8. International Law

1. A case in which the Corporation Tax Act was applied to the income of a foreign corporation obtained from its excavation of mineral resources of the continental shelf along the Japanese coast.

Decision by the Third Civil Division of the Tokyo District Court on Apr. 22, 1982. Demand dismissed. Case No. (*gyo u*) 116 of 1978. 1041 *Hanrei Jihō* 11. 480 *Hanrei Taimuzu* 126.

[Facts]

Plaintiff X (a corporate enterprise of the Republic of Panama), on the basis of its contracts with Japanese companies (not related to the current case), drilled exploratory wells for oil and natural gas at several mining areas on the continental shelf outside the territorial sea but adjacent to the Japanese coast, and received payment for its work from these companies.

With regard to the income from its drilling operations, X was advised to submit a final corporation tax return, but X in a written statement dated Mar. 8, 1974, addressed to the defendant Y (director of the Shiba Taxation Office in Tokyo) insisted that there was no liability to taxation on its part.

On Aug. 24, the same year, Y decided on X's corporate tax for each year from February, 1971, through December 31, 1973 (years involved in the current case) as well as imposing additional tax for X's failure to file such returns.

Against this decision, X put in a demurrer against the director of the Tokyo Taxation Bureau, and then requested the residing judge of the Tax Complaints Tribunal to examine the case. In each case, the contention of X was rejected. X then filed an action demanding cancellation of the decision made by Y.

[Opinions of the Court]

1. With regard to the existence of customary international law concerning continental shelves, "the rules couched in Article 1

through 3 of the Convention on the Continental Shelf, except for the part relating to sedentary living resources, are the basis of the continental shelf system and are recognized as having become customary international law with the adoption of the Convention and subsequent practices, at least when the International Court of Justice passed judgment in the North Sea Continental Shelf Case in February, 1969." "Accordingly, although Japan did not accede to the Convention on the Continental Shelf, it could exercise its sovereign rights to explore its own continental shelf and exploit its own mineral resources as empowered under customary international law during the years involving the current dispute."

2. As for the nature and contents of sovereign rights, "the sovereign rights over the continental shelf shall include all sovereign rights required for or related to the exploration and exploitation of mineral resources of the continental shelf, that is, legislative, administrative and judicial rights."

"Although there are restrictions on the purpose of such sovereign rights, they are one and the same as the territorial sovereignty within the scope of the purpose, being complete in their nature and at once comprehensive and exclusive."

"Accordingly, the sovereign rights over the continental shelf include, as a matter of course, the right of taxation as part of the sovereignty. So long as the sovereign rights over the continental shelf concern the exploration and exploitation of mineral resources of the continental shelf and other related activities, they are an extension of territorial sovereignty and extend territorial jurisdiction over these activities. Accordingly, the income arising from these activities can be taxable as income of a domestic source."

"Moreover, even if such activities were not for exploration and exploitation for their own interests but for providing services on the basis of a contract, the activities as such were included in the scope of the purpose of the sovereign rights as mentioned above as long as such activities are related to the exploration and exploitation of mineral resources of the continental shelf, and as long as such activities are conducted on the continental shelf they are subject to taxation as belonging to the scope of territorial juris-

diction."

3. With regard to the advisability of the application of the Corporate Tax Act, "the area of enforcement of the Corporate Tax Act is the same as the scope to which Japan's territorial jurisdiction is extended and shall be established automatically by the effect of such sovereignty or sovereign rights."

"Since the sovereign rights of the coastal state over the continental shelf have come to be received into customary international law, the continental shelf becomes an area for enforcement of the Corporate Tax Act as a matter of course within the scope of the purpose of the exploration and exploitation of mineral resources, and does not require any special legislative measures to enforce the Corporate Tax Act on the continental shelf."

[Comment]

The current case directly concerns the application and interpretation of the Corporate Tax Act, but as a prerequisite the Court was required to evaluate and probe into the continental shelf system in international law.

X insisted that Japan's right to taxation does not extend to the continental shelf area in question which is outside the territorial sea of Japan. Y refuted that the right to taxation is included, as a matter of fact, in the sovereign rights of the coastal State concerning the exploration and exploitation of mineral resources of the continental shelf.

Japan, however, was not a party to the Convention on the Continental Shelf during the years of the current dispute nor has it acceded to it to date. (Japan has not acceded to the Convention mainly because it included sedentary living resources as well as mineral resources among the list of natural resources.) Hence, the Court cannot but make a judgment on the existence of the sovereign rights and their nature and contents on the basis of the study of customary international law instead of basing it on the articles of the Convention.

As was stated in the opinions of the Court, the Court acknowl-

edged that the rights of the coastal State as provided for in Articles 1, 2 and 3 of the Convention on the Continental Shelf have already been accepted generally as customary international law during the years involving the current dispute and, therefore, the sovereign rights over the continental shelf can be exercised as a power under customary international law.

This judgment of the Court can be termed an adequate conclusion in the light of the insistence of rights by various States on the continental shelves with the Truman Proclamations of 1954 as a starting point, the adoption of the Convention on the Continental Shelf in 1958 and subsequent practices by various States, and the judgment of the ICJ in the North Sea Continental Shelf Case in 1969, etc.

On the ground that reservations to Articles 1 through 3 of the Continental Shelf Convention are not allowed by Article 12, the ICJ judgment concluded that "these three Articles are the ones which, it is clear, were then regarded as reflecting, or as crystalizing, received or at least emergent rules of customary international law relative to the continental shelf."

Supposing that Japan can exercise what are called sovereign rights in the Convention on the Continental Shelf as a power under customary international law (excluding those relating to sedentary resources, according to the Court's ruling), then the nature and contents of such sovereign rights become a problem.

In particular, the need arises to probe whether or not the legislative, administrative and judicial jurisdictions of the coastal State including the right to taxation fall within the scope of sovereign rights. On this point, the ICJ judgment on the North Sea Continental Shelf Case explains as follows:

"The rights of the coastal State in respect of the area of continental shelf that constitutes a natural prolongation of its land territory into and under the sea exist *ipso facto* and *ab initio*, by virtue of its sovereignty over the land, and as an extension of it in an exercise of sovereign rights for the purpose of exploring the seabed and exploiting its natural resources."

It also says that "what confers the *ipso jure* title which inter-

national law attributes to the coastal State in respect of its continental shelf, is the fact that the submarine areas concerned may be deemed to be actually part of the territory over which the coastal State already has dominion."

In other words, this judgment is based on the concept that the rights of the coastal State are an extension of the existing territorial sovereignty and that they are the manifestation of the territorial jurisdiction limited to the scope of the purpose of exploration and exploitation of the continental shelf.

According to this concept, the rights of the coastal State, although restricted by the purpose, are as comprehensive and exclusive as territorial sovereignty. In this context, it is recognized that domestic laws can be established and applied freely in relation to the exploration and exploitation of the continental shelf and if such is necessary.

Accordingly, the right to taxation under dispute in the current case has come to be clearly included in the sovereign rights, when viewed from this stand. As a result, all the activities relative to the exploration and exploitation of the continental shelf including the offer of service based on a contract shall be subjected to taxation, irrespective of the nationality of the developer, whether it be a national of the coastal State or a foreigner. The current judgment of the Court can be termed as totally dependent on such stand.

The next important problem is whether the existing domestic laws (the Corporate Tax Act in this instance) can be enforced and applied *ipso facto* to the continental shelf as the Court says, even if we adopt the doctrine of the natural extension of the land territory supported by the ICJ and many academic theories.

Although the continental shelf can be regarded as part of the territory, the fact that the rights of the coastal State are subject to functional restrictions depending upon the purpose of exploration and exploitation and that the jurisdiction of the coastal State does not cover the waters and the airspace above the continental shelf indicates that the continental shelf is not exactly the same as ordinary territory.

Since the sovereign rights of the continental shelf are limited by

virtue of the purpose and subject to the regulation by virtue of the order of the high seas, the domestic laws to be applied to the continental shelf cannot be unconditional in terms of their kind, scope and degree. On these points, international law is not fully concrete and final, and actual judgment is left in the hands of the coastal States concerned.

It was in this context that the ICJ judgment stated that in order to exercise the sovereign rights of the coastal State, "no special legal process has to be gone through, nor have any special legal acts to be performed." It does not mean that the ICJ thought that the attribution of sovereign rights to the coastal State shall *ipso facto* and immediately have the effect of the domestic law.

Regarding how sovereign rights should be domestically realized and exercised practically and concretely, it must be noted that such major coastal States as West Germany, the United States and the Soviet Union have adopted special domestic legislative measures to cope with the situation.

Hence, there exists an actual necessity for Japan to take some steps. On this score, the Japanese Government takes the stand that actual problems can be dealt with by the application of existing related domestic laws without special legislative measures concerning the exploration and exploitation of the continental shelf, and the argument of the Court seems to have confirmed such government stand. However, we cannot but point out their inadequate manner of recognizing the problems.

2. The jurisdiction over the European Communities in a lawsuit concerning a contract of employment.

Decision by the 19th Civil Division of the Tokyo District Court on May 31, 1982. Application rejected. Case No. (*yo*) 2305 of 1980. 1042 *Hanrei Jihō* 67. 468 *Hanrei Taimuzu* 65.

[Facts]

Plaintiff X who filed an application for a provisional injunction had concluded a contract of employment with defendant Y, the EC

Commission, on Apr. 21, 1980, and was employed as a member of the local staff of Y's delegation in Japan dated back to April 1 the same year.

In the contract there was no mention about the specific period of employment except that the trial period was set at three months. In a letter sent to X dated June 20, Y informed her that the contract of employment would be terminated with June 30 as the final effective working day upon termination of the trial period.

Thereupon, on the ground that she was employed without any set period and that there was no specific reason why she should be discharged, X maintained that the indication of Y's intention to terminate the employment contract was unjust and unlawful. She then filed an application for a provisional injunction against Y seeking a guarantee of her status and suspended payment of wages.

[Opinions of the Court]

1. Y insisted that on the ground that it enjoys immunity from the execution of the judgement, the trial on a provisional injunction was meaningless for lack of power of execution and that the application of X was short of the interest necessary for filing an action (the standing to sue).

Concerning Y's insistence, the Court ruled as follows:

"As the defendant has insisted, there is no dispute between the parties concerned about the fact that Y enjoys privileges and immunities, but the procedure for making a decision and that for execution can be considered independently of each other. Even if there is a possibility that the execution of a decision may be rejected, it cannot be concluded that there is no standing to sue in the procedure for making a decision."

"Moreover, as it is evident to this Court that the defendant has waived its immunity from the jurisdiction of the Court, it stands to reason to affirm that there is the standing to sue in the current case."

2. Y insisted that the Rules of Employment in the current case should be applied exclusively without the application of Japanese

laws to the relationship of employment between a member of the local staff and the EC Delegation in Japan.

The Court, however, took cognizance of the following four points:

(1) Article 79 of the Conditions of Employment of Other Servants of the EC provided for in Article 3 of the EC Council Regulation No. 259/68 dated Feb. 29, 1968, provides that "Subject to the provisions of this Title, the conditions of employment of local staff, in particular: (a) the manner of their engagement and termination of their contract; (b) their leaves; and (c) their remuneration shall be determined by each institution in accordance with current rules and practice in the place where they are to perform their duties." Article 81 of the same also provides that "Any dispute between the institution and a member of the local staff shall be submitted to the competent court in accordance with the laws in force in the place where the servant performs his duties."

(2) In the preamble of the Rules of Employment in the current case, it is expressly stated that the Rules of Employment in question were worked out in accordance with Article 79 of the Conditions of Employment of Other Servants of the EC.

(3) Article 3 of the employment contract in the current case admits that rules concerning the employment conditions of local staff employed in Tokyo, drawn by the EC Commission in accordance with the EC Council Regulation and Articles 79 through 81 of the Conditions of Employment, shall be applied to the contract in the current case.

(4) Although it concerned a case within the EC, there was a judicial precedent by the EC court to the effect that "current rules and practice" in Article 79 of the Conditions of Employment shall include laws in the place where they are to perform their duties.

The Court then stated: "The Rules of Employment in the current case should be decided in accordance with existing rules and practice in Japan where the duties are to be performed, as provided for in the EC Council Regulation. If the Rules of Employment that have to be worked out in the manner above should conflict with the laws and judicial precedents in Japan, the rules shall not have

effect as long as they are in conflict, in the light that the Council Regulations are the norm taking precedence, and therefore the laws of Japan shall be applied."

3. With regard to X's discharge, the Court held as follows:

"That the defendant refused to grant the plaintiff regular employment because she lacked the compentency necessary for a member of the staff of the EC Delegation in Japan can be admitted as being reasonable from socially accepted views, since there is rational reason in the light of the intent and purposes of the reservation of the right to discharge in connection with the trial employment period."

[Comment]

Besides the current case, there was only one other case in which an international organization was sued at court. This was the United Nations University case involving an application for a provisional injunction in connection with the discharge of a locally-employed staff member as in the current case. (Decision by the Tokyo District Court on Sept. 21, 1977. Case No. (*yo*) 2441 of 1976. 884 *Hanrei Jihō* 77.)

In this case, the Court dismissed the application of the plaintiff. Upon affirming that the United Nations University has a juridical personality separate from the United Nations in terms of domestic laws, the Court held that the University enjoys immunity from legal process on the basis of the Convention on the Privileges and Immunities of the United Nations.

In the current EC case, the Court has not made any study of the question concerning the capacity of the EC Commission to be a party as the defendant, but it does not mean that the Court has made judgment taking it for granted that the Commission has a separate juridical personality independent of the European Communities. Rather, interpreting that such a legal capacity to be a party belongs to the EC itself as an international organization, the Court did not venture to make an issue of the consideration that the Commission was a defendant as a matter of convenience, because the other party with whom X had concluded an employment con-

tract happened to be the Commission as a matter of form.

In the EC, it is interpreted that the only one that has a juridical personality is the EC itself in terms of international law and the domestic laws of each of the member States, and that the Commission is merely representing the EC in each of the member States. (For instance, see EEC Treaty, Articles 210 and 211.)

Although Japan is not a member State, "Accord entre le Gouvernement du Japon et la Commission des Communautés européennes sur l'établissment ainsi que les privilèges et immunités de la Délégation de la Commission des Communautés européennes" (signed on Mar. 11, 1974 and entered into force on May 31, 1974) also adopts a similar way of thinking, and its Article 2 stipulates that the EC itself has the juridical personality and the Commission merely represents the EC in Japan.

Accordingly, it can be judged that in Japan it is the EC itself that has the capacity for being a party in the legal suit, not the Commission.

In the current case, defendant EC Commission Y contested the suit willingly by waiving its immunity from the jurisdiction of the court on the basis of the Rules of Employment of the EC Delegation in Japan Article 31 providing that "any dispute between the institution and a member of the local staff shall be submitted to the competent court under Japanese laws."

There is no objection to the conclusion reached by the Court that the immunity from jurisdiction is, in international law, regarded as independent of the immunity from the execution of the judgment and that even if the immunity from execution is not waived the standing to sue in the decision-making process can be admitted.

Some passages are, however, problematical, in that Y relied on Articles 31 and 32 of the Vienna Convention on Diplomatic Relations as the basis of its contention, calling for immunity from jurisdiction and execution, and that the Court also stated to the effect that "just as Y contends it enjoys privileges and immunities."

Y relied on the Vienna Convention because Article 3 of l'-Accord sur l'établissement de la Délégation stipulates that "La

Délégation de la Commission et son chef et ses membres ainsi que les membres de leurs familles qui font partie de leurs ménages respectifs jouissent, sur le territoire du Japon, des privilèges et immunités correspondant à ceux qui sont réservés, conformément aux dispositions de la Convention de Vienne sur les relations diplomatiques."

According to this provision, it is evident that the members of the EC Delegation in Japan enjoy immunities from jurisdiction and execution, but there is nothing expressly stated about the immunity of the Delegation or the EC itself that the Delegation represents, because the Vienna Convention provided for the privileges and immunities of the members of the diplomatic mission but failed to mention about the immunity of the mission itself from jurisdiction.

In this connection, it should be considered improper that the immunity of the EC Delegation in Japan from jurisdiction and execution was based on the Japan-EC Commission agreement on the establishment of a delegation and the Vienna Convention.

At this stage, it is rather difficult to find established practice and rules generally agreed upon in international law concerning immunities of international organizations. In the current case, as it was evident that defendant Y had waived its immunity from the jurisdiction of the court, the Court did not necessarily have to express its opinion in general concerning the question of immunities of international organizations from jurisdiction.

In the light that the Court deployed its opinion with Y's waiver of immunity as a starting point, however, it can be presumed that the Court has taken as a prerequisite the stand of the doctrine of absolute immunity, that is, without waiver the action concerning the employment contract of a local staff member becomes the subject of immunity.

The presumption as above has also been strengthened by the fact that the Japanese Government recognizes the EC as having a status similar to a state, as is shown, for instance, that the members of the Delegation in Japan, unlike those of universal international organizations such as the United Nations and its specialized agencies,

enjoy privileges and immunities in accordance with the Vienna Convention, and that Japan's judicial precedents concerning sovereign immunity of foreign states have so far adhered to the doctrine of absolute immunity.

On the other hand, if the stand based on the doctrine of restrictive immunity — in which immunity is allowed depending upon the nature of the act — is taken, the current suit concerning the employment contract can be considered a case in which jurisdiction cannot be exempted from even if there were no waiver of immunity.

With regard to the applicable law concerning the employment contract in the current case, there is no problem about the conclusion itself reached by the Court, as it recognized the application of Japan's labor laws in accordance with the intention of the parties concerned, as are found in the EC Council Regulation, Rules of Employment, and the employment contract.

It is not necessarily clear, however, whether the court has taken the stand that the employment relations between an international organization and its local staff are regulated solely by the internal law of the organization concerned or has taken the stand that if the said internal law is in conflict with Japanese laws (labor law as a compulsory law), the Japanese laws can be applicable generally up to the part in conflict. Whichever stand has been taken, the current case was one in which Japanese laws can be applied.

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