Translated from Spanish

Responses of the Republic of Chile

Questionnaire and background to the topic "Settlement of international disputes to which international organizations are parties"

1. What types of disputes/issues have you encountered?

To date, there have been no disputes between international organizations and the State of Chile itself resulting from the application or interpretation of treaties to which both are parties.

There have been disputes between international organizations and private parties arising from the jurisdictional immunities of organizations. The nature of the immunities of international organizations gives rise to the possibility of a third party's right to access to justice being infringed, given that the most frequent application of these immunities is as a barrier or impediment to the exercise of judicial or adjudicatory jurisdiction, which could mean that local courts are the wrong forum to exercise such jurisdiction. Most of the disputes in question are related to labour matters.

Article 27 of the Vienna Convention on the Law of Treaties provides that "a party may not invoke the provisions of its internal law as justification for its failure to perform a treaty. This rule is without prejudice to article 46." This rule is fully applicable to international organizations,[1] meaning that a State party to a treaty establishing an intergovernmental organization or a State that has signed an agreement on immunities with such an organization may not invoke its internal law in order to not recognize the immunities and privileges provided for in the instrument.

The foregoing does not preclude failure to comply with the fundamental obligation to respect the rights at play in conflicts between an organization and a third party, such as the rights to due process and effective judicial protection.[2] This matter pertains to the international development of human rights and the constitutional protection of fundamental rights, as opposed to the immunities of international organizations, which are assumed as international obligations.[3] The difficulty lies in achieving compliance with the international obligations in dispute, i.e. recognizing the immunities

[1] This provision constitutes a codified customary rule. On this subject, see Annemie Schaus, "Commentaires de l'article 27 de la Convention de Vienne sur le droit des traités du 23 mai 1969", *Les Conventions de Vienne sur le droit des traités: Commentaire article par article*, O. Corten and P. Klein, eds. (Brussels, Bruylant, 2006), pp. 1119–1137.

[2] August Reinisch, (2008 A), *International Organizations before National Courts* (New York, United States of America, Cambridge University Press), p. 392. See also Pierre Schmitt (2017), p. 91.

[3] On this issue, Blokker (2013, p. 260) states that "from the early days in which immunity rules became part of the law of international organizations, it has been recognized that such immunity should not leave complainants without a remedy."

from jurisdiction established at treaty level, while also protecting the human or fundamental rights of third parties.

Thus, as a result of the foregoing, when international organizations come into contact with the jurisdiction of a national legal system, the question of the effects or consequences of their immunities arises. While the need to uphold the immunities of organizations, in order to maintain their independence, should not be forgotten, that aim must be balanced against the rights of potential litigants to pursue their interests against an organization before a national court.

2. What methods of dispute settlement have been resorted to in cases of disputes with other international organizations, States or private parties?

Dispute settlement mechanisms provided for in headquarters agreements between Chile and international organizations include the procedure set forth in sections 24 and 32 of the Convention on the Privileges and Immunities of the Specialized Agencies – whereby the International Court of Justice shall be requested to provide an advisory opinion, if the dispute involves certain United Nations agencies – and also consultations and arbitration.

However, as mentioned above, to date there have been no disputes between the Republic of Chile and international organizations that have made it necessary to resort to any of the aforementioned means of dispute resolution.

Nevertheless, in relation to our response to the previous question, it should be noted that disputes between international organizations and private parties, in particular those concerning labour matters, have been resolved through the national courts.

National jurisprudence has been divided on the question of whether national courts are competent to hear cases involving international organizations. The jurisprudence has gone in a zigzagging and somewhat contradictory direction; the immunity of international organizations from jurisdiction has been accepted almost without limit in some cases, while in others it has not been accepted at all.

In Chile, there have been cases, specifically cases brought against the United Nations Development Programme (UNDP), in which it has been claimed before the national courts that the service contracts between private parties and UNDP indicate that any claim or dispute between the parties concerning the interpretation, execution or termination of the contract that cannot be settled amicably must be settled through obligatory arbitration as set out in the Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL). Obligatory arbitration must, in all cases, be preceded by a conciliation procedure as provided for in the UNCITRAL Conciliation

Rules.

The Ministry of Foreign Affairs of Chile understands that this clause complies with article VIII of the Convention on the Privileges and Immunities of the United Nations, regarding the settlement of disputes, which provides that "the United Nations shall make provisions for appropriate modes of settlement of (a) disputes arising out of contracts or other disputes of a private law character to which the United Nations is a party", and has so informed the courts.

3. From a historical perspective, have there been any changes or trends in the types of disputes arising, the numbers of such disputes and the modes of settlement used?

Chile considers that there have been changes in the types of disputes with international organizations. The field in which international organizations operate has expanded over time. Moreover, the number of organizations has been increasing exponentially. This means that there are now more potential sources of conflict. For example, there is no longer only a State-organization relationship, but also an organization-private party relationship.

As the establishment of the rule of law has progressed, international human rights law, which is closely related, has also been developing. The emphasis here is obviously on establishing guarantees for individuals in relation to the activity of the State.

The centrality of the rights at stake in relation to due process under international human rights law is clear from the frequency with which they are raised before the various universal and regional international human rights organizations serving as protection mechanisms.[4]

The protection of human rights is fundamental to Chile, as reflected in the various judgments that have been issued upholding claims against international organizations. The right of access to court proceedings is not unlimited, and limits may be justified provided that immunity is accompanied by appropriate safeguards, such as the existence of alternative remedies that are accessible or available to the claimant. In this regard, in the field of human rights there are concepts such as "public order", "health", "public morals", "public danger" and "national security" that can be used to protect common values shared by society and therefore provide sufficient grounds for limiting or restricting rights.[5]

In Chile, many human rights are constitutionally guaranteed. Constitutional limits found in

[4] For example, the right to a fair trial, provided for in article 6 of the European Convention on Human Rights, is one of the most frequently invoked rights in litigation before the European Court of Human Rights. The same is true of the American Convention on Human Rights, which enshrines this right in its article 8.

[5] John Finnis, *Natural Law and Natural Rights* (New York, Oxford University Press, 2011), pp. 214–216.

internal regimes should be considered potential restrictions on immunities.[6]

Another type of dispute that may arise are disputes related to the accountability of States and international organizations when funds have passed between them on the basis of a treaty on, for example, international assistance. In Chile, an independent entity, the Office of the Comptroller General of the Republic, is responsible for the oversight of government agencies requesting such assistance and must ensure the proper use of the funds.

With regard to potential disputes between international organizations and the State of Chile, there seems to be a tendency in the most recent treaties for the preferred methods of settlement to be consultations and/or international arbitration.

While the first agreements concluded between the Republic of Chile and international organizations, such as the 1952 agreement with the Food and Agriculture Organization of the United Nations (FAO) and the 1969 agreement with the United Nations Educational, Scientific and Cultural Organization (UNESCO), provide for disputes being settled by means of advisory opinions of the International Court of Justice, the subsequent trend demonstrates a preference for direct consultations or negotiations and, failing that, arbitration.

This is the case, for example, of the agreement concluded with the United Nations Special Fund in 1960, concerning assistance from the Special Fund; the agreement concluded with the European Organization for Astronomical Research in the Southern Hemisphere in 1963; and the agreement concluded with the Pan American Health Organization in 2011.

Similarly, in the headquarters agreement between Chile and the Office of the United Nations High Commissioner for Human Rights concluded in 2009, arbitration is explicitly provided for as a method of dispute settlement.

It is the view of Chile that the changes that have taken place in this regard have been aimed at providing for mechanisms that are mutually satisfactory to the parties while also being effective. Thus, methods that encourage consultation between the parties or the use of voluntary mechanisms (good offices, conciliation or mediation) have been developed, with disputes being submitted to a judicial or adjudicatory authority, such as an international court or an arbitration panel, only as a last resort.

With regard to disputes between international organizations and private parties, various

[6] See the analysis on human rights and constitutional limits by Reinisch (2000, *op. cit.*, pp. 278–305), concerning various decisions adopted by constitutional courts in different States.

dispute settlement mechanisms have been developed, such as administrative tribunals within international organizations, insurance, arbitration and the waiving of immunity.

4. Are there standard/model clauses concerning dispute settlement in your treaty and/or contractual practice? Please provide representative examples.

There are no standard or model clauses *per se* in treaties between Chile and international organizations. However, the most frequently used clauses are the following.

(a) Treaties in which the procedure enshrined in sections 24 and 32 of the Convention on the Privileges and Immunities of the Specialized Agencies is provided for as a method of dispute settlement contain a provision along the following lines:

> Any dispute between the Government and the [relevant international organization] concerning the interpretation or application of this Agreement or any supplementary agreement, or any question affecting the Headquarters of the Regional Bureau or relations between the [relevant International Organization] and the Government shall be resolved in accordance with the procedure indicated in section 24 and section 32 of the Convention on the Privileges and Immunities of the Specialized Agencies.

(b) More recent treaties in which consultation and arbitration is preferred include clauses along the following lines:

> Any dispute between the [relevant international organization] and the Government arising out of or relating to this Agreement which cannot be settled by negotiation or other mutually agreed procedure shall be submitted to arbitration at the request of either Party. Each Party shall appoint one arbitrator, and the two arbitrators so appointed shall appoint a third, who shall be the chair. If within 30 days of the request for arbitration either Party has not appointed an arbitrator or if within 15 days of the appointment of two arbitrators the third arbitrator has not been appointed, either Party may request the President of the International Court of Justice to appoint an arbitrator. The procedure of the arbitration shall be fixed by the arbitrators, and the expenses of the arbitration shall be borne by the Parties as assessed by the arbitrators. The arbitral award shall contain a statement of the reasons on which it is based and shall be accepted by the Parties as the final adjudication of the dispute.

5. Are there types of disputes that remain outside the scope of available dispute settlement methods?

Disputes involving private parties generally fall outside the scope of the available dispute settlement methods, since the vast majority of international organizations do not have mechanisms in place for the settlement of disputes with private parties. This means that the national courts hear the cases and subject organizations to their jurisdiction, despite the immunities of those organizations.

It is necessary for international organizations to provide settlement mechanisms for such disputes, since the current situation could give rise to conflicts between States and organizations. Moreover, the existence of such mechanisms would resolve the fundamental problem created by these situations, which is the violation of the private party's right to access to justice.
