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Trends

A Review of Significant Recent Decisions, Legislative, Executive and Administrative Actions in the United States and Abroad, and of Treaties and International Organizational Developments

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United States Occupation Court in Berlin. For the first time in several decades the United States is asserting its right as an occupying power to convene a court in Berlin. Known formally as United States Element Allied Kommandatura v. Ruske and Tiede, the case involves two East Germans accused of hijacking a Polish airliner and forcing it to land in West Berlin. United States rights in Berlin date from the arrival of Allied Forces in Germany in 1943. General Eisenhower, as Supreme Allied Commander, issued a proclamation suspending German courts and replacing them with military government tribunals (MGT) established "for the trial of offenses against the interests of the Allied Forces." These MGTs eventually heard hundreds of thousands of cases, encompassing not just occupation-related crimes such as illegal border crossings and curfew violations but ordinary crimes as well. At one point, some 343 MGTs operated in the United States Zone of occupation. But their number began to decline sharply in January 1946, when concurrent jurisdiction was granted to newly opened German courts, and they disappeared altogether in the early 1950s with the agreements terminating the Allied occupation of Germany. However, the Allied
Powers never yielded occupation rights to Berlin. To this day, that city is governed, at least technically, by a *Kommandatura* consisting of France, the United Kingdom, the United States and Russia, each of whom administers a sector of the city and retains the right to establish its own courts in its sector. In practice, this right has seldom been asserted.

Then why has the United States decided to convene a court at this time? According to reports appearing in the press, the United States Government decided to step in after the West German government declined to prosecute the accused hijackers for political reasons. Its action probably relates to the fact that the United States is a party to the 1970 Hague International Hijacking Convention. Article 4(2) of the Convention obligates every contracting state to "take such measures as may be necessary to establish its jurisdiction over the offence . . . where the alleged offender is present in its territory and it does not extradite him" to the airline's state. Article 7 says that the contracting state "in the territory of which the alleged offender is found" is obliged, "without exception whatsoever and whether or not the offence was committed in its territory, to submit the case to its competent authorities for . . . prosecution." The State Department is not discouraging speculation that this is why the United States Government has decided to establish a tribunal in Berlin to hear the instant case, although for the record it will say only that the Government's rights and responsibilities as an occupying power are affected.

There being no United States occupation court in Berlin, the United States Ambassador to the Federal Republic of Germany appoints the officers of the court under occupation legislation still in effect. Ambassador Walter S. Stoessel, Jr., has appointed Herbert Stern, a United States district court judge from New Jersey, to preside; Roger Adleman, an Assistant United States Attorney for the District of Columbia, to prosecute (but as "Special Assistant United States Attorney for Berlin," not as an Assistant United States Attorney as such); and Judah Best of Washington, D.C., and Bernard Hellring of Newark, New Jersey, as defense counsel. In March, 1979 Judge Stern ruled that defendants are protected by United States constitutional guarantees. The case brings to mind two earlier cases: *Madsen v. Kinsella*, which traced the development of occupation

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1The Soviet Union purported to withdraw from the *Kommandatura* in 1948, but the other occupying powers continue to regard it as a party to and bound by the obligations it undertook as an occupying power. Thus, for example, they refuse to recognize East Berlin as the capital of the German Democratic Republic and treat it, instead, as the Soviet sector in Berlin.


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courts in detail; and *Reid v. Covert,* in which Justice Hugo Black expounded on the Constitution's hold on United States courts wherever they sit. Important aspects of the pleadings and rulings in the case may be published, unofficially, in *International Legal Materials* and could also appear in the *Digest of United States Practice in International Law* prepared quarterly by the State Department for the *American Journal of International Law* and published annually, in more complete form, by the United States Government Printing Office under the same title.

*Extraterritoriality and international law.* Until fairly recently, American courts confronted with challenges to the extraterritorial reach of American laws tended to look to constitutional or other national policy considerations for guidance. Typically, the larger issue would be reduced to one of jurisdiction over the persons or res involved in the suit, in which case the court could look to *International Shoe Co. v. Washington,* which holds that the existence of at least "minimum contacts" between the defendant and the forum is an essential ingredient of in personam jurisdiction under the Constitution's due process clause. When the Supreme Court in *Shaffer v. Heitner,* extended that requirement to quasi in rem jurisdiction by demanding some nexus between property which is the basis of jurisdiction and the cause of action itself,' it became even easier for a judge troubled by the length of our national legal arms to extrapolate limiting principles from our national legal principles. Even the notion of forum *non conveniens* could be, and usually has been, invoked in the name of national, not international, policy considerations.

The problem is that, viewed from a larger perspective, what is involved is intrinsically a problem of global allocation of competence. That is, from the global perspective of international law, the fulfillment of American constitutional or other policy requirements is far from the last word—or even the most relevant one.

This clash of perspectives was underscored last year by harsh criticism in the United Kingdom's House of Lords directed at the excessive zeal with which American antitrust laws are sometimes enforced extraterritorially. The case was *Rio Tinto Zinc Corp. v. Westinghouse Electric Corp.*, and no less a figure than Lord Wilberforce quoted with approval from the intervention by the Attorney General in behalf of H.M. Government to the effect that "the wide investigatory procedures under the United States antitrust legislation against persons outside the United States who are not United States citizens constitute an infringement of the proper jurisdiction

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326 U.S. 310 (1945).
and sovereignty of the United Kingdom." Viscount Dilhorne agreed, adding that "[the] exercise [of] jurisdiction over foreigners in respect of acts done outside [U.S.] jurisdiction . . . is not in accordance with international law."

Lords is hardly a hotbed of anti-Americanism, nor is it invariably xenophobic. So one cannot easily dismiss its concern on either of these accounts. The fact is that their Lordships are justified in drawing attention to the overlapping of national laws and the attendant need to develop international principles of accommodation allocating among the world's now numerous national legal systems' competence to deal with conduct with which more than one of them has a legitimate interest. Traditional principles of international law offer a starting point, but little more than that owing to their ambiguity, inconsistency and relative isolation from other policy considerations.

They tend to fall into three categories. The first category is sometimes called the nationality principle and says, in effect, that nationality carries with it an attachment to one's national legal system. From the standpoint of our constitutional notions of due process, the nationality principle is not without flaws. But empirically national governments seldom challenge one another's competence to deal with the conduct of its own citizens wherever that conduct occurs.

As to the conduct of aliens, several variants of what is loosely called the territoriality principle are usually invoked. One, the so-called subjective territorial principle (the "conduct" test), bases jurisdiction on conduct occurring within a nation's territorial limits. The situs of the effects flowing from the conduct is largely irrelevant to the inquiry. On the other hand, the so-called objective territorial principle (the "effects" test) accords jurisdiction over acts which cause foreseeable and substantial effects within the country, regardless of where those acts occurred. It is the objective territorial principle, when applied to the conduct of nonresident aliens, which usually evokes cries of national overreaching, as illustrated by the Rio Tinto case.

But the objective principle itself abounds in normative ambiguity. Under what has been labelled the protective principle, for example, a nation is justified in punishing conduct committed abroad which has serious conse-

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Id. at 434. Lord Wilberforce directed attention specifically to article 12(b) of the Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, 23 U.S.T. 2555, T.I.A.S. 7444, which expressly provides that in deciding whether to give effect to letters rogatory—in this instance those issued out of a United States district court in Virginia—courts are entitled to have regard to any possible prejudice to the sovereignty of their state. But his observation has precedent in longheld attitudes of British courts toward the extraterritorial application of United States antitrust laws. E.g., British Nylon Spinners Ltd. v. Imperial Chemical Industries, Ltd., [1952] 2 All E.R. 780, [1953] ch. 19.

Id. at 460.

quences for its national security or the integrity of its public order system (e.g., counterfeiting). But not all penal laws are regarded as being of this sort. Antitrust laws, for example, whether penal or not, are often treated as mere commercial policy preferences unrelated to the kind of national danger the protective principle is concerned with. The line between national imperative and parochial overenthusiasm cannot yet be said to have been drawn with precision.

In any event, unless the International Court of Justice unexpectedly finds itself charged with drawing an international jurisdictional road map, there is scant prospect for an authoritative demarcation in the immediate future. That suits the common law tradition just fine. At the same time it underscores the increasingly important role national courts of law and equity are playing in developing a comprehensive world legal order. Whether they acknowledge it or not, national courts have come to serve a global legal community, not just a domestic one. Two recent cases illustrate the point and in so doing give further evidence of a trend among American courts away from reliance on purely national policy considerations in limiting extraterritorial assertions of national legal competence.

The first, *IIT v. Cornfeld*, handed down last December, makes only a passing reference to international law as such but is infused with a transnational perspective. In it, Judge Gerard L. Goettel dismissed for lack of subject matter jurisdiction a derivative suit brought under Section 10b of the Securities Exchange Act of 1934 in behalf of foreign shareholders of a foreign mutual fund. The action, in the nature of a derivative suit, had been instituted by liquidators of one of four mutual funds that once constituted a large part of IOS, Ltd. ("made somewhat infamous by Bernard Cornfeld and later by Robert Vesco"). Plaintiffs alleged a conspiracy, or series of conspiracies, between the directors of IIT’s management company and several other groups of defendants to defraud IIT’s shareholders. They specifically challenged three transactions: the purchase in Europe of $8 million in debentures of a foreign subsidiary of an American company; the purchase of some $14 million in stock of an American company, and a loan of some $12 million to an American company.

But in his opinion Judge Goettel found the ultimate alleged deception to be a nondomestic act and he thought it untoward for an American court to impose a Rule 10b-5 duty to disclose on foreign directors of a foreign

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corporate entity for the benefit of foreign fundholders." Subject matter jurisdiction, he decided, could not be sustained merely because .5 percent of the fund's assets was held by Americans or because the alleged scheme as a whole involved the purchase of American securities and some domestic acts by alleged American aiders and abettors. All the domestic acts of the alleged aiders and abettors became "preparatory" or secondary to the primary deception practiced on the fundholders. "Since virtually all the fundholders were foreign nationals residing in foreign countries, the deception, if it could be proved, must have occurred outside the United States."20

"The essential fraud here was foreign, "and the line has to be drawn somewhere if the securities laws are not to apply in every instance where something has happened in the United States, however large the gap between that something and a consummated fraud and however negligible the effect in the United States or on its citizens."21

Too unlimited an extension of the federal securities laws, Judge Goettel concluded, "even if possible under international law and the Constitution, cannot be warranted."22

A few weeks later, the federal Court of Appeals for the Eighth Circuit, in Continental Grain (Australia) Pty., Ltd. v. Pacific Oilseeds, Inc.23 reversed a district court order dismissing another securities law case for lack of subject matter jurisdiction, but this time the focus of the opinion was squarely on the international law implications of the alleged subject matter jurisdiction. Not necessarily noteworthy as precedent because of the uniqueness of the nondisclosure complained of (it was another 10b-5 case), the court's opinion is certain to be cited for its lengthy discussion of the application of international law principles by United States courts in recent securities laws cases and its conclusion, inter alia, that this application has been something less than a model of consistency.24 Perhaps most importantly, the court does not merely recite what it regards as relevant principles of international law, though it does that (not altogether persuasively), it

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1**Supra** note 17 at 223. The court noted, at 212, that only 218 of the 144, 496 fundholders currently reside in the United States.

2**Id.** at 220.

3**Id., quoting from** IIT v. Vencap, 519 F.2d 1001, 1018 (2d Cir. 1975).

462 F. Supp. at 223.

592 F.2d 409 (8th Cir. 1979).

also examines the policy implications such principles reflect.25

The significance of the trend evidenced by these two and other recent securities law cases seems to be twofold: in the first place, counsel cannot assume that pleadings which discuss only the domestic law implications of extraterritoriality will prove compelling; in the second, judges may find the influence exerted by their opinions extending to the entire international legal community—extraterritorially, so to speak.

Foreign sovereign immunity. In Upton v. Empire of Iran,26 the District Court for the District of Columbia dismissed for lack of personal and subject matter jurisdiction an action brought against the Empire of Iran and Iran’s Department of Civil Aviation, as owner of Mehrabad International Airport’s terminal building in Tehran, for wrongful death, survival and personal injury following collapse of the roof of the building in 1974. Plaintiffs, American nationals, had charged defendants with negligence and strict liability in tort, claiming jurisdiction under a provision in the Foreign Sovereign Immunities Act of 197627 that establishes jurisdiction where an action is based on commercial activity of a foreign state outside the territory of the United States which causes a direct effect in the United States.28 District Judge Charles R. Richey found absent the minimum contacts with the jurisdiction which are required for in personam jurisdiction under International Shoe, quasi in rem jurisdiction under Shaffer, and jurisdiction over subject matter by the Act itself. “The common sense interpretation of a ‘direct effect’ is one which has no intervening element, but, rather, flows in a straight line without deviation or interruption.”29 Such injuries as occurred, “though endured here, were caused in Tehran.”30

The decision cites with approval31 the decision of the federal District Court for the Southern District in Carey v. National Oil Corp.,32 which also holds that the Act’s “direct effect” test embodies the “minimum contacts” requirement of International Shoe.

Immunities of intergovernmental organizations. The conceptual bases of sovereign immunity differ from those of the immunity accorded intergovernmental organizations, the latter being functional and teleological, the former being attributable to state sovereignty and reciprocity. Moreover, while state sovereignty derives from principles of comity embedded in

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25See also SEC v. Kasser, 548 F.2d 109 (3d Cir.), cert. denied sub nom. Churchill Forest Industries (Manitoba), Ltd. v. SEC, 431 U.S. 938 (1977) (“We are reluctant to conclude that Congress intended to allow the United States to become a ‘Barbary Coast’, as it were, harboring international securities 'pirates'.” 548 F.2d at 116).
28Id. § 1605(a)(2).
29Upton v. Empire of Iran, 459 F. Supp. at 266.
30Id.
31Id.
general international law, the immunity of intergovernmental organizations is largely a matter of treaty law, specifically, the constitutive treaties establishing the organizations.

Typical of the genre is the United Nations Charter, which provides that the organization shall enjoy in the territory of each member state "such legal capacity as may be necessary for the exercise of its functions and the fulfillment of its purposes," and Article 105(1) of which adds "such privileges and immunities as are necessary for the fulfillment of its purposes." There is little doubt that the immunity intended is absolute. Commission IV on the Judicial Organization of the 1945 San Francisco Conference stated the general understanding that the proposed language indicated

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, . . . inviolability of buildings, properties, and archives, etc. . . . [N]o member state may hinder in any way the working of the Organization or take any measures the effect of which might be to increase its burdens, financial or other.

So, absent any legislative history to the contrary, there is little reason to suspect that when Congress codified the restrictive doctrine of sovereign immunity in the Foreign Sovereign Immunities Act of 1976 (FSIA), it also had in mind altering the existing, absolute, immunity of intergovernmental organizations. But according to pleadings in several recent actions challenging the immunity of intergovernmental organizations headquartered in Washington, that is precisely the effect FSIA has had.

The most prominent of these cases, Broadbent v. Organization of American States, is currently on appeal in the Court of Appeals for the D.C. Circuit. The appellants are seven former staff members of the Organization of American States (OAS) whose employment was terminated due to a general reduction in force. In November 1977, they filed an action in federal district court alleging breach of contract and seeking compensation and damages of several hundred thousand dollars each, plus interest, attorneys fees and costs. To catch the flavor of the litigation, though, is to go back to 1976, when twelve of those dismissed by the OAS filed suit in federal district court alleging breach of contract and seeking compensation and damages of several hundred thousand dollars each, plus interest, attorneys fees and costs. To catch the flavor of the litigation, though, is to go back to 1976, when twelve of those dismissed by the OAS filed suit in federal district court, then withdrew that suit and refiled in the District of Columbia's Superior Court, alleging civil conspiracy, libel and slander, claiming some $60 million in damages. Their suit was dismissed in June 1977 on the merits. But the judge declined to rule on the immunity from suit of the two

39[12 ex-staff members of OAS] v. Secretary-General of OAS, No. 76-2348 (D.C. Cir. 1977), withdrawn and later refiled, (Superior Court, D.C. 1977).
named defendants (the Organization's Secretary-General and Director of Public Information), thereby allowing the inference that no such immunity obtains.

While this action was pending, the OAS asked the State Department to suggest the two officials' immunity. But State would only go so far as to certify that the two were entitled to the immunities conferred by Section 7(b) of the International Organizations Immunities Act of 1945 (IOIA). The International Organizations Immunities Act was enacted in 1945 to fill a void then thought to exist in United States law, namely, that there appeared to be no statutory authority whereby the United States could extend privileges and immunity to intergovernmental organizations and their officials. In essence, IOIA resolved that perceived deficiency by simply placing such organizations on an equal footing with sovereign states, a useful enough analogy at the time, despite the conceptual differences between the two, because sovereign states then enjoyed absolute immunity. It was only later, with the advent of state trading and other commercial initiatives by states, that a restrictive doctrine of sovereign immunity emerged which renders these differences critical. The restrictive doctrine distinguishes between governmental acts (acts *iure imperii*) and commercial acts (acts *iure gestionis*) such that, in general, a state while engaged in the latter is not entitled to the immunity it enjoys while engaged in the former. The distinction, in other words, reaffirms the original rationale of sovereign immunity, which is that it is in consequence of the absolute independence of every sovereign authority that every other sovereign is obliged to respect its independence and dignity. What the restrictive doctrine adds as a corollary is that this obligation does not warrant according states acting as commercial entities a competitive advantage over private commercial entities. All this has little to do with intergovernmental organizations, which are not sovereign and do not enjoy the qualities statehood and sovereignty afford which underlie the logic of sovereign immunity. But when Congress enacted FSIA, it made no mention of intergovernmental organizations and neglected to account for the fact that thirty-one years earlier it had placed them on an equal footing with sovereign states. Therein lies the rub.

After the OAS employees' Superior Court suit was dismissed, the OAS drew the State Department's attention both to the court's refusal to decide

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5What IOIA says, in pertinent part, is this:

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.

22 U.S.C. § 288a(b).
the question and to an order signed by Chief Judge William B. Bryant of the federal district court, in an otherwise unrelated action, which stated that the OAS enjoys only restrictive immunity which does not extend to "commercial activities." In a letter dated March 24, 1977, the State Department’s Counselor on International Law refused the Secretary-General’s request for a suggestion of immunity, indicating that no such suggestion had been filed in international organization cases since 1960, and that FSIA made any revival of the custom inappropriate. Further entreaties were similarly rejected.

Then in November seven of the twelve former OAS employees filed a new complaint against the OAS and its General Secretariat, that is, the Broadbent case. In addition to denying the substance of the charges, the defendants moved to quash service of process and to dismiss the complaint, arguing that the court lacked both in personam and subject matter jurisdiction and that they were absolutely immune from service of process by virtue of the OAS’s status as an intergovernmental organization and pursuant to IOIA. On January 25, 1978 District Judge Aubrey E. Robinson, Jr., issued an order denying their motion, holding that the express language of the IOIA and the statutory purposes underlying it bring intergovernmental organizations within the terms of FSIA and that, therefore, under FSIA the court has jurisdiction over both the parties and the controversy. Defendants, he added, enjoy restricted, not absolute, immunity and the employment contracts which are the subject matter of the litigation constitute "commercial activity" not entitled to immunity under the restrictive doctrine as codified in FSIA.

Defendants thereupon moved for certification under 28 U.S.C. Section 1291(b) to take an interlocutory appeal and to stay the proceedings pending appeal, a motion supported, with leave of the court, by the United Nations, the International Bank for Reconstruction and Development, the Inter-American Development Bank, and the Pan-American Health Organization.

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1 Judge Bryant’s order, dated May 31, 1977, was issued in Dupree Associates, Inc. v. Organization of American States, No. 76-2335 (D.C. Cir. May 31, 1977), which alleged breach of contract in connection with services performed in developing a lot for the OAS’s new headquarters building. In Dupree, the State Department’s Deputy Legal Adviser for Management told the court that “whether immunity exists under [IOIA] in a given case is a question of law.” The court’s attention was drawn to the March 20, 1975 agreement between the United States and the OAS relating to privileges and immunities of representatives to and staff of the OAS. Agreement Respecting Privileges and Immunities, March 20, 1975, United States—Organization of American States, [1975] 26 U.S.T. 1025, T.I.A.S. No. 8089.

2 In addition to breach of contract, the suit charged defendants with failure to abide by a decision of the OAS’s Administrative Tribunal ordering them to reinstate plaintiffs or pay them damages.

3 No. 77-1974 (D.C. Cir. Jan. 25, 1978) (order denying motion to quash service of process and dismiss the complaint).

4 Id. slip op. at 2. Plaintiffs subsequently amended their complaint alleging jurisdiction based on diversity of citizenship and deleting their earlier allegation of jurisdiction based on FSIA and IOIA.
as *amici*. The UN's brief, which Judge Robinson appears to have found especially persuasive, contended that the court had failed to distinguish between the sovereign immunity of States and the functional immunity of international organizations in international law and appears to have taken no account of the treaty obligations of the United States flowing from Article 139 of the Charter of the Organization of American States . . . , which provides that the Organization "shall enjoy in the territory of each Member such privileges and immunities as are necessary for the exercise of its functions and the accomplishment of its purposes." 

The purpose of such extensive immunity, the UN's brief continued, is to prevent a court of any of the member states from interfering in any way with the functioning of the organization, "which is—like a federal government with respect to its constituent states—a joint enterprise of all members." Its administrative decisions are taken by or under the authority of its political organs, in which each member state has a vote as prescribed by the organization's constitutive treaty.

Moreover, it concluded, a holding that American courts have jurisdiction to consider the merits of disputes between international organizations and their staff would destroy the possibility of creating a truly international civil service, "which has always been considered to be one of the prerequisites for the successful functioning of any international organization that is to serve all its members impartially."

In an order and memorandum dated March 28, 1978, Judge Robinson vacated his order of January 25, saying that upon careful review of its decision, the court had found that "it did not properly weight the fact that international organizations . . . are creatures of treaty and by virtue of treaty stand in a different position with respect to the issue of immunity than sovereign nations." He then added this:

The Court is persuaded that international organizations are immune from every form of legal process except insofar as that immunity is expressly waived by treaty or expressly limited by statute. This Court is further persuaded that this Court has
jurisdiction over lawsuits involving international organizations only insofar as such jurisdiction is expressly provided for by statute."  

Neither FSIA nor IOIA, in Judge Robinson's view, provides for such jurisdiction.

When a statute appears on its face to be inconsistent with a treaty obligation, or when a statute incorporates an earlier statute or parts of it without considering the full extent of the impact such incorporation may have, courts are likely to bail out the legislature by reference to some canon of interpretation which enables them to conclude that what they wished the legislature had done, it had in fact done. But Judge Robinson used no such legal fiction. Nor, on the other hand, did he say in so many words that IOIA is inconsistent with U.S. treaty obligations or general principles of international law. But it certainly appears to be and that is almost certain to be a point of contention on appeal.

The appeal matches appellants, together with the Justice Department, as amicus, against appellees and the United Nations and World Bank as amici. For international lawyers, the most interesting contrast is between the briefs of the Government and the United Nations. The Government's brief, in fact, seems virtually certain to raise eyebrows in the international legal community, if only because of its almost casual concern for international law.  

Its argument is relatively simple. It contends that IOIA places the immunity of intergovernmental organizations on a par with that of sovereign states; that by virtue of FSIA foreign states are not entitled to immunity from suit in respect of their commercial activities; but that this suit should be dismissed for lack of subject matter jurisdiction because the legislative history of FSIA evinces an intention not to include a foreign state's (and therefore an intergovernmental organization's) administration of its civil service within the scope of its commercial activities exception. In other words, the Government says IOIA is controlling, FSIA is explanatory of its present reach, and the legislative history of FSIA shows that the narrow range of organizational behavior this case involves was meant to be kept immune from attack in American courts.

The brief is almost silent in respect of appellees' contention that the issue is settled by the terms of the OAS treaty itself, i.e., the "necessary" privileges and immunities clause, as interpreted in international law and the practice of states. Nor does it directly gainsay Judge Robinson's somewhat elliptic conclusion to the same effect. Instead, the relevance of the treaty's

12Id.  
13The Government brief is signed by an Assistant Attorney General, a U.S. Attorney and three Justice Department attorneys. No State Department lawyers are mentioned as participating in the preparation of the brief.  
14Only in the context of discussing why the employment of civil servants is not a commercial activity under FSIA does the government brief concede the effect which an attempt by a court of a member state to adjudicate personnel claims would have on an intergovernmental organization's independence.
immunities clause is reduced to an unattended observation that the clause does not pertain to commercial activities. No mention is made, accordingly, of any inconsistency between IOIA-FSIA and the treaty commitment. In fact, international law itself appears in the Government brief to have a bearing on the case only insofar as it justifies the proposition that the employee relations of an intergovernmental organization ""[are] rarely in complete harmony with the municipal laws of the member states comprising [it]."

The UN's brief is cut from a different cloth. Arguing that the absolute immunity of intergovernmental organizations has been understood by member states since before IOIA was drafted, it undertakes an extensive review of the drafting history of the constitutive instruments of postwar organizations, the conceptual differences between the two types of immunity, and the decisions of foreign courts dealing with the question and analogous ones. As a fallback position it agrees with the Government's interpretation of FSIA's exclusion of employee relations from the definition of "commercial activities." But the bulk of its argument is spent in establishing the nature of the treaty commitment the United States and other member states have undertaken to accord intergovernmental organizations immunity from national interference.

A decision by the court is expected sometime this summer.

Expropriation Award. On December 8, 1978, the U.S. District Court for the District of Columbia confirmed the award made in arbitration proceedings between Revere Copper and Brass Incorporated and Overseas Private Investment Corporation (OPIC), growing out of actions taken by the Jamaican government affecting Revere's Jamaican subsidiary.

Revere's subsidiary operated a bauxite and alumina processing complex in Jamaica. In 1970, Revere obtained expropriation insurance from OPIC, a United States Government-owned corporation, to protect its investment in Jamaica against political risk. The insurance contract provided that all disputes between OPIC and Revere were to be resolved by arbitration and that the arbitration award would be "final and binding upon the parties." After the subsidiary shut down its operations in August 1975, Revere filed a


claim with OPIC alleging that the Jamaican government had taken certain actions—principally the imposition of a tax in June 1974—which constituted "expropriation" within the meaning of the insurance contract. OPIC denied Revere's claim and initiated arbitration under the auspices of the American Arbitration Association. Although one of the three neutral arbitrators felt that OPIC was not obligated to Revere, the majority found it was, but to the tune of only $1,131,144 rather than the $64,131,000 claimed by Revere.

Revere thereupon filed a motion with the district court to correct the award, pursuant to 9 U.S.C. Section 11 (1976), and to vacate it, pursuant to 9 U.S.C. Section 10 (1976), arguing that the majority of the arbitrators exceeded their powers by:

1. making three adjustments which disregarded express terms of the insurance contract;
2. writing into the contract a term it does not contain;
3. giving to that term a meaning which it does not have; and
4. choosing a construction of the contract most favorable to the insurer and least favorable to the insured.

All this, said Revere, resulted in the writing down of the amount of Revere's equity investment, the amount recoverable under the contract.

The district court found its scope of review of an arbitral award extremely limited under case law, quoting language from recent D.C. Circuit cases to the effect that an arbitral award will not be vacated, even though the arbitrator may have made errors of fact and law, unless it "compels the violation of law or conduct contrary to accepted public policy." That the arbitrators here may have misconstrued the contract is not open to judicial review, the court said, nor would their failure to apply the rule of contra proferentem to this insurance contract, if indeed they had so failed, violate public policy so as to justify the court in vacating the award. In fact, Revere "failed to convince the Court that any error has occurred, and certainly the Court can find no error of the magnitude required" by case law to set aside the award. "Public policy is involved in this case," the court continued, "but not in the manner the petitioner contends. There is a strong public policy behind judicial enforcement of binding arbitration clauses."

Congress and the treaty power. The 95th Congress took several unheralded actions which may resolve, at least for the time being, the impasse between Congress and the executive branch over their respective prerogatives in the negotiation and conclusion of international agreements.

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3"Id."
On its face, the International Consultation Resolution merely expresses the sense of the Senate that in determining whether a particular international agreement should be submitted to it as a treaty, "the President shall have the timely advice of the [Senate's] Committee on Foreign Relations through agreed procedures established with the Secretary of State." Senator Clark, one of the resolution's co-sponsors, had originally sought approval of a measure which would have authorized the Senate to reverse any executive branch determination that a particular international undertaking constitutes an "executive agreement" rather than a "treaty." Failing that, Senator Clark sought legislation which would bar funding whenever the executive branch failed to consult with the Senate in determining the constitutional status of an international agreement entered into in behalf of the United States.

S. Res. 536, instead, deals with the Senate's related concern that its "advice" and "consent" powers not be construed as one; in other words, that its advice be sought and heeded early in the treaty negotiation process rather than at the time its consent is sought to ratification. To satisfy the Senate on this point, the State Department offered to send the Senate's Foreign Relations Committee periodically, on a confidential basis, a list of significant international agreements which have been authorized for negotiation pursuant to the Department's Circular 175 procedure. The list would describe the subject matter of the proposed agreements and indicate their anticipated form. The Committee would then advise the State Department of any listed agreement as to which it wishes to consult and consultation would follow. The Committee decided to accept this procedure and that, it appears, is how the innocuous-sounding S. Res. 536 came to be adopted.

The State Department's reference to its Circular 175 procedure raised the question of whether consultation would take place with respect to agreements to be negotiated by departments and agencies other than the State Department. Surprising as it may seem, the State Department is not always told by other executive departments and agencies that they are negotiating, or indeed have already concluded, an international agreement. Because these agreements are not normally of great significance and would therefore probably constitute "executive agreements" under the traditional distinction between "treaties" and "executive agreements," they are not subject to the consent of the Senate. Nor, when their existence is unknown to the

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41Id. See also U.S. CONST. art. II, § 2, cl. 2.
42See 11 FOREIGN AFFAIRS MANUAL §§ 700 et seq. (1974), and Murphy, Treaties and International Agreements Other Than Treaties: Constitutional Allocation of Power and Responsibility Among the President, the House of Representatives, and the Senate, 23 KANSAS L. REV. 221, 223 (1975).
43A similar offer was extended by the State Department to the House Committee on International Relations and accepted by that Committee early in October 1978.
State Department, does the Congress learn of them through the reporting procedure for executive agreements established by the Case Act.64

The Case Act,65 enacted by Congress in 1972 and named for its chief sponsor, then Senator Clifford Case, requires the Secretary of State to transmit to Congress the text of any international agreement other than a treaty to which the United States has become a party, and to do so within sixty days of its entering into force. The purpose of the Case Act was to assure Congress that it is fully informed, on a timely basis, of internationally binding agreements entered into on behalf of the United States.66 To the extent that Congress is not so informed because the Secretary of State himself does not know of certain agreements, the Case Act's reporting system does not achieve its purpose. Ironically, the more diligent the Secretary of State is in seeking to identify international agreements made by other departments and agencies, the less likely he will be able to meet the sixty-day reporting deadline. Late reporting, in fact, has been an almost constant feature of the operation of the Case Act in practice.

To tighten the Case Act, and incidentally to give the State Department greater control over the negotiation of international agreements binding on the United States, the Congress enacted several amendments to the Case Act on October 7, 1978.67 The first of these adds to the definition of those "international agreements" which must be reported within sixty days "any oral international agreement, which shall be reduced to writing."68 The second requires the President to submit an annual report to the Speaker of the House and the chairman of the Senate Foreign Relations Committee with respect to each international agreement which, during the preceding

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64A striking example of such an agreement, if it proves to have been such, was one which came to light a few weeks ago during the trial in Washington of three Cuban exiles charged with helping in the assassination of Orlando Letelier, the former Chilean diplomat who was killed by a car bomb in Washington in September 1976. According to an account of the trial which appeared in The New York Times on March 8, 1979, at A3, an agreement was entered into on April 7, 1978 by the United States Attorney for the District of Columbia and the Chilean Under Secretary of the Interior which resulted in the extradition, the following day, of Michael Vernon Townley, an American electronics expert then in Chile who has admitted planting the car bomb. Mr. Townley claims that he was acting as an agent of DINA, the Chilean secret police. In order to get Chile to extradite Mr. Townley, the United States Attorney apparently agreed to restrict the information it would make available to the world about its investigation into the murder. According to The New York Times the restricted information concerns other DINA assassination plots.

65The United States Attorney's authority to enter into such an agreement would have to come either from an existing judicial assistance treaty, an interagency agreement or—at least according to the view long held by the executive branch—under a delegation of the President's general executive powers. The United States has no judicial assistance treaty with Chile.


67"That a particular undertaking is regarded as an "executive agreement" rather than a "treaty" for the purposes of United States constitutional law, does not, without more, detract from its juridical status as an international agreement under international law.


year, was transmitted to the Congress after the expiration of the sixty-day reporting period, "describing fully and completely the reasons for the late transmittal." Neither of these changes affects the "national security" exception in the Act which provides that transmission of any agreement believed by the President to endanger national security will be restricted to the Senate Foreign Relations and the House Foreign Affairs Committees rather than being released to the full Congress.

Perhaps most importantly, the new amendments add a section to the Case Act which provides that no international agreement may be signed or otherwise concluded in behalf of the United States without prior consultation with the Secretary of State (although "consultation" may encompass a class of agreements rather than a particular agreement). And it directs the President, through the Secretary of State to promulgate rules and regulations to carry out this new arrangement.

The procedural agreement which led to S. Res. 536 and the October 1978 amendments are likely to assure Congress a greater role in the agreement-making process, relative to the executive branch, and to assure the State Department a greater role in coordinating the process, relative to the rest of the executive branch.

**UNESCO Declaration on News Media.** The General Conference of the 146-member United Nations Educational, Scientific and Cultural Organization (UNESCO), meeting in Paris for its twentieth session from October 24 to November 28, 1978, adopted by acclamation the text of a Declaration of Fundamental Principles concerning the contribution of the mass media (i.e., the press) to strengthening peace and international understanding. A draft of the Declaration introduced two years ago had drawn fire from western governments and representatives of press organizations for its apparent endorsement of government control of news reporting. The final version, though still criticized in some press circles because it appears to accept the premise that UNESCO has a right to prescribe to the media, is a far cry from the earlier version. It still alludes to the International Covenant on Civil and Political Rights adopted by the U.N. General Assembly in 1966 which, because it holds that the "right to freedom of expression... carries with it special duties and responsibilities," strikes some observers as opening the door to official control over news organizations. But the carefully worded compromise text refers only to certain "principles proclaimed" in the Covenant, a nice distinction which might be overlooked in practice by authoritarian governments seeking to rationalize their control of the media.

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10See UNESCO draws press flak, The Inter Dependent, Jan. 1979, at 5. The newspaper is a monthly publication of the United Nations Association of the United States.
Read in its entirety, however, the text appears to represent a balance between the ideal of freedom of the press and the special concerns of developing countries for greater control over the elements which appear to them to be retarding their development. Article II(2) states, for example, that

Access by the public to information should be guaranteed by the diversity of the sources and means of information available to it, thus enabling each individual to check the accuracy of facts and to appraise events objectively. To that end, journalists must have freedom to report and the fullest possible facilities of access to information . . .

Similarly, Article II(4) provides:

If the mass media are to be in a position to promote the principles of this Declaration in their activities, it is essential that journalists and other agents of the mass media, in their own country and abroad, be assured of protection guaranteeing them the best conditions for the exercise of their profession.

On the other hand, Article I of the UNESCO Declaration might strike some observers as tying freedom of the press to the "promotion of human rights and the countering of racialism, apartheid and incitement to war,"—words and phrases which are unobjectionable out of context, but which, in the parlance of the United Nations are often uttered with anti-Western inflections.

Other provisions of the Declaration containing reminders about the purposes of a free press, whether or not intended by some states as admonitions to western press services in their reporting on the events in Third World countries, are on their own terms not at all unreasonable. For example, Article II(3) reminds the press of the need to give expression to "peoples . . . who are unable to make their voices heard within their own territories." And Article III(2), which seems tied to demands for a new international economic order, speaks of the contribution the press makes by "drawing[ing] attention to the great evils which afflict humanity, such as poverty, malnutrition and diseases. . . ."

Transnational organizations—IATA. From the time of its formation after World War II until about two years ago, the International Air Transport Association (IATA) set agreed-on fares, region by region, for international air transport. But its power to do so diminished sharply in 1977 when the United States Government withheld its approval of new fares by IATA to compete with Laker Airways' standby offers on the North Atlantic run. Instead, the United States approved a set of discounts outside the IATA framework, engendering a period of competitive pricing, including deep discount fares, which for the short run, at least, has reduced the cost to consumers of international air transportation.

The International Air Transport Association's 106 airline members voted at its annual meeting in Geneva last November to reorganize the association. The reorganization plan, which is subject to approval by member governments, would establish a two-tier system that would allow airlines to withdraw from IATA's fare-setting activities while continuing to participate
in its technical activities. These include agreeing to cover interchange of baggage, minimizing of red tape at borders and standardizing of ticketing to permit travel with one transaction over a long, multairline itinerary.

In a speech delivered at a symposium on air policy in Kingston, Jamaica, in January of this year, IATA's Director-General, Knut Hammarskjold, expressed concern "that the manner in which [American-backed innovations] are being collectively implemented may undermine the principles of negotiations which have held the system together." He is concerned "that in the process of seeking its new objectives, the United States may be threatening to destroy multilateral mechanisms which have coordinated international operations to the enormous benefit of consumers."

**Practice of law in Europe.** A directive issued by the Council of the European Economic Community (EEC) on March 22, 1977, effective March 1, 1979, requires EEC member states to remove national barriers to the practice of law insofar as they apply to lawyers certified to practice by other member states.

The directive grows out of a ruling of the European Court of Justice in 1974 in a case brought by a Dutch lawyer, Jean Reyners. Though born, raised and educated in Belgium, M. Reyners had retained his Dutch parents' nationality and thereby was rendered ineligible to register with the Belgian bar, a precondition to practicing law in Belgium. His having received a Belgian law degree (docteur en droit) helped him not a whit. All of this struck M. Reyners as inconsistent with the Rome Treaty's right-of-establishment provisions, provisions which are designed to assure freedom of movement within the Common Market for nationals of member states. But the Belgian bar association argued that lawyers exercise official authority and as such are exempt from the treaty's right-of-establishment provisions.

The ECJ agreed with Reyners, reasoning that although lawyers' activities may be compelled by the state and constitute a legal monopoly, lawyers themselves act with impartiality and independence and their work does not involve the exercise of official authority.

The directive does not completely eliminate restrictions on interstate practice. Member states may draw up regulations to assure proper identifi-
cation, for example. And certain amenities may be retained, such as the necessity for the visiting trial lawyer to be introduced to the presiding judge or even the president of the local bar. The directive also anticipates that member states will require the participation as co-counsel of members of their own bar, the idea being to assure familiarity, and compliance, with local procedural rules.

But the directive does mark a trend in the Common Market towards the emergence of a truly supranational law, a treaty-based constitutional law whose impact on the national legal system of member states is becoming more pronounced.

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