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Immunity of Foreign States in Brazilian Labor Courts

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IMMUNITY OF FOREIGN STATES IN BRAZILIAN LABOR COURTS

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The expansion of the activities of the State and its intervention in a wide variety of interests, not only within its own territory but also abroad, complicates the legal issues connected with the immunity of a foreign State from local jurisdiction. Because the rule *par in parem non habet judicium* was difficult to apply where it was in conflict with the interests of the forum, a solution was sought by establishing a distinction between acts *jure gestionis* and acts *jure imperii*. Only with respect to the latter was immunity recognized. However, the distinction proved to be largely ineffectual because it made the immunity dependent upon judicial interpretation which in many instances deprived the foreign State of the guarantees that the principle of immunity aims to insure.

Nevertheless, the primacy of international law over local law has been legally established by custom in certain regions and by numerous international instruments, among them the Declaration of Bogotá (Charter of the Organization of American States, Art. 5), approved in Brazil by Legislative Decree No. 64 and published in the Official Gazette of December 8, 1949. As the immunity of foreign States is one of the basic principles of international law, it cannot be altered by local regulation, law, or even by the Constitution, because the hierarchy of laws in certain areas, does not permit the State to infringe upon, or to alter at will a principle indispensable to international coexistence.

With certain reservations, this has been the interpretation of the law by the Brazilian courts, and the subject gained particular interest when brought before the Brazilian Labor Courts. On May 9, 1967, Appeal No. 4950/65 (Rehearing), the Superior Labor Court, basing its decision on the report of Judge Arnaldo Sussekind, declared the proceeding null *ab initio*. There, the *exceção de incompetência* or allegation of lack of jurisdiction of the Brazilian courts was presented, and a ruling in favor of the defendant — the United States Information Service (USIS) — resulted.

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It is interesting to note that the decision of the Superior Labor Court, the highest in labor matters, was given in spite of the constitutional provision (Article 101 II, b of the Brazilian Constitution of 1946) which confers jurisdiction on the Federal Supreme Court to judge, on ordinary appeal, cases "in which the parties are a foreign State and a person domiciled in Brazil."

The appellate jurisdiction of the Federal Supreme Court under the Constitution, does not per se confer international jurisdiction upon the Court under Brazilian law. In a case frequently quoted concerning the *Mission Economique Belge,* the Federal Supreme Court decided only the question of appellate jurisdiction, without affirming the question of international jurisdiction. And, in Extraordinary Appeal No. 48,256, the Supreme Court asserted its appellate jurisdiction by declaring admissible the exception of incompetence of the Brazilian courts, when presented by a foreign nation. Appellate jurisdiction is an internal matter, independent of international jurisdiction.

In the case of Mario Pinto Fula v. the Institute of Inter-American Affairs, Judge Celso Lanna, presiding at the Regional Labor Court of the 1st Region, ruled that the labor relationship between an employee of a foreign mission, or of an office or agency thereof and the mission, office or agency, was outside the territoriality of Brazilian labor legislation:

> The territoriality of public laws is not always applicable to all persons within the territorial area.

In fact, the territoriality of the labor legislation is not absolute. This is set forth in the Consolidation of the Labor Laws where the jurisdiction of the Labor Courts is broadened to cover "disputes arising in agencies or branch offices abroad, provided the employee is a Brazilian and there is no international convention to the contrary." (Art. 651, §2). In such cases, the principle of nationality supersedes that of territoriality, with a reservation in favor of international law. The law does not expressly cover the reverse situation, i.e., disputes which arise in Brazil and which, because of their nature, pertain to other fields such as international law and are, therefore outside of Brazilian jurisdiction. In these instances, it is obvious that Brazil cannot impose the provisions of its labor laws on foreign governments requiring, for instance, that labor nationality requirements be complied with in the respective Embassies.

In the Pinto Fula case mentioned above, one of the parties was a legal person under foreign public law, and therefore not within the definition of an *employer* as set forth in Article 2 of the Consolidation

of Brazilian Labor Laws. This would automatically render the Labor Court incompetent, *ratione personae*, to judge disputes arising from this relationship. Moreover, the other party — the alleged employee — was actually a public servant of a foreign government and thus subject to the laws and regulations of the foreign country. In this case extraterritoriality applied by virtue of an international rule, and accordingly, the legal relationship itself was outside local labor jurisdiction by reason of incompetence, *ratione materiae*.

There are other cases worthy of mention such as Process No. 1435/54 in which the defendant was the United States Army Section. The Regional Labor Court of the 1st Region held:

> Diplomatic missions. Complaint. Incompetence of the Labor Court. Immunity from jurisdiction. Diplomatic missions and their agencies constitute a part of the territory of the country they represent and, as such, enjoy the privilege of immunity from local jurisdiction. The United States Army Section is a part of the diplomatic representation of the Government of the United States of America, and, as such, the Labor Law is incompetent to recognize any complaint against it. (Trabalho e Seguro Social, Jan/Feb 1955, p. 99/100).

Also in point was the decision of the Regional Labor Court of the 1st Region in Ordinary Appeal No. 1,046/56, in which the reporting Judge was Pires Chaves and the defendant Aerolíneas Argentinas (*Diário da Justica* of March 21, 1956).

> From the point of view of international law, the interest in question is the interest of the foreign State, a legal person under foreign public law . . . The appellee, it should be emphasized, is a part of that State's sovereignty . . . The relationship being debated now concerns the appellant, a public employee at the service of the appellee, and the foreign nation.

The same Regional Court, in Ordinary Appeal No. TRT 2, 374-62, in which the appellant was Jorge Roliano Marcos and the appellee the Cuban Embassy (Official Gazette, Part III, June 26, 1964, supl., p. 287), ruled:

> A complaint against a foreign Embassy shall not be recognized.

The same was true in the decision of the above Court in Process No. TRT 2,442/64, in which the appellee was the Embassy of China.

Moreover, in Process No. TST-RR-1, 326/65, in which the appellant was Severino Silvano de Barros and the appellee the Embassy of China

(Official Gazette, Part III, Feb. 17, 1967), the Superior Labor Court ruled:

> The Labor Law is incompetent to consider a complaint from employees of a foreign Embassy, in view of the principle of extra-territoriality adopted by the Federal Constitution.

The fact that this last decision was rendered recently by the highest Labor Court gives it special significance. Furthermore, it should be noted that the preliminary argument of incompetence of the Labor Justice was presented *ex officio* by Judge Amaro Barreto.

It should also be noted that contrary decisions rendered by courts of first instance are rare and, as a rule, revoked on appeal. No information is available regarding the enforcement of these decisions.

Thus, the decision given in default against The Institute of Inter-American Affairs, by the Fourth Labor Court of Guanabara, was rescinded by the Regional Labor Court of the 1st Region, in unanimous judgment (Rescissory Action No. TRT 4 AR-63, Official Gazette, Part III, of May 6, 1964, p. 6047).

After the Superior Labor Court, by Prejudgment No. 2, rendered a decision establishing the inadmissibility of a rescissory action under the labor laws, a judgment of the Fourth Labor Court of Recife against the Alliance for Progress was reversed by means of a writ of injunction No. TRT-7/64 (*mandado de segurança*), by the Regional Labor Court of the Sixth Region. The reporting Judge and all members of the Court ruled:

> We are in favor of granting the writ. As stressed by His Excellency the Consul General of the United States of America, the United States Agency for International Development (USAID) constitutes an integral part of the Embassy of that foreign State in Brazil. For this reason, its property belongs to the American State, and its employees are public servants of that country. This information having been confirmed by our Ministry of Foreign Affairs, on pages 17/18 of the proceedings, the conclusion is imperative that, as the foreign State itself, USAID enjoys the prerogatives and immunities granted, including the immunity from jurisdiction . . . .

It has been established that Brazilian law faithfully recognizes the immunity of a foreign State from local jurisdiction, even in labor matters. The restrictions based on the qualification of acts *jure gestionis* have not been accepted, even under allegation of public interest, since according

to Article 6 of the Consolidation of Labor Laws, the latter cannot be superseded by any class or private interest. This is particularly true as regards a basic principle of international law such as that of *par in parem non habet judicium*, the observance of which, is undeniably, in the public interest.