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**International organizations—Privileges and immunities—Head of international organization—Whether entitled to privileges of diplomatic agent—Whether privileges limited by provisions of Headquarters Agreement between organization and host State — Vienna Convention on Diplomatic Relations, 1961 — Headquarters Agreement between the European Molecular Biology Laboratory and the Federal Republic of Germany, 1974**

EUROPEAN MOLECULAR BIOLOGY LABORATORY ARBITRATION

*Arbitration Tribunal.* 29 June 1990

(Mosler, *Chairman*; Schweitzer and Wildhaber, *Arbitrators*)

**SUMMARY:** *The facts:*—The European Molecular Biology Laboratory (“EMBL”) was established by Agreement on 10 May 1973 (“the Establishing Agreement”). On 10 March 1974 a Headquarters Agreement between the Federal Republic of Germany (“the Federal Republic”) and EMBL was concluded, providing for immunities and privileges of the Laboratory (“the Headquarters Agreement”). Articles 7 and 8 of the Headquarters Agreement provided for the exemption of EMBL from the payment of certain taxes and customs duties with respect to its official activities. Article 9 of the Headquarters Agreement defined official activities as those undertaken in

pursuance of the purposes of EMBL as set out in the Establishing Agreement. The exemptions were limited by Article 10 of the Headquarters Agreement, which declared them inapplicable to goods purchased or imported for the personal benefit of the Director-General and staff of EMBL. By Article 19 of the Headquarters Agreement, the Director-General was vested with the immunities and privileges of a diplomatic agent as defined in the Vienna Convention on Diplomatic Relations, 1961.

Differences arose between the Federal Republic and EMBL with respect to the interpretation of the Headquarters Agreement, particularly with regard to the scope of exemptions which EMBL enjoyed. The Federal Republic required EMBL to pay taxes and duties on income and goods which EMBL claimed were related to official activities including, *inter alia*, the income generated from the operation of a canteen and guest-house used by staff and scientists visiting EMBL and the maintenance of the residence of the Director-General of EMBL. In addition, EMBL was obliged to deal with a multiplicity of different Federal and local government institutions in relation to its tax burden, each having its own interpretation of the scope of exemptions under the Headquarters Agreement. Another subject of dispute concerned the status and immunities of the Director-General.

In 1977 the Federal Ministry for Research and Technology (“BMFT”) sent a letter (“the 1977 Letter”) to EMBL stating simply that the Federal Government regarded the Director-General as enjoying the privileges and immunities enjoyed by diplomatic agents under the Vienna Convention on Diplomatic Relations. However, in 1982 the Federal Foreign Ministry informed EMBL that it considered that goods purchased or imported for the Director-General’s personal benefit were not exempt from import duty and value added tax.

In 1987 negotiations begun on the interpretation of the Headquarters Agreement resulted in a Settlement which established guidelines on the interpretation of the Headquarters Agreement. Section B2 of the Settlement provided “that in the case of a difference on the interpretation of these agreements all competent government authorities of the Federal Republic of Germany are requested to contact the BMFT to solve the question between the EMBL and the Federal Government”, but simply reiterated the statement of purposes and responsibilities of EMBL in the Establishing Agreement. The Settlement did not end the differences between the parties and, in December 1987, BMFT informed the Director-General of EMBL that no consensus had been reached among the various Federal organs which would satisfy the demands of EMBL. As a result, the Director-General wrote on 25 January 1988 to the Federal Ministry of Foreign Affairs and BMFT informing them that, in accordance with Article 37(1) of the Headquarters Agreement, he intended to submit the questions relating to the interpretation of the Headquarters Agreement to an Arbitration Tribunal.<sup>1</sup> The Tribunal was constituted in January 1989. The Arbitration Tribunal proposed, and the parties agreed, that it should take a binding decision on the fundamental legal questions. The parties agreed that, following the award of the Tribunal, a working group would be established to consider the practical application of the award. In the event of failure to resolve the practical issues, further recourse could be had by either party to the Arbitration Tribunal.

<sup>1</sup> For the full text of Article 37(1), see p. 11.

At an early stage in the proceeding, the question of the relationship between the parties under international law was raised. EMBL asserted that there was legal equality between the two parties to the treaty. EMBL submitted that the Headquarters Agreement was to be interpreted in accordance with public international law, a central principle of which was the rule of effective interpretation which, in the present case, meant the facilitation of the best possible discharge of its functions by EMBL. It was therefore inadmissible, EMBL maintained, to apply a restrictive interpretation tending to limit the immunities and privileges of the Laboratory. EMBL submitted that there were rules of customary international law regulating the legal status of international organizations and their personnel. The Federal Republic contended that there were few, if any, rules of customary international law in this sphere by reason of the variety of the nature and tasks of international organizations which had precluded the establishment of a fixed set of rules; the status of international organizations had to be determined by reference to their own establishing and headquarters agreements. The Federal Republic submitted that international organizations were subject to the law of the host State in so far as was permitted by the relevant treaties and referred to Article 3(3) of the Headquarters Agreement which provided for "the activities of the Laboratory in the Federal Republic of Germany being subjected to German law, insofar as nothing to the contrary was determined in the Establishing Agreement or the Headquarters Agreement". In addition, the Federal Republic noted that, in respect of non-sovereign acts, foreign States' activities in its territory were subject to the jurisdiction of the German courts, and thus subjects of international law—States and international organizations—on one level enjoyed equality with the host State and, on another level, were subordinate to the territorial jurisdiction. The Federal Republic agreed that the Headquarters Agreement was to be interpreted in accordance with principles of public international law.

Before the Tribunal EMBL argued that the Federal Government had not fulfilled its obligation, under the Headquarters Agreement and the Settlement, to inform relevant national organs of the privileges and immunities accorded to EMBL under the Headquarters Agreement and had not fulfilled its duty to urge such organs to consult BMFT in the event of disagreement with EMBL on the interpretation of the Headquarters Agreement. EMBL argued that it had been prevented from enjoying the privileges to which it was entitled by the absence of a single Federal Government organ, the BMFT, overseeing the consistent application of the treaty and making determinations on questions of interpretation binding on all Federal and local government organs. EMBL asserted that the Federal Republic could not rely on its internal division of responsibilities for its failure to apply the provisions of the Settlement and claimed that the Federal Republic had not sufficiently respected its international legal status. The Federal Republic contended that it had fulfilled its obligations as a host State and asserted that, under public international law, a host State could choose the manner in which it fulfilled its treaty obligations. The Federal Republic noted that the Headquarters Agreement had been given immediate effect in domestic law and was thus binding on all Federal and local government organs. The Settlement, the Federal Republic argued, merely required it to inform Federal and local government organs of

the legal basis for their dealings with EMBL and to urge such organs to consult BMFT when differences in interpretation arose.

With regard to the operation of a guest-house and canteen, as well as the maintenance of the official residence of the Director-General, EMBL claimed that these were official activities and, accordingly, income from these activities was exempt from German taxes and duties. EMBL submitted that the interpretation of the term “official activities” under Article 9 of the Headquarters Agreement was to be found in Article II of the Establishing Agreement which expressly referred to working accommodation and research facilities for visiting scientists and also permitted EMBL to operate facilities “necessary” for its purposes. EMBL maintained that the canteen, a guest-house and other facilities were inseparably linked to EMBL’s functions in that they catered for staff and visiting scientists. EMBL claimed that the rental and maintenance of the Director-General’s official residence were official activities, the residence being used, *inter alia*, for the purposes of representation. EMBL maintained that its interpretation of official activities was supported by State practice and also asserted that there was a prohibition under international law upon host States gaining financial advantage, e.g. by levying taxes, from the presence of international organizations in their territories. The Federal Republic denied the existence of such a legal rule. With respect to the scope of official activities, the Federal Republic claimed that these had to be determined by reference to the Headquarters Agreement and the Establishing Agreement. The Federal Republic submitted that “official activities” were limited to functions of a scientific nature and did not extend to the supply of facilities such as a canteen and guest-house because, notwithstanding the benefit to staff and guests of EMBL of such facilities, these did not come within the functions with which EMBL was charged under its constitutive Agreements. The determining factor was whether the absence of a particular facility would prevent or impair the achievement of the goals of EMBL. Furthermore, the Federal Republic contended, no conclusion could be drawn from the Settlement which merely reiterated Article II of the Establishing Agreement. With regard to alleged State practice, the Federal Republic submitted that there were no uniform rules and what little State practice as might exist tended to confirm that supply facilities were not generally regarded as “official activities” and privileges granted in this respect were granted voluntarily by individual States who were not under any legal obligation to do so. The scope of privileges and exemptions conferred on international organizations was determined by treaty and not by customary international law and EMBL’s privileges were derived from the Headquarters Agreement. In addition, the Federal Republic argued that Article 7 of the Headquarters Agreement was not a general exemption from taxation and customs duties, but a restricted, conditional exemption which did not extend to commercial activities. It submitted that the operation of facilities such as a canteen was a commercial activity.

On the question of the Director-General’s status, EMBL denied that the privileges conferred by Article 19 were restricted by Article 10 of the Headquarters Agreement and claimed that Article 10 merely regulated the legal status of the Laboratory and did not govern the rights of members of staff. The 1977 Letter was, EMBL claimed, a legally binding agreement on the

interpretation of the Headquarters Agreement within the meaning of Article 31(3)(a) of the Vienna Convention on the Law of Treaties, 1969 and the Vienna Convention on the Law of Treaties between States and International Organizations, 1986.<sup>2</sup> EMBL maintained that the Federal Republic was estopped under general principles of international law from taking a different position from that stated in the 1977 Letter, and also claimed that State practice confirmed that heads of international organizations were generally granted in full the privileges of a diplomatic agent under the Vienna Convention on Diplomatic Relations. The Federal Republic, while recognizing the applicability of the privileges enjoyed by diplomatic agents to the Director-General, maintained that these were limited by Article 10 of the Headquarters Agreement. The Federal Republic contended that Article 10 prevailed over Article 19 and asserted that there was no general principle to be derived from State practice with respect to heads of international organizations. Having regard to practice in Germany, the heads of other international organizations were not exempted from taxes and duties on goods for their personal benefit and, the Federal Republic maintained, Article 10 was to be construed as having a similar effect *vis-à-vis* EMBL. The 1977 Letter, it was submitted, was simply a unilateral communication which was not legally binding.

With respect to the procedure for effecting the exemptions, especially tax remittance and reimbursement, EMBL claimed that these had to be determined by negotiation between EMBL and the Federal Republic. EMBL claimed that the Federal Republic had breached an obligation to negotiate under the Headquarters Agreement by treating the matter as one exclusively within its own competence. EMBL submitted that there had been a fundamental misunderstanding by the Federal Republic of the functions of an international organization when it had urged EMBL voluntarily to accept standard tax procedures and claimed that the Federal Republic should have relied on EMBL's internal procedures to ensure that the immunities under the Headquarters Agreement were not abused. The Federal Republic contended that, under Article 7 of the Headquarters Agreement, it was for the host State to determine the measures for tax exemption and noted that the same procedure was applied to all international organizations in its territory.

Finally, with regard to costs, EMBL claimed that the Federal Republic should bear the costs of the arbitration proceedings because it was the behaviour of the Federal Republic and the disparity of the factual positions of the parties which had, despite their legal equality, compelled EMBL to institute legal proceedings. The Federal Government claimed that the costs should be borne equally by both parties as provided under public international law; each party bearing their own costs and half the costs of the Arbitration Tribunal.

*Held:*—(1) On the level of public international law, EMBL and the Federal Republic were in a position of equality. The substantive legal status of EMBL

<sup>2</sup> Neither of the two Vienna Conventions applied directly because the 1969 Convention only applied as between States and the 1986 Convention was not yet in force. They were, however, regarded as evidencing customary international law. Article 31(3)(a) provided that, in the interpretation of a treaty, "any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions" shall be taken into account.

was derived from the Establishing Agreement and the Headquarters Agreement and there was no need for the Tribunal to refer to additional rules of customary international law relating to privileges and immunities of international organizations. The Headquarters Agreement and the Establishing Agreement were to be interpreted in accordance with international law (pp. 19-22).

(2) (a) Having regard to Article 31(1) of the Vienna Conventions on the Law of Treaties 1969 and 1986, the Establishing Agreement and the Headquarters Agreement were to be interpreted in accordance with their ordinary meaning and in the light of their object and purpose. The Settlement of 1987 was a legally binding agreement, being a subsequent agreement regarding the interpretation of the Headquarters Agreement within the meaning of Article 31(3)(a) of the two Vienna Conventions on the Law of Treaties. The Federal Republic was under an obligation to respect the special nature of the international status of EMBL and sufficiently to inform the competent authorities of the privileges and immunities of EMBL. The manner in which the Government fulfilled its treaty obligations was its own affair, but it could not claim to have discharged its responsibilities by simply pointing to its internal division of responsibilities. A party to a treaty could not invoke its internal law to justify non-fulfilment of that treaty.<sup>3</sup> Although it was practical for EMBL to deal with individual Federal and local government organs with respect to certain issues, this did not remove the Federal Republic's obligation to inform (pp. 22-6).

(b) The Federal Republic was also under an obligation to nominate a single organ competent to speak on behalf of all Federal and local government organs and capable of issuing interpretations of the Headquarters Agreement binding on all such organs. Section B2 of the Settlement did not specifically provide that BMFT's recommendations or decisions were to be binding on all Federal and local government organs and matters of internal competences lay within the jurisdiction of the Federal Government. However, there was a need for a single authority with which EMBL could negotiate and which spoke on behalf of all other German institutions. Under the Settlement, Section B of which was legally binding, the BMFT had been designated as that competent organ and should perform those functions accordingly. The Federal Republic could not, under international law, rely on its internal system of competences as a reason for failing to fulfil its obligations under the Settlement (pp. 26-30).

(c) The request for a declaration by the Arbitration Tribunal that the Federal Republic should sufficiently respect the international status of EMBL in the application of the Headquarters Agreement was refused. Such a declaration would not serve to bring a resolution of the legal dispute between the parties closer (pp. 30-1).

(3) (a) The scope of official activities was to be determined by reference to the Headquarters Agreement and the Establishing Agreement. Official activities were those activities undertaken in furtherance of the purposes of EMBL as defined in the Establishing Agreement. The purposes of EMBL included research, the provision of working accommodation and research facilities for visiting scientists and teaching. By Article II(3)(i) of the Establishing Agreement, EMBL could establish and operate the facilities

<sup>3</sup> Article 27 of the Vienna Conventions on the Law of Treaties, 1969 and 1986.

necessary for its programmes, but the operation of a canteen and guest-house were not expressly considered. State practice in respect of the application of domestic revenue laws to international organizations did not clarify the position, because this was generally determined by reference to the establishing and headquarters agreements of the relevant organization. Nor could the matter be determined by looking to Section B of the Settlement which merely reiterated the provisions of Article II of the Establishing Agreement. Section C of the Settlement, which referred specifically to these matters, was not legally binding as between the parties and could not, therefore, be regarded as resolving the issue (pp. 42-3).

(b) Activities of a specifically scientific nature, for example the conduct of seminars, were clearly official activities, as were the meals and accommodation placed at the disposal of those participating in those activities. However, where the supply of meals and accommodation was paid for, whether by staff or guests, this was not an official activity because the Establishing Agreement did not include the sale of goods and services as a function of EMBL, nor did EMBL have a function of making a profit. Article 7(2) of the Headquarters Agreement was restrictive in so far as it provided for "strictly necessary" facilities. The provision of a canteen and guest-house, although useful, was not strictly necessary. German revenue laws applied to all goods and services which were not regulated by the Headquarters Agreement. The renting and maintenance of the official residence of the Director-General was exempted from the application of revenue laws to the extent that the accommodation was used for official purposes and the facilities were put at the disposal of the Director-General free of charge. Where used for non-official purposes, German tax laws applied (pp. 43-7).

(c) The submission by EMBL that the Federal Republic, as the host State, was not permitted to derive financial advantage from the activities of the organization was irrelevant. It had not been established that such a legal principle existed and, even if it did, it would not apply in the present case, because, where EMBL was bound to pay tax and duties, it benefited from deductions reducing the financial burden placed on it and the States party to the Establishing Agreement (pp. 47-8).

(4) The 1977 Letter was conclusive regarding the exemptions enjoyed by the Director-General and any revenue collected after the 1977 Letter and contrary to the statements therein had to be reimbursed. The criterion to be applied, in accordance with the jurisprudence of the Permanent Court of International Justice and the International Court of Justice, was whether the 1977 Letter was a response to a request for clarification emanating from a State representative on a matter falling within the competence of that representative and terminating the dispute between the parties, leading to an agreement, or whether the 1977 Letter was an intermediate link in the course of a dispute which continued. The 1977 Letter was a reply to EMBL's request for clarification in which the Federal Republic confirmed that the Director-General's status under Article 19 was not restricted by Article 10. It was not, therefore, a unilateral declaration but a subsequent agreement regarding interpretation of the Headquarters Agreement within the meaning of Article 31(3)(a) of the Vienna Conventions on the Law of Treaties, 1969 and 1986. EMBL was justified in regarding the 1977 Letter as ending the dispute between

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Excerpt

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the parties and the Director-General's exemptions under Article 36(1)(b) of the Vienna Convention on Diplomatic Relations were not restricted. This conclusion was supported by the fact that the 1977 Letter emanated from BMFT, the department most competent to deal with EMBL and, following the Settlement, established as the contact agency for negotiations with EMBL. In contrast, the letter of 1982 was sent by the Federal Foreign Ministry. Reference by EMBL to State practice with respect to heads of international organizations only tended to support its arguments, but was insufficient to determine the matter. Customary international law had not developed in this regard because of the diversity of international organizations (pp. 48-56).

(5) By Article 7(2) of the Headquarters Agreement, the Federal Republic was free to choose the tax exemption procedure to be followed, subject to the provisions of the Headquarters Agreement. A procedure which prevented EMBL from fulfilling its obligations properly and efficiently would be incompatible with the Headquarters Agreement. Thus, the Federal Republic was not under an obligation to choose a procedure particularly favourable to EMBL, merely one that was not incompatible with the Headquarters Agreement. Nor, if the Government sought to change to another system, would it necessarily be under an obligation to enter into negotiations with EMBL on this matter (pp. 57-62).

(6) With respect to the costs of the Arbitration Tribunal, it was appropriate to proceed from the principle of equal sharing of costs, normally applied in international arbitration proceedings and which followed the model of Article 85 of the Hague Convention for the Peaceful Settlement of International Disputes, 1907. The difference in factual positions of the parties was not relevant to the determination of costs. However, the Federal Republic did have to bear responsibility for the long duration of the dispute. The behaviour of the Federal Republic had been inconsistent and the Federal Republic was required to meet three-fifths of the costs of the Tribunal. With respect to the parties' own costs, normal international practice was that each party should bear its own costs<sup>4</sup> (pp. 63-7).

The following is the text of the Award delivered by the Arbitration Tribunal:

*Arbitration Award*

A. FACTS AND PROCEEDINGS

I

1. The European Molecular Biology Laboratory (herein referred to as the "EMBL") has been established by the "Agreement establishing the European Molecular Biology Laboratory" of 10 May 1973 (*BGBI/ Official Journal of the Federal Republic of Germany* 1973 II 1005) (herein

<sup>4</sup> For example, see Article 64 of the Statute and Article 97 of the Rules of the International Court of Justice. See also the Hague Convention for the Peaceful Settlement of International Disputes, 1907.



referred to as the “Establishing Agreement”) in Heidelberg. The Establishing Agreement provides that “the State in which the Laboratory is situated shall conclude with the Laboratory a headquarters agreement (. . .) relating to the status of the Laboratory and such privileges and immunities of the Laboratory and its staff which are necessary for the fulfilment of its objectives and for the exercise of its functions” (Article XI). On this basis the government of the Federal Republic of Germany and the EMBL have concluded the Headquarters Agreement of 10 December 1974 (herein referred to as the “HQA”) (*BGBI* 1975 II 933).

2. The interpretation and application of the HQA has after a short time led to year long differences of opinion and disputes between the EMBL and the Federal Ministries and the authorities competent according to the German system of competences. These differences generally concern the legal status of the EMBL in its relation to the host State, the Federal Republic of Germany, in particular the extent of the exemptions and relief of the EMBL’s activities and its facilities from the German tax laws, the customs duties exemptions, the legal status of the Director-General with its consequences for exemptions from customs duties and taxes and the procedures of tax accounting and control. These disputes mainly concern Articles 7 to 11 paragraphs 1 and 19 HQA. These provisions are attached to this arbitration award as Enclosure I.

3. In the opinion of the EMBL, the differences of opinion with regard to the legal status of the Director-General have been bindingly clarified in accordance with the interpretation of the EMBL by a letter of the Federal Ministry for Research and Technology of 21 September 1977; the Federal Government denies this legal interpretation of the event. The arguments will be referred to in the reasons for the decision.

At the request of the EMBL, in the spring of 1987 negotiations were carried out with the Federal Government, represented by the Federal Ministry for Research and Technology (BMFT), on the subject of the interpretation of the HQA in all the disputes mentioned above (paragraph 2). The parties have reached the following agreement, signed by the representatives of both sides:

*Settlement resulting from the negotiations between the Federal Republic of Germany and the European Molecular Biology Laboratory (EMBL) in Heidelberg on June 1, 1987*

*A. The Parties noted*

1. that the Federal Republic of Germany has appointed the BMFT as the single authority in charge of the interpretation of the Agreement establishing the EMBL and the Headquarters Agreement of December 10, 1974;

2. that the interpretation of the Headquarters Agreement should be guided by the principle that the Laboratory is enabled to fully and efficiently discharge its responsibilities and fulfil its purposes (Art. 33). Therefore the

administrative duties of the EMBL in dealing with the government agencies of the Federal Republic of Germany should be facilitated.

*B. The Parties agreed furthermore*

1. that all competent authorities of the Federal Republic of Germany at the federal, State or local level are to be fully informed about the international privileges and immunities of the EMBL according to the Agreement establishing the EMBL, the Headquarters Agreement and any subsequent agreement or understanding between the Federal Republic of Germany and the Laboratory regarding the interpretation of the Treaty or the application of its provisions;

2. that in case of a difference of opinion on the interpretation of these agreements all competent government authorities of the Federal Republic of Germany are requested to contact the BMFT to solve the question between the EMBL and the Federal Government.

3. the term "official activities" in the meaning of Article 9 in the Headquarters Agreement is to be interpreted as including all purposes and means as defined in Article II of the Agreement establishing the EMBL, including, for instance, the provision of working accommodation and research facilities for visiting scientists and the organization and sponsoring of international co-operation by scientific meetings, conferences and contacts with research institutions and scientists, taking into account the decisions of the EMBL Council under Article VI(3) of this Agreement.

*C. BMFT undertakes*

1. to seek agreement within the Federal Government that according to Article 19 of the Headquarters Agreement the Director-General, provided he is not a German national, in addition to the privileges and immunities granted to staff members of the Laboratory, enjoys as the chief representative of the EMBL all privileges and immunities to which diplomatic agents as defined in Article 1 lit. (e) of the Vienna Convention on Diplomatic Relations are entitled. Therefore Article 10 of the Headquarters Agreement is not to be interpreted as restricting in any way the number of privileges and immunities of the Director-General under Article 19 of the Headquarters Agreement;

2. in light of the particular importance of the guest-house and canteen operations for the pursuance of the purposes of EMBL, in particular carrying out the tasks under Article II, paragraph 2 and paragraph 4 of the Agreement establishing the EMBL, to seek, as quickly as possible, a definite decision of the Federal Government as to what extent these operations are considered official activities in the meaning of Article 9 of the Headquarters Agreement;

3. to seek the simplest solution for reimbursement of taxes on cars and gasoline consumption for official activities of the EMBL;

4. to investigate the possibility of remittance instead of reimbursement of indirect taxes, which would simplify administrative procedures for the EMBL.

The EMBL and the BMFT agree that all still unresolved questions will be discussed in the same spirit of collaboration and mutual respect.

The "Settlement" contains the declaration of the agreement of the parties on part of the points of dispute; with regard to other disputed