

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

John Kamyra, Assignee and)	
Attorney-In-Fact)	
)	Civil No. 1:02CV01176 (TFH)
Plaintiff,)	
)	Hon. Thomas F. Hogan
v.)	
)	
The United Nations)	
)	
Defendant.)	

STATEMENT OF INTEREST OF THE UNITED STATES OF AMERICA

The United States files this Statement of Interest to advise the Court that under the Convention on Privileges and Immunities of the United Nations, 59 Stat. 1031 (1945)("U.N. Convention"), defendant the United Nations is immune from suit in United States courts absent express waiver.¹ However, the United States takes no position on whether the United Nations has expressly waived that immunity here.

FACTS AND PROCEDURAL HISTORY

The Complaint in this case relates to a long-standing matter that already has been the subject of litigation. See Abdi Hosh Ashkir, et al. v. United Nations, Civil Action No. 97-2266 (D.D.C. 1997)(TFH). The underlying matter arose between the United Nations and two different groups of claimants, both of which alleged to have owned certain premises in Mogadishu, Somalia that were used by United Nations' operations in Somalia between 1993 and 1995. See id. According to the Complaint, the matter was submitted to arbitration pursuant to the

¹This Statement of Interest is filed pursuant to 28 U.S.C. § 517, which authorizes the Attorney General to attend to the interests of the United States in any pending suit. A Statement of Interest does not constitute a motion to intervene under Fed. R. Civ. P. 24.

Agreement to Submit Dispute to Arbitration. See Complaint, § 5. The arbitral tribunal, established under the Agreement, issued its award in February 2001, ruling that the U.N. owed claimants US \$757,452.26. Id. at §§ 6-8. The U.N., however, has refused to make payment pursuant to the award, asserting that until the claimants agree on appropriate distribution of the award or enter into an escrow agreement its refusal to make payment is fully consistent with the terms of the Agreement. See Letter from Bruce C. Rashkow to Judge Thomas F. Hogan, August 27, 2002, at 3. Plaintiff's Complaint seeks to compel such payment.

On August 27, 2002, the United Nations filed a letter brief stating that the United Nations is immune from suit absent express waiver under the U.N. Convention, and that the United Nations has made no such waiver here. See id. On September 25, 2002, plaintiff filed a letter brief arguing that the United Nations has waived its immunity by agreeing to an arbitration. See Letter from Paul S. Edelman to Judge Thomas F. Hogan, September 25, 2002.

A previous suit was filed in this same court involving the same defendant and the same underlying dispute. See Abdi Hosh Ashkir, et al. v. United Nations, Civil Action No. 97-2266 (D.D.C. 1997)(TFH). The United States also filed a statement of interest supporting U.N. immunity in that case, and this Court promptly dismissed the suit on immunity grounds. See id.

DISCUSSION

The Convention on the Privileges and Immunities of the United Nations ("U.N. Convention") affords the U.N. absolute immunity absent express waiver. Accordingly, the jurisdictional question here is whether, under the U.N. Convention, the U.N. has expressly waived its immunity with respect to this case. If it has not, the Court lacks subject matter jurisdiction.

Under the U.N. Convention, the U.N. has absolute immunity "from every form of legal process except insofar as in any particular case it has expressly waived its immunity [, and] . . . no waiver of immunity shall extend to any measure of execution." U.N. Convention art. II, § 2 (emphasis added).² Accordingly, unless there has been an express waiver by the U.N., suits against the U.N. must be dismissed for lack of subject matter jurisdiction. See, e.g., De Luca v. United Nations Organization, 841 F. Supp. 531, 533 (S.D.N.Y. 1994), aff'd 41 F.3d 1502 (2d Cir.)(table), cert. denied, 514 U.S. 1051 (1995); Boimah v. United Nations Gen. Assembly, 664 F. Supp. 69, 71 (E.D.N.Y. 1987). Importantly, "court[s] should be slow to find an 'express' waiver" of immunity. Boimah, 664 F.Supp. at 72; cf. Mendaro v. World Bank, 717 F.2d 610, 617 (D.C. Cir. 1983)(noting that "courts should be reluctant to find that an international organization has inadvertently waived immunity when the organization might be subjected to a class of suits which would interfere with its functions.").

It is true that foreign states that agree to arbitrate are sometimes held to have impliedly waived their sovereign immunity under the Foreign Sovereign Immunities Act, 28 U.S.C. § 1602, et seq. ("FSIA"), which strips foreign states of their immunity if a state "has waived its immunity either explicitly or by implication," 28 U.S.C. § 1605(a)(1)(emphasis added).³ But, it is

² Like all treaties, the U.N. Convention, which the United States ratified in 1970, is as authoritative as a statute. See, e.g., 767 Third Ave. Assocs. v. Permanent Mission of the Republic of Zaire, 988 F.2d 295, 297 (2d Cir.)("[a]pplicable treaties [are] binding upon federal courts to the same extent as domestic statutes"), cert. denied, 510 U.S. 819 (1993).

³ Compare Birch Shipping Corp. v. Embassy of United Republic of Tanzania, 507 F. Supp. 311, 312 (D.D.C. 1980)(arbitration agreement waives FSIA immunity) and Libyan American Oil Co. v. Socialist People's Libyan Arab Jamahirya, 482 F. Supp. 1175, 1177-78 (D.D.C. 1980) (arbitration agreement constitutes implicit waiver of FSIA immunity), vacated, 684 F.2d 1032 (D.C. Cir. 1981)(table) with Maritime International Nominees Establishment v. Republic of Guinea, 693 F.2d 1094, 1102-04 (D.C. Cir. 1982)(under FSIA, foreign state's

immaterial whether arbitration agreements would constitute an implied waiver of sovereign immunity under the FSIA, because the U.N. Convention -- not the FSIA or any other statute or treaty -- is the governing law in this case. The U.N. Convention is specifically tailored to address the immunities of the U.N. and its officers. It specifies, for example, the immunities to be accorded to "[t]he United Nations," Art. II, § 2; "the Secretary-General" of the United Nations," Art. V, § 19; and the "[o]fficials of the United Nations," Art. V, § 18. By contrast, the FSIA establishes the immunities of "foreign state[s]" generally. 28 U.S.C. § 1604. The immunity standards of this more generalized law cannot override the U.N. Convention's treatment of the "narrow, precise, and specific subject" of the immunities of the U.N. Radzanower v. Touche Ross, 426 U.S. 148, 153 (1976)(statute dealing with specific subject is not submerged by a statute covering a "more generalized spectrum," absent "clear intention otherwise")(citation omitted). Thus, a court would not need to decide whether the activities at issue in this case amount to an implied waiver under the standards of the FSIA. Cf. De Luca, 841 F.Supp. at 533 n.1 (declining to consider whether FSIA exceptions applied, where the U.N. Convention, "which contains no such exceptions," shielded U.N. from suit).⁴

The United States takes no position regarding whether the facts of this case amount to an express waiver of the United Nations' immunity under the U.N. Convention. However, the

sovereign immunity not waived by agreement to arbitrate which did not indicate that parties contemplated any role for U.S. courts in compelling arbitration), cert. denied, 464 U.S. 815 (1983).

⁴ Moreover, the FSIA is subject to pre-existing treaties, including the U.N. Convention, which entered into force for the United States six years before the passage of the FSIA. See 28 U.S.C. § 1604 (FSIA is "[s]ubject to existing international agreements to which the United States is a party at the time of enactment of [the FSIA]"). See also 767 Third Ave. Assocs., 988 F.2d at 297.

United States does urge this Court to examine the threshold question of immunity before reviewing other issues in this case, and determine whether or not the United Nations has expressly waived its immunity under the standards of the U.N. Convention.

CONCLUSION

For the reasons stated above, this Court should conclude that it lacks subject matter jurisdiction if it finds that the United Nations has not expressly waived its immunity in this case under the U.N. Convention.

Dated: October 15, 2002

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 15th day of October, 2002, a true and correct copy of the foregoing STATEMENT OF INTEREST OF THE UNITED STATES OF AMERICA was sent by first-class mail, postage prepaid, to:

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