

## **SECURING THE INDEPENDENCE OF THE COURT AND COMMISSIONS - PROTOCOL ON PRIVILEGES AND IMMUNITIES AND HEADQUARTERS AGREEMENT**

"In order to function effectively, International organizations require a certain minimum of freedom and legal security for their assets, headquarters, and other establishments and for their personnel and representatives of member states accredited to the organizations....".

"The minimum principle appears to be that officials of international organizations are immune from legal process in respect of all acts performed in their official capacity. In any case, the international Immunities are highly specialized and inevitably vary a great deal.....".

"Naturally the immunity given to judges of the International Court and other holders of judicial offices is of special importance and is equated to diplomatic privileges.....".  
(Brownlie, Ian, Principles of Public International Law, Fourth Edition, 1972.)

The ensuing traces the provisions in the draft Instruments on Privileges and immunities of the Court of Justice, Judges, Officials etc., Corresponding proposals in the Headquarters Agreement.

### **II**

#### **THE PROTOCOL ON PRIVILEGES AND IMMUNITIES**

The provision of privileges and immunities for the Caribbean Court of Justice ("the Court") and the Regional Judicial and Legal Services Commission ("the Commission") recognizes the importance of the Court as a judicial institution. The provisions are intended to uphold its dignity, to protect and safeguard the independence, impartiality and integrity of the judges and offices of these institutions, and to facilitate them as well as Attorneys before the Court in the performance of their duties.

This Protocol is made under the enabling provisions of Articles VI(2) and XX of the Agreement Establishing the Caribbean Court of Justice ("the Agreement"). By and large, the provisions which are contained in the Protocol recognize the international law principles on Privileges and Immunities for institutions such as the Court. This paper affords a narrative of the provisions of the Protocol.

#### **A - The Legal Status of the Court and Commission**

Article II confers upon the Court and the Commission full juridical personality. In particular, it accords to them full capacity to contract, acquire and dispose of property and to institute legal proceedings. The Registrar is the representative of those institutions in all legal proceedings.

## **B - Privileges and Immunities of Judges, Officers and Members of the Commission**

By virtue of the provisions of Article IX, judges and officers of the Court, as well as members of the Commission will be granted certain privileges and immunities in their official capacities. They will have the benefit of these privileges and immunities when they are engaged in the business of the Court or Commission in the territory of a government which is a party to the Protocol. These officials will enjoy immunity from all legal action for acts, and words spoken or written in their official capacities. This immunity will continue even after they leave office (Article IX(1)(a)).

These officials will also be immune from arrest or detention for acts which they perform in their official capacities (Article IX(1)(b)). They will also be immune from inspection and from the seizure of their personal and official baggage, except in cases of *flagrante delicto*. In those cases in which the baggage of any of these officials of the Court will be searched, the competent authorities must immediately inform the Registrar or other appropriate officer of the Court. The inspection must be conducted in the presence of the official or his authorised representative. In these cases, official baggage must be searched in the presence of an officer who is the authorised representative of the Registrar (Article IX(1)(h)).

Under Paragraph 1(c) of Article IX all papers, documents and materials which are related to the work of the Court or Commission will be inviolable.

Article IX (1)(d) exempts these officials from several municipal obligations such as national service obligations. It also exempts them from direct taxation on their salaries, remunerations and allowances which will be paid by the Court or Commission, as well as from custom duties on anything which they import for personal use. This latter exemption will not apply, however, with respect to imported articles which are sold within the territory into which they are imported, except where the sale is done under such conditions as one provided by the government of that territory (Article IX(1)(b)).

The officials who are the beneficiaries under this Article will also be entitled to the same privileges and facilities with respect to currency and exchange restrictions, and the same protection and repatriation facilities in times of international crises, that are accorded to representatives of foreign governments on temporary official missions (Articles IX(1)(g) and X(1)(e)).

For the purpose of all communications with the Court or Commission, they will also be entitled to the right to use codes to despatch or receive papers, correspondence or other official material by courier or in sealed bags.

## **C - Counsel appearing before the Court**

Counsel appearing before the Court will be entitled to certain personal immunities, while they are in the territory of a Government Party. These immunities, which will relate to the performance of their functions connected to the proceedings in which they will be

involved before the Court, are provided in Article X. They are intended to assist Counsel in the efficient representation of their clients as well as ensuring that the judicial process is not compromised..

Article X entitles Counsel to immunity from personal arrest or detention, as well as from legal process for words spoken or written, or acts which are performed in relation to these proceedings. They will be entitled to continue to enjoy immunity from legal process even after the proceedings before the Court have ended.

The Article also entitles Counsel who are appearing before the Court to the inviolability of papers, documents and other materials which relate to the proceedings. It will also entitle them to exemption from immigration restrictions, alien registration requirements and national service obligations. It will further entitle them, in relation to the proceedings, to the same privileges and facilities that are accorded to government representatives on temporary official missions with respect to currency and exchange restrictions.

#### **D - Travel facilities**

By virtue of the provisions of Article XII, a government Party will facilitate judges and officers of the Court, other persons performing missions for the Court, and members of their families who form part of their households, to enjoy uninterrupted passage within, and entry into and departure from its territory. The same facilities will also be accorded to members of the Commission, Counsel, their clients and other persons who will appear before the Court, as well as other persons invited to the Seat of the Court, and the officers of the Commission on official business.

### **INSTITUTIONAL PRIVILEGES AND IMMUNITIES**

#### **E - Exemption from taxes, custom duties etc.**

Article VII provides exemptions for the Court and the Commission in their institutional capacities. It exempts them from any form of taxation, including airport departure, travel, hotel and restaurant, value added and other indirect taxes. The exemption from indirect taxes will not exempt these institutions from charges for public utility services. They will also be exempted from custom and excise duties, prohibitions, restrictions and levies on the importation, export or sale of their publications, as well as on articles which they will import or export for their official use. They will however be prohibited from selling articles imported or exported for their official use within the territory of a Government Party, except under conditions agreed to with the government.

#### **F - Exemption from foreign exchange controls**

Article VI provides exemptions for the Court and the Commission, in their institutional capacities, from restrictions with respect to financial controls, regulation or moratoria. These institutions will be permitted to purchase negotiable currencies from authorised

dealers, to hold and use these currencies, operate foreign currency accounts and external accounts, and to purchase through authorised dealers, hold and use funds and securities. The Article further permits them to transfer funds, securities and foreign currencies freely to the territory of a Government Party, and to convert any currency which they hold into other currencies, freely.

In obtaining the benefits of these exemptions, these institutions will be required to take into consideration and give effect to any requests which may be made by a Government Party, so far as those requests will not be detrimental to their interests.

### **G - Communications facilities**

By virtue of the provisions of Article VIII, the Court and the Commission will be entitled to enjoy the same treatment for their official communications, which a Government Party accords to any international organization. The Article also confers upon these institutions immunity from censorship with respect to their official correspondence and communications. It further affords them the right to use codes, and to send and receive correspondence by courier in sealed bags. Correspondence and communications which they will send or receive by these means will enjoy the same immunities and privileges as diplomatic couriers and bags.

## **PRIVILEGES AND IMMUNITIES RE PROPERTY**

### **H - Property, funds and assets**

By virtue of the provisions of Article III, the property and assets of the Court and Commission will be offered immunity from legal process, except in so far as the immunity is expressly waived. Immunity from legal process cannot be waived, however, with respect to any measure of execution.

The article also renders any property of those institutions immune from search, requisition, confiscation, expropriation and any other interference by executive administrative or judicial action.

### **I - Premises of the Court and Commission**

Article IV provides for the inviolability of the premises occupied by the Court and the Commission with the consent of a Government Party. The Article seeks to prohibit government officials from entering the premises to perform any official duties except with the consent of the President, and under conditions agreed to by him. This prohibition will of course apply, except where there is a fire or other emergency which requires prompt action, or where government officials have reasonable cause to believe that such an emergency has occurred. In these cases, the consent of the President for their entry into the premises will be presumed if the President cannot be contacted on time.

The Article empowers the President to make regulations for the purpose of establishing conditions for the full execution of the functions of the Court or Commission with respect to their premises.

Article V renders inviolable the archives and all documents which belong to, or are held by the Court or Commission.

### **J - Waiver of Privilege and Co-operation with Competent Authorities**

Even in the instances in which privileges and immunities are conferred upon an official of the Court or Commission, they are intended for their benefit in their official capacities. Article XI will therefore give the Conference (in relation to the President) and the President (in relation to all other person entitled to the privilege and immunities) the right to waive them whenever they are of the view that they would impede the course of justice, and their waiver will not be inimical to the interests of the Court or Commission.

The Article also urges the President and the Registrar to co-operate with the competent authorities in order to facilitate the proper administration of justice, secure the observance of the laws and prevent the abuse of the privileges or immunities. It also imposes upon the beneficiaries of the privileges and immunities a duty to respect the laws of Government Parties and to refrain from interfering in their internal affairs.

The Article further seeks to put into place a mechanism for the resolution of disputes which may arise concerning alleged abuses of the privileges and immunities. It will provide that a government which alleges an abuse should notify the Registrar of it. The Registrar should then consult the relevant competent authority, in order to determine whether there has been an abuse. If the matter is not thereby resolved to the satisfaction of the Registrar and the government, the matter is to be settled in accordance with the procedures for the settlement of disputes provided in Article XIII.

Article XIII requires the President to make provisions for the settlement of disputes. It refers specifically to disputes of a private law character to which the Court or Commission may be party, and disputes which may involve a judge or officer of the Court or Counsel conducting proceedings before the Court, where the privileges or immunities to which they are entitled are not waived.

Article XIII(2) also provides for the settlement of differences between governments and the Commission with respect to the interpretation or application of the Protocol.

A matter which is not settled is to be referred to a tribunal of three arbitrators, by any Government Party. The government and the Registrar will each appoint one arbitrator. The two arbitrators will then appoint a third arbitrator who will chair the tribunal. The Chairperson will determine all questions of procedure.

Where the Registrar or the government fail to appoint an arbitrator within six weeks of the decision to resort to arbitration, the Secretary-General will be entitled to make the

appointment. He will also be entitled to appoint the third arbitrator, at the request of the government or Registrar, if the two arbitrators fail to agree upon the third arbitrator within three weeks.

A majority decision of the tribunal will be final and binding.

## VI

### **AGREEMENT ESTABLISHING THE SEAT OF THE COURT AND THE OFFICES OF THE COMMISSION**

This is a draft of the Agreement, which will be made between the government of Trinidad and Tobago where the Court and the Commission will be located, and the Court and Commission. The Agreement is made by virtue of the provisions of paragraphs 3 and 4 of Article III. Paragraph 3 provides for the Seat of the Court to be in the territory of a Contracting Party as may be determined by a majority of the Contracting Parties. Paragraph 4 provides for an Agreement to be concluded by that territory with the Court and Commission ("the institutions").

#### **Status of Court and Commission**

Article II of the Agreement confers upon the institution full judicial personality and, particularly, full capacity to contract, acquire and dispose of property and to institute legal proceedings. It also provides that the Registrar will represent the institutions in all legal proceedings. It is a reproduction of Article II of the Protocol on Privileges and Immunities.

#### **The Seat of the Court and Offices of Commission**

Article III of this Agreement essentially reproduces Article IV of the Protocol on Privileges and Immunities, with the addition of the provisions. Article III (3) which renders the Seat and Offices of the Court and Commission inviolable is an exact repetition of Article IX (1) of the Protocol. Article III (2) empowers the President to make regulations to establish the necessary conditions for the full execution of the functions of the Court and Commission. Article III (4) provides for the conditions upon which officials of the government of the Seat of the Court or its Agents may enter the Seat of the Court or offices of the Commission.

Additionally, Article III of this Agreement provides that the service of any legal process whatever within the Seat of the Court or the Offices of the Commission may only be done with the consent of the Registrar, and under conditions approved by this Court official (Article III (5)). Article III (6) forbids the President from permitting the Seat of the Court or the Offices of the Commission from being used, by virtue of this privilege, as a refuge for fugitives and persons who wish to avoid legal process in Trinidad and Tobago. Article III (7) empowers the President to expel any person who violates its regulations made under the Article.

## **Property, Funds and Assets of the Court and Commission**

Article IV of this Agreement will essentially reproduce Article III of the Protocol on Privileges and Immunities, with the addition of one provision which will permit the government to take whatever action is appropriate to investigate accidents which may involve motor vehicles which are owned or operated by the Commission (Article IV (3)).

Article IV (I) and (II) will protect the property, funds and assets of the Court and Commission, from search, acquisition, confiscation, expropriation or any other form of interference by actions by any arm of the government. The President may waive the immunity. Article IV (1) of this Agreement goes further than Article III (1) of the Protocol in that it expressly exempts from the immunity:

"cases arising out of or in connection with the borrowing of money or the acquisition or disposal of money or the acquisition or disposal of immovable property...".

## **Archives of the Court and Commission**

Article V of this Agreement is a verbatim reproduction of Article V of the Protocol which renders the Archives and all of their documents inviolable.

## **Exemption from Foreign Exchange Controls**

Article VI of this Agreement reproduces Article VI of the Protocol. Its provisions will permit the Court (but not the Commission, notwithstanding that it benefits from a similar provision in the Protocol), to have the facilities to freely transfer and deal in foreign currencies, funds and securities, without financial controls, regulations or moratoria.

## **Exemption from Taxes, Custom Duties etc.**

Article VII of this Agreement is a reproduction of Article VII of the Protocol. It will exempt the property of the Court and Commission from direct or indirect taxation, except for charges for public utilities.

## **Facilities with respect to communications**

Article VIII of this Agreement is a near reproduction of Article VIII of the Protocol, which is designed to grant to these institutions the enjoyment of the privilege of the inviolability and freedom of communication for their official communities. The essential difference is the waiver from this privilege which is created in Article VIII (3) of this Agreement, which permits the competent authorities of Trinidad and Tobago to search and detain seal bags of these institutions if they have "serious reason" to believe that they contain material which is not for the official use of the Court of the Commission. In these cases, the bags can only be opened in the presence of an officer of the Court.

## **Privileges and Immunities for Judges and Officers**

Article IX of this agreement will be an exact reproduction of Article IX of the Protocol, which provides immunities and privileges for judges and officers of the Court and for members of the Commission, when acting in their official capacities.

### **Counsel appearing before the Court**

Article X of this Agreement is an exact reproduction of Article X of the Protocol, which provides certain privileges and immunities for Counsel appearing in proceedings before the Court in Trinidad and Tobago. These privileges and immunities relate to the performance of their functions connected to those proceedings.

### **Co-operation with Competent Authorities**

Article XI of this Agreement is an exact reproduction of Article XI of the Protocol. It essentially provides for the waiver of the privileges and immunities, when the enjoyment of them will impede the course of justice and their waiver will not be prejudicial to the interests of the Court of Commission. It also provides for co-operation by the President or the Registrar with the competent authorities of Trinidad and Tobago to facilitate the proper administration of justice and the laws of Trinidad and Tobago to avoid abuse of privileges and immunities.

### **Facilitation of Travel**

Article XII is a near reproduction of Article XII of the Protocol. It requires the government of Trinidad and Tobago to extend all facilities to assist judges and officials of the Court and Commission, as well as other persons who are on official business with or before those institutions, in matters which relate to their travel. The Agreement does not contain the list of category of persons to be facilitated under this provision. It simply refers to: "(e) persons appearing in proceedings before the Court;".

### **Settlement of disputes**

Article XIII of this Agreement is an exact reproduction of Article XIII of the Protocol. It will enable the President to make rules for the settlement of disputes.

### **General Provisions**

This Agreement and any supplementary Agreements to it will enter into force upon signature by the Parties (Article XIV(1)). Consultation with respect to any amendment may be initiated either by the government of Trinidad and Tobago or by the Registrar (Article XIV (2)). The Agreement or any amendment to it will cease to have effect six months after either of the Contracting Parties gives notice in writing to the other of its decision to terminate the Agreement.

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