*Extract from:*

# UNITED NATIONS JURIDICAL YEARBOOK

1981

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

Chapter VIII. Decisions of national tribunals

## CONTENTS (*continued*)

# Chapter VIII

# DECISIONS OF NATIONAL TRIBUNALS

## 1. France

BENVENUTI & BONFANT COMPANY *v.* THE GOVERNMENT OF THE PEOPLE'S REPUBLIC OF THE CONGO. JUDGEMENT OF 26 JUNE 1981

*Request for arbitration addressed to the International Centre for Settlement of International Disputes — Order of a national court granting recognition of the award subject to a reservation concerning measures of execution — Limits to the authority of the requested court under article 54 of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States*

On 16 April 1973, an Agreement was executed by the Government of the People's Republic of the Congo and the Italian company Benvenuti & Bonfant, relating to the creation of a semi-public company for the manufacturing of plastic bottles.

This Agreement included, under Article 12, the following arbitration clause:

> "Any dispute between the parties arising out of the performance of this Agreement, which could not be amicably settled, shall be submitted to arbitration within the framework of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, of March 18, 1965, prepared by the I.B.R.D.; the proceedings shall be conducted in the French language. The parties hereby agree to abide by the arbitral award and undertake to comply with its terms, and to waive any right to any appeal or other power [*sic*] of such award. The costs of arbitration shall be borne equally by the parties."

Following the creation of the Plasco company and the execution of a contract dated 21 April 1973 between that company and the Socisca company for the delivery, on a turn-key basis, of a plant for the manufacturing of thermo-plastic bottles, capable of producing about 8 million units and of a plant for the bottling of mineral waters, disputes arose between the parties to the Agreement of 16 April 1973.

On 15 December 1977 the Benvenuti & Bonfant Company addressed a request for arbitration, dated 12 December 1977, to the International Centre for Settlement of Investment Disputes.

The arbitral tribunal rendered its award on 8 August 1980.

At the request of the Benvenuti & Bonfant Company, the President of the *Tribunal de Grande Instance* (the court of first instance) of Paris, by order of 23 December 1980, granted recognition to the award, however, subject to the following reservation:

> "We rule that no measure of execution, or even a conservatory measure, can be taken pursuant to said award, on any assets located in France without our prior authorization."

The Benvenuti & Bonfant Company, consistent with the rules of French procedure in such cases, lodged an appeal against that part of the order granting recognition which contained the reservation quoted above.

The President of the *Tribunal de Grande Instance* was asked, pursuant to article 952, para. 1 of the New Code of Civil Procedure, whether he would consider amending or deleting that part of his order which was objected to. By order dated 13 January 1981, he answered in the negative.

Before the Court of Appeal, the appellant Company contended that the part of the order under appeal made it, in effect, impossible to enforce the award.

The Company argued that under article 54, paragraph 2 of the Convention of Washington of 1965,[1] the lower judge could only ascertain the existence (authenticity) of the award and that he

had mixed up two different steps, i.e., that relating to the recognition and enforcement of the award and that regarding specific measures of execution.

The Company contended that the lower judge did not have to deal with this second step, which might raise the question of the immunity from execution of foreign States.

Accordingly, the Benvenuti & Bonfant Company requested the deletion of that part of the order to which it objected.

The Court of Appeal stressed that, as set forth in article 54 of the Convention of Washington of 18 March 1965 on the Settlement of Investment Disputes between States and Nationals of Other States, which had been acceded to by the People's Republic of the Congo on 27 December 1965, by Italy on 18 November 1965, and by France on 22 December 1965:

> "(1) Each Contracting State shall recognize an award rendered pursuant to this Convention as binding and enforce the pecuniary obligations imposed by that award within its territories as if it were a final judgment of a court in that State. A Contracting State with a federal constitution may enforce such an award in or through its federal courts and may provide that such courts shall treat the award as if it were a final judgment of the courts of a constituent state.
>
> "(2) A party seeking recognition or enforcement in the territories of a Contracting State shall furnish to a competent court or other authority which such State shall have designated for this purpose a copy of the award certified by the Secretary-General. Each Contracting State shall notify the Secretary-General of the designation of the competent court or other authority for this purpose and of any subsequent change in such designation.
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> "(3) Execution of the award shall be governed by the laws concerning the execution of judgments in force in the State in whose territories such execution is sought."

The Court noted that these provisions offered a simplified procedure for recognition and enforcement (*exequatur simplifié*) and restricted the function of the court designated for the purposes of the Convention by each Contracting State to ascertaining the authenticity of the award certified by the Secretary-General of the International Centre for Settlement of Investment Disputes.

While observing that under article 55 of the aforesaid Convention of Washington

> "Nothing in article 54 shall be construed as derogating from the law in force in any Contracting State relating to immunity of that State or of any foreign State from execution",

the Court pointed out that the order granting recognition and enforcement to an arbitral award did not constitute a measure of execution but was only a decision preceding possible measures of execution and that, as a result, the lower judge, requested pursuant to article 54 of the Convention of Washington, could not, without exceeding his authority, deal with the second step, that of execution, to which related the question of the immunity from execution of foreign States.

The Court therefore ordered the deletion from the order rendered on 23 December 1980 by the President of the *Tribunal de Grande Instance* of the following provision:

> "We rule that no measure of execution, or even a conservatory measure, can be taken pursuant to said award, on any assets located in France, without our prior authorization."

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## 2. United States of America

### UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

TUCK *v.* PAN AMERICAN HEALTH ORGANIZATION: DECISION OF 13 NOVEMBER 1981

*Case brought against an international organization coming under the International Organizations Immunities Act — Motion to dismiss presented by the defendants on the basis of their alleged immunity from suit — Extent of the immunity from suit enjoyed by foreign sovereigns*

The case concerned a United States lawyer who had been placed on a retainer by the Staff Association of the Pan American Health Organization — an organization related to the World Health Organization. The Staff Association of PAHO had arranged to instal him on PAHO premises in an office assigned to the Association. The Director of PAHO having ordered him to vacate those premises, the appellant filed suit in the United States District Court for the District of Columbia, which dismissed the suit for failure to state a cause of action. Before the United States Court of Appeals for the District of Columbia Circuit, the appellant alleged that the PAHO and its Director had (1) breached and tortingly interfered with his contract with the PAHO Association, (2) discriminated against him on the basis of race in violation of the Fifth and Fourteenth Amendments and (3) interfered with his relationship with PAHO employees in violation of the First and Fifth Amendments. The defendants on the other hand moved to dismiss the suit on jurisdictional and immunity grounds.

The Court found that the District Court had jurisdiction to consider the claims inasmuch as counts (2) and (3) of the complaint alleged violations of the appellant's and his clients constitutional liberties, thus furnishing the Court with federal jurisdiction.

On the issue of immunity, the Court stated the following:

> "As had been frequently noted, immunity, where justly invoked, properly shields defendants 'not only from the consequences of litigation's results but also from the burden of defending themselves'. *Dombrowski* v. *Eastland*, 387, U.S. 82, 85 (1967) (per curiam), quoted in *Davis* v. *Passman*, 442 U.S. 228, 235 n.11 (1979). This shield would be lost if the merits of a complaint were fully tried before the immunity question was addressed.[2]
>
> "Upon consideration of the claims raised by appellant . . . , we find that appellees are in most respects immune from suit in District Court. However, like the panel of this court in *Broadbent* v. *Organization of American States*, 628 F.2d 27 (D.C. Cir. 1980),[3] we need not decide whether the International Organizations Immunities Act of 1945, 22 U.S.C. § 288a (*b*) (1976), when read in light of the Foreign Sovereign Immunities Act, 26 U.S.C. §1604, 1605 (1976), grants the PAHO absolute or restrictive immunity. After full review of the parties' arguments, we conclude that even under the less expansive restrictive immunity standard, which permits a lawsuit based on "commercial activity" to be maintained against a sovereign without its consent, 28 U.S.C. §1605 (*a*) (2) (1976), the PAHO is immune from suit in this case. [The] claims arise from the PAHO's supervision of its civil service personnel and from its provision and allocation of office space. Neither constitutes a "commercial activity" potentially subjecting the PAHO to suit. *See* 28 U.S.C. §1603 (*d*); *Broadbent* v. *Organization of American States*, 628 F.2d 27, 33-36 (D.C. Cir. 1980). Because the PAHO is immune from this suit if restrictive immunity applies, it is *a fortiori* immune if absolute immunity applies."

The Court also found the Director of the PAHO "immune from suit in his official capacity", so that, to the extent that the acts charged in the complaint related to his functions as Director of the PAHO, the provisions of the International Organizations Immunities Act protected him from suit.

The Court of Appeals however noted that the District Court had not passed upon the appellant's claims against the Director of PAHO in his individual capacity, and therefore remanded the case for the District Court's consideration of those claims.

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NOTES

[1] Reproduced in the *Juridical Yearbook*, 1966, p. 196.

[2] The Court however recognized that "because the issues often are so intertwined, it may be impossible in some suits to resolve a claim of immunity without first conducting a limited factual inquiry". *See Forsyth* v. *Kleindienst*, 599 F.2d 1203 (3d Cir. 1979), *cert. denied*, 101 S.Ct. 3147 (1981).

[3] For a summary of that case see *Juridical Yearbook*, 1980, p. 224.