

and enforcement of arbitral awards,” 28 U.S.C. §1605(a)(6)(B), and (2) the United States and Argentina are both parties to the ICSID Convention . . . , Argentina’s agreement to submit its dispute to arbitration under the ICSID Convention constituted a waiver of immunity from suit pursuant to 28 U.S.C. §1605(a)(6)(B).¹¹

INTERNATIONAL ORGANIZATIONS

New York Supreme Court Addresses Immunity of Heads of International Organizations

In May 2011, Dominique Strauss-Kahn, the former head of the International Monetary Fund (IMF), was involved in a sexual encounter with a hotel employee in Manhattan.¹ The nature of the encounter is disputed. Criminal charges against Strauss-Kahn were dropped, but the hotel employee brought a civil action (later settled) in the New York Supreme Court in the Bronx.² (The New York Supreme Court is the trial-level court for civil cases in New York State.)

In the civil action, Strauss-Kahn argued that he was entitled to absolute immunity as head of the IMF, pursuant to customary international law as evidenced by Section 21 of the 1947 Convention on the Privileges and Immunities of the Specialized Agencies.³ This claim was rejected in a substantial opinion by Justice Douglas E. McKeon examining the official acts immunity of international organization officials under U.S. law. Because the case was settled following McKeon’s ruling, his opinion is the only assessment of Strauss-Kahn’s immunity claim. An excerpt follows:

In July, 1944, optimistic that the conclusion of World War II was near, delegates from 44 nations met at Bretton Woods, New Hampshire, to promulgate plans for a post-World War II international monetary system. From that gathering came the idea for the IMF. Soon, Articles of Agreement (“Articles”) for the proposed agency were drafted, which were ratified by the United States in 1945 by enactment of the Bretton Woods Agreement Act (22 U.S.C. §286 *et seq.*). By 1946, the Articles were ratified by sufficient nations to make the IMF a legally empowered specialized agency.

....

Turning to the issue of immunity, pursuant to IMF Articles §8(i), *all employees of the IMF are “immune from legal process with respect to acts performed by them in their official capacity”* except when the Fund waives [the] immunity. . . .” (emphasis supplied). This provision is expressly incorporated into the Bretton Woods Agreement (22 U.S.C. §286h), which gives the immunity provisions of the Articles “full force and effect in the United States” Hence, the document creating the IMF and the American statute approving it provide for “functional” or “official acts” immunity for IMF employees.

In 1945, the International Organizations Immunity Act of 1945 (IOIA) (22 U.S.C. §288d[b]), became law in the United States. This statute provides that:

¹¹ *Blue Ridge Invs.*, 2013 U.S. App. LEXIS 17160, at *30–35 (footnotes omitted).

¹ Al Baker & Steven Erlanger, *I.M.F. Chief, Apprehended at Airport, Is Accused of Sexual Attack*, N.Y. TIMES, May 14, 2011, at http://www.nytimes.com/2011/05/15/nyregion/imf-head-is-arrested-and-accused-of-sexual-attack.html?_r=0.

² *Settlement Reached in Strauss-Kahn, NYC Hotel Maid Case*, CBS NEWS, Dec. 10, 2012, at http://www.cbsnews.com/8301-201_162-57558280/settlement-reached-in-strauss-kahn-nyc-hotel-maid-case.

³ Convention on the Privileges and Immunities of the Specialized Agencies, Nov. 21, 1947, 33 UNTS 261, *available* at <http://www.uia.org/archive/legal-status-5-1>.

“representatives of foreign governments in or to international organizations and officers and employees of such organizations shall be immune from suit and legal process relating to acts performed by them in their official capacity and falling within their functions as such representatives, officers, or employees except insofar as such immunity may be waived by the foreign government or international organization concerned” (emphasis supplied).

. . . .

Mr. Strauss-Kahn contends that the U.N.-inspired Convention on the Privileges and Immunities of the Specialized Agencies (Specialized Agencies Convention), approved November 21, 1947, 33 U.N.T.S. 261 (entered into force December 2, 1948), with its absolute immunity protection for the “Executive Head” of specialized agencies, is evidence of an international norm binding on civilized nations as part of customary law. But, as will be shown in greater detail later, the Specialized Agencies Convention never caught on internationally as the U.N. had hoped. For instance, Ethiopia, Switzerland, and the United States, nations where major centers of multilateral diplomacy are located (Addis Ababa, Geneva, New York City and Washington D.C.) never even acceded to its terms. . . .

Mr. Strauss-Kahn’s Claim of Absolute Immunity

Confronted with the reality that the IMF’s own Articles, the Bretton Woods Agreement, and the IOIA bestow only functional immunity on the Managing Director of the IMF, Mr. Strauss-Kahn contends that customary international law requires this court to disregard binding American statutes and apply the provisions of the Specialized Agencies Convention, to which the United States is not a signatory, because its acceptance by 116 countries around the world establishes a customary international norm as to the type and extent of immunity available to the “executive head” of a specialized agency.

Concededly, the Special Agencies Convention, at first glance, provides Mr. Strauss-Kahn with the absolute immunity which he seeks. However, the Convention’s provisions are far more extensive than merely bestowing immunities to heads of specialized agencies. The terms of the Convention recognize the prerogative of a State, housing the headquarters of a specialized agency, to enter into “supplemental agreements [with the agency] adjusting the provisions” of the Specialized Agencies Convention to curtail the privileges and immunities granted thereunder (Specialized Agencies Conventions §39).

Moreover, there is no dispute that the IMF filed, as it was entitled to do under this Specialized Agencies Convention, a document entitled Annex V which expressly provides that the Specialized Agencies Convention

“in its application to the International Monetary Fund does not require modification or amendment of [the IMF’s] Articles of Agreement” or “impair or limit any of the rights, immunities, privileges, or exemptions conferred upon the fund or any of its members” “by the Articles of Agreement of the Fund, or by any statute, law, or regulation of any member of the fund”

When pressed by this court during oral argument as to the meaning of Annex V, counsel for Mr. Strauss-Kahn stated the following:

“The IMF is simply saying by that Convention whatever rights and privileges and immunities are set forth in our Articles, we continue to reserve those. However, if there

are greater rights, privileges, and immunities contained in the Convention, we are signing on then” (official court transcript, at 8–9).

Actually, quite the opposite is true:

....

[A] specialized agency, under the express language of the Specialized Agencies Convention, can opt out of the immunity provisions, as the IMF clearly did. Indeed, Specialized Agencies Convention §2 states:

“each state party to this convention in respect of any specialized agency to which this convention has become applicable in accordance with §37 shall accord to, or in connexion [sic] with, that agency the privileges and immunities set forth in the standard clauses on the conditions specified therein, subject to any modification of those clauses contained in the provisions of the final (or revised) annex relating to that agency and transmitted in accordance with §§ 36 or 38.”

In view of the express right of a specialized agency to modify and curtail standard immunity clauses, it’s hard to make the case that the Specialized Agencies Convention is a codification of customary international law on immunity for specialized agency executive heads. Indeed, as the International Court of Justice in the North Sea Continental Shelf Cases, *North Sea Continental Shelf* (Judgment, I.C.J. Reports 1969, 3, 38–39), aptly stated:

“[C]ustomary law rules and obligations . . . by their very nature must have equal force for all members of the international community, and cannot therefore be the subject of any right of unilateral exclusion exercisable at will by any one of them in its own favour.”

Also unpersuasive is Mr. Strauss-Kahn’s argument that:

“The best evidence that absolute immunity for executive heads of specialized agencies has achieved the status of customary international law is the vast number of United Nations’ member states that have adopted the Specialized Agencies Convention (citations omitted). Since its adoption in 1947, 116 of the United Nations’ 193 member nations have ratified and become parties to the Specialized Agencies Convention” (Defendant’s Memorandum at Law at 12–13).

Yes, the numbers are impressive, but as Mr. Strauss-Kahn well knows, 188 countries belong to the IMF and have presumably accepted its Articles, limited immunity *and all*.⁴

INTERNATIONAL LAW AND NONSTATE ACTORS

*U.S. Clothing Retailers Adopt Factory Safety Plan for Bangladesh*¹

Many garments sold by U.S. and European retailers are manufactured in Bangladesh. Following a November 2012 factory fire and an April 2013 building collapse highlighting unsafe

⁴ *Diallo v. Strauss-Kahn*, No. 307065/11 (N.Y. Sup. Ct. May 1, 2012), available at <http://www.ft.com/cms/56b9c214-939d-11e1-baf0-00144feab49a.pdf>.

¹ See *U.S. Government Responds to Poor Working Conditions in Bangladesh’s Garment Industry*, this issue.