

International organizations — Immunity from jurisdiction — International Bank for Reconstruction and Development (“IBRD”) — IBRD Articles of Association — Agreement between Austria, IBRD, International Finance Corporation and Multilateral Investment Guarantee Agency Regarding the Establishment of Liaison Offices in Vienna, 2011 — Relevance of dispute settlement provisions in treaties for questions of immunity of international organizations — Implicit waiver — Obligation to pay court fees in civil proceedings — Treaty interpretation — Treaty authenticated in several languages — Whether Article VII Section 9 of IBRD Articles of Association and Article 10(3) of Establishment Agreement providing for an exemption to pay court fees — Whether Austrian authorities having jurisdiction over matter

Treaties — Interpretation — Agreement between Austria, IBRD, International Finance Corporation and Multilateral Investment Guarantee Agency Regarding the Establishment of Liaison Offices in Vienna, 2011 (“Establishment Agreement”) — Dispute settlement provisions — Relevance for questions of immunity of international organizations — Treaty authenticated in several languages — Meaning of terms — Whether Article VII Section 9 of IBRD Articles of Association and Article 10(3) of Establishment Agreement providing for an exemption to pay court fees — The law of Austria

INTERNATIONAL BANK FOR RECONSTRUCTION AND
DEVELOPMENT (IBRD) COURT FEES CASE¹

(Case No 2018/16/0017)

Austria, Supreme Administrative Court. 22 October 2018

SUMMARY:² *The facts:*—On 2 February 2015, the International Bank for Reconstruction and Development (“IBRD”) initiated a lawsuit against several other entities before the Klagenfurt Regional Court. In the submission initiating proceedings (*Klagsschrift*), the IBRD argued that it was exempt from court fees on the basis of Article VII Section 9 of the Articles of Association of the International Bank for Reconstruction and Development (“IBRD-AoA”)³ and

¹ The plaintiff was represented by Wolf Theiss Rechtsanwälte GmbH & Co KG.

² Prepared by Mr P. Janig.

³ For the text of Article VII Section 9 of the IBRD-AoA, see para. 46 of the judgment.

Article 10(3) of the Agreement between the Republic of Austria, the IBRD, the International Finance Corporation and the Multilateral Investment Guarantee Agency Regarding the Establishment of Liaison Offices in Vienna, 2011 (“the Establishment Agreement”).⁴ The competent official, on behalf of the President of the Klagenfurt Regional Court, ordered the IBRD to pay fees under the Austrian Court Fees Act (“GGG”) and the Austrian Federal Law on the Collection of Court Fees (“GEG”).

The IBRD objected to that order to the President of the Klagenfurt Regional Court, who confirmed it by way of decision on 10 July 2015. The reasoning stipulated that the initiation of the lawsuit fell outside of the scope of Article 10(3) of the Establishment Agreement, as it did not constitute a “transaction” (which was exempt from taxes, recording charges and court fees) and the obligation to pay court fees was not triggered by the written submission as such (as a potential document relating to a transaction), but by the civil proceedings in their entirety. Moreover, the court fees were not “taxes” within the meaning of that provision.

The IBRD appealed that decision to the Federal Administrative Court. It argued that the sale of bonds, which were the subject of the civil proceedings, were undoubtedly a “transaction” within the meaning of Article 10(3) of the Establishment Agreement. As a result, the submission initiating proceedings constituted a document relating to a transaction (which was likewise exempt). Moreover, the IBRD was exempt from court fees on the basis of Article VII Section 9(a) of the IBRD-AoA, which exempted it from “taxes and custom duties”. These terms were to be understood more broadly in international law than in Austrian law, as to include any charges, including court fees. In addition, it asserted that the President of the Klagenfurt Regional Court lacked the competence to order unilaterally the payment of court fees. Rather, the Establishment Agreement foresaw a specific procedure for questions concerning the interpretation of the Agreement between the Republic of Austria and the IBRD.

The Federal Administrative Court granted the appeal and annulled the decision, while declaring an appeal to the Supreme Administrative Court admissible. It held that, pursuant to Article 20(1) of the Headquarters Agreement, all disputes between the Republic of Austria and one of the Organizations concerning the interpretation of the Agreement should be submitted to arbitration. Thus, until such a resolution within the meaning of Article 20(1) was taken, the authority might not order the payment of court fees, likewise the Federal Administrative Court might not reject the appeal. In any event, Article 10 of the Establishment Agreement provided for the exemption from the pertinent fees.

The President of the Klagenfurt Regional Court lodged an *ex officio* appeal against that decision to the Supreme Administrative Court, with the IBRD being a co-involved party in the proceedings.

⁴ For the text of Article 10 of the Establishment Agreement, see para. 49 of the judgment.

Held:—The appeal was allowed. The Austrian authorities had jurisdiction over the matter and the IBRD was not exempt from the obligation to pay court fees.

(1) International organizations were regularly granted immunity from civil lawsuits, with international financial institutions (such as the IBRD) enjoying only limited immunity. Despite their immunity, international organizations remained fully bound by domestic law and are thus obliged to fulfil their contracts under private law. The gap in legal protection was closed through dispute settlement procedures. However, treaty provisions on dispute settlement had no significance for the question as to what extent an international organization might enjoy immunity. In the context of the IBRD, the question was to be exclusively assessed on the basis of the pertinent treaty provisions, namely Article VII Section 3 of the IBRD-AoA and Article 5 of the Headquarters Agreement (paras. 57-63 and 69).

(2) International organizations might waive their immunity from jurisdiction. In particular, the initiation of or participation in proceedings constituted such a waiver. Thus, the international organization became subject to the judicial assertion of all claims by the opponent resulting from these proceedings and became subject to all judicial orders issued in these proceedings. This included orders on the payment of court fees (paras. 64-8).

(3) The question of a material exemption from court fees was to be separated from the question of immunity from jurisdiction. Article 10(1) of the Establishment Agreement provided for an exemption from taxation. However, a contextual interpretation taking account of explicit listing of “taxes, recording charges and court fees” in Article 10(3) of the Establishment Agreement prevented a broad reading of the term “taxation” that also included court fees. Article 10(3) provided for an exemption also from court fees for all “transactions” and (in the German version) “all documents relating to such transactions” or (in the English version) “all documents recording such transactions”. It was undisputed that a lawsuit as such did not constitute a transaction. The exemption for “documents” also did not apply. The obligation to pay court fees was not triggered by the drafting of a submission initiating proceedings, but rather its filing at the court. The subject of the court fees was the civil proceedings of the first instance rather than the submission initiating proceedings. Therefore, Article 10(3) of the Establishment Agreement did not apply (paras. 70-7).

(4) Article VII Section 9(a) of the IBRD-AoA further provided immunity “from all taxation and from all customs duties”. The obligation to pay court fees neither fell under “taxation” nor under “customs duties”. This was supported by a contextual interpretation, as Article VII Section 3 IBRD-AoA used the terms “judicial process” and “action”, which was terminologically distinct from the term “operations and transactions” used in Section 9. Thus, the provision provided no basis for a personal exemption of the IBRD from court fees (paras. 78-80).

The following is the text of the judgment of the Court:⁵

[1] The appeal is upheld and the contested decision is amended to read as follows:

[2] The appeal against the decision of the President of the Klagenfurt Regional Court of 10 July 2015, 1 Jv 2009/15p33-21, is rejected as unfounded pursuant to Sec 28(2)(1) Proceedings of Administrative Courts Act (*VwGVG*).

REASONS

[3] 1. It is undisputed that the co-involved party brought a lawsuit against X, Y and Z before the Klagenfurt Regional Court, in which it sought payment of EUR 6,255,000 as well as findings which it valued at EUR 150,000,000. According to the submission initiating proceedings (*Klagsschrift*) under item 11 (p. 52), it was exempt from any taxes pursuant to Art. VII Sec 9 of the Articles of Agreement of the International Bank for Reconstruction and Development, Federal Law Gazette No 105/1949—IBRD-AoA. In addition, an agreement under international law existed between it and the Republic of Austria, namely the “Agreement between the Republic of Austria and the International Bank for Reconstruction and Development, the International Finance Corporation and the Multilateral Investment Guarantee Agency regarding the Establishment of Liaison Offices in Vienna” (Establishment Agreement, Federal Law Gazette III No 23/2011, hereinafter referred to as the “Agreement”):

[4] According to Art. 10(3) of this Agreement all documents in connection with transactions to which the claimant was a party were exempt from court fees.

[5] 2. With a payment order (mandate order) dated 11 May 2015, the fee-collection clerk of the Regional Court, on behalf of the President of the Klagenfurt Regional Court (the appellant), ordered the co-involved party to pay the flat fee pursuant to fee item 1 Court Fees Act (*GGG*) in the amount of EUR 2,163,480.10 as well as a collection fee pursuant to Sec 6a(1) Federal Law on the Collection of Court Fees (*GEG*), to which the co-involved party objected.

[6] 3. By decision of 10 July 2015, the appellant declared that the co-involved party was liable to pay the flat fee pursuant to fee item

⁵ The paragraph numbers have been inserted by the editors.

1 Court Fees Act (*GGG*) on an assessment basis of EUR 156,525,000, as well as the collection fee in the total amount of EUR 2,163,480.10.

[7] As justification, the appellant, after recounting the administrative proceedings and quoting from the Court Fees Act (*GGG*) as well as said Agreement elaborated,

[8] [t]he present facts do not fall within Art. 10(3) of the Agreement—Establishment Agreement of 2 February 2011, Federal Law Gazette III No 23/2011.

[9] According to Art. 10(3) of said Agreement, all transactions to which the Organizations are parties and all documents related to such transactions are exempt from taxes, recording charges and court fees. According to the materials to this Convention (see the explanatory notes RV 923 of supplements XXIV GP, 5), the exemption provisions of Art. 10 serve to safeguard the independence of the Organizations. There are no indications in the materials of a definition of transactions or related documents that deviates from that in the Austrian legal system (as is provided, for example, for the concept of property). In the Austrian legal system, a lawsuit (*Klage*) is an application for the granting of legal protection on the merits, which initiates civil proceedings before court (Rechberger/Simotta, *ZPR* [8th edn] MN 520). The lawsuit thus serves to enforce rights established, *inter alia*, by transaction and is thus not to be understood as a transaction itself, also not within the meaning of Art. 10(3) of the Establishment Agreement. The exemption provision for documents related to transactions cannot be applied here either. All judicial civil proceedings to be initiated by means of a lawsuit are subject to the flat fee pursuant to fee item 1 Court Fees Act (*GGG*) (Note 1 to fee item 1). Pursuant to Sec 2(1)(1)(a) Court Fees Act (*GGG*), the Federal Government's claim to the flat fees for civil proceedings of first instance is established upon submission of the lawsuit. This flat fee shall be paid regardless of whether the proceedings are concluded (Note 1 fee item 1). There are no further individual fees in the proceedings in first instance insofar as fee item 1 Court Fees Act (*GGG*) is applicable (Note 4 first sentence to fee item 1). The court fee pursuant to fee item 1 Court Fees Act (*GGG*) is thus not paid for a document related to a transaction, but for the (entire) civil proceedings in first instance. The flat fee pursuant to fee item 1 Court Fees Act (*GGG*) is therefore not a document fee and thus not covered by the exemption provisions of Art. 10(3) of the Establishment Agreement.

[10] The President of the Klagenfurt Regional Court, as the authority of first instance is only required to examine whether a possible exemption from fees is to be granted and whether the court fees have been correctly calculated or prescribed in accordance with the provisions of the Court Fees Act and the Federal Law on the Collection of Court Fees.

[11] According to the specific wording of Art. 10(3) of the Establishment Agreement, Federal Law Gazette III No 23/2011 and the relevant materials, the requested exemption was to be denied in the present case.

[12] Furthermore, according to the Austrian legal system, court fees (in this case the flat fee pursuant to fee item 1 Court Fees Act (*GGG*)), are federal charges and not taxes (Sec 7(2) 2008 Fiscal Equalization Law (*FAG 2008*), Federal Law Gazette I No 103/2007). A different legal position cannot be inferred from the materials on Art. 10(3) of the Establishment Agreement.

[13] According to the settled case law of the Constitutional Court and the Supreme Administrative Court, the workload caused to the court is not to be taken into account in the obligation to pay court fees. On the contrary, court fees are charges which do not require that there is an equivalence of official acts in individual cases (Supreme Administrative Court on 30 April 2003, ZI. 2000/16/0086). There are also no constitutional concerns about the height of court fees (Constitutional Court on 1 March 2007, ZI. B 301/06). [. . .]

[14] 4. In the appeal filed against this, the co-involved party took the view that it was entitled to the personal exemption from fees pursuant to Sec 10(3) of said Agreement in accordance with Sec 10 (1) Court Fees Act (*GGG*). The co-involved party's subscription to the bonds at issue in the case before the Klagenfurt Regional Court had undoubtedly been a transaction. The appellant, however, apparently assumed that the lawsuit would be considered a transaction. However, this was not the case; rather, the lawsuit was a document connected with a transaction within the meaning of Art. 10(3) of said Agreement. Otherwise, the remaining scope of application of the provision would be marginal. Moreover, the co-involved party is entitled to the exemption pursuant to Art. VII Sec 9(a) IBRD-AoA. The terms "taxes and duties" used under international law (especially in treaties) were not identical or equivalent to "taxes and duties" in the sense of Austrian tax law, but were to be understood more broadly. The original English text is more appropriate here, which speaks of "any tax or duty", to be understood as any kind of charges and fees, therefore court fees as federal charges also fall under the term "taxes and duties". Finally, according to Art. IX IBRD-AoA, the appellant was not competent to interpret this agreement or authorized to unilaterally adopt a legal view that differed from that of the co-involved party and to unilaterally prescribe a court fee, but should also have followed the procedure provided for this purpose: Any question of interpretation of this agreement arising between the Republic of Austria and the co-involved party were to be submitted to the Executive Directors of the co-involved party for decision; the decision of the Executive Directors could, at the request of any member, be referred to the Board of Governors, whose decision shall be final. Since this procedure for interpreting said Agreement had not been followed, the contested decision also suffered from a substantial procedural error in this respect.

[15] 5. In the contested decision, the Federal Administrative Court upheld the appeal pursuant to Sec 10 Court Fees Act (*GGG*) in conjunction with Art. 10 and Art. 20(1) of said Agreement and repealed the decision of 10 July 2015—apparently without any substitution. Furthermore, the Administrative Court considered that the appeal [to the Supreme Administrative Court] was admissible pursuant to Art. 133(4) Federal Constitutional Act (*B-VG*).

[16] After recounting the course of the proceedings and quoting from the Court Fees Act (*GGG*), the German and English versions of said Agreement, the Administrative Court made the following conclusions on the law:

[17] 2.1.2. There appears to be no dispute between the parties to the appeal proceedings as to whether the complainant's claim, which it filed on 2 February 2015, falls under fee item 1 Court Fees Act (*GGG*). The only dispute is whether certain exemption provisions are applicable, in particular Art. 10(3) of the Agreement. That this exemption provision has not been declared inoperative by Sec 10 Court Fees Act (*GGG*) is apparent from the first sub-sentence of this Section, as it stems from an international treaty, namely the Agreement. The fact that Sec 10(2) Court Fees Act (*GGG*) is fulfilled follows from the fact that the complainant has claimed the exemption from fees pursuant to Art. 10(3) of the Agreement already in the lawsuit. It can therefore be left open whether the exemption provision of the Agreement is to be interpreted as *lex specialis* in this respect.

[18] Since the complainant has also asserted that it is exempt from paying fees pursuant to Art. 10(3) of the Agreement in all further pleadings, and since the authority concerned takes the opposite view, the matter falls under Art. 20(1) of the Agreement, according to which “[a]ny dispute [...] between the Republic of Austria and the Organization arising out of or relating to the interpretation [...] of this Agreement, [...] which is not settled by negotiation or other agreed mode of settlement, shall be settled by final and binding arbitration [...]”. It is thus clear that neither the authority concerned may prescribe fees nor the Federal Administrative Court may reject the complaint as long as a resolution within the meaning of Art. 20(1) of the Agreement has not been found. What procedural consequences are to be drawn from this is now to be discussed.

[19] 2.2.1. The present proceedings are characterized by the fact that a resolution in the aforementioned sense has not yet been reached and does not appear to be possible in the near future. Since it has thus not been established that the provision on the exemption from fees does not apply, the authority concerned was not allowed to issue a decision such as the contested one and the Federal Administrative Court is currently not allowed to confirm such a decision.

[20] Pursuant to Sec 34(1) Proceedings of Administrative Courts Act (*VwGVG*), the Administrative Court is obliged to rule on requests initiating proceedings filed by parties as well as complaints. The Federal Administrative Court is therefore under a duty to decide, which likewise applies to

administrative authorities presented with requests, pursuant to Sec 73 General Administrative Procedure Act (*AVG*), and which is also assumed for supreme courts and applies to courts in general (see e.g. the following decisions, which generally presuppose a duty to decide in various contexts: Supreme Court of 28 August 1986, 8 Ob 611/86; 23 February 1995, 8 Ob 3/95 (8 Nd1/95); 19 December 1999, 8 ObA 134/99k; 27 September 2016, 1 Nc 40/16x; Vienna Higher Regional Court on 22 January 2004, 3 R 210/03d).

[21] The contested decision is to be annulled for the following reasons:

[22] 2.2.2.1. Since the authority concerned has not decided on the objections within two weeks and the mandate order had thus expired, it had no duty to decide within Sec 73 General Administrative Procedure Act (*AVG*), since there was no request on which it would have had to decide. Although it was competent to consider whether the complainant was liable to pay fees (or whether it was exempt from paying fees), it was not allowed to issue a decision imposing the fees on it, since the complainant had invoked the exemption provision and a resolution to this dispute within the meaning of Art. 20(1) of the Agreement had not been brought about. This impermissibility of prescribing fees can be interpreted as a functional lack of jurisdiction on part of the authority concerned. Its jurisdiction was thus limited to making the aforementioned considerations and, if necessary, to approaching the competent authorities with the suggestion to seek a resolution within the meaning of Art. 20(1) of the Agreement. However, it exceeded its jurisdiction when it issued a decision prescribing fees. If one follows this view, the contested decision must be annulled due to the lack of jurisdiction (the same considerations already apply to the mandate order; if it had not ceased to have effect, the authority concerned, as the authority presented with objections, would have had to annul it due to the lack of jurisdiction of the fee-collection clerk).

[23] 2.2.2.2. If, however, the impermissibility of prescribing fees by the authority concerned is not considered a functional lack of jurisdiction, the following results:

[24] The authority concerned was not prevented by a lack of jurisdiction from issuing a decision such as the one contested. Likewise, the Federal Administrative Court is not prevented from issuing a corresponding—positive or negative—ruling, if necessary after a resolution within the meaning of Art. 20(1) of the Agreement has been reached; rather, it is required to do so due to Sec 28(2) Proceedings of Administrative Courts Act (*VwGVG*). (In case of a resolution in the form of a settlement by negotiation or another agreed form of dispute resolution, the question of whether and how the Federal Administrative Court can decide depends on the specific outcome of this resolution.) It also assumed this in the proceedings so far when it approached the Federal Ministry of Finance in this respect.

[25] If the complainant's lawsuit falls under the exemption provision of Art. 10(3) of the Agreement, as it assumes itself, or under that of Art. 10(1) of the Agreement, as the Office of the Legal Advisor [of the Ministry of Foreign Affairs] assumes, then no obligation to pay fees arose and the

imposition of the flat fee is unlawful for this reason alone. In this case, too, the contested decision is thus to be annulled.

[26] 2.2.2.3. Thus, it remains to be determined how to proceed if the obligation to pay fees has actually arisen (in particular pursuant to Sec 2(1)(a) Court Fees Act (*GGG*) with the submission of the lawsuit), but an imposition is precluded by the fact that the complainant objects to the interpretation by the authority concerned or by the appellate body and no resolution within the meaning of Art. 20(1) of the Agreement has been reached. The Federal Administrative Court assumes that a possible arbitral award which, contrary to the objective legal situation, interprets the exemption provision favourably for the complainant and which binds the Austrian authorities in accordance with the Agreement creates new law as *lex specialis* (*vis-à-vis* fee item 1 Court Fees Act (*GGG*) and the exemption provision). Since the arbitral award would be binding, a fee may not be prescribed or the contested decision not be confirmed; it would have to be set aside. (The possibility that the arbitral award interprets the exemption provision favourably for the complainant [*sic*] in accordance with the objective legal situation is not to be discussed here, because it has already been dealt with in the preceding paragraph.)

[27] It thus remains open how to proceed if no resolution within the meaning of Art. 20(1) of the Agreement is reached, because the relevant Austrian bodies refuse to take steps in this direction, or if it is not foreseeable when this will occur—as in the present case. Since the Federal Administrative Court—unlike the aforementioned bodies—is under a duty to decide, it can be assumed that the legal system also provides a solution for this case that will enable the Federal Administrative Court to fulfil its duty to decide.

[28] A possible solution could be that the duty to decide is suspended, so that the time available to the Federal Administrative Court for making a decision does not include the time that elapses after it has approached the bodies. This would mean that a duty to decide would only exist again when the resolution within the meaning of Art. 20(1) of the Agreement has been reached. This would be based on an analogy to Sec 34(2) Proceedings of Administrative Courts Act (*VwGVG*). Sec 34(1) and (2) Proceedings of Administrative Courts Act (*VwGVG*) reads in part:

[...]

[29] However, the Federal Administrative Court considers the overall legal situation to be such that Sec 2(1)(a) Court Fees Act (*GGG*) is, as it were, transformed by the Agreement in such a way that the emergence of the Federal Government's claim to fees is conditional upon an arbitral award in favour of the obligation to pay fees. As long as this condition has not materialized, it shall be proceeded as if the claim to fees had not arisen. (If an arbitral award is made to the effect that the exemption provision does not apply, the condition has materialized and the fee may be imposed.) If there is no arbitral award, but another resolution within the

meaning of Art. 20 of the Agreement (settlement by negotiation or another agreed form of dispute resolution), the decision of the administrative judicial authority or the appellate body would have to be based on this resolution.

[30] Also in case of this interpretation, the contested decision is thus to be annulled, because there is currently no resolution within the meaning of Art. 20(1) of the Agreement.

[31] 2.2.2.4 However one sees the legal situation, the contested decision is thus unlawful and therefore to be annulled, without the [...] Federal Administrative Court being able or having to make a different decision on the merits.

[32] 2.2.3. This means the following for the further proceedings:

[33] If one assumes that the authority concerned does not have jurisdiction, then it only becomes competent as soon as a resolution within the meaning of Art. 20(1) of the Agreement has been reached. Thereby, the jurisdiction of the authority concerned arises (if this is consistent with the resolution reached (settlement by negotiation or another agreed form of dispute resolution)) and it is competent to issue a decision.

[34] If one assumes that the authority concerned had jurisdiction, but the obligation to pay the fee did not arise because the lawsuit falls under the exemption provision of Art. 10 of the Agreement, the fee may still not be prescribed.

[35] If one finally assumes that the emergence of the fee is subject to a condition, then it may only be prescribed if a resolution within the meaning of Art. 20(1) of the Agreement has been reached, namely a resolution in the respect that the exemption provision does not apply. If the resolution, in particular possible arbitral award, is different, i.e. if it interprets Art. 10 of the Agreement in such a way that the exemption provision applies, the Federal Government's claim is extinguished.

[36] 3. Therefore, it was to be decided as held above.

[37] 6. Finally, the Administrative Court justified its decision not to hold an oral hearing requested by the co-involved party and its decision on the admissibility of the appeal [to the Supreme Administrative Court] by considering that there was no case law of the Supreme Administrative Court on the question whether the appellant was competent to prescribe a fee at all if the co-involved party invoked an exemption provision of the Agreement and this dispute was not resolved within the meaning of Art. 20(1) of the Agreement. If one assumes that the appellant was nevertheless competent to make a decision, the decision would depend on the solution of a further legal question which is of fundamental importance because there is no case law of the Supreme Administrative Court, i.e. whether the lawsuit of the co-involved party falls under the

exemption provision of Art. 10 of the Agreement. If this was not the case, the decision would depend on the solution of a further legal question of fundamental importance, i.e. how to proceed if and as long as a resolution within the meaning of Art. 20(1) of the Agreement had not been reached.

[38] 7. The *ex officio* appeal (*Amtsrevision*) of the President of the Klagenfurt Regional Court is directed against this decision, in which primarily a decision by the Supreme Administrative Court in the matter itself in the form of rejecting the complaint as unfounded is requested, *in eventu* the annulment of the decision due to unlawfulness of its content, *in eventu* due to unlawfulness as a result of the violation of procedural provisions.

[39] 8. The appeal shares the opinion of the Administrative Court on the question of the admissibility of an appeal [to the Supreme Administrative Court] against the contested decision and additionally submits that the question of the competence to prescribe a fee in case of a dispute within the meaning of Art. 20(1) of said Agreement is of importance beyond the individual case because such formulations are found in a large number of agreements. If it were already sufficient to invoke the alleged applicability of this provision in order to deny jurisdiction for fee orders by the state, then international organizations would very often make use of this possibility in the future. The question of the exemption provision of Art. 10 of said Agreement was also of importance beyond the individual case, because it was relevant to all similar cases. Finally, the question arose, in the case of a decision of the Federal Administrative Court which annulled a decision, as to how the legal situation corresponding to its legal view was to be established in accordance with Sec 28(5) Proceedings of Administrative Courts Act (*VwGVG*), if this legal view existed in three different variants, but the Administrative Court had not decided in favour of any of the variants.

[40] 9. The co-involved party filed a response to the appeal in which it denied the admissibility of the appeal due to the lack of a legal issue of fundamental importance and requested the dismissal of the appeal as inadmissible or, *in eventu*, its rejection as unfounded.

[41] The Supreme Administrative Court considered:

[42] 10. According to Sec 10(1) Court Fees Act (*GGG*) on personal exemptions from fees for other reasons, personal exemptions from court and judicial administrative fees provided for in statutory provisions are without effect, unless they are provided for in international treaties.

[43] According to Sec 10(2) Court Fees Act (*GGG*), the exemptions from fees under paragraph 1 shall only apply, if they are claimed with reference to the legal basis at the time of submission, when the minutes are taken or when any other official act is performed.

[44] According to Sec 13(1) Court Fees Act (*GGG*) on the material exemption from fees, exemptions from court and judicial administrative fees granted in statutory provisions without reference to specific persons for material reasons are invalid, unless they are provided for in international treaties.

[45] According to paragraph 2 second half-sentence of the cited legislation, exemptions from fees under paragraph 1 shall only apply if they are claimed with reference to the legal basis at the time of submission, when the minutes are taken or when any other official act is performed.

[46] 11. The “Articles of Agreement of the International Bank for Reconstruction and Development”, Federal Law Gazette No 105/1949—IBRD-AoA, read (in their authentic English version) in excerpts:

Article VII: Status, immunities and privileges

...

Section 3. Position of the Bank with regard to judicial process

Actions may be brought against the Bank only in a court of competent jurisdiction . . . The property and assets of the Bank shall, wheresoever located and by whomsoever held, be immune from all forms of seizure, attachment or execution before the delivery of final judgment against the Bank.

...

Section 9. Immunities from taxation

- (a) The Bank, . . . and its operations and transactions authorized by this Agreement shall be immune from all taxation and from all customs duties . . .

Article IX: Interpretation

- (a) Any question of interpretation of the provisions of this Agreement arising between any member and the Bank or between any members of the Bank shall be submitted to the Executive Directors for their decision. . . .
- (b) In any case where the Executive Directors have given a decision under (a) above, any member may require that the question be referred to the Board of Governors, whose decision shall be final. Pending the result of the

reference to the Board, the Bank may, so far as it deems necessary, act on the basis of the decision of the Executive Directors.

[47] 12. The Agreement between the Republic of Austria, the International Bank for Reconstruction and Development, the International Finance Corporation and the Multilateral Investment Guarantee Agency Regarding the Establishment of Liaison Offices in Vienna, Federal Law Gazette III No 23/2011, is—according to its preamble—based on the desire to define the status as well as the privileges and immunities of such liaison office or offices in the Republic of Austria and to enable the liaison office or offices to fulfil its purposes and functions.

[48] 13. Art. 5 of said Agreement reads in its authentic version in [...] English:

[...]

Article 5: Immunity from jurisdiction and other actions

- (1) The Organizations shall have immunity from jurisdiction and enforcement, except:
 - (a) to the extent that the Organizations shall have expressly waived such immunity in a particular case; and
 - (b) in cases arising out of or in connection with the exercise of their powers to issue or guarantee securities on the territory of the Republic of Austria.
- (2) Without prejudice to paragraphs (1) and (3), the property and assets of the Organizations, wherever situated, shall be immune from any form of seizure, confiscation, expropriation and sequestration.
- (3) The property and assets of the Organizations shall also be immune from any form of administrative or provisional judicial restraint.

[49] Art. 10 of said Agreement reads in excerpts in [...] English:

[...]

Article 10: Freedom from taxation and customs duties

- (1) The Organizations and their property shall be exempt from all forms of taxation.

...

- (3) All transactions to which one of the Organizations is a party and all documents recording such transactions shall be exempt from all taxes, recording charges and court fees.

...

[50] Art. 20 of said Agreement, concerning “Settlement of disputes”, provides in paragraph 1 that all disputes, controversies or claims

between the Republic of Austria and the Organizations arising out of or relating to the interpretation, application or performance of this Agreement, including its existence, validity or termination, which is not settled by negotiation or other agreed mode of settlement, shall be settled by final and binding arbitration in accordance with the Permanent Court of Arbitration Optional Rules for Arbitration Involving International Organizations and States, as in effect on the date of this Agreement, and the additional provisions of Art. 20 of this Agreement.

[51] 14. The comments to the government bill for said Agreement, 923 BlgNR XXIV. GP, remark in their cover sheet with regard to financial consequences,

[t]he Headquarters Agreement does not create any obligation to pay rent or similar charges . . . However, the tax privileges contained in the Headquarters Agreement will result in a loss of tax revenue, which, however, must be considered merely fictitious with regard to the potential establishment of further institutions in the future, since there would be neither tax revenue nor a loss of tax revenue due to the privileges if the institutions were located outside of Austria.

[52] Furthermore, the quoted comments to the government bill remark in their Special Section, *loc. cit.* at 4f, with regard to Art. 5 of the Agreement:

This provision establishes in principle the immunity of the Organizations in relation to the jurisdiction of Austria, as accorded to diplomatic representatives or states according to Art. IX(2) Introductory Act to the Law on Jurisdiction (*EG/N*), Imperial Law Gazette No 110/1895. In the context of immunity law, immunity from jurisdiction also includes the activities of administrative authorities. Lit. (a)-(b) provide for certain exceptions, such as with regard to the exercise of the Organizations' powers in connection with securities. Should one of the abovementioned exceptions apply, Paras. 2 and 3 shall nevertheless remain in force, which prohibit, *inter alia*, judicial enforcement measures, seizures or expropriations.

See also the provision of Art. 19.

Similar provisions on immunity from jurisdiction are found in all Headquarter Agreements concluded with comparable international organizations; . . .

[53] With regard to Art. 10 of the Agreement, the quoted comments to the government bill, *loc. cit.* at 5, remark:

In order to safeguard the independence of the Organizations, they enjoy the exemptions referred to in Art. 10. These correspond to those in

the Headquarters Agreement of the Joint Vienna Institute (Art. 10), the Headquarters Agreement of the International Centre for Migration Policy Development (Art. 10) and the Headquarters Agreement of the International Commission for the Protection of the Danube River (Art. 11).

The term “property” in Para. 1 also includes objects and rights which are only in the possession of the Organizations and is thus broader than the Austrian notion of property as defined, for instances, in Sec 353 ff Civil Code (*ABGB*).

...

Moreover, all transactions in which the Organizations are involved and all documents relating to them are exempt from all charges (Para. 3).

...

[54] Finally, the quoted comments to the government bill, *loc. cit.* at 8, remark with regard to Art. 20:

all disputes, controversies or claims between the Republic of Austria and the Organizations arising out of or relating to the interpretation, application or performance of this Agreement, including its existence, validity or termination, which cannot be settled in another way, shall be submitted to the arbitral tribunal provided for in this Article.

[55] 15. The *ex officio* appeal is admissible and also justified for the following reasons:

[56] The Administrative Court justified annulling the decision of 10 July 2015 primarily on the grounds of a “functional lack of jurisdiction” of the appellant due to the lack of dispute settlement within the meaning of Art. 20 of said Agreement, *in eventu* on the applicability of the exemptions provided for in Art. 10(1) and (3) of said Agreement; thereafter, the Administrative Court explained its opinion on the procedure under Art. 20(1) of said Agreement. Questions of fundamental legal significance thus already arise in consideration of the question of the exemption from or restriction of the jurisdiction of Austrian authorities and in particular courts through international treaties or generally recognized rules of international law within the meaning of Art. 9(1) Federal Constitutional Act (*B-VG*), but also the interpretation of the exemption provisions in question against the background of the jurisprudence of the Supreme Administrative Court with regard to comparable exemption provisions.

*On the question of the jurisdiction of Austrian authorities
(including of administrative courts):*

[57] 16. The exception in favour of international treaties contained in Sec 10(1) and Sec 13(1) Court Fees Act (*GGG*) are to be read in their context as such in respect of material exemption provisions, however not as such in respect of procedural rules; such an exception can also not be inferred from the Federal Law on the Collection of Court Fees (*GEG*) or other laws.

[58] 17. In the present context, immunity means the right of a state or an international organization, including their officials, not to be subject to the enforcement powers (*Zwangsgewalt*) of other states. In addition to the exemption from foreign jurisdiction, it also includes exemption from the fiscal authority of other states (Seidl-Hohenveldern, *Völkerrecht* [10th edn], MN 1462). As the European Court of Human Rights has stated in its judgment of 18 February 1999, App No 26083/94—*Waite and Kennedy*, in para. 63, the granting of privileges and immunities to international organization serves to ensure the proper functioning of such organizations free from unilateral interference by individual governments. The immunity from jurisdiction was in the interest of the good working of these organizations.

[59] 18. International organizations are regularly granted immunity from civil lawsuits for them and their assets in respective documents (Reinisch, *Handbuch des Völkerrechts* [5th edn], MN 1629). International financial institutions such as the World Bank (International Bank for Reconstruction and Development—IBRD) only enjoy limited immunity (see Reinisch, *loc. cit.*, MN 1630; see also Ibsen, *Völkerrecht* [6th edn], page 227 on the so-called functional immunity of international organizations).

[60] 19. Despite their exemption from national jurisdiction, international organizations are fully bound by the laws of their member states and thus, for instance, also obliged to fulfil their contracts under private law. The gap in legal protection resulting therefrom is closed through dispute settlement procedures (Ibsen, *loc. cit.*, page 230). The—peaceful—settlement of disputes is served, *inter alia*, by arbitral tribunals under international law (see Ibsen, *loc. cit.*, page 1147).

[61] 20. In line with this distinction, both the IBRD-AoA as well as the Agreement in Federal Law Gazette III No 23/2011 (hereinafter: “Agreement”) provide various immunities on the one hand and dispute settlement mechanisms under international law on the other hand. This distinction is illustrated by the quoted comments to the government bill to the Agreement, 923 BlgNR XXIV. GP, which explain the question of immunity from jurisdiction exclusively with regard to

Art. 5 of this Agreement, while in the context of Art. 20 of this Agreement they only clarify that disputes, controversies or claims between the Republic of Austria and the Organizations in question are to be submitted to the arbitral tribunal provided for therein.

[62] 21. In line with this distinction under international law, which is also reflected in the IBRD-AoA as well as the Agreement, the rules in neither Art. IX IBRD-AoA nor Art. 20 of the Agreement on the settlement of disputes between subjects of international law have any significance for the question of the immunity of the IBRD from the jurisdiction of Austria, including its administrative authorities. Rather, the question of the exemption from Austrian jurisdiction is to be considered exclusively from the perspective of Art. VII Sec 3 IBRD-AoA and Art. 5 of the Agreement.

[63] 22. Whether a potential arbitral award under, for instance, Art. 20 of the Agreement would have relevance for administrative or administrative court proceedings within the meaning Sec 6b(1) Federal Law on the Collection of Court Fees (*GEG*) in conjunction with Sec 38 General Administrative Procedure Act (*AVG*) can be left open, as in the present case there are indisputably no dispute settlement proceedings or even an arbitral award which could be of significance.

[64] 23. Immunity under international law can be waived, as is also provided for in Art. 5 of the Agreement (Seidl-Hohenveldern, *loc. cit.*, MN 1041 ff.; Reinisch, *loc. cit.*, MN 1560 ff.; Matscher in Fasching/Konecny, *Kommentar zu den Zivilprozessgesetzen* [3rd edn], Volume I, MN 135 on Art. IX EGJN). Such a waiver of immunity lies, for instance, in the filing of a lawsuit in the receiving state with respect to a counterclaim (Seidl-Hohenveldern, *loc. cit.*, MN 1041; Matscher, *loc. cit.*, MN 158 on Art. IX EGJN).

[65] The initiation of proceedings has the effect of becoming subject to the judicial assertion of all claims of the opponent that result from these proceedings, including claims for reimbursement of costs or compensation, for instance under Sec 408 Code of Civil Procedure (*ZPO*), and entails becoming subject to all judicial orders issued in the proceedings, for instance also for the revision of written pleadings under Sec 84 Code of Civil Procedure (*ZPO*), for the production of documents, for the provision of security for legal costs, but also the payment of advances on costs and payment of court fees (Matscher, *loc. cit.*, MN 166 on Art. IX EGJN; see also Zimmermann, *Münchener Kommentar zur Zivilprozessordnung*, Volume 33, on the question of the imposition of costs of the proceedings).

[66] 24. A distinction must be made between the question of waiver of immunity from jurisdiction and the question of a potential enforcement against the assets of the international organization, [the immunity from] which must be waived separately (Seidl-Hohenveldern, *loc. cit.*, MN 1044).

[67] 25. Whether—or to what extent—a subject of international law enjoys immunity from jurisdiction or whether it has validly waived its immunity is to be decided by the court itself (see Matscher, *loc. cit.*, MN 190 on Art. IX EGJN, with further references); also in case of an appeal there is no arbitral award within the meaning of Art. 20 of the Agreement.

[68] 26. On the basis of that standard, the lodging of a lawsuit by the co-involved party before the Klagenfurt Regional Court was, under rules of international law, first of all a valid waiver of immunity from orders of the court, but also from the authorities of the judicial administration during the proceedings, for instance for the payment of court fees, which is why the Austrian authorities have jurisdiction in this matter.

[69] 27. The question of immunity from jurisdiction must be separated from that of the material exemption from fees under Art. 10 of the Agreement, but also under Art. VII Sec 9(a) IBRD-AoA.

On the question of the material exemption from fees:

[70] 28. According to the jurisprudence of the Supreme Administrative Court, the interpretation of treaties should not, in principle, stop at the wording. Rather, according to Art. 31(1) Vienna Convention on the Law of Treaties, Federal Law Gazette No 40/1980, treaties shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose (see, for instance, Supreme Administrative Court, 3 September 1987, 87/16/0071 = Slg. 6244/F).

[71] 29. In its judgment of 9 September 2015, Ro 2015/16/0028, the Supreme Administrative Court reached the following conclusion while interpreting Sec 8 Enterprise Liquidity Support Act (*ULSG*):

[72] Following the settled case law of the Supreme Administrative Court, the broadest possible meaning of the words constitutes the limit of any interpretation (see for instance the judgment of this court of 25 October 1990, 89/16/0029 with further references). Sec 8 Enterprise Liquidity Support Act (*ULSG*) states that the liability agreements concluded in the

implementation of this federal law are, *inter alia*, exempt from the fees laid down in the Court Fees Act (*GGG*). The broadest possible meaning of the wording of Sec 8 Enterprise Liquidity Support Act (*ULSG*) extends the exemption from fees—in this case from an obligation to pay fees under the Court Fees Act (*GGG*)—to liability agreements concluded in the implementation of the Enterprise Liquidity Support Act (*ULSG*). This means that the (written) liability agreements of the Federal Government, which are set out in the Enterprise Liquidity Support Act (*ULSG*) in the form of an authorization to the Federal Ministry of Finance, should be exempt from court fees. The exemption from fees under Sec 8 Enterprise Liquidity Support Act (*ULSG*) is therefore limited to circumstances in which the conclusion of the liability agreement could potentially be subject to fees. Thus, the attempt to interpret the provision as meaning that any further circumstances, which may trigger such fees subsequently to the conclusion of such liability agreements, such as the initiation of disputes arising from such liabilities, also fell under the exemption of Sec 8 Enterprise Liquidity Support Act (*ULSG*), goes beyond the possible meaning of the words of the exemption provision. Insofar as the appellant refers to the view held by Diwok/Schramm in *Unternehmensstabilitätsstärkungsgesetz* (2010) in MN 2 and 7 on Sec 8 that the exemption of fees also extends to lawsuits, this is not convincing, as the commentators do not give any reasons for their interpretation.

[73] An interpretation attempt, which would grant the benefit of the exemption from fees to potential other circumstances beyond the scope of application of the exemption provision—subsequent to the conclusion of contracts falling within the scope of application also to the filing of lawsuits arising from such contracts—would go beyond the possible meaning of the words of the exemption provision.

[74] 30. According to Art. 10(1) of said Agreement, the Organizations and their property are exempt from all forms of taxation [...]. According to paragraph 3, all transactions [...] in which the Organizations are involved and all documents relating to such transactions (in English: “all documents recording such transactions”) are exempt from all taxes, recording charges and court fees [...]. Insofar as the co-involved party construes a personal exemption from fees also for court fees from Art. 10(1) of the Agreement by way of a broad interpretation of the term “taxation” [...], this is opposed by the context, namely the distinction made in Art. 10(3) of the Agreement between taxes, recording charges and court fees [...], which precludes a broad interpretation of the term taxation [...] as including court fees.

[75] 31. Only Art. 10(3) of said Agreement provides for an exemption (also) from court fees, however (in the German version) only for all transactions in which the Organizations are involved, and all documents relating to such transactions, in English only for “all transactions” (i.e. transactions in general, dealings, negotiations) and for “all

documents recording such transactions” (i.e. all documents authenticating such transactions).

[76] 32. Neither the Administrative Court nor the parties to the administrative court proceedings consider that the lawsuit in question constitutes a transaction [...]. Also the exemption of a *document* relating to such transactions does not apply here, as the circumstances triggering the obligation to pay court fees are not the mere drafting of a submission initiating proceedings (*Klagsschrift*), but the *filing of the submission initiating proceedings at the court* (Sec 2(1)(a) Court Fees Act (*GGG*)), especially since to English version of Art. 10(3) of said Agreement—formulated even more narrowly in relation to documents—provides for exemption from fees only for *documents recording such transactions* [...], whereby this version clearly does not cover the filing of a lawsuit in court. The subject of the flat fee pursuant to fee item 1 Court Fees Act (*GGG*) are civil proceedings of the first instance and not the submission initiating proceedings. In line with this, for the obligation to pay fees to arise, Sec 2(1)(a) and (b) Court Fees Act (*GGG*) takes account of certain acts, so that it does not depend on mere drafting of the submission initiating proceedings [...], but on procedural acts during civil proceedings.

[77] By taking account of both versions of the Agreement, the attempt of the Administrative Court, as well as the co-involved party, to interpret the Agreement in a such a way that any other circumstances—triggering the obligation to pay court fees—that result from such transactions or documents in connection with such transactions (“transactions ... and all documents recording such transactions”), namely the filing of a lawsuit arising from such transactions, would also fall under Art. 10(3) as an exemption provision, exceeds the broadest possible meaning of the exemption provision.

[78] 33. The co-involved party also claimed exemption from fees from Art. VII Sec 9(a) IBRD-AoA:

[79] Art. VII Sec 9(a) IBRD-AoA provides for the immunity of the Bank “from all taxation and from all customs duties ...”. While the term “taxation”—as already explained—only means taxation, the term “customs duties” only includes customs duties (see likewise the German translation in the promulgation Federal Law Gazette No 105/1949), especially due to the context of Art. VII Sec 3 IBRD-AoA, which uses the terms “judicial process” [...] and “action” [...], while Sec 9 IBRD-AoA terminologically distinguishes “operations and transactions” therefrom; if an exemption for judicial proceedings had also been considered, Art. VII Sec 9(a) IBRD-AoA would presumably

also have listed “actions” at least for such acts, if not added the term “court fees” to the terms “taxation” and “customs duties”.

[80] Thus, also Art. VII Sec 9(a) IBRD-AoA provides no basis for considering a personal exemption of the co-involved party from court fees.

[81] 34. The contested decision of the Administrative Court is thus unlawful as to its content; against the background of the described—unambiguous—understanding of said Agreement as well as the IBRD-AoA, the case proves ready for a decision, which is why, in the interest of simplicity, expediency and the saving of expenses, it is found in the merits themselves that the contested decision is to be amended to the effect that the appeal of the co-involved party is rejected. [. . .]

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