Extract from:

UNITED NATIONS JURIDICAL YEARBOOK

1972

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. Austria

LABOUR COURT OF VIENNA

ANTON JAKESCH v. INTERNATIONAL ATOMIC ENERGY AGENCY:
DECISION OF 8 JULY 1971 [1]

Immunity of the IAEA from legal process under the Headquarters Agreement concluded between the Agency and Austria [2]

Plaintiff had instituted an action before the Court in connexion with an employment relationship which had at one time existed between him and the defendant. Pursuant to article IX, paragraph 3, of the Federal Act on Civil Jurisdiction (*Bundesgesetz zur Jurisdiktionsnorm*), the Court asked the Federal Ministry of Justice to indicate whether, in the present instance, the defendant was prepared to accept the jurisdiction of the Austrian courts under the Agreement concluded on 11 December 1957 between Austria and the IAEA. The Court was informed that the defendant was not prepared to do so.

Under article VIII, section 19, of the above-mentioned Agreement, "The IAEA and its property, wherever located and by whomsoever held, shall enjoy immunity from every form of legal process except in so far as in any particular case the IAEA shall have expressly waived its immunity". Noting that the IAEA had not waived its immunity from legal process, the Court declared itself incompetent in the matter and dismissed the action.

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2. Netherlands

COURT OF CASSATION (HOGE RAAD)

STATE SECRETARY FOR FINANCIAL AFFAIRS v. PASSER:
DECISION NO. 16786 OF 7 JUNE 1972

Exemption of United Nations officials from all taxation on the salaries and emoluments paid to them by the United Nations—These salaries and emoluments are not to be taken into account in calculating the taxation on income from other sources

In this case concerning the applicability of the progressive taxation reservation (progressie-voorbehoud), the Court concluded that the income of a United Nations official

[1] Kindly provided by the Secretariat of IAEA.

[2] United Nations, *Treaty Series*, vol. 339, p. 110.

of Netherlands nationality may not be taken into consideration, under the terms of article V, section 18 of the Convention on the Privileges and Immunities of the United Nations of 12 February 1946, in determining the rate of tax on the taxable income of that official in the Netherlands. Thus, the above-mentioned article excludes the applicability of article 40 of the General Act on State Taxes (Algemene Wet inzake Rijksbelastingen) to a salary paid by the United Nations.

The Court held *inter alia* that the provision in article V, section 18 of the Convention on the Privileges and Immunities of the United Nations differs from the arrangements concerning the prevention of double taxation, which are intended to assure the individual taxpayer that taxes will be levied only once on the same element of income or capital—whether this be done by his own country or abroad—since such provision exempts altogether the salaries and emoluments concerned from taxation by the States party to the Convention.

The Court further stated that the exemption, which according to article V, section 20 of the Convention has been granted exclusively in the interest of the United Nations and not for the personal benefit of the individual staff member, aims primarily at enabling the United Nations to set net salaries for the persons which it recruits in different States, thereby assuring the equality of remuneration, without having to take into consideration the impact of this United Nations salary on the fiscal position of the person concerned in any individual State.

The Court observed that the intended purpose could not be attained if each individual State were left the discretion, in determining the rate of tax to be levied on income other than that derived from the work for the United Nations, to take into consideration also the emoluments derived from the United Nations. And since the above cited exemption must be interpreted in the light of its intended purpose, it does not permit a State party to the Convention to take into account in any way the emoluments paid by the United Nations to its staff members for establishing tax rates on non-exempt income.

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3. Philippines

SUPREME COURT

WORLD HEALTH ORGANIZATION AND DR. L. VERSTUYFT v. HON. BENJAMIN AQUINO ET AL.: DECISION OF 29 NOVEMBER 1972

Claim of diplomatic immunity under the Host Agreement between the Philippine Government and the World Health Organization—Where such a claim is recognized and affirmed by the executive branch of the Government, it is the duty of the courts to accept it—Where there is reason to suspect an abuse of diplomatic immunity, the matter should be dealt with in accordance with Article VII of the Convention on the Privileges and Immunities of the Specialized Agencies

The petitioner had been assigned to the Regional Office of WHO in Manila as Acting Assistant Director of Health Services. Pursuant to the Host Agreement of 22 July 1951 between the Philippine Government and the World Health Organization, [3] he was entitled to diplomatic immunity and, in particular, to personal inviolability, inviolability of the official's properties, exemption from local jurisdiction and exemption from taxation and

[3] United Nations, *Treaty Series*, vol. 149, p. 197.

customs duties. When his personal effects contained in twelve crates entered the Philippines as unaccompanied baggage, they were accordingly allowed free entry and sent directly to a warehouse. Nevertheless, the respondent judge issued a few weeks later, at the request of the Constabulary Off-shore Action Center, a search warrant directing the search and seizure of the dutiable items in the crates. Upon protest of the petitioner, the Secretary of Foreign Affairs requested suspension of the search warrant order. The respondent judge however maintained the effectivity of the warrant on the ground that there were strong reasons to believe that the crates contained dutiable items. In that respect he observed: "The Court is certain that the World Health Organization would not tolerate violations of local laws by its officials and/or representatives under a claim of immunity granted to them by the Host Agreement. Since the right of immunity is admittedly relative and not absolute, and there are strong and positive indications of violation of local laws, the Court declines to suspend the effectivity of the search warrant issued in the case at bar."

At a subsequent hearing, the Office of the Solicitor-General maintained that the petitioner was entitled to diplomatic immunity, that he had not abused his diplomatic immunity and that in any event court proceedings in the receiving or host State were not the proper remedy in the case of abuse of diplomatic immunity. The Solicitor-General referred in that respect to Article VII of the Convention on the Privileges and Immunities of the Specialized Agencies. [4] The respondent judge having denied quashal of the search warrant, the petitioner, joined by WHO, brought before the Supreme Court an action to set aside the respondent judge's decision.

The Supreme Court declared null and void the questioned search warrant. It noted that the executive branch of the Philippine Government had expressly recognized that the petitioner was entitled to diplomatic immunity, a conclusion which had also been reached by the Solicitor General. The Court observed that in accordance with international law and under the Philippine system of separation of powers, diplomatic immunity was essentially a political question and that courts should refuse to look beyond a determination by the executive branch of the government. Where the plea of diplomatic immunity was recognized and affirmed by the executive branch of the government, it was the duty of the courts to accept the claim of immunity. Hence, in adherence to the settled principle that courts may not so exercise their jurisdiction by seizure and detention of properties as to embarrass the executive arm of the government in conducting foreign relations, it was accepted doctrine that in such cases, the judicial department of the government followed the action of the political branch and would not embarrass the latter by assuming an antagonistic jurisdiction.

Even assuming, the Court went on to say, that the respondent judge had some reason to suspect an abuse of diplomatic immunity, he should have acceded to the quashal of the search warrant and forwarded his findings to the Department of Foreign Affairs for it to deal with the matter in accordance with Article VII of the Convention on the Privileges and Immunities of the Specialized Agencies to which the Philippine Government was a party.

[4] *Ibid.*, vol. 33, p. 261. Article VII, Section 24, reads as follows: "If any State party to this Convention considers that there has been an abuse of a privilege or immunity conferred by this Convention, consultations shall be held between that State and the specialized agency concerned to determine whether any such abuse has occurred and, if so, to attempt to ensure that no repetition occurs. If such consultations fail to achieve a result satisfactory to the State and the specialized agency concerned, the question whether an abuse of a privilege or immunity has occurred shall be submitted to the International Court of Justice in accordance with section 32. If the International Court of Justice finds that such an abuse has occurred, the State party to this Convention affected by such abuse shall have the right, after notification to the specialized agency in question, to withhold from the specialized agency concerned the benefits of the privilege or immunity so abused."

Finally, the Court noted with concern the apparent lack of co-ordination between the various departments involved. It referred in that respect to Republic Act 75 of 21 October 1946 which declares null and void writs and processes issued out or prosecuted whereby *inter alia* the person of an ambassador or public minister is arrested or imprisoned or his goods and chattels are seized or attached and makes it a penal offence for "every person by whom the same is obtained or prosecuted, whether as party or as attorney, and every officer concerned in executing it" to obtain such writ or process.

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4. United States of America

UNITED STATES COURT OF APPEALS, DISTRICT OF COLUMBIA CIRCUIT

CHARLES COLES DIGGS ET AL. v. GEORGE P. SHULTZ, SECRETARY OF TREASURY ET AL.: DECISION OF 31 OCTOBER 1972 [5]

Action for declaratory and injunction relief in respect of the importation of metallurgical chromite from Southern Rhodesia—Question whether the personal interest of appellants in the controversy was sufficient to confer standing on them—Power of Congress to set treaty obligations at naught

The plaintiffs—appellants who included, among others, persons unable to return to their homeland of Rhodesia and an author one of whose books was banned from sale in Rhodesia, sought declaratory and injunctive relief in respect of the issuance, by the Office of Foreign Assets Control, of licenses authorizing the importation of metallurgic chromite from Rhodesia notwithstanding Security Council resolution 232 (1966) which directs that all States Members of the United Nations impose an embargo on trade with Southern Rhodesia. The lower Court had dismissed the complaint on the ground firstly that the plaintiffs lacked standing and secondly that the case was not one in respect of which relief could be granted.

On appeal, the judgement of dismissal was confirmed.

The Court of Appeals noted that in compliance with Security Council resolution 232 (1966) the President of the United States had issued Executive Order establishing criminal sanctions for violation of the embargo. In 1971, however, Congress had adopted the so-called Byrd Amendment to the Strategic and Critical National Stock Piling Act, Section 10 of which provided as follows: "Sec. 10. Notwithstanding any other provision of law . . . the President may not prohibit or regulate the importation into the United States of any material determined to be strategic and critical pursuant to the provisions of this Act, if such material is the product of any foreign country or area not listed as a Communist-country or area . . . for so long as the importation into the United States of material of that kind which is the product of such Communist-dominated countries or areas is not prohibited by any provisions of law." The Court observed that since Southern Rhodesia was not a Communist-controlled country, and inasmuch as the United States imported from Communist countries substantial quantities of metallurgical chromite and other materials available from Rhodesia, the Byrd Amendment contemplated the resumption of trade by the United States with Southern Rhodesia.

On the question of standing, the Court observed that the appellants, along with many other persons, had suffered, and continued to suffer, tangible injuries at the hands of Southern

[5] 470 F. 2d 461 (1972).

Rhodesia. In an attempt to terminate the policies giving rise to those wrongs, the United Nations, with the United States as an assenting member, had established the embargo. The precise injury of which appellants complained in this law suit was allegedly illegal present action *by the United States* which tended to limit the effectiveness of the embargo and thereby to deprive appellants of its potential benefits. That quarrel was directly and immediately with the United States Government, and not with Southern Rhodesia.

Appellees suggested that the prospects of significant relief by means of the embargo were so slight that this relationship of intended benefit was too tenuous to support standing. But this, in the view of the Court, was tantamount to saying that because the performance of the United Nations was not always equal to its promise, the commitments of a member might be disregarded without having to respond in court to a charge of treaty violation. It might be that the particular economic sanctions invoked against Southern Rhodesia in this instance would fall short of their goal, and that appellants would ultimately reap no benefit from them. But, the Court observed, to persons situated as were appellants, United Nations action constituted the only hope; and they were personally aggrieved and injured by the dereliction of any Member State which weakened the capacity of the world organization to make its policies meaningful.

Of course it was true that appellants' plight stemmed initially from acts done by Southern Rhodesia, and that their primary quarrel was with it. But this did not foreclose the existence of a judicially cognizable dispute between appellants, on the one hand, and appellees, on the other, who were said to be acting in derogation of the solemn treaty obligation of the United States to adhere to the embargo for so long as it was in being. [6]

On the question of non-justiciability of the case, the Court observed that appellants sought to show that, in the Byrd Amendment, Congress did not really intend to compel the Executive to end United States observance of the Security Council's sanctions, and that, therefore, it was the Executive which was, without the essential shield of Congressional dispensation, violating a treaty engagement of the United States. Appellants pointed out in this regard that the Byrd Amendment did not in terms require importation from Southern Rhodesia, but left open two alternative courses of action. The Statute said the President might not ban importation from Rhodesia of materials classified as critical and strategic unless importation from Communist countries was also prohibited. Instead of permitting resumption of trade with Rhodesia, the President, so it was argued, could (1) have banned importation of these materials from Communist nations as well as from Rhodesia, or (2) have taken steps to have these materials declassified, thereby taking them in either case out of the scope of the Byrd Amendment.

Citing the canon of construction that a statute should, if possible, be construed in a manner consistent with treaty obligations, appellants argued that the Byrd Amendment, although discretionary on its face, should be construed to compel the President to take one or the other of these two steps as a means of escape from the necessity of breaching the United Nations Charter. But these alternatives raised questions of foreign policy and national defense as sensitive as those involved in the decision to honor or abrogate the United treaty obligations. To attempt to decide whether the President chose properly among the three alternatives confronting him "would be, not to decide a judicial contro-

[6] The passage of the Byrd Amendment was the subject of widespread notice and comment within the United Nations, resulting in the reaffirmation by the Security Council on 8 February 1972 of the sanctions against Southern Rhodesia. The resolution to this end declared that any legislation passed by any Member State "with a view to permitting, directly or indirectly, the importation from Southern Rhodesia of any commodity falling within the scope of the obligations imposed (by the 1968 resolution), including chrome ore, would undermine sanctions and would be contrary to the obligations of States".

versy, but to assume a position of authority over the governmental acts of another and coequal department, an authority which plainly we do not possess".

In the view of the Court, the purpose and effect of the Byrd Amendment was to detach the United States from the United Nations boycott of Southern Rhodesia in blatant disregard of the United States' treaty undertaking. The so-called options given to the President were, in reality, no option at all. In any event, they were in neither case alternatives which were appropriately to be forced upon him by a Court.

The Court recalled that under the constitutional scheme of the United States, Congress could denounce treaties if it saw fit to do so. The Court considered that this was precisely what Congress had done in this case and that the lower Court was therefore correct to the extent that it found the complaint to state no tenable claim in law.
