

# Should Arbitral Institutions Have Diplomatic Immunity?

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In November 2018, the former director of the Asian International Arbitration Centre (**AIAC**) in Kuala Lumpur resigned from his role after being arrested on suspicions that he paid past and present ministers bribes to renew his role at the AIAC.

His lawyer argued before Malaysian courts that, by virtue of his role at AIAC, he is protected by diplomatic immunity under Malaysia's 1992 International Organisations (Privileges and Immunity) Act and the Vienna Convention on Diplomatic Relations (18 April 1961) (**Vienna Convention**). As a result, he cannot be arrested, detained or subject to criminal jurisdiction in Malaysia. He was detained for investigations briefly, but released, not subject to bail on 21 November 2018.

Are arbitral institutions and their officers entitled to diplomatic immunity?

## **Legal Regime for Diplomatic Immunity of Arbitral Institutions**

Under international law, the question whether an international organization enjoys diplomatic immunity depends on treaties with the host State and customary international law.[fn] Josef L. Kunz, 'Privileges and Immunities of International Organizations' American Journal of International Law, vol. 41, No. 4 (Oct., 1947),

pp. 828-862; Michael Wood, 'Do International Organizations Enjoy Immunity under Customary International Law?' in *Immunity of International Organizations* (Brill, 2015), pp 29-60.[/fn]

Under the Vienna Convention, immunity from criminal jurisdiction is complete. But the Vienna Convention does not apply to international organizations. As provided in the Commentary:

'Apart from diplomatic relations between States, there are also relations between States and international organizations. [...] However, these matters are, as regards most of the organizations, governed by special conventions.'

Under domestic law, States have enacted legislation regarding diplomatic immunity for international organisations. In Malaysia, the applicable law cited by Rajoo is the Malaysian 1992 International Organisations (Privileges and Immunity) Act. In the United States, the 1945 International Organizations Immunities Act applies to protect international organizations and their officers from U.S. search and seizure laws.

The Permanent Court of Arbitration (**PCA**) has a treaty with the Netherlands concerning their headquarters. It provides that the PCA shall be immune from legal processes and its property shall be inviolable. The PCA also has several Host Country Agreements, providing privileges and immunities to its staff, adjudicators and participants in PCA-administered proceedings. The International Chamber of Commerce (**ICC**) Court of Arbitration is part of the ICC, a non-governmental business organization, organized under the laws of France. It does not have the same treaties setting out diplomatic immunity protections as the PCA.

According to the AIAC, it was established under the Asian African Legal Consultative Organization (AALCO), an international organization comprising 47-member states from across the region, and that:

*"Formed pursuant to the host country agreement between Malaysia and AALCO, the AIAC is a not-for-profit, non-governmental international arbitral institution which has been accorded independence and certain privileges and immunities by the Government of Malaysia for the purposes of executing its functions as an independent, international organization."*

The extent to which officers of arbitral institutions are protected by diplomatic immunity depends on the same legal framework above.

Officers of arbitral institutions perform a great variety of roles, including registering the case, appointing arbitrators, making procedural decisions, facilitating the hearing, drafting or editing the award, and promoting the arbitral institution to users.

Generally, the diplomatic immunity enjoyed by the arbitral institution would extend to the officer when he acts on behalf of the institution. The key requirement is that the arbitral institution's officer was acting within the scope of his role and in the exercise of his functions. But what happens when the officer is accused of corruption or bribery?

### **Corruption and Bribery in Arbitral Institutions**

Suspicious of corruption and bribery raise the temptation to lift diplomatic immunity for international organizations.

In such cases, there is a delicate balance between the need to investigate corruption and bribery and giving the international organization space to conduct activities that may be against the interests of a host State. For arbitral institutions, this includes the freedom to issue awards directly against the host State.

On the one hand, corruption suspicions should be investigated effectively. Allegations of corruption can seriously tarnish the reputation of the arbitral institution, its panel of arbitrators and affect the respect for its awards in enforcement proceedings around the world.

On the other hand, the ability of a State to create obstacles in the way of a tribunal's work, interfere with legal proceedings and gain access to confidential information, simply by starting a corruption investigation, poses a significant risk to the sanctity of due process.

The balance may be shifted if the arbitral institution's treaty with the host State requires that the institution respects domestic laws. For diplomats, Article 41(1) of the Vienna Convention provides:

*Without prejudice to their privileges and immunities, it is the duty of all persons enjoying such privileges and immunities to respect the laws and regulations of the receiving State.*

When should an arbitral institution's officer be prosecuted for corruption? If an officer of an arbitral institution was not serving in his official capacity when committing the acts of corruption, he should not be entitled to diplomatic immunity.

Whether an official acted outside his official capacity in each instance would depend on the court's interpretation of the facts. For instance, if a court finds that the arbitral institution's officer was acting only in his interest by offering or soliciting bribes, it may be possible to conclude that he was not performing the institutional functions. However, there may be factual situations where it would be far more difficult to distinguish between the institution's officer's official duties and acts performed for only in his own interest. This difficulty is reflected in the debate currently before the International Law Commission on expressly excluding corruption and bribery from diplomatic immunity.

### **Should arbitral institutions and their officers enjoy diplomatic immunity?**

First, the rationale for granting diplomatic immunity to international organizations is to enable them to fulfil their functions independently, by preventing member states and, particularly, the host State from exerting undue influence.[fn] Philippa Webb, 'The Immunity of States, Diplomats and International Organizations in Employment Disputes: The New Human Rights Dilemma?' (2016) 27 (3) European Journal of International Law 745-767p 762.[/fn] It is particularly important, that international organizations that sit in judgment of States enjoy the highest form of protection from State interference. If arbitral institutions were vulnerable to interference from their host State's criminal investigations, these institutions would find it difficult to administer cases against State-related parties.

Second, we may draw parallels to arbitrators being granted immunity from liability under arbitration rules.[fn] See Asif Salahuddin, 'Should arbitrators be immune from liability? Arbitration International, Volume 33, Issue 4, 1 December 2017, Pages 571-581.[/fn] Arbitrators enjoy civil immunity so that they may sit in

judgment of a State or State-related party in a neutral manner. Similarly, arbitral institutions and their officers should be free from the criminal or civil interference or other influences of that State.

Third, the officers of arbitral institutions need to be granted diplomatic immunity in order to carry out their duties. Especially in the case of investor-State arbitration, the officers of the arbitral institution cannot be subject to interference from the host State. The Secretariat of the International Centre for the Settlement of Investment Disputes (**ICSID**) would find it very difficult to do their jobs if they were vulnerable to investigations and detention by a respondent State. The ICC Court of Arbitration would have difficulty exercising certain key functions, such as appointing arbitrators and deciding on consolidation of arbitration proceedings, if its members were subject to the constant threat of investigations by State authorities. When an arbitral institution's officers are conducting adjudication-related activities, especially against a State, these functions should be protected by diplomatic immunity.

These compelling justifications are akin to arguments regarding diplomatic immunity for State diplomats. If diplomats are not granted immunity, they would be vulnerable to interference by host States, frustrating important diplomatic functions of negotiations, representation and secrecy of communications with their home State. But many have pointed out that the latitude granted to diplomats has led to abuse of diplomatic immunity, and in recent years, people have started calling for such abuse to stop by restraining the scope of diplomatic immunity.

Could the institution be found responsible? In the context of a State's diplomat, a corrupting State could be held responsible as a matter of State responsibility for the actions of its corrupting diplomat.[fn] See Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries (2001), footnote 150[/fn]

To conclude, the question whether an arbitral institution and its officers are entitled to diplomatic immunity in cases of corruption will depend on the presence of host State treaties and domestic laws on diplomatic immunity. However, arbitral institutions and host States should consider amending their treaties and domestic laws to expressly exclude corruption and bribery from diplomatic immunity.