

## ..... Book Review

Reinisch, August. *International Organizations Before National Courts*. Cambridge: Cambridge University Press, 2000. Pp. lxviii, 449. Table of cases, table of legal instruments, bibliography, index. GBP60.

The author of this book describes it as 'radically empirical'. The wealth of material examined, especially decisions of national courts, would certainly justify such a designation. The case material is by no means spread evenly over different jurisdictions. There is a preponderance of US and Italian cases as well as a number of UK and French decisions. Other countries are represented only relatively sparsely.

But empiricism is not all this book has to offer. Legal analysis and policy alternatives are also part of this balanced and well-argued treatise. The author carefully separates these various intellectual functions. Part I undertakes a detailed descriptive analysis of practice. Part II examines the policy issues underlying decisions. Part III examines alternatives and offers specific suggestions for reform.

Part I is by far the largest. The decision techniques used by courts are examined separately for situations in which jurisdiction is declined (avoidance techniques) and in which jurisdiction is assumed (strategies of judicial involvement). As it turns out, jurisdictional immunity is by no means the only such technique or strategy. At times, the non-recognition of the organization under the forum state's domestic law is contemplated. But it appears that this line of reasoning, though repeatedly discussed, is rarely applied as the *ratio decidendi*. Other lines of reasoning involve the non-recognition of *ultra vires* acts of the organization, abstention doctrines such as act of state, political questions and non-

justiciability. Other avoidance techniques are absence of subject matter jurisdiction, respect for a competent forum within the organization or the acceptance of a choice of forum clause providing for arbitration. But the classical immunity argument is still the most frequently used reason given for declining jurisdiction. Immunity may be based on domestic law, on treaty law or, at times, on customary international law.

Despite the far-reaching grants of immunity, especially in a number of treaties, court practice is far from uniform. In particular, Italian courts have shown a tendency to interpret the immunity of international organizations restrictively along the lines of state immunity. Other exceptions to immunity were applied in cases involving real property and counterclaims. Yet another strategy of judicial involvement is a generous interpretation of explicit or construed waivers of immunity by international organizations.

Part II looks beyond legal technicalities and examines the broader policies that militate in favour or against assuming jurisdiction in cases involving international organizations. Many of these policies are put forward by domestic courts themselves and are, at times, barely distinguishable from the reasons described in Part I. Some of the policies put forward in favour of declining jurisdiction are more serious than others. The more curious ones point to a lack of territory, delegated sovereignty, an inherent quality of an international legal person or simply prestige. More serious policy arguments for abstention are the protection of the independence and functioning of the organization, a check on the influence of certain states over the organization and the uniformity of decision-making.

The analysis of policies that speak in favour of assuming jurisdiction is particularly interesting. Here, too, some arguments are

weightier than others. The less convincing ones describe immunity as an encroachment on the forum state's territorial sovereignty or postulate the extension of the restrictive theory of state immunity to entities that represent their member states collectively. A utilitarian argument points to the creditworthiness of an organization as a reason for assuming jurisdiction.

By far the weightiest argument is the human right to access to courts and to judicial protection. Surprisingly, the human rights dimension of jurisdictional immunities has, so far, attracted relatively little attention in court practice and scholarly writings. Reinisch analyses this aspect extensively and reaches the result that the wholesale exemption of classes of defendants from the jurisdiction of domestic courts is becoming increasingly unacceptable under contemporary human rights standards. He also points out that the right of access to courts creates a corresponding obligation on the part of the forum state and not the international organization that is the potential party to the proceedings.

An important element in balancing the interests of the individual seeking judicial protection and of the organization seeking to preserve its functional independence is the availability of alternative dispute settlement fora such as arbitration or administrative tribunals. To the extent that these alternative fora guarantee appropriate procedural standards, immunity before domestic courts becomes acceptable from a human rights perspective.

Part III looks for new approaches beyond past practice. Most of the author's suggestions can be implemented within the framework of existing black letter law. Others go beyond the *lex lata*. Reinisch does not attempt to develop a new system of rules for the treatment of international organizations before domestic courts. Rather, he attempts to set out a number of policies that will best accommodate the conflicting interests of organizations and their potential adversaries. These policies are based on the obligation of states to provide access to their courts and the related obligation of international organizations to pro-

vide legal redress. At the same time, they seek to protect the independence and functioning of the organizations.

A core element in this endeavour is the identification of an appropriate functional immunity standard that falls short of absolute immunity. A functional necessity concept, while convincing in principle, is elusive in its precise circumscription. A simple transplantation of concepts developed in the context of state immunity does not seem practicable. The *iure imperii/iure gestionis* dichotomy is not likely to produce satisfactory results for international organizations. A number of international organizations conduct their primary activities through commercial transactions. Financial institutions borrow and lend money. Commodity organizations buy and sell goods. Analogies from functional necessity standards in diplomatic and consular law may offer alternatives by denying immunity for patently non-functional acts.

Perhaps the most promising idea is the adoption of a result-oriented immunity standard protecting the functioning of international organizations. This would exclude petty claims from immunity but would shield the organization from claims that threaten their existence or interfere with their core functions. Domestic courts may feel uncomfortable with the broad discretion that such a method engenders. The existence of alternative dispute settlement arrangements would be an important factor in weighing the respective interests. Their significance for decisions on immunity would also create an added incentive for international organizations to create such alternative procedures. The division of adjudicative powers between the Court of Justice of the European Communities and domestic courts may serve as a viable example.

This book incorporates the best elements of different jurisprudential traditions. It combines the insights of case analysis characteristic of the common law with rigorous systematic thinking inherited from the civil law tradition. It patiently analyses traditional legalistic reasoning but proceeds to examine the value of the policies underlying decisions.

It builds on the authority of past practice but goes beyond retrospective reasoning to offer policy alternatives. The result is not a new unified theory of the status of international organizations before domestic courts but a number of thoughtful directions towards a

more balanced and satisfactory approach to this increasingly important problem.

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