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FOLLOW-UP ACTION ARISING OUT OF THE INAUGURAL CONFERENCE
OF CHIEF EXECUTIVES OF ECA-SPONSORED REGIONAL AND SUB-
REGIONAL INSTITUTIONS: A BRIEF STUDY OF SOME
HOST HEADQUARTERS AGREEMENTS OF
ECA-SPONSORED INSTITUTIONS

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Introduction

Generally speaking, apart from the host agreements covering the early institutions sponsored by ECA namely, the African Development Bank (ADB) and the African Institute for Economic Development and Planning (IDEP), the host agreements in respect of the remaining ECA sponsored institutions have followed a uniform pattern. Host agreements which are intended to regulate the immunities and privileges which shall apply to the headquarters, property, communications, imports, public services and officials etc. of the institutions usually derive their existence from basic document such as the Constitutions, Statutes or Agreement establishing the institutions themselves. It is usual and indeed recommended that such basic documents should set out as far as possible or appropriate, the privileges and immunities to be accorded in respect of the institutions concerned. This has the added advantages that not only are all Member States of an institutions upon acceding to its basic documents, bound to accord as appropriate, with respect to the institution, the privileges and immunities set out in the basic document, but also considerably facilitates negotiations between the institution and its Member State in which the headquarters of the institution is established.

Over the years, several host agreements have been concluded for ECA sponsored institutions. These agreements which have not unnaturally been inspired by the United Nations Convention on Privileges and Immunities have played an important role in the development of international law jurisprudence relating to inter-governmental organizations in Africa. This report examines some of the important provisions in selected host agreements of ECA sponsored institution with a view to drawing attention to similarities and dissimilarities and to observable new trends.

Headquarters seat

The first matter dealt with in the host agreements relates to the establishment of the headquarters and the vesting of buildings and land by the host country in institutions for the purposes of the institutions and for use as their headquarters. Just as other additional buildings may also be vested in the institutions as part of their headquarters, so many other buildings or land outside the headquarters used for the purposes of the institutions, be temporarily included in the headquarters. The wording employed with respect to this latter aspect of the matter has invariably been the following:

Any building in or outside of (city where the headquarters of the institution is) which may be used with the concurrence of the (Host) Government for courses, seminars or other purposes of the (institution) shall be temporarily included in the headquarters seat.

Recently however, the Government of Kenya in negotiations concerning the host agreements of two ECA sponsored institutions namely, the African Institution for High Technical Training and Research (AIHTTR) and the Industrial Property Organization for English Speaking Africa, (ESARIPO), have baulked at this provision which they had previously accepted with respect to the host agreement

of the Regional Centre for Services in Surveying and Mapping (RCSSM), and proposed wording which conveys the opposite sense:

... shall not constitute, or form part of
the headquarters seat for the length of time
it is under such usage .

At the time of preparing this note a satisfactory compromise has been found with respect to the host agreement of AITTR the matter is, however, still under negotiations with respect to the host agreement of ESARIPO. The reason given for the new attitude of the Government of Kenya is that courses, workshops and seminars are really of a temporary nature and places where these occur should not become part of the headquarters of an institution. The acceptance of this view would mean that the inviolability of the headquarters seat shall not extend to such venues. International law as perceived from the many host agreements in force including several relating to international organizations which the Government of Kenya is host to, and practice do not support the new attitude of that Government.

Control and protection of headquarters

Next in order come provisions which confer inviolability on headquarters, places headquarters under the control and authority of institutions, prevents officers or officials of host governments from entering headquarters without the consent of institutions and imposes on host governments the duty of ensuring the tranquility of headquarters. Institutions in turn, are to prevent headquarters from becoming refuge for persons avoiding arrest, extradition or the service of legal process. So far, no inroads have been made into the time honoured provisions above referred to, on the control and protection of the headquarters of international institutions.

Status of institutions

Recognizing the international status of institutions, provisions under this heading accord immunity from legal process, search, or expropriation etc. with respect to institutions, their property and assets and the inviolability of the archives and documents of the institutions, and the exemption of institutions, their property, assets, income and transaction from all taxations and from customs duties and prohibitions and restrictions on imports and exports in respect of articles imported or exported by institutions for their official use. It is also normally provided that the assets and other property of institutions can only be sold within a host country in accordance with the conditions to be mutually agreed upon or determined by the governments of host countries. Here again, in the current negotiations being undertaken at the time of the preparation of this report concerning the ESARIPO host agreement, the Government of Kenya is again seeking to depart from the normal wording which reflects the prevailing international practice and as provided for in the United Nations Convention on Privileges and Immunities and also in the several host agreements of ECA sponsored institutions, by suggesting that the exemptions be subject to the constitution and laws of Kenya a provision which can be found in the RCSSM host agreement.

Access and residence

The next important set of provisions relate to the right of members of the organs of institutions, officials of institutions, persons or officials on the business of institutions and participants or trainees as the case may be, to meetings or training courses organized by institutions, to be granted by host governments facilities for speedy travel and visas promptly and free of charge. These provisions in slightly varying forms but substantially identical in meaning, exist in all the host agreements of the ECA sponsored institutions.

Members of the organs of institutions

Members of the various organs of institutions who are representatives of Member States of institutions are always granted certain privileges which are intended to enable them to exercise their functions effectively. They are to be entitled while in the territories of the host governments and whilst exercising their functions and during their journeys to and from the headquarters of their institutions, to the same privileges, subject to the necessary changes being made, to those as provided by Article IV of the United Nations Convention on Privileges and Immunities. Article IV which relates to the privileges and immunities of representatives of members of the United Nations and which deserves to be set out in extenso, is as follows:

ARTICLE IV

THE REPRESENTATIVES OF MEMBERS

SECTION 11. Representatives of Members to the principal and subsidiary organs of the United Nations and to conferences convened by the United Nations shall, while exercising their functions and during the journey to and from the place of meeting, enjoy the following privileges and immunities:

- (a) immunity from personal arrest or detention and from seizure of their personal baggage, and, in respect of words spoken or written and acts done by them in their capacity as representative, immunity from legal process of every kind
- (b) inviolability for all papers and documents
- (c) the right to use codes and to receive papers or correspondence by courier or in sealed bags
- (d) exemption in respect of themselves and their spouses from immigration restriction, aliens registration or national service obligations in the State they are visiting or through which they are passing in the exercise of their functions
- (e) the same facilities in respect of currency or exchange restrictions as are accorded to representatives of foreign governments on temporary official missions

- (f) the same immunities and facilities in respect of their personal baggage as are accorded to diplomatic envoys, and also
- (g) such other privileges, immunities and facilities not inconsistent with the foregoing as diplomatic envoys enjoy, except that they shall have no right to claim exemption from customs duties on goods imported (otherwise than as part of their personal baggage) or from excise duties of sales taxes.

SECTION 12. In order to secure, for the representatives of Members to the principal and subsidiary organs of the United Nations and to conferences convened by the United Nations, complete freedom of speech and independence in the discharge of their duties, the immunity from legal process in respect of words spoken or written and all acts done by them in discharging their duties shall continue to be accorded, notwithstanding that the persons concerned are no longer the representatives of Members.

SECTION 13. Where the incidence of any form of taxation depends upon residence, periods during which the representatives of Members to the principal and subsidiary organs of the United Nations and to conferences convened by the United Nations are present in a State for the discharge of their duties shall not be considered as periods of residence.

SECTION 14. Privileges and immunities are accorded to the representatives of Members not for the personal benefit of the individuals themselves but in order to safeguard the independent exercise of their functions in connection with the United Nations. Consequently a Member not only has the right but is under a duty to waive the immunity of its representative in any case where in the opinion of the Member the immunity would impede the course of justice, and it can be waived without prejudice to the purpose for which the immunity is accorded.

SECTION 15. The provisions of Sections 11, 12 and 13 are not applicable as between a representative and the authorities of the State of which he is a national or of which he is or has been the representative.

SECTION 16. In this article the expression "representatives" shall be deemed to include all delegates, deputy delegates, advisers, technical experts and secretaries of delegations.

Officials of institutions

There are standard privileges and immunities invariably applied to officials of ECA sponsored institutions which are based on those applied to officials of the United Nations and which have been generally accepted by all African governments hosting such institutions. At the time of preparing this report, however, the Government of Kenya is seeking to further limit some of these privileges and immunities in respect of the officials of ESARIPO.

The standard privileges and immunities are as follows:

- (a) immunity from legal process in respect of words spoken or written or acts performed by officials of institutions in their official capacity;
- (b) immunity from personal arrest or detention - this immunity is not provided for in the host agreement between the Government of Kenya and RCSSM or in that between the Government of Tanzania and the Eastern and Southern African Management Institute (ESAMI);
- (c) immunity from seizure of personal and official luggage - the RCSSM host agreement is silent on this issue and that of ESAMI excludes nationals of Tanzania from its application;
- (d) exemption from taxation on salaries and emoluments paid to officials by institutions - the host agreements of the Dodoma based East African Mineral Resources Development Centre (EAMRDC), do not extend the exemption to Tanzania officials whilst the RCSSM host agreement extends the exemption to Kenyans and permanent residents of Kenya, the present attitude of the Government of Kenya as exemplified in the current negotiations concerning the ESARIPO host agreement, is that senior officials of ESARIPO who are national or permanent residents of Kenya and all other officials whether they be Kenyans or permanent residents, should not be exempted from taxation on salaries paid from contributions by the Member States of ESARIPO;
- (e) immunity from national services obligations - the EAMRDC host agreement does not exempt Tanzanian officials from EAMRDC from national service obligations; the ESAMI host agreement is completely silent on the issue thus making international officers of ESAMI liable to national service obligations in Tanzania; the RCSSM host agreement, however, provides that immunity from national services obligations shall apply only to Kenyan officials of RCSSM whose names have by reason of their duties, been placed on a list compiled by the Director General of the RCSSM and approved by the Government of Kenya;
- (f) immunity of officials of institutions together with members of their families and their personal employees (the ESAMI host agreement speaks of "house servants") from immigration restriction and alien registration - the RCSSM host agreement is silent on this issue and in the current negotiations concerning the ESARIPO host agreement, the Government of Kenya has proposed the limitation of this immunity to officials of the organization, their spouses and children under the age of 21 years;
- (g) the same privileges in respect of exchange facilities are accorded to the officials of comparable ranks forming part of diplomatic missions to host governments - this privilege has not suffered any inroads up till now;
- (h) the same repatriation facilities in time of international crisis, together with members of their families and their personal employees (the ESAMI Host agreement refers to

house servants), as diplomatic envoys - strangely enough, the ECSSM host agreement which is silent on the general immunity of members of the families and personal employees of officials from immigration restriction and alien registration, provides for the above repatriation facilities for such family members and personal employees:

- (i) exemption for officials other than nationals or permanent residents of host countries from direct taxation on income derived by them from sources outside host countries and the freedom to maintain within host countries or elsewhere foreign securities and other movable or immovable property and whilst employed by institutions and the time of termination of such employment the right to take out host countries funds in convertible currencies which they can show to have been lawfully acquired - whilst these three privileges are generally to be found in the host agreements of ECA sponsored institutions, Kenya again proves the exception. The ECSSM host agreement grants only the first privilege namely, the exemption for non-Kenyan officials of ECSSM from taxation in income derived from sources outside Kenya except Tanzania and Uganda, because of the existing monetary arrangements affecting the currencies of the three East African countries. Not unexpectedly, the Government of Kenya does not, in the current negotiations concerning the ESARIPO host agreement, wish to include the latter two privileges in that host agreement.
- (j) the right of officials to import, free of duty and other levies, prohibitions and restriction on imports, their furniture and effects and the application to them of the same regulations with respect to the importation, transfer and replacement of motorcars as are in force for resident members of diplomatic missions of comparable rank - a diversity of provisions concerning these privileges can be found in the existing host agreements of the ECA sponsored agreements. The host agreements of EATWDC and the Regional Centre for Training in Aerial Surveys (RECTAS) at Ile Ife, Nigeria, for instance grant the privileges set out above except that the importation of furniture and effects must take place within twelve months of an official taking up his appointment and within three months or such further period as the Government of Kenya may agree with respect to ECSSM. Whilst the ECANI host agreement is silent on the importation, transfer and replacement of motorcars it grants to officials the right to import at the time of first taking up their post free of duty their furniture and effects. The same host agreement is unique in the sense that it alone of all the host agreements of the ECA sponsored institutions provides that:

Officers of the Institute (other than Tanzanian nationals or residents) shall be granted full diplomatic privileges as usually granted to officers of comparable rank of diplomatic missions,

thus implying that such officers who are not stricto sensu diplomats can acquire privileges concerning the importation, transfer and replacement of motorcars and more besides, such as immunity from legal process and arrest and detention, duty free importation of beverages and tobacco and the other immunities and privileges applicable to diplomats.

Staff of institutions

All the above mentioned immunities and privileges inure to officials of institutions and these are generally defined to include all members of the staff of an institution excluding those locally recruited and assigned to hourly rates. Whilst the RCSSM, RECTAS and EAMEDC host agreements for instance, apply this definition, the ESAMI host agreement which has its headquarters in the same country as EAMEDC, narrowerly provides that officers of ESAMI shall be:

"the Director, Deputy Director, Registrar, Consultants, Advisers, Chief Accountant, Librarian and any other person whom the Director of the Institute in consultation with the host country may request to have such privileges and immunities."

Also, whilst the RCSSM host agreement applies the usually accepted provisions, Kenya which is the host country of RCSSM is in the current negotiations concerning the ESARIPO host agreement, and contrary to international practice, proposing that a distinction be made between "senior officials" and "other officials" of ESARIPO and the granting to "senior officials" only of the usual functional immunities and privileges. It is to be hoped that a satisfactory solution would be found in the course of the ESARIPO host agreement negotiations.

Special identity cards

All host agreements provide that officials of institutions shall be provided with special identity cards certifying that they are officials of the institutions enjoying the privileges and immunities specified in the host agreements of their institution. Whilst such identity cards may not be a substitute for travel documents, they will facilitate the travels of officials into and out of the territories of the host countries where they work. A similar document issued by institutions to members of their organs would serve a similar purpose.

Co-responding obligations

Officials of institutions in turn, have the duty not to abuse their privileges and immunities and invariably, all host agreements provide for this. The provisions also indicate that the privileges and immunities are granted in the interest of institutions and not for the benefit of the officials themselves and institutions are duty bound to waive the immunity of officials where such immunity would impede the course of justice and can be waived without prejudice to the interest of the institutions. It is also provided that institutions shall co-operate at all times with the appropriate authorities of host countries so as to "facilitate the proper administration of justice, secure the observance of police regulations and prevent the occurrence of any abuse in connection with the privileges and immunities and facilities".

Public utilities

Under this heading, host governments are to exercise the powers they possess to ensure that the headquarters of institutions are supplied on equitable terms with necessary public services such as electricity, water, gas, post, telegraph, telephone, transport, drainage, collection of refuse and fire protection etc. In some case where this has been agreed between the host government and the institutions concerned, the former has undertaken to provide housing at reasonable rents to the international staff of institutions.

Co-operation with the government of host countries

This varies depending on the activities of institutions. In the case of the RECTAS host agreement for instance, the educational institutions and technical departments of the host country are to extend their full co-operation to RECTAS in its fields of competence. The host government is also to allow the operation of aircraft and other means of transport for the purposes of RECTAS. Similar provisions exist in respect of the RCSSM host agreement.

Conclusions

Whilst in general, standard provisions which have been hallowed by international conventions and practice continue to be found in the host agreements of ECA sponsored institutions, there are a few cases where certain countries have not complied fully with the accepted norms either deliberately or inadvertently. The occurrence of the latter instance can be minimized if negotiations of host agreements are centralized. Also, it might be advisable in the future to circulate to governments which are anxious to host an institution a standard text of a host agreement which they would be expected to accede to if they are chosen to host the institution.