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IMMUNITIES OF INTERNATIONAL ORGANIZATIONS

(presented by Dr. Joel Hernández García)

1. Background to the topic within the Inter-American Juridical Committee

At the last period of sessions, the Committee decided to separate its study of the immunities of international organizations from the general topic "Immunity of States and of International Organizations" that it has been discussing since its 81st session.

Three factors fully warrant the separate study of this topic. First, the sources of international law used by the Member States to recognize international organization immunities are different from those used with respect to the immunity of States. Second, in material terms, the immunities differ substantially between the two groups. While international practice is more homogenous in the case of State immunity, the treatment given to international organizations is determined on a case-by-case basis. Finally, and perhaps most importantly, the very nature of these two subjects of international law requires that distinctions be made in how they appear before domestic courts.

This Rapporteurship has benefited from the work carried out by the Committee since the topic was included on its agenda. In addition to the discussions that have taken place within the Committee, the *questionnaire* distributed to the Member States in 2013 contains questions related to the immunities of international organizations. The answers to those specific questions provide a first understanding of the practices that the states follow. One of this Rapporteurship's first conclusions is that it is not necessary to send out a second *questionnaire* on international organization immunities.

This first report by the Rapporteurship is intended to serve a dual purpose. First, to describe the dimensions of international organizations' immunities, in order to explain how they differ from the immunities granted to States. Second, to present the Committee with a proposed instrument for its consideration, based on the Rapporteur's work.

This initial report is accompanied by a document prepared by the Secretariat (document CJI/09/15), for which the Rapporteurship is most grateful and which will be used as the basis for its work in the future.

2. Results of the *questionnaire* sent by the Committee to the Member States

The questionnaire that the Secretariat distributed among the Member States (document CJI/doc.431/13 rev. 1) has received a total of 12 replies to date, from Bolivia, Brazil, Colombia, Costa Rica, the Dominican Republic, El Salvador, Jamaica, Mexico, Panama, Paraguay, the United States, and Uruguay.

The following questions from the *questionnaire* are of relevance in studying the immunity of international organizations:

1. Does your country's domestic law provide jurisdictional immunity for states and international organizations? If so, please indicate the applicable provisions. If not, are there any guidelines of relevance in connection with state immunity?

3. Does your country's domestic law provide for any exceptions related to "commercial activities" carried out by a state or foreign entity? What is the situation as regards cases of "intentional" or "negligent" violations and breaches of international law?

4. Has your country's judiciary issued any important decisions regarding the immunity of states or of international organizations? If so, please indicate the names and dates of those decisions and provide official citations or copies of the judgments.

7. Does your country's judiciary follow customary provisions (international custom) regarding state immunity or the immunity of international organizations?

Analyzing the responses received yields the following conclusions:

National law on jurisdictional immunity for States and International Organizations

The United States reports that the privileges and immunities of international organizations are granted under an Executive Order of the President pursuant to the International Organizations Immunities Act (IOIA). The other Member States that replied do not have specific legislation for the jurisdictional immunity of either States or international organizations.

Jamaica presented information on its Technical Assistance (Immunities and Privileges) Act of 1982. Likewise, a group of states indicated that the legal basis for dealing with the topic was set down in international treaties. In that the incorporation of international law into the domestic legal order is automatic — in other words, without requiring a separate act of the legislature — international treaties are generally the direct source for granting immunities to international organizations. In the context of the OAS, reference was frequently made to the Agreement on Privileges and Immunities of the Organization of American States of 1948, along with other international instruments, as one of the main sources.

Most of the answers to this question spoke of the hosting agreements signed by international organizations and the States where their headquarters are based as a principal source of International Law. Accordingly, a study of the hosting agreements

entered into by the Member States would reveal the treatment given to international organizations in the Hemisphere and, as a result, the States' international practices.

Exception for "commercial activities"

Studying the exceptions to jurisdictional immunities not only reveals their scope but, more importantly, indicates how situations arising as a result of organizations' actions in their host countries are treated juridically, with a view to preventing legal vacuums that could affect third parties and to ensuring that domestic law is enforced. The domestic treatment given to the exceptions that apply to commercial activities should assist in determining whether states follow the absolute or restrictive theory in their relations with international organizations.

The answers were mixed. In some cases, the States deal with this issue based on the international treaties — chiefly hosting agreements — to which they are parties. In others, the matter is settled by different interpretations adopted by the domestic courts, as indicated in the reply of the United States.

Important decisions related to the immunities of international organizations

As regards judicial decisions, Brazil, Colombia, Jamaica, and the United States reported on significant cases before their domestic courts that have resolved matters relating to international organization immunity.

In the document prepared by the Secretariat (document CJI/09/15), the Committee will also see a long list of cases heard by the courts in Argentina, Brazil, Canada, Colombia, Guatemala, El Salvador, the United States, Uruguay, and Venezuela, which will be examined as part of the Rapporteur's work.

International custom

The Member States' replies were unanimous in indicating international custom as one of the sources of International Law used domestically to resolve matters related to international organization immunity. As stated below, one future task will be to identify the content of that custom and its current status.

3. Current status of international organization immunity in international law

Under the principle of *par in parem non habet imperium*, States enjoy immunity from the courts of other States and so cannot appear as respondents in judicial proceedings. This approach derives from the principle of equality among states, which originally granted absolute immunity. As International Law evolved, absolute immunity was curtailed in those cases in which the basis for the action arose from "commercial activity."

The law applicable to international organizations took a different course. As a general rule, the constituent instrument is the treaty in which each of the Member States extends the organization sovereign recognition and grants it its own legal

personality for the pursuit of its goals. In addition, the majority of constituent treaties establish and regulate — albeit in a very general fashion — the prerogatives of the international organization in question.

However, there is no treaty that codifies the immunities of international organizations at the global or regional levels; instead, each organization enters into a hosting agreement with each State in which it establishes an office. Thus, each State that accredits an international organization in its territory recognizes and grants it, on a sovereign basis, a series of rights and obligations in accordance with the organization's goals and objectives.

Given the lack of both a general international instrument and national law, the Member States deal with the international organizations accredited in their territories on a case-by-case basis.

In this way, before national courts, international organizations assert the immunities recognized to them in the treaties signed with the receiving States. The topic that most frequently reaches the courts is that of labor relations, brought by the employees of international organizations. To better understand the exception to immunity in labor matters, the 1999 judgment of the European Court of Human Rights in the case of *Waite and Kennedy v. Germany* is germane. That ruling found that the immunity of international organizations depended on the availability of suitable and effective resources for the resolution of disputes, provided that:

- The granting of immunity did not hinder or reduce the right of due process.
- The limitations (immunities) sought a legitimate goal that would ensure the organization's operations were free of unilateral interference.
- There was a reasonable level of proportion between the measures adopted and the goal sought.

The purpose of the ruling was ensure that the employee or officer was not left in a state of defenselessness or denied the fundamental right of access to justice.

One this Rapporteurship's goals is to determine the practice followed — both in the Americas and globally— to resolve exceptions to the immunity of international organizations.

4. Proposed document to be drawn up by the Inter-American Juridical Committee

The elements gathered so far lead to a preliminary conclusion: the Member States do not have a homogeneous way of dealing with the immunities of international organizations.

Most of the Member States do not have relevant domestic laws, and there is no evidence that they require to adopt such legislation. The States' practice is to use hosting agreements to regulate their relations with the international organizations

based in their territories. We can also conclude that in connection with this issue, international custom serves as a source of law for resolving cases brought before the domestic courts. Nevertheless, we have insufficient information to determine what that international custom should be understood as implying.

This Rapporteurship is of the opinion that the conditions do not exist for the Organization of American States to consider drafting a legally binding international instrument on the jurisdictional immunities of international organizations. The case-by-case approach adopted for this topic leads us to conclude, first, that the agencies of the State, both administrative and judicial alike, would benefit from learning about the state practices that are following and feeding an emerging international custom, in order to guide their own decisions.

This Rapporteurship therefore suggests that the Committee draft an instrument containing general principles of International Law in the Americas on the jurisdictional immunities of international organizations.

The Rapporteurship believes that if the principles that are generating international custom can be identified, administrative and judicial agencies will have a reference point for orienting their decisions. The proposed instrument would also assist the international organizations themselves in better conducting their legal relations with host States. Finally, both the Member States and the international organizations would benefit from learning about a wide range of principles to assist them in negotiating future hosting agreements.

5. Working method

Over the coming months, and with the invaluable support of the Secretariat, this Rapporteurship will set about examining three sources of law: the constituent treaties of the inter-American system's agencies, the hosting agreements in force in the Member States, and the court decisions that exist. For this third source, the study will cover decisions adopted by the Member States' courts, but it will also examine domestic case law from other parts of the world.

Subject to adaptations as work progresses, the initial purpose of this comparative analysis will be to determine the following issues:

a. The material scope of the jurisdictional immunity of international organizations.

b. Exceptions or limits provided for in treaties or issued by domestic courts.

c. The scope of the exception to jurisdictional immunity for "commercial activities" or cases in which domestic or International Law is breached, particularly in labor matters.

d. The scope of the principle that international organizations must abide by the domestic law, including respect for the fundamental right of access to justice.

e. The resources available to third parties to remedy violations of domestic or International Law.

6. Next steps

This Rapporteurship has set itself the goal of presenting a preliminary draft instrument at the 88th regular session. Once a text has been adopted by the Committee, we suggest that it be presented for consideration by the Member States within the Committee on Juridical and Political Affairs of the OAS, to receive such comments as the Member States deem appropriate, with a view to its adoption by the OAS General Assembly in due course.

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