

**REPORTS OF INTERNATIONAL  
ARBITRAL AWARDS**

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ARBITRALES**

**Taxation liability of Euratom employees between the Commission of the  
European Atomic Energy Community (Euratom) and the United Kingdom  
Atomic Energy Authority**

25 February 1967

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**PART III**

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**Case concerning the taxation liability of Euratom employees  
between the Commission of the European Atomic Energy  
Community (Euratom) and the United Kingdom  
Atomic Energy Authority**

**Decision of 25 February 1967**



CASE CONCERNING THE TAXATION LIABILITY OF EURATOM EMPLOYEES BETWEEN THE COMMISSION OF THE EUROPEAN ATOMIC ENERGY COMMUNITY (EURATOM) AND THE UNITED KINGDOM ATOMIC ENERGY AUTHORITY

DECISION OF 25 FEBRUARY 1967

Sovereignty of States in matters related to taxes—The relevance of preparatory works in illuminating a text of an agreement—application of Article 12 of the 1957 Protocol on Privileges and Immunities of Euratom—the role of double taxation agreements in protecting the interest of international officials—determination as to when unilateral action taken voluntarily for reasons of convenience may create legally binding obligations which cannot be changed unilaterally—distinction between a statement of fact and a statement of a legal obligation—Identification of an example of a *Pactum ad contrahendum* and its limited practical importance

Souveraineté des Etats en matière fiscale—Importance des travaux préparatoires pour ce qui est d'élucider le texte d'un accord—Application de l'article 12 du Protocole de 1957 sur les Privilèges et immunités de la Communauté européenne de l'énergie atomique—Rôle des conventions de double imposition dans la protection des intérêts des fonctionnaires internationaux—Détermination des cas où une mesure unilatérale prise volontairement pour des raisons de commodité risque de créer des obligations juridiquement contraignantes qui ne peuvent pas être modifiées unilatéralement—Distinction à établir entre un exposé des faits et une déclaration d'obligation juridique—Illustration d'un cas de *Pactum ad contrahendum* et de son importance pratique limitée.

EXCHANGES OF NOTES BETWEEN THE GOVERNMENT OF THE UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND AND THE COMMISSION OF THE EUROPEAN ATOMIC ENERGY COMMUNITY (EURATOM) FOR THE SETTLEMENT OF A DISPUTE CONCERNING THE TAXATION LIABILITY OF EURATOM EMPLOYEES WORKING IN THE UNITED KINGDOM ON THE DRAGON PROJECT

*The Commission of the European Atomic Energy Community to the United Kingdom Delegation to the European Communities*

No. 1

Note A

Your Excellency,

*Brussels, 11th July, 1966*

I have the honour to refer to the Note Verbale addressed to the Commission of the European Atomic Energy Community by the United Kingdom Delegation to the European Communities on the 6th of July, 1965, about the taxation liability of Euratom employees working in the United Kingdom on the Dragon Project, and to discussions which took place in Brussels on the 26th of July, 1965, about the possibility of settling the dispute by arbitration, and now have the honour to propose that this matter be settled by an

arbitration between the Commission of the European Atomic Energy Community (hereinafter referred to as "the Commission") and the United Kingdom Atomic Energy Authority (hereinafter referred to as "the Authority") in accordance with the following provisions:

- (a) The Arbitrator shall be H.E. Mr. Edvard Hambro, Ambassador.
- (b) (i) The arbitrator is requested to determine whether employees of the Commission who have been seconded by the Commission to work on the high temperature gas cooled reactor project (known as, and hereinafter referred to as, "The Dragon Project") in the United Kingdom are entitled, under the terms of the Agreement concerning the Dragon Project signed at Paris on the 18th of December, 1962 (hereinafter referred to as "The Dragon Agreement, 1962"), to exemption from liability to pay United Kingdom income tax.
- (ii) The arbitrator is further requested to advise the Commission and the Authority whether, under Section 151 of the Report of the Preparatory Committee of the Conference on the Reorganisation of the Organisation for European Economic Co-operation adopted by the Conference on the 14th of December, 1960, the Government of the United Kingdom of Great Britain and Northern Ireland are under a legal obligation to negotiate an agreement with the Commission providing for those employees the exemptions from liability to pay United Kingdom income tax included within the terms of Articles 9 and 12 of Supplementary Protocol No. 1 to the Convention for European Economic Co-operation on the Legal Capacity, Privileges and Immunities of the Organisation for European Economic Co-operation signed at Paris on the 16th of April, 1948,<sup>107</sup> as given continued effect in relation to the Organisation for Economic Co-operation and Development by Supplementary Protocol No. 2 to the Convention establishing that Organisation signed at Paris on the 14th of December, 1960.<sup>108</sup>
- (iii) If the answers to the questions set out in sub-paragraphs (i) and (ii) above are in the negative, the arbitrator is also requested to determine whether the Authority is under any obligation, under Article 5 (d) of the Dragon Agreement, 1962 to meet the cost of the United Kingdom income tax due from those employees.
- (iv) If the answer to the question set out in sub-paragraph (iii) above is in the negative, the arbitrator is further requested to determine whether, assuming that the Commission reimburses its employees for the cost of the United Kingdom income tax due from those employees, the Commission may, in accordance with Article 5 (c) of the Dragon Agreement, 1962 reclaim from the Budget of the Dragon Project the costs to the Commission of such reimbursement.

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<sup>107</sup> "Treaty Series No. 59 (1949)", Cmd. 7796

<sup>108</sup> "Treaty Series No. 21 (1962)", Cmnd 1646

(c) The Authority and the Commission shall each, within fourteen days of today's date, appoint an Agent for the purposes of the arbitration and shall communicate his name and address to the arbitrator and to the other party.

(d) *Annex A* to this Note sets out a statement of facts which has been agreed by the Commission and the Authority, and which shall be submitted to the arbitrator.

(e) (i) The proceedings shall be in writing only.

(ii) Within three months of today's date the Commission shall submit to the arbitrator and to the Authority a Memorial, setting out its case including all supporting arguments. Within three months of the submission of the Memorial the Authority shall submit to the arbitrator and to the Commission a Counter-Memorial. Within two months of the submission of the Counter-Memorial the Commission may submit to the arbitrator and to the Authority a Reply. Within two months of the submission of the Reply, the Authority may submit to the arbitrator and to the Commission a Rejoinder.

(f) The arbitrator may request from either party any supplementary information he may need. Any such supplementary information given to the arbitrator shall be furnished to the other party.

(g) Written statements to be submitted to the arbitrator shall be submitted in the English language or in one of the official languages of the Community.

(h) All other questions on procedure arising shall be decided by the arbitrator.

(i) The arbitrator shall as soon as possible deliver his award in writing giving the reasons therefor, and shall transmit one signed copy to each Agent.

(j) All general costs of the arbitration shall be borne equally by the Authority and the Commission, but each of them shall bear its own expenses incurred in or for the preparation of its case.

If the foregoing proposal is acceptable to the Government of the United Kingdom of Great Britain and Northern Ireland, I have the honour to suggest that this Note and Your Excellency's reply in that sense shall constitute an Agreement between that Government and the Commission in this matter which shall enter into force on this day's date.

I have the honour to be,  
with the highest consideration,  
Your Excellency's obedient Servant,

J. SASSEN  
*Member of the Euratom Commission*

## ANNEX TO NOTE A

## AGREED STATEMENT OF FACTS

*Part I. The Dragon Project*

1. The Dragon Project is a joint European project for the design, construction and operation in the United Kingdom of a high temperature gas-cooled reactor. The Project was conceived under the auspices of the European Nuclear Energy Agency of the Organisation for European Economic Co-operation, now the Organisation for Economic Co-operation and Development.

2. The Dragon Project was established by an Agreement which was signed in March, 1959, and concluded for a period of five years. A copy of this Agreement is attached at Annex 1;<sup>109</sup> this Agreement will be referred to as "The Dragon Agreement, 1959". On 18 December, 1962, a new Dragon Agreement was concluded (between the same signatories as had signed the Dragon Agreement (1959) which revised and replaced the Dragon Agreement, 1959, and remains in force until 31 March, 1967. A copy of this Agreement is at Annex 2,<sup>109</sup> this Agreement will be referred to as "The Dragon Agreement, 1962". In both Agreements the United Kingdom Atomic Energy Authority (the Authority) and the Commission of the European Atomic Energy Community (the Commission) were among the signatories

3 Article 5 (a) of the Dragon Agreement, 1959, and of the Dragon Agreement, 1962, provide that "the personnel necessary for carrying out the joint programme shall be seconded by the signatories . . ."; accordingly, employees of the Commission were seconded to the Project by the Commission.

4. From the beginning of the Project until 1 April, 1964, the Commission's employees seconded to the Project paid no United Kingdom income tax in respect of their salaries or other emoluments paid or remitted to them in the United Kingdom, the Authority deciding to make composite annual payments in lieu thereof to the United Kingdom Board of Inland Revenue.

5 With effect from 1 April, 1964, the Euratom employees have been requested to pay, and have paid, United Kingdom income tax on their salaries and other emoluments paid or remitted to them in the United Kingdom. They are reimbursed by the Commission for the amounts so paid by them in tax

*Part II: The OEEC and OECD Agreements*

6 When the Organisation for European Economic Co-operation was established by a Convention signed in Paris on 16 April, 1948, Supplementary Protocol No. 1 to the Convention was concluded at the same time on the Legal Capacity, Privileges and Immunities of the Organisation Articles 9 and 12 of this Protocol, which appear in Part IV headed "The Representatives of Members", read as follows:

*Article 9.* Representatives of Members to the principal and subsidiary organs of the Organisation shall, while exercising their functions and during their journey to and from the place of meeting, enjoy the privileges, immunities and facilities normally enjoyed by the diplomatic envoys of comparable rank.

*Article 12.* In this Part IV the expression "representatives" shall be deemed to include all delegates, alternates, advisers, technical experts and secretaries of delegations

7 In 1960 the Organisation for European Economic Co-operation was organised, and a Convention was concluded replacing it by the Organisation for Economic Co-operation and Development, signed at Paris on 14 December, 1960. Supplementary Protocol No. 2 to that Convention dealt with the question of privileges and immunities. So far as is relevant here, this Protocol reads as follows.

The Organisation shall have legal capacity and the Organisation, its officials, and rep-

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<sup>109</sup> Not reproduced.

representatives to it of the Members shall be entitled to privileges, exemptions, and immunities as follows:

- (i) In the territory of the Contracting Parties to the Convention for European Economic Co-operation of 16th April, 1948, the legal capacity, privileges, exemptions, and immunities provided for in Supplementary Protocol No. 1 to that Convention.

8. Supplementary Protocol No. 1 to that Convention provided that:

1 Representation in the Organisation for Economic Co-operation and Development of the European Communities established by the Treaties of Paris and Rome of 18th April 1951, and 25th March, 1957, shall be determined in accordance with the institutional provisions of those Treaties.

2 The Commissions of the European Economic Community and of the European Atomic Energy Community as well as the High Authority of the European Coal and Steel Community shall take part in the work of that Organisation.

9. The Conference which drew up the Convention effecting this reorganisation of the Organisation for European Economic Co-operation established a Preparatory Committee Paragraph 151 of the Report of the Committee, which was adopted by the Conference on 14 December, 1968, reads as follows:

The question of privileges and immunities which might be accorded to the representatives of the Commissions of the European Economic Community and the European Atomic Energy Community, of the High Authority of the European Coal and Steel Community, and of the European Free Trade Association, which will participate in the work of the Organisation, has been raised in the Preparatory Committee. The Committee consider that this question will have to be settled by agreements or arrangements concluded for the purpose.

## No. 2

### *The United Kingdom Delegation to the European Communities to the Commission of the European Atomic Energy Community*

Your Excellency,

*Brussels, 11 July, 1966*

I have the honour to acknowledge receipt of Your Excellency's Note A of today's date, which reads as follows:

[As in No. 1]

I have the honour to inform Your Excellency that the foregoing proposal is acceptable to the Government of the United Kingdom of Great Britain and Northern Ireland, who therefore agree that Your Excellency's Note and the present reply shall constitute an Agreement between them and the Commission, which shall enter into force on this day's date.

I have the honour to be,  
with the highest consideration,  
Your Excellency's obedient Servant,  
J. A. M. MARJORIBANKS

[Enclosure as in No. 1]



*The Commission of the European Atomic Energy Community  
to the United Kingdom Delegation to the European Communities*

Note B

Your Excellency,

*Brussels, 11th July, 1966*

I have the honour to refer to my Note A of today's date about the taxation liability of Euratom employees working in the United Kingdom on the Dragon Project, and to Your Excellency's Note of the same date in reply.

I have the honour to inform you that the Commission will accept the arbitrator's determination of the questions set out in sub-paragraphs (b) (i), (b) (iii), and (b) (iv) of my Note under reference as final and binding upon the Commission for purpose of the present dispute only. With regard to the arbitrator's advice on the question set out in sub-paragraph (b) (ii) of that Note, the Commission will accept that advice. The Commission will accordingly take all steps open to it to give effect to the determination and advice of the arbitrator.

With regard to the arbitrator's decision on the question set out in sub-paragraph (b) (iv) of my Note under reference I have the honour to record my understanding that, should the arbitrator decide that the Commission is entitled to reclaim from the budget of the Dragon Project the costs of the reimbursement, the sum in question will not in fact be charged to the budget of the Dragon Project but will be paid by the Commission and the Authority in equal proportions.

I have the honour to be,  
with the highest consideration,  
Your Excellency's obedient Servant,  
J. SASSEN  
*Member of the Euratom Commission*

No. 4

*The United Kingdom Delegation to the European Communities  
to the Commission of the European Atomic Energy Community*

Your Excellency,

*Brussels, 11 July, 1966*

I have the honour to refer to Your Excellency's Note B of today's date, referring to Your Excellency's Note A of today's date about the Dragon Income Tax dispute and to my Note of the same date in reply.

I have the honour to inform you that the Authority will accept the arbitrator's determination of the questions set out in sub-paragraphs (b) (i), (b) (iii), and (b) (iv) of Your Excellency's Note A as final and binding upon the Authority for purposes of the present dispute only. With regard to the arbitrator's advice on the question set out in sub-paragraph (b) (ii) of that Note, the Authority will accept that advice. The Authority will accordingly

take all steps open to it to give effect to the determination and advice of the arbitrator including any financial payments which may be necessary in order that the determination and advice may have effect as regulating the position regarding the payment of Income Tax as from the 1st of April, 1964.

With regard to the arbitrator's decision on the question set out in sub-paragraph (b) (iv) of Your Excellency's Note A I have the honour to record the Authority's understanding that, should the arbitrator decide that the Commission is entitled to reclaim from the Budget of the Dragon Project the costs of reimbursement, the sum in question will not in fact be charged to the Budget of the Dragon Project, but will be paid by the Commission and the Authority in equal proportions.

I should like to take this opportunity of recording that since the proposed arbitration is not one to which Her Majesty's Government are a party, the determination and advice of the arbitrator will not be legally binding upon, nor give rise to any legal obligations for, nor constitute any precedent against, Her Majesty's Government, particularly insofar as concerns the Protocols and Conventions concerning the Organisation for European Economic Co-operation and the Organisation for Economic Co-operation and Development referred to in sub-paragraph (b) (ii) of Your Excellency's Note A. However, notwithstanding this, I wish to assure Your Excellency that Her Majesty's Government will, so far as concerns the liability to United Kingdom Tax of the Commission's employees seconded to work on the Dragon Project, take the necessary action in order to give effect as from 1 April, 1964, by administrative means to any determination or advice by the arbitrator that the employees in question are entitled to, or should be the subject of negotiations for an agreement providing for, exemption from liability to pay United Kingdom income tax.

I have the honour to be,  
with the highest consideration,  
Your Excellency's obedient Servant,  
J. A. M. MARJORIBANKS

#### INTRODUCTION

The present Arbitration is between the Commission of the European Atomic Energy Community (hereinafter called the Commission) on the one hand and the United Kingdom Atomic Energy Authority (hereinafter called the Authority) on the other hand. The Commission represents an international organization whereas the Authority has no such status and is established by the British Atomic Energy Authority Act, 1954 (attached as Annex A to the Counter Memorandum of the Authority). The Arbitration is not between the United Kingdom Government and Euratom, but between the latter and the Authority. However, the exchange of Notes which form the basis of the Arbitration was concluded between the United Kingdom Delegation in Brussels and Euratom. It was also agreed that the Arbitration should be

binding for the parties. The Note from the Commission to the United Kingdom Delegation states in this respect:

I have the honour to inform you that the Commission will accept the arbitrator's determination of the questions set out in sub-paragraphs (b) (i), (b) (iii), and (b) (iv) of my Note under reference as final and binding upon the Commission for purpose of the present dispute only. With regard to the arbitrator's advice on the question set out in sub-paragraph (b) (ii) of that Note, the Commission will accept that advice. The Commission will accordingly take all steps open to it to give effect to the determination and advice of the arbitrator.

The answer from the United Kingdom Delegation is couched in the following terms:

I have the honour to inform you that the Authority will accept the arbitrator's determination of the questions set out in sub-paragraphs (b) (i), (b) (iii), and (b) (iv) of Your Excellency's Note No. 1000 as final and binding upon the Authority for purposes of the present dispute only. With regard to the arbitrator's advice on the question set out in sub-paragraph (b) (ii) of that Note, the Authority will accept that advice. The Authority will accordingly take all steps open to it to give effect to the determination and advice of the arbitrator including any financial payments which may be necessary in order that the determination and advice may have effect as regulating the position regarding the payment of Income Tax as from the 1st of April, 1964.

The Agreed Statement of Issues which is equivalent to the special agreement or compromise is set out in the following terms:

#### AGREED STATEMENT OF ISSUES

1. The Arbitrator is requested to determine whether employees of the Commission who have been seconded by the Commission to work on the high temperature gas cooled reactor project (known as, and hereinafter referred to as, "The Dragon Project") in the United Kingdom are entitled, under the terms of the Agreement concerning the Dragon Project signed at Paris on 18 December, 1962 (hereinafter referred to as "The Dragon Agreement, 1962"), to exemption from liability to pay United Kingdom income tax.

2. The Arbitrator is further requested to advise the Commission and the Authority whether under Section 151 of the Report of the Preparatory Committee of the Conference on the Reorganization of the Organization for European Economic Cooperation adopted by the Conference on 13 December, 1960, the Government of the United Kingdom of Great Britain and Northern Ireland are under a legal obligation to negotiate an agreement with the Commission providing for those employees the exemptions from liability to pay United Kingdom income tax included within the terms of Articles 9 and 12 of Supplementary Protocol No. 1 to the Convention for European Economic Cooperation on the Legal Capacity, Privileges and Immunities of the Organization for European Economic Cooperation signed at Paris on the 16th of April, 1948, as given continued effect in relation to the Organization for Economic Cooperation and Development by Supplementary Protocol No. 2 to the Convention establishing that Organization signed at Paris on the 14th of December, 1960.

3. If the answers to the questions set out in paragraphs 1 and 2 above are in the negative, the Arbitrator is also requested to determine whether the Authority is under any obligation, under Article 5 (d) of the Dragon Agreement, 1962 to meet the cost of the United Kingdom income tax due from those employees.

4. If the answer to the question set out in paragraph 3 above is in the negative, the Arbitrator is further requested to determine whether, assuming that the Commission reimburses its employees for the cost of the United Kingdom income tax due from those employees, the Commission may, in accordance with Article 5 (c) of the Dragon Agreement, 1962 reclaim from the budget of the Dragon Project the costs to the Commission of such reimbursement.

The parties have also agreed on a statement of facts in the following terms:

I: *The Dragon Project*

1. The Dragon Project is a joint European project for the design, construction and operation in the United Kingdom of a high temperature gas cooled reactor. The Project was conceived under the auspices of the European Nuclear Energy Agency of the Organization for European Economic Cooperation, now the Organization for Economic Cooperation and Development.

2. The Dragon Project was established by an Agreement which was signed in March, 1959, and concluded for a period of five years. A copy of this Agreement is attached at Annex 1. This Agreement will be referred to as "The Dragon Agreement, 1959". On 18 December, 1962, a new Dragon Agreement was concluded (between the same signatories as had signed the Dragon Agreement, 1959) which revised and replaced the Dragon Agreement, 1959, and remains in force until 31 March 1967. A copy of this Agreement is at Annex 2; this Agreement will be referred to as "The Dragon Agreement, 1962". In both Agreements the United Kingdom Atomic Energy Authority (the Authority) and the Commission of the European Atomic Energy Community (the Commission) were among the signatories.

3. Article 5 (a) of the Dragon Agreement, 1959, and of the Dragon Agreement, 1962, provide that "the personnel necessary for carrying out the joint programme shall be seconded by the signatories . . ."; accordingly, employees of the Commission were seconded to the Project by the Commission.

4. From the beginning of the Project until 1 April, 1964, the Commission's employees seconded to the Project paid no United Kingdom income tax in respect of their salaries or other emoluments paid or remitted to them in the United Kingdom, the Authority deciding to make composite annual payments in lieu thereof to the United Kingdom Board of Inland Revenue.

5. With effect from 1 April, 1964, the EURATOM employees have been requested to pay, and have paid, United Kingdom income tax on their salaries and other emoluments paid or remitted to them in the United Kingdom. They are reimbursed by the Commission for the amounts so paid by them in tax.

II: *The O.E.E.C. and O.E.C.D. agreements*

6. When the Organization for European Economic Cooperation was established by a Convention signed in Paris on 16 April, 1948, Supplementary Protocol No. 1 to the Convention was concluded at the same time on the Legal Capacity, Privileges and Immunities of the Organization. Articles 9 and 12 of this Protocol, which appear in Part IV headed "The Representatives of Members", read as follows.

*Article 9* Representatives of Members to the principal and subsidiary organs of the Organization shall, while exercising their functions and during their journey to and from the place of meeting, enjoy the privileges, immunities and facilities normally enjoyed by the diplomatic envoys of comparable rank.

*Article 12* In this Part IV the expression "representatives" shall be deemed to include all delegates, alternates, advisers, technical experts and secretaries of delegations.

7. In 1960 the Organization for European Economic Cooperation was re-organized, and a Convention was concluded replacing it by the Organization for Economic Cooperation and Development, signed at Paris on 14 December, 1960. Supplementary Protocol No. 2 to that Convention dealt with the question of privileges and immunities. So far as is relevant here, this Protocol reads as follows:

The Organization shall have legal capacity and the Organization, its officials, and representatives to it of the Members shall be entitled to privileges, exemptions, and immunities as follows:

(a) In the territory of the Contracting Parties to the Convention for European Economic Cooperation of 16th April, 1948, the legal capacity, privileges, exemptions, and immunities provided for in Supplementary Protocol No. 1 to that Convention.

8. Supplementary Protocol No. 1 to that Convention provided that

1. Representation in the Organization for Economic Cooperation and Develop-

ment of the European Communities established by the Treaties of Paris and Rome of 18th April, 1951, and 25th March, 1957, shall be determined in accordance with the institutional provisions of those Treaties

2. The Commissions of the European Economic Community and of the European Atomic Energy Community as well as the High Authority of the European Coal and Steel Community shall take part in the work of that Organization.

9. The Conference which drew up the Convention effecting this re-organization of the Organization for European Economic Cooperation established a Preparatory Committee. Paragraph 151 of the Report of the Committee, which was adopted by the Conference on 13 December, 1960, reads as follows:

The question of privileges and immunities which might be accorded to the representatives of the Commissions of the European Economic Community and the European Atomic Energy Community, of the High Authority of the European Coal and Steel Community, and of the European Free Trade Association, which will participate in the work of the Organization, has been raised in the Preparatory Committee. The Committee consider that this question will have to be settled by agreements or arrangements concluded for the purpose.

\* \* \*

Dr. Edvard Hambro, who was at the time professor of law at the Norwegian School of Economics and Business Administration and a Member of Parliament, was approached by the two parties in a letter of May 11, 1966, and asked to act as sole Arbitrator. The final acceptance was given in a letter of July 4, 1966, by the Arbitrator, who had in the meantime been appointed Permanent Representative of Norway to the United Nations.

The formal Exchange of Notes between the Commission and the Authority was dated July 11, 1966.

\* \* \*

Dr. Th. W. Vogelaar, Director General of the Legal Services of the Commission was appointed the agent of the Commission. The agent of the Authority was Mr. C. J. Highton, later succeeded by Mr. D. F. Sim.

\* \* \*

The Memorial of the Commission was dated July 13, 1966. It was followed by a Counter Memorial of the Authority delivered to the Arbitrator by a note of October 12, 1966. The reply of the Commission was dated December 19, 1966, and the Rejoinder of the Authority February 7, 1967.

#### FIRST-QUESTION

The first question is drawn up in the following terms:

The Arbitrator is requested to *determine* whether employees of the Commission who have been seconded by the Commission to work on the high temperature gas cooled reactor project (known as, and hereinafter referred to as, "The Dragon Project") in the United Kingdom are entitled, under the terms of the Agreement concerning the Dragon Project

signed at Paris on 18 December, 1962 (hereinafter referred to as "The Dragon Agreement, 1962"), to exemption from liability to pay United Kingdom tax.

\* \* \*

It is quite clear that a State under its own sovereignty decides, as a general rule, any question of taxes to be imposed on residents in that State or on income derived from or paid in that State.

This first question submitted to arbitration must, therefore, depend on the agreements which the United Kingdom Government may have concluded to this effect.

The parties have discussed the question of the immunities and privileges of officials and experts of the O.E.C.D. The Arbitrator finds no necessity for entering into this question, because in spite of the "Dragon Project" being undoubtedly an O.E.C.D. project, the personnel seconded from Euratom can not be classified as O.E.C.D. personnel. This is also recognized by the parties as set out in an Exchange of Notes between Euratom and the United Kingdom Delegation in Brussels in the summer of 1965. These Notes were at the request of the Arbitrator sent him by letter from Mr. Vogelaar of July 27, 1966.

Since this is so, it is necessary to search for other documents to justify tax exemption. Many claims are made by the two parties concerning the debates and Exchange of Notes prior to the signing of the Dragon Agreement. The conclusion to be drawn from the preparatory works—if they have any relevance—is that all matters of detail were not clarified, that the parties did not always draw the distinction between the Project and its employees or between the personnel of the Project and the officials of O.E.C.D. This is indeed not surprising and shows that arguments drawn from previous negotiations referring to international agreements should be used very sparingly. However, the relevant texts which were finally adopted seem less obscure.

The first agreement of importance in this respect is the Dragon Agreement of 1959, which is the basic agreement in the matter.

The most important article of the Agreement in this connection is Article 5 which deals with the personnel. It is stated in paragraph c of the article:

Seconded staff shall continue to be paid by and, except as otherwise provided in this Agreement, shall remain subject to conditions of service of, their parent bodies; the Signatories shall be entitled to reclaim from the budget the cost of staff seconded from their respective countries, on an agreed scale according to grade, which scale shall be laid down by the General Purposes Committee.

This paragraph is unchanged in the Revised Agreement of 1962. There is no doubt that the Euratom personnel working on the Dragon Project are seconded staff. This is admitted by both parties in the Agreed Statement of Facts.

As far as staff seconded from the Commission is concerned, it can not be doubted that they shall be paid according to the rules in force for the staff

of the Commission. If such conditions exempt them from taxation, they should not personally bear the burden of income tax on their salaries as long as they are employed by the Commission.

According to article 12 of the Protocol on Privileges and Immunities of April 17, 1957, the officials of the Euratom do not pay national income tax, but pay a tax to Euratom. This article reads as follows:

*Dans les conditions et suivant la procédure fixées par le Conseil statuant sur les propositions formulées par la Commission dans le délai d'un an à compter de l'entrée en vigueur du Traité, les fonctionnaires et agents de la Communauté sont soumis au profit de celle-ci à un impôt sur les traitements, salaires et émoluments versés par elle.*

*Ils sont exempts d'impôts nationaux sur les traitements, salaires et émoluments versés par la Communauté.*

It is, therefore, quite clear that these officials are exempt from income tax when they are seconded to a project under Euratom. It is, of course, quite another matter whether the United Kingdom is under any obligation to desist from claiming income tax. The United Kingdom is not a member of Euratom, and is, therefore, *prima facie*, not bound by this Protocol, if they have not in any other way accepted this obligation.

The different circulars distributed to staff members, (No. 92 of 10 December 1959, 135 of 17 November 1960, and 31-36 of 9 October 1963) have not made any change in their tax situation.

Such tax exemption is eminently in accordance with accepted principles for the treatment of international officials. They should be on a term of equality and they should not be taxed twice. It should also be mentioned that the agreements to provide against double taxation are concluded between States and not between States and international organizations. If the employees seconded by the Commission were obliged to pay national income tax in Great Britain, they would be put in a disadvantageous position compared with other staff in the Dragon Project and—more important still—they would be in an inferior position compared with other Commission staff. It would thus seem quite clear that they personally are exempt.

This principle is also affirmed in the Judgment of the "Cour de Justice des Communautés européennes" of December 16, 1960, in the case of *Humblet contre l'Etat Belge* where it is stated at page 26:

*Attendu qu'une raison péremptoire s'ajoute à l'argument ci-dessus exposé, à savoir le fait que l'exonération totale d'impôts nationaux est indispensable pour garantir l'égalité du traitement des fonctionnaires de nationalités différentes, qu'il serait hautement injuste que deux fonctionnaires, pour lesquels l'institution communautaire a prévu le même traitement brut, touchent des traitements nets différents; que la différence de traitements nets pourrait rendre plus difficile le recrutement de fonctionnaires ressortissant de certains Etats membres, créant ainsi une discrimination quant aux possibilités réelles d'accès aux fonctions communautaires des ressortissants de chaque Etat membre;*

However justified this statement seems, and however strong the persuasive authority of such a judgment, as quoted in the Memorial on page 15, it is, of course, not binding on the parties to the present Arbitration.

Over a period of five years no income tax was levied on the officials in question. In the Agreed Statement of Fact, it is stated:

From the beginning of the Project until 1 April, 1964, the Commission's employees seconded to the Project paid no United Kingdom income tax in respect of their salaries or other emoluments paid or remitted to them in the United Kingdom, the Authority deciding to make composite annual payments in lieu thereof to the United Kingdom Board of Inland Revenue.

This is an agreed statement, but there it is open to different interpretations.

The Commission interprets this practice as a clear recognition on the part of the Authority that direct personal income tax could not and should not be levied on the seconded officials. The Authority on the other hand claims that the whole procedure was a purely practical device adopted *ex gratia* to help the individual employees in a difficult situation.

It appears to the Arbitrator unnatural to interpret such a practical arrangement as an act or a series of acts creating a binding precedence which could not be changed unilaterally. On the other hand it seems equally unnatural to interpret it as a purely voluntary action on behalf of the Authority and the national tax board. Such *ex gratia* payment would seem to accord badly with all which is known of tax authorities.

It is probably correct to interpret this practice as an indication of the undetermined state of affairs as far as tax is concerned.

More to the point is an exchange of letters between the Authority and the Commission on the question of tax exemption. This exchange was only shown in the Reply of the Commission. The most important letter is from the Chief Finance Officer of the Dragon Project to Euratom of December 22, 1960:

O. E. E. C. HIGH TEMPERATURE REACTOR PROJECT

Dragon Project Office  
A E E Winfrith  
Dorchester  
Dorset, England

Quoting reference: 131/0/3/6

22nd December 1960

M. P. Nacivet  
Director General of Finance  
Communauté Européenne de l'Energie Atomique  
51-53 rue Belliard  
Brussels, Belgium

Dear Mr. Nacivet,

*Liability to U.K. income tax of overseas staff seconded to the Dragon Project*

You wrote to me on 7th December enquiring about the liability to U.K. Income Tax of overseas staff seconded to the Dragon Project, and I then asked the Director of Accounts of the U.K.A.E.A. (the Authority) for a statement on the latest position, since it is the U.K.A.E.A. who have undertaken the negotiations with the (U.K.) Department of Inland Revenue.



Mr. Harris has now informed me that the final details of the settlement with the Inland Revenue have not yet been agreed, but the principle has been established that there will be no direct assessment on the individuals concerned in respect of their income from the Dragon Project. The settlement does not include investment or other income in the U K. but will ensure that no overseas staff seconded to the Dragon Project will be called upon to pay any United Kingdom tax on their reimbursed salaries or overseas allowance.

Yours sincerely,  
R. B. REYNOLDS  
*Chief Finance Officer*

This letter is a very important element for the understanding of the complex situation as far as income tax is concerned. It shows that for the five year period seconded staff did not pay income tax, but the letter cannot be interpreted as a binding undertaking that no income tax could be levied and deals *expressis verbis* only with "direct assessment". All the time the Authority made a composite annual payment to the United Kingdom Board of Inland Revenue.

All the correspondence submitted to the Arbitrator indicates that great efforts have been made both from the Commission and the Authority to reach a satisfactory solution, but that no agreement was ever reached either indicating a waiver of the tax claims of the United Kingdom or an acceptance of such claims from the Commission.

\* \* \*

It is thus established to the satisfaction of the Arbitrator that the officials seconded from Euratom have a claim against their employer, the Commission, not to pay taxes or to have the sums paid in taxes refunded to them, but that no clear stipulation exists imposing a legal obligation on the United Kingdom Government to grant such tax exemption. This is not a very satisfactory situation, but an international obligation for a State to grant tax exemptions must be based on internationally binding texts and not on implications from negotiations between bodies or representatives not having full powers in this regard. No knowledge of relations between Euratom and its officials can be a substitute for a treaty stipulation.

\* \* \*

#### SECOND QUESTION

The second question is labelled thus:

The Arbitrator is further requested to advise the Commission and the Authority whether, under Section 151 of the Report of the Preparatory Committee of the Conference on the Reorganization of the Organization for European Economic Cooperation adopted by the Conference on 13 December, 1960, the Government of the United Kingdom of Great Britain and Northern Ireland are under legal obligation to negotiate an agreement with the Commission providing for those employees the exemptions from liability to pay United

Kingdom tax included within the terms of Articles 9 and 12 of Supplementary Protocol No. 1 to the Convention for European Economic Cooperation on the Legal Capacity, Privileges and Immunities of the Organization for European Economic Cooperation signed at Paris on the 16th of April, 1948 as given continued effect in relation to the Organization for Economic Cooperation and Development by Supplementary Protocol No. 2 to the Convention establishing that Organization signed at Paris on the 14th of December, 1960

On December 13, 1960, the report of the preparatory committee was unanimously adopted by the conference prior to the signature of the OECD Convention.

The representative of all the member states, including of course the United Kingdom agreed:

Desiring that effect be given to the recommendations of the preparatory committee;

Approve the report of the preparatory committee and accept the recommendations therein

The main point in issue is Section 151 which states:

The question of privileges and immunities which might be accorded to the representatives of the Commission of the European Economic Community and the European Atomic Energy Community, of the High Authority of the European Coal and Steel Community, and of the European Free Trade Association, which will participate in the work of the Organization, has been raised in the Preparatory Committee. The Committee consider that this question will have to be settled by agreements or arrangements concluded for the purpose.

The Commission claims that this section contains a firm obligation to enter into negotiations whereas the Authority is of opinion that it contains only a statement of facts. And these facts are fairly clear. Both the British and the Netherlands delegations forwarded proposals to include definite obligations to grant tax exemptions to certain classes of officials of EFTA and the European Communities. These proposals were favourably received by the relevant sub-committees and would probably have been accepted by the whole commission. However, time ran short, and the proposals were not acted upon.

The Commission in the Memorandum states that "The compulsory nature of this language is striking and clear". The Arbitrator cannot share this interpretation. It seems that the wording is closer to a pure statement of fact. The natural meaning of such a statement is that no agreement has so far been reached and that it will be necessary to conclude a special agreement to establish any new privileges and immunities. Whether such an agreement will be reached or not, is up to the parties to decide on.

Although it would seem a natural result of diplomatic courtesy and friendly relations in international intercourse not to refuse to enter into such negotiations, this still does not constitute a legal obligation. Furthermore, an obligation under the above mentioned Section 151 would at its best only constitute an obligation to negotiate and not any guarantee as to the result of the negotiations. Such a pactum ad contrahendum is always of limited practical importance.

Since the Arbitrator holds that no obligation can be deduced from Section 151 he sees no necessity to enter into an effort to interpret the term "representative" contained therein.

\* \* \*

### THIRD QUESTION

Question 3 is labelled thus:

If the answers to the questions set out in paragraphs 1 and 2 above are in the negative, the Arbitrator is also requested to determine whether the Authority is under any obligation, under Article 5(d) of the Dragon Agreement, 1962 to meet the cost of the United Kingdom income tax due from those employees.

The cost to be defrayed would be the sum necessary to refund to the employees the national tax they would have been forced to pay, or which the Commission would have been forced to pay for them.

The basis for this claim is article 5(d) of the Dragon Agreement which states:

The Authority shall be solely liable in respect of all actions, claims, costs and expenses whatsoever arising out of the construction and operation of any experimental reactor which may be built in the United Kingdom or installations ancillary thereto, and indemnify the other Signatories in respect of any such actions, claims, costs and expenses which may involve the other Signatories.

The Commission states that this language is so broad that it covers all claims and that it would be quite unwarranted to give a restrictive interpretation to it.

The Authority on the other hand claims that the text and the history make it quite plain that it aims at claims, not among the parties to the Dragon Agreement but to claims arising in regard to outside parties.

The language of this paragraph is very broad indeed. It makes the Authority "solely liable" in respect of *all* actions, claims, costs and expenses *whatsoever* arising out of the construction and operation of any experimental reactor which may be built in the United Kingdom.

In view of this broad and all inclusive language the Arbitrator finds no possibility for a restrictive interpretation.

Since the text appears to be clear there is no need for a recourse to the preparatory works. Even if these works should be taken into consideration, the Arbitrator finds no justification for a restrictive interpretation.

The terms of the paragraph must evidently be interpreted within its context. If that is done, it would seem even clearer that the Project is responsible for the repayment since this paragraph figures immediately after the paragraph about personnel and in the same article of the Agreement.

None of the paragraphs gives the slightest intimation of a necessity to give a restrictive interpretation.

In this part of the arbitration the claims of the Commission must be admitted.

\* \* \*

FOURTH QUESTION

Question four is formulated in the following terms:

If the answer to the question set out in paragraph 3 above is in the negative, the Arbitrator is further requested to determine whether, assuming that the Commission reimburses its employees for the cost of the United Kingdom income tax due from those employees, the Commission may, in accordance with Article 5(c) of the Dragon Agreement, 1962, reclaim from the budget of the Dragon Project the costs to the Commission of such reimbursement

Since the answer to question three is positive, it follows that the Arbitrator need not answer this question.

\* \* \*

For these reasons,  
THE ARBITRATOR,

DETERMINES Question 1 in the negative,  
ANSWERS Question 2 in the negative,  
ANSWERS Question 3 in the affirmative.

DONE in New York this twenty-fifth day of February one thousand nine hundred and sixty-seven, in two copies, one of which will be transmitted to the Commission of the European Atomic Energy Community and the other to the United Kingdom Atomic Energy Authority respectively.

*(Signed)*

Edvard HAMBRO

COMMUNICATIONS RELATED TO THE QUESTION OF INTERPRETATION  
OF THE ARBITRATION AWARD

1. *Letter dated 21st December 1967 from the Director General (Agent) of the Commission of the European Atomic Energy Community to the United Kingdom Atomic Energy Authority*

Mr. D. F. Sim,  
Legal Adviser,  
United Kingdom Atomic Energy Authority,  
Legal and Lands Branch,  
11, Charles II Street,  
London, S.W.1

Dear Mr. Sim,

*Re: Dragon Arbitration*

I am sorry that there appears to be a difference of interpretation concerning the Arbitration. Had the Authority brought this up sooner, a regrettable delay of nearly one year would have been avoided.

In our mind there can be no misunderstanding of what the Arbitrator said and meant. According to the compromise, the Arbitrator had to answer positively or negatively to the four questions we put before him. The third question, to which he gave a positive answer, read as follows:

the Arbitrator is also requested to determine whether the Authority is under any obligation under Article 5 (d) of the Dragon Agreement, 1962, to meet the cost of the United Kingdom Income Tax due from those employees

Article 5 (d) of the Dragon Agreement makes the Authority liable in respect of all actions, claims, costs and expenses whatsoever arising out . . . etc. On page 26, the Arbitrator stated that this paragraph 5 (d) makes the Authority solely liable in respect of all actions, claims, costs and expenses whatsoever arising out of the construction and operation of any experimental reactor which may be built in the United Kingdom. On page 25, he determines the costs to be defrayed in the following wording:

The cost to be defrayed would be the sum necessary to refund to the employees the national tax they would have been forced to pay, or which the Commission would have been forced to pay for them

In admitting the claims of the Commission in this part of the Arbitration (see page 27 of the Arbitration), the Arbitrator cannot have meant anything less than admitting that the Authority is solely liable to refund the Commission the sum necessary to refund its employees the national tax they have paid or which the Commission is forced to pay for them. No importance therefore should be attached to the words "the Project" on page 26 of the Award. These words can in no way be considered as a determination by the Arbitrator that the Project, and not the Authority, is responsible for meeting such costs. Such a finding would moreover have been beyond his powers and would be contradictory to the text of article 5 (d) of the Agreement.

What we agreed—in the exchange of letters of July 11th, 1966—was related exclusively to the eventuality that the Arbitrator should give a positive answer to the *fourth* question and not to the third question. The Arbitrator however has not decided that the Commission is entitled to reclaim from the Budget of the Dragon Project the costs of the reimbursement. Since the answer to question 3 was positive, the Arbitrator did not need to answer this fourth question—and he hasn't (see page 28 of the Award). Therefore, the cost-sharing formula we agreed upon in respect of question 4 is of no avail.

Although I have not the slightest doubt as to what the Arbitrator said and intended, I have no objection to sending him a letter from both of us seeking a clarification on the points you raised, if you so insist. I hope, however, that in any event, you would do your utmost to avoid any further delay.

Yours sincerely,  
(Signed)  
Th. W. VOGELAAR  
Director General

2. *Letter dated 14 February 1968 from the Agent of the United Kingdom Atomic Energy Authority to Mr. Hambro*

H.E. Ambassador Edvard Hambro,  
Permanent Mission of Norway to the  
United Nations,  
757 Third Avenue,  
New York, N.Y. 10017,  
U.S.A.

Sir,

*Dragon Project Income Tax Arbitration*

The Agents of the European Atomic Energy Community and the United Kingdom Atomic Energy Authority have carefully studied the Arbitration

Award delivered on 25th February, 1967. A difference of interpretation has arisen on one point, however, and I am authorised by the Agent for the Community to write to you asking, in the name of both parties, if you would be good enough to let us have your comment on the point at stake, which is as follows.

The final paragraph on page 26 of the Award states that if the terms of a particular provision are interpreted within its context,—“it would seem even clearer that the Project is responsible for the repayment . . . ”. The Authority have taken the view that the use of the word “Project” in this context is not necessarily contradictory with your finding that the Authority are solely liable for meeting the Commission’s claim under Article 5 (d) of the Dragon Agreement, but that it is declaratory of the fact that the Project as a whole is ultimately responsible for reimbursing the costs to the Authority, as being expenditure for the carrying out of the joint programme within the scope of Article 6 (a) of the Dragon Agreement.

The Commission do not agree with this interpretation. Their views are set out in the attached copy letter dated 21st December, 1967, which their Agent has asked me to place before you.

Your comments on this question of interpretation would be welcomed.

I remain, Your Excellency,  
Your Obedient Servant,  
D. F. SIM  
*Agent of the United Kingdom  
Atomic Energy Authority*

3. *Letter dated 19 February 1968 from Mr. Hambro in response to the above communications*

D. F. Sim, Esq.  
Agent of the United Kingdom  
Atomic Energy Authority  
London S.W.1

Sir,

I have the honour to acknowledge receipt of your letter of 14 February, 1968, with which was enclosed copy of a letter dated 21 December, 1967, from the Agent for the Commission of the European Atomic Energy Community in the Dragon Project Income Tax Arbitration.

I feel it should not be necessary for me to offer any formal interpretation of my Award in the Dragon Project Income Tax Arbitration, as, according to established practice, it is the Arbitrator’s conclusions which constitute the Award proper, not the preceding *rationes decidendi*. The operative part

of the Award, as given on page 29 of the document, contains the Arbitrator's replies to those questions set out in the *compromis*—the Agreed Statement of Issues—which the Arbitrator found grounds for answering. The reply to question three, when read with the text of the question, should not leave any room for interpretation.

I have, however, become aware of the ambiguous effect of the word "Project", which inadvertently was employed in the text of the statement of the Arbitrator at page 26, last line but two, instead of "Authority". I realise that the word thus employed might have given rise to misunderstandings, especially as regards matters referred to the fourth question before the Arbitrator. It did not, in the event, become necessary for the Arbitrator to formulate any answer to this question, and it was of course not his intention to make any indirect allusion to it through any language contained in the *rationes* relating to question three.

I trust that in the light of the above comments, it will be possible for the Parties to establish a common view of the point raised in your letter. A copy of this letter has been forwarded to the Agent for the Commission of the European Atomic Energy Community.

I have the honour to be,  
Sir,  
Your obedient Servant,  
(Signed)  
Edvard HAMBRO