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Working Paper submitted by Japan

PRIVILEGES AND IMMUNITIES OF THE ORGANIZATION AND INSPECTORS

As is pointed out in a separate Working Paper on “Protection of Intellectual Property Rights (IPR) with regard to Biotechnology”, arrangements for the protection of IPR related to advanced technology, including biotechnology, require not only preventive measures but also follow-up measures in the case of illegal leakage of Commercial Proprietary Information (CPI). The follow-up measures would also contribute to deterring such illegal leakages. This Working Paper addresses, as part of the contents of the follow-up measures, the question of international responsibility of the organization to be set up for BWC verification, the civil and criminal responsibility of the inspectors for illegal acts, and the privileges and immunities that may exempt the organization and its inspectors from the jurisdiction of the State Party concerned.

I. International Responsibility and the Privileges and Immunities of the Organization

1. Principle of responsibility for illegal acts

(1) It is one of the fundamental principles of international law that international illegal acts incur international responsibility. This principle’s application to international organizations warrants careful examination because, while there are several examples of this principle being applied to acts committed by international organizations, there is one example in which this principle is not applied.

(2) The examples in which the principle is applied fall into two categories: (I) relating to personnel and (ii) relating to the organization itself.

(I) The following are instances in which an international organization is responsible for the illegal acts of its personnel.

The Treaties Establishing the European Community and the European Atomic Energy Community (EURATOM) stipulate that in regard to non-contractual liability: “The Community shall ... make reparation for any damage caused by its institutions or by its

employees in the performance of their duties” (EC Treaty, Article 215; EURATOM Treaty, Article 188).

In relation to its peacekeeping activities, the United Nations has often admitted jurisdiction of a claims commission or an arbitration tribunal over cases in which damage is inflicted by peacekeepers on their official duties.

(ii) There are several examples regarding the responsibility of an international organization arising from its own illegal acts. For instance, Article 22 of the Convention on International Liability for Damage Caused by Space Objects provides that both the organization concerned and its member States which are States Parties to the Convention are jointly and severally liable. The primary responsibility falls on the organization in accordance with the provision of that Article.

(3) The Chemical Weapons Convention is the only example in which the principle explained in (1) is not applied. It provides, in Paragraph 22 of the Annex on the Protection of Confidential Information, that: “The Organization (OPCW) shall not be held liable for any breach of confidentiality committed by members of the Technical Secretariat”, while, by implication, the OPCW would be held responsible in cases other than breach of confidentiality. This provision perhaps originated from the fear of the negotiating States (potential States Parties) that they might be burdened with an incalculable amount of damages which would be claimed against the OPCW but would ultimately have to be paid by the States Parties.

The problem is that there are no provisions in the CWC for remedies for such damages. Since one cannot disregard the damages, the Preparatory Commission for the OPCW has been trying to work out a solution. In the Commission, however, such an awkward idea as the following has been put forward: the State Party is to accept responsibility for the breach of confidentiality by an OPCW staff member, causing damage to natural or legal persons located in the State Party’s territory (See PC-X/B/WP.3, para. 15). This seems to illustrate the inappropriateness of the provision of the CWC’s Confidentiality Annex cited above.

(4) From these illustrations, while not a comprehensive study, one can observe certain tendencies.

(I) One should not conclude that international organizations are not subject to international responsibility. In fact, there is only one treaty which contradicts the fundamental principle, and in only one particular area. Moreover, that contradiction has caused problems insurmountable so far within the framework of the Preparatory Commission of the OPCW.

(ii) Other treaties referring to this point admit that the international organizations are subject to international responsibilities. Therefore, one can safely argue that the fundamental principle of international law mentioned in (1) is applicable to international organizations.

2. Privileges and Immunities

Of course this principle does not necessarily translate into an actual legal action against the organization. There are several privileges and immunities that may exempt it from the jurisdiction of the State Party concerned. The treaty establishing an international organization normally contains a provision stating that: the organization shall enjoy in the territory of each member “such legal capacity and such privileges and immunities as are necessary for the exercise of its functions” (UN Charter, Articles 104 and 105, Paragraph 1; IAEA Statute, Article 15, Paragraph A; CWC, Article 8, Paragraph 48). Thus, privileges and immunities granted to international organizations generally have their legal footing in “functional necessity” and it is submitted that they can be invoked to the extent to which it is necessary for the exercise of their functions. In other words, it is logical to state that privileges and immunities of international organizations are not unlimited; they are determined based on the functions of the organizations and should not be claimed where they are not necessary for the exercise of these functions.

With regard to detailed privileges and immunities, each organization normally concludes an agreement with its member states on privileges and immunities based on a provision of its establishing treaty. In deciding their scope it is crucial to take into account what the functions of the organizations are, as well as whether the organization has its own internal remedy system.

II. Responsibility and the Privileges and Immunities of the Inspectors

1. Civil and criminal responsibility

The responsibility of inspectors, or other staff members of the organization, for a leakage of CPI can be pursued independently from that of the organization. Unlike the latter, the former entails both civil and criminal responsibilities.

From a preventive perspective, it is imperative to have a legal system for both responsibilities. Because of the limited reparation capacity of individual staff members, however, the payment of reparations would in effect be left to the organization. Still, this does not mean that the staff members are exempted from civil responsibility.

2. Privileges and immunities

(1) As in the case of an international organization, its staff members are also entitled to enjoy privileges and immunities from the jurisdiction of the States Parties.

In addition to the privileges and immunities of the organization, the treaty establishing an international organization usually contains a provision to the effect that: “the Director-General and the staff of the organization shall enjoy such privileges and immunities as are necessary for the independent exercise of their functions in connection with the organization” (UN Charter, Article 105, Paragraph 2; WHO Constitution, Article 67, Paragraph b; IAEA

Statute, Article 15, Paragraph B; CWC, Article 8, Paragraph 49). The granting of these privileges and immunities should also be limited to the extent necessary for the exercise of their functions, as in the case with those for the organization. This observation is warranted by the fact that there is a common provision in privileges and immunities agreements concluded between the organization and each member State that “Privileges and immunities are granted to officials in the interest of the organization only and not for the personal benefit of the individuals themselves” (UN P&I Convention, Article 5, Section 20; Specialized Agencies P&I Convention, Article 6, Section 22; IAEA P& I Agreement, Article 6, Section 21).

Taking into account the above considerations, as well as the fact that the granting of privileges and immunities is an exception in a domestic legal order, an agreement between a future organization for the BWC verification and its States Parties should ensure that the privileges and immunities are confined to those necessary for the exercise of the functions of the officials.

(2) Privileges and immunities agreements commonly provide that “The Organization shall have the right and the duty to waive the immunity of any official in any case where, in its opinion, the immunity would impede the course of justice and can be waived without prejudice to the interests of the organization” (emphasis added) (UN P&I Convention, Article 5, Section 20; Specialized Agencies P&I Convention, Article 6, Section 22; IAEA P&I Agreement, Article 6, Section 21).

The Confidentiality Annex of the CWC, Paragraph 20, however, states that in cases of “serious breaches”, the immunity from jurisdiction “may be waived by the Director-General” (emphasis added). It refers only to the right to waive the immunity and not the duty to do so. Yet, it should have referred to both the right and the duty of the Director-General to waive the immunity in view of the commonly stipulated provision quoted above as well as the severity of the consequences of cases of “serious breaches”. The agreement to be concluded with regard to the BWC verification should contain a clear provision stating that the waiver of immunity is obligatory in principle in cases of leakages of CPI.

3. The question of conflicts in criminal jurisdiction

Concerning the criminal jurisdiction of the inspectors and other staff members of the verification organization there may arise the question of which State Party’s jurisdiction should apply. Regarding this matter, it would be necessary to address such a question as whether (1) the State hosting the organization’s headquarters, for instance, should have the sole jurisdiction over all penal actions in order to avoid jurisdictional disputes, and thus all the other States Parties should be obliged to extradite the offenders to that State; or (2) there should be a universal jurisdiction, allowing the jurisdiction to be exercised by all the State Parties concerned.