposes of subsection (*b*), an appearance by a foreign State does not confer personal jurisdiction with respect to any claim for relief not arising out of any transaction or occurrence enumerated in sections 1605–1607 of this title."

[13] The text of the brief of the United Nations as *amicus curiae* is reproduced below.

[14] By Executive Order 10533 (June 3, 1954), 19 Fed. Reg. 3289 (1954), President Eisenhower designated OAS an international organization entitled to the privileges and immunities conferred by the IOIA.

[15] The legislative history of the Act makes it clear that the Act was passed to fill a then existing void in the domestic law with respect to the legal status of international organizations. 11.Rep. No. 1203, 79th Cong., 1st Sess.2 (1945).

[16] See, e.g., the "Tate Letter", 26 Dept. State Bull. 984-85 (1952), quoted in Alfred Dunhill of London, Inc. *v.* Cuba, 425 U.S. 682, 711 (1975).

[17] Sands (ed.), Sutherland Statutory Construction § 51.08 (4th ed. 1975).

[18] 28 U.S.C. § 1603 (1979) provides:

"§ 1603. Definitions

"For purposes of this chapter

"(*a*) A 'foreign State' except as used in section 1608 of this title, includes a political subdivision of a foreign State or an agency or instrumentality of a foreign State as defined in subsection (*b*).

"(*b*) An 'agency or instrumentality of a foreign State' means any entity

"(1) which is a separate legal person, corporate or otherwise, and

"(2) which is an organ of a foreign State or political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign State or political subdivision thereof, and

"(3) which is neither a citizen of a state of the United States as defined in section 1332 (*c*) and (*d*) of this title, nor created under the laws of any third country.

"(*c*) The 'United States' includes all territory and waters, continental or insular, subject to the jurisdiction of the United States.

"(*d*) A 'commercial activity' means either a regular course of commercial conduct or a particular commercial transaction or act. The commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose.

"(*e*) A 'commercial activity carried on in the United States by a foreign State' means commercial activity carried on by such State and having substantial contact with the United States."

[19] 28 U.S.C. § 1603(*d*) (1979) defines "commercial activity":

"A 'commercial activity' means either a regular course of commercial conduct or a particular commercial transaction or act. The commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose."

[20] H. Rep. No. 94-1487, 94th Cong., 2d Sess. 16 (1976) (*emphasis added*).

[21] See, e.g., XIII Documents of the United Nations Conference on International Organizations 704-05 (1945), reprinted in 13 Whitman, *Digest of International Law* 36 (1968).

[22] See, e.g., OAS Charter, article 143 (forbidding discrimination on the basis of "race, creed or sex"), article 126 (requiring staff recruitment on as wide a geographic basis as possible).

[23] For example, the Age Discrimination in Employment Act of 1978 (ADEA) 29 U.S.C. § 621 *et seq.*, forbids in most circumstances a requirement that a person retire at a particular age. Yet other countries consider early retirement an important social goal, the achievement of which facilitates advancement by younger people. Since there is no inconsistent provision in the OAS Charter (and since, even if there were, ADEA was enacted after the latest amendment to the OAS Charter), ADEA presumably would govern, and unless its provisions were considered not to cover international employment (see 29 U.S.C. §§ 630 and 633a), OAS and other international organizations who are thought not immune from suit would be required to abide by the terms of the Act in their employment here.

Or, for another example, the rigid quotas employed as an integral part of recruiting a "balanced" international civil service (see, e.g., General Assembly resolution 33/143, 18 December 1978) might run afoul of the emerging law of "affirmative action" in the United States.

[24] Treatise writers on the law of international organizations have recognized the force of the argument made in text. See, e.g., M. B. Akehurst, *The Law governing employment in international organizations* 12 (1967), which discusses suits such as the instant case in the following terms:

"At first sight, disputes of this sort could be referred to municipal tribunals. The organization normally possesses immunity, but immunity can be waived. However, the special nature of the law governing employment in international organizations, closely linked as it is with delicate questions of administrative policy, makes municipal tribunals totally unsuited to deal with it. It would be like an English court trying to judge a dispute between the French Government and one of its officials. Courts in all countries usually refuse to handle questions of foreign *public* law and, in the same way, a number of municipal courts have held themselves incompetent to judge claims brought by international civil servants against the organizations which employ them, not on the grounds of immunity, but on the grounds of the special law applicable.

"There is therefore a vacuum which needs to be filled by the organizations themselves. The creation of an independent body, empowered to make binding decisions in legal disputes between an organization and its staff, is by no means an altruistic gesture from the organization's point of view: without it, officials might suffer from a sense of injustice which would impair the smooth running of the secretariat."

[25] The factual background recited below is not introduced for the purpose of inviting the Court to examine either the fundamental merits of the dispute to which this jurisdictional appeal relates, or the internal procedures of the OAS Administrative Tribunal in disposing of them, but solely to complete the Court's appreciation of the earlier phases of the prior proceedings in this dispute, which appear to have been incompletely and consequently to some extent misleadingly presented in the previous Briefs, in particular that of the Plaintiffs-Appellants.

[26] Judgements Nos. 29 and 30 of the OAS Administrative Tribunal are parts of the record of this case.

[27] General Standards to Govern the Operations of the General Secretariat of the Organization of American States (OAS document OEA/Ser.D/I.1.2/Rev.2, 19 July 1977).

[28] Although the term "international organizations" is used in both the International Organizations Immunities Act (22 U.S.C. § 288) and in the other Briefs filed in this appeal to refer solely to intergovernmental organizations, in common usage the former term also includes international non-governmental organizations and various mixed entities. As the international legal principles to which this Brief refers are applicable only to intergovernmental organizations, that term is used generally herein.

[29] The proposition that the Federal Government is immune from suit, whether in State or federal courts, without its consent, is too well established to require extensive citation (see, e.g., *Larson* v. *Domestic and Foreign Commerce Corporation*, 337 U.S. 682 (1949), relied on in *Malone* v. *Bowdorin* 369 U.S. 643 (1962)). Even when the United States has waived that immunity, in respect of itself or its officers, Congress has provided that an action against it or them may always be removed from a State court to a federal one (see 28 U.S.C. §§ 1441 read with 1345, and 1442); the constitutionality of these removal statutes (*Tennessee* v. *Davis*, 100 U.S. (10 Otto) 257 (1880)) testifies to the inherent powers that a federal government has to protect itself from suit in any but its own courts.

[30] Quoting from *The Federalist* No. 80 (Modern Library ed.), p. 516.

[31] ILC therefore formulated first the proposed instrument that became the 1961 Vienna Convention on Diplomatic Relations and the 1963 Vienna Convention on Consular Relations before turning to the studies that became the 1975 Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character and more recently taking up the still incomplete work on the immunities of the organizations themselves and of their officials.

[32] United Nations, *Treaty Series*, vol. I, p. 15.

[33] *Ibid.*, vol. 33, p. 261.

[34] This article includes section 2, quoted above.

[35] Even as to the immunity of States, Congress was careful to make the FSIA "[s]ubject to existing international agreements to which the United States is a party at the time of the enactment of this Act" (28 U.S.C. § 1604).

[36] United Nations, *Treaty Series*, vol. 824, p. 215.

[37] *Ibid.*, vol. 414, p. 231.

[38] *Ibid.*, vol. 492, p. 58.

[39] The closely corresponding provisions of the OAS Charter (articles 124-125) read as follows:

> *"Article 124*
>
> "In the performance of their duties, the Secretary-General and the personnel of the Secretariat shall not seek or receive instructions from any Government or from any authority outside the Organization, and shall refrain from any action that may be incompatible with their position as international officers responsible only to the Organization.
>
> *"Article 125*
>
> "The Member States pledge themselves to respect the exclusively international character of the responsibilities of the Secretary-General and the personnel of the General Secretariat, and not to seek to influence them in the discharge of their duties."

[40] It is against the exercise of this power of OASAT and the Secretary-General that Plaintiffs-Appellants are complaining in the instant case.

[41] As to judicial remedies, such as afforded by OASAT, it should be noted that the issue, at least at this stage, is not one of *res judicata* (in view of the prior Judgement Nos. 29 and 30 of the OAS Administrative Tribunal in respect of the present dispute), nor of *forum non conveniens* (in view of the greater appropriateness of having disputes of this type considered by the competent Administrative Tribunal rather than by a court considering a "law foreign to itself" (cf. *Gulf Oil Corp.* v. *Gilbert*, 330 U.S. 501, at 509 (1946)), since consideration of either *res judicata* or *forum non conveniens* would require that the District Court have jurisdiction — which is contrary to the contention of this Brief.

[42] Reading as follows:

> *"Article 143*
>
> "The Organization of American States does not allow any restriction based on race, creed, or sex, with respect to eligibility to participate in the activities of the Organization and to hold positions therein."

[43] Reading as follows:

> *"Article 126*
>
> "In selecting the personnel of the General Secretariat, first consideration shall be given to efficiency, competence, and integrity; but at the same time, in the recruitment of personnel of all ranks, importance shall be given to the necessity of obtaining as wide a geographic representation as possible."

[44] See Age Discrimination in Employment Act Amendment of 1978 (P.L. 95-256, 29 U.S.C. § 633a).

[45] See, e.g., para. II.3 of General Assembly resolution 33/143 of 20 December 1978, referring to United Nations staff regulation 9.5: "Staff members shall not be retained in active service beyond the age of sixty years. The Secretary-General may, in the interest of the Organization, extend this age limit in exceptional cases".

[46] See, e.g., para. II.1 of General Assembly resolution 33/143 of 20 December 1978 (establishing a target of 40 per cent recruitment from unrepresented and under-represented countries) and para. III.1 of the same resolution (setting a target of 25 per cent, to be achieved within four years, for the number of women employed in professional posts in the Secretariat).

[47] Summarized in the *Juridical Yearbook*, 1969, p. 238.

[48] The "common system" applies directly to the United Nations as well as to the following specialized or related agencies: Food and Agriculture Organization of the United Nations; Inter-Governmental Maritime Consultative Organization; Interim Commission for International Trade Organization/General Agreement on Tariffs and Trade; International Atomic Energy Agency; International Civil Aviation Organization; International Labour Organisation; International Telecommunication Union; United Nations Educational, Scientific and Cultural Organization; Universal Postal Union; World Intellectual Property Organization; World Health Organization; World Meteorological Organization. It is also largely followed by the International Fund for Agricultural Development and to some extent by the Organization of American States.