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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. France

COURT OF APPEALS OF RENNES

GUINEA AND SOGUIPECHE V. ATLANTIC TRITON COMPANY: DECISION OF 26 OCTOBER 1984[1]

Arbitration of the International Centre for Settlement of Investment Disputes—Rule of judicial abstention of national courts

The Court, in the case between *The Revolutionary People's Republic of Guinea and La Société Guinéenne de Pêche (SOGUIPECHE)* v. *The Atlantic Triton Company,* ruled as follows:

On 6 July 1984 the Revolutionary People's Republic of Guinea and SOGUIPECHE appealed against the order issued on 6 April, by the presiding judge of the Quimper Commercial Court, which disallowed their request for release of three fishing boats arrested at the request of the Norwegian company Atlantic Triton while undergoing repair in the Piriou yard at Concarneau, and were summoned on 25 and 31 July to appear at the hearing on 14 September so that a decision could be reached on the merits of their appeal.

. . .

The Public Attorney has pointed out that the management agreement signed between the parties contained an arbitration clause providing that disputes should be referred for settlement to ICSID, set up by the Convention on the Settlement of Investment Disputes between States and Nationals of Other States of 18 March 1965, ratified by France, Guinea and Norway; that such tribunal has the power to recommend any provisional measures, and enjoys sole jurisdiction to the exclusion of that of national courts; that the local judge should have either stayed the proceeding if the [ICSID arbitral] tribunal had not yet ruled on the matter, or, if that had been done, decided in the same manner as the tribunal; that this solution is consistent with the information in the section on provisional measures in the ICSID brochure;[2] he therefore concludes that the order should be set aside and that the attachment of the three ships be vacated.

. . .

As regards the facts

The Minister of Fisheries of the revolutionary People's Republic of Guinea,... designated as the shipowner, and the Norwegian company Atlantic Triton signed a management agreement on 12 August 1981 in which the State requested the company to undertake at the State's expense the conversion, equipping and operation of three vessels acquired with a view to establishing a fishing industry designed to meet the food needs of the urban population. The agreement was to last two years and could be terminated with three months' advance notice. The document contained a clause committing both parties to refer disputes to ICSID for settlement on an equitable basis, while disputes not falling within the jurisdiction of ICSID were to be arbitrated by the International Chamber of Commerce.

The company undertook the ship repair and conversion work in Norway from August to November 1981, sailed the vessels to Guinea and operated them until September 1982.

The Government of Guinea requested technical assistance from FAO to improve the poor results obtained by the national fishing company, SOGUIPECHE, during the first

six months of operation. This study showed that the ships were unsuitable for fishing in Guinean waters, being too large, too expensive and too complicated; the Norwegian nets were unsuitable, and the ships had not been properly maintained, making a general overhaul necessary. FAO advised that overhaul of the two ships, *Matakang* and *Sow,* should be reorganized, that fuel should be subsidized and that the third trawler, *Kaloum,* be sold and new fishing vessels acquired. These conclusions were confirmed in a report from the technical director of SOGUIPECHE on 11 September 1982 which referred to a large number of mechanical and electrical breakdowns that had immobilized the vessels for long periods and left them in poor condition, although they had been overhauled, except for careening.

The Government, acting on behalf of SOGUIPECHE, the shipowner, made arrangements in a contract dated 14 January 1984, pursuant to an agreement of 26 February 1983, for the Piriou facility to overhaul and convert the three ships ... In the light of the breakdowns and the evidence of the unsuitability of the ships for fishing in tropical waters, meetings took place between the Guinean Ministry of Fisheries and the Norwegian company at Bergen from 17 through 21 September 1982 regarding the performance of the management agreement. The record of the meeting prepared on 21 September referred to the unsatisfactory technical performance of the vessels, particularly the *Matakang,* the technically unfortunate choice of equipment which resulted in very small catches and represented an economic disaster, to the lack of flexibility of the arrangements and to the difficult character of operating conditions. Austerity measures were taken; the Norwegian company acknowledged its responsibility for the defects in the conversion in the *Matakang* but, alleging a difficult financial situation and the non-payment of management fees for the third quarter, undertook to finance 40 per cent of the rehabilitation plan. The parties agreed on the need for revision of the basic provisions of the management agreement.

In a letter of 5 April 1983, Atlantic Triton, in the light of the refusal of its partner to perform its financial obligations, cancelled the agreement with the Guinean Government with effect from 30 June and requested payment of the sum of $US226,867 as owing to the Mjellem and Karlsen yards, and of $US334,444 as administrative expenses for the period 1 October 1982 through 30 June 1983. The Government protested about a considerable overrun in relation to the estimate for converting the ships. Having received no reply to its cancellation of the contract, Atlantic Triton obtained an order from the President of the Quimper Commercial Court dated 12 October, authorizing the attachment of the three ships as security for a claim estimated at $US571,311, plus a sum of $US 150,000 for expenses in penalty interest, provided that an appeal was lodged on the merits of the matter within three months. The company then informed ICSID that the ships had been attached by the bailiff and that the attachment order had been notified on 19 and 21 October to the Piriou yard and the Guinean Embassy respectively. The Government of Guinea and SOGUIPECHE moved to vacate the attachment and requested compensation of F 150,000 for abuse of process. The motion was dismissed by order of 6 April last, which was appealed.

In the meantime a request for arbitration under the auspices of ICSID was submitted on 9 January 1984 by the Norwegian company. Notice of registration of the request was dispatched on the 19th of that month, and the tribunal was constituted on 1 August (article 6 of the ICSID Arbitration Rules).

On 20 August the Republic of Guinea requested the ICSID tribunal to order the immediate suspension of the provisional measures authorized by the President of the Quimper Court. A ruling was requested before 14 September, the date of the hearing before this court. It was alleged that the company had violated ICSID Rules which forbid that a request for provisional measures be submitted to a national jurisdiction.

The appellants put forward the following grounds in support of their appeal: immunity from execution ... and the Convention of Washington of 1965.

...

On the first ground

The State of Guinea did not waive its immunity from execution by adding a claim for compensation for wrongful attachment to its demand for the release of the ships attached.

The ships, whose owner's identity is contested, had become the property of SOGUIPECHE as a result of the "acts of Guineazation" dated 7 June 1983 and communicated by Ms. Tessier, counsel for the appellants, on 19 December of the same year. Furthermore, they had become part of the company's assets from its establishment on 6 January 1982; in a telex of 3 June 1983 to Atlantic Triton the company indicated its desire to sell the ships' equipment; the company has both a separate legal identity from that of the State of Guinea and its own assets, and engages in commercial activity governed by the laws and customs of commerce (cf. decree of 6 January 1982, particularly article 10). Therefore the argument regarding immunity from execution is without foundation.

. . .

On the third ground

The Convention on the Settlement of Investment Disputes between States and Nationals of Other States established under the auspices of the International Bank for Reconstruction and Development (IBRD) on 18 March 1965,[3] which came into effect on 14 October 1966 and was ratified by a large number of States, including France, Norway and Guinea, set up an International Centre for Settlement of Investment Disputes (ICSID) which includes conciliation and arbitration machinery (in this case a tribunal).

Article 26 provides that the consent to arbitration shall "unless otherwise stated" be deemed consent to such arbitration to the exclusion of any other remedy, although "a Contracting State may require the exhaustion of local administrative or judicial remedies as a condition of its consent to arbitration under this Convention". Article 47 provides that "except as the parties otherwise agree, the Tribunal may, if it considers that the circumstances so require, recommend any provisional measures which should be taken to preserve the respective rights of either party".

The rules applicable to ICSID's arbitration proceedings, which is an official document drawn up by the Administrative Council of the Centre pursuant to article 6 of the Convention, provide, in rule 39 entitled "provisional measures", that at any time during the proceeding a party may request that provisional measures for the preservation of its rights may be "recommended" by the tribunal, which shall give priority to the request. The tribunal may also recommend provisional measures on its own initiative or recommend measures other than those specified in a request. In cases of urgency the tribunal may take decisions by correspondence among its members; the President may also call special meetings of the tribunal.

The ICSID rules specify that unless otherwise agreed by the parties, consent to arbitration by ICSID is exclusive of any other remedy, and therefore the parties cannot apply to local administrative or judicial authorities to obtain provisional measures, but must have recourse only to the arbitration tribunal.

The purpose of the Convention was to set up a machinery that would be widely accepted for conciliation and arbitration purposes, to which the contracting States and the nationals of other contracting States can submit disputes on matters of private international investments, rather than to local jurisdictions.

As this rule regarding arbitration makes the purpose of the Convention clear, it follows that the arbitration tribunal has the general and exclusive power to rule not only on the merits of the dispute but also on all provisional measures. The terms used, such as "remedy" (article 26 of the Convention) have a general application that dispels any possible ambiguity … if local jurisdictions had the power to consider requests for provisional measures, this would restrict the competence of the tribunal and would entail the serious risk of decisions being taken that would complicate the task of the arbitrators, who in this case must reach equitable decisions. Under international law it is agreed that the parties must refrain from any steps that might have prejudicial effects on the enforcement of a future decision [of an international tribunal] and, in general terms, must not engage in any activities that could aggravate or extend the scope of dispute.

From the start of the dispute bringing into effect the clause providing consent to ICSID arbitration, the parties to the agreement are compelled to have recourse to such arbitration.

...

In the light of these observations the President of the Commercial Court had no jurisdiction to grant the request for an order of attachment regarding three ships belonging to SOGUIPECHE.

...

Therefore the Court

•••

Grants the appeal lodged by the Revolutionary People's Republic of Guinea and the SOGUIPECHE company;

Quashes the order made by the President of the Quimper Commercial Court of 6 April 1984;

...

Directs the company to apply to the appropriate jurisdiction;

Orders the Atlantic Triton Company to pay all the costs...

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2. Italy

PRETORE DI ROMA

ISTITUTO NAZIONALE DI PREVIDENZA PER I DIRIGENTI DI AZIENDE INDUSTRIALI (INPDAI)

v. FOOD AND AGRICULTURE ORGANIZATION OF THE UNITED NATIONS: JUDGEMENT OF 4 APRIL 1984[4]

Determination by the Supreme Court of Cassation that the Italian courts have jurisdiction over the claim—Resumption of the suspended proceedings on the claim by INPDAI for rent increases—FAO's refusal of the notification of an application on the ground that it had never waived the immunity from jurisdiction provided for in section 16 of the headquarters agreement—Decision declared to be provisionally executory

**•

By an application made on the basis of article 29 of Law No. 253 of 1956, deposited on 18 July 1978 and notified on 25 July 1978, INPDAI (owner of the entire building situated at No. 432 and No. 430/e, Via Cristoforo Colombo, Rome) brought an action against FAO, which had rented the said building by a lease running from 1 May 1969 to 30 April 1975, the lease being registered on 15 February 1969 under No. 74395 at the Ufficio Atti Privati in Rome. The said lease was extended for three further years (on the basis of article 2, by simple request of the tenant). The lessor requested that the rent, fixed at advance instalments of 180,000,000 Italian lire by semester, be increased in accordance with the ISTAT [Istituto Centrale di Statistical clause. INPDAI requested in particular that, the validity and efficacy of the ISTAT clause having been declared, the Respondent be ordered to pay, for accrued differences in rent until 31 July 1978, the capital sum of Lit 1,110,180,000 (or whatever higher or lower amount might result), besides the interest due at the legal rate. In fact, the annual rent should be increased as follows (except where otherwise determined): Lit 470,160,000 from 1 January 1974; Lit 652,680,000 from 1 January 1976; Lit 882,000,000 from 1 January 1978.

FAO, having appeared at the first hearing (19 October 1978), presented as a preliminary objection the lack of jurisdiction of the Italian court on the basis of article VIII of the Treaty of Washington of 31 October 1950, ratified by Italy by Law No. 11 of 9 January 1951. FAO also objected, on the merits, that under article 11 of the contract any dispute should be resolved by arbitration in accordance with the rules of the International Chamber of Commerce.

The proceedings were suspended, under article 367 of the Code of Civil Procedure, after FAO notified to INPDAI an application addressed to the Corte di Cassazione for a preliminary ruling on the question of jurisdiction *(regolamento preventivo di giurisdizione).*

By Judgement No. 2124/81 of 1 April/18 October 1982[s] the Corte di Cassazione affirmed "the jurisdiction of the Italian judge in the dispute pending before the Pretore of Rome, as the judge competent to hear equitable rent cases, concerning the claim for a rent increase". The judgement also clarified, in its reasoning, that article 11 of the contract, under which any dispute should be settled by arbitration in accordance with the rules of the International Chamber of Commerce, was in any case null and void, in the light of both principles of international law and article 2 of the Code of Civil Procedure.

INPDAI resumed the proceedings by an application deposited on 31 January 1983. Said application was notified on 14 February 1983 to FAO's attorneys, one of whom refused the notification, declaring that his power of attorney had been revoked (whereas the second attorney had changed his address). On 5 February 1983 the application was also notified directly to FAO under article 142 of the Code of Civil Procedure; FAO refused the notification on the ground that it had never waived the immunity from jurisdiction provided for in section 16 of the headquarters agreement (as stated in a note from the Ministry of Foreign Affairs—Cerimoniale II No. 022/3919 of 31 March 1983).

While FAO did not appear (and withdrew its file), the proceedings continued.

By an order of 14 November 1983 the case was reinstated on the rolls of the court for the purpose of "clarifying the terms of the mandate given by FAO to its attorneys, as well as to ascertain the exact date on which the original application had been notified to FAO (which date was relevant in order to determine the date on which the action was initiated, for the purpose of the possible application of the special procedure provided for in Law No. 392/78)". The order was notified by a note from the court to FAO's attorneys (one of whom—Aw. Guerreri—refused to receive the note because of the revocation of his mandate, whereas the other attorney—Aw. Attanasio—did not receive the notification because he had changed address).

After INPDAI submitted certain documents, some of which clarified the questions posed by the order of 14 November 1983, the case was set down for decision on the basis of the conclusions mentioned above, while FAO remained absent.

The application made by INPDAI concerning the validity and efficacy of the ISTAT clause and FAO's consequent obligation to pay the rent increase to the extent and at the times established in the contract, is lawful and must be acceded to.

First of all, it must be stated *ex officio* that under article 6 of law No. 368/1955 rental disputes fall within the competence of the Pretore (if they are not within the competence of a *conciliatorè)* whenever they relate to the efficacy of a clause providing for rent increases on the basis of ISTAT indices, in accordance with article 1, paragraph 4, of DL [the Decree/Law] of 24 July 1974 No. 428 (promulgated as Law No. 495 of 4 August 1973), "taking into account that such provisions are part of the system of legal restrictions governing the lease or sub-lease of urban property" (Cassazione No. 2646/1980, No. 3166/1979, No. 2206/1977).

Two questions, both of a preliminary nature, must be clarified.

The first question concerns the validity of the proceedings relating to the phase which followed the suspension resulting from FAO's application for a preliminary ruling on the question of jurisdiction. The second question concerns the exact date on which the action was initiated, in order to determine the applicability of the special procedure laid down by Law No. 392/1978 for fair rent *[equo canone]* disputes, since the dispute under consideration is in substance such a dispute.

The first question requires a preliminary clarification of the terms of the mandate which FAO vested in the attorneys who represented and defended it in the first phase of the proceedings. As is well known, the latter phase ended with the suspension which was decided at the hearing of 10 March 1981 in accordance with article 367 of the Code of Civil Procedure. The withdrawal of the file by FAO—which has not put in an appearance in the present phase of resumed proceedings—requires that the solution of the problem be based on the documents

existing in the court's file as well as on the verbatim reports of the case. This is entirely justified and likewise conclusive.

The verbatim report of the first hearing, which took place on 19 October 1978, reads as follows: "Aw. G. Guerreri and Aw. L. Attanasio appear and undertake the defence of FAO. They deposit the respondent's file containing a notified copy of the application, a mandate written on the *'comparsa di costituzione'* and a rejoinder..." The file contains a copy of the said *comparsa di costituzione,* of which the last page is missing, where evidently the mandate must have been written in its entirety. This can be deduced from the last page at our disposal, at the end of which the following words appear "mandate: I delegate to represent and defend the Organization of..."

By a note of 18 November 1982 sent directly to INPDAI (at its seat in Rome, Viale delle Province No. 196), Aw. G. Guerreri communicated that FAO had revoked, with respect to the proceedings in question, his own and Aw. Attanasio's mandate which "was the following: I delegate to represent and defend the Food and Agriculture Organization of the United Nations—FAO—Aw. G. Guerreri and Aw. L. Attanasio, domiciled in Rome at Via delle Quattro Fontane 15, and I confer upon them, jointly as well as severally, full legal powers". Aw. Guerreri stated in the same note: "As a consequence of the said revocation, all authority to represent and defend [FAO] ceases as from the date of the present communication; in the absence of any express choice of domicile, it will not be possible to receive any writ or communication of a judicial character, addressed to the above-mentioned Organization."

It is thus confirmed that FAO did grant joint and several powers of attorney to Aw. Guerreri and Aw. Attanasio, at the foot of the *atto di costituzione e risposta.* Via delle Quattro Fontane No. 15 is actually the address of Aw. Guerreri's office. Apart from other documentary evidence, the application for a preliminary ruling on the question of jurisdiction, made by FAO on 7 March 1981, shows that the organization, besides being represented and defended by the said attorneys, had "elected its domicile at the office of Aw. G. Guerreri, Via delle Quattro Fontane, 15, Rome".

If it were maintained that in the mandate under consideration the indication of Via delle Quattro Fontane 15 did not correspond to the implicit will of FAO to elect its domicile at the above-mentioned address, one should recall the provision of article 170, paragraph 1, of the Code of Civil Procedure, according to which "after the *'costituzione in giudizio'* all notifications and communications are made to the attorney, except where the law otherwise provides". In any event, the said hypothesis is logically untenable, because in that case the indication of Via delle Quattro Fontane 15 would not have any legally relevant significance. The Corte di Cassazione has affirmed that "the defending counsel of a party becomes its representative, and therefore the recipient of all judicial acts which have to be served, without the need of any choice of domicile at his address" (Corte di Cassazione, No. 1070/1982); "under article 170 of the Code of Civil Procedure after the *'costituzione in giudizio'* all notifications are made to the attorney at his domicile, without the need for the party to elect domicile at his address" (Corte di Cassazione, No. 142/1973).

Moreover, the notification at the office of the attorney who made the *"costituzione in giudizio"* is valid even if the party should have elected his domicile in a place different from the attorney's office (Corte di Cassazione, No. 4026/75).

It is therefore ascertained that FAO, in virtue of the mandate repeatedly conferred upon Aw. Guerreri and Aw. Attanasio, elected its domicile (either implicitly or on the basis of article 170 cited above) at Via Quattro Fontane 15, i.e., at the office of Aw. Guerreri.

It goes without saying that the revocation of the power of attorney vested in the defending counsels, made by FAO on 12 November 1982, while the proceedings were suspended under article 367 of the Code of Civil Procedure, had no effect with respect to INPDAI. Article 81 of the Code of Civil Procedure provides that "revocation and renunciation have no effect with respect to the other party until the defending counsel has been substituted". No

substitution has been made in the present case. Therefore, a writ is considered as having been notified, even if the attorney refuses service declaring that his mandate has been revoked, and that he is no longer the legal representative and defending counsel of the party (Corte di Cassazione, No. 330/1962).

In the light of the foregoing considerations, the notification of the application, by which INPDAI requested resumption of the suspended proceedings, is perfectly in order. The said notification took place on 4 February 1983 at the domicile elected by FAO (as is shown in the mandate at the foot of the *comparsa di risposta),* at Via Quattro Fontane 15, i.e., at the office of Aw. Guerreri in his capacity as FAO's representative and defending counsel even separately from Aw. Attanasio. In this respect it is not relevant that Aw. Guerreri refused to receive the notification from the clerk of the court on the grounds that his mandate and that of Aw. Attanasio had been revoked.

Some further observations are required. The clerk of the court, after Aw. Guerreri had refused to receive the notification of the application from him, decided to complete the notification procedure in accordance with article 140 of the Code of Civil Procedure. This notification, however, was superfluous, on the basis of article 138, paragraph 2, and article 141 of the Code of Civil Procedure (Corte di Cassazione, No. 3777/1979). On the said occasion Aw. Guerreri informed the clerk of the court that Aw. Attanasio had moved his office to Via Priscilla 128; no notification was made to Aw. Attanasio because, as already noted, the notification made to Aw. Guerreri was sufficient, in view of the fact that the mandate had been granted to each of the two attorneys even separately, and that the elected domicile was Aw. Guerreri's office at Via delle Quattro Fontane (see Corte di Cassazione, No. 1976/1977). Since it has been ascertained that the repeated notification made to Aw. Guerreri was valid, it is not necessary to examine the further notification of the petition which INPDAI made directly as an extra precaution at the seat of FAO (Via delle Terme di Caracalla).

The court's note of 14 November 1983, informing the parties that the action had been resumed, was served on FAO on 24 November 1983 at its elected domicile: the office of its representative and defending counsels. That notification too was valid, notwithstanding Aw. Guerreri's refusal to receive the note on the ground that the power of attorney had been revoked.

The second question which needs to be resolved concerns the exact date on which the action was started. This date must be ascertained in order to determine the applicability of the special procedure laid down in articles 45 and 46 of law No. 392 of 27 July 1978 (which entered into force on 30 July 1978) relating to actions concerning payment of rental increases due by lessees on the basis of the ISTAT clause, even for periods preceding its entry into force (Corte di Cassazione, No. 471/1983, No. 829/1981).

The original application by which the action was initiated (under articles 29 and 30 of law No. 253 of 1950) was deposited on 18 July 1978 and was notified to FAO at Via delle Terme di Caracalla (as well as at Viale Cristoforo Colombo No. 422/430) under article 142 of the Code of Civil Procedure, on 26 July 1978.

The said article 142 provides that a notification to a person who is neither domiciled, nor residing or sojourning in the Republic, takes place by posting one copy on the notice board of the court and by sending another copy to the addressee by registered mail; a third copy is given to the Pubblico Ministero, who forwards it to the Ministry of Foreign Affairs so that it may be delivered to the addressee. It was lawful to make use of this mode of notification, since on the one hand such a notification is an act of authority which cannot be carried out on foreign territory, and on the other hand FAO—an entity endowed with international legal personality—enjoys the immunities accorded to diplomatic missions, including the inviolability of its headquarters at Viale delle Terme di Caracalla, which enjoy the privilege of extraterritoriality and where the notification took place. The requirements of article 142 of the Code of Civil Procedure were all fulfilled on 25 July 1978.

Article 143 of the Code of Civil Procedure (last para.) provides, *inter alia,* that service under article 142 "is considered to have taken place on the twentieth day following the date on which all the prescribed formalities were fulfilled". According to the Corte di Cassazione, the notification to a person residing abroad must be considered as completed, as far as the notifying party is concerned, as soon as the formalities prescribed by article 142 of the Code of Civil Procedure (paras. 1 and 2) are fulfilled, irrespective of the actual knowledge of the addressee and also irrespective of the expiry of the period of 20 days indicated in article 143 (last para.). This expiry on the other hand is necessary in order that the notification may be considered as completed also with respect to the addressee, since the interval of 20 days is laid down in his favour (No. 4129/1981; No. 4947/1980; No. 2033/1980; Corte Costituzionale, No. 10/1978).

In view of the foregoing, it must be observed that in the case under consideration the notification was completed (at least from the viewpoint which is relevant here) on 25 July 1978, when the clerk of the court fulfilled the various requirements prescribed by article 142, and not after the expiry of 20 days indicated in the last paragraph of article 143. In fact the purpose of this interval is to preclude the addressee from suffering any procedural prejudice before its expiry, whereas, as far as the notifying party is concerned, the notification is completed at such time as all the formalities have been fulfilled. Therefore the action is to be considered as having been initiated on the said date. To postpone this event until after the expiry of 20 days would imply an undue extension of the protection of the addressee's interests, which interests are protected in all other aspects by the expiry of the 20-day interval.

Moreover, in the case under consideration, since the action was initiated by an application *(ricorso),* the date of deposit of this act—18 July 1978—is relevant under article 5 of the Code of Civil Procedure in order to determine the competent judge, as well as the procedure in accordance with which the action shall be heard. In fact the *ricorso* is by itself an indication of the particular type of procedure to be followed in the action. If one were to hold otherwise, that determination of the competent judge and the applicable procedure should take place at the time of the notification of the *ricorso,* this would imply (apart from a violation of article 5 of the code of Civil Procedure) that the applicant should bear the consequences of any delay of the judge in fixing the first hearing of the parties, since during this time a change in the rules governing competence might occur.

At this point, a conclusion can be easily reached. Law No. 392, which entered into force on 30 July 1978 and laid down a special procedure for actions relating to rental disputes, cannot apply to the present action because the said action, which was initiated on 25 July 1978, was already subject to the ordinary procedure.

On the merits of the case:

The lease under consideration, for an entire building to be used by FAO as office space, was entered into for a duration of six years from 1 May 1969 to 30 April 1975 (article 2), with the possibility of extension "for three further years upon a simple request by FAO, to be notified by registered mail before 31 December of the year preceding the year of expiry". By note of 1 April 1974 FAO availed itself of this right to request (and automatically obtain) the extension of the contract for three further years, from 1 May 1975 to 30 April 1978. In view of said periods of validity, the contract was never subject to extension by operation of law (in particular to the extension provided for by Law No. 351 of 12 August 1974).

In accordance with article 3, the rent was fixed at Lit 360,000,000 a year, to be paid in advance instalments of Lit 180,000,000, within the first five days of each semester. The said article continues as follows: "The rent will remain unchanged until 31 December 1971. For the period from 1 January 1972 to 31 December 1973 the rent will be reviewed by the parties on the basis of any increases or decreases which may take place in the average of general indices for Rome, of the *Tavola Numeri indici deiprezzi al Consumo per.lefamiglie di operai e impiegati nei capoluoghi di Provincia* (formerly 'cost of living indices') concerning the last three months of 1971 as shown in the *Bollettino mensile di statistica dell'Istituto Centrale di*

Statistica, with respect to the same general index concerning the month of December 1969. The per cent increases and decreases, resulting from the said bulletin, shall be applied to the rent. For the period from 1 January 1974 to 30 April 1975 (or to 31 December 1975 in case of extension of the lease), the rent will again be reviewed in the same manner as described above; subsequent revisions will take place every two years during all the duration of the contract. It is understood that the rent will remain unchanged for the biennium following the revision."

One must examine the compatibility of this ISTAT clause with the provision of article 1 (paragraph 4) of Decree Law No. 426 of 24 July 1973, according to which "agreements and contractual clauses stipulated after the entry into force of the present decree, which provide for rental increases of any kind with respect to urban buildings, are null and void. From the same date, all clauses providing for rental increases designed to counterbalance the effects of monetary devaluation shall also be inoperative."

It has been argued that the said article, providing for the invalidity or inefficacy of the ISTAT clause, should apply only to leases that are subject to extension by operation of law, and not to those leases which, like the one under consideration, were not at the time subject to any such extension, because their date of expiry was later than the date established for such extension. But we do not believe that such an interpretation is well founded, and therefore we must reaffirm the full validity of the clause stipulated by the parties to the present dispute.

The reasons for such a decision have already been expounded in our judgement delivered on 14 February 1980 in *Cittadini* v. *Soc. Mobil Oil Italiana* (see *Giustizia Civile,* 1980,1. 1705). Moreover the said decision is in line with the ruling of Corte di Cassazione (No. 6035/ 83, No. 2661/81, No. 2524/83, No. 3395/82, No. 6827/81, as well as No. 1925 of 1981, in *Giustizia Civile,* 1982,1, 487). In fact the Corte di Cassazione has reaffirmed the principle that the invalidity and inefficacy of the ISTAT clause refers only to contracts subject to extension by operation of law and does not apply to those leases, such as the one under consideration, which have an agreed date of expiry subsequent to the date of expiry of such extension.

At this point it is appropriate to make some observations about the rationale of Decree Law No. 426, in order further to confirm the conclusion that the ISTAT clause remained valid and effective in those leases which, at the time, were not subject to extension by operation of law.

The rent restriction provisions promulgated in the early 1960s (Law No. 1444 of 6 November 1963 and Law No. 30 of 19 February 1965), as well as the provisions on extension by operation of law and on rent restriction contained in Law No. 833 of 26 November 1969, were all motivated by the need to restrain the effects of the inflationary tendency of that period. The national market for leased premises reacted to the said provisions by generalizing the practice of inserting in all long-term contracts the so-called ISTAT clause, for the purpose of ensuring a constant value of rents, irrespective of fluctuations in the value of money. The said clause was generally considered by the courts as compatible with the system of rental restriction and extension by operation of law. And this view was confirmed by the Corte di Cassazione (No. 771/76, No. 4296/78, No. 4297/78).

It was precisely for the purpose of avoiding the nullification of the said system of restrictions by the general use of the ISTAT clause, that the legislator issued the provisions of Decree Law No. 426 of 1963, article 1, paragraph 4.

Once the aforementioned provision is interpreted as a stricter regulation of the rent restriction system, it would make no sense to extend it to those contracts which at the time were not subject to extension by operation of law.

It has been argued by some that limiting the validity of the ISTAT clause only to rents that were restricted would not be logical, since the expiry of the extension provided for by Decree Law No. 426 was very short—only six months (until 31 January 1974)—and therefore the said provision would have had an extremely limited effect. But such an interpretation is only plausible in appearance; and it actually works against the very notion which it is intended to support. In fact the observation may be made more correctly with respect to the

duration of the extension: if Decree Law No. 426 provided that this extension should last only six months, although that provision was destined to affect the great majority of the rents then in force, one cannot see why the same legislator should have provided for the inefficacy of the ISTAT clause, moreover *sine die,* also with respect to leases which were not subject to extension by operation of law.

The extremely short duration of the said extension clearly indicates that the legislator did not consider the current economic situation as particularly serious. It further excludes the possibility that he widened the application of the invalidity of the ISTAT clause to encompass leases which at the time were not automatically extended and which as such were destined to last (even for several years) in the period subsequent to that of the expected economic crisis.

Moreover the rent restriction, which would be the result of the invalidity of the ISTAT clause in a long-term contract like the one under consideration, as well as the extension by operation of law were always established for limited periods of time, with an express indication of a deadline (it is obviously not necessary to list the dozens of legal provisions which have dealt with this matter in a period of approximately 30 years). This interpretative criterion of a systematic nature also excludes the possibility that the legislator in 1973 had wished to affirm the invalidity of the ISTAT clause without indicating any duration of the limitation thus imposed.

Again it follows from the foregoing that the ISTAT clause agreed to by the parties was valid and effective.

One should now examine the requests by which INPDAI, on the basis of the constant increase of the cost of living since 1969, seeks to obtain:

(i) a declaration that the annual rent be increased, from 1 January 1974, 1 January 1976 and 1 January 1978, to the following amounts respectively: Lit 470,160,000; Lit 652,680,000; Lit 882,000,000;

(ii) FAO's order to pay the global amount of 940,000,000 (plus interest) as arrears of rent. The certified statements issued by ISTAT, relating to cost of living indices for the city of Rome, confirm that the requests are correct.

With regard to the level at December 1969, the price index increased on an average by 30.6 per cent in the last quarter of 1973,81.3 per cent in the last quarter of 1975 and 145 per cent in the last quarter of 1977.

Therefore, applying these percentage increases, the rent would be increased as follows:

from 1 January 1974: Lit 360,000,000 + (360,000,000 X 30.6%) = Lit 470,160,000;

from 1 January 1976: Lit 360,000,000 + (360,000,000 X 81.3%) = Lit 652,680,000;

from 1 January 1978: Lit 360,000,000 + (360,000,000 X 145%) = Lit 882,000,000.

Since the annual rent paid by FAO from 1 January 1974 has always been Lit 397,080,000, the arrears to be paid are the following:

—for the years 1974/1975 = Lit (470,160,000 X 2) - (397,080,000 X 2) = Lit 146,160,000

—for the years 1976/1977 = Lit (652,680,000 X 2) - (397,080,000 X 2) = Lit 511,200,000;

—for the period January/July 1978: Lit (882,000,000 : 7/12) - 397,080,000: 7/12) = Lit 282,870,000.

FAO's debt amounts in total to Lit 940,230,000. Besides the obligation to pay the said capital sum, FAO shall also pay interest at the legal rate from 25 July 1978, i.e., the date on which the application was notified and therefore FAO was put in suit (article 1282, paragraph

2, of the Civil Code; it is probable that INPDAI requested payment even before that date, but this is not materially relevant because there is no proof of the date of such request).

The costs of the action shall be paid by the losing party, in the liquidated amounts set out below.

Since the applicant's claims are based essentially on documentary evidence (lease and certified statements issued by ISTAT), the judgement shall be provisionally executory.

In view of all the foregoing, the Pretore delivers the following DECISION:

—declares the validity and efficacy of the ISTAT clause contained in article 3 of the lease and, for this reason, declares that the annual rent to be paid by FAO is the following: Lit 470,160,000 from 1 January 1974; Lit 652,680,000 from 1 January 1976; Lit 882,000,000 from 1 January 1978;

—orders FAO to pay to INPDAI the capital sum of Lit 940,230,000 with interest at the legal rate from 25 July 1978;

—orders FAO to refund to INPDAI the expenses and honoraria incurred by the latter in pursuing this action in a total liquidated sum of Lit 4,479,000 (480,000 for expenses; 4,020,00 for honoraria);

—declares the decision to be provisionally executory.

3. United States of America

(a) UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

OCEAN SHIPPING ANTITRUST LITIGATION: DECISION OF 24 FEBRUARY 1984[6]

United Nations treated as a Government or government agency as regards purchases of shipping services—Legal status of the United Nations

The United "Nations as a purchaser of shipping services on cargo vessels in United States/Europe had sought recovery of damages in the litigation under the United States anti-trust laws. The Administrative Committee in the matter opposed the claim of the United Nations pursuant to the terms of the proposed settlement that had excluded from the class Governments and government agencies.

BRIEF OF THE UNITED NATIONS IN SUPPORT OF THE UNITED NATIONS POSITION THAT IT IS A MEMBER OF THE CLASS IN ABOVE MATTER

Summary of relevant procedural facts

1. On 13 July 1983 the Administration Committee in the above referenced matter informed the United Nations by letter that:

> "In connection with the claim filed in the Ocean Shipping Antitrust Litigation the Committee will recommend disallowance to the Court. Pursuant to the terms of the settlement and the notice in connection therewith, Governments and governmental agencies are excluded from the class."

2. On 15 September 1983 representatives of the United Nations met with representatives of the Administration Committee who reviewed documents of the United Nations in respect of its claim. The Committee decided, however, to maintain its position as referred to above.

3. On 7 November 1983 this Court's "Notice of Hearing and Plan of Allocation and Distribution" stated with respect to the claim of the United Nations that

> "Amount of Claim to be recommended for approval——0"

4. On 2 December 1983 representatives of the United Nations met again with the representatives of the Administration Committee pursuant to paragraph 3 of the Court's notice referred to above, but were

unable to receive an adequate explanation for the denial beyond the conclusion of the Committee that the United Nations was excluded as a "Government".

Legal issue presented

5. The issue presented is whether or not as a matter of law the United Nations is a "Government" or "government agency" to be excluded from the class in above captioned matter pursuant to the following definition of parties to be excluded:

> "excluding Governments and government agencies other than wholly or partially government-owned business enterprise and further excluding defendants or any of their parents, subsidiaries, affiliates or agents". *Notice of Class Action and Proposed Settlement,* 20 October 1981, at para. 1, page 2

Argument

6. The United Nations is *not* a Government. Rather, it is a public international organization having a character completely different from that of its constituent Member States. The United States District Court for the Southern District of New York has previously recognized and clearly stated law on this question as follows:

> "The United Nations is a legal entity, separate and distinct from the member nations. While it is not a State nor a super-State, it is an international person, clothed by its members with the competence necessary to discharge its functions. Advisory Opinion, Reparation for Injuries Suffered in the Service of the United Nations, *I.CJ.Reports 1938,* 174; 43 *American Journal of International Law* 478 (1949). See *Balfour, Guthrie and Co.* v. *United States,* D.C. Cal.1950, 90 F.Supp.831, 832."
>
> • • •
>
> "There can be no dispute about the proposition that American courts are bound to recognize and apply the Law of Nations as part of the law of the land."
>
> *U.S.* v. *Melekh,* 190 F.Supp.67, 81, 85 (S.D.N.Y. 19.60)

It is as such an international person that the United Nations has submitted its claim in the above referenced matter.

7. The distinction between a "State" under international law and an international organization has been described as follows:

> "4. State Defined
>
> Except as otherwise indicated, state, as used in the Restatement of this Subject, means an entity that has a defined territory and population under the control of a Government and that engages in foreign relations.
>
> "Comment:
>
> "a. *Use of state in domestic law and international law.* In the domestic law of the United States, the term "state" is commonly used to refer to a State of the United States. In international law the term "state" when used with reference to a federal union ordinarily identifies the union rather than the several component units of the union."
>
> "5. International Organization Defined
>
> "International organization," as used in the Restatement of this Subject, means an organization that
>
> *"(a)* is created by an international agreement as defined in Section 115 and
>
> *"(b)* has a membership consisting primarily of states as defined in Section 4."
>
> *Restatement, Second, Foreign Relations Law of the United States,* American Law Institute (1962) at Sections 3 and 4, pages 14, 15, and 17.

A Government cannot be said to exist *except* in relation to a State in respect of which it constitutes the recognized governmental régime for a defined territory or population. See *Idem,* at sections 95-101, pages 307-324.

8. The United States of America became a Member of the United Nations by signing and ratifying the Charter of the United Nations as a treaty under the United States Constitution and has entered into a Headquarters Agreement with the United Nations under the United Nations Participation Act of 1945, as amended, and the United Nations Headquarters Agreement Act. See, 22 *U.S.CA.,* Section 287, ff., including the notes thereto for the text of the Headquarters Agreement.

9. The United Nations has been recognized by United States courts as having its own independent capacity to contract, to acquire and dispose of real and personal property, and to institute legal proceedings. See, e.g., Article 104 of the Charter of the United Nations, *T.S.* 993,59 *Stat.* 1031,3 *Bevans* 1153; *International Refugee Organ, v. RepublicS.S. Corp.,* 189F.2d 858,860,861 (4th Cir. 1951); and *United*

Nations Korean R.A. v. *Glass Production Meth,* 143 RSupp. 248,249 (D.C.N.Y. 1956). The purchases of shipping services at issue in this case were obtained under contract by the United Nations acting in such capacity and the Administrative Committee has not contended otherwise.

10. Although requested to do so, the Administrative Committee has not specified the legal basis for characterizing the United Nations as a "Government" or a "government agency." Nor has the Administrative Committee specified what characteristics of a Government, which motivated or warranted the exclusion of Governments from the class in question, are also characteristics of the United Nations that would require its exclusion. It ought rather to be relevant that the United Nations does not exercise or assert sovereign rights and does not exercise governmental authority; nor does it regulate shipping or control ports. Moreover, in the present case the United Nations was not granted any "government" benefits or discounts with respect to said shipping charges and does not have any legislative or other governmental authority with respect to any matters at issue in this case, nor has the Administrative Committee contended otherwise.

Conclusion

11. For the above stated reasons no basis in law is apparent or has been alleged to conclude that the United Nations is a "Government" or "government agency". The United Nations should not therefore be excluded from sharing in the settlement proceeds under the above referenced class action. Should the Administrative Committee now or at a later stage give specific legal reasons for its determination, the United Nations would then appreciate being given the opportunity to consider such reasons and to answer.

Dated: 9 December 1983

BRIEF OF THE ADMINISTRATION COMMITTEE IN OPPOSITION TO THE POSITION OF THE UNITED NATIONS THAT IT IS A MEMBER OF THE CLASS

The Administration Committee submits this brief in opposition to the claim of the United Nations in the above-captioned litigation. Contrary to the claimant's apparent perception, this opposition is based not on the claimant's inherent nature or status, but solely on the explicit settlement language and the intent of the parties thereto.[7]

The class consists of:

> "All purchasers of shipping services ... (excluding Governments and government agencies other than wholly or partially government-owned business enterprises...)"

The single factual and legal question before this Court is whether the United Nations is a "Government" or "government agency" and, as such, excluded from the class by definition. In the first instance, the inquiry should be to the clear meaning of the language, and in the second, to the intent of the parties.

I

The relevant dictionary definition of the word "Government" is:

> "[T]he organization, machinery, or agency through which a political unit exercises authority and performs functions...; the complex of political institutions, laws and customs through which the function of governing is carried out in a specific political unit.. ."*

Black's Law Dictionary, in its definition of republican government, adds the term "sovereignty".*

The Headquarters Agreement, 22 *U.S.CA.,* section 287, ff., referred to in the claimant's Brief, at paragraph 8, contains explicit terms which clearly relate to the organization by which a political unit exercises authority or sovereignty. For example, sections 7, 8 and 9 vest regulatory authority over the headquarters district within the United Nations and make this enclave inviolable to all American authorities as follows:

> *"Section7*
>
> *"(a)* The headquarters district shall be under the control and authority of the United Nations as provided in this agreement."
>
> * * *
>
> *"Section8*
>
> "The United Nations shall have the power to make regulations, operative within the headquarters district, for the purpose of establishing therein conditions in all respects necessary for the full execution of its functions. No federal, state or local law or regulation of the United States which is inconsistent with a regulation of the United Nations authorized by this section shall, to the extent of such inconsistency, be applicable within the headquarters district..."
>
> * * *

"Section 9

"(a) The headquarters district shall be inviolable. Federal, state or local officers or officials of the United States, whether administrative, judicial, military or police, shall not enter the headquarters district to perform any official duties therein except with the consent of and under conditions agreed to by the Secretary-General,..."

Further, said Agreement also authorized the establishment of a separate postal system. Moreover, this Court should take judicial notice of the facts that the United Nations has in fact established its own postal service, has governed trusteeship territories and has had troops fighting under its flag.

These facts, taken together with the Headquarters Agreement, call into mind "Government" or "government agency" within the usual meaning of these words.[10]

II

Even were the explicit language unclear, which we submit it is not, the intent of the parties to the agreement should next be considered. The members of the Administration Committee who were involved in these negotiations specifically recollect that the potential claim of the United Nations was raised during the course of negotiations, and that it was concluded that the exclusionary language should cover the instant situation. If the Court deems it appropriate, this position could be presented in the form of affidavits or testimony, and we presume would be confirmed by the attorneys for the defendants who participated in the negotiations.

Moreover, the reason for the exclusion confirms this intent In the case of the United States and other foreign States, the claims would be limited to single damages, and thus differ markedly from other members of the class. In the case of domestic states and other governmental agencies, the exclusion was made to avoid the political entanglements that have occurred in other multi-district litigation." It was to avoid the potential of this type of political entanglement that the exclusion was broadened from national States to all "Governments" and "government agencies."[12] It should also be remembered that the negotiations were conducted during the course of debate in various foreign legislatures concerning this very litigation; for example, the "claw-back" legislation in the United Kingdom. Thus, the avoidance of political controversy seemed a worthwhile objective to the plaintiffs' attorneys who conducted these negotiations.[13]

Ill

For the foregoing reasons, the Administration Committee respectfully requests that its recommendation be adopted and the claim of the United Nations be denied.

REPLY BRIEF

By the United Nations in response to the "Brief of the Administration Committee in opposition to the position of the United Nations that it is a member of the class"

The United Nations submits this Reply Brief in response to some legal issues raised by the Administration Committee for the first time in its brief of 18 January 1984 as reasons for its determination that the United Nations ought not to be considered a member of the class in the above entitled action. Accordingly, the United Nations wishes to reply as follows:

1. The class has been defined in full as follows:

"All purchasers of shipping services on cargo vessels in the United States/Europe trade during the period 1971 through 1979 inclusive (excluding Governments and government agencies other than wholly or partially government-owned business enterprise and further excluding defendants or any of .their parents, subsidiaries, affiliates or agents) from any of the following shipping lines..."

Notice of Class Action and Proposed Settlement, 20 October 1981, at para. 1, page 2

We would reiterate that the United Nations ought to be considered by this Court as a member of the above class for the reasons already explained in our brief, notwithstanding the arguments in the Committee's answering brief.

I

2. The Committee contends in part I of its answering brief that various facts as well as a few provisions in the Agreement Between the United Nations and the United States of America Regarding the Headquarters of the United Nations (the Headquarters Agreement) "call into mind 'Government' or 'government agency' within the usual meaning of these words". See Committee's answering brief.

3. But, objectively and legally the United Nations is a public international organization having a character completely different than its constituent Member States. It was established by sovereign States, through the agreement of their Governments to the Charter of the United Nations, as an "international organization" having its own separate legal personality, although it is sometimes commonly referred to as /nter-governmental in relation to its creation and purpose among Governments. "Sovereignty" is, in any event, not an issue in these proceedings, but it may be observed that the United Nations is not a sovereign and does not exercise "sovereignty". The characteristics mentioned in the Committee's answering brief do not indicate any government-like authority relating to the matter at hand. The Headquarters Agreement between the United Nations and the United States of America was necessary precisely because, among other reasons, the United Nations Headquarters is located on "land" which is within the "territory" of the United States of America and is not governed by law applicable to foreign sovereign States. See, e.g., the concluding paragraph to the Preamble to the Charter of the United Nations; sections 1 *(d),* 22 and 24 and the Headquarters Agreement (contained in the notes to 22 *USCA* section 287) and 22 *USC* section 288.

4. A fact more relevant to the present issue is that the United Nations was not treated as a Government or governmental agency as regards purchases of shipping services.

II

5. In addition, the Committee now contends in part II of its answering brief that the exclusion of the United Nations by virtue of the definition set forth above in paragraph I accords with the "intent" of the parties to this antitrust litigation because by excluding "other governmental agencies" the parties intended "to avoid the political entanglements that have occurred in other multi-district litigation". See Committee's answering brief.

6. Given the actual wording of the definition of the class as approved by this Court, the alleged intent of the parties in originally proposing that definition is of no present relevance. More important, the alleged reasons for exclusions from the class have no bearing as regards the United Nations. See also paragraph 10 of the brief of the United Nations.

7. It may be of interest that the United Nations, in respect of a somewhat similarly defined class, previously received payment in the settlement of a 1979 anti-trust case in the United States District Court for the Eastern District of Pennsylvania without any of the problems or difficulties now expressed by the Committee in its brief.[14]

CONCLUSION

8. For the reasons stated above and in our brief of 9 December 1983, the United Nations, as a purchaser of such shipping services who did not receive "governmental" benefits, ought not to be excluded from sharing in the settlement proceeds under the above-referenced class action.

Dated: 25 January 1984

MEMORANDUM DECISION

STEWART, District Judge:

In a "Notice of Class Action and Proposed Settlement" dated 20 October 1981, the class in the above-captioned matter was defined as

> "All purchasers of shipping services on cargo vessels in the United States/Europe trade during the period 1971 through 1979 inclusive *(excluding Governments and government agencies* other than wholly or partially government-owned business enterprise and further excluding defendants or any of their parents, subsidiaries, affiliates or agents) from any of the following shipping lines... (emphasis added)

The Administrative Committee (the "Committee") has taken the position that the United Nations is a Government or government agency and therefore that it should be excluded from the class and its claim disallowed. The United Nations appeals the Committee's recommendation.

We agree with the United Nations that it should not be excluded from the class. The

United Nations does not resemble a Government or a government agency in any usual sense of those words. Rather, as its Charter makes clear, it is an international organization of States dedicated to serving as "a centre for harmonizing the actions of nations in the attainment of" "peace", "friendly relations", and "co-operation". See Charter of the United Nations, Chapter I, article 1, printed at 59 *StaL* 1031.

The Committee points to the fact that the United Nations has territory and that United Nations law regulates that territory. But, unlike a Government (in its usual sense), the United Nations purpose is *not* to provide a mechanism for governance of that territory. Territory was given to the United Nations to assure its independence from the control of any one Member State. Thus, in the absence of any other authority to regulate activity within United Nations territory, the United Nations has prescribed laws. The provision of such laws, however, was only an ancillary, if necessary, function the United Nations had to perform to carry out its primary mission, which, as noted, is not the governance of a territory or its people. See Joint Res. 4 Aug. 1947,61 *Stat,* 756, cited in notes following 22 *U.S.C.A.* § 287 (construing Article 104 of the Charter of the United Nations).

Because the United Nations is different from a Government or a government agency within the usual meaning of those words, the parties should have drafted the class exclusion to more explicitly cover the United Nations if it was their intention to exclude it. We note as a final consideration that the United Nations has asserted, and the Committee has not contested, that the United Nations did not receive "any 'government' benefits or discounts with respect to said shipping charges." United Nations Memo, at 5.

For the foregoing reasons, the Administrative Committee is ordered to proceed with the processing of the United Nations' claim.

SO ORDERED.

DATED: New York, New York
24 February 1984

(b) UNITED STATES DISTRICT COURT, CENTRAL DISTRICT OF CALIFORNIA

UNITED NATIONS V. MISS UNITED NATIONS PAGEANT, INC., AND FAYE SMITH: JUDGEMENT OF 7 NOVEMBER 1984[15]

Use of the name "United Nations" and its abbreviations in commercial ventures and as part of the corporate name—Name "United Nations" and the abbreviation "UN" have acquired a clear second meaning—Permanent injunction sought by the United Nations—Tests required under United States law to be met for granting injunction

The United Nations sued Miss United Nations Pageantry, Inc., and its sponsors, which had been planning to hold a beauty contest. The Organization claimed that use of its name threatened to cause public confusion and harm its world-wide reputation. The Plaintiff sought to obtain a permanent injunction prohibiting the defendant from using the United Nations' name in any commercial venture and to cease using the United Nations name as part of their corporate name.

Final Judgement of Permanent Injunction

• • •

"1. Defendants, and each of them, and all officers, directors, employees, agents, assigns and successors in interest of defendant Miss United Nations Pageant, Inc., as well as all persons acting under the direction, control, permission or authority of defendants, or either of them, and all persons acting in concert therewith, are hereby permanently restrained and enjoined from using in the United States and anywhere else in the word the name "United Nations" in English or translated or rendered in any language or the

abbreviation of such name through the use of its initial letters in connection with any commercial, cultural or charitable venture or in any matter whatsoever which is not officially sponsored or sanctioned by Plaintiff or any agency thereof, including, without limitation, the promotion and conduct of fashion shows and beauty contests and the promotion or endorsement of commercial goods and services.

"2. Defendant Miss United Nations Pageant, Inc., shall immediately take steps as are necessary to change its corporate name to eliminate the words "United Nations" and to cause such changed name to be reflected in the records of the Secretary of State of the State of California.

"3. Defendant Faye Smith shall immediately take such steps as are necessary to cancel or withdraw her pending application to the United States Patent and Trademark Office, Serial No. 469,268, for a trademark in the name 'Miss United Nations'."

Summary of proceedings

The defendant corporation was the organizer and sponsor of either actual or proposed beauty pageants and related fashion shows in various parts of the world. The apparent plan was to have contestants selected in various areas of the world come to a single location for a beauty pageant and contest to be held at Bangkok, Thailand, to select the one who would receive the title of Miss United Nations.

The Plaintiff was suing both the sponsors and the organizing Corporation and its Principal Ms. Faye Smith. The complaint was in three causes of action. The first was based on the Lanham Act, the second was based on section 14330 of the California Business and Professions Code, which proscribed the use of a mark likely to injure or dilute the distinctive quality of any existing mark. The third cause of action was based on unfair competition under state law.

Referring to the standards for granting a preliminary injunction as enunciated by the circuit was the Los Angeles Memorial Coliseum versus NFL, 634 F.2D 1197, and that a plaintiff who sought such a preliminary injunction might discharge his burden by meeting one of two tests, and they were phrased as being in the alternative. Test one was a demonstration of probable success on the merits and the possibility of irreparable injury. Test two was a demonstration that serious questions were raised and that the balance of hardship tipped sharply in the Plaintiffs favour. The Court stated that in its tentative view the Plaintiff's proof met either and both of those tests and therefore the preliminary injunction ought to be issued.

The Court observed that the Plaintiff owned the mark and the name United Nations, and that those or that mark and name had acquired a clear secondary meaning. Such was also the case for the abbreviation UN, and it was hard to perceive of any name or mark better known anywhere in the world.

The Court indicated also its cognizance of United Nations General Assembly resolution 92 (I) of 7 December 1946 that required all Member nations to take all necessary steps to prohibit the unauthorized use of the name "United Nations" or the abbreviation "UN". It observed that since that resolution had not been briefed by the parties he intended to disregard it as having any legal effect under United States law, being convinced that the Plaintiff Organization had the right to protect its mark and name under United States law and without reference to that resolution.

The Court found that on the first test the Plaintiff had shown probable success on the merits and the possibility of irreparable injury. The Plaintiff had shown that the mark had acquired a secondary meaning and there was a likelihood that the public would be confused as to the sponsorship of the Defendant's activities or the fact that the Plaintiff was endorsing them in some way. The mark "United Nations" might be called a weak mark but that fact was of little significance where secondary meaning was established. The mark and the initials "UN" were primarily associated in the public's mind with the United Nations. With reference to the Defendants' arguments that an auto body shop and an employment agency used the

name or initials as part of their business title, the Court stated that those unprosecuted instances did not detract from the demonstrated secondary meaning. The United Nations, both itself and through its components, sponsored collateral money-raising activities such as concerts, and there was a strong likelihood that people seeing the publicity for the Defendants' beauty pageant would believe that the beauty pageant was an activity of the United Nations and under its sponsorship. The irreparable harm requirement of the first test was met by its very nature; the harm of confusion and the tendency to confuse could not be remedied by legal means and an injunction was necessary to remedy it. Confusion and use by the Defendants and others could lead the United Nations to loss of control over its image, its stature and reputation, and could harm the financial activities undertaken by the United Nations and its components for supplemental financial support. On the second test, the Plaintiff needed to prove only a fair chance of success on the merits or that there were serious questions, but the Plaintiff must prove that the balance of hardship weighed heavily in his favour. The Court found that the proof on chance of success was much stronger than a fair chance of success and there was a strikingly strong balance of hardship in the Plaintiffs favour, particularly as demonstrated by the fact that the Defendants had already arranged for a new name and had put off the final beauty contest, originally scheduled for Thailand in November, to another time.

NOTES

[1] The Court's decision in English translation is taken from *International Legal Materials,* vol. 24, p. 340.

[2] ICSID Model Clauses, clause XVI.

[3] United Nations, *Treaty Series,* vol. 575, p. 159.

[4] Text based on an unofficial translation submitted by FAO.

[5] See summary of the judgement in *Juridical Yearbook, 1982,* p. 234.

* Master File No. M.D.L. 395; M2I-26 (CES).

[7] Much of the claimant's argument is devoted to showing that the United Nations is not a "State", and that it has independent capacity to contract and to institute legal proceedings. See, the brief in support of the United Nations' position, above, at paras. 5-9. These questions are not issues here.

[1] *Webster's 3rd New International Dictionary,* 1976 (A. C. Merriam Co.).

* *Black's Law Dictionary,* 5th ed., 1979 (West Publishing Co.).

[10] See, further, *Opinion of the Governor,* 116 A.2d 474 *(S.O.R.R.,* 1955), in which the Rhode Island Supreme Court refused to permit that State's Governor to serve as Special Representative of the United States to the United Nations because he would be exercising "some portions of the sovereignty of another government", thus conflicting with the State's constitutional prohibition.

[1'] For example, in the *Auto Fleet Leasing Antitrust Litigation,* a multi-million dollar settlement was rejected by certain necessary states, and the cases were subsequently tried to the Court with a judgement for the defendants,

[12] The inclusion of "wholly or partially government-owned business enterprises" in the class was made to satisfy the defendants' specific demands.

[13] Moreover, at least one case has questioned the appropriateness of private and public entities representing one another. See *Board of Education* v. *Climatemp, Inc.,* 91 *F.R.D.* 245 (N.D.IU. 1981).

[14] *In re: Fine Paper Antitrust Litigation,* MDL Docket No. 323, United States District Court for the Eastern District of Pennsylvania. The 29 June 1979 "Notice of Pendency of Class Action and Proposed Settlement with certain Defendants" in that matter provided, in part, as follows:

> *"Such Class is defined as follows:*
>
> > *"All persons, other than governmental entities, in the United States* (excluding defendants and named co-conspirators in the MDL 323 actions, their respective subsidiaries and affiliates) which during the period 1 January 1965 to 30 June 1977, purchased from any defendant, or any subsidiary or affiliate thereof, any kind, type or grade of Fine Paper as hereinafter defined, or any paper product into which such papers were converted by any such defendant, subsidiary or affiliate.
>
> Plaintiffs in this litigation assert claims against defendants for violation of the federal antitrust laws and seek treble damages and injunctive relief." (emphasis added)

[15] Case No. 84-5352-IH.