E.4.5.

United States Department of State

Washington, D.C. 20520

October 23, 1990

Dear ,

Per your letter request of October 10, 1990, for departmental guidance on the applicability of United States labor laws to foreign missions and their non-diplomatic personnel, I have compiled the following material for your information and guidance. This material consists of excerpts from unclassified department letters, telegrams, and notes addressing the above subject. I hope that it proves useful to you.

1. Letter dated September 11, 1990 to foreign embassy from the Office of the Legal Adviser, Diplomatic Law and Litigation Division:

"1. Foreign Missions as Employers

Under international law, a sovereign state is not immune in the courts of another state from lawsuits arising out of its commercial acts. The Foreign Sovereign Immunities Act of 1976, 28 U.S.C. §§ 1330, 1602 et seq., expressly incorporates this principle into U.S. law. See 28 U.S.C. § 1605(a)(2). In any lawsuit involving a claim to which it is not immune, a foreign state, including its political subdivisions, agencies and instrumentalities, is liable to the same extent as a private individual under like circumstances. Id. § 1606.

The courts of many countries have concluded that the employing of local residents is a commercial activity and that foreign sovereigns are therefore not immune to lawsuits arising out of these employment relationships. Moreover, under both the Vienna Convention on Diplomatic Relations (article 41) and the Vienna Convention on Consular Relations (article 55), the personnel of foreign missions are obliged to respect host state laws and regulations. Taken together, these provisions mean that, as employers in the United States, [foreign] missions are subject to relevant federal and state employment laws and regulations unless they are exempted from these rules by U.S. or international law.

Certain U.S. statutes contain express exemptions for foreign governments as employers. See 26 U.S.C. § 3401(a)(5) (foreign governments need not withhold income tax from the salaries of their foreign national employees); 26 U.S.C. § 3121(b)(11) (foreign missions exempt from withholding Social Security taxes from their employees' salaries); and 26 U.S.C. § 3306(a) and (c)(11) (foreign missions exempt from paying federal unemployment tax on the salaries of their employees). ...[A]t least one state has interpreted its laws as exempting foreign consulates from participating in a mandatory state-administered unemployment compensation scheme. See Opinion of Georgia Administrative Law Judge Harold Irvin, Jan. 3, 1990, Claim Number 255-80-9357. In addition, it is the U.S. position that international law precludes a host state from requiring a diplomatic or consular mission to employ any particular person. Thus, we regard foreign missions as exempt from any requirement to reinstate a former employee found to have a right under local law to reemployment -- as, for example, following a successful action for wrongful discharge.

I am aware of no U.S. law, treaty provision, or rule of customary international law, however, that exempts a sending state from participating in a workers' compensation plan if local law so requires [consistent with the Vienna Conventions on Diplomatic and Consular Relations]. [It is recommended that the Embassy] determine, through private counsel or consultation with the [locality], (1) whether a foreign government is required to participate in such a plan and, if so, (2) what action by the State would be required to exempt [the foreign government] from this requirement."

2. Unclassified telegram from Department to U.S. mission abroad dated February 14, 1989; Subject: Tax collection from employees of diplomatic missions:

"Accredited diplomatic agents and administrative and technical ("A & T") staff are exempt from taxation in host country under the Vienna Convention on Diplomatic Relations ("VDCR"), to which both the U.S. and [host state] are parties. Article 33 of VCDR exempts diplomatic agents from host state social security provisions, Article 34 exempts diplomatic agents from other host state taxation, and Article 37 grants the same treatment to A & T staff. Thus, ... diplomatic agents and A & T staff pay no taxes here, and VCDR requires that U.S. diplomatic agents and A & T staffers receive the same treatment.

As for U.S. citizen and resident employees of diplomatic missions here, U.S. statutes explicitly exempt foreign governments, including diplomatic and consular missions, from the requirement to withhold income or social security taxes

from paychecks, or to pay the employer contribution to the social security system. 26 U.S.C. section 3401a(5) states that, for purposes of calculating wages on which an employer must withhold income tax, the term "wages" "shall not include remuneration paid ... for services by a citizen or resident of the United States for a foreign government or international organization ...". 26 U.S.C. Section 3121b(11) excludes, from the definition of "employment" which gives rise to an employer's obligation to withhold and pay social security tax, "service performed in the employ of a foreign government (including service as a consular or other officer or employee or a nondiplomatic representative) ...." Under these statutes a foreign mission has no obligation to collect or pay tax obligations of its U.S. citizen or resident employees."

3. Unclassified telegram from Department to U.S mission abroad dated June 27, 1989; Subject: Litigation against U.S. Embassy:

"Under restrictive theory of sovereign immunity now prevailing in international law, states are not permitted to claim immunity in foreign courts with respect to commercial activities in that state. Employment of local nationals by diplomatic or consular mission is generally deemed to constitute commercial activity, at least to the extent that what is at issue in litigation is benefits provided under terms of employment or under local labor law. Department does take the position ... that jurisdiction of local courts does not extend to ordering reinstatement of employees or other actions inconsistent with autonomy of mission as representative of sovereign government, but claims for labor benefits or breach of contract money damages can generally be adjudicated by local courts."

4. Letter dated September 24, 1990, to U.S. Department of Labor from the Office of the Legal Adviser, Diplomatic Law and Litigation Division:

"Per our conversation, following are excerpts from Department of State diplomatic notes to all embassies dated 1981 regarding treatment of private servants of diplomatic personnel:

"The Secretary of State [expresses] deep concern of the Department of State over the evidence that some members of diplomatic missions have seriously abused or exploited household servants who are in the United States under nonimmigrant A-3 visas.

The Department is confident that all [embassies] are aware that promotion of the increased observance of internationally recognized human rights by all countries is stated by statute to be a principal goal of the foreign policy of the United States."

. . . .

[Where a United States consular officer abroad is uncertain that a prospective domestic servant fully understands the salary and working conditions of the proffered employment, consular officers should require a written employment contract.] United States consular officers will carefully review such contracts prior to the issuance of a visa to ensure that the wages and other conditions of employment are reasonable in light of the work involved and the costs of living in this country. That contract must contain the following information:

1. A description of the duties to be performed by the alien;
2. The wages to be paid on an hourly or weekly basis;
3. Total hours of guaranteed employment per week, amount of overtime work which may be required of the employee, and conditions for overtime payment;
4. A statement that the employee will be free to leave the employer's premises at all times other than during regular or overtime working hours.
5. The total amount of money, if any, to be advanced by the employer, with details of specified items, such as air fare, and the terms for repayment of the advance;
6. Express provisions for any offsetting charges for room and board viewed as a part of compensation;
7. A provision governing termination by either party to the contract; and
8. A statement that a duplicate of the contract has been furnished to the employee in a language he or she can understand.

. . . .

The Department of State wished to stress that it must look to each mission to take appropriate measures to ensure that domestic employees of their staff members are treated fairly and equitably. Verified instances of abuse will be dealt with effectively.

. . . .

[The Department emphasizes its] resolve to ensure reasonable living and working conditions for all servants, attendants and personal employees of diplomatic mission personnel."

5. For further information on the applicability of United States and State employment laws to foreign missions, I refer you to the provisions of the Foreign Sovereign Immunities Act, 28 U.S.C. 1330, 1332, 1602-1611 (FSIA), judicial decisions under the FSIA, and the legislative history of the statute, cited in part in 11 Vanderbilt J. Transnat'l L. 483, 498-506 (1979).

Please let me know if I may be of further assistance to you and to the Embassy of .

Very truly yours,

Gilda Brancato

Gilda Brancato
Attorney-Adviser
Office of the Legal Adviser
Diplomatic Law and Litigation Division

drafted: L/SFP - G Brancato x 71074 Wang 803
10/9/90

cleared: L/SFP - D Jones
L/SFP - T Ramish
S/CPR - L Dunham (info)
M/OFM - H Porter (info)