

AUSTRIA

1. Delegations are invited to provide information on any domestic legislation existing on this particular issue.

There is no legislation in Austria regulating possibilities for the Austrian Federal Ministry of European and International Affairs to raise public international law issues in procedures pending before national tribunals and related to States' or international organisations' immunities. Austrian Courts are obliged to determine any question of immunity of States or international organisations *ex officio* and at any stage of the judicial proceedings pursuant to Section 42 of the Jurisdictional Code (Jurisdiktionsnorm, Imperial Law Gazette No. 111/1895 as amended).

Concerning information to the courts on whether a person or entity enjoys immunity, Article IX paragraph 3 of the Introductory Law to the Jurisdictional Code (Einführungsgesetz zur Jurisdiktionsnorm, Imperial Law Gazette No. 110/1895 as amended) is relevant. It provides that where it is unclear whether domestic jurisdiction may be exercised in respect of a person [this term includes foreign states] enjoying immunity or whether immunity of a person has been recognized, the court shall request a declaration in this matter from the Federal Ministry of Justice. In practice, the Federal Ministry of Justice consults the Federal Ministry of European and International Affairs and requests its legal opinion on the question of immunity and then transmits this information to the requesting court (see e.g. L-W Verwaltungsgesellschaft m.b.H & Co. KG vs. D V A (state), Supreme Court Judgement OGH 3 OB 38/86 of 30 April 1986). This declaration by the Ministry of Justice is, however, not binding upon the Court due to the principle of separation of powers and the independence of the judiciary as enshrined in Article 94 of the Federal Constitutional Law (B-VG, Federal Law Gazette No. 1/1930 as amended).

While the Federal Ministry of European and International Affairs does not raise issues of international law in court proceedings, it can play a role in proceedings insofar as paragraphs 3 and 4 of Section 32 of the Jurisdictional Code determine that court orders in respect of a person enjoying immunity require the intervention of the Ministry in their execution. In the same vein, Section 11 paragraph 2 of the Act concerning the service of official documents (Zustellgesetz, Federal Law Gazette No. 200/1982 as amended) requires that orders and other official documents may only be served upon a foreigner or international organisation enjoying immunity with the assistance of the Federal Ministry of European and International Affairs, irrespective of their residence or seat. The participation of the Federal Ministry of European and International Affairs is provided for in this Act in order to take into account relevant aspects of international law (cf. legislative preparatory works RV 162 BlgNR XV. GP 10 as referred to in Supreme Court Judgement OGH 9 Ob A 14/03d, W. vs. United States of America of 7 May 2003). Moreover, Section 31 paragraph 1 of the Enforcement Act (Exekutionsordnung, Imperial Law Gazette No. 79/1896 as amended) provides that enforcement action against persons, who enjoy immunity in Austria under international law, may only be taken by way of the Federal Ministry of Justice in agreement with the Federal Ministry of European and International Affairs.

Part 5 on Privileges and Immunities under international law (Sections 32 – 36) of the Decree concerning international mutual assistance and other legal relations with foreign states in civil matters (Rechtshilfeerlass für Zivilsachen 2004, Official Gazette of the Austrian Judicial Administration No. 13/2004) reaffirm what has been set out above.

2. Delegations are invited to inform the Committee as to whether there are any other means for the Ministry of Foreign Affairs of communicating information to national courts and how the Ministry of Foreign Affairs perceives the scope of international legal obligations in [this] field.

- **Are there any information related to international legal obligations contained in the legislative preparatory works of domestic laws on immunities?**
- **Are there any directives, guidelines or circulars that have been issued on this subject?**

Generally accepted rules of international law are part of domestic Austrian law pursuant to Article 9 paragraph 1 of the Federal Constitutional Law. Therefore, Austrian courts directly apply not only immunity provisions contained in treaties, but also those of customary international law that are self-executing, such as those pertaining to State immunity. The Austrian Supreme Court in its Judgement OGH 1 Ob 167/49 and 1 Ob 171/50, Hoffmann vs. Dralle (Czechoslovakia) of 10 May 1950, elaborated that Article 9 paragraph 1 of the Federal Constitutional Law provides for the transformation of international customary law as it stands at the respective date (dynamic transformation), and therefore came to the conclusion that State immunity extended only to acts of a sovereign nature. Austria is of the view that the United Nations Convention on Jurisdictional Immunities of States and Their Property of 2 December 2004 largely reflects customary international law on this issue. Moreover, Austria is a party to the 1972 European Convention on State Immunity (Federal Law Gazette No. 1967/432).

In accordance with what has been set out under Question 1, the Federal Ministry of European and International Affairs informs the Federal Ministry of Justice about existing immunities and relevant legal rules but is not entitled to engage in court proceedings on this subject due to the independence of the judiciary.

- 3. Delegations are invited to precise whether there are any prohibitions or stated limits in domestic law, which would prevent the transmission of information to national courts by the Ministry of Foreign Affairs. In this regard, are there, in your domestic legal order, any relevant legislation or national practices (any reference of case-law would be appreciated)?**

Any information from the Federal Ministry of European and International Affairs concerning immunities of states or international organisations in court proceedings is transmitted by way of the Federal Ministry of Justice and is, by virtue of the independence of the judiciary (Art. 94 B-VG), not binding on the Courts. This is also stated in Sections 32 – 36 of the Decree concerning international mutual assistance and other legal relations with foreign states in civil matters referred to above.

See also the answer to question 4.

- 4. From a broader perspective, delegations are called upon to express their views as to whether the Ministry of Foreign Affairs can communicate with the Parties engaged in procedures before national courts and, if so, as to how it can proceed. In particular with regard to:**

- **the principle of equality of arms (e.g. does the communication with one Party imply informing the others about the content of that communication ?).**
- **the scope of the communication (e.g. communication of possible factual elements or communication restricted to a single point of law).**
- **the principle of independence of the Judiciary.**
- **any other related issue.**

The Federal Ministry of European and International Affairs serves as the official point of contact to the Austrian authorities for foreign states and international organisations. Communications of such parties in relation to court proceedings will be transmitted to the relevant authorities by the Foreign Ministry. There are, however, no rules in Austrian law providing for communication between the Foreign Ministry and the parties to court proceedings on points of law or fact.

Regarding its activities, the Federal Ministry of European and International Affairs is subject to the Federal Act on the Duty to Grant Information (Auskunftspflichtgesetz, Federal Law

Gazette No. 287/1987 as amended) and shall give information to whoever so requests on matters within its scope of activities to the extent that this does not contradict a statutory duty of secrecy (Section 1 of the Act). Such a duty of secrecy would stem, in particular, from Article 20 paragraph 3 of the Federal Constitutional Law and is binding upon administrative organs in order to safeguard the following interests: maintenance of public peace, order and security; national defence; external relations; interest of a public law corporate body; for the preparation of a ruling or in the preponderant interest of the parties involved (official secrecy).