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Translated from French and German

Swiss Confederation

Directorate of Public International Law

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Response of Switzerland to the questionnaire on the topic "Settlement of international disputes to which international organizations are parties"

(1) What types of disputes/issues have you encountered?

N/A

(2) What methods of dispute settlement have been resorted to in cases of disputes with other international organizations, States or private parties? Please provide any relevant case law, or a representative sample thereof. If you cannot provide such information for confidentiality reasons, could you provide any such decisions or awards in redacted form, or a generic description/digest of such decisions?

Switzerland hosts many international organizations on its territory. As a result, cases involving disputes of a private law character to which an international organization is a party have been brought before the Swiss judicial and executive authorities on several occasions. Applicants are generally referred back to the dispute settlement provisions put in place by the international organizations in accordance with their undertakings given to Switzerland in the conclusion of their respective headquarters agreements. If applicants attempt to initiate proceedings before Swiss courts or executive authorities (Federal Department of Foreign Affairs and/or Federal Council) against international organizations in disputes of a private law character, they are referred back to the dispute settlement system put in place by the international organizations flowing from the headquarters agreement concluded with Switzerland.

Some examples of case law:

- Federal Court decision No. ATF 118 lb 562 of 21 December 1992:[1] The Federal Court considered the question of immunity from jurisdiction invoked by the European Organization for Nuclear Research (CERN) in an appeal against a decision of an arbitral tribunal. The Federal Court noted inter alia that: "the subjection of international organizations to an arbitration clause does not mean a waiver of their immunity. The arbitration in which they participate remains protected from any intervention by a national court, unless, the organization waives its immunity or its headquarters agreement provides otherwise, or the organization agrees that the arbitration be subject to a national law, generally that of the headquarters (...)" (recital 1b). The Federal Court upheld the immunity from jurisdiction of CERN and declared the appeal inadmissible.
- Unpublished Federal Court decision No. 4C.518/1996 of 25 January 1999: The Federal Court considered the question of immunity from jurisdiction of the League of Arab States in the context of a labour law dispute. The Court pointed out that "international organizations enjoy absolute, complete and unfettered immunity. The principle of so-called relative immunity applies only to States, since the distinction between *acta de jure imperii* and *acta de jure gestionis* does not apply to international organizations (...). The case law specifies, however, that since immunity guarantees that they will not be subject to the jurisdiction of State courts, international organizations enjoying such a privilege must give an undertaking to the host State, generally in the headquarters

[1] See https://www.bger.ch/ > jurisprudence.

agreement, that they will establish a method for settling disputes that may arise in connection with contracts concluded with private individuals. This obligation to establish a procedure for settling disputes with third parties is the counterpart of the immunity granted (...)" (recital 4 (c)). The Court upheld the organization's immunity from jurisdiction and dismissed the appeal.

- Decision No. ATF 130 I 312 of 2 July 2004: The Federal Court considered inter alia a possible violation of the right to a fair trial (article 6 of the European Convention on Human Rights) following the refusal by CERN to establish a third arbitration procedure in the case of a dispute. The Court noted that "art. 24 (a) of the headquarters agreement provides that CERN 'shall make appropriate arrangements for the satisfactory settlement of disputes arising from contracts and other disputes to which the organization is a party and other disputes on a point of private law' (...). The exclusion of any review by State courts is therefore corrected by recourse to an arbitral tribunal, or to any other means that may be covered by the expression 'appropriate arrangements' of article 24 of the headquarters agreement. This position is consistent with the case law of the European Court of Human Rights (...) the appellants had the opportunity to present the merits of their claims to the second arbitral tribunal (...) they therefore (...) had access to a court authority. This finding is sufficient to reject the claim of violation of article 6, paragraph 1, of the European Convention on Human Rights (..)" (recital 4 - 4.3.2). The Federal Court rejected the appeal and did not find any violation of article 6 of the Convention. In its case, the European Court of Human Rights also found no violation of article 6 of the Convention (application No. 1742/05, *Eiffage S.A. and others v. Switzerland* - decision of 15 September 2009).
- Decision No. ATF 136 III 379 of 12 July 2010: The Federal Court considered the immunity of the Bank for International Settlements (BIS) and held, among other things, that: "The respondent enjoys immunity from jurisdiction and from enforcement. According to the headquarters agreement, assets entrusted to the respondent or the deposits of the central banks cannot be the subject of an enforcement order, and the respondent, as a third-party debtor, cannot be sued in Switzerland for the purposes of an enforcement (…). It emerged, in the enforcement of the attachment order or the proceedings before the supervisory authority, that the respondent had at no time given its consent to the attachment of the Argentine assets and funds entrusted to it. The respondent cannot, however, be compelled to object to the attachment and to claim before the courts that its rights or immunity are affected by the attachment. (...) The supervisory authority rightly deemed the attachment orders and the enforcement thereof by the debt collection office to be manifestly invalid, in view of the immunity provisions in the headquarters agreement" (recital 4.2.2). The Federal Court upheld the organization's immunity from jurisdiction and dismissed the appeal.
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(3) In your dispute settlement practice, for each of the types of disputes/issues arising, please describe the relative importance of negotiation, conciliation or other informal consensual dispute settlement and/or third-party dispute resolution, such as arbitration or judicial settlement.

N/A

(4) Which methods of dispute settlement do you consider to be most useful? Please indicate the preferred methods of dispute settlement for different types of disputes/issues

N/A

(5) 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?

N/A

(6) Do you have suggestions for improving the methods of dispute settlement (that you have used in practice)?

N/A

(7) Are there types of disputes that remain outside the scope of available dispute settlement methods?

N/A

(8) Does your organization have a duty to make provision for appropriate modes of settlement of disputes arising out of contracts or other disputes of a private law character under the 1946 Convention on the Privileges and Immunities of the United Nations, the 1947 Convention on the Privileges and Immunities of the Specialized Agencies, or an equivalent treaty? How in practice has your organization interpreted and applied the relevant provisions?

N/A

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

In accordance with article 28 of the Federal Act of 22 June 2007, on the privileges, immunities and facilities and the financial subsidies granted by Switzerland as a host State (Host State Act, HSA),[2]the headquarters agreements concluded between the Federal Council and international organizations enjoying immunities in Switzerland provide that each organization must set up appropriate mechanisms for the settlement of disputes arising from contracts to which the organization is a party, or other disputes concerning a point of private law. The obligation to set up an alternative mechanism for the settlement of disputes in place of referral to a judicial authority is the "counterpart" of the immunity granted. Switzerland recognizes the importance of preserving the immunities of international organizations in order to ensure their independence and freedom of action, but also to ensure that private parties are able to exercise their right of access to justice.

Headquarters agreements also contain a dispute settlement clause pertaining to disputes between the host State and the international organization that may arise from the application of the agreement itself.

The following are some examples of texts contained in headquarters agreements concluded by Switzerland:

(a) Agreement on privileges and immunities of the United Nations concluded between the Swiss Federal Council and the Secretary-General of the United Nations on 11 June/1 July 1946.[3]

Article VIII – Settlement of disputes

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;

[2] https://www.fedlex.admin.ch/eli/cc/2007/860/fr.
[3] https://www.fedlex.admin.ch/eli/cc/1956/1092_1171_1183/fr.

(b) Disputes involving an official of the United Nations who by reason of his or her official position enjoys immunity, if immunity has not been waived by the Secretary-General.

Any difference between the United Nations and the Swiss Federal Council concerning the interpretation or application of this Agreement or of any supplementary arrangement or agreement which is not settled by negotiation shall be submitted for decision to a board of three arbitrators; the first to be appointed by the Swiss Federal Council, the second by the Secretary-General of the United Nations, and the third, the presiding arbitrator, by the President of the International Court of Justice, unless in any specific case the parties agree to resort to a different mode of settlement.

(b) Agreement of 11 March 1946 between the Swiss Federal Council and the International Labour Organization concerning the legal status of the International Labour Organization in Switzerland[4]

Article 23 - Private disputes

The International Labour Organization shall make provision for appropriate methods of settlement of:

(a) Disputes arising out of contracts and other disputes of a private law character to which the International Labour Organization is a party;

(b) Disputes involving an official of the International Labour Organization who by reason of his or her official position enjoys immunity, if such immunity has not been waived by the Director.

Article 27 – Jurisdiction

1. Any divergence of opinion concerning the application or interpretation of this agreement or the arrangement for its execution which has not been settled by direct conversations between the parties may be submitted by either party to a tribunal of three members which shall be established on the coming into force of this agreement.
2. The Swiss Federal Council and the International Labour Organization shall each choose one member of the tribunal.
3. The judges so appointed shall choose their president.
4. In the event of disagreement between the judges on the choice of a president, the president shall be chosen by the President of the Supreme Court of the Netherlands at the request of the members of the tribunal.

5. The tribunal may be seized of an application by either party.

6. The tribunal shall determine its own procedure.

(c) Agreement of 2 June 1995 between the Swiss Confederation and the World Trade Organization to determine the legal status of the Organization in Switzerland[5]

Article 44 - Private disputes

1. The Organization shall take appropriate measures to establish a system for the settlement of:

[4] https://www.fedlex.admin.ch/eli/cc/1956/1103_1182_1194/fr.
[5] https://www.fedlex.admin.ch/eli/cc/1997/816_816_816/fr.

(a) Disputes arising from contracts to which the Organization is a party and other disputes involving a point of private law;

(b) Disputes involving an official of the organization who by reason of his or her official position enjoys immunity, if such immunity has not been waived in accordance with article 38.

2. At the request of either party, the Swiss authorities shall assist in the amicable settlement of the above-mentioned disputes.

Article 48 - Settlement of disputes

1. Any difference of opinion between the parties to this agreement concerning the application or interpretation of this agreement which is not settled by direct talks between the parties may be referred by either party to a three-member arbitral tribunal.

2. The Swiss Federal Council and the Organization shall each appoint a member of the arbitral tribunal.

3. The members so appointed shall select by mutual agreement the third member, who shall chair the arbitral tribunal. If no agreement is reached within a reasonable period of time, the third member shall be designated by the President of the International Court of Justice, at the request of either party.

4. The tribunal shall determine its own procedure.

5. The arbitral award shall be binding on the parties to the dispute. It shall be final and without appeal.

(10) Does “other disputes of a private law character” encompass all disputes other than those arising from contracts? If not, which categories are not included? What has been the practice of your organization in determining this? What methods of settlement have been used for “other disputes of a private law character” and what has been regarded as the applicable law?

N/A

(11) Have you developed a practice of agreeing ex post to third-party methods of dispute settlement (arbitration or adjudication) or waiving immunity in cases where disputes have already arisen and cannot be settled otherwise, e.g. because no treaty/contractual dispute settlement has been provided for?

N/A