

**IMMUNITIES OF INTERNATIONAL ORGANIZATIONS:
SECOND REPORT**

(Presented by Dr. Joel Hernández García)

1. Background

At its 86th regular session the Inter-American Juridical Committee decided to separate the review of immunities of international organizations from the general topic of “Immunity of States and International Organizations”, which it has been discussing since its 81st regular session. The Rapporteur presented his first report in response to the Committee’s mandate at the 87th regular session (document CJI/doc.486/15 of July 30, 2015).

In his first report, the Rapporteur argued that the separate study of the issue was amply justified for three reasons. First, the sources of International Law on which Member States draw in granting immunities to international organizations are different from those used in the case of States. Second, the material context of immunities differs markedly from one case to the next. While we see a more homogenous practice with respect to immunities in the case of States, where international organizations are concerned, the treatment is on a case-by-case basis. Last, and perhaps most important, the very nature of these two subjects of International Law inevitably makes their appearance before domestic tribunals is different.

The Rapporteur proposed drafting an instrument containing “general principles of International Law in the Americas on jurisdictional immunities of international organizations.”

The purpose is to set down in the proposed document the principles that are generated in international practice and customs in order to provide the administrative or judicial bodies of Member States with a point of reference to guide their decisions. The proposed instrument should also be useful for international organizations by helping them better to manage their legal relations with host States. The Rapporteur believes that both Member States and international organizations would benefit from the knowledge of those principles in the negotiation of future headquarters agreements.

2. Methodology

It should be recalled that the Rapporteur proposed in his first report examining the following sources of law in drafting the above instrument: constituent treaties of

the organizations of the Inter-American System, headquarters agreements in force for Member States, and case-law decisions.

The purpose of this comparative review will be to identify, *inter alia*, the following aspects:

- a. The material scope of the jurisdictional immunities of international organizations.
- b. Exceptions or limits provided in treaties or domestic court decisions.
- c. The scope of the exception to jurisdictional immunity with respect to “commercial activities” or violations of domestic or International Law, particularly in labor matters.
- d. The scope of the principle of observance of domestic law by international organizations, including observance of the fundamental right of access to justice.
- e. Third-party recourse to remedy violations of domestic or International Law.

3. Constituent treaties, agreements on privileges and immunities, and headquarters agreements

The first stage reviewed 15 international instruments, including constituent treaties, agreements on privileges and immunities, and headquarters agreements of the following regional and subregional organizations. A detailed breakdown of the contents of those treaties can be found in the Annex of this report.

Organization of American States

- Charter of the Organization of American States signed in Bogotá on April 30, 1948, as amended by the Protocol of Buenos Aires in 1967, the Protocol of Cartagena de Indias in 1985, the Protocol of Washington in 1992, and the Protocol of Managua in 1993.
- Agreement on Privileges and Immunities of the Organization of American States adopted at Washington, D.C., on May 15, 1949.
- Headquarters Agreement between the Organization of American States and the Government of the United States of America of May 14, 1992.

Inter-American Development Bank

- Agreement Establishing the Inter-American Development Bank (IDB), adopted at Washington, D.C., on April 8, 1959.

Pan American Health Organization

- Basic Agreement on Technical Advisory Cooperation between the Government of the United Mexican States and the Pan American Sanitary Bureau of May 30, 1984.

- Agreement between the Pan American Sanitary Bureau and the Government of Mexico regarding the establishment of a representative's office in Mexico City and the privileges and immunities required for its operation, of May 30, 1984.

Latin American Institute for Educational Communication

- Cooperation agreement entered into by the countries of Latin America and the Caribbean, henceforth the "Member States" to reorganize the Latin American Institute for Educational Communication (ILCE), adopted at Mexico City on May 31, 1978.
- Agreement between the Government of the United Mexican States and the Latin American Institute for Educational Communication (ILCE) concerning the headquarters of the Institute and the Permanent Missions to be accredited to said Institute adopted on July 10, 1981.

Latin Union

- Constituent Agreement of the Latin Union signed in Madrid on May 15, 1954.
- Headquarters Agreement between the Government of the Argentine Republic and the Latin Union signed at Paris, February 8, 1996.

Southern Cone Common Market (MERCOSUR)

- Treaty establishing a Common Market between the Argentine Republic, the Federative Republic of Brazil, the Republic of Paraguay and the Eastern Republic of Uruguay (Treaty of Asunción) of May 26, 1991.
- Additional Protocol to the Treaty of Asunción on the Institutional Structure of MERCOSUR (Protocol of Ouro Preto) of December 17, 1994.
- Headquarters Agreement between the Eastern Republic of Uruguay and the Southern Cone Common Market (MERCOSUR) for the operation of the Administrative Secretariat of MERCOSUR of December 16, 1996.
- Headquarters Agreement between the Republic of Paraguay and the Southern Cone Common Market (MERCOSUR) relating to the operation of the Permanent Review Tribunal of June 20, 2006.

Latin American Faculty of Social Sciences (FLACSO)

- Agreement on the Latin American Faculty of Social Sciences (FLACSO) of June 18, 1971, as well as the Agreement of April 30, 1975, and the Protocol of Amendment to the Agreement, of June 8, 1979.

The treaties in this area recognize the following as recipients of privileges and immunities: international organizations, missions and representatives of Member States, and officials of the organizations' secretariats. The privileges and immunities contained in those treaties cover the following applicable matters, depending on the subject concerned:

- Immunity from jurisdiction
- Immunity from execution
- Inviolability of premises and archives
- Facilities of communication
- Tax exemption
- Immigration facilities
- Monetary and exchange facilities
- Customs facilities
- Responsibility for contracts of employment governed by local law
- Waiver of immunity

4. Material scope of the immunities of international organizations contained in the treaties reviewed

Legal capacity

A common theme present in constituent treaties is that they grant the international organization legal capacity to exercise its functions and fulfill its purposes.

The content of that legal capacity varies from treaty to treaty. However, in general, they recognize the capacity (i) to contract, (ii) to acquire and dispose of real and personal property, and (iii) to institute legal proceedings.

Immunity from jurisdiction

The texts reviewed recognize immunity from jurisdiction to the international organization, the Member States and their representatives, and the staff of the organization's Secretariat. However, there are degrees of variation to that immunity, depending on the recipient.

By and large, the treaties grant international organizations, as well as their property and assets, immunity from all judicial proceedings. That absolute immunity granted to international organizations is developed to different degrees in each of the

treaties examined. Notable, however, is the Agreement Establishing the Inter-American Development Bank, where the immunity extends to the territories of a Member State where the Bank has an office or where it has appointed an agent for the purpose of accepting service or notice of process or has issued or guaranteed securities.

Immunity from jurisdiction also extends to the missions of the Member States of the international organization. Broadly speaking, representatives of Member States enjoy the same level of immunity from jurisdiction as is recognized under International Law to diplomatic agents.

In the case of general secretariat staff of international organizations, immunity varies with the administrative level of the official. For example, the Secretary General and Assistant Secretary General of the OAS enjoy privileges and immunities equivalent to those accorded to diplomats.

For the rest of the staff, immunity from jurisdiction is of a functional nature. In other words, officials enjoy immunity from all judicial proceedings in respect of acts performed in the course of their official duties.

Inviolability of premises and archives and facilities of communication

The treaties reviewed recognize the inviolability of the premises and archives of international organizations. For example, the Agreement on Privileges and Immunities of the OAS provides that “[t]he premises of the Organization and of its Organs shall be inviolable” (Article 3) and that “[t]he archives of the Organization and of its Organs, and all documents belonging to them or in their possession, shall be inviolable wherever located” (Article 4).

The inviolability of premises and archives generally extends to the missions of Member States.

The treaties reviewed grant both international organizations and Member States missions facilities of communication. Those facilities cover the use of codes, receipt of documents, and even exemption from mail fees of Member States. Those facilities extend to the missions of Member States.

Tax exemptions and customs facilities

Such matters are mainly governed by agreements on privileges and immunities as well as by headquarters agreements.

International organizations and their officials are exempt from all direct taxes. Similarly, international organizations are exempt from customs duties, prohibitions, and restrictions on articles that they import or export for official use.

In the case of the missions of Member States, the treaties reviewed grant tax exemptions and customs facilities similar to those recognized to diplomatic missions.

At a personal level, international organization officials are exempt from taxation on salaries and emoluments. They are also granted customs facilities for the import of their personal effects upon taking up their post in the host country.

5. Exceptions to or limits on the immunities of international organizations under the treaties reviewed

The instruments examined expressly stipulate exemptions or limits on the immunities or privileges accorded.

A feature of the treaties examined is the waiver of privileges and immunities. In the case of international organizations, the treaties establish that the privileges and immunities granted to officials and staff members may be waived in the interests of the organization. The Agreement on Privileges and Immunities of the OAS provides that “the Secretary General shall waive the privileges and immunities of any official or member of the staff in any case where ... the exercise thereof would impede the course of justice” (Article 14).

In some cases a safeguard is included, by which immunities and privileges are not waived when doing so would prejudice the purposes for which they were granted. See, for example, Article 13 of the Agreement on Privileges and Immunities of the OAS.

Another limitation envisaged in agreements is based on the nationality of the representative of the Member State or of the secretariat official. Some agreements limit the privileges and immunities of their nationals when their functions are performed within their territory. For example, customs and immigration facilities and exemption from taxation are denied to nationals in the Agreement Establishing the Inter-American Development Bank (see Article 9).

Generally speaking, the tax exemption excludes the payment of charges for public utility services for international organizations, Member State missions and representatives, and Secretariat officials. The tax exemption only applies to direct taxes and excludes indirect levies, such as value-added tax (VAT).

One constant in the cases of waiver of immunity from jurisdiction concerns measures of execution. In the instruments reviewed, immunity from jurisdiction includes immunity from execution unless the waiver of immunity from jurisdiction excludes *ipso facto* immunity from execution. For instance, the second paragraph of Article 5 of the Headquarters Agreement between the Eastern Republic of Uruguay and MERCOSUR for the Operation of its Administrative Secretariat states that a separate pronouncement shall be required for a waiver of immunity from execution.

As regards responsibility for contracts employment of governed by local law, most of the treaties analyzed do not contain specific rules. Given that such matters

are the ones that most often come before domestic courts, it would be useful to review other international instruments in order to identify international practice.

In the meantime, it is worth noting that the Agreement between the Government of the United Mexican States and the Pan American Sanitary Bureau provides that the Bureau's Representative's Office shall establish appropriate procedures for the settlement of controversies arising from contracts or other private law disputes in which the Bureau's Representative's Office is a party (Article IV.2.a).

That instrument also provides that the Bureau's Representative's Office shall establish appropriate procedures for the settlement of controversies involving an official of the Bureau's Representative's Office who enjoys immunity by reason of their official position, where the Representative has not waived said immunity (Article IV.2.b)

For its part, the Headquarters Agreement between the Government of the Republic of Argentina and the Latin Union provides that "the Organization shall pay the social security contributions established under Argentine national law and its staff rules for local employees" (Article VII).

In other words, we can tentatively identify two approaches. On one hand, the approach adopted by the Pan American Sanitary Bureau in Mexico where the Bureau accepts the obligation to establish dispute settlement mechanisms; and on the other, making disputes subject to local law, as Argentina provides for the office of the Latin Union on its territory.

By reviewing more instruments we will be able to determine if the practice of States coalesces around those two approaches.

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