



Strasbourg, 26/11/03

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COMMITTEE OF LEGAL ADVISERS ON PUBLIC INTERNATIONAL LAW
COMITE DES CONSEILLERS JURIDIQUES SUR LE DROIT INTERNATIONAL PUBLIC
(CAHDI)

26th meeting/26e réunion
Strasbourg, 18-19 September/septembre 2003

PILOT PROJECT OF THE COUNCIL OF EUROPE
ON STATE PRACTICE REGARDING STATE IMMUNITIES/
PROJET PILOTE DU CONSEIL DE L'EUROPE
SUR LA PRATIQUE DES ETATS RELATIVE AUX IMMUNITES

Secretariat memorandum
Prepared by the Directorate General of Legal Affairs/
Note du Secrétariat
préparée par la Direction Générale des Affaires Juridiques

Foreword

At its 21st meeting (Strasbourg, 6-7 March 2001) the CAHDI decided to carry out an activity entitled "Pilot Project of the Council of Europe on State practice regarding State Immunities". This activity focuses particularly, although not exclusively, on judicial practice in the member States of the Council of Europe and aims at collecting the most relevant judicial decisions involving foreign States and their property.

It is modelled on the Pilot Project of the Council of Europe on State Practice regarding State Succession and Issues of Recognition which the CAHDI implemented in the mid-1990s and which resulted in a publication including an analytical study.

At its 22nd meeting (Strasbourg, 11-12 September 2001) the CAHDI agreed on Secretariat proposals for the implementation of this activity and decided that the activity should be carried out on the basis of the guidelines which appear in Appendix I.

The present document was prepared on the basis of the replies submitted by the following member States: Austria, Belgium, Croatia, Cyprus, Czech Republic, Finland, Germany, Greece, Ireland, Italy, Netherlands, Norway, Poland, Portugal, Russian Federation, Slovakia, Spain, Sweden, Switzerland, United Kingdom and Japan.

Appendices marked with an * are not included in this version but, if appropriate, will be included in the final version.

Action required

Delegations are invited to take note of the document and discuss about possible follow-up.

Avant-propos

A sa 21^e réunion (Strasbourg, 6-7 mars 2001) le CAHDI a décidé de mener une activité intitulée "Projet pilote du Conseil de l'Europe sur la pratique des Etats au regard de l'immunité des Etats". Cette activité se concentre plus particulièrement, mais pas exclusivement, sur la pratique judiciaire dans les Etats membres du Conseil de l'Europe et a pour but de rassembler les décisions judiciaires les plus importantes concernant les Etats étrangers et leurs biens.

L'activité suit le modèle du Projet pilote du Conseil de l'Europe sur la pratique des Etats concernant la succession d'états et les questions de reconnaissance, mis en oeuvre au milieu des années 90 et ayant abouti à une publication comprenant une étude analytique.

A sa 22^e réunion (Strasbourg, 11-12 septembre 2001) le CAHDI s'est accordé sur les propositions du Secrétariat pour la mise en oeuvre de cette activité et a décidé que l'activité devrait être menée sur la base des directives qui se trouvent en Annexe I.

Le présent document a été préparé sur la base des réponses des Etats membres suivants: Autriche, Belgique, Croatie, Chypre, République Tchèque, Finlande, Allemagne, Grèce, Irlande, Italie, Norvège, Pays-Bas, Pologne, Portugal, Fédération de Russie, Slovaquie, Espagne, Suède, Suisse, Royaume-Uni et Japon.

Les annexes marquées d'un * ne sont pas incluses dans ce document mais, le cas échéant, le seront dans la version finale.

Action requise

Les délégations sont invitées à prendre note du document et discuter de la suite à donner.

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ITALY/
ITALIE

ITALY/

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**STATE IMMUNITIES IN JUS IMPERII/
LES IMMUNITES DES ETATS DANS LE JUS IMPERII**

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CROATIA/ CROATIE	1	•	•							•
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FINLAND/ FINLANDE	1	•		•						•
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FRANCE	8					•				
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GERMANY/ ALLEMAGNE	6	•				•				
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GREECE/ GRECE	2	•				•				
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ICELAND/ ISLANDE	4	•				•				•
IRELAND/ IRELANDE	1	•			•					•
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ITALY/ ITALIE	11	•		•				•		
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NETHERLAND/ PAYS-BAS	15	•				•		•		
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NORWAY/ NORVEGE	5	•			•					•
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POLAND/ POLOGNE	1	•		•						
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PORTUGAL	2	•		•					
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ROMANIA/ ROUMANIE	1	•		•			•		
SWEDEN/ SUEDE	1	•	•						•
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SWITZERLAND/ SUISSE	6	•		•					•
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TURKEY/ TURQUIE	2	•			•				
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**STATE IMMUNITIES IN JUS GESTIONIS /
LES IMMUNITES DES ETATS DANS LE JUS GESTIONIS**

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BELGIUM / BELGIQUE	1	•							•					
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CROATIA / CROATIE	1	•					•							•
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CZECH REPUBLIC / REPUBLIQUE TCHEQUE	5				•				•				•	
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FINLAND/ FINLANDE	8	•							•				•	
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FRANCE	1				•			•						
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ITALY/ ITALIE	29	•		•				•					•
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NETHERLANDS/ PAYS BAS	5	•					•					•	
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POLAND/ POLOGNE	2	•						•					
PORTUGAL/ PORTUGAL	8			•				•					
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ROMANIA/ ROUMANIE	1	•	•					•				•	
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SPAIN/ ESPAGNE	3	•		•				•					•
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SWEDEN/ SUEDE	2				•		•						•
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SWITZERLAND/ SUISSE	1					•			•				•
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TURKEY/ TURQUIE	5		•					•						
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	JAPAN/ JAPON	4		•					•					

ANDORRE

Il n'existe pas dans notre ordre juridique interne de législation spécifique sur les immunités de juridiction et d'exécution.

Néanmoins, notre Loi qualifiée de la Justice en date du 2 et 3 septembre 1993 dans son article 4 dispose que les cas d'immunité de juridiction et d'exécution établis par les normes de Droit international public ne relèvent pas de la compétence des Tribunaux andorrans.

Nous reproduisons ci-après *in extenso* les dispositions de l'article 4 de la Loi qualifiée de la Justice :

Article 4

"1.-Les juges et les tribunaux andorrans seront compétents en ce qui concerne les procès qui se présenteront en territoire andorran entre andorrans, entre étrangers et entre andorrans et étrangers en conformité avec ce que prévoit la présente Loi et les traités internationaux dont l'Andorre est Etat partie.

2.-Restent exclues de la compétence de la juridiction andorrane les affaires d'immunité de juridiction et d'exécution prévues par les normes de droit international public".

En ce qui concerne l'examen de la Jurisprudence, force est de constater qu'aucune décision n'a été rendue par nos tribunaux en cette matière.

Ce manque de décisions de Justice en la matière trouve son explication dans la récente histoire constitutionnelle de la Principauté d'Andorre, approuvée il y a maintenant dix ans le 14 mars 1993, comportant de ce fait l'adoption d'un système judiciaire nouveau et d'autre part, l'accueil sur le territoire andorran d'Ambassades et de Consuls d'Etats étrangers à partir des années 1993.

AUSTRIA

(a)	Registration no.	A/1
(b)	Date	10 May 1950
(c)	Author(ity)	Supreme Court (Oberster Gerichtshof), judgment
(d)	Parties	Hoffmann Dralle(individual) vs. Czechoslovakia (State)
(e)	Points of law	Pursuant to international and Austrian law Foreign States are exempted from Austrian jurisdiction only in relation to acts of a ius imperii character.
(f)	Classification no.	O.b.3., 1.b, 2.b
(g)	Source(s)	No. 1Ob167/49 and 1Ob171/1950; Austrian legal information system (see: http://www.ris.bka.gv.at - Rechtsinformationssystem – Judikatur Justiz (OGH); see as well: Grotius International Law Reports Volume 17 p 155
(h)	Additional information	similar decisions:1Ob622/49; 1Ob130/50; 2Ob21/48; 2Ob448/50;1Ob264/52; 2Ob243/60; 5Ob343/62;5Ob56/70;3Ob38/86;9ObA170/89;9Ob A244/90; 7Ob627/91; 1Ob28/92; 1Ob100/98g; 8ObA201/00t; 4Ob97/01w
(i)	Full text - extracts - translation - summaries	Summary English: see below Full text: Appendix A/1 *

Summary:

The appellant (Mr. Hoffmann) was the representative in Austria of the German firm of G. Dralle which owned certain trade marks registered in Austria and which were applied to goods manufactured by them and offered for sale by the appellant in Austria. A branch office of the Hamburg firm in Bohemia was the owner of the mentioned trade marks registered in the Austrian register. In 1945 the branch office was nationalized. The nationalized firm requested the appellant's customers in Austria not to offer for sale under the mentioned trade marks any of the goods supplied by the appellant. Mr. Hoffmann applied for an injunction to restrain the Czechoslovak firm (the respondent) from using the mentioned trade marks in Austria. The respondent claimed to be immune from Austrian jurisdiction and to be entitled in any case to use the trademarks concerned.

1 The supreme Court stated that the question whether a foreign State can be subject to jurisdiction of another State has not been answered in a uniform manner by Austrian and foreign courts. Some countries stuck to the concept of absolute immunity others only in the context of acts of ius imperii character. Thus there was no generally accepted rule in international law establishing the concept of absolute immunity of foreign States. The Supreme Court stated further that in the present case the respondent's claim to immunity concerned commercial and not political activities of a foreign sovereign State and thus the respondent was subject to Austrian jurisdiction. The Czechoslovak nationalization decree was only valid in the territory of Czechoslovakia and had no extraterritorial effect. Accordingly the respondent was not entitled to use trademarks owned by its predecessor in Austria. The Supreme Court decided that in result the appellant was entitled to an injunction restraining the respondent from using the trade marks in Austrian territory.

(a)	Registration no.	A/2
(b)	Date	30 April 1986
(c)	Author(ity)	Supreme Court (Oberster Gerichtshof), judgment
(d)	Parties	L-W Verwaltungsgesellschaft mbH&Co.KG (individual) vs. D V A (State)
(e)	Points of law	The Court establishes that execution of a judgment on a running account of an embassy is only exceptionally permitted if the plaintiff proves that the account serves exclusively for private purposes of the embassy.
(f)	Classification no.	O.b., 1.b, 2.b
(g)	Source(s)	No. 30b38/86, Austrian legal information system (see: http://www.ris.bka.gv.at - Rechtsinformationssystem – Judikatur Justiz (OGH); see as well: Grotius International Law Reports Volume 77 p 489
(h)	Additional information	see as well judgment of the Supreme Court no. 6 0b 126/58
(i)	Full text - extracts - translation - summaries	Summary English: see below Full text: Appendix A/2 *

Summary:

The plaintiff held a default judgment against the Democratic Republic of A. The judgment was subsequently declared enforceable and the plaintiff obtained an attachment order on a bank account held by the embassy of the D. R. of A. in Vienna. The D. R. of A. appealed against the attachment in reliance on a certificate issued by its embassy in Vienna which stated that the bank account in question was an official account allocated for the performance of sovereign functions. The Court of Appeal held that in these circumstances the bank account was not subject to attachment. The judgment was confirmed by the Supreme Court. Contrary to its previous view (see judgement no. 6 0b 126/58) the Supreme Court found that although there was no rule in international law which prohibits execution against foreign States in general, there is such rule as to the execution on property which serves the performance of sovereign (embassy) functions. Due to the difficulties involved in judging whether the ability of a diplomatic mission to function was endangered international law gave wide protection to foreign States and referred to the typical, abstract danger to the ability of the mission to function and not to the specific threat in a particular case. Thus operating accounts of embassies were not subject to execution without the consent of the State concerned, unless the plaintiff proves that the account serves exclusively for private purposes of the embassy.

(a)	Registration no.	A/3
(b)	Date	21 November 1990 and 13 September 1994
(c)	Author(ity)	Supreme Court (Oberster Gerichtshof), judgment, and Administrative Court (Verwaltungsgerichtshof), decision
(d)	Parties	R. W. (individual) vs. Embassy of X. (State)
(e)	Points of law	Employment contracts between foreign missions in Austria (States) and Austrian employees are subject to Austrian jurisdiction.
(f)	Classification no.	O.b.2., 1.b, 2.b
(g)	Source(s)	No. 9ObA244/1990 (Supreme Court) and No.93/09/0346 (Adm. Court), Austrian legal information system (see: http://www.ris.bka.gv.at -Rechtsinformationssystem – „Judikatur Justiz OGH“and „Verwaltungsgerichtshof“)
(h)	Additional information	similar decisions: see No. 04/01/0260-11 (Administrative Court, 29 April 1985), No. 98/08/0127 (Administrative Court, 12 October 1998).
(i)	Full text - extracts - translation – summaries	Summary English: see below Full text: Appendix A/3 *

Summary:

An individual employed locally as a photographer by a foreign embassy in Vienna filed a suit against her employer who had issued a notice terminating her contract arguing that the employer had not observed the relevant provisions of Austrian industrial law. The defendant appealed to the Supreme Court claiming immunity. The Court noted that the employment contract in this case was a legal relationship under private law in respect of which a foreign State was subject to Austrian jurisdiction by virtue of the rules of both international and Austrian law. The Supreme Court noted as well that international organisations enjoyed more far-reaching privileges and immunities than States, the immunity of international organisations arose from the relevant international agreements and intended to protect international organisations from interference of States.

The same case was dealt with by the Administrative Court, which agreed to the view of the Supreme Court as to the applicability of Austrian industrial law in this case.

(a)	Registration no	A/4
(b)	Date	10 February 1961
(c)	Author(ity)	Supreme Court (Oberster Gerichtshof), judgment
(d)	Parties	X:Y. (individual) vs. Embassy of X (State)
(e)	Points of law	The Court establishes that driving a government owned vehicle for official purposes is not an act of ius imperii character
(f)	Classification no./n°	O.b.1, 1.b, 2.b
(g)	Source(s)	No. 2Ob243/60, Austrian legal information system (see: http://www.ris.bka.gv.at); see as well: Grotius International Law Reports Volume 40 p 73)
(h)	Additional information	judgement of the Supreme Court No. 1Ob167/49 and 1Ob171/1950
(i)	Full text - extracts - translation – summaries	Summary English: see below Full text: Appendix A/4 *

Summary:

The plaintiff's car was damaged in a car accident with a vehicle owned by the Government of the United States (defendant). The defendant contended that since at the time of the accident the car was carrying diplomatic mail, the act was of ius imperii character and the case was therefore not subject to Austrian jurisdiction. The Supreme Court reiterated its view previously expressed in *Dralle vs Republic of Czechoslovakia* that a distinction must be drawn between *acta iure imperii* and *acta iure gestionis* and that in respect of the latter a foreign State is subject to Austrian jurisdiction. In determining whether an act was *iure imperii* or *iure gestionis* the Court stated that the act itself and not the purpose for which it was performed had to be considered. In the present case the US Government had operated a vehicle on a public road, an act which could be performed as well by an individual. Therefore the case was subject to Austrian jurisdiction.

(a)	Registration no.	A/5
(b)	Date	23 February 1988
(c)	Author(ity)	Supreme Court (Oberster Gerichtshof), decision
(d)	Parties	X.Y. (individual) vs. X (State)
(e)	Points of law	The construction as well as the operation of nuclear power plants is not an act of ius imperii but of ius gestionis character and therefore not excluded from national jurisdiction.
(f)	Classification no.	O.b., 1.b, 2.b
(g)	Source(s)	No.5Nd509/87, Austrian legal information system (see: http://www.ris.bka.gv.at) and Austrian Journal of Public and International Law, Vol. 39, 1988/89 p.360
(h)	Additional information	
(i)	Full text - extracts - translation - summaries	Summary English: see below Full text: Appendix A/5 *

Summary:

The plaintiff, owner of a real estate in Austria, claimed the omission of the construction of a nuclear power plant in a neighbouring State, arguing that already in normal operation the effects would be above the standards customary in place. Jurisdiction *ratione loci* was not given. The plaintiff requested the Supreme Court to determine which court was competent *ratione loci* pursuant to section 28 of the Austrian law concerning the jurisdiction of courts in civil law matters, RGBI. 111/1895 as most recently amended, BGBl. I Nr. 98/2001. The Supreme Court decided that the request was justified and stated that legal proceedings in the State concerned were unreasonable for the claimant and obviously not possible, as there the problem under consideration was treated a public law problem and from acts *iure imperii* no civil obligations could arise. The Supreme Court stated further that the question of whether an act is of *ius imperii* or *ius gestionis* character needed to be assessed according to general international and not national law. The construction as well as the operation of a nuclear power plant were in the area of *iure gestionis* and therefore not excluded from national (Austrian) jurisdiction.

(a)	Registration no.	A/6
(b)	Date	14 June 1989
(c)	Author(ity)	Supreme Court (Oberster Gerichtshof), judgment
(d)	Parties	N. P. (individual) vs. R. F. (State)
(e)	Points of law	The European Convention on State Immunity is only applicable if both the State against which legal action is taken and the State in which the procedure takes place are parties to the convention
(f)	Classification no.	O.b.2, 1.b, 2.b
(g)	Source(s)	No. 9ObA170/89, Austrian legal information system (see: http://www.ris.bka.gv.at - „Judikatur Justiz, OGH“)
(h)	Additional information	see as well No. 30b38/86 (Supreme Court)
(i)	Full text - extracts - translation - summaries	Summary English: see below Full text: Appendix A/6 *

Summary:

An individual employed locally by a foreign consulate in Austria filed a suit against her employer for payment of overtime and vacation compensation. The defendant claimed immunity pursuant to the Vienna Convention on Consular Relations and the European Convention on State Immunity. The Court noted that the first convention was not applicable as the plaintiff had a contract with the sending State and not with a consular officer. The European Convention on State immunity could only be applied if both the State against which legal action is taken and the State in which the procedure takes place were parties to the convention, which was not the case. The Court reiterated its view that employment contracts of this kind were a legal relationship under private law in respect of which a foreign State was subject to Austrian jurisdiction by virtue of the rules of both international and Austrian law.

(a)	Registration no.	A/7
(b)	Date	23 January 2001
(c)	Author(ity)	Regional Court Vienna as appellate Court (Landesgericht Wien), judgment
(d)	Parties	E. AG Wien (individual) vs. L (State)
(e)	Points of law	The conclusion of a rental lease by a foreign State is a relationship under private law, even if the rented real estate is used for the location of the embassy of that State.
(f)	Classification no.	O.b.1, 1.b, 2.b
(g)	Source(s)	40/R7/01b, Austrian legal information system (see: http://www.ris.bka.gv.at - Judikatur, Justiz LG)
(h)	Additional information	
(i)	Full text - extracts - translation - summaries	Summary English: see below Full text: Appendix A/7 *

Summary:

The landlord (plaintiff) took legal action against the tenant (a State) who was in arrears with the payment of rent. The defendant argued that the real estate had been rented to accommodate its embassy in Vienna and that the conclusion of the lease contract was therefore in performance of sovereign function and the case not subject to Austrian jurisdiction. The Regional Court of Vienna noted that for determining whether an act was *iure imperii* or *iure gestionis* the act itself and not the purpose for which it was performed had to be considered. The conclusion of a rental lease by a foreign State needed to be qualified as a relationship under private law, even if the rented real estate is used for official purposes (location of the embassy) of that State. Therefore the case was subject to Austrian jurisdiction.

(a)	Registration no.	A/8
(b)	Date	11 June 2001
(c)	Author(ity)	Supreme Court (Oberster Gerichtshof), decision
(d)	Parties	R. W. (individual) vs. US (State)
(e)	Points of law	The denial of a State to comply with a request of service of a legal documents is an act of ius imperii character.
(f)	Classification no.	O.a, 1.a, 2.a
(g)	Source(s)	No. 8ObA201/00t, Austrian legal information system (see: http://www.ris.bka.gv.at -„Judikatur Justiz, OGH“)
(h)	Additional information	
(i)	Full text - extracts - translation - summaries	Summary English: see below Full text: Appendix A/8 *

Summary:

The plaintiff filed a suit against the US (her employer) for compensation for damages arising from her employment contract. The Court requested the Federal Ministry of Justice to forward the respective legal documents through diplomatic channels to the defendant (US Department of Justice). The documents were left with the Department of State by the driver of the Austrian Embassy in Washington, the signature on the acknowledgement of receipt was not readable. The defendant claimed immunity referring to a note verbale of its embassy and failed to appear before the Court. The plaintiff requested a default judgment. The Court did not comply with this request, arguing that there was no sufficient proof that the action and the summon had been served on the defendant correctly. The Appellate and the Supreme Court stated that according to international law the implementation of letters rogatory or their denial was an act of ius imperii character and the case therefore not subject to Austrian jurisdiction. In determining whether an act was iure imperii or iure gestionis the Court repeated its view previously expressed (see A/4) that the act itself and not the purpose for which it was performed had to be considered.

(a)	Registration no.	A/9
(b)	Date	14 February 2001
(c)	Author(ity)	Supreme Court (Oberster Gerichtshof), decision
(d)	Parties	A. W. (individual) vs. J.(H).A. F.v.L.(Head of State)
(e)	Points of law	An incumbent Head of State against whom legal action for the declaration of paternity is taken in a foreign State is immune from jurisdiction of that State unless it impossible to sue the Head of State concerned in his home country
(f)	Classification no.	1.a, 2.a
(g)	Source(s)	No. 70b316/00x, Austrian legal information system (see: http://www.ris.bka.gv.at - „Judikatur Justiz, OGH“)
(h)	Additional information	
(i)	Full text - extracts - translation - summaries	Summary English: see below Full text: Appendix A/9 *

Summary:

The plaintiff brought an action against an incumbent head of State as well as against his sister and two brothers and applied for a declaration of paternity.

The first defendant claimed immunity. The District Court dismissed the application. The Regional Court as Court of Appeal affirmed the judgment of the District Court concerning the question of absolute immunity of foreign heads of States. The plaintiff finally lodged an appeal with the Supreme Court. She argued that the right of a person to a declaration of paternity by a court took precedence over immunity. Even if the first respondent, due to its immunity, did not fall under the jurisdiction of Austrian courts, the plaintiff had to be granted a right to redress against the other respondents.

The Supreme Court stated that an essential principle deriving from international law was that foreign heads of State, by virtue of their office (*ex officio*) and at least during the term of their office "*ratione materiae*", were exempt from the jurisdiction of other States. They were also exempt from the jurisdiction of other States with regard to private acts "*ratione personae*" (absolute immunity). The Supreme Court noted that the first defendant therefore enjoyed immunity and was not subject to Austrian jurisdiction. This was not true for the other defendants who do not live in the same household with the head of State concerned. The Supreme Court further stated that only if legal action against an incumbent head of State in his home country is impossible the right of declaration of paternity might - under the aspects of humanitarian law - precede the relevant principles of international law concerning immunity of heads of State.

(a)	Registration no.	A/10
(b)	Date	14 May 2001
(c)	Author(ity)	Supreme Court (Oberster Gerichtshof), decision
(d)	Parties	K. S. (individual) vs. Kingdom of B. (State)
(e)	Points of law	<p>The Convention on Jurisdiction and the Enforcement of Judgements in Civil and Commercial Matters (Lugano Convention 1988) creates a system of international jurisdiction and does not refer to the immunity of states and diplomatic agents. Claims which arise from iure imperii acts and state liability are excluded from this convention.</p> <p>Art. 11 of the European Convention on State immunity does not cover compensation for immaterial damage. The distinction between acts iure imperii and iure gestionis is irrelevant in this context.</p>
(f)	Classification no.	0.a, 1.a, 2.a
(g)	Source(s)	No. 40b97/01w, Austrian legal information system (see: http://www.ris.bka.gv.at - „Judikatur Justiz, OGH“)
(h)	Additional information	
(i)	Full text - extracts - translation - summaries	<p>Summary English: see below</p> <p>Full text: Appendix A/10 *</p>

Summary:

An Austrian citizen filed an action against the Kingdom of B. claiming inter alia compensation of damages which arose from the sanctions imposed by Austria's 14 EU partners claiming that the call to boycott and the decision to impose sanctions on Austria were not iure imperii acts and that the Kingdom of B. was therefore subject to Austrian jurisdiction. The Kingdom of B claimed immunity. The Supreme Court noted that the question whether and under which conditions legal action can be taken against a foreign State was ruled both by international customary and treaty law. One of such international treaties was the European Convention on State immunity. Both the Kingdom of B. and Austria are parties to the convention, but Article 11 of this convention was not applicable (as claimed by the plaintiff) as it did not cover immaterial damage. Therefore the Kingdom of B. was immune from Austrian jurisdiction according to Article XV of the mentioned convention. The Court noted further that there was no distinction between acts iure imperii and iure gestionis in this context.

The Supreme Court also stated that the question of immunity had not been ruled specifically EU law. Therefore general international law was applicable and this fact led as well to the immunity of the Kingdom of B. from Austrian jurisdiction.

This legal situation was not changed by the Convention on Jurisdiction and the Enforcement of Judgements in Civil and Commercial Matters (Lugano Convention 1988) as this convention created a system of international jurisdiction and does not refer to the immunity of states and diplomatic agents . Claims which arose from iure imperii acts and state liability

were excluded from the mentioned convention. Finally the Supreme Court stated that the mentioned acts of the Kingdom of B. were with no doubt an activity in the field of foreign policy and therefore acts of *ius imperii* character.

(a)	Registration no.	A/11
(b)	Date	envisaged for autumn 2002
(c)	Author(ity)	Austrian Parliament; amendment to the law on the status of OSCE institutions in Austria
(d)	Parties	
(e)	Points of law	The principle of customary international law that State aircrafts and their personnel enjoy certain privileges and immunities will be codified for Austria if the Austrian Parliament approves a government bill (see draft para. 5b sub-section 2 of the above-mentioned amendment).
(f)	Classification no.	O.a; 1.a, 2.a
(g)	Source(s)	see amendment to be adopted to BGBl. Nr. 511/1993 as amended by BGBl. Nr. 735/1995; see Austrian legal information system (http://www.ris.bka.gv.at - Bundesrecht)
(h)	Additional information	
(i)	Full text - extracts - translation - summaries	Summary English: see below Full text: Appendix A/11 *

The Austrian government has submitted a bill to Parliament containing various amendments to the Austrian law on the status of OSCE institutions in Austria, BGBl. Nr. 511/1993 as amended by BGBl. Nr. 735/1995. One of these (draft para. 5b sub-section 2) relates to State aircrafts which participate in observation flights within the framework of the Open Skies Treaty (to which Austria is not a party). In accordance with international customary law the new provision will, if adopted by Parliament, grant certain privileges and immunities to these aircrafts and their personnel when passing through Austria.

BELGIQUE

(a)	N° d'enregistrement	B/1
(b)	Date	11 juin 1903
(c)	(Service) auteur	Cour de cassation
(d)	Parties	Société anonyme des chemins de fer liégeois - luxembourgeois contre Etat néerlandais (Ministère du Waterstaat)
(e)	Points de droit	Les Etats étrangers, en tant que personnes civiles, et agissant non comme puissance publique, mais pour la défense ou l'exercice d'un droit privé, sont justiciables des tribunaux belges. Cet arrêt consacre le principe d'une immunité de juridiction restreinte ou relative. La Cour de Cassation a jugé que c'est la nature de l'acte qui détermine pour les tribunaux le caractère public ou privé de l'acte étatique.
(f)	Classification n°	O.b,1.b
(g)	Source(s)	Pasicrisie 1903, I, 294-303
(h)	Renseignements complémentaires	La distinction s'établit dès lors entre les actes de souveraineté (actes accomplis « jure imperii ») pour lesquels l'immunité de juridiction subsiste et les actes de gestion privée (actes accomplis « jure gestionis »), pour lesquels l'immunité est désormais refusée
(i)	Texte complet - extraits - traduction - résumés	Texte complet annexe B 01

Résumé des faits :

La Société des Chemins de fer liégeois-luxembourgeois a payé la part de l'Etat néerlandais (34 000 florins)dans les frais d'extension de la gare d'Eindhoven et tend par une action en justice à en obtenir le remboursement.

1^{re} CH. — 11 Juin 1903.

ÉTAT ÉTRANGER. — EXERCICE OU DÉFENSE D'UN DROIT PRIVÉ. — COMPÉTENCE DES TRIBUNAUX BELGES.

Les Etats étrangers, en tant que personnes civiles et agissant non comme puissance publique, mais pour la défense ou l'exercice d'un droit privé, sont justiciables des tribunaux belges.

(SOCIÉTÉ ANONYME DES CHEMINS DE FER LIÉGEOIS-LUXEMBOURGEOIS, — C. ETAT NÉERLANDAIS (MINISTÈRE DU WATERSTAAT).)

ARRÊT.

LA COUR; — Sur l'unique moyen du pourvoi accusant la violation des articles 52, 53 et 54 de la loi du 25 mars 1876, de l'article 14 du code civil et de l'article 92 de la Constitution et fautive application des principes du droit des gens, en ce que l'arrêt attaqué décide qu'un Etat étranger, ayant traité comme personne civile, ne peut être justiciable des tribunaux belges, et ce à raison de sa souveraineté;

Attendu que la règle du droit des gens, qui proclame l'indépendance des nations, découlée du principe de leur souveraineté; qu'elle est, dès lors, sans application quand la souveraineté n'est pas en cause;

Attendu que la souveraineté n'est engagée que par les actes de la vie politique (le l'Etat;

Que les actes par lesquels la puissance publique s'affirme sont régis à l'intérieur par le droit constitutionnel et échappent, à raison de la séparation des pouvoirs, au contrôle de l'autorité judiciaire; que leurs effets, en dehors du territoire, ne résultent que du droit international et sont soustraits, à ce titre, à l'appréciation des tribunaux, tant du pays que de l'étranger;

Mais attendu que l'Etat ne doit pas se confiner dans son rôle politique; qu'en vue du besoin de la collectivité, il peut acquérir et posséder des biens, contracter,

devenir créancier et débiteur; qu'il peut même faire le commerce, se réserver des monopoles ou la direction de services d'utilité générale;

Que, dans la gestion de ce domaine ou de ces services, l'Etat ne met pas en œuvre la puissance publique, mais fait ce que des particuliers peuvent faire, et partant, n'agit que comme personne civile ou privée;

Que lorsqu'en cette qualité il est engagé dans un différend, après avoir traité d'égal à égal avec son cocontractant ou a encouru la responsabilité d'une faute étrangère à l'ordre politique, la contestation a pour objet un droit civil du ressort exclusif des tribunaux, aux termes de l'article 92 de la Constitution;

Attendu que les Etats étrangers sont, en tant que personnes civiles et au même titre que les autres étrangers, justiciables des tribunaux belges;

Que pour ces Etats, comme pour l'Etat belge, la souveraineté n'est pas en jeu, quand ils sont en cause, non pas comme pouvoir, mais uniquement pour l'exercice ou la défense d'un droit privé;

Attendu, à cet égard, qu'il n'y a pas à distinguer, comme l'arrêt dénoncé le tente, entre la contestation qui concerne, comme celle de l'espèce, l'exécution d'un contrat conclu par l'Etat étranger et celle relative à un immeuble qu'il possède sur le territoire; qu'il n'y a pas à rechercher non plus si l'Etat étranger a saisi comme demandeur les tribunaux de sa réclamation, s'il répond à une demande reconventionnelle, si assigné comme défendeur il n'expose pas d'incompétence ou s'il a compromis sur les difficultés à naître de la convention qu'il a souscrite;

Qu'il ne se voit pas, en effet, en quoi l'Etat abdiquerait sa souveraineté en se soumettant à la juridiction des tribunaux étrangers pour le jugement des conventions qu'il a librement formées, et conserverait cette souveraineté intacte lorsqu'il subit leur juridiction ou y recourt dans les autres hypothèses ci-dessus visées, pour lesquelles une doctrine et une jurisprudence presque unanimes admettent leur compétence;

Que, d'ailleurs, dans le cas de contrat, comme dans les autres, il y aurait renonciation au moins implicite à l'immunité, s'il pouvait être question de renonciation en une matière qui intéresse des prérogatives inhérentes;

Qu'en réalité, dans toutes les hypothèses, la compétence dérive, non du consentement du justiciable, mais de la nature de l'acte et de la qualité en laquelle l'Etat y est intervenu; que si l'Etat étranger peut saisir nos

tribunaux de poursuites contre ses débiteurs, il doit répondre devant eux à ses créanciers;

Attendu que l'arrêt argumente vainement des travaux préparatoires du code civil; qu'en effet, l'immunité généralement reconnue aux ambassadeurs, repose sur leur caractère représentatif de la personne du souverain et sur une fiction d'extraterritorialité qui serait inutile si cette immunité se rattachait, comme celle de l'Etat, à la notion de la souveraineté; que l'observation de Portalis n'a eu d'autre but que d'empêcher l'introduction dans une loi de régime intérieur, comme le code civil, d'une disposition qui appartenait au droit des gens; mais que Portalis n'a proposé aucune solution pour la question des immunités diplomatiques et qu'il n'a pas même touché à celle de l'exception de juridiction des Etats qui n'était pas en discussion;

Que de la suppression dans le projet de code civil de l'article 11 il n'y a donc à tirer aucune lumière pour l'interprétation de l'article 14 de ce code ni de la loi de 1876 sur la compétence qu'il a remplacé;

Attendu que par étranger il faut entendre dans les articles 52, 53 et 54 de cette dernière loi non seulement les personnes physiques, mais encore les personnes morales étrangères, et qu'il faut ranger au nombre de celles-ci, à côté des sociétés anonymes et des corps moraux tels que les communes et les établissements publics, la plus éminente de toutes, l'Etat, auquel la loi accorde, quand il est reconnu, la jouissance de droits privés, en lui permettant de posséder et de contracter, et auquel elle ouvre, comme à des particuliers, le recours à la justice même contre les nationaux;

Attendu que l'arrêt dénoncé signale en fin la difficulté, sinon l'impossibilité, d'exécuter le jugement obtenu contre un gouvernement étranger; mais que l'objection n'a rien de décisif; que, fallût-il concéder à cet égard à l'Etat étranger une condition différente de celle des personnes privées étrangères, il n'en faudrait pas conclure à l'incompétence des tribunaux belges; que ceux-ci, en effet, ne cessent pas d'être compétents pour juger l'Etat belge lui-même, quoique ses biens soient insaisissables, et que, d'autre part, la validité d'une décision de justice est indépendante de difficultés que peut présenter sa mise à exécution;

Attendu, au surplus, que l'objection a le tort de perdre de vue l'autorité morale qui s'attache, dans nos sociétés modernes, à une décision rendue par des juges indépendants; qu'un jugement fondé sur des motifs d'étranger

nelle et universelle justice a par lui-même, sur la conscience publique, une action autrement puissante que les moyens les plus énergiques de coercition;

Attendu que, d'après les constatations de l'arrêt dénoncé, l'Etat néerlandais était assigné en remboursement d'une somme de 34,000 florins ou 70,822 francs payée par la Compagnie des chemins de fer liégeois-luxembourgeois pour les frais d'extension d'une gare commune;

Que la convention sur laquelle l'action était fondée a été souscrite par l'Etat néerlandais, défendeur, pour la gestion d'une des lignes ferrées au profit d'une autre administration de chemin de fer; que cette convention apparaît donc comme un acte d'intérêt privé dont l'interprétation ne peut en rien entamer sa souveraineté;

Attendu qu'il suit des considérations ci-dessus développées, qu'en se déclarant incompétente pour connaître d'une demande se produisant dans ces conditions, la cour d'appel de Bruxelles a contrevenu aux dispositions des articles 52 et 53 de la loi du 25 mars 1876 visées au pourvoi et à l'article 92 de la Constitution;

Par ces motifs, casse...; renvoie la cause à la cour d'appel de Gand.

Du 11 juin 1903. — 1^{re} ch. — Prés. M. van Maldeghem, conseiller faisant fonctions de président. — Repp. M. van Maldeghem. — Concl. conf. M. Terlinden, premier avocat général. — Pl. MM. Beernaert, Delacroix, Leciercq et Despret.

(a)	N° d'enregistrement	B/2
(b)	Date	25 avril 1983
(c)	(Service) auteur	Tribunal du Travail de Bruxelles
(d)	Parties	Rousseau contre République de Haute Volta
(e)	Points de droit	L'immunité de juridiction ne concerne que les actes accomplis par l'Etat étranger dans l'exercice de sa souveraineté et non les actes de gestion accomplis comme personne privée tels ceux accomplis à l'occasion de la rupture d'un contrat de travail.
(f)	Classification n°	0.b.2, I,b
(g)	Source(s)	Journal des Tribunaux du Travail (JTT) 1984, p. 276
(h)	Renseignements complémentaires	
(i)	Texte complet - extraits - traduction - résumés	Voir annexe B 02

Résumé des faits:

Monsieur Rousseau a été engagé par l'Ambassade de Haute-Volta à Bruxelles en qualité de chauffeur par contrat écrit du 10 janvier 1977. Suite à des demandes de réenregistrement de salaires et d'autres malentendus, congé lui est notifié le 11 mars 1982. Le dossier est présenté à la justice. Le tribunal du Travail de Bruxelles a à se prononcer sur sa compétence dans ce litige.

ANNEXE B/2

Trib. Trav. Bruxelles (3^e ch.),
25 IV 1983

Siég. : Mme LION, prés.; MM. RENARD et STEENS, juges soc.
Plaid. : M^e CHARTIER.

(Rousseau c. République de Haute-Volta.)

COMPETENCE. — IMMUNITÉ DE JURIDICTION.

L'immunité de juridiction ne concerne que les actes accomplis par l'Etat étranger dans l'exercice de sa souveraineté et non les actes de gestion accomplis comme personne privée tels ceux accomplis à l'occasion de la conclusion ou de la rupture d'un contrat de travail d'ouvrier.

BEVOEGDHEID. — GERECHTELIJKE IMMUNITeit.

De gerechtelijke immuniteit betreft slechts de handelingen door de vreemde Staat gesteld in de uitoefening van zijn soevereiniteit en niet de beheershandelingen gesteld als privaat persoon, zoals die welke gesteld worden naar aanleiding van het sluiten en het verbreken van een arbeids-overeenkomst voor arbeider.

La demande tend à obtenir condamnation de la partie défenderesse à payer au demandeur :

— 164.142 F à titre d'indemnité pour licenciement abusif;

Les faits peuvent être résumés comme suit :

Par contrat écrit du 10 janvier 1977, l'ambassade de Haute-Volta à Bruxelles engage M. Rousseau en qualité de chauffeur, à partir du 13 janvier 1977, moyennant un salaire mensuel de 18.000 F.

Une lettre du 6 janvier 1977 précisait que le demandeur serait assujéti à la sécurité sociale, ce qui a été fait.

Par lettre dont la copie n'est pas datée, mais qui pourrait être du 4 mai 1981, le demandeur demande le réajustement de son salaire en fonction du revenu mensuel moyen garanti.

Le 29 octobre 1981, il lui est répondu qu'il sera fait droit à sa demande; il lui est demandé une plus grande rigueur dans le respect des horaires de travail et une meilleure volonté dans l'exécution de ses tâches.

Par lettre du 2 novembre 1981, M. Rousseau demande que soit respectée l'indexation de son salaire.

Le mercredi 11 mars 1982, il lui est notifié congé par la voie recommandée, dans les termes suivants :

« Nous avons constaté ce jour mardi 9 mars 1982, votre absence irrégulière de votre poste de travail.

« Cette absence que vous avez tenté de justifier au téléphone en invoquant une soi-disant grève des trains, vient s'ajouter à celle du 8 février 1982 et est, comme cette dernière, totalement injustifiable.

« N'étant pas, à notre connaissance, syndiqué et n'étant pas en grève ce jour, vous ne pouvez arguer du motif pris de la grève pour vous absenter toute une journée et ainsi paralyser le service, d'autant que vous avez toujours dit avoir une voiture et que vous pouvez avoir, si vous étiez de bonne foi, toutes les possibilités pour vous rendre au service.

« Dans tous les cas, chaque agent à l'ambassade est responsable de sa ponctualité au service, et l'ambassade n'a droit d'intervention pour aucun d'eux.

« Les moyens mis à notre disposition par notre gouvernement ne nous permettant pas d'engager plusieurs chauffeurs, nous ne pouvons plus longtemps garder à notre service un chauffeur qui ne vient que quand bon lui semble, et qui ne peut se conformer aux nécessités minimales du service et qui notoirement fait preuve de graves négligences dans l'exécution des tâches qui lui sont assignées.

« En conséquence, devant ces faits et absences irrégulières incompatibles avec les contraintes de l'ambassade, j'ai l'honneur par la présente de vous notifier votre préavis de congé pour compter du lundi 15 mars 1982, date à laquelle je vous libère de vos obligations de service.

« Vous pourrez donc mettre à profit ce délai pour la recherche éventuelle d'un autre emploi ».

Il s'ensuit un échange de correspondance entre l'organisation représentative des travailleurs à laquelle M. Rousseau a confié la défense de ses intérêts, et l'ambassade.

1. — La juridiction :

Le tribunal doit examiner tout d'abord sa compétence *ratione materiae* au sens du droit public international, soit, en d'autres termes, le problème de l'application en la cause de la règle spéciale de compétence, issue du droit des gens, qu'est l'immunité de juridiction.

Si les Etats étrangers jouissent en effet de l'immunité de juridiction, que doctrine et jurisprudence fondent généralement sur l'égalité entre Etats, l'indépendance ou la souveraineté de ceux-ci, cette immunité n'est toutefois pas absolue : il faut distinguer le cas où l'Etat étranger a agi comme puissance publique, dans l'exercice de sa souveraineté (son *imperium*) ou comme personne privée, en vue d'actes de gestion.

Le principe de l'indépendance des Etats, déduit de leur souveraineté, n'est en effet pas d'application lorsque cette souveraineté n'est pas en cause : « si l'Etat ne met pas en œuvre la puissance publique, mais fait ce que les particuliers peuvent faire et, partant, n'agit que comme personne civile ou privée », les cours et tribunaux ont compétence pour connaître d'un différend entre un Belge et un Etat étranger, compétence qui dérive « non du consentement du justiciable, mais de la nature de l'acte et de la qualité en laquelle l'Etat y est intervenu » (Cass., 1903, *Pas.*, I, 294; Bruxelles, 2^e ch., 4 déc. 1963, *J.T.*, 1964,

p. 44; De Page, t. I, nos 105 et s.; E. Suy, « L'immunité des Etats dans la jurisprudence belge », in *L'immunité de juridiction et d'exécution des Etats*, Bruxelles, éd. de l'Institut de sociologie, 1971 spéc. pp. 286 et 298; Paul de Visscher et Joe Verhoeven, « L'immunité de juridiction de l'Etat étranger dans la jurisprudence belge et le projet de Convention du Conseil de l'Europe », dans le même ouvrage).

L'immunité de juridiction ne s'applique pas davantage en cas de renonciation « expresse, voire même tacite, mais certaine et régulière » (Léopoldville, 29 mai 1956, *Pas.*, 1957, II, 56; *J.T.*, 1956, p. 716, confir. Civ. Léopoldville, 14 oct. 1955, *J.T.*, 1956, p. 292; E. Suy, *op. cit.*, p. 303).

Cette renonciation est superflue si, en raison de la nature même de l'acte — celui-ci étant étranger à l'exercice de l'*imperium* de l'Etat — le tribunal est compétent; il convient donc de déterminer si la relation de travail entre les parties est de droit public, si cet engagement est constitutif d'acte de gouvernement ou si au contraire, il s'agit d'un acte de la vie civile, ne rentrant pas dans ses attributions essentielles de la puissance publique.

Le contrat liant les parties est, sans aucun doute possible, un contrat de travail d'ouvrier : c'est un lien de droit privé qui les a unis, et la partie défenderesse n'a pas fait acte de gouvernement : elle a agi comme personne civile; le tribunal a juridiction en la cause.

Il est compétent *ratione materiae* sur base de l'article 635 du Code judiciaire, et *ratione loci* conformément à l'article 627, 9^o du Code judiciaire.

2. — Le fond :

Par ces motifs :

LE TRIBUNAL,

Statuant par défaut réputé contradictoire.

Dit la demande recevable.

(a)	N° d'enregistrement	B/3
(b)	Date	22 septembre 1992
(c)	Author(ity)	Cour du Travail de Bruxelles
(d)	Parties	Queiros Magalhaes Abrantes c/Etat du Portugal
(e)	Points de droit	<p>Le Tribunal de travail s'étant déclaré incompétent pour juger l'affaire en vertu de l'immunité de juridiction (jugement du 28 mai 1991), la Cour de travail a jugé que :</p> <ul style="list-style-type: none"> - L'Etat du Portugal ne s'est pas comporté comme pouvoir public dans l'exercice de sa souveraineté politique, mais comme une personne civile ; - Le Portugal a signé mais pas ratifié la Convention de Bâle du 16 mai 1972 sur l'immunité des Etats de sorte que, en principe, celle-ci n'est pas applicable au présent litige, sauf dans les dispositions déclaratives de droit coutumier à savoir le paragraphe 1^{er} de l'article 5, lequel stipule « <i>Un Etat ne peut invoquer l'immunité de juridiction devant un tribunal d'un autre Etat contractant si la procédure a trait à un contrat de travail conclu entre l'Etat et une personne physique, lorsque le travail doit être accompli sur le territoire de l'Etat du for.</i> » - La juridiction du travail belge doit dès lors se déclarer compétente.
(f)	Classification no.	O .b.2,1.b
(g)	Source(s)	Pasicrisie 1992, II, 104
(h)	Renseignements complémentaires	
(i)	Texte complet - extraits - traduction - résumés	Voir annexe B 03

Résumé des faits:

L'appelant a été engagé en 1976 par l'Etat portugais par contrat à durée déterminée en qualité de professeur de langue et de culture portugaise de l'Ambassade du Portugal à Bruxelles. Le contrat est renouvelé à plusieurs reprises ; en 1990 il se voit signifier par l'employeur qu'il est mis fin au contrat du travail . L'appelant exige une indemnité, l'Etat portugais fait appel à l'immunité de juridiction

ANNEXE B/3

COUR DU TRAVAIL
DE BRUXELLES

22 septembre 1992

1° COMPÉTENCE ET RESSORT. — MATIÈRE CIVILE. — COMPÉTENCE D'ATTRIBUTION. — IMMUNITÉ DE JURIDICTION D'UN ETAT ÉTRANGER. — CONVENTION EUROPÉENNE SUR L'IMMUNITÉ DES ETATS DU 16 MAI 1972, ARTICLE 5. — APPLICATION A L'ÉGARD D'UN ETAT

CONTRACTANT N'AYANT PAS RATIFIÉ LA CONVENTION.

2° IMMUNITÉ. — IMMUNITÉ DE JURIDICTION D'UN ETAT ÉTRANGER. — CONVENTION EUROPÉENNE SUR L'IMMUNITÉ DES ETATS DU 16 MAI 1972, ARTICLE 5. — APPLICATION A L'ÉGARD D'UN ETAT CONTRACTANT N'AYANT PAS RATIFIÉ LA CONVENTION.

3° CONTRAT DE TRAVAIL. — CONTRAT DE TRAVAIL CONCLU ENTRE UN ETAT ÉTRANGER ET UNE PERSONNE PHYSIQUE AYANT LA NATIONALITÉ DE L'ETAT EMPLOYEUR AU MOMENT DE L'INTRODUCTION DE L'INSTANCE, LE TRAVAIL ÉTANT ACCOMPLI SUR LE TERRITOIRE BELGE. — COMPÉTENCE DES COURS ET TRIBUNAUX BELGES. — CONVENTION EUROPÉENNE SUR L'IMMUNITÉ DES ETATS DU 16 MAI 1972, ARTICLE 5. — APPLICATION A L'ÉGARD D'UN ETAT CONTRACTANT N'AYANT PAS RATIFIÉ LA CONVENTION.

4° TRAITÉS INTERNATIONAUX. — ABSENCE DE RATIFICATION PAR UN ETAT CONTRACTANT. — DISPOSITIONS DU TRAITÉ REPRODUISANT UNE COU-TUME PRÉEXISTANTE. — CONSÉQUENCES. — CONVENTION EUROPÉENNE SUR L'IMMUNITÉ DES ETATS DU 16 MAI 1972, ARTICLE 5.

1°, 2°, 3° et 4° Nonobstant le fait qu'elle n'a pas été ratifiée par un Etat qui cependant l'a signée, une convention internationale est néanmoins d'application à son égard en ses dispositions se limitant à reproduire une coutume pré-existante.

Tel est le cas de l'article 5, § 1^{er} de la Convention européenne sur l'immunité des Etats, conclue à Bâle le 16 mai 1972, en ce qu'il constitue la codification d'une coutume préexistante quand il dispose qu'un Etat ne peut invoquer l'immunité de juridiction devant un tribunal d'un autre Etat contractant si la procédure est fondée sur un contrat de travail conclu entre l'Etat et une personne physique et que le travail doit être accompli sur le territoire de l'Etat du for.

Par contre, tel n'est pas le cas du paragraphe 2 du même article, lequel prévoit, par dérogation, que le paragraphe 1^{er} ne s'applique pas lorsque la personne physique possède la nationalité de l'Etat employeur au moment de l'introduction de l'instance.

L'Etat étranger qui n'a pas ratifié la Convention précitée, ne peut invoquer l'article 5, § 2 pour décliner la compétence des cours et tribunaux belges pour connaître d'un litige qui l'oppose à un de ses ressortissants et ayant pour objet un contrat de travail, le travail ayant été accompli en Belgique.

(QUEIROZ MAGALHAES ABRANTES,
C. L'ÉTAT DU PORTUGAL.)

ARRÊT.

LA COUR; — Vu le jugement *a quo* prononcé par défaut à l'égard de l'intimé le 28 mai 1991 par le Tribunal du travail de Bruxelles;

Antécédents.

L'appelant, demandeur originaire, travaille comme professeur de langues au service de l'Ambassade du Portugal, section consulaire, du 19 octobre 1976 au 31 août 1990.

Un formulaire C4 lui est remis le 18 septembre 1990 mentionnant comme motif de chômage « fin de contrat ».

L'employeur mentionné est l'Ambassade du Portugal — section consulaire — n° d'affiliation 032.0398501.21 ».

Monsieur de Queiroz devint immédiatement bénéficiaire des allocations de chômage à titre provisoire.

En première instance, le demandeur originaire réclame une indemnité de rupture (1.127.963 F).

Le premier juge s'est déclaré incompétent pour connaître de la cause. La partie défenderesse originaire faisait défaut.

Le tribunal fait valoir que le demandeur a la même nationalité que l'Etat employeur. Il y a donc lieu d'appliquer le § 2 de l'article 5 de la convention européenne du 16 mai 1972 sur l'immunité des Etats (convention dite de Bâle).

Certes, dit le tribunal, le Portugal n'a ni signé, ni ratifié cette convention. Comme ce texte ne fait que reproduire

une coutume existante, dit-il, « la force obligatoire de ses dispositions s'étend au-delà des seules parties contractantes et atteint tous ceux qui sont régulièrement assujettis à la coutume codifiée ».

L'appelant demande la mise à néant de ce jugement et réintroduit sa demande originaire égale à 15 mois de rémunération.

L'intimé fait défaut comme en première instance.

Examen.

1. Compétence des tribunaux belges.

Attendu que le litige porte sur l'exécution d'une obligation née en Belgique;

Que l'étranger peut être assigné devant les tribunaux du royaume, même par un étranger (article 635, 3° du Code judiciaire);

Que l'intimé défaillant ne soulève pas l'immunité de juridiction;

Que le tribunal a considéré cependant qu'il devait soulever ce moyen *d'office*, l'immunité de juridiction le rendant incompétent en raison de la nationalité du demandeur (application de l'article 5, § 2 de la Convention européenne sur l'immunité des Etats du 16 mai 1972, approuvée par la loi du 19 juillet 1975);

Attendu que cette convention établit pour règle (article 5, § 1^{er}) « qu'un Etat contractant ne peut invoquer l'immunité de juridiction devant un tribunal d'un autre Etat contractant si la procédure a trait à un contrat de travail conclu entre l'Etat et une personne physique lorsque le travail doit être accompli sur le territoire de l'Etat du for »;

Qu'à titre de dérogation (article 5, § 2), cette règle ne s'applique pas « lorsque la personne physique a la nationalité de l'Etat employeur au moment de l'introduction de l'instance... », ce qui est le cas en l'espèce;

Attendu que le Portugal a signé cette convention le 10 mai 1979 mais ne l'a pas ratifiée;

Que le premier juge souligne « qu'il est admis lorsque le traité se contente de reproduire une coutume préexistante, que la force obligatoire de ses dispositions s'étend au-delà des seules parties contractantes et atteint tous ceux qui sont régulièrement assujettis à la coutume codifiée (voir citations doctrinales dans le jugement);

Qu'en l'espèce, dit le tribunal « les dispositions de la convention constituent

à l'évidence la codification d'une règle coutumière préexistante;

Attendu que l'appelant fait valoir que l'article 5, § 2 n'est qu'une dérogation à la règle générale de l'article 5, § 1^{er}; qu'elle doit donc être interprétée restrictivement;

Qu'il convient de rejeter son application aux Etats non contractants;

Attendu que l'appelant relève en outre que l'Etat employeur ne peut se soustraire à la juridiction de l'Etat du for lorsque le droit du travail de cet Etat confère à ses tribunaux une compétence exclusive (article 627, 9^o du Code judiciaire);

Qu'en outre, le Code de procédure du travail portugais prévoit que les actions découlant du contrat de travail intentées par un travailleur contre son employeur, doivent être soumises au tribunal du lieu où le contrat a été exécuté (article 14 décret-loi 272 A 81 du 30 avril approuvant le Code de procédure portugais du travail);

Attendu que le Ministère public en son avis très minutieusement et longuement motivé, relève, concernant la non-ratification par le Portugal de la Convention de Bâle du 16 mai 1972 que l'article 38, 2^o du statut de la Cour internationale de Justice (ex Cour permanente) déclare que « la coutume internationale, comme preuve d'une pratique générale acceptée comme étant le droit, est également une source de droit et d'obligation pour les Etats dans leurs rapports réciproques (Ch. ROUSSEAU, Droit international public, t. 1^{er}, Introduction et sources, Sirey, 1971, p. 307, n^o 259);

Que les décisions des tribunaux internes et les traités internationaux contribuent à la formation du droit coutumier;

Qu'il est cependant difficile de déterminer dans une convention de codification la part de la consécration de la coutume et celle de la création d'une norme nouvelle;

Attendu qu'en l'espèce, il convient de savoir si la Convention de Bâle du 16 mai 1972, en son article 5, constitue une codification d'une règle coutumière;

Que, l'étude de la pratique des Etats membres du Conseil de l'Europe en matière d'immunité, révèle une certaine disparité d'attitude des Etats intéressés, les uns optant pour une *immunité absolue* (Royaume Uni ...), les autres ayant une position douteuse ou optant pour le principe de l'*immunité relative* (France, Belgique, Allemagne, Italie...);

Attendu que la jurisprudence belge refuse de reconnaître l'immunité lorsque la souveraineté d'un Etat n'est pas engagée, même si sa personne l'est, distinguant ainsi le *jus gestionis* du *jus imperii*;

Attendu que, appliquant cette thèse, il importe de distinguer la qualité en laquelle l'Etat est intervenu;

Que s'il exerce ses droits comme gestionnaire en participant comme personne civile à des rapports de droit privé, il n'est plus en droit de bénéficier de l'immunité qu'il invoque (DE VISSCHER et VERHOEVEN, « L'immunité de l'Etat étranger dans la jurisprudence belge et le projet de convention du Conseil de l'Europe », in *L'immunité de juridiction et d'exécution des Etats*, Bruxelles, éditions de l'Institut de sociologie, 1971, p. 46);

Que c'est la nature de l'acte qui détermine pour les tribunaux le caractère public ou privé de l'acte étatique, sans considération, en principe, de la finalité poursuivie par l'Etat étranger;

Qu'il y a donc acte d'autorité ou acte de gestion, selon que l'acte est la mise en œuvre d'un procédé de souveraineté ou d'un procédé susceptible d'être utilisé par de simples particuliers (voir en doctrine : DE VISSCHER, *op. cit.*, p. 47 et 149; RIGAUX, *Droit international privé*, t. 1^{er}, p. 184 ...; CAMBIER, *Dr. judic. civil*, 1981, t. II, *La compétence*, p. 50 + note; en jurisprudence, Trib. trav. Bruxelles, 25 avril 1983, *J.T.T.*, 1984, p. 271, *R.D.I.*, et *D. Comp.*, 1987, p. 169 + note SACR; Cour trav. Bruxelles, 6 novembre 1989, RG 20.524 en cause Royaume du Maroc; Cour trav. Bruxelles, 26 juin 1985, RG 16.736 en cause Air Algérie; Trib. trav. Bruxelles, 23 mai 1989, *J.T.B.*, 1989, p. 274);

Attendu que l'article 5, § 1^{er} de la convention citée constitue une application de la théorie de l'*immunité relative*: non-application de l'immunité pour les actes de gestion;

Que cette disposition constitue une codification d'une coutume préexistante ou plutôt une cristallisation d'un droit coutumier en formation (voir note citée ci-dessus sous Trib. trav. Bruxelles, 25 avril 1983, *J.T.T.*, 1984, p. 277; Cour trav. Bruxelles, 6 novembre 1989, cité également ci-dessus);

Qu'il n'en est pas de même pour l'article 5, § 2, le Ministère public relevant correctement en son avis ce qui suit :

« Les dérogations à la règle énoncée au § 1^{er}, par l'admission d'un lien de

rattachement lié à la nationalité du travailleur s'écarte totalement des principes dégagés par la théorie de l'immunité relative dont ils constituent une remise en question contraire à la jurisprudence belge et ne sont pas la reproduction d'une coutume préexistante »;

Que cette opinion découle du commentaire de SALMON (« Le projet de convention du Conseil de l'Europe sur l'immunité des Etats », voir éd. Institut de sociologie, 1971, cité ci-dessus, p. 92) et de l'examen de l'exposé des motifs de la loi ratifiant la convention (voir Ch. représ., session 1974-1975, 426, n^o 1, p. 9);

Attendu qu'en l'espèce, le contrat liant les parties est un contrat de travail établissant des liens de droit privé;

Que l'intimé n'a pas fait acte de gouvernement et a agi comme une personne privée;

Que l'Etat du Portugal en engageant l'appelant dans les liens d'un contrat de travail pour enseigner la langue et la culture portugaise en Belgique ne s'est pas comporté comme pouvoir public dans l'exercice de sa souveraineté politique;

Qu'il convient d'entériner l'opinion du Ministère public considérant que puisque le Portugal a signé mais n'a pas ratifié la convention européenne invoquée du 16 mai 1972, celle-ci n'est pas applicable au présent litige, sauf dans ses dispositions déclaratives de droit coutumier (article 5, § 1^{er});

Que le § 2 de cet article ne constitue pas la reproduction d'une coutume préexistante du fait de l'insertion d'un lien de rattachement tiré de la nationalité du travailleur, ce qui est la dénégation de la théorie de l'immunité restreinte basée sur la distinction entre acte d'autorité (*jure imperii*) et acte de gestion (*jure gestionis*);

Attendu que la Cour est compétente pour régler le présent litige;

... (Suite sans intérêt.)

PAR CES MOTIFS, entendu à l'audience publique du 23 juin 1992, Monsieur Werquin, substitut général, en la lecture de son avis écrit conforme qu'il dépose; reçoit l'appel; le déclare fondé; met à néant le jugement *a quo*; statuant à nouveau, dit la demande originaire fondée; se déclare compétente pour en connaître.

Du 22 septembre 1992. — Cour du travail de Bruxelles — 4^e ch. — Sidq.

MM. Gustot, président, Robert et Dubois, conseillers sociaux. — Min. publ. M. Werquin, substitut général. — Pl. M^{me} Capellini loco Bourgaux.

(a)	N° d'enregistrement	B/4
(b)	Date	8 octobre 1996
(c)	(Service) auteur	Cour d'appel de Bruxelles
(d)	Parties	République du Zaïre c/ d'Hoop et crts
(e)	Points de droit	<p>Cet arrêt réforme le jugement rendu par le juge des saisies de Bruxelles le 9 mars 1995 :</p> <p><i>I. Indépendamment de la différence faite en considération des biens d' un Etat étranger ,du point de vue de leur affectation, soit qu'ils servent à l'accomplissement des fonctions inhérentes à la souveraineté, soit qu'ils sont détenus à titre purement privé, une mesure d'exécution représente un acte de coercition et est, comme telle, en temps de paix, inadmissible contre un Etat étranger.</i></p> <p><i>II. Il découle de l'indisponibilité totale des avoirs saisis-arrêtés qu'aucune mesure de saisie bancaire ne peut être ordonnée, car il ne se conçoit pas qu'un Etat étranger puisse se passer de ses avoirs bancaires, lesquels sont nécessaires à l'exercice de sa souveraineté.</i></p> <p><i>III. En vertu des principes de souveraineté et d'immunité, l'Etat étranger ne peut être contraint à apporter la preuve de la nature des fonds saisis-arrêtés.</i></p>
(f)	Classification n°	2.a
(g)	Source(s)	Journal des Tribunaux 1997, p. 100
(h)	Renseignements complémentaires	
(i)	Texte complet - extraits - traduction - résumés	Voir annexe B 04

Résumé des faits :

Le Zaïre agissait, par l'entremise de son ambassadeur en Belgique, en mainlevée d'une saisie-arrêt-exécution pratiquée auprès des banques Indosuez Belgique et Belgolaise à la requête de particuliers ayant obtenu du juge de paix une condamnation à charge du Zaïre d'un certain montant de Francs belges dans le cadre d'un contentieux locatif relatif à une maison utilisée à des fins privées. Il obtint satisfaction.

ANNEXE B/4

ETAT ETRANGER. — SAISIE-
ARRET-EXECUTION. — Immunité
d'exécution. — Indisponibilité totale.

Bruxelles (9^e ch.), 8 octobre 1996

Siég. : M. Vermeylen, conseiller unique.

Plaid. : MM^{es} Lion, Himpler, Malherbe et Pa-
peians de Morchoven.

(Zaire c. d'Hoop et crts).

I. — *Que les biens d'un Etat étranger, soit
servent à l'accomplissement des fonctions in-
hérentes à sa souveraineté, soit qu'ils sont dé-
tenus à titre purement privé, une mesure d'exé-
cution représente un acte de coercition et est,
comme telle, en temps de paix, inadmissible
contre un tel Etat.*

II. — *Il découle de l'indisponibilité totale des
avoirs saisis-arrêtés qu'aucune mesure de sai-
sie bancaire ne peut être ordonnée, car il ne se
conçoit pas qu'un Etat étranger puisse se pas-
ser de ses avoirs bancaires, lesquels sont né-
cessaires à l'exercice de sa souveraineté.*

III. — *En vertu des principes de souveraineté et
d'immunité, l'Etat étranger ne peut être con-
traint à apporter la preuve de la nature des
fonds saisis-arrêtés.*

Attendu que l'action originaire mue par l'appe-
lante avait pour objet d'entendre prononcer la
mainlevée de la saisie-arrêt-exécution prati-
quée le 18 avril 1994 à sa charge pour sûreté
d'une créance d'un montant fixé à la somme de
997.606 F en principal, en exécution d'un juge-
ment prononcé par le juge de paix du canton de
Nivelles en date du 24 mars 1993, entre les
mains des troisième et quatrième intimées, sai-
sie dénoncée le 22 avril 1994, et la condamna-
tion des intimés *sub* 1 et 2 au paiement de la
somme de 50.000 F, à titre de dommages-inté-
rêts et des dépens;

Attendu que le premier juge a déclaré la de-
mande recevable, mais non fondée contre l'appe-
lante; qu'il a déclaré la demande à l'égard de
la troisième intimée irrecevable;

Attendu qu'en page 6 de ses conclusions, l'appe-
lante invoque le principe de l'immunité
d'exécution dont jouissent les Etats étrangers;

Attendu que par jugement prononcé par le juge
de paix du canton de Nivelles en date du 24
mars 1993 l'appelante fut condamnée à des
paiements de sommes;

Que la nature de ceux-ci est sans incidence sur
la valeur du titre exécutoire que les premier et
deuxième intimés entendent mettre à exécution
à charge de l'appelante;

Attendu que le principe de l'immunité d'exé-
cution est basée sur la nécessité d'assurer des
relations pacifiques entre les Etats;

Que la soumission des Etats étrangers aux voies
d'exécution et même à de simples mesures con-

servatoires menacerait de compromettre ces re-
lations (Bela Vitanyi, *L'immunité des navires
d'Etat*, N.T.I.R., 1963, pp. 58-59);

Que l'exécution, lorsqu'il y a lieu d'y procéder,
entraîne l'emploi de la force publique pour la
contrainte du débiteur;

Qu'utiliser la force publique contre un Etat
étranger serait contraire aux droits des gens, à
la souveraineté et l'indépendance des Etats,
ainsi qu'à la reconnaissance de cet Etat étranger
par la Belgique;

Qu'indépendamment de la différence faite en
considération des biens du point de vue de leur
affectation, soit qu'ils servent à l'accomplisse-
ment des fonctions inhérentes à la souveraineté,
soit qu'ils sont détenus à titre purement privé,
une exécution représente un acte de coercition
et est comme tel(le) (*sic*), en temps de paix
inadmissible contre un Etat étranger, car elle est
propre à blesser des susceptibilités et à porter
préjudice aux rapports internationaux en y en-
gendrant des frictions;

Attendu que, du reste, s'il était considéré que
l'Etat étranger doit jouir de l'immunité dans la
même mesure que l'Etat belge en bénéficie
en pareille hypothèse, il ressort de l'article
1412bis du Code judiciaire, que ne sont pas
saisissables, les biens de l'Etat qui sont mani-
festement utiles pour l'exercice de sa mission
ou pour la continuité du service public;

Attendu que les fonds saisis-arrêtés sont mani-
festement utiles pour l'exercice de la souverai-
neté de l'appelante en raison du fait que la
saisie-arrêt opère une indisponibilité totale des
avoirs saisis entre les mains des tiers saisis;

Que le principe de cette indisponibilité totale
est unanimement admis (G. de Leval, *Traité
des saisies, règles générales*, Faculté de droit
de Liège, 1988, n° 197, p. 370, *in fine*; K.
Broeckx en E. Dirix, *Bestag*, A.P.R., 1992,
n° 687);

Attendu qu'il ne se conçoit pas qu'un Etat
étranger, tel que l'appelante, puisse se passer de
ses avoirs bancaires, lesquels sont nécessaires à
l'exercice de sa souveraineté et à la continuité
des services publics qui en sont le corollaire;

Qu'il est manifeste que cette souveraineté est
mise en brèche par un blocage immédiat et
total de ses comptes bancaires, comme les pre-
mier et deuxième intimés le demandèrent dans
l'exploit de saisie, lequel précise « que la partie
requérante s'oppose formellement par les pré-
sentes à ce que la partie signifiée se dessaisisse
ou se libère de toutes sommes, deniers, valeurs
ou objets généralement quelconques, qu'elle a
ou aura, doit ou devra, revenant ou appartenant
à la République populaire de Zaire »;

Attendu qu'il n'est pas établi que l'appelante
ait renoncé à l'application de l'immunité d'exé-
cution;

Qu'en vertu des mêmes principes, l'Etat étranger
ne saurait être contraint à apporter la preuve
de la nature des fonds saisis-arrêtés;

Attendu qu'il convient d'ordonner la mainlevée
de la saisie-arrêt querellée;

Par ces motifs :

La Cour,

Met le jugement entrepris à néant;

Condamne les intimés à donner mainlevée de la
saisie-arrêt-exécution pratiquée le 18 avril
1994 entre les mains des intimées.

(a)	N° d'enregistrement	B/5
(b)	Date	27 février 1995
(c)	(Service) auteur	Tribunal civil de Bruxelles
(d)	Parties	Irak c/ S.A. Dumez
(e)	Points de droit	<p>Le juge des saisies de Bruxelles dit pour droit qu' « <i>en droit international public, le principe de l'immunité d'exécution n'a pas non plus une portée absolue. Il ne suffit pas qu'un bien appartienne à un Etat étranger pour qu'il doive ipso facto échapper à toute mesure d'exécution. Cette immunité ne joue que pour certains biens. Lorsque des fonds ont été saisis à charge d'une ambassade, il s'agit de savoir si ceux-ci sont affectés en tout ou en partie à des activités de souveraineté (iure imperii), l'Etat saisi ayant la charge de la preuve conformément à l'article 870 du Code judiciaire. La mainlevée de la saisie ne peut être ordonnée alors qu'il n'existe aucune proportion raisonnable entre l'importance des montants saisis et les besoins d'une ambassade réduite à sa plus simple expression.</i> »</p> <p>Le juge des saisies a donc souligné que l'immunité d'exécution de l'Etat étranger n'est pas absolue. C'est l'une des premières fois que cette solution, conforme à une pratique internationale dominante, est expressément consacrée en jurisprudence.</p> <p>En ce qui concerne le critère permettant de déterminer les biens sur lesquels une exécution forcée est possible, le juge des saisies utilise celui de leur affectation en tout ou en partie à des activités de souveraineté : il décide en outre qu'il revient à l'Etat de prouver que le bien est affecté à des activités de souveraineté, ce qui laisse croire qu'il faut présumer qu'il ne l'est pas.</p>
(f)	Classification n°	2.b
(g)	Source(s)	Journal des Tribunaux 1995, p. 565
(h)	Renseignements complémentaires	
(i)	Texte complet - extraits - traduction - résumés	Voir annexe B 05

Résumé des faits :

La société française Dumez avait, en avril 1990, obtenu d'une juridiction de Bagdad la condamnation de l'Etat irakien au paiement d'une somme d'argent considérable. Le 2 août 1990, l'Irak envahit le Koweït et promulgue le 16 septembre la loi interdisant à ses tribunaux 'de connaître toute action dirigée contre lui'. Par suite, la société Dumez agit devant le tribunal de grande instance de Nanterre, obtient à nouveau satisfaction, fait procéder à diverses saisies en France et décide d'étendre celles-ci en Belgique. Devant le juge des saisies à Bruxelles, l'Irak, représenté par son ambassade en Belgique, tente d'obtenir la mainlevée d'une saisie-arrêt.

ANNEXE B/5

**ETAT ETRANGER. — SAISIE-
ARRÊT CONSERVATOIRE. —**

- I. Immunité de juridiction. — Autorité de la chose jugée au fond. —**
II. Immunité d'exécution. — Portée des résolutions du Conseil de sécurité des Nations Unies. — Biens affectés à une activité de la souveraineté. —
Charge de la preuve. — III. Immunité diplomatique. — Finalité. — Comptes d'ambassade. — IV. Saisie-arrêt conservatoire. — Conditions.

Civ. Bruxelles (sais.), 27 février 1995

Sié. : M. Goldenberg, juge des saisies.

Plaid. : MM^{es} Puelinckx, Halin, Vandemeulebroeke et Houssa.

(Irak c. s.a. Dumez).

I. — L'autorité de chose jugée interdit au juge des saisies de remettre en cause la levée de l'immunité de juridiction d'un Etat étranger prononcée au fond par une juridiction belge ou étrangère.

II. — Il n'existe pas d'obstacle de principe à ce qu'effet direct soit reconnu aux résolutions du Conseil de sécurité des Nations Unies; encore faut-il en prendre l'exacte mesure.

Seuls les biens d'un Etat étranger affectés à des activités de souveraineté bénéficient de l'immunité d'exécution.

Conformément à l'article 870 du Code judiciaire, la charge de la preuve de cette affectation incombe à l'Etat étranger agissant en mainlevée d'une saisie-arrêt conservatoire.

III. — La Convention de Vienne sur les relations diplomatiques ne peut être détournée de sa finalité et servir de manteau à des activités étrangères aux seules activités des diplomates.

§ 1^{er}. — Objet de l'action.

Attendu que l'action tend à obtenir la mainlevée d'une saisie-arrêt conservatoire pratiquée le 3 juin 1993 par l'huissier de justice Patrick Ouart entre les mains de la s.a. Générale de Banque à la requête de la défenderesse;

§ 2. — Antécédents.

1. — Faits et procédure.

Attendu qu'il est constant que la société de droit koweïtienne Fiafi, agissant en tant qu'entrepreneur principal du ministère de la Défense irakien, demandeur en la présente cause et ci-

après appelé l'Etat d'Irak, a chargé la défenderesse ci-après appelé Dumez, de la construction de bâtiments;

Qu'il est également établi que l'Etat d'Irak a agréé Dumez comme sous-traitant et que le marché entre l'Etat d'Irak et la société Fiafi contenait une clause compromissoire;

Attendu que Dumez, se heurtant à des difficultés de paiement de la part de Fiafi, s'est adressé aux autorités irakiennes qui ont accepté de signer des lettres de change en sa faveur, les montants devant être prélevés sur les sommes dues par l'Etat d'Irak à Fiafi;

Que ces lettres de change n'ont pas été honorées de sorte que Dumez s'est adressé à la justice irakienne;

Que par décisions des 7 avril et 19 juillet 1990, une juridiction de Bagdad a enjoint à l'Etat d'Irak de payer à Dumez 22.800.000 dollars américains, décisions qui ne seront pas suivies d'effet;

Attendu qu'après avoir envahi le Koweït, l'Etat d'Irak a notamment interdit à ses cours et tribunaux de connaître de toute action dirigée contre lui ou contre les personnes de droit public irakien, par la loi n° 57 du 16 septembre 1990;

Attendu que par exploit du 8 février 1991 Dumez a fait citer le ministère de la Défense irakien à comparaître devant le tribunal de grande instance de Nanterre;

Que par jugement du 9 octobre 1991, celui-ci l'a condamné à payer à Dumez 22.821.979 dollars américains ou son équivalent en francs français, à majorer des intérêts au taux légal à compter du 16 octobre 1987, de 100.000 F au titre de l'article 700 du nouveau Code de procédure civile et des dépens;

Qu'en outre le jugement ordonnait l'exécution provisoire;

Que Dumez lui a fait signifier cette décision le 17 octobre suivant;

Attendu que les 3 juillet, 25 septembre et 5 octobre 1992, Dumez a fait procéder à plusieurs saisies-arrêts exécutions à Paris à charge de l'Etat d'Irak sur le fondement de ce jugement;

Qu'il en a demandé la validation par assignations des 2 et 5 octobre 1992 au tribunal de grande instance de Paris;

Attendu que s'appuyant sur cette même décision, Dumez a fait procéder le 7 juin 1993 à la saisie litigieuse à Bruxelles;

Que le 16 juin suivant, la banque a fait savoir qu'elle détenait en tout l'équivalent de quelque 90.000.000 FB au nom de l'ambassade d'Irak à Bruxelles;

Attendu qu'une ordonnance rendue le 26 juillet 1993 par le tribunal de céans a revêtu de l'exequatur le jugement du tribunal de grande instance de Nanterre;

Que l'Etat d'Irak a introduit un recours contre cette ordonnance; Que cette instance est toujours pendante;

Attendu que le 29 septembre 1993, l'Etat d'Irak a relevé appel du jugement de Nanterre devant la cour d'appel de Versailles qui n'a pas

encore statué si ce n'est à propos de la mise en état;

Qu'en effet, une ordonnance prononcée le 9 juin 1994 par le conseiller chargé de la mise en état a déclaré recevable l'appel formé par l'Etat d'Irak au motif que le jugement du 9 octobre 1991 ne lui avait pas été signifié régulièrement, la signification ayant eu lieu à Moscou par l'entremise des autorités russes alors que la Russie n'était pas chargée de la représentation de ses intérêts;

Attendu que dans le cadre du débat relatif à la validation des saisies-arrêts effectuées à Paris, le tribunal de grande instance de Paris a, par jugement avant dire droit du 25 mai 1994, écarté les immunités de juridiction et d'exécution invoquées par l'Etat d'Irak et rejeté les demandes tendant à faire déclarer non avenu le jugement sur lequel reposent les saisies;

2. — Décisions prises à l'égard de l'Etat d'Irak sur le plan international.

Attendu qu'il y a lieu de rappeler que l'Etat d'Irak a fait l'objet de mesures décrétées à son encontre par la communauté internationale et par la Belgique parmi lesquelles l'arrêté royal du 8 août 1990 et les résolutions 687 et 778 du Conseil de sécurité de l'O.N.U. qui organisent en substance un embargo sur le commerce et les mouvements de fonds avec l'Etat d'Irak et l'astreignent notamment à réparer les conséquences de l'invasion du Koweït;

§ 3. — Discussion.

Attendu qu'avant d'aborder l'examen des arguments en présence, il paraît opportun de rappeler — en préambule — que le juge des saisies est lié par l'autorité de chose jugée, qui s'attache aux décisions rendues entre parties par d'autres juges, français ou belges;

Que le débat devant le juge des saisies ne peut pas s'assimiler — fût-ce implicitement — à un recours exercé contre ces décisions même dans l'hypothèse, non avérée en l'espèce où ces jugements seraient affectés d'erreurs flagrantes; Qu'en un mot, le juge des saisies ne peut étendre, restreindre ou modifier les droits consacrés par d'autres décisions;

Attendu en outre qu'en principe les décisions françaises sont reconnues d'emblée en Belgique (art. 26, Convention de Bruxelles, 27 sept. 1968);

Attendu enfin que le seul fait que la saisie litigieuse ait eu lieu dans l'arrondissement judiciaire de Bruxelles rend le juge des saisies de cet arrondissement compétent pour en connaître;

A. — Immunité de juridiction.

Attendu que l'Etat d'Irak croit pouvoir invoquer l'immunité de juridiction;

Mais attendu que le tribunal de grande instance de Nanterre a, par son jugement du 9 octobre 1991, estimé pouvoir connaître de la demande portée devant lui en prenant soin de constater que l'Etat d'Irak s'était comporté comme une personne privée et que les conditions générales du marché contenaient une clause compromissoire;

Que le juge des saisies ne peut remettre en cause cette décision dont la cour d'appel de Versailles doit encore apprécier la justesse;

Que l'examen du cadre contractuel initial auquel se livre l'Etat d'Irak manque de pertinence; Qu'il n'est pas permis d'y avoir égard à ce stade-ci du litige;

Que même sur le plan de l'exercice des droits de la défense, les juges de Nanterre ont constaté la régularité de l'assignation;

Attendu que l'autorité de chose jugée qui s'attache à ce jugement est encore renforcée — si besoin en était — par ordonnance du 26 juillet 1993 qui le revêt de l'exequatur en Belgique, ordonnance qui est elle aussi nantie de cette autorité;

Qu'il en découle en effet qu'aux yeux du tribunal de céans, dont le juge des saisies est membre, cette décision ne contient rien de contraire aux principes d'ordre public ni aux règles du droit public belge et que les droits de la défense ont été respectés;

Que faire droit aux arguments de l'Etat d'Irak reviendrait à contredire la décision du juge du fond et du juge de l'exequatur, ce qui n'est pas concevable;

Attendu que sur ce plan connue sur les questions qui seront examinées ci-après, l'ordonnance de la cour d'appel de Versailles — limitée à la seule question de la régularité de la signification du jugement — demeure sans incidence;

Qu'il n'y a pas lieu pour le juge des saisies d'extrapoler et d'anticiper sur ce que pourrait être la décision de cette cour sur l'ensemble du contentieux qui lui est soumis;

Que rien ne permet en plus d'exclure qu'elle raisonne à l'instar du tribunal de grande instance de Paris sur la régularité de l'acte introductif d'instance;

Attendu qu'en l'état actuel du litige, l'Etat d'Irak ne peut invoquer l'immunité de juridiction et doit être considéré comme un justiciable semblable aux autres notamment quant à l'application des règles de procédure;

B. — Immunité d'exécution.

Attendu que l'Etat d'Irak prétend que ses biens ne pourraient pas faire l'objet de mesures d'exécution, pas même de leurs prémisses telles une saisie conservatoire, en raison de la coutume internationale voulant qu'un Etat souverain se trouve sur un pied de stricte égalité avec les autres Etats et par là soustrait aux effets des décisions de justice étrangères;

Qu'à cela Dumez objecte qu'au jour de la saisie l'Etat d'Irak se trouvait amputé des prérogatives d'un Etat souverain à la suite de multiples résolutions du Conseil de sécurité de l'O.N.U. et que de toute façon cette immunité ne trouvait pas à s'appliquer en l'espèce;

b.1. — Résolutions du Conseil de sécurité de l'O.N.U.

Attendu qu'à partir du 2 août 1990, le Conseil de sécurité de l'O.N.U. a pris de nombreuses résolutions par lesquelles l'Etat d'Irak a été désigné comme agresseur à l'égard du Koweït, sommé de mettre fin à son invasion et d'en réparer les conséquences (Pierre d'Argent, « Le Fonds et la Commission de compensation

des Nations Unies », *Rev. b. dr. intern.*, rappel historique, pp. 485 et 486);

Que parmi ces résolutions, celle portant le numéro 687 dispose :

« 16. — Réaffirme que l'Irak sans préjudice de ses dettes et obligations antérieures au 2 août 1990, questions qui seront réglées par les voies normales, est responsable, en vertu du droit international, de toutes les pertes, de tous les dommages, y compris les atteintes à l'environnement et le gaspillage délibéré des ressources naturelles ainsi que de tous les préjudices subis par d'autres Etats et pour des personnes physiques et des sociétés étrangères, directement imputables à l'invasion et à l'occupation illicite du Koweït par l'Irak.

» 17. — Décide que les déclarations faites par l'Irak depuis le 2 août 1990 au sujet de sa dette extérieure sont nulles et de nul effet et exige que l'Irak honore scrupuleusement toutes ses obligations au titre du service et du remboursement de sa dette extérieure.

» 18. — Décide également de créer un fonds d'indemnisation pour les dommages et préjudices visés au paragraphe 16 et de constituer une commission qui sera chargée de gérer ce fonds.

» 19. — Charge le Secrétaire général d'élaborer et de soumettre à sa décision... des recommandations... qui devront porter notamment sur les points suivants : ... le mode de calcul de la contribution de l'Irak au Fonds, qui représentera un certain pourcentage de la valeur de ses exportations de pétrole et de produits pétroliers à concurrence d'une limite proposée au Conseil par le Secrétaire général... ».

Attendu que Dumez entend se prévaloir de ces résolutions pour affirmer qu'elles privent l'Etat d'Irak de la qualité d'Etat souverain et par voie de conséquence de toute immunité d'exécution;

Mais attendu que s'il n'existe pas d'obstacle de principe à ce qu'un effet direct soit reconnu aux résolutions du Conseil de sécurité de l'O.N.U. (J. Verhoeven, « Guerre et droit international ». Sur certaines questions soulevées par ce conflit Irak-Koweït », *J.T.*, 1991, p. 141, § 5), encore faut-il prendre l'exacte mesure des résolutions en question (Eric David, *Revue québécoise de droit international*, 1985, remarques générales sur l'effet direct, pp. 90, 91, 93, 94 notamment);

Attendu que s'il est vrai que ces résolutions, singulièrement la 687, amputent la souveraineté de l'Etat d'Irak en organisant en réalité une vaste mainmise, on pourrait même parler d'une saisie-exécution, sur une part importante de ses revenus pétroliers, elles ne le font que par le biais d'une stipulation pour autrui en faveur des seules victimes de la guerre, c'est-à-dire celles dont les droits sont nés après le 2 août 1990;

Que pour les créances antérieures, la résolution 687 prend soin de renvoyer aux « voies normales »;

Qu'il n'est pas douteux que ce faisant, le Conseil de sécurité a entendu réserver le système de réparation exceptionnel qu'il a mis sur pied aux créances issues de la guerre elle-même;

Attendu que les droits de Dumez sont de beaucoup antérieurs à l'éclatement du conflit;

Que cette société ne peut donc puiser dans ces résolutions le droit de faire procéder à la saisie litigieuse;

b.2. — Principe traditionnel de l'immunité d'exécution.

Attendu qu'en droit belge, les personnes de droit public ne jouissent plus d'une insaisissabilité absolue et automatique depuis la loi du 30 juin 1994, contrairement à ce qu'affirme l'Etat d'Irak;

Attendu qu'en droit international public le principe en question n'a pas la portée absolue qu'il lui prête;

Qu'il ne suffit pas qu'un bien appartienne à un Etat étranger pour qu'il doive *ipso facto* échapper à toute mesure d'exécution; Qu'il ressort nettement d'un arrêt de la cour d'appel de Bruxelles du 10 mars 1993 (*J.T.*, 1994, p. 788) que cette immunité ne joue que pour « certains » biens;

Attendu qu'il s'agit de savoir si les fonds déposés entre les mains du tiers saisi sont affectés en tout ou en partie à des activités de souveraineté;

Que l'Etat d'Irak a la charge de la preuve à ce propos conformément à l'article 870 du Code judiciaire, ce qu'il admet puisqu'il dépose certaines pièces à ce propos;

Attendu que l'attestation du 29 août 1992 qu'il a établie lui-même et qui tend à rattacher les fonds saisis aux seuls besoins de sa représentation en Belgique, ne peut naturellement pas faire foi;

Qu'outre que n'existe aucune proportion raisonnable entre l'importance des montants saisis et les besoins d'une ambassade réduite à sa plus simple expression, l'intention — également invoquée par l'Etat d'Irak — de faire l'acquisition d'un immeuble pour cette ambassade ne peut être prise en considération parce qu'elle ne s'est nullement concrétisée et qu'elle remonte au premier trimestre 1990, soit plus de trois ans avant la saisie litigieuse;

Attendu que d'une manière générale les allégations de l'Etat d'Irak à propos des fonds saisis doivent être prises avec la plus grande circonspection lorsque l'on sait que l'embargo mis en œuvre en Belgique a eu pour effet de bloquer quelque quatre milliards de francs belges selon la Banque nationale de Belgique et l'Association belge des banques ou à tout le moins 1.250.000.000 F selon la Banque centrale d'Irak, ce qui contredit ses conclusions coordonnées pages 35, 36 et surtout 37 (réponse du ministre des Affaires étrangères à la question écrite n° 7 du 31 janvier 1992, *Rev. b. dr. intern.*, 1993, n° 2, p. 598);

Qu'il est dès lors permis de croire que les fonds saisis-arrêtés entre les mains de la s.a. Générale de Banque font partie de dépôts infiniment plus importants en Belgique et qui dépassent de beaucoup les nécessités strictement liées au *ius imperii* de l'Etat d'Irak qui, à défaut d'autres éléments d'appréciation, ne peuvent censément excéder les besoins de sa maigre représentation diplomatique en Belgique;

Qu'il ne saurait dès lors être question d'immunité d'exécution;

C. — Convention de Vienne - Immunité diplomatique.

Attendu que cette Convention vise essentiellement à assurer l'accomplissement efficace des fonctions des missions diplomatiques en tant que représentants des Etats (voy. préambule);

Qu'elle doit être comprise à la lumière de cet objectif : permettre à l'Etat accréditant de jouir de toutes facilités dans l'Etat accréditaire pour les seules nécessités de sa représentation;

Attendu que la Convention elle-même contient des dispositions qui font obligation à l'Etat accréditant de ne pas s'écarter de sa finalité (voy. art. 27-4° relatif à la valise diplomatique; art. 36-2° relatif au bagage personnel des agents diplomatiques, art. 41-3° relatif à l'utilisation des locaux de la mission diplomatique);

Que l'Etat accréditaire puise dans la Convention le pouvoir d'en vérifier le respect, cette appréciation n'étant pas abandonnée au seul Etat accréditant;

Qu'ainsi l'article 36-2° va jusqu'à permettre aux autorités de l'Etat accréditaire d'exiger l'inspection du bagage personnel d'un agent diplomatique;

Qu'en cas d'abus, et sans même avoir à motiver sa décision, l'Etat accréditaire peut déclarer un agent diplomatique *persona non grata*;

Qu'à l'inverse de ce qu'affirme l'Etat d'Irak, il ne paraît, en principe pas incompatible avec l'esprit et la lettre de la Convention que la nature des dépôts effectués par une ambassade soit débattue devant l'autorité judiciaire de l'Etat accréditaire, particulièrement dans un litige où cet Etat a la qualité de justiciable ordinaire, « a contracté suivant les règles de forme et de fond du droit privé... s'est comporté comme une personne privée... et a entendu de façon claire et précise renoncer... à ses prérogatives de puissance publique » (Nanterre, 9 oct. 1991);

Attendu qu'il a déjà été constaté que l'Etat d'Irak ne rapporte pas la preuve de la relation entre les fonds saisis et les nécessités de la représentation diplomatique à Bruxelles;

Que la Convention de Vienne ne peut être détournée de sa finalité et servir de manteau à des activités étrangères aux seules activités de ses diplomates;

Qu'outre ce qui a été constaté lors de l'examen de l'immunité d'exécution, il faut relever que la s.a. Générale de Banque — selon sa déclaration de tiers saisi — détenait au nom de l'ambassade d'Irak des francs belges mais également et en grandes quantités des florins; des marks allemands, des dollars américains, des francs français, circonstance également peu compatible avec les seules nécessités de cette ambassade, que l'Etat d'Irak limite lui-même à l'occupation d'une maison, au paiement des traitements et à des frais administratifs;

Attendu que les points de vue des autorités belges exprimés sur ces questions et qui ne s'écartent au demeurant pas des principes ici rappelés, ne sauraient lier le tribunal;

Attendu enfin que les fonds saisis avaient déjà fait l'objet d'une mesure de même nature à la requête d'autres créanciers qui ont fini par accorder la mainlevée après plusieurs mois de blocage;

Que l'Etat d'Irak a eu le loisir de rétablir la transmission des fonds nécessaires à son ambassade bruxelloise, le gouvernement belge n'ayant dressé aucun obstacle à cet égard;

Qu'en conséquence rien ne permet de croire, en l'état actuel du dossier, que l'immunité diplomatique devrait jouer fût-ce partiellement;

D. — *Convention de Bruxelles du 27 septembre 1968.*

Attendu que l'Etat d'Irak demande qu'en tout état de cause et en application de l'article 27-1) et 2° de cette Convention, la décision de Nanterre ne soit pas reconnue;

Mais attendu que pour les motifs exposés sous forme de préambule au présent jugement le juge des saisies est lié tant par les termes de la décision de Nanterre que par ceux de l'ordonnance bruxelloise qui la revêt de l'exequatur, lesquelles constatent précisément la régularité de la procédure à l'égard de l'Etat d'Irak;

Que cet argument ne peut être retenu;

E. — *Conditions de la saisie.*

Attendu que le jugement de Nanterre, complété par l'exequatur consacre incontestablement pour Dumez une créance qui remplit les conditions des articles 1414 et 1415 du Code judiciaire;

Attendu, en ce qui concerne l'article 1413, force est de constater que l'Etat d'Irak met tout en œuvre depuis des années pour se soustraire à ses obligations, et ce au mépris de l'injonction formelle du Conseil de sécurité de l'O.N.U. (résolution 687, point 17);

Qu'il ignore les décisions de son propre pouvoir judiciaire;

Que bien plus par sa loi n° 57 il a créé en sa faveur un véritable état d'apesanteur juridique puisqu'elle le déclare non responsable des retards d'exécution des règlements financiers et qu'elle prohibe aux étrangers l'accès à son système judiciaire;

Que cette situation — aggravée par les immunités dont il voudrait bénéficier aujourd'hui — a pour effet, sinon pour objectif, de réduire à néant les droits évidents de sa créancière;

Qu'au vu de ces circonstances, la Dumez a pu et peut toujours estimer que le cas requérait célérité;

Attendu qu'il s'ensuit que la saisie était et demeure justifiée par application des articles 1413, 1414 et 1415 du Code judiciaire mais uniquement sur ce fondement parce qu'à la date de la saisie, le jugement de Nanterre n'avait pas encore été déclaré exécutoire en Belgique; Qu'ainsi l'article 39 de la Convention de Bruxelles du 27 septembre 1968 ne peut servir de fondement, au demeurant d'une autre nature (voy. Bruxelles, sais., 29 juill. 1993, *J.T.*, 1994, pp. 251 et 252), à la saisie litigieuse;

Attendu que la demande est en tous points mal fondée;

Par ces motifs :

Déclarons l'action recevable mais la demande en tous points mal fondée;

En tant que de besoin, déclarons le présent jugement exécutoire par provision nonobstant tout recours et à l'exclusion de toute offre de cautionnement ou de caution.

(a)	N° d'enregistrement	B/6
(b)	Date	10 mars 1993
(c)	(Service) auteur	Cour d'Appel de Bruxelles
(d)	Parties	Société de droit irakien Rafidain Bank et crts c. Consarc Corporation, société de droit américain et crts)
(e)	Points de droit	<p>Pour ce qui trait à l'immunité de <u>juridiction</u>: l'Etat étranger jouit de l'immunité de juridiction dans la mesure où il accomplit des actes de puissance publique et non lorsqu'il traite, comme personne civile, dans le cadre de rapports régis par le droit privé. Le contrat conclu par le ministre irakien de l'Industrie et de l'Armement participe à un acte à caractère purement commercial. C'est donc en vain que le ministre irakien oppose son immunité de juridiction à la demande en exequatur</p> <p>Pour ce qui trait à l'immunité d'<u>exécution</u> : la Cour d'appel de Bruxelles laisse entendre clairement que l'immunité d'exécution n'est pas absolue lorsqu'elle précise que celle-ci a pour but de soustraire certains biens de l'Etat étranger aux mesures d'exécution de ses créanciers, elle ne se prononce en revanche pas sur le point de savoir quels sont les biens sur lesquels une exécution forcée serait licite.</p>
(f)	Classification n°	O.b.3,1.b et 2.b
(g)	Source(s)	Journal des Tribunaux 1994, p. 787
(h)	Renseignements complémentaires	
(i)	Texte complet - extraits - traduction - résumés	Voir annexe B 06

Résumé des faits :

Le Ministre irakien de l'Industrie et de l'Armement commande en 1989 à deux sociétés – l'une britannique et l'autre américaine- des fourneaux « destinés à des fins médicales et à la fabrication d'appareils de recherche scientifique », ses obligations étant garanties par une banque irakienne, la Rafidain Bank. En juin 1990, le gouvernement américain s'oppose à la livraison à l'Irak des premiers fourneaux, au motif qu'ils pourraient être utilisés dans la

fabrication d'armes nucléaires. Deux mois plus tard, l'Irak envahit le Koweït. Les Nations Unies décident des sanctions économiques. L'embargo sur les exportations est total ; les avoirs irakiens aux Etats-Unis sont bloqués. Le 10 avril 1991, les deux fabricants obtiennent de la district Court for the District of Columbia 9 millions de dollars à titre de dommages et intérêts. Les autorités américaines s'opposent à l'exécution du jugement sur les avoirs irakiens qui sont bloqués. Sans attendre le résultat des recours qu'elles ont introduits aux Etats-Unis, les sociétés intéressées sollicitent du tribunal de première instance de Bruxelles l'exequatur du jugement américain. L'intention est manifestement de procéder à l'exécution forcée sur des fonds irakiens déposées auprès des banques belges. Elles obtiennent partiellement gain de cause. Sur appel, le juge est plus généreux. En sa totalité le jugement est déclaré exécutoire par la Cour d'Appel de Bruxelles le 12 mars 1992. Cette décision est infirmée par l'arrêt de la Cour d'appel de 1993 (arrêt rendu sur tierce opposition).

ANNEXE B/6

I. TIERCE OPPOSITION. — Article 1122, alinéa 1^{er}, du Code judiciaire. — Recevabilité. — Conditions. — Intérêt à l'action. — Notion. — SAISIE. — Régularité. — Contestation. — Tiers saisi. — II. APPEL INCIDENT. — Article 1054, alinéa 1^{er}, du Code judiciaire. — Partie intimée, défaillante. — Opposition. — SAISIE-ARRÊT-EXECUTION. — ACTION EN MAINLEVÉE. — Jugement. — Appel. — Effets. — III. IMMUNITÉ DE JURIDICTION. — Notion. — IMMUNITÉ D'EXECUTION. — Notion. — IV. EXEQUATUR. — Article 570 du Code judiciaire. — Vérification.

Bruxelles (8^e ch.), 10 mars 1993

Siég. : M. Londers, conseiller unique.

Plaid. : MM^{es} Puelinckx, Halin, De Kock, Vandemeulebroeke, Houssa, Dal, Stranart, Bloch, Van Ommeslaghe, Heenen et Verheyden.

(Société de droit irakien Rafidain Bank et crts c. Consarc Corporation, société de droit américain et crts).

I. — *Etant étranger aux rapports entre le saisissant et le débiteur saisi, le tiers saisi n'est pas le juge de la régularité et du fondement de la saisie pratiquée entre ses mains. Il ne lui appartient en aucun cas, de contester l'existence ou la régularité de la créance que le saisissant invoque.*

II. — *Une partie intimée peut, à l'égard des parties qui sont à la cause en degré d'appel, attaquer par cette voie, toutes les dispositions du jugement dont appel qu'elle considère pouvoir lui causer préjudice, sans distinction et sans égard à une limitation de l'appel principal.*

Lorsqu'il est statué par défaut à l'égard de la partie intimée et que celle-ci forme opposition, elle peut, avant la clôture des débats tenus suite à l'opposition, former un appel incident alors qu'elle conserve la qualité qui était sienne lors des débats par défaut et étendre ainsi régulièrement la saisine du juge d'appel.

III. — *L'Etat étranger jouit de l'immunité de juridiction dans la mesure où il accomplit des actes de puissance publique et non lorsqu'il traite, comme personne civile, dans le cadre de rapports régis par le droit privé.*

Contrairement à l'immunité de juridiction qui tend à soustraire certains actes d'un Etat étranger au pouvoir de juridiction des tribunaux du for, l'immunité d'exécution a pour but de soustraire certains biens de l'Etat étranger aux mesures d'exécution de ses créanciers.

IV. — *Le juge de l'exequatur ne peut procéder à la révision au fond du jugement rendu par une juridiction étrangère et substituer sa décision à celle de la juridiction étrangère.*

S'il est autorisé à faire les vérifications prévues à l'article 570 du Code judiciaire, sans modifier pour autant le contenu de la décision, il peut néanmoins préciser l'identité de la partie à l'égard de laquelle la décision étrangère sera rendue exécutoire, par exemple, en cas de décès, mais sans pouvoir la rendre exécutoire à l'encontre de personnes qui n'ont pas été touchées par la condamnation prononcée par le juge étranger.

Vu le dossier de la procédure et notamment :

- l'arrêt rendu par défaut à l'égard des opposants le 12 mars 1992 par la cour de céans, décision à l'égard de laquelle l'opposition a été formée par exploit d'huissier signifié le 15 mai 1992 à la demande des opposants,
- la citation signifiée le 26 juin 1992 aux défenderesses sur opposition, ainsi qu'à la Rafidain Bank, la Central Bank of Iraq et les opposants, par laquelle la s.a. Banque Bruxelles Lambert forme tierce opposition contre l'arrêt rendu le 12 mars 1992 par la cour de céans,
- les conclusions additionnelles déposées le 8 décembre 1992 au greffe de la cour, par lesquelles les opposants, forment un appel incident,
- la requête déposée le 2 septembre 1992 au greffe de la cour, par laquelle la s.a. Générale de Banque déclare intervenir volontairement dans la cause mue par citation en tierce opposition par la s.a. Banque Bruxelles Lambert;

III. — En droit.

B. — Quant à la recevabilité de la tierce opposition.

Attendu qu'il échet de se placer au moment où la tierce opposition a été formée pour vérifier la recevabilité de ce recours extraordinaire; que cet examen n'est dès lors pas affecté par le fait que par exploit signifié le 16 octobre 1992 au tiers opposant, les défenderesses sur opposition ont renoncé volontairement à la transformation de la saisie-arrêt conservatoire en saisie-arrêt-exécution, pratiquée par exploit du 27 mars 1992 sur base de l'arrêt du 12 mars 1992 de la cour de céans;

Attendu qu'en vertu de l'article 1122, alinéa 1^{er}, du Code judiciaire, toute personne qui n'a point été dûment appelée ou n'est pas intervenue à la cause, est recevable à former tierce opposition à la décision rendue par une juridiction civile, susceptible de préjudicier à ses droits (Cass., 24 janv. 1974, *Pas.*, 1974, I, 544, avec les conclusions du procureur général Ganshof van der Meersch);

Attendu qu'il n'est pas contesté que la s.a. Banque Bruxelles Lambert n'était pas partie à la cause devant la cour lors des débats qui donnèrent lieu à l'arrêt du 12 mars 1992 et que, partant, elle a la qualité de tiers lui permettant de former tierce opposition;

Attendu que conformément aux principes généraux régissant la recevabilité de toute action en justice, le tiers opposant doit justifier d'un intérêt (art. 17, C. jud.);

qu'il suffit cependant que la décision attaquée soit susceptible de lui causer un préjudice éventuel;

qu'il n'est pas requis que le tiers opposant ait réellement subi un préjudice;

que la tierce opposition n'est irrecevable à défaut d'intérêt que si tout préjudice est exclu (Cass., 5 oct. 1972, *Pas.*, 1973, I, 136);

Attendu qu'en l'espèce, la s.a. Banque Bruxelles Lambert soutient qu'en sa qualité de tiers saisi, sommée de se dessaisir des fonds qu'elle détient pour le compte de ses clients, elle risque d'être accusée par ceux-ci d'avoir vidé ses mains de manière imprudente alors que des doutes sérieux persistent quant à l'étendue des droits des créanciers saisissants;

Attendu que le tiers saisi est étranger aux rapports entre le saisissant et le débiteur saisi;

que partant, le tiers saisi n'est pas le juge de la régularité et du fondement de la saisie pratiquée entre ses mains;

qu'il ne lui appartient en aucun cas de contester l'existence ou la régularité de la créance que le saisissant invoque;

qu'il est néanmoins généralement admis que le tiers saisi doit limiter ses vérifications à la validité de l'exploit de saisie et au respect des formes prescrites par le Code judiciaire aux fins de le protéger (E. Dirix et K. Broeckx, « Beslag », *A.P.R.*, 1992, n° 696);

qu'en outre, avant de se dessaisir au profit du saisissant, il peut exiger la production de l'acte de dénonciation de la saisie (art. 1543, C. jud.), du visa du juge des saisies (art. 1544, C. jud.) ainsi que de l'attestation du greffier (art. 1388, C. jud.) ou contester sa dette (art. 1542, C. jud.);

Attendu que lorsqu'il agit dans les limites tracées ci-dessus, le tiers saisi soit retient les fonds, soit s'en dessaisit régulièrement et ne commet en aucun cas une faute à l'égard du saisi;

que la circonstance que, comme en l'espèce, le tiers saisi est le banquier du saisi et qu'un contrat de compte les lie, ne modifie en rien les droits et obligations du premier à l'égard du second;

Attendu que les incertitudes et difficultés que le tiers opposant invoque pour justifier de son intérêt à former tierce opposition, concernent toutes la validité et l'étendue de la créance des défenderesses sur opposition ainsi que leur aptitude à poursuivre l'exécution vu la qualité des saisis;

qu'il s'agit à l'évidence d'irrégularités qu'il n'appartient pas au tiers saisi de soulever et qui ne sont, dès lors, pas de nature à lui causer éventuellement un préjudice personnel en cas de maintien de la décision entreprise;

Attendu que bien qu'il est incontestable que l'immunité de juridiction et d'exécution de l'Etat étranger sont des principes d'ordre public, il n'appartient pas au tiers opposant de

s'ériger en gardien de l'ordre public et de demander la rétractation d'une décision judiciaire alors qu'elle ne préjudicie pas à ses droits, ses intérêts personnels n'étant pas concernés;

C. — *Quant à la recevabilité de l'intervention volontaire.*

Attendu que l'intervention volontaire dans le cadre d'une procédure en tierce opposition doit satisfaire aux mêmes conditions que cette dernière;

que l'intervenante volontaire doit, dès lors, démontrer que la décision entreprise est de nature à lui causer un préjudice;

Attendu que pour les motifs invoqués ci-dessus à l'égard du tiers opposant, l'intervenante volontaire ne justifie pas d'un intérêt suffisant et son intervention est, partant, irrecevable;

D. — *Quant à l'appel incident et la saisine de la cour.*

Attendu que tant dans leur acte d'appel signifié le 13 février 1992 que dans leurs conclusions d'appel déposées le 25 février 1992 au greffe de la cour, les défenderesses sur opposition, alors appelantes, ont fait grief au tribunal de première instance de Bruxelles :

1° d'avoir limité l'exequatur du jugement du 10 avril 1991 de la United States District Court for the District of Columbia en ce qu'il a condamné la Rafidain Bank et le ministère irakien de l'Industrie et de l'Armement au paiement de la somme de 6.123.162 US \$, majorée des intérêts,

2° d'avoir déclaré la demande intégralement non fondée dans la mesure où elle est dirigée contre la Central Bank of Iraq et la Rasheed Bank;

Attendu qu'il est évident que les défenderesses sur opposition n'avaient aucun grief à formuler à l'égard du jugement dont ils avaient relevé appel dans la mesure où il accorda l'exequatur du jugement américain du 10 avril 1991 à l'encontre des opposants en ce qu'il condamne ceux-ci au paiement de l'équivalent de la somme de 6.123.162 US \$, majorée des intérêts, et était, partant, sans intérêt pour interjeter appel sur ce point;

que dans ces conditions leur demande tendant à entendre confirmer le jugement entrepris sur ce point, était parfaitement superflète et ne peut avoir comme conséquence de déférer ce chef de demande au juge d'appel;

Attendu que c'est à bon droit que les défenderesses sur opposition soutiennent que leur appel était limité;

que l'effet dévolutif de l'appel, consacré par l'article 1068 du Code judiciaire, ne porte pas atteinte à l'effet relatif de l'appel traduit par l'adage *tantum devolutum quantum appellatum*, suivant lequel la partie appelante fixe elle-même, sous réserve des règles applicables en cas d'indivisibilité du litige, les limites dans lesquelles le juge d'appel aura à statuer;

Attendu cependant qu'en vertu de l'article 1054, alinéa 1^{er}, du Code judiciaire, la partie intimée peut former un appel incident à tout moment, contre toutes les parties en cause devant le juge d'appel, même si elle a signifié le jugement sans réserve ou si elle y a acquiescé avant sa signification;

qu'en conséquence, la partie intimée peut, à l'égard des parties qui sont à la cause en degré

d'appel, attaquer par cette voie toutes les dispositions du jugement dont appel qu'elle considère pouvoir lui causer préjudice, sans distinction et sans égard à une limitation de l'appel principal (Cass., 22 déc. 1978, *Pas.*, 1979, I, 451);

qu'ainsi la partie intimée peut, en formant un appel incident, reconstituer entièrement devant le juge d'appel le litige initial, corrigeant de cette manière les conséquences de l'effet relatif de l'appel;

Attendu que la partie intimée qui, en vertu de l'article 1054 du Code judiciaire, peut former un appel incident, est celle contre laquelle un appel principal recevable a été dirigé (Cass., 24 avril 1987, *Pas.*, 1987, I, 994 et Cass., 1^{er} déc. 1988, *Pas.*, 1989, I, 358);

qu'en l'espèce, les défenderesses sur opposition ont dirigé de manière régulière leur appel contre les opposants, qui avaient, dès lors, la qualité de parties intimées;

qu'en cette qualité, les opposants étaient en droit de former un appel incident;

que de la seule circonstance que l'appel des défenderesses sur opposition était recevable, il découle certainement et nécessairement qu'il y a eu une instance liée entre celles-ci et les opposants;

Attendu que l'opposition provoque une nouvelle saisine de la juridiction qui a statué par défaut et celle-ci procède à un nouvel examen contradictoire de la cause, en principe dans les limites tracées par l'acte d'opposition;

que lorsque, comme en l'espèce, il est statué par défaut à l'égard de la partie intimée et que celle-ci forme opposition, elle peut, avant la clôture des débats tenus suite à l'opposition, former un appel incident alors qu'elle conserve sa qualité procesuelle qui était sienne lors des débats par défaut et étendre ainsi régulièrement la saisine du juge d'appel;

que, dès lors, les opposants pouvaient former un appel incident régulier devant la cour;

Attendu que dans le dispositif de leurs conclusions additionnelles déposées le 8 décembre 1992 au greffe de la cour — et qui précèdent donc chronologiquement les premières conclusions déposées à l'audience du 5 janvier 1993 —, les opposants déclarent explicitement former un appel incident, tendant à entendre réformer le jugement rendu le 29 janvier 1992 par le tribunal de première instance de Bruxelles en ce qu'il autorise l'exequatur du jugement américain du 10 avril 1991 dans la mesure où il les condamne au paiement de la somme de 6.123.162 US \$, majorée des intérêts, et qu'il les condamne aux dépens;

que cet appel incident, régulier quant à la forme, est recevable;

Attendu qu'à la suite de cet appel incident, régulièrement formé, le litige initialement soumis au tribunal de première instance de Bruxelles, est actuellement reconstitué devant la cour, sous la seule limitation que comme l'opposition ne peut profiter qu'aux opposants, il est définitivement jugé que la demande en exequatur est non fondée à l'égard de la Central Bank of Iraq et de la Rasheed Bank;

qu'ainsi il appartient à la cour de réexaminer si le jugement américain du 10 avril 1991 satisfait aux conditions prévues à l'article 570, alinéa 2, du Code judiciaire;

Attendu que la cour, en tant que juge du fond, n'est pas liée par la décision du juge des saisies quant à la portée du jugement en vertu duquel une saisie est pratiquée, alors que ce jugement fait toujours l'objet d'un recours dont elle est saisie;

qu'en l'espèce, la cour n'est pas liée par le jugement rendu le 7 janvier 1993 par le juge des saisies qui, pour justifier le rejet de l'action en mainlevée de la saisie-arrêt-exécution pratiquée par exploit du 16 octobre 1992, a estimé que le jugement du tribunal de première instance de Bruxelles du 29 janvier 1992 est passé en force de chose jugée dans la mesure où il accorde l'exequatur de la condamnation au paiement de la somme de 6.123.162 US \$;

E. — *Quant à l'immunité de juridiction et d'exécution de l'Etat irakien.*

1. — *L'immunité de juridiction.*

Attendu que l'Etat étranger jouit de l'immunité de juridiction dans la mesure où il accomplit des actes de puissance publique (*actes iure imperii*) et non lorsqu'il traite comme personne civile dans le cadre de rapports régis par le droit privé (*actes iure gestionis*);

Attendu qu'en l'espèce, l'Etat irakien, représenté par son ministère de l'Industrie et de l'Armement, a conclu une convention portant sur l'achat de matériel médical et scientifique, ainsi que des services destinés à rendre opérationnel ce matériel;

qu'en agissant de la sorte, le ministère irakien de l'Industrie et de l'Armement participe à un acte à caractère purement commercial comme toute autre personne civile ou morale;

Attendu que le caractère d'acte *iure gestionis* de cette transaction, établi suivant le droit du for, est déterminé par la nature de cet acte, mais n'est pas influencé par le but réel poursuivi par le ministère irakien de l'Industrie et de l'Armement;

que la circonstance qu'aux dires des défenderesses sur opposition, le matériel commandé aurait pour but la production d'armes nucléaires, par hypothèse destinées à assurer la défense de la souveraineté nationale de l'Irak, est indifférent pour qualifier l'acte accompli et, partant, pour délimiter l'immunité de juridiction de l'Etat irakien;

Attendu qu'il ressort de ce qui est dit ci-dessus, que c'est en vain que le ministère irakien de l'Industrie et de l'Armement oppose son immunité de juridiction à la demande en exequatur introduite par les défenderesses sur opposition;

2. — *L'immunité d'exécution.*

Attendu que contrairement à l'immunité de juridiction, qui tend à soustraire certains actes d'un Etat étranger au pouvoir de juridiction des tribunaux du for, l'immunité d'exécution a pour but de soustraire certains biens de l'Etat étranger aux mesures d'exécution de ses créanciers;

que l'immunité d'exécution autorise l'Etat étranger à s'opposer à toute mesure de contrainte sur ses biens par la mise en œuvre d'une saisie conservatoire ou exécutoire;

Attendu qu'en l'espèce, la cour est saisie d'une demande d'exequatur d'un jugement américain rendu à l'encontre du ministère irakien de l'Industrie et de l'Armement, émanation de l'Etat irakien;

que l'exequatur étant par lui-même distinct d'une mesure d'exécution sur les biens qu'il peut néanmoins soustraire, le ministère irakien de l'Industrie et de l'Armement ne peut opposer son immunité d'exécution à la présente demande des défenderesses sur opposition;

qu'en juger autrement, reviendrait en réalité à introduire une immunité de juridiction par le biais de l'immunité d'exécution, alors qu'il s'agit de deux notions distinctes;

Attendu qu'il appartiendra éventuellement au ministère irakien de l'Industrie et de l'Armement d'invoquer cette immunité d'exécution devant le juge des saisies à l'occasion d'une opposition à saisie;

F. — Quant au fond de la demande en exequatur.

1. — En tant que la demande est dirigée contre la Rafidain Bank.

Attendu que, contrairement à la Rasheed Bank et la Central Bank of Iraq, la Rafidain Bank — seconde opposante — était partie à la cause devant la United States District Court for the District of Columbia;

que néanmoins, il apparaît tout d'abord à la lecture du jugement rendu le 10 avril 1991, que la District Court s'est limitée à constater des fautes et manquements dans l'exécution des obligations contractuelles uniquement dans le chef du ministère de l'Industrie et de l'Armement (« The Court hereby... also specifically finds that NIM (= Ministry of Industry and Minerals), as described in the testimony of..., committed egregious and wantonly malicious and willful acts of fraud and breaches of contract against plaintiffs... » et « ... due to NIM's fraud and breaches of contract... »);

que ceci est parfaitement évident alors que seul le ministère irakien de l'Industrie et de l'Armement était partie au contrat conclu avec les sociétés Consarc, tandis que l'intervention de la Rafidain Bank s'est limitée à garantir financièrement l'opération;

qu'en outre, le jugement américain ne prononce aucune condamnation au paiement soit de « compensatory damages », soit de « punitive damages » à l'encontre de la Rafidain Bank, alors que les condamnations à ces dommages et intérêts font l'objet de la demande d'exequatur;

Attendu qu'aucun élément objectif ne permet de conclure que le juge américain, comme le soutiennent les défenderesses sur opposition, a visé au moins implicitement la Rafidain Bank;

qu'au contraire, il apparaît évident que si tel avait été l'intention de la United States District Court, elle n'aurait pas manqué de condamner explicitement la Rafidain Bank, qu'elle qualifie de « agency or instrumentality of de government of Iraq », alors que celle-ci était partie à la cause;

qu'en outre, le juge américain fait une distinction très claire dans le dispositif de son jugement entre, d'une part, les condamnations prononcées à l'encontre du ministère irakien de l'Industrie et de l'Armement et, d'autre part, les interdictions et les obligations de faire prononcées à l'encontre tant du ministère irakien que de la Rafidain Bank;

que la circonstance que le 1^{er} avril 1991 le ministère des Finances américain a dressé une liste d'individus et d'organisation qui sont con-

sidérés comme compris dans le terme « Gouvernement de l'Irak » et sur laquelle figure la Rafidain Bank, ne permet pas de considérer que, suivant le droit américain, une condamnation à payer à l'encontre de l'Etat irakien doit s'étendre automatiquement à la Rafidain Bank;

que dans la jurisprudence américaine citée par les défenderesses sur opposition, le problème de l'extension des condamnations à l'encontre de l'Irak à d'autres organismes et individus, a apparemment chaque fois été explicitement soumis au juge américain;

Attendu que contrairement à ce qu'affirment les défenderesses sur opposition, le juge de l'exequatur ne peut procéder à la révision au fond du jugement rendu par une juridiction étrangère et substituer sa décision à celle de la juridiction étrangère;

qu'il n'est autorisé qu'à faire les vérifications prévues à l'article 570 du Code judiciaire, sans modifier pour autant le contenu de cette décision;

Attendu qu'il est généralement admis en doctrine qu'il peut néanmoins, en vue d'assurer l'efficacité de l'exécution, procéder aux adaptations indispensables à cet effet;

qu'ainsi le juge de l'exequatur peut préciser l'identité de la partie à l'égard de laquelle la décision étrangère sera rendue exécutoire, par exemple, en cas de décès, mais sans pouvoir la rendre exécutoire à l'encontre de personnes qui n'ont pas été touchées par la condamnation prononcée par le juge étranger;

Attendu que pour autant que la Rafidain Bank doit être assimilée à l'Etat irakien, les défenderesses sur opposition, au cas où elles obtiendraient une condamnation déclarée exécutoire en Belgique à l'égard de celui-ci, pourront procéder à l'exécution contre elle sans que le jugement américain doive être expressément déclaré exécutoire à son encontre;

que l'exemple donné par les défenderesses sur opposition en conclusions est illustratif sur ce point : le juge belge qui condamne l'Etat belge ne doit pas énumérer expressément tous les départements ministériels belges susceptibles d'une exécution forcée;

qu'au cas où la Rafidain Bank contesterait une éventuelle exécution du jugement américain sur ses biens, après qu'il soit déclaré exécutoire à l'encontre de l'Etat irakien, il appartiendrait, le cas échéant, au juge des saisies de décider si oui ou non la condamnation à l'encontre du ministère irakien de l'Industrie et de l'Armement peut être étendue à cette banque;

Attendu que par contre, si la Rafidain Bank est un sujet de droit distinct de l'Etat irakien, la cour modifierait la décision étrangère en la déclarant exécutoire à l'encontre de cette banque, qui n'a pas été condamnée par la juridiction étrangère;

que dans ce cas, l'extension de l'exequatur à la Rafidain Bank équivaldrait à créer dans le chef des défenderesses sur opposition des droits qui excèdent ceux attribués ou reconnus par la juridiction américaine;

Attendu qu'il ressort de ce qui est exposé ci-dessus qu'il n'a pas lieu d'étendre l'exequatur du jugement américain à la Rafidain Bank aux motifs de vouloir assurer l'efficacité exécutoire de cette décision;

Attendu que dans ces conditions, la demande en exequatur est non fondée dans la mesure où elle est dirigée contre la Rafidain Bank;

2. — En tant que dirigée contre le ministère irakien de l'Industrie et de l'Armement.

Attendu qu'en l'absence de traité entre la Belgique et l'Irak, il y a lieu de vérifier si le jugement du 10 avril 1991 de la United States District Court for the District of Columbia satisfait aux conditions énumérées à l'article 570, alinéa 2, du Code judiciaire;

Attendu que le premier opposant soutient que les droits de la défense ont été violés, alors qu'il n'a pas été valablement cité à comparaître devant la juridiction américaine et qu'il n'a pas eu connaissance, en temps utile, du contenu de la citation;

que les défenderesses contestent ces affirmations, arguant d'avoir scrupuleusement veillé à la régularité de la citation;

Attendu qu'il apparaît des pièces produites par les défenderesses sur opposition que leur conseil belge a fait transmettre la citation, accompagnée d'une traduction en langue arabe, par la valise diplomatique belge à l'ambassade de Belgique à Bagdad;

que l'attaché commercial auprès de l'ambassade de Belgique, M. Louis Daddiza, a remis ces documents le 17 novembre 1990 à une personne nommée Mohammed Jabes Hassan au ministère irakien de l'Industrie et de l'Industrialisation militaire à Bagdad;

qu'un reçu (acknowledgement of receipt) a été délivré par la personne précitée;

Attendu que le premier opposant conteste qu'une personne de ce nom et habilitée à recevoir une citation, travaille à son service;

que même s'il était établi que le premier opposant a été atteint par la citation, il appartient de vérifier si la citation a été régulièrement signifiée au regard de la législation américaine;

Attendu que par une ordonnance (« order directing method of service ») du 22 octobre 1990, la U.S. District Court for the District of Columbia, après avoir qualifié le premier opposant comme « agency or instrumentality of a foreign state », a ordonné, conformément à l'article 1608 (b) (3) (C) du F.S.I.A. (Foreign Sovereign Immunities Act), que la citation soit remise au ministère de l'Industrie et de l'Armement à son siège à Bagdad par téléfax, télex ou à l'intervention du ministre des Affaires étrangères des Etats-Unis conformément à la procédure prescrite à l'article 1608 (a) (4) F.S.I.A. et qu'en outre elle soit notifiée à l'ambassade de l'Irak à Washington;

que cet « order » a été complété, à la demande des défenderesses sur opposition et compte tenu de difficultés rencontrées à mettre en œuvre la première ordonnance, par une seconde ordonnance rendue le 26 octobre 1990, dans la mesure où il est dit que la remise de la citation peut également se faire au siège du ministère irakien par messenger (« by courier »);

que finalement les défenderesses sur opposition ont choisi pour ce mode de signification comme il a été dit ci-dessus;

Attendu que ces ordonnances de la U.S. District Court for the District of Columbia appellent deux observations;

Attendu tout d'abord que, conformément à l'article 1608 (b) (3) (C) F.S.I.A., le juge ne peut

fixer le mode de citation que dans la mesure où celle-ci est destinée à une « agency or instrumentality of a foreign state », hypothèse visée par l'article 1608 (b) F.S.I.A.;

qu'en l'occurrence, la citation était destinée au ministère de l'Industrie et de l'Armement qui est l'Etat irakien ou tout au moins une subdivision politique de cet Etat (« a foreign state or political subdivision of a foreign state »), hypothèse visée à l'article 1608 (a) F.S.I.A. (raisonnement *a fortiori* sur la base du jugement rendu le 28 septembre 1992 par la U.S. District Court Southern District of New York dans une affaire First City c/Rafidain Bank et Central Bank of Iraq - pièce A VIII du dossier des opposants);

que cette dernière disposition ne prévoit pas de remise de la citation par messenger;

Attendu ensuite, que même si l'article 1608 (b) était d'application en l'espèce — *quod non* —, le pouvoir du juge de désigner un mode de signification est limité aux formes compatibles avec la loi du lieu où la citation doit être remise, ce en vertu du paragraphe (3) (C) de la disposition susdite (« as directed by order of the court consistent with the law of the place where service is to be made »);

qu'il n'est pas démontré que la signification par messenger (« courier ») est prévue ou tolérée par le système juridique irakien;

Attendu qu'il ressort de ce qui est dit ci-devant que la citation à comparaître n'a pas été valablement signifiée au premier opposant;

que cette irrégularité entraîne, en règle, la nullité de la procédure subséquente (voy. jugement en cause First City c/Rafidain Bank, cité ci-dessus);

que dans ces conditions il est indifférent de savoir si oui ou non le premier opposant a effectivement reçu la citation et a pu prendre connaissance de son contenu;

Attendu que l'article 6 de la loi irakienne n° 57, édictée le 16 septembre 1990 par le Revolutionary Command Council, ne peut en aucun cas excuser l'irrégularité de la citation et le défaut accordé par la U.S. District Court à l'égard des parties irakiennes;

Attendu que contrairement à ce qu'affirment les défenderesses sur opposition, l'examen de la validité de la citation par le juge américain a été très sommaire et non dénué d'ambiguïté, comme le démontre la lecture de la transcription littérale des débats par défaut devant la U.S. District Court for the District of Columbia (pp. 3 et 4);

que plus particulièrement la situation de conflit armé existant entre l'Irak et les Etats-Unis, avec toutes les difficultés de communication qu'elle entraîne, devait l'inciter à être particulièrement attentif au respect des droits de la défense;

qu'au contraire, le déroulement des débats devant la U.S. District Court for the District of Columbia permettent de conclure que les parties irakiennes n'ont pas eu droit à un procès équitable et serein;

que cette conviction est plus particulièrement suscitée par, d'une part, certaines interventions du juge lui-même qui donnent à croire que la guerre du Golfe s'est poursuivie devant sa juridiction (par ex., un extrait de la transcription littérale des débats page 14 : « The Court : You don't think Schwarzkopf has done enough ? We've got to do some more ? This Court's

going to. Mr. Marks (conseil de Consarc, précisé par la cour) : We're counting on this Court ») et, d'autre part, l'offre faite publiquement par Consarc de transmettre un part substantielle des « punitive damages » accordés par la District Court au gouvernement des Etats-Unis (transcription p. 15 et jugement du 22 août 1991);

que cette attitude est d'autant plus regrettable que suite à l'embargo américain, il était à l'époque quasi impossible pour les défenderesses irakiennes de se faire représenter par un avocat devant les juridictions américaines;

qu'encore en juillet 1992, l'O.F.A.C. imposait des conditions draconiennes avant d'autoriser un avocat américain à représenter les parties irakiennes aux Etats-Unis (lettre du 11 juillet 1991 de l'avocat américain Fedder);

Attendu que dans ces conditions la cour ne peut que conclure que la juridiction américaine n'a pas respecté les droits de la défense du ministère irakien de l'Industrie et de l'Armement;

que dès lors, le jugement rendu le 10 avril 1991 par la United States District for the District of Columbia ne satisfait pas à une des conditions cumulatives imposées par l'article 570, alinéa 2, du Code judiciaire;

qu'il n'a plus lieu de vérifier s'il est satisfait aux autres conditions;

qu'il ne peut être donné suite à la demande d'exequatur de ce jugement à l'encontre du ministère irakien de l'Industrie et de l'Armement;

que la demande est également non fondée à l'égard de celui-ci;

Par ces motifs :

La Cour,

Déclare la tierce opposition, ainsi que l'intervention volontaire irrecevables;

Reçoit l'opposition ainsi que l'appel incident et les déclare fondés;

Rétracte l'arrêt rendu le 12 mars 1992 par la cour de céans, sauf en ce qu'il reçoit l'appel et confirme le jugement du 29 janvier 1992 dans la mesure où il déclare la demande recevable, mais non fondée à l'égard de la Central Bank of Iraq ainsi que de la Rasheed Bank;

Statuant à nouveau par voie de dispositions nouvelles;

Met à néant le jugement rendu le 29 janvier 1992 par le tribunal de première instance de Bruxelles en ce qu'il déclare la demande en exequatur partiellement fondée et, en conséquence, accorde l'exequatur du jugement prononcé le 11 avril 1991 par la United States District Court for the District of Columbia à l'encontre des opposants en ce qu'il condamne ces parties au paiement de l'équivalent en francs belges de la somme de 6.123.162 US \$, majorée des intérêts, et condamne les opposants aux dépens;

En conséquence,

Déclare la demande en exequatur non fondée à l'égard du ministère irakien de l'Industrie et de l'Armement et de la Rafidain Bank.

(a)	N° d'enregistrement	B/7
(b)	Date	30 avril 1951
(c)	(Service) auteur	Tribunal civil de Bruxelles
(d)	Parties	Socobel c/ l'Etat hellénique et la banque de Grèce
(e)	Points de droit	<p>Le jugement valide les saisies-arrêt pratiquées à charge de l'Etat hellénique et la banque de Grèce, à titre de mandataire de ce dernier; il les valide aux motifs –principalement- que l'immunité des biens de l'Etat n'est pas un principe légal, que la jurisprudence se doit de s'adapter à l'intervention croissante de l'Etat dans le domaine du commerce et que « <i>l'intérêt général de la communauté belge à laquelle les biens de l'Etat sont affectés</i> », qui justifie l'impossibilité d'exécution forcée contre l'Etat belge, « <i>n'apparaît pas au profit d'un Etat étranger ayant conclu quelque negotium en Belgique.</i>»</p> <p>Ce faisant, le tribunal civil de Bruxelles établit un parallèle entre immunités de juridiction et d'exécution : dès lors qu'il agit « <i>jure gestionis</i> », l'Etat étranger perd à la fois l'une et l'autre.</p>
(f)	Classification n°	2.b
(g)	Source(s)	Journal des Tribunaux, 1951, p.302
(h)	Renseignements complémentaires	
(i)	Texte complet-extraits-traduction-résumés	Voir annexe B07

Résumé des faits:

Le 27 août 1925 fut conclu entre la demanderesse et l'Etat hellénique un contrat ayant pour objet la construction par la demanderesse en Grèce pour le compte de l'Etat hellénique de certaines lignes de Chemins de fer ainsi que la réfection d'autres lignes et la fourniture du matériel nécessaire à leur exploitation.

Le financement des prestations et des fournitures assumées par la demanderesse devait se faire par un prêt consenti par la demanderesse à l'Etat hellénique qui était couvert par la remise à la demanderesse ou à un trustee d'obligations d'un emprunt, émis à cet effet par l'Etat hellénique et dont les intérêts et amortissements devaient permettre à la demanderesse de faire face aux frais de dépense de son entreprise .

L'Etat hellénique a cessé tout paiement d'intérêts et tout amortissement sur lesdites obligations le 1^{er} juillet 1932.

ANNEXE B/7

Civ. Bruxelles (5^e ch.), 30 avril 1951.

Siég. : M. WARLOMONT, j. un.

Min. publ. : M. RUTTEN, subst. Proc. Roi.

Plaid. : M^{mes} SAND, G. DELACROIX, BERNARD, VAN REEPINGHEN et SIMONT.

(Socobel et Etat belge c. Etat hellénique, Banque de Grèce et Banque de Bruxelles).

I à III. SAISIE-ARRET. – Titre requis. – Action en validation. – Distinctions : validation de l'opposition à la remise. – Sentence arbitrale non revêtue d'exequatur. – Demande corrélative de condamnation imposant aux tiers saisis de remettre les fonds au saisissant. – Condamnations à charge du saisi. – IV. Sentence arbitrale étrangère : exécution forcée en Belgique. – V. Cour permanente internationale de Justice de La Haye : force exécutoire de ses arrêts en Belgique. – VI. – Etat Etranger. – Immunité d'exécution – exécution forcée permise à charge de l'Etat étranger. – VII. Saisie-arrêt. – Banque. – Personnalité distincte du saisi. – Mandataire jouissant du monopole pour accomplir les transactions du saisi. – Saisie valable en vertu du titre existant contre le saisi. – VIII. Ministère public. – Matières civiles. – Avis. – Collaborateur du Juge.

(...)

VI. – Le législateur belge n'a d'une manière générale, pas disposé à l'égard des exécutions forcées, exercées tant contre l'Etat belge que contre les Etats étrangers, il ne l'a fait expressément qu'en ce qui concerne les navires de mer appartenant à l'Etat et ceux qu'il exploite ou affrète pour décider que ceux-ci seraient au regard tant des actions en justice que de la procédure, soumis au régime de droit commun.

L'impossibilité d'exécuter un jugement contre l'Etat belge procède de facteurs propres à l'ordre public interne belge, c'est à dire participant de "l'intérêt général" de la communauté belge, à laquelle "les biens sont affectés" et qu'il importe "de ne pas distraire de leur destination".

Cet intérêt majeur incitant à soustraire sur son propre territoire l'Etat belge à une exécution forcée, n'apparaît pas au profit d'un Etat étranger ayant conclu quelque negotium en Belgique.

C'est à tort qu'un Etat étranger prétend au titre du principe de l'égalité, voire de l'indépendance des Etats dans la société internationale, pouvoir se réclamer de l'immunité d'exécution au regard de jugements rendus par les tribunaux belges et qui sont susceptibles d'affecter ses intérêts particuliers : qu'il prétend ainsi échapper à l'emprise d'une juridiction dont, non plus que l'Etat belge, lorsqu'il est assigné, il ne décline la compétence; mais prétend, à l'encontre de cet Etat, éluder en fait comme en droit l'application; qu'il tend de la sorte à réclamer à son profit un statu que l'Etat belge, qui s'exécute volontairement sur son propre territoire, s'interdit, effectivement, par respect pour la chose jugée.

En droit positif, la souveraineté de l'Etat étranger s'arrête à sa frontière, sous la réserve des exceptions imposées par le libre exercice de sa représentation diplomatique à l'extérieur.

La confiance étant la condition essentielle des transactions tant nationales qu'internationales, le courant de celles-ci ne peut se trouver utilement affecté du fait qu'un jugement les sanctionne et en assure, au surplus, l'exécution sur des biens étrangers qui se trouvent en Belgique.

On n'aperçoit pas quelle considération justifierait le juge de refuser une validation de saisie, fondée en droit au profil d'une société belge, par la raison que la validation pourrait préjudicier aux intérêts d'un Etat étranger, attrait, dans les conditions de la cause, devant les tribunaux belge par un ressortissant belge; en ce faisant, le juge ne fait qu'accomplir, dans

son sens le plus large, sa mission institutionnelle, sous la réserve des recours; qu'à cet égard, le législateur a en vue de porter remède aux écarts pouvant échapper à la vigilance ou à la discrétion du magistrat.

ANTECEDENTS DE LA CAUSE

Attendu qu'il n'est pas contesté qu'à la date du 27 août 1925 fut conclu entre la demanderesse et l'Etat hellénique un contrat, ayant pour objet la construction, par la demanderesse, en Grèce, pour le compte de l'Etat hellénique, de certaines lignes de chemin de fer, ainsi que la réfection de certaines autres lignes et la fourniture du matériel nécessaire à leur exploitation; que cette convention et le décret-loi hellénique du 6 octobre 1925, qui la ratifiait, furent publiés au n° 294 du Journal Officiel du Gouvernement hellénique du 8 octobre 1925; que l'article 2 du décret-loi portait : "Toutes les clauses de la Convention précitée et de son avenant acquièrent par la présente ratification force de loi";

Attendu que le financement des prestations et des fournitures assumées par la demanderesse devait se faire par un prêt, que la demanderesse consentait à l'Etat hellénique, mais qui était couvert par la remise, à la demanderesse ou à un "trustee" d'une certaine quantité d'obligations d'un emprunt, émis à cet effet par l'Etat hellénique, - dont les intérêts et l'amortissement, conventionnellement arrêtés d'avance, devaient permettre à la demanderesse de faire face aux frais et dépenses de son entreprise;

Attendu que l'Etat hellénique ne dénie pas avoir cessé tout paiement d'intérêt, et tout amortissement sur lesdites obligations le 1^{er} juillet 1932;

Attendu que la convention du 27 août 1925 contenait une clause compromissoire comportant, notamment, la suivante : "Les décisions des arbitres seront souveraines et sans appel";

Attendu que, par une première sentence, rendue le 3 janvier 1936, la Commission d'arbitrage, sur les conclusions de la société demanderesse, prononça la résiliation de la convention du 27 août 1925, en raison de la suspension du service de l'emprunt par le Gouvernement hellénique; que cette sentence institua une expertise, destinée à établir le montant et le mode de paiement des sommes, qui seraient constatées à être dues par l'une des parties à l'autre, à la suite de la résiliation du contrat;

Attendu que, le 25 juillet 1936, la Commission arbitrage rendit une seconde décision par laquelle, après due compensation des sommes, que les parties se devaient ou se réclamaient l'une à l'autre la créance finale de la société demanderesse, à charge de l'Etat hellénique, était fixée à 6.771.868 dollars-or U.S.A. au poids et fin d'août 1925, avec intérêts de 5 % au profit de la société demanderesse, à dater du 1^{er} août 1936;

Attendu que la sentence obligeait, en outre, la société à remettre à l'Etat hellénique ses dossiers, plans et études, et à lui livrer une certaine quantité de matériel roulant, resté en Belgique; que, de son côté, l'Etat hellénique devait restituer une lettre de garantie et se substituer à la société dans les rapports entre celle-ci et les tiers;

Attendu que l'une des principales questions, soumises aux arbitres, était celle de savoir si les obligations pécuniaires de l'Etat hellénique, à la suite de la résiliation du contrat du 27 août 1925, constituant une dette pure et simple, ou bien, comme le prétendait l'Etat hellénique, pouvaient être considérées comme une partie de la dette extérieure hellénique, et soumises aux mêmes conditions de paiement que celles qui s'appliquaient à cette dette; que la décision des arbitres, rendue à l'unanimité, écarta les prétentions de l'Etat hellénique quant à ce, et le qualifia débiteur pur et simple de la somme, reprise ci-avant;

Attendu que les dispositions de sentences, autres que celle, relative au paiement de 6.771.668 dollars-or, furent exécutées, tant par la société que par l'Etat hellénique; que la substitution de l'Etat hellénique à la société, vis-à-vis des tiers fut réalisée par la "loi de nécessité" du 7 décembre 1936, publiée au Journal Officiel du 8 décembre, loi portée en exécution de la sentence arbitrale;

Attendu, en revanche, que la demanderesse Socobel prétend que toutes démarches pour obtenir paiement, total ou même partiel de sa créance, auraient rencontré une résistance persistante de l'Etat hellénique; que celui-ci aurait prétendu subordonner tout arrangement à la condition, écartée par les arbitres, que la dette du Gouvernement hellénique serait considérée comme partie de la Dette publique hellénique et traitée comme telle; que la Socobel déclare qu'au contraire les arbitres avaient affirmé le caractère commercial de la créance, et décidé qu'elle ne faisait pas partie de la Dette extérieur hellénique;

Attendu que la société demanderesse s'adressa, le 21 mai 1937, au Gouvernement belge, - intervenant volontaire dans la cause (R.G. 27386), afin d'obtenir sa protection; que, dès le 14 juin 1937, le Gouvernement belge prit fait et cause pour la société et fit agir son ministre à Athènes; mais que ces interventions ne furent pas suivies d'effet, le Gouvernement hellénique considérant sa dette, envers la société belge, comme faisant partie de la Dette extérieure hellénique, et ne pouvant être réglée par une autre voie que celle-ci;

Attendu que le Gouvernement belge proposa, dès lors, au Gouvernement hellénique de soumettre, par compromis, le différend au jugement de la Cour permanente de Justice internationale à La Haye; que cette proposition n'ayant pas été agréée par le Gouvernement hellénique, le Gouvernement belge saisit ladite Cour, par voie de requête unilatérale;

Attendu que la compétence de la Cour permanente de Justice internationale se fondait sur l'article 36 du Statut de ladite Cour, ainsi que sur l'article 4 de la Convention de Conciliation, d'Arbitrage et de règlement judiciaire, intervenue le 25 juin 1929 entre la Belgique et la Grèce (loi belge du 14 juillet 1930);

Attendu qu'au cours des débats devant cette haute juridiction, l'Etat hellénique tendit à obtenir que la créance de la société, au lieu d'être considéré comme une créance purement commerciale, ainsi que l'avaient décidé les arbitres, fût traitée comme faisant partie de la Dette extérieur hellénique et affectée des mêmes conditions de moratoire que celle-ci;

Attendu que la Cour, dans son arrêt du 15 juin 1939, par 13 voix (y compris celles du juge belge et du juge grec) a dit "que les sentences arbitrales rendues les 3 janvier et 25 juillet 1936 entre le Gouvernement hellénique et la Société Commerciale de Belgique, sont définitives et obligatoires";

Attendu que, prétend la demanderesse Socobel, après comme avant l'arrêt de la Cour permanente de Justice internationale, elle aurait envoyé périodiquement au Gouvernement hellénique le relevé de sa créance avec le compte des intérêts à jour;

Que jamais, le Gouvernement hellénique n'aurait répondu à ces envois de comptes, ne faisant à la société demanderesse aucun paiement d'acompte; que le seul acompte, que la demanderesse ait jamais reçu sur sa créance aurait consisté dans une somme de 111.384 dollars papier, qui se trouvaient entre les mains de la Société Nationale de Crédit à l'Industrie pour le compte de la Grèce, et que la société demanderesse avait frappée de saisi-arrêt; que l'Etat hellénique abandonna cette somme à la société demanderesse;

DISCUSSION

Action mue par la Société Commerciale de Belgique, société anonyme demanderesse au principal, contre l'Etat hellénique et la Banque de Grèce :

(...)

III.- Attendu que l'action principale apparaissant recevable autant que fondée, dans son principe, il échet, au tribunal d'examiner la pertinence de l'exception d'immunité d'exécution, opposée par le premier défendeur à la validation des saisies querellées; qu'au seuil de ce débat, il n'est pas sans intérêt de souligner que certaine doctrine et certaine jurisprudence reconnaissent une corrélation intrinsèque entre cette immunité et celle de juridiction, dont elle ne ferait que procéder (cf. infra p. 30);

Attendu que le premier défendeur oppose deux objections, déduites, la première, du principe de l'égalité des Etats, la seconde de celui de la courtoisie internationale

A. - Egalité des Etats :

Attendu que, du fait que la législation belge ne permettrait pas, prétendument, les exécutions forcées contre l'Etat belge, le premier défendeur entend conclure, a pari, que semblable immunité devrait compéter aux Etats étrangers pour leurs biens et intérêts, se trouvant sur le territoire de la Belgique; qu'il fait valoir qu'il se trouve au nombre des Etats qui, chez eux, professent l'insaisissabilité des biens nationaux;

Attendu qu'au point de vue de sa teneur cette articulation mérite d'être rectifiée, dans ce sens qu'en réalité le législateur belge n'a, d'une manière générale, pas disposé à l'égard des exécutions forcées, exercées tant contre l'Etat belge que contre les Etats étrangers; qu'en vérité, il ne l'a fait expressément qu'en ce qui concerne les "navires de mer, appartenant à l'Etat et ceux qu'il exploite ou affrète" et que ce fut, précisément, pour décider que ceux-ci seraient, au regard tant des actions en justice que de la procédure, soumis au régime de droit commun (quatrième loi du 28 nov. 1928, art. 1 à 4);

Attendu qu'aucun argument a contrario ne peut être inféré de ce qu'une loi belge soit intervenue pour introduire dans notre droit positif, les dispositions d'une convention internationale soustrayant, d'une manière expresse, des navires à un régime antérieur; qu'en effet, le législateur a, lui-même, reconnu qu'en principe une intervention de la loi n'était pas indispensable mais, - et simplement - "utile" "certains gouvernements, entrés dans le commerce maritime depuis la guerre" n'ayant jamais entendu se prévaloir de l'immunité (Rapport au Sénat, Pasin. 1928, p. 488); que son propos n'a été que de régler au regard de notre régime intérieur, et en vue de l'entente internationale, une matière particulière, intéressant le droit des gens (loc. cit. et Rapport de la Commission de la Chambre, op. cit. p. 485);

Attendu qu'au regard de l'Etat belge, la doctrine se borne à enseigner que, "l'exécution forcée n'est pas possible en ce qui le concerne" (De Page, Droit civil, t. VI éd. 1942 n) 733; note 2 sous Brux. 22 nov. 1907, Pas. 1908, II, 55; note 1 sous Trib. Anvers 24 nov. 1910, Pas. 1911, III, 104; - Leurquin, op. cit. n° 74);

Attendu qu'à ce point de vue l'objection, opposée par le premier défendeur, apparaît théorique; qu'il est, en effet, notoire que l'Etat belge s'incline devant la force de la chose jugée jusqu'à inscrire d'office, - en vertu des pouvoirs que lui reconnaissent les lois organiques, - au budget des institutions publiques subordonnées, le montant des condamnations, prononcées à leur charge;

Attendu qu'il résulte, du reste, des considérations, émises par les autorités, citées ci-devant, que l'impossibilité d'exécuter un jugement contre l'Etat belge procède de facteurs, propres à l'ordre public interne belge, c'est à dire participant de "l'intérêt général" de la communauté belge, à laquelle "les biens de l'Etat sont affectés" et qu'il importe de ne pas "distraire de leur destination" (cf. notamment, De Page, loc. cit.) :

Attendu que cet intérêt majeur, existant à soustraire, sur son propre territoire, l'Etat belge à une exécution forcée, à laquelle procéderait une quelconque partie poursuivante, n'apparaît pas au profit d'un Etat étranger, ayant conclu quelque negotium en Belgique; que semblable Etat s'est, en effet, exposé à l'application des lois belges et ne peut faire valoir les considérations d'autorité comme de prestige, compétant en Belgique aux autorités qui y exercent et y doivent exercer le pouvoir de commandement;

Attendu qu'aussi bien le premier défendeur se réclame-t-il de plano du régime de l'égalité des Etats, afin de bénéficier, en Belgique, de la condition, propre et particulière à l'Etat belge; qu'il écarte, sans y répondre, la considération déduite par la demanderesse, de ce que, en s'opposant à l'exécution, en territoire belge, des saisies-arrêts, pratiquées à sa charge, le premier défendeur, qui se réclame de l'indépendance des Etats, cause, en réalité,

préjudice à l'indépendance économique locale (Van Praag, Immunité de juridiction des Etats étrangers, Rev. Dr. Int. 935, p. 129) :

Qu'ainsi, le premier défendeur se réclame-t-il d'une considération, qui compète à l'Etat belge, en tant que responsable de l'ordre public interne, mais qui ne lui compète pas à lui-même;

Attendu qu'à l'appui de leurs thèses la demanderesse et le premier défendeur produisent des autorités, tant doctrinales que jurisprudentielles;

Attendu qu'en l'espèce les opinions divergentes ne doivent pas tant être comptées que pesées, et que leur incidence relative, dans le présent débat, dépend des facteurs concrets du litige, à propos duquel elles sont, respectivement, invoquées;

Attendu que cette considération s'impose avec toute la pertinence, qui est la sienne, dès lors que l'on a égard que ces opinions n'interprètent pas une loi écrite, mais bien une coutume, sujette à l'évolution, propre aux facteurs qui l'ont fait naître;

Attendu qu'en définitive il résulte de la teneur de ces opinions, dûment précisées et rectifiées par les parties au cours des débats, qu'il serait assurément inexact de prétendre que doctrine et jurisprudence belges soient unanimes en la matière;

Attendu que, seule, la demanderesse invoque, en conclusions, certaines versions doctrinales et jurisprudentielles, dont le premier défendeur ne récuse pas la teneur, se bornant à opposer les siennes, énoncées, suivant l'usage, en plaidoirie;

Attendu qu'il n'incombe pas au tribunal de discuter, une à une, la pertinence des opinions, dont les parties se réclament; qu'il doit, en effet, aux plaideurs d'énoncer et justifier sa jurisprudence; qu'il ne lui appartient pas, en revanche, d'abriter celle-ci sous l'invocation, pure et simple, de décisions antérieures, quels que soient l'autorité et le rang des juridictions qui les ont rendues;

(Le style des jugements-dialectique, par P. Mimin, premier président de la Cour d'Angers, n° 130 et 132, Paris, Marchal et Billard, éd. 1936);

Attendu qu'il y a lieu de retenir que le premier défendeur invoque une tradition doctrinale et jurisprudentielle ancienne, qui a trouvé, naguère encore, des échos dans nos cours et tribunaux;

Attendu qu'il échet, cependant, d'observer que la thèse, développée par la demanderesse, n'est pas sans pouvoir se réclamer d'autorités, intéressant tant la science du droit que son application juridictionnelle;

que si celles-ci ne remontent pas aussi loin dans le passé que les opinions qui leur sont opposées, elles accusent un mouvement constant, sinon continu, se manifestant de 1885 jusqu'à nos jours et dont, pour mémoire, la relation suit : Cour de cassation de Florence, 25 juillet 1885; (cf. relation d'arrêts rendus postérieurement par les Cours italiennes. Pand. Pér., 1932, p. 426; - De Paepe. P., Conseiller à la Cour de cassation de Belgique, membre de la Commission de réforme du Code de procédure civile, dans la Compétence civile à l'égard des étrangers (éd. 1894, Bruxelles, Bruylant n° 47 à 50); - conclusions du procureur général Terlinden, avant Cass., 11 juin 1903, Pas. 1903, I, pp. 294 et sqq; note 1 sous Trib. Anvers, 24 nov. 1910, Pas., 1911, III, 104, par référence à l'état de la législation ottomane; André Prudhomme, directeur du Journal de droit international de Clunet, Clunet, 1926, p. 311; - Cour de Paris, 19 nov. 1926 dans Clunet, p. 406 et la note: - Cass. Fr., requ., 19 févr. 1929. Sir. 1930, I, 49 et la note du professeur Niboyet : - Trib. 1^{ère} inst. Athènes 1930, Clunet 1932 p. 810; - Van Praag, "Possibilité d'exécution des jugements qui condamnent les Etats étrangers" dans Rev. dr. int. lég. comp., 1935, pp. 117, 122, 127 : note 260; 129 à 131, et la note 269; 135 à 137; (cf. également, op. cit., 1934, pp. 653 à 682; 1923, pp. 436 à 454, Pasim.) : - Comm. Marseille, 11 mai 1938, Clunet, 1939, p. 72; - professeur Niboyet. Traité de droit international privé. T. VI. Éd. 1949, n° 1761 à 1769, complétant et mettant à jour une information jurisprudentielle, arrêtée à l'année 1920 dans un ouvrage, jadis écrit en collaboration avec Pillet (Man. Dr. Int. pr. 1924, n°592; 1928 n° 802, Paris, Sirey);

Attendu que la relation qui précède suffit à manifester qu'à tort prétendrait-on qu'il serait interdit au juge, tenant compte et des facteurs de l'évolution contemporaine et de l'absence d'une version indicative, donnée par la Cour suprême, d'avoir, à ceux-ci tels égards que de droit;

Que la Cour de cassation, elle-même "n'est évidemment pas liée par ses arrêts" devant, au contraire "réexaminer les questions, chaque fois que celles-ci sont portées devant elle" (La Cour de cassation, considérations sur sa mission, mercuriale de M. le procureur général Cornil, J.T. 1950, p. 493); qu'il sied de remarquer, ici, que l'opinion, rappelée ci-devant, se réfère au cas d'une interprétation de la loi écrite "dépassée parla marche des idées et des faits" (loc. cit.) alors que la contestation, à présent examinée par le tribunal, concerne la portée d'une règle, simplement coutumière;

Attendu qu'il échet d'observer que le 1^{er} défendeur n'a rien trouvé à répondre à cette considération, pertinente et essentielle, développée par la demanderesse, et suivant laquelle l'évolution jurisprudentielle contemporaine se trouve dominée par le fait, constant, du développement de plus en plus considérable de l'action de l'Etat moderne, se manifestant, de manière positive, voire directe, dans le domaine du commerce et de l'économie internationale; que le 1^{er} défendeur n'a pu contester que, depuis un arrêt, plus que centenaire, rendu le 22 janvier 1849, par la Cour de cassation de France, ce développement n'a cessé de s'accuser; qu'il lui eût, du reste, été malaisé de la faire, la loi IV du 28 novembre 1928 dont question ci-devant, ayant procédé de ce facteur, dûment accusé par ses auteurs (Pas. 1928, loc. cit.) (cf. supra pp. 24 et 25 du présent jugement);

Attendu que c' est cette conception, dépassée par les événements, d'un "Etat-gendarme", qu'un magistrat éminent, dans des conclusions, données avant l'arrêt du 11 juin 1903, rendu par la Cour de cassation de Belgique, déjà réprouvait, en invitant la Cour suprême à casser un arrêt, rendu par le juge du fond, "les yeux tournés vers le passé" alors qu'il incombait à la Cour suprême de dire le droit "en ne tenant compte que du présent et en regardant l'avenir"; que ce haut magistrat estimait, au surplus, évident "que le pouvoir d'exécution est la conséquence du pouvoir de juridiction" (Concl. du premier avocat général Terlinden, avant Cass. 11 juin 1903. Pas. 1903, I, 298 à 300); que l'on n'aperçoit pas pourquoi l'Etat hellénique, "personne civile sur son territoire, se trouverait personne souveraine au delà de la frontière, les conditions d'une convention étant restées les mêmes et le seul changement intervenu étant la nationalité du juge, appelé à régler le différend" (op. cit. 297); (cf. au sujet de ce qui précède, également De Paepe, op. cit. n° 47; Niboyet. Op. cit. t. VI, n° 1769, p. 361).

Attendu que le fait que, même sur son territoire, la condition de l'Etat, personne civile, n'est pas, en tout point, assimilable, pratiquement, à celle des personnes civiles privées (De Page, Droit civil, t. II, n° 1067bis. Éd. 1940) est sans intérêt dans le débat, ainsi qu'il a été démontré ci-avant (page 25 du présent jugement);

Attendu que c'est l'enchevêtrement des rapports économiques entre les Etats modernes, qui a autorisé un jurisconsulte réputé à dégager les conclusions suivantes, ayant égard autant aux principes de l'ordre international qu'aux nécessités du commerce juridique entre les Etats : "La relation fondamentale des Etats n'est pas leur indépendance réciproque, c'est la reconnaissance et le respect de leurs souverainetés"; que cette version doctrinale se trouve explicitée dans les termes suivants : "L'indépendance extérieure de l'Etat ne s'affirme, en effet, comme une réalité tangible et concrète que dans les limites, internationalement acceptées, de son autorité souveraine; elle n'est, donc, qu'une conséquence, dérivée du respect mutuel des souverainetés" (Ch. de Visscher, "Les Gouvernements étrangers en Justice", Rec. dr. int. lé. Comp. 1922, p. 311); que les considérations qui précèdent, viennent consacrer le principe que la souveraineté d'un Etat ne réalise pas un absolu, devant lequel les autres Etats ne pourraient adopter d'autre attitude que celle d'une adhésion inconditionnelle; Que semblable conception, que le premier défendeur s'est, du reste, abstenu d'exprimer, irait à l'encontre de la notion même d'une société internationale ordonnée;

Attendu que c'est, dès lors, à tort que le premier défendeur prétend, au titre du principe de l'égalité, voire de l'indépendance des Etats dans la société internationale, pouvoir se réclamer de l'immunité d'exécution, au regard de jugements, rendus par les tribunaux belges, et qui sont susceptibles d'affecter ses intérêts particuliers; qu'il prétend, ainsi, échapper à l'emprise effective d'une juridiction dont, non plus que l'Etat belge, lorsque celui-ci est assigné, il ne décline la compétence, mais prétend, à l'encontre de cet Etat, éluder en fait comme en droit, l'application; qu'il tend, de la sorte, à réclamer à son profit la reconnaissance d'un statut, que l'Etat belge, qui s'exécute volontairement sur son propre territoire, s'interdit, effectivement, par respect pour la chose jugée;

Attendu, au surplus, qu'en droit positif, la souveraineté de l'Etat étranger s'arrête à sa frontière, sous la réserve des exceptions, imposées par le libre exercice de sa représentation diplomatique à l'extérieur;

Que les considérations, opposées par le premier défendeur, sont étrangères à ce concept;

(...)

Par ces motifs.

LE TRIBUNAL :

Vu la loi du 15 juin 1935 sur l'emploi des langues en matière judiciaire;

Oùï M. Rutten, substitut du procureur du Roi, en son avis conforme;

Statuant contradictoirement et rejetant toutes conclusions autres, plus amples ou contraires, comme non fondées;

Joignant comme connexes les causes inscrites au Rôle général sub nis. 26433, 26434, 26545, 26546, 26895 et 27386; Donnant acte aux parties de leurs dires, dénégations ou réserves;

Donnant acte à l'Etat belge, représenté par MM. les Ministres du Commerce et de l'Extérieur, ainsi qu'à la Société Commerciale de Belgique, l'Etat hellénique, la Banque de Grèce, et la Banque de Bruxelles, du désistement de son intervention volontaire, offert par l'Etat belge, du référé à justice et des acceptations de ce désistement, marqués par les autres parties;

Décète le désistement de l'Etat belge, représenté comme dit ci-dessus;

Condamne l'Etat belge aux dépens de son intervention volontaire;

Statuant sur les actions inscrites au R.G. Sub. Nis. 26433, 26434, 26545 et 26546, mues à la requête de la Société Commerciale de Belgique contre l'Etat hellénique et la Banque de Grèce :

Déclare bonnes et valables, et en conséquence, valide les saisies-arrêts pratiquées à la requête de la partie demanderesse, Socobel, à charge des défendeurs, l'Etat hellénique et la Banque de Grèce, les 23 et 25 novembre 1950 par ministère de Me Baiwir de Bruxelles, entre les mains de la S.A. Banque de Bruxelles, la Banque Nationale de Belgique et la S.A. Banque de la Société Générale de Belgique : le 20 novembre 1950, par ministère de Me Vyt d'Anvers et Me Vanderhaegen de Gand, entre les mains de la S.P.R.L. Van Dosselaere et Cie, et la S.A. Colufrandes et la S.A. Clouteries et Trèfileries des Flandres; le 20 novembre 1950, par ministère de Me Baiwir de Bruxelles, entre les mains de la S.A. Ucométal et de la S.A. Société Commerciale de Sidérurgie; le 29 novembre 1950, par le ministère de Me Fossion, de résidence à Liège, entre les mains de la S.A. Ougrée Marihaye, la Société Coopérative Cobelmétal, la S.A. Phenix works, la S.A. John Cockerill, la S.A. Comptoir des Aciéries Belges, la S.A. Espérance-Longdoz, par le ministère de Me Boeckx, de Charleroi, entre les mains de la S.A. Hauts Fourneaux, Forges et Aciéries de Thy-le-Château et Marcinelle, la S.A. Métallurgie de Sambre-et-Moselle, la S.A. Usines Métallurgiques du Hainaut par le ministère de Me Lefèvre, de Binche, entre les mains de la S.A. Usines et boulonneries de Mariemont, la S.A. Forges et Laminoirs de Baume; par

ministère de Me Adant, de Charleroi, entre les mains de la S.A. Hauts Fourneaux et Laminoirs de la Providence; par ministère de Me Collette, de Huy entre les mains de la S.A. Boulonnerie de Huy, par ministère de Me Detraux, de Manage, entre les mains de la S.A. Usines Gilson; par ministère de Me Theys, de Nivelles, entre les mains de la S.A. Forges de Clabecq; par ministère de Me Monnom, de La Louvière, et Me Baiwir de Bruxelles, entre les mains de la S.A. Usines Gustave Boel, aux sièges de La Louvière et de Bruxelles;

Déboute les défendeurs, Etat hellénique et Banque de Grèce, de leur demande reconventionnelle;

Et statuant sur l'action 26895 du R.G. mue à la requête de la Banque de Grèce, demanderesse en intervention et de déclaration de jugement commun, contre la Banque de Bruxelles :

Déclare l'action recevable, mais non fondée;

En déboute la demanderesse, Banque de Grèce;

Et statuant sur la prosécution de la cause Socobel contre l'Etat hellénique et la Banque de Grèce :

Déclare qu'il y a lieu de surseoir à statuer, quant à présent, au sujet de la délivrance des sommes saisies, postulée par la demanderesse Société Commerciale de Belgique;

Dit que celle-ci sera tenue de déclarer à l'audience de ce tribunal, si elle postule ou non, après le prononcé du présent jugement, condamnation de sommes, à charge des défendeurs : Etat hellénique et Banque de Grèce;

Dit qu'à défaut par la demanderesse de s'expliquer à cet égard, il sera loisible aux défendeurs précités de prendre telles dispositions que le conseil;

Fixe à cette l'audience du 29 mai 1951;

Réserve les dépens dans les causes ci-devant, non réglées à cet égard.

(a)	N° d'enregistrement	B/8
(b)	Date	15 février 2000
(c)	(Service) auteur	Cour d'appel de Bruxelles
(d)	Parties	Leica AG c/ Central Bank of Iraq et Etat irakien
(e)	Points de droit	<p>Cet arrêt consacre d'abord l'existence d'une immunité d'exécution pour les missions diplomatiques basée sur l'article 25 de la Convention de Vienne de 1961 («selon lequel l'Etat accréditaire accorde toutes facilités pour l'accomplissement des fonctions de la mission ») ;</p> <ul style="list-style-type: none"> - Ensuite, il confirme, dans le cadre de l'immunité d'exécution, la distinction entre les biens affectés à des fins souveraines (iure imperii) et les biens affectés aux fins de gestion (iure gestionis) ; - En ce qui concerne la charge de la preuve, il établit une présomption en faveur de l'affectation des biens au fonctionnement de la mission, d'où une présomption en faveur de l'immunité d'exécution, sauf preuve contraire que doit apporter le demandeur ; - Il affirme l'existence d'un contrôle marginal par le juge afin de vérifier la crédibilité de l'affectation des biens
(f)	Classification n°	2
(g)	Source(s)	Journal des Tribunaux 2001 p. 6
(h)	Renseignements complémentaires	
(i)	Texte complet - extraits - traduction - résumés	Voir annexe B 08

Résumé des faits :

Le 25 juillet 1997, la société suisse Leica saisit des sommes sur des comptes bancaires appartenant à l'Irak. Celui-ci assigne Leica devant le juge des saisies et fait valoir l'immunité d'exécution pour ses comptes d'ambassade. Le juge des saisies tranche en faveur de l'Irak. Leica fait appel de cette décision et la Cour d'appel de Bruxelles rend son arrêt le 15 février 2000. Elle ordonne la levée de la saisie effectuée par Leica dans la mesure où elle porte sur des comptes dont est titulaire l'Ambassade d'Irak à Bruxelles.

ANNEXE B/8

I. IMMUNITÉ DIPLOMATIQUE. —
Convention de Vienne sur les relations
diplomatiques. — Article 25. —
Interprétation. — Application aux
comptes en banque d'ambassade. —
Preuve de l'affectation des dépôts. —
II. IMMUNITÉ D'ÉTAT. — Preuve
de l'affectation à des fins publiques
ou privées. — **III. CONSEIL DE
SÉCURITÉ DES NATIONS UNIES. —**
Résolution 687 (1991) du 3 avril 1991.
— Effet sur la souveraineté de l'Iraq.

Bruxelles (2^e Ch.), 15 juillet 2000

Siég. : M. Blondeel, prés.; M. Raes et
Mme Schürmans, cons.

Plaid. : MM^{es} Walravens, Sepulchre, J.V.
Lindemans, Angelet.

(Leica AG c. Central Bank of Iraq et Etat ira-
quien).

I. — Il résulte de la Convention de Vienne du
18 avril 1961 sur les relations diplomatiques, et
plus particulièrement de son article 25, que les
comptes d'ambassade doivent bénéficier de
l'immunité dans l'Etat d'accueil. L'immunité
diplomatique des comptes d'ambassade trouve
seulement à s'appliquer dans la mesure où les
sommes y déposées sont nécessaires ou utiles à
l'exercice des fonctions de la mission. L'utilité
des sommes pour les fonctions de la mission ré-
sulte, en principe et avec une large marge d'ap-
préciation, du jugement de l'Etat d'envoi et de
la mission.

II. — L'immunité d'exécution peut uniquement
être écartée s'il s'avère, non seulement que les
sommes ne sont pas utiles à l'exercice des fonc-
tions de la mission, mais aussi que ces sommes
n'appartiennent pas au domaine public, mais
sont affectées à des fins privées.

III. — La Résolution 687 (1991) du Conseil de
sécurité n'a pas modifié les règles normales
concernant l'immunité d'exécution pour les
dettes de l'Iraq étrangères à la guerre du Golfe.

(Traduction)

2. — La demande de levée de la saisie introduite
par l'Iraq.

2.3. — Attendu que Leica prétend que l'Iraq
n'est pas fondé à se prévaloir de l'immunité
d'exécution, ni même de l'immunité diploma-
tique, afin de demander la levée de la saisie
sur les comptes de son ambassade, conformé-
ment au paragraphe 17 de la Résolution 687
(1991), adoptée le 3 avril 1991 par le Conseil
de sécurité des Nations unies, qui prévoit ce
qui suit :

Décide que les déclarations faites par l'Iraq
depuis le 2 août 1990 au sujet de sa dette ex-

terieure sont nulles et de nul effet et exige que
l'Iraq honore scrupuleusement toutes ses
obligations au titre du service et du rembour-
sement de sa dette extérieure;

Attendu que la reconnaissance forcée de ces
dettes ne signifie pas nécessairement que
l'Iraq doit renoncer à l'immunité diploma-
tique des comptes bancaires dont sont titulaires
ses ambassades à l'étranger, ou encore renon-
cer à l'immunité d'exécution de l'Etat;

Attendu que dans la même Résolution, une
distinction est faite, d'une part, entre les det-
tes et obligations de l'Iraq qui sont antérieures
au 2 août 1990 et qui seront réglées par les
voies normales, et d'autre part, la responsabi-
lité de l'Iraq en vertu du droit international
pour tous les dommages, y compris les atteintes
à l'environnement et la destruction des
ressources naturelles, ou encore les préjudices
subis par d'autres Etats et par des personnes
physiques et des sociétés étrangères, qui sont
la conséquence de l'invasion et de l'occupati-
on illégale du Koweït par l'Iraq;

Qu'en ce qui concerne la réparation des dom-
mages mentionnés en dernier lieu, un fonds a
été créé par les paragraphes 18 et suivants de
la Résolution;

Que, dès lors, cette Résolution n'a pas modi-
fié les règles normales concernant l'immunité
d'exécution pour les dettes de l'Iraq qui sont
étrangères à la guerre du Golfe;

Attendu que l'immunité d'exécution de l'Etat
n'exclut d'ailleurs pas que la reconnaissance
de dette mène à l'exécution effective, et cela
alors même que l'Etat iraquien ne paie pas vo-
lontairement ou refuse de se conformer à un
titre exécutoire;

Que, en effet, sans préjudice de l'immunité di-
plomatique ou consulaire, l'immunité d'exé-
cution de l'Etat peut seulement être invoquée
pour des avoirs qui appartiennent au domaine
public, et qui donc n'ont pas reçu une affecta-
tion privée;

2.4. — Attendu qu'il résulte de la Convention
de Vienne du 18 avril 1961 sur les relations
diplomatiques, et plus particulièrement de
l'article 25, que les comptes d'ambassade doi-
vent bénéficier de l'immunité diplomatique
dans l'Etat d'accueil;

Attendu que cette Convention ne prévoit pas,
comme le fait l'article 22, § 3, pour les locaux
de la mission, leur ameublement et les autres
objets qui s'y trouvent ainsi que pour les
moyens de transport de la mission, que les
comptes en banque de la mission ne peuvent
faire l'objet d'aucune perquisition, réquisi-
tion, saisie ou mesure d'exécution;

Attendu néanmoins que l'article 25 de la Con-
vention prévoit que l'Etat d'accueil accorde
toutes facilités à la mission pour l'accomplis-
sment de ses fonctions;

Que cela implique que les comptes en banque
qui sont nécessaires ou utiles à l'exercice des
fonctions de la mission ne peuvent faire l'ob-
jet de mesures d'exécution;

Attendu que cette interprétation de la Con-
vention de Vienne de 1961 est conforme aux ré-
gles coutumières d'interprétation des Traités
qui sont contenues dans la Convention de
Vienne du 23 mai 1969 sur le droit des Traités
(...);

Que l'article 31.1 prévoit en effet que le sens des dispositions d'un Traité doit être recherché à la lumière de son objet et de son but, et que la Convention sur les relations diplomatiques a pour but de faciliter les fonctions de la mission;

2.5. — Attendu que l'immunité diplomatique des comptes d'ambassade s'applique seulement dans la mesure où les sommes déposées sur les comptes sont nécessaires ou utiles à l'exercice des fonctions de la mission;

Que dans le cas contraire, il n'y aurait aucune raison d'octroyer l'immunité au compte de la mission conformément à l'article 25 de la Convention de Vienne sur les relations diplomatiques;

Attendu que l'utilité des sommes pour les fonctions de la mission relève, en principe et avec une large marge d'appréciation, du jugement de l'Etat d'envoi et de la mission elle-même;

Que ceci ne signifie cependant pas que cette utilité ne peut être contrôlée par les tribunaux belges;

Attendu que dans la présente affaire, il doit être admis que les sommes saisies à charge de l'Iraq, et qui se trouvent sur les comptes ouverts à la Générale de Banque au nom de l'ambassade d'Iraq, sont nécessaires ou tout au moins utiles à l'exercice des fonctions de cette ambassade;

Attendu que l'Iraq a présenté une déclaration du directeur général du ministère iraquien des Affaires étrangères, M. Tariq Al-Marouf, datée du 29 août 1992, où l'on peut lire ce qui suit :

— que la Résolution 665 des Nations unies du 25 août 1990 a pour conséquence que la représentation diplomatique de l'Iraq à Bruxelles devra être réduite, et la section commerciale de l'ambassade fermée,

— que la mission diplomatique de l'Iraq à Bruxelles ne peut utiliser les sommes mises à sa disposition par l'Iraq et qui sont déposées sur plusieurs comptes à la Générale de Banque que pour acquérir un bâtiment pour l'établissement de la nouvelle ambassade, afin de subvenir aux besoins de la mission auprès des autorités belges, et auprès des Communautés européennes, de payer le personnel intérimaire de la mission recruté sur place et de couvrir les frais liés à la résidence de l'ambassadeur, et

— que la mission n'est pas autorisée à exercer une quelconque activité commerciale, cette interdiction étant strictement contrôlée par le ministère des Affaires étrangères, conformément à l'embargo des Nations unies du 25 août 1990;

Attendu qu'il n'y a pas de raisons de douter de la crédibilité de cette déclaration;

Attendu qu'il est vrai qu'une somme de plus de 100.000.000 de FB a été saisie sur les comptes de l'ambassade d'Iraq;

Que l'Iraq a fourni quatre lettres émanant d'agents immobiliers qui montrent qu'avant la guerre du Golfe, des discussions et des négociations visant à acquérir un immeuble pour l'ambassade ont eu lieu, ce qui aurait nécessité une dépense considérable;

Que la mission diplomatique à Bruxelles est aussi la représentation de l'Iraq auprès des Communautés européennes;

Qu'il n'est pas anormal que les sommes soient libellées en monnaies étrangères;

Attendu que Leica n'a pas fait la preuve que les sommes saisies ne sont pas nécessaires ou utiles à l'exercice des fonctions de la mission;

2.6. — Attendu, de plus, que l'immunité d'exécution peut seulement être écartée, s'il apparaît, non seulement que les sommes déposées sur les comptes de la Générale de Banque ne pourraient pas être utiles à l'exercice des fonctions de la mission, mais aussi que ces sommes, qui font partie du patrimoine de l'Etat iraquien, n'appartiennent pas au domaine public de l'Iraq, mais sont affectées à des fins privées;

Attendu qu'aucun élément ne montre l'affectation des sommes à des fins commerciales;

Par ces motifs :

La Cour,

Déclare le présent appel recevable et partiellement fondé, confirme le jugement attaqué en ce qu'il juge la requête de l'Iraq recevable et fondée et par conséquent ordonne la levée de la saisie effectuée par Leica le 25 juillet 1997 dans la mesure où elle porte sur des comptes dont est titulaire l'ambassade d'Iraq à Bruxelles, confirme l'estimation des dépens, Réforme la saisie-arrêt pour le reste

(a)	N° d'enregistrement	B/9
(b)	Date	4 octobre 2002
(c)	(Service) auteur	Cour d'appel de Bruxelles (9 ^{ème} chambre).
(d)	Parties	Etat d'Irak c. Vinci Constructions Grands Projets s.a. de droit français.
(e)	Points de droit	<p>Les sommes déposées sur le compte en banque d'une mission diplomatique bénéficient d'une présomption d'affectation à des fins souveraines.</p> <p>Mettre la preuve de l'affectation des fonds à charge de l'Etat serait contraire au principe même de l'immunité, qui établit par définition une présomption en faveur de l'Etat qui en bénéficie.</p> <p>Obliger un Etat à devoir systématiquement et à tout moment prouver qu'il est bien dans les conditions pour jouir de son immunité revient en pratique à lui en retirer le bénéfice.</p>
(f)	Classification n°	2 b
(g)	Source(s)	Journal des Tribunaux 2003 p. 318.
(h)	Renseignements complémentaires	<p>(Cet arrêt est rendu en appel du jugement rendu le 27 février 1995 par la chambre des saisies du tribunal de première instance de Bruxelles).</p> <p>(v. B 05)</p>
(i)	Texte complet - extraits - traduction - résumés	Voir annexe B 09

Résumé des faits

Le 3 juin 1993, Dumez a fait procéder à une saisie-arrêt conservatoire entre les mains de la Générale de Banque, actuellement Fortis Banque, en vertu du jugement du tribunal de Nanterre du 9 octobre 1991, sur tous deniers, valeurs ou objets généralement quelconques appartenant à l'Etat d'Irak et plus particulièrement sur les comptes ouverts au nom de son ambassade en Belgique.

L'Etat d'Irak a formé opposition à cette saisie en vue d'en obtenir la mainlevée et a été débouté par la décision du juge des saisies du 27 février 1995, qui fait l'objet du présent appel.

L'Etat d'Irak réitère son opposition à la saisie litigieuse et introduit également par voie de conclusions une demande incidente en dommages et intérêts à charge de Vinci pour cause du maintien abusif de sa saisie.

Vinci pour sa part demande, sur la base des articles 871 et 877 du Code judiciaire, qu'il soit ordonné à l'Etat d'Irak et à Fortis Banque de produire les extraits de compte couvrant les opérations enregistrées par les comptes saisis pendant l'année 1989 et jusqu'au 8 août 1990.

Annexe B/9

lorsque plusieurs personnes ont, par une faute commune, causé un dommage à autrui, le préjudice peut être imputé à chacune d'elles » (*idem*, n° 423);

suivants ne s'appliquent probablement pas en matière délictuelle »;

que la Cour de cassation a maintes fois rappelé que l'article 1254 du Code civil ne s'appli-

ÉTAT ÉTRANGER. — Immunité d'exécution. — Preuve de l'affectation des fonds à charge de l'Etat saisi.

Bruxelles (9^e ch.), 4 octobre 2002

Jéq. : Mmes M. Regout (prés.), I. Diercxsens et Ch. Schurmans.

Plaid. : MM^{es} J. Sépulchre, N. Angelet et J. Houssa.

Etat d'Irak c. Vinci Constructions Grands Projets s.a. de droit français).



Les sommes déposées sur le compte en banque d'une mission diplomatique bénéficient d'une présomption d'affectation à des fins souveraines.

Mettre la preuve de l'affectation des fonds à charge de l'Etat serait contraire au principe même de l'immunité, qui établit par définition une présomption en faveur de l'Etat qui en bénéficie.

Obliger un Etat à devoir systématiquement et à tout moment prouver qu'il est bien dans les conditions pour jouir de son immunité revient en pratique à lui en retirer le bénéfice.



Vu :

— le jugement attaqué, prononcé contradictoirement le 27 février 1995 par la chambre des saisies du tribunal de première instance de Bruxelles,

Les faits et antécédents de la procédure :

La s.a. Vinci Constructions Grands Projets (ci-dessous dénommée Vinci), à qui la s.a. Dumez-GTM (ci-dessous dénommée Dumez) a apporté sa branche d'activités opérationnelles, en ce compris tous les droits et obligations afférents au présent litige, est créancière de l'Etat d'Irak d'une somme de 22.821.797 USD à augmenter des intérêts et des frais de justice liquidés à 100.000 FRF, en vertu d'un jugement du tribunal de grande instance de Nanterre (France) du 9 octobre 1991, exequaturé en Belgique par une ordonnance du tribunal de première instance de Bruxelles du 26 juillet 1993, et qui a été rendu à la suite des circonstances suivantes :

Le 5 février 1981, la société FIAFI, entrepreneur koweïtien, a passé avec le département des travaux militaires du ministère de la Défense irakien un marché pour la conception, la construction, l'achèvement et la maintenance de divers bâtiments en Irak.

Le 27 janvier 1984, la société FIAFI a sous-traité une partie de ce marché à Dumez avec l'accord du maître de l'ouvrage.

Les travaux confiés à Dumez ont été exécutés et réceptionnés sans réserve.

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Ne parvenant pas à obtenir le paiement de ces travaux, Dumez a entrepris devant les juridictions irakiennes une procédure de saisie-arrêt à l'encontre de FIAFI.

Le différend entre Dumez et FIAFI a finalement pris fin par la signature le 12 mars 1990 d'un protocole d'accord, aux termes duquel FIAFI a reconnu une créance de Dumez à sa charge d'un montant de 22.821.797 USD du chef des travaux effectués par cette dernière pour le compte du ministère de la Défense irakien. Il fut convenu que les « promissary notes » émises par le ministère de la Défense irakien seraient établies au nom de Dumez.

Cet accord a été entériné par un jugement du tribunal de première instance de Bagdad le 20 mars 1990.

Plusieurs ordonnances d'exécution rendues par une juridiction de Bagdad furent adressées à l'Etat d'Irak en vertu de ce jugement, mais ce dernier ne s'exécuta jamais sans toutefois exercer de recours contre le jugement irakien précité.

Après avoir envahi le Koweït, l'Etat irakien a interdit à ses cours et tribunaux de connaître de toute action dirigée contre lui par des sociétés étrangères ou contre des personnes de droit public irakien.

Dumez a alors assigné l'Etat d'Irak devant le tribunal de grande instance de Nanterre, qui a condamné l'Etat d'Irak par le jugement précité du 9 octobre 1991 qui est exécutoire par provision.

L'Etat d'Irak a, dans un premier temps, introduit une opposition à l'ordonnance d'exequatur de ce jugement de Nanterre rendue par le tribunal de première instance de Bruxelles le 26 juillet 1993, mais s'est désisté de son instance le 25 janvier 1999.

Le 3 juin 1993, Dumez a fait procéder à une saisie-arrêt conservatoire entre les mains de la Générale de Banque, actuellement Fortis Banque, en vertu du jugement du tribunal de Nanterre du 9 octobre 1991, sur tous deniers, valeurs ou objets généralement quelconques appartenant à l'Etat d'Irak et plus particulièrement sur les comptes ouverts au nom de son ambassade en Belgique.

L'Etat d'Irak a formé opposition à cette saisie en vue d'en obtenir la mainlevée et a été débouté par la décision du juge des saisies du 27 février 1995, qui fait l'objet du présent appel.

L'Etat d'Irak réitère son opposition à la saisie litigieuse et introduit également par voie de conclusions une demande incidente en dommages et intérêts à charge de Vinci pour cause du maintien abusif de sa saisie.

Vinci pour sa part demande, sur la base des articles 871 et 877 du Code judiciaire, qu'il soit ordonné à l'Etat d'Irak et à Fortis Banque de produire les extraits de compte couvrant les opérations enregistrées par les comptes saisis pendant l'année 1989 et jusqu'au 8 août 1990.

Discussion.

Comme le souligne lui-même l'Etat d'Irak au point 7 de ses conclusions, dès lors qu'il a renoncé à son opposition à l'ordonnance d'exequatur en Belgique du jugement de Nanterre, il est acquis que Vinci dispose à sa charge en

Belgique d'une créance certaine, liquide et exigible. Le litige en degré d'appel se limite donc à savoir si l'Etat d'Irak est en droit d'opposer à Vinci une quelconque immunité pour les comptes en banque de son ambassade.

Il résulte clairement de ses conclusions que l'Etat d'Irak ne met pas en cause le principe de l'immunité d'exécution restreinte, ni le fait que c'est l'affectation des biens saisis qui décide des limites de cette immunité d'exécution, comme le défend Vinci (voy., notam., point 15 de ses conclusions principales).

Comme Vinci le souligne (point 28 de ses conclusions) la distinction éventuelle entre l'immunité d'Etat résultant du droit international général et l'immunité diplomatique résultant de l'article 25 de la Convention de Vienne de 1961 dont bénéficient les comptes de l'ambassade d'Irak auprès de Fortis Banque ne présente pas d'intérêt pratique pour la solution du présent litige puisque dans les deux cas, c'est le critère de l'affectation des biens saisis qui décide des limites de l'immunité d'exécution.

Vinci ne soutient plus, comme en première instance, que l'Etat d'Irak serait privé de tout ou partie des immunités qu'il invoque en raison des sanctions qui le frappent à la suite de l'invasion du Koweït.

Les parties s'entendent également pour dire qu'en ce qui concerne l'immunité d'Etat, les comptes ne sont saisissables que s'ils sont affectés à des activités commerciales ou de droit privé, et qu'en ce qui concerne l'immunité diplomatique, ils ne sont saisissables que s'ils ne sont pas utiles ou nécessaires au fonctionnement de l'ambassade.

Dans l'hypothèse d'une saisie d'un compte bancaire au nom d'une ambassade, l'immunité d'exécution peut n'être que partielle et ne pas concerner la partie des fonds affectée à une activité autre que le service diplomatique.

La durée de la présence des fonds sur le compte bancaire peut être un élément d'appréciation de leur destination.

Les points de divergence qui subsistent entre les parties sont les questions de l'affectation des fonds figurant sur les comptes saisis, de la charge de la preuve de l'affectation de ces fonds et des modes de preuve qui peuvent être utilisés pour prouver cette affectation.

Il convient également de remarquer que l'Etat d'Irak ne met pas en cause le pouvoir de contrôle des tribunaux sur l'affectation des biens saisis.

1. — La charge de la preuve de l'affectation des biens saisis.

Vinci reconnaît elle-même en conclusions (pt 39 de ses conclusions) que le principe généralement admis par la jurisprudence en matière d'immunité est que la charge de la preuve de la saisissabilité des biens visés repose sur le créancier saisissant, mais considère que l'application de ce principe aboutit au caractère quasi absolu de l'immunité d'exécution.

Il est exact que l'application de ce principe n'est pas de nature à faciliter la tâche des créanciers d'un Etat étranger, mais il n'en résulte pas nécessairement que la preuve de l'affectation des fonds soit pour autant impossible dans la mesure notamment où cette affectation peut s'induire des activités mêmes de l'Etat ou de l'ambassade, qui revêtent nécessairement un certain caractère d'apparence.

Conformément à l'opinion dominante, il faut admettre que les sommes déposées sur le compte en banque d'une mission diplomatique bénéficient d'une présomption d'affectation à des fins souveraines. Exiger de l'Etat dont ressort la mission qu'il justifie l'utilisation de ses avoirs bancaires pour chacune de ses activités diplomatiques ou afférentes au bon fonctionnement de la mission constituerait une intervention indue dans les affaires de cet Etat et une atteinte à sa souveraineté (note M. Romero, sous Bruxelles, 15 févr. 2000, « L'immunité d'exécution des missions diplomatiques », *J.T.*, 2001, p. 6, spéc. p. 11, n° 27).

Par ailleurs, il faut admettre que l'utilité des avoirs bancaires pour les fonctions de la mission relève, avec une large marge d'appréciation, du jugement de l'Etat d'envoi et de la mission elle-même (Bruxelles, 15 févr. 2000, précité).

Mettre la preuve de l'affectation des fonds à charge de l'Etat saisi serait contraire au principe même de l'immunité, qui établit par définition une présomption en faveur de l'Etat qui en bénéficie. En effet, obliger un Etat à devoir systématiquement et à tout moment prouver qu'il est bien dans les conditions pour jouir de son immunité revient en pratique à lui en retirer le bénéfice.

Il convient encore de remarquer que dans l'ordre juridique belge, la mise à charge du créancier de la preuve de la nature des biens saisissables des pouvoirs publics a été expressément reconnue. Les travaux préparatoires de la loi du 30 juin 1994 insérant un article 1412bis dans le Code judiciaire, qui édicte l'insaisissabilité des biens des pouvoirs publics moyennant certaines restrictions, notamment si ces biens ne sont manifestement pas utiles pour l'exercice de leur mission, énoncent clairement que ce n'est pas aux pouvoirs publics à prouver positivement, *ab initio*, l'utilité manifeste des biens envisagés (voy. Stranart et Goffaux, « L'immunité d'exécution des personnes publiques et l'article 1412bis du Code judiciaire », *J.T.*, 1995, p. 437).

Vinci reconnaît par ailleurs elle-même l'existence de cette présomption (voy. le point 47 p. 24 de ses conclusions).

C'est donc à Vinci qu'il appartient de prouver que les fonds figurant sur les comptes saisis avaient une affectation commerciale ou de droit privé, ou qu'ils n'étaient pas nécessaires ou utiles au fonctionnement de l'ambassade.

C'est donc à Vinci qu'il appartient de prouver que les fonds figurant sur les comptes saisis avaient une affectation commerciale ou de droit privé, ou qu'ils n'étaient pas nécessaires ou utiles au fonctionnement de l'ambassade.

2. — Le devoir de collaboration à la preuve et les modes de preuve de l'affectation des biens saisis.

Vinci reproche à l'Etat d'Irak de ne pas collaborer loyalement à l'administration de la preuve de l'affectation des fonds, selon le principe consacré par l'article 871 du Code judiciaire, car il refuse de produire les extraits de comptes attestant des mouvements de comptes saisis.

Cet argument ne peut être retenu étant donné que ces extraits de compte constituent des archives et documents protégés par l'article 2-

de la Convention de Vienne sur les relations diplomatiques du 18 avril 1961, selon lequel ils sont inviolables à tout moment et en quel que lieu qu'ils se trouvent.

Contrairement à ce que soutient Vinci, cet article a une portée extrêmement large, et ne se limite pas à la protection des documents touchant à la sécurité nationale. Il s'étend aux extraits des comptes bancaires de la mission diplomatique (J. Sahnou et S. Sucharitkul, « Les missions diplomatiques entre deux chaises : immunité diplomatique ou immunité d'Etat? » *A.F.D.I.*, 1987, p. 191).

Ne pas étendre aux extraits de compte le bénéfice de la protection de l'article 24 précité perturberait incontestablement l'activité de la mission diplomatique, contrairement à ce que soutient Vinci, dans la mesure où la mission, qui peut avoir des raisons politiques très légitimes de souhaiter la confidentialité de certains de ses mouvements de fonds, se verrait empêchée dans ces cas d'utiliser la monnaie scripturale puisque la confidentialité n'en serait pas garantie, à tout le moins à terme.

S'il est exact que certaines opérations en compte à caractère tout à fait banal, comme des paiements ordinaires, n'ont pas de raison d'être protégées par l'immunité, il convient de remarquer qu'en l'espèce Vinci demande la production de tous les extraits afférents à toutes les opérations financières réalisées via les comptes saisis depuis le début 1989 jusqu'au 8 août 1990, ce qui peut bien entendu inclure des opérations à caractère confidentiel et justifie dès lors que l'Etat d'Irak invoque l'immunité.

Ces mêmes motifs font également obstacle à la demande formulée par Vinci à la cour d'ordonner à l'Etat d'Irak et à Fortis Banque de produire les extraits de compte en question, sur la base de l'article 877 du Code judiciaire.

Vinci a la possibilité, comme il le soutient et au contraire de ce que soutient l'Etat d'Irak, d'utiliser des présomptions visées à l'article 1353 du Code civil pour tenter d'établir l'affectation des fonds saisis. Ceci n'est pas contradictoire avec la présomption d'affectation non commerciale et la présomption de nécessité des fonds pour l'exercice de ses fonctions par l'ambassade, puisque, en règle générale, certaines présomptions, plus convaincantes, peuvent en renverser d'autres.

La cour ne peut néanmoins retenir le refus par l'Etat d'Irak de produire les extraits de compte demandés comme une présomption de mauvaise foi compte tenu des motifs ci-dessus exposés.

3. — L'affectation des fonds saisis.

Les pièces déposées par l'Etat d'Irak attestent que son ambassade était, en 1990, à la recherche d'un nouveau bâtiment, ce qui justifie que ses comptes bancaires enregistraient à ce moment des soldes créditeurs importants. Ces comptes ont fait l'objet d'une première saisie le 5 avril 1991. Le montant qui y était inscrit n'a donc pas pu diminuer entre cette date et celle de la saisie pratiquée par Dumez, de sorte qu'il n'y a pas lieu de s'étonner, comme l'a fait le premier juge, de ce que ce montant n'ait pas diminué depuis l'époque où l'ambassade cherchait un nouveau siège.

L'importance de la somme saisie-arrêtée n'est donc pas en l'espèce un indice de ce que les fonds n'étaient pas nécessaires au bon fonctionnement de l'ambassade.

Le fait que ces fonds aient été ventilés en différentes devises européennes ne permet pas de supposer qu'ils étaient destinés à payer des fournisseurs résidant dans ces différents pays. Il convient de rappeler que l'euro n'existait pas encore au début des années 1990, et qu'il était dès lors de bonne gestion à l'époque de placer une somme de cette importance en différentes devises pour la mettre autant que possible à l'abri du risque monétaire d'une devise unique.

Le fait que ces montants aient été placés à un terme de sept jours leur garde une liquidité suffisante pour faire face à un éventuel achat immobilier, et relève davantage d'une saine gestion que d'un placement financier.

La mention utilisée par la Générale de Banque dans sa déclaration de tiers saisi selon laquelle elle précise que ces différents soldes de comptes sont indiqués sous réserve des opérations effectuées mais non encore comptabilisées n'implique nullement que ces fonds aient eu une affectation étrangère aux nécessités fonctionnelles de l'ambassade. Il s'agit d'une clause de style régulièrement utilisée par les organismes bancaires pour les mettre, autant que possible, à l'abri de l'éventuelle sanction prévue à l'article 1451 du Code judiciaire dans l'hypothèse d'un différé en compte.

Il convient par ailleurs de remarquer que c'est au moment de la saisie, qui a été pratiquée le 3 juin 1993, qu'il faut se situer pour apprécier l'affectation des fonds inscrits dans les comptes saisis, et non avant l'invasion du Koweït, comme le soutient à tort Vinci.

Or en juin 1993, l'ambassade d'Irak n'était autorisée à utiliser ses avoirs bancaires qu'à

des fins strictement fonctionnelles, comme en attestent la lettre du ministère des Finances adressée en 1990 à la Générale de Banque et l'attestation du 29 août 1992 du ministère des Affaires étrangères irakien. L'attestation du ministère des Affaires étrangères irakiens est crédible dans la mesure où elle a une portée générale, est antérieure à la saisie litigieuse et est corroborée par d'autres éléments dont la lettre du ministère des Finances précitée. A supposer donc que ces fonds aient eu, *quod non*, une affectation commerciale ou étrangère aux stricts besoins du fonctionnement de l'ambassade avant l'invasion du Koweït, ils ne pouvaient plus avoir une telle affectation au moment de la saisie pratiquée par Dumez le 3 juin 1993.

Vinci ne démontre donc pas qu'au moment de sa saisie du 3 juin 1993, les avoirs saisis-arrêtés avaient une affectation de nature à les soustraire à l'immunité d'exécution.

4. — L'article 6 de la Convention européenne des droits de l'homme et l'article 14 du Pacte des Nations unies.

Lors des plaidoiries à l'audience du 18 avril 2002 et dans le dossier complémentaire que Vinci a remis à la cour à l'audience du 25 avril 2002, cette dernière invoque les deux dispositions précitées pour faire valoir que le droit à un tribunal serait illusoire si l'ordre juridique interne d'un Etat contractant permettait qu'une décision judiciaire définitive et obligatoire reste inopérante au détriment d'une partie ayant gain de cause dans un procès.

Il n'était certainement pas dans l'intention des auteurs de ces deux dispositions de mettre à néant le principe de l'immunité d'exécution d'Etat et diplomatique unanimement admis en droit international, ce qui serait le résultat de l'interprétation que veut leur donner Vinci.

La Cour européenne des droits de l'homme a d'ailleurs expressément énoncé que l'on ne peut, de façon générale, considérer comme une restriction disproportionnée au droit d'accès à un tribunal tel que le consacre l'article 6, § 1^{er}, de la Convention des mesures qui reflètent des principes de droit international généralement reconnus en matière d'immunité des Etats (voy. notam., *Fogarty c. Royaume-Uni*, 21 nov. 2001).

Force est donc de considérer que l'immunité d'exécution d'Etat et diplomatique, dans les limites toutefois de son interprétation restrictive prime les deux dispositions invoquées.

5. — La demande incidente en dommages et intérêts.

Il ne peut en aucun cas être reproché à Vinci d'utiliser toutes les voies de droit pour tenter d'obtenir l'exécution d'une décision judiciaire.

Vinci n'étant pas partie à l'instance d'appel dirigée contre la société Leika, n'avait pas de raison de s'incliner devant l'arrêt rendu en cette cause.

Il est par contre particulièrement choquant que l'Etat d'Irak, tout en se reconnaissant expressément débiteur d'une dette certaine, liquide et exigible, puisse considérer comme dommageable à son égard le fait d'essayer d'en obtenir le paiement.

Cette demande est donc totalement non fondée.



Dans la collection *Droit actuel*

Le droit du bail de résidence principale

par Bernard LOUVEAUX

Annoncée depuis de nombreuses années, la loi sur les baux de résidence principale a finalement été adoptée par la loi du 20 février 1991. Le présent ouvrage est consacré exclusivement à ce type de bail et en aborde tous les aspects essentiels, en faisant la synthèse des opinions exprimées lors des travaux préparatoires, de la jurisprudence et de l'expérience de plusieurs années d'application de la législation.

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(a)	N° d'enregistrement	B/10
(b)	Date	16 mai 1972
(c)	(Service) auteur	Exécutif – législatif(loi d'approbation du 19 juillet 1975), ratification le 27 octobre 1975.
(d)	Parties	Convention européenne sur l'immunité des Etats (convention multilatérale du Conseil de l'Europe (Bâle)
(e)	Points de droit	La Convention fournit une liste de cas dans lesquels l'Etat ne bénéficie pas d'une immunité de juridiction dont le principe n'est pas mis en doute.
(f)	Classification n°	1,2a
(g)	Source(s)	Moniteur belge (M B) 10 juin 1976.
(h)	Renseignements complémentaires	Protocole additionnel à la convention européenne sur l'immunité des Etats (ratifiée par la Belgique le 27 octobre 1975)
(i)	Texte complet - extraits - traduction - résumés	Site Conseil de l'Europe (http://convention.coe.int/treaty) STE n° 074,074A

CROATIA

1. INTERNATIONAL LEGAL INSTRUMENTS

Republic of Croatia is not a party to, nor has it signed the European Convention on State Immunity of 1972 (European Treaty Series No. 074) with an Additional Protocol thereto (ETS No. 074A). Neither is a party or a signatory to any other international legal instrument in this field.

2. DOMESTIC LAW

Legislation of the Republic of Croatia does not regulate the issue of state immunity directly, however, it contains certain acts which direct to the rules of public international law. Examples include:

a) Civil Litigation Act (Official Gazette of the Republic of Croatia, No. 53/91, 91/92) which reads in its Article 26, as follows:

"Regarding the competence of Croatian courts of law to adjudicate the foreign nationals enjoying right to immunity in the Republic of Croatia, as well as foreign states and international organisations, rules of international law shall be applied.

In case where there is a doubt as to the existence and scope of the right of immunity, an explanation is given by an executive body in charge of judicial affairs."

b) Execution Act (Official Gazette of the Republic of Croatia, No. 57/96) reads in its Article 18, as follows:

"An act of execution or an act of securing cannot be issued against the property of a foreign State without previous consent of the Ministry of Justice of the Republic of Croatia, except when a foreign State agrees to execution or securing."

In the preliminary phase of the Pilot Project, the following data as annexed in standard forms (HR/1 – HR/7), has been collected

a	Registration No.	HR/1
b	Date	26 June 1991
c	Authority	House of Representatives of the Parliament of the Republic of Croatia
d	Parties	
e	Points of law	Civil Litigation Act of Croatia in Article 26 states that in a dispute involving a foreign state or international organizations the relevant rules are those of public international law. In case of any uncertainties regarding the existence and scope of state immunity, an executive body in charge of judicial matters gives an explanation.
f	Classification No.	0.a., 0.b., 1., 2.c.
g	Source	Official Gazette of the Republic of Croatia, No. 53/91, 91/92.
h	Additional information	The act was taken over from legislation of Croatia's legal predecessor, the former Socialist Federal Republic of Yugoslavia
i	Summaries	

a	Registration No.	HR/2
b	Date	28 July 1996
c	Authority	House of Representatives of the Parliament of the Republic of Croatia
d	Parties	
e	Points of law	Execution Act of Croatia in Article 18 states that an act of execution or an act of securing cannot be issued against the property of a foreign State without previous consent of the Ministry of Justice of the Republic of Croatia, except when a foreign State agrees on execution or insurance.
f	Classification No.	0.a., 0.b., 1.c., 2.
g	Source	Official Gazette of the Republic of Croatia, No. 57/96.
h	Additional information	
i	Summaries	

a.	Registration No.	HR/3
b	Date	25 May 2001
c	Authority	Zagreb Municipal Court
d	Parties	J. Š. B. (individual) vs. the Embassy of Japan
e	Points of law	In this case, the Zagreb Municipal Court has not yet passed the final decision about state immunity. However, in this case there have been two opposite opinions regarding state immunity. The Ministry of Foreign Affairs establishes that in a labor dispute, a foreign country is able to be a party to the dispute because of limited state immunity in this category of cases. Contrary to that opinion, the Embassy of Japan holds that state immunity is absolute in accordance with general principles of public international law except in cases when a state expressly gives a consent for a trial before a court of a foreign country. The whole process is still ongoing.
f	Classification No.	0.b.2, 1b., 2.c.
g	Source	Zagreb Municipal Court, the Ministry of Foreign Affairs via the Ministry of Justice
h	Additional information	Pursuant to Article 26 of the Civil Litigation Act of Croatia, in a dispute involving a foreign state or international organizations the relevant rules are those of public international law. In case of any uncertainties regarding the existence and scope of state immunity, an executive body in charge of judicial matters gives an explanation.
i	Summaries	

a	Registration No.	HR/4
b	Date	9 April 2001
c	Authority	Zagreb Municipal Court
d	Parties	P.K. (individual) vs. the Embassy of the United States of America
e	Points of law	In this case, the Zagreb Municipal Court has not yet passed the final decision about state immunity. The defendant (Embassy of the USA) became involved in the dispute without challenging the competence of a Croatian court. By acting in this way, the defendant has given up the principle of absolute state immunity. The Ministry of Foreign Affairs establishes that in a labor dispute, a foreign country is able to be a party to the dispute because of limited state immunity in this category of cases. The whole process is still ongoing.
f	Classification No.	0.b.2, 1b., 2.c.
g	Source	Zagreb Municipal Court, the Ministry of Foreign Affairs of Croatia via the Ministry of Justice
h	Additional information	Pursuant to Article 26 of the Civil Litigation Act of Croatia, in a dispute involving a foreign state or international organizations the relevant rules are those of public international law. In case of any uncertainties regarding the existence and scope of state immunity, an executive body in charge of judicial matters gives an explanation.
i	Summaries	

a	Registration No.	HR/5
b	Date	19 October 1993
c	Authority	Zagreb Commercial Court
d	Parties	Company "S", Vinkovci, Croatia vs. the Republic of Bosnia and Herzegovina, Ministry of Transport and Communications
e	Points of law	The parties have previously agreed that any of their disputes would be subject to competence of the Zagreb Commercial Court. By doing so, the defendant (Republic of Bosnia and Herzegovina) did not bring up the issue of its immunity as an obstacle to settle the dispute before the Croatian court. The Court has decided and subsequently executed its decision on defendant's assets.
f	Classification No.	0.b.3., 1.b., 2.b.
g	Source	Zagreb Commercial Court
h	Additional information	The Commercial Court has asked for consent for execution of its decision from the Ministry of Justice and the Ministry of Foreign Affairs of Croatia. These executive bodies gave their consent.
i	Summaries	

a	Registration No.	HR/6
b	Date	9 June 1999
c	Authority	Zagreb Municipal Court
d	Parties	Company "S", Vinkovci, Croatia vs. the Republic of Bosnia and Herzegovina, Ministry of Transport and Communications
e	Points of law	In the dispute before the Municipal Court, the defendant did not raise the issue of its state immunity. Moreover, it has filed a counterclaim. The Zagreb Municipal Court has passed its decision in favor of the plaintiff.
f	Classification No.	0.b.3., 1.b., 2.c.
g	Source	Zagreb Municipal Court
h	Additional information	The defendant has lodged a complaint with the Zagreb District Court for the reasons unrelated to state immunity. The second-degree process is still ongoing.
i	Summaries	

a	Registration No.	HR/7
b	Date	4 December 2000
c	Authority	The Ministry of Foreign Affairs of Croatia
d	Parties	unknown
e	Points of law	The Ministry establishes that the exemption from acts of inquiry (by the court of law) is recognized only on the premises of the diplomatic mission notified as such by diplomatic protocol of the receiving country
f	Classification No.	0.a,1.a,2.c
g	Source	The Ministry of Foreign Affairs
h	Additional information	In the dispute initiated between private parties the issue of inquiry on the premises allegedly used by diplomatic mission of the foreign state was raised. The inviolability of such premises was not established since the premises in question were not the ones notified as such by that state's diplomatic protocol.
i	Summaries	

a	Registration No.	HR/8
b	Date	9 April 2001
c	Authority	Zagreb Municipal Court
d	Parties	L.O. (individual) vs. Turkish Embassy
e	Points of law	Based on a legal opinion given by the Ministry of Foreign Affairs via the Ministry of Justice of Croatia, the Court establishes that in a labor dispute, a foreign country is able to be a party to the dispute because of limited state immunity in this category of cases.
f	Classification No.	0.b.2,1.b,2.c
g	Source	Zagreb Municipal Court, the Ministry of Foreign Affairs via the Ministry of Justice of Croatia
h	Additional information	Pursuant to Article 26 of the Civil Litigation Act of Croatia, in a dispute involving a foreign state or international organizations the relevant rules are those of public international law. In case of any uncertainties regarding existence and scope of state immunity, an executive body in charge of judicial matters gives an explanation.
i	Summaries	

CYPRUS

The following Laws providing for State Immunities are in force:

1. The Diplomatic Rights, Immunities and Privileges Law, 1965 as amended by the Laws 67 of 1977 and 47 of 1985 (Annex I)

2. A Law ratifying the Vienna Convention on Diplomatic Relations (Law 40/68)

3. A Law ratifying the European Convention on State Immunities and Additional Protocol (Law 6/76).

Section 12 of law 60 of 1965 (Annex I) provides:

“12.-(1) A diplomatic agent shall enjoy immunity from criminal and civil jurisdiction of the Republic, except in the case of :

(a) an action in respect of immovable property owned or occupied by him otherwise than on behalf of the sending State or for the purposes of the diplomatic mission;

(b) an action in respect of succession in which the diplomatic agent is involved as executor, administrator, heir or legatee, otherwise than in this official capacity;

(c) an action in respect of the exercise of any profession or the carrying on of any trade or business by the diplomatic agent in his private capacity.

(2) Save with the consent of the head of the diplomatic mission, a diplomatic agent shall not be required to give evidence in any civil or criminal proceedings.

(3) No execution shall be levied in respect of a diplomatic agent except in the case of paragraphs (a), (b) or (c) of sub-section (1):

Provided that in such a case execution may be levied without infringing the inviolability of the person or residence of the diplomatic agent.

(4) The immunity from civil and criminal jurisdiction of a diplomatic agent under this section may be waived by the head of the diplomatic mission:

Provided that in the case of execution of a judgment a specific waiver shall be required.”

4. It should be noted that all international treaties ratified by Law, have superior force to any other Law in Cyprus, on condition that such treaties are applied by the other party.

5. There are no judicial decisions involving state immunity and related matters.

Appendix I

THE DIPLOMATIC RIGHTS, IMMUNITIES AND PRIVILEGES LAW, 1965

No. 60 of 1965

A LAW TO MAKE PROVISION FOR THE RIGHTS, IMMUNITIES AND PRIVILEGES OF THE DIPLOMATIC MISSIONS AND DIPLOMATIC AGENTS ACCREDITED TO THE REPUBLIC OF CYPRUS AND OF CERTAIN OTHER PERSONS AND FOR MATTERS CONNECTED THEREWITH.

(14th October, 1965.)

The House of Representatives enacts as follows :—

PART I.—PRELIMINARY PROVISIONS.

1. This Law may be cited as the Diplomatic Rights, Immunities and Privileges Law, 1965. Short title.

2. In this Law, unless the context otherwise requires—

“ Council of Ministers ” means the Council of Ministers of the Republic ; Interpretation.

“ diplomatic agent ” means any High Commissioner, Ambassador, Legate, Nuncio, Envoy, Internuncio, Minister, Chargé d’Affaires, Deputy High Commissioner, Counsellor, Secretary of Embassy, or Attaché (whether diplomatic, commercial, military or otherwise) ;

“ diplomatic mission ” means any High Commission, Embassy, Apostolic Delegation, Legation or United Nations mission established and functioning in the Republic ;

“ diplomatic premises ” means any buildings or parts of buildings and the land ancillary thereto, irrespective of ownership, used for the purpose of the diplomatic mission including the residence of the head of the mission ;

“ head of the diplomatic mission ” means any diplomatic representative accredited by the sending State with the duty of acting in that capacity ;

“ immovable property ” has the meaning assigned to such expression by section 2 of the Immovable Property (Tenure, Registration and Valuation) Law ; Cap. 224.
3 of 1960.

“ judicial proceedings ” means any proceeding had or taken in or before any Court, commission of inquiry or person in which or before whom evidence may be taken on oath, whether such Court, commission of inquiry or person takes evidence on oath or not ;

“ local staff ” means the technical, administrative and service staff of the diplomatic mission, comprised of citizens or permanent residents of the Republic ;

“ members of the diplomatic mission ” means any person who is a diplomatic agent, or belongs to the technical or administrative staff of the diplomatic mission or to the service staff thereof ;

“ private servants ” means the persons who are in the domestic service of a member of the diplomatic mission and who are not employed by the sending State ;

“ registered ” means recorded in the Land Register kept under the provisions of the Immovable Property (Tenure, Registration and Valuation) Law ; Cap. 224.
3 of 1960.

“ Republic ” means the Republic of Cyprus ;

“ sending State ” means the State to which the mission belongs ;

“ service staff ” means the members of the mission employed in the domestic service of the members of the diplomatic mission ;

“ technical and administrative staff ” means the members of the diplomatic mission who are employed in the technical and administrative service of the diplomatic mission.

**PART II.—RIGHTS OF THE SENDING STATE
AND OF ITS DIPLOMATIC MISSION.**

Right of the sending State to acquire immovable property in the Republic.

3.—(1) A sending State shall have the right to acquire under such form of tenure as obtains for the time being in the Republic and to own, hold or occupy in its own name immovable property situated in the Republic and required by the sending State for the purpose of its diplomatic mission or for a residence for the Head of the diplomatic mission or for any other purpose to which the Republic does not object.

(2) Subject to the provisions of any Law in force for the time being, the sending State shall have the right to erect, build, maintain, demolish, rebuild or otherwise change any immovable property owned by such State which is necessary for its diplomatic mission.

(3) Notwithstanding anything to the contrary effect in any other Law in force for the time being contained, immovable property of the sending State may be registered either in its name or in the name of its diplomatic mission.

Use of national flag and the State coat-of-arms.

4.—(1) The diplomatic mission shall have the right to fly the national flag and to display the State coat-of-arms, with an inscription identifying the diplomatic mission on its diplomatic premises.

(2) The Head of the diplomatic mission shall have the right to fly the national flag on his means of transport at any time.

**PART III.—IMMUNITIES AND PRIVILEGES
OF THE DIPLOMATIC MISSION.**

Inviolability of the diplomatic premises.

5.—(1) The diplomatic premises shall be inviolable.

(2) No act of any executive, administrative or judicial authority or organ of the Republic shall be performed within the diplomatic premises except by special permission of the head of the diplomatic mission.

(3) Nothing in this section contained shall be construed as precluding the compulsory acquisition or requisition by the Republic of any immovable property owned or otherwise held by the diplomatic mission under the provisions of the Constitution of the Republic and of any Law relating to compulsory acquisition or requisition in force for the time being.

Exemption from taxes, etc.

6. The sending State shall be exempted from all taxes, duties, dues, fees and any other charges imposed by the Republic in respect of its diplomatic premises, other than such as represent payment for specific services rendered.

Inviolability of archives.

7. The diplomatic archives, documents and official correspondence shall be inviolable.

Freedom of communication.

8.—(1) The Republic shall permit and protect free communication by whatever means of the diplomatic mission for all official purposes :

Provided that for the importation, installation and use of a wireless transmitter or receiver, a previous licence by the Republic shall be required.

(2) The official correspondence of the diplomatic mission shall be inviolable.

(3) The diplomatic pouch shall not be opened or detained, if it bears visible external marks indicating its character.

Exemption from taxation fees and charges.

9. The fees and charges levied by the diplomatic mission in the exercise of its official functions shall be exempted from any taxes, duties, dues, fees and any other charges.

**PART IV.—IMMUNITIES AND PRIVILEGES OF THE
DIPLOMATIC AGENTS.**

- 10.** A diplomatic agent shall not be liable to any form of arrest or detention. No arrest, etc., of a diplomatic agent.
- 11.—**(1) The private residence of a diplomatic agent shall be inviolable. Inviolability of residence, etc.
 (2) Any document, paper and correspondence of a diplomatic agent shall be inviolable and shall not be interfered with.
- 12.—**(1) A diplomatic agent shall enjoy immunity from criminal and civil jurisdiction of the Republic, except in the case of— Immunity from criminal and civil jurisdiction.
 (a) an action in respect of immovable property owned or occupied by him otherwise than on behalf of the sending State or for the purposes of the diplomatic mission ;
 (b) an action in respect of succession in which the diplomatic agent is involved as executor, administrator, heir or legatee, otherwise than in his official capacity ;
 (c) an action in respect of the exercise of any profession or the carrying on of any trade or business by the diplomatic agent in his private capacity.
 (2) Save with the consent of the head of the diplomatic mission, a diplomatic agent shall not be required to give evidence in any civil or criminal proceeding.
 (3) No execution shall be levied in respect of a diplomatic agent except in the case of paragraphs (a), (b) or (c) of sub-section (1) :
 Provided that in such a case execution may be levied without infringing the inviolability of the person or residence of the diplomatic agent.
 (4) The immunity from civil and criminal jurisdiction of a diplomatic agent under this section may be waived by the head of the diplomatic mission :
 Provided that in the case of execution of a judgment a specific waiver shall be required.
- 13.—**(1) A diplomatic agent shall be exempted from the requirements of any law and regulation relating to registration of aliens and so long as he performs his official functions he shall not be subject to any limitation or restriction imposed by such laws and regulations. Exemption from the provisions of certain Laws.
 (2) A diplomatic agent shall be exempted from any provision in force for the time being relating to social insurance.
- 14.—**(1) A diplomatic agent shall be exempted from all taxes, duties, dues, fees and any other charges other than import duties, levied by the Republic. Exemption from taxation, etc.
 (2) A diplomatic agent shall not be exempted from—
 (a) any indirect taxes, duties, dues, fees or any other charges which are normally incorporated in the price of goods or services ;
 (b) any taxes, duties, dues, fees or any other charges on or in respect of immovable property owned or occupied by him unless he holds such property on behalf of the sending State for the purposes of its diplomatic mission ;
 (c) any taxes, duties, dues, fees or any other charges levied by the Republic in the event of succession :
 Provided that in the event of the death of a diplomatic agent the Republic shall permit the withdrawal of the movable property of the deceased, with the exception of any property in the Republic the export of which was prohibited at the time of his death

and the presence of which in the Republic was due to the presence of the deceased ;

- (d) any taxes, duties, dues, fees or any other charges on private income having its source in the Republic and on investments made in commercial undertakings in the Republic ;
- (e) any charges levied for specific services rendered.

Exemption from import duties and inspection of personal baggage.

15.—(1) The Republic shall, in accordance with the provisions of any law or regulation in force for the time being, permit importation of, and grant exemption from all customs duties, dues and any other charges, other than charges for storage or similar services, on—

- (a) any goods imported by a diplomatic agent for the official use of the diplomatic mission ;
- (b) any goods imported in the name of the diplomatic agent in reasonable quantities for his personal use, or for the use of members of his family forming part of his household :

Provided that in the case of the importation of a motor car for the personal use of the diplomatic agent or of his family there shall be permitted the importation and use, free of customs duties, dues and any other charges, of only one motor car so imported or of any other in replacement thereof.

(2) The personal baggage of a diplomatic agent shall be exempted from inspection, unless there are reasonable grounds for believing that it contains any goods not covered by the exemptions mentioned in sub-section (1), or any goods the importation or exportation of which is prohibited or controlled :

Provided that such inspection shall be conducted in the presence of the diplomatic agent or of his authorised representative.

Privileges of members of the family of the diplomatic agent.

16. The members of the family of the diplomatic agent forming part of his household shall, if they are not citizens of the Republic or permanent residents therein, enjoy the privileges and immunities specified in sections 10, 11, 12, 13, 14 and 15.

PART V.—MISCELLANEOUS.

Privileges of the members of the technical and administrative staff.

17.—(1) Any member of the technical and administrative staff of the diplomatic mission performing the duties of archivist or cypher officer together with members of his family forming part of his household shall, if they are not citizens of the Republic or permanent residents therein, subject to sub-sections (2) and (3) enjoy the privileges and immunities specified in articles 10, 11, 12, 13 and 14.

(2) Any person mentioned in sub-section (1) shall not enjoy immunity from any criminal or civil jurisdiction, as provided in sub-section (1) of section 12, for any act or omission committed by him outside the course of his official duties.

Privileges of technical and administrative staff in respect of imported goods.

18. Any member of the technical and administrative staff of the diplomatic mission together with the members of his family forming part of his household shall, if they are not citizens of the Republic or permanent residents therein, enjoy the privileges specified in sub-section (1) of section 15 in respect of goods imported on first arrival or within three months of such arrival, if such goods are declared to the Customs Authorities of the Republic on such arrival.

Privileges of service staff.

19. A member of the service staff of the diplomatic mission and a private servant who is not a citizen of the Republic or permanent resident therein shall enjoy the same privileges, subject to the same terms and conditions, as a member of the technical and administrative staff of the diplomatic mission.

20. The Council of Ministers may, by order published in the official *Gazette* of the Republic, confer on the technical, administrative or service staff of the diplomatic mission any other rights, immunities or privileges.

Extension of privileges.

21.—(1) A member of the diplomatic mission shall enjoy the rights, privileges and immunities provided by this Law from the moment he enters the territory of the Republic on proceeding to take up his duties or if already in the Republic from the moment when his appointment is notified to the Ministry of Foreign Affairs of the Republic.

Commencement and end of rights, immunities and privileges.

(2) When the functions of a member of the diplomatic mission enjoying the rights, privileges and immunities provided by this Law shall come to an end, such rights, privileges and immunities shall normally cease at the moment when he leaves the Republic or on the expiration of a reasonable period in which to do so.

(3) In the case of the death of a member of a diplomatic mission the members of his family forming part of his household shall continue to enjoy the rights, privileges and immunities provided by this Law until the expiration of a reasonable period in which to leave the Republic.

22.—(1) Subject to the provisions of this Law, any member of the diplomatic mission shall obey and be bound by the provisions of any law in force for the time being and of any public instrument made thereunder.

Members of the mission bound by the laws, etc.

(2) A member of the diplomatic mission shall not practice in the Republic for profit any profession or carry on any trade or business.

23. Any right, immunity or privilege conferred by this Law shall be on the condition of reciprocity by the sending State.

Rule of reciprocity.

24. Customary International Law shall continue to regulate any matter for which no express provision is made in this Law.

Customary International Law to continue to apply.

25.—(1) Notwithstanding the provisions of this Law, bilateral international agreements may be concluded by the Republic or accession may be made to multilateral international agreements in respect of any matters regulated by this Law.

Conclusion of bilateral agreements, etc.

(2) The provisions of any international agreement concluded by the Republic under sub-section (1) or of any international agreement applying in the Republic in respect of any matters regulated by this Law shall continue to be in force and to bind the Republic.

26. The Council of Ministers may make Regulations to be published in the official *Gazette* of the Republic for the better carrying out of the provisions of this Law.

Regulations.

27.—(1) Any provision in any other law inconsistent with any of the provisions of this Law shall cease to have effect.

Inconsistent provisions.

(2) Without prejudice to the generality of sub-section (1), items A. 3 (a), (b) and (c) and the conditions referring to such items of Part II of the Second Schedule to the Customs Tariff Law, 1961, shall have effect subject to the provisions of this Law.

32 of 1961.

28. Nothing in this Law contained shall be taken to be in derogation of any of the provisions of the Diplomatic Privileges (Extension) Law and of the Diplomatic Privileges (European Commission of Human Rights) Law.

Saving. Cap. 237. Cap. 238.

CZECH REPUBLIC

(a)	Registration no.	CZ/1
(b)	Date	4 December 1963
(c)	Authority / document	National Assembly of the Czechoslovak Socialist Republic (Národní shromáždění Ěskoslovenské socialistické republiky) / Act No. 97/1963 concerning private international law and the rules of procedure relating thereto, as amended
(d)	Parties	-
(e)	Points of law	Section 47 of Act No. 97/1963, as amended, provides that foreign States are, subject to stated exceptions (section 47, para. 3 lit. a) and d)), absolutely immune from the jurisdiction of Czech courts and notarial offices.
(f)	Classification no.	0.c, 1.a, 2.a
(g)	Source(s)	Collection of Laws of the Czechoslovak Socialist Republik, No. 97/1963, as amended by Acts No. 158/1969, 234/1992, 264/1992 and 125/2002
(h)	Additional information	<p>1. Section 47 of the Act is the principal domestic legal provision in force regulating jurisdictional immunities of foreign States and their property.</p> <p>2.</p> <p>a) Section 2 of the Act provides that the provisions of the Act shall be applied only if an international treaty binding on the Czechoslovak Socialist Republic (i. e. on the Czech Republic) does not provide otherwise.</p> <p>b) Article 10 of Constitutional Act of the Czech Republic No. 1/1993, Constitution of the Czech Republic, in the wording that came into effect on 1 June 2002 provides as follows: Promulgated international treaties the ratification of which was approved by the Parliament and which are binding on the Czech Republic shall be part of the national legislation; if an international treaty differs from a law, the international treaty shall be applied.</p>
(i)	Full text - extracts - translation summaries	<p>Appendix 1: Text of Section 47 of Act No. 97/1963</p> <p>Appendix 2: English translation of Section 47 of Act No. 97/1963</p>

§47

Vynití z pravomoci èeskoslovenských soudù

(1) Pravomoci èeskoslovenských soudù nejsou podrobeny cizí státy a osoby, jež podle mezinárodních smluv nebo jiných pravidel mezinárodního práva anebo zvláštních èeskoslovenských právních pøedpisù požívají v Èeskoslovenské socialistické republice imunity.

(2) Ustanovení odstavce 1 platí i ohledni doruèování písemností, pøedvolávání uvedených osob za svìdky, výkonu rozhodnutí nebo jiných procesních úkonù.

(3) Pravomoc èeskoslovenských soudù je však dána, jestliže:

a) pøedmìtem øízení je nemovitý majetek státù a osob uvedených v odstavci 1, nacházející se v Èeskoslovenské socialistické republice, nebo jejich práva na takových nemovitých vïcech patøících jiným osobám, jakož i práva z pomiru nájemního k takovým nemovitým vïcem, pokud není pøedmìtem øízení placení nájemného,

b) pøedmìtem øízení je dìdictví, v nimž osoby uvedené v odstavci 1 vystupují mimo rámec svých úøedních funkcí,

c) pøedmìt øízení se týká výkonu povolání nebo obchodní èinnosti, které osoby uvedené v odstavci 1 provádí mimo rámec svých úøedních funkcí,

d) cizí stát nebo osoby uvedené v odstavci 1 se dobrovolni podrobí jejich pravomoci.

(4) Doruèení v pøípadech uvedených v odstavci 3 zprostøedkuje ministerstvo zahranièních vïcí. Nelze-li takto doruèit, ustanoví soud opatrovníka pro pøijímání písemností, popøípadi k obhájení práv.

Section 47

Exemption from the jurisdiction of Czechoslovak courts

(1) Foreign States and persons who under international treaties or other rules of international law or special Czechoslovak legal regulations enjoy immunity in the Czechoslovak Socialist Republic shall not be subject to the jurisdiction of Czechoslovak courts.

(2) The provision of paragraph 1 shall also apply to the delivery of documents, summoning of the aforesaid persons as witnesses, execution of decisions or other procedural acts.

(3) However, Czechoslovak courts shall have jurisdiction, if:

(a) the object of the proceedings is real property of the States and persons mentioned in paragraph 1, which is located in the Czechoslovak Socialist Republic, or their rights relating to such real property belonging to other persons, as well as rights arising from the lease of such real property, unless the object of the proceedings is the payment of rent,

(b) the object of the proceedings is an inheritance in which the persons mentioned in paragraph 1 act outside their official duties,

(c) the object of the proceedings concerns the pursuance of a profession or commercial activity which the persons mentioned in paragraph 1 carry out outside their official duties,

(d) the foreign State or the persons mentioned in paragraph 1 voluntarily submit to their jurisdiction.

(4) Delivery in the cases listed in paragraph 3 shall be done through the Ministry of Foreign Affairs. If delivery cannot thus be realized, the court shall appoint a guardian for accepting documents or, if necessary, for protecting the absentee's rights.

(a)	Registration no.	CZ/2
(b)	Date	9 April 1981 (date in the note of the Permanent Mission of Czechoslovakia by which the answers to the questionnaire were sent to the Secretariat of the United Nations)
(c)	Authority/nature of the document	The Government of the Czechoslovak Socialist Republic/answers to the questionnaire of the United Nations on the topic "Jurisdictional immunities of States and their property"
(d)	Parties	-
(e)	Points of law	The answers to the UN questionnaire describe the position of the Czechoslovak Socialist Republic on jurisdictional immunities of States and their property that was based on the doctrine of absolute immunity.
(f)	Classification no.	0.c, 1.a, 2.a
(g)	Source(s)	United Nations Legal Series, Materials on Jurisdictional Immunities of States and their Property, United Nations, New York, 1982
(h)	Additional information	-
(i)	Full text - extracts - translation summaries	Appendix: Full English text of the above mentioned questionnaire and of the answers of the Czechoslovak Socialist Republic to this questionnaire



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JURISDICTIONAL IMMUNITIES OF STATES AND THEIR PROPERTY

Information and materials submitted by Governments

Addendum

I. GOVERNMENT REPLIES TO THE QUESTIONNAIRE

Czechoslovakia

/Original: English/
/9 April 1981/

Questionnaire on the topic
"Jurisdictional immunities of States and their property"*

Question 1

Are there laws and regulations in force in your State providing either specifically for jurisdictional immunities for foreign States and their property, or generally for non-exercise of jurisdiction over foreign States and their property without their consent? If so, please attach a copy of the basic provisions of those laws and regulations.

According to Czechoslovak law, judicial practice and legal theory, the doctrine of the sovereignty of States and their equality corresponds to that of their "absolute" immunity.

According to the provisions of section 47, paragraph 1 of the Act on private international law No. 97/1963 of the Collection of Laws of Czechoslovakia and the

* This questionnaire is not concerned with diplomatic or consular immunities and privileges.

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English

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rules of procedure relating thereto, foreign States are not subject to the jurisdiction of Czechoslovak courts and notarial offices. However, the jurisdiction of Czechoslovak courts and notarial offices is applicable in cases where the subject of the proceedings is unmovable property located in Czechoslovakia or to rights of States on such unmovable property belonging to other persons, as well as to rights on such property arising from lease, but not in cases where the subject of the proceedings is payment of rentals and in cases where foreign States voluntarily submit to the jurisdiction of Czechoslovak courts and notarial offices (sect. 47, para. 3 (d), of the above-mentioned Act). 1/ The text of the Act is enclosed.

Question 2

Do courts of your State accord jurisdictional immunities to foreign States and their property? If so, please indicate whether they have based their decisions on any provisions of internal law in force or on any principle of international law.

See reply to question 1 above.

1/ Section 47 provides:

"(1) Foreign States and persons who under international treaties or other rules of international law or special Czechoslovak legal regulations enjoy immunity in the Czechoslovak Socialist Republic shall not be subject to the jurisdiction of Czechoslovak courts and notarial offices.

"(2) The provision of paragraph 1 shall also apply to the service of documents, summoning of the aforesaid persons as witnesses, execution of decisions or other procedural acts.

"(3) However, Czechoslovak courts and notarial offices shall have jurisdiction, if:

"(a) the subject of the proceedings is real property of the States and persons listed in paragraph 1, which is located in the Czechoslovak Socialist Republic, or their rights relating to such real property belonging to other persons, as well as their rights arising from their tenancy of such real property, unless the subject of the proceedings is the payment of rent,

"(b) the subject of the proceedings is an inheritance in which the persons listed in paragraph 1 appear outside their official duties,

"(c) the subject of the proceedings concerns the pursuit of a profession or commercial activity which the persons listed in paragraph 1 carry out outside their official duties,

"(d) the foreign State or the persons listed in paragraph 1 voluntarily submit to their jurisdiction.

"(4) Service in the cases listed in paragraph 3 shall be done through the Ministry of Foreign Affairs. If service cannot thus be realized, the court shall appoint a trustee for accepting documents or, if necessary, for protecting the absentee's rights."

/...

Question 3

What are the main trends of the judicial practice of your State in regard to jurisdictional immunities of foreign States and their property? Do the courts regard the doctrine of State immunity as "absolute", and if not, is its application subject to qualifications or limitations?

See reply to question 1 above.

Question 4

What is the role of the executive branch of the Government of your State in matters of recognition of jurisdictional immunities of foreign States and their property, especially in the definition or delimitation of the extent of the application of State immunity?

In matters regulated by Act No. 97/1963 of the Collection, judicial organs may, in case of doubt, ask the Ministry of Justice for an opinion (sect. 53, para. 2, of the above-mentioned Act). 2/

This opinion, given in the matter of exemption of foreign States from the jurisdiction of Czechoslovak courts and notarial offices, is of those which are not binding for judicial organs.

Question 5

Is the principle of reciprocity applicable in the matters relating to jurisdictional immunities of States and their property? Inter alia, would courts of your State be expected to apply the principle of reciprocity to a foreign State which would deny your State immunity in a dispute similar to the one pending before your courts, even if the courts would normally grant immunity to other foreign States in such disputes?

According to Czechoslovak laws and regulations, the principle of absolute immunity is not bound to reciprocity.

2/ Section 53 provides:

"(1) The judicial organ shall take all necessary measures to ascertain the provisions of a foreign law; if such provisions are not known to such an organ, it may request the information for this purpose from the Ministry of Justice.

"(2) If any doubt arises in the consideration of the cases listed in paragraph 1, the judicial organs may ask the Ministry of Justice for an opinion."

Question 6

Do the laws and regulations referred to under question 1 or the judicial practice referred to in question 3 make any distinction, as far as jurisdictional immunities of foreign States and their property are concerned, between "public acts" and "non-public acts" of foreign States? If so, please outline the distinctions, and provide examples of their application.

Czechoslovak laws and regulations do not make any distinction between "public acts" and "non-public acts". This would contravene the principle of absolute immunity of States.

Question 7

If the answer to question 6 is "yes":

(a) Can jurisdictional immunities be successfully invoked before courts in your State in connexion with "non-public acts" of foreign States? If not, please indicate the types of "non-public acts" of foreign States not covered by immunities.

(b) In a dispute relating to a contract of purchase of goods, would courts of your State be expected to grant immunity to a foreign State which establishes that the ultimate object of the contract was for a public purpose or the contract was concluded in the exercise of a "public" or "sovereign" function?

(c) In a dispute relating to a foreign State's breach of a contract of sale, would courts of your State be expected to grant immunity to a foreign State which establishes that its conduct was motivated by public interests?

(d) In any dispute concerning a commercial transaction, is the nature of the transaction decisive of the question of State immunity, if not, how far is ulterior motive relevant to the question?

Considering the reply to question 6 above, no answer is required here.

Question 8

If "non-public" activities of a foreign State in the territory of your State are such as to be normally susceptible to payment of taxes, duties or other levies, would the foreign State be required to pay them or would it be exempted in all cases or on the basis of reciprocity?

Czechoslovak laws and regulations do not explicitly regulate this matter.

Question 9

Are courts of your State entitled to entertain jurisdiction over any public acts of foreign States? If so, please indicate the legal grounds on which competence is based, such as consent, or waiver of immunity, or voluntary submission, etc. If jurisdiction is exercised in such cases, does it mean that the doctrine of State immunity is still recognized by the courts?

No.

Question 10

What rules are in force in your State, if any, governing:

- (a) Waiver of jurisdictional immunities of foreign States;
- (b) Voluntary submission by foreign States; and
- (c) Counter-claims against foreign States?

(a) See Act No. 97/1963, Collection, section 47, paragraph 3. 3/

(b) Ditto.

(c) None.

Question 11

What are the exceptions or limitations, if any, provided by laws and regulations in force or recognized by judicial or governmental practice in your State with respect to jurisdictional immunities of foreign States and their property?

Act No. 97/1963, Collection, section 47, paragraph 3. 4/

Question 12

What is the status, under laws and regulations in force or in practice in your State, of ships owned or operated by a foreign State and employed in commercial service?

Czechoslovak laws and regulations do not explicitly regulate this matter. When signing the Convention on the High Seas at Geneva on 29 April 1958, the Czechoslovak Socialist Republic made the following reservations concerning article 9:

3/ See foot-note 1 above.

4/ See foot-note 1 above.

"The Government of the Czechoslovak Republic holds that under international law in force government ships operated for commercial purpose also enjoy on the high seas complete immunity from the jurisdiction of any State other than the flag State."

Question 13

If a foreign State applies to administrative authorities of your State for a patent, a licence, a permit, an exemption or any other administrative action, would it be treated procedurally or substantively, like any other applicant or would it receive special treatment on the procedure or on the substance?

States are in principle treated in the same way as any other applicant.

A special régime might result from bilateral or multilateral agreements.

Question 14

If a foreign State owns or succeeds to an immovable or movable property situated in your State, how far is the foreign State subject to territorial jurisdiction in respect of title to that property or other property rights?

According to section 47, paragraph 3 (a), of Act No. 97/1963, Collection, a foreign State is subject, in these cases, to the jurisdiction of Czechoslovak organs. It is exempted from such jurisdiction only in matters related to the payment of rentals.

Question 15

Can a foreign State inherit or become a legatee or a beneficiary in a testate or intestate succession? If so, is voluntary submission essential to a meaningful involvement in the judicial process?

Unless stipulated otherwise by an international agreement (cf. sect. 2 of Act No. 97/1963, Coll.), 5/ matters of inheritance are governed by the law of the State whose citizen the decedent was at the time of his death (according to sect. 17 of the above-mentioned Act). If the testator was a Czechoslovak citizen, Czechoslovak law does not limit the testator in the choice of the heir when drawing up his will. The heir may therefore be even a foreign State.

With regard to escheats of foreign citizens, agreements on judicial assistance concluded by Czechoslovakia with other States provide that movable escheats go to the State whose citizen the decedent was at the time of his death; unmovable escheats to the State on the territory of which the unmovable escheat is located.

5/ Section 2 provides:

"The provision of the present Act shall be applied only if an international treaty binding on the Czechoslovak Socialist Republic does not provide otherwise."

/...

Question 16

Under the laws and regulations in force in your State, does the property of a foreign State enjoy immunity from attachment and other provisional or interim measures prior to an executory judicial decision? Is there any distinction based on the nature or on the use of property involved?

Yes, they enjoy immunity, with the exceptions mentioned in section 47, paragraph 3 (a), of Act No. 97/1963, Collection, concerning unmovable property.

Question 17

Similarly, does the property of a foreign State enjoy immunity from distraint and other forcible measures in aid of execution of a judicial decision? Is there any distinction based on the nature or on the use of the property involved?

See reply to question 16 above.

Question 18

Are there procedural privileges accorded a foreign State in the event of its involvement in a judicial process? If so, please elaborate.

They are not. According to the provisions of section 48 of Act No. 97/1963, Collection, 6/ Czechoslovak courts and notarial offices apply Czechoslovak rules of procedure with all participants enjoying equal status in claiming their rights.

Question 19

Are foreign States exempt from costs or security for costs in the event of participation in a judicial process?

They are not.

6/ Section 48 provides:

"In proceedings, Czechoslovak courts and notarial offices shall act in accordance with Czechoslovak procedural rules and all parties shall have an equal status in claiming their rights."

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Question 20

Is your State inclined to invoke jurisdictional immunities before foreign courts, where, in like circumstances, none would be accorded to foreign States by the courts of your State? Or conversely, are courts in your State prepared to grant jurisdictional immunities to foreign States to the same extent as that to which your State is likely to claim immunities from foreign jurisdiction?

The Czechoslovak Socialist Republic proceeds from the opinion that it enjoys before courts of foreign States absolute immunity which it grants itself to foreign States before its own courts.

(a)	Registration no.	CZ/3
(b)	Date	20 July 1979
(c)	Authority / document	The Government of the Czechoslovak Socialist Republic / Analysis of the topic of jurisdictional immunities of States and their property submitted by the Government of Czechoslovakia to the Secretariat of the United Nations
(d)	Parties	-
(e)	Points of law	The analysis describes the position of the Czechoslovak Socialist Republic on jurisdictional immunities of States and their property that was based on the doctrine of absolute immunity.
(f)	Classification no.	0.c, 1.a, 2.a
(g)	Source(s)	United Nations Legal Series, Materials on Jurisdictional Immunities of States and their Property, United Nations, New York, 1982
(h)	Additional information	-
(i)	Full text - extracts - translation summaries	Appendix: English text of the analysis

Analysis of the topic of jurisdictional immunities of States and their property submitted by the Government of Czechoslovakia to the Secretariat of the United Nations on 20 July 1979

The Permanent Mission of the Czechoslovak Socialist Republic would like to point out in this connection that Section 47 of Act No. 47/1963 concerning private international law and the rules of procedure relating thereto constitutes the basic provision of Czechoslovak law in the sphere of an exclusion of foreign States and their property from the jurisdiction of Czechoslovak civil courts and notarial offices. It clearly follows from this provision that the Czechoslovak law is based in this respect on the theory of absolute immunity.

This theory represents a legal concept according to which a foreign State (and its property as well), being a sovereign territorial and political entity, cannot be submitted to jurisdiction of another State unless it expressly agrees to it. The theory of absolute immunity is the only possible and logic consequence of one of the cornerstones of contemporary international law - the principle of sovereign equality of States.

The application of this principle in international relations is based on the assumption that the will of a State will always be duly and fully respected. This principle does not, however, exclude the possibility that a State under certain circumstances can find it desirable or otherwise appropriate to submit a certain case to the jurisdiction of another State. This case being the consequence of that State's own decision is the only example when a State may establish its jurisdiction in respect to another State. Where there is no expressly declared readiness on the part of one State to submit certain cases to the jurisdiction of another State be it by an oral agreement or by an international treaty, any attempts to establish the jurisdiction unilaterally (by internal law, by decisions of the courts or otherwise) must be considered to be contrary to international law.

There is no rule in contemporary international law identifying possible exceptions from the immunity of States for certain areas of their activities (e.g. economy, finance, trade etc.).

With reference to Section 47, para. 2, subpara. (a) of the enclosed Act the Permanent Mission underlines that this provision can in no way be viewed as forming an exception from the basic principle set forth in Section 47, para 1. This rule, quite on the contrary, confirms the respect for the principle of the sovereign equality of States since its sole aim is to ensure the indisputable and self-evident link that exists between a territorial State and an object forming a content of real property or rights relating to real property in the State concerned.

Summing up, the Permanent Mission would like to note that since the concept of absolute immunity is shared by a considerable number of members of the international community, the correctness and purposefulness of the attitude that the International Law Commission, or to be more exact, its appropriate Working Group, has adopted in this respect on its thirtieth session last year, must necessarily be questioned. The Permanent Mission has in mind particularly the following part of the above-mentioned Working Groups report: "A working distinction may eventually have to be drawn between activities of States performed in the exercise of sovereign authority which are covered by immunities, and other activities in which States, like individuals, are engaged in an increasing manner and often in direct competition with private sectors. ... In other words only *acta iure imperii* or acts of sovereign authority as distinct from *acta iure gestionis* or *iure negotii* are covered by State immunities." (U.N. document A/33/10, p. 388, para. 29). This approach to the topic in question cannot lead to any positive results, since it cannot be met in the affirmative by at least a significant part of the international community.*

(a)	Registration no.	CZ/4
(b)	Date	27 August 1987
(c)	Authority / document	The Supreme Court of the Czechoslovak Socialist Republic (Nejvyšší soud Ěeskoslovenské socialistické republiky) / Supreme Court Opinion Cpjf 27/86 published as Rc 26/1987
(d)	Parties	-
(e)	Points of law	The Supreme Court expresses the opinion that: a) foreign diplomatic missions in the Czechoslovak Socialist Republic cannot be sued because they are organs of a foreign State and have no legal personality, which pertains only to the foreign State itself, b) the damage actions directed against a foreign State can be heard in Czechoslovak courts only if the foreign State voluntarily submits to their jurisdiction, c) submission of the foreign State to the hearing in Czechoslovak courts does not imply that the foreign State submits to their jurisdiction also as regards the execution of judgment.
(f)	Classification no.	0.c, 1.a, 2.a
(g)	Source(s)	Sbírka soudních rozhodnutí (Collection of Judicial Decisions) 87, 9-10
(h)	Additional information	The Opinion is not a decision in rem, but a commentary on and interpretation of Act No. 97/1963 concerning private international law and the rules of procedure relating thereto, as amended
(i)	Full text - extracts - translation summaries	Appendix 1: Extract from Supreme Court Opinion Appendix 2: English translation of the extract

V praxi soudů přicházejí nikdy žaloby o náhradu škody, jež jsou podávány proti zastupitelským orgánům cizích států. Pokud neplyne nic jiného z mezinárodní smlouvy, je nutno vycházet v takovém případě z ustanovení §47 zákona č. 97/1963 Sb., nebo zastupitelský orgán (velvyslanectví, vyslanectví) tu vystupuje jménem cizího státu, který je v uvedeném právním vztahu pasivně legitimován. Žalobu o náhradu škody tu může český soud projednávat jen tehdy, jestliže se cizí stát podrobí jeho pravomoci. Podrobení se tomuto projednávání věci před českým soudem neznamená ovšem, že se cizí stát podrobil pravomoci i pokud jde o soudní výkon rozhodnutí.

Správně proto místský soud v Praze uvedl v odůvodnění svého rozhodnutí o odvolání proti rozsudku vydanému obvodním soudem pro Prahu 6 ve věci sp. zn. 8 C 111/82, v níž byla podána žaloba o náhradu škody proti velvyslanectví cizího státu a na této žalobě žalobce setrval, že diplomatické mise jsou zahraničním orgánem cizího státu a nemají právní subjektivitu, která tu náleží jen cizímu státu samotnému.

From time to time the courts are required to deal with actions for damages directed against foreign diplomatic missions. Unless an international treaty provides otherwise, Section 47 of Act No. 97/1963 must be applied because the diplomatic mission acts on behalf of a foreign State which in this legal relation has the capacity to be sued. The damage action can be heard in Czechoslovak courts only if the foreign State voluntarily submits to their jurisdiction. However, submission to the hearing in Czechoslovak courts does not imply that the foreign State submits to their jurisdiction also as regards the execution of judgement.

In the reasoning of its decision on an appeal against the judgment delivered by the District Court for Prague 6 in case ref. 8 C 111/82 where an action for damages was brought against a foreign embassy and the plaintiff insisted on the claim, the Regional Court in Prague correctly stated that a diplomatic mission is an organ of a foreign State and has no legal personality, which pertains only to the foreign State itself.

(a)	Registration no.	CZ/5
(b)	Date	1 November 2001
(c)	Authority / document	The Government of the Czech Republic / Guarantee Agreement between the Czech Republic and Kreditanstalt für Wiederaufbau
(d)	Parties	The Czech Republic and Kreditanstalt für Wiederaufbau (a corporation organised and existing under public law of Germany)
(e)	Points of law	In the Guarantee Agreement the Czech Republic (the Guarantor) waives its immunity (other than with respect to its property solely serving military, security or diplomatic purposes) from court, enforcement, arbitration or any other legal proceeding.
(f)	Classification no.	0.b.3, 1.b, 2.b
(g)	Source (s)	-
(h)	Additional information	<p>1. The Guarantee Agreement pertains to a facility agreement made between Kreditanstalt für Wiederaufbau and ĚESKÉ DRÁHY, státní organizace (state organization), in which KfW has agreed to make available a loan facility for the purpose of the partial financing of the rehabilitation of the Dièin-Praha-Bøeclav railway line (Corridor I).</p> <p>2. The Guarantee Agreement is governed by the laws of the Federal Republic of Germany.</p> <p>3. Any dispute or difference between Kreditanstalt für Wiederaufbau and the Czech Republic out of or in connection with the Guarantee Agreement shall be referred to and finally settled by arbitration under the Rules of Conciliation and Arbitration of the International Chamber of Commerce.</p>
(i)	Full text - extracts - translation - summaries	Appendix: English text of the relevant provision of the Guarantee Agreement

To the extent the Guarantor has or may acquire in any jurisdiction immunity from court, enforcement, arbitration or any other legal proceeding, the Guarantor hereby irrevocably waives such immunity (other than with respect to its property solely serving military, security or diplomatic purposes).

(a)	Registration no.	CZ/6
(b)	Date	15 December 1997
(c)	Authority / document	District Court for Prague 6 / case No. E 1426/97, decision of 15 December 1997
(d)	Parties in the case	General Health Insurance Company of the Czech Republic / Embassy of the State of Palestine in the Czech Republic
(e)	Points of law	The Court stated in the decision that: a) The Embassy of the State of Palestine does not have legal personality - it is merely an authority of the State of Palestine; b) With regard to Section 47 of Act No. 97/1963 concerning private international law and the rules of procedure relating thereto (see CZ/1), in the given case the State of Palestine could be subject to the jurisdiction of Czech courts only if it voluntarily submitted to such jurisdiction.
(f)	Classification no.	0.b.1, 1.a, 2.a
(g)	Source(s)	-
(h)	Additional information	By its decision of 15 December 1997 the District Court for Prague 6 corrected its previous erroneous decision of 30 September 1997 on the same case ordering that the General Health Insurance Company's claim be satisfied by the taking (deducting) the debt off the debtor's (Embassy's) bank account.
(i)	Full text - extracts - translation - summaries	Appendix 1: Copy of the decision of the District Court for Prague 6 of 15 December 1997, No. E 1426/97 Appendix 2: English translation of the summary of the decision



Toto rozhodnutí je vykonatelné - nabylo právní moci

dne: 12.03.1998

OBVODNÍ SOUD PRO PRAHU 6

dne: 14.10.2002

E 1426/97

U S N E S E N Í

Obvodní soud pro Prahu 6 rozhodl v právní věci oprávněného Všeobecné zdravotní pojišťovny ČR, proti povinnému Velvyslavectví státu Palestina, Na Ořechovce 4, Praha 6

t a k t o :

Soud prohlašuje nařízený výkon rozhodnutí dle usnesení Obvodního soudu pro Prahu 6, ze dne 30.9.1997 čj. E 1426/97 za nepřipustný. Soud řízení o výkon tohoto řízení **z a s t a v u j e .**

O d ů v o d n ě n í :

Návrhem ze dne 4.9.1997 se domáhá oprávněná nařízení výkonu rozhodnutí odepsáním z účtu povinného pro pohledávku ve výši 41.283,—Kč dle exekučního titulu a to platebního výměru č.Ro 2142000663 oprávněného, který nabyl právní moci dne 15.5.1997.

Soud usnesením ze dne 30.9.1997 výkon rozhodnutí odepsáním z účtu dle návrhu ze dne 4.9.1997 nařídil. Po vydání usnesení o nařízení výkonu rozhodnutí, soud tímto usnesením prohlašuje výkon rozhodnutí za nepřipustný dle § 268 odst. 1. písm. h o.s.ř. a to pro nedostatek pravomoci českého soudu vůbec.

Soud odůvodňuje toto své nové stanovisko poukazem na zákonné ustanovení § 47 odst. 1 zák. č. 97/63 sb. z kterého jasně vyplývá, že pravomoci tehdejších československých nyní českých soudů nejsou podrobeny s výjimkou § 47 odst. 3 výše uvedeného zákona cizí státy a osoby, jež podle mezinárodních smluv nebo jiných pravidel mezinárodního práva požívají v ČR imunity.

Povinný uvedený v návrhu na nařízení výkonu rozhodnutí jako Velvyslavectví státu Palestina je pouze orgánem státu Palestina a vlastní právní subjektivitu nemá.

Soud pochybil, pokud výkon rozhodnutí vůči povinnému nařídil, neboť s ohledem na výše uvedená ustanovení zákona č.97/63 sb. by Stát Palestina mohl být podroben pravomoci českého soudu jedině v případě, že by se soudní pravomoci podrobil dobrovolně.

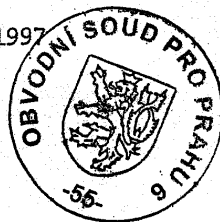
Soud nápravu vadného soudního rozhodnutí učinil tak, že prohlásil dle § 268 odst. 1.písm. h o.s.ř. nařízený výkon rozhodnutí za nepřipustný, neboť ho nelze vykonat ze nedodržení podmínky řízení spočívající v nedostatku pravomoci českých soudů.

P o u č e n í : Proti tomuto usnesení je možno podat odvolání do 15ti dnů ode dne jeho doručení k Městskému soudu v Praze prostřednictvím soudu zdejšího.

V Praze dne 15. prosince 1997

JUDr. Marta Beránková
předsedkyně senátu

Za spvánost-E.Dvořáčková



The plaintiff (General Health Insurance Company of the Czech Republic) requested the court to order that the decision be executed by taking (deducting) the debt (sums charged in the payment assessment of the General Health Insurance Company) amounting to CZK 41,283 off the debtor's (Palestinian Embassy's) bank account. In its decision of 30 September 1997 the District Court for Prague 6 ordered execution of the decision. Having issued this decision, the same court by decision dated 15 December 1997 declared that the execution of the previous decision was inadmissible. In stating the reasons for this new and final opinion it referred to the provision of Section 47, para 1 of Act No. 97/1963 concerning private international law and the rules of procedure relating thereto, under which foreign States and persons who under international treaties or other rules of international law enjoy immunity in the Czech Republic are not subject to the jurisdiction of Czech courts, except for cases defined in Section 47, para 3 of the Act. The court stated that the debtor identified in the motion to commence execution proceedings was merely an authority of the State of Palestine and thus had no legal personality and that the State of Palestine could be subject to the jurisdiction of Czech courts only if it voluntarily submitted to such jurisdiction.

(a)	Registration no.	CZ/7
(b)	Date	31 August 1995
(c)	Authority / document	Superior Court in Prague / decision of 31 August 1995, No. 10 Cmo 418/95-16
(d)	Parties in the case	Petr Roith (provider of cleaning services) / Embassy of the Republic of South Africa in the Czech Republic
(e)	Points of law	The court stated in its decision that: a) The diplomatic mission of a foreign state is neither a natural nor a legal person and therefore has no capacity to be a party to the proceedings; b) Even if an existing entity, i. e. a state, is identified as the defendant the proceedings against it would have to be stopped on the grounds of the want of jurisdiction of courts of the Czech Republic arising from Section 47 of Act No. 97/1963 concerning private international law and the rules of procedure relating thereto (see CZ/1).
(f)	Classification no.	0.b.3, 1.a, 2.a
(g)	Source(s)	-
(h)	Additional information	In the said decision, the Superior Court in Prague affirmed the decision of the Regional Commercial Court in Prague of 8 March 1995, No. 81 Ro 1618/94-8.
(i)	Full text - extracts - translation - summaries	Appendix 1: Copy of the decision of the Superior Court in Prague of 31 August 1995, No. 10 Cmo 418/95-16 Appendix 2: English translation of the summary of the decision

Č.j. 10 Cmo 418/95-16

U s n e s e n í

Vrchní soud v Praze jako soud odvolací rozhodl v právní věci žalobce Petr ROITH - dodavatel úklidových prací, Pekárenská 2, Praha 4, právně zastoupeného JUDr. Karlem Stečinským, advokátem, Ohradní 1352, 140 00 Praha 4 proti žalovanému Jihoafrické velvyslanectví Praha, Ruská 65, Praha 10 o zaplacení 30.000,-- Kč, o odvolání žalobce proti usnesení Krajského obchodního soudu v Praze č.j. 81 Ro 1618/94-8 ze dne 8. 3. 1995

t a k t o :

Usnesení Krajského obchodního soudu v Praze č.j. 81 Ro 1618/94-8 ze dne 8. 3. 1995 se potvrzuje.

Žalobce nemá právo na náhradu nákladů odvolacího řízení.

O d ů v o d n ě n í :

Návrhem na zahájení řízení, podaným u Krajského obchodního soudu v Praze dne 13. 7. 1994, se žalobce domáhal na označeném žalovaném zaplacení 30.000,-- Kč jako náhrady škody, která mu vznikla tím, že mu nebylo umožněno vykonávat úklidové práce od 28. 2. 1994 po dobu 6 měsíců, takže vzniklá škoda za 1 měsíc představuje částku 5.000,-- Kč, a náhrady nákladů řízení. Navrhl vydání platebního rozkazu.

Krajský obchodní soud v Praze usnesením č.j. 81 Ro 1618/94-8 ze dne 8. 3. 1995 řízení zastavil a rozhodl, že žádný z účastníků nemá právo na náhradu nákladů řízení a žalobci se nevrací soudní poplatek, protože nebyl zaplacen. V odůvodnění uvedl, že žalobce označil jako žalovaného neexistující subjekt, což je neodstranitelný nedostatek podmínky řízení, takže řízení musí být zastaveno podle § 104 odst. 1 o.s.ř. Usnesení bylo doručeno žalobci dne 15. 5. 1995.

Proti usnesení podal žalobce v zákonem stanovené lhůtě odvolání, v němž uvedl, že jím označený žalovaný vystupoval ve smluvním vztahu pod označením, které je uvedeno v návrhu na zahájení řízení, proto zastává názor, že jako právní subjekt existuje. Navrhl zrušení napadeného usnesení.

Vrchní soud v Praze jako soud odvolací projednal věc na základě podaného odvolání podle § 212 o.s.ř. a bez nařízení jednání podle § 214 odst. 2 písm. c) o.s.ř. dospěl k závěru, že odvolání není důvodné.

Ze spisového materiálu zjistil odvolací soud, že žalobce označil jako žalovaného "Jihoafrické velvyslanectví Praha, Ruská 65, Praha 10". Soud prvního stupně zastavil řízení po zjištění, že žalobcem označený žalovaný nemá způsobilost být účastníkem řízení podle § 19 o.s.ř.

Odvolací soud se s tímto závěrem soudu prvního stupně ztotožňuje. Zastupitelský orgán jiného státu není ani fyzickou ani právnickou osobou a nemá proto způsobilost být účastníkem řízení. Podle ustanovení § 47 odst. 1 zákona č. 97/1963 Sb., o mezinárodním právu soukromém a procesním, ve znění pozdějších předpisů, jsou vyňaty z pravomoci soudů České republiky cizí státy a osoby, jež podle mezinárodních smluv nebo jiných pravidel mezinárodního práva nebo podle zvláštních českých právních předpisů požívají v České republice imunity. To znamená, že i kdyby byl žalobcem jako žalovaný označen existující subjekt tj. stát, muselo by být řízení proti němu zastaveno pro nedostatek pravomoci soudů České republiky.

Z uvedených důvodů odvolací soud rozhodnutí soudu prvního stupně potvrdil podle § 219 o.s.ř.

O náhradě nákladů odvolacího řízení bylo rozhodnuto podle § 224 odst. 1 a § 142 odst. 1 o.s.ř., jak je ve výroku uvedeno.

Proti tomuto usnesení není odvolání přípustné.

V Praze dne 31. srpna 1995

JUDr. Jiří Chudoba, v. r.
předseda senátu

Za správnost vyhotovení:




CZ/7

Appendix 2

The plaintiff (P. R., provider of cleaning services) applied to the Regional Commercial Court in Prague and claimed from the defendant (Embassy of the Republic of South Africa in the Czech Republic) the payment of CZK 30,000 in compensation for losses the plaintiff allegedly incurred due to the fact that he was not allowed to provide cleaning services for a period of six months. The Regional Commercial Court stopped the proceedings stating that the plaintiff identified as the defendant an inexistent entity, i.e. an entity which, under Czech law, does not have the capacity to be a party to the proceedings. The plaintiff lodged an appeal against this decision and claimed that the party he had identified as the defendant had acted in the contractual relation under the name which had been stated in the petition initiating the suit; the plaintiff therefore held the view that the defendant does exist as a legal person. The Superior Court in Prague dismissed the appeal by the plaintiff and upheld the decision of the Regional Commercial Court. According to the Superior Court, the diplomatic mission of a foreign state is neither a natural nor a legal person and therefore has not the capacity to be a party to the proceedings. With reference to Section 47, para 1, of Act No. 97/1963 concerning private international law and the rules of procedure relating thereto, under which foreign states and individuals enjoying in the Czech Republic immunity in conformity with international treaties or other rules of international law or in conformity with special Czech legal regulations shall not be subject to the jurisdiction of Czech courts, the Superior Court further stated that even if the plaintiff identified as the defendant an existing entity, i.e. a state, the proceedings against such a state would have to be stopped on the grounds of the want of jurisdiction of the courts of the Czech Republic.

(a)	Registration no.	CZ/8
(b)	Date	24 October 1997
(c)	Authority / document	The Czech Republic (the Government of the Czech Republic, the Ministry of Finance of the Czech Republic) / Credit Agreement
(d)	Parties to the contract	The Czech Republic (as guarantor); AERO Vodochody, a.s. (joint stock company) (as borrower); Canadian Imperial Bank of Commerce (as agent); Československá obchodní banka (Czechoslovak Commercial Bank), a. s. (as local agent)
(e)	Points of law	In the Credit Agreement AERO Vodochody, a.s., (the "Company") and the Czech Republic (the "Guarantor") agree to waive and not to claim or plead any immunity that it or any of their property has or hereafter may acquire in connection with any legal action or proceeding related to the Credit Agreement.
(f)	Classification no.	0.b.3, 1.b, 2.b
(g)	Source (s)	-
(h)	Additional information	-
(i)	Full text - extracts - translation - summaries	Appendix: English text of the relevant provision (Section 12.14) of the Credit Agreement

CZ 8

Appendix

Each of the Company and the Guarantor irrevocably and unconditionally agrees to waive and not to claim or plead any immunity (whether sovereign or otherwise) that it or any of its property has or hereafter may acquire from any aspect of any legal action or proceeding to enforce or collect upon the Note, the Guarantee, any other Credit Document or any other Obligation or liability related to or arising from the transactions contemplated hereby, including, without limitation, immunity from jurisdiction or judgment of any court, immunity from execution of judgment, immunity from attachment prior to judgment or in aid of execution of judgment, or immunity from set-off or any legal process (whether service of notice or otherwise). The waivers contained in this Section 12.14 shall, among other things, be effective to the fullest extent permitted under the Foreign Sovereign Immunities Act of 1976, of the United States, as amended, and shall be irrevocable and not subject to withdrawal for the purposes of such Act; provided, however, that the waiver of immunity contained herein shall not extend to property of the Guarantor (wherever situated) serving military, national security or diplomatic purposes of the Guarantor. The Company and the Guarantor affirm their respective representations that the activities contemplated by the Credit Documents constitute commercial activities of the Company and the Guarantor within the meaning of the Foreign Sovereign Immunities Act of 1976 and agree not to contest this characterization.

FINLAND

Introduction

The data on State practice regarding State immunities compiled by the Ministry for Foreign Affairs of Finland mainly consists of judicial decisions. These judicial decisions include cases in which a foreign State has been sued before a Finnish court as well as cases where the State of Finland has been summoned by an individual or by a company to a foreign court. The data also contains cases where Finland has been summoned to a court of a State not member of the Council of Europe. In addition, there are some replies of the Minister for Foreign Affairs to written questions put forward by members of Parliament and a statement of the Ministry for Foreign Affairs regarding immunity from the execution of a judgment. The cases mainly deal with jurisdictional immunity. Immunity from the execution of a judgment has been less often under consideration. A more detailed description of the cases is included in the sixteen enclosed standard forms, or in the short summaries or other materials attached thereto.

Finland is not a State party to the European Convention on State Immunity (ETS No 074) nor to any other relevant convention. Finland, however, has actively contributed to the work of the ad hoc Committee of the Sixth Committee of the UN General Assembly on the Jurisdictional Immunities of States and Their Property (see also Finland/10).

As regards the table of description in the CAHDI circular 241001, particularly the section on "state immunity" with its distinction between absolute jurisdictional immunity (1.a) and limited jurisdictional immunity (1.b), it is understood that a conclusion as to whether the act in question falls under 1.a or 1.b is meant to be made by the competent authority - for example, a court or the Ministry for Foreign Affairs. Thus, the distinction has been made on the basis of a decision of the authority in question. However, the data also includes some cases that are still pending before a court. In respect of those cases the distinction could not have been made.

Most of the cases concern labour disputes between a foreign mission and a locally recruited employee. It is noted that the legal practice regarding these cases has not been entirely consistent. With the exception of one judgment rendered by a district court, the Finnish courts have, however, found that, due to the immunity, they cannot exercise jurisdiction over labour disputes involving foreign missions. This interpretation has also been confirmed by the Supreme Court of Finland in its decision No. KKO:1993:120 (see also Finland/2). Those cases concerning labour disputes where a court has concluded that it does not have jurisdiction over the case due to immunity, have been classified under 1.a (absolute immunity). In cases where the court has found that it has jurisdiction, the case has been classified under 1.c (jurisdictional immunity not applicable).

The distinction between acts of government (*jus imperii*) and acts of a commercial nature (*jus gestionis*) has been emphasized both in the judicial decisions and in the statements by the Minister for Foreign Affairs. With the exception of one judgment entered by a district court, the Finnish authorities have concluded that foreign states do not enjoy immunity in relation to their commercial transactions with a natural or juridical person (*jus gestionis*).

(a)	Registration no/ N° d'enregistrement	FIN/1
(b)	Date	1 February 2002
(c)	Author(ity)/ (Service) auteur	United States District Court, District of New Jersey
(d)	Parties	Komet Inc. and Konetehdas OY Komet (company) v. Republic of Finland (State) and John Doe
(e)	Points of law	The Court established that Finland was immune from suit in the Courts of the United States for claims arising under a cooperative tax treaty between Finland and the United States (Convention for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income and on Capital). Finland claimed immunity in the case.
(f)	Classification no/ n°	0.a, 1.a, 2.c
(g)	Source(s)	Civil Action No. 99-6080 (JWB)
(h)	Additional information/ Renseignements complémentaires	The order entered by the United States District Court for the District of New Jersey vacated the default judgment previously entered by the Court on July 5, 2001 against Finland. The United States of America submitted an amicus brief on behalf of Finland.
(i)	Full text – extracts – translation - summaries/ Texte complet – extraits – traduction - résumés	Full text: Appendix 1

FIN/1

Appendix 1

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

KOMET INC., and :
KONETEHDAS OY KOMET, :
 :
Plaintiffs, :

v. :

REPUBLIC OF FINLAND and :
JOHN DOE, :
 :
Defendants. :

Civil Action No. 99-6080 (JWB)

O P I N I O N

APPEARANCES:

HOWARD A. MILLER, ESQUIRE
20 Mercer Street
Hackensack, New Jersey 07601-5608
(Attorney for Plaintiffs)

SAIBER SCHLESINGER SATZ & GOLDSTEIN
By: Sean R. Kelly, Esquire
One Gateway Center, 13th Floor
Newark, New Jersey 07102-5311

- and -

ARENT FOX KINTNER PLOTKIN & KAHN
By: Michael Evan Jaffe, Esquire
Michael S. Rothman, Esquire
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036-5339
(Attorneys for Defendant
Republic of Finland)

U.S. DEPARTMENT OF JUSTICE
 By: Stuart D. Gibson, Esquire
 Trial Attorney, Tax Division
 P.O. Box 227
 Ben Franklin Station
 Washington, D.C. 20044

- and -

CHRISTOPHER J. CHRISTIE
 United States Attorney
 By: Susan C. Cassell
 Assistant United States Attorney
 Federal Building
 970 Broad Street
 Newark, New Jersey 07102
 (Attorneys for *Amicus Curiae*
 United States of America)

BISSELL, Chief Judge

This matter comes before the Court on defendant Republic of Finland's ("Finland") motion to vacate the default judgment entered by the Court on July 5, 2001. The motion raises issues of the Court's subject matter jurisdiction and, in particular, requires the Court to consider whether Finland is immune from suit in this Court for claims arising under a cooperative tax treaty between Finland and the United States.

FACTS

A. The Parties

Plaintiff Konetehdas Oy Ko-met ("Komet-Finland") is a limited liability company of the Republic of Finland. (Compl., ¶ 2). Komet-Finland is in the machine tool business, specializing in the modification or manufacture and marketing of precision, balanced parts, such as drive shafts and fans. (Id., ¶ 7).

Plaintiff Komet USA Inc. ("Komet-USA") is a corporation of the State of Delaware whose business address is located in Riverdale, New Jersey. (Id., ¶ 1). Komet-USA was incorporated to serve as the operational arm of and in joint venture with Komet-Finland. (Id., ¶ 9). The President and "main owner" of both Komet-USA and Komet-Finland is Treho Linnavuorri. (Id., ¶ 8). Defendant Finland is a sovereign country located in Scandinavia (Europe). (Id., ¶ 3).

B. Plaintiffs' Cause of Action

The Complaint alleges that, for the tax years 1989 through 1991, Komet-USA supplied consulting services to Komet-Finland. As a result Komet-USA invoiced Komet-Finland and was paid for those consulting services. These payments were deducted by Komet-Finland to reduce its Finnish tax liability as a corporate expense. For tax years 1992 through 1995, however, Finland's taxing authority did not approve these payments as tax deductions. Komet-Finland sought rectification in accordance with Finnish procedure and secured partial deductions for 1993 and 1994. Plaintiffs contend that the Finnish tax authorities treated Komet-Finland differently than other domestic corporations in regard to these deductions. Moreover, they assert that Finland's failure to approve the tax deductions in toto have resulted in an unjust taking of revenue from Komet-USA in violation of international law and treaties. Plaintiffs

alleged generally that Finland failed to abide by the Convention for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income and on Capital, Dec. 30, 1990, U.S.-Fin., T.I.A.S. No. 12101 [hereinafter "Convention on Double Taxation" or "the Convention"].

PROCEDURAL HISTORY

On December 29, 1999, plaintiffs filed the instant action and a summons was issued for defendant Finland. On August 21, 2000, a return of service executed as to Finland on June 29, 2000 was filed with the Clerk. By May 21, 2001, no answer had been filed and plaintiffs moved for default judgment. On July 2, 2001, the Court entered default judgment in the amount of \$146,769.50 plus post-judgment interest and costs in favor of plaintiffs against Finland, at which time the case was marked closed.¹

On August 30, 2001, Finland filed the instant motion to vacate the default judgment pursuant to Fed. R. Civ. P. 60(b). On December 18, 2001, with consent of the parties and permission of the Court, the United States of America submitted an amicus brief on behalf of Finland.

¹ Although the Court had received correspondence in regard to plaintiffs' Complaint from a representative of the Finnish Government, these communications contained only generalized claims to sovereign immunity and were deemed inadequate to avoid the entry of default judgment.

DISCUSSIONA. Governing Legal Standard

Defendant seeks relief from the default judgment entered against it under Federal Rule of Civil Procedure 60(b). Rule 60(b) permits a court to vacate a prior judgment if, inter alia, the judgment is void, or for "any other reason justifying relief from the operation fo the judgment." Fed. R. Civ. P. 60(b)(4) and (6). A judgment is void, for instance, if the court lacked subject matter jurisdiction over the action when it entered the judgment. Marshall v. Bd. of Educ., 575 F.2d 417, 422 (3d Cir. 1978) (citing United States v. Walker, 109 U.S. 258, 265-67 (1883)) (determining that a judgment may be void, and therefore subject to relief under 60(b)(4), if the court that rendered it lacked jurisdiction of the subject matter).

Since 1976, subject matter jurisdiction of suits against foreign sovereign states has been governed by the Foreign Sovereign Immunity Act ("FSIA"), which is codified in a number of sections of the United States Code, Title 28. In the first instance, § 1330 vests in the district courts original jurisdiction of any non-jury civil action against a foreign state as to any claim for relief in personam with respect to which the foreign state is not entitled to sovereign immunity. 28 U.S.C. § 1330. From this point, the FSIA states broadly that foreign states enjoy sovereign immunity from all suits except in certain

situations. 28 U.S.C. § 1604. Section 1605, in turn, sets forth the specific categories of actions as to which foreign states are not immune. Thus, if a civil action against a foreign state does not fit within a § 1605 exception to the general rule of sovereign immunity, the foreign state defendant is immune, and, concomitantly, the district court lacks subject matter jurisdiction. Argentine Republic v. Amerada Hess Shipping Corp., 488 U.S. 428, 434-39 (n.1) (1989) (determining that the text and structure of the FSIA demonstrate Congress's intention that the FSIA be the sole basis for obtaining subject matter jurisdiction over a foreign state in federal courts); Erickson v. Alitalia Linee Aeree Italiane, 1991 WL 117797, at *2 (D.N.J. June 5, 1991).

With respect to analyzing particular claims to immunity under the FSIA, Congress intended courts to apply certain burden-shifting standards. Federal Ins. Co. v. Richard I. Rubin & Co., Inc., 12 F.3d 1270, 1285 and n.13 (3d Cir. 1993). The defendant bears an initial burden of making a prima facie showing that it is a "foreign state" and thus enjoys sovereign immunity. (Id.) If this showing is made, the burden then shifts to the plaintiff to produce evidence establishing that the foreign state is not entitled to immunity under one of the exceptions of § 1605. (Id.) The ultimate burden of proving immunity rests with the party claiming that it is a foreign state. (Id.)

B. Analysis

In the instant case, the plaintiffs have sought direct relief in personam against Finland. Finland claims immunity from suit under the FSIA as a foreign state. That Finland is a "foreign state" under the FSIA is uncontested; therefore, the burden shifts to the plaintiffs to establish that their claims fall within a § 1605 exception.

Although plaintiffs do not cite any part of § 1605, they apparently seek to persuade the Court to determine that Finland has waived its sovereign immunity under the "express language" of the Convention.² (Plaintiffs' Br. at 2). The lone support for this argument comes in the form of the following excerpt from Article 25 of the Convention:

Where a person considers that the actions of one or both of the Contracting States result or will result for him in taxation not in accordance with the provisions of this

² The issue of waiver is treated in the exception appearing in § 1605(a)(1) which provides:

(a) A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case -

(1) in which the foreign state has waived its immunity either explicitly or by implication, notwithstanding any withdrawal of the waiver which the foreign state may purport to effect except in accordance with the terms of the waiver...

Convention, he may, irrespective of the remedies provided by the domestic law of those States, present his case to the competent authority of the Contracting State of which he is a resident or national

Convention on Double Taxation, supra., art. 25, para. 1.

(Emphasis added). The scope of the term "competent authority" as used in this paragraph, plaintiffs argue, should extend to the district courts, and, thus, this provision should be found to constitute a waiver of Finland's immunity from suit in this Court.

This argument is unpersuasive. First, it is significant that plaintiffs do not cite a single decision that supports this view. Second, plaintiffs' interpretation of the express language is flawed because it renders incoherent the subsequent provisions of Article 25, which further inform the role of the "competent authority." Plaintiffs tacitly admit this fact given their complete failure to discuss the significance of the remaining paragraphs of Article 25. Third, and finally, plaintiffs' understanding is controverted by the very practice of the government in discharging its duties under the Convention. The amicus submission of the United States substantially establishes that the competent authority referred to throughout Article 25, far from pertaining to a United States court, is in fact an officer of the Department of State who negotiates with a Finnish counterpart in aid of the claim management procedure contemplated

clearly by the Convention. In sum, plaintiffs' selective employment of portions of the Convention is wholly insufficient to establishing the type of unequivocal waiver that must be present in order to support a deprivation of immunity provided a foreign state by the FSIA.³

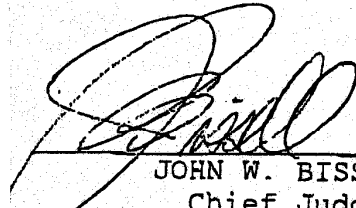
Plaintiffs have offered nothing that addresses these difficulties with their waiver theory. Accordingly, the Court determines that plaintiffs have failed to demonstrate that a § 1605 exception applies in this case. In the absence of an applicable § 1605 exception, the FSIA compels a finding that Finland is immune from the instant suit. This conclusion, in turn, is the equivalent of a determination that this Court was without subject matter jurisdiction to enter default judgment against Finland. A judgment entered by a Court without subject matter jurisdiction is void. Marshall, 575 F.2d at 422. Consequently, defendant Finland is entitled to vacation of the default judgment pursuant to Fed. R. Civ. P. 60(b)(4).

CONCLUSION

For the foregoing reasons, defendant Finland's motion to vacate the default judgment is granted, and the Amended Complaint is dismissed without prejudice, for lack of subject matter

³ Aquinda v. Texaco, Inc., 175 F.R.D. 50, 52 (S.D.N.Y. 1997) (citing cases) (recognizing as well settled that waiver of sovereign immunity must be clear, complete, unambiguous and unmistakable in order to be effective), vacated on other grounds sub nom., Jota v. Texaco, Inc., 157 F.3d 153 (2d Cir. 1998)).

jurisdiction in this forum. Each side shall bear its own costs and expenses.



JOHN W. BISSELL
Chief Judge
United States District Court

DATED: February 1st, 2002

(a)	Registration no/ N° d'enregistrement	FIN/2
(b)	Date	30 September 1993
(c)	Author(ity)/ (Service) auteur	Supreme Court (Korkein oikeus)
(d)	Parties	Hanna Heusala (individual) v. Republic of Turkey (state)
(e)	Points of law	The Court established that the Finnish courts were not competent to consider labour disputes involving local employees of foreign missions when duties of the employees were closely related to the exercise of governmental authority.
(f)	Classification no/ n°	0.a, 1.a, 2.c
(g)	Source(s)	Korkeimman oikeuden ratkaisuja 1993 II at 563.
(h)	Additional information/ Renseignements complémentaires	Although Finland is not a party to the European Convention on State Immunity, the Supreme Court referred to the Convention as a source when analysing the rules and principles of customary international law.
(i)	Full text – extracts – translation - summaries/ Texte complet – extraits – traduction - résumés	Summary English: Appendix 1

FIN/2

Appendix 1

The case before the Supreme Court of Finland concerned a labour dispute between the Embassy of Turkey and a locally recruited employee, who had worked as a secretary and translator. The Supreme Court held that the European Convention on State Immunity was a valid source when analysing the rules and principles of customary international law. The Supreme Court stated that, pursuant to the Convention, a State cannot claim immunity if the proceedings relate to a contract of employment between the State and an individual, where the work has to be performed on the territory of the forum State. However, the Court referred to Article 32 of the Convention, according to which 'nothing in the present Convention shall affect privileges and immunities relating to the exercise of the functions of diplomatic missions and consular posts and of persons connected with them'. On the basis of Article 32 and customary international law, the Court found that a foreign mission as an employer could invoke immunity from jurisdiction before a court of the receiving State when the labour dispute was closely related to the official duties of the mission.

The Court held that the duties of the Plaintiff were meant to serve the official duties of a member of the diplomatic staff of Turkey and was thus closely related to the exercise of governmental authority of Turkey. Therefore, Turkey enjoyed jurisdictional immunity in the case and the Finnish courts lacked subject matter jurisdiction.

(a)	Registration no/ N° d'enregistrement	FIN/3
(b)	Date	3 July 2002
(c)	Author(ity)/ (Service) auteur	Labour Court (<i>Tribunal regional do trabalho – 10 região</i>), Brazil
(d)	Parties	Vilda Custodio de Carvalho (individual) v. Republic of Finland (state)
(e)	Points of law	The Court established that it was competent to consider labour disputes involving locally recruited employees of foreign missions. Finland invoked immunity in the case.
(f)	Classification no/ n°	0.a, 1.c, 2.c
(g)	Source(s)	
(h)	Additional information/ Renseignements complémentaires	
(i)	Full text – extracts – translation - summaries/ Texte complet – extraits – traduction - résumés	Summary English: Appendix 1

FIN/3

Appendix 1

The dispute related to pension contributions of a locally recruited housemaid of the official residence of the Finnish Embassy. Finland participated in the proceedings but claimed immunity as a foreign state. The Court established that it was competent to consider a labour dispute against a foreign state as, under the provisions of Brazilian law and case law, foreign missions cannot in principle invoke immunity in labour disputes. Furthermore, the Court found that the diplomatic immunity only applied to the members of the diplomatic staff and not to the mission itself. Finland was ordered by the Court to pay the pension contributions in question.

(a)	Registration no/ N° d'enregistrement	FIN/4
(b)	Date	Plaintiff filed the Complaint on 5 March 2002.
(c)	Author(ity)/ (Service) auteur	United States District Court, Eastern District of New York
(d)	Parties	The Plaintiff (individual) v. Republic of Finland (state), et al.
(e)	Points of law	The Plaintiff complains of his experiences <u>in Finland</u> regarding the enforcement of Finland's criminal and/or civil law by the Finnish government officials and employees. Finland has moved the court to dismiss the Complaint for lack of subject matter jurisdiction under the Foreign Sovereign Immunities Act of 1976 (28 U.S.C. §§ 1330, 1604, 1605, 1608). Hence, Finland has claimed immunity from suit as a foreign state and its ministers and employees have claimed derivative immunity. Furthermore, in case that the Court will find that the sovereign immunity of Finland is not dispositive of the Plaintiff's claims, Finland has moved to dismiss the Complaint on other grounds as well. The case is pending before the Court.
(f)	Classification no/ n°	0.a, 2.c
(g)	Source(s)	Case No. 02 CV-1471 (CBA)(LB)
(h)	Additional information/ Renseignements complémentaires	
(i)	Full text – extracts – translation - summaries/ Texte complet – extraits – traduction - résumés	

(a)	Registration no/ N° d'enregistrement	FIN/5
(b)	Date	6 August 2001
(c)	Author(ity)/ (Service) auteur	The High Court of Justice, Queen's Bench Division, London
(d)	Parties	The Plaintiff (individual) v. Republic of Finland (state) and the Commissioner of Police for the Metropolis
(e)	Points of law	The Claimant has filed a claim against Finland and other defendant for wrongful arrest, malicious prosecution and false imprisonment. As a response to the inquiry by the Embassy of Finland in London, the communication from the Court indicates that the case will be dealt with in accordance with the State Immunity Act 1998. The case is pending before the Court.
(f)	Classification no/ n°	0.a, 1.a, 2.c
(g)	Source(s)	
(h)	Additional information/ Renseignements complémentaires	
(i)	Full text – extracts – translation - summaries/ Texte complet – extraits – traduction - résumés	

(a)	Registration no/ N° d'enregistrement	FIN/6
(b)	Date	Action was filed on 12 April 2000.
(c)	Author(ity)/ (Service) auteur	Court of Shevchenkivskyy district of the city of Kyiv
(d)	Parties	The Plaintiff (individual) v. Republic of Finland (state)
(e)	Points of law	The case concerns a labour dispute between a former locally recruited employee, who worked as a interpreter and the Embassy of Finland. The Embassy of Finland stated in its answer to the note of the Ministry of Foreign Affairs of Ukraine that it did not agree to the waiver of its diplomatic immunity.
(f)	Classification no/ n°	0.a, 1.a, 2.c
(g)	Source(s)	
(h)	Additional information/ Renseignements complémentaires	
(i)	Full text – extracts – translation - summaries/ Texte complet – extraits – traduction - résumés	The observations of the Embassy of Finland: Appendix 1

FIN/6

Appendix 1

The Embassy of Finland present their compliments to the Protocol Department of the Ministry of Foreign Affairs of Ukraine and referring to the Latter's Note No. 202/20-140-1423 of 9 October, 2001, have the honour to state the following:

The employment of Mr. Vadim Mishakov at the Embassy of Finland ended in 1999 in full observance of all the relevant stipulations of his contract of employment, which was concluded with him by a diplomatic representation of a foreign country. Correspondingly, the Embassy of Finland consider the case closed and see no reason for agreeing to the lifting of their diplomatic immunity in the context of the legal proceedings brought against the Embassy by Mr. Mishakov.

The Embassy of Finland avail themselves of this opportunity to renew to the Protocol Department of the Ministry of Foreign Affairs the assurance of their highest consideration.

Kyiv, October 23rd 2001

To
the Ministry for Foreign Affairs of Ukraine

(a)	Registration no/ N° d'enregistrement	FIN/7
(b)	Date	11 November 2001
(c)	Author(ity)/ (Service) auteur	People's Court of Hamovnik, Moscow
(d)	Parties	The Plaintiff (individual) vs. Republic of Finland (state)
(e)	Points of law	The case concerns a labour dispute between a former locally recruited employee and the Embassy of Finland. Finland claimed jurisdictional immunity, holding that the court lacked subject matter jurisdiction. Finland returned the plaintiff's note to the Ministry of Foreign Affairs of Russian Federation.
(f)	Classification no/ n°	0.a, 1.a, 2.c
(g)	Source(s)	
(h)	Additional information/ Renseignements complémentaires	
(i)	Full text – extracts – translation - summaries/ Texte complet – extraits – traduction - résumés	

(a)	Registration no/ N° d'enregistrement	FIN/8
(b)	Date	26 March 1999
(c)	Author(ity)/ (Service) auteur	Ministry for Foreign Affairs of Finland
(d)	Parties	Distrain Office of Helsinki, Embassy of Iraq
(e)	Points of law	In its statement, the Ministry for Foreign Affairs found that participation in commercial activities by a state is not to be considered an act of government, <i>jure imperii</i> and therefore, the state does not enjoy immunity in respect of these activities.
(f)	Classification no/ n°	0.b, 1.b, 2.b
(g)	Source(s)	-
(h)	Additional information/ Renseignements complémentaires	The Ministry referred in its statement to the European Convention on State Immunity, Vienna Convention on Diplomatic Relations and Vienna Convention on Consular Relations.
(i)	Full text – extracts – translation - summaries/ Texte complet – extraits – traduction - résumés	Summary English: Appendix 1

FIN/8

Appendix 1

In this case, the State of Iraq had been ordered by the court to pay a certain amount to a Finnish company. On the grounds of this judgment, the distraint office had foreclosed receivables of Iraq from the bankrupt's estate of another Finnish company. The District Bailiff of Helsinki asked for a statement from the Ministry for Foreign Affairs, concerning the immunity of Iraq from execution in the case.

The Ministry found that participation in commercial activities by a state was not to be considered an act of government, *jure imperii* and, therefore, the state did not enjoy immunity in respect of these activities. The Ministry stated that, in the case in question, the following matters should be taken into account: applicability of the European Convention on State Immunity and the Vienna Convention on Diplomatic Relations and the question of whether the State of Iraq should be considered to become, through succession, a party to the proceedings comparable to a private party in the business relationship in question.

(a)	Registration no/ N° d'enregistrement	FIN/9
(b)	Date	19 November 1998
(c)	Author(ity)/ (Service) auteur	Minister of Foreign Affairs of Finland
(d)	Parties	A reply of the Minister for Foreign Affairs to a written question put forward by a Member of Parliament.
(e)	Points of law	The written question concerned the following: how the status of wrecks of aircraft or ships is regulated by international law.
(f)	Classification no/ n°	0.a, 1.c, 2.c
(g)	Source(s)	KK 1213/1998
(h)	Additional information/ Renseignements complémentaires	
(i)	Full text – extracts – translation - summaries/ Texte complet – extraits – traduction - résumés	Summary English: Appendix 1

FIN/9

Appendix 1

The written question put forward by a Member of Parliament concerned a Finnish wreck of fighter plane which was shut down during the Second World War and lies now in the territorial sea of the Russian Federation. It was questioned why Finland had not demanded the wreck to itself.

In his reply, the Minister for Foreign Affairs stated that international law made a distinction between acts of government and acts of a commercial nature, when examining the title to property belonging to a State. The leading principle has been that property which relates to acts of government enjoys immunity as an expression of the sovereignty of the flag state. During the war, the use of war equipment by the armed forces constitutes an act of government. However, in a state of war, the rules of armed conflict must also be taken into account. These rules create a system of regulation of their own, applicable in times of war. In the light of this, the wreck of the Finnish fighter would enjoy sovereign immunity.

In this connection, it is worth noting that, according to the 2001 UNESCO Convention on the Protection of the Underwater Cultural Heritage, a wreck of a State-owned vessel which is over 100 years old does not enjoy sovereign immunity.

The Minister emphasized, however, that in the relations between Finland and Russia, the treaties in force between the countries (between Finland and the Soviet Union at first and later between Finland and Russia) are a primary concern to be taken into account when examining the status of the wreck. Thus, by virtue of the Peace Treaty of Paris 1947, the Minister concluded that claims concerning the wreck were not possible.

(a)	Registration no/ N° d'enregistrement	FIN/10
(b)	Date	July 2001
(c)	Author(ity)/ (Service) auteur	Minister for Foreign Affairs of Finland
(d)	Parties	A reply of the Minister for Foreign Affairs to a written question put forward by two Members of Parliament.
(e)	Points of law	The written question put forward by two members of the Parliament concerned employment security of the locally recruited employees (Finnish nationals) of the foreign embassies.
(f)	Classification no/ n°	0.a, 1.b, 2.c
(g)	Source(s)	KK 853/2001 vp
(h)	Additional information/ Renseignements complémentaires	
(i)	Full text – extracts – translation - summaries/ Texte complet – extraits – traduction - résumés	Summary English: Appendix 1

FIN/10

Appendix 1

A written question put forward by two Members of Parliament concerned the employment security of local employees (Finnish nationals) working at foreign embassies in Helsinki.

In his reply, the Minister for Foreign Affairs referred to the International Law Commission's Draft Convention on the Jurisdictional Immunities of States and Their Property under discussion at the Ad Hoc Committee of the Sixth Committee of the UN General Assembly. Finland has actively taken part in the work of the Ad Hoc Committee. The ILC draft states, as a rule, that immunity from jurisdiction does not apply, with certain exceptions, to a contract of employment between a State and an individual. In the work of the Committee, Finland has emphasized that the group of persons against whom an employer state can claim immunity should remain as limited as possible. The question concerns the right of an individual to have a case concerning his/her contract of employment heard in a local court and, therefore, it is also a matter of human rights.

In the reply, a tendency in international law to restrict the situations where a State may claim immunity before foreign courts, was recognised. The variety of national legislations has, however, delayed the finalisation of the Convention.

Reference was also made to Article 38 of the Vienna Convention on Diplomatic Relations, according to which other members of the staff of the mission and private servants who are nationals of or permanently resident in the receiving State shall enjoy privileges and immunities only to the extent admitted by the receiving State. Finland has not admitted privileges or immunities for the local employees of foreign embassies. Consequently, the foreign embassies are not exempted from their obligations under Finnish social security provisions. They are obliged to observe the peremptory provisions of the Finnish labour law in respect of their local employees.

(a)	Registration no/ N° d'enregistrement	FIN/11
(b)	Date	31 March 1999
(c)	Author(ity)/ (Service) auteur	District Court of Helsinki
(d)	Parties	Inkeri Kivi-Koskinen (individual) v. Kingdom of Belgium (state)
(e)	Points of law	The Court entered a default judgment against Belgium in a labour dispute between the Embassy of Belgium and its former local employee.
(f)	Classification no/ n°	0.a, 1.b, 2.c
(g)	Source(s)	
(h)	Additional information/ Renseignements complémentaires	The default judgment was vacated by the Court when it confirmed the friendly settlement of the parties.
(i)	Full text – extracts – translation - summaries/ Texte complet – extraits – traduction - résumés	Summary English: Appendix 1

FIN/11

Appendix 1

The case concerned the termination/cancellation of an employment contract between the Embassy of Belgium and its locally recruited secretary. Belgium did not react to the claim. The Court did not expressly address the matter of state immunity, but stated that the claim was not manifestly unfounded. Therefore, the Court entered a default judgment against the Kingdom of Belgium.

Belgium moved the Court to enter an order vacating the default judgment. It claimed immunity and, therefore, held that the Court lacked subject-matter jurisdiction in the case. The parties, however, settled the dispute and this friendly settlement was confirmed by the Court. With this confirmation, the earlier default judgment was vacated by the Court.

(a)	Registration no/ N° d'enregistrement	FIN/12
(b)	Date	Judgment was received by the Embassy of Finland on 6 July 2000.
(c)	Author(ity)/ (Service) auteur	Labour Court (<i>Tribunal regional do trabalho - 3 região</i>)
(d)	Parties	Edvaldo Moreira de Azevedo (individual) v. Republic of Finland
(e)	Points of law	Finland claimed immunity in the case. The Court established that it was competent to consider labour disputes involving local employees of foreign missions.
(f)	Classification no/ n°	0.a, 1.a, 2.c
(g)	Source(s)	
(h)	Additional information/ Renseignements complémentaires	See also the case No. FIN/3.
(i)	Full text – extracts – translation - summaries/ Texte complet – extraits – traduction - résumés	Summary English: Appendix 1

FIN/12

Appendix 1

The labour dispute between the Embassy of Finland and its former locally recruited gardener concerned the gardener's retirement and compensation. Finland filed documents concerning the case to the Court and invoked immunity. The Embassy of Finland was not present in the proceedings. The Labour Court found that it was competent to consider the dispute and ordered Finland to pay compensation to the former employee in full compliance with the claim.

(a)	Registration no/ N° d'enregistrement	FIN/13
(b)	Date	11 July 2001
(c)	Author(ity)/ (Service) auteur	District Court of Helsinki
(d)	Parties	As Veli ja Veljed (company) v. Republic of Estonia
(e)	Points of law	The Court found that it was not competent to consider a case involving private companies of which one was owned by a foreign state.
(f)	Classification no/ n°	0.b, 1.b, 2.c
(g)	Source(s)	Case No. 00/23021
(h)	Additional information/ Renseignements complémentaires	
(i)	Full text – extracts – translation - summaries/ Texte complet – extraits – traduction - résumés	Summary English: Appendix 1

FIN/13

Appendix 1

The case concerned a breach of contract between two Estonian companies. The first party to the contract - the Plaintiff in the case - was an Estonian company having a permanent place of business in Finland. The other party was a company (Püssi PPK) owned at the time the contract was concluded (1992) by the State of Estonia and being under the control of the Ministry of Trade and Energy of Estonia. The latter company was later privatized.

The Court found that, when privatizing the Püssi PPK, the State of Estonia had not assumed liability for the contract under consideration, and nor was it responsible for the liabilities of the Püssi PPK on other grounds. The Court cited legal literature and stated that the socialistic countries used to consider that immunity was enjoyed not only with respect to state acts, *jus imperii*, but also with respect to state acts, *jus gestionis*. The Court established that, due to the immunity of the State of Estonia from jurisdiction, it was not competent to consider the claim and ruled it inadmissible without considering the merits of the case.

(a)	Registration no/ N° d'enregistrement	FIN/14
(b)	Date	14 November 2000
(c)	Author(ity)/ (Service) auteur	District Court of Helsinki
(d)	Parties	Oliva Carrasco, Ricardo (individual) v. Republic of Venezuela (state)
(e)	Points of law	The Court established that it was not competent to consider labour disputes between foreign missions and their employees.
(f)	Classification no/ n°	0.a, 1.a, 2.c
(g)	Source(s)	Case No. 00/1467
(h)	Additional information/ Renseignements complémentaires	Judgment of the District Court was upheld by the Court of Appeal of Helsinki. The Plaintiff appealed against the judgement of the Court of Appeal on 28 May 2002. The Case is pending before the Supreme Court.
(i)	Full text – extracts – translation - summaries/ Texte complet – extraits – traduction - résumés	Summary English: Appendix 1

FIN/14

Appendix 1

The case concerned the termination/cancellation of an employment contract between the Embassy of Venezuela and its former chauffeur. Venezuela invoked immunity. By referring to a precedent of the Supreme Court of Finland (KKO 1993:120; FIN/2), the Court established that it was not competent to consider the case and ruled the claim inadmissible without considering the merits. Further, it stated that immunity was a matter that had to be taken into account *ex officio* by the Court.

(a)	Registration no/ N° d'enregistrement	FIN/15
(b)	Date	29 October 1999
(c)	Author(ity)/ (Service) auteur	District Court of Helsinki
(d)	Parties	Metra Oy Ab (company) vs. Republic of Iraq (state)
(e)	Points of law	The case concerned a debt obligation of the State of Iraq towards a Finnish company. As Iraq did not react to the claim, and as the Court found that the claim was not unfounded, it entered a default judgment against Iraq on 9 December 1994. Iraq moved to vacate the judgment. At the beginning of the proceedings, Iraq claimed immunity, but later waived the right to invoke immunity. Therefore, the Court found that it was competent to consider the case.
(f)	Classification no/ n°	0.b, 1.c, 2.c
(g)	Source(s)	Case No. 95/3561
(h)	Additional information/ Renseignements complémentaires	
(i)	Full text – extracts – translation - summaries/ Texte complet – extraits – traduction - résumés	

(a)	Registration no/ N° d'enregistrement	FIN/16
(b)	Date	21 January 1998
(c)	Author(ity)/ (Service) auteur	District Court of Helsinki
(d)	Parties	Yrityspankki Skop Oy (company) vs. Republic of Estonia (state)
(e)	Points of law	The Court found that the case concerned acts of a commercial nature and, therefore, Estonia could not invoke immunity from the jurisdiction of the Court. Thus, the Court was competent to consider the case.
(f)	Classification no/ n°	0.b, 1.b, 2.c
(g)	Source(s)	Case No. 95/19597
(h)	Additional information/ Renseignements complémentaires	The judgement vacated a default judgment entered by the Court on 7 March 1995. The judgment was upheld by the Court of Appeal of Helsinki.
(i)	Full text – extracts – translation - summaries/ Texte complet – extraits – traduction - résumés	Summary English: Appendix 1

FIN/16

Appendix 1

The case concerned a guarantee undertaken by the Estonian Soviet Socialist Republic. Estonia claimed immunity in the case. Furthermore, it stressed that as it had not become a successor to the Estonian Soviet Socialist Republic through a state succession, it could not be considered defendant in the case.

The Court emphasized the distinction to be made between acts of government (*jure imperii*) and acts of a commercial nature (*jure gestionis*). In addition, it referred to a precedent of the Supreme Court of Finland (KKO 1993:120; FIN/2). The Court stated that the Estonian Soviet Socialist Republic had undertaken a guarantee when the export association of agricultural producers had opened a credit with a private foreign bank. Thus, the matter concerned commercial activities and the status of the guarantor had a private law character.

At the time the guarantee was undertaken, the Estonian Soviet Socialist Republic was going through a period of economical and political transition. The Court found that, during that period of transition, the nature and the purpose of the state transaction had conclusive significance. It concluded that the activities in question could not be considered to have public law character by virtue of the economical system of the state only, so as to grant immunity to the defendant. Thus, the Court was competent to consider the case.

FRANCE

Le droit français des immunités des Etats étrangers se singularise par l'inexistence de sources écrites. Aucune législation ni réglementation française ne régit le domaine des immunités souveraines.

Il en est de même concernant les sources internationales conventionnelles puisque la France n'est pas partie à la convention européenne du 16 mai 1972, seule convention internationale relative aux immunités des Etats étrangers.

La source essentielle du droit des immunités des Etats souverains est, en conséquence, la jurisprudence qui fait application du principe de l'immunité de l'Etat en tant que principe de droit international.

La Cour de cassation a ainsi élaboré un véritable droit français des immunités des Etats étrangers en définissant le champ tant personnel que matériel des immunités de juridiction et d'exécution.

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(a)	N° d'enregistrement	F/1
(b)	Date	25 février 1969
(c)	Auteur	Cour de cassation (1re chambre civile)
(d)	Parties	Société Levant Express Transport (entreprise privée) contre Chemins de fer du gouvernement iranien (administration gouvernementale)
(e)	Points de droit	"Les Etats étrangers et les organismes agissant par leur ordre ou pour leur compte ne bénéficient de l'immunité de juridiction qu'autant que l'acte qui a donné lieu au litige constitue un acte de puissance publique <i>ou</i> a été accompli dans l'intérêt d'un service public".
(f)	Classification N°	0.b.3, 1b
(g)	Source(s)	Revue critique de droit international privé, 1970, pp. 102-103
(h)	Renseignements complémentaires	<p>Cet arrêt consacre le principe d'une immunité restreinte de juridiction des Etats étrangers.</p> <p>La Cour de cassation fonde l'immunité juridictionnelle non plus exclusivement sur la qualité du bénéficiaire, mais sur la nature (acte de puissance publique), <i>ou</i> le but (intérêt du service public) de l'acte en cause.</p> <p><i>(Voir aussi arrêt cité sous la rubrique "démembrements organiques")</i></p> <p>Pour une application à la vente de l'immeuble d'une ambassade :</p> <ul style="list-style-type: none"> • <i>TGI de Paris 1re chambre, 1re section, 20 février 1991, Sieur Mourcade contre République arabe du Yémen, JDI 1992, p.398</i> : A agi dans l'intérêt d'un service public l'ambassade d'un Etat étranger ayant donné mandat, suivant les règles de forme et de fond du droit privé, à un agent d'affaires aux fins de vendre l'hôtel particulier abritant le siège de l'ambassade, au motif que le contrat de mandat de vente concerne le fonctionnement même du service public de l'Etat étranger.
(i)	Texte complet-extraits-traductions-résumés	Annexe – Extrait

F/1 - Annexe**Cour de cassation****Chambre civile 1****Audience publique du 25 février 1969****Rejet**

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République française
Au nom du peuple français

Sur le moyen unique pris en ses diverses branches : Attendu que, selon les énonciations de l'arrêt attaqué, la Compagnie Générale d'Entreprises électriques ayant expédié, à destination de l'Iran, des marchandises par l'entreprise d'un commissionnaire, la société méditerranéenne de portefaillage et de transit Someport, a assigné celle-ci en réparation de diverses avaries ;

Que ladite société a appelé en garantie notamment la société iranienne "Levant Express Transport", plus spécialement chargée du transport terrestre entre Khorramshar et Téhéran, laquelle a appelé en intervention forcée et garantie l'Administration des chemins de fer du gouvernement iranien ;

Que l'arrêt infirmatif attaqué l'ayant déboutée de son exception d'incompétence fondée sur l'immunité de juridiction dont elle se prévalait, cette administration soutient qu'en tant qu'organe du pouvoir central et expression de son activité elle bénéficiait de l'immunité et fait grief à la cour d'appel d'avoir "insuffisamment répondu" aux conclusions par lesquelles elle faisait valoir que les chemins de fer du gouvernement iranien constituent une administration purement gouvernementale et totalement inassimilable à une société commerciale même étatique et d'avoir dénaturé et méconnu les justifications qui l'établissaient ;

Qu'il est aussi prétendu que les juges d'appel se seraient contredits, en énonçant que le transport ferroviaire constituait, selon le droit iranien, une opération "*fixée ratione materiae*" qui ne saurait dès lors dépendre de la qualité de celui qui l'accomplit tout en admettant qu'un transport de cette nature "puisse faire intervenir un acte de souveraineté" ;

Mais attendu que les états étrangers et les organismes agissant par leur ordre ou pour leur compte ne bénéficient de l'immunité de juridiction qu'autant que l'acte qui donne lieu au litige constitue un acte de puissance publique ou a été accompli dans l'intérêt d'un service public ;

D'où il suit qu'après avoir justement énoncé que cette immunité est fondée sur la nature de l'activité, et non sur la qualité de celui qui l'exerce, la cour d'appel qui, sans dénier à la demanderesse au pourvoi son caractère d'organe du pouvoir central iranien, relève que selon la loi iranienne elle-même, le transport, même ferroviaire, entre dans la catégorie des actes de commerce qui ne sont "pas subordonnés de manière nécessaire à l'intervention d'un acte de souveraineté" a, sans contradiction ni dénaturation, et en répondant aux conclusions dont elle était saisie, légalement justifié sa décision ;

1. Par ces motifs : rejette le pourvoi formé contre l'arrêt rendu le 2 juillet 1966 par la cour d'appel de Paris.

N° 67-10.243. Administration des chemins de fer du gouvernement iranien c/ société levant express transport. Président : m. Ausset, conseiller doyen, faisant fonctions. - rapporteur : m. Thirion. - avocat général : m. Lebegue. - avocat : m. Lepany.

(a)	N° d'enregistrement	F/2
(b)	Date	11 février 1997
(c)	Auteur	Cour de cassation (1re chambre civile)
(d)	Parties	M. Saignie (personne privée) contre ambassade du Japon
(e)	Points de droit	"A méconnu le principe de l'immunité de juridiction des Etats étrangers l'arrêt qui a déclaré irrecevable l'action d'un concierge d'ambassade afin d'obtenir des indemnité liées à la rupture de son contrat de travail, alors qu'il résulte des constatations de la cour d'appel que les fonctions de ce dernier, chargé de la surveillance des locaux , ne lui donnait aucune responsabilité particulière dans l'exercice d'un service public, de sorte que son licenciement constituait un acte de gestion".
(f)	Classification N°	0.b.2, 1.b
(g)	Source(s)	Revue critique de droit international privé, 1997, pp. 332-335
(h)	Renseignements complémentaires	<p>Le jeu de l'immunité de juridiction dans le contentieux du licenciement des employés d'ambassade dépend de la nature du travail exercée par le demandeur. Selon les fonctions et responsabilités de l'employé, l'Etat employeur qui met fin au contrat de travail, accomplit soit un acte de gestion soit un acte de souveraineté.</p> <p>Ce contentieux fait l'objet d'une jurisprudence constante.</p> <ul style="list-style-type: none"> • <i>Cf. : Cour de cassation, Chambre sociale, Mme Barrandon contre fédération des Etats-Unis d'Amérique 10 novembre 1998, Bulletin civil, 1998 n°479, p. 357 : Le licenciement d'une infirmière-secrétaire médicale de l'ambassade des Etats-Unis à Paris constitue un acte de gestion du fait que les fonctions de cette personne "ne lui conféraient aucune responsabilité particulière dans l'exercice du service public diplomatique"</i>
(i)	Texte complet-extraits-traductions-résumés	Annexe - Extrait

F/2 - Annexe**Cour de cassation****Chambre civile 1****Audience publique du 11 février 1997****Cassation****N° de pourvoi : 94-41871**

Publié au bulletin

Président : m. Lemontey .

Rapporteur : m. Ancel.

Avocat général : m. Gaunet.

Avocat : la scp masse-dessen, georges et thouvenin.

Republique francaise
Au nom du peuple francais

Sur le moyen tiré du mémoire en demande :

Vu le principe de l'immunité de juridiction des Etats étrangers ;

Attendu que, pour déclarer irrecevable l'action intentée par M. Saignie, licencié de son emploi de concierge de l'ambassade du Japon à Paris, afin d'obtenir des indemnités liées à la rupture du contrat de travail, l'arrêt attaqué énonce que, chargé de la surveillance des locaux, M. Saignie exerçait des attributions qui le faisaient participer directement au service public de l'ambassade ;

Attendu, cependant, qu'il résulte des constatations de la cour d'appel que les fonctions de M. Saignie ne lui donnaient aucune responsabilité particulière dans l'exercice du service public, de sorte que son licenciement constituait un acte de gestion ;

D'où il suit que la cour d'appel n'a pas déduit les conséquences légales de ses constatations et a méconnu le principe susvisé ;

Par ces motifs :

Casse et annule, dans toutes ses dispositions, l'arrêt rendu le 17 mars 1994, entre les parties, par la cour d'appel de paris ; remet, en conséquence, la cause et les parties dans l'état où elles se trouvaient avant ledit arrêt et, pour être fait droit, les renvoie devant la cour d'appel de paris, autrement composée.

Publication : bulletin 1997 i n° 49 p. 32

Décision attaquée : cour d'appel de paris, 1994-03-17

(a)	N° d'enregistrement	F/3
(b)	Date	12 mai 1990
(c)	Auteur	Cour de cassation (1re chambre)
(d)	Parties	Kuwait News Agency (entreprise gouvernementale) contre Parott (personne privée)
(e)	Points de droit	"Ne saurait porter atteinte aux intérêts protégés d'un Etat étranger justifiant l'immunité de juridiction, l'acte de gestion par lequel une agence de presse, fût-elle l'émanation de cet Etat, a licencié un journaliste nommé dans le cadre des activités propres de celle-ci et qui n'était chargée d'aucune responsabilité particulière."
(f)	Classification N°	0.b.2, 1.b
(g)	Source(s)	Revue critique de droit international privé, 1991, pp.140-147
(h)	Renseignements complémentaires	<p>Cet arrêt confirme la jurisprudence selon laquelle les organismes, même dotés d'une personnalité juridique propre, agissant "par l'ordre ou pour le compte" d'un Etat étranger, bénéficient de l'immunité de juridiction pour les actes de puissance publique et pour les actes accomplis dans l'intérêt du service public.</p> <p><i>A contrario</i>, les organismes, même non dotés d'une personnalité juridique propre, agissant "par l'ordre ou pour le compte" de l'Etat étranger ne bénéficient d'aucune immunité de juridiction pour les actes de gestion.</p> <p>Cf sur ce point : <i>Cour de cassation, chambre mixte, arrêt n°220, 20 juin 2003, Mme Naria X...contre Ecole saoudienne de Paris et autre</i> : le refus de l'Ecole saoudienne de Paris, émanation de l'Etat saoudien, de déclarer madame X... au régime français de protection sociale constitue un acte de gestion administrative.</p> <p>Concernant les critères de la représentation, voir :</p> <ul style="list-style-type: none"> • <i>Cour de cassation 1re chambre civile, 19 mai 1976, Zavicha Blagojevic contre Banque du Japon, RCDIP 1977, p.359</i> : Un organisme privé peut invoquer l'immunité de juridiction "du moment qu'il est constaté que les actes qui lui sont reprochés correspondaient à l'objet même de la délégation de pouvoirs qui lui avait été conférée par l'Etat et qu'il n'est pas relevé [qu'il] eût agi dans un intérêt autre que celui du service". • <i>Epoux Martin contre Banque d'Espagne, Cour de cassation 1re chambre civile, 3 novembre 1952.</i> • <i>Cour de cassation 1re chambre civile, 25 février 1969, Société Levant Express Transport contre chemins de fer du gouvernement iranien.</i>
(i)	Texte complet-extraits-traductions-résumés	

(a)	N° d'enregistrement	F/4
(b)	Date	15 janvier 1969
(c)	Auteur	Tribunal de grande instance de Paris
(d)	Parties	Neger (personne privée) contre Gouvernement du Land de Hesse
(e)	Points de droit	"L'immunité de juridiction n'existe qu'au profit des Etats souverains, c'est à dire qu'ils possèdent le droit exclusif d'exercer les activités étatiques, de déterminer librement leur propre compétence dans les limites du droit international public, que tel n'est pas le cas pour les Etats membres d'une fédération qui sont soumis à la tutelle de l'Etat fédéral."
(f)	Classification N°	O.c, 1.c
(g)	Source(s)	Revue critique de droit international privé, 1970, pp. 99-101
(h)	Renseignements complémentaires	Plus généralement, selon le même fondement juridique, les juridictions Françaises ne reconnaissent pas le bénéfice de l'immunité de juridiction à tous les démembrements des Etats étrangers tels que les collectivités publiques étrangères (Cf. : CA .Paris 11 juillet 1924 : Gazette du Palais 1925, 1, p.389 pour les départements colombiens)
(i)	Texte complet- extraits-traductions- résumés	

(a)	N° d'enregistrement	F/5
(b)	Date	14 mars 1984
(c)	Auteur	Cour de cassation (1re chambre civile)
(d)	Parties	Société Eurodif (entreprise privée) contre République islamique d'Iran
(e)	Points de droit	"L'immunité d'exécution dont jouit l'Etat étranger est de principe; toutefois, elle peut exceptionnellement être écartée; il en est ainsi lorsque le bien saisi a été affecté à l'activité économique ou commerciale relevant du droit privé qui donne lieu à la demande en justice."
(f)	Classification N°	0.c, 2.b
(g)	Source(s)	Revue critique de droit international privé, 1984, pp. 644-655
(h)	Renseignements complémentaires	La Cour de cassation affirme le caractère relatif de l'immunité d'exécution des Etats étrangers. Celle ci n'en demeure pas moins de principe; les restrictions apportées à l'immunité d'exécution sont strictement définies et les biens appartenant à l'Etat étranger sont présumés affectés à une activité publique. Il appartient aux créanciers de l'Etat de prouver par tout moyen que les biens saisis sont affectés à une activité économique ou commerciale relevant du droit privé et que la demande en justice d'ou procède la saisie trouve son origine dans cette même activité économique ou commerciale.
(i)	Texte complet-extraits-traductions-résumés	Annexe - Extrait

F/5 - Annexe**Cour de cassation****Chambre civile 1****Audience publique du 14 mars 1984****Cassation****N° de pourvoi : 82-12462**

Publié au bulletin

Pdt. M. Joubrel

Rapp. M. Fabre

Av.gén. M. Gulphe

Av. Demandeur : scp Lyon-Caen fabiani liard

Av. Défendeur : scp boré xavier

**Republique francaise
Au nom du peuple francais**

Sur le premier moyen, pris en sa première branche : vu les principes de droit international prive régissant les immunités des Etats étrangers ;

Attendu que l'immunité d'exécution dont jouit l'Etat étranger est de principe ;

Que, toutefois, elle peut être exceptionnellement écartée ;

Qu'il en est ainsi lorsque le bien saisi a été affecté à l'activité économique ou commerciale relevant du droit privé qui donne lieu à la demande en justice ;

Attendu qu'en exécution d'accords internationaux intervenus le 27 juin 1974 et le 23 décembre de la même année entre le gouvernement impérial de l'Iran et le gouvernement français en vue d'une large coopération "scientifique, technique et industrielle" entre les deux pays, l'Etat iranien a consenti, par un contrat du 23 février 1975, un prêt d'un milliard de dollars au Commissariat à l'Energie Atomique (c e a), prêt dont le remboursement était garanti par l'Etat français, tandis que, par une convention du même jour, le C.E.A et l'Organisation de l'Energie Atomique de l'Iran (O E A I), établissement public iranien (auquel a été substituée par la suite l'Organisation pour les Investissements et les Aides Economiques et Techniques de l'Iran O I.A E T I, simple département de l'Etat iranien) ont signé un "accord de participation" en matière de production d'uranium enrichi à des fins pacifiques qui précisait les modalités de constitution d'une nouvelle société de droit français dénommée société franco-iranien d'enrichissement d'uranium par diffusion gazeuse (S O F I D I F) à laquelle devait être transférée une partie des actions de la société Eurodif.

Que les deux contrats du 23 février 1975 contenaient une clause d'arbitrage faisant référence au règlement de la cour d'arbitrage de la Chambre de commerce internationale (C C I) ;

Qu'en 1977, la totalité du prêt avait été versée mais qu'en juin 1979, le nouveau gouvernement iranien, qui avait depuis quelques mois cessé de notifier ses commandes de service d'uranium enrichi et suspendu le paiement de ses avances d'actionnaire et des acomptes qu'il devait en qualité de client, a fait connaître sa décision d'abandonner son programme nucléaire et de cesser d'acquiescer de l'uranium enrichi ;

Qu'invoquant le grave préjudice que leur causait cette brusque rupture des contrats en cours d'exécution, les sociétés EURODIF et SOFIDIF ont déclenché la procédure arbitrale et, pour préserver leurs droits, ont présenté requête au président du tribunal de commerce de Paris aux fins de saisie conservatoire des sommes détenues par le C E A , en sa qualité

d'emprunteur, et par l'Etat français, en sa qualité de garant, à la suite du prêt consenti par l'Etat iranien le 23 février 1975 ;

Attendu que, pour rétracter l'ordonnance du 24 octobre 1979 par laquelle le premier juge avait accueilli la requête et donner mainlevée de la saisie conservatoire pratiquée en vertu de cette ordonnance, l'arrêt attaqué énonce que "s'il est constant que la somme de un milliard de dollars versée au C E A était destinée à financer la construction de l'usine de Tricastin et a effectivement été utilisée à cette fin, les fonds dont le C E A et l'Etat français sont désormais débiteurs envers l'Etat iranien feront retour à celui-ci sans être grevés d'aucune affectation et que le gouvernement iranien décidera souverainement de leur utilisation dans l'exercice de ses compétences internes ;

Que sa créance porte donc sur des fonds publics et bénéficie en principe de l'immunité d'exécution ;

Qu'il est des lors sans intérêt de rechercher si les opérations de production et de distribution d'uranium enrichi auxquelles l'Etat iranien s'était engagé à participer présentaient un caractère commercial les soumettant au seul droit privé" ;

Attendu qu'en statuant ainsi alors que l'arrêt attaqué avait relevé que la créance saisie était celle que l'Etat iranien possédait sur le C E.A et l'Etat français par l'effet du contrat de prêt consenti le 23 février 1975 et qu'il en résultait que cette créance avait pour origine les fonds mêmes qui avaient été affectés à la réalisation du programme franco-iranien de production et de distribution d'énergie nucléaire, dont la rupture par la partie iranienne donnait lieu à la demande, la cour d'appel, à laquelle il appartenait donc de rechercher la nature de cette activité pour trancher la question de l'immunité d'exécution, n'a pas donné de base légale à sa décision ;

Par ces motifs, et sans qu'il y ait lieu de statuer sur la seconde branche du premier moyen ni sur le second moyen : casse et annule l'arrêt rendu le 21 avril 1982, entre les parties, par la cour d'appel de Paris ;

Remet, en conséquence, la cause et les parties au même et semblable état ou elles étaient avant ledit arrêt et, pour en être fait droit, les renvoie devant la cour d'appel de Versailles, à ce désignée par délibération spéciale prise en la chambre du conseil.

Publication : Bulletin 1984 I N° 98

Jurisclasseur Périodique 1984 N° 20205, conclusions de M. l'Avocat Général GULPHE ET NOTE Hervé SYNDET. Dalloz, 20 décembre 1984, N° 43 P. 629, rapport de M. Le Conseiller FABRE, note Jean ROBERT.

Décision attaquée : Cour d'Appel Paris, Chambre 1 A, 1982-04-21

(a)	N° d'enregistrement	F/6
(b)	Date	12 décembre 2001
(c)	Auteur	Cour d'appel de Paris (1re chambre, section G)
(d)	Parties	Société Creighton Limited (entreprise privée) contre ministère des finances et le ministère des affaires municipales et de l'agriculture du gouvernement de l'Etat du Qatar
(e)	Points de droit	"Sont saisissables les biens affectés par l'Etat à la satisfaction de la réclamation en question ou réservés par lui à cette fin, à défaut à tous autres biens de l'Etat étranger situés sur le territoire de l'Etat du for ou prévus pour être utilisés à des fins commerciales", sans qu'il soit besoin d'établir que lesdits biens étaient affectés à l'entité contre laquelle la procédure a été engagée.
(f)	Classification N°	0.c, 2.b
(g)	Source(s)	Revue de l'arbitrage, avril 2003, n° 2, pp. 417-425
(h)	Renseignements complémentaires	La solution de la Cour d'appel de Paris vient étendre le champ de l'exception à l'immunité d'exécution posée par la Cour de cassation dans l'arrêt <i>Société Eurodif contre République islamique d'Iran</i> . Toutefois, aucun arrêt de la Cour de cassation n'est encore intervenu pour confirmer cette évolution dans le sens d'une nouvelle restriction de la portée de l'immunité d'exécution.
(i)	Texte complet- extraits-traductions- résumés	

(a)	N° d'enregistrement	F/7
(b)	Date	1er octobre 1985
(c)	Auteur	Cour de cassation (1re chambre civile)
(d)	Parties	Société Sonatrach (société nationale algérienne) contre Migeon (personne privée)
(e)	Points de droit	"A la différence des biens de l'Etat étranger qui sont en principe insaisissables, sauf exceptions, notamment quand ces biens ont été affectés à l'activité économique ou commerciale de droit privé qui est à l'origine du titre du créancier saisissant, les biens des organismes publics, personnalisés ou non, distincts de l'Etat étranger, lorsqu'ils font partie d'un patrimoine que celui-ci a affecté à une activité principale relevant du droit privé, peuvent être saisis par tous les créanciers, quels qu'ils soient, de cet organisme."
(f)	Classification N°	0.b.3, 2.b
(g)	Source(s)	Revue critique de droit international privé, 1986, pp. 527-537
(h)	Renseignements complémentaires	La Cour de cassation opère une distinction entre le régime juridique des biens appartenant en propre à l'Etat et ceux des organismes distincts de l'Etat. Il appartient à ces organismes de prouver que les biens en cause sont affecté à une activité publique.
(i)	Texte complet - extraits-traductions-résumés	Annexe - Extrait

F/7 – Annexe**Cour de cassation****Chambre civile 1
Rejet****Audience publique du 1 octobre 1985****N° de pourvoi : 84-13605**

Publié au bulletin

Pdt. M. Joubrel

Rapp. M. Fabre

Av.Gén. M. Gulphe

Av. Demandeur : SCP Guiguet Bachellier Potier de La Varde

Av. Défendeur : Me Le Bret

**Republique francaise
au nom du peuple francais**

sur le moyen unique, pris en ses deux branches : Attendu, selon les énonciations des juges du fond, qu'un arrêt du 16 février 1971, devenu irrévocable, de la cour d'appel de Paris a condamné la Société nationale (algérienne) de transport et de commercialisation des hydrocarbures (s.o.n.a.t.r.a.c.h.) a payer une indemnité à M. Migeon pour résiliation fautive de son contrat de travail ;

que, pour avoir paiement de cette indemnité, M. Migeon a fait pratiquer entre les mains de Gaz de France et de la banque française du commerce extérieur (dans les comptes de laquelle transitaient les fonds) la saisie-arrêt de sommes dues par Gaz de France à la Sonatrach en exécution d'un contrat de fourniture de gaz liquéfié du 3 février 1982 ;

que l'arrêt attaqué a validé la saisie arrêt après avoir écarté l'immunité d'exécution invoquée par la Sonatrach, au motif qu'elle n'établissait pas que les fonds saisis avaient, par leur origine ou leur destination, une affectation publique les assimilant aux fonds publics de l'Etat algérien ;

Attendu que la Sonatrach reproche à la cour d'appel d'avoir ainsi statué, alors, selon le moyen, d'une part, que l'immunité d'exécution dont jouit l'Etat étranger ou l'organisme public agissant pour son compte ne peut être exceptionnellement écartée que lorsque la créance saisie a été affectée à une activité privée qui est celle-là même qui sert de base à la demande;

qu'en l'espèce, en validant une saisie-arrêt pratiquée sur une créance que détenait Sonatrach à l'encontre de Gaz de France et qui était totalement étrangère au litige opposant le saisissant à la Sonatrach à la suite de la rupture d'un contrat de travail, l'arrêt attaqué a violé les principes de droit international privé réglementant les immunités des Etats étrangers ;

et alors, d'autre part, que l'immunité d'exécution étant de principe, c'est à celui qui prétend faire pratiquer une mesure d'exécution sur les biens d'un organisme public étranger d'établir que ces biens ont une affectation privée ;

qu'en écartant l'immunité d'exécution au seul motif que la Sonatrach n'établit pas que les fonds saisis ont une affectation publique les juges d'appel ont violé l'article 1315 du code civil ;

Mais attendu qu'a la différence des biens de l'Etat étranger, qui sont en principe insaisissables, sauf exceptions, notamment quand ils ont été affectés a l'activité économique

ou commerciale de droit privé qui est à l'origine du titre du créancier saisissant, les biens des organismes publics, personnalisés ou non, distincts de l'Etat étranger, lorsqu'ils font partie d'un patrimoine que celui-ci a affecté à une activité principale relevant du droit privé, peuvent être saisis par tous les créanciers, quels qu'ils soient, de cet organisme ;

Attendu qu'en l'espèce, la Sonatrach ayant pour objet principal le transport et la commercialisation des hydrocarbures, activité relevant par sa nature du droit privé, sa créance sur Gaz de France, qui avait pour origine la fourniture de gaz, était saisissable par M. Migeon, sauf si elle démontrait qu'il n'en était pas ainsi, ce qu'elle n'a pas fait selon l'appréciation souveraine des juges du fond ;

qu'en aucune de ses deux branches le moyen n'est donc fondé ;

Par ces motifs : rejette le pourvoi.

Publication : Bulletin 1985 I N° 236 p. 211

Jurisclasseur Périodique 1986 n° 20566, note Hervé SYNDET.

Décision attaquée : Cour d'appel de Paris, chambre des urgences 1, 1984-02-10

(a)	N° d'enregistrement	F/8
(b)	Date	18 novembre 1986
(c)	Auteur	Cour de cassation (1re chambre civile)
(d)	Parties	Etat français et autre contre société européenne d'études et d'entreprises et autre (entreprise privée)
(e)	Points de droit	En souscrivant une clause compromissoire, "l'Etat étranger qui s'est soumis à la juridiction des arbitres a, par là même, accepté que leur sentence puisse être revêtue de l'exequatur".
(f)	Classification N°	1.c
(g)	Source(s)	Revue critique de droit international privé, 1987, pp. 786-792
(h)	Renseignements complémentaires	Le juge considère que l'acceptation par l'Etat étranger d'une clause compromissoire vaut renonciation de ce dernier à son immunité de juridiction. Dans le même sens, voir : <i>Cour de cassation, 1^{ère} chambre civile, 11 juin 1991, Journal du droit international, décembre 1991, n°4, p. 1005.</i>
(i)	Texte complet-extraits-traductions-résumés	Annexe - Extrait

F/8 – Annexe**Cour de cassation****Chambre civile 1****Audience publique du 18 novembre 1986****Rejet****N° de pourvoi : 85-10912 N° de pourvoi : 85-12112**

Publié au bulletin

Président :M. Fabre

Rapporteur :M. Ponsard

Avocat général :Mme Flipo

Avocats :la SCP Guiguet, Bachellier et Potier de La Varde, la SCP Vier et Barthélémy, M. Rouvière et la SCP Martin-Martinière et Ricard

**REPUBLIQUE FRANCAISE
AU NOM DU PEUPLE FRANCAIS**

Attendu, selon les énonciations des juges du fond, que la Société européenne de crédit foncier et de banque, ayant son siège à Paris, aux droits de laquelle se trouve aujourd'hui la Société européenne d'études et d'entreprises (SEEE), a passé, le 3 janvier 1932, avec le Gouvernement yougoslave, un contrat par lequel elle s'engageait à construire une ligne de chemin de fer en Yougoslavie et à fournir du matériel en contrepartie du paiement d'une somme d'argent qui devait être représentée par des " bons " payables en douze ans ; que le contrat comportait une clause destinée à remédier aux fluctuations des monnaies française et yougoslave, ainsi qu'une clause compromissaire ; que les travaux furent exécutés et les fournitures livrées, mais que, à partir de 1941, les bons ne furent payés qu'irrégulièrement ; qu'une sentence arbitrale, rendue par défaut contre la République de Yougoslavie le 2 juillet 1956, arrêta la créance de la SEEE à 6 184 528 521 anciens francs ; que l'arrêt infirmatif attaqué, rendu sur renvoi après deux cassations successives, a déclaré cette sentence exécutoire en France ;

Sur le premier moyen du pourvoi n° 85-10.912 et sur le premier moyen, pris en ses deux branches, du pourvoi n° 85-12.112, réunis :

Attendu qu'il est fait grief à l'arrêt attaqué d'avoir écarté l'immunité de juridiction invoquée par la République de Yougoslavie, alors que cette immunité serait de droit pour l'Etat étranger lorsque l'acte litigieux est un marché de travaux publics, et alors que la renonciation à cette immunité ne peut se déduire de la seule présence d'une clause compromissaire dans un contrat ;

Mais attendu que, par une telle clause, l'Etat étranger, qui s'est soumis à la juridiction des arbitres a, par là même, accepté que leur sentence puisse être revêtue de l'exequatur ; que le moyen des deux pourvois ne peut donc être accueilli ;

Et sur le second moyen de chacun des pourvois, pris en ses deux branches :

Attendu qu'il est encore reproché à la cour d'appel d'avoir dit que les arbitres, sans interpréter l'accord franco-yougoslave du 18 novembre 1950, en avaient seulement défini la portée et les effets et que, à supposer même qu'ils l'aient interprété, fût-ce dans un sens contraire à l'interprétation donnée par le Gouvernement français, la violation de l'ordre public international n'en serait pas établie pour autant, alors que, selon les pourvois, pour décider que l'accord franco-yougoslave précité, qui avait pour objet d'apurer les sommes que l'Etat

yougoslave restait devoir en vertu de la convention du 3 janvier 1932, ne concernait que la créance résultant des bons émis par cet Etat en représentation de sa dette et n'interdisait pas à la SEEE de réclamer le règlement d'une " créance de change " résultant de l'article VIII de la convention, les arbitres ont nécessairement dû interpréter ledit accord, qui n'était ni clair ni précis, et alors que les arbitres, non plus que les tribunaux judiciaires, ne peuvent interpréter un accord lorsque cette interprétation met en jeu des questions de droit public international, ce qui est nécessairement le cas lorsque l'interprétation des arbitres est contraire à celle donnée par le Gouvernement, et qu'en tout cas, l'exequatur ne peut être accordé à une sentence qui comporte une telle interprétation ;

Mais attendu que les arbitres, qui tiennent leurs pouvoirs de la volonté des parties et non de la puissance publique, peuvent interpréter les actes litigieux et notamment les accords internationaux, sans avoir à en solliciter l'interprétation par le gouvernement ; que le juge de l'exequatur, qui n'a pas à contrôler cette interprétation, ne peut refuser l'exequatur au seul motif qu'elle est différente de celle consacrée par le Gouvernement français ; que le moyen ne peut donc, en aucune de ses branches, être mieux accueilli que le précédent ;

PAR CES MOTIFS :

REJETTE les pourvois

Publication : Bulletin 1986 I N° 266 p. 254

Revue de l'arbitrage, juin 1987, p. 149, note J.L. DELVOLVE. Journal du droit international, mars 1987, p. 120, note B. OPPETIT.

(a)	N° d'enregistrement	F/9
(b)	Date	6 juillet 2000
(c)	Auteur	Cour de cassation (1re chambre civile)
(d)	Parties	Société Creighton (entreprise privée) contre ministre des finances de l'Etat du Qatar et autre
(e)	Points de droit	"L'engagement pris par un Etat signataire de la clause d'arbitrage d'exécuter la sentence dans les termes de l'article 24 du règlement d'arbitrage de la chambre de commerce international implique renonciation de cet Etat à l'immunité d'exécution."
(f)	Classification N°	2.c
(g)	Source(s)	Bulletin civil I, n°207
(h)	Renseignements complémentaires	<p>La Cour de cassation fonde la renonciation par l'Etat étranger à son immunité d'exécution sur l'interprétation des termes de l'article 24 du règlement d'arbitrage de la chambre de commerce international auquel renvoie la clause d'arbitrage signée par le Qatar, selon lequel "les parties s'engagent à exécuter sans délai la sentence à intervenir et renoncent à toutes voies de recours auxquelles elles peuvent renoncer".</p> <p>Traditionnellement, les tribunaux français considéraient que le recours à l'article 24 du règlement d'arbitrage de la CCI ne pouvait être interprété comme emportant renonciation à l'immunité d'exécution.</p> <p>(cf: <i>CA de Paris, 1re chambre, section A, 21 avril 1982, RCDIP 1983, p.101</i>).</p>
(i)	Texte complet-extraits-traductions-résumés	Annexe – Extrait

F/9 – Annexe**Cour de cassation****Chambre civile 1****Audience publique du 6 juillet 2000****Cassation****N° de pourvoi : 98-19068**

Publié au bulletin

Président : M. Lemontey .

Rapporteur : M. Bargue.

Avocat général : M. Roehrich.

Avocats : M. Foussard, la SCP Bouzidi.

**REPUBLIQUE FRANCAISE
AU NOM DU PEUPLE FRANCAIS**

Sur le premier moyen :

Vu les principes du droit international régissant les immunités des Etats étrangers, ensemble l'article 24 du règlement d'arbitrage de la Chambre de commerce international ;

Attendu qu'en exécution de sentences arbitrales devenues définitives, la société américaine Creighton limited, reconnue créancière du ministère des Affaires municipales et de l'Agriculture du Gouvernement de l'Etat du Qatar, a fait procéder d'une part, à deux saisies-attribution sur des sommes détenues au nom de ce ministère par la Qatar National Bank et par la banque de France et, d'autre part, à deux saisies conservatoires de droits d'associés et de valeurs mobilières détenues par ces deux mêmes banques;

Attendu que pour ordonner la mainlevée de l'ensemble de ces saisies, l'arrêt attaqué retient qu'il n'est pas établi par la société Creighton limited que l'Etat du Qatar ait renoncé à l'immunité d'exécution et que le fait d'avoir accepté une clause d'arbitrage ne peut faire présumer la renonciation à cette immunité, qui est distincte de l'immunité de juridiction ;

Qu'en statuant ainsi, alors que l'engagement pris par l'Etat signataire de la clause d'arbitrage d'exécuter la sentence dans les termes de l'article 24 du règlement d'arbitrage de la Chambre de commerce international impliquait renonciation de cet Etat à l'immunité d'exécution, la cour d'appel a violé les principes et texte susvisés ;

PAR CES MOTIFS, et sans qu'il y ait à statuer sur le second moyen :

CASSE ET ANNULE, dans toutes ses dispositions, l'arrêt rendu le 11 juin 1998, entre les parties, par la cour d'appel de Paris ; remet, en conséquence, la cause et les parties dans l'état où elles se trouvaient avant ledit arrêt et, pour être fait droit, les renvoie devant la cour d'appel de Paris, autrement composée.

(a)	N° d'enregistrement	F/10
(b)	Date	10 août 2000
(c)	Auteur	Cour d'appel de Paris, première chambre, section A
(d)	Parties	Ambassade de la fédération de Russie en France contre société NOGA (entreprise privée)
(e)	Points de droit	La seule mention, dans le contrat litigieux, que "l'emprunteur renonce à tout droit d'immunité relativement à l'application de la sentence arbitrale rendue à son encontre en relation avec le présent contrat" ne manifeste pas la volonté non équivoque de cet Etat de renoncer à se prévaloir de l'immunité diplomatique d'exécution et d'accepter qu'une société commerciale puisse, le cas échéant, entraver le fonctionnement et l'action de ses ambassades et représentations à l'étranger."
(f)	Classification N°	2.c
(g)	Source(s)	Journal du droit international, 2001, n°1, pp. 116-127
(h)	Renseignements complémentaires	Les comptes bancaires des missions diplomatiques des Etats étrangers bénéficient de l'immunité diplomatique d'exécution en vertu de la convention de Vienne du 18 avril 1961 sur les relations diplomatiques. La renonciation d'un Etat à "tout droit d'immunité" n'emporte pas renonciation à son immunité diplomatique d'exécution.
(i)	Texte complet- extraits-traductions- résumés	

GERMANY

(a)	Registration no.	D/1
(b)	Date	31 Octobre 1978
(c)	Author(ity)	Bundesminister des Auswärtigen (Federal Foreign Minister)
(d)	Parties	
(e)	Points of law	Objection to the reservation of the Soviet Union concerning Article XI, paragraph 2 of the International Convention on Civil Liability for Oil Pollution Damage
(f)	Classification no.	0.c, 1.b
(g)	Source(s)	Bundesgesetzblatt (Federal Law Gazette) 1979 Part II, p.299
(h)	Additional information	
(i)	Full text – extracts – translation - summaries	

Article XI, paragraph 2 of the Convention:

“With respect to ships owned by a Contracting State and used for commercial purposes, each State shall be subject to suit in the jurisdictions set forth in Article IX and shall waive all defences based on its status as a sovereign State.”

Reservation of the Soviet Union:

“The Union of Soviet Socialist Republics does not consider itself bound by the provisions of Article XI, paragraph 2 of the Convention, as they contradict the principle of the judicial immunity of a foreign State.”

Translation of the German Note:

The Federal Republic of Germany, without excluding the accomplishment of any treaty relations on the basis of the convention, declares not to accept the reservation of the Soviet Union; according to customary international law no state can claim immunity before the courts of another state with regard to ships, which are used by the state for commercial purposes or which are operated by a corporation registered as a supplier or a ship-owner in that state.

Appendix:

German text of the objection (Bekanntmachung über den Geltungsbereich des Internationalen Übereinkommens über die zivilrechtliche Haftung für Ölverschmutzungen - see Source)

(a)	Registration no.	D/2
(b)	Date	6 April 1989
(c)	Author(ity)	<i>Bundesregierung</i> (Federal Government)
(d)	Parties	
(e)	Points of law	Government draft of Act of Parliament required by Article 59 (2) of the Basic Law (for the text see D/20 under Additional Information) to enable the Federal Republic of Germany to ratify the European Convention on State Immunity of 1972 (ETS No.74). The Explanatory Memorandum shows that the Federal Government supports the concept of relative state immunity embodied in the Convention.
(f)	Classification no.	0.c, 1.b, 2.a (refers to the European Convention)
(g)	Source(s)	Deutscher Bundestag, 11. Wahlperiode, Drucksache 11/4307 (official prints of the German Federal Diet)
(h)	Additional information	The Act of Parliament was passed in a slightly revised version and signed by the Federal President on 22 January 1990 (BGBl.1990 II, 34 – see D/20). The Federal Republic of Germany ratified the Convention (but not the Additional Protocol) on 15 May 1990.
(i)	Full text – extracts – translation - summaries	

English Translation of Excerpt from Government Draft:

“The Convention follows the concept of relative state immunity which is approved by legal doctrine and case law in the Federal Republic of Germany ...“ (title page under B.)

Partial Summary of the *Denkschrift* (explanatory memorandum of the Federal Government to the Convention):

According to the jurisprudence of the Federal Constitutional Court approved by legal doctrine a state enjoys immunity only with regard to *acta iure imperii*. The question whether state action is *iure imperii* or *iure gestionis* must be determined according to the law of the forum state. In Germany, judicial practice focuses on the nature of the state action or of the ensuing legal relationship and not on the motive or purpose of the state action because all state activity is ultimately linked to sovereign purposes and responsibilities. With regard to execution against a foreign state, which is not *a priori* inadmissible under customary international law, there is no exact parallelism in German law between jurisdictional immunity and immunity of execution because the effects of an execution will hit a foreign state much harder than a judgment and thus the risk of political complications will be greater.

If there is no jurisdictional immunity because a private law activity of a foreign state is involved or because this state has submitted to the jurisdiction of the forum state that does not mean that an execution will also be admissible. The admissibility of an execution does not depend on whether the foreign state owns the object of the execution as a sovereign or

merely as a legal person under private law. The decisive question is rather whether the object of the execution serves sovereign purposes of the foreign state at the time at which the execution is bound to commence. (Part I.A. [p.30])

Article 15 attributes immunity to states even with regard to disputes concerning *acta iure gestionis* which are not covered by the exceptions in Articles 1 to 13. However, Article 24 authorizes states parties to make a unilateral declaration, thereby extending the jurisdiction of their courts to acts of foreign states not so covered but excluding *acta iure imperii*. As the Federal Republic of Germany adheres to the restrictive theory of sovereign immunity, it intends to make such a declaration. This declaration shall primarily preserve the jurisdiction of German courts in labor disputes between employees and the foreign states which employed them. (Explanations by the Federal Government with regard to Articles 15 and 24 [pp.34, 36-7]) (see also D/2)

Appendix: *Gesetzentwurf* and *Denkschrift* of the Federal Government (see Source). Text of Convention and Additional Protocol (ibid. p.7-29) not included.

(a)	Registration no.	D/3
(b)	Date	15 May 1990
(c)	Author(ity)	Permanent Representative of Germany to the Council of Europe
(d)	Parties	
(e)	Points of law	<i>Declaration concerning Article 24 made at the time of deposit of the instrument of ratification concerning the European Convention on State Immunity (ETS No.74). The declaration shows that the Federal Government supports the theory of relative state immunity beyond the scope of the Convention.</i>
(f)	Classification no.	0.b; 1.b
(g)	Source(s)	Council of Europe – Treaty Office (http://conventions.coe.int/)
(h)	Additional information	
(i)	Full text – extracts – translation - summaries	

Text of Declaration:

“The Federal Republic of Germany declares in accordance with paragraph 1 of Article 24 of the Convention that, in cases not falling within Articles 1 to 13, its courts are entitled to entertain proceedings against another Contracting State to the extent that its courts are entitled to entertain proceedings against States not Party to the Convention. Such a declaration is without prejudice to the immunity from jurisdiction which foreign States enjoy in respect of acts performed in the exercise of sovereign authority (*acta jure imperii*).“

(a)	Registration no.	D/4
(b)	Date	3 June 1992
(c)	Author(ity)	Permanent Representative of Germany to the Council of Europe
(d)	Parties	
(e)	Points of law	Declaration concerning Article 28 made at the time after the reunification of Germany, replacing an earlier declaration made at the time of deposit of the instrument of ratification concerning the European Convention on State Immunity (ETS No.74). It shows that the Federal Government intended to convey the benefit of state immunity with regard to sovereign acts to all the constituent states of Germany.
(f)	Classification no.	0.c, 1.b, 2.a (refers to the European Convention)
(g)	Source(s)	Council of Europe – Treaty Office (http://conventions.coe.int/)
(h)	Additional information	
(i)	Full text – extracts – translation - summaries	

Text of Declaration:

“The Federal Republic of Germany hereby amends its declaration relating to Article 28, paragraph 2, of the Convention to the effect that all constituent states (Laender) of the Federal Republic of Germany ... shall be able to invoke the provisions of the Convention applying to the Contracting States and shall have the same duties as the latter.”

(a)	Registration no.	D/5
(b)	Date	11 November 1994
(c)	Author(ity)	Permanent Mission of Germany to the United Nations
(d)	Parties	
(e)	Points of law	Statement during the discussions on the ILC draft Convention on Jurisdictional Immunities of States and their Property in the Sixth Committee of the United Nations General Assembly, 49 th Session. The statement outlines the German position on different questions arising from the draft.
(f)	Classification no.	0.c, 1.b (refers to the draft Convention)
(g)	Source(s)	Permanent Mission of Germany to the United Nations, 49 th General Assembly, Sixth Committee, Item 143, 60, in: Deutschland 1994 (Collection by the Federal Foreign Office)
(h)	Additional information	
(i)	Full text – extracts – translation - summaries	

Excerpt from Statement:

- On the qualification of a transaction as commercial or non-commercial

"In the interest of legal certainty, my Government continues to maintain that only the objective nature of a transaction involving a foreign state and not its subjective purpose can determine whether the state is entitled to immunity. Legal transactions with foreign states would carry a risk impossible to calculate if the purpose of state action were to constitute a criterion.

[...]

Some of these proposals admit a reference to the purpose of a transaction if the purpose is relevant to the invocation of immunity under the national law of the respective state. In our opinion this would make it too difficult for a party involved in a transaction with a foreign state to predict whether it will be able to pursue a claim in court. Furthermore, the question of reciprocity would arise since the granting of state immunity would necessarily differ according to the applicable law.

As far as the idea of requiring a general declaration by a state to refer to the criterion of purpose is concerned this would solve none of the problems. It would not ensure a greater measure of certainty. Since such a general declaration would not be able to take into account that law and practice of a state might change, it would remain difficult for the private party to predict in which situations the contracting state could invoke immunity. A specific notification of the state about the potential relevance of the purpose criterion would be preferable to a general declaration. However, in the view of my delegation, this proposal still leaves too much uncertainty since it does not require the consent of the private party.

If in addition to nature as the primary criterion, the parties could also expressly agree that a transaction be designated as non-commercial, the granting of immunity would not be left up to the discretion of a foreign state involved in a transaction. We see merit in this proposal

which in cases of doubt would make the objective nature of the transaction the decisive criterion."

- On enforcement measures

"In the opinion of my Government the problem of state immunity and enforcement measures is an essential component of the draft convention without which it would be robbed of its justification.

The provision in article 18 para. 1 (c) of the ILC draft, according to which enforcement measures would be restricted to property with some connection to the claim, constitutes a limitation of the liability of the foreign state that goes too far. It would amount to a limited exemption from financial consequences of commercial transactions engaged in by a state. In our view, the interest of a state party is already sufficiently protected by the remaining limitations contained in articles 18 and 19."

- On prejudgement measures

"With regard to prejudgment measures we hold it necessary that they be subject to the same legal regime as postjudgment measures. The exclusion of measures of constraint intended to afford temporary protection could endanger the implementation of judgements against a state party in cases where it does not enjoy immunity."

- On the liability of state agencies or other legal entities connected with a state

"As far as the treatment of state agencies or other legal entities connected with a state is concerned the question is primarily whether, as compensation for the liability of such legal entities, it will be possible, in certain cases to access the property of the parent state. To exclude the possibility of recourse to the state entirely would enable states to avoid financial liability for commercial transactions by setting up independent entities."

Appendix: Full Text of the statement (see source)

(a)	Registration no.	D/6
(b)	Date	18 October 1995
(c)	Author(ity)	Bundesregierung (Federal Government)
(d)	Parties	
(e)	Points of law	Verbal note from the Federal Government of Germany to the embassy of the Republic of Greece concerning Greek Court decisions dealing with claims for compensation against Germany in connection with the German occupation during World War II. In the verbal note the Federal Foreign Office explained the German position on state immunity.
(f)	Classification no.	0.a, 1.c
(g)	Source(s)	Grote, Völkerrechtliche Praxis der Bundesrepublik Deutschland 1995, III, 18 (www.virtual-institute.de/de/prax1995/praxb95_.cfm); Röben, Völkerrechtliche Praxis der Bundesrepublik Deutschland 1996, III, 18 (www.virtual-institute.de/de/prax1996/pr96_.cfm)
(h)	Additional information	In an answer to a parliamentary question concerning the compensation of Greek victims of the Nazi-Regime the Federal Government in 1997 <i>inter alia</i> referred to the relevant verbal note.
(i)	Full text – extracts – translation - summaries	

Translation of Verbal Note (Excerpt):

Proceedings before Greek courts concerning claims of Greek citizens against the Federal Republic of Germany based on incidents in World War II are not consistent with international law, and therefore any action before Greek Courts against the Federal Republic of Germany is inadmissible. The basic principle of state immunity in international law hinders any conduct of a case before the courts of one state as far as the proceeding is directed against a foreign state in relation to that state's sovereign action (*acta iure imperii*).

[...]

Furthermore according to international law the direction of individual claims for compensation of material and immaterial damages against another state based on that state's belligerent conduct is impermissible.

(a)	Registration no.	D/7
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(b)	Date	30 October 1962
(c)	Author(ity)	Bundesverfassungsgericht (Federal Constitutional Court)
(d)	Parties	Submission by the Bundesgerichtshof [Federal High Court] under Art.100 (2) of the Basic Law (for the text <i>infra</i> under Additional Information). Parties in the underlying civil suit: Vereinigte Kaliwerke Salzdetfurth AG (plaintiff); Federative National Republic of Yugoslavia (defendant)
(e)	Points of law	Federal Constitutional Court applies theory of relative immunity to suit concerning legation premises. The case concerned the premises of the Yugoslav Military Mission in Berlin which had been sold by plaintiff to defendant. Plaintiff claimed that the conveyance of property was void and sought rectification of the land register in its favor which required defendant's consent. Suit was filed to obtain this consent.
(f)	Classification no.	0.b.1; 1.b.
(g)	Source(s)	<i>Entscheidungen des Bundesverfassungsgerichts</i> Vol.15, p.25 <i>et seq.</i> (German original); English extracts in: Decisions of the Bundesverfassungsgericht – Federal Constitutional Court – Federal Republic of Germany, Volume I/1: International Law and Law of the European Communities 1952-1989 (published by the Members of the Court), 1992, p.137 <i>et seq.</i>
(h)	Additional information	<p>This Federal Constitutional Court decision was followed by the Bundesverwaltungsgericht [Federal Administrative Court] in a decision of 17 May 1999 [ZOV 1999, 381 <i>et seq.</i>] which concerned the transfer of an embassy compound to the heirs of the original owner who had been expropriated during the Nazi period because of his race.</p> <p>Article 100 (2) of the Basic Law (German Constitution of 1949) reads as follows: "Where in the course of litigation doubt exists whether a rule of international law is an integral part of federal law and whether such rule directly establishes rights and obligations for the individual (Article 25), the</p> <p>court shall seek a ruling from the Federal Constitutional Court." (Official translation published by the Press and Information Office of the Federal Government)</p>
(i)	Full text – extracts – translation - summaries	

English Excerpt (quoted from Decisions of the Bundesverfassungsgericht [see *supra* under Source], p.148):

"[N]o general rule of public international law whereby domestic jurisdiction in suits against a foreign State in relation to its legation premises are in every case ruled out can be found. The immunity of legation premises instead reaches only as far as is requisite for carrying out the tasks of the diplomatic mission."

Appendix 1: German original (see Source)

Appendix 2: English translation (see Source)

Appendix 3: Federal Administrative Court decision of 1999 (mentioned under Additional Information)

(a)	Registration no.	D/8
(b)	Date	30 April 1963
(c)	Author(ity)	<i>Bundesverfassungsgericht</i> (Federal Constitutional Court)
(d)	Parties	Submission by the Cologne Regional Court under Art.100 (2) of the Basic Law (for the text see D/7 under Additional Information). Parties in the underlying civil suit: anonymous heating installation repair shop (plaintiff); Iranian Empire (defendant)
(e)	Points of law	Federal Constitutional Court adopts and explains the theory of relative state immunity. The case arose when the defendant refused to pay plaintiff for repair work done at the Iranian Embassy building in Cologne.
(f)	Classification no.	0.b.1; 1.b.
(g)	Source(s)	<i>Entscheidungen des Bundesverfassungsgerichts</i> Vol.16, p.27 <i>et seq.</i> (German original); English extracts in: Decisions of the Bundesverfassungsgericht – Federal Constitutional Court – Federal Republic of Germany, Volume I/1: International Law and Law of the European Communities 1952-1989 (published by the Members of the Court), 1992, p.150 <i>et seq</i>
(h)	Additional information	This decision of the Federal Constitutional Court is quoted in the Explanatory Report to the European Convention on State Immunity (ETS No.74) as an “important decision” that “adopted the principle of relative State Immunity” (§5).
(i)	Full text – extracts – translation - summaries	

English Excerpt (quoted from Decisions of the Bundesverfassungsgericht [see *supra* under Source], p.150 [headnotes]):

- “1. A rule of public international law whereby domestic jurisdiction for actions against a foreign State in relation to its non-sovereign activity is ruled out is not an integral part of Federal law.
2. a) The criterion for distinguishing between sovereign and non-sovereign State activity is the nature of the State’s action.
b) Classification as sovereign or non-sovereign State activity is in principle to be done according to national law.”

Appendix 1: German original (see Source)

Appendix 2: English translation (see Source)

(a)	Registration no.	D/9
(b)	Date	13 December 1977
(c)	Author(ity)	<i>Bundesverfassungsgericht</i> (Federal Constitutional Court)
(d)	Parties	Submission by the Bonn Local Court under Art.100 (2) of the Basic Law (for the text see D/7 under Additional Information). Parties in the underlying civil suit: anonymous landlord (creditor) and the Republic of the Philippines (debtor)
(e)	Points of law	The landlord had rented a house to the Republic of the Philippines which used it as an office for its Embassy in Germany. After the end of the tenancy agreement the landlord secured a default judgment against the Philippines concerning arrears of rent and expenses for necessary repair work. To execute this judgment he seized a current bank account used by the Philippine Embassy. The Republic of the Philippines lodged an objection with the Bonn Local Court claiming sovereign immunity. The Federal Constitutional Court upheld the objection.
(f)	Classification no.	0.b.1; 1.b; 2.b.
(g)	Source(s)	<i>Entscheidungen des Bundesverfassungsgerichts</i> Vol.46, p.342 <i>et seq.</i> (German original); English extracts in: Decisions of the Bundesverfassungsgericht – Federal Constitutional Court – Federal Republic of Germany, Volume I/1: International Law and Law of the European Communities 1952-1989 (published by the Members of the Court), 1992, p.358 <i>et seq.</i>
(h)	Additional information	
(i)	Full text - extracts - translation - summaries/ Texte complet - extraits - traduction – résumés	

English Excerpt (quoted from Decisions of the Bundesverfassungsgericht [see *supra* under Source], p.358 *et seq.* [headnotes]):

- “5. “The fact that general customary international law contains the minimum obligation for contentious proceedings to grant immunity in relation to sovereign acts (*acta iure imperii*) does not by itself mean that, even as regards execution, it requires only limited immunity. ...
7. At present there is no practice of States that would as yet be sufficiently general and supported by the necessary legal conviction as to establish a general rule of intern[ation]al law whereby the State having jurisdiction would be barred from execution against a foreign State absolutely.
8. There is a general rule of international law that execution by the State having jurisdiction on the basis of a judicial writ of execution against a foreign State, issued in relation to non-sovereign action (*acta iure gestionis*) of that State upon that State’s things located or occupied within the national territory of the State having jurisdiction, is inadmissible without assent by the foreign State, insofar as those things serve

sovereign purposes of the foreign State at the time of commencement of the enforcement measure.

9. In the case of measures by way of security or execution against a foreign State, international law objects, at the time concerned serving its diplomatic representation in carrying out its official functions, may not be seized (*ne impediatur legatio*).
10. Because of the problems of demarcation in assessing endangerment of that functionality and because of the latent possibilities of abuse, general international law draws the area of protection in favour of the foreign State very broadly and focuses on the typical, abstract danger, not on the specific endangerment of the functionality of the diplomatic representation.
11. Receivables from a current ordinary bank account of the embassy of a foreign State existing in the forum State and intended to cover the embassy's expenses and costs are not subject to execution by the forum State.
12. It would constitute interference contrary to international law in the exclusive affairs of the sending State for the enforcement agencies of the receiving State to demand that the sending State, without its assent, give details of the existence or of the earlier, present or future uses of credits on such an account.
13. The question remains open whether and on what criteria claims and other rights on other accounts of a foreign State with banks in the forum State, for instance special accounts in connection with procurement purposes or issues of loans or on accounts without special earmarking, are to be treated as sovereign or non-sovereign assets and which limits in international law are accordingly to be taken into account as appropriate for the law of evidence. ...
14. The principle of the sovereign equality of States is a constitutive principle of contemporary general international law, which, at any rate within the sphere of the diplomatic transactions of States, requires far-reaching formal equality of treatment. Differential treatment of States in the sphere of diplomatic immunity according to their respective economic capacity would be incompatible therewith."

Appendix 1: German original (see Source)

Appendix 2: English translation (see Source)

(a)	Registration no.	D/10
(b)	Date	26 September 1978
(c)	Author(ity)	<i>Bundesgerichtshof</i> (Federal High Court)
(d)	Parties	Plaintiff: religious association with legal personality as an association registered in Germany (branch of the Church of Scientology of California whose mother-church is domiciled in England); defendant: director of New Scotland Yard
(e)	Points of law	Plaintiff brought action for a permanent injunction against defendant in view of the fact that New Scotland Yard had issued a report on the Scientology movement accusing it of dishonest acts to the detriment of its members. This report had been sent to the Federal Office of Criminal Investigation (<i>Bundeskriminalamt</i>) upon its request and transmitted by it to all the state offices of criminal investigation (<i>Landeskriminalämter</i>). Plaintiff claimed that certain factual allegations made in the report were untrue. The action was dismissed because the German courts did not have jurisdiction in view of defendant's sovereign immunity.
(f)	Classification no.	0.a., 1.b
(g)	Source(s)	Neue Juristische Wochenschrift 1979, p.1101 <i>et seq.</i>
(h)	Additional information	
(i)	Full text - extracts - translation - summaries/ Texte complet - extraits - traduction – résumés	

English Summary of Relevant Parts of Decision:

The question whether defendant is subject to jurisdiction of German courts is to be answered pursuant to the general rules of international law (see Article 25 of the Basic Law [for the text see D/19 under Additional Information]). This refers to customary international law. While sovereign immunity no longer covers *acta iure gestionis* it still applies to sovereign acts of states. Whether the report of Scotland Yard about Scientology qualifies as a sovereign act or a non-sovereign act must be determined according to German law as the law of the forum. According to German law the exercise of police power is undoubtedly part of the sovereign activity of states. It even is at the core of sovereign power so that the report at issue here must be considered as an act *iure imperii* even if it had to be qualified as an act *iure gestionis* under English law. The report was sent to the Federal Office of Criminal

Investigation upon its request pursuant to the international agreement between the Federal Republic of Germany and Great Britain on mutual assistance in criminal matters of 1961. Fulfilling an obligation arising under an international treaty on police cooperation in criminal matters always amounts to an act *iure imperii*. The acts of Scotland Yard and its director – the defendant – are sovereign acts of the British state and not an act of the defendant as a private person. It would undermine the unlimited immunity of foreign states with regard to their sovereign acts if German courts were to allow actions directly against the individual performing these sovereign acts on behalf of the state.

Appendix: German original (from the Juris online retrieval system)

(a)	Registration no.	D/11
(b)	Date	12 April 1983
(c)	Author(ity)	<i>Bundesverfassungsgericht</i> (Federal Constitutional Court)
(d)	Parties	Constitutional complaint by the National Iranian Oil Company (a joint stock company under Iranian law owned by the Islamic Republic of Iran) against orders of attachment and distraint by German courts, issued on petitions by British and U.S. firms.
(e)	Points of law	The Federal Constitutional Court dismissed the complaint as unfounded because it drew a distinction between the sovereign state and separate legal entities under private law established by it.
(f)	Classification no.	0.b.1; 1.b; 2.b.
(g)	Source(s)	<i>Entscheidungen des Bundesverfassungsgerichts</i> Vol.64, p.1 <i>et seq.</i> (German original); English extracts in: <i>Decisions of the Bundesverfassungsgericht – Federal Constitutional Court – Federal Republic of Germany, Volume 1/2: International Law and Law of the European Communities 1952-1989</i> (published by the Members of the Court), 1992, p.479 <i>et seq.</i>
(h)	Additional information	
(i)	Full text – extracts – translation - summaries	

English Excerpt (quoted from Decisions of the Bundesverfassungsgericht [see *supra* under Source], p.479 *et seq.* [headnotes]):

“There is no general rule of international law requiring that a foreign State be treated as owner of receivables on accounts maintained with banks in the forum State kept in the name of an enterprise of the foreign State having legal capacity.

The forum State is not prevented from treating the enterprise concerned as entitled to receive claims and, on the basis of a title of enforcement given against that enterprise, issued in prior proceedings for protection of rights in relation to non-sovereign action by the enterprise, to distraint the receivables concerned in order to secure the claim in the title.

This applies irrespective of whether the credits on these accounts are freely available to the enterprise or are according to foreign law intended for transfer to an account of the foreign State with its central bank.”

Appendix 1: German original (see Source)

Appendix 2: English translation (see Source)

(a)	Registration no.	D/12
(b)	Date	30 September 1988
(c)	Author(ity)	<i>Bundesverwaltungsgericht</i> (Federal Administrative Court)
(d)	Parties	Asylum seeker filed suit against rejection of his application for asylum by the Federal Government.
(e)	Points of law	Tamile asylum seeker from Sri Lanka moved for the cross examination of the Indian minister of defense to support his allegation that Indian troops had engaged in indiscriminate killings of Tamiles in Sri Lanka. Motion was denied because of state immunity. On appeal the Bundesverwaltungsgericht rejected the argument that denial of motion amounted to procedural error.
(f)	Classification no.	0.a, 1.b
(g)	Source(s)	Deutsches Verwaltungsblatt 1989, 261 <i>et seq</i>
(h)	Additional information	
(i)	Full text – extracts – translation - summaries	

English Summary of Relevant Part of Decision:

The testimony of the Indian defense minister is a piece of evidence which cannot be obtained. Sovereign states enjoy unlimited immunity with regard to their sovereign acts (*acta iure imperii*) under customary international law which binds German courts according to Art.25 of the Basic Law (for the text see D/19 under Additional Information). This immunity extends to the officials acting for the states. It also excludes subpoenas which would direct them to testify as witnesses concerning those sovereign acts absent special provisions in a treaty. There is no such treaty between Germany and India. As the testimony of the Indian defense minister concerns the mission of Indian troops deployed in Sri Lanka, their motives and their official acts it undoubtedly concerns sovereign acts. Therefore the minister is under no legal obligation to testify, and he is not even required to do so by a rule of international comity.

Appendix: German original (from the Juris online retrieval system)

(a)	Registration no.	D/13
(b)	Date	15 May 1995
(c)	Author(ity)	<i>Bundesverfassungsgericht</i> (Federal Constitutional Court)
(d)	Parties	Submission by the <i>Kammergericht</i> [Berlin Superior Court] under Art.100 (2) of the Basic Law (for the text see D/7 under Additional Information) in criminal proceedings against persons indicted for espionage against the Federal Republic of Germany on behalf of the former German Democratic Republic. Constitutional complaints of persons against their conviction for espionage against the Federal Republic of Germany on behalf of the former German Democratic Republic.
(e)	Points of law	The decision mainly concerns the question whether there is a general rule of international law according to which it is inadmissible to prosecute persons for espionage committed on behalf of and from the territory of a state that later peacefully acceded to the state against which the espionage was directed. The existence of such rule was denied. In the course of argument the court briefly touched upon the state immunity issue and rejected the argument that it could be used as a defense against the prosecution of spies.
(f)	Classification no.	0.a, 1.c
(g)	Source(s)	<i>Entscheidungen des Bundesverfassungsgerichts</i> Vol.92, p.277 et seq.
(h)	Additional information	
(i)	Full text – extracts – translation - summaries	

English Excerpt:

“There is no rule of international law according to which spies who are prosecuted by the state against which the espionage was directed could rely on the principles of sovereign immunity. There is an exception only if the accused enjoy the protection of the Vienna Conventions on Diplomatic Relations of 1961 or on Consular Relations of 1963 or of special agreements.” (p.321)

Appendix: German original (see Source)

(a)	Registration no.	D/14
(b)	Date	3 July 1996
(c)	Author(ity)	<i>Bundesarbeitsgericht</i> (Federal Labor Court)
(d)	Parties	Plaintiff: Argentine citizen and former employee of the Argentine Consulate General in Germany; defendant: Argentine Republic
(e)	Points of law	Plaintiff considered termination of her labor contract as ineffective and sued defendant, seeking declaratory relief to the effect that her labor contract had continued beyond the date of the termination. Suit was dismissed according to §20 (2) of the Courts Act (see D/19) for lack of jurisdiction of the German courts. The decision of the Federal Labor Court heavily relies on the decisions of the Federal Constitutional Court reported under D/8 and D/9.
(f)	Classification no.	0.a., 1.b
(g)	Source(s)	Entscheidungen des Bundesarbeitsgerichts Vol. 83, p.262 <i>et seq</i>
(h)	Additional information	
(i)	Full text – extracts – translation - summaries	

English Summary of Relevant Parts of Decision:

The immunity claim by defendant must be evaluated according to the general rules of international law (§20 (2) of the Courts Act). Customary international law excludes the jurisdiction of German courts over sovereign acts of foreign states but not over their non-sovereign acts. The distinction turns not on the motive or purpose of the act but on its nature. The distinction is to be made according to the law of the forum state. However, the general rules of international law provide that all those acts of foreign states must remain exempt from the jurisdiction of the national courts which are considered as sovereign acts (*acta iure imperii*) by the majority of states even if the law of the forum state would rate them as *acta iure gestionis*. Although labor contracts are considered as private law contracts in Germany even if concluded on behalf of the state the pending case concerns *acta iure imperii* beyond the jurisdiction of the German courts. The reason is that plaintiff exercised consular functions (e.g., she issued Argentine passports and visas). These functions are within the core area of sovereignty. The concept of state immunity protects foreign states from German courts' interference in their sovereign functions. If an employee exercises sovereign functions as a consular official of a foreign state, the review of this employee's dismissal by German courts would interfere with the consular functions of this state and thus run counter to the principle *ne impediatur legatio*.

Appendix: German original (from the Juris online retrieval system)

(a)	Registration no.	D/15
(b)	Date	24 October 1996
(c)	Author(ity)	<i>Bundesverfassungsgericht</i> (Federal Constitutional Court)
(d)	Parties	Constitutional complaints of members of the government of the former German Democratic Republic who had after the reunification of Germany been convicted and sentenced for homicide with regard to the shooting and killing of persons who had tried to flee the GDR across the inner-German border.
(e)	Points of law	The decision mainly concerns the question whether the conviction of the complainants violates the prohibition of retroactive criminalization of acts not subject to punishment at the time when they were committed. But the complainants had also raised the state immunity defense which the court rejected in a short passage quoted below.
(f)	Classification no.	0.a, 1.c
(g)	Source(s)	<i>Entscheidungen des Bundesverfassungsgerichts</i> Vol.95, p.96 <i>et seq.</i>
(h)	Additional information	See also the short decision of a chamber of the Federal Constitutional Court of 21 February 1992 which had rejected the immunity defense of former GDR head of state Honecker for the same reason (published in German with an English headnote in <i>Deutsche Rechtsprechung zum Völkerrecht und Europarecht 1986-1993</i> [1997], p.129 <i>et seq.</i>). The headnote says: "The immunity of a head of state cannot outlast the existence of the state which he or she represented. After the extinction of a state its representatives can therefore be subject to the criminal jurisdiction of other states."
(i)	Full text – extracts – translation - summaries	

English Excerpt:

"... it is the generally accepted position in the international legal literature ... that the immunity does not continue beyond the existence of the state whose citizen was the person concerned. ... The argument of the complainant no.3 that Article 25 of the Basic Law was violated for the reason alone that his criminal prosecution disregarded the sovereignty of the German Democratic Republic is not correct for this reason." (p.129 *et seq.*)

Appendix 1: Relevant parts of the German original (see Source)

Appendix 2: Decision of chamber of Federal Constitutional Court (see Additional Information)

(a)	Registration no.	D/16
(b)	Date	10 Juni 1997
(c)	Author(ity)	<i>Bundesverfassungsgericht</i> (Federal Constitutional Court)
(d)	Parties	Constitutional complaint of a former ambassador against an arrest warrant issued for an act he had committed in his official function
(e)	Points of law	Complainant was accredited as the ambassador of his home state in the former German Democratic Republic. At that time, a terrorist bombing occurred in West Berlin which killed one person. The explosives had been stored at the embassy in East Berlin whose head was the complainant. After the reunification of the GDR and the Federal Republic of Germany an arrest warrant was issued against complainant for aiding and abetting the terrorist bombing. The complaint was rejected because complainant's diplomatic immunity recognized by the German Democratic Republic did not bind the Federal Republic of Germany. In this context the Federal Constitutional Court referred to distinctions between state immunity and diplomatic immunity which are summarized below.
(f)	Classification no.	0.a, 1.c
(g)	Source(s)	<i>Entscheidungen des Bundesverfassungsgerichts</i> Vol.96, p.68 <i>et seq</i>
(h)	Additional information	
(i)	Full text – extracts – translation - summaries	

English Summary of Parts of the Decision:

The immunity of state officials, in particular members of the government, derives directly from state immunity. It must be distinguished from diplomatic immunity. State immunity and diplomatic immunity represent two distinct concepts of international law following their own rules so that one can draw no conclusions from the limits of one of the concepts as to the existence of similar limits of the other concept. Therefore exceptions to the concept of state immunity permitting the prosecution of state officials for international crimes etc. cannot be transferred to the concept of diplomatic immunity. This is so because of the personal element involved in diplomatic immunity which protects not only the sending state but also the diplomat personally. Even if a state does not enjoy immunity for non-sovereign acts this does not mean that a diplomat involved in such acts is subject to the jurisdiction of the receiving state. The distinction between *acta iure imperii* and *acta iure gestionis* which characterizes the concept of state immunity is unknown to the law of diplomatic relations. Diplomatic immunity for official acts thus is not a mere reflection of the immunity of the sending state but has its independent basis in the special status of the diplomat. His presence and his competence to act for the sending state in the territory of the receiving state is based on the consent of the latter in the form of the *agrément* while the extension of state immunity to state officials is based on nothing but the internal appointment processes of the state concerned (p.85 *et seq.*)

Appendix: German original (see Source)

(a)	Registration no.	D/17
(b)	Date	23 May 2000
(c)	Author(ity)	<i>Landgericht</i> Frankfurt/Main (Frankfurt District Court)
(d)	Parties	Defendant is creditor of plaintiff-debtor, the state of Brazil. Creditor has two executory titles against debtor and has commenced an enforcement procedure trying to attach claims of debtor against a group of banks arising from a Brazilian government bond which banks have subscribed. Debtor has filed a special appeal petitioning for a court order declaring inadmissible the execution against these claims.
(e)	Points of law	Inadmissibility of execution against assets of foreign state used for sovereign purposes.
(f)	Classification no.	0.b.3, 2.b
(g)	Source(s)	<i>Recht der Internationalen Wirtschaft</i> 2001, p.308
(h)	Additional information	
(i)	Full text – extracts – translation - summaries	

English Summary of the Decision:

Pursuant to a general rule of international law foreign states enjoy immunity from execution. Execution against their assets which serve sovereign purposes is inadmissible even if these assets are located in the forum state. The claims arising from the government bond against which execution is directed are exempt from execution because they serve the balancing of the Brazilian state budget. This has been proven by the Brazilian finance minister's affirmation in lieu of an oath. To require further proof would constitute an illicit interference in the internal affairs of Brazil.

Appendix: German original (see Source)

(a)	Registration no.	D/18
(b)	Date	25 October 2001
(c)	Author(ity)	<i>Bundesarbeitsgericht</i> (Federal Labor Court)
(d)	Parties	Plaintiff: German citizen and former employee of the Belgian Embassy in Germany working in a branch office of this Embassy; defendant: Kingdom of Belgium
(e)	Points of law	Termination of plaintiff's labor contract after she had abused an Embassy seal for private purposes was considered as ineffective by plaintiff. She therefore sued defendant, seeking declaratory relief to the effect that her labor contract had continued beyond the date of the termination. Suit was dismissed according to §20 (2) of the Courts Act (see D/19) for lack of jurisdiction of the German courts. The decision of the Federal Labor Court relies on its earlier decision reported under D/14.
(f)	Classification no.	0.a., 1.b
(g)	Source(s)	Betriebs-Berater 2002, p.787 <i>et seq</i>
(h)	Additional information	See also the decision of the Federal Labor Court of 23 November 2000 (Neue Zeitschrift für Arbeitsrecht 2001, p. 683 <i>et seq.</i>)
(i)	Full text – extracts – translation - summaries	

English Summary of Relevant Parts of Decision:

The defendant is not subject to the jurisdiction of the German courts (§20 (2) of the Courts Act [*Gerichtsverfassungsgesetz*]). Although Article 5 of the European Convention on State Immunity of 1972 excludes the state immunity defense in certain labor contract disputes Article 31 of the Convention expressly reserves the privileges and immunities of diplomatic and consular missions and accords priority to the Vienna Conventions on Diplomatic Relations of 1961 and on Consular Relations of 1963 in cases of conflict. Thus a state party to the European Convention on State Immunity of 1972 can claim sovereign immunity in labor contract disputes with employees of its embassies and consulates to a wider extent than in similar disputes with other employees. In particular, the international legal principle *ne impediatur legatio* applies in those cases. According to Art.32 of the European Convention on State Immunity this convention is not meant to limit the sovereign powers of the states parties with regard to diplomatic and consular personnel any further than they were limited by the general rules of international law and the Vienna Conventions when the European Convention on State Immunity entered into force. This interpretation is also supported by Article 24 (1) of the European Convention on State Immunity pursuant to which the immunity of foreign states from jurisdiction with regard to *acta iure imperii* is expressly reserved.

According to §20 (2) of the Courts Act a foreign state is exempted from the jurisdiction of the German courts with regard to disputes arising from the termination of labor contracts with consular employees. (Here the court refers to its earlier decision reported under D/14.) The same applies with regard to embassy employees who perform consular functions in a branch office of the embassy. The judicial review of the dismissal of such an employee would interfere with the sovereign functions of the foreign state and thus run counter to the principle *ne impediatur legatio*. This holds true no less if the foreign state is a party to the European Convention on State Immunity (see Article 32 of this Convention).

The plaintiff did in fact perform core consular functions at the branch office of defendant's embassy. She was empowered to sign visas and to use the embassy seal. She was also put on the list of personnel with signing authority.

Appendix 1: German original (from the Juris online retrieval system)

Appendix 2: Decision of Federal Labor Court mentioned under Additional Information

(a)	Registration no.	D/19
(b)	Date	17 July 1984
(c)	Author(ity)	Federal Parliament (<i>Bundestag</i> and <i>Bundesrat</i>)
(d)	Parties	
(e)	Points of law	Art.4 of the Second Act Amending the Act on the Federal Central Register (<i>Zweites Gesetz zur Änderung des Bundeszentralregistergesetzes</i>) rephrases §20 of the Courts Act (<i>Gerichtsverfassungsgesetz</i>). §20 (2) of the Courts Act incorporates the general rules of international law concerning the immunity of states and their officials.
(f)	Classification no.	0.c, 1.b
(g)	Source(s)	<i>Bundesgesetzblatt</i> (Federal Law Gazette) 1984 Part I, p.990, 993-4
(h)	Additional information	Article 25 of the Basic Law (German Constitution of 1949) reads as follows: "The general rules of international law shall be an integral part of federal law. They shall override laws and directly establish rights and obligations for the inhabitants of the federal territory." (Official translation published by the Press and Information Office of the Federal Government)
(i)	Full text – extracts – translation - summaries	

English Translation of §20 of the Courts Act:

"(1) The jurisdiction of the German courts does not extend to representatives of other states and their entourage who stay within the area of application of the present Act upon an official invitation of the Federal Republic of Germany.

(2) In other respects, the jurisdiction of the German courts does not extend either to other persons than those mentioned in paragraph (1) and in §18 [concerning diplomatic agents] and §19 [concerning consular officials] insofar as these persons are exempted from it pursuant to the general rules of international law, on the basis of international agreements or other provisions of law."

Appendix: German text of *Zweites Gesetz zur Änderung des Bundeszentralregistergesetzes*

(a)	Registration no.	D/20
(b)	Date	1 September 1989
(c)	Author(ity)	<i>Rechtsausschuß des Deutschen Bundestages</i> (Judiciary Committee of the German Federal Diet)
(d)	Parties	
(e)	Points of law	Report and Recommendation on the Government draft of Act of Parliament required by Article 59 (2) clause 1 of the Basic Law (for the text see infra under Additional Information) to enable the Federal Republic of Germany to ratify the European Convention on State Immunity of 1972 (ETS No.74). The Report shows that the Committee shares the theory of relative state immunity.
(f)	Classification no.	0.c, 1.b, 2.a (refers to the European Convention)
(g)	Source(s)	Deutscher Bundestag, 11. Wahlperiode, Drucksache 11/5132 (official prints of the German Federal Diet)
(h)	Additional information	See D/1, D/21. Article 59 (2) clause 1 of the Basic Law (German Constitution of 1949) reads as follows: "Treaties which regulate the political relations of the Federation or relate to matters of federal legislation shall require the approval or participation of the appropriate legislative body in the form of a federal law. ..." (Official Translation published by the Press and Information Office of the Federal Government)
(i)	Full text – extracts – translation - summaries	

English Translation of Excerpt from Committee Report:

"The immunity of foreign States from national jurisdiction is an internationally recognized principle of customary international law, safeguarded by reciprocity. In the course of time, however, international and national practice as well as legal doctrine have moved away from the absolute immunity of foreign states. According to the theory of relative or limited immunity a state shall enjoy immunity only with regard to sovereign acts but not with regard to private law acts. The certain and harmonious application of this by now well-established principle is not yet ensured, due to the lack of sufficiently defined agreements. Therefore the European Convention on State Immunity establishes general rules which specify the extent of immunity from jurisdiction which a state enjoys vis-à-vis the courts of other states. ..." (p.1 under A)

Appendix: *Beschlußempfehlung und Bericht des Rechtsausschusses* (see Source)

(a)	Registration no.	D/21
(b)	Date	28 September 1989 (passed <i>Bundestag</i>); 20 October 1989 (passed <i>Bundesrat</i>)
(c)	Author(ity)	Federal Parliament (<i>Bundestag</i> and <i>Bundesrat</i>)
(d)	Parties	
(e)	Points of law	Act of Parliament required by Article 59 (2) of the Basic Law (for the text see D/20 under Additional Information) to enable the Federal Republic of Germany to ratify the European Convention on State Immunity of 1972 (ETS No.74). In assenting to the Convention without reservation, the German Parliament recognizes the theory of relative state immunity embodied therein.
(f)	Classification no.	0.c, 1.b, 2.a (refers to the European Convention)
(g)	Source(s)	<i>Bundesgesetzblatt</i> (Federal Law Gazette) 1990 Part II, p.34
(h)	Additional information	
(i)	Full text – extracts – translation - summaries	

English Translation of Article 1 of the Act:

“The European Convention on State Immunity, signed by the Federal Republic of Germany in Basle on 16 May 1972, is assented to. The Convention is published below.”

Appendix: Text of the Act (see Source)

GREECE

(a)	Registration no	GR/1
(b)	Date	2002
(c)	Author(ity)	Special Supreme Court
(d)	Parties	Judgment 6/2002 X. v. Federal Republic of Germany
(e)	Points of Law	The Special Supreme Court held that there is no rule of customary international law providing that a State may be brought before the Tribunals of another State for civil liability arising out of crimes committed either in wartime or in peacetime by its armed forces.
(f)	Classification no	
(g)	Source	Archeion Nomologias (Archive of Case-Law in Greek) 2003, p. 40.
(h)	Additional Information	
(i)	Full text - extracts - translation - summaries	The Court held that at the present stage of development of international law, there still applies a generally accepted rule of that law pursuant to which a State cannot be validly brought in civil proceedings before the Courts of another State for compensation resulting from any kind of tort which took place on the territory of the forum, if in such tort were involved the military forces of the defendant State, either in time of peace or in time of war.”

(a)	Registration no	GR/2
(b)	Date	2002
(c)	Author(ity)	Supreme Court (Areios Pagos) Plenary
(d)	Parties	Judgment 37/2002
(e)	Points of Law	The Plenary of the Supreme Court held that the requirement for prior consent of the Minister of Justice (as provided in article 923 of the Code of Civil Procedure) is not contrary to article 6 par. 1 of the European Convention on Human Rights (ECHR) and article 2 par. 3 as well as 14 of the International Covenant on Civil and Political Rights (ICCPR).
(f)	Classification no	
(g)	Source	
(h)	Additional Information	
(i)	Full text - extracts - translation - summaries	<p>The Plenary of the Supreme Court held that the prior consent of the Minister of Justice (article 923 of the Code of Civil Procedure), which is necessary to initiate enforcement proceedings against a foreign State, is not contrary to article 6 par. 1 of the ECHR and articles 2 par. 3 as well as 14 of the ICCPR. It consequently decided that the right to effective remedies in case of enforcement proceedings may, under certain conditions, be subject to restrictions. Such restrictions should be provided for by law and should not violate the substance of the protected right or be disproportionate to the aim pursued and the means employed.</p> <p>The Supreme Court held that the refusal of the Minister of Justice to consent to enforcement proceedings against a foreign State is not contrary to the aforementioned rules of the ECHR and the ICCPR if such enforcement proceedings are directed against the property of a foreign State serving “<i>jure imperii</i>” purposes or if these proceedings may endanger the international relations of the country with foreign States ...</p>

(a)	Registration no	GR/3
(b)	Date	2002
(c)	Author(ity)	Supreme Court (Areios Pagos) Chamber
(d)	Parties	Judgment 302/2002 Prefecture of Boeteia v. The Fed. Rep. of Germany
(e)	Points of Law	The Chamber of the Supreme Court having doubts as to whether prior consent of the Minister of Justice is necessary to initiate enforcement proceedings against a foreign State, decided to refer the case to the Plenary of the Supreme Court (Areios Pagos).
(f)	Classification no	2, 2.b, 2.c
(g)	Source	
(h)	Additional Information	
(i)	Full text - extracts - translation - summaries	As stated above, the Chamber of the Supreme Court had doubts as to whether prior consent of the Minister of Justice, which is necessary according to article 923 of the Greek Code of Civil Procedure to start enforcement proceedings against a foreign state, is contrary to article 6 par. 1 of the European Convention on Human Rights and articles 2 par. 3 as well as 14 of the International Covenant on Civil and Political Rights. It therefore decided to refer the case to the Plenary of the Supreme Court (Areios Pagos).

(a)	Registration no	GR/4
(b)	Date	2001
(c)	Author(ity)	Supreme Court (Areios Pagos) Chamber
(d)	Parties	Judgment 131/2001
(e)	Points of Law	The Chamber of the Supreme Court having doubts as to whether a foreign State enjoys State immunity for acts performed <i>jure imperii</i> which violate the laws of war on land, decided to refer the question to the Supreme Special Court.
(f)	Classification no	0.a, 0.c, 1c
(g)	Source	Nomiko Vima 2001 p. 1166
(h)	Additional Information	
(i)	Full text - extracts - translation - summaries	As stated above, the Chamber of the Supreme Court, had doubts as to the recognition or non recognition of State immunity with regard to claims arising out of violations of the laws of war on land by the nazi forces in occupied Greece. It therefore decided to refer the case to the Supreme Special Court which is provided for in article 100 of the Greek Constitution. Such Court will decide on whether a rule as to the abovementioned question exist and has reached the status of international customary law.

(a)	Registration no	GR/5
(b)	Date	2000
(c)	Author(ity)	Supreme Court (Areios Pagos) Plenary
(d)	Parties	Judgment 11/2000 Prefecture of Boeteia v. The Fed. Rep. of Germany
(e)	Points of Law	In cases of grave violations of the laws of war on land, and generally of rules recognized as having a <i>jus cogens</i> character, foreign States are not entitled to State Immunity
(f)	Classification no	0.a, 0.c, 1c
(g)	Source	Dike (Trial) Greek Journal of Civil Procedure 2000, p. 696
(h)	Additional Information	
(i)	Full text - extracts - translation - summaries	There is a general practice of States which has reached the status of international custom -thus constituting in accordance with article 28 par. 1 of the Greek Constitution an integral part of the Greek domestic law with increased force of validity- according to which domestic Courts have jurisdiction, in derogation of the principle of State immunity, to hear claims of compensation arising out of grave breaches of the laws of war. This derogation from the sovereign immunity rule refers to damages arising out of torts inflicted upon a specific number of persons of the civilian population by way of abuse of force by members of the occupying Force.

(a)	Registration no	GR/6
(b)	Date	1993
(c)	Author(ity)	Athens Court of Appeals
(d)	Parties	Judgment 5288/1993, X. (Professor of the Italian language) v. (Casa d' Italia) The Italian Republic
(e)	Points of Law	In disputes arising out of labour contracts foreign States are not entitled to sovereign immunity.
(f)	Classification no	0b, 0.b2, 1.b
(g)	Source	Epitheorisi Emborikou Dikaiou (in Greek Journal of Commercial Law) vol. 53 (1994) p. 763
(h)	Additional Information	
(i)	Full text - extracts - translation - summaries	Foreign States do not enjoy sovereign immunity for acts performed <i>jure gestionis</i> . Conversely, they enjoy immunity for acts performed <i>jure imperii</i> . Since there is no international norm establishing international jurisdiction of domestic courts on this matter, every State establishes its international jurisdiction in accordance with its domestic law. Consequently, the criteria for determining which acts are considered as <i>jure gestionis</i> or <i>jure imperii</i> are set out in the domestic legislation. Labour contracts in which a foreign State is a Party, do not fall in the ambit of governmental authority of the State (except for contracts in matters of civil service). Therefore in such cases foreign States are not entitled to sovereign immunity.

(a)	Registration no	GR/7
(b)	Date	1992
(c)	Author(ity)	Athens Court of Appeals
(d)	Parties	Judgment 1822/1992 I.G. v. The United States
(e)	Points of Law	In cases of labour contracts in which a foreign State is a contracting party and stands on an equal footing with private persons, the State cannot raise the plea of sovereign immunity.
(f)	Classification no	0b, 0.b2, 1.b
(g)	Source	Dike (Trial) vol. 23 (1992) p. 897
(h)	Additional Information	
(i)	Full text - extracts - translation - summaries	In accordance with article 3 par. 1 of the Greek Code of Civil Procedure foreign nationals are under the jurisdiction of Greek Courts unless they are entitled to immunity from jurisdiction. Foreign States are not immune from judicial proceeding for acts they perform as <i>fiscus</i> . In cases of labour contracts in which a foreign State is a contracting party and stands on an equal footing with private persons, the State cannot raise the plea of sovereign immunity Accordingly that State is not immune from lawsuits arising out of these contracts.

(a)	Registration no	GR/8
(b)	Date	1992
(c)	Author(ity)	Athens Court of First Instance
(d)	Parties	Judgment 600/1992 X. (Professor of the Italian language) v. (Casa d' Italia) The Italian Republic.
(e)	Points of Law	A foreign State is entitled to sovereign immunity in case of disputes arising out of labour contracts concluded in order to fulfil the functional needs of that State.
(f)	Classification no	0.a, 1.a
(g)	Source	Epitheorissi Ergatikou Dikaiou (in greek) Journal of Labour Law 1994 p. 806
(h)	Additional Information	
(i)	Full text - extracts - translation - summaries	Foreign States are entitled to immunity from jurisdiction of domestic Courts in disputes arising out of acts performed <i>jure imperii</i> . Disputes related to the performance of labour contracts which have been concluded between a foreign State and a private person in order to fulfil functional needs of the State, are not subject to the jurisdiction of domestic Courts

(a)	Registration no	GR/9
(b)	Date	1991
(c)	Author(ity)	Court of Appeals of Crete
(d)	Parties	Judgment 491/1991 X v. Mediterranean Institute for Agriculture
(e)	Points of Law	Greek Courts are entitled to adjudicate on disputes between private persons and international organizations arising out of labour contracts.
(f)	Classification no	0.b, 0.b.2, 1.b
(g)	Source	"Armenopoulos" (in greek) 1993 p. 931
(h)	Additional Information	
(i)	Full text - extracts - translation - summaries	In cases of labour contracts between a private person and an international organisation, Greek Courts are entitled to adjudicate on disputes arising out of acts in which the international organisation acted as <i>fiscus</i> and not as <i>imperium</i> . Consequently, Greek Courts have jurisdiction to judge on lawsuits arising out of these contracts against the organisation

(a)	Registration no	GR/10
(b)	Date	1991
(c)	Author(ity)	Court of Appeals of Crete
(d)	Parties	Judgment 479/1991 X v. Mediterranean Institute for Agriculture
(e)	Points of Law	International Organisations are not entitled to immunity from jurisdiction of domestic Courts for acts they have performed as <i>fiscus</i> . Under the contrary hypothesis there could be no jurisdiction with regard to the greatest part of private law cases involving the organisation.
(f)	Classification no	0.b, 0.b.2, 1.b
(g)	Source	Epitheorissi Ergatikou Dikaiou (in greek) Journal of Labour Law 1992 p. 503
(h)	Additional Information	
(i)	Full text - extracts - translation - summaries	As stated above, international organisations are not entitled to immunity from jurisdiction of domestic Courts for acts they have performed as <i>fiscus</i> . Otherwise, there could be no jurisdiction on the greatest part of private law cases involving an international organisation. This is because the latter would enjoy immunity from jurisdiction in all its Member States, it does not possess any territory of its own and, only incidentally could a lawsuit be brought against it in a third country according to the rules on jurisdiction applying in each state.

(a)	Registration no	GR/11
(b)	Date	1990
(c)	Author(ity)	Athens Court of Appeals
(d)	Parties	Judgment 12845/1990
(e)	Points of Law	Greek Courts are not entitled to adjudicate on disputes arising out of acts performed <i>jure imperii</i> . Greek Courts have jurisdiction for acts performed <i>jure gestionis</i> .
(f)	Classification no	0.b, 0.b.3, 1.b
(g)	Source	Elliniki Dikaiosyni (in greek) 1992 p. 882.
(h)	Additional Information	
(i)	Full text - extracts - translation - summaries	Foreign States do not enjoy sovereign immunity for acts performed <i>jure gestionis</i> . Conversely, they enjoy immunity for acts performed <i>jure imperii</i> . Disputes arising out of acts in which a person entitled to sovereign immunity appears as a private person exercising commercial, industrial, financial or other lucrative activities are private law disputes. Consequently, those disputes fall in the ambit of jurisdiction of domestic Courts.

(a)	Registration no	GR/12
(b)	Date	1988
(c)	Author(ity)	Athens Court of Appeals
(d)	Parties	Judgment 13043/1988
(e)	Points of Law	Foreign States are entitled to sovereign immunity for acts performed <i>jure imperii</i> . In matters of labour law, foreign States are not acting in their sovereign capacity. They appear on an equal basis with the private person employed.
(f)	Classification no	0.b,1.b
(g)	Source	Dike (Trial) 1990 p. 288
(h)	Additional Information	
(i)	Full text - extracts - translation - summaries	Foreign States are entitled to sovereign immunity for acts performed <i>jure imperii</i> , i.e. acts performed under their governmental authority. On the contrary where a State is acting as a <i>fiscus</i> and private law rules are applicable, the State in question is not entitled to immunity. In matters of labour law, foreign States are not acting in their sovereign capacity when contracting labour law contracts. Indeed, they appear on an equal basis with the private person employed.

(a)	Registration no	GR/13
(b)	Date	1988
(c)	Author(ity)	Athens Court of Appeals
(d)	Parties	Judgment 175/1988 X. v. Iraqi Airways
(e)	Points of Law	Although an instrumentality of a foreign State does not possess legal personality according to its national law, such instrumentality is considered to have <i>locus standi</i> before Greek Courts, if it has developed activities of its own.
(f)	Classification no	0.b, 0.b.3, 1.b
(g)	Source	Dike (Trial) 1989 p. 264
(h)	Additional Information	
(i)	Full text - extracts - translation - summaries	Although an instrumentality of a foreign State does not possess legal personality according to its national law, an instrumentality of a foreign State is considered to have its own distinct legal capacity when such instrumentality has developed activities of its own. In the latter case even if such instrumentality is not distinct from the foreign State, it has its own <i>locus standi</i> before the Greek courts.

(a)	Registration no	GR/14
(b)	Date	1986
(c)	Author(ity)	Supreme Court (Areios Pagos) Chamber
(d)	Parties	1398/1986 X v. Japan
(e)	Points of Law	According to international law, foreign States are entitled to immunity from jurisdiction for acts performed <i>jure imperii</i> , i.e. disputes arising out of acts which have no relation with private law disputes.
(f)	Classification no	0.b,0.b2, 1.b
(g)	Source	Elliniki Dikaiosyni 1987 p. 1029
(h)	Additional Information	
(i)	Full text - extracts - translation - summaries	According to international law foreign States are entitled to immunity from jurisdiction for acts performed <i>jure imperii</i> . This is the case for disputes arising out of acts performed under the governmental authority of that State which have no relation to private law disputes, i.e. disputes arising out of acts where the state appears as <i>fiscus</i> . The question whether, in a particular case, an act is coming under the governmental authority of the State, or refers to private law relations, is a matter to be decided by the Greek Courts in accordance with relevant domestic law provisions.

(a)	Registration no	GR/15
(b)	Date	1982
(c)	Author(ity)	Court of First Instance of the Island of Kos
(d)	Parties	Judgment 275/1982
(e)	Points of Law	The request for interim measures against a foreign State is not admissible if there is no previous decision of the Minister of Justice consenting to the request.
(f)	Classification no	0.b, 2c
(g)	Source	Epitheorissi Navtikou Dikaiou (Journal of Maritime Law)
(h)	Additional Information	
(i)	Full text - extracts - translation - summaries	Article 689 of the Code of Civil Procedure provides that the request for interim measures against a foreign State is not admissible if there is no previous decision of the Minister of Justice consenting to the request. Prior consent is necessary when the request is filed against the foreign State itself and, consequently, it is not necessary when the request is filed against a foreign legal or natural person, organisation or union, irrespective of the closeness of legal ties with the foreign State.

(a)	Registration no	GR/16
(b)	Date	1981
(c)	Author(ity)	Court of First Instance of Thessaloniki
(d)	Parties	Judgment 1822/1981
(e)	Points of Law	According to article 689 of the Code of Civil Procedure a request for interim measures against a foreign state is admissible if the Minister of Justice has already given his/her consent.
(f)	Classification no	0.b, 2c
(g)	Source	Epitheorissi Emborikou Dikaiou (Journal of Commercial Law) 1981 p. 419
(h)	Additional Information	
(i)	Full text - extracts - translation - summaries	A request for interim measures against a foreign state-owned ship is admissible (in accordance with article 689 of the Code of Civil Procedure) if the Minister of Justice has already given his/her consent to that effect.

(a)	Registration no	GR/17
(b)	Date	1981
(c)	Author(ity)	Court of First Instance of Thessaloniki
(d)	Parties	Judgment 519/1981 X v. Japan
(e)	Points of Law	Foreign States are not entitled to sovereign immunity where it appears that they transacted as equals with a private person.
(f)	Classification no	0b, 0b.4, 1.b
(g)	Source	Elliniki Dikaiosyni 1983 p. 704
(h)	Additional Information	
(i)	Full text - extracts - translation - summaries	According to customary law, a foreign State is entitled to sovereign immunity for acts which fall under the governmental authority of the State. Foreign States are not entitled to sovereign immunity where it appears that they transacted as equals with a private person. Since there are no international law rules concerning the limits of international jurisdiction of States, each State is determining the international jurisdiction of its domestic courts in accordance with its domestic legislation and international treaties binding on them. Consequently, the criteria to determine which acts fall under the governmental authority of a state and which do not are set out in domestic law.

IRELAND

(a)	Registration no:	IRL/1
(b)	Date:	12 March 1992
(c)	Authority:	Supreme Court
(d)	Parties:	The Government of Canada (Applicant) v. The Employment Appeals Tribunal (Respondent) and Brian Burke (Notice Party)
(e)	Points of law:	The Court establishes that restrictive sovereign immunity applies to proceedings before a Court or administrative tribunal and is applicable to this case concerning employment within an embassy because it comes within the sphere of governmental or sovereign activity.
(f)	Classification no:	O.a, 1.b, 2.c
(g)	Source:	Irish Reports, 1992, Vol. 2, pp484-502
(h)	Additional Information:	Reversed the High Court decision of 14 March, 1991 and quashed the determination of the Employment Appeals Tribunal. Article 29.3 of the Irish Constitution is relevant
(i)	Full text:	Full text: Appendix *

(a)	Registration no:	IRL/2
(b)	Date:	7 July 1994
(c)	Authority:	Supreme Court
(d)	Parties:	Angelo Fusco (Plaintiff) v. Edward O'Dea (Defendant)
(e)	Points of law:	The Court establishes that sovereign immunity precludes making an order for discovery against a sovereign state
(f)	Classification no:	O.a, 1.a, 2.c
(g)	Source:	Irish Reports, 1994, Vol. 2, pp93-104
(h)	Additional Information:	High Court decision of 21 April, 1993 upheld
(i)	Full text:	Full text: Appendix *

(a)	Registration no:	IRL/3
(b)	Date:	15 December 1995
(c)	Authority:	Supreme Court
(d)	Parties:	John McElhinney (Plaintiff) v. Anthony Ivor John Williams and Her Majesty's Secretary of State for Northern Ireland (Defendants)
(e)	Points of law:	The Court establishes that sovereign immunity applies because the tortious acts of a soldier who is a foreign State's servant or agent are "jus imperii"
(f)	Classification no:	O.a, 1.a, 2.c
(g)	Source:	Irish Reports, 1995, Vol. 3, pp382-405
(h)	Additional Information:	High Court decision of 15 April, 1994 upheld. In "McElhinney v. Ireland", 21 November 2001, the European Court of Human Rights finds no violation of the Convention
(i)	Full text:	Full text: Appendix *

(a)	Registration no:	IRL/4
(b)	Date:	24 April 1997
(c)	Authority:	Supreme Court
(d)	Parties:	Norburt Schmidt (Plaintiff) v. Home Secretary of the Government of the United Kingdom et al. (Defendants)
(e)	Points of law:	The Court establishes that the Commissioner and an individual agent of the Metropolitan Police (United Kingdom) are also entitled to rely on sovereign immunity
(f)	Classification:	O.a, 1.a, 2.c
(g)	Source:	Irish Reports, 1997, Vol. 2, p121
(h)	Additional Information:	High Court decision of 22 November 1994 upheld
(i)	Full text:	Full text: Appendix *

The first traces of restrictive sovereign immunity in Irish law appear to emanate from Hanna J. in Zarine v. Owners of S.S. "Ramava" [1942] I.R.148

Other case law on State immunity:

Saorstát and Continental Steamship Co. v. De las Morenas [1945] I.R. 291

More generally, see case law on Article 29.3 of the Irish Constitution and the incorporation of international law, particularly customary international law.

ACT Shipping (Pte) Ltd. v. Minister for the Marine [1995]3 I.R. 406

State (Sumers Jennings) v. Furlong [1966] I.R. 183

The Marshal Gelovani [1995] 1 I.R. 159

ICELAND

(a)	Registration no.	IS/1
(b)	Date	15 September 1995
(c)	Author(ity)	Supreme Court (<i>Hæstiréttur</i>)
(d)	Parties	Guðrún Skarphéðinsdóttir (Individual) vs. the Embassy of the United States of America (State)
(e)	Points of law	The Court establishes that according to the principles of public international law a foreign State cannot fall under the jurisdiction of judicial tribunals of another State, without the consent of the former, in the manner the plaintiff sought to accomplish with the instituted legal proceedings.
(f)	Classification no.	0.b, 1, 2.c
(g)	Source(s)	The Supreme Court's Collection of Court Rulings 1995 (Dómasafn Hæstaréttar 1995)
(h)	Additional information	
(i)	Full text - extracts - translation - summaries	Summary English: Appendix 1 Full text: Appendix 2* Full text English: Appendix 3

(*) Not included in this document. Will be included in the final publication where appropriate.

Appendix 1

A landlord instituted legal proceedings against the Ambassador of the United States of America on account of the Embassy of the United States of America in Iceland acting for the State Department of the United States of America regarding unpaid rent. In the lease agreement the tenant was claimed to be the Secretary of State of the United States of America. In light of the lease agreement it was understood that the defendant proper were the United States of America, which were represented by the Secretary of State. The Court pointed out that according to Icelandic rules of civil procedure, a foreign Embassy does not enjoy the status of being capable of acting as an independent party in a court case. Also, the Court stated that in accordance with principles of public international law, a State cannot fall under the jurisdiction of judicial tribunals of another State, without the consent of the former, in the manner the plaintiff sought to accomplish with the instituted legal proceedings. The case was dismissed *ex officio*.

Appendix 3**The Supreme Court of Iceland**

Friday 15 September 1995.

No 299/1995.

Ms. Guðrún Skarphéðinsdóttir

(Barrister Mr. Björgvin Þorsteinsson)

versus

The Embassy of the United States of America in Iceland

Complaint. Dismissal confirmed. Judicial tribunals. Public international law.

Ruling of the Supreme Court of Iceland.

Supreme Court Justices, Mr. Garðar Gíslason, Mr. Gunnlaugur Claessen and Mr. Markús Sigurbjörnsson, hand down judgement in the present case.

The plaintiff took an appeal to the Supreme Court by way of a complaint on 4 September 1995, which was received by the Court together with the complaint documents on 6 September the same year. The subject matter of the complaint is the decree of the District Court of Reykjavík on 30 June 1995, where the plaintiff's case against the defendant was dismissed *ex officio*, but the plaintiff states that she did not learn of the decree until 22 August 1995. Regarding freedom of filing a complaint the plaintiff refers to Article 143, paragraph 1(j) of the Civil Litigation Act No 91/1991. The plaintiff makes the claim that the decree complained about would be annulled and requests that the District Court judge would be ordered to hear the case *de novo*. Furthermore the plaintiff makes the claim that the defendant would bear the costs associated with the complaint.

The defendant has not exerted itself with regard to the case.

In the summons the plaintiff states that she brings action against "Ambassador Parker Borg residing at Laufásvegur 21, Reykjavík, on account of the Embassy of the United States of America in Iceland, acting for the State Department of the United States of America". The plaintiff backs up her claims in the present case with a lease agreement, dated 18 September 1990, concerning an apartment at Freyjugata 27 in Reykjavík, where the tenant is claimed to be the Secretary of State of the United States of America. Considering the aforementioned wording of the summons the plaintiff's building of the case must be so understood, in light of the lease agreement, that the defendant proper were the United States of America, which were represented by the Secretary of State of that state. Furthermore it must be borne in mind that, according to Icelandic rules of civil procedure, a foreign Embassy does not enjoy the status of being capable of acting as an independent party in a court case.

In accordance with principles of public international law, a state cannot fall within the jurisdiction of judicial tribunals of another state, without the consent of the former, in such a manner that the plaintiff seeks to accomplish with her legal proceedings. The present case will therefore not be presented before Icelandic judicial tribunals. For that reason the conclusion of the decree complained about must be confirmed forthwith.

No costs, related to the complaint, will be determined.

The verdict:

The decree complained about is here by confirmed.

Decree of the District Court of Reykjavík 30 June 1995.

The present legal action, where the case was taken in for judgement on 27 June 1995, is brought against Ambassador Parker Borg, residing at Laufásvegur 21 in Reykjavík, on account of the Embassy of the United States of America in Iceland acting for the State Department of the United States of America, before the Court by way of a summons issued 23 June 1995 by Ms. Guðrún Skarphéðinsdóttir, identity number 130741-7459, residing at Freyjugata 27 in Reykjavík, on the subject of payment of a debt of the amount of ISK 7 424 280 at a penalty rate, pursuant to Chapter III of the Interest Act No 25/1987, as regards the amount of ISK 322 920 as from 20 July 1992 to 20 October 1992; as regards the amount of ISK 664 500 as from the same date to 20 January 1993; as regards the amount of ISK 1 046 400 as from the same date to 20 April 1993; and as regards the amount of ISK 1 424 280 as from the same date until the date of payment.

The plaintiff makes the alternative claim that the defendant would be ordered to pay the amount of ISK 1 101 360 at a penalty rate, pursuant to Chapter III of the Interest Act No 25/1987, as regards the amount of ISK 341 580 as from 20 October 1992 to 20 January 1993; as regards the amount of ISK 723 480 as from the same date to 20 April 1993; and as regards the amount of ISK 1 101 360 as from 20 April 1993 until the date of payment.

The plaintiff makes the claim that the Court would rule that penalty interest would be added every 12 months to the amount of principal outstanding determined by the Court, whichever would be accepted, the principal or the alternative claim.

Furthermore the plaintiff makes the claim that the defendant would bear the Court costs in accordance with the invoice for the costs, which would be presented at the primary hearing of the case at the latest, with the addition of mandatory value added tax.

Conclusion.

An Ambassador has been summoned, on account of the Embassy of the United States of America in Iceland acting for the State Department of the United States of America, before the Court by the plaintiff on the issue of the payment of a rent, that she claims the Embassy owes her. Article 31(1) of the Vienna Convention on Diplomatic Relations, which was legally validated in this country by Act of Parliament No 16/1971, states that a diplomatic agent should enjoy immunity from civil and administrative jurisdiction of the receiving State. An exception is made to this principle as stated in subparagraphs a to c of the aforementioned Article. With reference to this it must be held that the Embassy of the United States of America in Iceland, acting for the State Department of the United States of America, enjoys immunity (extraterritorial rights) in this country. Hence the present case must be dismissed *ex officio*.

No costs will be determined.

Ms. Arnfriður Einarisdóttir, deputy for the President of the Court, issued the decree.

The decree reads as follows:

The present case is dismissed. No costs are determined.

(a)	Registration no.	IS/2
(b)	Date	28 January 1998
(c)	Author(ity)	Supreme Court (<i>Hæstiréttur</i>)
(d)	Parties	Sigurður R. Þórðarson, Björn Erlendsson, Vilhjálmur A. Þórðarson, Hákon Erlendsson, Jón Ársæll Þórðarson og Naustin hf. (Individuals) vs the Government of the United States, the United States Forces in Iceland and the State of Iceland (States)
(e)	Points of law	The Court dismissed the the case against the Government of the United States and the United States Forces in Iceland <i>ex officio</i> on the grounds that neither the Defence Agreement between the Republic of Iceland and the United States of America, done on 5 May 1951, nor rules of public international law lead to the conclusion that the US Government or the US Forces in Iceland should fall under the jurisdiction of Icelandic judicial tribunals in disputes over such matters.
(f)	Classification no.	0.c, 1, 2.c
(g)	Source(s)	The Supreme Court's Collection of Court Rulings 1998 (Dómasafn Hæstaréttar 1998)
(h)	Additional information	
(i)	Full text - extracts - translation - summaries	Summary English: Appendix 1 Full text: Appendix 2* Full text English: Appendix 3

Appendix 1

The plaintiffs commenced legal action against the Government of the United States, the United States Forces in Iceland and the State of Iceland, submitting various claims related to the defendants' use of the plaintiffs' land. The plaintiffs' land had been leased by the Government of Iceland that then handed it over to the US Forces to use. Neither the US Government nor the US Forces in Iceland were parties to the lease agreement. The Supreme Court dismissed the case against the US Government and the US Forces in Iceland *ex officio* on the grounds that neither the Defence Agreement between the Republic of Iceland and the United States of America, done on 5 May 1951, nor rules of public international law lead to the conclusion that the US Government or the US Forces in Iceland should fall under the jurisdiction of Icelandic judicial tribunals in disputes over such matters.

Appendix 3**Supreme Court**

No 7/1998.

Wednesday 28 January 1998.

Mr. Sigurður R. Þórðarson

Mr. Björn Erlendsson

Mr. Vilhjálmur A. Þórðarson

Mr. Hákon Erlendsson

Mr. Jón Ársæll Þórðarson and

Naustin Ltd

(Themselves)

versus

The Government of The United States of America,

The US Defence Force in Iceland

(No one) and

The State of Iceland

(Barrister Ms. Guðrún Margrét Árnadóttir)

Complaint. Dismissal confirmed. Jurisdiction.

Ruling of The Supreme Court of Iceland

Supreme Court Justices, Mr. Pétur Kr. Hafstein, Mr. Garðar Gíslason and Mr. Haraldur Henrysson, hand down judgement in the present case.

The plaintiffs took an appeal to the Supreme Court by way of a complaint on 29 December 1997, which was received by the Court, together with the complaint documents, on 6 January 1998. The subject matter of the complaint is the decree of the District Court of Reykjavík where the case was dismissed. Reference is made to the clause on freedom of filing a complaint in Article 143, paragraph 1(j) of the Civil Litigation Act No 91/1991. The plaintiffs make the claim that the decree complained about would be annulled and request that the District Court judge would be ordered to hear the case *de novo*. Furthermore they call for the reimbursement of costs related to the complaint.

The defendants, the US Government and the US Defence Force in Iceland, have not exerted themselves with regard to the case.

The defendant, the State of Iceland, demands that the decree of dismissal and costs related to the complaint will be confirmed.

Article 2 of the Defence Agreement between The Republic of Iceland and The United States of America, dated 5 May 1951, which was enacted by adoption of Act of Parliament No 110/1951, provided that Iceland would make all acquisitions of land and other arrangements required to permit entry upon and use of facilities in accordance with the said agreement and that the United States should not be obliged to compensate for such entry or use. The Defence Agreement does not stipulate that the US Government or the US Defence Force in Iceland should fall within the jurisdiction of Icelandic judicial tribunals in matters of disputes over such matters. Rules of public international law do not lead to that conclusion either. By

way of this observation and with reference to the argumentation for the decree complained about in other respects it will be confirmed

The plaintiffs shall pay the defendant, the State of Iceland, costs related to the complaint as stated in the verdict.

The verdict:

The decree complained about is here by confirmed.

The plaintiffs, Mr. Sigurður R. Þórðarson, Mr. Björn Erlendsson, Mr. Vilhjálmur A. Þórðarson, Mr. Hákon Erlendsson, Mr. Jón Ársæll Þórðarson and Naustin Ltd, shall pay the defendant, the State of Iceland, *in solidum* costs related to the complaint of the amount of ISK 60 000.

Decree of The District Court of Reykjavík 15 December 1997

The present legal action is brought against the defendant by way of a summons, served on the defendant, the United States Government, 21 May 1997, and a summons was served on the Icelandic Government 26 May the same year.

The plaintiffs are: Mr. Sigurður R. Þórðarson, identity number 260745-3959, residing at Glaðheimar 8, Reykjavík; Mr. Björn Erlendsson, identity number 210545-3529, residing at Aðalland 15, Reykjavík; Mr. Vilhjálmur A. Þórðarson, identity number 050342-3529, residing at Háteigsvegur 40, Reykjavík; Mr. Jón Ársæll Þórðarson, identity number 160950-4399, residing at Framnesvegur 68, Reykjavík and Mr. Hákon Erlendsson, identity number 210150-4719, residing at Helluhóll 5, Hellissandur, in person and also on behalf of Nausin Ltd, as the owners of all shares in the company and the owners of the farms Eiði I and II, situated in the peninsula of Langanes in the District of Norður-Þingeyjarsýsla.

The plaintiffs' claims are mainly submitted against the US Government, represented in Iceland by the Ambassador of The United States of America in Iceland, Mr. D. O. Mount, in the American Embassy at Laufásvegur 21, 101 Reykjavík, on behalf of the US Government, and by Admiral J. E. Boyington, the Commandant of the US Armed Forces Defence Force in Iceland (Iceland Defence Force), on behalf of the US Armed Forces Defence Force, post office box 1, 235 Keflavíkurlflugvöllur, and alternatively Mr. Davíð Oddsson, Prime Minister, and Mr. Halldór Ásgrímsson, Minister for Foreign Affairs, are summoned on behalf of the Icelandic Government for the defence in the case.

Claims Made Before the Court

The plaintiffs make the following claims before the Court against the prime defendants: That the US Government and the US Armed Forces Defence Force would be ordered to make acquisitions of land, by way of agreements, for the purpose of the storing of military wastes and other construction debris in the part of the plaintiffs' land on Mount Heiðarfjall/Mount Hrollaugstaðafjall on the estate of Eiði I and II in the peninsula of Langanes delimited by the following coordinates: 1) N 7352.095.52, E 499.927.88, 2) N 7351.500, E 500.300, 3) N 7351.180, E 500.500, 4) N 7350.500, E 500.500, 5) N 7350.500, E 499.500, 6) N 7351.500, E 499.500 and 7) N 7351.902.34, E 499.500, in aggregate 156 hectares. The claim is also made that the acquisitions made would be upheld during the prime defendant's use of the land and until wastes and other construction debris, belonging to the prime defendant, had been fully cleaned up and that the rightful owners would, in pursuance thereof, be compensated for the damage, which they had genuinely suffered.

The plaintiffs make the claims before the Court against the alternate defendant that the State of Iceland would be ordered to make the same acquisitions of land, as those stated in the claims against the prime defendant, on the aforementioned estate and in the aforementioned area, on behalf of the US Government and the US Armed Forces Defence Force, cf. Article

2 of the Defence Agreement dated 5 May 1951, in order to release the rightful owners from the obligation, imposed upon them at the present, to provide the aforesaid access to their private property. The claim is also made that the acquisitions made would be upheld during the use of the prime defendant of the land and until wastes and other construction debris, belonging to the defendant, had been fully cleaned up and the rightful owners had, in pursuance thereof, been compensated for the damage, which they had genuinely suffered.

Furthermore, the plaintiffs make the claim before the Court that the defendants would be ordered to pay *in solidum* full costs, in accordance with the invoice presented, with the addition of a mandatory value added tax put on the costs amount, cf. the provisions of Acts of Parliament No 50/1988 and No 119/1989, and that the plaintiffs would not be treated as taxable persons with regard to the VAT; further still that the costs amount would bear late-payment interest, cf. Article III of the Interest Act No 25/1987, as amended in accordance with Article 129(4) of Act of Parliament No 91/1991.

These claims were made before the Court since the defendants' use of the plaintiffs' private property, for the purpose of storage of wastes and other construction debris, were continuing, prevailing and illegal, and were moreover causing the plaintiffs damage and considerable inconvenience. The summons were in direct consequence thereof.

The alternate defendant's main claims made before the Court, i.e. those of the State of Iceland, are that the case would be dismissed and that the plaintiffs would be ordered to pay the alternate defendant full costs *in solidum*, determined by the Court. The alternate defendant's alternative plea is that it would be acquitted of all claims, made by the plaintiffs, and that it would receive full costs, paid *in solidum*, from the plaintiffs, as may be determined by the Court.

No one was present on behalf of the prime defendants, when the case was instituted here before the Court on 26 June 1997. The President of the Court received a letter from the Ministry for Foreign Affairs, dated 10 June 1997, stating that the American Embassy and the US Defence Force had contacted the Ministry and expressed their opinion that an action would not be brought against them before Icelandic judicial tribunals. Hence no one would be present on their behalf before the Court and they would assume that the case would be dismissed *ex officio* as they were concerned.

At the hearing on 22 October 1997 the plaintiffs' advocates made the request that the representation on account of the dismissal claim introduced would be in writing. The judge granted the request with the approval of the attorney for the alternate defendant, hereinafter referred to as "the defendant", unless otherwise stated. Before addressing substantially the alternate defendant's dismissal claim and the prime defendants' involvement in the case, a general account will be given of the circumstances of case.

Circumstances of the Case

Act of Parliament No 110/1951 enacted the Defence Agreement between The Republic of Iceland and The United States of America. Two so-called attachments were enacted concurrently with the legislation procedure and are regarded as a part of the enactment. The attachments lay down more specifically the legal status of the two contracting states and their nationals in this country. One of the attachments bears the title "The Defence Agreement between The Republic of Iceland and The United States of America Pursuant to the North Atlantic Treaty" and the other "Annex on the Status of the United States Personnel and Property". In the present case the first mentioned attachment applies and it will hereinafter be referred to as the attachment to the Act of Parliament No 110/1951. According to Article 2 of the attachment the Icelandic authorities undertake to make all acquisitions of land and other arrangements required to permit The United States entry upon and use of facilities with no obligation to compensate for such facilities, cf. Article 1 of the attachment.

By concluding a contract, dated 3 May 1954, the Icelandic authorities leased a piece of land on the farm Eiði in the peninsula of Langanes (Eiði I and II). The area concerned is 1 km² of land on Mount Hrollaugsstaðafjall, delimited on a geological map attached to the contract as

a part there of. The contract was valid as from 1 September 1953 and no time limit was set on the lease. The lessor was unable to withdraw from the contract, whereas the lessee was entitled to cancel it with six months notice as from 1 September every year. The contract states that the lessee may use the piece of land leased at will and may authorize others to use it. The contract authorizes the lessee to lay water pipes on the land of the estate Eiði leading to the piece of land leased and to lay sewage pipes out to sea. Furthermore construction works were authorized and excavation of minerals for building purposes and other use. The contract does not lay down any requirements with respect to departure from the area when the lease would expire.

Access to the area was granted to the Americans in May 1955, who built a radar station there, which was in operation from 1957 until 1970. By way of a contract, dated 10 December 1960, the landowners handed over to the Icelandic authorities additional land on Mount Hrollaugsstaðafjall. In communications between Icelandic authorities and the US Government this area is referred to as the H-2 area. Use of the said area, as stated in the lease, was terminated in a letter to the owners of the farm Eiði, dated 5 March 1970, as from 1 September the same year. Payment for the lease, from 1 September 1970 until 1 March 1971, was enclosed with the letter. Icelandic authorities received the said area from the Americans by way of a contract dated 7 July 1970. The contract states that Icelandic authorities renounce, on their behalf and on the behalf of all Icelandic nationals, all claims against the US Government that might be attributed to its use of the said area. The State of Iceland took over all constructions and other assets of the Defence Force in the area and the Surplus Agency was assigned the task of putting them up for sale and furthermore the cleaning-up of the area. A letter from the Surplus Agency, dated 8 March 1976 and produced in Court, states amongst other things: "In 1974, when removal of utilizable constructions had been finished, remediation works started on the mountain and its environment. This was done May through September 1974. Remediation, burying and levelling of earth on the mountain had then been completed and thus the aforementioned area was fully levelled and no remains to be seen, except the bottoms of the residential constructions, which are flat concrete floors, all foundations being underground structures." A team of people went up and down the mountain hills and collected loose items, such as wrappings, barrels, containers and other debris, as stated in the aforementioned letter. These wastes were collected and transported by tractors and trailers to the sites where they were buried. The Commissioner of the Municipality of Sauðaneshreppur was assigned the task of supervising these remediations." A letter to the Surplus Agency from the Commissioner, Mr. Sigurður Jónsson, dated 25 February 1976, has also been produced. Towards the end of his letter Mr. Jónsson states: "It is almost certain that people will argue about the accomplishment of this tidying up, but I am of the opinion that the job was well done." The letter from the Surplus Agency is an answer to the plaintiffs' complaint, dated 19 January 1976, about the Agency's departure from the area.

In 1985 remediation works were taken on in the area with the help of the Icelandic authorities. The task was assigned to the Rescue Unit Hafliði in the town of Þórshöfn for remuneration. The rescue unit collected the debris to form a heap with the aim of burying it, but that aim was never achieved due to the plaintiffs' opposition, who demanded that the waste heap would be removed from the area. This was rejected on behalf of the Icelandic authorities due to high costs associated with such removal.

In recent years research has been carried out in the area, both through Icelandic authorities and the plaintiffs. The objects of the research was the wastes heaps, the burying of which had been the responsibility of the Defence Force while it was present in the area, and the effects of the presence of the wastes on the water budget in the area as a whole. The Department of Pollution Prevention of the Environmental and Food Agency of Iceland submitted an opinion on the situation in the area in 1993. The research was first and foremost aimed at finding out if heavy metals had, together with persistent organohalogen compounds, leaked out of the wastes heaps and mixed with surface and spring water around Mount Heiðarfjall/Hrollaugsstaðafjall. The research revealed no measurable pollution of the water, which would render the water unfit to drink, with the exception of iron, which

has leaked out of the moorland into the creek near the farms Eiði and Eiðisvatn. Results from more recent research are not available.

A letter, dated 29 August 1974, to Mr. Jónas Gunnlaugsson, one of two owners of the farms Eiði I and II, has been produced in Court. Enclosed was a payment of ISK 110 000 made by the defendant to each of the owners of the farm Eiði at that time for the lease and of damages on account of a piece of land on the property Eiði in the peninsula of Langanes, as stated in the letter. The letter states further that the amount also included a payment for disturbance of ground and damage to land on account of constructions of the Defence Force on the estate.

The plaintiffs came into possession of the farms Eiði I and II by signing a sales contract, dated 10 April 1974, which was registered 30 March 1994. The following statement, issued by the vendors, is written beneath the signatures and the certification of the document: "In addition to that which is mentioned in the present sales contract I, the undersigned, would like to point out that the affairs of the Defence Force on Mount Heiðarfjall on the estate of Eiði concerning the situation there and its departure from there are unresolved and unsettled. The departure of the Defence Force and the situation on Mount Heiðarfjall are unacceptable. There the estate is being used without permission and without any valid agreement. The leasing contract was terminated unilaterally on 5 March 1970, but the estate was continuously in use. You, the purchasers, must wind up these affairs. Improvements have been promised, but these promises have not been fulfilled. I hereby assign all our rights to you, the purchasers, regarding these affairs". This statement, as well as the sales contract, is signed by Mr. Jóhann Gunnlaugsson on his behalf and on the behalf of Mr. Jónas Gunnlaugsson on his authority. This statement is not written on the bill of sales, which is dated 30 November 1974.

The plaintiffs have, from the time they came into possession of the farms Eiði I and II, encouraged Icelandic authorities and the US Government to see to that the piece of land on the properties Eiði I and II, handed over to the Defence Force, would be adequately cleaned up and that all hazardous substances and other wastes, which were buried there while the Defence Force was present on the estate, would be removed. The plaintiffs had intended to start fish farming on the land, which fitted well for exploitation of that kind, but that had not been worth risking, since they did not have knowledge of what substances had been buried there, and therefore danger was that subterranean water, to be used for the farming, would be contaminated. For that reason they had been unable to exploit their land in a normal way. While that state of affairs was continuing it seemed clear that the US Government, or Icelandic authorities on their behalf, must make payments for leasing the land, since it had not been expropriated. Hence the claim was made before the Court that the US Government and The United States Armed Forces Defence Force would be ordered to make, by way of contracts, acquisitions of land for the purpose of storing military wastes and construction debris on the plaintiffs' estate.

The Merits of the Case and Legal Arguments Presented by the Defendant, The State of Iceland, Regarding Dismissal

The defendant, the State of Iceland, points out that the US Government and its Defence Force, stationed in this country, enjoys extraterritorial rights and therefore did not fall within the jurisdiction of Icelandic judicial tribunals, cf. the final clause of Article 16(1) and Article 24(1) of the Civil Litigation Act No 91/1991. Hence that the Court had not jurisdiction with regard to accusations brought against the aforementioned parties, which would cause all claims made against them to be dismissed *ex officio*.

The defendant, the State of Iceland, makes the claim that the case, as a whole, would be dismissed and that the plaintiffs would be ordered to pay the defendant the court costs of this part of the case *in solidum* and as determined by the Court.

The defendant backs up its claim for dismissal by pointing out that the plaintiffs' claims and building of the case were contrary to the principles of legal procedures applying to clear and

definite building of a case, cf. Article 80, subparagraphs d and e, of the Civil Litigation Act No 91/1991.

The claims made by the plaintiffs were of such unclear and indistinct character that it were impossible to examine them qualitatively.

Article 80(1)(d) of the Civil Litigation Act No 91/1991 stated that a claim made should be of such conclusive and clear wording that it could stand as a conclusion in the ruling, in such a way that requirements set with regard to a court solution were met, i.e. that the claim should be so conclusive that it could stand on its own as a conclusion as regards the accusation, cf. Article 1140(4) of the Civil Litigation Act No 91/1991. Thus a judicial tribunal should be able to use the wording of the claim unchanged as a conclusion in its ruling, provided that the substantial preconditions allow such an outcome of the case.

The term "reservation" in Article 80(1)(d) of the Civil Litigation Act No 91/1991 meant that, if a request were made that a judicial tribunal would address the claim that rights and obligations should be of a specific quality, a request which were made in the present case, this would call for the provision of a clear definition of the objects of the rights and obligations the ruling on which were requested. The reservation of the legislative provision, that a claim should be clear, included a demand that the claim were stated clearly enough to be understood. The wording of the claim proper should make it quite clear to the defendant and the Court which obligations it held in store for the defendant and how the defendant should fulfil them.

In their claim, as it is presented, the plaintiffs demand that the State of Iceland will be ordered to make, by way of a contract, acquisition of a specified piece of land for the purpose of storage for an unlimited period of time. However, the claim does not in any way define the rights and obligations that such a contract is supposed to hold in store for the contracting parties. Thus the claim did not, for example, include any definition of the usage contract to be concluded, e.g. a lease for a consideration or usage free of charge, nor of the object of the intended storage, which the plaintiffs called "military wastes" and "construction debris" in the claim incorporated into the summons. There were no definition of the wording "fully cleaned up", no explanation of the necessary measures to be taken, and no instructions given regarding what should be cleaned up. A precise definition of the subject matter of the legal relationship, which were expected to be established, were on the other hand necessary in order to allow the defendant to put up a defence, as the law allowed, and so that the claim could be regarded as eligible for adjudication. The same would apply to the part of the claims, made by the plaintiffs before the Court, which concerned their demand to be compensated later for damage they had verifiably suffered. The claim did not include any explanation of the alleged damage, its cause, or how severe the damage were, and it should be clear, apart from other considerations, that claims concerning events, that occurred in the future, should be dismissed, cf. Article 26(1) of the Civil Litigation Act No 91/1991.

The defendant further draws on the assumption that a ruling, in accordance with the claim incorporated into the summons, would not settle the dispute between the parties qualitatively, which had been going on for decades. The plaintiffs had since 1976 been making diverse claims against the Ministry for Foreign Affairs, which had been rejected, e.g. claims for further remediation of the piece of land in question and the removal of wastes heaps. Furthermore they had made claims for payments going to themselves, such as leasing fees and damages. The plaintiffs did not, as the case were presently put forward, make any particular claims against the defendants in addition to the claim that they must accept to be ordered by a judicial tribunal to observe the law and make acquisition of the piece of land in question, either by contracts or by a lease or taking under the right of eminent domain. The only conclusion to be drawn from this were that the plaintiffs' intension were to make further claims in case their claims, submitted in the present case, were accepted. The proceedings thus did not serve the purpose of settling the dispute between the parties once and for all. This sole flaw in the claim made by the plaintiffs and in their building of the case would lead to dismissal of the case, cf. decrees of The District Court of Reykjavík No 539/1996 and 2713/1996.

The defendant also draws on the assumption that the plaintiffs' building of the case did not, in other respects, meet the requirements set regarding the argumentation of an accusation, cf. Article 80(1), subparagraphs e and f, of the Civil Litigation Act No 91/1991, which stipulated that the building of a case should be clear and definite enough to demonstrate what events and arguments lead to the claim. This constitutes that imperfect argumentation and ill-defined presentation, in this respect, would result in a dismissal of a case. There were such defects in the summons, issued in the present case, that would be impossible to correct during the proceedings.

In the account of the circumstances of the case, included in the summons, considerations were given to several issues, which were of little or no relevance to the claims made before the Court, and the same seemed to apply to a good number of documents presented by the plaintiffs in Court. The plaintiffs' building of the case were thus imperfectly argued for, unclear and aimless, and were extremely inaccessible for the defendant and the Court. For instance, the plaintiffs had not produced any list of documents with the summons. Furthermore documents were produced in one textbook, as exhibit No 3, but the book did not include any table of contents. The pages of the aforementioned exhibit, a textbook of more than 100 pages, were not numbered, which made it almost impossible to make reference to the exhibit or find documents included therein by any chance.

Finally, the defendant drew attention to the fact that the landowners and the company Naustin made jointly all claims before the Court. No information were available on that company and its activities and no attempt had been made to explain, in the summons, the concern of Naustin Ltd in the claims made. Moreover, shareholders, as such, were not allowed to represent companies in a court case, cf. Article 17(4) of the Civil Litigation Act No 91/1991.

The Merits of the Case and Legal Arguments Presented by the Plaintiffs Regarding the Dismissal Claim Introduced by the Defendant

Concerning this section of the case the plaintiffs make the claim that their claims, made before the Court, would be accepted as presented in the summons. The judge is of the opinion that it is implicit in the aforementioned claim that the dismissal claim of the defendant, the State of Iceland, would be rejected.

Furthermore, the plaintiffs make the claim that the Attorney General's deputy demonstrated, by producing a written authorization from the alternate defendants, Mr. Davíð Oddsson, prime minister, and Mr. Halldór Ásgrímsson, minister for foreign affairs, verifying that he were their defence counsel in these proceedings, and moreover, that he verified his authorization to represent the prime defendant, the US Government, with regard to the Attorney General's claim before the Court that the case would be dismissed *ex officio* with regard to the US Government's concern in the present case.

The plaintiffs draw on the assumption that their building of the case and their claims were clear and definite and in accordance with Article 80, subparagraphs d and e, of the Civil Litigation Act No 91/1991. They point out that their claim, that the defendants would be ordered to make acquisition of the land in question by way of contracts, were based on Article 2 of the Defence Agreement. It were clear what claims they were making and against whom they were directed. The claim, made before the Court, also comprised that the area would be cleaned up and vacated or that a permit would be sought to take a lease or carry out a taking under the right of eminent domain.

Moreover, the plaintiffs reject the point, made by the defendants, that their claim were unclear, due to the fact it were of unlimited duration. It were clearly stated in their claim that acquisition of land should be made and such a permit should be maintained during the defendant's use of facilities on their land. The plaintiffs also raise an objection to the assertion that it were difficult to understand the context of the merits of their claims, as were maintained on behalf of the State.

The plaintiffs also reject the State's argumentation that their claims were of such nature that they did not bring an end to the dispute between the parties. In this connection they point out that in cases, where a claim were put forward for a lease or a taking under the right of eminent domain, various matters, concerning rights, obligations, and amounts, would have to wait. Therefore it were not unsuitable to make the claim that the judge would rule on the question of the obligation to make acquisition of land, and that other questions should wait until that claim had been addressed substantially.

The plaintiffs point out that they had realized from the beginning that their claims, made before the Court, were somewhat abrupt and there were valid arguments for that, as should be obvious. The plaintiffs had thought it would be improper, at this stage, to mention leasing fees, e.g. claims concerning a lease or a taking under the right of eminent domain, but had preferred to allow the judge to decide on such matters later in the proceedings, since many difficult and complicated issues would be addressed then. The plaintiffs are of the opinion that their claims, made before the Court, could hardly be more specific considering the subject matter and nature of the case and other circumstances.

The plaintiffs call attention to a great difference with regard to facilities, on the one hand the position they were in and on the other hand the position the State were in, which enjoyed the services of attorneys, assigned the task of protecting its interests, and did not have to worry about the costs related to such legal proceedings as were initiated before this Court. The general public had two choices, either to suffer damage or to defend its rights at a great cost, concurrently carrying the burden associated with such proceedings.

Argumentation and Conclusion

I.

Competency of the US Government to be Involved

Article 2 of a attachment to the Defence Agreement between The Republic of Iceland and The United States of America, which was enacted by Act of Parliament No 110/1951, clearly states that the US Government were not obliged to compensate Iceland or its nationals for the use of a piece of land or facilities handed over to it by the State of Iceland. The piece of land in question was leased by Icelandic authorities for the purpose of enabling the US Defence Force to use it and on the basis of the cited clause. The US Government was not a party to that agreement and had no part in it. The US Government returned the piece of land to the State of Iceland by way of an agreement dated 7 July 1970. The agreement states that the State of Iceland took the land back together with all constructions and other betterments to be found there and in the said agreement the State of Iceland declares that it waived, on its behalf and on behalf of its nationals, all claims against The United States that might be put forward on account of the Defence Force's use of the piece of land in question.

With reference to the course of events described above and to the provision of Article 2 of the attachment to the Defence Agreement, and to extraterritorial rights enjoyed by the US Government, entailing that it were not obliged to accept the jurisdiction of Icelandic judicial tribunals, the plaintiffs' case against the US Government is dismissed *ex officio*.

II.

Claim for Dismissal Made by the Defendant, The State of Iceland

The plaintiffs have questioned the authorization of the Attorney General's deputy to protect the interests of the State of Iceland in this case and demanded that he produced a written authorization from the prime minister and minister for foreign affairs, which were summoned on behalf of the State of Iceland for the defence in the case.

Act of Parliament No 51/1985 concerns the office of the Attorney General and defines its field of activities. Article 2(2) of the said Act states *inter alia* that the Attorney General

conducted legal defence before judicial tribunals in civil proceedings instituted against the state. In Article 3 authorization is granted to employ deputies at the office of the Attorney General, who would conduct the cases, on behalf of the state, which the Attorney General had assigned to them.

The Attorney General's authorization in the present case is based on the aforementioned Act. The Attorney General is therefore not obliged to prove further his authorization. The aforementioned authorization is embodied in the position of a deputy at the office of the Attorney General.

The defendant's claim for dismissal is *inter alia* based on the assumption that the plaintiffs' claim contravened Article 80, subparagraphs d and e, of the Civil Litigation Act No 91/1991 and conflicted with the principles of civil procedure concerning an evident building of a case. Moreover, the dismissal claim is based on the assumption that a court conclusion, based on the plaintiffs' claim, did not settle the dispute between the parties, on the contrary it created more arguments than it would settle.

On the other hand the plaintiffs maintain that their claims, made before the Court, were of such evident and unambiguous character that they could be examined qualitatively.

The plaintiffs' claim, made before the Court, is that the State of Iceland would be ordered to make acquisition of land by way of contracts, which would permit the use of land for the purpose of storing military wastes, etc.

The Court is of the opinion that a claim of this kind is of such unclear and undecided character that it were impossible to accept it. Its acceptance would create a situation where the defendant, the State of Iceland, would be obliged to enter into negotiations with the plaintiffs without any notion of the content and subject matter of a subsequent agreement. The results achieved could be no agreement at all, which meant that the plaintiffs had no legal remedies to force the judgment debtor to fulfil his obligations in accordance with the judgement. Hence the judgement would not have any effect on the settlement of the dispute between the parties and would create more serious legal uncertainty about their dispute than existed already. The defendant's views, regarding the plaintiffs' imperfect argumentation concerning the definition of the terms "military wastes" and "construction debris", i.e. whether they specified buried wastes or merely visible wastes, can also be agreed to. Furthermore, the Court accepts the opinion expressed by the defendant that the plaintiffs should provide a more lucid explanation of what were meant by the wording "fully cleaned up" or what damages they demanded to be compensated for in case their claims would be accepted.

Hence the Court draws the conclusion that the present case must be dismissed with reference to the aforementioned argumentation.

With reference to the fact that there exists a great difference between the parties as to facilities, i.e. the plaintiffs have no education in law and have not enjoyed the services of lawyers, and the defendant has behind it a legion of experts in all fields, it is fair that each party will bear its share of the Court costs.

District Court Justice, Mr. Skúli J. Pálmason, issued the decree.

THE DECREE READS AS FOLLOWS:

The present case is dismissed.

No costs are determined.

(a)	Registration no.	IS/3
(b)	Date	2 September 2002
(c)	Author(ity)	Supreme Court (<i>Hæstiréttur</i>)
(d)	Parties	Sigurður R. Þórðarson, Björn Erlendsson, Vilhjálmur A.

		Þórðarson, Hákon Erlendsson, Jón Ársæll Þórðarson (Individuals) vs. United States of America (State)
(e)	Points of law	The Court dismissed the the case against the Government of the United States <i>ex officio</i> on the grounds that neither the Defence Agreement between the Republic of Iceland and the United States of America, done on 5 May 1951, nor the rules of public international law lead to the conclusion that the US Government should fall under the jurisdiction of Icelandic judicial tribunals in disputes over such matters.
(f)	Classification no.	0.c, 1, 2.c
(g)	Source(s)	The Supreme Court's Collection of Court Rulings 2002 (Dómasafn Hæstaréttar 2002).
(h)	Additional information	
(i)	Full text - extracts - translation - summaries	Summary: Appendix 1 Full text: Appendix 2* Summary English: Appendix 3

Appendix 1

The plaintiffs commenced legal action against the Government of the United States submitting various claims related to the defendant's use of land belonging to the plaintiffs. In accordance with the Defence Agreement between the Republic of Iceland and the United States of America, done on 5 May 1951, the land in question had been leased by the Government of Iceland that then handed it over to the US Forces to use. The defendant was not party to the lease agreement. The plaintiffs argued that because of the private law character of the actions giving rise to their claims, which concerned the plaintiffs' proprietary rights and free disposal of their estate, the US Government should not enjoy extraterritorial rights in this case. The Tribunal pointed out that the 1951 Defence Agreement does contain a rule which stipulates how claims (other than contractual claims) arising out of acts done by members of the United States Forces shall be settled through the auspices of a specific body construed for that purpose. However, neither the Defence Agreement nor rules of public international law were thought to lead to the conclusion the the US Government should fall under the jurisdiction of Icelandic judicial tribunals disputes over such matters. The Tribunals decision to dismiss the case *ex officio* was confirmed by the Supreme Court.

Appendix 3**The Supreme Court of Iceland**

No 356/2002.

Monday 2 September 2002.

Mr. Sigurður R. Þórðarson

Mr. Björn Erlendsson

Mr. Vilhjálmur A. Þórðarson

Mr. Hákon Erlendsson and

Mr. Jón Ársæll Þórðarson

(Barrister Mr. Páll Arnór Pálsson)

versus

The United States of America

(no one)

Complaint. Jurisdiction. Judicial tribunals. Dismissal confirmed.

The case of S. R. Þ., B. E., V. A. Þ., H. E. and J. Á. Þ. against The United States of America was dismissed by the District Court of Reykjavík on the grounds that the defendant did not fall within the jurisdiction of Icelandic judicial tribunals.

Ruling of The Supreme Court of Iceland

Supreme Court Justices, Mr. Markús Sigurbjörnsson, Mr. Árni Kolbeinsson and Ms. Ingibjörg Benediktsdóttir, hand down judgement in the present case.

The plaintiffs took an appeal to the Supreme Court by way of a complaint on 22 July 2002, which was received by the Court, together with the complaint documents, on 2 August 2002. The subject matter of the complaint is the decree of the District Court of Reykjavík on 9 July 2002, where the plaintiffs' case against the defendant was dismissed. Reference is made to the clause on freedom of filing a complaint in Article 143, paragraph 1(j) of the Civil Litigation Act No 91/1991. The plaintiffs make the claim that the decree complained about would be annulled and request that the District Court judge would be ordered to hear the case *de novo*.

The defendant has not exerted itself with regard to the case.

With reference to the argumentations for the decree complained about it will be confirmed.

No costs, related to the complaint, will be determined.

The verdict:

The decree complained about is here by confirmed.

Decree of The District Court of Reykjavík 9 July 2002

The present legal action is brought against the defendant by way of a summons, issued 9 April 2001 and served on the defendant, the Government of the United States of America, on

17 and 19 April the same year. The case was instituted before the District Court of Reykjavík 28 June 2001 and taken in for judgement the same day. The case was heard *de novo* and taken in for judgement anew on 1 November the same year.

The plaintiffs are the owners of the farms Eiði I and II situated in the peninsula of Langanes in the District of Norður-Þingeyjarsýsla, Mr. Sigurður R. Þórðarson, identity number 260745-3959, residing at Glaðheimar 8, Reykjavík; Mr. Björn Erlendsson, identity number 210545-3529, residing at Aðalland 15, Reykjavík; Mr. Vilhjálmur A. Þórðarson, identity number 050342-3529, residing at Háteigsvegur 40, Reykjavík; Mr. Hákon Erlendsson, identity number 210150-4719, residing at Kambasel 28, Reykjavík; and Mr. Jón Ársæll Þórðarson, identity number 160950-4399, residing at Framnesvegur 68, 107 Reykjavík.

The plaintiffs' claims are submitted against the Government of the United States of America and the following persons summoned to represent the aforementioned Government: the President of the United States, Mr. George W. Bush, at The White House, 1600 Pennsylvania Ave., NW 20500, Washington, D.C., USA; Secretary of State, Mr. Colin Powel, at the Office of the Secretary, United States Department of State, 7th Floor, 2201 C Street, NW, Washington, DC 20520, USA; and Secretary of Defence, Mr. Donald Rumsfeld, at the Office of the Secretary, United States Department of Defence, The Pentagon, Washington DC 20301-1155, USA, all three on behalf of the Government of the United States of America.

Claims Made Before the Court

The claims made by the plaintiffs before the Court are the following:

That the defendant would be ordered by the Court to remove hazardous wastes and construction debris in the soil and on the ground on Mount Heiðarfjall (Mount Hrollaugsstaðarfjall) on the estate Eiði I and II in the peninsula of Langanes in an area delimited on the surface of the earth by the following coordinates used by the United States Armed Forces: 1) N 7352.095.52, E 499.927.88, 2) N 7351.500, E 500.300, 3) N 7351.180, E 500.500, 4) N 7350.500, E 500.500, 5) N 7350.500, E 499.500, 6) N 7351.500, E 499.500 and 7) N 7351.902.34, E 499.500, as shown on a map marked "Headquarters Iceland Defence Force, Station H-2, agreed area boundary, 17 March 1960, LGS", and in a drawing marked "US Naval Station, H-2 Site Plan dwg: 568-E-690", and failing to do so to pay a fine per diem of ISK 150.000 for each day work on the removal of debris and hazardous wastes from the estate is delayed;

that the defendant would be ordered to reimburse costs to the plaintiffs, as determined by the Court.

The defendant, the Government of the United States of America, has not exerted itself with regard to the case.

Circumstances of the Case

The plaintiffs state the case and explain the reasons for the litigation in the summons.

In the summons it is mentioned that, in a letter dated 23 March 1954, the US Government had invited Icelandic authorities to make acquisitions of land, on their behalf, designated on maps and in documents of the United States Armed Forces as the H-2 area in the peninsula of Langanes, and in pursuance of which an agreement on the leasing of land on Mount Hrollaugsstaðarfjall (hereinafter referred to as Mount Heiðarfjall) had been signed on 3 May 1954 between the Ministry for Foreign Affairs and the representative of the owners of Eiði I and II and again on 10 December 1960 on additional land, in aggregate 156 hectares. Acquisition of land, which had been required to be made on behalf of the American Defence Force, cf. Article 2 of the Defence Agreement between The Republic of Iceland and The United States of America, dated 5 May 1951, had then been made, cf. letters from the American Defence Force to Icelandic authorities dated 23 March 1954, 9 August 1954, 17

August 1954, and the Defence Council minutes dated 17 August 1954, 19 April 1955, 10 May 1955 and 17 May 1955.

It is mentioned that the American Defence Force had been notified, by way of an official communication from the Icelandic Ministry for Foreign Affairs to the American Defence Force on 17 May 1955, that acquisition of land had been made on behalf of the American Defence Force. In the official communication it had been explained to the American Defence Force what consisted in the acquisition of the land leased. There had been no mention of any waste landfill permit or a permit to store waste, neither before nor after the use granted would come to an end. It had been assumed, as stated in the leasing contract, that all sewage would be lead out to sea, but that had never been accomplished and all sewage had been let out on the land leased. The official communication had stated clearly the rights and obligations of the American Defence Force in the H-2 area on Mount Heiðarfjall.

It is mentioned that the Icelandic Government had not taken part in any works in the area and that when implementation of the provisions of the leasing contract had commenced the Americans themselves had implemented them as the accountable party and user of the estate, to cite an instance they enclosed the land leased and paid the costs there of, cf. a number of letters and minutes relating there to from 1958 and 1959, it being stated in the leasing contract that: "The lessee undertakes to enclose the land with an isolating fence". The American Defence Force had repeatedly been reminded of its obligations under the agreement, cf. letter of Mr. Björn Ingvarsson, Chief of Police, dated 28 April 1958.

At the time the US Government had decided to bring an end to the operation of the radar station on Mount Heiðarfjall, the Americans had been asked if they required to continue to lease the H-2 area for future use by the American Defence Force, cf. minutes of the Defence Council, dated 24 February 1970. The Americans had then replied, *"that at present it would not be necessary for the Government of Iceland to continue to hold the land under lease on behalf of the Defence Force"*. Shortly after, or on 7 July the same year, the Americans had presented to the Icelandic authorities the so-called "renunciation agreement" in which all rights of the landowners, protected by the Constitution, to make claims for damages were renounced, which had then been signed. Subsequent to the meeting on 24 February 1970 the leasing contract with the landowners had been terminated unilaterally as from 1 September 1970. This had been done by way of a letter, dated 5 March 1970, from the Ministry for Foreign Affairs to the landowners. The leasing charge had been paid until 1 March 1971.

As stated above, agreements between the US Government and Icelandic authorities had been signed, first on 30 June 1970 and again on 7 July and 18 September 1970. According to the agreements Icelandic authorities had taken over constructions and other betterments on Mount Heiðarfjall and all rights had been renounced. In the agreements no mention had been made of wastes and other construction debris, which had been continuously stored in the area. The aforementioned agreements had not been concluded with the rightful owners of the estate and the Icelandic authorities had not represented the owners or been their advocate when these agreements had been concluded, and further more the owners had only learned of the existence of these contracts on 4 April 1990. From this, one could draw the conclusion that officials of the Ministry for Foreign Affairs had willingly attempted to conceal the agreements from the owners. The landowners had received a photocopy of the agreements in May 1990 from the Prime Minister at that time, Mr. Steingrímur Hermannsson.

According to the minutes of the Defence Council, dated 7 July 1970, the US Government had presented and promulgated the aforementioned agreements and requested that they would be concluded. The following had been specified in the minutes: *"After having vetted the agreement the Icelandic chairman requested to be advised whether the provision of Article II of the agreement dated 7 July 1970, where the Government of Iceland renounces all claims made by Icelandic nationals against The United States of America for a personal detriment or a property damage, would be active as from the date use was first made of the estate or whether one should construe the provision as being retroactive from another date."*

Lieutenant Commander Crane replied that the provision of Article II were active as from the date of signature of the agreement, 7 July 1970, and not retroactive."

United States authorities had, from 1 September 1970 onwards, been storing wastes and other construction debris, despite the fact that no agreement had been concluded, without permission, and illegally, on a private property on Eiði in the peninsula of Langanes. The estate had not been legally expropriated. When the leasing contract had expired on 1 September 1970 United States Government had lost all its rights to occupy the area, i.e. have personnel stationed there and store wastes and other construction debris in the area.

In the period 1971-1974 former landowners had, on several occasions, made oral observations and submitted their requests for improvements and corrective actions to Mr. Sigurður Jónsson, Commissioner of the Municipality of Sauðaneshreppur, and Mr. Jóhann Skaptason, sheriff of the District of Þingeyjarsýsla, as regards the situation on Mount Heiðarfjall. The landowners at present had continued to make observations as from midyear 1974 and submitted requests for improvements and corrective actions.

On 10 April 1974 the owners at present, Mr. Björn Erlendsson, Mr. Hákon Erlendsson, Mr. Jón Ársæll Þórðarson, Mr. Sigurður R. Þórðarson and Mr. Vilhjálmur A. Þórðarson, had purchased the estate Eiði. The following were *inter alia* stated in the sales contract: "*In addition to that which is mentioned in the present sales contract I, the undersigned, would like to point out that the affairs of the Defence Force on Mount Heiðarfjall on the estate of Eiði concerning the situation there and its departure from there are unresolved and unsettled. The departure of the Defence Force and the situation on Mount Heiðarfjall are unacceptable. There the estate is being used without permission and without any valid agreement. The leasing contract was terminated unilaterally on 5 March 1970, but the estate was continuously in use. You, the purchasers, must wind up these affairs. Improvements have been promised, but these promises have not been fulfilled. I hereby assign all our rights to you, the purchasers, regarding these affairs*". (Signed by Mr. Jóhann Gunnlaugsson.) The vendors had issued a bill of sale on 30 November 1974. The bill of sale had been registered on 28 January 1975 by the vendors and without the signatures of the purchasers.

As repeatedly mentioned in the history of the case and in accordance with the facts of the matter, as the advocates of the Ministry for Foreign Affairs had established them for the landowners, the Icelandic authorities had not regarded themselves as being responsible for the present and future situation and had referred to the fact that Icelandic authorities had terminated warranties and authorizations on the land in 1970, after United States authorities had given a negative answer to the Defence Council's question, if they required their authorizations to be maintained on the estate. On 17 December 1996 the Ministry for Foreign Affairs had, in a letter to the landowners, informed them that the case were closed as far as the Ministry were concerned. Acquisitions of land had not been made anew after 1970, nor had other necessary measures been taken to secure any facilities.

It is mentioned that the landowners had already started preparations for, and conducted research in, fish farming in April 1974. On 16 January 1975 they had, for fish farming and aquaculture purposes, established the company Naustin Ltd., which had been engaged in extensive research and construction works in preparation for industrial production of char fry for char farming and smolt for open-ocean rearing in bulk by way of exploiting spring water on the land. Naustin Ltd. leased the estate for fish farming purposes, but the defendant's use at present made the aforementioned activities impossible. Preparations, research and pilot projects, which had shown promising results, had been going on for 15 years, contradictory to what many others had been achieving, it being generally criticized how little effort and money had been put forth for preparations for and research in fish farming. Participation of foreign copartners had been secured when the existence of the rubbish heaps on the mountain had been discovered above the wells on 13 July 1989.

In the period June through August 1974 the Surplus Agency had, under the auspices of the Ministry for Foreign Affairs, conducted the so-called "cleaning-up" on the mountain and demolished buildings and other constructions, but previously, in 1970-1971, buildings had

been demolished and debris buried. Some of it had been collected and a considerable amount buried in the area, without any permission granted by the landowners, and the whole operation had been performed without their knowledge and without holding consultations with them. At this time the landowners had dwelled only temporarily in Eiði. There, personnel had entered a private property with powerful construction machinery without any warrant at all. The outward appearance of the land had been worse after this operation and evidence suggested that the personnel had for the most part been engaged in collecting usable articles rather than in cleaning-up. The Surplus Agency had then asked the Commissioner of the Municipality Sauðaneshreppur to assess the outcome. The rightful owners had not been contacted and the Commissioner had neither been authorized by them to assess the finished work nor had he in any sense been the owners' advocate or agent when the operation had been under way.

The landowners had continued to make complaints about the situation, which had been totally unacceptable, and in a letter from Mr. Páll Ásgeir Tryggvason, an official of the Ministry for Foreign Affairs, dated 11 March 1976, the following had been stated *inter alia*: "*The Ministry agrees with The Surplus Agency that a complete remediation of land on the estate Eiði has already been perfected and further treatment charged to the Treasury is therefore unjustified*".

Further complaints had been made about the situation and Mr. Helgi Ágústsson, director with the Ministry for Foreign Affairs, had stated the following in a letter dated 15 January 1981: "*The Ministry hereby informs you that it will not take your claim regarding further remediation on the estate Eiði into consideration*".

In 1982-1984 plans had been made for the construction of a new radar station on Mount Heiðarfjall. In the end it had been decided to choose another mountain nearby for the station.

In 1986-1987 the Ministry for Foreign Affairs had employed boy scouts and teenagers under the aegis of a rescue unit from a nearby town, Þórshöfn, to collect and form heaps of surface debris, e.g. oil containers and other articles. The rightful owners had not been consulted on this matter. Later permission had been sought to bury the debris, but the landowners had refused and insisted that it would be removed from the mountain. The debris, which had not already been blown into the blue by strong winds, had not yet been removed from the estate.

Further complaints had been made about the situation and Mr. Þorsteinn Ingólfsson, an official of the Ministry for Foreign Affairs, had stated the following in a letter to the Althingi Ombudsman, dated 26 August 1988: "*The Defence Department is of the opinion that it is under no obligation to the present landowners regarding the situation in the area*". It is stated that Mr. Ingólfsson had maintained in the letter that the owners had purchased the land on 30 November 1974, but that the fact of the matter were that the estate had been purchased on 10 April 1974.

Further complaints had been made about the situation and an agreement had been negotiated between the Ministry for Foreign Affairs and the landowners to make a trip to the mountain on 13 July 1989 and assess the situation in the area. Representatives of the Ministry for Foreign Affairs, the landowners, the landowners' lawyer, a representative of the Rescue Unit of Þórshöfn, a representative of the Nature Conservation Council, a representative of the Nature Conservation Committee of Þórshöfn, and a former employee of the radar station had met on the mountain. When the assessment had been under way the former employee had stated that all wastes from the radar station had been buried and left hidden in pits on the top of the mountain and he had shown the people present the area, where the waste had been buried, which had been of the dimensions 1.5-2 hectares. He had explained to those present that all wastes from the military installation had been buried there, i.e. waste oils, electric accumulators, and other articles, unseparated and without taking any safety measures at all. This had been a complete surprise to everyone. No one else, amongst those present, had seemed to know about this. United States military authorities had later refused to disclose information to the landowners about the nature of the debris buried on Mount Heiðarfjall.

The discovery of the wastes, in July 1989, had forced the landowners to review their plans for continued water budget, fish farming, and food production underneath the heaps on the mountain, which had been going on for 15 years and shown good results, but at a high cost and with heavy investments made. The reason for this had not least been the fact that foreign copartners had stated that they could not continue to operate under the scrap heaps until all wastes had been removed and it had been established that no substances, causing damage to the environment, had leaked out of the heaps into water leaking strata below, cf. their letter dated 30 November 1989. Neither had it been thought to be appropriate to start further work, or make more investments, whilst the exposed wastes were still stored above the wells.

The decision had then been made to stop all investments and terminate all activities in the water budget, fish farming and food production sectors until all wastes and hazardous substances had been removed.

It is mentioned that in letters from the Environmental Health and Protection Office of the district Norðurland-eystra to the Ministry for Foreign Affairs, the Environmental Committee on Mount Heiðarfjall, and Mr. Ólafur Pétursson at the Environmental and Food Agency of Iceland, dated 12 and 13 June 1990, the following had been stated: *"It may be asserted that leachate from waste heaps from the radar station on Mount Heiðarfjall will mix with the groundwater. The consequences will be determined by the waste heap and leachate content, and the course and flow rate of the groundwater"*.

It is pointed out that research and sampling, in August and November 1991, on the surface of the waste heaps, under the direction of The National Toxic Campaign Fund in Boston, USA, had revealed the existence of toxic heavy metals and waste oils, both in samples of soil and water.

It is pointed out that measurements in springs on the slopes of Mount Heiðarfjall, done on 18-19 August 1993 by the Environmental and Food Agency of Iceland under the auspices of the Ministry for the Environment, had revealed the existence of lead in the landowners' well of drinking water. Concentration of lead had been measured 0,0059 mg per litre, which were 18% above the maximum permitted level of lead in drinking water according to a new standard issued by the US Environmental Protection Agency and provisions of law adopted by the US Congress on 24 May 1994 under the aegis of the Department of Health and Human Services. According to the said provisions and the recommendations of the Food and Drug Administration in Washington D. C. the maximum permitted level of lead in drinking water should be 0,005 mg per litre, cf. Act No 5 U.S.C., 552(a), 1 CFR 51, 21 CFR 103.35(d)(3)(v).

The Center for International Environmental Law in Washington D. C. furnished the landowners with documents on the issue from the United States Armed Forces by virtue of the Freedom of Information Act, cf. a letter from the Admiral in the Naval Base in Keflavík, dated 12 May 1992. The documents included agreements dated 7 July and 18 September 1970. The landowners had received the documents in the beginning of October 1993. 25% of the documents had been declared confidential information and had not been disclosed. Earlier the Americans had declared that they were willing to furnish the landowners with the said documents, i.e. 75% of the documents, which were not confidential, against a considerable payment.

The Environmental Health and Protection Office of the district Norðurland-eystra had written the Commandant of the American Defence Force a letter on 11 August 1992 stating: *"The Health Commission of the Þórshöfn-region considers the completion on Mount Heiðarfjall a major violation of the above mentioned provisions. The Environmental Health and Protection Office of the district Norðurland-eystra insists that the said provisions will be complied with and that the Defence Force will remove the wastes it left on Mount Heiðarfjall when it terminated its activities there"*. In relation to this reference had been made to Articles 14(1), 16(1), and 46(1) of Health Regulation No 149/1990. Furthermore attention had been called to Article 27, paragraphs 4, 5 and 6, of the Sanitary Measures and Environmental Health and Protection Act No 81/1988. This letter had not been responded to.

It is pointed out that a complaint had been filed with The Director of Public Prosecutions on 19 April 1993 in consequence of alleged violations of Article 257 and paragraphs 2 and 3 of Article 259 of the Penal Code No 19/1940. The Director of Public Prosecutions, Mr. Hallvarður Einvarðsson, had dismissed the complaint and stated in a letter dated 3 September 1993: *"The fact that your clients have suffered indefinite financial losses by virtue of this case is not questioned, but that question must be resolved by way of civil proceedings"*. The approach of the Director of Public Prosecutions to the case had been complained of to the Althingi Ombudsman on 31 August 1994, but the Ombudsman had not been able to take on the case.

A complaint had been filed with the Ministry of Justice about the approach of the Director of Public Prosecutions to the case on 23 September 1994 and the case restated with the Ministry on 12 February 1995. A reply had been received from the Ministry of Justice, dated 2 May 1995, where the complaint had been dismissed. Reference had been made to the reasoning of the Director of Public Prosecutions that the Ministry for Foreign Affairs had stated, in its opinion to the Director of Public Prosecutions, that the Defence Force's disposal of wastes on Mount Heiðarfjall had been consistent with normal practice and rules prevailing in the period in question. Furthermore, a complaint had been filed with The State Department of Criminal Investigation on 7 December 1994, which had dismissed the complaint, in a letter dated 21 December 1994, by reason of the dismissal of the Director of Public Prosecutions, that decision being binding for The State Department of Criminal Investigation. A new complaint had been filed with The National Commissioner of The Icelandic Police on 17 March 1999 in the light of new information and data and on other foundations than before. The National Commissioner of The Icelandic Police had referred the matter to the Director of Public Prosecutions, which again had refused to act.

The Foreign Affairs Committee of The Althingi had taken up the matter, in a meeting in the Pentagon on 12 May 1994, and sought access to information. According to the members of the Committee the request had then been well received, but later acted on negatively by the Americans in a letter, dated 15 November 1994, where reference had been made to the agreement dated 7 July 1970. The landowners had, in a letter to the Foreign Affairs Committee of The Althingi dated 24 February 1996, sought access to information and data regarding the matter. It had been stated in the Committee's reply on 11 March 1996 that it would not be possible to honour that request since the data were of confidential nature. The landowners had been invited to approach the Ministry.

The Health Commission of the district of Norðurland-eystra had requested from the Ministry for the Environment, in letters dated 13 June 1994 and later, that the United States Armed Forces would be called upon to submit information about the debris on Mount Heiðarfjall. On 29 March 1995 the Minister for the Environment at that time, Mr. Össur Skarphéðinsson, had described the circumstances of the case in a letter to the Secretary of Defence, Mr. William J. Perry, and demanded an explanation for the existence of hazardous wastes and had further recommended that an agreement would be concluded with the landowners. In reply to the letter, letter dated 22 June 1995, Vice-Admiral H. W. Gehman, Jr. had referred the matter to the Icelandic Ministry for Foreign Affairs. On the other hand the Ministry for the Environment had written the Regional Committee on Environmental Health and Protection in the district of Norðurland-eystra a letter, dated 10 September 1996, and had maintained, with reference to the opinion of the Environmental and Food Agency of Iceland, that nothing had come into view that indicated serious pollution in the Mount Heiðarfjall area. The Environmental and Food Agency of Iceland had planned to take samples to verify pollution, but the landowners had not been willing to accept the operation. The fact of the matter had, on the other hand, been that the landowners had not been able to accept the work procedure. They had called for a detailed and scientific research project, which, amongst other things, would uncover the identity of the substances in the heaps, but the Environmental and Food Agency had favoured sampling outside the heaps, which would mean an incidental outcome. The landowners' reply had been based on the fact that they had received a letter from a prominent Belgian firm on 27 March 1990 describing procedures to be followed in verifying pollution in the area. The plaintiffs had wished to follow these procedures, but in a letter from the Ministry for the Environment to the landowners, dated 17

July 1991, it had been stated that it would be inappropriate and unsafe to dig up the heaps on Mount Heiðarfjall.

The landowners had also written a letter to Secretary of State, Mr. William J. Perry, on the issue on 9 December 1995. Neither that letter nor a letter dated 9 March 1996 had been responded to.

The landowners had, in a letter to the Ministry for Foreign Affairs dated 1 January 1997, called for information in accordance with the Information Act No 50/1996. The landowners had almost exclusively received documents, which were already in their possession, but on the other hand they had not received documents about communications between United States and Icelandic authorities concerning the issue, which they had insisted would be delivered to them.

Furthermore the Council of the Municipality of Þórshöfn had, in a letter to the Ministry for Foreign Affairs dated 5 July 2000, invited the Ministry to ensure that the owner of the wastes on Mount Heiðarfjall would remove it from the mountain. In the Ministry's reply, dated 28 August 2000, it had been stated that the Ministry entertained the opinion that sufficient remediation had already been completed, and that the Minister for Foreign Affairs had declared his intention to visit the site and examine the situation for himself.

Landvernd, The National Association for the Protection of the Icelandic Environment, had, in a letter to the Ministry for Foreign Affairs dated 5 July 2000, requested answers to questions regarding disposal of wastes from the Defence Force on Mount Heiðarfjall, and in a written reply from the Ministry, dated 6 October 2000, it had been stated that the Ministry entertained the opinion that nothing were wrong with the situation on Mount Heiðarfjall.

On 26 June 2000 and 11 October 2000 the plaintiffs had written letters to the Ambassador of The United States of America in Iceland, Ms. Barbara J. Griffiths, requesting the US Government to make adjustments to the current situation brought about by storage of hazardous wastes on Mount Heiðarfjall. Furthermore the US Secretary of State, Ms. Madeleine Albright, had been sent a letter on the same issue on her visit to Iceland 29 September 2000. These letters had not been responded to.

It is mentioned that the case had been subject for Parliamentary procedure, during the 125. Parliamentary session of the Althingi, when two members of the Althingi, representatives of the political party The Left-Green Movement, had submitted a proposal for a Parliamentary resolution to investigate environmental impacts of foreign military presence (Parliamentary document No 650). The proposed resolution had not been acted on during the aforementioned session.

It is mentioned that in the United States Armed Forces radar station on Mount Gunnólfsvíkurfjall no wastes were buried on the mountain. All wastes were transported from the site and stored elsewhere, as had been done in the United States Armed Forces telecommunication station in Hraun, near the town of Grindavík, in the period 1954-1969. In 1989 the American Defence Force had provided 9 million US dollars for the construction of a new water supply for the town of Keflavík and Keflavík-airport, since there had been a reason to believe that the wells, used by the Americans, had become polluted on account of hazardous wastes. This had been achieved by way of a memorandum dated 17 July 1989. In July 1991 the American Defence Force had been in charge of remediation works on Mount Straumnesfjall in northwest Iceland, where the Defence Force had at one time operated a radar station. At the time the American loran station in Sandur, in the peninsula of Snæfellsnes, had been closed down, the Ministry for Foreign Affairs had entertained the opinion that on departure from the site the situation should be the same as on entering. The Americans had accepted these terms in case the issue would be put to the test. Neither had wastes been systematically disposed of on the estate in Sandur. All wastes had been moved elsewhere.

When the owners of the estate Eiði had sought access to information on the matter from the Icelandic Ministry for Foreign Affairs, they had been referred to the American Defence Force, in accordance with what had been stated earlier and a letter to the landowners from the

Ministry for Foreign Affairs, dated 12 June 1991. When the owners had turned to the American Defence Force they had been referred to the Ministry for Foreign Affairs in accordance with an agreement, which they had concluded with the director of the Defence Department of the Ministry for Foreign Affairs, cf. the aforementioned letter from the Commandant of the American Defence Force dated 23 February 1993.

The plaintiffs had time and again requested that the American Armed Forces and Icelandic authorities had wastes and hazardous substances removed from Mount Heiðarfjall, but their requests had always been rejected. Furthermore the plaintiffs had to no avail endeavoured to file a complaint with the Icelandic Police Authorities about the storing of these substances. The plaintiffs had also tried to get the American Armed Forces to make acquisition of the land, which the Military had used for the storing of hazardous substances and wastes, but without success. The plaintiffs had gone to court in an attempt to have the US Government's obligation to make acquisition of the land recognized, but the case had been dismissed (cf. Ruling of the Supreme Court of Iceland in the Court Reports for 1998, page 374).

It is mentioned that the plaintiffs had not known how deep substances from the wastes heaps had sunk into the soil with the leachate, and lead, above the maximum permitted level in drinking water, had been measured in a spring, approximately 200 metres below certain wastes heaps at a great distance outside the area delimited by the aforementioned coordinates. The consequences of the US Government's aforementioned use had been that the owners could not continue to exploit the estate for fish farming and food production purposes, since the wastes from the United States Armed Forces had been situated above the wells and the area. For that reason the US Government were indirectly using the two farms, Eiði I and II, or the rightful owners had been deprived of control over their estate in this respect.

When the case was heard *de novo* in court on 1 November 2001 the plaintiffs submitted additional information reaffirming that summons had rightfully been served on the President of the United States of America and two members of his administration. This had been done within a legal period of notice under Icelandic legislation, which were three months pursuant to Article 91(3) of Act of Parliament No 91/1991, and within a legal period of notice under public international law, cf. cited letter from the American Embassy to the Icelandic Ministry for Foreign Affairs. In that letter the Ministry had been noted that summons should be served through diplomatic channels, which the plaintiffs had attempted two times. In the first incidence the Ministry for Foreign Affairs had given consideration to the matter for a too long period of time before the summons had been served, and in the second incidence the Ministry had refused to forward the summons. The American Embassy had been alerted and since the Embassy had refused to receive the summons the only option left for the plaintiffs had been to serve the President of the United States, as the highest ranking holder of executive powers, with a summons, as well as the Secretary of State, since, under public international law, it were normal practice to serve that particular Secretary with a summons on behalf of a sovereign State. Furthermore a summons had been served on the Secretary of Defence, since institutes under his authority were responsible for the storage of wastes in the H-2 area on Mount Heiðarfjall. According to a certificate, issued by process servers in Washington D. C. employed by a New York firm specializing in summons, the aforementioned three parties had all been legally served with a summons, which had been done more than 60 days before the case were instituted before the District Court of Reykjavík.

Finally, reference is made to a produced letter from the American Ambassador who declared, amongst other things that, according to an agreement concluded in 1970, the area on Mount Heiðarfjall had been returned to the Government of Iceland. It had been stated in that letter that, due to the fact that the Government of Iceland had agreed to accept delivery of the area in accordance with the said agreement, the Ministry for Foreign Affairs should govern all matters regarding the area. The Minister for Foreign Affairs had expressed a contrary view in an interview with the newspaper Fréttablaðið, where he had stated that Icelandic authorities were not obliged to administer remediation works on Mount Heiðarfjall: The US Government had been obliged to do so and it had been done as normally practiced

at that time. The fact of the matter had been that the area had never been cleaned up, and in no way as had been generally accepted at that time, e.g. since all wastes and hazardous substances were still stored at the site without any security measures taken, but still the Government of Iceland had notified the landowners that the case were closed on its behalf.

The Merits of the Case and Legal Arguments Presented by the Plaintiffs

The plaintiffs maintain that the United States Armed Forces' illegal use of private property on Mount Heiðarfjall on the estate Eiði I and II in the peninsula of Langanes for the purpose of the storage of thousands of tons of military wastes, comprising of hazardous substances and "other construction debris", were prevailing, continuing and totally unauthorized. The wastes were stored in water leaking strata above water wells, where no security measures had been taken. Toxic agents from the place of storage were passing into the landowners' wells. The defendant were using the plaintiffs' property without any valid contract. Acquisition of land had neither been made by the United States Armed Forces, or by Icelandic authorities on their behalf, for exploitation purposes, nor had there been made other arrangements required to permit entry upon and use of facilities in accordance with Article 2 of the Defence Agreement between The Republic of Iceland and The United States of America, dated 5 May 1951, cf. Act of Parliament No 110/1951. As from 1 September 1970 the lessee had unilaterally terminated warranties and authorizations in accordance with leasing contracts concluded 3 May 1954 and 10 December 1960. The real estate in question did not fall within authorized areas any more, as stated in the Defence Agreement, and that the United States Armed Forces had not enjoyed extraterritorial rights with regard to the site, or the use of the estate, since 1970.

The plaintiffs maintain that the presence of hazardous wastes has been established, since they can be seen on the surface of the wastes heaps, and further more former employees of the firm Iceland Prime Contractor had confirmed that hazardous wastes had been buried on the site in large quantities. All wastes from the radar station had been put unseparated into the ground on the mountaintop.

The plaintiffs, as rightful owners of the farms, had always maintained that officials of the Ministry for Foreign Affairs were not in any way their advocates or agents and had never been. All matters regarding the removal of wastes or the remediation of Mount Heiðarfjall were the defendant's affair and not under the auspices of, or within the sphere of activities of, the Icelandic Government, which had not exercised control or jurisdiction over the area or the case since 1 September 1970. It seemed as if the agreement and the information available suggested that the US Government had concealed the presence of wastes and hazardous substances on Mount Heiðarfjall from the Icelandic authorities.

The plaintiffs maintain that the Icelandic Government's renunciation, on their behalf and on the behalf of Icelandic nationals, of the right to claim damages against The United States of America for personal detriment or for property damage, which could arise due to usage on the estate, cf. Article 2 of the agreement dated 7 July 1970, could neither exempt the defendant in any way from being accountable to the plaintiffs for the alleged illegal and concealed use of the land after the agreement had been concluded, nor in fact before its conclusion. The defendant's advocates had always known or ought to have been aware of the fact that the renunciation of the landowners' rights, in accordance with the agreement dated 7 July 1970, had not been binding on the plaintiffs.

When the landowners had tried to reach an agreement on the matter officials of the Ministry for Foreign Affairs had told them to bring an action against the Icelandic Government, and had, amongst other things, recommended that this should be done with reference to Article 12(2) of the Annex to the Defence Agreement on the Status of the United States Personnel and Property. Nevertheless Article 12(2) of the said Annex would not be understood in such a way that the Icelandic Government had assumed liability for damage inflicted on Icelandic nationals by the United States Armed Forces. The Article dealt with damage done by the United States Armed Forces personnel, cf. Article 1 of the Annex to the Defence Agreement, but not with the United States Armed Forces' obligation to comply with Icelandic legislation.

The plaintiffs maintain that the US Government makes repeatedly reference to the agreements dated 7 July and 18 September 1970, and in a letter from the Ambassador of the United States of America, dated 30 July 1990, the following had been stated: "Since this site was accepted by the Government of Iceland pursuant to 1970 agreement". It could well be the case that the Icelandic Government had assumed some liability vis-à-vis the Americans by way of this agreement, but it could not deprive landowners in Iceland of the right to make the claim against the US Government that it would remove debris, buried for storage purposes by its Armed Forces, which would prejudice the exploitation of the estate and the right to go to Icelandic courts over such a claim.

The plaintiffs maintain that the Republic of Iceland cannot, by way of agreements concluded with the United States of America, deprive them of the control over their estate or of the right to exploit it in a tangible manner. They make reference to Article 1 of Annex No 1 to the Convention for Protection of Human Rights and Fundamental Freedoms, cf. Act of Parliament No 62/1994.

Concerning legal arguments in other respects the plaintiffs refer to of the Constitution of the Republic of Iceland, cf. Act of Parliament No 33/1944, to Article 21, which prohibits the renunciation of land by way of international agreements, and to Article 72, on protection of property, cf. Act of Parliament No 97/1995. Furthermore the plaintiffs refer to unwritten rules of property ownership law on legal protection of ownership rights and of property ownership. Moreover the plaintiffs refer to Article 5 of the Defence Agreement, cf. Act of Parliament No 110/1951, stipulating "nothing in this Agreement shall be so construed as to impair the ultimate authority of Iceland with regard to Icelandic affairs". The defendant's usage had caused damage and considerable inconvenience and had been a violation of Article 257 and Article 259(2) of the Penal Code No 19/1940. Still further reference is made, on behalf of the plaintiffs, to the Sanitary Measures and Pollution Prevention Act No 7/1998, Article 14(1) of Health Regulation No 149/1990, Pollution Prevention Control Regulation No 786/1999, and to the Nature Conservation Act No 44/1999, e.g. to Article 44. That "with its actions and failure to act the defendant were violating the aforementioned law and regulations and the Icelandic authorities had not wished to prevent such violations". Therefore the only option left for the plaintiffs had been to take the defendant to court with the aim of forcing the defendant to take positive action.

Article 34 of Act of Parliament No 91/1991 stipulated that action might be brought on account of a real estate in the district court where it is situated. Nevertheless the plaintiffs had decided to take the present case against the defendant to the District Court of Reykjavík with reference to Article 33(3), specifying that the Government should be taken to court in Reykjavík, and to the provisions of Article 32(4) on account of the location of the American Embassy.

The ruling of The Supreme Court of Iceland, dated 28 January 1998, in the case of the landowners against the US Government, the United States Defence Force, and alternatively against the Icelandic Government would not disallow the plaintiffs to bring the present case against the United States of America. The first case had concerned the landowners' claim that the US Government should make acquisition of land on Mount Heiðarfjall in order to gain access with the aim of storing military wastes. In its ruling the Supreme Court had pronounced that the Defence Agreement did not contain any provisions laying down that the US Government or the United States Defence force in Iceland should fall within the jurisdiction of Icelandic judicial tribunals in disputes over such matters. Claims made in the present case were of an entirely different nature as had been described above. It should be pointed out that nor were there any provisions in the Defence Agreement stipulating that the US Government or the United States Defence Force should not fall within the jurisdiction of Icelandic judicial tribunals in a similar case to the present case. The plaintiffs also maintain that the ultimate authority of Iceland with regard to Icelandic affairs, cf. Article 5 of the Defence Agreement, should include the jurisdiction of Icelandic judicial tribunals over Icelandic affairs and full authority of rightful Icelandic owners over the affairs of their private properties in Iceland.

Reference is made, on behalf of the plaintiffs, to the notion that property ownership of Icelandic nationals had priority over the extraterritorial rights of the United States in Iceland, and since the United States Armed Forces, and hence the US Government, had a permanently fixed place of establishment in this country and did not observe the rights of owners of immovable property in Iceland they were forced to accept to be ordered by a judicial tribunal in this country to collect their belongings and wastes from the grounds and soil of the plaintiffs.

Notwithstanding the actuality of the principle of public international law, laying down that the Government of one country would not be the subject of a lawsuit before a judicial tribunal in another country, there were generally accepted exemptions from that rule. In the last decades public international law had developed rapidly towards increased exceptions, since the business of states were not entirely limited to the exercise of their rights as a state (*jus imperii*), but in stead there were all kinds of activities of an exclusivity nature also blooming in other countries in the trade and communications sectors, which meant that the law of the state, where the activities were going on, would prevail (*jus gestorum*). No regulations had been enacted to this effect in this country, but in the United States a law had been adopted, "The Foreign Sovereign Immunities Act of 1976", delimiting these rules, which amongst other things stipulated that a foreign state would not be excluded from the jurisdiction of US judicial tribunals where a case concerned a real estate, situated in the United States of America, or legal deeds concerning assets and taking place in US territory. By virtue of the fact that a US national or legal person were capable of taking the State of Iceland to court, on account of a similar claim to the one made in this case, the plaintiffs are of the belief that it would be only logical that the principles of reciprocity and equality should prevail. Likewise they should, for that same reason, be able to take the US Government to court in Iceland.

By virtue of the aforementioned rule under public international law governing exemptions, general rules of private international law applied to the legal relationship, since the plaintiffs' claim were based on exclusivity, even though the opposite party were a state. The plaintiffs lay emphasis upon that their claim were not a claim for damages or a claim of a kind that could fall within the regulatory procedures of the Defence Agreement, but rather a claim for an obligation to act to be met by the defendant alone. The plaintiffs maintain that only Icelandic judicial tribunals were competent to address questions regarding the exploitation of assets in this country and that the US Government could be summoned as a party to the dispute, which meant that the US Government would not be excluded from jurisdiction in such matters pursuant to Article 16 of the Civil Litigation Act No 91/1991, or under public international law. No provisions of the Defence Agreement stipulated that Icelandic nationals were incapable of taking the US Government to court in Iceland, but on the other hand the provisions on payment obligations to Icelandic nationals, assumed by the Icelandic Government on account of damages, were clearly invented for their convenience.

The plaintiffs maintain that the defendant's exploitation of their land were unauthorized under Icelandic law and for that reason the plaintiffs were entitled to make the legally protected claim that the wastes, causing them harm and damage, would be removed from their estate. The plaintiffs are of the opinion that the case could not be time barred, since the illegal circumstances were persisting, nor could indifference on behalf of the plaintiffs be taken into consideration, who had, after the extensive and concealed storage of wastes had become clear in 1989, constantly fought for the cleaning-up and removal thereafter of wastes on behalf of the defendant. The plaintiffs' efforts had only met with indifference on behalf of the defendant, even though great emphasis had been put on remediation in similar cases in the United States, e.g. on account of hazardous substances dating back to the second World War.

Since the defendant's use of the plaintiffs' estate, for the purpose of storage of wastes and other construction debris, were continuing, prevailing and illegal, and since utility theft were being committed, which were causing the plaintiffs damage and considerable inconvenience, the plaintiffs made the claim before the Court that the defendant should be ordered by the Court to pay a fine per diem on failing to remove the wastes. Great interests were at stake for the plaintiffs, industrial, social and economic, and if a court ruling on the plaintiffs' claim

were to have any effect, determination of a high fine per diem were necessary. A claim were made for ISK 150 000, which were not a high amount considering other issues in relation to the case, and the interests at stake for the defendant in this context must be regarded minor in relation to those of the plaintiffs. As concerns powers to determine fines per diem the plaintiffs refer to Article 114(4) of the Civil Litigation Act No 91/1991.

When the case was heard *de novo* the plaintiffs presented additional evidence. Regarding the Ambassador's assertion, that in 1970 the area on Mount Heiðarfjall had been handed over to the Icelandic Government by way of an international agreement, it should be pointed out that the aforementioned agreement had not covered the Icelandic Government's acceptance of wastes and hazardous substances, which had been buried and concealed. The Icelandic Government had not wished to accept responsibility for the situation, but on the other hand the rights of the owners were renounced by way of agreements. The aforementioned agreement had not been an international agreement proper intended to amend rights between the two states or to have the consequence that one of the states would be released from its obligations under private international law. The parties most deeply concerned, i.e. the owners, had only learned of the existence of the agreement when more than twenty years had passed from the date of its conclusion. Likewise the plaintiffs make reference to the fact that the Americans had been tidying up and removing debris in other areas.

The farms Eiði I and II had not been sold concurrent with the issue of the bill of sale on 30 November 1974, but by way of a sales contract, dated 10 April the same year, and in the current condition at that time. The purchasers had then examined the condition of the estate at first hand and voiced their full approval such as they had confirmed with their signature. The bill of sale, issued at a later date, should be regarded as a unilateral recognition, on behalf of the vendors, of the fact that the purchasers had fulfilled their contractual obligations. Hence it should be the purchasers' concern to specify what kind of an asset they had purchased, to what condition reference had been made, and what they had accepted, but not the concern of other parties, who had not had anything to do with the purchase. The present owners had thus come into possession of the farms in the very condition the farms had been in at the change of ownership on 10 April 1974 and the text of the bill of sale had not obliged the owners to accept any condition not known of at that time, e.g. buried wastes and hazardous substances, which neither the vendors nor the purchasers had learned about until 1989, bearing in mind that the bill of sale had not covered renunciation on account of the situation on Mount Heiðarfjall. Problems concerning surface debris, which the vendors had made complaints about to the sheriff of the District of Þingeyjarsýsla in the town of Húsavík from 1971, had been discussed separately when the transaction had taken place in April 1974, and the right to make claims on account thereof had been transferred to the purchasers. When the vendors had issued the bill of sale that act had only been between the owners and the vendors and the clause on the condition had been of no concern to other parties and had not concerned the situation on Mount Heiðarfjall with regard to the Defence Force or the Ministry for Foreign Affairs' further use there of land for the purpose of storage of debris and with regard to possible future claims made by the owners. The declaration of the former owners, included in the bill of sale, could not be interpreted as if possible future rights of the owners to make claims against the aforementioned parties had been renounced. They had acquired such rights when the sales contract had been concluded. The vendors' declaration only stated that the purchasers had accepted certain facts vis-à-vis the vendors. The purchasers had examined the condition of the estate and voiced their full approval vis-à-vis the vendors, but neither the purchasers nor the vendors had been satisfied with the situation in the Defence Force area. The purchasers had always intended to continue to make claims against the Ministry for Foreign Affairs or the Defence Force on account of the situation in area H-2 on Mount Heiðarfjall and make requests for corrective actions and improvements regarding the situation in the area, which the US Military had been using continuously. The vendors had known of this, cf. a certified declaration, dated 30 January 1991, made by the former owners and concerning issues regarding a third party. The Municipality of Þórshöfn had supported the landowners' claims that the defendant should remove wastes and debris, containing hazardous substances, from Mount Heiðarfjall

and had repeatedly made the claim against the Americans that this would be removed from the soil. This revealed that it were not only in the plaintiffs interest to have the wastes removed, but also in the interest of the general public, as the legislative provisions, referred to in the summons, revealed.

Finally, the plaintiffs make the claim that the defendant would be ordered to pay full costs, in accordance with the invoice presented, with the addition of a mandatory value added tax put on the costs amount, cf. the provisions of Acts of Parliament No 50/1988 and No 119/1989, and that the plaintiffs would not be treated as taxable persons with regard to the VAT.

Conclusion

In the present case the plaintiffs make their claims against the government of a foreign state, the Government of the United States of America. With regard to the principle of public international law, concerning extraterritorial rights of states, that a state cannot fall within the jurisdiction of a court of another state, it is imperative to take a stand on the issue of jurisdiction before adopting a further qualitative position on the plaintiffs' claims and merits of a case.

It is maintained, on behalf of the plaintiffs, that the Government of the United States of America does not enjoy extraterritorial rights before Icelandic judicial tribunals in a case concerning the aforementioned alleged undertakings of the US Military on the land of the plaintiffs. Therefore, given the circumstances, Icelandic judicial tribunals had jurisdiction over the present case and authority, where applicable, to oblige the defendant to act as claimed by the plaintiffs. The basic argument, presented on behalf of the plaintiffs, is that the approach of public international law at present lead to the conclusion that the legal deeds in question should be considered as being of civil law nature and concerning the plaintiffs' proprietary rights and control over their land. On behalf of the plaintiffs, reference is also made to aspects of reciprocity and argued that in other countries judicial tribunals might reserve jurisdiction over foreign states in cases of certain legal deeds of civil law nature.

Subparagraph 2 of Article 16(1) of the Civil Litigation Act No 91/1991 lays down that judicial tribunals have powers to determine the case of everyone, who qualifies as a party, without prejudice to exceptions in accordance with the law or under public international law. Likewise Article 24(1) of the aforementioned Act lays down that judicial tribunals have powers to rule on any matter under national legislation, unless it is excluded from their jurisdiction according to law, contract, practice, or its nature.

Article 2 of the Defence Agreement between The Republic of Iceland and The United States of America, dated 5 May 1951 and which became legally valid with the adoption of Act of Parliament No 110/1951, provided that Iceland would make all acquisitions of land and other arrangements required to permit entry upon and use of facilities in accordance with the said agreement and that the United States should not be obliged to compensate for such entry or use; but Article 12(2) of the Annex to the Defence Agreement deals specifically with proceedings regarding claims, other than contractual claims, concerning acts of United States Armed Forces personnel causing damage to assets of natural persons or agencies in Iceland or to human lives and health there, excluding claims according to paragraph 1(d).

The Defence Agreement does not stipulate that the Government of The United States of America should fall within the jurisdiction of Icelandic judicial tribunals in a dispute like that which is being addressed before this Court. Rules of public international law have neither been considered to lead to such a conclusion in Icelandic law, cf. rulings of the Supreme Court of Iceland No 613/1961 and 374/1998. The merits of the case presented by the plaintiffs, namely that the building of the present case should be seen as different from the case mentioned later from the point of view of Icelandic law regarding extraterritorial rights of foreign states before Icelandic judicial tribunals, cannot be accepted. Hence the present case must, in accordance with the aforementioned arguments, be dismissed *ex officio*. No costs will be determined.

The issue of this decree was delayed due to workload and the magnitude of the case.

District Court Justice, Mr. Eggert Óskarsson, issued the decree.

THE DECREE READS AS FOLLOWS:

The present case is dismissed.

No costs are determined.

(a)	Registration no.	IS/4
(b)	Date	12 December 2002
(c)	Author(ity)	Supreme Court (<i>Hæstiréttur</i>)
(d)	Parties	The Prosecution (State) vs. Ingólfur Guðmundsson, Arnar Ingi Jónsson and Erpur Þórólfur Eyvindarson (Individuals).
(e)	Points of law	The Court establishes that the act of throwing a Molotov cocktail at an embassy is a public act of disrespect towards a foreign State and punishable by law when committed in public and directed at official embassy premisses. The embassy premisses were considered to be an emblem of the foreign State in Iceland and a part thereof according to public international law.
(f)	Classification no.	0.a, 1.c, 2.c
(g)	Source(s)	The Supreme Court's Collection of Court Rulings 2002 (Dómasafn Hæstaréttar 2002).
(h)	Additional information	
(i)	Full text extracts translation summaries	<ul style="list-style-type: none"> - Summary English: Appendix 1 - Full text: Appendix 2* - Full text English: Appendix 3

Appendix 1

The defendants were accused of having publicly disgraced a foreign nation and a foreign State, pursuant to Article 95 of the Penal Code, by throwing a Molotov cocktail against the place of residence of the Embassy of the United States of America and of the Ambassador. It was pointed out that the conduct, i.e. to disgrace publicly a foreign nation or a foreign State within the meaning of Article 95(1) of the Penal Code, must consist of an insult to or disrespect for the nation, in one way or another, the aim of which would be to attract attention, and of an act of disparagement and the demonstration of contempt and dishonour. The defendants' conduct, i.e. to attack the facade of the American Embassy with a Molotov cocktail, the intention of which seemed to have been to leave tracks rather than to cause significant damage, was deemed to have disgraced the United States of America, the American people or its leaders, since the Molotov cocktail exploded on the wall within a very short distance from the United States Coat of Arms and the American flag. The aforementioned act was deemed to have constituted an act of public disrespect for the United States of America, since it was initiated in public and directed against a public building bearing a symbol of the United States of America in Iceland and a part of that State pursuant to established public international law cf. Article 22 of the Vienna Convention, cf. Act of Parliament No 16/1971 on the adherence of Iceland to the Convention on Diplomatic Relations. The defendants were therefore found guilty of having violated Article 95(1) of the Penal Code.

Appendix 3**The Supreme Court of Iceland**

No 328/2002

Thursday 12 December 2002.

The Prosecution

(Mr. Bogi Nilsson, Director of Public Prosecutions)

versus

Mr. Ingólfur Guðmundsson,

(Barrister Mr. Sigmar K. Albertsson)

Mr. Arnar Ingi Jónsson, and

(Barrister Mr. Brynjar Níelsson)

Mr. Erpur Þórólfur Eyvindsson

(Barrister Mr. Haraldur Blöndal)

A foreign state. Disgrace. Legal authority to penalize. The Vienna Convention. Appeal. A claim for dismissal refuted. Dissenting opinion.

I. G., A. I. J. and E. Þ. E. were accused of having publicly disgraced a foreign nation and a foreign state, pursuant to Article 95 of the Penal Code No 19/1940, by throwing, in the early hours of the morning, a Molotov cocktail against the place of residence of the Embassy of the United States of America and of the Ambassador, leaving obvious traces of fire and smoke on the facade of the Embassy building. It was established that I. G. had prepared the Molotov cocktail and thrown it against the Embassy and that A. I. J. and E. Þ. E. had accompanied him. I. G. was deemed to have been the main perpetrator and A. I. J. and E. Þ. E. his accomplices. It was pointed out that the conduct, i.e. to disgrace publicly a foreign nation or a foreign state within the meaning of Article 95(1) of the Penal Code, must consist of an insult to or disrespect for the nation, in one way or another, the aim of which would be to track attention, and of an act of disparagement and the demonstration of contempt and dishonour. I. G.'s conduct, i.e. to attack the facade of the American Embassy with a Molotov cocktail, the intention of which seemed to have been to leave tracks rather than to cause significant damage, must be deemed to have disgraced the United States of America, the American people or its leaders, since the bomb exploded on the wall within a very short distance from the United States Coat of Arms and the American flag. The aforementioned action was deemed to have been the equivalence of a public disrespect for the foreign nation in question, since it was initiated in public and directed against a public building being a symbol of the United States of America in this country and a part of that state pursuant to established public international law, cf. Article 22 of the Vienna Convention, cf. Act of Parliament No 16/1971 on the adherence of Iceland to the Convention on Diplomatic Relations. I. G., A. I. J. and E. Þ. E. were therefore found guilty of having violated Article 95(1) of the Penal Code; furthermore A. I. J. and E. Þ. E. were subjects to criminal liability pursuant to Article 22(1) of the said Penal Code.

Ruling of the Supreme Court of Iceland.

Supreme Court Justices Mr. Hrafn Bragason, Mr. Garðar Gíslason, Mr. Haraldur Henrysson, Ms. Ingibjörg Benediktsdóttir and Mr. Pétur Kr. Hafstein hand down judgement in the present case.

The Director of Public Prosecutions appealed against the decree of the District Court of Reykjavík to the Supreme Court on 1 July 2002 for conviction, in accordance with the charges made, and for determination of penalty.

The main requirement of all the defendants is that the Supreme Court would dismiss the case. Their alternative plea is firstly to be acquitted and secondly to receive the mildest punishment the law allows.

I.

The defendants' claim for dismissal is based on the assumption that an appeal against the decree of the District Court of Reykjavík were not permitted. Such permission would have been necessary, pursuant to Article 150(2) of the Criminal Proceedings Act No 19/1991, since conviction could only lead to punishment in the form of a fine, that would be much lower than an amount appealed against in civil proceedings, cf. Article 152(2) of the Civil Litigation Act No 91/1991, and the prosecutor's claim before the District Court had not involved anything else.

The Director of Public Prosecutions believes that the defendants were wrongly acquitted in the District Court and appeals against the Courts decree as Article 148 of Act of Parliament No 19/1991 permits, cf. Article 8 of Act of Parliament No 37/1994. The provisions of Article 150(2) of the Act on appeal against convictions do not apply in this case, since the view that punishment or other sanctions were much too mild, cf. Article 148, is not at issue here. The defendants' claim for dismissal will therefore not be taken into consideration.

II.

The defendants are accused of having publicly disgraced a foreign nation and a foreign state, pursuant to Article 95 of the Penal Code No 19/1940, by throwing, in the early hours of the morning of Saturday 21 April 2001, a Molotov cocktail against the place of residence of the Embassy of the United States of America and of the American Ambassador in Laufásvegur in Reykjavík, which caused a fire to flare up on the facade of the building. Still no serious damage was inflicted on the Embassy building and security guards put out the fire within a short period of time. Presented photographs show however obvious traces of fire and smoke on the facade of the Embassy building. The Prosecution holds the opinion that the defendants were agreed on the offence, and that the defendant I. Guðmundsson prepared the Molotov cocktail and threw it against the building. The defendants A. I. Jónsson and E. Þ. Eyvindsson had been guilty of having a part in the defendant I. Guðmundsson's violation of the above mentioned clause of the Penal Code, cf. Article 22 of the said Penal Code. The case was reopened after primary hearing and decree of the District Court and the Counsels were invited to argue the relevance of the offences, allegedly committed by the defendants, to Article 257 of the Penal Code, but the prosecutor also referred to Article 165 of the said Penal Code. The Counsels have, here before the Supreme Court, also expressed their views about the implementation of these legislative provisions and opposed such implementation.

The original police report states that the police was called to the American Embassy at Laufásvegur at 04.23 hours on the morning of Saturday 21 April 2001 "by reason of an attack alert from there". On their arrival at the scene the police officers had noticed heavy smoke rising from the building and an employee of the security service Securitas Ltd. had been engaged in applying a fire extinguisher to the west side of the Embassy. He told the police that a man had been seen on TV surveillance throwing a Molotov cocktail against the Embassy and another employee of Securitas had pursued the man in question. After the security guard had reported two men in the street of Skáholtsstígur police patrol cars were sent off to search for the men. The defendants A. I. Jónsson and E. Þ. Eyvindsson were arrested in the street of Templarasund few minutes after the offence was committed and taken into police custody. They were interrogated on the following day and released in the evening. On the other hand the defendant I. Guðmundsson was not arrested until in the

evening of Saturday 21 April 2001 and was interrogated at noon the following day, Sunday, and released thereafter. The police interrogated the defendants A. I. Jónsson and E. Þ. Eyvindsson again in December 2001.

III.

Reference is made to the decree of the District Court in which the testimony of the defendants and witnesses in the case before the said Court, which largely explains the course of events in this case, is described. On the other hand it is also necessary to argue certain parts in the defendants' testimony, given in the police investigation, which they have confirmed before the District Court on being asked to do so, with the exception of E. Þ. Eyvindsson.

During police interrogation on 22 April 2001 the defendant I. Guðmundsson stated amongst other things that they, the defendants, had late at night discussed politics in general in a restaurant, e.g. the United States warfare policy and intervention in Palestine. They had also discussed demonstrations, which had taken place in front of the American Embassy in Reykjavík, where fire had been set to the Israeli flag. These discussions had led to the idea of expressing some noticeable protest at the premises of the Embassy and then the idea had been hit upon to throw a Molotov cocktail against the Embassy building. He stated that he did not remember who had come up with the idea. The defendant I. Guðmundsson declared before the District Court that this was not wrongly repeated after him. It was further repeated after him, in the police record, that the other two defendants had seemed very pleased when he had told them that he had prepared the bomb, after having walked to the defendant A. I. Jónsson's car, fetched an empty bottle of vodka, and filled it up with soil and petrol together with a strip of newspaper, as further explained in the District Court decree. Shortly after, they had decided to go and throw the bomb against the American Embassy. In Court he declared that this was accurately repeated after him and that the other two defendants had known where they were going.

In the police report dated 21 April 2001 the defendant A. I. Jónsson states that on their way the defendant I. Guðmundsson had told the other two that he were going to throw a Molotov cocktail against the American Embassy, but he had never told them the reason why. In Court the defendant said that this was "somehow" correctly repeated after him, but that he did not recall that they had, on the way, discussed at any length the act of throwing the bomb. The defendant A. I. Jónsson stated, during police interrogation on 17 December 2001, that Guðmundsson had met him and Eyvindsson in the restaurant Prikið and asked them to leave the restaurant with him and once they were outside he had shown them a completed Molotov cocktail, which he had prepared in the vodka bottle. They had then walked together to the American Embassy and in the backyard of a house opposite the Embassy Guðmundsson had lifted the bottle, lit the wick, jumped out of the yard into the street of Laufásvegur, and thrown the flaming bottle against the Embassy. Concurrently he, i.e. Jónsson, and Eyvindsson had run and fled from the scene. He had realized what was about to happen when Guðmundsson had shown them the Molotov cocktail. He had done nothing to stop Guðmundsson from throwing the bottle against the Embassy and said: "It is my belief that this action was not decided on jointly and that Ingólfur Guðmundsson did this and we did nothing to stop him." Before the District Court the defendant A. I. Jónsson declared that this was accurately repeated after him.

In the police report dated 21 April 2001 it is repeated after the defendant E. Þ. Eyvindsson that Guðmundsson had been hiding a completed Molotov cocktail inside his clothes when they were leaving the restaurant Prikið. Then Guðmundsson had told him and Jónsson that he intended to throw this against the American Embassy. They had been under the influence of alcohol and thought this was a joke and had not said anything to Guðmundsson. He claimed to have seen Guðmundsson lit the bomb and jump around the corner of the house and thereafter he had lost sight of him and ran to flee the scene. Before the District Court the defendant E. Þ. Eyvindsson excused himself for not remembering clearly what happened owing to his intoxication.

IV.

It is established, with confession made in Court by Guðmundsson, which is supported by other evidence in this case, in particular the testimony of the defendant A. I. Jónsson, that Guðmundsson prepared a Molotov cocktail and threw it against the Embassy of the United States of America in Laufásvegur in Reykjavík on the morning of 21 April 2001, as detailed in the charges made, the defendant I. Guðmundsson knowing that the Embassy was covered by TV surveillance. It is furthermore established, with the testimony of the defendants in Court, in particular the testimony of I. Guðmundsson and A. I. Jónsson, that the defendants A. I. Jónsson and E. Þ. Eyvindsson accompanied the defendant I. Guðmundsson and that, before taking action, he borrowed from them some clothes the purpose of which was to help him disguise himself and give false impression of himself, from the defendant A. I. Jónsson a blue cap and from the defendant E. Þ. Eyvindsson a camouflage jacket. Information from police investigation also supports this. Due to the fact that the defendants went downhill to the street of Fríkirkjuvegur, it is clear that they did not take the shortest route from restaurant Prikið in the street of Ingólfsstræti, presumably in order to hide, and from Fríkirkjuvegur they went uphill, alongside house No 11, into the backyard of a house in the street of Laufásvegur facing the Embassy. On the other hand it has not been established beyond a doubt that the defendants agreed amongst themselves on the action, but according to the testimony of the defendant A. I. Jónsson he was at least sure of the defendant I. Guðmundsson's intentions when they approached the American Embassy. With regard to the testimony of the defendants I. Guðmundsson and A. I. Jónsson it must also have been clear to the defendant E. Þ. Eyvindsson what was brewing in spite of his excuse of having been intoxicated and having had lapses of memory, and he, like the defendant A. I. Jónsson, did nothing to stop the defendant I. Guðmundsson. The defendant I. Guðmundsson must, in accordance with the statements above, be considered the main perpetrator of the act described in the charges made, and the defendants A. I. Jónsson and E. Þ. Eyvindsson his accomplices. Hereinafter, relevance to an appropriate sanction will be discussed further as well as the appropriate punishment.

V.

Pursuant to Article 95(1) of the Penal Code, cf. Acts of Parliament No 101/1976 and No 82/1998, a natural person, who publicly disgraces a foreign nation or a foreign state, its head of government, head of state, flag, or another established national emblem, the flag of the United Nations or of the Council of Europe, shall be fined or imprisoned for up to two years. In case of serious charges the offence can carry up to six years imprisonment. Pursuant to Article 95(2), cf. Act of Parliament No 47/1941, the same penalty can be imposed for publicly disgracing or abusing, injuring otherwise in words or deeds, or making slanderous insinuations to other officers of a foreign state placed in this country.

With Act of Parliament No 56/2002, which took effect on 14 May 2002, the following new paragraph was added to Article 95 of the Penal Code: "A natural person, who threatens, or uses force in this country against, a diplomat of a foreign state or intrudes into or causes damage on the premises of an Embassy or threatens to do so, shall pay the same penalty." In the general annotations made to the Parliamentary bill the assertion is made that the purpose of this paragraph is to give protection by way of penalty against threats to or use of force against foreign diplomats in this country and against property damage made on the premises of an Embassy or against threats to cause such property damage. It is stated that neither in paragraph 1 nor in paragraph 2 of Article 95 is there absolutely provided for protection by way of penalty in the event of an attack or a threat directed against an officer of a foreign state in this country, or in the event of an act of sabotage committed on the premises of an Embassy. It is further indicated that Article 95(2) exclusively concerns "the act of publicly disgracing or other injuries" inflicted on the officers of a foreign state placed in this country. The bill should clarify that the clause "even though there is no case of disgrace and injury" should comprise conduct, which is considered a minor act of sabotage directed

against an Embassy building, the premises of an Embassy, or the home of a foreign diplomat, and the threat to commit such an act. It is a prevalent opinion that this should be provided for more clearly in the Penal Code, notably bearing in mind Iceland's commitments in accordance with public international law. Reference is made to the Vienna Convention on Diplomatic Relations of 18 April 1961, which has been ratified by Iceland, cf. Notification No 14/1971 in Section C of the Official Journal 1971, and to Act of Parliament No 16/1971 on the adherence of Iceland to the International Convention on Diplomatic Relations, Article 1 of which provides for the validity of the Convention in this country. Commitments, in accordance with Article 22 of the Vienna Convention, are reaffirmed and mentioned that Iceland's adherence to the said Convention had not called for specific amendments to Article 95 of the Penal Code before. In Norway, however, one had chosen to phrase the concept of "protection by way of penalty" in Article 95(2) of the Norwegian Penal Code, similarly, qualitatively speaking, to the wording in the Article of the Bill, but that clause had, among other things, been enacted with a view to honour commitments in accordance with the Vienna Convention. In specific annotations made to the Article of the bill the assertion is made that the aim of the clause were to honour the commitments in accordance with Articles 22, 29 and 30 of the Vienna Convention. For that reason it is suggested that all doubts would be dispelled that a threat made, or the use of violence against a diplomat of a foreign state in this country, or an attack or an act of sabotage committed on the premises of an Embassy, or the threat to commit such an act, would be declared a punishable conduct, even though it did not comprise disgrace or injury according to Article 95(2) of the Penal Code.

The defence claims that the legislature had harboured a doubt that the clause of Article 95(1) of the Penal Code would cover incidents equivalent to those referred to in this case, which gave grounds to the enactment, by way of Act of Parliament No 56/2002, of the clause which became Article 95(3) of the Penal Code.

VI.

It is obvious that with the aforementioned amendment to Article 95 of the Penal Code the legislature had in mind, amongst other things, to offer Embassies and their premises increased protection by way of penalty with a view to honour international commitments in accordance with the Vienna Convention more effectively than before. Thus the clause comprises minor acts of sabotage, not necessarily including disgrace or injury, which may rather be looked upon as property damage. Nevertheless it does not rule out that vandalism in various forms will be deemed to include disgrace brought on an Embassy and the foreign nation of which it is a symbol, even though such vandalism is insignificant.

The conduct of publicly disgracing a foreign nation or a state, within the meaning of Article 95(1) of the Penal Code, must comprise insult or disrespect for the nation in one way or another, the aim of which would be to track attention. It must entail an act of disparagement and the demonstration of contempt and dishonour. The clause will be applied in such circumstances, provided that freedom of expression, as protected by the Constitution, does not oppose such application. No declaration has been made, on behalf of the defendants, that the purpose of the said action had been to exercise such rights. However, the conduct of the defendant I. Guðmundsson, i.e. to attack the facade of the American Embassy with a Molotov cocktail, the aim of which seems to have been to leave tracks rather than to cause significant damage, must be deemed to have disgraced the United States of America, the American people or its leaders. He himself explained to the police that he had aimed at the wall of the Embassy's first floor, i.e. to the right above the entrance. There the flaming bottle exploded and photographs show soot and black stuff on a part of the wall, within a very short distance from the United States Coat of Arms and the American flag. This action must be deemed to be the equivalence of a public disrespect for the foreign nation in question, since it was initiated in public and directed against a public building being a symbol of the United States of America in this country and a part of that state pursuant to established public international law, cf. Article 22 of the Vienna Convention.

With regard to what has been mentioned earlier the defendant I. Guðmundsson's behaviour must be deemed to comprise a violation of Article 95(1) of the Penal Code, which renders it unnecessary to take a stand on other sanctions referred to in this case. The defendants A. I. Jónsson and E. Þ. Eyvindsson assisted the defendant I. Guðmundsson, as described earlier, and did nothing to prevent the action he intended to initiate. For that reason they are also subjects to criminal liability pursuant to Article 22(1) of the Penal Code.

When penalty is decided upon it is appropriate to take into account the defendants' young age and the fact that they have not been convicted of crimes, relevant in this context, before. The defendants I. Guðmundsson and A. I. Jónsson have been convicted of committing a driving offence and the defendant E. Þ. Eyvindsson has a clean police record. The offence they committed is certainly serious, but did not cause extensive damage. With regard to all events and to Article 70, paragraph 1, points 1, 2, 4 and 5 of the Penal Code it is held to be right that the defendants should be ordered to pay a fine to the Treasury, the defendant I. Guðmundsson ISK 250 000, and the defendants A. I. Jónsson and E. Þ. Eyvindsson ISK 150 000 each. The fines shall be paid within 30 days from the pronouncement of this judgement, if not, alternative penalties will be imposed as detailed in the verdict.

In accordance with the verdict the defendants shall pay all costs in connection with the charges brought against them before the District Court and in connection with the procedure in the Supreme Court:

The verdict:

The defendant Mr. Ingólfur Guðmundsson shall be fined ISK 250 000 to be paid to the Treasury within 30 days from the pronouncement of this judgement, failing to do so he shall be imprisoned for 34 days.

The defendant Mr. Arnar Ingi Jónsson shall be fined ISK 150 000 to be paid to the Treasury within 30 days from the pronouncement of this judgement, failing to do so he shall be imprisoned for 26 days.

The defendant Mr. Erpur Þ. Eyvindsson shall be fined ISK 150 000 to be paid to the Treasury within 30 days from the pronouncement of this judgement, failing to do so he shall be imprisoned for 26 days.

The defendant Mr. I. Guðmundsson shall pay his appointed defence in the District Court and the Supreme Court, Barrister Mr. Sigmar K. Albertsson, an amount of ISK 300 000.

The defendant Mr. A. I. Jónsson shall pay his appointed defence in the District Court and the Supreme Court, Barrister Mr. Brynjar Níelsson, an amount of ISK 270 000.

The defendant Mr. E. Þ. Eyvindsson shall pay his appointed defence in the District Court, solicitor Gísli Gíslason, an amount of ISK 150 000 and his appointed defence in the Supreme Court, Barrister Mr. Haraldur Blöndal, an amount of ISK 120 000.

The defendants in this case shall pay *in solidum* all other costs in connection with the charges made.

Dissenting opinion
of Supreme Court Justice Mr. Hrafn Bragason

I agree to the statements in the first four chapters of the opinion of the majority of the judges regarding the facts of this case and that the defendants are responsible for the defendant I. Guðmundsson's act of throwing a Molotov cocktail against the American Embassy in the early hours of the morning of Saturday 21 April 2001, inflicting some fire damage on the facade of the building, as shown in the photographs presented. I also agree to the majority's explanation of the provisions of Article 95 of the Penal Code No 19/1940 and of the amendments to that Article, laid down in Act of Parliament No 56/2002, that is to say after the events of this case took place, and one can refer to Chapter V of the said opinion in this respect. On the other hand I disagree with the majority on the relevance of a sanction to the action in question and I am of the opinion that Chapter VI of the ruling should read as follows:

VI.

The defendants are accused of having publicly disgraced a foreign nation and a foreign state according to Article 95 of the Penal Code. In the annotations made to the provisions of the original version of the said Article the assertion was made that the aim of its enactment was to protect the interests of the State of Iceland, and not especially to protect foreign interests in this country. This view is *inter alia* based on the fact that the State of Iceland is under an obligation, according to public international law, to offer delegates of foreign states, dwelling in this country, special protection, including protection by way of penalty, cf. Act of Parliament No 16/1971 on the adherence of Iceland to the International Convention on Diplomatic Relations, or the so called Vienna Convention, Article 1 of which provides for the validity of the Convention in this country. Subsequently the American Embassy referred the police to the Icelandic Ministry for Foreign Affairs after the youngsters had committed the act, by reason of which the Ministry filed a legal accusation with the police on 9 October 2001, accurately so in fulfilment of the state's obligations under the aforementioned Convention. This was done within the period of six months referred to in Article 29 of the Penal Code, as discussed here below. According to the Vienna Convention states are required to declare attacks and acts of sabotage, committed on the premises of an Embassy, or a threat thereof, as a punishable conduct.

Established facts of this case reveal that the youngsters' act was notified to the police as an attack against an Embassy, but was later investigated as an arson attack. The Director of Public Prosecutions would have had the choice to prosecute under Article 164 of the Penal Code, or, since damage done to the building turned out to be light, under Article 257 of the said Code, taking into account the fact that a legal accusation was filed as a result of the act within a period of six months after it was committed, as mentioned earlier. The case was reopened in the District Court and the Counsels were invited to argue the relevance of the offences, allegedly committed by the defendants, to Article 257 of the Penal Code, but the prosecutor then also referred to Article 165 of the said Penal Code. For that reason it was considered to be appropriate that the Counsels would also argue the case, before the Supreme Court, with regard to the aforementioned provisions. According to the introductory clause of Article 117 of the Criminal Proceedings Act No 19/1991 a defendant shall not be convicted of a conduct other than that referred to in the charges made. It is appropriate, however, to pass sentence raised on other sanctions than those referred to in the charges made, provided the defence is not faulty and the description of the act committed is in compliance with the respective sanction. In this case the Director of Public Prosecutions decided to prosecute the offenders for having publicly disgraced the United States of America by way of their action and to apply the clause of Article 95(1) of the Penal Code to their action, as mentioned earlier. The description, in the charges made, of the act committed does not give rise to penalty based on the clause of Article 257 of the Penal Code.

It is mentioned in Chapter V above that the defence had claimed that the legislature had harboured a doubt that the clause of Article 95(1) of the Penal Code would cover the act

committed by the young men. Reference was made to the fact that with the Act of Parliament No 56/2002, which was adopted after the said act was committed, a new paragraph was added to Article 95. This clause is clarified in Chapter V and in the general annotations made thereto. In there it is indicated that neither in paragraph 1 nor in paragraph 2 of Article 95 is there absolutely provided for protection by way of penalty in the event of an act of sabotage committed on the premises of an Embassy. The bill should, amongst other things, clarify that the clause “even though there is no case of disgrace and injury” should comprise conduct, which is considered a minor act of sabotage against an Embassy building. In specific annotations made to the Article of the bill the assertion is made that the aim of the clause were to honour the commitments in accordance with Articles 22, 29 and 30 of the Vienna Convention. It is stated in the annotations that in Norway it had been believed necessary to adopt a comparable clause for the same purpose. That was done on 15 December 1950.

The provision of Article 95(1) of the Penal Code has not been applied in Supreme Court rulings since the first half of the last century. An identical clause has neither been applied in Denmark since that time. In Norway an act, comparable to that which is being considered here, has been made relevant to Article 95(2) of the Norwegian Penal Code after 1950, which is comparable to the clause, which was enacted in Iceland in 2002. Since the end of World War II public opinion regarding matters dealt with in Article 95(1) of the Penal Code has changed, which is best seen in the provisions of the Universal Declaration of Human Rights and the United Nations Agreements on Human Rights, and which coalesces in Article 10 of the Convention for the Protection of Human Rights and Fundamental Freedoms of the Council of Europe, which was enacted in Iceland by adoption of Act of Parliament No 62/1994 relating thereto, and in Article 73 of the Constitution, as amended by Article 11 of the Constitutional Law No 97/1995. The aforesaid provisions assert enhanced rights to the general public to express itself, e.g. to demonstrate in front of foreign Embassies. The objective of the provision of Article 95(1) of the Penal Code is to support that foreign nations and states are shown due respect in words and deeds in public. This provision cannot be clarified without reference to the human rights provisions on freedom of speech mentioned above and the ideas reflected therein. When clarifying these articles one can not ignore the clarification of the European Court of Human Rights of the provisions of the Convention for the Protection of Human Rights and Fundamental Freedoms. It is imperative to take into account the aforementioned conventions and the legislation resulting there from when clarifications of the provision of Article 95(1) of the Penal Code are provided, just as when other honour protection provisions of Icelandic legislation are clarified. The said provision will not be deemed to apply to an act committed, unless such an act is undoubtedly specified in that provision, cf. Article 73(3) of the Constitution. The Icelandic legislature responded to this, e.g. by adopting Act of Parliament No 56/2002 with regard to acts of sabotage committed on the premises of an Embassy.

The defendant I. Guðmundsson claimed before the District Court that it had not been his intention to disgrace the United States of America. In the Supreme Court proceedings his defence maintained that he had been opposed to the United States foreign policy and that the idea to attack the Embassy had merged from discussions of the policy pursued by the United States in the Middle East and that the aim of the attack had been to symbolize his disapproval. This is in harmony with I. Guðmundsson's testimony and the defendant A. I. Jónsson's testimony, that were confirmed for the most part in the District Court. It is clear that the reason for the defendants attack on United States Embassy is at least the opinions of the defendant I. Guðmundsson. On the other hand it has been established that all the young men were roaring drunk when the act was committed, which makes it difficult to work out their exact intentions. The only comparison to be made is that their intention had been to inflict damage on the Embassy and the act committed should not be given any other or hidden meaning. Furthermore the act was committed early in the morning, when few people were on the move, it only being observed by security guards through TV surveillance, and the defendants had sneaked through backyards towards the Embassy. By reason of what has been mentioned here above Article 95(1) of the Penal Code cannot apply to the act committed by the defendants. Whereas the Prosecution has tied the description of the

charges made to a breach pursuant to the aforesaid Article the defendants must be acquitted of its demands and the State of Iceland sentenced to pay all costs related to the appeal made.

(a)	Registration no.	IS/5
(b)	Date	21 December 1987
(c)	Author(ity)	Governments of Denmark, Finland, Iceland, Norway and Sweden Statement
(d)	Parties	Governments of Denmark, Finland, Iceland, Norway and Sweden to the International Law Commission
(e)	Points of law	See S/E 4
(f)	Classification no.	0.c, 1, 2.c
(g)	Source(s)	
(h)	Additional information	
(i)	Full text - extracts - translation - summaries	Appendix 1: See S/E 4

(a)	Registration no.	IS/6
(b)	Date	11 June 1992
(c)	Author(ity)	Governments of Denmark, Finland, Iceland, Norway and Sweden Statement
(d)	Parties	Governments of Denmark, Finland, Iceland, Norway and Sweden to the International Law Commission
(e)	Points of law	See S/E 5
(f)	Classification no.	O.c, 1, 2.c
(g)	Source(s)	United Nations, Report of the Secretary General, UN document A/47/326, p. 17
(h)	Additional information	
(i)	Full text - extracts - translation - summaries	Appendix 1: See S/E 5

ITALY

(a)	Registration no.	I/1
(b)	Date	August 30, 1925
(c)	Author(ity)	Italian Government
(d)	Parties	
(e)	Points of law	The law provides the impossibility to carry out confiscations, distrains or executions over properties that belong to foreign States without the authorization of the Ministry of Justice
(f)	Classification no.	0.c, 1.c, 2.b
(g)	Source(s)	Official Gazette, January 25, 1925, no. 223
(h)	Additional information	See law July 15, 1926, no. 1263
(i)	Full text – extracts – translation - summaries	Full text: Annex 1* Summary in English: Annex 2

I.1

It is not be possible to proceed to seizure or garnishment of, and to executive actions in general, on movables or immovable, ships, claims, stocks, valuables and whatever else a foreign State is entitled to possess without the authorisation of the Minister of Justice.

Proceedings underway cannot be continued without said authorisation.

The above provisions apply only to the States envisaging a reciprocity regime, declared by Ministerial decree.

Neither judicial remedy nor administrative claims can be filed against such decree, nor against those rejecting such authorisation.

(a)	Registration no.	I/2
(b)	Date	January 9, 1953
(c)	Author(ity)	Ministry of Justice
(d)	Parties	Italy (State)– Jugoslavia (State)
(e)	Points of law	The decree declares the existence of reciprocity between Italy and Jugoslavia with reference to decree-law August 30, 1925, no. 1621
(f)	Classification no.	0.c, 1.c, 2.b
(g)	Source(s)	Official Gazette January 10, 1953, no. 7
(h)	Additional information	
(i)	Full text – extracts – translation - summaries	Full text: Annex 1* Summary in English: Annex 2

I.2

The decree provides for a reciprocity regime between Italy and Yugoslavia, under article 1 of decree-law n. 1621 of August 30, 1925, turned into law n. 1263 of July 15, 1926, as amended.

(a)	Registration no.	l/3
(b)	Date	June 30, 1958
(c)	Author(ity)	Ministry of Justice
(d)	Parties	Italy (State)– Great Britain (State)
(e)	Points of law	The decree declares the existence of reciprocity between Italy and Great Britain with reference to decree-law August 30, 1925, no. 1621
(f)	Classification no.	0.c, 1.c, 2.b
(g)	Source(s)	Official Gazette July 4, 1958, no. 159
(h)	Additional information	
(i)	Full text – extracts – translation - summaries	Full text: Annex 1* Summary in English: Annex 2

I.3

The decree provides for a reciprocity regime between Italy and Great Britain, under article 1 of decree-law n. 1621 of August 30, 1925, turned into law n. 1263 of July 15, 1926, as amended.

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(a)	Registration no.	I/4
(b)	Date	August 6, 1958
(c)	Author(ity)	Ministry of Justice
(d)	Parties	Italy (State)– Saudi Arabia (State)
(e)	Points of law	The decree declares the existence of reciprocity between Italy and Saudi Arabia with reference to decree-law August 30, 1925, no. 1621
(f)	Classification no.	0.c, 1.c, 2.b
(g)	Source(s)	Official Gazette August 11, 1958, no. 193
(h)	Additional information	
(i)	Full text – extracts – translation - summaries	Full text: Annex 1* Summary in English: Annex 2

I.4

The decree provides for a reciprocity regime between Italy and Saudi Arabia, under article 1 of decree-law n. 1621 of August 30, 1925, turned into law n. 1263 of July 15, 1926, as amended.

(a)	Registration no.	I/5
(b)	Date	May 18, 1960
(c)	Author(ity)	Ministry of Justice
(d)	Parties	Italy (State)– Argentina (State)
(e)	Points of law	The decree declares the existence of reciprocity between Italy and Argentina with reference to decree-law August 30, 1925, no. 1621
(f)	Classification no.	0.c, 1.c, 2.b
(g)	Source(s)	Official Gazette May 18, 1960, no. 121
(h)	Additional information	
(i)	Full text – extracts – translation - summaries	Full text: Annex 1* Summary in English: Annex 2

I.5

The decree provides for a reciprocity regime between Italy and Argentina, under article 1 of decree-law n. 1621 of August 30, 1925, turned into law n. 1263 of July 15, 1926, as amended.

(a)	Registration no.	I/6
(b)	Date	March 6, 1963
(c)	Author(ity)	Ministry of Justice
(d)	Parties	Italy (State)– Hungary (State)
(e)	Points of law	The decree declares the existence of reciprocity between Italy and Hungary with reference to decree-law August 30, 1925, no. 1621
(f)	Classification no.	0.c, 1.c, 2.b
(g)	Source(s)	Official Gazette March 6, 1963, no. 63
(h)	Additional information	
(i)	Full text – extracts – translation - summaries	Full text: Annex 1* Summary in English: Annex 2

I.6

The decree provides for a reciprocity regime between Italy and Hungary, under article 1 of decree-law n. 1621 of August 30, 1925, turned into law n. 1263 of July 15, 1926, as amended.

(a)	Registration no.	I/7
(b)	Date	March 1, 1965
(c)	Author(ity)	Ministry of Justice
(d)	Parties	Italy (State)– Jugoslavia (State)
(e)	Points of law	The decree declares the existence of reciprocity between Italy and Jugoslavia with reference to decree-law August 30, 1925, no. 1621
(f)	Classification no.	0.c, 1.c, 2.b
(g)	Source(s)	Official Gazette March 5, 1965, no. 57
(h)	Additional information	
(i)	Full text – extracts – translation - summaries	Full text: Annex 1* Summary in English: Annex 2

I.7

The decree provides for a reciprocity regime between Italy and Yugoslavia, under article 1 of decree-law n. 1621 of August 30, 1925, turned into law n. 1263 of July 15, 1926, as amended.

(a)	Registration no.	I/8
(b)	Date	February 2, 1971
(c)	Author(ity)	Tribunal of Livorno
(d)	Parties	Cali (natural person) vs. Government of the United States of America (State)
(e)	Points of law	The decision admits the immunity from civil jurisdiction only for foreign States when they act as sovereign bodies and not when they act as private subjects
(f)	Classification no.	0.b, 0.b.2, 1.b, 2.c
(g)	Source(s)	Giurisprudenza di merito, 1972, III, 24
(h)	Additional information	London Convention of June 19, 1951 (NATO-SOFA Convention)
(i)	Full text – extracts – translation - summaries	Extract: Annex 1* Summary in English: Annex 2

I.8

According to a principle of international customary law, enshrined also in the London Convention of June 19, 1951, on the Status of Armed Forces of NATO Countries, immunity from civil jurisdiction should be recognised to a foreign country only in case it acts as a sovereign entity, and not in case it acts as a private body. This provision is aimed at guaranteeing that public functions of States are protected from interference.

(a)	Registration no.	I/9
(b)	Date	November 14, 1972
(c)	Author(ity)	Supreme Court of Cassation
(d)	Parties	Ditta Campione (body corporate) vs. Ditta Peti Nitrogenmuvek (body corporate) and Hungary (State)
(e)	Points of law	The decision admits the immunity from civil jurisdiction only for foreign States when they act as sovereign bodies and not when they act as private subjects
(f)	Classification no.	0.b, 0.b.1, 1.b, 2.c
(g)	Source(s)	Italian Yearbook of International Law, 1975, 238
(h)	Additional information	Article 10 of the Italian Constitution
(i)	Full text – extracts – translation - summaries	Full text: Annex 1* Summary in English: Annex 2

I.9

According to one the commonly recognised international law rules (customary rules) enshrined in the Italian legal system under article 10 of the Italian Constitution, foreign countries are exempt from jurisdiction for those acts that are not governed by domestic law. In fact, States act in foreign territories, but as international law subjects, or they exercise the powers of a public authority in their own legal system and within their territory.

(a)	Registration no.	I/10
(b)	Date	November 7, 1973
(c)	Author(ity)	Supreme Court of Cassation
(d)	Parties	Comitato intergovernativo per le migrazioni europee (governmental body) vs. Chiti (natural person)
(e)	Points of law	The decision admits the immunity from civil jurisdiction only for foreign States when they act as sovereign bodies and not when they act as private subjects
(f)	Classification no.	0.b, 0.b.1, 1.b, 2.c
(g)	Source(s)	Italian Yearbook of International Law, 1976, 348
(h)	Additional information	
(i)	Full text – extracts – translation - summaries	Full text: Annex 1* Summary in English: Annex 2

I.10

Immunity of foreign countries from civil jurisdiction does not cover private acts, i.e. acts expressing the sovereign power of an international law subject.

(a)	Registration no.	I/11
(b)	Date	November 23, 1974
(c)	Author(ity)	Supreme Court of Cassation
(d)	Parties	Luna (natural person) vs. Romania (State)
(e)	Points of law	The decision admits the immunity from civil jurisdiction only for foreign States when they act as sovereign bodies and not when they act as private subjects
(f)	Classification no.	0.a, 1.a, 2.a
(g)	Source(s)	Italian Yearbook of International Law, 1976, 325
(h)	Additional information	Article 10 of the Italian Constitution
(i)	Full text – extracts – translation - summaries	Full text: Annex 1* Summary in English: Annex 2

I.11

The Italian jurisdiction cannot apply when an employment relation is altogether alien to domestic legislation, in that it refers to activities a foreign country is carrying out in the exercise of the powers of a public authority, within its own legal system and within its territory, or even outside it, if the State acted as an international law subject. This principle is based on the generally recognised customary international law rule providing for the immunity from jurisdiction of foreign countries, enshrined in the Italian domestic law under article 10 of its Constitution.

(a)	Registration no.	I/12
(b)	Date	April 29, 1977
(c)	Author(ity)	Tribunal of Rome
(d)	Parties	Società immobiliare Corte Barchetto (body corporate) vs. Morocco (State)
(e)	Points of law	The decision admits the immunity from civil jurisdiction only for foreign States when they act as sovereign bodies and not when they act as private subjects
(f)	Classification no.	0.b, 0.b.1, 1.b, 2.c
(g)	Source(s)	Italian Yearbook of International Law, 1980-81, 222
(h)	Additional information	Article 10 of the Italian Constitution
(i)	Full text – extracts – translation - summaries	Extract: Annex 1* Summary in English: Annex 2

I.12

On the basis of a generally recognised customary international law principle enshrined in the Italian domestic law, under article 10, paragraph 1, of the Constitution, foreign States are immune from civil jurisdiction only when, acting in their capacity as international law subjects or in the exercise of the powers of a public authority, perform acts aimed at attaining public goals. On the contrary, immunity cannot be applied when a foreign State acts outside its sovereign powers, as if it were a private citizen.

(a)	Registration no.	I/13
(b)	Date	July 5, 1979
(c)	Author(ity)	Supreme Court of Cassation
(d)	Parties	Castagna (natural person) vs. United States of America (State) and Delta Immobiliare (body corporate)
(e)	Points of law	The decision provides that, in the relationships between States Parties to the NATO Agreement, immunity from jurisdiction related to acts achieved in the territory of an host Country and referred to Member States of the Alliance or to specific bodies of the same Organization, is not regulated by customary law
(f)	Classification no.	0.b, 0.b.2, 1.c, 2.c
(g)	Source(s)	Diritto del lavoro, 1981, 129
(h)	Additional information	NATO Treaty (Washington, 1949)
(i)	Full text – extracts – translation - summaries	Extract: Annex 1* Summary in English: Annex 2

I.13

In the relations between the States signatories of the NATO Treaty, immunity from jurisdiction for acts performed in the territory of the host State and involving both Member States of the Alliance and the bodies belonging to its organisation, is governed not by customary provisions, but by specific contractual provisions.

(a)	Registration no.	I/14
(b)	Date	April 14, 1981
(c)	Author(ity)	Pretura (lower court judge) of Milan
(d)	Parties	SIMAC-CISL (body corporate) vs. United States of America (State)
(e)	Points of law	The decision admits the immunity from civil jurisdiction only for foreign States when they act as sovereign bodies and not when they act as private subjects
(f)	Classification no.	0.a, 1.a, 2.c
(g)	Source(s)	Italian Yearbook of International Law, 1985, 181
(h)	Additional information	
(i)	Full text – extracts – translation - summaries	Full text: Annex 1* Summary in English: Annex 2

I.14

An Italian judge has no jurisdiction on a claim filed by a trade union of employees of foreign consulates against a foreign country, under article 28 of the statute of workers' rights. In fact, the effects of the provisions contained in this article are not limited to the individual working relations, but also cover the prerogatives of the employer, therefore affecting the organisation functions of the foreign State.

(a)	Registration no.	I/15
(b)	Date	June 4, 1986
(c)	Author(ity)	Supreme Court of Cassation
(d)	Parties	Sindacato UIL-Scuola di Bari (body corporate) vs. Istituto di Bari del Centro internazionale di studi agronomici mediterranei (body corporate)
(e)	Points of law	The decision admits the immunity from civil jurisdiction only for foreign States when they act as sovereign bodies and not when they act as private subjects
(f)	Classification no.	0.a, 1.a, 2.a
(g)	Source(s)	Rivista di diritto internazionale, 1987, 182
(h)	Additional information	Article 10 of the Italian Constitution; European Convention on State immunity
(i)	Full text – extracts – translation - summaries	Full text: Annex 1* Summary in English: Annex 2

I.15

On the basis of an international customary principle sanctioned by scholars, jurisprudence and practice, and applied by the Italian Constitution under article 10, paragraph 1, foreign States are immune from jurisdiction and execution in the performance of the functions by which they pursue their institutional public goals. The European Convention on Immunity of States, signed in Basel on May, 16, 1972, does not bear witness to a limitation of the scope of this customary principle, in particular with reference to the exclusion of working disputes in the application of immunity from jurisdiction. To-date, said Convention was in fact accessed by a limited number of Countries, and Italy is not one of them.

(a)	Registration no.	I/16
(b)	Date	June 4, 1986
(c)	Author(ity)	Supreme Court of Cassation
(d)	Parties	Paradiso (natural person) vs. Istituto di Bari del Centro internazionale di alti studi agronomici mediterranei (body corporate)
(e)	Points of law	The decision admits the immunity from civil jurisdiction only for foreign States when they act as sovereign bodies and not when they act as private subjects
(f)	Classification no.	0.a, 1.a, 2.a
(g)	Source(s)	Rivista di diritto internazionale, 1987, 190
(h)	Additional information	
(i)	Full text – extracts – translation - summaries	Full text: Annex 1* Summary in English: Annex 2

I.16

On the basis of an international customary rule sanctioned by scholars, jurisprudence and practice, and enshrined in the Italian Constitution under article 10, paragraph 1, foreign States are immune from jurisdiction and execution in the performance of the functions by which they pursue their institutional public goals. The European Convention on Immunity of States, signed in Basel on May, 16, 1972, does not bear witness to a limitation of the scope of this customary rule, in particular with reference to the exclusion of working disputes in the application of immunity from jurisdiction. To-date, said Convention was in fact accessed by a limited number of Countries, and Italy is not one of them.

(a)	Registration no.	I/17
(b)	Date	May 26, 1979
(c)	Author(ity)	Supreme Court of Cassation
(d)	Parties	SpA Imprese maritime Frassinetti and SpA Italiana lavori marittimi e terrestri (body corporates) vs. Libia (State)
(e)	Points of law	The decision admits the immunity from civil jurisdiction only for foreign States when they act as sovereign bodies and not when they act as private subjects
(f)	Classification no.	0.a, 1.a, 2.a
(g)	Source(s)	Italian Yearbook of International Law, 1980-81, 262
(h)	Additional information	Article 10 of the Italian Constitution
(i)	Full text – extracts – translation - summaries	Full text: Annex 1* Summary in English: Annex 2

I.17

Since foreign countries are immune from jurisdiction on disputes on activities performed in pursuance of their public goals, and since the acquisition by a State of goods belonging to foreigners through seizure is undoubtedly a public act, foreign Countries are immune from jurisdiction on disputes originating from said acquisition.

(a)	Registration no.	I/18
(b)	Date	October 21, 1977
(c)	Author(ity)	Supreme Court of Cassation
(d)	Parties	lasbez (natural person) vs. Centre international de hautes études agronomiques méditerranéens (body corporate)
(e)	Points of law	The decision admits the immunity from civil jurisdiction only for foreign States when they act as sovereign bodies and not when they act as private subjects
(f)	Classification no.	0.b, 0.b.2, 1.b, 2.c
(g)	Source(s)	Italian Yearbook of International Law, 1977, 319
(h)	Additional information	European Convention on State immunity
(i)	Full text – extracts – translation - summaries	Full text: Annex 1* Summary in English: Annex 2

I.18

The European Convention on Immunity of States, signed in Basel on May, 16, 1972 (signed, but not yet ratified by Italy) bears witness to the evolution of customary international law. Such evolution is aimed at limiting the cases in which immunity from jurisdiction can be invoked by foreign countries and, in particular, at rejecting immunity in case of disputes related to a “working contract concluded by the State and a natural person when the job is to be performed on the territory of the State concerned” (article 5).

Immunity of foreign countries from jurisdiction only applies to working relations under which the worker is entrusted with co-operation and collaboration tasks, in that only such tasks entail the participation in the public functions of the foreign State.

(a)	Registration no.	I/19
(b)	Date	February 3, 1986
(c)	Author(ity)	Supreme Court of Cassation
(d)	Parties	Belgian Consulate in Naples (State) vs. Esposito (natural person)
(e)	Points of law	Working activities related to the organization and operative structure of a Consular Office, are directly expression of the foreign State and express a typical public activity of that State
(f)	Classification no.	0.a, 1.a, 2.a
(g)	Source(s)	Rivista di diritto internazionale privato e processuale, 1987, 332
(h)	Additional information	European Convention on State immunity
(i)	Full text – extracts – translation - summaries	Full text: Annex 1* Summary in English: Annex 2

I.19

Working relations established in order to organise the proper functioning of a consular office are to be considered as acts performed by a foreign State and, since they concern typically public activities of the State itself, they are immune from Italian jurisdiction.

In order to ascertain the public nature of the working relation established by the Consul, the existence of a link between the activity performed by the employee and the consular function is to be verified. This link can be reasonably found in the performance of qualified co-operation and collaboration tasks, implying the status expressly covered by article 43 of the Vienna Convention of April 24, 1963 on consular relations, governing the treatment to be given to members of a consular office.

(a)	Registration no.	I/20
(b)	Date	May 17, 1985
(c)	Author(ity)	Supreme Court of Cassation
(d)	Parties	United States of America (State) vs. Smorra (natural person)
(e)	Points of law	The decision is concerned with legitimacy of collective dismissals of the local personnel of NATO Headquarters
(f)	Classification no.	0.b, 0.b.2, 1.b, 2.c
(g)	Source(s)	Rivista di diritto internazionale privato e processuale, 1986, 922
(h)	Additional information	
(i)	Full text – extracts – translation - summaries	Full text: Annex 1* Summary in English: Annex 2

I.20

The Court stated that, in the framework of relations between NATO foreign military bodies operating in Italy and their locally employed workers, collective dismissals are inadmissible, which are not governed by the individual dismissal regime, irrespective of the entrepreneurial nature of the activity carried out by workers.

(a)	Registration no.	I/21
(b)	Date	April 29, 1977
(c)	Author(ity)	Tribunal of Rome
(d)	Parties	Società immobiliare Corte Barchetto (body corporate) vs. Morocco (State)
(e)	Points of law	The decision admits the immunity from civil jurisdiction only for foreign States when they act as sovereign bodies and not when they act as private subjects
(f)	Classification no.	0.b, 0.b.1, 1.b, 2.c
(g)	Source(s)	Italian Yearbook of International Law, 1980-81, 222
(h)	Additional information	Confirmed by the decision of the Court of Appeal of Rome, September 12, 1979 (Italian Yearbook of International Law, 1980-81, 226)
(i)	Full text – extracts – translation - summaries	Extract: Annex 1* Summary in English: Annex 2

I.21

The Italian judge can be seized of a dispute against a foreign Embassy on the subject of lease of immovable property. The Embassy did not state its intention to enjoy the privileges of a body representing a foreign State and concluded a contract as if it were a private body, committing itself to abide by the related conditions. Not even the public aim for which the contract was signed, i.e. the use of the immovable property as premises of the Embassy, could subtract the contract from the jurisdiction of the Italian State.

(a)	Registration no.	I/22
(b)	Date	September 12, 1979
(c)	Author(ity)	Court of Appeal of Rome
(d)	Parties	Morocco (State) vs. Società immobiliare Corte Barchetto (body corporate)
(e)	Points of law	The decision admits the immunity from civil jurisdiction only for foreign States when they act as sovereign bodies and not when they act as private subjects
(f)	Classification no.	0.b, 0.b.1, 1.b, 2.c
(g)	Source(s)	Italian Yearbook of International Law, 1980-81, 226
(h)	Additional information	
(i)	Full text – extracts – translation - summaries	Extract: Annex 1* Summary in English: Annex 2

I.22

Foreign States are immune from civil jurisdiction only as far as public acts performed while exercising their sovereign powers are concerned.

With a view to recognising immunity, not the ultimate goal pursued by the foreign State, but only a private activity which could be performed by a private subject is relevant.

It is undoubted that, while leasing immovable property according to the Italian law, the foreign State is acting *iure privatorum*.

(a)	Registration no.	I/23
(b)	Date	September 22, 1969
(c)	Author(ity)	Tribunal of Rome
(d)	Parties	Parravicini (natural person) vs. Commercial Office of the Republic of Bulgaria (State)
(e)	Points of law	The decision admits the immunity from civil jurisdiction only for foreign States when they act as sovereign bodies and not when they act as private subjects
(f)	Classification no.	0.b, 0.b.2, 1.b, 2.c
(g)	Source(s)	Rivista di diritto internazionale privato e processuale, 1970, 658
(h)	Additional information	
(i)	Full text – extracts – translation - summaries	Extract: Annex 1* Summary in English: Annex 2

I.23

The Commercial Department of the Popular Republic of Bulgaria – which has not a legal personality of its own, distinct from the personality of the Bulgarian State – is but an office of that State, and is therefore responsible for taking actions and filing claims.

A foreign State is immune from Italian jurisdiction only in relation to acts performed by it *iure imperii*, i.e. acts expressing the exercise of its sovereignty. It is not immune in relation to acts performed *jure gestionis*, i.e. acts committing the State to property rights and obligations, at the same level as private contracting bodies. As a consequence, the Italian judge can exercise his jurisdiction only on a working dispute filed by an employee carrying out auxiliary tasks only, having no legal relation to the institutional tasks of the office itself.

(a)	Registration no.	I/24
(b)	Date	November 25, 1971
(c)	Author(ity)	Supreme Court of Cassation
(d)	Parties	De Ritis (natural person) vs. Government of the United States of America (State)
(e)	Points of law	The decision admits the immunity from civil jurisdiction only for foreign States when they act as sovereign bodies and not when they act as private subjects
(f)	Classification no.	0.a, 1.a, 2.a
(g)	Source(s)	Italian Yearbook of International Law, 1975, 235
(h)	Additional information	
(i)	Full text – extracts – translation - summaries	Full text: Annex 1* Summary in English: Annex 2

I.24

The *United State Information Agency*, which is part of *United States Information Service (U.S.I.S.)*, is a US government agency performing public functions abroad. A dispute involving an employee working for the U.S.I.S. library in Naples falls therefore outside the Italian jurisdiction.

(a)	Registration no.	I/25
(b)	Date	April 19, 1973
(c)	Author(ity)	Court of Appeal of Venice
(d)	Parties	Pelizon (natural person) vs. SETAF Headquarters (body corporate)
(e)	Points of law	The decision admits the immunity from civil jurisdiction only for foreign States when they act as sovereign bodies and not when they act as private subjects
(f)	Classification no.	0.b, 0.b.2, 1.b, 2.c
(g)	Source(s)	Italian Yearbook of International Law, 1977, 338
(h)	Additional information	London Convention of June 19, 1951 (NATO-SOFA Convention)
(i)	Full text – extracts – translation - summaries	Full text: Annex 1* Summary in English: Annex 2

I.25

The decision rejects the exception raised by the US Government, according to which it would not be possible to distinguish between public and private relations in the exercise of a typically sovereign activity, such as the organisation and maintenance of troops.

The 1951 London Convention confirmed a customary international law principle, based on which foreign States are exempt from jurisdiction only with reference to acts being the expression of a concrete exercise of their sovereignty, i.e. private law acts. In fact, in Article IX, paragraph 4, the Convention expressly reaffirmed the principle according to which working and employment relations concluded between the armed forces or a civil body of a member State of the Atlantic Alliance and a private citizen of the host State are governed by the legislation in force in the hosting State. As a consequence, the Contracting Parties to the Convention, and therefore the United States of America too, accepted the recognition of the private law nature of working relations concluded with Italian citizens.

(a)	Registration no.	I/26
(b)	Date	April 29, 1974
(c)	Author(ity)	Pretore (lower court judge) of Rome
(d)	Parties	Mallavel (natural person) vs. Ministère des affaires étrangères français (governmental body)
(e)	Points of law	The decision admits the immunity from civil jurisdiction only for foreign States when they act as sovereign bodies and not when they act as private subjects
(f)	Classification no.	0.b, 0.b.2, 1.b, 2.c
(g)	Source(s)	Italian Yearbook of International Law, 1976, 322
(h)	Additional information	
(i)	Full text – extracts – translation - summaries	Extract: Annex 1* Summary in English: Annex 2

I.26

According to the Italian legislation, foreign States, and international law subjects in general, are to be given the same treatment reserved by the Italian State to any other legal person exercising the powers of a public authority. Similarly, when such a subject is exercising a merely private activity, at the same level as a natural or legal person with whom it has a relation, it is subject to the Italian legislation. On the contrary, when an international law subject, in the pursuance of its domestic institutional goals, is exercising public activities or is concluding contracts on the basis of its sovereignty, it is exempt from jurisdiction, similarly to the Italian State, according to the principle *par in parem non habet iurisdictionem*.

(a)	Registration no.	I/27
(b)	Date	January 25, 1977
(c)	Author(ity)	Supreme Court of Cassation
(d)	Parties	Bruno (natural person) vs. United States of America (State)
(e)	Points of law	The decision provides that, in the relationships between States Parties to the NATO Agreement, immunity from jurisdiction related to acts achieved in the territory of an host Country and referred to Member States of the Alliance or to specific bodies of the same Organization, is not regulated by customary law
(f)	Classification no.	0.b, 0.b.2, 1.b, 2.c
(g)	Source(s)	Italian Yearbook of International law, 1977, 344
(h)	Additional information	London Convention of June 19, 1951 (NATO-SOFA Convention)
(i)	Full text – extracts – translation - summaries	Full text: Annex 1* Summary in English: Annex 2

I.27

An Italian fireman in force to the US armed forces cannot be considered as part of the “civil element” of NATO. In fact, the US Command has never included Italian firemen in that element, and the working hours of such workers were the subject of a special clause of the agreement concluded on July 17, 1957, between the Italian Minister of Labour and the US Commander. The agreement aimed at governing “recruitment, administration and payment of personnel employed by the US armed forces”, in execution of Article IX, paragraph 4 of the Convention. Moreover, the fireman was covered by insurance by the National Social Security Institute. As a consequence, immunity from jurisdiction cannot be invoked in working disputes between the above-mentioned fireman and the United States of America.

(a)	Registration no.	I/28
(b)	Date	January 27, 1977
(c)	Author(ity)	Supreme Court of Cassation
(d)	Parties	United States of America (State) vs. Porciello (natural person)
(e)	Points of law	The decision admits the immunity from civil jurisdiction only for foreign States when they act as sovereign bodies and not when they act as private subjects
(f)	Classification no.	0.b, 0.b.2, 1.b, 2.c
(g)	Source(s)	Italian Yearbook of International Law, 1978-79, 174
(h)	Additional information	Article IX of the London Convention of June 19, 1951 (NATO-SOFA Convention)
(i)	Full text – extracts – translation - summaries	Extract: Annex 1* Summary in English: Annex 2

I.28

In order to determine whether the Italian judge has jurisdiction on working relations between NATO bodies and private citizens of the State of residence, it is necessary to distinguish between workers employed under a NATO international contract and workers employed under a local contract. Such a distinction is linked to the difference between acts performed *jure imperii* and acts performed *jure gestionis*.

Article IX, paragraph 4 of the London Convention of June 19, 1951, on the Status of NATO Countries' Armed Forces recognised the distinction between the public and private nature of the disputed relation. It subjected working relations concluded locally to the legislation in force in the residence State, and consequently also to its jurisdiction.

(a)	Registration no.	I/29
(b)	Date	October 13, 1977
(c)	Author(ity)	Tribunal of Naples
(d)	Parties	Di Palma (natural person) vs. Government of the United States of America (State)
(e)	Points of law	The decision admits the immunity from civil jurisdiction only for foreign States when they act as sovereign bodies and not when they act as private subjects
(f)	Classification no.	0.b, 0.b.2, 1.b, 2.c
(g)	Source(s)	Foro napoletano, 1979, 51
(h)	Additional information	Article IX of the London Convention of June 19, 1951 (NATO-SOFA Convention)
(i)	Full text – extracts – translation - summaries	Extract: Annex 1* Summary in English: Annex 2

I.29

Under article IX, paragraph 4, of the London Convention of June 19, 1951 on the Status of NATO Countries' Armed Forces, working relations between the Armed Forces of NATO Countries and workers employed to meet the civil manpower local needs are governed by the legislation in force in the State of residence. In no case can these locally employed workers be considered as belonging to the armed forces, or to the civil element by which they are employed, nor as belonging to the public organisation of States operating abroad.

(a)	Registration no.	I/30
(b)	Date	October 14, 1977
(c)	Author(ity)	Supreme Court of Cassation
(d)	Parties	Gereschi (natural person) vs. United States of America (State)
(e)	Points of law	The decision admits the immunity from civil jurisdiction only for foreign States when they act as sovereign bodies and not when they act as private subjects
(f)	Classification no.	0.b, 0.b.2, 1.b, 2.c
(g)	Source(s)	Italian Yearbook of International Law, 1978-79, 173
(h)	Additional information	Article IX of the London Convention of June 19, 1951 (NATO-SOFA Convention)
(i)	Full text – extracts – translation - summaries	Full text: Annex 1* Summary in English: Annex 2

I.30

The intention to put workers employed by the armed forces of a foreign country at the same level as workers employed by national subjects would be thwarted if the former were denied the possibility to appeal to judges of their State of origin for the protection of their rights. For this reason, it is to be understood that the fact that working conditions of local manpower are subjected to the laws of the State of residence should include also the fact that related disputes are to be subjected to the jurisdiction of that State. Immunity from Italian jurisdiction of a dispute between a NATO member country and a worker employed in Italy belonging to the category of workers covered by the above-mentioned provision cannot be invoked.

(a)	Registration no.	I/31
(b)	Date	May 26, 1979
(c)	Author(ity)	Supreme Court of Cassation
(d)	Parties	Velloso (natural person) vs. Borla (natural person)
(e)	Points of law	Working activities immediately related to decisional, directive or responsible offices of an embassy, are not subjected to italian jurisdiction
(f)	Classification no.	0.a, 1.a, 2.a
(g)	Source(s)	Italian Yearbook of International Law, 1980-81, 232
(h)	Additional information	
(i)	Full text – extracts – translation - summaries	Full text: Annex 1* Summary in English: Annex 2

I.31

Italian jurisdiction on a foreign State is excluded in case the latter, while working in order to carry out its public functions, aimed at attaining its institutional goals, employed in Italy a subject entitled to perform decision-making, managing or clerk functions within the organisational structure of its Embassy or of bodies closely linked with it.

(a)	Registration no.	I/32
(b)	Date	July 14, 1980
(c)	Author(ity)	Pretore (lower court judge) of Martina Franca
(d)	Parties	Castagna (natural person) vs. United States of America (State) and Delta Immobiliare (body corporate)
(e)	Points of law	The decision admits the immunity from civil jurisdiction only for foreign States when they act as sovereign bodies and not when they act as private subjects
(f)	Classification no.	0.b, 0.b.1, 2.b, 2.c
(g)	Source(s)	Diritto del lavoro, 1981, 131
(h)	Additional information	Article 9 (a) of the Paris Agreement of July 26, 1961 between the Italian Government and the Supreme Allied Headquarters in Europe (SACEUR)
(i)	Full text – extracts – translation - summaries	Extract: Annex 1* Summary in English: Annex 2

I.32

Since it was ascertained that in this specific case the supply of work and services was not in favour of the subject formally appearing as employer, but rather of the Government of the United States of America, the latter is to supply the economic and legal treatment due to the claimant employed by it.

(a)	Registration no.	I/33
(b)	Date	July 5, 1982
(c)	Author(ity)	Supreme Court of Cassation
(d)	Parties	Special Delegate for the Vatican City State (governmental body) vs. Pieciuckiewicz (natural person)
(e)	Points of law	The decision admits the immunity from civil jurisdiction only for foreign States when they act as sovereign bodies and not when they act as private subjects
(f)	Classification no.	0.a, 1.a, 2.a
(g)	Source(s)	Italian Yearbook of International Law, 1985, 179
(h)	Additional information	Article 10 of the Italian Constitution
(i)	Full text – extracts – translation - summaries	Full text: Annex 1* Summary in English: Annex 2

I.33

In pursuance of the universally accepted customary principle *par in parem non habet iurisdictionem*, enshrined in article 10, paragraph 1 of the Italian constitution, the competence of the Italian judge is excluded in case of supply of translation and speaker services in favour of the Vatican Radio. In fact, these services clearly refer to the performance of its “mission in the world” and therefore are part of the tasks performed in order to attain the public goals of the Vatican State.

(a)	Registration no.	I/34
(b)	Date	November 25, 1983
(c)	Author(ity)	Supreme Court of Cassation
(d)	Parties	United States of America (State) vs. Strino (natural person)
(e)	Points of law	The decision is concerned with legitimacy of collective dismissals of the local personnel of NATO Headquarters
(f)	Classification no.	0.b, 0.b.2, 1.b, 2.c
(g)	Source(s)	Rivista di diritto internazionale privato e processuale, 1984, 741
(h)	Additional information	Article IX of the London Convention of June 19, 1951 (NATO-SOFA Convention)
(i)	Full text – extracts – translation - summaries	Full text: Annex 1* Summary in English: Annex 2

I.34

The Italian judge cannot question the decisions by the employer, which is a foreign NATO Member State country, on the organisation of its own armed forces and related auxiliary services. If appropriate, the employer can proceed to collective dismissal.

(a)	Registration no.	I/35
(b)	Date	May 5, 1984
(c)	Author(ity)	Supreme Court of Cassation
(d)	Parties	United States of America (State) vs. Calvano (natural person)
(e)	Points of law	Article IX of the London Convention of 1951 says that working activities with civil personnel of an host Member State of NATO are subjected to legislation of such State
(f)	Classification no.	0.b, 0.b.2, 1.b, 2.c
(g)	Source(s)	Rivista di diritto internazionale privato e processuale, 1985, 584
(h)	Additional information	Article IX of the London Convention of June 19, 1951 (NATO-SOFA Convention)
(i)	Full text – extracts – translation - summaries	Full text: Annex 1* Summary in English: Annex 2

I.35

Under article IX, paragraph 4, of the 1951 London Convention on the Status of NATO Armed Forces, working relations with civil personnel of the host State are subject to the legislation of that State.

(a)	Registration no.	I/36
(b)	Date	January 17, 1986
(c)	Author(ity)	Supreme Court of Cassation
(d)	Parties	Church (natural person) vs. Ferraino (natural person)
(e)	Points of law	The decision admits the immunity from civil jurisdiction only for foreign States when they act as sovereign bodies and not when they act as private subjects
(f)	Classification no.	0.a, 1.a, 2.a
(g)	Source(s)	Rivista di diritto internazionale privato e processuale, 1987, 325
(h)	Additional information	Article 43 (1) of the Vienna Convention of April 24, 1963 on consular relations
(i)	Full text – extracts – translation - summaries	Full text: Annex 1* Summary in English: Annex 2

I.36

According to article 43, paragraph 1, of the Vienna Convention on Consular Relations, concluded on April 24, 1963, codifying an international general principle on this subject, Consuls cannot be judged by the authorities of the State of residence for acts performed in the exercise of their consular functions.

The Italian judge has no jurisdiction on a working dispute filed by an employee of the international hospital of Naples against a foreign Consul being a member of the Board of Directors of the Hospital.

(a)	Registration no.	I/37
(b)	Date	June 11, 1990
(c)	Author(ity)	Tribunal of Piacenza
(d)	Parties	CF SpA (body corporate) vs. Libia (State)
(e)	Points of law	The decision admits the immunity from civil jurisdiction only for foreign States when they act as sovereign bodies and not when they act as private subjects
(f)	Classification no.	0.b, 0.b.3, 1.b, 2.b
(g)	Source(s)	Rivista di diritto internazionale, 1990, 406
(h)	Additional information	
(i)	Full text – extracts – translation - summaries	Full text: Annex 1* Summary in English: Annex 2

I.37

The defending foreign State is not immune from jurisdiction in case the dispute refers to a merely private activity, such as the supply of goods.

Under paragraph 3 of the single article of Royal Decree 1621 of 1925, the authorisation of the Minister of Justice is necessary only when the Minister has previously stated the existence of reciprocity by decree duly published in the Official Journal.

Based on a customary international law principle (enshrined in the Italian law by article 10 of the Constitution, i.e. through a preceptive rule) the assets of a foreign State necessary to exercise sovereign functions or to attain public goals cannot be seized nor subjected to compulsory enforcement. Hence, the seizure of bank current accounts is to be excluded, in that it would deprive a foreign State of the resources needed to carry out its institutional and public tasks in the State in which the accounts are open.

(a)	Registration no.	I/38
(b)	Date	August 23, 1990
(c)	Author(ity)	Supreme Court of Cassation
(d)	Parties	Libia (State) vs. Condor Srl (body corporate)
(e)	Points of law	The decision admits the immunity from civil jurisdiction only for foreign States when they act as sovereign bodies and not when they act as private subjects
(f)	Classification no.	0.a, 0.b, 1.b, 2.b
(g)	Source(s)	Rivista di diritto internazionale, 1991, 679
(h)	Additional information	
(i)	Full text – extracts – translation - summaries	Full text: Annex 1* Summary in English: Annex 2

I.38

According to a customary international law principle, the exemption of a foreign State from the jurisdiction of the territorial State can be applied only in case of acts performed *iure imperii*, except in cases where the foreign State is in the same situation as Italian citizens resorting to private instruments of domestic law.

According to an international customary law principle, the assets of a foreign State are exempt from provisional and executive measures, provided that the assets are used in the exercise of sovereign functions or to attain public goals. Hence, also in case of conservatory or enforcement acts, immunity from jurisdiction can be applied to activities carried out in the exercise of the powers of a public authority, whereas it is excluded in case of private activities.

(a)	Registration no.	I/39
(b)	Date	November 28, 1991
(c)	Author(ity)	Supreme Court of Cassation
(d)	Parties	Norway (State) vs. Quattri (natural person)
(e)	Points of law	The decision admits the immunity from civil jurisdiction only for foreign States when they act as sovereign bodies and not when they act as private subjects
(f)	Classification no.	0.b, 0.b.1, 1.b, 2.c
(g)	Source(s)	Rivista di diritto internazionale, 1991, 993
(h)	Additional information	Article 10 of the Italian Constitution
(i)	Full text – extracts – translation - summaries	Full text: Annex 1* Summary in English: Annex 2

I.39

According to customary international law, a foreign State is immune from jurisdiction of other States in the performance of acts aimed at attaining its institutional goals, i.e. acts through which it exercises its State functions. On the contrary, no immunity is provided for with reference to acts performed in the territory of another State by a foreign State acting as private law subject, within the domestic law of the hosting State, even if these acts are necessary in order to establish, organising and operating an office.

The Italian State cannot interfere with in the exercise of functions typical of a public service of a foreign State. Yet, there is no interference when the jurisdiction is exercised on disputes concerning working relations and the employee is carrying out merely auxiliary functions, or the claim only concerns property aspects, unless public powers related to the organisation of offices or services of an Embassy are directly involved.

(a)	Registration no.	I/40
(b)	Date	March 19, 1992
(c)	Author(ity)	Tribunal of Milan
(d)	Parties	PROCURA Impianti Srl (body corporate) vs. Alberta Agriculture Department (governmental body)
(e)	Points of law	The decision admits the immunity from civil jurisdiction only for foreign States when they act as sovereign bodies and not when they act as private subjects
(f)	Classification no.	0.b, 0.b.1, 1.b, 2.c
(g)	Source(s)	Rivista di diritto internazionale privato e processuale, 1992, 584
(h)	Additional information	
(i)	Full text – extracts – translation - summaries	Full text: Annex 1* Summary in English: Annex 2

I.40

Immunity from jurisdiction of foreign States is at present limited to functional aspects and does not cover relations in which States and employees of territorial autonomous bodies act as if they were private subjects, in an ordinary contractual framework.

(a)	Registration no.	I/41
(b)	Date	July 15, 1992
(c)	Author(ity)	Constitutional Court
(d)	Parties	Condor and Filvem (body corporates) vs. Ministry of Justice (governmental body)
(e)	Points of law	The decision declares the constitutional illegitimacy of the royal decree-law August 30, 1925, no. 1621 and the inexistence of a customary rule that absolutely forbids coercive measures on properties belonging to foreign States
(f)	Classification no.	0.c, 1.c, 2.b
(g)	Source(s)	Rivista di diritto internazionale privato e processuale, 1992, 941
(h)	Additional information	
(i)	Full text – extracts – translation - summaries	Full text: Annex 1* Summary in English: Annex 2

I.41

A not written international rule prohibiting enforcement measures on assets belonging to foreign State is no longer applicable.

The single article of royal decree n. 1621 of August 30, 1925, turned into law n. 1263 of July 15, 1926, is against the Italian constitution (see Article 24). It refers to enforcement measures on assets belonging to foreign States in Italy, and subjects to the authorisation of the Minister of Justice any conservatory act or enforcement measures on assets belonging to a foreign State, other than assets which - according to generally recognised international law measures - cannot be subjected to enforcement measures.

(a)	Registration no.	I/42
(b)	Date	February 13, 1993
(c)	Author(ity)	Supreme Court of Cassation
(d)	Parties	Terracciano (natural person) vs. Cappellari (natural person)
(e)	Points of law	Articles 37 and 41 the italian Civil Proceedings Code enable to check italian jurisdiction in the cases of immunity
(f)	Classification no.	0.c, 1.c, 2.c
(g)	Source(s)	Foro italiano, 1993, I, 722
(h)	Additional information	Articles 37 and 41 of the italian Civil Proceedings Code
(i)	Full text – extracts – translation - summaries	Extract: Annex 1* Summary in English: Annex 2

I.42

The immunity of jurisdiction of the Italian judge, based on rules on immunity from civil jurisdiction in disputes between an Italian citizen and a foreign State (or another sovereign international or foreign body) can be codified through a preventive regulation on jurisdiction, under articles 37 and 41 of the civil procedure code.

(a)	Registration no.	I/43
(b)	Date	April 2, 1993
(c)	Author(ity)	Supreme Court of Cassation
(d)	Parties	Kanton Uri (State) vs. Società Reale Mutua di Assicurazioni (body corporate)
(e)	Points of law	The decision admits the immunity from civil jurisdiction only for foreign States when they act as sovereign bodies and not when they act as private subjects
(f)	Classification no.	0.b, 0.b.4, 1.b, 2.c
(g)	Source(s)	Rivista di diritto internazionale privato e processuale, 1994, 372
(h)	Additional information	
(i)	Full text – extracts – translation - summaries	Full text: Annex 1* Summary in English: Annex 2

I.43

The exercise of public powers on which the system of road signs and signals is based only concerns the law-making process, i.e. the time orders or prohibitions related to the specific requirements of road traffic regulation are planned through typical cases corresponding to different situations. On the other hand, the actual enforcement of such a system is compulsory, and those who do not comply with it are liable of sanctions. The ascertainment of this kind of responsibilities does not interfere with the exercise of the above-mentioned powers. As a consequence, a foreign State against which a claim is filed, aimed at attributing such a responsibility, cannot be exempt from the jurisdiction of the Italian judge, based on the principle *par in parem non habet iurisdictionem*, in that the related activities are not *iure imperii*.

(a)	Registration no.	I/44
(b)	Date	May 7, 1994
(c)	Author(ity)	Court of Appeal of Genoa
(d)	Parties	Fincantieri-Cantieri navali SpA and Oto Melara SpA (body corporates) vs. Irak (State)
(e)	Points of law	The decision admits the immunity from civil jurisdiction only for foreign States when they act as sovereign bodies and not when they act as private subjects
(f)	Classification no.	0.b, 0.b.1, 1.b, 2.c
(g)	Source(s)	Nuova giurisprudenza civile commentata, 1995, I, 661
(h)	Additional information	Article 10 of the Italian Constitution
(i)	Full text – extracts – translation - summaries	Extract: Annex 1* Summary in English: Annex 2

I.44

A foreign State is not exempt from jurisdiction in all cases where it could become a party, but only with reference to some cases, i.e. cases concerning activities performed by a foreign State in the exercise of its sovereign power as *superiorem non recognoscens*, i.e. as international law subject. This is not the case when, like in the reference case, a foreign State acts as a private law subject, enjoying its legal capacity recognised to it by another legal system and its relevant private law instruments.

(a)	Registration no.	I/45
(b)	Date	January 12, 1996
(c)	Author(ity)	Supreme Court of Cassation
(d)	Parties	United States of America (State) vs. Montefusco (natural person)
(e)	Points of law	The decision admits the immunity from civil jurisdiction only for foreign States when they act as sovereign bodies and not when they act as private subjects
(f)	Classification no.	0.a, 1.a, 2.a
(g)	Source(s)	Giustizia civile, 1996, I, 1671
(h)	Additional information	Article 10 of the Italian Constitution
(i)	Full text – extracts – translation - summaries	Extract: Annex 1* Summary in English: Annex 2

I.45

Customary international law, applied in the Italian domestic law through article 10 of the constitution, provides for the recognition of immunity from jurisdiction only with reference to disputes related to public activities carried out by foreign States.

(a)	Registration no.	I/46
(b)	Date	February 3, 1996
(c)	Author(ity)	Supreme Court of Cassation
(d)	Parties	Guinea (State) vs. Buzi Jannetti (natural person)
(e)	Points of law	The decision admits the immunity from civil jurisdiction only for foreign States when they act as sovereign bodies and not when they act as private subjects
(f)	Classification no.	0.b, 0.b.2, 1.b, 2.c
(g)	Source(s)	Archivio civile, 1996, 1425
(h)	Additional information	
(i)	Full text – extracts – translation - summaries	Extract: Annex 1* Summary in English: Annex 2

I.46

The generally recognised international law provision on immunity from jurisdiction of foreign States and international public bodies only applies to situations which are not covered by domestic law, either because those States or bodies act in other countries as international law subjects, or because they act exercising their powers of a public authority in the legal system they belong to. When those States or foreign public bodies act not in the exercise of their sovereign powers, but as if they were private citizens, the jurisdiction of the host State cannot be excluded, in that it performs its activities *iure privatorum*.

(a)	Registration no.	I/47
(b)	Date	March 31, 1989
(c)	Author(ity)	Pretore (lower court judge) of Rome
(d)	Parties	Cecchi Paone (natural person) vs. Czechoslovakia (State)
(e)	Points of law	The decision admits the immunity from civil jurisdiction only for foreign States when they act as sovereign bodies and not when they act as private subjects
(f)	Classification no.	0.a, 1.a, 2.a
(g)	Source(s)	Rivista di diritto internazionale privato e processuale, 1990, 153
(h)	Additional information	
(i)	Full text – extracts – translation - summaries	Full text: Annex 1* Summary in English: Annex 2

I.47

The provisions in articles 22, paragraphs 1 and 3, and 31, paragraph 1.a, of the Vienna Convention on Diplomatic Relations, of April 18, 1961, provide not only for immunity of the premises of a foreign Embassy from any measures of civil judges, but also for the exemption from jurisdiction, in case a concrete measures are taken on immovable property.

(a)	Registration no.	I/48
(b)	Date	May 15, 1989
(c)	Author(ity)	Supreme Court of Cassation
(d)	Parties	British General Consulate in Naples (State) vs. Toglia (natural person)
(e)	Points of law	Consuls have immunity from civil and administrative jurisdiction of the host Country for acts related to the exercise of their functions
(f)	Classification no.	0.b, 0.b.2, 1.b, 2.c
(g)	Source(s)	Rivista di diritto internazionale privato e processuale, 1990, 652
(h)	Additional information	European Convention on State immunity
(i)	Full text – extracts – translation - summaries	Full text: Annex 1* Summary in English: Annex 2

I.48

According to a generally recognised international principle – codified in article 43 of the Vienna Convention on Consular Relations of April 24, 1963, as well as in articles 6 and 13 of the Italian-British of June 1, 1954 – Consuls are entitled to immunity from the civil and administrative jurisdiction of the host State for acts performed in the exercise of their functions.

The European Convention on Immunity of States, concluded in Basel on May 16, 1972, excluding immunity for working relations with workers who are citizens of the accrediting State and which was not ratified by Italy, constitutes a document codifying the evolution of international customary law.

(a)	Registration no.	I/49
(b)	Date	November 18, 1992
(c)	Author(ity)	Supreme Court of Cassation
(d)	Parties	Giaffreda (natural person) vs. France (State)
(e)	Points of law	Working activities related to the organization and operative structure of a Consular Office are directly expression of the foreign State and express also a typical public activity of that State
(f)	Classification no.	0.a, 1.a, 2.c
(g)	Source(s)	Rivista di diritto internazionale privato e processuale, 1994, 340
(h)	Additional information	
(i)	Full text – extracts – translation - summaries	Full text: Annex 1* Summary in English: Annex 2

I.49

An Italian judge cannot exercise jurisdiction on disputes concerning working relations of Italian personnel of a foreign Consulate in Italy, when such personnel is carrying out activities aimed at attaining public and institutional goals of the Consulate.

(a)	Registration no.	I/50
(b)	Date	October 17, 1995
(c)	Author(ity)	Supreme Court of Cassation
(d)	Parties	Cuba (State) vs. Sonnino (natural person)
(e)	Points of law	The decision excludes immunity from civil jurisdiction when a foreign embassy sues an Italian citizen
(f)	Classification no.	0.b, 0.b.1, 1.b, 2.c
(g)	Source(s)	Rivista giuridica dell'edilizia, 1996, 61
(h)	Additional information	
(i)	Full text – extracts – translation - summaries	Extract: Annex 1* Summary in English: Annex 2

I.50

An Italian judge has jurisdiction when a foreign Embassy in Italy files a civil claim against an Italian citizen. In fact, in the related proceeding it is not possible to enjoy immunity, as provided for in article 31 of the Vienna Convention on Diplomatic Relation of April 18, 1961, and therefore the acceptance of the Italian jurisdiction is clearly implied.

(a)	Registration no.	I/51
(b)	Date	December 9, 1992
(c)	Author(ity)	Tribunal of Genoa
(d)	Parties	Fincantieri SpA, Oto Melara SpA (body corporates) vs. Irak (State)
(e)	Points of law	The decision admits the immunity from civil jurisdiction only for foreign States when they act as sovereign bodies and not when they act as private subjects
(f)	Classification no.	0.b, 0.b.1, 1.b, 2.c
(g)	Source(s)	Rivista di diritto internazionale privato e processuale, 1993, 413
(h)	Additional information	
(i)	Full text – extracts – translation - summaries	Full text: Annex 1* Summary in English: Annex 2

I.51

Immunity from jurisdiction of a foreign State applies to sovereign acts performed by that State in its capacity as international law subject or as subject of its domestic law. Such acts cannot in fact have legal consequences on a different legal system.

On the other hand, there is no immunity from jurisdiction of a foreign State for private law acts performed by that State in its capacity as a subject of the domestic law of other States. In fact, in this case it acts as if it were a subject of that legal system and resorts to the ordinary private instruments of that system, irrespective of the fact that these acts are performed in order to attain the public interests of the foreign State.

(a)	Registration no.	I/52
(b)	Date	November 16, 1993
(c)	Author(ity)	Tribunal of Palermo
(d)	Parties	Fall. SpA Maniglia Costruzioni (body corporate) vs. Saudi Arabia (State)
(e)	Points of law	The decision admits the immunity from civil jurisdiction only for foreign States when they act as sovereign bodies and not when they act as private subjects
(f)	Classification no.	0.b, 0.b.1, 1.b, 2.c
(g)	Source(s)	Diritto fallimentare, 1994, II, 379
(h)	Additional information	
(i)	Full text – extracts – translation - summaries	Extract: Annex 1* Summary in English: Annex 2

I.52

The customary international law rule on immunity from jurisdiction of foreign countries was and still is interpreted by the States belonging to the international community on the basis of the principle of relativity of immunity. Said rule therefore applies only to public acts performed by a foreign State in its relations not covered by its domestic law, or in the exercise of its sovereign powers, but does not apply to private acts it may carry out. This principle was also repeatedly supported by the joint sections Court of Cassation.

(a)	Registration no.	I/53
(b)	Date	May 30, 1990
(c)	Author(ity)	Supreme Court of Cassation
(d)	Parties	Libia (State) vs. Riunione adriatica di Sicurtà SpA (body corporate)
(e)	Points of law	The decision admits the immunity from civil jurisdiction only for foreign States when they act as sovereign bodies and not when they act as private subjects
(f)	Classification no.	0.b, 0.b.1, 1.b, 2.a
(g)	Source(s)	Rivista di diritto internazionale privato e processuale, 1991, 450
(h)	Additional information	
(i)	Full text – extracts – translation - summaries	Full text: Annex 1* Summary in English: Annex 2

I.53

According to the international principle of limited immunity, the Italian jurisdiction applies to a dispute concerning a contract of lease of immovable property hosting the premises of a consular office.

On the basis of the principle of immunity, in the implementation stage of the proceeding the Italian jurisdiction will not apply.

(a)	Registration no.	I/54
(b)	Date	May 18, 1992
(c)	Author(ity)	Supreme Court of Cassation
(d)	Parties	Malta (State) vs. Società Nicosia Immobiliare SpA (body corporate)
(e)	Points of law	The decision admits the immunity from civil jurisdiction only for foreign States when they act as sovereign bodies and not when they act as private subjects
(f)	Classification no.	0.b, 0.b.1, 1.b, 2.c
(g)	Source(s)	Rivista di diritto internazionale privato e processuale, 1993, 397
(h)	Additional information	
(i)	Full text – extracts – translation - summaries	Full text: Annex 1* Summary in English: Annex 2

I.54

Immunity from jurisdiction of foreign States and public bodies applies when they act as international law subjects or in the exercise of the powers of a public authority. It does not apply when they act as private Italian citizens, resorting to the private instruments provided for by the domestic law, e.g. in the case of the conclusion of a contract of lease, even if the premises are to host the Embassy of a foreign State.

(a)	Registration no.	I/55
(b)	Date	October 18, 1993
(c)	Author(ity)	Supreme Court of Cassation
(d)	Parties	Guinea (State) vs. Trovato (natural person)
(e)	Points of law	The decision admits the immunity from civil jurisdiction only for foreign States when they act as sovereign bodies and not when they act as private subjects
(f)	Classification no.	0.b, 0.b.1, 1.b, 2.c
(g)	Source(s)	Rivista di diritto internazionale privato e processuale, 1994, 620
(h)	Additional information	
(i)	Full text – extracts – translation - summaries	Full text: Annex 1* Summary in English: Annex 2

I.55

Although ordinary practice and article 30 of the Vienna Convention of April 18, 1961, provide for the official residence of the Ambassador to be treated as the premises of the Embassy, the Italian jurisdiction applies to a dispute with a foreign State concerning the validity of a preliminary contract aimed at purchasing a building that will host the residence of the Ambassador.

With a view to establishing immunity from jurisdiction of a foreign State, the actual property of a building by its diplomatic agent is irrelevant, in case the preliminary sale contract was not subsequently sanctioned by an official document.

(a)	Registration no.	I/56
(b)	Date	May 4, 1987
(c)	Author(ity)	Pretore (lower court judge) of Pisa
(d)	Parties	Greco (natural person) vs. United States of America (State)
(e)	Points of law	Working activities of civil personnel in the NATO military bases are subject to Italian jurisdiction when they are not immediately related to specific duties of the Alliance
(f)	Classification no.	0.b, 0.b.2, 1.b, 2.c
(g)	Source(s)	Rivista di diritto internazionale privato e processuale, 1988, 721
(h)	Additional information	London Convention of June 19, 1951 (NATO-SOFA Convention)
(i)	Full text – extracts – translation - summaries	Full text: Annex 1* Summary in English: Annex 2

I.56

According to the London Convention of June 19, 1951, the acquisition of the status of civil element at NATO requires the person concerned not to be resident in the host State and to carry out an activity closely and directly linked to the performance of the tasks of the Organisation.

The jurisdiction of the Italian judge applies in case of disputes between the Government of the United States of America and a US citizen permanently residing in Italy, who is not a staff member, and was charged with the task of maintaining sports facilities at the Camp Darby NATO base in Pisa.

(a)	Registration no.	I/57
(b)	Date	July 19, 1961
(c)	Author(ity)	Tribunal of Rome
(d)	Parties	Cassa di risparmio della Libia (body corporate) vs. Federazione italiana dei consorzi agrari and Consorzio agrario della Tripolitania (body corporates)
(e)	Points of law	The decision admits the immunity from civil jurisdiction only for foreign States when they act as sovereign bodies and not when they act as private subjects
(f)	Classification no.	0.b, 1.b, 2.c
(g)	Source(s)	Diritto internazionale, 1963, II, 241
(h)	Additional information	
(i)	Full text – extracts – translation - summaries	Extract: Annex 1* Summary in English: Annex 2

I.57

Immunity from jurisdiction applies to foreign public bodies only in case they are entitled to have public law relations, but not in connection to private activities, such as the conclusion of contracts entailing property obligations.

(a)	Registration no.	I/58
(b)	Date	July 15, 1987
(c)	Author(ity)	Supreme Court of Cassation
(d)	Parties	Panattoni (natural person) vs. Germany (State)
(e)	Points of law	The decision admits the immunity from civil jurisdiction only for foreign States when they act as sovereign bodies and not when they act as private subjects
(f)	Classification no.	0.a, 1.a, 2.a
(g)	Source(s)	Rivista di diritto internazionale privato e processuale, 1989, 109
(h)	Additional information	Article 10 of the Italian Constitution
(i)	Full text – extracts – translation - summaries	Full text: Annex 1* Summary in English: Annex 2

I.58

A foreign country is exempt from the Italian jurisdiction with respect to disputes on employment contracts with an Italian citizen permanently working in the organisation of the diplomatic mission, even if he/she carries out merely material functions.

(a)	Registration no.	I/59
(b)	Date	May 19, 1988
(c)	Author(ity)	Supreme Court of Cassation
(d)	Parties	United Kingdom (State) vs. Bulli (natural person)
(e)	Points of law	The decision admits the immunity from civil jurisdiction only for foreign States when they act as sovereign bodies and not when they act as private subjects
(f)	Classification no.	0.a, 1.a, 2.a
(g)	Source(s)	Rivista di diritto internazionale privato e processuale, 1990, 704
(h)	Additional information	
(i)	Full text – extracts – translation - summaries	Extract: Annex 1* Summary in English: Annex 2

I.59

In the field of working relations with the Embassy of a foreign State in Italy, the customary international principle of immunity from civil jurisdiction applies only to individuals employed to perform professional or clerk jobs. In fact, due to this reason, they are part of the public organisation of the State, thus contributing to attain its institutional goals.

(a)	Registration no.	I/60
(b)	Date	July 7, 1988
(c)	Author(ity)	Supreme Court of Cassation
(d)	Parties	Libia (State) vs. Longo (natural person)
(e)	Points of law	The decision admits the immunity from civil jurisdiction only for foreign States when they act as sovereign bodies and not when they act as private subjects
(f)	Classification no.	0.a, 1.a, 2.a
(g)	Source(s)	Rivista di diritto internazionale privato e processuale, 1990, 708
(h)	Additional information	
(i)	Full text – extracts – translation - summaries	Extract: Annex 1* Summary in English: Annex 2

I.60

Foreign States and other international law subjects are exempt from Italian jurisdiction for activities related to the exercise of their sovereign functions, or aimed at attaining their institutional goals.

Lack of jurisdiction of an Italian judge with reference to a request for conservative measures of goods in Italy belonging to the Libyan State, aimed at safeguarding credits for news reporting activities carried out in favour of such State, must be declared.

(a)	Registration no.	I/61
(b)	Date	October 17, 1988
(c)	Author(ity)	Supreme Court of Cassation
(d)	Parties	Brasil (State) vs. De Lucia (natural person)
(e)	Points of law	The decision admits the immunity from civil jurisdiction only for foreign States when they act as sovereign bodies and not when they act as private subjects
(f)	Classification no.	0.b, 0.b.2, 1.b, 2.c
(g)	Source(s)	Rivista di diritto internazionale privato e processuale, 1990, 705
(h)	Additional information	
(i)	Full text – extracts – translation - summaries	Extract: Annex 1* Summary in English: Annex 2

I.61

In order to determine whether a foreign State is immune from civil jurisdiction for working or employment relations with Italian citizens, it is necessary to consider the nature of the job of the individual worker. Based on this principle, an Italian judge has no jurisdiction for working relations entailing the participation of the employee in activities carried out by a foreign country in order to attain its public goals. On the other hand, mechanical or manual jobs, which cannot be considered as public activities of a State, are subject to the Italian jurisdiction.

(a)	Registration no.	I/62
(b)	Date	March 15, 1989
(c)	Author(ity)	Supreme Court of Cassation
(d)	Parties	Malta (State) vs. Dalli (natural person)
(e)	Points of law	The decision admits the immunity from civil jurisdiction only for foreign States when they act as sovereign bodies and not when they act as private subjects
(f)	Classification no.	0.a, 1.a, 2.a
(g)	Source(s)	Rivista di diritto internazionale privato e processuale, 1991, 474
(h)	Additional information	
(i)	Full text – extracts – translation - summaries	Extract: Annex 1* Summary in English: Annex 2

I.62

In case of dispute between a foreign Embassy in Italy and a typist, the Italian jurisdiction cannot be applied. In fact, his/her job implies his/her participation in the public organisation of the State itself, in that it is performed in close connection with the officials' job, and therefore in a position of trust, due to his/her necessary knowledge of the State's institutional acts.

(a)	Registration no.	I/63
(b)	Date	January 16, 1990
(c)	Author(ity)	Supreme Court of Cassation
(d)	Parties	Libia (State) vs. Trobbiani (natural person)
(e)	Points of law	The decision admits the immunity from civil jurisdiction only for foreign States when they act as sovereign bodies and not when they act as private subjects
(f)	Classification no.	0.a, 1.a, 2.a
(g)	Source(s)	Rivista di diritto internazionale privato e processuale, 1991, 435
(h)	Additional information	
(i)	Full text – extracts – translation - summaries	Full text: Annex 1* Summary in English: Annex 2

I.63

In case of dispute on a working relation with a foreign State, the Italian jurisdiction cannot be applied. In fact, although the dispute refers to a financial aspect of the relation itself, the claimant asks the judge to deal with the functions carried out by an employee, and thus with the autonomous activity of the State itself.

(a)	Registration no.	I/64
(b)	Date	July 9, 1991
(c)	Author(ity)	Supreme Court of Cassation
(d)	Parties	Ghana (State) vs. Barbini (natural person)
(e)	Points of law	The decision admits the immunity from civil jurisdiction only for foreign States when they act as sovereign bodies and not when they act as private subjects
(f)	Classification no.	0.a, 1.a, 2.a
(g)	Source(s)	Rivista di diritto internazionale privato e processuale, 1993, 87
(h)	Additional information	
(i)	Full text – extracts – translation - summaries	Full text: Annex 1* Summary in English: Annex 2

(a)	Registration no.	I/65
(b)	Date	October 10, 1991
(c)	Author(ity)	Pretore (lower court judge) of Rome
(d)	Parties	Taha (natural person) vs. Egypt (State)
(e)	Points of law	The decision admits the immunity from civil jurisdiction only for foreign States when they act as sovereign bodies and not when they act as private subjects
(f)	Classification no.	0.b, 0.b.2, 1.b, 2.c
(g)	Source(s)	Rivista giuridica del lavoro, 1992, II, 784
(h)	Additional information	
(i)	Full text – extracts – translation - summaries	Extract: Annex 1* Summary in English: Annex 2

I.65

Immunity from civil jurisdiction, enjoyed by foreign States under a customary international law principle, only applies to acts through which the public functions of said States are exercised and cannot be applied to private activity of the States. When applying this principle to working relations, it is common opinion that immunity from jurisdiction cannot be applied when the employee carries out manual or auxiliary jobs, or in case the dispute concerns property aspects not connected with the organisation of the offices of the foreign State concerned.

(a)	Registration no.	I/66
(b)	Date	October 17, 1991
(c)	Author(ity)	Pretore (lower court judge) of Rome
(d)	Parties	Younis (natural person) vs. Jordania (State)
(e)	Points of law	The decision admits the immunity from civil jurisdiction only for foreign States when they act as sovereign bodies and not when they act as private subjects
(f)	Classification no.	0.a, 1.a, 2.a
(g)	Source(s)	Rivista giuridica del lavoro, 1992, II, 785
(h)	Additional information	
(i)	Full text – extracts – translation - summaries	Extract: Annex 1* Summary in English: Annex 2

I.66

An Italian judge has no jurisdiction on a working dispute filed by a driver employed by the Embassy of a foreign State. The long time of his/her working relation bears witness to his/her permanent integration in the Embassy, which is the requirement necessary to apply immunity, irrespective of the manual job performed by the worker.

(a)	Registration no.	I/67
(b)	Date	May 18, 1992
(c)	Author(ity)	Supreme Court of Cassation
(d)	Parties	Zambia (State) vs. Sendanayake (natural person)
(e)	Points of law	Working activities performed in a foreign embassy and concerning subordinate and subsidiary duties are submitted to Italian jurisdiction
(f)	Classification no.	0.b, 0.b.2, 1.b, 2.c
(g)	Source(s)	Rivista di diritto internazionale privato e processuale, 1993, 399
(h)	Additional information	
(i)	Full text – extracts – translation - summaries	Full text: Annex 1* Summary in English: Annex 2

I.67

An Italian judge has jurisdiction on a dispute filed by a worker against the Embassy of a foreign State in Italy, in case the dispute deals with auxiliary and secondary functions. The fact the worker is a foreign citizen is insignificant, in that the right to take legal action is given to everybody and not only to Italian citizens, based on the wide scope of article 24 of the Italian constitution.

(a)	Registration no.	I/68
(b)	Date	February 25, 1993
(c)	Author(ity)	Supreme Court of Cassation
(d)	Parties	United States of America (State) vs. Giannetti and Puccetti (natural persons)
(e)	Points of law	The decision is concerned with legitimacy of collective dismissals of the local personnel of NATO Headquarters
(f)	Classification no.	0.b, 0.b.2, 1.b, 2.c
(g)	Source(s)	Rivista di diritto internazionale privato e processuale, 1994, 361
(h)	Additional information	London Convention of June 19, 1951 (NATO-SOFA Convention)
(i)	Full text – extracts – translation - summaries	Full text: Annex 1* Summary in English: Annex 2

I.68

Working relations between Italian citizens and a foreign NATO Member State are governed by the Italian law, according to the London Convention of June 19, 1951, on the Status of the Armed Forces of the Atlantic Alliance stationed in the territory of an allied State. Yet, the regime of collective dismissals and of the protection of employment does not apply to the above relations, in the light of the non-entrepreneurial nature of the employer.

(a)	Registration no.	I/69
(b)	Date	September 24, 1993
(c)	Author(ity)	Supreme Court of Cassation
(d)	Parties	Brasil (State) vs. Magurno (natural person)
(e)	Points of law	The decision admits the immunity from civil jurisdiction only for foreign States when they act as sovereign bodies and not when they act as private subjects
(f)	Classification no.	0.b, 0.b.2, 1.b, 2.c
(g)	Source(s)	Rivista di diritto internazionale privato e processuale, 1994, 648
(h)	Additional information	
(i)	Full text – extracts – translation - summaries	Extract: Annex 1* Summary in English: Annex 2

I.69

According to the well-established principle of limited immunity, the Italian jurisdiction applies to working relations of the Italian personnel employed by foreign States, not only in case of disputes concerning the performance of auxiliary activities, but also in case of disputes filed by employees carrying out tasks closely connected to institutional functions. In fact, the decision requested from the Italian judge – even though it only involves financial aspects of the working relation – cannot affect or interfere with the above functions.

(a)	Registration no.	I/70
(b)	Date	April 21, 1995
(c)	Author(ity)	Supreme Court of Cassation
(d)	Parties	United States of America (State) vs. Lo Gatto (natural person)
(e)	Points of law	The decision admits the immunity from civil jurisdiction only for foreign States when they act as sovereign bodies and not when they act as private subjects
(f)	Classification no.	0.a, 1.a, 2.a
(g)	Source(s)	Il Consiglio di Stato, 1995, II, 1771
(h)	Additional information	Vienna Convention of April 24, 1963 on consular relations
(i)	Full text – extracts – translation - summaries	Extract: Annex 1* Summary in English: Annex 2

I.70

According to the Vienna Convention of April 24, 1963, on Consular Relations, an Italian judge has no jurisdiction in case of re-employment of an Italian citizen who was employed by a foreign Consulate in Italy as a switchboard operator. His job is in fact one of the confidential jobs of the public organisation of the consular office.

(a)	Registration no.	I/71
(b)	Date	October 1, 1996
(c)	Author(ity)	Supreme Court of Cassation
(d)	Parties	United States of America (State) vs. Trapè (natural person)
(e)	Points of law	Article IX of the London Convention of 1951 says that working activities with civil personnel of an host Member State of NATO, are subject to the jurisdiction of such State
(f)	Classification no.	0.b, 0.b.2, 1.b, 2.c
(g)	Source(s)	Rivista di diritto internazionale privato e processuale, 1998, 181
(h)	Additional information	Article IX of the London Convention of June 19, 1951 (NATO-SOFA Convention)
(i)	Full text – extracts – translation - summaries	Full text: Annex 1* Summary in English: Annex 2

I.71

Article IX of the London Convention of June 19, 1951, on the Status of the Armed Forces of the Atlantic Alliance allows the Italian State to exercise its jurisdiction on personnel employed by the *Marine Navy Exchange* to meet the local requirements of civil manpower. In order to enforce the principle of protection of employment, under article 18 of law n. 300 of May 20, 1970, an Italian judge must start an inquiry on the economy of the conduct of the activity carried out by such institution.

(a)	Registration no.	I/72
(b)	Date	May 6, 1997
(c)	Author(ity)	Supreme Court of Cassation
(d)	Parties	Spain (State) vs. Chiesa di San Pietro in Montorio (body corporate)
(e)	Points of law	The decision admits the immunity from civil jurisdiction only for foreign States when they act as sovereign bodies and not when they act as private subjects
(f)	Classification no.	0.b, 0.b.1, 1.b, 2.c
(g)	Source(s)	Rivista di diritto internazionale privato e processuale, 1998, 605
(h)	Additional information	
(i)	Full text – extracts – translation - summaries	Full text: Annex 1* Summary in English: Annex 2

I.72

In a dispute between a foreign government and a church body on the property of a church, the Italian jurisdiction can be applied. In fact, from the agreement signed by such body and the Italian government it can be inferred that the former acted as a private law subject within the Italian law.

(a)	Registration no.	I/73
(b)	Date	February 12, 1999
(c)	Author(ity)	Supreme Court of Cassation
(d)	Parties	United Arab Emirates (State) vs. Pinto (natural person)
(e)	Points of law	The decision admits the possibility to bring a specific trial action to protect the immunity of a foreign State from execution
(f)	Classification no.	0.c, 1.c, 2.c
(g)	Source(s)	Rivista di diritto internazionale privato e processuale, 2000, 119
(h)	Additional information	
(i)	Full text – extracts – translation - summaries	Full text: Annex 1* Summary in English: Annex 2

I.73

Preventive jurisdiction in appeals based on the enforcement measure filed by an Italian citizen vs. a foreign State is inadmissible, in that the immunity of a foreign State from enforcement measures is adequately safeguarded by the appeal against execution.

(a)	Registration no.	I/74
(b)	Date	May 26, 1999
(c)	Author(ity)	Supreme Court of Cassation
(d)	Parties	Egypt (State) vs. Refaat Armia (natural person)
(e)	Points of law	The decision admits the possibility to bring a specific trial action to protect the immunity of a foreign State from execution
(f)	Classification no.	0.c, 1.c, 2.c
(g)	Source(s)	Rivista di diritto internazionale privato e processuale, 2000, 494
(h)	Additional information	
(i)	Full text – extracts – translation - summaries	Extract: Annex 1* Summary in English: Annex 2

I.74

The preventive rule of jurisdiction by which a foreign State claims immunity from jurisdiction of an Italian judge on the seizure of sums of money deposited with a bank of its Embassy is inadmissible, in that the case can be lodged appealing against execution.

(a)	Registration no.	I/75
(b)	Date	May 27, 1999
(c)	Author(ity)	Supreme Court of Cassation
(d)	Parties	British General Consulate in Milan (State) vs. Sala (natural person)
(e)	Points of law	Working activities not related to the organization and operative structure of a Consulate, are submitted to the jurisdiction of Italian judges
(f)	Classification no.	0.b, 0.b.2, 1.b, 2.c
(g)	Source(s)	Rivista di diritto internazionale privato e processuale, 1999, 628
(h)	Additional information	Article 43 of the Vienna Convention of April 24, 1963 on consular relations
(i)	Full text – extracts – translation - summaries	Full text: Annex 1* Summary in English: Annex 2

I.75

Under article 43 of the Vienna Convention on Consular Relations of April 24, 1963, an Italian judge has jurisdiction on the request for payment of sums of money, submitted by an employer against a foreign Consulate, in case the relevant working relation does not consist of the exercise of organisation powers of the foreign State.

(a)	Registration no.	I/76
(b)	Date	June 12, 1999
(c)	Author(ity)	Supreme Court of Cassation
(d)	Parties	Austria (State) vs. Petrone (natural person)
(e)	Points of law	The decision excludes the Italian jurisdiction when there is a claim for damages, due to an error of judgment, proposed against a foreign State
(f)	Classification no.	0.a, 1.a, 2.a
(g)	Source(s)	Rivista di diritto internazionale privato e processuale, 2000, 727
(h)	Additional information	
(i)	Full text – extracts – translation - summaries	Full text: Annex 1* Summary in English: Annex 2

I.76

A case of compensation of damages resulting from a judicial error, filed by an Italian citizen against a foreign State does not fall within the Italian jurisdiction.

(a)	Registration no.	I/77
(b)	Date	April 20, 1998
(c)	Author(ity)	Supreme Court of Cassation
(d)	Parties	Canada (State) vs. Cargnello (natural person)
(e)	Points of law	Working activities immediately related to directive offices of a Consulate are not submitted to Italian jurisdiction
(f)	Classification no.	0.a, 1.a, 2.a
(g)	Source(s)	Rivista di diritto internazionale privato e processuale, 1999, 1030
(h)	Additional information	Article 5 (b) (c) of the Vienna Convention of April 24, 1963 on consular relations
(i)	Full text – extracts – translation - summaries	Extract: Annex 1* Summary in English: Annex 2

I.77

The fact that the State of Canada proposes an appeal in cassation through a decision concerning the Consulate General of Canada in Milan does not constitute a case for replacement. In fact said Consulate is not a subject different from the State it belongs to, but is one of its representation bodies. The Italian judge, however, has no jurisdiction on the dismissal by the Consulate General of Canada of a commercial attaché, in that the tasks performed by him fall within the consular functions under article 5.b and c of the Vienna Convention on Consular Relations of April 24, 1963. Moreover, a decision on the financial aspect of the case would entail an assessment and an inquiry on the exercise of the sovereign powers of a foreign State.

(a)	Registration no.	I/78
(b)	Date	July 15, 1999
(c)	Author(ity)	Supreme Court of Cassation
(d)	Parties	Saudi Arabia (State) vs. Al Baytaty Khalil (natural person)
(e)	Points of law	Working activities not immediately related to decisional, directive or responsible offices of a foreign embassy, are submitted to Italian jurisdiction
(f)	Classification no.	0.b, 0.b.2, 1.b, 2.c
(g)	Source(s)	Rivista di diritto internazionale privato e processuale, 2000, 757
(h)	Additional information	
(i)	Full text – extracts – translation - summaries	Full text: Annex 1* Summary in English: Annex 2

I.78

The Italian jurisdiction applies to the cases filed by employees of a foreign Embassy performing auxiliary functions when the decision concerns only financial aspects of the working relation and is therefore liable to interfere with the functions themselves.

The Italian judge jurisdiction applies to disputes concerning the collective wage agreement of Embassies or Consulates.

NETHERLANDS

Explanatory note of the Kingdom of the Netherlands

Treaties, legislation and Explanatory Memoranda

The Netherlands legislation with regard to State Immunity is limited. Article 13a of the Act on General Provisions of Kingdom Legislation (*Wet Algemene Bepalingen*, commonly known as *Wet AB*), (NL / 1), only states that the jurisdiction of the courts and the execution of judicial decisions and deeds are subject to exceptions recognised in international law. Also there is the possibility for the State under the Bailiffs Regulation (*Deurwaardersreglement*), (NL / 2)¹, to prevent an attachment, which it considers to be contrary to its obligations under international law. These obligations are laid down in international customary law and in the European Convention on State Immunity, to which the Netherlands is a party.² The Netherlands law of State immunity is, however, to a large extent formed by the case law of the Courts.

Case law

The Supreme Court accepted in a very important decision of 1973 the relative concept of State immunity. Since that time the Courts have gradually enlarged the number of subjects covered by their case law and fine-tuned their reasoning in line with the earlier mentioned decision. Most notably they seem to opt in general for the nature- rather than the subject test, when assessing whether a certain act or purpose should be granted immunity. A unique feature of the Netherlands jurisprudence is that the Courts were twice requested to adjudicate a foreign State bankrupt.

Hereinafter a survey is given of the decisions incorporated in this selection, sorted to subject.

Relative concept of State immunity

- *Société Européenne d'Etudes et d'Entreprises en liquidité volontaire (SEEE) v. Socialist Federal Republic of Yugoslavia*, Supreme Court, 26 October 1973, NL / 5.

Immunity from jurisdiction: application of the criterion on *Acta jure gestionis* / *Acta jure imperii*

- *Société Européenne d'Etudes et d'Entreprises en liquidité volontaire (SEEE) v. Socialist Federal Republic of Yugoslavia*, Supreme Court, 26 October 1973, NL / 5.
- *The Kingdom of Morocco v. Stichting Revalidatiecentrum "De Trappenberg"*, District Court of Amsterdam, 18 May 1978, NL / 6.

¹ Excerpts of the Explanatory Memorandum to the Bailiffs Regulation are included in this selection in document NL / 4.

² Excerpts of the Explanatory Memorandum to the Bill for the approval of the European Convention on State Immunity are included in this selection in document NL / 3.

- *M.K.B. van der Hulst v. United States of America*, Supreme Court, 22 December 1989, NL / 10.
- *The Russian Federation v. Pied-Rich B.V.*, Supreme Court, 28 May 1993, NL / 12.
- *Kingdom of Morocco v. Stichting Revalidatiecentrum "De Trappenberg"*, Supreme Court, 25 November 1994, NL / 13.
- *United States v. Havenschap Delfzijl/Eemshaven*, Supreme Court, 12 November 1999, NL / 16

Recognition of foreign awards: immunity from jurisdiction

- *Société Européenne d'Etudes et d'Entreprises en liquidité volontaire (SEEE) v. Socialist Federal Republic of Yugoslavia*, Supreme Court, 26 October 1973, NL / 5.

Bankruptcy of a foreign State

- *Republic of Zaire v. J.C.M. Duclaux*, Court of Appeal of The Hague, 18 February 1988, NL / 9.
- Appeal in cassation by the Procurator-General 'in the interest of the law' (*W.L. Oltmans v. The Republic of Surinam*), Supreme Court, 28 December 1990, NL / 11.

Immunity from execution

- *Société Européenne d'Etudes et d'Entreprises en liquidité volontaire (SEEE) v. Socialist Federal Republic of Yugoslavia*, Supreme Court, 26 October 1973, NL / 5.
- *The Kingdom of Morocco v. Stichting Revalidatie Centrum "De Trappenberg"*, District Court of Amsterdam, 18 May 1978, NL / 6.
- *M.K. v. State Secretary for Justice*, Council of State, President of the Judicial Division, 24 November 1986, NL / 7.
- *Wijsmuller Salvage B.V. v. ADM Naval Services*, District Court of Amsterdam, 19 November 1987, NL / 8.
- *The Russian Federation v. Pied-Rich B.V.*, Supreme Court, 28 May 1993, NL / 12.
- *State of the Netherlands v. Azeta B.V.*, District Court of Rotterdam, 14 May 1998, NL / 15.

Place of service

- *The United States of America v. A.F.W. Delsman*, Supreme Court, 3 October 1997, NL / 14.

Literature

A more elaborate survey and a list of cases and materials of the Dutch State practice with regard to State immunity can be found in 'Spiegel J. – Vreemde staten voor de Nederlandse rechter: immunititeit van jurisdictie en van executie, 2001. (Thesis, VU Amsterdam; English summary added)'.

(a)	Registration no.	NL/ 1
(b)	Date	15 May 1829
(c)	Authority	Beatrix, Queen of the Kingdom of the Netherlands.
(d)	Parties	<i>Article 13a of the Act on General Provisions of Kingdom Legislation (Wet Algemene Bepalingen, more commonly known as Wet AB)</i>
(e)	Points of law	The jurisdiction of the courts and the execution of judicial decisions and deeds are subject to exceptions recognised in international law.
(f)	Classification	0.c, 1.c, 2.c
(g)	Source	Staatsblad 1829, no. 28.
(h)	Additional information	

Appendix to NL/1

Article 13a of the Act on General Provisions of Kingdom Legislation (*Wet Algemene Bepalingen*, more commonly known as *Wet AB*)

The jurisdiction of the courts and the execution of judicial decisions and deeds are subject to exceptions recognised in international law.

(a)	Registration no.	NL/ 2
(b)	Date	26 January 2001
(c)	Authority	Beatrix, Queen of the Kingdom of the Netherlands
(d)	Parties	<i>Article 3a Bailiffs' Act</i>
(e)	Points of law	Article 3a of the Bailiffs' Act empowers the State to intervene if it considers that the service of a notification would be contrary to its obligations under international law.
(f)	Classification	0.c, 1.c, 2.a
(g)	Source	Staatsblad 2002, 318
(h)	Additional information	Article 3a of the Bailiffs' Act closely resembles article 13a of the (former) Bailiffs' Regulations.

Appendix to NL/2**Act of 26 January 2001 establishing the Bailiffs Act****Article 3a**

1. A bailiff who is instructed to perform an official act shall, if he must reasonably take account of the possibility that performing the act in question would be incompatible with the State's obligations under international law, immediately inform Our Minister [the Minister of Justice] of the instruction in the manner prescribed by ministerial order.
2. Our Minister may notify a bailiff that an official act which he has been or will be instructed to perform or which he has performed is incompatible with the State's obligations under international law.
3. Such notification may only be given *ex officio*. If the matter is urgent, notification may be given verbally, in which case it must be confirmed in writing without delay.
4. The notification shall be published by being placed in the Government Gazette (*Staatscourant*).
5. If, when he receives notification as referred to in paragraph 2, the bailiff has not yet performed the official act, the effect of the notification shall be that the bailiff is not competent to perform the official act. An official act performed contrary to the first sentence shall be void.
6. If, when a bailiff receives notification as referred to in paragraph 2, the official act has already been performed and involved a writ of seizure, the bailiff shall immediately serve the notification on the person on whom the writ was served, cancel the seizure and reverse its consequences. The costs of serving the notification shall be borne by the State.
7. A judge hearing applications for provisional relief may, in interim injunction proceedings, terminate the effect of the notification referred to in the first sentence of paragraph 5 and the obligations referred to in paragraph 6, without prejudice to the powers of the ordinary courts. If the official act involves seizure, article 438, paragraph 4 of the Code of Civil Procedure shall apply.

(a)	Registration no.	NL/ 3
(b)	Date	1 July 1984
(c)	Authority	The minister of Justice and the minister of Foreign Affairs
(d)	Parties	<i>Explanatory memorandum to the Bill for the approval of the European Convention on State Immunity</i>
(e)	Points of law	<ol style="list-style-type: none"> 1. It is recognised that under conventional and customary international law certain persons, institutions or property cannot be made defendants in proceedings in Dutch courts or be made the subject of enforcement proceedings. 2. In Dutch case law the theory of restricted immunity has now been firmly established. In the light of this broadly stated view of the Supreme Court, there is every reason to leave scope for Dutch courts to exercise the widest possible powers in entertaining proceedings against other Contracting States. 3. International law may at least be said not to require proof of the existence of a connection between the act and the territory of the State of the forum as a condition for jurisdiction of the court of that State, but the requirement that jurisdiction should not be based on exorbitant grounds must not be forgotten. 4. Judgments against a foreign State are in principle enforceable, but may not in any case be enforced against property destined for public use, according to the the Hague Court of Appeal. 5. To what extent such awards against a foreign State are subject to a judicial <i>exequatur</i> is a question to be determined only by the law of the State of the forum.
(f)	Classification	0.c, 1.b, 2.b
(g)	Source	Kamerstukken 17485, no. 3.
(h)	Additional information	

Appendix to NL/3

Bill for the approval of the European Convention on State Immunity

The Explanatory Memorandum to the Bill for the approval of the European Convention on State Immunity reads:

"Article 13a of the Act on General Provisions of Kingdom Legislation (*Wet Algemene Bepalingen*, more commonly known as *Wet AB*) reads as follows: 'The jurisdiction of the courts and the execution of judicial decisions and deeds are subject to exceptions recognised in international law'. Thus it is recognised that under conventional and customary international law certain persons, institutions or property cannot be made defendants in proceedings in Dutch courts or be made the subject of enforcement proceedings. [...]

Immunity from jurisdiction

In Dutch case law the theory of restricted immunity has now been firmly established. In its judgment of 26 October 1973 7, the Supreme Court considered that in cases where the State engages in private activities and therefore enters into legal relationships on an equal footing with private individuals, it is reasonable for the other party to be granted the same degree of legal protection that would be granted if the transaction had been with a private person, and that it must therefore be assumed that the immunity from jurisdiction to which a foreign State is entitled under contemporary international law does not extend to cases where a State has engaged in such activities as those referred to above.

In the light of this broadly stated view of the Supreme Court, there is every reason to leave scope for Dutch courts to exercise the widest possible powers in entertaining proceedings against other Contracting States and therefore to accept the '*zone grise*' of Chapter IV of the Convention by making the relevant declaration referred to in Article 24(1). [...]

Reasons for ratification

The preparation for ratification by the Netherlands has not been given the highest priority, since the Convention including Chapter IV will not alter the current Dutch legal practice to any appreciable extent. Nevertheless, by acceding to the Convention the Netherlands will be able to contribute to the harmonisation of views in the field of immunity from jurisdiction. [...]

It may be useful briefly to dwell upon the significance of the '*zone grise*', in particular on the extension which it represents in respect of the system laid down in Chapter I of the Convention. [...]

In the above-mentioned judgment of the Supreme Court of 26 October 1973 one of the parties advanced on appeal that a foreign State is subject to the jurisdiction of another State only in proceedings relating to an industrial, commercial or financial activity in which this foreign State is engaged in the same manner as a private person, and if, in addition, there is a clear connection between this activity and the territory of the State where jurisdiction was assumed. The Supreme Court considered that neither the case law of various countries nor the legal literature contained any reference to any prevailing view that the existence of such a connection is a requirement for acceptance of jurisdiction over disputes in which a foreign State is a party; and that, consequently, no such rule of international law may be assumed to exist.

It may be doubted whether this consideration is fully consistent with the Convention. Nevertheless, although acceptance of the '*zone grise*' may remove the connection in Articles 4-12 between the act and the territory of the State of the forum so that international law may at least be said not to require proof of the existence of such a connection as a condition for jurisdiction of the court of the State of the forum, the requirement that jurisdiction should not be based on exorbitant grounds must not be forgotten.

Not all the grounds of jurisdiction which, in the terms of the Annex to the Convention, qualify as exorbitant, exist in Dutch law. Most significant in practice are the grounds mentioned in (a) and (c).³ [...]

Execution of judgments

The Convention is not concerned with the question to what extent a Contracting State may claim immunity from execution of judgments given against it in the State of the forum. Opinions on this question still differ too much from country to country. Thus, some States, while fully accepting the theory of restricted immunity from jurisdiction, make an exception of immunity from execution, taking the view that it is contrary to international law for judgments against a foreign State to be enforced against its will in the State of the forum. Other States consider that such judgments are in principle enforceable, but may not in any case be enforced against property destined for public use.

The latter view was shared by the Court of Appeal of The Hague in its judgment of 28 November 1968, where the Court considered, on the defendant's argument that it is contrary to international law to give effect to a judgment given by a forum other than that of a foreign State against property of that State, or a State organ that can be assimilated to that State, and that therefore Dutch courts are in any case not entitled to entertain proceedings relating to the execution of preventive measures, "that it had already been decided that the international rule of sovereign immunity does not bar in this case the jurisdiction of the Dutch court; that a judicial decision is by its very nature enforceable; that if immunity does not bar jurisdiction, it also does not, in principle, bar execution; that, however, as also appears from Article 13a of the *Wet AB*, it is possible for a rule of international law to restrict enforceability; that the only rule applicable to this case is the rule that property destined for public use is not subject to measures of execution in another country." [...]

To what extent such awards against a foreign State are subject to a judicial *exequatur* is a question to be determined only by the law of the State of the forum (Cf. in this context, the judgment of the Supreme Court of 26 October 1973).

³ "(a) the presence in the territory of the State of the forum of property belonging to the defendant, or the seizure by the plaintiff of property situated there, unless

- the action is brought to assert proprietary or possessory rights in that property or arises from another issue relating to such property;

or

- the property constitutes the security for a debt which is the subject matter of the action; ...

(c) the domicile, habitual residence or ordinary residence of the plaintiff within the territory of the State of the forum, unless the assumption of jurisdiction on such a ground is permitted by way of an exception made on the account of the particular subject-matter of a class of contracts.

(a)	Registration no.	NL/ 4
(b)	Date	5 April 1993
(c)	Authority	The deputy Minister of Justice
(d)	Parties	<i>Explanatory memorandum to the amendment of the Bailiffs' Act</i>
(e)	Points of law	
(f)	Classification	0.c, 1.b, 2.a
(g)	Source	Kamerstukken 23081, no. 3.
(h)	Additional information	See also document NL / 2.

Appendix to NL/4

Amendments to the Bailiffs Act to regulate the consequences of official acts by bailiffs that are incompatible with the State's obligations under international law

EXPLANATORY MEMORANDUM

[...]

Immunity from jurisdiction

First let us consider the question of jurisdiction. In that respect restrictions on jurisdiction can be found in article 13a of the General Legislative Provisions Act and article 13, paragraph 4 of the Bailiffs' Regulations, the provisions of the latter being found in stricter form in article 3 of the Bailiffs Bill. There are also restrictions deriving from a number of international agreements to which the Netherlands is party: the European Convention on State Immunity (Netherlands Treaty Series (*Tractatenblad*)1973, 43) and the Vienna Convention on Diplomatic Relations (Netherlands Treaty (*Tractatenblad*) Series 1962, 159).

It is clear from these instruments and from Supreme Court case law (especially the judgment of 26 October 1973, *Nederlandse Jurisprudentie* (NJ) 1974, 361) that in this connection it is important whether the matter at issue was an act performed in the context of societal relationships governed by private law. If so, the Dutch courts do have jurisdiction; if not, they do not. However, in recent cases the Supreme Court has taken a more subtle approach to accepting jurisdiction in disputes to which international organisations or foreign States are party, even if the acts in question were performed in the context of societal relationships governed by private law. Reference may be had to the Supreme Court judgment of 23 December 1985 (NJ 1986, 438) where the question of whether an employee plays an essential role in the services offered by the employer was cited as an additional criterion in a labour dispute. Also of relevance in this connection is the Supreme Court judgment of 22 December 1989 (NJ 1991, 70) in which the Court held that according to current thinking, there is a tendency to restrict the privilege of sovereign States to invoke immunity in proceedings before a court in another State, and to grant this privilege only if the forum State is of the opinion that the act on the part of the foreign State that prompted the proceedings against it was clearly a governmental act. The same judgment holds that, while it must in general be assumed that a foreign State which enters into a private-law contract in a host State may not invoke immunity in disputes arising from the contract and that this situation does not alter if the foreign state wishes to withdraw, by means of an act which is distinctively a governmental act, from the binding contractual provisions it has entered into, but that there are nonetheless some exceptions to this basic rule. In the judgment in question, the Supreme Court accepted the following situation as an exception: a foreign State in the exercise of its diplomatic mission and its consular services in the host State may, for reasons of state security, make the conclusion or continuation of a contract (in the case at issue a contract of employment) dependent on the result of a security clearance. This result is not open to review by either the other party to the contract or the courts of the host State. In addition, as stated above, since 1990 there has been another exception in force, which cannot be circumscribed, namely that the Dutch courts have no jurisdiction to declare a foreign power bankrupt (Supreme Court 28 September 1990, NJ 1991, 247). [...]

Immunity from execution [...]

Both in treaties and in customary international law, immunity from execution is more readily accepted than immunity from jurisdiction. Although the matter is not absolutely clear, and opinions differ, it can be said that, in accordance with both customary and codified international law, it should be assumed that the property of a foreign State enjoys immunity from execution.

(a)	Registration no.	NL/ 5
(b)	Date	26 October 1973
(c)	Authority	Supreme Court
(d)	Parties	Société Européenne d'Etudes et d'Entreprises en liquidité volontaire (SEEE) v. Socialist Federal Republic of Yugoslavia
(e)	Points of law	<ol style="list-style-type: none"> 1) Foreign States are only entitled to restricted jurisdictional immunity. The immunity does not extend to cases in which the State has acted in its civil capacity. 2) There is no rule of international law requiring an obvious link between the territory of the State where the jurisdiction is invoked and the activity in question. 3) If a State enters into a legal relationship on an equal footing with the other party, it makes no difference that the transaction has been concluded under an enabling Act, nor that the contested activity has a military or strategic character. 4) International law is not opposed to any execution against foreign State-owned property situated in the territory of another State.
(f)	Classification	0.b, 1.b, 2.b
(g)	Source	<p>RvdW (1973) No. 64; N.J. (1974) No. 361.4.</p> <p>English summary: NYIL 1972, p. 290-296.</p>
(h)	Additional information	<p>Summaries of the proceedings before the District Court and the Court of Appeal can be found in NYIL 1972, p. 294 and NYIL 1973, p. 390-391. A summary of the decision of the Court of Appeal to which the case was remitted can be found in NYIL 1975, p. 374-377.</p>

Appendix to NL/5

Société Européenne d'Etudes et d'Entreprises en liquidité volontaire (SEEE) v. Socialist Federal Republic of Yugoslavia

In 1932, the appellant concluded an agreement with the respondent for the construction of a railroad in Yugoslavia. Since there were difficulties with regard to the payments, the appellant submitted the question to arbitration at Lausanne. In the arbitral award the respondent was ordered to pay a certain sum. However, although the Court of Appeal granted no immunity to Yugoslavia, it found itself unable to execute the award.

In the incidental appeal instituted by Yugoslavia against the decision of the Court of Appeal refusing immunity from jurisdiction and execution, it was argued as follows:

- I. (a) A foreign State cannot be obliged to submit to the jurisdiction of another State.
- (b) Jurisdiction over a foreign State can be exercised only where the activities in question have a definite link with the territory of the State where jurisdiction is invoked.
- (c) The Court has only examined the question whether Yugoslavia's action was a "purely governmental act", and not whether Yugoslavia had acted as a private person. If the latter is what the Court had in mind then its decision is contestable: Yugoslavia acted in accordance with an enabling Act and the railway had a military character.
- (d) If immunity from jurisdiction can be granted only in respect of purely governmental acts, the finding of the Court without more that the private law trades-action for the construction of a railway was not a purely governmental Act, goes too far, in the light of the enabling Act and the military character of the railway.

[...]

III. To apply for the grant of enforcement of an arbitral award is an act of execution [and, as such, contrary to Yugoslavia's immunity from execution].

[...]

The Supreme Court held:

"...With regard to subsections (a) and (b) of Section I of the incidental appeal:

In subsection (a) it is argued that as an exception, recognised under international law, to the exercise of jurisdiction by municipal courts, it should be accepted that a foreign State cannot be obliged to submit to the jurisdiction of another State;

However, no rule of international law involves taking the jurisdictional immunity to which foreign States are entitled so absolutely, as is suggested in this subsection;

Clearly, there is a tendency apparent in the international practice of treaties and in literature, as well as in the case law of national courts, to limit the extent to which a State may invoke immunity before a foreign court;

That this trend has been induced by, *inter alia*, the fact that in many States the government has increasingly engaged in activities in areas of society where the relations are governed by private law and where, consequently, the State enters into a legal relationship on an equal footing with individuals;

It is considered reasonable in such cases to grant a similar legal protection to the opposing party of the State concerned as would be granted if that party had dealt with an individual;

That on these various grounds it has to be assumed that the immunity from: jurisdiction to which a foreign State is entitled under the prevailing international law does not extend to cases in which a State has acted as set out above; Subsection (b) purports to contend that, if the rule as stated in (a) cannot be accepted, nevertheless jurisdiction over a foreign State which has acted as set out above can be exercised only where the activity in question of that State has an obvious link with the territory of the State where jurisdiction is invoked; this requirement is said not to be fulfilled in the present case;

Neither the case law of national courts nor the literature, as being a reflection of prevailing views, provide any evidence that such a link is, in international law, a condition for the exercise of jurisdiction in respect of disputes to which a foreign State is a party; therefore no rule of international law as stated in subsection (b) can be assumed;

Consequently, the arguments raised in subsections (a) and (b) fail;

With regard to subsections (c) and (d) of section I:

The Court of Appeal has established that the Kingdom of Yugoslavia has, in the present case, concluded a private law transaction whereby a private legal person was to construct a railway with delivery of materials against payment;

From this it follows that the Kingdom of Yugoslavia has entered into a legal relationship on an equal footing with SEEE; it makes no difference that the transaction has been concluded under an enabling Act nor that the railway, as contended by Yugoslavia, has a military or strategic character;

Therefore, Yugoslavia cannot invoke immunity from jurisdiction. Consequently, these arguments also fail;

[...]

With regard to section III:

To apply for a grant of enforcement of the present award could be deemed to be contrary to the immunity from execution to which a foreign State is entitled under international law only if international law is opposed to any execution against foreign State-owned property situated in the territory of an- other State;

However, such rule of international law does not exist;

Consequently, this point, whatever the relevant considerations of the Court of Appeal, cannot lead to cassation.

(a)	Registration no.	NL/ 6
(b)	Date	18 May 1978
(c)	Authority	District Court of Amsterdam (summary proceedings)
(d)	Parties	<i>The Kingdom of Morocco v. Stichting Revalidatie Centrum "De Trappenberg"</i>
(e)	Points of law	<p>1) Much as States are not normally subject to one another's jurisdiction, this principle may be subject to exceptions in cases where a State becomes involved in legal situations not as a public authority, but rather in a private capacity. This occurs not only where the State takes on an obligation by entering into relationships in the sphere of private law, but also where such an obligation arises out of the law itself.</p> <p>2) Reliance on the purposes for which the sums attached were intended, viz., public purposes, cannot succeed because, much as these sums were to be used for public purposes, this circumstance cannot render the moneys themselves immune from attachment.</p>
(f)	Classification	0.b1, 1.b, 2.b
(g)	Source	English summary: NYIL 1979, p. 444-445.
(h)	Additional information	<p>In a later judgment (see NYIL 1987, p. 354-356) the Court dismissed the claim of "De Trappenberg", because Morocco had not acted carelessly.</p> <p>See on the same facts also case NL/ 13</p>

Appendix to NL/6***The Kingdom of Morocco v. Stichting Revalidatie Centrum "De Trappenberg"***

The daughter of the cleaner/caretaker of the Moroccan Consulate-General at Amsterdam was seriously injured in an accident at the Consulate. She was taken to "De Trappenberg" rehabilitation centre for medical treatment. During the treatment it became apparent that part of the costs involved were not covered by any Dutch or Moroccan insurance. Only during the course of treatment had Morocco taken out a policy, and this became operative a year after the accident. The non-insured costs amounted to Dfl. 84,185.15. Assuming that the caretaker was unable to pay such a sum, the defendant requested the Court for a garnishee order to secure the debt on funds held by Morocco in the Banque de Paris et des Pays-Bas. It was alleged that Morocco was liable in tort for failure to ensure that the caretaker, who was sent to the Netherlands as an employee and his family were adequately insured. The Court complied with the request, whereupon Morocco applied to the Court in summary proceedings for an injunction for the withdrawal of the garnishee order. The President gave judgment for the plaintiff.

The District Court held:

[...] 6. Much as States are not normally subject to one another's jurisdiction, this principle may be subject to exceptions in cases where a State becomes involved in legal situations not as a public authority, but rather in a private capacity. This occurs not only where the state takes on an obligation by entering into relationships in the sphere of private law, but also where such an obligation arises out of the law itself.

7. In the present case "De Trappenberg" alleges that Morocco is liable in tort under Article 1401 of the Civil Code, viz., an act or omission in which Morocco is involved not as a sovereign state, but in the same capacity as a private person, as the employer of M. Bouarfa.

8. Judged by the criterion set out in paragraph 6 of this judgment, Morocco's reliance on immunity must fail.

9. Also, Morocco's reliance on the purposes for which the sums attached were intended, viz., public purposes, cannot succeed because, much as these sums were to be used for public purposes, this circumstance cannot render the moneys themselves immune from attachment. [...]

(a)	Registration no.	NL/ 7
(b)	Date	24 November 1986
(c)	Authority	Council of State, President of the Judicial Division
(d)	Parties	M.K. v. State Secretary for Justice
(e)	Points of law	<ol style="list-style-type: none"> <li data-bbox="906 685 1417 1093">1) Article 13(4) of the Bailiffs' Regulations empowers the respondent to intervene if he considers that the service of a notification would be contrary to his obligations under international law. Only in this case may the respondent make use of his power and is he also therefore bound to do so, in view of the obligations to which the Dutch State is subject in this connection. <li data-bbox="906 1104 1417 1512">2) There is no question of the respondent being left any discretion in policy which could be construed as imposing a certain restriction on the Courts right of assessment. Whether the respondent was correct in arriving at the conclusion that it had an obligation under international law is a question which is ideally suited in every respect to be decided in full by the courts. <li data-bbox="906 1523 1417 1899">3) When interpreting and applying customary international law, the courts should take account of the fact that the Government, as the representative of the State in dealings with other States, also helps to mould the law by disseminating its views on what the law is and by endeavouring to observe in its dealings the practice based on these views. <li data-bbox="906 1910 1417 2074">4) Although there is no rule of international law that prohibits executions levied on the assets of a foreign State which are in the territory of another State, it is

		<p>equally beyond doubt that rules of customary law prescribe immunity from execution in respect of the enforcement of a judgment, even if the court which gave the judgment was competent to do so under these rules [as in the present case] if this execution relates to assets intended for public purposes.</p> <p>5) The note verbale from the foreign Embassy in which it is stated that all the money in the account which has been attached, is used in the performance of its functions, must be deemed sufficient proof that these moneys are intended for public purposes. To require the foreign mission in the Netherlands to give a further and more detailed account of the funds in this account would amount under international law to an unjustified interference in the internal affairs of this mission.</p>
(f)	Classification	0.c, 1.c. 2.a
(g)	Source	KG 1987, 38. English summary: NYIL 1988, p. 439-443.
(h)	Additional information	See also the documents NL/2 and NL/ 4 on the Bailiffs' Act.

Appendix to NL/7***M.K. v. State Secretary for Justice***

The petitioner instructed a bailiff in The Hague, to attach a bank account of the Republic of Turkey at the Algemene Bank Nederland in Amsterdam, by way of execution of a judgment given against the Republic on 1 August 1985 in which her dismissal by the Turkish Embassy in The Hague was declared void and Turkey was ordered to pay a sum of Dfl. 7,700. By letter dated 3 November 1986 the State Secretary gave notice to the bailiff under Article 13(4) of the Bailiffs' Regulations⁴ that he should refuse to serve any notification in connection with the execution of the judgment since this was contrary to the international obligations of the State of the Netherlands.

The Council of State held:

[...] It should be said at the outset that the State and its organs are obliged to refrain from acts or omissions in relation to another State and its organs which are in breach of the obligations to which a State is subject under international law. In this context Article 13(4) of the Bailiffs' Regulations empowers the respondent to intervene if he considers that the service of a notification would be contrary to these obligations. Only in this case may the respondent make use of his power and is he also therefore bound to do so, in view of the obligations to which the Dutch State is subject in this connection. There is therefore no scope for a weighing of the interests and everything that the petitioner has submitted on this subject, notably her argument that an indemnity should not have been omitted in any weighing of the interests, does not need to be taken into consideration. The dispute therefore revolves around the question whether the execution of the judgment would be contrary to the obligations of the State under international law. [...]

If the respondent means by this that his opinion as to whether he made correct use of his power under the said provision of the Bailiffs' Regulations takes precedence over our opinion or that in any event our opinion can only be of a very marginal character, we cannot agree with him. We hold at the outset that a right of appeal exists under the Administrative Decisions Appeals (AROB) Act, and that neither Article 13a of the General Provisions of Legislation Act nor Article 13(4) of the Bailiffs' Regulations restricts the freedom of assessment given to us and the Division under the AROB Act, and that any such restriction cannot be based solely on the history of legislative provisions. There is also no question of the respondent being left any discretion in policy which could be construed as imposing a certain restriction on our right of assessment, since, as stated previously, the respondent may and indeed must exercise the power if he considers that the execution of a judgment would be contrary to the State's obligations under international law. Finally, whether the respondent was correct in arriving at this opinion is a question which is ideally suited in every respect to be decided in full by the courts. We can, however, concede to the respondent that when interpreting and applying customary international law in particular, the courts should take account of the fact that the Government, as the representative of the State in dealings with other States, also helps to mould the law by disseminating its views on what the law is and by endeavouring to observe in its dealings the practice based on these views. Justice can be done to the Government's special position if the courts hear the Government's advisers on international law to ascertain its views on legal positions, either ex officio or at the Government's request, and accord the deference to this opinion which is due on account of the special position. [...]

Although there is no rule of international law that prohibits executions levied on the assets of a foreign State which are in the territory of another State (cf., HR 26 October 1973, NJ

⁴ This article was replaced by article 3a of the Bailiffs' Act from 26 January 2001. See document NL/ 2.

(1974), No. 361), it is equally beyond doubt that rules of customary law prescribe immunity from execution in respect of the enforcement of a judgment, even if the court which gave the judgment was competent to do so under these rules (as in the present case) if this execution relates to assets intended for public purposes. [...]

The note verbale from the Turkish Embassy in The Hague in which it is stated that all the money in the account which has been attached was transferred by the Turkish Government in order to defray the costs of the Embassy in the performance of its functions must be deemed sufficient proof that these moneys are intended for public purposes of the Republic of Turkey.

It is necessary to take into account in this connection that great importance has traditionally been attached to the efficient performance of the functions of embassies and consulates; confirmation of this is provided in the Vienna Conventions on diplomatic relations (1961) 31 and consular relations (1963). To require the Turkish mission in the Netherlands to give a further and more detailed account of the funds in this account would amount under international law to an unjustified interference in the internal affairs of this mission.

(a)	Registration no.	NL/ 8
(b)	Date	19 November 1987
(c)	Authority	District Court of Amsterdam
(d)	Parties	<i>Wijsmuller Salvage B.V. v. ADM Naval Services</i>
(e)	Points of law	<p>1) The decisive criterion is the status of the ship at the time of attachment.</p> <p>2) A warship delivered by a foreign State to Dutch companies for refitting not only has to spend a long time in dock but must also undergo sea trials, during which it sails under national command and is manned in part by a national crew, should also be regarded as a ship intended for use in the public service even during the execution of the work.</p>
(f)	Classification	0.c, 1.c, 2.a
(g)	Source	English summary: NYIL 1989, p. 294-296
(h)	Additional information	

Appendix to NL/8***Wijsmuller Salvage B.V. v. ADM Naval Services***

The Peruvian warship *Almirante Grau*, a cruiser, got into difficulties during sea trials which were being conducted on the North Sea as part of a refit by ADM Naval Services. *Wijsmuller Salvage B.V.* successfully assisted the vessel. As *Wijsmuller* feared that Peru would arrange for the ship to sail away, it applied to Amsterdam District Court for an interlocutory injunction attaching the cruiser in order to secure its rights and obtain payment of the salvage money.

The District Court held:

[...] ADM had put forward as its defence, inter alia, that leave should not be given because *Wijsmuller* wishes to attach a vessel belonging to a foreign power which is intended for use in the public service. [...] *Wijsmuller* has tried in vain to challenge this by arguing that the ship was not being used in the public service during the present trials. Leaving aside the point that the decisive criterion is the status of the ship at the time of the attachment (which may differ from the status at the time when the claim for which redress is sought arose), *Wijsmuller's* argument fails because in view of the background described at 1, the *Almirante Grau* (a warship delivered by Peru to Dutch companies for refitting (i.e., "the work") not only has to spend a long time in dock but must also undergo sea trials, during which it sails under Peruvian command and is manned in part by Peruvian crew) should also be regarded as a ship intended for use in the public service (i.e., the Peruvian public service) even during the execution of the work.. [...]

(a)	Registration no.	NL/ 9
(b)	Date	18 February 1988
(c)	Authority	Court of Appeal of The Hague
(d)	Parties	<i>Republic of Zaire v. J.C.M. Duclaux</i>
(e)	Points of law	A bankruptcy would entail a by no means insubstantial infringement of the independence of the sending State vis-à-vis the receiving State. Therefore the sending State can, under the generally recognised rules of international law, invoke its immunity from execution in proceedings before the court in the receiving State which has been asked to give judgment on a petition for the sending State to be declared bankrupt.
(f)	Classification	0.c, 1.c, 2.a
(g)	Source	English summary: NYIL 1989, p. 296-300
(h)	Additional information	An English summary of the judgment of the District Court can also be found in NYIL 1989, p. 296-300.

Appendix to NL/9***Republic of Zaire v. J.C.M. Duclaux***

The Hague Sub-District Court ordered the Republic of Zaire in absentia to pay arrears of wages to Duclaux, who had worked as a secretary at the Embassy of Zaire in The Hague. When the Embassy failed to pay her wages, Duclaux petitioned the District Court of The Hague to declare the Republic of Zaire bankrupt to enable her to collect the debt, claiming that the Republic was also failing to pay other recoverable debts and therefore was in a position that it had ceased to pay its debts. The District Court rejected the Republic of Zaire's claim that it was immune from jurisdiction and execution, and declared the Republic of Zaire bankrupt. It furthermore instructed the trustee in bankruptcy to open letters and telegrams from the bankrupt.

The Court of Appeal held:

[...] Under Dutch law a declaration of bankruptcy is a very far-reaching measure; it constitutes judicial seizure of the entire assets of the debtor concerned with a view to their forced sale to enable the assets thus realised to be distributed among all the creditors; by virtue of being declared bankrupt, the debtor also automatically, by law, forfeits control over and the use of the assets which form part of the bankrupt estate.

It cannot be denied that if a Dutch court were to declare a sovereign State (which has an embassy or diplomatic mission in the Netherlands) bankrupt as the court of first instance did the Republic of Zaire this would in no small measure impede the efficient performance of the functions of that State's official diplomatic representation in the Netherlands in view of the nature, effects and consequences of a bankruptcy under the Dutch Bankruptcy Act, which have been considered above, particularly if, as in the present case, the trustee in bankruptcy were also to be declared competent to open letters and telegrams addressed to the sovereign sending State.

As therefore such a bankruptcy would entail a by no means insubstantial infringement of the independence of the sending State vis-à-vis the receiving State, given that, at the minimum, the diplomatic mission would not be able to function properly, the sending State can, under the generally recognised rules of international law, invoke its immunity from execution in proceedings before the court in the receiving State which has been asked to give judgment on a petition for the sending State to be declared bankrupt. [...]

(a)	Registration no.	NL/ 10
(b)	Date	22 December 1989
(c)	Authority	Supreme Court
(d)	Parties	M.K.B. van der Hulst v. United States of America
(e)	Points of law	<p>1) A foreign State can only claim immunity if its act clearly has the character of a governmental act according to the views of the forum State. No immunity is in principle accepted for relations of an employment law nature entered into by a foreign State in the receiving State, although the defence of immunity may not be excluded in all cases.</p> <p>2) If the applicant can rely on a contract of employment already in existence under private law, in carrying on its diplomatic mission and providing consular services in the receiving State, a foreign State should, for reasons of State security, be given the opportunity to allow the conclusion or continued existence of such a contract to depend on the result (which is not subject to the assessment of the other party or the courts of the receiving State) of a security check</p>
(f)	Classification	0.b.2, 1.b, 2.c
(g)	Source	RvdW (1990) No. 15. English summary: NYIL 1991, p. 379-387.
(h)	Additional information	

Appendix to NL/10***M.K.B. van der Hulst v. United States of America***

The case concerns immunity in respect of an employment dispute between the United States of America and a Dutch woman, Mrs Van der Hulst, who had been employed as a secretary in the Foreign Commercial Service Department of the United States Embassy in The Hague since 1 July 1984. A final appointment was dependent on the results of a security check. On 29 August 1984 she was dismissed 'for security reasons'.

The Supreme Court held:

[...] 3.3. As regards the question of whether an exception recognised under international law should be allowed to the jurisdiction conferred here in principle, the starting point should be that according to present-day views on international law as evidenced for example by international regulations already in existence or still in the draft stage there is a trend towards limiting the privilege of a sovereign State to claim immunity before the courts of another State and only to allow this immunity if the act of the foreign State which forms the subject of the proceedings instituted against it clearly has the character of a governmental act according to the views of the forum State. As far as employment relations are concerned, reference may be made in this connection to the European Convention on State Immunity and the draft scheme produced in the United Nations for Jurisdictional Immunities of States and their Property of July 1986. Under these international provisions, no immunity is in principle accepted for relations of an employment law nature entered into by a foreign State in the receiving State, although the defence of immunity may not be excluded in all cases.

[...]

3.5 [...] Although it must generally be assumed that if a foreign State enters into a contract of a private law nature in the receiving State it is not entitled to claim immunity in respect of disputes resulting from such contract and that the position is no different if the foreign State wishes to evade the commitment it has accepted under the contract by means of a typically governmental act. However, this general rule is not entirely without exceptions. It must be assumed that an exception of this kind occurs in the present case, even if Van der Hulst could rely in this case on a contract of employment already in existence under private law. In carrying on its diplomatic mission and providing consular services in the receiving State, a foreign State should, for reasons of State security, be given the opportunity to allow the conclusion or continued existence of a contract such as the present one to depend on the result (which is not subject to the assessment of the other party or the courts of the receiving State) of a security check by stipulating a condition such as the present one. It cannot be assumed that a foreign State which enters into such a contract thereby loses its right to rely on immunity when terminating the contract on the ground of a security check of the kind mentioned above, no matter how much the contract itself is of a private law nature.

(a)	Registration no.	NL/ 11
(b)	Date	28 September 1990
(c)	Authority	Supreme Court
(d)	Parties	<i>W.L. Oltmans v. the Republic of Surinam</i>
(e)	Points of law	The nature of the bankruptcy and the consequences attached to a declaration of bankruptcy prevent the Dutch courts from having jurisdiction to take a measure of this kind in relation to a foreign power. Acceptance of this jurisdiction would imply that a trustee in bankruptcy with far-reaching powers could take over the administration and winding up of the assets of a foreign power under the supervision of a Dutch public official. This would constitute an unacceptable infringement under international law of the sovereignty of the foreign State concerned.
(f)	Classification	O.c, 1.c, 2.a
(g)	Source	NJ 1991, 247. English summary: NYIL 1992, p.443-447.
(h)	Additional information	An English summary of the judgment of the District Court can also be found in NYIL 1992, p. 443-447.

Appendix to NL/11***W.L. Oltmans v. the Republic of Surinam***

By petition Oltmans, who lived in the United States, requested that the Republic of Surinam be declared bankrupt on the ground that it was in the position of having ceased to pay its debts, as it had not paid a debt to Oltmans.

The Supreme Court held:

[...] The ground of appeal raises the question whether the Dutch courts have jurisdiction to declare a foreign State bankrupt. This question must be answered in the negative for the following reason. Bankruptcy is a general seizure of the assets of a debtor and comprises his entire assets at the time of the bankruptcy petition (Art. 20 of the Bankruptcy Act), deprives a debtor of the right to dispose of and administer the assets belonging to the bankruptcy (Art. 23) and confers the power on one or more trustees in bankruptcy to administer and wind up the assets of the bankrupt (Arts. 68 and 70) under the supervision of a delegated judge (Art. 64), whereby the trustee has far-reaching powers such as the power to open all letters and telegrams addressed to the bankrupt (Art. 99). The nature of the bankruptcy and the consequences attached to a declaration of bankruptcy prevent the Dutch courts from having jurisdiction to take a measure of this kind in relation to a foreign power. Acceptance of this jurisdiction would imply that a trustee in bankruptcy with far-reaching powers could take over the administration and winding up of the assets of a foreign power under the supervision of a Dutch public official. This would constitute an unacceptable infringement under international law of the sovereignty of the foreign State concerned. [...]

(a)	Registration no.	NL/ 12
(b)	Date	28 May 1993
(c)	Authority	Supreme Court
(d)	Parties	<i>The Russian Federation v. Pied-Rich B.V.</i>
(e)	Points of law	<p>1) The fact that the undertaking was given in order to promote the economic interests of the USSR does not bar the conclusion that the undertaking was an act performed on the footing of equality. What is decisive, is the nature of the act, not the motive for it.</p> <p>2) There is no rule of unwritten international law to the effect that seizure (provisional or otherwise) of a vessel belonging to the State and intended for commercial shipping, is permissible only if the seizure is levied for the purpose of insurance or to recover a ("maritime") claim resulting from the operation of the vessel.</p>
(f)	Classification	0.b, 1.b, 2.b
(g)	Source	<p>NJ 1994, no. 329</p> <p>English summary: NYIL 1994, p. 512-515</p>
(h)	Additional information	

Appendix to NL/12***The Russian Federation v. Pied-Rich B.V.***

Pied-Rich B.V., concluded a tripartite contract with the Baltic Shipping Company (hereinafter referred to as 'BSC') and a number of Russian importers in 1989 for the delivery of women's and children's wear. Under the contract, Pied-Rich sold and delivered the goods to the Russian importers and payment was guaranteed both by BSC, which transported the goods to Russia, and by the Ministry to which BSC was responsible. Pied-Rich made deliveries in 1990 and early 1991. When the relevant Ministry failed to comply with its guarantees and payment was not made, Pied-Rich instituted arbitration proceedings in Moscow. As Pied-Rich wished to be certain that any award made by the arbitrators would actually be paid, it applied to the District Court in Rotterdam for leave to seize the 'Kapitan Kanevsky', a vessel which belonged to the Russian Federation (hereinafter referred to as 'the RF') and which was used by BSC. The leave was originally granted on 27 April 1992 while the vessel was bound for Rotterdam. However, it did not arrive there. But, a month later, it did eventually dock in the port of Rotterdam. Pied-Rich then once again applied for leave to seize the vessel. The RF and BSC for their part instituted interim injunction proceedings to prevent leave being granted, in any event unless a prohibitive counter-guarantee was issued.

The Supreme Court held:

[...] The Court of Appeal did not show it had misinterpreted the law by concluding on the basis of this uncontested findings that the undertaking by the Ministry was an act performed on a footing of equality with the trading partners and by consequently not interpreting this undertaking as an act that was clearly in the nature of a governmental act. [...]

The Court of Appeal did not refrain from making its contested ruling, because the undertaking was given in order to promote the economic interests of the USSR: this circumstance may well explain what induced the Ministry to give this undertaking, but it does not mean that this act was clearly a government act. What was decisive was the nature of the act, not the motive for it.

[...]

There is no rule of unwritten international law to the effect that seizure (provisional or otherwise) of a vessel belonging to the State and intended for commercial shipping, is permissible only if the seizure is levied for the purpose of insurance or to recover a ("maritime") claim resulting from the operation of the vessel.

(a)	Registration no.	NL/ 13
(b)	Date	25 November 1994
(c)	Authority	Supreme Court
(d)	Parties	The Kingdom of Morocco v. Stichting Revalidatiecentrum “De Trappenberg”
(e)	Points of law	<p>1) If in principle the Dutch courts have jurisdiction with regard to a dispute referred to them, they must try the dispute even if the defendant is a sovereign State, except where the defendant claimed in good time and on good grounds the privilege of immunity from jurisdiction. It follows that there is no occasion for an ex officio investigation into the question of whether the circumstances of the case warrant such a claim.</p> <p>2) The nature of the undertaking given was not a clearly governmental act since such an undertaking could equally well have been given by a private sector employer in a comparable situation. The reasons why the Kingdom gave the undertaking in question are not relevant to the nature of the undertaking</p>
(f)	Classification	0.b, 1.b, 2.c
(g)	Source	<p>NJ 1995, 650</p> <p>English summary: NYIL 1996, p. 321-325</p>
(h)	Additional information	<p>See for English summaries of previous judgments in the same case NYIL 1987, p. 354-356; NYIL 1993, p. 340.</p> <p>See for another judgment on the basis of the same facts document NL/ 6</p>

Appendix to NL/13***Kingdom of Morocco v. Stichting Revalidatiecentrum “De Trappenberg”***

The daughter of B., the cleaner/caretaker of the Moroccan Consulate-General in Amsterdam, was seriously injured in an accident at the Consulate. She was taken to “De Trappenberg” rehabilitation centre for medical treatment. During the treatment it became apparent that part of the costs involved were not covered by any Dutch or Moroccan insurance. Only during the course of the treatment had Morocco taken out a policy, and this became operative a year after the accident. The District Court of Amsterdam ordered B. to pay “De Trappenberg” the non-insured costs of Dfl. 89,185. Execution of this judgment proved, however, to be impossible since no part of the sum could be recovered from B. “De Trappenberg” then sued the Kingdom of Morocco before the District Court of Amsterdam, claiming payment of this sum. It based its claim on the unlawful conduct of Morocco in failing to comply with its duty of care as B.’s employer to insure B. and his family in good time against medical expenses. Morocco then claimed immunity in interlocutory proceedings. The District Court dismissed this claim to immunity. Subsequently it dismissed the claim by “De Trappenberg” because the Kingdom of Morocco had not acted carelessly or contrary to the general principles of Dutch law vis-à-vis “De Trappenberg” by not insuring B. against medical expenses. “De Trappenberg” appealed against this judgment. Morocco then lodged an interim appeal against the judgment, arguing that the District Court had wrongly held that the Dutch courts were competent to take cognisance of the dispute. The Court of Appeal of Amsterdam dismissed the interim appeal, upheld the judgment of the District Court and referred the case to the cause list judge for the submission of the statement of defence by Morocco in the main action. In an interlocutory judgment of the Court of Appeal dismissed the basis of the claim by “De Trappenberg” in the originating summons, but then allowed it to prove its submission that Morocco had ultimately undertaken to make payment. In its judgment the Court of Appeal held that “De Trappenberg” had succeeded in discharging the burden of proof upon it and, after quashing the judgment of the District Court, granted the claim of “De Trappenberg” on the basis of the undertaking given by Morocco. Morocco then lodged notice of appeal in cassation to the Supreme Court.

The Supreme Court held:

[...] If in principle the Dutch courts have jurisdiction with regard to a dispute referred to them, they must try the dispute even if the defendant is a sovereign State, except where the defendant claimed in good time and on good grounds the privilege of immunity from jurisdiction. It follows that there is no occasion for an ex officio investigation into the question of whether the circumstances of the case warrant such a claim. What is therefore decisive is whether, after “De Trappenberg” had altered the basis of its claim, the Kingdom claimed the privilege of immunity from jurisdiction with regard to the trial of the dispute on these altered grounds. [...]

It should also be noted that even if this had not been the case [i.e. if Morocco had claimed immunity], it could not have benefited the Kingdom. The nature of the undertaking given (voluntarily) by the ambassador of the Kingdom to pay the claim of “De Trappenberg” against B., a national of the Kingdom, who was in the employ of the Kingdom, was not a clearly governmental act since such an undertaking could equally well have been given by a private sector employer in a comparable situation. The reasons why the Kingdom gave the undertaking in question are not relevant to the nature of the undertaking

(a)	Registration no.	NL/ 14
(b)	Date	3 October 1997
(c)	Authority	Supreme Court
(d)	Parties	<i>The United States of America v. A.F.W. Delsman</i>
(e)	Points of law	A foreign State has no office within the meaning of Article 1:14 of the Civil Code at its military basis and is therefore not domiciled there. A foreign State has a domicile at the place where it has its seat.
(f)	Classification	0.c, 1.c, 2.c
(g)	Source	RvdW 1997, 189 C. English summary: NYIL 1998, p. 254-256
(h)	Additional information	

Appendix to NL/14***The United States of America v. A.F.W. Delsman***

Delsman concluded two contracts with the 'contracting officer' of the air force base of the United States of America – 'USAFE' – at Soesterberg (near Amersfoort). The contracts were terminated prematurely by USAFE and when protests were of no avail Delsman sued the USA before the Sub-District Court of Amersfoort. A few days later the writ of summons was served a second time at the embassy of the USA in The Hague. However, the USA (USAFE) did not enter an appearance and the Sub-District Court gave judgment by default on 20 May 1992. The judgment was served on the USA by bailiff's notification of 8 July 1992 at the address of USAFE in Soesterberg, where it was left in a sealed envelope.

The USA objected to the default judgment, arguing inter alia that the service of the default judgment at the address of USAFE in Soesterberg had been void.

The Supreme Court held:

[...] The second complaint challenges the view of the District Court that the USA has an office in Soesterberg within the meaning of Article 1:14 of the Civil Code and is therefore domiciled there.

This complaint is well-founded. Article 1:14 of the Civil Code is not applicable to States, and the District Court was therefore wrong to assume on the basis of this provision that the United States was domiciled in Soesterberg too for the purpose of the present matter.

The established facts do not show that the US has a domicile elsewhere than the place where it has its seat. It follows that the service [of the default judgment] should have been effected in accordance with Article 4, point 8, of the Code of Civil Procedure [at the seat of the US] [...].

(a)	Registration no.	NL/ 15
(b)	Date	14 May 1998
(c)	Authority	District Court of Rotterdam
(d)	Parties	State of the Netherlands v. Azeta B.V.
(e)	Points of law	<ol style="list-style-type: none"> <li data-bbox="847 629 1409 1066">1) A foreign State is entitled to immunity from execution when execution measures are employed against the State concerned involving the attachment of property intended for the public service of that State. Establishing, maintaining and running embassies is an essential part of the function of government and hence of the public service. Moneys intended for the performance of this function must therefore be treated as property intended for the public service. <li data-bbox="847 1081 1409 1384">2) A letter from the deputy Foreign Minister and a 'note verbale' from the Embassy in The Hague, in which it is stated that the credit balances in the attached bank account are intended for the running of the Embassy is sufficient to support the assumption that the present moneys are intended for the public service. <li data-bbox="847 1400 1409 1798">3) It was up to the defendant to adduce evidence of facts and/or circumstances to support its submission that this was not the case. The defendant wrongly demands that the Embassy should provide more detailed information about the nature and scope of the bank balances held by it, since this would entail an unacceptable interference under international law in the internal affairs of this mission. <li data-bbox="847 1814 1409 1989">4) The interests of the uninterrupted functioning of a diplomatic mission should prevail over the interests of executing (by expeditious means) a judgment given in the Netherlands.

(f)	Classification	0.a, 1.c, 2.a
(g)	Source	KG 1998, 251. English summary: NYIL 2000, p. 264-267.
(h)	Additional information	

Appendix to NL/15

State of the Netherlands v. Azeta B.V.

Azeta arranged for the credit balances of the Chilean Embassy in an account at ABN-AMRO Bank in Amsterdam to be attached by way of execution of a judgment against Chile. After the Bank had informed the Chilean ambassador of the attachment, he lodged a protest with the Dutch Ministry of Foreign Affairs. The ambassador demanded that the Minister take steps to arrange for termination of the attachment on the ground of the Netherlands' obligation under international law to maintain the immunity of the diplomatic mission of Chile from attachment.

The District Court held:

3.2. The starting point in this dispute is that – pursuant to (unwritten) international law – a foreign State is entitled to immunity from execution when execution measures are employed against the State concerned involving the attachment of property intended for the public service of that State. Establishing, maintaining and running embassies is an essential part of the function of government and hence of the public service. Moneys intended for the performance of this function must therefore be treated as property intended for the public service.

In the present case the defendant denies that (all) bank balances which it has caused to be attached are intended for the functioning of the Chilean Embassy. The plaintiff has lodged in this connection a letter of 8 May 1998 from the deputy Foreign Minister of the Republic of Chile and a 'note verbale' from the Chilean Embassy in The Hague of 11 May 1998, in which it is stated that the credit balances in the attached bank account are intended for the running of the Chilean Embassy.

Contrary to what the defendant has alleged in this connection, the President considers that these statements are sufficient in this case to support the assumption that the present moneys are intended for the public service of the Republic of Chile. It was up to the defendant to adduce evidence of facts and/or circumstances to support its submission that this was not the case. As the defendant has failed to do so, and as such facts and/or circumstances have not become known in any other way either, the Republic of Chile is – in view of the above – in principle entitled to claim immunity from. The defendant wrongly demands that the Chilean Embassy should provide more detailed information about the nature and scope of the bank balances held by it, since this would entail an unacceptable interference under international law in the internal affairs of this mission. The defendant's submission that the State of the Netherlands should also defend the interests of its national companies does not detract from the above.

3.3. The defence put forward by the defendant that recognition of the immunity from execution would jeopardise the immunity of Dutch administration of justice is rejected. Quite apart from whether such a general principle exists in [the Dutch] legal system, a higher importance should in principle be attached to the rules of international law than to the rules of Dutch law (in particular Dutch procedural law), with the result that the interests of the uninterrupted functioning of a diplomatic mission should in this case prevail over the interests of executing (by expeditious means) a judgment given in the Netherlands.

(a)	Registration no.	NL/ 16
(b)	Date	12 November 1999
(c)	Authority	Supreme Court
(d)	Parties	The United States of America v. Havenschap Delfzijl/Eemshaven (Delfzijl/ Eemshaven Port Authority)
(e)	Points of law	As international law stands at present, foreign States are not subject to the jurisdiction of the Dutch courts in respect of claims arising in the Netherlands as the result of the operation of ships which belong to or are operated by them and which are used in the performance of a typical government function (such as military action). The nature of the act or event giving rise to the claim is not of importance in this connection.
(f)	Classification	0.a, 1.a, 2.c
(g)	Source	NJ 2001, 567. English summary: NYIL 2001
(h)	Additional information	A similar decision of the Supreme Court ' <i>The United States of America, Department of the Navy, Military Sealift Command v. P.C. van der Linden</i> ' is published in NJ 2001, 568.

Appendix to NL/16***The United States of America v. Havenschap Delfzijl/Eemshaven (Delfzijl/ Eemshaven Port Authority)***

In November and December 1990 the seagoing motor vessel Cape May, which sailed under the flag of the United States, berthed in the Dutch port of Eemshaven. The ship was owned by the United States. The berthing had taken place on conditions contained in a document drawn up by the Port Authority, which had been signed in confirmation of the agreement of the United States by Mijne and Barends B.V. for or on behalf of OMI Corporation in New York. While the ship was berthed a number of boiler tubes fell overboard during loading. The Port Authority was involved in the salvage of these tubes and incurred costs in this connection. Subsequently the Cape May broke from its moorings on a number of occasions and drifted away. It collided with quayside walls belonging to the Port Authority and caused damage. The Port Authority sued the United States claiming compensation for the items of damage. The United States claimed that the Dutch Courts lacked jurisdiction.

The Supreme Court held:

[...] Part 1 therefore raises the question of whether the United States is entitled on the basis of unwritten rules of international law to immunity from jurisdiction in respect of a claim which has arisen in the Netherlands on account of the use by the United States of a vessel belonging to or operated by the United States if, at the time when the cause of action arose, this vessel had the status of a warship or military supply ship and was used exclusively to carry out a military (i.e., non-commercial) public function.

This question must be answered in the affirmative. As international law stands at present, foreign States are not subject to the jurisdiction of the Dutch courts in respect of claims arising in the Netherlands as the result of the operation of ships which belong to or are operated by them and which are used in the performance of a typical government function (such as military action). The nature of the act or event giving rise to the claim is not of importance in this connection. [...]

NORWAY

a)	Registration no.	N/1
b)	Date	18 February 1992
c)	Author(ity)	Eidsivating Court of Appeal, (Eidsivating Lagmannsrett), a judgement
d)	Parties	Brødrene Smith Entreprenørforretning (company) vs. den Sør-Afrikanske stat (The South African State – State)
e)	Points of law	The Court established that a suit brought against a State in the latter`s capacity as a party to a contract governed by private law, would normally fall outside the scope of state immunity. The Court therefore referred the case back to Oslo City Court for further deliberations. The court stated explicitly that the fact that the construction work were supposed to be carried out on a building used for consular purposes and enjoying inviolability had no bearing on the competence of the court to entertain such a matter.
f)	Classification no.	0.b.1, 1.b, 2.c
g)	Source(s)	Extracts published in Nordic Journal of International Law, No 70, 2001, page 531-566.
h)	Additional information	Previous case was ruled by Oslo City Court the 25 October 1990. The Oslo City Court came in its first ruling, to the opposite conclusion.
i)	Full text – extracts – translation - summaries	

a)	Registration no.	N/2
b)	Date	17 January 2001
c)	Author(ity)	Borgarting Court of Appeal (Borgarting Lagmannsrett), a judgement
d)	Parties	Constructor Norge AS (company) vs. Amerikas Forente Stater (USA)
e)	Points of law	The Court concluded that Norwegian Courts had the competence necessary to deal with a claim for compensation brought against the United States of America before Oslo City Court by a private party. The Court considered whether immunity could be denied also in cases which clearly fall within the scope of <i>acta iure gestionis</i> . The Court of Appeal concluded that customary international law does not restrict the competence of national courts only to those cases falling within the specific exemptions from immunity listed in the European Convention on State Immunity of 16 May 1972 and the draft UN Convention on Jurisdictional Immunities for States and their Property prepared by the International Law Commission. Immunity was thus denied and the case referred back to Oslo City Court for further deliberations. The Court had found that the restrictive immunity goes beyond what is envisaged in the European Convention and the Draft UN Convention.
f)	Classification no.	0.b.1, 1.b, 2.c
g)	Source(s)	Extracts published in Nordic Journal of International Law, No 70, 2001, page 531-566.
h)	Additional information	The case was previously ruled by Oslo City Court on the 9 August 2000. The Oslo City Court came to the opposite conclusion. In the Court of Appeal's Judgement both the European Convention on State Immunity of 16 May 1972 and the Draft UN Convention on Jurisdictional Immunities for States and their Property prepared by the International Law Commission, are mentioned.
i)	Full text – extracts – translation - summaries	

a)	Registration no.	N/3
b)	Date	15 October 1998
c)	Author(ity)	Borgarting Court of Appeal (Borgarting Lagmannsrett), a judgement
d)	Parties	Scancem International ANS (Private company) vs. Antione Yazbeck, Rabyeh, Libanon, Walid Yazbeck, Rabyeh, Libanon, Henri Jabre, Paris, France, Christian Jabre, London, England (private persons)
e)	Points of law	The issue at stake was whether a private company registered in Norway was liable for damages suffered by a third party as a result of an expropriation carried out by the authorities of Sierra Leone. The claimants owned shares in a cement factory, which was nationalised by the Government in Sierra Leone and later sold to the Norwegian Company. In order to settle the claim, the court had to take a prejudicial stand with regard to the legality of the expropriation made by a foreign state. The Court emphasised that the legal position of the foreign state would not be affected by its decision. On this basis it found that State immunity could not prevent it from making a prejudicial assessment of the legality of an act of that state in order to determine a claim for compensation between to private parties.
f)	Classification no.	0.b.3, 1.b, 2.c
g)	Source(s)	Extracts published in Nordic Journal of International Law, No 70, 2001, page 531-566. Published in full text in the Norwegian law review "Rettsens Gang" 1999, page 793
h)	Additional information	This case was previously ruled by Oslo City Court on the 5 May 1998. The Court of Appeal reached the same conclusion as the City Court.
i)	Full text - extracts - translation - summaries	

a)	Registration no.	N/4
b)	Date	29 May 1989
c)	Author(ity)	Eidsivating Court of Appeal (Eidsivating Lagmannsrett), a judgement
d)	Parties	A (Private Person) vs. United States of America by Department of Justice
e)	Points of law	The Court confirms that a state is not granted immunity for acts regulated by private law or acts that have any form of commercial character. The question was whether this particular business was of this character.
f)	Classification no.	0.b.2, 1.b, 2.c
g)	Source(s)	
h)	Additional information	The judgement confirmed the Asker and Bærum county court's decision of 20 January 1989
i)	Full text – extracts – translation - summaries	

a)	Registration no.	N/5
b)	Date	24.09.1999
c)	Author(ity)	The Norwegian Royal Ministry of Foreign Affairs, a letter
d)	Parties	The Norwegian Ministry of Foreign Affairs – Embassy of Ukraine
e)	Points of law	<p>The Norwegian Ministry of Foreign Affairs answers questions concerning Norwegian practice on State Immunity. It states that Norway has not adopted any general law regarding immunity of foreign states in particular. However, the Norwegian domestic law is considered to be in conformity with the rules of public international law. The Norwegian administration and the Norwegian courts will thus apply the rules of public international law, in addition to relevant provisions of applicable international conventions to which Norway is a party.</p> <p>It also states that Norwegian authorities acknowledge the distinction between the acts of a state in its sovereign capacity (<i>acta jure imperii</i>) and those of a private law or commercial character (<i>acta jure gestionis</i>), immunity not being granted for the latter. Furthermore the letter states that Norway is not bound by any international conventions or agreements specifically regulating state immunity.</p>
f)	Classification no.	0.a and 0.b, 1.b, 2.c
g)	Source(s)	
h)	Additional information	The letter refers to the decision made by Eidsivating Court of Appeal (Eidsivating Lagmannsrett) on 18 February 1992.
i)	Full text – extracts – translation - summaries	

a)	Registration no.	N/6
b)	Date	10.12.1998
c)	Author(ity)	The Norwegian Ministry of Foreign Affairs, a letter
d)	Parties	The Norwegian Ministry of Foreign Affairs - The Norwegian Veritas (Det norske Veritas)
e)	Points of law	The Norwegian Ministry of Foreign Affairs states that it acknowledges the distinction between the acts of a state in its sovereign capacity (acta jure imperii) and those of a private law or commercial character (acta jure gestionis), immunity not being granted for the latter.
f)	Classification no.	0.a and 0.b, 1.b, 2.c
g)	Source(s)	
h)	Additional information /	The letter refers to the Vienna Convention on diplomatic relations of 18 April 1961 and Eidsivating Court of Appeals (Eidsivating Lagmannsrett) judgement of 18 February 1992
i)	Full text - extracts - translation - summaries	

a)	Registration no.	N/7
b)	Date	3 March 2002
c)	Author(ity)	The Norwegian Ministry of Foreign Affairs, a verbal note
d)	Parties	The Norwegian Ministry of Foreign Affairs - the Embassy of the United States of America
e)	Points of law	The Norwegian Ministry of Foreign Affairs expresses that it does not consider that customary international law, pertaining the procedures to be followed when bringing a case against a foreign state in national courts, provides for an obligation to effect service through diplomatic channels, nor that a notice of 60 days is compulsory in such cases.
f)	Classification no.	0.c, 1.c, 2.c
g)	Source(s)	
h)	Additional information	
i)	Full text – extracts – translation - summaries	

POLANDIntroduction

During the inter-war period and after the war, Polish judicial practice has consistently adhered to the principle of absolute state immunity, including the inadmissibility of court proceedings against diplomatic representatives of other states, their diplomatic missions and consular offices.

However, in the year 2000, for the first time in Polish judicial practice, the Supreme Court admitted domestic jurisdiction in a case concerning an employment contract.

From among the rulings of the Polish Supreme Court issued in the second half of the last century the matter of state practice regarding state immunities were brought up in two rulings presented below.

In the decision of 26 September 1990 issued in the case III PZP 9/90 /published in OSNCP 1991, no 2-3, item 17/ The Supreme Court stated that the unit of the branch office of the foreign embassy is outside the scope of jurisdiction of the Polish court. In the explanation of the ruling there was expressed the opinion that none of the sovereign States is subject to the law of the other State. It undoubtedly gave voice to the theory of full /absolute/ jurisdictional immunity of the State.

However, in the explanation of the decision dated 11 January 2000 issued in the case I PKN 562/99 /published in OSNAP 2000, no. 19, item.723/, The Supreme Court stated, that the jurisdictional immunity of the State can be derived from the principle of states' equality. But that immunity can be only applied to the acts of foreign State as regards the acts of public authorities. It is impossible to link the State immunity to the acts of its bodies within the scope of civil law transactions. It means, may be, turn away from the concept of the full /absolute/ immunity of the State in favor of the concept of limited /functional/ jurisdictional immunity of the State.

Moreover, that decision pointed out the independence of the State immunity from the diplomatic immunity. In that decision The Supreme Court stated that Polish labour court has jurisdiction in the case brought by the Polish citizen against foreign embassy concerning the ineffectiveness of giving the notice terminating of the employment.

It should be noted that Polish law does not yet contain normative regulations relating to the jurisdiction immunity of foreign states and their property in proceedings before Polish courts.

a	Registration No.	PL/1
b	Date	26 September 1990
c	Authority	Supreme Court
d	Parties	Polish citizens against Embassy of Foreign State
e	Points of law	The Supreme Court of Poland stated that the unit of the branch office of the Embassy of the Russian Federation in the Republic of Poland is outside the scope of jurisdiction of the Polish court. In the explanation of the ruling there was expressed the opinion that none of the sovereign States is subject to the law of the other State. It undoubtedly gave voice to the theory of absolute jurisdictional immunity of the State.
f	Classification No.	1.a/0.a/
g	Source	OSNCP 1991/2-3/17.- III PZP 9/90
h	Additional information	
i	Summaries	in English

September 26, 1990; Supreme Court resolution SN III PZP 9/90
OSNC 1991/2 3/17 – with grounds therefor

1990.09.26 Supreme Court III PZP 9/90 OSNC 1991/2-3/17

7 judges

Presiding judge: Supreme Court President J. Wasilewski

Supreme Court Judges: J. Iwulski, A. Józefowicz, J. Łętowski, W. Masewicz
(reporting judge), W. Santera, J. Skibińska-Adamowicz.

The Supreme Court, with the participation of I.Kaszczyszyn, a public prosecutor at the Ministry of Justice, in the civil suit case filed by Andrzej B. and Wiesław B. against the Motor Vehicles Technology Centre (Centrum Techniki Samochodowej) (...) in W. for payment, after having examined at an open session the following legal problem as transmitted by the bench of three Supreme Court judges by virtue of the order of 20 March 1990:

"Does the jurisdictional immunity enjoyed by the Commercial Representation (Przedstawicielstwo Handlowe), which constitutes an integral part of the Soviet Union Embassy, cover also the organisational units subordinated to, financed by and acting at that Commercial Representation ?"

has adopted the following resolution:

The Motor Vehicles Technology Centre (...), being an organisational unit of the Commercial Representation at the Embassy of the Soviet Union in Poland, is not subject to the jurisdiction of the Polish courts.

When examining different aspects of the legal problem as submitted for resolution to the bench of seven judges, the Supreme Court considered the following:

1. The granting of immunity from civil jurisdiction to a foreign subject of rights depends on its legal status in the receiving state. In the case under consideration, the Motor Vehicles Technology Centre was established in the implementation of the arrangements provided for in the appendix to the agreement between the Polish Government and the Soviet Union of 18 July 1974 on cooperation in improving technical machines, equipment and apparatus supplied within the framework of mutual commercial exchange. In paragraph 3 of that appendix, the contracting parties have agreed, *inter alia*, to establish at the Commercial Representation of the Soviet Union in Poland three technical centres which would cooperate in the maintenance of motor vehicles, metal and plastic working machines, construction and road building machines, cranes, excavators, wheeled loaders, agricultural machines and tractors.

The phrase used in the above mentioned appendix to the intergovernmental agreement which says that the technological centres in question are to operate at "the Commercial Representation of the Soviet Union" was understood by the competent representatives of both parties in the following manner: the Commercial Representation of the Soviet Union in Warsaw, in the letter addressed to the District Court for Warszawa-Praga of 7 December 1987 designates the Motor Vehicles Technological Centre as "one of the divisions of the Commercial Representation of the Soviet Union in the People's Republic of Poland (...)". The Ministry of Foreign Affairs, in the letter of 14 December 1989, expressed the opinion that "(...) the Motor Vehicles Technology Centre (...) is an organisational unit of the Commercial Representation of the Soviet Union, which, in turn, constitutes an integral part of the Embassy of the Soviet Union in Warsaw (...)".

The Supreme Court is of the opinion that the above described legal status of the Motor Vehicles Technology Centre (...) is justified not only by the obvious right of the diplomatic mission of the Soviet Union in the Republic of Poland to freely shape the organisational structure of that mission and to determine the placement of its constituent elements, but also by other circumstances disclosed in the case. The Motor Vehicles Technology Centre is not an agency of a foreign company or a company under commercial or civil law, or a foreign employing establishment which – according to the Polish law – would have the status of a separate organisational unit with legal personality. The Centre does not conduct any manufacturing or trading activity in the territory of Poland. Its statutory tasks are limited to the promotion of the Soviet technology supplied to Poland. The statutory bodies of the Motor Vehicles Technology Centre did not have the right to submit declarations of will on behalf of the Centre, since the contracts of employment concluded with the plaintiffs in this case required "approval" to be granted by the Commercial Representative of the Soviet Union in Poland. Without considering the question whether or not the Motor Vehicles Technology Centre, within the framework of legal relations in the territory of the Republic of Poland, enjoyed a limited, i.e. special legal capacity granted to some legal persons, which extends beyond the scope of the legal problem as presented to the bench the seven judges, the Supreme Court has determined that the Centre, being an organisational unit of the Commercial Representation of the Soviet Union, did not fall within the national jurisdiction in the meaning of art. 64 § 1 of the Code of Criminal Procedure, and could not appear in the case as the defendant.

2. The Commercial Treaty concluded between the Republic of Poland and the Soviet Union on 7 July 1945 stipulates in art. 8 that the USSR will have a Commercial Representation within the Embassy structure, its legal status having been specified in an appendix to the treaty. The appendix, according to the text of art. 8 of the treaty referred to above, constitutes an integral part of the treaty. It has been stipulated in the appendix that the commercial

representative and his deputies are part of the diplomatic personnel and enjoy all the rights and privileges vested in the members of diplomatic missions. The premises occupied by the Commercial Representation and its Branches enjoy extraterritorial status and, pursuant to paragraph 5 of the appendix, persons who constitute the personnel of the Commercial Representation – citizens of the USSR are not subject to the jurisdiction of the Polish courts in matters which fall within the scope of their internal official relationship.

The commercial treaty specifies, in an unambiguous manner, the legal status of the Commercial Representation of the USSR in Poland, including its Branches or Divisions which constitute part of the Representation's organisational structure.

3. Having recognised the Motor Vehicles Technology Centre as an organisational unit of the Commercial Representation of the USSR, it is justified to conclude that in this case a suit has been filed against a diplomatic representation of a foreign state which enjoys immunity from the jurisdiction (civil, administrative) of the receiving state. This principle, being recognised and respected by the civilised international community, has been consolidated *inter alia* in art. 31, paragraph 1 of the Vienna Convention on diplomatic relations, ratified by Poland by virtue of the governmental declaration of 13 August 1965 (Journal of Laws – Dz.U. No 37, item 235). Earlier, diplomatic privileges in the bilateral relations between the Republic of Poland and the Union of Soviet Socialist Republics had been granted to the Commercial Representation of the USSR by virtue of the Commercial Treaty of 7 July 1945.

The fundamental premise to justify the exclusion of a diplomatic representation from the jurisdiction of the Polish courts is the sovereignty of the sending state, since there exists an obvious and undeniable link between the jurisdictional immunity of a state and the privileges and immunities of its organs. No sovereign and independent state which is a subject of international law can be subordinated to the law of another state.

4. Being guided by the above described premises, the Supreme Court, pursuant to art. 301, paragraph 1 of the Code of Civil Procedure, has adopted the resolution as specified in its conclusion.

a	Registration No.	PL/2
b	Date	11 January 2000
c	Authority	Supreme Court
d	Parties	Polish citizen against the Embassy of foreign State
e	Points of law	the Supreme Court stated that the jurisdictional immunity of the State can be derived from the principle of state's equality. But that immunity can be only applied to the acts of foreign State as regards the acts of public authorities. Whereas it is impossible to link the State immunity to the acts of its bodies within the scope of civil law transactions. In that decision the Supreme Court stated that Polish labor court has jurisdiction in the case brought by the Polish citizen against foreign embassy concerning the ineffectiveness of giving the notice terminating of the employment. It means that the Supreme Court of Poland first time departed from the concept of the absolute immunity of the State in favor of the concept of limited/functional/jurisdictional immunity of the State
f	Classification No.	1.b/0.b/.
g	Source	Published on OSNAP 2000/19/723 - IPN 562/99.
h	Additional information	
i	Summaries	In English

.11 Supreme Court judgement N I PKN 562/99
2000/19/723

approval: J. Ciszewski OSP 2000/11/175

ish courts do have national jurisdiction over a case involving a suit filed
ish citizen against the embassy of a foreign state to recognise the
ion of an employment contract as being ineffective (suit for reinstatement

g judge: President of the Supreme Court Jan Wasilkowski

e Court judges: Józef Iwulski (reporting judge), Jerzy Kwaśniewski

reme Court, after having examined at a closed session on 11 January 2000
filed by Maciej K. against the Embassy [...] C. in W. for reinstatement in
result of the plaintiff's cassation motion against the decision of the
al Labour and Social Security Court in Warsaw of 27 March 1998 [...]

lved:

e the appealed decision and the decision of the District Labour Court for
va Praga of 8 December 1997 [...]

Maciej K. filed a suit against the Embassy [...] C. in W. for the
ion of the termination notice he received on 22 October 1997 as being
ve.

istrict Labour Court for Warszawa-Praga, by virtue of its decision of
iber 1997, dismissed the suit. The District Court determined that the case
fall within the national jurisdiction, which prevents the case against the
tic mission of a foreign state from being examined by the Polish court.

ntiff filed an appeal against that decision in which he argued that when
work at the Embassy [...] C., he entered into a contract with an employing
ment, since under art. 6, paragraph 2 of the Labour Code, the
tation of a **Civil** state in Poland is such an establishment. Therefore the
[...] C. is a party of thus established legal relationship, and may be sued
ie Polish court. He claimed that the absence of national jurisdiction
to by the District Court concerns foreigners, i.e. heads of diplomatic
tations of foreign countries accredited in the Republic of Poland as
specified in art. 1111, paragraph 1, subparagraph 1 of the Code of Civil
Procedure. None of the provisions concerning exemption from the national
jurisdiction makes use of the term diplomatic mission of a foreign state.

By virtue of the decision of 27 March 1998 [...], the Provincial Labour and Social Security Court in Warsaw dismissed the appeal. The court of second instance determined that art. 6, paragraph 2 of the Labour Code and the provisions of the employment contract do not lift the jurisdictional immunity under art. 1111, paragraph 1, subparagraph 1 of the Code of Criminal Procedure.

The plaintiff filed a cassation motion against that decision. He claimed that article 1111 paragraph 1, subparagraph 1 was infringed by its improper application. He argued that it is not the ambassador or any other representative of the diplomatic mission of a foreign state who is the defendant, but the representation of a foreign state as indicated in art. 6 paragraph 2 of the Labour Code, which, being the employer, has capacity to appear before court and be a party to proceedings (art. 460 of the Code of Civil Procedure), and therefore may be sued in labour law cases.

The Supreme court has determined as follows:

The cassation is justified, since article 1111 paragraph 1, subparagraph 1 of the Code of Civil Procedure had been applied mistakenly. It is because that provision concerns the immunity of a diplomatic representative and not the immunity of a foreign state. It was the Embassy [...] C., as the plaintiff's employer in the meaning of art. 3 and 6, paragraph 2 of the Labour Code, that was the defendant in the case. The Code of Civil Procedure does not regulate in any way the jurisdictional immunity of a foreign state which may be derived from the principle of equality of states. However, such immunity may only cover the activities of a foreign state in the execution of acts of public authority. The immunity of a foreign state may not apply to the activities of that state's authorities in the field of civil law (commercial) transactions in the territory of another state. The Embassy [...] appears in the case under consideration as an employer. i.e. an entity which is a party to civil law transactions. In this capacity, it does not execute acts of public authority of a foreign state, and therefore the jurisdictional immunity enjoyed by that state does not apply to it. Nor are there any grounds to assume that the Embassy [...] C. is covered by the diplomatic immunity of the Ambassador as the diplomatic representative. As has been indicated above, it is the employer (Embassy) which is the defendant party in the case, and the diplomatic representative may only be considered to be the person who manages the organisational unit of the employer (art. 3¹, paragraph 1 of the Labour Code). It is for those reasons that the Supreme Court, in the panel of judges examining the case in question, does not share the interpretation included in the decision of 18 March 1998, I PKN 26/98 (OSNAPIUS 1999 No 5, item 172) and agrees with the critical assessment of it as expressed in the literature (PIP 1999 No 10, p. 108, a gloss by J. Skrzydło, and Palestra 1999 No 9-10, p. 202, a gloss by J. Ciszewski).

For those reasons, pursuant to art. 393¹⁰ of the Code of Civil Procedure, it was legitimate to revoke the appealed decision and the decision of the court of first instance.

PORTUGAL

This report contains fourteen judicial decisions on the subject of State immunities, compiled and treated by the national co-ordinator.

Notwithstanding the recommendation of the CAHDI not to include State practice dated before 1970, it was decided to open one exception to include a judicial decision of 1962, for it was the first one on the issue of immunity from jurisdiction and influenced most of the later decisions of Portuguese courts. Although there is not such a thing as the precedent rule in the Portuguese legal system, the importance of the 1962 decision was considerable.

(a)	Registration no.	P/1
(b)	Date	27 February 1962
(c)	Author(ity)	Supreme Court (Supremo Tribunal de Justiça) – Appeal
(d)	Parties	United States of America (State) v. Companhia Portuguesa de Minas, SARL (Private Company)
(e)	Points of Law	<ul style="list-style-type: none"> • immunity from jurisdiction of foreign States as to the generality of cases • the only exceptions being express or tacit waiver and cases related to immovable property or forum hereditatis
(f)	Classification n.º	0.a, 1.a
(g)	Source(s)	Boletim do Ministério da Justiça, 1962, No. 114
(h)	Additional Information	-
(i)	Full Text – Extracts – Translation – Summaries	Summary and Full Text: Annex 1 * Summary in English: Annex 2

P/1**APPENDIX 2**

In an appeal before the Supreme Court by the United States of America against a Portuguese private company, the Court considered that:

Foreign States are entitled to immunity from jurisdiction as to the generality of cases that could be brought against them, even if acting as private law persons. Such immunity does not encompass the cases of express or tacit waiver and cases related to immovable property or forum hereditatis. Tacit waiver presupposes a concrete will by the author of the waiver and resort to judicial proceedings by a foreign State, namely in the case of a counterclaim cannot be considered as amounting to such waiver.

(a)	Registration no.	P/2
(b)	Date	5 January 1981
(c)	Author(ity)	District Court (Tribunal da Relação do Porto) – Appeal
(d)	Parties	Aurélio Moreira de Sousa (individual) v. Consulado Geral de Espanha no Porto (Consular mission)
(e)	Points of Law	<ul style="list-style-type: none"> • immunity from jurisdiction of foreign States • the only exceptions being express or tacit but unequivocal waiver • immunity encompasses not only acts ius imperii, but also cases where the State acts as a private law person • a Consulate constitutes a representation of a foreign State and its acts are, whether of ius imperii or ius gestionis, acts of the State and thus Portuguese courts lack competency to judge them
(f)	Classification n.º	0.a, 1.a
(g)	Source(s)	Colectânea de Jurisprudência, 1981, No. VI-1
(h)	Additional Information	-
(i)	Full Text – Extracts – Translation – Summaries	Summary and Full Text: Annex 1 * Summary in English: Annex 2

P/2

APPENDIX 2

In an appeal before the District Court of Porto by an individual against the Spanish Consulate, the Court considered that:

When one of the subjects of a judicial proceeding is a foreign State, namely when the State is the defendant, one has to look into the international rules regarding jurisdictional competency contained in treaties and custom and not in internal law. There is no general rule of international law regarding jurisdictional competency. Foreign States are entitled to immunity from jurisdiction, the only exceptions being express or tacit but unequivocal waiver, for the waiver cannot be presumed. This immunity encompasses not only acts *ius imperii*, but also cases where the State acts as a private law person. A Consulate constitutes a representation of a foreign State and its acts are, whether of *ius imperii* or *ius gestionis*, acts of the State and thus Portuguese courts lack competency to judge them.

(a)	Registration no.	P/3
(b)	Date	6 July 1983
(c)	Author(ity)	District Court (Tribunal da Relação de Lisboa) – Appeal
(d)	Parties	António Portugal e Castro (individual) v. Estado Brasileiro (State)
(e)	Points of Law	<ul style="list-style-type: none"> • foreign States are entitled to immunity from jurisdiction • including regarding labour law questions • the issue should be solved by diplomatic means
(f)	Classification n.º	0.a, 1.a
(g)	Source(s)	Colectânea de Jurisprudência, 1983, No. VIII-4
(h)	Additional Information	-
(i)	Full Text – Extracts – Translation – Summaries	Summary and Full Text: Annex 1 * Summary in English: Annex 2

P/3

APPENDIX 2

In an appeal before the District Court of Lisbon by an individual against the Brazilian State, the Court considered that:

Foreign States are entitled to immunity from jurisdiction, including regarding labour law questions. Thus the initial request shall be considered as inadmissible and the issue should be solved by diplomatic means.

(a)	Registration no.	P/4
(b)	Date	11 May 1984
(c)	Author(ity)	Supreme Court (Supremo Tribunal de Justiça) – Appeal
(d)	Parties	A. (Individual) v. Ambassador in Portugal (State)
(e)	Points of Law	<ul style="list-style-type: none"> • a foreign State is entitled to immunity from jurisdiction in Portuguese courts, in a law suit against it by a Portuguese national fired by the Embassy where he was working
(f)	Classification n.º	0.a, 1.a
(g)	Source(s)	Boletim do Ministério da Justiça, 1984, No. 337
(h)	Additional Information	-
(i)	Full Text – Extracts – Translation – Summaries	Summary and Full Text: Annex 1 * Summary in English: Annex 2

P/4

APPENDIX 2

In an appeal before the Supreme Court by an individual against a foreign State, the Court considered that:

A foreign State is entitled to immunity from jurisdiction in Portuguese courts, in a law suit against it by a Portuguese national fired by the Embassy where he was working.

(a)	Registration no.	P/5
(b)	Date	17 June 1987
(c)	Author(ity)	Supreme Court (Supremo Tribunal de Justiça) – Appeal
(d)	Parties	Carlos Manuel Flores André and Miguel Carlos Parada André (individuals) v. Spanish Institute in Lisbon (Foreign School)
(e)	Points of Law	<ul style="list-style-type: none"> the foreign school is distinct and has autonomy from the foreign State and thus can be tried in Portuguese courts.
(f)	Classification n.º	0.c, 1.c
(g)	Source(s)	Boletim do Ministério da Justiça, 1987, No. 368
(h)	Additional Information	-
(i)	Full Text – Extracts – Translation – Summaries	Summary and Full Text: Annex 1 * Summary in English: Annex 2

P/5

APPENDIX 2

In an appeal before the Supreme Court by two individuals against a foreign school, the Court considered that:

The foreign school is distinct and has autonomy from the foreign State and thus can be tried in Portuguese courts.

(a)	Registration no.	P/6
(b)	Date	9 November 1988
(c)	Author(ity)	District Court (Tribunal da Relação de Lisboa) – Appeal
(d)	Parties	Maria Cristina Silva (individual) v. Spanish Institute, Spanish Embassy and Spanish State (Foreign School, Foreign Embassy and Foreign State).
(e)	Points of Law	<ul style="list-style-type: none"> Portuguese courts are internationally incompetent to judge a law suit against the Spanish State
(f)	Classification n.º	0.a, 1.a
(g)	Source(s)	Colectânea de Jurisprudência, 1988, No. XIII-5
(h)	Additional Information	-
(i)	Full Text – Extracts – Translation – Summaries	<p>Summary and Full Text: Annex 1 *</p> <p>Summary in English: Annex 2</p>

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APPENDIX 2

In an appeal before the District Court of Lisbon by an individual against the Spanish Institute, the Spanish Embassy and the Spanish State, the Court considered that:

Portuguese courts are internationally incompetent to judge a law suit against the Spanish State.

(a)	Registration no.	P/7
(b)	Date	12 July 1989
(c)	Author(ity)	District Court (Tribunal da Relação de Lisboa) – Appeal
(d)	Parties	Bernardette Bravo (individual) v. Republic of Zaire (State)
(e)	Points of Law	<ul style="list-style-type: none"> Portuguese courts are internationally incompetent to judge a labour suit against a foreign State
(f)	Classification n.º	0.a, 1.a
(g)	Source(s)	Colectânea de Jurisprudência, 1989, No. XIV-4
(h)	Additional Information	-
(i)	Full Text – Extracts – Translation – Summaries	<p>Summary and Full Text: Annex 1 *</p> <p>Summary in English: Annex 2</p>

P/7**APPENDIX 2**

In an appeal before the District Court of Lisbon by an individual against the Republic of Zaire, the Court considered that:

In view of the sovereignty and independence of States regarding other States, an international law customary rule has developed according to which foreign States are entitled local immunity from jurisdiction in the judicial proceedings filed against them. This rule applies in Portugal in accordance with article 8 of the Constitution. Therefore, Portuguese courts are internationally incompetent to judge a civil or labour suit against a foreign State.

(a)	Registration no.	P/8
(b)	Date	30 January 1991
(c)	Author(ity)	Supreme Court (Supremo Tribunal de Justiça) – Appeal
(d)	Parties	Rosa de Jesus Lourenço Barros Fonseca (individual) v. Gilbert Buddig Larren and Madeleine Laurent Larren (French Diplomats)
(e)	Points of Law	<ul style="list-style-type: none"> • a State's immunity from jurisdiction is applicable also to its diplomatic agents, but only when the acts are practised on behalf of the State and for the purposes of the mission and not in case of acts in their private capacity
(f)	Classification n.º	0.b.2, 1.b
(g)	Source(s)	Boletim do Ministério da Justiça, 1991, No. 403
(h)	Additional Information	-
(i)	Full Text – Extracts – Translation – Summaries	Summary and Full Text: Annex 1 * Summary in English: Annex 2

P/8**APPENDIX 2**

In an appeal before the Supreme Court by one individual against two foreign diplomats, the Court considered that:

The State's immunity from jurisdiction contained in the Vienna Convention on Diplomatic Relations aims at ensuring the reciprocal independence of States and prevents States from being placed in the position of defendants in the courts of another State. This rule is applicable also to the diplomatic agents of a State, but only when the acts are practised on behalf of the State and for the purposes of the mission and not in case of acts in their private capacity. Hiring a domestic servant for the private residence of a diplomat is an act outside of the diplomatic functions of the agent and therefore not included in the immunity from jurisdiction.

(a)	Registration no.	P/9
(b)	Date	4 May 1994
(c)	Author(ity)	District Court (Tribunal da Relação de Lisboa) – Appeal
(d)	Parties	Anabela Catarina Ramos et al. (individuals) v. US Government (State)
(e)	Points of Law	<ul style="list-style-type: none"> Portuguese courts are internationally incompetent to judge labour contracts entered into with the US Diplomatic Mission in Portugal, since this State has not waived its immunity from jurisdiction
(f)	Classification n.º	0.a, 1.a
(g)	Source(s)	Unpublished
(h)	Additional Information	-
(i)	Full Text – Extracts – Translation – Summaries	<p>Summary and Full Text: Annex 1 *</p> <p>Summary in English: Annex 2</p>

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APPENDIX 2

In an appeal before the District Court of Lisbon by a group of individuals against the US Government, the Court considered that:

Portuguese courts are internationally incompetent to judge labour contracts entered into with the US Diplomatic Mission in Portugal, since this State has not waived its immunity from jurisdiction.

(a)	Registration no.	P/10
(b)	Date	4 February 1997
(c)	Author(ity)	Supreme Court (Supremo Tribunal de Justiça) – Appeal
(d)	Parties	Manuel Ventura Arroja (individual) v. Republic of Bolivia (State)
(e)	Points of Law	<ul style="list-style-type: none"> • immunity of foreign States is restricted to acts jure imperii alone, where the State exercises its sovereignty • honorary consuls enjoy immunity from jurisdiction for acts practised in the exercise of the consular function since it is a public administrative function
(f)	Classification n.º	0.a, 1.a
(g)	Source(s)	Boletim do Ministério da Justiça, 1997, No. 464
(h)	Additional Information	-
(i)	Full Text – Extracts – Translation – Summaries	Summary and Full Text: Annex 1 * Summary in English: Annex 2

P/10**APPENDIX 2**

In an appeal before the Supreme Court by one individual against the Republic of Bolivia, the Court considered that:

According to customary international law, foreign States are entitled to immunity from jurisdiction, based in the principle *par in parem non habet imperium*, automatically received in the Portuguese domestic law in accordance with article 8^o/1 of the Constitution of the Republic. Acts of a public nature – *acta jure imperii* – are those which derive from the exercise of public power and constitute the realisation of a public function of the collective person, regardless of whether they are accompanied or not of coercive means and of technical or other rules that should be applied. Acts of a private nature – *acta jure gestionis* – are those comprised in an activity of the collective person that, in the absence of the public power, acts in a position of parity with private persons, in the same conditions and regime that would apply to a private person, the private law rules being applicable. Immunity of foreign States is restricted to acts *jure imperii* alone, for this rule having its basis in the principle of equality and autonomy, it is logical that such immunity is only to exist where the State exercises its sovereignty. Honorary consuls, that perform a merely administrative role, enjoy immunity from jurisdiction for acts practised in the exercise of the consular function since it is a public administrative function.

(a)	Registration no.	P/11
(b)	Date	5 March 1998
(c)	Author(ity)	District Court (Tribunal da Relação de Lisboa) – Appeal
(d)	Parties	Rui Manuel do Couto Mendes Valada (individual) v. Popular Republic of Angola (State)
(e)	Points of Law	<ul style="list-style-type: none"> the principle of the immunity from jurisdiction of foreign States does not apply when the State is sued in its quality of party to a private law contract, but only when the foreign State intervenes in the legal relationship in the quality of sovereign State, with “jus imperii”
(f)	Classification n.º	0.b.2, 1.b
(g)	Source(s)	Colectânea de Jurisprudência, 1998, No. XXIII-2
(h)	Additional Information	-
(i)	Full Text – Extracts – Translation – Summaries	Summary and Full Text: Annex 1 * Summary in English: Annex 2

P/11**APPENDIX 2**

In an appeal before the District Court of Lisbon by an individual against the Republic of Angola, the Court considered that:

The principle of the immunity of jurisdiction of foreign States does not apply when the State is sued in its quality of party to a private law contract, but only when the foreign State intervenes in the legal relationship in the quality of sovereign State, with *jus imperii*. In this case (labour contract), the foreign State is a mere subject, acting without *jus imperii* and in the same situation as the other subjects of the legal relationship, and thus should be treated in equality as the other private persons. It would be an unjustified privilege if the foreign State that enters into a private law contract would be immune from all possibilities of being sued for violations of the contractual relationship and its consequences, namely compensation.

(a)	Registration no.	P/12
(b)	Date	9 December 1998
(c)	Author(ity)	Supreme Court (Supremo Tribunal de Justiça) – Appeal
(d)	Parties	A. (individual) v. France (State)
(e)	Points of Law	<ul style="list-style-type: none"> • if there is no conventional rule binding for a State barring immunity from jurisdiction in the case of labour contracts, one has to apply the customary rule according to which foreign States enjoy such immunity
(f)	Classification n.º	0.a, 1.a
(g)	Source(s)	Boletim do Ministério da Justiça, 1999, No. 482
(h)	Additional Information	-
(i)	Full Text – Extracts – Translation – Summaries	<p>Summary and Full Text: Annex 1 *</p> <p>Summary in English: Annex 2</p>

P/12**APPENDIX 2**

In an appeal before the Supreme Court by one individual against the French State, the Court considered that:

There is no convention or treaty binding upon Portugal regarding State immunities. Portugal is not bound by article 5^o, n.º 1 of the European Convention regarding State Immunities of 1972, that bars such immunity in the case of labour contracts. Therefore, one has to apply the customary rule of international law according to which foreign States enjoy immunity from jurisdiction in local courts in judicial proceedings against them.

This customary rule is automatically received by Portuguese domestic law, in accordance with article 8^o, n.º 1, of the Constitution of the Portuguese Republic.

In view of such immunity from jurisdiction, a Portuguese citizen who worked as a driver at the French Embassy in Portugal cannot resort to judicial proceedings against the French State, in order to obtain the payment of alleged labour credits.

(a)	Registration no.	P/13
(b)	Date	23 February 2000
(c)	Author(ity)	District Court (Tribunal da Relação de Lisboa) – Appeal
(d)	Parties	Jorge Manuel Nunes Marques (individual) v. Saudi Arabia Embassy (State)
(e)	Points of Law	<ul style="list-style-type: none"> • the Court cannot judge this case against a foreign State because the Ambassador expressly rejected the jurisdiction of Portuguese Courts • the trial could only proceed if the defendant had waived this immunity
(f)	Classification n.º	0.a, 1.a
(g)	Source(s)	Unpublished
(h)	Additional Information	-
(i)	Full Text – Extracts – Translation – Summaries	<p>Summary and Full Text: Annex 1 *</p> <p>Summary in English: Annex 2</p>

P/13**APPENDIX 2**

In an appeal before the District Court of Lisbon by an individual against the Saudi Arabia Embassy, the Court considered that:

There is a rule of public international law according to which the sovereign State cannot be sued in a court of another State. That is what is called immunity from jurisdiction of foreign sovereign States. It is possible to renounce to this immunity, but the Court cannot judge this case against a foreign State because the Ambassador expressly rejected the jurisdiction of Portuguese Courts and there is no international treaty binding for the Portuguese State that would remove such immunity in regard to labour contracts.

(a)	Registration no.	P/14
(b)	Date	13 December 2000
(c)	Author(ity)	District Court (Tribunal da Relação de Lisboa) – Appeal
(d)	Parties	Maria Aparecida Pereira de Melo Cunha Brazão (individual) v. Brazilian Embassy and Republic of Brazil (State)
(e)	Points of Law	<ul style="list-style-type: none"> • immunity from jurisdiction of foreign States must have a restrictive scope, limited to acts of public power, practised under the “jus imperii” • when the State acts “jure gestionis” there is no immunity from jurisdiction • in this case even if one applied the principle of absolute immunity, the Republic of Brazil waived such immunity • the court is internationally competent to judge the case
(f)	Classification no.	0.b.2, 1.b
(g)	Source(s)	Unpublished
(h)	Additional Information	-
(i)	Full Text – Extracts – Translation – Summaries	Summary and Full Text: Annex 1 * Summary in English: Annex 2

P/14**APPENDIX 2**

In an appeal before the District Court of Lisbon by an individual against the Brazilian State, the Court considered that:

Immunity from jurisdiction of foreign States must have a restrictive scope, limited to acts of public power, practised under the “jus imperii”; when the State acts “jure gestionis” there is no immunity from jurisdiction. The international community, doctrine and jurisprudence are evolving in the sense of restricting the State’s immunity. In this case (labour contract), the foreign State is a mere contractual party acting without jus imperii and in the same situation as the other subjects of the legal relationship, and thus should be treated in equality as the other private persons. However, even if one applied the principle of absolute immunity, the Republic of Brazil waived such immunity by accepting the local jurisdiction and by refraining from invoking such immunity, having accepted to the cited and having appointed a lawyer to represent her in court. The court is internationally competent to judge the case of the claimant against the Republic of Brazil for the labour relationship between her and the Brazilian Embassy in Lisbon.

ROMANIA**Explanatory note**

The activity of research for documentation concerning the Romanian practice in this field revealed that such documentation exists at the level of judicial authorities.

There is no documentation issued by the executive or parliamentary Romanian bodies on this item.

As to the documentation provided by the judicial bodies from Romania, it comes out that the case-law is very poor. Moreover, the case-law is not uniform, which is understandable, taking into account that, in none of the cases, the Supreme Court of Justice pronounced a decision on this item, which would have consisted in guidelines for the judicial bodies.

In a case of 2001, the Tribunal of Bucharest considered that the 1961 Vienna Convention on Diplomatic Relations does not grant immunity for *iure gestionis* acts.

Nevertheless, in 2002, the Tribunal of Bucharest considered that the same Convention prevents a foreign State from being defendant in a case involving *iure gestionis* acts, such as acts related to labour rights of the employees of the Embassy.

The same opinion is supported by the Court of Appeal of Bucharest in an address to the Ministry of Foreign Affairs of Romania, stating that foreign States enjoy absolute immunity, irrespective of the nature of the acts fulfilled.

The fluctuant character of the judicial practice is, in the viewpoint of the Ministry of Foreign Affairs of Romania, an additional reason pleading for the elaboration of a legally binding instrument setting forth precisely in which hypothesis foreign States enjoy immunity.

(a)	Registration no.	RO/1
(b)	Date	29.05.2003
(c)	Author(ity)	Court of Appeal of Bucharest
(d)	Parties	-
(e)	Points of law	<p>The Court establishes that Romanian courts are not competent to consider any kind of disputes in which a foreign State, its representative of the diplomatic representation is defendant, excepting for cases where the respective State waives its immunity.</p> <p>In case where the foreign State or its representative is a claimant, it is deemed to have waived its immunity.</p>
(f)	Classification no.	0.a., 0.b., 0.b.1, 1.a, 2.a
(g)	Source(s)	Address from the chairman of the IIIrd Civil Section to the Chairman of the Court of Appeal, sent as being relevant for the case-law of the Court of Appeal of Bucharest to the Ministry of Foreign Affairs of Romania
(h)	Additional information	The classification from point f) is valid only for cases where the State is defendant in the dispute.
(i)	Full text - extracts - translation - summaries	Excerpts in English : Appendix 1

Appendix 1***Unofficial translation*****“Romania****Court of Appeal of Bucharest****The IIIrd Civil Section****Cabinet of the Chairman****29.05.2003****To the President of the Court of Appeal of Bucharest**

Following your letter no. 2869/c/13/05.2003, asking for the viewpoint of the magistrates from this Section with regard to the sphere of the States immunity and the participation of States in any dispute tried in Romania, we inform you that:

We consider that the foreign Stat, its representative of the diplomatic mission of the foreign State may not be defendants in any dispute tried in Romania, irrespective of their nature, taking into account that they enjoy immunity according to article 31 of the Vienna Convention on Diplomatic Relations, ratified by Romania by Decree no. 566 of 1968.

[...]

In case where the State or its representatives are applicants, they are deemed to have waived immunity. (art. 32 (3) of the Convention).

[...]”

(a)	Registration no.	RO/2
(b)	Date	5.06.2002
(c)	Author(ity)	Tribunal of Bucharest
(d)	Parties	A. S. M. vs The Embassy of P. in Romania
(e)	Points of law	The Tribunal establishes that according to the Vienna Convention on Diplomatic Relations (1961) diplomatic missions enjoy immunity, therefore they may not be a Party as defendant in disputes before the Romanian courts.
(f)	Classification no.	0.b., 0.b.2 1.a
(g)	Source(s)	Address from the chairman of the IVth Civil Section to the Chairman of the Tribunal of Bucharest, sent as being relevant for the case-law of the Tribunal to the Ministry of Foreign Affairs of Romania
(h)	Additional information	
(i)	Full text - extracts - translation - summaries	Excerpts in English : Appendix 2

Appendix 2*Unofficial translation***“Tribunal of Bucharest - the 4th Civil Section****The Civil Decision no.1136 R****Public hearing: 5.06.2002**

[...]

The Court is called to pronounce upon the appeal on points of law dispute made by A. S. M. versus the Embassy of P. in Romania[...] having as an object a labour dispute [...].A. S.M. was an auditor at the Embassy of P. in Romania and considers that its labour contract was abusively put an end [...]

Taking into account art. 31 of the Vienna Convention on Diplomatic Relations which guarantees immunity of jurisdiction for diplomatic missions, the Embassy of P. in Romania may not be a Party in the present case. Having due regard to these legal provisions, the Court [...] rejects the contestation as being introduced against a person having no capacity of stay in Court as defendant. [...]”

Pilot Project of the Council of Europe on State practice on State Immunity

(a)	Registration no.	RO/3
(b)	Date	9.03.2001
(c)	Author(ity)	The Vth Civil and Administrative Section of the Tribunal of Bucharest
(d)	Parties	G. M. & T. I. vs The Embassy of P. in Bucharest
(e)	Points of law	The Tribunal establishes that in cases related to real estate, even if the foreign State is defendant, it has to be considered a legal person of Civil Law and therefore it does not enjoy immunity of jurisdiction.
(f)	Classification no.	0.b., 1.b
(g)	Source(s)	Address from the chairman of the Tribunal of Bucharest, sent as being relevant for the case-law of the Court of Appeal of Bucharest to the Ministry of Foreign Affairs of Romania
(h)	Additional information	
(i)	Full text - extracts - translation - summaries	Excerpts in English: Appendix 3

Appendix 3

Unofficial translation

“Tribunal of Bucharest, the V th Civil and Administrative Section

Civil Decision no.593

Public Hearing of 9.03.2001

[...] The object of the case is the evacuation of the Embassy of P. from the building which is owned by the applicants. [...]

The Tribunal considers that the P. State has the capacity to stay in Court as defendant, as it acted in the case judged by the Court as a civil moral person and therefore is deemed not to have immunity of jurisdiction. [...]

RUSSIAN FEDERATION

Explanatory Note

There are two main sources regulating the issues of jurisdictional immunities of foreign States in the Russian Federation: international treaties to which the Russian Federation is a party and national legislation.

Until recently the prevailing view on the problem of jurisdictional immunities of a State was "absolute immunity." Without the consent of a foreign State no claim could be made in a court against that State. Several provisions of the former legislation on this issue are still in force. Therefore, there are practically no judicial cases on this point.

With the adoption in 1994 of a new Civil Code of the Russian Federation there has been some evolution in the concept of jurisdictional immunity of a State and the Russian legislation started moving towards "functional", or limited immunity, yet a special law on the immunity of a foreign State and its property is still under work.

1. International legal instruments

According to article 15 (4) of the Constitution of the Russian Federation the generally recognized norms and principles of international law and international treaties of the Russian Federation form an integral part of its legal system.

Russian Federation is a party to several conventions, dealing with various aspects of immunity of foreign States, among them the 1961 Vienna Convention on Diplomatic Relations, the 1963 Vienna Convention on Consular Relations, the 1982 United Nations Convention on the Law of the Sea and others.

Russian Federation is not a party to the 1972 European Convention on State Immunity.

2. Domestic legislation

Legislation of the Russian Federation has no special act regulating the issue of State immunity. However, certain laws contain provisions dealing with particular aspects of foreign State immunity.

(a)	Registration no.	RUS/1
(b)	Date	11.06.1964 (as amended on 01.08.1980)
(c)	Authority	Supreme Soviet of the Russian Soviet Federative Socialist Republic
(d)	Parties	-
(e)	Points of law	<p>Civil Procedural Code of the Russian Soviet Federative Socialist Republic</p> <p><u>Article 435</u></p> <p>Marking a claim against a foreign State, pre-judgement measures of constraint and attachment against property of a foreign State located on the territory of the USSR, may be taken only with the consent of the competent authorities of the respective State.</p> <p>Members of diplomatic missions accredited in the USSR and other persons indicated in the relevant laws and international treaties of the USSR, may be subject to the jurisdiction of Soviet courts in respect of civil proceedings only to the extent provided by the norms of international law or international treaties of the USSR.</p> <p>In accordance with article 61 of the Principles of civil proceedings in the USSR and union republics, in cases where a foreign State doesn't ensure to the Soviet state, its property or representatives of the Soviet State the same scope of immunity, which is provided to a foreign state, its property or its representatives in the USSR according to the present article, the Council of Ministers of the USSR or any other competent authority may provide for counter-measures in respect of this State, its property or its representative.</p>
(f)	Classification	1.a; 2.a
(g)	Source	Vedomosty of the Supreme Council of the RSFSR, 1980, № 32, p.987
(h)	Additional information	Article 435 is reproduced as amended by the Decree of the Presidium of the Supreme Council of the Russian Soviet Federative Socialist Republic of 01.08.1980, the article is still in force.

(a)	Registration no.	RUS/2
(b)	Date	24.07.2002
(c)	Authority	State Duma of the Russian Federation
(d)	Parties	-
(e)	Points of law	<p>Arbitration Procedural Code of the Russian Federation</p> <p style="text-align: center;"><u>Article 251</u></p> <p>A foreign State acting as a sovereign enjoys immunity from the jurisdiction of the court in respect of a claim, brought against it in arbitration courts of the Russian Federation, in respect of its involvement in a proceeding as a third person, in respect of arrest of the property belonging to that foreign State and located on the territory of the Russian Federation, and in respect of measures of constraint.</p> <p>Execution against property by a decision of an arbitration court is permitted only with the consent of the competent authorities of the relevant State, unless otherwise provided by an international treaty of the Russian Federation or a federal law.</p> <p>Judicial immunity of international organisations is determined by international treaties of the Russian Federation and a federal law.</p> <p>Renouncement from judicial immunity must be made in the order, provided by the law of a foreign state or by the rules of an international organisation. In this case the arbitration court proceeds with the case according to the order provided by the present Code.</p>
(f)	Classification no.	1.b; 2.a.
(g)	Source	Federal law № 95, "Sobranie zakonodatelstva Rossijskoy Federatsii" 29.07.2002, № 30, p.3012
(h)	Additional information	-

(a)	Registration no.	RUS/3
(b)	Date	30.11.1994
(c)	Authority	State Duma of the Russian Federation
(d)	Parties	-
(e)	Points of law	Civil Code of the Russian Federation, Part One Article 127 Particular aspects of liability of the Russian Federation and subjects of the Russian Federation in relations, regulated by civil legislation, with foreign entities, citizens or States are defined by a law on immunity of State and its property.
(f)	Classification no.	1.c; 2.c.
(g)	Source	"Sobranie zakonodatelstva Rossijskoy Federatsii", 05.12.1994, № 32, p.3301, Federal law № 51
(h)	Additional information	The law on immunity of State and its property, to which art.127 of the Civil Code referes, is not yet adopted.

(a)	Registration no.	RUS/4
(b)	Date	14.11.2002 Federal law № 138
(c)	Authority	State Duma of the Russian Federation
(d)	Parties	-
(e)	Points of law	<p>Civil Procedural Code of the Russian Federation</p> <p><u>Article 401</u></p> <p>1. Marking a claim against a foreign state, evolving a foreign State into a proceeding as a defendant or a third person, arrest of property of a foreign State located on the territory of the Russian Federation, taking against that property other measures of constraint, attachment against that property for execution of a decision of a court may be taken only with the consent of the competent authorities of the respective State, unless otherwise provided by an international treaty of the Russian Federation or by a federal law.</p> <p>2. International organisations may be subject to jurisdiction of the courts of the Russian Federation in respect of civil matters to the extent it is provided by the international treaties of the Russian Federation, by federal laws.</p> <p>3. Members of diplomatic missions accredited in the Russian Federation and other persons indicated in the relevant federal laws and international treaties of the Russian Federation, may be subject to the jurisdiction of the courts of the Russian Federation in respect of civil proceedings only to the extent provided by the generally recognized principles and norms of international law or international treaties of the Russian Federation.</p>
(f)	Classification	1.a; 2.a
(g)	Source	-
(h)	Additional information	The Civil Procedural Code of the Russian Federation will enter into Force in February 2003. Article 401 will substitute article 435 of the Civil Procedural Code of the RSFSR.

3. Judicial practice

(a)	Registration no.	RUS/5
(b)	Date	-
(c)	Authority	High Arbitration Court of the Russian Federation
(d)	Parties	Russian Co. Embassy of State X
(e)	Points of law	<p>A foreign Embassy concluded a building contract with a Russian company.</p> <p>The Russian company applied to the arbitration court claiming to take recourse upon debt for the works done.</p> <p>The Embassy appealed to the High Arbitration Court stating that the contract was concluded not for commercial purposes and therefore the Embassy enjoyed immunities from the jurisdiction of Russian courts.</p> <p>High Arbitration court recommended to the lower court to study if the Embassy had expressed its consent to the exercise of jurisdiction by Russian courts through concluding a contract. In case the Embassy has not consented to the exercise of jurisdiction, the High Arbitration Court recommended to apply Article 213 (1) of Arbitration Procedural Code of the Russian Federation and to stop the proceedings for the reasons of the immunity of a foreign state.</p>
(f)	Classification no.	1.a
(g)	Source	Review of practice of arbitration courts concerning the protection of foreign investments (Information letter of Presidium of the High Arbitration Court of the Russian Federation № 58 of 18.01.2001)

(a)	Registration no.	RUS/6
(b)	Date	-
(c)	Authority	High Arbitration Court of the Russian Federation
(d)	Parties	Embassy of State X v. Russian Company
(e)	Points of law	<p>An Embassy of a foreign State brought a claim from a building contract to a Russian company. The Russian company brought a counter-claim arising out of the same contract. The Embassy invoked immunity from the jurisdiction of the Russian court and for these reasons the counter-claim was rejected by the arbitration court.</p> <p>The court of appeal revoked the decision of the lower court stating that the Embassy had lost its right to invoke immunity by instituting the initial proceeding before the Russian court.</p>
(f)	Classification no.	1.b
(g)	Source	Review of practice of arbitration courts concerning the protection of foreign investments (Information letter of Presidium of the High Arbitration Court of the Russian Federation № 58 of 18.01.2001)
(h)	Additional information	-

(a)	Registration no.	RUS/7
(b)	Date	02.11.2000
(c)	Authority	Constitutional Court of the Russian Federation
(d)	Parties	M.Kalashnikova
(e)	Points of law	<p>Russian citizen M.Kalashnikova was dismissed from the Embassy of the United States on the basis of article 33 (2) of the Labour Code of the Russian Federation. Considering her dismissal unlawful, she made a claim against the US Embassy which was based on a contract of employment.</p> <p>The Russian court rejected the claim for the reasons of immunity of an Embassy of a foreign State provided for in art. 435 of the Civil Procedural Code. M.Kalashnikova appealed to the Constitutional Court claiming that art. 435 of the Civil Procedural Code was in contradiction with the Constitution of the Russian Federation, which guarantees her right for judicial protection.</p> <p>The Constitutional Court stated that the relevant provisions of Civil Procedural Code were subsidiary to the provisions of the Labour Code in case of disputes arising from labour contracts.</p> <p>It also stated that the Russian court didn't study the question if the application of Russian legislation by an Embassy of a foreign State could be considered as its consent for the jurisdiction of Russian courts.</p> <p>For these reasons the claim of M.Kalashnikova was to be reconsidered by the lower court and art. 435 of Civil Procedural Code was to be applied subject to the afore-mentioned order of the Constitutional Court.</p>
(f)	Classification no.	1.b
(h)	Additional information	-

SLOVAKIA

(a)	Registration no.	SK/1
(b)	Date	4 December 1963
(c)	Author(ity)	The National Council of the Slovak Republic
(d)	Parties	-----
(e)	Points of law	Exemption of the foreign States from the jurisdiction of the Slovak Courts
(f)	Classification no.	0.c., 1.b, 2.c
(g)	Source(s)	Law No. 97/1963 of 4 December 1963 on Private International Law and Rules of Procedure relating thereto as amended by law No.158/1969, No.234/1992, No.264/1992 and No.48/1996
(h)	Additional information	Act entered into force on 1 April 1964
(i)	Full text – extracts – translation - summaries	Extract: Annex 1 * Translation English: Annex 23

The Act
of 4 December 1963 No. 97 Collection of Laws
on Private International Law and Rules of Procedure
Relating Thereto
as amended by Act No. 158/1969, Act No. 234/1992, Act 264/1992 and Act No. 48/1996
Collection of Laws

The National Assembly of the Slovak Republic has passed the following Act:

INTRODUCTORY PROVISIONS

Section 1

The Purpose of the Act

The purpose of the present Act is to determine which law shall govern civil, family, labour and other similar relations with an international element, to regulate the legal status of aliens, as well as to set up the procedure before Slovak judicial authorities in the regulation of such relations and the decision-making in respect of such relations, and help thereby to facilitate international co-operation.

Section 2

International treaties

The provisions of the present Act shall apply only if an international treaty binding on the Slovak Republic or the implementing legislation thereto do not provide otherwise.

PART I

Section 47**Exemption from the jurisdiction of Slovak courts**

(1) Foreign States and persons who under international treaties or other rules of international law or specific Slovak legal regulations enjoy immunity in the Slovak Republic shall not be subject to the jurisdiction of Slovak courts.

(2) The provision of paragraph 1 shall also apply to the service of documents, to summons of the aforesaid persons as witnesses, to enforcement of decisions as well as to other procedural acts.

(3) Slovak courts, however, shall have jurisdiction if

(a) the object of the proceedings is the immovable property, situated in the Slovak Republic, of the States or persons specified in paragraph 1 or their rights relating to such immovable property owned by other persons, as well as their rights arising from the tenancy of such immovable property, unless the object of the proceedings is the payment of rent,

(b) the object of the proceedings is the inheritance in which the persons specified in paragraph 1 appear outside their official duties,

(c) the object of the proceedings relates to the employment or commercial activity which the persons specified in paragraph 1 carry out outside their official duties,

(d) the foreign State or the persons specified in paragraph 1 voluntarily submit to their jurisdiction.

(4) Service in the cases specified in paragraph 3 shall be carried out by the Ministry of Foreign Affairs. If service cannot thus be performed, the court shall appoint a guardian for the service of documents or, as the case may be, for the protection of the rights.

SPAIN**Preliminary Note**

The following documents represent a selection of the recent and relevant practice of Spain in the sphere of State immunities. As regards to legislative instruments, it is well known that Spain does not have specific legislation on jurisdictional immunities. However, we include an important article that provides for an exception to the jurisdiction of Spanish courts and tribunals when issues of immunity are concerned as defined by international law. We have also included a reference to the law that governs the contentious activity of Spanish attorneys in cases where Spain is a defendant outside its territory. As regards to the judicial activity, we have set 1986 as the starting point of our selection, because that year witnessed an important jurisprudential turn in the interpretation of jurisdictional immunities. Indeed, in 1986 the Supreme Court clearly accepted for the first time a restrictive interpretation of jurisdictional immunities of States. Today, despite some controversial judgments decided by municipal courts, the leading cases are those decided since 1992 by the Constitutional Court, duly covered by this selection.

(a)	Registration no.	E/1
(b)	Date	1.7.1985
(c)	Authority	Statute. Legislative
(d)	Parties	
(e)	Points of Law	Recognition of jurisdictional immunities and immunities of execution as defined in international law.
(f)	Classification no.	1, 2
(g)	Sources	Boletín Oficial del Estado (BOE) no. 157, 2.7.1985.
(h)	Additional information	
(i)	Full text – extracts – translations – summaries	Appendix 1: Full text Appendix 2: Summary

E/1-Appendix 1: Full Text

Artículo 21 de la Ley Orgánica del Poder Judicial (LOPJ).

1. *Los Juzgados y Tribunales españoles conocerán de los juicios que se susciten en territorio español entre españoles, entre extranjeros y españoles y extranjeros con arreglo a los establecido en la presente Ley y en los tratados y convenios internacionales en los que España sea parte.*
2. *Se exceptúan los supuestos de inmunidad de jurisdicción y de ejecución establecidos por las normas de Derecho internacional público.*

E/1-Appendix 2: Summary

The LOPJ regulates the jurisdiction of Spanish courts and tribunals. This article is important because it recognizes an exception to the jurisdiction of the Spanish courts based on immunity of jurisdiction and immunity of execution, as established by the norms of Public International law.

(a)	Registration no.	E/2
(b)	Date	11.7.1980
(c)	Authority	Executive
(d)	Parties	
(e)	Points of Law	Legislation regulating International litigation for cases in which Spain is a defendant in foreign States' courts.
(f)	Classification no.	1, 2
(g)	Sources	Boletín Oficial del Estado (BOE), no. 197, 16.8.1980
(h)	Additional information	
(i)	Full text – extracts – translations – summaries	Appendix 1: Full text Appendix 2: Summary

E/2-Appendix 1: Full Text

Artículo 7 del Real Decreto 1654/1980, de 11 de julio, sobre Servicio de lo Contencioso del Estado en el Exterior.

“Los Abogados del Estado, a cuyo cargo está la defensa del Estado en juicio en el extranjero, cuidarán de que se invoque, cuando proceda, la inmunidad de jurisdicción, así como cuantas excepciones concurran en el litigio planteado.

En los supuestos en que la alegación de inmunidad resulte controvertida, se recabará el informe de la Asesoría Jurídica Internacional del Ministerio de Asuntos Exteriores.

Existiendo una demanda judicial contra el Estado español en el extranjero, no podrá hacerse renuncia a la inmunidad de jurisdicción sin previa autorización del Ministerio de Asuntos Exteriores, previo informe de la Asesoría Jurídica Internacional.”

E/2-Appendix 2: Summary

The Real Decreto 1654/1980 provides some rules for the defense of Spain in foreign jurisdictions. According to Article 7, Spanish public attorneys must appropriately invoke jurisdictional immunities whenever Spain is sued in the courts of a foreign country.

(a)	Registration no.	E/3
(b)	Date	10.2.1986
(c)	Authority	Supreme Court (Tribunal Supremo)
(d)	Parties	Emilio M.B. (individual) v. Embassy of Guinea Ecuatorial (State)
(e)	Points of Law	The Supreme Court adopts the limited theory of jurisdictional immunities, and establishes that Spanish courts are competent in cases related to labour law where foreign States are sued.
(f)	Classification no.	0.b, 0.b.2, 1.b, 2.c
(g)	Sources	Aranzadi, 1986, No. 727
(h)	Additional information	Confirmed by Supreme Court decision of 1 December 1986 (Aranzadi, 1986, No. 7231).
(i)	Full text – extracts – translations – summaries	Appendix 1: Full Text Appendix 2: Summary

E/3-Appendix 1: Full Text

Sentencia Tribunal Supremo (Sala de lo Social), de 10 febrero 1986

Recurso de casación por infracción de ley.

Jurisdicción: Social

Ponente: Excmo. Sr. D. Juan Antonio del Riego Fernández

FUNDAMENTOS DE DERECHO

PRIMERO.- Son antecedentes que interesa destacar, a efectos de decidir sobre la competencia del orden social de la jurisdicción española para conocer de la demanda, que el actor, de nacionalidad española el 1 de noviembre de 1983 inició la prestación de sus servicios en Madrid, por cuenta y bajo la dependencia de la Embajada de Guinea Ecuatorial, como conductor, con el salario mensual, incluido prorrateo de gratificaciones, de 102.049 pesetas mensuales, que fue dado de alta en la Seguridad Social española, y que se pretende en dicha demanda que el despido que afirma le fue comunicado verbalmente el 26 de agosto de 1984 sea declarado nulo o improcedente, con condena de la Embajada a la readmisión y abono de los salarios de tramitación correspondientes.

SEGUNDO.- La sentencia recurrida declara la incompetencia de la jurisdicción española, lo que fundamenta en el artículo 31 del Convenio de Viena de 18 de abril de 1961, al que se adhirió España por Instrumento publicado en el Boletín Oficial del Estado de 24 de enero de 1968, y en determinados precedentes judiciales, concretamente la sentencia del Tribunal Central de Trabajo de 17 de enero de 1980; no cabe desconocer la existencia de dicho precedente, que no es único, pues aparte de otras sentencias de ese Tribunal -9 de noviembre de 1968, 14 de octubre de 1975, 25 de noviembre de 1976 y 21 de abril de 1978-, es de mencionar la de esta Sala de 8 de noviembre de 1979.

TERCERO.- No debe sin embargo mantenerse en el presente caso la misma solución, de una parte porque implicaría una aplicación, más que extensiva, analógica, del mencionado Convenio atribuyendo la inmunidad que otorga al Agente diplomático a título personal, al Estado que representa, y de otra el reconocimiento de la subsistencia de un principio básico o de una norma consuetudinaria universal de Derecho internacional, según la que un Estado soberano no puede ser sometido a los Tribunales de otro, cuando la vigencia de ese principio básico, que fue históricamente aceptado, está siendo cuestionado en la actualidad por la doctrina científica en base a la realidad internacional que permite comprobar cómo los Tribunales de Estados extranjeros vienen decidiendo en la esfera de los «acta jure gestioni» -aunque no en la de los «acta jure imperi»- cuestiones que afectan (al margen por tanto de los litigios entre Estados como sujetos de Derecho Internacional Público sometidos a los Tribunales internacionales) a otros Estados soberanos y concretamente al español.

CUARTO.- Es altamente significativo en dicho sentido el Real Decreto 1654/80 de 11 de julio, sobre Servicio Contencioso del Estado en el Extranjero, que en su exposición de motivos afirma «la doctrina de la inmunidad absoluta de jurisdicción puede considerarse ya en su etapa final» y «hoy en día la mayor parte, sino la totalidad de los Estados, aceptan la teoría restringida de la inmunidad de jurisdicción, lo que ha producido un aumento de litigios en los que el Estado o sus Organos, son parte ante una jurisdicción extranjera», por lo que en su articulado establece las normas de defensa y actuación del Estado español cuando es demandado ante Tribunales extranjeros. **Por todo ello, al igual que cualquiera otro Estado, el de Guinea Ecuatorial, del que su Embajada forma parte, no disfruta de**

inmunidad absoluta, en relación a las reclamaciones que le dirijan los súbditos españoles contratados para prestar servicios en nuestro país; no puede inhibirse tampoco del conocimiento de la demanda la jurisdicción española con fundamento en el Convenio de Viena, pues como ha quedado dicho, sólo otorga inmunidad a los Agentes Diplomáticos extranjeros a título personal, es decir en cuanto titulares de derechos, y no al Estado que representan al que sólo se podría extender esa inmunidad absoluta en aplicación de una doctrina consuetudinaria, que, como se ha visto, ha caído en desuso.

QUINTO.- De acuerdo con lo razonado y teniendo también fundamentalmente en cuenta lo dispuesto en el artículo 24 de la Constitución Española, los principios que inspiran el hoy vigente artículo 25.1 de la Ley Orgánica del Poder Judicial y el artículo 1 y concordantes de la Ley de Procedimiento Laboral, ha de declararse la competencia de la jurisdicción española para el conocimiento de la demanda, con estimación del recurso en que así se postula, la casación y anulación de la sentencia recurrida y devolución de las actuaciones a la Magistratura de procedencia a fin de que, con plena libertad de criterio, se dicte nueva resolución en cuanto al fondo del asunto. No obstante, como cabría la posibilidad de la subsistencia de una inmunidad relativa o residual, que puede tener incidencia en la fase de ejecución, si la sentencia que se dicte fuere condenatoria, la Magistratura de instancia, antes de acordar la práctica de cualquier medida concreta de ejecución forzosa, deberá recabar, exponiendo las modalidades de ejecución que la parte sugiera, informe de la Asesoría Jurídica a que se refiere el artículo 7 del Real Decreto 1654/80, a fin de que en dicha ejecución se observen los acuerdos bilaterales, y usos o prácticas internacionales vigentes sobre el particular, debiendo a los efectos de determinar la existencia de reciprocidad dirigirse al Gobierno, a través del Ministerio de Justicia, por conducto del Consejo General del Poder Judicial, conforme al artículo 268-2 de la Ley Orgánica del Poder Judicial.

E/3-Appendix 2: Summary

For the first time, and changing its previous jurisprudence (see, e.g., judgment of the same Social Chamber of the Supreme Court of 8 November 1979), the Supreme Court accepts the limited theory of jurisdictional immunities, and the distinction between *acta iure gestionis* and *acta iure imperii*. The judgement also states that immunities arising out of the Vienna Convention on Diplomatic Relations are different from those granted by international law to States as such, and that a restrictive doctrine should be applied to the latter as concern jurisdictional immunities. Finally, the judgement admits that the rejection of jurisdictional immunities does not mean the automatic denial of the immunities of execution, i.e. the prohibition to adopt measures of constraint on certain property of foreign States according to international law. In the latter case, the Supreme Court recommends to consult the Department of International Law of the Ministry of Foreign Affairs before the adoption of any measure of constraint.

(a)	Registration no.	E/4
(b)	Date	1 December 1986
(c)	Authority	Supreme Court (Tribunal Supremo)
(d)	Parties	Diana Gayle Abbott (individual) v. República de Sudáfrica (State)
(e)	Points of Law	The Supreme Court reaffirms its previous judgment of 10.2.1986 establishing that Spanish courts are competent in cases related to labour law where foreign States are sued.
(f)	Classification no.	0.b, 0.b.2, 1.b, 2.c
(g)	Sources	Aranzadi, 1986, No. 7231.
(h)	Additional information	See Constitutional Court,
(i)	Full text – extracts – translations – summaries	Appendix 1: Full Text Appendix 2: Summary

E/4-Appendix 1: Full Text

Sentencia Tribunal Supremo (Sala de lo Social), de 1 diciembre 1986

Recurso de casación por infracción de ley.

Jurisdicción: Social

Ponente: Excmo. Sr. D. José Lorca García

FUNDAMENTOS DE DERECHO

Primero.- La recurrente impugna la sentencia de instancia que estimó la excepción de incompetencia de jurisdicción para conocer por razón de la materia de la demanda que formuló contra la República de Sudáfrica, en la que solicitaba se declarara el despido nulo o subsidiariamente improcedente. Cuestión que al afectar al orden público procesal faculta a la Sala para examinar las pruebas unidas al proceso, con objeto de recoger los antecedentes necesarios para poder calificar la naturaleza jurídica de la relación que liga a las partes litigantes y cuál sea la jurisdicción que deba conocer de ella.

Los antecedentes que constan en las actuaciones de instancia y que sirven para delimitar la competencia de orden jurisdiccional, son los siguientes:

- a) El 18 de Marzo de 1983, el Consejero de la Embajada de la República Sudafricana, dirigió escrito a la actora en el que se le participaba que había tenido éxito su solicitud para el puesto de secretaria bilingüe; que comenzaría a prestar sus servicios el 5 de Abril de 1983, fijándose un salario bruto anual de 1.145.812 pesetas, constituido por las partidas que enumera, el cual sería revisado anualmente de acuerdo con su rendimiento y a los ajustes debidos a las encuestas salariales que la Embajada lleve a cabo; que se le daría de alta en la Seguridad Social española; quedando sujetas las condiciones de trabajo al «South African Public Service Regulations» -Reglamentos del Servicio Público Sudafricano-, «mas, sin embargo, las leyes laborales vigentes en España también influyen en éstas».
- b) El 30 de Agosto de 1985, la actora fue despedida por la empleadora con efectos de 30 de Septiembre siguiente, por estimar insatisfactoria la forma de cumplir su trabajo.

Segundo.- El respeto a la recíproca independencia es una exigencia en la vida de relación de los Estados soberanos; y la razón de ser de la inmunidad jurisdiccional. Privilegio jurisdiccional que cede a favor de la jurisdicción del Estado receptor cuando se trata de simples actos de gestión, en los que el Estado actúa como un particular o de acuerdo con las normas del Derecho privado. Por esto, uno de los problemas que la realidad plantea es el de diferenciar los «acta iure imperii» de los «acta iure gestionis»; por lo que para obviarla se llega a establecer por la Convención Europea sobre la inmunidad de los Estados, firmada con su Protocolo Adicional en Basilea el año 1972, la relación de casos en los que los Estados firmantes se comprometen a no alegar la inmunidad de jurisdicción, y dispone en el artículo 5, que un Estado no puede invocar la inmunidad de jurisdicción ante los Tribunales de otro Estado, si el proceso se refiere a un contrato de trabajo concluido entre el Estado y una persona física, cuando el trabajo deba realizarse en el territorio del Estado del foro. Criterio que es mantenido en los trabajos llevados a cabo en las Naciones Unidas, al sostenerse que los actos de gestión son excepcionales a la regla general de la inmunidad de un Estado por sus actividades en el territorio de otro.

Materia que al carecer de una regulación específica en la legislación española, nos obliga a acudir a las disposiciones dispersas en distintos textos legales, que de una u otra forma la tratan. Prescindiendo de los artículos 51 de la Ley de Enjuiciamiento Civil, que nada resuelve sobre el caso enjuiciado, y del 10-6 del Código Civil, que en la nueva redacción que le ha dado el Decreto 1836/1974, de 31 de Mayo, supone un paso atrás, al no poderse

mantener, dado su texto literal, la doctrina jurisprudencial acerca de la ley aplicable a las relaciones contractuales laborales, que en general se correspondía con los criterios utilizados para la determinación de la competencia internacional judicial, de forma que la cobertura de la territorialidad determinaba que la ley española normalmente se aplicara al contrato celebrado en España, o a los contratos en los que el empresario o el trabajador tenían la condición de españoles -caso de un conflicto derivado de un contrato laboral de españoles en Guinea-, o al contrato que se ejecutó en España, en un caso de traspaso de empresas, e incluso en casos en los que se aplicaron las normas de policía en relaciones laborales entre extranjeros -Sentencias de la Sala de 2 de Marzo de 1966, 22 de Diciembre de 1972, 5 de Enero de 1973 y 30 de Abril de 1963-. Por ello, debemos acudir para resolver el problema a los siguientes preceptos: a) Artículo 24-1 de la Constitución, que representa un cambio favorable, al romper con la presunción anteriormente imperante de «in dubio pro inmunitate», ya que establece el derecho de toda persona a obtener la tutela efectiva de sus derechos e intereses legítimos, sin que pueda producirse su indefensión. Derecho equivalente a la afirmación que el texto constitucional hace de que en ningún supuesto puede producirse la denegación de justicia, al ser la voluntad del constituyente el reconocer con carácter general el derecho a la jurisdicción. Precepto al que la doctrina del Tribunal Constitucional y la de esta Sala han dado un alcance amplísimo, que dificulta, si no impide, que algún órgano jurisdiccional pueda acceder a la solicitud de inmunidad de jurisdicción invocada por un Estado extranjero en base a textos legales del ordenamiento positivo vigente -ver sentencias de la Sala de 10 de Febrero y 4 de Junio del presente año-. b) La exposición de motivos del Real Decreto 1654/1980, de 11 de Julio, sobre Servicio Contencioso del Estado en el extranjero, afirma que «la doctrina de la inmunidad absoluta de jurisdicción puede considerarse ya en su etapa final», y que «hoy en día la mayor parte, si no la totalidad de los Estados, aceptan la teoría restringida de la inmunidad de jurisdicción, lo que ha producido un aumento de litigios en los que el Estado o sus órganos, son parte de una jurisdicción extranjera». En su articulado establece las normas de defensa y de actuación del Estado español cuando es demandado ante Tribunales extranjeros. c) El artículo 25-1 de la Ley Orgánica del Poder Judicial de 1 de Julio de 1985, dispone que en el orden social los Juzgados y Tribunales españoles serán competentes en «materia de derechos y obligaciones derivados de contrato de trabajo, cuando los servicios se hayan prestado en España o el contrato se haya celebrado en territorio español».

Tercero.- Al caso enjuiciado no le son de aplicación los artículos 31 y 43 de los Convenios de Viena de 18 de Abril de 1961 y de 24 de Abril de 1963, a los que se adhirió España, como equivocadamente ha entendido el Magistrado «a quo», ya que únicamente otorgan inmunidad a los Agentes Diplomáticos y Consulares extranjeros a título personal y no al Estado que representan, al que sólo podrá extenderse la inmunidad absoluta en aplicación de una doctrina consuetudinaria caída en desuso, como afirma la sentencia de la Sala de 10 de Febrero del año corriente. Convenio de Viena, del que no procede examinar el alcance de los preceptos invocados por infringidos, al salirse del marco del presente recurso.

Por lo expuesto y de acuerdo con lo que se dispone en el artículo primero y concordantes de la Ley de Procedimiento Laboral, procede declarar la competencia de esta jurisdicción laboral para conocer de la pretensión formulada por la actora en la demanda; estimar el recurso, casar y anular la sentencia recurrida, y devolver las actuaciones a la Magistratura de origen para que el Magistrado «a quo» se pronuncie sobre el fondo de libertad de criterio.

No obstante, de pronunciarse sentencia condenatoria, ante la posibilidad de la existencia de una inmunidad en la ejecución, procede que el Magistrado de instancia antes de que acuerde cualquier medida concreta de ejecución forzosa, deberá recabar, exponiendo las modalidades de ejecución que la parte sugiera, informe de la Asesoría Jurídica a la que se refiere el artículo 7 del Real Decreto 1654/1980, para que en la referida ejecución se observen los acuerdos bilaterales y usos o prácticas internacionales vigentes sobre el particular; y a los efectos de la posible existencia de reciprocidad, se dirigirá al Gobierno, a través del Ministerio de Justicia, por conducto del Consejo General del Poder Judicial, conforme establece el artículo 268-2 de la Ley Orgánica del Poder Judicial.

E/4-Appendix 2: Summary

The Supreme Court annuls the decision of a lower court, and affirms the jurisdiction of Spanish courts to decide cases where a foreign State appears as defendant. Consequently, the Supreme Court confirms the restrictive scope of jurisdictional immunities for Spanish courts and tribunals. In this case, the Supreme Court mentions the distinction between *acta iure gestionis* and *acta iurii imperii*, and also cites article 24 of the Spanish Constitution as an important argument for the recognition of the limited scope of jurisdictional immunities. The Supreme Court rejects the application of the Convention on Diplomatic Relations of 1961 to these kind of cases, which was erroneously applied by the judge “a quo”. Finally, the Supreme Court said that the courts should take into account the distinction between immunity of jurisdiction and immunity of execution. It advised that any decision providing for measures of constraint against State property should take due care of the latter, and that the judges should ask the opinion of the International Law Department of the Ministry of Foreign Affairs before adopting such measures.

(a)	Registration no.	E/5
(b)	Date	1 July 1992
(c)	Authority	Constitutional Court
(d)	Parties	Diana Gayle Abbott (individual) v. República de Sudáfrica (State)
(e)	Points of Law	The Constitutional Court applies the limited theory of immunity to the execution of judgments, following the distinction between acts <i>iure imperii</i> and <i>iure gestiones</i> . It also declares that the property of an embassy is not subject to measures of constraints, including the bank accounts of a Mission.
(f)	Classification no.	2.b
(g)	Sources	Aranzadi 1992, No. 107
(h)	Additional information	See E/4
(i)	Full text – extracts – translations – summaries	Appendix 1: Full Text Appendix 2: Summary

E/5-Appendix 1: Full Text

Sentencia Tribunal Constitucional núm. 107/1992 (Sala Segunda), de 1 julio

Recurso de Amparo núm. 1293/1990.

Jurisdicción: Constitucional

BOE 24 julio 1992

Ponente: D. Miguel Rodríguez-Piñero y Bravo-Ferrer

*Recurso de amparo contra Sentencia de 8 febrero 1990 de la Sala de lo Social del Tribunal Superior de Justicia de Madrid que, resolviendo recurso de suplicación, promovido por la República de Sudáfrica contra Auto de 21 marzo 1988 del Juzgado de lo Social núm. 11 de Madrid dictado en ejecución de Sentencia de ese Juzgado en procedimiento sobre despido, declara la inmunidad absoluta de ejecución de sentencias de la Embajada de la República de Sudáfrica: la recurrente de amparo entiende que se ha interpretado restrictivamente el privilegio de inmunidad de los Estados en materia de contratos de trabajo, al no haber base legal para admitir la inmunidad de ejecución frente a sentencia en materia de relación laboral: **vulneración del derecho fundamental a obtener la tutela efectiva de Jueces y Tribunales**: existencia: otorgamiento parcial de amparo.*

DERECHO FUNDAMENTAL A OBTENER LA TUTELA EFECTIVA DE JUECES Y TRIBUNALES: **Derecho a la ejecución de las resoluciones judiciales: naturaleza:** derecho de configuración legal por no tratarse de un derecho de libertad, sino de un derecho prestacional: el legislador puede establecer límites al pleno acceso a la ejecución de las sentencias, siempre que los mismos sean razonables y proporcionales respecto de los fines que lícitamente puede perseguir el legislador en el marco de la Constitución. **Alcance:** no se extiende a la ejecución de bienes de Estados extranjeros amparados por una causa legal de inmunidad. **Causa legal de inmunidad de ejecución de los bienes de Estados extranjeros:** aplicación: debe estar guiada por el principio «pro actione» que inspira todas las manifestaciones del art. 24.1 de la CE, de manera que debe adoptarse la interpretación más favorable a la efectividad del derecho.

SENTENCIAS: Ejecución: **Inmunidad de ejecución de los bienes de Estados extranjeros: régimen legal:** no es contrario, cualquiera que éste sea, al derecho fundamental a obtener la tutela efectiva de Jueces y Tribunales en su faceta de derecho a la ejecución de las sentencias: la soberanía y el principio de igualdad de los Estados es fundamento suficiente para que se pueda legítimamente excluir la potestad ejecutiva respecto de los bienes que dichos Estados tengan en territorio español. **Régimen legal vigente:** relatividad de la inmunidad: se asienta en la distinción entre bienes destinados a actividades «iure imperii» y bienes destinados a actividades «iure gestionis»: con carácter general, cuando en una determinada actividad o cuando en la afectación de determinados bienes no esté empeñada la soberanía del Estado extranjero, tanto el ordenamiento internacional como, por remisión, el ordenamiento interno, desautorizan que se inejecute una sentencia y, en consecuencia, una decisión de inejecución supone una vulneración del art. 24.1 CE: no obstante, la inmunidad de ejecución se extiende a la inembargabilidad de las cuentas corrientes afectadas al desenvolvimiento de la actividad ordinaria de las misiones diplomáticas y consulares, incluso si sirven también para la realización de actos en que no esté empeñada la soberanía del Estado extranjero, esto es, actos «iure gestionis» a los que no alcanza la «ratio» de la inmunidad de los bienes de las misiones diplomáticas.

Voto particular formulado por D. Eugenio Díaz Eimil.

La Sala Segunda del Tribunal Constitucional, compuesta por don Francisco Rubio Llorente, Presidente en funciones; don Eugenio Díaz Eimil, don Miguel Rodríguez-Piñero y Bravo-Ferrer, don José Luis de los Mozos y de los Mozos, don Alvaro Rodríguez Bereijo y don José Gabaldón López, Magistrados, ha pronunciado,

EN NOMBRE DEL REY

la siguiente

SENTENCIA

En el recurso de amparo núm. 1.293/1990, promovido por la Procuradora de los Tribunales doña María Jesús González Díez, en nombre y representación de doña Diana Gayle Abbott, asistida del Letrado don José Manuel López López, contra la Sentencia de la Sala de lo Social del Tribunal Superior de Justicia de Madrid, de 8 de febrero de 1990 [recurso núm. 18.773/1990 (3.109/1989)], dictada en ejecución de Sentencia en procedimiento sobre despido. Ha comparecido el Ministerio Fiscal y, como demandada, la República de Sudáfrica, representada por el Procurador de los Tribunales don Alfonso Gil Meléndez y asistida del Letrado don León Barriola Urriticoechea. Ha sido Ponente el Magistrado don Miguel Rodríguez-Piñero y Bravo-Ferrer, quien expresa el parecer de la Sala.

I. ANTECEDENTES

1. Por escrito registrado en este Tribunal el 24 de mayo de 1990, doña María Jesús González Díez, Procuradora de los Tribunales, y de doña Diana Gayle Abbott, interpone recurso de amparo contra la Sentencia de la Sala de lo Social del Tribunal Superior de Justicia de Madrid, de 8 de febrero de 1990, resolutoria del recurso de suplicación [núm. 18.773/1990 (3109/1989)], promovido por la República de Sudáfrica, contra el Auto del Juzgado de lo Social núm. 11 de Madrid, de fecha 21 de marzo de 1988, dictado en ejecución de la sentencia de ese Juzgado de 1 de junio de 1987, resultante del procedimiento sobre despido núm. 1.245/1985.

2. La demanda se fundamenta en los siguientes antecedentes:

a) La hoy recurrente, de nacionalidad norteamericana, prestaba desde el 5 de abril de 1983 sus servicios como Secretaria bilingüe, en virtud de contrato de trabajo, en la Embajada de la República de Sudáfrica en Madrid. Despedida con efectos desde el 30 de septiembre de 1985, interpuso demanda por despido contra la República de Sudáfrica que fue tramitada bajo el núm. 1.245/1985, ante la entonces Magistratura de Trabajo núm. 11 de Madrid, la cual dictó sentencia de 26 de noviembre de 1985, declarando la inmunidad de jurisdicción de la demandada, estimando la excepción de incompetencia de jurisdicción alegada por la contraparte y absolviéndola en la instancia.

b) Promovido recurso de casación (núm. 308/1986) contra dicha Sentencia por la demandante de amparo, la Sala de lo Social del Tribunal Supremo dictó Sentencia estimatoria de 1 de diciembre de 1986 en la que se declaró la competencia de la jurisdicción española para conocer de la pretensión deducida por la actora y se acordó la devolución de los autos a la Magistratura de procedencia para que el Magistrado se pronunciara sobre el fondo del asunto con libertad de criterio, previniéndole de que en el caso de que la sentencia dictada fuera condenatoria, cumpliera, antes de ejecutarla, con lo establecido en el art. 7 del Real Decreto 1.654/1980, de 11 de junio. Específicamente disponía la Sentencia de 1 de diciembre de 1986 que, de pronunciarse Sentencia condenatoria por la Magistratura de origen, ante la posibilidad de la existencia de una inmunidad en la ejecución, procedía que el Magistrado de instancia, antes de ordenar cualquier medida concreta de ejecución forzosa, recabara, exponiendo las modalidades de ejecución que la parte sugiriera, informe de la Asesoría Jurídica del Ministerio de Asuntos Exteriores a la que se refiere el art. 7 del

Real Decreto 1.654/1980, para que en la referida ejecución se observaran los acuerdos bilaterales y usos o prácticas internacionales vigentes sobre el particular; y a los efectos de la posible existencia de reciprocidad, se dirigiera al Gobierno, a través del Ministerio de Justicia, por conducto del Consejo General del Poder Judicial, conforme establece el art. 278.2 de la Ley Orgánica del Poder Judicial.

c) La Magistratura dictó nueva Sentencia de 1 de junio de 1987, estimatoria de la demanda, declarando nulo el despido y condenando a la República de Sudáfrica a la inmediata readmisión de la trabajadora, con abono de los salarios de tramitación. Al no proceder la demandada a la readmisión, la recurrente solicitó la ejecución del fallo de acuerdo con lo dispuesto en los arts. 209 y ss. de la Ley de Procedimiento Laboral. Una vez celebrada la comparecencia prevista en el art. 210 de la LPL, la Magistratura de Trabajo dictó Auto de 23 de julio de 1987 por el que se resolvía el contrato de trabajo y se condenaba a la República de Sudáfrica a pagar a la demandante la cantidad de 758.206 pesetas en concepto de indemnización y a hacer efectivos los salarios dejados de percibir desde la fecha del despido hasta la del citado Auto.

d) Por escrito de 2 de septiembre de 1987, la representación procesal de la hoy recurrente solicitó a la Magistratura de Trabajo núm. 11 de Madrid que, dado que la demandada no estaba dispuesta a cumplir la condena, tratándose de un Estado soberano y de acuerdo con las orientaciones contenidas en la Sentencia del Tribunal Supremo de 1 de diciembre de 1986, se procediera antes de acordarse cualquier medida de ejecución forzosa a recabar los informes señalados en dicha sentencia. A tales efectos, y dado que el Tribunal Supremo indicaba que la demandante sugiriera las modalidades de ejecución de la Sentencia que pudieran resultar posibles, ésta indicaba que consideraba posibles todas las existentes en Derecho, haciendo salvedad de aquellas que pudiesen afectar al recinto de la propia Embajada de la República de Sudáfrica, que como tal enclave debe reputarse inmune, pero no así las cuentas corrientes que la República de Sudáfrica pueda tener en España y las transacciones de bienes o dinero que se lleven a efecto en nuestro territorio, bien por la demandada o por cualquiera de sus deudores.

e) Por providencia de fecha 21 de septiembre de 1987, la Magistratura de Trabajo núm. 11 de Madrid resolvió que se recabara informe de la Asesoría Jurídica Internacional del Ministerio de Asuntos Exteriores, a fin de que se especificaran los acuerdos bilaterales existentes entre el Estado español y la República de Sudáfrica y los usos y prácticas, internacionales vigentes para poder instar la referida ejecución, participando que el trabajador exigía, como modalidad de ejecución, que se procediera contra las cuentas corrientes que pudiera tener en España la República de Sudáfrica, así como sobre las transacciones de dinero que se llevaran a efecto por la parte demandada o por alguno de sus deudores. Asimismo ordenaba que se dirigiera comunicación al Gobierno a través del Ministerio de Justicia y por conducto del Consejo General del Poder Judicial, para que informara sobre la existencia de reciprocidad entre España y la República de Sudáfrica. Así, el 21 de septiembre de 1987, la Magistratura de Trabajo núm. 11 dirigió escritos al ilustrísimo señor Jefe de la Asesoría Jurídica Internacional del Ministerio de Asuntos Exteriores, al excelentísimo señor Ministro de Justicia y al excelentísimo señor Presidente del Consejo General del Poder Judicial, en solicitud de la información referida.

f) Por escrito de fecha 16 de septiembre de 1987, el Subsecretario del Ministerio de Asuntos Exteriores envió el siguiente escrito a la Magistratura de Trabajo núm. 11 de Madrid: «La Embajada de la República de Sudáfrica en España ha solicitado la intervención de este Ministerio de Asuntos Exteriores con referencia a la Sentencia de esa Magistratura de Trabajo de fecha 23 de julio de 1987, en los autos sobre despido, procedimiento núm. 1.245/1985. A estos efectos, este Ministerio tiene el honor de comunicar a su Señoría que en virtud del cumplimiento del Convenio de Viena sobre relaciones diplomáticas de 18 de abril de 1961, la Embajada de Sudáfrica goza de inmunidad de jurisdicción e ineludiblemente de ejecución ya que los actos realizados por la Embajada de Sudáfrica y enjuiciados en la Sentencia de 1 de junio de 1987 de esa Magistratura de Trabajo son de *iure imperii* al cumplirse los requisitos subjetivo y funcional, necesarios para que sea de

aplicación la inmunidad de los Estados, por lo que, a juicio de este Ministerio, la Sentencia de 23 de julio de 1987 no puede ser ejecutada».

Con fecha 25 de noviembre de 1987, el Secretario general del Consejo General del Poder Judicial adjunto fotocopia compulsada de la Respuesta-Informe de la Secretaría General Técnica del Ministerio de Justicia, sobre la posible existencia de reciprocidad entre el Estado español y la República de Sudáfrica para la ejecución de Sentencia sobre despido contra la misma. Dicho informe era del siguiente tenor:

«Con este motivo me permito informarle que, aunque una tendencia doctrinal entiende que la inmunidad de ejecución es un colorario de la inmunidad de jurisdicción, por lo que aquella cuando no existe o se levanta, decae la segunda, es lo cierto que los instrumentos internacionales existentes continúan estableciendo una diferencia de tratamiento, de suerte que aunque pueda atenuarse la rigidez de la inmunidad de jurisdicción, sigue siendo absoluta la inmunidad de ejecución contra los Estados (véase, por ejemplo, relativo a Organizaciones Internacionales, el Acuerdo General sobre Privilegios e Inmunidades del Consejo de Europa y el protocolo sobre Privilegios e Inmunidades de las Comunidades Europeas).

Aunque son instituciones diferentes, la inmunidad de los agentes diplomáticos y la inmunidad de los Estados, autorizada doctrina entiende que las normas referidas a aquéllos (Convenio de bienes sobre Relaciones Diplomáticas, en el que España es parte), agotan su eficacia en las personas, de suerte que cuando se produce una situación litigiosa, las inmunidades hay que referirlas, no al Agente diplomático sino al Estado de envío.

La experiencia internacional española en la materia es variable, pudiendo citarse la Sentencia del Tribunal Superior de Frankfurt de 30 de junio de 1979, que no reconoció la inmunidad del Estado español por impago de gastos derivados de una campaña publicitaria en la televisión alemana, para la promoción del turismo, encargada por nuestra Embajada, por entender que era un acto *more privatorum*, mientras por el contrario la Cámara de los Loes reconoció en 1957 la inmunidad del Servicio Nacional del Trigo, por su carácter público, pese al carácter mercantil de la operación litigiosa.»

En escrito de 21 de octubre de 1987, el Ministerio Fiscal afirmó que entendía ser competente la Magistratura de Trabajo para ejecutar el Auto de 23 de julio de 1987 a tenor de lo dispuesto en el art. 24.1 de la Constitución y en el art. 55 de la Ley de Enjuiciamiento Civil.

g) A la vista de los informes solicitados y remitidos, la Magistratura de Trabajo dictó Auto de 19 de febrero de 1988 en el que declaraba que la República de Sudáfrica disfrutaba de inmunidad de ejecución y que, en consecuencia, no procedía seguir con la ejecución de la Sentencia de 1 de junio de 1987. Recurrido en reposición dicho Auto por la demandante, la Magistratura de Trabajo dictó Auto estimatorio de 21 de marzo de 1988 en el que, con base en los arts. 24.1 CE, 2 LOPJ y 55 LECiv, y de conformidad con el dictamen del Ministerio Fiscal se entendía en un inmediato análisis, que no había obstáculo alguno para que pueda ejecutarse la sentencia dictada contra la República de Sudáfrica y se procedía a reponer el Auto recurrido, formulando la siguiente parte dispositiva: «Ha lugar a reponer el Auto de 19 de febrero de 1988 y en su consecuencia proceder a la ejecución de la Sentencia de 1 de junio de 1987 y sin previo requerimiento y excepto los bienes sitos en el recinto de la Embajada, se decreta el embargo de bienes de la República de Sudáfrica entre ellos las cuentas corrientes que la misma puede tener en España y el saldo acreedor de las distintas transacciones de bienes o cualquier operación mercantil que se lleve a efecto por dicho Estado, o por sus deudores fuera de España, para cubrir la suma de 2.574.010 pesetas. Para la practica de dichas diligencias se comisiona al Agente Judicial asistido del Secretario o funcionario habilitado, y dirijase oficio a la Embajada de Sudáfrica para que indique los establecimientos bancarios en los que tiene cuentas corrientes, y sin perjuicio de lo anterior líbrense también oficios a los Bancos Central, Español de Crédito, Hispano-Americano, Vizcaya, Bilbao, Popular Español y Banco Exterior de España y con su resultado de acordará». En cumplimiento de lo resuelto en este Auto fue embargado el dinero existente en una cuenta corriente abierta a nombre de la Embajada de la República de Sudáfrica en

el Banco de Santander. Por providencia de 12 de junio de 1988 se acordó el levantamiento del embargo sobre el principal adeudado por importe de 2.574.010 pesetas, por haber sido consignado dicho importe a efectos del recurso de casación presentado.

h) Por la representación de la República de Sudáfrica se interpuso recurso de casación contra el Auto de 21 de marzo de 1988. Por Auto del Tribunal Supremo de 28 de abril de 1989, dictado al amparo del art. 2 de la Ley 7/1989, se remitieron las actuaciones a la Sala de lo Social del Tribunal Superior de Justicia de Madrid para que fuera examinado el recurso de casación como si de un recurso de suplicación se tratase.

i) La Sala de lo Social del Tribunal Superior de Justicia de Madrid dictó Sentencia de 8 de febrero de 1990 [recurso núm. 18.773/1989 (3109/1989)], estimatoria del recurso promovido y revocatoria del Auto de la Magistratura de Trabajo de 21 de marzo de 1988. En la mencionada Sentencia, la Sala de lo Social del Tribunal Superior de Justicia de Madrid centró el problema sometido a su consideración afirmando: «Constituye la cuestión esencial a resolver en el presente recurso la ejecutividad de una sentencia dictada en el orden laboral contra los bienes de un Estado extranjero, habiéndose inclinado por la postura afirmativa el Magistrado de instancia, quien en virtud de Auto de fecha 21 de marzo de 1988 acuerda el embargo de las cuentas corrientes que la República de Sudáfrica pueda tener en España, cuyo Auto es objeto del presente recurso por entender la parte ejecutada que existe un principio en el Derecho internacional que reconoce la inmunidad de ejecución respecto de Estados Soberanos». Centrado en estos términos el problema, el Tribunal razona que la República de Sudáfrica goza de inmunidad absoluta de ejecución: «Aun cuando es cierto que el principio básico aceptado históricamente de que un Estado soberano no pueda ser sometido a los Tribunales de otro está siendo cuestionado en la actualidad por la doctrina científica en base a la realidad internacional que permite comprobar cómo los Tribunales de Estados extranjeros vienen decidiendo en la esfera de los *acta iure gestionis* -aunque no en la de los *acta iure imperii*- cuestiones que afectan (al margen por tanto de los litigios entre Estados como sujetos de Derecho internacional público sometidos a los Tribunales internacionales) a otros Estados soberanos y concretamente al español, sin embargo, no ocurre lo mismo a la hora de hacer efectivas las sentencias dictadas contra otro Estado sobre los bienes de éste existentes sobre suelo extranjero, en cuyo caso, según informa el Ministerio de Asuntos Exteriores y el Ministerio de Justicia, los instrumentos internacionales existentes continúan estableciendo una diferencia de tratamiento, de suerte que aunque pueda atenuarse la rigidez de la inmunidad de jurisdicción, sigue siendo absoluta la inmunidad de ejecución contra los Estados; así pues, la ausencia de acuerdos bilaterales y de reciprocidad entre los Estados Español y de la República de Sudáfrica, obligan a acudir a las normas de Derecho internacional consuetudinario tal como recoge el preámbulo del Convenio de Viena de 24 de abril de 1963, publicado en el "Boletín Oficial del Estado" de nuestro País, en fecha 6 de marzo de 1970, cuyo art. 31.4, interpretado extensivamente, impide el embargo del dinero efectivo que un Estado extranjero posea en entidades bancarias españolas. De lo expuesto, en relación con los arts. 96.1 y 117.3 de la Constitución Española y 21.2 de la Ley Orgánica del Poder Judicial de 1 de julio de 1985, se desprende la necesaria consecuencia de revocar el Auto impugnado, previa estimación del recurso interpuesto, con las consecuencias inherentes a tal revocación». Fundamentado así, el fallo es del siguiente tenor «que estimando el Recurso de suplicación interpuesto por República de Sudáfrica, contra Auto dictado por la Magistratura de Trabajo núm. 21 de Madrid, hoy Juzgado de lo Social, de fecha 21 de marzo de 1988, en autos seguidos a instancias de doña Diana Abbott contra República de Sudáfrica, sobre despido, debemos revocar y revocamos dicho Auto, con las consecuencias legales inherentes a tal declaración respecto de la causa y los embargos ordenados en el mismo».

3. Se interpone recurso de amparo contra la Sentencia de la Sala de lo Social del Tribunal Superior de Justicia de Madrid de 8 de febrero de 1990. Entiende la demandante que dicha sentencia ha conculcado sus derechos fundamentales establecidos en los arts. 14 y 24.1 de la Constitución. Se denuncia, en primer lugar, que el hecho de haber admitido la inmunidad absoluta de ejecución de la República de Sudáfrica ha supuesto la vulneración del derecho a la tutela judicial efectiva y a no padecer indefensión, dado que, admitida tanto en el ámbito

del Derecho internacional como en el del Derecho interno la progresiva restricción del privilegio de la inmunidad jurisdiccional de los Estados en materia de relaciones laborales - citándose al efecto el art. 5.1 de la Convención Europea sobre Inmunidad de Estados, hecho en Basilea el 16 de mayo de 1972, así como Sentencias del Tribunal Supremo de 10 de febrero y 1 de diciembre de 1986, el Real Decreto 1.654/1980 y el art. 25.1 de la LOPJ, sin olvidar la mención del propio art. 24.1 de la Constitución-, sería una grave inconsecuencia -contradictoria, además, con la reciente práctica internacional y con preceptos como el art. 2 del Pacto Internacional de Derechos Civiles y Políticos- no admitir la correlativa y necesaria restricción de la inmunidad de ejecución de los Estados. Restricción que, obviamente, ha de operar tan sólo en el ámbito de los denominados «actos de gestión» -entre los que se encuadran los debatidos en el proceso del que trae causa este recurso- sin afectar a los «actos de soberanía». En la medida en que los actos de la República de Sudáfrica que han dado lugar a la Sentencia de Magistratura de 1 de junio de 1987 sólo pueden ser calificados de «actos de gestión» y los bienes trabados por el embargo no se destinan al ejercicio de derechos de soberanía, la Sala de lo Social del Tribunal Superior de Justicia de Madrid no debió admitir la inmunidad de ejecución de la demandada; al admitirla, el Tribunal ha vulnerado el derecho a la tutela judicial en su vertiente de derecho a la ejecución de las resoluciones judiciales (SSTC 32/1982, 61/1984, 67/1984, 109/1984, etc.). A todo ello no puede obstar en absoluto el hecho de que el Tribunal Superior de Justicia se haya apoyado en el art. 31.4 del Convenio de Viena de 24 de abril de 1963, precepto que en ningún caso admite una interpretación tan extensiva como la acogida en la Sentencia objeto del presente recurso, desautorizada además por el art. 22 del Convenio de Viena de 18 de abril de 1961.

Por su parte, la vulneración del art. 14 de la Constitución resultaría del hecho de que de la sentencia impugnada se desprende un trato desigual y discriminatorio respecto de la ejecución de sentencias entre los trabajadores españoles que prestan sus servicios laborales a Estados extranjeros en sus Embajadas y los que los prestan para Empresas españolas.

Se suplica de este Tribunal que dicte sentencia en la que, otorgando el amparo solicitado, se decrete la nulidad de la Sentencia de la Sala de lo Social del Tribunal Superior de Justicia de Madrid de 8 de febrero de 1990, se reconozca el derecho de la recurrente a la tutela judicial efectiva y se la restablezca en la integridad de su derecho, para lo cual se interesa que se retrotraigan las actuaciones al momento anterior a dictar sentencia, manteniendo el embargo de las cuentas corrientes de la demandada u ordenándolo de nuevo para el caso de que hubiera sido levantado, ordenando al Juzgado de lo Social núm. 11 de Madrid que prosiga las actuaciones del procedimiento ejecutivo hasta que a la recurrente le sea íntegramente pagado su crédito.

4. Por providencia de 1 de octubre de 1990, la Sección Cuarta de este Tribunal acordó admitir a trámite la demanda de amparo y de conformidad con lo establecido en el art. 51 de la LOTC, dirigir atenta comunicación a la Sala de lo Social del Tribunal Superior de Justicia de Madrid, interesando la remisión de certificación o fotocopia debidamente adverada de las actuaciones correspondientes al recurso de suplicación tramitado bajo el núm. 18.773/1989 (3.109/1989), así como al Juzgado de lo Social núm. 11 de Madrid, interesando la remisión de testimonio de las actuaciones correspondientes al procedimiento núm. 1.245/1985 y el emplazamiento de quienes hubiesen sido parte en la vía judicial (excepto la recurrente), haciéndose constar la exclusión de quienes quisieran coadyuvar con la demandante o formular cualquier impugnación y les hubiere transcurrido ya el plazo establecido en la Ley Orgánica de este Tribunal para recurrir.

5. Mediante providencia de 19 de noviembre de 1990 se acordó acusar recibo a la Sala de lo Social del Tribunal Superior de Justicia de Madrid y al Juzgado de lo Social núm. 11 de esa capital de las actuaciones remitidas, tener por comparecida en el proceso a la República de Sudáfrica y, en su nombre y representación al Procurador don Alfonso Gil Meléndez. Asimismo y de conformidad con lo dispuesto en el art. 52.1 de la LOTC, dar vista de las actuaciones recibidas por plazo común de veinte días, a los Procuradores dona María Jesús González Díez, en nombre de la recurrente y a don Alfonso Gil Meléndez, en

representación de la República de Sudáfrica, así como al Ministerio Fiscal, para que pudiesen formular las alegaciones que estimasen pertinentes.

6. La representación procesal de la República de Sudáfrica presentó su escrito de alegaciones el 7 de diciembre de 1990. Tras exponer detallada y minuciosamente los antecedentes del procedimiento judicial del que ha resultado la Sentencia ahora recurrida, sostiene la codemandada que esta última se ha limitado a ejecutar en sus términos la Sentencia del Tribunal Supremo de 1 de diciembre de 1986, en la que se condicionaba una posible ejecución sobre la República de Sudáfrica a la observancia de las prácticas internacionales vigentes y a la existencia de reciprocidad, de manera que la señora Abbott debió recurrir en amparo contra la meritada sentencia del Tribunal Supremo. Por lo demás, considera la representación procesal de la República de Sudáfrica que, en el hipotético caso de que la ley permitiera al Magistrado de Trabajo revisar la sentencia a ejecutar por considerar que los acuerdos y usos internacionales vigentes fueran contrarios a la Constitución, el Magistrado debería interponer la correspondiente cuestión de inconstitucionalidad. En cuanto a la denunciada vulneración del derecho a la tutela judicial efectiva de la recurrente, sostiene la codemandada que los arts. 22, 24, 30 y 31 del Convenio de Viena sobre relaciones diplomáticas excluyen de cualquier tipo de medida de ejecución los bienes de las representaciones diplomáticas cuando estén destinados -como es el caso- exclusivamente al mantenimiento de Embajadas y al pago de sueldos de representantes y funcionarios consulares, implicando una grave quiebra de tan elemental principio de las relaciones entre Estados soberanos -superior, incluso, a las propias Constituciones estatales- el que un órgano jurisdiccional proceda al embargo de cuentas corrientes de una Embajada, hecho este jamás acaecido en la historia contemporánea del mundo occidental civilizado, ni siquiera en las más graves crisis que han dado lugar a la ruptura de relaciones diplomáticas o a la declaración del estado de guerra. En cualquier caso y de acuerdo con la propia doctrina del Tribunal Constitucional, es perfectamente posible denegar la ejecución de una sentencia cuando concorra una causa legalmente establecida, como es el caso con los meritados artículos del Convenio de Viena de 1961. Por último y respecto de la pretendida vulneración del art. 14 de la Constitución, alega la codemandada que dicho precepto no ha sido invocado formalmente por la recurrente en el proceso judicial; además, el art. 14 no sería aplicable a la señora Abbott debido a su nacionalidad norteamericana; tampoco puede sostenerse que la diferencia de trato denunciada carezca de una fundamentación objetiva y razonable, ni que constituyan un término de comparación adecuado las situaciones descritas por la demandante. En consecuencia, se concluye suplicando de este Tribunal que dicte sentencia desestimatoria del amparo, con imposición de costas a la recurrente.

7. El Ministerio Fiscal registró sus alegaciones el 13 de diciembre de 1990. Tras exponer los antecedentes del proceso sustanciado ante la jurisdicción ordinaria, procede el Ministerio Público a examinar el fondo del asunto, ocupándose, en primer lugar, de la pretendida infracción del art. 14 de la Constitución. A su juicio, la aseveración de la recurrente en el sentido de que de la sentencia impugnada se desprende un trato desigual y discriminatorio entre los trabajadores españoles que prestan sus servicios laborales en Estados extranjeros en sus Embajadas y los que los prestan para Empresas españolas, a más de ser una afirmación confusa, resulta inviable desde el punto de vista constitucional, al establecerse una comparación entre supuestos distintos que, en principio, permitirían un tratamiento también distinto. El argumento, para el Ministerio Fiscal, es no sólo endeble sino sucinto y falto de mayor explicación, por lo que debe rechazarse.

La invocación del art. 24.1 CE le resulta, en cambio, más consistente, en la medida en que se denuncia la vulneración del derecho a la ejecución de sentencias, integrado en el derecho a la tutela judicial efectiva y susceptible, en consecuencia, de estar sometido a los requisitos formales y materiales establecidos por la legislación, bien entendido que ésta encuentra un límite insalvable en el art. 24.1 de la Constitución, precepto que impide la existencia de condicionamientos que dificulten o entorpezcan la posibilidad de que se cumpla en sus términos lo resuelto por los órganos judiciales y que exige que la legalidad sea interpretada en el sentido más favorable a la efectividad de la tutela (SSTC 113/1989 y 215/1988).

Puntualiza el Ministerio Fiscal que la demanda de amparo y, consecuentemente, la imputación de vulneración del art. 24.1 CE, se refiere únicamente a la Sentencia del Tribunal Superior de Justicia de 8 de febrero de 1990; es decir, dejando a un lado la inmunidad de jurisdicción, cuya no concurrencia ya fue declarada por los Tribunales ordinarios, la lesión constitucional se atribuye únicamente a la decisión judicial de declarar aplicable a la República de Sudáfrica la inmunidad de ejecución.

Continúa el Ministerio Fiscal exponiendo la evolución de los criterios sobre inmunidad de jurisdicción y de ejecución en el ámbito internacional, señalando el transido experimentado desde una concepción absoluta hasta otra interpretada a partir de criterios más racionales. Señala, en particular, la distinción entre «actos de soberanía» y «actos de gestión» - apuntada ya en la sentencia de la Cour de Cassation francesa en el caso Cassaux (1849) y acogida por la jurisprudencia italiana a partir de 1882-, amparando la inmunidad actualmente sólo a los primeros, como lo demuestra la practica judicial austriaca (Caso Dralle, 1950), británica (en un asunto en el que se vio afectado el Servicio Nacional del Trigo Español, 1956), norteamericana (que desde 1976 incluye entre los «actos de gestión» la contratación o empleo de trabajadores) y francesa (Caso Societé de Gostog et URSS). Estos ejemplos del Derecho comparado vienen además confirmados por la legislación internacional; así sucede con el art. 5 de la Convención Europea sobre Inmunidad de Estados (Basilea, 1972) que excluye de los supuestos de inmunidad de jurisdicción los procesos relativos a contratos de trabajo concluidos entre un Estado y una persona física cuando el trabajo se realiza en el Estado del foro. El propio Convenio de Basilea esta propiciando una relativización de las inmunidades de ejecución, dado que su art. 26 permite la ejecución contra los bienes de un Estado cuando éste lleve a cabo una actividad privada y se trate de ciertas clases de procesos, entre los que figuran los relativos a contratos laborales.

En lo que al Derecho interno español se refiere, señala el Ministerio Fiscal que, ante la ausencia de una legislación específica sobre la materia es preciso estar a lo dispuesto en el art. 24.1 de la Constitución, precepto en el que se reconoce con la mayor amplitud el derecho a la jurisdicción.

Entrando ya en el fondo de la cuestión planteada, se sostiene en el escrito de alegaciones que ha de tenerse en cuenta, por un lado, que la demanda se interpuso contra la República de Sudáfrica y no contra las personas de sus Agentes diplomáticos, lo que disipa todo posible error acerca de la aplicación de las inmunidades del Convenio de Viena y, por otro, que no se trata ahora de discutir la posible concurrencia de una inmunidad de jurisdicción - cuestión ya resuelta en su día y contra la que no se formuló demanda de amparo-, sino de precisar si una resolución firme debe o no ejecutarse. A partir de este planteamiento parece claro que -a la vista de la práctica internacional, de la naturaleza privada de la relación laboral y de la decisión del Tribunal Supremo (STS de 1 de diciembre de 1986), de excepcionar en este caso la inmunidad de jurisdicción- han de ejecutarse tanto la sentencia que declaró nulo el despido como su consecuencia, esto es, los Autos de 23 de julio de 1987 y 21 de marzo de 1988, todo ello, de conformidad con los arts. 51 LECiv, 25.1 LOPJ, 10.6 Código Civil y Real Decreto 1.654/1980, de 11 de julio, interpretados de conformidad con el art. 24.1 de la Constitución y evitándose así el contrasentido que supone la admisión de la competencia de una jurisdicción cuyo fallo fuera de imposible ejecución sin causa legal que lo autorice, según una interpretación adecuada del derecho a la tutela judicial efectiva.

En consecuencia, el Ministerio Fiscal interesa que se dicte Sentencia, otorgando el amparo y declarando la nulidad de la Sentencia del Tribunal Superior de Justicia impugnada.

8. La representación procesal de doña Diana Gayle Abbott presentó su escrito de alegaciones el 14 de diciembre de 1991. En él se dan por reproducidos los hechos y los fundamentos jurídicos consignados en la demanda, considerando innecesario abundar en los argumentos ya esgrimidos al interponer el recurso.

9. Por providencia de 14 de mayo de 1992, se señaló para deliberación y votación de la Sentencia el día 23 de mayo siguiente, quedando concluida con esta fecha.

II. FUNDAMENTOS JURIDICOS

1. El presente recurso de amparo se fundamenta en la presunta infracción de los arts. 14 y 24.1 de la Constitución. Dado que tanto la codemandada como el Ministerio Fiscal ponen de manifiesto en sus escritos de alegaciones la posible concurrencia de sendas causas de inadmisión -que en este momento procesal lo serían de desestimación del amparo pretendido-, procede examinar, con carácter previo a cualquier consideración sobre el fondo del asunto, la efectiva concurrencia de los motivos de desestimación denunciados.

La representación procesal de la República de Sudáfrica sostiene que el presente recurso de amparo es extemporáneo, toda vez que la sentencia impugnada no ha hecho más que ejecutar en sus términos la Sentencia del Tribunal Supremo de 1 de diciembre de 1986, de manera que era esta última resolución la que debió ser objeto en su día de un recurso ante este Tribunal. Entiende, en efecto, la República de Sudáfrica que la imposibilidad de ejecutar la sentencia dictada como consecuencia de la inadmisión de la inmunidad de jurisdicción ya estaba implícita en la sentencia del Tribunal Supremo que ordenó a la Magistratura de Trabajo entrar a conocer del fondo del asunto. Y ello porque, en su fallo, el Tribunal Supremo ordenaba a la Magistratura evacuar consultas en el caso de que dictara una resolución condenatoria, en orden a la constatación de una eventual inmunidad de ejecución en beneficio de la demandada.

Semejante planteamiento debe rechazarse, dado que la sentencia del Tribunal Supremo no prejuzgaba la existencia o inexistencia de una excepción de inmunidad, sino que, simplemente, obligaba al Tribunal de instancia a comprobar, como era obligado, si resultaba posible ejecutar una Sentencia en la que se condenara a la República de Sudáfrica. La hoy recurrente no venía obligada a recurrir en amparo contra la decisión del Tribunal Supremo, pues con ella se daba satisfacción a lo en ese momento pretendido: La obtención de una resolución de fondo por parte de la Magistratura. El problema de la ejecución sólo podía plantearse en un momento posterior, esto es, una vez dictada sentencia condenatoria. Además, los informes que habían de requerirse aparte de partir de una atípica interpretación del art. 7 del Real Decreto 1654/1980 -que lo que directamente regula es la invocación por parte de la Abogacía del Estado de la inmunidad del Estado español ante tribunales extranjeros- y del art. 278.2 LOPJ -que lo que contempla es la reciprocidad en materia de cooperación jurisdiccional- no puede considerarse que fueran vinculantes para el Juez, quien podía decidir en último término lo que considera pertinente. La demanda no es por tanto, extemporánea.

Asimismo debe rechazarse la alegación de la representación de la República de Sudáfrica en el sentido de que si el Magistrado de instancia hubiera querido apartarse de la inmunidad de ejecución derivada del tenor de la Sentencia del Tribunal Supremo de 1 de diciembre de 1986, por entender que los acuerdos bilaterales y usos y prácticas internacionales vigentes de aplicación al caso eran contrarias a la Constitución, dicho Magistrado debiera haber planteado cuestión de inconstitucionalidad ante este Tribunal, con arreglo a lo dispuesto en el art. 35 LOTC. Debe rechazarse este argumento porque, como ya ha quedado expuesto, la Sentencia de 1 de diciembre de 1986 no juzgó ni prejuzgó la cuestión de la inmunidad de ejecución de la República de Sudáfrica y, por ello, tanto el Magistrado, primero, como el Tribunal Superior de Justicia, después, se enfrentaron libremente al problema y entendieron, en uso de la discrecional facultad que los arts. 163 CE, 35 LOPJ y 5 LOPJ les conceden (vid. AATC 275/1983 y 791/1984, entre otros) que no procedía plantear cuestión de inconstitucionalidad.

En lo que a presunta infracción del art. 14 de la Constitución se refiere, tanto la alegada falta de invocación de dicho precepto en la fase judicial antecedente -tal y como señala la representación procesal de la República de Sudáfrica-, como la falta de argumentación sobre el particular en la demanda -aspecto este señalado por el Ministerio Público-, excusan de entrar en el análisis de dicho motivo de impugnación.

Así las cosas, el examen de la cuestión planteada debe constreñirse a la posible vulneración del derecho a la tutela judicial efectiva por parte de la resolución judicial impugnada.

2. Entiende la demandante que la Sentencia del Tribunal Superior de Justicia de Madrid de 8 de febrero de 1990, al haber admitido la inmunidad absoluta de ejecución de la Embajada de la República de Sudáfrica, ha vulnerado su derecho a la tutela judicial efectiva y a no padecer indefensión, por no haberse interpretado restrictivamente el privilegio de inmunidad de los Estados en materia de contratos de trabajo. A su juicio, no existe base legal para admitir la inmunidad de ejecución frente a la sentencia laboral favorable a sus intereses, habiéndose vulnerado el derecho a la tutela judicial en su vertiente de derecho a la ejecución de las resoluciones judiciales (SSTC 32/1982, 61/1984, 67/1984, 109/1984, entre otras muchas). También el Ministerio Fiscal es del parecer de que -a la vista de la práctica internacional de la naturaleza privada de la relación laboral y de la decisión del Tribunal Supremo (STS de 1 de diciembre de 1986) de excepcionar en este caso la inmunidad de jurisdicción- han de ejecutarse tanto la sentencia que declaró nulo el despido como su consecuencia, esto es, los Autos de 23 de julio de 1987 y 21 de marzo de 1988, todo ello de conformidad con los arts. 51 LECiv, 25.1 LOPJ, 10.6 del Código Civil y Real Decreto 1654/1980, interpretados de conformidad con el art. 24.1 de la Constitución, evitándose así el contrasentido que supondría la admisión de la competencia de una jurisdicción cuyo fallo fuera de imposible ejecución sin causa legal que lo autorice según una interpretación adecuada del derecho a la tutela judicial efectiva.

La cuestión se centra, pues, en la posible infracción del derecho a la tutela judicial efectiva en su vertiente de derecho a la ejecución de las resoluciones judiciales firmes, lo que implica examinar si carece de fundamento legal la denegación de la ejecución de la sentencia originaria por parte de la aquí impugnada.

Decidido que los Tribunales españoles disfrutaban de competencia de jurisdicción en el caso debatido (cuestión ya solventada en la Sentencia del Tribunal Supremo de 1 de diciembre de 1986), la ejecución de la resolución judicial derivada del ejercicio de esa competencia constituye un derecho de la recurrente que sólo puede excepcionarse de mediar alguna causa legal que lo justifique. Este Tribunal ha afirmado, y ahora lo debemos reiterar que **la ejecución de las sentencias forma parte del derecho a la tutela efectiva de los Jueces y Tribunales, ya que en caso contrario las decisiones judiciales y los derechos que en las mismas se reconocen o declaran no serían otra cosa que meras declaraciones de intenciones sin alcance práctico ni efectividad alguna** (SSTC 167/1987 y 92/1988). **La ejecución de sentencias es, por tanto, parte esencial del derecho a la tutela judicial efectiva y es, además, cuestión de esencial importancia para dar efectividad a la cláusula de Estado social y democrático de Derecho, que implica, entre otras manifestaciones, la vinculación de todos los sujetos al ordenamiento jurídico y a las decisiones que adoptan los órganos jurisdiccionales, no sólo juzgando, sino también haciendo ejecutar lo juzgado, según se desprende del art. 117.3 de la Constitución (SSTC 67/1984 y 92/1988).**

Junto a ello, este Tribunal igualmente ha afirmado que **no tratándose de un derecho de libertad, sino de un derecho prestacional, el de tutela judicial efectiva, en sus distintas vertientes -y entre ellas la de la ejecución de sentencias-, es conformado por las normas legales que determinan su alcance y contenido concretos y establecen los requisitos y condiciones para su ejercicio. De este modo, al tratarse de un derecho de configuración legal, el Legislador puede establecer límites al pleno acceso a la ejecución de las sentencias, siempre que los mismos sean razonables y proporcionales respecto de los fines que lícitamente puede perseguir el Legislador en el marco de la Constitución (STC 4/1988). Consecuentemente, cabe que un Tribunal adopte una decisión de inejecución de una sentencia, siempre que se haga expresamente en resolución motivada y con fundamento en una causa obstativa de la ejecución prevista por el ordenamiento. La aplicación judicial de una causa legal de inejecución debe estar guiada por el principio pro actione que inspira todas las manifestaciones del art. 24.1 CE, de manera que debe adoptarse la interpretación más**

favorable a la efectividad del derecho a la tutela judicial, en este caso del derecho a la ejecución. La denegación de la ejecución no puede, pues, ser arbitraria ni irrazonable, ni fundarse en una causa inexistente, ni en una interpretación restrictiva del derecho fundamental (STC 33/1987). Finalmente, hay que tener en cuenta que, si bien a este Tribunal no incumbe determinar la existencia o inexistencia de los hechos que han de subsumirse en la norma y en virtud de los cuales puede eventualmente entenderse el carácter no ejecutable de una sentencia, ello no es obstáculo para que sí pueda examinar, partiendo de los hechos resultantes de las actuaciones judiciales, la calificación jurídica que de ellos hace el órgano judicial, siempre a la luz del derecho fundamental a la ejecución de las sentencias. En otras palabras corresponde al Tribunal Constitucional, en esta vía de amparo, comprobar si la decisión de inejecución se ha fundado en una causa legal, interpretada en el sentido más favorable para aquel derecho (SSTC 33/1987 y 92/1988).

3. Sobre la base de la doctrina expuesta, cabe afirmar que la decisión del presente recurso de amparo debe realizarse a partir de la motivación de dos postulados básicos. **El primero es que el régimen de inmunidad de ejecución de los Estados extranjeros no es contrario, cualquiera que éste sea, al derecho a la tutela judicial efectiva consagrado por el art. 24.1 CE. El segundo es que, aun no dándose esa incompatibilidad entre inmunidad absoluta o relativa de ejecución de los Estados extranjeros ante nuestros Tribunales con el art. 24.1 CE, una indebida extensión o ampliación por parte de los Tribunales ordinarios del ámbito que es dable atribuir a la inmunidad de ejecución de los Estados extranjeros en el actual ordenamiento internacional acarrea una violación del derecho a la tutela judicial efectiva del ejecutante, porque supone restringir sin motivo las posibilidades del justiciable de conseguir la efectividad del fallo, sin que ninguna norma imponga una excepción a dicha efectividad.**

La compatibilidad del régimen de inmunidad de ejecución de los Estados extranjeros con el derecho a la tutela judicial efectiva en su faceta de derecho a la ejecución deriva de que debe reputarse legítimo desde el punto de vista constitucional que el Legislador, con un fundamento objetivo y razonable, impida que la potestad de ejecución forzosa pueda dirigirse sobre determinados bienes. Así, por ejemplo el Legislador puede legítimamente, con fundamento en la dignidad de la persona, excluir de la ejecución forzosa aquellos bienes que sirven a la subsistencia en condiciones mínimamente dignas de los particulares (art. 1.449 LECiv). Del mismo modo, los principios de legalidad presupuestaria y de continuidad de los servicios públicos, entre otros sirven de fundamento a la exclusión de la ejecución forzosa respecto de bienes de titularidad pública; si bien en tales casos los Tribunales cuentan con potestades compulsivas suficientes que sustituyen a las de ejecución forzosa en sentido estricto. Así, en lo que ahora interesa, por lo que respecta a los Estados extranjeros la soberanía y el principio de igualdad de los Estados es fundamento suficiente para que se pueda legítimamente excluir la potestad ejecutiva respecto de los bienes que dichos Estados tengan en nuestro territorio.

Si hubiese que concluir, además, que dicha inmunidad es de carácter absoluto y que los órganos jurisdiccionales no pueden realizar ningún tipo de actividad ejecutiva -ni de ejecución forzosa en sentido estricto ni de carácter compulsivo- frente a un Estado extranjero, no por ello habría que concluir que se produce una vulneración del derecho a la ejecución. Además, dicho derecho a la ejecución, entendido *lato sensu* como derecho a la efectividad de la resolución judicial dictada, podría verse satisfecho a través de expedientes distintos de la ejecución forzosa sobre los bienes del Estado extranjero. Así, por ejemplo, cabría pensar en el recurso a la vía de la protección diplomática, en los casos en que la misma sea procedente con arreglo al Derecho internacional público, o, en último término, en una asunción por parte del Estado del foro del deber de satisfacer la obligación judicialmente declarada, cuando la inejecución de la misma pudiera suponer un sacrificio especial para el justiciable contrario al principio de igualdad ante las cargas públicas.

4. Las anteriores consideraciones no obstan a que este Tribunal estime que una indebida extensión por parte de los Tribunales ordinarios del privilegio de la inmunidad de ejecución

pugne con el derecho a la tutela judicial efectiva, porque supone una restricción del derecho del justiciable a la ejecución del fallo que no tiene base legal. Ello implica que, a los efectos del presente caso, debe este Tribunal examinar si resulta razonable entender, como hizo el Tribunal Superior de Justicia de Madrid, que la República de Sudáfrica goza de inmunidad absoluta de ejecución frente a los Tribunales españoles. Si una interpretación distinta fuese posible, habría que concluir que la sentencia impugnada vulneró el derecho de la recurrente a la tutela judicial efectiva.

La determinación del régimen vigente en nuestro ordenamiento en materia de inmunidades de los Estados extranjeros es tarea que entraña cierta dificultad. Dicha dificultad deriva del hecho de que, a diferencia de otros países, que han codificado esta materia en leyes específicas o como parte de leyes procesales generales, nuestro Legislador decidió seguir la técnica de la remisión normativa, defiriendo en bloque al Derecho internacional público el sistema de inmunidades estatales. Así, dispone el art. 21 LOPJ:

«1. Los Juzgados y Tribunales españoles conocerán de los juicios que se susciten en territorio español entre españoles, entre extranjeros y entre españoles y extranjeros con arreglo a lo establecido en la presente Ley y en los Tratados y Convenios internacionales en los que España sea parte.

2. Se exceptúan los supuestos de inmunidad de jurisdicción y de ejecución establecidos por las normas del Derecho internacional público.»

Esta remisión al Derecho internacional público obliga al intérprete de nuestro Derecho y, en particular, obliga a los órganos jurisdiccionales españoles a adentrarse en dicho ordenamiento para sacar a la luz los supuestos en que pueden verse impedidos de ejercer actividad jurisdiccional -sea ésta de naturaleza declarativa, ejecutiva o cautelar- frente a determinados sujetos amparados por la inmunidad (Estados extranjeros, personas jurídico-públicas extranjeras, personal diplomático y consular, etc.). La remisión implica, en consecuencia, la necesidad de que los órganos jurisdiccionales españoles -incluido este Tribunal- se conviertan en intérpretes y aplicadores de la legalidad internacional, tal y como han tenido que hacer otros Tribunales nacionales, sin que ello suponga en absoluto una interferencia por parte del ordenamiento español en el Derecho internacional público, pues las normas de éste se conforman, entre otras cosas, en función de las prácticas internas adoptadas en cada materia por los Estados miembros de la Comunidad Internacional. La mencionada remisión normativa del art. 21.2 LOPJ exige, en cada caso, determinar la norma aplicable en conexión con el ordenamiento internacional; solución esta a la que nada cabe achacar en estrictos términos jurídico-constitucionales, aunque parece aconsejable que se lleve a cabo un desarrollo legislativo de esta materia que produzca una mayor seguridad jurídica.

La concreción de esas normas internacionales a las que remite el art. 21.2 LOPJ es una tarea que exige del intérprete una inducción basada en datos diversos, las convenciones internacionales de carácter universal o regional y las prácticas internas de los Estados, tanto en el plano legislativo, como en el judicial y administrativo; tarea que al tiempo debe tener en cuenta el proceso evolutivo que en esta materia es apreciable en la realidad internacional.

Dentro de esa evolución constante de las reglas internacionales en esta materia se puede, no obstante, trazar como tendencia clara una progresiva relativización de las inmunidades de los Estados extranjeros ante los Tribunales nacionales; relativización que resulta más acusada y clara en lo que respecta a la inmunidad de jurisdicción pero que, aun en menor medida, también se ha dejado sentir en lo tocante a la inmunidad de ejecución.

Dado que la inmunidad de jurisdicción no forma parte de los problemas planteados en el presente recurso de amparo, baste decir al respecto que, desde la tradicional regla absoluta de inmunidad de jurisdicción fundada en la igual soberanía de los Estados que expresaba el adagio *par in parem imperium non habet*, el ordenamiento internacional ha evolucionado a lo largo de este siglo hacia la cristalización de una regla relativa de inmunidad, que habilita a los Tribunales nacionales a ejercer jurisdicción respecto de aquellos actos del Estado

extranjero que no hayan sido realizados en virtud de imperio, sino con sujeción a las reglas ordinarias del tráfico privado. La distinción entre actos *iure imperii* y actos *iure gestionis*, por compleja que pueda ser su concreción en casos concretos y por diverso que sea su desarrollo en la práctica de los Estados y en las codificaciones internacionales. Se ha abierto paso como norma internacional general. Y ello sin perjuicio de que en el ordenamiento internacional subsistan otro tipo de inmunidades de carácter absoluto o cuasiabsoluto, como son las del personal diplomático y consular o la inviolabilidad de las sedes de los locales diplomáticos y consulares y de sus bienes. Conviene señalar ya en este punto que las inmunidades del Estado extranjero y otro tipo de inmunidades de Derecho internacional (en especial, las diplomáticas y consulares) no deben ser confundidas o identificadas. Sin perjuicio de que en ciertos supuestos ambos tipos de inmunidades puedan solaparse, lo cierto es que se trata de instituciones diferentes y resulta erróneo que la remisión que el art. 21.2 LOPJ hace a las normas internacionales se concrete sin más en las Convenciones de Viena sobre relaciones diplomáticas y consulares, cuando se está en presencia de supuestos de inmunidad del Estado extranjero y sus órganos.

Si de la inmunidad de jurisdicción pasamos a la inmunidad de ejecución, cabe apreciar mayores cautelas a la hora de sentar excepciones a la regla de la inmunidad, mas sin que quepa negar que dichas excepciones se van abriendo paso en la práctica de numerosos Estados. Dichas excepciones siguen la huella del criterio sentado para la inmunidad de jurisdicción, es decir, **se considera incontrovertible que un Tribunal interno no puede adoptar medidas de ejecución (o cautelares) sobre bienes de un Estado extranjero en el territorio del Estado del foro que sean destinados por aquél al sostenimiento de actividades soberanas o de imperio. Este sería el contenido claro de la inmunidad de ejecución en el momento presente. A partir de aquí, la aceptación de la no inmunidad de ejecución de los bienes que el Estado extranjero destine en el Estado del foro a actividades *iure gestionis* o de inequívoca naturaleza privada o comercial varía, moviéndose entre la no aceptación de la más mínima excepción a la inmunidad de ejecución hasta posturas ciertamente avanzadas que exigen una inequívoca afectación de los bienes a actividades *iure imperii*.** Esta variación en los datos que aporta la actual realidad jurídica Internacional dificulta, sin duda, la concreción de cuál es la norma que, por remisión del art 21.2 LOPJ, resulta aplicable en nuestro ordenamiento. A este respecto, cabe aportar los siguientes datos:

A) El Proyecto de artículos sobre inmunidades de los Estados elaborado en el seno de la Comisión de Derecho internacional de la ONU establece como principio la inmunidad absoluta de ejecución del Estado extranjero. Como excepción a dicho principio, el Proyecto CDI, aparte del supuesto de que el Estado extranjero preste su consentimiento a la ejecución, establece la de los bienes estatales afectos específicamente a fines comerciales y no gubernamentales, sin que, entre otros, puedan nunca ser considerados como utilizados o destinados a fines comerciales «los bienes, incluida cualquier cuenta bancaria, que estén situados en el territorio de otro Estado y sean utilizados o estén destinados a ser utilizados para los fines de la misión diplomática del Estado o de sus oficinas consulares». Este proyecto de codificación internacional carece naturalmente de fuerza obligatoria, aunque su valor indicativo sea muy alto, dada la sede en que se redactó y los materiales utilizados para su confección.

B) En el ámbito europeo debe mencionarse el Convenio europeo sobre inmunidad de los Estados y su protocolo adicional, hecho en Basilea el 16 de mayo de 1972, por iniciativa del Consejo de Europa. Aunque sean pocos los Estados entre los que se encuentra en vigor y aunque España no sea parte del mismo todavía, resulta también muy indicativo. En materia de inmunidad de ejecución, el Convenio distingue entre un régimen general y un régimen facultativo para los Estados parte. El régimen general consagra la regla de la inmunidad absoluta de ejecución del Estado extranjero, sin perjuicio de que dicho Estado tenga la obligación *ex convenio* de dar efecto a la sentencia dictada. El régimen facultativo al que voluntariamente pueden someterse los Estados parte sí que contempla la relatividad de la inmunidad de ejecución, al permitir con carácter general que las sentencias se ejecuten sobre bienes utilizados exclusivamente para actividades industriales o comerciales ejercidas

por el Estado extranjero de la misma manera que una persona privada. En cualquier caso, el Convenio restringe en cierta medida la posibilidad de ejecución al exigir que los bienes que sean objeto de la misma se destinen no ya genéricamente a actividades industriales o comerciales, sino a la misma actividad industrial o comercial que dio lugar a la demanda y, además, que se destinen exclusivamente a dicha actividad.

C) En el ámbito de las más recientes legislaciones nacionales sobre esta materia, realizadas sobre todo en países anglosajones o de su órbita de influencia, se observa que, aun partiendo igualmente del principio de la inmunidad de ejecución, se aceptan excepciones a la misma, centradas en el concepto de bienes usados para actividades comerciales en el Estado del foro. Así, por ejemplo, la Ley estadounidense de inmunidades soberanas extranjeras de 1976 excluye la inmunidad de los bienes de un Estado extranjero usados para una actividad comercial en los Estados Unidos, siempre que dichos bienes sean o hayan sido usados para la actividad comercial de la que derivó el litigio. La Ley británica de 1978 excluye con carácter general la inmunidad de ejecución de aquellos bienes del Estado extranjero que en el momento de la misma se utilicen o se pretendan utilizar para fines comerciales. Las leyes de Singapur (1979), Pakistán (1981), de la República Sudafricana (1981) y de Canadá (1982) siguen el modelo británico, con la particularidad en los casos de Singapur y Sudáfrica de que los litigios derivados de contratos de trabajo realizados con Estados extranjeros están acogidos a la inmunidad de jurisdicción y, consecuentemente también a la inmunidad de ejecución. La Ley australiana de 1985 sienta la misma exclusión de la inmunidad de los bienes destinados a actividades comerciales y, si bien excluye de tal consideración a la «propiedad diplomática», exige simplemente que los bienes estén destinados sustancialmente -y no exclusivamente- a actividades comerciales. En resumen, estas recientes legislaciones de países de la órbita anglosajona, aunque no puedan reputarse por sí mismas como configuradoras de una práctica general de los Estados, muestran una clara tendencia a la relativización de la inmunidad de ejecución de los Estados extranjeros.

D) Por último, cabe mencionar cómo las jurisprudencias nacionales de numerosos Estados han reconocido en supuestos concretos la posibilidad de que los Tribunales del foro realicen actos de ejecución. Así, en Bélgica (asunto Socobel), en Suiza (caso República Árabe Unida contra señora X), en Francia (caso Sociedad Eurodif contra República Islámica de Irán). En Austria, en Holanda, los Tribunales han reconocido excepciones a la inmunidad de ejecución. La Sentencia de 13 de diciembre de 1977 del Tribunal Constitucional Federal Alemán (caso de la República de Filipinas), paradigmáticamente, afirma que, aun siendo cierto que las medidas de ejecución afectan más directamente a la soberanía del Estado extranjero que las meras resoluciones judiciales declarativas, no existe una norma general de Derecho internacional, que imponga la inmunidad absoluta de ejecución del Estado extranjero.

A la vista de los datos aportados por la realidad jurídica internacional no cabe sino concluir que el art. 21.2 LOPJ, al remitir al Derecho internacional público, no impone una regla de inmunidad absoluta de ejecución de los Estados extranjeros. Antes al contrario, permite afirmar la relatividad de dicha inmunidad. El art. 24.1 CE, aunque como ha quedado dicho no impone, sí coadyuva a entender en un sentido limitado la inmunidad de ejecución, sobre todo si se tiene en cuenta que la ratio de las inmunidades de los Estados extranjeros no es el de otorgar a éstos una protección indiscriminada, sino la de salvaguardar la integridad de su soberanía. Por ello, con carácter general, cuando en una determinada actividad o cuando en la afectación de determinados bienes no esté empeñada la soberanía del Estado extranjero, tanto el ordenamiento internacional como, por remisión, el ordenamiento interno desautorizan que se inejecute una sentencia y, en consecuencia, una decisión de inejecución supone una vulneración del art. 24.1 CE.

5. La peculiaridad del presente caso es que la demandada y ejecutada en el proceso de que trae causa este recurso de amparo fue la República de Sudáfrica como tal Estado soberano y no su Embajada o alguno de sus representantes diplomáticos. Por ello, ni el Convenio de Viena de 1963 sobre relaciones consulares, ni el de 1961 sobre relaciones diplomáticas,

que sirven de fundamento a la prohibición de una ejecución forzosa contra bienes de las misiones diplomáticas y consulares, no pueden servir para definir si la inmunidad de ejecución del Estado sudafricano era absoluta o relativa, sino sólo para excluir determinado tipo de bienes -los adscritos a la Embajada sudafricana- de la ejecución forzosa.

Sentado que en la actualidad el Derecho internacional público no impone una inmunidad absoluta de ejecución, sino que permite que los Tribunales nacionales dirijan la ejecución forzosa frente a un Estado extranjero y que, en consecuencia, una interpretación distinta de la remisión contenida en el art. 21.2 LOPJ debe considerarse vulneradora del art. 24.1 CE por restringir sin causa legal el derecho a la ejecución, queda por determinar con qué amplitud o, si se quiere, con qué límites puede un tribunal español ejecutar una sentencia sobre bienes de un Estado extranjero en nuestro territorio.

En dicha tarea de concreción, debe partirse de dos principios generales: en primer término, el Derecho internacional impide que se lleven a cabo medidas de ejecución forzosa sobre aquellos bienes de titularidad del Estado extranjero que estén afectados o destinados al desenvolvimiento de actividades de soberanía o de imperio, permitiendo tan sólo la ejecución sobre bienes que estén destinados al desenvolvimiento de actividades económicas en las que no esté empeñada su potestad soberana por actuar conforme al Derecho privado. Ahora bien, en segundo término, debe tenerse especialmente en cuenta que, dentro del abanico de bienes de los que pueda ser titular un Estado extranjero en nuestro territorio, gozan de un específico régimen de protección los bienes de las misiones diplomáticas y consulares, en virtud del art. 22.3 de la Convención de Viena de 1961 de relaciones diplomáticas y del art. 31.4 de la Convención de Viena de 1963 de relaciones consulares. Es decir, **la relatividad de la inmunidad de ejecución de los Estados extranjeros se asienta en la distinción entre bienes destinados a actividades iure imperii y bienes destinados a actividades iure gestionis; mas, con independencia de este criterio, los bienes de las misiones diplomáticas y consulares son absolutamente inmunes a la ejecución, en virtud de los Convenios de Viena de 1961 y 1963.**

Del art. 22.3 del Convenio de Viena de 1961 se deduce que no son en absoluto susceptibles de ejecución forzosa los bienes de la República de Sudáfrica situados en el recinto de su Embajada, incluida la sede misma. Ahora bien, la duda se plantea respecto de aquellos bienes del Estado extranjero que, sin estar en la sede de la Embajada ni estar expresamente mencionados en el art. 22.3 de la Convención de Viena de 1961, están destinados por el Estado extranjero al sostenimiento de su misión diplomática. Concretamente, el problema consiste en determinar si las cuentas corrientes bancarias abiertas a nombre de una Embajada o cuyos fondos estén destinados al sostenimiento de la misma están amparadas por el citado precepto, puesto que el Auto que anula la sentencia impugnada procedió al embargo de parte del importe de una cuenta corriente bancaria abierta a nombre de la Embajada de Sudáfrica, lo que para la representación de la República de Sudáfrica implica una grave quiebra de las relaciones entre Estados soberanos.

La práctica internacional contemporánea exceptúa claramente de toda medida de ejecución las cuentas corrientes bancarias de la Embajada. A título indicativo, pues carece de fuerza normativa, cabe citar el art. 23 del ya mencionado Proyecto sobre inmunidades jurisdiccionales de los Estados. También ésta es la opinión aceptada en resoluciones de altos Tribunales nacionales en fechas aún recientes.

En su decisión de 12 de abril de 1984, en el caso *Alcolm Ltd. contra la República de Colombia*, la Cámara de los Lores británica ha estimado que el embargo de la cuenta corriente de la Embajada de Colombia no era posible de acuerdo con la Ley inglesa, aunque esa cuenta corriente sirva además de para hacer frente a los gastos corrientes de la Embajada, eventualmente para fines comerciales, al ser uno e indivisible el saldo de la cuenta corriente a favor de la misión diplomática. También el Tribunal Constitucional Federal Alemán en su Sentencia de 3 de diciembre de 1977 (caso República de Filipinas) ha rechazado la embargabilidad de cuentas corrientes de las misiones diplomáticas, protegida dentro de las inmunidades que el Derecho internacional general prevé para las misiones diplomáticas, por estar conectadas con el normal funcionamiento de la Embajada,

aplicándosele el brocardo *ne impediatur legatio*, puesto que la apertura de una cuenta corriente es un mecanismo necesario para el buen funcionamiento de la misión diplomática, bastando al respecto una declaración por parte del órgano competente del Estado en cuestión de que la cuenta corriente está destinada a asegurar la continuidad del funcionamiento de la Embajada.

Esta inembargabilidad de las cuentas corrientes de titularidad del Estado extranjero en bancos situados en el territorio nacional afectados al desenvolvimiento de la actividad ordinaria de las misiones diplomáticas y consulares, constituye la práctica internacional generalizada, de la que se deriva que la inmunidad de los Estados y de los bienes de las misiones diplomáticas y consulares en materia de ejecución impide que la ejecución forzosa pueda dirigirse, dentro de los bienes que las misiones diplomáticas y consulares puedan tener en el Estado del foro, contra aquellas cuentas corrientes. Y ello incluso si las cantidades depositadas en Entidades bancarias puedan servir también para la realización de actos en lo que no está empeñada la soberanía del Estado extranjero, esto es, a la realización de actividades iure gestionis a las que puede no alcanzar la ratio de la inmunidad de los bienes de las misiones diplomáticas y consulares. Esta eventualidad de que una cuenta corriente destinada a asegurar el funcionamiento de la misión diplomática, y consular del Estado extranjero pueda ser utilizada también para fines comerciales no justifica la exclusión de esa inmunidad de ejecución, y consecuente inembargabilidad, tanto por el carácter único e indivisible del saldo de la cuenta corriente, como por la imposibilidad de una investigación de las operaciones y de los fondos y destinos de los mismos en una cuenta corriente adscrita a una misión diplomática, lo que supondría una interferencia en la actividad de la misión diplomática, contraria a las reglas del Derecho internacional público.

No se le oculta a este Tribunal la dificultad que la inembargabilidad de dichas cuentas corrientes puede representar en algunos casos para el éxito de una ejecución forzosa frente a un Estado extranjero en los supuestos en que su inmunidad haya quedado exceptuada. Mas, la razonabilidad de la inmunidad en estos casos, en atención a la soberanía e igualdad de los Estados, conduce indefectiblemente a la conclusión de que el embargo de una cuenta corriente de una Embajada es un acto prohibido por el art. 21.2 LOPJ.

Como consecuencia de ello, en lo que interesa al presente recurso de amparo, debe entenderse que, en la medida en que la sentencia impugnada anuló un Auto que había decretado el embargo de las cuentas corrientes de la República de Sudáfrica, no se vulneró el derecho a la tutela efectiva de la recurrente. Tenía razón la demandada en este proceso de amparo al denunciar la ilicitud de dicha medida y, en consecuencia, el amparo no puede abarcar la petición de la recurrente de que se mantenga o se ordene de nuevo el embargo de las cuentas corrientes de la demandada, porque **el derecho a la tutela judicial efectiva de la recurrente, en su vertiente de derecho a la ejecución, no alcanza a que dicha ejecución se dirija sobre bienes amparados por una causa legal de inmunidad.**

6. La sentencia impugnada no se limita, sin embargo, a anular el Auto que declaró los embargos de determinadas cuentas corrientes, sino que a esa anulación añade las consecuencias legales inherentes a tal declaración respecto de la causa y los embargos ordenados en el mismo. Como además en el fundamento tercero de la sentencia se alude no sólo a la inembargabilidad de las cuentas corrientes a favor o adscritas al funcionamiento de una Embajada, sino que se refiere genéricamente al «embargo del dinero efectivo que un Estado extranjero posea en entidades bancarias españolas», y la anulación del Auto de 21 de marzo de 1981 puede entenderse como confirmación del Auto inicial de 19 de febrero de 1988, que además de declarar la inmunidad de ejecución, aunque referida a la Embajada de la República de Sudáfrica, ordenó no seguir la ejecución y proceder al archivo de la misma, puede entenderse que la sentencia impugnada no se ha limitado, con toda corrección desde la perspectiva constitucional que nos corresponde examinar, a anular el embargo decretado de las cuentas corrientes de la Embajada, sino que además ha cerrado el paso, al confirmar el archivo de las actuaciones y referirse genéricamente a la inembargabilidad de las cuentas del Estado extranjero demandado, a continuar la ejecución

sobre otros posibles bienes o dineros del Estado ejecutado situados en nuestro territorio que no gocen de inmunidad de ejecución.

Puede suceder que, al margen de los bienes inembargables porque efectiva o presumiblemente estén destinados al desenvolvimiento de la actividad de las misiones diplomáticas o consulares, el Estado extranjero -en este caso, la República de Sudáfrica-, objeto de ejecución, sea titular de otros bienes en nuestro país. Respecto de estos bienes, si existen, la inmunidad de ejecución garantizada por el ordenamiento internacional y, por remisión, por el art. 21.2 LOPJ, sólo alcanza a aquellos que estén destinados a la realización de actos *iure imperii*, pero no a aquellos destinados a la realización de actividades *iure gestionis*. De este modo, los Tribunales ordinarios, para satisfacer el derecho a la ejecución de sentencias, están habilitados para dirigir la actividad de ejecución forzosa frente a aquellos bienes que estén inequívocamente destinados por el Estado extranjero al desenvolvimiento de actividades industriales y comerciales en las que no esté empeñada su potestad soberana por actuar conforme a las reglas del tráfico jurídico-privado. Corresponde en cada caso al Juez executor determinar, conforme a nuestro ordenamiento, de entre los bienes de los que sea titular específicamente el Estado extranjero en nuestro territorio, cuáles están inequívocamente destinados al desenvolvimiento de actividades económicas en las que dicho Estado, sin hacer uso de su potestad de imperio, actúa de la misma manera que un particular. Sin que, por lo demás, cumplida esta circunstancia, sea necesario que los bienes objeto de la ejecución estén destinados a la misma actividad *iure gestionis* que provocó el litigio, pues otra cosa haría ilusoria la ejecución en casos como el presente en que, al tratarse del despido de una trabajadora de una Embajada, y admitido que dichos litigios quedan al margen de la inmunidad de jurisdicción del Estado extranjero, ningún bien quedaría sustraído a la inmunidad de ejecución, ya que sólo los bienes de la Embajada estarían en conexión con la actividad que provocó el litigio.

La sentencia impugnada, al declarar genéricamente la inejecución contra el dinero efectivo que el Estado ejecutado posea en Entidades bancarias españolas, al margen del destino específico de ese dinero, y confirmar el archivo de las actuaciones, ha aplicado una regla de inmunidad absoluta de ejecución de los bienes de la República de Sudáfrica que no viene exigida por el art. 21.2 LOPJ y, por tanto, supone una inejecución de las sentencias firmes sin causa legal desconocedor del derecho a la tutela judicial efectiva. El Auto del Juzgado de lo Social, y en la medida que lo confirma, la sentencia impugnada vulneraron el derecho a la tutela judicial efectiva de la recurrente en cuanto ordena el archivo de las actuaciones sin dar ocasión a que la ejecución pudiera realizarse sobre otros bienes de los que sea titular la República de Sudáfrica en nuestro territorio, y que no estando destinados al funcionamiento de su representación diplomática o consular, estén destinados al desenvolvimiento de actividades en las que dicho Estado no haga uso de su potestad o imperio.

Procede, en consecuencia, estimar parcialmente el recurso de amparo en cuanto a la confirmación del archivo de las actuaciones resultantes del Auto del Juzgado de lo Social núm. 11 de Madrid de 21 de marzo de 1908. Como esta confirmación no deriva directamente de la sentencia del Tribunal Superior de Justicia de Madrid aquí impugnada que en su fallo se limitó a revocar el Auto que había ordenado unos determinados embargos, la estimación parcial del amparo en el presente caso no requiere la anulación de la sentencia, sino que para el restablecimiento del derecho constitucional vulnerado basta anular el Auto de la Magistratura de Trabajo núm. 11 de Madrid de 19 de febrero de 1988, reponiendo las actuaciones ante dicho órgano judicial, hoy Juzgado de lo Social núm. 11 de Madrid, para que pueda proseguir las actuaciones del proceso de ejecución frente a otros posibles bienes del Estado ejecutado a los que no afecta la inmunidad de ejecución, si consta su existencia o son señalados por alguna de las partes.

FALLO

En atención a lo expuesto, el Tribunal Constitucional, POR LA AUTORIDAD QUE LE CONFIERE LA CONSTITUCION DE LA NACION ESPAÑOLA,

Ha decidido:

Estimar parcialmente el recurso de amparo interpuesto por doña Diana Gayle Abbot y, en su virtud:

- 1.º Reconocer su derecho a la tutela judicial efectiva, en su vertiente del derecho a la ejecución de sentencias firmes.
- 2.º Anular parcialmente el Auto de la Magistratura de Trabajo núm. 11 de Madrid de 19 de febrero de 1988, resultante del procedimiento de despido 1.245/1985, en cuanto ordena el archivo de las actuaciones.
- 3.º Reponer las actuaciones ante el Juzgado de lo Social núm. 11 de Madrid, a fin de que prosigan las actuaciones del proceso de ejecución frente a otros eventuales bienes del Estado ejecutado, que no gocen de la inmunidad de ejecución, en los términos indicados en el fundamento jurídico 6.º
- 4.º Desestimar el amparo en lo demás.

Publíquese esta sentencia en el «Boletín Oficial del Estado».

Dada en Madrid, a uno de julio de mil novecientos noventa y dos.-Francisco Rubio Llorente.-Eugenio Díaz Eimil.-Miguel Rodríguez-Piñero y Bravo-Ferrer.-José Luis de los Mozos y de los Mozos.-Alvaro Rodríguez Bereijo.-José Gabaldón López.-Firmados y rubricados.

Voto particular

parcialmente discrepante que formula el Magistrado don Eugenio Díaz Eimil a la Sentencia dictada en el recurso de amparo núm. 1.293/1990

Estoy de completo acuerdo con la doctrina general que acoge la sentencia, y, especialmente, en cuanto establece, como punto de partida para la resolución del caso, dos principios generales: el de Derecho internacional que, consagrando la inmunidad relativa de ejecución, considera embargables los bienes de los Estados extranjeros no destinados a actividades de soberanía y el de Derecho constitucional que proclama la prevalencia de la solución más favorable a la efectividad de los derechos fundamentales; principio este que debe siempre presidir toda interpretación y aplicación de las normas jurídicas en las que esté implicado un derecho constitucional, en el caso presente, el derecho a ejecutar las sentencias firmes, protegido por el art. 24.1 de la Constitución.

No comparto, sin embargo, la decisión elegida por la sentencia, puesto que excepcionar del referido principio de Derecho internacional, de manera absoluta, las cuentas corrientes bancarias, cualquiera que sea su destino -actividades de soberanía o de gestión- entraña, a mi juicio, una conclusión incompatible con el principio constitucional citado.

Y ello, porque este principio no consiente, que se limite o desconozca un derecho fundamental, sin que exista una norma jurídica que así lo disponga -de una manera razonable objetiva y en defensa de otros derechos o valores dignos de protección- y resulta que tal clase de norma no existe en el supuesto de autos, dado que no puede concederse tal efecto a una práctica internacional, que la propia sentencia reconoce variable y desprovista de universalidad y uniformidad, notas estas cuya presencia sería imprescindible para extraer de ella la norma cierta, objetiva y razonable que nuestra doctrina constitucional exige tener para considerar justificada la limitación de un derecho fundamental.

De todas formas, cualquiera que sea la opinión que se tenga sobre la vigencia, sentido y amplitud de esa práctica internacional, lo cierto es que el principio de inmunidad relativa de ejecución exige que para evitar el embargo, el Estado condenado acredite que los bienes contra los que se dirige estén destinados a actividad de soberanía, sin que ese acreditamiento pueda considerarse satisfecho por la simple manifestación del Estado contra

el cual se dirige la acción ejecutiva, puesto que éste equivale a volver a los tiempos ya superados de la inmunidad absoluta a través de una especie de presunción iure et de iure que se manifiesta carente de todo apoyo normativo.

La propia lógica del sistema hace necesario que el Estado extranjero deba aportar, más allá de una simple manifestación, las alegaciones y datos que puedan fundamentar el convencimiento judicial de que los bienes y, entre ellos, las cuentas corrientes, están destinados, en toda su integridad, a actividades de imperio, de tal forma que su pérdida puede poner en peligro el funcionamiento normal de sus Embajadas y oficinas consulares o diplomáticas, o atentar a su soberanía.

El caso aquí contemplado puede calificarse de típico supuesto no amparable en el privilegio de la inmunidad puesto que se trata de una Sentencia dictada en materia excluida de la inmunidad de jurisdicción -contrato laboral-, cuya ejecución se trata de realizar sobre cuenta corriente destinada, según propia confesión del Estado extranjero, a satisfacer gastos de personal, que es la misma actividad que ha dado lugar a la condena, habiéndose acordado además el embargo por una cuantía -2.574.010 pesetas-, que, salvo datos que acrediten lo contrario, no puede considerarse de entidad suficiente para poner en peligro el funcionamiento normal de la Embajada.

En resumen, estimo que al no existir entre España y la República de Sudáfrica pacto bilateral o régimen de reciprocidad, ni ley nacional o tratado internacional suscrito por España que dispongan de manera expresa, la inmunidad absoluta de las cuentas corrientes bancarias, debió, por imperativo constitucional, otorgarse el amparo sin condicionamiento de clase alguna y, en su consecuencia, permitir que continuase la ejecución en los términos ordenados por la Magistratura de Trabajo, puesto que las dudas que se suscitan sobre la materia debieron resolverse en tal sentido, por ser el más favorable a la efectividad del derecho constitucional y no existir norma que permita o justifique la grave limitación que se impone al mismo. Según dejamos dicho, esa anomia no puede subsanarse con la aplicación mimética de la práctica internacional seguida por algunos países, que, en contra de las tendencias dominantes en Derecho internacional prefieren seguir ancladas en una concepción absoluta de la inmunidad de ejecución que desde luego en la actualidad no concuerda con el respeto que entre Estados modernos, merecen las sentencias firmes dictadas por Tribunales competentes con todas las garantías constitucionales y legales en relaciones jurídicas derivadas de actividades de derecho privado en las que no esté implicada la soberanía del Estado.

En virtud de todo lo expuesto, opino que debió concederse el amparo sin limitarse sus efectos en la forma en que se hace en la Sentencia, que en la práctica equivale a la denegación pura y simple del amparo, a la que no se acompaña indicación o referencia a otras vías sustitutorias de la ejecución que permitan obtener algún género de efectividad del derecho fundamental invocado, que queda así totalmente desprotegido.

En razón a todo ello, formulo el presente voto particular, que formulo sin perjuicio de acatar la sentencia aprobada por la mayoría.

Madrid, dos de julio de mil novecientos noventa y dos.-Eugenio Díaz Eimil.-Firmados y rubricados.

E/5-Appendix 2: Summary

In this judgment the Constitutional Court partially recognized the violation of the fundamental right to a fair hearing by a tribunal, as established in article 24 of the Constitution. The plaintiff argued that the tribunal “a quo” violated her fundamental right to a fair hearing by a judicial organ, which the Constitutional Court has construed not only as a right to a judgement but also as a right to enforce it. In this sense, the Constitutional Court decided that, by simply denying the right to enforce the judgement based on the immunity of execution granted to South Africa, the tribunal had partially violated the fundamental right of Mrs. Abbott. Having said that there is a fundamental right to the enforcement of judicial decisions, the Constitutional Court also established that this right is not absolute, and that it does not cover the measures of constraint against the property of foreign States protected by international immunities. Indeed, the Constitutional Court clearly said that immunities of States and their property are not absolutely against the right to the enforcement of a judgement, because the principle of sovereign equality of States is a legitimate ground to restrict the scope of article 24 of the Constitution. Nevertheless, the Constitutional Court adopted a restrictive interpretation of jurisdictional immunities by affirming that the judges should decide their cases taking into account the distinction between *acta iure gestionis* and *acta iure imperii*, and not simply denying the right to enforce judgments. According to the Constitutional Court, however, the measures of constraint against bank accounts of the Embassies are in any case covered by the scope of the immunity of execution and, therefore, not subject to an embargo by domestic courts.

(a)	Registration no.	E/6
(b)	Date	27.10.1994
(c)	Authority	Tribunal Constitucional (Constitutional Court)
(d)	Parties	Esperanza Jequier Beteta (individual) v. Embajada de Brasil (State).
(e)	Points of Law	The Constitutional Court confirms the application of the limited theory of immunity to the execution of judgments, following the distinction between acts <i>iure imperii</i> and <i>iure gestionis</i> .
(f)	Classification no.	2, 2.b
(g)	Sources	Aranzadi 1994, no. 292 BOE, 29.11.1994
(h)	Additional information	
(i)	Full text – extracts – translations – summaries	Appendix 1: Full Text Appendix 2: Summary

E/6-Appendix 1: Full Text

Sentencia Tribunal Constitucional núm. 292/1994 (Sala Primera), de 27 octubre

Recurso de Amparo núm. 3039/1993.

Jurisdicción: Constitucional

BOE 29 noviembre 1994

Ponente: D. Vicente Gimeno Sendra

*DERECHO FUNDAMENTAL A OBTENER LA TUTELA EFECTIVA DE JUECES Y TRIBUNALES: **Naturaleza:** derecho de naturaleza prestacional, de configuración legal: el legislador puede establecer límites a su pleno acceso, siempre que sean razonables y proporcionados respecto de fines constitucionalmente lícitos para el legislador; **Derecho a la ejecución de resoluciones judiciales firmes:** régimen de inmunidad de Estados extranjeros: no es contrario al derecho a la tutela judicial efectiva: su régimen concreto se contiene en normas de Derecho Internacional Público: la delimitación del alcance concreto debe partir de la inexistencia de afectación de bienes a la soberanía del Estado extranjero. **Jurisdicción y Procedimiento Laboral:** ejecución de sentencia: bienes de Estado extranjero afectos al desenvolvimiento de actividades de tipo comercial o similar: auto que no examina, con arreglo a la doctrina de la STC 107/1992, si la ejecución solicitada era realizable: vulneración del derecho a la ejecución de las sentencias.*

*Recurso de amparo formulado contra Auto del Juzgado de lo Social núm. 23 de Madrid, de 1 septiembre 1993, relativo a denegación, en ejecución de sentencia, de embargo solicitado de bienes de la embajada de Brasil en España, para satisfacer pago de una pensión de jubilación. Vulneración del derecho fundamental a obtener la tutela efectiva de Jueces y Tribunales: existencia: **otorgamiento de amparo.***

La Sala Primera del Tribunal Constitucional, compuesta por don Miguel Rodríguez-Piñero y Bravo-Ferrer, Presidente; don Fernando García-Mon y González-Regueral, don Carlos de la Vega Benayas, don Vicente Gimeno Sendra y don Pedro Cruz Villalón, Magistrados, ha pronunciado

EN NOMBRE DEL REY

la siguiente

SENTENCIA

En el recurso de amparo núm. 3039/1993, promovido por doña Esperanza Jequier Beteta, representada por la Procuradora doña Raquel Gracia Moneva y asistida del Letrado don Pedro Feced Martínez, contra el Auto del Juzgado de lo Social núm. 23 de Madrid de 1 de septiembre de 1993, autos 41/1992, relativo a ejecución provisional de sentencia. Ha sido parte el Instituto Nacional de la Seguridad Social, representado por el Procurador don Carlos de Zulueta Cebrián y asistido de Letrado, e intervenido el Ministerio Fiscal. Ha sido Ponente el Magistrado don Vicente Gimeno Sendra, quien expresa el parecer del Tribunal.

I. ANTECEDENTES

1. Mediante escrito presentado en el Registro de este Tribunal el día 18 de octubre de 1993 se interpuso el presente recurso de amparo contra el Auto del Juzgado de lo Social núm. 23 de Madrid de 1 de septiembre de 1993 por el que se desestima el recurso de reposición interpuesto contra la providencia del mismo Juzgado de 18 de junio de 1993 por la que se declaraba no haber lugar al embargo solicitado de bienes de la Embajada de Brasil en

España, condenada por Sentencia de ese Juzgado de 22 de junio de 1992 al pago de una pensión de jubilación del 100 por 100 de la base reguladora de 193.458 pesetas al mes, con la consiguiente revalorización y mejoras.

En la demanda de amparo se solicita la nulidad del Auto de 1 de septiembre de 1993, que se reconozca a la recurrente el derecho a obtener la ejecución de la Sentencia de 29 de junio de 1992 y se retrotraigan las actuaciones al momento inmediatamente anterior al de dictar el Auto recurrido.

2. La pretensión nace de hechos que, brevemente expuestos, son los siguientes:

a) La actora, nacida en 1924, estuvo prestando servicios como encargada de contabilidad y tesorería de la Embajada de Brasil en España desde el 1 de enero de 1945 hasta el 31 de enero de 1991 sin que en momento alguno se le diera de alta ni cotizara en la Seguridad Social. Solicitada prestación de jubilación al Instituto Nacional de la Seguridad Social (INSS), le fue denegada por Resolución de 30 de septiembre de 1991. Tras la reclamación administrativa previa, interpuso demanda que correspondió conocer al Juzgado de lo Social núm. 23 de Madrid, frente al INSS, la Tesorería General de la Seguridad Social (TGSS) y la Embajada de Brasil, que fue parcialmente estimada en Sentencia de 29 de junio de 1992, absolviendo al INSS y la TGSS, y condenando a la Embajada de Brasil al pago de la referida prestación.

b) Interpuestos por la ahora demandante de amparo recursos de suplicación, desestimado por Sentencia del Tribunal Superior de Justicia de Madrid de 27 de mayo de 1993, y ulteriormente de casación para la unificación de doctrina, paralelamente, y con apoyo en el art. 292 de la Ley de Procedimiento Laboral (LPL), se solicitó del Juzgado de lo Social núm. 23 de Madrid la ejecución provisional de la Sentencia de 29 de junio de 1992, lo que fue acordado por Auto de 25 de enero de 1993, requiriéndose en el fallo a la Embajada de Brasil para que abonara la pensión solicitada.

c) Ante el incumplimiento por la Embajada de lo dispuesto en este último fallo, y solicitada la adopción de medidas tendentes a conseguir la efectividad de la ejecución, por providencia de 14 de mayo de 1993 el Juzgado requiere a la Embajada el abono inmediato de la pensión, bajo expreso apercibimiento de embargo, oficiándose a este fin escrito al Ministerio de Asuntos Exteriores por el que se le solicita informe sobre bienes de la Embajada susceptibles de embargo, a tenor de los convenios internacionales y del art. 7 del Real Decreto 1654/1980.

d) El 2 de junio de 1993 el Ministerio de Asuntos Exteriores emitió el informe solicitado, en el que se consideran amparados por la inmunidad de ejecución los locales, muebles y bienes allí situados, medios de transporte y cuentas corrientes de la Misión diplomática, añadiendo, no obstante -y con cita expresa de la STC 107/1992 y del art. 118 de la Constitución-, que el propio Ministerio debería conseguir información sobre bienes no afectos a las actividades propias de la Misión y sobre los que se pudiera hacer efectiva la condena. A su vista, por providencia de 18 de junio de 1993 acuerda el Juzgado no haber lugar al embargo; interpuesta reposición, con expresa cita del art. 24 CE, ésta se desestima por medio del Auto ahora recurrido, con el siguiente único fundamento jurídico:

«Según la Sentencia núm. 107/1992, de 1 de julio, de nuestro Tribunal Constitucional, si un órgano de jurisdicción española procediese al embargo de bienes (de cualquier clase) de una misión diplomática se violaría la Convención de Viena de 1961 y pudiera dar lugar a responsabilidades de carácter internacional, y como quiera que las Embajadas hacen uso de todos sus bienes para el propio ejercicio de sus funciones nos encontramos con el absurdo de que nada puede ser objeto de embargo mientras no se cambien los criterios. Ello está dando lugar a situaciones verdaderamente injustas desde el punto de vista legal, y en este mismo Juzgado se ha llegado incluso a la declaración de insolvencia de una Embajada.

Por todo lo cual no procede el embargo solicitado y, en consecuencia, debe ser desestimado el recurso de reposición.»

3. Argumenta la demanda de amparo que la resolución recurrida, que acabamos de reproducir, hace una lectura parcial e incompleta de la STC 107/1992, pese a citarla expresamente, pues en ella se sienta la doctrina de que la inmunidad de ejecución de los Estados no afecta a la que se pueda ejercitar sobre bienes inequívocamente destinados por el Estado extranjero al desenvolvimiento de actividades industriales y comerciales en las que, por actuar conforme a las reglas del tráfico jurídico-privado, no está empeñada su potestad soberana. Sobre bienes de esta naturaleza, no afectos al desenvolvimiento de la actividad propia de las misiones diplomáticas o consulares, sí es posible satisfacer el derecho a la ejecución de sentencias, correspondiendo en cada caso al Juez ejecutor determinar, de entre los bienes de los que sea titular el Estado extranjero en nuestro territorio, cuáles están inequívocamente destinados al desenvolvimiento de actividades económicas en los que dicho Estado actúa de la misma manera que un particular.

Prosigue su argumentación la demandante aduciendo que siempre que exista una norma internacional específica o reciprocidad bilateral puede decaer la inmunidad de ejecución, norma que a su juicio se contiene en el Convenio de cooperación jurídica en materia civil entre España y Brasil, ratificado por Instrumento de 29 de noviembre de 1990 («BOE» de 10 de julio de 1991), en cuyo art. 16.e) se prevé el reconocimiento y ejecución de las sentencias en materia de Seguridad Social «... de acuerdo con la ley interna de cada Estado». Por ello concluye la demandante, la inmunidad de ejecución ha quedado relativizada no sólo por la distinción entre los bienes destinados a actividades *iure imperii* y los afectos a actividades *iure gestionis*, sino también entre España y Brasil por acuerdo entre ambos Estados, por lo que es evidente que la resolución recurrida ha vulnerado el derecho a obtener la tutela efectiva de jueces y tribunales y el derecho a la ejecución de las resoluciones que dicten.

4. Por providencia de 24 de marzo de 1994, la Sección Segunda acordó admitir a trámite la demanda de amparo, tener por personada y parte a la recurrente y requerir del Juzgado de lo Social núm. 23 de Madrid la remisión de testimonio de las actuaciones, interesando el emplazamiento por diez días de cuantos hubieran sido parte en el proceso, excepto la recurrente, para su comparecencia ante este Tribunal.

5. Con fecha 16 de mayo del actual, la Sección Segunda acordó tener por recibido testimonio de las actuaciones previas y por personado y parte al INSS, representado por el Procurador don Carlos de Zulueta Cebrián. Asimismo, se acordó dar vista de las actuaciones a las partes y al Ministerio Fiscal por término común de veinte días, para que pudieran presentar las alegaciones que a su derecho convengan.

6. Mediante escrito registrado el 10 de junio siguiente, el Fiscal ante el Tribunal Constitucional informó a favor de la estimación del recurso, por entender que la resolución recurrida vulnera el art. 24.1 CE, anulándola y reponiendo las actuaciones al momento procesal inmediatamente anterior a su adopción, a fin de que por el Juzgado de lo Social se investiguen los bienes sobre los que sea posible hacer frente a la ejecución provisional. Considera el Ministerio Público, con extensa cita de la STC 107/1992, y de conformidad también con la advertencia contenida en el informe del Ministerio de Asuntos Exteriores, que el órgano judicial debió proseguir la investigación de los bienes susceptibles de forzosa ejecución, por cuanto la doctrina allí sentada claramente diferencia entre los afectos al desenvolvimiento de las actividades propias de la Misión diplomática y otros posibles destinados a actividades ajenas a esa función en los que los Estados actúan como simples particulares. Concuere finalmente el Fiscal con la recurrente en que no se ha tenido en cuenta el Convenio de cooperación jurídica en materia civil en vigor entre España y Brasil.

7. Mediante escrito registrado en este Tribunal el 9 de junio de 1994, la representación del INSS se abstiene de formular alegaciones, por cuanto las entidades gestoras resultan ajenas a la cuestión planteada al haber sido absueltas de las pretensiones en su contra.

La recurrente, por su parte, y mediante escrito registrado con la misma fecha, reproduce sustancialmente las alegaciones contenidas en la demanda, y añade la precisión de que los bienes sobre los que deba hacerse efectivo el fallo serán todos aquellos de que sea titular la República Federativa de Brasil no afectos al funcionamiento de Misiones diplomáticas o

consulares, y no sólo aquellos de que sea titular la Embajada de Brasil, pues ésta no es sino órgano de aquel Estado, desprovista de personalidad propia y separada. Termina por solicitar, conforme a lo alegado, se dicte sentencia anulando la resolución recurrida reconociendo a la actora el derecho a que la Sentencia de 29 de junio de 1992 sea ejecutada provisionalmente frente a todos los bienes y derechos de la República Federativa de Brasil no amparados por la inmunidad de ejecución.

8. Por providencia de 13 de octubre de 1994, la Sala acordó señalar para deliberación y votación del presente recurso el día 17 del mismo mes y año, fecha en que dio lugar la misma, que ha finalizado en el día de hoy.

II. FUNDAMENTOS JURIDICOS

1. Se contrae el presente recurso a la determinación de si el Auto del Juzgado de lo Social núm. 23 de los de Madrid de 1 de septiembre de 1993, confirmatorio en reposición de otro anterior, vulnera el derecho fundamental a la tutela judicial efectiva (art. 24.1 CE) en su vertiente de derecho a la ejecución de sentencias, concretamente por lo que se refiere a la ejecución provisional (art. 292 LPL), y mientras se resuelve el recurso de casación para la unificación de doctrina, de la Sentencia del mismo Juzgado de 29 de junio de 1992, por la que se condena a la Embajada de la República Federativa de Brasil en España al pago de determinada cantidad. Entiende el Auto objeto de este recurso, tras evacuar informe del Ministerio de Asuntos Exteriores al respecto, que la inmunidad de ejecución de que gozan los Estados extranjeros impide el embargo de bienes de cualquier clase de una misión diplomática.

En su contra, argumenta la ahora recurrente de amparo -y en ello coincide con el Ministerio Fiscal, que solicita la estimación del recurso- que la inmunidad de ejecución de los Estados no alcanza a los bienes inequívocamente destinados al desenvolvimiento de actividades industriales y comerciales no afectos a la actividad propia de la misión diplomática, correspondiendo en cada caso al juez ejecutor determinar, de entre los bienes de que sea titular el Estado extranjero en nuestro país, cuáles responden a aquella caracterización y son por tanto susceptibles de ejecución.

2. Antes de entrar en el fondo de la cuestión planteada conviene, sin embargo, que despejemos -pues alguna duda podría haber al respecto y **este Tribunal debe controlar incluso de oficio la concurrencia de las causas de inadmisibilidad del recurso**, que ahora lo serían de desestimación- la ausencia de obstáculos que en este orden presenta el carácter provisional de la ejecución que se intenta, por estar todavía pendiente la sustanciación del recurso de casación para la unificación de doctrina interpuesto por quien, en el presente proceso constitucional, es asimismo demandante de amparo. Pese a ello, **los términos del debate** propuesto en el recurso de casación -en el que se pretende la extensión a los codemandados, y absueltos en las dos instancias hasta ahora sustanciadas, de la condena ya apreciada con respecto a la Embajada de Brasil-, **hacen que el pronunciamiento que ahora se nos demanda no pueda resultar prematuro y contradictorio con el art. 44.1 a) LOTC, pues en nada podrá afectar la estimación o no del recurso de casación a la posición del recurrente con respecto a la Embajada de Brasil**, frente a quien no se pide ninguna modificación de la condena afirmada en las primeras instancias y que no es tampoco parte en casación.

3. Despejadas así las dudas que pudieran plantearse en orden a la admisibilidad del recurso, y pasando ya a entrar en la consideración de su objeto, se hace preciso recordar que **este Tribunal tuvo ocasión en la STC 107/1992 de pronunciarse por extenso sobre la compleja cuestión de las relaciones entre la inmunidad de ejecución de los Estados extranjeros y el derecho a la tutela judicial efectiva como comprensivo del derecho a la ejecución de sentencias**. Sin necesidad de reiterar ahora los argumentos allí expuestos, sí conviene establecer, como allí hacíamos, las siguientes afirmaciones:

1.^a **Tratándose de un derecho de naturaleza prestacional, el de tutela judicial efectiva - aquí en su vertiente de derecho a la ejecución de sentencias- es de configuración legal, por lo que el legislador puede establecer límites a su pleno acceso, siempre que sean razonables y proporcionales respecto de fines constitucionalmente lícitos para el legislador** (STC 4/1988), y se apliquen judicialmente conforme a la interpretación más favorable al derecho a la tutela (STC 33/1987) de modo que **corresponde a este Tribunal, en esta vía de amparo, comprobar que la decisión de inejecución se ha basado en una causa legal, interpretada en el sentido más favorable a la efectividad de la tutela** (SSTC 33/1987 y 92/1988).

2.^a Desde esta perspectiva **«el régimen de inmunidad de ejecución de los Estados extranjeros no es contrario, cualquiera que éste sea, al derecho a la tutela judicial efectiva consagrado por el art. 24.1 CE»**, pero, por otra parte **«una indebida extensión o ampliación por parte de los Tribunales ordinarios del ámbito que es dable atribuir a la inmunidad de ejecución de los Estados extranjeros en el actual ordenamiento internacional acarrea una violación del derecho a la tutela judicial efectiva del ejecutante, porque supone restringir sin motivo las posibilidades del justiciable de conseguir la efectividad del fallo, sin que ninguna norma imponga una excepción a dicha efectividad»** (STC 107/1992, fundamento jurídico 3.^o).

3.^a **El régimen concreto de la inmunidad de ejecución de los Estados extranjeros, por remisión del art. 21.2 LOPJ, se contiene en normas de Derecho internacional público que se obtienen por inducción de datos de origen muy diverso**, entre los que se encuentran las convenciones internacionales y la práctica de los Estados, siempre teniendo en cuenta el proceso de evolución que en esta materia es apreciable en la realidad internacional. Analizados en nuestra STC 107/1992 (fundamento jurídico 4.^o) los antecedentes a tener en cuenta (proyecto de codificación de la Comisión de Derecho Internacional, Convenio Europeo sobre Inmunidad de los Estados, hecho en Basilea el 16 de mayo de 1972, práctica de los Estados en sus vertientes legislativa y jurisprudencial), llegamos a la conclusión de que **no existe una inmunidad absoluta, sino relativa, de ejecución de los Estados, conclusión que se ve reforzada por la propia exigencia de efectividad de los derechos contenidos en el art. 24 CE y por la ratio de la inmunidad**, que no es la de otorgar a los Estados una protección indiscriminada, sino la de salvaguardar la integridad de la soberanía.

4.^a Por tanto **la delimitación del alcance concreto de la inmunidad de ejecución de los Estados, debe partir de que «con carácter general, cuando en una determinada actividad o cuando en la afectación de determinados bienes no esté empeñada la soberanía del Estado extranjero, tanto el ordenamiento internacional como, por remisión el ordenamiento interno desautorizan que se inejecute una sentencia y, en consecuencia, una decisión de inejecución supone una vulneración del art. 24.1 CE»** (fundamento jurídico 4.^o).

5.^a Además de esta delimitación genérica, es preciso tener en cuenta que determinados bienes gozan de una particular inmunidad por la calidad de sus titulares, como ocurre con los de las misiones diplomáticas y consulares (art. 22.3 de la Convención de Viena de 1961 de relaciones diplomáticas y art. 31.4 de la Convención de Viena de 1963 de relaciones consulares); de modo que la inmunidad de los Estados se asienta sobre una doble distinción: a) **son absolutamente inmunes a la ejecución los bienes** de las misiones diplomáticas y consulares, incluyendo **las cuentas corrientes bancarias** -según la práctica internacional contemporánea-; b) **son inmunes a la ejecución los demás bienes de los Estados extranjeros que estén destinados a actividades iure imperii** pero no los destinados a actividades *iure gestionis* (fundamento jurídico 5.^o).

6.^a De este modo, corresponde en cada caso al Juez ejecutor determinar cuáles de entre los bienes de que sea titular un Estado extranjero en nuestro territorio, y que no sean específicamente de las misiones diplomáticas o consulares, están inequívocamente destinados al desenvolvimiento de actividades en las que dicho Estado, sin hacer uso de su potestad de imperio, actúa de la misma manera que un particular (fundamento jurídico 5.^o).

7.^a No es necesario «que los bienes objeto de la ejecución estén destinados a la misma actividad *iure gestionis* que provocó el litigio, pues otra cosa haría ilusoria la ejecución» en determinados casos (fundamento jurídico 6.^o).

4. Esta doctrina, que ahora reafirmamos, es de plena aplicación al presente supuesto y conduce a la estimación del recurso planteado. Para ello es bastante considerar que, aunque en puridad la demandada en el proceso de instancia no fuera la República Federativa de Brasil, sino su Embajada, ésta no es sino órgano de aquel Estado y su representante en España [art. 3.1 a) Convenio de Viena sobre relaciones diplomáticas), **por lo que no es imprudente extender las posibilidades de ejecución de la sentencia no a los bienes de la Embajada afectos al desenvolvimiento de las actividades que le son propias, que gozan de absoluta inmunidad de ejecución, sino a aquellos otros de que sea titular el Estado en último término demandado que inequívocamente estén afectos a actividades de naturaleza comercial, o similar, a los que en los términos antedichos, no alcanza la inmunidad de ejecución.**

No es tampoco obstáculo para llegar a esta conclusión, en el Derecho internacional actual - que por remisión del art. 21.2 LOPJ configura el contenido de la inmunidad de ejecución-, que la ejecución de la que se trata lo sea a título provisional y mientras se sustancia el recurso de casación interpuesto para la unificación de doctrina legal (art. 292 LPL). En efecto, pese a la práctica de determinados Estados (así en Estados Unidos, por imperativo de su Ley de inmunidades soberanas extranjeras de 1976, la misma solución, con matices, se sigue en la legislación del Reino Unido, Canadá, Pakistán, Singapur y República de Sudáfrica), ni el último proyecto de codificación de ámbito universal, todavía en curso de elaboración en el seno de la Comisión de Derecho Internacional, ni la práctica de otro grupo de Estados -particularmente, Sentencia del Tribunal Constitucional federal alemán de 12 de marzo de 1983, así como la legislación italiana y australiana-, **permiten afirmar con plena certeza la existencia de una norma internacional que impida en todo caso, salvo consentimiento específico del Estado extranjero afectado, la ejecutabilidad de resoluciones judiciales no definitivas, cual es el caso presente por estar pendiente de resolución el recurso de casación interpuesto por la demandante de amparo.** Por otra parte, la fundamentación que pudiera tener una regla internacional como la apuntada -más destinada a evitar la ejecutabilidad de resoluciones interlocutorias o adoptadas en estadios muy iniciales del procedimiento, o en materias de especial trascendencia, de manera que su adopción pudiera dar lugar a controversia internacional, o bien medidas que se adoptan *ad fundandam jurisdictionem*-, ni siquiera permitiría su aplicación al caso presente, ni está claro que con ella se pretenda hacer frente a la ejecución provisional de sentencias y no tan sólo a la adopción de medidas cautelares supuestos aunque próximos materialmente no idénticos entre sí ni por el procedimiento con que se adoptan ni por sus efectos. Tal conclusión se afirma con mayor razón aún en el caso presente, dados los términos en que esa ejecución, provisional en la formulación legal, es en realidad definitiva por lo que respecta a los interesados en este proceso de amparo.

5. Las anteriores afirmaciones llevan, sin que sean necesarias ulteriores argumentaciones, a la concesión del amparo, por cuanto el Auto recurrido procedió a denegar la ejecución solicitada sin intentar determinar, conforme establecíamos en nuestra STC 107/1992 (fundamento jurídico 6.^o), la existencia de bienes del Estado demandado inequívocamente destinados al desenvolvimiento de actividades económicas y a los que no alcance la inmunidad específica de las misiones diplomáticas. Al estimar el amparo por esta causa, es innecesario que analicemos el segundo de los argumentos del recurrente -basado en la existencia de una norma bilateral entre España y la República Federativa de Brasil permisiva en todo caso de la ejecución de sentencias en materia de Seguridad Social, conforme al Convenio de cooperación jurídica en materia civil de 13 de abril de 1989-, por más que éste estuviera destinado al fracaso al confundir los procedimientos de reconocimiento y declaración de ejecutividad de decisiones españolas en Brasil y brasileñas en España, con la ejecución en España de sentencias españolas, siendo tales procedimientos, por lo demás, no extensibles a decisiones en materia de Seguridad Social, como el propio Convenio determina [art. 16.e)].

FALLO

En atención a todo lo expuesto, el Tribunal Constitucional POR LA AUTORIDAD QUE LE CONFIERE LA CONSTITUCION DE LA NACION ESPAÑOLA,

Ha decidido:

Estimar parcialmente el recurso de amparo interpuesto por doña Esperanza Jehquier Beteta y, en su virtud:

1.º Reconocer su derecho a la tutela judicial efectiva, en su vertiente del derecho a la ejecución de sentencias.

2.º Anular el Auto del Juzgado de lo Social núm. 23 de Madrid, de 1 de septiembre de 1993, dimanante de procedimiento 41/1992 sobre ejecución provisional de sentencia, en cuanto confirma su providencia de 18 de junio de 1993 por la que se declaró no haber lugar al embargo solicitado.

3.º Reponer las actuaciones ante el Juzgado de lo Social núm. 23 de Madrid, a fin de que prosigan las del proceso de ejecución frente a otros eventuales bienes del demandado, que no gocen de la inmunidad de ejecución en los términos indicados en los fundamentos jurídicos 3.º y 5.º

4.º Desestimar el recurso en todo lo demás.

Publíquese esta sentencia en el «Boletín Oficial del Estado».

Dada en Madrid, a veintisiete de octubre de mil novecientos noventa y cuatro.-Miguel Rodríguez-Piñero y Bravo-Ferrer.-Fernando García-Mon y González-Regueral.-Carlos de la Vega Benayas.-Vicente Gimeno Sendra.-Pedro Cruz Villalón.-Firmado y rubricado.

E/6-Appendix 2: Summary

The present judgment of the Constitutional Court is mainly based in the leading case 107/1992 of 1 July 1992 (see E/4). The Constitutional Court repeats its understanding of the fundamental right to a fair hearing as established in article 24 of the Constitution, which comprehends both the right to a judicial decision and its execution. However, this fundamental right may be limited by legitimate exceptions –the immunity of execution of foreign State property is one of these legitimate exceptions. For the Constitutional Court, the judgment appealed partially violated the right of the appellant because it did not examine whether its execution was possible taking into account the relative theory of State immunities in international law, and the distinction between acts *iure imperii* and *iure gestionis*.

(a)	Registration no.	E/7
(b)	Date	10.2.1997
(c)	Authority	Tribunal Constitucional
(d)	Parties	Emilio Blanco Montero (individual) v. Embajada de Guinea Ecuatorial (State)
(e)	Points of Law	The Constitutional Court establishes that the judges should exhaust the possible ways of execution of a judgment against a foreign state.
(f)	Classification no.	2, 2.b
(g)	Sources	Aranzadi 1997, no. 18 BOE, 14.3.1997, no. 63 (suplemento)
(h)	Additional information	
(i)	Full text – extracts – translations – summaries	Appendix 1: Full Text Appendix 2: Summary in English

E/7-Appendix 1: Full Text

Sentencia Tribunal Constitucional núm. 18/1997 (Sala Segunda), de 10 febrero

Recurso de Amparo núm. 2913/1993.

Jurisdicción: Constitucional

BOE 14 marzo 1997, núm. 63 (suplemento).

Ponente: D. Carles Viver Pi-Sunyer

*DERECHO FUNDAMENTAL A OBTENER LA TUTELA EFECTIVA DE JUECES Y TRIBUNALES: **Derecho a la ejecución de las resoluciones judiciales firmes:** contenido: el contenido principal consiste en que la prestación jurisdiccional sea respetuosa con lo fallado y enérgica, si fuere preciso, frente a su eventual contradicción por terceros: doctrina constitucional; Deber de diligencia de los órganos judiciales: impone al órgano judicial un conjunto de obligaciones de actuar en cuanto medios instrumentales necesarios para poder dar satisfacción al titular de dicho derecho fundamental; Deber de prestar la colaboración requerida por los Jueces y Tribunales en el curso del proceso y en la ejecución de lo resuelto.*

*SENTENCIAS: **Ejecución:** forma parte del derecho fundamental a la tutela efectiva de los Jueces y Tribunales, ya que en caso contrario las decisiones judiciales y los derechos que en las mismas se reconocen o declaran no serían otra cosa que meras declaraciones de intenciones sin alcance práctico ni efectividad alguna: doctrina constitucional; **Inmunidad de ejecución por normas de Derecho Internacional Público:** configuración y exigencia de efectividad de los derechos contenidos en el art. 24.1 CE; Bienes de Estados extranjeros: supuesto de ejecución de sentencia por despido contra la Embajada de Guinea Ecuatorial: no agotamiento de todas las posibilidades de actuación judicial respecto de las diligencias iniciadas por el Juzgado, a instancia del Abogado del Estado, en relación con los organismos competentes de los Ministerios de Economía y Hacienda y de Asuntos Exteriores para el embargo de los créditos, ayudas y subvenciones que pudiera haber concedidas a Guinea Ecuatorial: vulneración del derecho fundamental a obtener la tutela efectiva de Jueces y Tribunales.*

*Recurso de amparo contra diligencia que archiva la ejecución de la Sentencia de 22 abril 1986 del Juzgado de lo Social núm. 20 de Madrid (entonces, Magistratura de Trabajo) en autos sobre nulidad de despido contra la Embajada de Guinea Ecuatorial en España: ejecución de sentencia: no agotamiento de todas las posibilidades de actuación judicial pese a la laboriosa y compleja tarea judicial llevada a cabo. **Vulneración del derecho fundamental a obtener la tutela efectiva de Jueces y Tribunales: existencia: otorgamiento de amparo.***

La Sala Segunda del Tribunal Constitucional, compuesta por don José Gabaldón López, Presidente: don Fernando García-Mon y González-Regueral, don Rafael de Mendizábal Allende, don Julio Diego González Campos, don Carles Viver Pi-Sunyer y don Tomás S. Vives Antón, Magistrados, ha pronunciado

EN NOMBRE DEL REY

la siguiente

SENTENCIA

En el recurso de amparo núm. 2913/1993 promovido por don Emilio Blanco Montero, representado por la Procuradora de los Tribunales doña Mónica Oca de Zayas y asistido por

el Letrado don Juan Luis Yoate Flaquer contra la diligencia que archiva la ejecución (Autos núm. 182/1986) de la Sentencia del Juzgado de lo Social núm. 20 de Madrid (entonces, Magistratura de Trabajo), de 22 de abril de 1986, recaída en Autos núm. 1257/1984, sobre nulidad de despido. Ha sido parte el Abogado del Estado, en nombre y representación del Fondo de Garantía Salarial, y ha intervenido el Ministerio Fiscal. Ha sido Ponente el Magistrado don Carles Viver Pi-Sunyer, quien expresa el parecer de la Sala.

I. ANTECEDENTES

1. Por escrito registrado en este Tribunal el 7 de febrero de 1994, doña Mónica Oca de Zayas Procuradora de los Tribunales, en nombre y representación de don Emilio Blanco Montero, interpone recurso de amparo contra la diligencia que archiva la ejecución (autos núm. 182/1986) de la Sentencia del Juzgado de lo Social núm. 20 de Madrid (entonces, Magistratura de Trabajo), de 22 de abril de 1986, recaída en Autos núm. 1257/1984, sobre nulidad de despido.

2. Los hechos en los que se fundamenta la demanda son, sucintamente expuestos, los siguientes:

a) El día 29 de septiembre de 1984, don Emilio Blanco Montero presentó escrito de demanda en la oficina de Registro de Magistratura que por turno de reparto correspondió a la Magistratura de Trabajo núm. 20. Se admitió a trámite la demanda y se señaló para que tuviera lugar el acto del juicio la audiencia del 8 de noviembre de 1984. Tras la celebración de dicho trámite, la Magistratura dictó Sentencia, de 9 de noviembre de 1984, por la que declaraba la incompetencia de esta jurisdicción para conocer de la demanda formulada. Interpuesto el correspondiente recurso de casación contra la misma, la Sala Sexta del Tribunal Supremo casó y anuló, en Sentencia de 10 de febrero de 1986, la pronunciada por la Magistratura de Trabajo, declarando la competencia del orden laboral de la jurisdicción española para el conocimiento de la demanda. El 22 de abril de 1986, la Magistratura dictó nueva Sentencia por la que declaró nulo el despido acordado por la demandada Embajada de Guinea Ecuatorial, a la que condenó a la readmisión inmediata del demandante, con abono de los salarios dejados de percibir hasta que la readmisión tuviera lugar.

b) Como quiera que la mencionada misión diplomática no procedió a la readmisión del trabajador despedido, éste instó la ejecución de la sentencia antes citada, solicitando el abono de la indemnización y los salarios de tramitación. El día 3 de julio de 1986, se dictó Auto en el que, después de declarar extinguido el contrato de trabajo que unía a los litigantes, se condenó a la Embajada de Guinea Ecuatorial a que abonase al actor, en concepto de indemnización, la suma de 408.195 ptas., así como los salarios dejados de percibir desde la fecha del despido -26 de agosto de 1984- hasta el día de tal resolución.

c) En escrito presentado en fecha 9 de septiembre de 1986, la parte actora interesó la ejecución de la referida resolución judicial firme, cuantificando el importe de la misma en 2.546.574 ptas., cantidad correspondiente a 408.195 ptas. de indemnización, y 2.138.379 ptas. de salarios de tramitación, para lo que solicitaba, al mismo tiempo, el embargo de determinados bienes propiedad de la demandada (cuentas corrientes, bienes muebles e inmuebles). El mismo día, recayó proveído en el que se acordó requerir a la parte actora para que concretase las vías de ejecución que proponía, a lo que la misma contestó insistiendo en el embargo de bienes que tenía interesado y en el orden en que aparecían en la mencionada lista.

d) Al socaire del último de los fundamentos jurídicos de la Sentencia del Tribunal Supremo recaída en autos, en fecha 25 de noviembre de 1986, el órgano judicial dictó providencia por la que acordó elevar oficio al Excmo. Sr. Presidente del Gobierno, a través del Ministerio de Justicia y por conducto del Consejo General del Poder Judicial, a los efectos previstos en el art. 278.2 LOPJ. La Comisión Permanente del Consejo General del Poder Judicial, en reunión del día 9 de enero de 1987, acordó remitir al Ministerio de Justicia las certificaciones enviadas por la Magistratura, al igual que el informe emitido por su Gabinete Técnico. Dada

la tardanza en evacuar el informe solicitado, el 22 de febrero de 1988 se dictó proveído requiriendo a la Dirección General de Relaciones con la Administración de Justicia, para que remitiera informe sobre la existencia o no de reciprocidad entre España y Guinea Ecuatorial. Finalmente, el 22 de septiembre de 1988, se recibió comunicación de la Secretaría General Técnica del Ministerio de Justicia, en el que se informaba al órgano judicial que entre ambos países «no existe acuerdo bilateral en materia de inmunidad».

e) El 20 de octubre de 1988, se dictó Auto cuya parte dispositiva era la siguiente: «... que accediendo a lo interesado por el ejecutante Emilio Blanco Montero debía declarar haber lugar a la misma (la ejecución) debiendo recabarse de la demandada Embajada de Guinea Ecuatorial el abono al actor de la cantidad de 408.195 ptas. el abono de la misma en potestad directiva. Interesando del Ministerio de Asuntos Exteriores por medio de la oportuna exposición, tramitada a través del Tribunal Central de Trabajo».

El demandante formuló en tiempo y forma recurso de reposición frente al auto anterior, entendiendo que había existido un error en la cuantía de la ejecutoria. Por Auto, de 3 de abril de 1989, se estimó el recurso de reposición, se ordenó la continuación de la ejecución y se acordó requerir formalmente a la Embajada de Guinea Ecuatorial para que, en el plazo de quince días, procediera a dar cumplimiento en sus propios términos al Auto de la entonces Magistratura de Trabajo núm. 20 de las de Madrid, de 3 de julio de 1986, y para que, en consecuencia, satisficiera al demandante la suma de 2.546.574 ptas., cantidad que por conceptos de indemnización y salarios de tramitación le fuera fijada al trabajador por la extinción del contrato laboral que le unía con dicha legación diplomática.

f) Por nuevo escrito del demandante, fechado a 3 de junio de 1989, se volvió a solicitar al Juzgado de lo Social núm. 20 de Madrid que ordenara el embargo de bienes suficientes de la Embajada de Guinea Ecuatorial, para que la misma hiciera frente a la deuda que tenía contraída. Por providencia de 3 de junio de 1989, el Juzgado requirió a la parte actora para que aportara relación de cuentas corrientes a nombre de la ejecutada, a fin de proceder al embargo de éstas. Tras señalarse por el recurrente, a través de sucesivos escritos, las entidades financieras en las que la Embajada de Guinea Ecuatorial era potencial titular de cuentas corrientes («Banco Hispano Americano», «Banco Exterior de España», «Banco de España» y «Banco de Andalucía»), el Juzgado decretó el embargo de los saldos existentes en tales cuentas corrientes. Al mismo tiempo, el órgano judicial requirió, sucesivamente, a los distintos Registros de la Propiedad de Madrid y de Majadahonda a fin de que remitiesen certificación de bienes inmuebles que aparecieran inscritos a nombre de Embajada de Guinea Ecuatorial.

Todas estas gestiones resultaron, o bien insatisfactorias, o bien infructuosas: el «Banco Hispano Americano» manifestó al Juzgado que había procedido a efectuar retención en las cuentas de dicha Embajada, por un importe de 604 ptas., poniéndolas a su disposición; el «Banco Exterior de España» contestó que no aparecían bienes de ninguna especie en su entidad a nombre de la mencionada Embajada; el «Banco de España» indicó lo mismo que el anterior; y el «Banco de Andalucía» puso a disposición del Juzgado de lo Social, primero, 1 pta., que constaba en la cuenta corriente de la Embajada, y después, 601 ptas. Los diversos Registros de la Propiedad de Madrid requeridos contestaron que en sus oficinas no aparecía inscrito ningún bien inmueble, ni derecho real alguno, a nombre de la reiterada Embajada; el Registro de la Propiedad de Majadahonda indicó que no aparecía inscrita finca o derecho alguno a nombre de la Embajada en aquel Registro. Finalmente, el Ayuntamiento de Madrid comunicó al Juzgado que la mencionada embajada ocupaba el piso 5.º de la calle Claudio Coello pero en régimen de alquiler.

g) Por Auto del Juzgado de lo Social, de 10 de noviembre de 1989, se declaró, previa audiencia del Fondo de Garantía Salarial, la insolvencia de la Embajada ejecutada con carácter provisional y parcial, sin perjuicio de continuar la ejecución cuando aquélla mejorase de fortuna.

h) El Abogado del Estado, en representación del mencionado Fondo, interesó al Juzgado que se practicaran las siguientes diligencias: 1) embargo de bienes existentes en el domicilio de la demandada; 2) dirigir oficio a la Jefatura Provincial de Tráfico de Madrid, a fin

de que se trabara embargo de los distintos vehículos que prestaban servicio para la demandada; 3) dirigir oficio a distintos organismos del Ministerio de Asuntos Exteriores, para que informaran sobre los acuerdos o convenios de cooperación bilateral; y 4) dirigir oficio al organismo competente del Ministerio de Economía y Hacienda, a fin de que se informara sobre la existencia de cualquier tipo de subvenciones o ayudas concedidas al Estado de Guinea Ecuatorial.

i) El 6 de noviembre de 1989, el Juzgado dictó providencia por la que acordó no haber lugar a lo solicitado en los apartados 1) y 2) del anterior escrito, pero accedió a dirigir oficio a la Secretaría de Estado para la Cooperación Internacional e Iberoamericana y a la Oficina de Cooperación de Guinea Ecuatorial del Ministerio de Asuntos Exteriores, e igualmente a la Dirección General de Política Comercial u Organismo competente del Ministerio de Economía y Hacienda, con los fines anteriormente mencionados.

El Ministerio de Asuntos Exteriores remitió al Juzgado al Instituto de Cooperación para el desarrollo, integrado en la Agencia Española de Cooperación Internacional. El Ministerio de Economía y Hacienda comunicó al órgano judicial la cuantía de los créditos [FAD I (1979), por importe de 10.000.000 \$, FAD II (1979), por importe de 4.000.000 \$, FAD III (1980), por importe de 700.000.000 de ptas. y FAD IV (1988), por importe de 1.400.000.000 de ptas.], indicándole que se canalizaban a través del Instituto de Crédito Oficial y que podía dirigirse al «Banco Exterior de España», quien concede los que incluye en su coeficiente de inversión.

j) Por providencia, de 19 de febrero de 1990, el Juzgado ofició al «Banco Exterior de España» que se decretaba el embargo de los créditos autorizados por el Ministerio de Economía y Hacienda dentro de la modalidad de Fondo de Ayuda al Desarrollo (FAD).

k) El Abogado del Estado, en representación del Fondo de Garantía Salarial, comunicó al órgano judicial que aquel organismo, en su condición de representante legal subsidiario, había dictado resolución concediendo al actor el importe de 581.788 ptas. El Juzgado, mediante providencia de 11 de junio de 1990, tras los oportunos trámites, tuvo por subrogado al Fondo de Garantía Salarial en los derechos de don Emilio Blanco Montero, frente a la Embajada de Guinea Ecuatorial, por el importe de 581.788 ptas., abonadas por el mencionado Fondo de Garantía Salarial.

l) El Juzgado de lo Social acordó, mediante providencia de 10 de junio de 1991, oficiar al Instituto de Crédito Oficial para que procediera a la retención y puesta a disposición del Juzgado de las cantidades que pudiera tener pendientes de pagos al país de Guinea Ecuatorial, como consecuencia de los créditos autorizados por el Ministerio de Economía y Hacienda dentro de la modalidad «Fondo de Ayuda al Desarrollo»; oficiar al «Banco Exterior de España» reiterando el contenido de los oficios de fechas anteriores, y oficiar a la Agencia Española de Cooperación Internacional (Ministerio de Asuntos Exteriores), para que informara al Juzgado de la existencia de subvenciones o ayudas económicas a Guinea Ecuatorial, cuantía de las mismas y organismo que gestiona su pago.

El Subdirector General de Financiación a la Exportación del Instituto de Crédito Oficial comunicó al Juzgado que el Estado de Guinea Ecuatorial no tenía actualmente importes pendientes del percibir por el tipo de créditos del «Fondo de Ayuda al Desarrollo», especificando, además, que, en tales casos, el receptor directo es el exportador español que suministra la mercancía, aunque el deudor del crédito otorgado sea el propio Estado del país receptor del bien suministrado. El «Banco Exterior» de España comunicó al Juzgado que, una vez verificados sus archivos, no se constataba la existencia de crédito alguno dentro de la modalidad «Fondo de Ayuda al Desarrollo», concedido por esa entidad de crédito a Guinea Ecuatorial. El Ministerio de Asuntos Exteriores indicó, por su parte, que las ayudas o subvenciones a la República de Guinea Ecuatorial son concedidas en virtud de un Tratado de amistad y que dicho Tratado obliga a España como parte, por lo que su incumplimiento podría hacer incurrir a España en responsabilidad internacional; en consecuencia este organismo se declaró imposibilitado para acceder a lo solicitado por el Juzgado en cuanto a retener y poner a disposición la cantidad requerida. La Agencia Española de Cooperación Internacional certificó que, en ese momento, no se estaba

tramitando ninguna ayuda o subvención que tuviera por destinatario el Estado de Guinea Ecuatorial.

m) El Juzgado dictó providencia, de fecha 1 de diciembre de 1992, por la que, dando cuenta que se había agotado la vía ejecutiva directa iniciada por el Auto de 3 de abril de 1989 y, no conociéndose bienes en territorio español pertenecientes al Estado de Guinea, se acordaba librar oficio a la Asesoría Jurídica Internacional del Ministerio de Asuntos Exteriores para que emitiera informe sobre las modalidades de ejecución de la sentencia conforme a los Tratados, prácticas y usos internacionales.

En dicho informe se puso de manifiesto que no era posible, en el presente caso, ejercer la protección diplomática, pues el actor no había agotado los recursos judiciales internos del Estado demandado; en cambio, se exponía que sí era posible que el Estado español solicitara a Guinea Ecuatorial el cumplimiento de la sentencia, y que esa solicitud podía realizarse a través de la vía diplomática.

A tenor de este informe, el Juzgado requirió del Ministerio de Asuntos Exteriores el acceso a la vía diplomática, lo que motivó la entrega, por parte del citado Ministerio, de una nota verbal a la Embajada de la República de Guinea Ecuatorial.

n) Por providencia de 1 de junio de 1993, el Juzgado acordó quedar a la espera un tiempo prudencial para su cumplimiento. Finalmente, y por diligencia de 30 de noviembre de 1993, se procedió al archivo del procedimiento.

3. La demanda de amparo, escueta en su fundamentación, centra su queja en la inejecución de la resolución judicial que había acordado el pago de una cantidad indemnizatoria a favor del actor, como consecuencia de no haber optado la empleadora, Embajada de Guinea Ecuatorial, a la readmisión del mismo tras haber sido declarado nulo su despido. Con ello, se cita como vulnerado el art. 24.1 CE en su vertiente de derecho a ejecutar las resoluciones judiciales en sus propios términos.

4. Por providencia de 19 de mayo de 1994, la Sección Tercera de este Tribunal, acordó recabar del Juzgado de lo Social núm. 20 de Madrid, la remisión o fotocopia adverada de las actuaciones correspondientes al procedimiento núm. 1257/1986, ejecutoria 182/1986. **5.** Mediante providencia de 11 de octubre de 1994, la mencionada Sección acordó admitir a trámite la demanda de amparo y, en consecuencia, dirigir comunicación al Juzgado de lo Social núm. 20 de Madrid a fin de que procediera a emplazar, para que en el plazo de diez días pudieran comparecer en el recurso de amparo y defender sus derechos, a quienes hubieran sido parte en el procedimiento.

6. Por providencia de 23 de febrero de 1995, la Sección Cuarta acordó dar vista de las actuaciones a la parte recurrente y al Ministerio Fiscal por plazo común de veinte días, a fin de que pudieran presentar las alegaciones que estimaran pertinentes, conforme determina el art. 52.1 de la Ley Orgánica del Tribunal Constitucional.

7. Por escrito registrado ante este Tribunal el 24 de marzo de 1985, el Ministerio Fiscal dio curso al trámite anterior, solicitando de este Tribunal que dictara sentencia en virtud de la cual acordara estimar el amparo solicitado, por entender que las resoluciones judiciales recurridas han vulnerado el art. 24.1 CE. Para el Fiscal no puede afirmarse que el Juzgado de lo Social incurriera en una inactividad procesal. De manera periódica requirió y recordó a los preceptivos órganos y organizaciones ministeriales a fin de que le informaran sobre la existencia de créditos «Fondo de Ayuda al Desarrollo», concedidos al Estado demandado, así como de cualquier otro tipo de préstamo o concesión económica. El Juzgado también intentó pesquisas sobre bienes inmobiliarios inscritos a favor del Estado y Embajada demandadas, resultando infructuosa la gestión. Es decir, el Juzgado, hasta la providencia de 1 de junio de 1993, hizo todo lo posible por la efectividad de la ejecución. No cabe decir lo mismo, a juicio del Fiscal, de la representación letrada del actor de amparo, que nada solicitó, ni cuando fue requerido designó bienes *iure gestionis* susceptibles de amparo.

Por otra parte, en la STC 107/1992 se mencionaban, en un caso semejante al presente, otras vías de satisfacción del interés del ejecutante; y, así, se decía «... por ejemplo, cabría pensar en el recurso a la vía de la protección diplomática, en los casos en que la misma sea

procedente con arreglo al derecho internacional público, o, en último término, en una asunción por parte del Estado del Foro del deber de satisfacer la obligación judicialmente declarada, cuando la inejecución de la misma pudiera suponer un sacrificio especial para el justiciable contrario al principio de igualdad ante las cargas públicas». Según el Fiscal, es al filo de esta reflexión donde surge la posibilidad de amparo. El Juzgado si bien instó la vía diplomática y quedó a la espera, acabó archivando la causa sin interesar del Ministerio de Asuntos Exteriores el estado de la reclamación en vía diplomática, y si procedía, intentar la ejecución subsidiaria en el Estado del Foro. En consecuencia, y a juicio del Ministerio Fiscal, al no haber agotado esas posibilidades, el Juzgado vulneró con su decisión de archivo el derecho de ejecución, por lo que considera que el amparo debe prosperar. Su alcance presupondría la anulación de la diligencia de archivo y la prosecución de la ejecución por las vías antes reseñadas. **8.** El Abogado del Estado registró escrito ante este Tribunal el día 13 de diciembre de 1996 mediante el que se persona en el presente recurso, en nombre y representación del Fondo de Garantía Salarial, y formula las alegaciones previstas en el art. 52.1 LOTC. Se aduce en el mismo que es de aplicación al caso la doctrina contenida en las SSTC 107/1992 y 292/1994, de las que resulta que son ejecutables las sentencias dictadas por Tribunales españoles y condenatorias de Estados extranjeros, siempre que la ejecución se circunscriba a bienes destinados a las actividades prestadas *iure gestionis*, si existieran. No obstante, se manifiesta que de las actuaciones consultadas no se constata que el Juzgado de lo Social se haya planteado la cuestión de si existen bienes pertenecientes a la República de Guinea Ecuatorial que no gocen de inmunidad de ejecución para proceder a su traba y realización o aplicación. Por ello, sería posible otorgar el amparo reconociendo al demandante su derecho a la ejecución de la sentencia dictada contra la Embajada de Guinea Ecuatorial sobre bienes que no gocen de inmunidad de ejecución, si alguna vez llegan a existir antes de que prescriba la acción de ejecución. De todos modos, en opinión del Abogado del Estado, éste sería un reconocimiento vacío de consecuencias prácticas desde el punto de vista del éxito de la ejecución y tendría el inconveniente de no hacer justicia a los intentos del Juzgado por lograr la ejecución de la sentencia. Además, considera que, en buena parte, el problema que se plantea es el del éxito económico de la ejecución, algo que el art. 24 CE no garantiza; y, en el presente caso, se da la peculiaridad de que la Embajada parece no tener bienes libres susceptibles de traba, es decir, bienes no inmunes a la ejecución por estar adscritos a actividades *iure gestionis*, mientras que bienes ostensiblemente pertenecientes a la Embajada (o más exactamente a la República de Guinea Ecuatorial) parecen ser *inmunes* a la ejecución.

Por otra parte, se aduce que la tesis contenida en la STC 107/1992, fundamento jurídico 3.º *in fine*, en donde se contiene una referencia a la posible «asunción por parte del Estado del foro del deber de satisfacer la obligación judicialmente declarada, cuando la inejecución de la misma (por razón de inmunidad de ejecución) pudiera suponer un sacrificio especial para el justiciable contrario al principio de igualdad ante las cargas públicas», presenta graves problemas y dificultades; pero es que, además, en todo caso, este es, en su opinión, un problema de responsabilidad patrimonial de la Administración absolutamente ajeno a la jurisdicción constitucional de amparo, sobre el que, por tanto, sería improcedente cualquier pronunciamiento en el presente recurso.

A pesar de estos inconvenientes, esta parte solicita que se dicte sentencia reconociendo el derecho del actor a la ejecución de la sentencia en bienes de la Embajada de Guinea Ecuatorial destinados a actividades *iure gestionis*, si existieran.

9. Por providencia de 19 de diciembre de 1996, la Sección, visto el contenido del anterior, acordó unirlo a las presentes actuaciones y tener por personado y parte al Abogado del Estado en el procedimiento en la representación que ostenta.

10. Por providencia de 6 de febrero de 1997, se señaló para deliberación y votación de la presente sentencia el día 10 del mismo mes y año.

II. FUNDAMENTOS JURIDICOS

1. El presente recurso tiene como objeto la diligencia del Juzgado de lo Social núm. 20 de los de Madrid, de 30 de noviembre de 1993, por la que se declara el archivo de la ejecución de la Sentencia del mismo Juzgado (entonces, Magistratura de Trabajo), de 22 de abril de 1986, recaída en Autos 1257/1984, sobre nulidad de despido. Todas las partes personadas en este proceso y el Ministerio Fiscal coinciden en atribuir al acto que se impugna la vulneración del art. 24.1 CE, en su vertiente de derecho a la ejecución de las sentencias firmes.

2. Como se ha relatado en los antecedentes, la ejecución que se reclama se remonta a 1984, año en el que don Emilio Blanco presentó escrito de demanda por despido contra la Embajada de Guinea Ecuatorial en España, en la que había desempeñado un puesto como conductor. Tras sucesivos trámites, entre los que destacan la sentencia de Magistratura que declaraba la incompetencia de esa jurisdicción para conocer de la demanda formulada y la sentencia del Tribunal Supremo, por la que casó y anuló la anterior, la Magistratura de Trabajo núm. 20 de Madrid dictó nueva Sentencia de 22 de abril de 1986, declarando nulo el despido acordado por la mencionada Embajada y condenándola a la readmisión inmediata del demandante, con abono de salarios dejados de percibir hasta que la readmisión tuviera lugar. Pero como quiera que la mencionada misión diplomática no procedió a la readmisión del trabajador despedido, éste reclamó el abono de la indemnización correspondiente, quedando definitivamente fijada, por Auto de 3 de abril de 1989, en la suma de 2.546.574 ptas., en concepto de indemnización y salarios de tramitación. Designados por el demandante los bienes sobre los que se solicitaba el embargo (cuentas corrientes y bienes muebles e inmuebles), el Juzgado decretó el embargo de los saldos existentes en las cuentas corrientes referidas por el actor y, al mismo tiempo, requirió, sucesivamente, a los distintos Registros de la Propiedad de Madrid y de Majadahonda, a fin de que remitiesen certificación de bienes inmuebles que aparecieran inscritos a nombre de la Embajada de Guinea Ecuatorial. Todas estas gestiones resultaron, o bien insatisfactorias, o bien infructuosas, tal y como se detalla en los antecedentes.

Se declaró, así, la insolvencia de la Embajada ejecutada con carácter provisional y parcial, facilitándose, con ello, la intervención del Fondo de Garantía Salarial en el proceso, quien, tras los correspondientes trámites, concedió al actor el importe de 581.788 ptas., subrogándose por tal cuantía en los derechos del trabajador. El Abogado del Estado, en nombre y representación del mencionado Fondo, interesó que se practicasen, por una parte, una serie de diligencias tendentes a averiguar la existencia de posibles bienes de la meritada Embajada a través de determinados organismos públicos y, por otra, instó que se trabara embargo sobre bienes sitos en el domicilio de la misma y sus vehículos. El Juzgado accedió a la práctica de las diligencias solicitadas relativas a recabar nueva información sobre posibles bienes, pero no así al embargo de los bienes mencionados.

Se inició así una larga sucesión de oficios dictados por el órgano judicial a distintos organismos públicos a fin de que le informaran sobre la existencia de cualquier tipo de subvenciones o ayudas concedidas por el Estado español al Estado de Guinea Ecuatorial. El tipo de gestiones que realizó el Juez en este período de la ejecución deberá ser objeto de un examen más detenido, dada su relevancia para la resolución del presente caso; pero baste recordar, por el momento, que la respuesta negativa de tales organismos, con independencia de la causa que la motivó, llevó al juzgador a requerir al Ministerio de Asuntos Exteriores el acceso a la vía de protección diplomática, lo que motivó, por parte del citado Ministerio, la entrega de una nota verbal a la Embajada de la República de Guinea Ecuatorial. El Juzgado, en junio de 1993, acordó quedar a la espera de su cumplimiento. Sin embargo, fue en el mes de noviembre cuando, ante la falta de un resultado satisfactorio de tal gestión, se dictó la diligencia de archivo, motivo del presente amparo.

Este extracto de los hechos que han dado lugar al presente amparo permite identificar las cuestiones que deben abordarse para la resolución del mismo. Así, será ineludible

determinar el contenido del derecho fundamental que se alega. También será necesario examinar con detenimiento las obligaciones del sujeto pasivo frente al que se ejerce. Posteriormente, y analizados en abstracto los elementos de la estructura del derecho consagrado en el art. 24.1 CE, éstos deberán ponerse en relación con el contexto concreto en el que se plantea la queja del recurrente, a saber, la ejecución de una sentencia dictada en el orden laboral frente a una embajada de un Estado extranjero sita en España.

3. Este Tribunal ha afirmado, y ahora lo debemos reiterar, que **la ejecución de las sentencias forma parte del derecho a la tutela efectiva de los Jueces y Tribunales, ya que en caso contrario las decisiones judiciales y los derechos que en las mismas se reconocen o declaran no serían otra cosa que meras declaraciones de intenciones sin alcance práctico ni efectividad alguna.** Más concretamente, el derecho a la ejecución impide que el órgano judicial se aparte, sin causa justificada, de lo previsto en el fallo que ha de ejecutar, o que le abstenga de adoptar las medidas necesarias para proveer a la ejecución de la misma, cuando ello sea legalmente exigible (SSTC 125/1987, 215/1988, 153/1992, entre otras). **El contenido principal del derecho consiste, pues, en que esa prestación jurisdiccional sea respetuosa con lo fallado y enérgica, si fuera preciso, frente a su eventual contradicción por terceros.** En tal contexto, no es cometido de este Tribunal la determinación de cuáles sean las decisiones que, en cada caso, hayan de adoptarse para la ejecución de lo resuelto, pero sí deberá vigilar, cuando de la reparación de eventuales lesiones del derecho a la tutela judicial se trate, que ésta no sea debida a una decisión arbitraria ni irrazonable, ni tenga su origen en la pasividad o desfallecimiento de los órganos judiciales para adoptar las medidas necesarias que aseguren la satisfacción de este derecho (STC 153/1992).

Profundizando en estas dos últimas cuestiones, sobre las que sí puede y debe pronunciarse este Tribunal en ejercicio de su jurisdicción, hemos afirmado, por una parte, que **una decisión de no ejecución de una sentencia habrá de apoyarse en la concurrencia de una causa prevista por una norma legal, pero interpretada a su vez en el sentido más favorable a tal ejecución, sin que sea constitucionalmente válida la inejecución salvo que así se decida expresamente en resolución motivada, en aplicación de una causa prevista por una norma legal y no interpretada restrictivamente** (SSTC 155/1985, 151/1993). Por otra parte, y **en relación con el deber de diligencia que debe desplegar el órgano judicial en toda ejecución**, en aquellos casos en los que la resolución de ejecución debe ser cumplida por un ente público, éste ha de llevarla a cabo con la necesaria diligencia, sin obstaculizar el cumplimiento de lo acordado, por imponerle así el art. 118 CE; y cuando tal obstaculización se produzca, el Juez ha de adoptar las medidas necesarias para la ejecución, de acuerdo con las leyes. Si tales medidas no se adoptan con la intensidad necesaria -y legalmente posible- para remover la obstaculización producida, el órgano judicial vulnera el derecho fundamental a la ejecución de las sentencias, que le impone -como antes decíamos- el deber de adoptar las medidas oportunas para llevarlas a cabo (SSTC 64/1987, 298/1994).

4. Pues bien, conectando el contenido del derecho que se invoca con los sujetos y el Juzgado encargado de la ejecución que conforman su estructura ha de precisarse ahora cuál es el deber de diligencia exigido legalmente al órgano judicial en relación con el procedimiento judicial concreto que ha tenido lugar. En el presente caso, tal delimitación hace inexcusable una referencia a las Leyes Laborales.

Ahora bien, el contexto legal referido presenta cierta complejidad en un supuesto como el de autos, en el que su fase de ejecución, desde su comienzo hasta el momento actual, ha sobrevivido a tres normativas distintas. Se rigió en su inicio por la Ley de Procedimiento Laboral (en adelante LPL), aprobada por el Real Decreto Legislativo 1568/1980, de 13 junio; a éste sobrevino la Ley de Procedimiento Laboral, aprobada por el Real Decreto Legislativo 521/1990, de 27 abril (disposición transitoria cuarta), y, actualmente de seguir la ejecución, regiría el nuevo texto de dicha Ley, aprobado por el Real Decreto Legislativo 2/1995, de 7 abril (Disposición transitoria cuarta).

De este modo, la norma que ha configurado el ejercicio del derecho a la ejecución de la sentencia recaída en el proceso de autos ni es única, ni su contenido es el mismo. La Ley

de Procedimiento Laboral de 1990, además de incrementar notablemente el número de preceptos dedicados a la fase ejecutiva de las sentencias laborales, introdujo una nueva regulación en relación con las obligaciones del órgano ejecutor. A estos preceptos habrá que hacer especial mención, pues tales normas han sido de aplicación al procedimiento que ahora enjuiciamos. Lo mismo sucede con la última reforma de 1995, que también lo sería de continuar abierta la ejecución.

Punto común de este conjunto normativo es tanto el modo de inicio como el de seguimiento e impulso de esta fase procesal. Señalaba el entonces vigente art. 201 de la LPL de 1980 que «la ejecución de las sentencias dictadas por las Magistraturas de Trabajo tendrán únicamente lugar a instancia de parte. Una vez solicitada, se llevará a efecto por todos sus trámites, dictándose de oficio todos los proveídos necesarios». El impulso de oficio de la ejecución de los procesos laborales se reitera y perfecciona en las dos Leyes procesales posteriores (art. 236 de la LPL de 1990 y art. 237 de la LPL de 1995).

De acuerdo con tal normativa, la ejecución de las sentencias laborales se inicia tras el auto de despacho de la ejecución. A partir de este momento, el órgano judicial debe practicar diversas diligencias sobre la existencia de bienes o derechos del ejecutado con los que éste pudiese hacer frente a la obligación declarada en sentencia. El art. 204 de la entonces vigente LPL de 1980, circunscribía la realización de esas diligencias ante la Alcaldía, el Registro de la Propiedad y la Delegación de Hacienda correspondientes. En cambio, el art. 247 de la LPL de 1990 ampliaba la capacidad del Juez para efectuar dichas diligencias a todos los organismos y registros públicos, de cualquier ámbito territorial, en los que se presumiera que el ejecutado pudiera tener bienes; además la extendía a entidades financieras o depositarias u otras personas privadas que, por el objeto de su normal actividad o por sus relaciones jurídicas con el ejecutado, debieran tener constancia de los bienes o derechos de éste o pudieran resultar deudoras del mismo. En idénticos términos se ha expresado el vigente art. 248 LPL de 1995.

Además de estas concretas diligencias averiguatorias, la reforma de 1990 implantó una importante novedad respecto de la legislación anterior que se mantiene en la regulación actual. Su art. 246 establecía, previo requerimiento del órgano judicial, la obligación del propio ejecutado de efectuar manifestación sobre sus bienes o derechos. Manifestación que alcanzaba, incluso, a indicar las personas que ostentaran derechos de cualquier naturaleza sobre sus bienes (actual art. 247 LPL de 1995).

De lo expuesto se deduce, pues, que **el contenido del derecho a la ejecución de la sentencia, en nuestro caso, impone al órgano judicial un conjunto de obligaciones de actuar en cuanto medios instrumentales necesarios para poder dar satisfacción al titular de dicho derecho fundamental:** Tras dictar auto despachando la ejecución, debe requerir al ejecutado, a los organismos públicos de cualquier ámbito territorial en el que se presuma que el ejecutado pueda tener bienes y a cualquier organismo o persona privada en los términos indicados.

Ahora bien, aunque hubiera que tener en cuenta que las tres Leyes procesales antes mencionadas han ido modificando el ámbito de la propia actuación judicial, según se acaba de ver, la pervivencia en el tiempo del presente procedimiento de ejecución (desde el Auto de despacho de ejecución de 20 de octubre de 1988 hasta diligencia de archivo de 30 de noviembre de 1993) ha hecho confluir en el mismo las exigencias contenidas en las dos primeras normas y, a la postre, el canon de aquella actuación judicial se ha establecido por la suma de ambas regulaciones. Suma a la que habría de añadirse el contenido de la tercera Ley, como se ha dicho, de continuar abierta la ejecución.

5. Todavía en el análisis del contenido del derecho fundamental invocado por el actor en el marco del proceso laboral, y delimitadas las obligaciones que incumben al órgano judicial en el mismo, debemos referirnos también a aquellas facultades de las que, al mismo tiempo, dispone, en conexión con los hechos que han tenido lugar en el presente supuesto.

En el *íter* procesal de la ejecución de una sentencia dictada en el ámbito laboral bien puede suceder que, tras la práctica de las distintas diligencias averiguatorias señaladas, el proceso se archive por insolvencia total o parcial del ejecutado, cuando no se encontraren bienes o

bienes suficientes en los que hacer traba o embargo. La declaración por parte del Juez de la insolvencia del deudor y el consiguiente archivo de las actuaciones son facultades que la Ley concede al órgano judicial en determinadas circunstancias; por lo que, de concurrir éstas, aquel acuerdo no vulnera por sí mismo derecho fundamental alguno.

Lo cierto es que la declaración de insolvencia del ejecutado se decide, en cualquier caso, de forma provisional, no definitiva (arts. 204 LPL de 1980; 273.2 LPL de 1990 y 274 LPL de 1995), lo que, por una parte, asegura, incluso en caso de archivo por esa causa, que no se interrumpa la prescripción de la acción ejecutiva mientras no esté cumplida en su integridad la obligación que se ejecuta (arts. 240.3 LPL de 1990 y 241.3 LPL de 1995); por otra, permite proseguir o reabrir la ejecución si se conocen bienes del deudor por haber venido a mejor fortuna. Cuestión distinta es la de que tal posibilidad pueda ser más teórica que real si persiste la insolvencia del deudor. Mas ello, como se ha dicho, no afecta a la integridad de la tutela judicial efectiva, pues el art. 24.1 CE no garantiza la solvencia de los deudores (STC 171/1991, fundamento jurídico 4.º).

No obstante, una cosa es que la decisión de archivo de la acción ejecutoria por insolvencia del deudor no entrañe en sí misma una vulneración del art. 24.1 CE y otra muy distinta es que el órgano judicial la adopte sin haber dado cumplimiento previo a las obligaciones que el art. 24.1 CE le impone en el ámbito laboral. Repárese, en este sentido, que la resolución judicial de archivo tiene, entre otros efectos, abrir la vía del recurso de amparo. O dicho de otro modo: El archivo de la acción ejecutoria supone que el Juez «cancela», por más que sea de modo provisional, su obligación de dar curso de oficio a la ejecución. Pues bien, **desde la perspectiva constitucional es menester examinar si la decisión de archivo ha sido adoptada después de haber agotado todas y cada una de las posibilidades descritas en las Leyes de procedimiento para la averiguación de la existencia de bienes suficientes del ejecutado. En caso contrario, podría constatarse una vulneración del art. 24.1 de la Constitución Española.**

6. Antes, sin embargo, de entrar al análisis de los hechos concretos es necesaria, para acabar de dejar perfilada la estructura del derecho fundamental invocado, una referencia al sujeto ejecutado -la Embajada de Guinea Ecuatorial- quien, por su especial condición subjetiva, aporta una serie de peculiaridades al objeto del presente amparo.

No es éste un supuesto extraño a la casuística de nuestra jurisprudencia, puesto que hemos tenido ya oportunidad de pronunciarnos anteriormente en dos asuntos -SSTC 107/1992 y 292/1994- en los que, también en un procedimiento de ejecución laboral, el sujeto ejecutado era una embajada extranjera sita en España. Estos dos casos plantean, desde un punto de vista doctrinal, la cuestión de hasta qué punto la condición subjetiva del ejecutado puede matizar el contenido del art. 24.1 CE; en definitiva, plantean las relaciones entre la inmunidad de ejecución de los Estados extranjeros y el derecho a la tutela judicial efectiva como comprensivo del derecho a la ejecución de las sentencias.

Sin necesidad de reiterar ahora los argumentos expuestos en las dos resoluciones mencionadas y centrándonos en lo que aquí interesa, sí conviene reiterar las siguientes afirmaciones:

a) Corresponde a este Tribunal, en esta vía de amparo, comprobar que la decisión de inejecución se ha basado en una causa legal, interpretada en el sentido más favorable a la efectividad de la tutela.

b) Desde esta perspectiva el régimen de inmunidad de ejecución de los Estados extranjeros no es contrario, cualquiera que éste sea, al derecho a la tutela judicial efectiva consagrado por el art. 24.1 CE, pero, por otra parte, una indebida extensión o ampliación por parte de los Tribunales ordinarios del ámbito que es dable atribuir a la inmunidad de ejecución de los Estados extranjeros en el actual ordenamiento internacional acarrea una violación del derecho a la tutela judicial efectiva del ejecutante, porque supone restringir sin motivo las posibilidades del justiciable de conseguir la efectividad del fallo, sin que ninguna norma imponga una excepción a dicha efectividad.

c) El régimen concreto de la inmunidad de ejecución de los Estados extranjeros, por remisión del art. 21.1 LOPJ, se contiene en normas de Derecho internacional público que se obtienen por inducción de datos de origen muy diverso, entre los que se encuentran las convenciones internacionales y la práctica de los Estados. Analizados en las dos resoluciones a las que nos referimos, llegamos a la conclusión de que **no existe una inmunidad absoluta, sino relativa, de ejecución de los Estados, conclusión que se ve reforzada por la propia exigencia de efectividad de los derechos contenidos en el art. 24 CE y por la *ratio* de la inmunidad, que no es la de otorgar a los Estados una protección indiscriminada, sino la de salvaguardar la integridad de su soberanía.** Por tanto, la delimitación del alcance concreto de la inmunidad de ejecución de los Estados debe partir de que, con carácter general, cuando en una determinada actividad o cuando en la afectación de determinados bienes no esté empeñada la soberanía del Estado extranjero, tanto el ordenamiento internacional como, por remisión, el ordenamiento interno desautorizan que se inejecute una sentencia; en consecuencia, una decisión de inejecución supone en tales casos una vulneración del art. 24.1 de la Constitución Española.

d) Además de esta delimitación genérica, es preciso tener en cuenta que determinados bienes gozan de una particular inmunidad por la calidad de sus titulares, como ocurre con los de las misiones diplomáticas y consulares; de modo que **la inmunidad de los Estados se asienta sobre una doble distinción:** 1) Son absolutamente inmunes a la ejecución los bienes de las misiones diplomáticas y consulares; 2) son inmunes a la ejecución los demás bienes de los Estados extranjeros que estén destinados a actividades *iure imperii*, pero no los destinados a actividades *iure gestionis*.

e) De este modo, corresponde en cada caso al Juez executor determinar cuáles de entre los bienes que sea titular un Estado extranjero en nuestro territorio, y que no sean específicamente de las misiones diplomáticas o consulares, están inequívocamente destinados al desenvolvimiento de actividades en las que dicho Estado, sin hacer uso de su potestad de imperio, actúa de la misma manera que un particular.

f) No es necesario que los bienes objeto de la ejecución estén destinados a la misma actividad *iure gestionis* que provocó el litigio, pues otra cosa podría hacer ilusoria la ejecución.

g) Por último, añadíamos en la STC 292/1994, que aunque en tales casos el demandado en el proceso de instancia no sea propiamente el Estado extranjero, sino su embajada, ésta no es sino un órgano de aquel Estado y su representante en España (art. 3.1, a) del Convenio de Viena sobre relaciones diplomáticas), por lo que no es imprudente extender las posibilidades de ejecución de la sentencia no a los bienes de la embajada afectos al desenvolvimiento de las actividades que le son propias, que gozan de absoluta inmunidad de ejecución, sino a aquellos otros de los que sea titular el Estado en último término demandado que estén afectos a actividades de naturaleza comercial o similar, a los que, en los términos antedichos, no alcance la inmunidad de ejecución.

A lo dicho hasta ahora cabe añadir dos datos relevantes en relación con el caso aquí enjuiciado: Que **cuando el sujeto ejecutado es una Embajada o un Estado extranjero no puede presumirse su insolvencia y, sobre todo, que, en estos supuestos, cuando surgen dificultades en la ejecución de las resoluciones judiciales cobra vital importancia la colaboración de los poderes públicos del Estado del foro y, en especial, de su Ministerio de Asuntos Exteriores. Por ello el órgano judicial debe recabar sin desmayo esta colaboración cuya negativa puede producir de nacimiento las pertinentes responsabilidades.**

7. Los fundamentos anteriores nos han permitido perfilar el contenido de la pretensión ejercitada y sus límites. Ahora es menester, para llevar a buen fin la resolución del presente amparo, poner en relación las conclusiones anteriores con el supuesto de hecho que ha dado lugar al mismo.

En esta tarea, deben resaltarse de inmediato las diferencias que concurren entre el caso de autos y los resueltos en las SSTC 107/1992 y 292/1994, aunque en algunos aspectos la

doctrina allí contenida sí sea, como se verá, de aplicación al presente caso. Desde esta perspectiva, frente a lo acaecido en aquellos supuestos, este recurso de amparo no se interpone porque el órgano judicial haya estimado una inmunidad absoluta de los bienes de la Embajada ejecutada y, en consecuencia, haya denegado la ejecución de la sentencia correspondiente. Se interpone porque a pesar de que se han intentado varios embargos éstos se han visto mayoritariamente frustrados y no ha podido satisfacerse el derecho del recurrente a la ejecución de la sentencia laboral.

Bien es cierto, que, en nuestro caso, **el Juzgado de lo Social denegó el embargo solicitado por el Abogado del Estado sobre bienes existentes en el domicilio de la demandada y sobre los distintos vehículos que le prestaban servicio.** Pero esta decisión, es perfectamente acorde con la doctrina contenida en las reiteradas SSTC 107/1992 y 292/1994, según la cual **tales bienes gozan de inmunidad absoluta de ejecución.**

Al margen de esta decisión, y lejos de realizar una proclamación general de inmunidad de ejecución de la Embajada de Guinea Ecuatorial, el Juzgado de lo Social ha procedido al embargo de los únicos bienes -cuentas corrientes con cantidades dinerarias irrisorias, como se relata en los antecedentes- que han aflorado de la demandada durante la fase de ejecución; bienes que, desde luego no han cubierto más que una parte insignificante de la obligación de la embajada ejecutada.

Pues bien, como se ve, no nos enfrentamos aquí con una decisión judicial que niegue el derecho del recurrente a ver ejecutada la resolución recaída en el proceso laboral por estimar la concurrencia de la inmunidad de ejecución de los bienes de la deudora. El problema es otro: El objeto de este amparo consiste en una decisión de archivo provocada por la supuesta insolvencia de la Embajada deudora. O visto desde otra perspectiva: de las diligencias realizadas por el órgano judicial no ha surgido el conocimiento de la existencia de bienes embargables suficientes con los que la Embajada deudora pudiera hacer frente a la obligación impuesta en la sentencia cuya ejecución se pretendía.

Con ello, toda **la cuestión se centra en determinar si el órgano judicial, sobre quien recae la carga de llevar a término la ejecución, ha impulsado el procedimiento con el alcance que el art. 24.1 CE le impone en el ámbito laboral.**

Desde luego, no puede afirmarse que, en el presente caso, el Juzgado de lo Social haya mantenido una actitud pasiva durante la fase de ejecución. Antes al contrario, basta leer los antecedentes de esta resolución para comprender cuán laboriosa y compleja ha sido la tarea desempeñada por el Juez, que se ha visto incluso obstaculizada por la renuncia de diversos organismos públicos en dar respuesta a los distintos oficios que les ha dirigido durante el recurso de la ejecución. No debe olvidarse que la falta de respuesta o la respuesta tardía de tales organismos pudo, por otra parte, haber generado su responsabilidad, como ya puso de manifiesto la Comisión Disciplinaria del Consejo General del Poder Judicial en su Acuerdo de 5 de diciembre de 1990, que consta en las actuaciones, por el que archiva el expediente abierto contra el Juez del Juzgado de lo Social núm. 20 «... por no apreciarse, según lo informado, responsabilidad disciplinaria, ya que la interrupción del curso de la ejecutoria no es atribuible al Juzgado de lo Social núm. 20 de Madrid sino a la Administración».

Ahora bien, constatado esto, es preciso señalar también que en este supuesto lo que está en juego es el derecho fundamental de un ciudadano; y, cualquiera que sea la complejidad de la causa y las dificultades que entrañe su adecuada resolución, el órgano judicial viene obligado, por el propio ordenamiento, a utilizar todas las vías que objetivamente sean posibles y pertinentes para dotar de eficacia al contenido del derecho fundamental en litigio. De esta forma, la decisión judicial de interrumpir las actuaciones no debe responder a un principio de discrecionalidad o razonabilidad subjetiva sino a un principio imperativo objetivo marcado por el ordenamiento, en los términos expresados en nuestro fundamento jurídico 4.º Y, por los motivos que ahora se dirán, tal supuesto se ha producido en esta causa.

8. En efecto, el examen del cumplimiento de aquel principio objetivo pone de manifiesto ciertas carencias en la realización de las actividades indagatorias sobre la

existencia de bienes de la ejecutada ante el elenco de organismos públicos, entidades y personas privadas que el art. 247 LPL de 1990 (actual art. 248 LPL de 1995) *preveía frente al art. 204 LPL de 1980*. Según consta en los antecedentes, ciertamente, a petición de la parte recurrente, el órgano judicial decretó el embargo de los saldos de la Embajada existentes en las cuentas corrientes de las entidades financieras indicadas por el actor, con los resultados ya descritos. No obstante, su actividad impulsora de oficio se circunscribió a dichas entidades sin solicitar ampliación informativa a otros organismos en los que previsiblemente pudieran constar la relación de tales bienes, como, por ejemplo el Ministerio de Asuntos Exteriores u otros Ministerios que, por razón de competencia, pudieran tener constancia de esos bienes o derechos afectables. Lo propio hay que señalar de los requerimientos realizados a los Registros de la Propiedad de Madrid y de Majadahonda y al Ayuntamiento de Madrid, a fin de que remitiesen certificación de bienes inmuebles que aparecieran inscritos a nombre de la Embajada de Guinea Ecuatorial.

Pero, además, y ello es fundamental, el contenido de los distintos requerimientos y oficios mencionados adolecían de una importante imprecisión: pretendía únicamente la averiguación o, en su caso, el embargo de bienes de titularidad de la Embajada de Guinea Ecuatorial. Sin embargo, como se dejó indicado en el fundamento jurídico 6.º, aunque, en puridad, la demandada en el proceso de instancia no fuera la República de Guinea Ecuatorial, sino su Embajada, ésta no es sino órgano de aquel Estado y su representante en España, por lo que las posibilidades de ejecución de la sentencia se extienden también a aquellos otros bienes de que sea titular el Estado en último término demandado, y a los que no alcance la inmunidad de ejecución. En consecuencia, **ha quedado al margen de la investigación el principal titular potencial de bienes susceptibles de utilización para lograr una ejecución de la sentencia acorde con el derecho fundamental protegido**.

En ese mismo ámbito de carencias, también se hace notar la no cumplimentación de lo dispuesto en el art. 246 LPL de 1990 (art. 247 LPL de 1995) por parte del órgano judicial, pues no ha requerido a la ejecutada para que efectuase manifestación sobre sus bienes o derechos con la precisión necesaria para garantizar sus responsabilidades y con necesaria indicación, además, de las personas que ostentaran derechos de cualquier naturaleza sobre sus bienes.

Sin embargo, dadas las circunstancias del presente caso, **el desfallecimiento más relevante sufrido por el órgano judicial en la ejecución de la sentencia se refiere al seguimiento de dos diligencias iniciadas por el Juzgado, a instancia del Abogado del Estado, en relación con los organismos competentes de los Ministerios de Economía y Hacienda y de Asuntos Exteriores**.

En efecto, como se ha señalado con detalle en los antecedentes, el órgano judicial, tras requerir la información pertinente, decidió, de un lado, dirigir oficio a los referidos organismos decretando el embargo de los créditos que pudiera haber concedido a Guinea Ecuatorial y la retención y puesta a disposición del Juzgado de las cantidades que pudieran tener pendiente de pago al mencionado Estado y, de otro lado, requerir del Ministerio de Asuntos Exteriores el acceso a la vía diplomática.

El contenido de las contestaciones relativas al embargo y a la retención de créditos y ayudas, o bien fueron negativas, en el sentido de que en tal momento no existían fondos disponibles, o bien fueron positivas, señalando la existencia de tales fondos, pero expresando a su vez la imposibilidad de acceder a lo solicitado por el Juzgado porque la aceptación de dicha solicitud hubiera supuesto, a su juicio, el que España incurriera en responsabilidad internacional al traer causa las ayudas de un Tratado de amistad con Guinea Ecuatorial.

El requerimiento dirigido al Ministro de Asuntos Exteriores concluyó con una nota verbal a la Embajada de la República de Guinea Ecuatorial que no tuvo respuesta alguna.

Decretar el archivo en estas circunstancias equivale a no agotar las posibilidades de actuación que el ordenamiento ofrece al órgano judicial ejecutor. En efecto, respecto de las ayudas y subvenciones, el Juez se conformó, sin más indagación, con la contestación de que no existían en tal momento fondos disponibles siendo así que consta

en el expediente que este tipo de ayudas se conceden de forma periódica, como en la práctica ha venido ocurriendo entre los años 1989 a 1995 en los que el Estado español ha concedido sustanciosas ayudas y subvenciones al Estado de Guinea Ecuatorial. Por otra parte, **y ante la negativa de la Administración de acceder al embargo decretado de las ayudas y subvenciones, por entender ésta que la aceptación de dicha orden supondría el que España incurriera en responsabilidad internacional, el órgano judicial debió reiterar hasta obtener respuesta y bajo el apercibimiento correspondiente, la orden referida, pues el cumplimiento de las sentencias y demás resoluciones firmes de los Jueces y Tribunales es obligatorio, así como prestar la colaboración requerida por éstos en el curso del proceso y en la ejecución de lo resuelto** (arts. 118 CE, 17 LOPJ y 410 del Código Penal).

En cuanto a la vía diplomática, dada la ya referida trascendencia que debe atribuirse a la colaboración del Ministerio de Asuntos Exteriores, el Juzgado debía haber reiterado su requerimiento antes de declarar el archivo, no aquietándose ante la falta de respuesta de la Embajada a la nota verbal. El órgano judicial debía insistir en el requerimiento al Ministerio de Asuntos Exteriores para que adoptase las medidas que el Derecho internacional le ofrece en el ámbito de las relaciones diplomáticas frente a la Embajada de otro Estado y frente al mismo Estado en el ámbito de las relaciones económicas. De haberse reiterado la gestión iniciada, cabía esperar un resultado positivo en orden a la pretendida ejecución de la sentencia y ello sin perjuicio de la responsabilidad de la Administración por su inactividad, caso de no continuarlas.

Al no reiterar su orden y ceder pasivamente ante las respuestas de la Administración, el Juez declinó su obligación de utilizar cuantos cauces le brinda el ordenamiento para ejecutar una sentencia firme. Cabría pensar, no obstante, que en el ínterin el Juez asumió la respuesta de imposibilidad de embargo de aquellos bienes ofrecida por el mencionado Ministerio; pero ello, obligaba al órgano judicial a exteriorizar, mediante resolución motivada, cuáles eran los impedimentos que, a su juicio, concurrían para no proceder al embargo de las ayudas y subvenciones otorgadas al Estado de Guinea Ecuatorial. Sea como sea, y visto desde la perspectiva que se quiera, la conclusión sigue siendo la misma: cuando finalmente se ha llegado al conocimiento de la existencia de determinados bienes de la Embajada deudora, el órgano judicial se muestra inactivo siendo así que el ordenamiento le compelia a actuar a fin de satisfacer el derecho fundamental del recurrente a ver ejecutada la Sentencia de 22 de abril de 1986.

9. Por todo lo expuesto, el recurso de amparo debe ser estimado. El derecho a la tutela judicial efectiva sin indefensión, en su vertiente de derecho a la ejecución de las resoluciones firmes, ha sido conculcado por el órgano judicial por cuanto la diligencia de 30 de noviembre de 1993, ha procedido al archivo de la ejecución antes de haber agotado todas las posibilidades de actuación judicial que el ordenamiento jurídico prevé, en los términos indicados en los fundamentos anteriores.

No obstante, y a pesar de este reconocimiento, no podemos concluir esta sentencia sin insistir, de nuevo, en el hecho de que una vez se hayan cumplido las obligaciones que derivan del deber de tutela judicial por parte del Juez ejecutante, y que ahora se declaran por el momento insatisfechas, de persistir la insolvencia del deudor o de no hallarse bienes destinados a actividades *iure gestionis*, el consiguiente archivo ya no afectaría el derecho fundamental reconocido en el art. 24.1 CE, pues dicho precepto ni garantiza la solvencia de los deudores, ni impide la aplicación del régimen de inmunidad de ejecución a ciertos bienes de los Estados extranjeros, como podría ser el caso.

FALLO

En atención a todo lo expuesto, el Tribunal Constitucional, POR LA AUTORIDAD QUE LE CONFIERE LA CONSTITUCION DE LA NACION ESPAÑOLA,

Ha decidido

Otorgar el amparo solicitado y, en su virtud,

1.º Declarar que se ha vulnerado el derecho a la tutela judicial efectiva.

2.º Restablecer al recurrente en su derecho y, en consecuencia, declarar la nulidad de la diligencia que archiva la ejecución, de 30 de noviembre de 1993 (Autos núm. 182/1986) de la Sentencia del Juzgado de lo Social núm. 20 de Madrid (entonces, Magistratura de Trabajo), de 22 de abril de 1986, recaída en autos núm. 1257/1984, sobre nulidad de despido, para que continúe la ejecución de la referida sentencia. Publíquese esta sentencia en el «Boletín Oficial del Estado».

Dada en Madrid, a diez de febrero de mil novecientos noventa y siete. José Gabaldón López.-Fernando García-Mon y González-Regueral.-Rafael de Mendizábal Allende.-Julio Diego González Campos.-Carles Viver Pi-Sunyer.-Tomás S. Vives Antón.-Firmados y rubricados.

E/7-Appendix 2: Summary

The Constitutional Court defines once again the fundamental right to a fair hearing and the right to enforce judicial judgments. The enforcement, says the Court, is an integral part of the fundamental right provided for in article 24 of the Constitution –any other interpretation would devoid the law of its efficacy and would transform it into a mere declaration of intentions. The Constitutional Court declares that the tribunals did not exhaust the possible ways of execution available, such as credits, aid or subsidies granted to the foreign state.

(a)	Registration no.	E/8
(b)	Date	17.9.2001
(c)	Authority	Tribunal Constitucional (Constitutional Court)
(d)	Parties	Maite G.Z. (individual) v. Consulado General de Francia (State)
(e)	Points of Law	The Constitutional Court applies its leading case 107/1992 (see E/4). It accepts the limited theory of immunity of execution; however, the Court affirms that the property of diplomatic and consular missions is absolutely immune against measures of execution. In any case, for the Court, the determination of the property subject to measures of execution is a question that should be resolved by the ordinary courts, and it's not a constitutional question.
(f)	Classification no.	2, 2.a, 2.b
(g)	Sources	Aranzadi 2001, no. 176 BOE, 19.10.2001, no. 251 (suplemento)
(h)	Additional information	
(i)	Full text – extracts – translations – summaries	Appendix 1: Full text Appendix 2: Summary in English

E/8-Appendix 1: Full Text

Sentencia Tribunal Constitucional núm. 176/2001 (Sala Segunda), de 17 septiembre
Recurso de Amparo núm. 1403/1997.

Jurisdicción: Constitucional

BOE 19 octubre 2001, núm. 251 (suplemento).

Ponente: D. Rafael de Mendizábal Allende

*DERECHO FUNDAMENTAL A OBTENER LA TUTELA EFECTIVA DE JUECES Y TRIBUNALES: **Derecho a la ejecución de las resoluciones judiciales firmes:** alcance: forma parte del derecho a la tutela judicial efectiva pues, de lo contrario, las decisiones judiciales y los derechos que las mismas se reconocen no serían otra cosa que meras declaraciones de intenciones sin alcance práctico ni efectividad alguna. Derecho de conformación legal: dado su carácter prestacional el legislador puede establecer límites al pleno acceso a la ejecución de sentencias siempre que los mismos sean razonables y proporcionados respecto a los fines que lícitamente pueden perseguirse en el marco de la CE. Inmunidad de ejecución por normas de Derecho Internacional: bienes de Estados extranjeros: régimen jurídico: relatividad: se asienta en la distinción entre bienes destinados a actividades «iure imperi» y bienes destinados a actividades «iure gestionis»: en cualquier caso, los bienes de las misiones diplomáticas y consulares son absolutamente inmunes a la ejecución. **Jurisdicción y procedimiento laboral:** bienes de Estado extranjero: inejecución de Sentencia por recaer sobre determinados bienes no susceptibles de ser trabados por gozar del privilegio de inmunidad: pretensión de que se recalifique su naturaleza jurídica para que puedan ser embargados: cuestión de mera legalidad ajena al ámbito del TC.*

Recurso de amparo contra Sentencia de 25-02-1997, de la Sala de lo Social del Tribunal Superior de Justicia del País Vasco, estimatoria de recurso de suplicación interpuesto contra Auto, de 27-05-1996, del Juzgado de lo Social núm. 2 de Vizcaya, en procedimiento de ejecución.

*Vulneración de los derechos fundamentales a obtener la tutela efectiva de jueces y tribunales y a un proceso público sin dilaciones indebidas: inexistencia: **desestimación del amparo.***

La Sala Segunda del Tribunal Constitucional, compuesta por don Carles Viver Pi-Sunyer, Presidente, don Rafael de Mendizábal Allende, don Julio Diego González Campos, don Tomás S. Vives Antón, don Vicente Conde Martín de Hijas y don Guillermo Jiménez Sánchez, Magistrados, ha pronunciado

EN NOMBRE DEL REY

la siguiente

SENTENCIA

En el recurso de amparo núm. 1403/1997, promovido por doña Maite G. Z., representada por la Procuradora de los Tribunales doña Esperanza A. C. y bajo la asistencia de la Letrada doña Pilar M. S., contra la Sentencia de 25 de febrero de 1997 de la Sala de lo Social del Tribunal Superior de Justicia del País Vasco, por la que se estimó el recurso de suplicación interpuesto por el Consulado General de Francia contra el Auto dictado por el Juez de lo Social núm. 2 de Vizcaya el 27 de mayo de 1996, en procedimiento de ejecución. Han comparecido los Servicios Diplomáticos y Consulares de la República de Francia en España con el Procurador don Manuel L. L. y bajo la asistencia del Letrado don Emilio P. S.

Ha intervenido el Ministerio Fiscal. Ha sido Ponente el Magistrado D. Rafael de Mendizábal Allende, quien expresa el parecer de la Sala.

I. ANTECEDENTES

1. Por escrito registrado en este Tribunal el día 4 de abril de 1997, la Procuradora doña Esperanza A. C., en nombre y representación de doña Maite G. Z., interpuso demanda de amparo constitucional contra la Sentencia de 25 de febrero de 1997 de la Sala de lo Social del Tribunal Superior de Justicia del País Vasco, de la que se hace mérito en el encabezamiento, por entender que vulnera el art. 24.1 CE. En la demanda se nos cuenta que la recurrente en amparo venía prestando sus servicios para el Estado de Francia en el centro de trabajo en el Consulado de Francia en Bilbao (Servicios Económicos), desde el 1 de diciembre de 1984, con la categoría profesional de coordinadora. Con fecha de 31 de agosto de 1993, el Consulado comunicó a la recurrente la extinción de su contrato por la necesidad de amortizar su puesto de trabajo, conforme a lo dispuesto en los artículos 52.c y 53.1 de la Ley 8/1980, de 10 de marzo, del Estatuto de los Trabajadores. Por tal motivo, esta última formuló demanda por despido ante la jurisdicción social, que fue estimada por Sentencia de 28 de octubre de 1993 del Juez de lo Social núm. 2 de Vizcaya (autos núm. 627/1993) declarando improcedente el despido e instada por la parte actora la ejecución del fallo otro Auto de 12 de enero de 1994 declaró extinguida la relación laboral existente entre las partes, condenando a la demandada a satisfacer a la parte actora la cantidad de 3.407.780 pesetas en concepto de indemnización y 1.915.396 pesetas en concepto de salarios de tramitación.

Posteriormente, y ante la falta de abono de las mencionadas cantidades, por escrito de 17 de marzo de 1994, la recurrente instó su ejecución forzosa, por lo que en virtud del Auto de 17 de marzo de 1994 ambas partes fueron citadas a comparecencia por el Juzgado a fin de que la ejecutada justificase el pago realizado, y, en caso de no haberse producido éste, determinase, entre otras cuestiones, los medios con los que había de llevarse a efecto. Ante la falta de concreción por parte de la ejecutada de los bienes que podían ser ejecutados, por medio de Auto de 6 de junio de 1994, el Juzgado ordenó que se prosiguiese con la ejecución sobre bienes inequívocamente destinados por el ejecutado al desenvolvimiento de actividades industriales, comerciales, culturales o cualquier otra que no se refiriese a actividades «*ius imperii*». Contra el mencionado Auto, el Consulado francés interpuso recurso de reposición al entender que de conformidad con el art. 21.2 LOPJ los bienes de los Servicios Comerciales del Consulado de Francia en España no podían ser objeto de una ejecución. Así las cosas, por escrito de 20 de junio de 1994, la ejecutante señaló bienes de propiedad de la ejecutada susceptibles de embargo, por lo que por providencia de 20 de junio de 1994, el Juzgado acordó el embargo de las dos fincas urbanas (núms. ... y ...) de la parte demandada designadas por el ejecutante (plazas de garaje sitas en el inmueble de la Calle Alameda de Mazarredo, núm. ..., de Bilbao).

El recurso de reposición contra el Auto de 6 de junio de 1994, fue desestimado por Auto de 12 de julio de 1994, no obstante lo cual, el Juzgado ordenó recabar del Ministerio de Asuntos Exteriores informe sobre la idoneidad de la ejecución en relación con los tratados y acuerdos bilaterales suscritos entre España y la República Francesa, y con los usos y prácticas internacionales vigentes. Con fecha de 29 de julio de 1994, la Asesoría Jurídica Internacional del Ministerio de Asuntos Exteriores puso de manifiesto al Juzgado la inexistencia de acuerdos bilaterales entre ambos Estados sobre privilegios e inmunidades, y que, con base a los usos y prácticas del Derecho Internacional, la inmunidad de ejecución de los locales y bienes de las oficinas consulares era clara, como lo había reconocido el Consejo de Estado (Dictamen de 20 de junio de 1991), y el Tribunal Constitucional (Sentencia de 1 de julio de 1992).

Disconforme con el mencionado Auto de 12 de julio de 1994, el Consulado interpuso recurso de suplicación, que fue estimado por la Sentencia de 24 de enero de 1995 de la Sala de lo Social del Tribunal Superior de Justicia del País Vasco (recurso núm. 3245/1996),

al declarar la nulidad del Auto recurrido así como del anterior de 6 de junio de 1994, ordenando que se recabase del Ministerio de Asuntos Exteriores informe suficiente sobre los bienes del Estado francés existentes en nuestro país. Ese informe fue facilitado por el Ministerio con fecha de 15 de noviembre de 1995, en el que puso en conocimiento del Juzgado distintos bienes inmuebles de la propiedad de aquél sitios en nuestro país, entre los que constaban las dos plazas de garaje cuyo embargo se había ordenado y que, al igual que el resto de los bienes mencionados, gozaban de los privilegios e inmunidades que otorga el Convenio de Viena sobre Relaciones Consulares de 1963.

Con posterioridad, y por providencia de 28 de noviembre de 1995, el Juzgado requirió al Embajador de Francia para que delimitase cuáles bienes de titularidad del Estado que representaba no estaban afectados a inmunidad, y que de estar afectos la totalidad, delimitase cuáles estaban destinados a actividades industriales y comerciales («iure gestionis»). Ante la falta de respuesta por parte de la Embajada el Juez reiteró el requerimiento por providencia de 26 de marzo de 1996. Ante la falta de respuesta de ambos requerimientos, el Juez dictó Auto el 27 de mayo de 1996, acordando el embargo de las dos plazas de garaje de propiedad del Consulado, al entender que se encontraban insertas en la actividad «iure gestionis» del Estado francés.

Contra el anterior Auto, la parte ejecutada interpuso recurso de reposición, que fue desestimado por Auto de 22 de julio de 1996, al mantener el Juzgado que las plazas de garaje objeto del embargo no podían ser consideradas como misión diplomática, pues no eran parte del edificio de la representación diplomática o de la vivienda de los agentes diplomáticos, y que tampoco constaban como efectivamente puestas al servicio de la embajada o consulado, por lo que llegó a la convicción de que los bienes trabados pertenecían a la actividad «iure gestionis» del Estado francés y, en consecuencia, no gozaban de inmunidad.

Disconforme con ese Auto, el Consulado interpuso recurso de suplicación, que fue estimado por Sentencia de 25 de febrero de 1997 de la Sala de lo Social del Tribunal Superior de Justicia del País Vasco, afirmando que los bienes embargados gozaban del privilegio de inembargabilidad de conformidad con el Convenio de Viena de 1963 y que aquél tenía base documental fehaciente en la resolución del Ministerio de Asuntos Exteriores de España que así lo reconocía, previa consulta del registro de bienes inmuebles.

2. Con fundamento en ese itinerario procesal, la recurrente alega en su demanda de amparo que la Sentencia de 25 de febrero de 1997 de la Sala de lo Social del Tribunal Superior de Justicia del País Vasco (recurso núm. 3245/1996) ha vulnerado su derecho a la tutela judicial (art. 24.1 CE) en su vertiente de derecho a la ejecución de resoluciones firmes, al establecer que los bienes embargados del Estado francés gozan del privilegio de inembargabilidad de conformidad con lo dispuesto en el Convenio de Viena de 1963. A este respecto, señala que el art. 21.2 LOPJ no impone una regla de inmunidad absoluta de ejecución para los Estados extranjeros, sino que por el contrario permite afirmar la relatividad de dicha inmunidad, y que cuando en una determinada actividad no esté empeñada la soberanía del Estado extranjero («iure imperii»), tanto el ordenamiento internacional como el español desautorizan que se inejecute una Sentencia, en consecuencia, cualquier decisión de inejecución supone, como ocurre en este caso, una vulneración del art. 24.1 CE. Partiendo de lo anterior, prosigue diciendo que los bienes objeto de la ejecución eran embargables ya que se hallaban en el inmueble de las dependencias del «Poste d'Expansion Economique» para el que prestaba sus servicios, y que tal organismo se dedicaba a actividades de «de iure gestionis» al tener una naturaleza privada o comercial, como lo probaban las facturas que giraba a las empresas que contrataba, y el hecho de que dependiese del Ministerio de Economía francés (Dirección de Relaciones Económicas Exteriores-DREE) y no del Ministerio de Asuntos Exteriores francés. Finalmente, mantiene que también se ha vulnerado el art. 24.2 CE, pues la ejecutada ha dilatado el proceso por más de tres años, incumpliendo así una resolución judicial dictada por los órganos judiciales españoles al amparo de su pretendida inmunidad.

3. La Sección Cuarta, por providencia de 28 de julio de 1997, admitió a trámite la demanda y, en aplicación del art. 51 LOTC, acordó dirigir comunicación al Juzgado de lo Social, núm.

2 de Vizcaya y a la Sala de lo Social del Tribunal Superior de Justicia del País Vasco, a fin de que en el plazo de diez días remitiesen certificación o fotocopia adverbada de las actuaciones correspondientes; así como para que se emplazase a quienes hubieran sido parte en el procedimiento, excepto la parte recurrente en amparo, a los efectos de que en el plazo de diez días pudiesen comparecer en el recurso de amparo y defender sus derechos.

4. La representación procesal de los Servicios Diplomáticos y Consulares de la República Francesa en España se personó por escrito registrado en este Tribunal con fecha 14 de octubre de 1997, y por providencia de fecha de 20 de octubre de 1997, la Sección Cuarta la tuvo por personada y parte en el procedimiento, acordando, conforme al art. 52.1 LOTC, dar vista de las actuaciones recibidas a las partes y al Ministerio Fiscal por plazo común de veinte días.

5. Con fecha de 24 de noviembre de 1997, la representación procesal de los Servicios Diplomáticos y Consulares de la República de Francia en España presenta su escrito de alegaciones en el que recuerda que según la doctrina constitucional (cita SSTC de 1 de julio de 1992, de 27 de octubre de 1994 y de 10 de febrero de 1997) los bienes adscritos a las Misiones Diplomáticas y Consulares son absolutamente inmunes a la ejecución forzosa de conformidad con lo previsto en el Convenio de Viena de 1961 sobre relaciones diplomáticas y de 1963 sobre relaciones consulares; y que en cuanto al resto de los bienes de un Estado extranjero, tal inmunidad será predicable únicamente de aquéllos destinados a actividades soberanas o de imperio («iure imperii») y no a los que lo estén a actividades de gestión («iure gestionis»). Partiendo de la anterior doctrina, mantiene que la Sentencia recurrida en amparo no ha vulnerado el derecho a la tutela judicial efectiva (art. 24.1 CE) de la recurrente toda vez que los bienes a los que se dirigió el embargo (dos plazas de garaje ubicadas en el edificio donde se encuentran los locales de los Servicios Económicos y Comerciales del Consulado de Francia en Bilbao) estaban adscritos a los Servicios de la Misión Diplomática y Consular del Estado francés en España, como había sido constatado por el Ministerio de Asuntos Exteriores, y, por lo tanto, resultaban absolutamente inmunes a la ejecución.

6. Por el Ministerio Fiscal se presenta escrito de alegaciones con fecha de 19 de noviembre de 1997, en el que interesa la denegación del amparo. Recuerda el Fiscal que, según ha declarado la STC 18/1997, el régimen de inmunidad de ejecución de los Estados extranjeros no es contrario al derecho a la tutela judicial efectiva consagrado en el art. 24.1 CE, y que tal inmunidad se asienta sobre una doble distinción: 1) que son absolutamente inmunes a la ejecución los bienes de las misiones diplomáticas y consulares, y 2) que son inmunes a la ejecución los demás bienes de los Estados extranjeros que estén destinados a actividades «iure imperii», pero no los destinados a actividades «iure gestionis». En consecuencia, corresponde en cada caso al Juez ejecutor determinar cuáles de entre los bienes de que es titular un Estado extranjero en nuestro país, y que no sean específicamente las misiones diplomáticas o consulares, están inequívocamente destinados al desenvolvimiento de actividades en las que dicho Estado (sin hacer uso de su potestad de imperio) actúa de la misma manera que un particular. Prosigue diciendo que la Sentencia recurrida en amparo no acordó la inejecución de la Sentencia de despido favorable a la demandante, sino que de conformidad con el art. 21.2 LOPJ en relación con los arts. 22.3 y 25 de la Convención de Viena de 1961 de relaciones diplomáticas se limitó a establecer la nulidad de los Autos que acordaban los embargos por afectar a bienes inembargables.

Finalmente, el Fiscal discrepa de las alegaciones del recurrente acerca de que con los bienes embargados se realizaba una actividad «iure gestionis» dado que no toda actividad soberana de los Estados en los países extranjeros se realiza exclusivamente a través de su Ministerio de Asuntos Exteriores y puesto que el cobro por el Estado de determinadas prestaciones que realiza no resulta acreditativo de que la actividad sea de carácter mercantil o privado.

7. Por providencia de 13 de septiembre de 2001 se señaló para deliberación y fallo de la presente Sentencia el siguiente día 17 del mismo mes y año.

II. FUNDAMENTOS JURIDICOS

1. El presente proceso de amparo tiene por objeto la impugnación de la Sentencia que el 25 de febrero de 1997 pronunció la Sala de lo Social del Tribunal Superior de Justicia del País Vasco estimando el recurso de suplicación interpuesto por el Consulado General de Francia contra otra de 22 de julio de 1996 donde el Juez de lo Social núm. 2 de Bilbao había declarado que los bienes embargados en el procedimiento de ejecución correspondiente gozaban del privilegio de inembargabilidad por ser propiedad de una Oficina consular. La demandante sostiene que se ha vulnerado su derecho a la tutela judicial efectiva (art. 24.1 CE) en la vertiente que afecta a la ejecución de las resoluciones firmes, puesto que la Sentencia recurrida decidió la inejecución de bienes de un Estado extranjero susceptibles de ser ejecutados al estar afectados a una actividad «iure gestionis» desprovista de privilegio alguno, así como el derecho a un proceso público sin dilaciones indebidas (art. 24.2 CE) por haberlo dilatado el Consulado francés, incumpliendo una decisión judicial firme al amparo de su inmunidad. A su vez, el Consulado lo niega por cuanto los bienes adscritos a las Misiones Diplomáticas y Consulares —como en el caso de éstos que son objeto de ejecución— son absolutamente inmunes a la ejecución forzosa de conformidad con lo previsto en el Convenio de Viena de 1961 sobre relaciones diplomáticas y de 1963 sobre relaciones consulares. Finalmente, el Ministerio Fiscal interesa la denegación del amparo con base a la STC 18/1997, de 10 de febrero (conforme a la cual, los bienes de las misiones diplomáticas y consulares son absolutamente inmunes a la ejecución, y del resto, sólo son susceptibles de ejecución los destinados a actividades de «iure gestionis»), al no estar los bienes embargados destinados inequívocamente a actividades comerciales o industriales en las que el Estado francés actúe de la misma manera que un particular. No se impugna pues una hipotética falta de ejecución de la Sentencia sino un concreto embargo trabado sobre unos determinados bienes.

2. Delimitado así el objeto de este proceso conviene recordar una vez más que **la ejecución de las Sentencias forma parte del derecho a la tutela judicial pues, de lo contrario, las decisiones judiciales y los derechos que en las mismas se reconocen no serían otra cosa que meras declaraciones de intenciones sin alcance práctico ni efectividad alguna** (SSTC 167/1987, de 28 de octubre, F. 2; y 92/1988, de 23 de mayo, F. 2). También es necesario tener presente que **ese derecho por su carácter prestacional es deferido a la conformación de las normas legales que habrán de determinar su contenido y establecer los requisitos para su ejercicio, pudiendo en consecuencia el legislador establecer límites al pleno acceso a la ejecución de Sentencias siempre que los mismos sean razonables y proporcionados respecto a los fines que lícitamente puede perseguir en el marco de la Constitución** (STC 4/1988, de 21 de enero, F. 5).

Por otra parte, y puesto que el recurrente imputa a la resolución judicial impugnada la vulneración del art. 24.1 CE por haber declarado que los bienes pertenecientes al Consulado francés gozan del privilegio de inmunidad que les hace inembargables, se hace necesario traer a colación aquí y ahora nuestra doctrina sobre la relación entre tal inmunidad de los Estados extranjeros y el derecho a la tutela judicial efectiva en su vertiente de la ejecución de las Sentencias. Hemos dicho en efecto que, aun cuando el régimen de inmunidad de ejecución de los Estados extranjeros no resulte contrario en principio al derecho fundamental sobredicho, una indebida extensión de su ámbito por parte de los Tribunales ordinarios sí conllevaría una violación de ese derecho. Como este Tribunal ha tenido la ocasión de manifestar, el art. 21.2 LOPJ y las normas de Derecho Internacional público a la que tal precepto remite, no imponen una regla de inmunidad absoluta de ejecución de los Estados extranjeros, sino que permiten afirmar la relatividad de dicha inmunidad, conclusión que se ve reforzada por la propia exigencia de la efectividad de los derechos que contienen el art. 24 CE y por la «ratio» de la inmunidad, que no es la de otorgar a los Estados una protección indiscriminada, sino la de salvaguardar su igualdad e independencia. Por consiguiente, la delimitación del alcance de tal inmunidad debe partir de

la premisa de que, con carácter general, cuando en una determinada actividad o cuando en la afectación de determinados bienes no esté empeñada la soberanía del Estado extranjero, tanto el ordenamiento internacional como, por remisión, el ordenamiento interno desautorizan que se inejecute una Sentencia; en consecuencia, una decisión de inejecución supondría en tales casos una vulneración del art. 24.1 CE (SSTC 107/1992, de 1 de julio, F. 4; 292/1994, de 27 de octubre, F. 3; y 18/1997, de 10 de febrero, F. 6). Por lo tanto, **la relatividad de la inmunidad de la ejecución de los Estados extranjeros se asienta en la distinción entre bienes destinados a actividades de «iure imperii» (es decir, en las que está empeñada la soberanía del Estado) y bienes destinados a actividades de «iure gestionis» (o lo que es lo mismo, actividades en las que el Estado no hace uso de su potestad de imperio y actúa de la misma manera que un particular).**

No obstante lo anterior, como ya puso de manifiesto este Tribunal en la STC 107/1992, de 1 de julio, F. 5 (y, con posterioridad en las SSTC 292/1994, de 27 de octubre, F. 3; y 18/1997, de 10 de febrero, F. 6), **con independencia de la mencionada inmunidad «relativa» de ejecución de los bienes de los Estados extranjeros sobre la base de la distinción de los destinados a actividades de «iure imperii» o a actividades de «iure gestionis», los bienes de las Misiones Diplomáticas y Consulares son absolutamente inmunes a la ejecución, en virtud de lo dispuesto en el art. 22.3 del Convenio de Viena de 18 de abril de 1961 sobre relaciones diplomáticas (que dispone que «los locales de la misión diplomática, su mobiliario y demás bienes situados en ellos, así como los medios de transporte de la misión, no podrán ser objeto de ningún registro, requisa, embargo o medida de ejecución») y en el art. 34 del Convenio de Viena de 24 de abril de 1963 sobre relaciones consulares (que establece que «los locales consulares, sus muebles, los bienes de la oficina consular y sus medios de transporte, no podrán ser objeto de ninguna requisa por razones de defensa nacional o de utilidad pública»).**

3. Aun cuando en principio los bienes del Consulado objeto de embargo gozan del privilegio de inmunidad, como así lo certificó el Ministerio de Asuntos Exteriores al Juez de lo Social núm. 2 de Vizcaya con fecha de 15 de noviembre de 1995, por estar afectados a la actividad del propio Consulado, la pretensión de la demandante no es otra sino que este Tribunal recalifique la naturaleza jurídica de los bienes embargados como bienes destinados al «ius gestionis» y no al «ius imperii», para sustraerlos así de tal privilegio y conseguir su traba y ejecución.

Nos encontramos pues, ante una mera cuestión de legalidad que sólo a los Jueces y Tribunales corresponde resolver en el ejercicio de su función jurisdiccional, juzgando y haciendo ejecutar lo juzgado, que en exclusiva les atribuye el art. 117.3 CE, sólo controlable en esta sede por una eventual falta de motivación, o por arbitrariedad manifiesta, irrazonabilidad o error patente (SSTC 111/2000, de 5 de mayo, F. 8; y 161/2000, de 12 de junio, F. 4). Se trata, a fin de cuentas, de una mera disconformidad con lo decidido por el juzgador sin que el derecho a la tutela judicial efectiva en la fase de ejecución de Sentencias se haya visto en modo alguno lesionado, puesto que la Sentencia impugnada no ha impedido la ejecución de la Sentencia sino que únicamente ha declarado de forma razonable y razonada que ésta recae sobre determinados bienes no susceptibles de ser trabados por gozar, según la legislación vigente, del privilegio de inmunidad, lo que ciertamente no impide como dijimos en la STC 107/1992, de 1 de julio, dictada posteriormente, que el apremio pueda llevarse a cabo sobre otras cosas o derechos no protegidos por la ley internacional.

4. En fin, la parte actora alega también la vulneración del derecho a un proceso público sin dilaciones indebidas consagrado en el art. 24.2 CE por considerar que el Consulado ha contribuido a prolongar su duración más de tres años escudándose en su privilegio con el fin de incumplir una resolución judicial de los Jueces y Tribunales españoles, la Sentencia dictada por despido. Ahora bien, tampoco este motivo resulta viable por cuanto el derecho a un proceso sin dilaciones indebidas como individualizable, autónomo y diferenciado de aquel otro de la tutela judicial efectiva (por ejemplo, SSTC 32/1999, de 8 de marzo, F. 1; 124/1999, de 28 de junio, F. 2; 125/1999, de 28 de junio, F. 2; y 160/1999, de 14 de septiembre, F. 2) no puede ser invocado para denunciar argucias obstativas a la contraparte

del recurso, amén de exigir que el proceso donde hipotéticamente se hubieren causado los retrasos no haya finalizado en el momento de interponer la demanda de amparo (SSTC 151/1990, de 4 de octubre, F. 4; 61/1991, de 20 de marzo, F. 1; 103/2000, de 10 de abril, F. 2 y 3; y 119/2000, de 5 de mayo, F. único). En este caso, la actora no sólo imputa el vicio invocado a unas sedicentes tácticas retardatarias de la contraparte, sino que además el amparo se interpuso contra la resolución judicial que ponía fin al proceso y en consecuencia a cualquier eventual dilación.

FALLO

En atención a todo lo expuesto, el Tribunal Constitucional, POR LA AUTORIDAD QUE LE CONFIERE LA CONSTITUCION DE LA NACION ESPAÑOLA,

Ha decidido

Desestimar la presente demanda de amparo

Publíquese esta Sentencia en el «Boletín Oficial del Estado».

Dada en Madrid, a diecisiete de septiembre de dos mil uno; Carles Viver Pi-Sunyer; Rafael de Mendizábal Allende; Julio Diego González Campos; Tomás S. Vives Antón; Vicente Conde Martín de Hijas; Guillermo Jiménez Sánchez; Firmado y rubricado.

E/8-Appendix 2: Summary

The Constitutional Court declares that the right to a fair hearing includes the right to enforce the judgments of a judicial court. It also says that the Spanish legal system applies a restrictive theory of jurisdictional immunities, and that the measure of execution should take due consideration of the distinction between acts *iure imperii* and acts *iure gestionis* –only the latter are subject to measures of constraint. The Court literally says that property of diplomatic and consular missions is absolutely immune against measures of execution, such as embargoes. The appellant asked the Court to revise the determination of the property subject to measures of execution done by the ordinary court, but the Constitutional Court rejected the constitutional character of that question. On the contrary, it said that the question of the determination of property as *iure gestionis* or *iure imperii* is not a constitutional question and, therefore, must be resolved by ordinary courts.

SWEDEN

In Sweden, the question of State immunity has hardly been regulated and case-law on the matter is scarce. Nevertheless, it has for a long time been argued in literature as well as by courts and the Executive, that Sweden adheres to the restrictive theory of State immunity. In reality, however, the practice of the courts has been rather unclear. This is why it was of utmost importance when the Supreme Court in 1999 handed down a decision in which it invoked the restrictive theory of State immunity. As regards the important question of the categorisation of states' acts as sovereign or commercial, the Supreme Court commented that it is difficult to formulate a distinction applicable in all circumstances. For that reason the Court did not make the categorisation only by considering the form and nature of the act nor solely by considering the State's purpose with the act. Instead, the Supreme Court found that the practical solution, when making such a categorisation, was to make an assessment in casu of the circumstances that support one position or the other.

Very few national laws and regulations deal with State immunity in Sweden. There is one act on certain regulations regarding foreign State-owned vessels and their cargo (issued in 1938) and another act on immunity from embargo for certain aircraft (issued in 1939).

Furthermore, Sweden has ratified the International Convention for the Unification of Certain Rules Concerning the Immunity of State-owned Ships of 1926.

At the international level, Sweden has actively participated in the work of the ILC and of the Sixth Committee of the General Assembly on State immunity. In these fora, Sweden has consistently argued in favour of the restrictive theory of State immunity.

Preliminary phase of collection of data

As mentioned above, Swedish case-law regarding State immunity is rather scarce. Furthermore, it has been somewhat difficult to fully study the practice of the district courts and of the courts of appeal since these courts still lack easily accessible information systems regarding their decisions and judgements.

The enclosed preliminary collection of data has been divided into three different parts. The first part is concerned with the practice of the Courts and Tribunals (S/CT), whereas the second and third parts include material from the Executive (S/E) and the Legislative (S/L) respectively. As regards the Executive, the material is furthermore subdivided according to the subject dealt with in every document: S/E 1 – S/E 3 comment on the European Convention on State Immunity, S/E 4 – S/E 8 refer to the work within the ILC and the UN on State immunity, and finally documents S/E 9 – S/E 13 concern national inquiries on State immunity.

Registration No	S/1 (Sweden/Courts and Tribunals No. 1)
Date	21 December 1972
Author(ity)	Supreme Court (<i>Högsta domstolen</i>) Decision
Parties	Tekno-Pharma AB vs. Iran (State)
Points of law	The Supreme Court finds that an arbitration clause does not constitute an explicit waiver of immunity
Classification No.	0.a, 1, 2.c
Sources	- <i>Nytt Juridiskt Arkiv</i> 1972, Avd. I, Case No. 1972c434 - http://www.infotorg.sema.se
Additional information	- Supreme Court decision 30 December 1999 (<i>Nytt Juridiskt Arkiv</i> 1999, Avd. I, Case No. 1999:112) - Svea Court of Appeal decision 18 June 1980 (<i>Rättsfall från Hovrätterna</i> 1981, Case No. 76:81)
Full text – extracts – translation – summaries	Appendix 1: Full text * Appendix 2: Summary * Appendix 3: Summary in English

Appendix 3

Decision of the Supreme Court (*Högsta domstolen*) on 21 December 1972.

Tekno-Pharma AB of Stockholm vs. the State of Iran through the Embassy of Iran in Stockholm regarding appointment of arbitrator. Tekno-Pharma AB applied for the appointment of an arbitrator since the Embassy had failed to do so according to a mutual arbitration agreement between the company and the Embassy. The Embassy claimed immunity. The County administrative board of Stockholm found that the Embassy was entitled to invoke immunity before the board in the matter, regardless of the fact that the Embassy had signed an arbitration agreement, why the board found itself to be legally prevented from trying the company's application. Tekno-Pharma AB appealed to the Svea Court of Appeal, which found that the quoted arbitration clause was not equal to an explicit waiver of immunity, why the appeal was overruled. The decision was appealed to the Supreme Court, which affirmed the decision of the Court of Appeal.

Registration No.	S/2
Date	18 June 1980
Author(ity)	Svea Court of Appeal (<i>Svea hovrätt</i>) Decision
Parties	Libyan American Oil Company vs. Libya (State)
Points of law	The Court of Appeal finds that Libya, by the approval of an arbitration clause, has waived its immunity.
Classification No	0.a or 0.b.3, 1, 2.c
Sources	- <i>Rättsfall från Hovrätterna 1981</i> , Case No. 76:81 - http://www.infotorg.sema.se
Additional information	- Supreme Court decision 21 December 1972 (<i>Nytt Juridiskt Arkiv 1972, Avd. I</i> , Case No. 1972c434) - Supreme Court decision 30 December 1999 (<i>Nytt Juridiskt Arkiv 1999, Avd. I</i> , Case No. 1999:112)
Full text – extracts – translation – summaries	Appendix 1: Full text * Appendix 2: Summary in English

Appendix 2

Decision of the Svea Court of Appeal (*Svea hovrätt*) on 18 June 1980.

Libyan American Oil Company vs. the State of Libya. In an agreement for an oil license between the Company and the State an arbitration clause was included for the settlement of disputes. After a dispute had arisen and an arbitration had been passed, the Company applied for the arbitration to be executed as a Swedish judgement that has acquired legal force. Libya raised objections and claimed immunity from the jurisdiction of Swedish courts. The Svea Court of Appeal found that by the approval of the arbitration clause Libya had waived its immunity. Thereafter, Libya appealed to the Supreme Court whereupon the Company withdrew its case.

Registration No.	S/3
Date	4 March 1986
Author(ity)	Supreme Administrative Court (<i>Regeringsrätten</i>) Judgement
Parties	Ministerium Fur Aussenhandel der Deutschen Demokratischen Republik (DDR) vs. Riksförsäkringsverket (<i>National Social Insurance Board</i>)
Points of law	The Supreme Administrative Court finds that the Ministry of DDR has waived its possible immunity by not invoking immunity earlier than before the Supreme Administrative Court
Classification No.	0.b.3, 1, 2.c
Sources	- <i>Regeringsrättens årsbok 1986</i> , Case No. 1986 ref 66 - http://www.infotorg.sema.se
Additional information	Supreme Court decision 30 December 1999 (<i>Nytt Juridiskt Arkiv 1999, Avd. I</i> , Case No. 1999:112)
Full text – extracts – translation – summaries	Appendix 1: Full text * Appendix 2: Statement by the Swedish Ministry for Foreign Affairs * Appendix 3: Summary in English

Appendix 3

Judgement of the Supreme Administrative Court (*Regeringsrätten*) on 4 March 1986.

Ministerium Fur Aussenhandel der Deutschen Demokratischen Republik (DDR) vs. Riksförsäkringsverket, RFV (*National Social Insurance Board*). RFV charged the Ministry of DDR for employment tax in Sweden for DDR citizens working at the DDR Handelszentrum (trading centre) in Gothenburg, Sweden. The Ministry refused to pay and appealed to the Stockholm Administrative Court of Appeal. The Ministry claimed that what had been paid to the employees was not to be considered as salary and furthermore that the employees would not raise any social claims to the Swedish State.

The Stockholm Administrative Court of Appeal established that the Ministry was a foreign employer that had employed staff in Sweden why it was obliged to pay employment tax. In the appeal to the Supreme Administrative Court the Ministry claimed immunity.

The Supreme Administrative Court asked for a statement by the Swedish Ministry for Foreign Affairs on the question of immunity for the trading centre. In the statement (appendix 2) the Ministry for Foreign Affairs noted that in the agreement concerning the establishment of diplomatic relations between Sweden and DDR, it had been stated that if a trading office was established it should not be seen as a part of the diplomatic mission. Furthermore, the Ministry for Foreign Affairs noted that in the said agreement there had not been included any regulations regarding immunity or privileges for the trading office. In the light of the statement by the Ministry for Foreign Affairs, the Supreme Administrative Court found that the only question that remained to be solved was if the Ministry should be considered to enjoy such general immunity that might belong to foreign States' authorities. In this respect the Supreme Administrative Court pointed out that the Ministry had not claimed immunity before RFV or before the Court of Appeal. In view of this the Supreme Administrative Court was of the view that the Ministry had waived the immunity that it possibly could have been entitled to, why it left the appeal without assent.

Registration No.	S:4
Date	4 May 1988
Author(ity)	Labour Court (<i>Arbetsdomstolen</i>) Decision
Parties	Douglas H (individual) vs. Korea Trade Center (KTC)
Points of law	The Labour Court affirms the decision of the Stockholm City Court that KTC enjoys immunity because of its activities and close connections with the Korean State
Classification No.	0.a, 1, 2.c
Sources	- Riksarkivet (<i>National Archives</i>), Arbetsdomstolens arkiv, Inkomna mål 1987, Vol. EI:1219, målnr B 41/87 - <i>Nytt Juridiskt Arkiv 1987, Avd I</i> , Case No. 1987:59 (partly published) - http://www.infotorg.sema.se
Additional information	Supreme Court decision 30 December 1999 (<i>Nytt Juridiskt Arkiv 1999, Avd. I</i> , Case No. 1999:112)
Full text – extracts – translation – summaries	Appendix 1: Full text, Labour Court * Appendix 2: Full text, Stockholm City Court, Svea Court of Appeal, Supreme Court * Appendix 3: Statement by the Swedish Ministry for Foreign Affairs * Appendix 4: Summary in English

S/4 Appendix 4: Summary in English

Decision of the Labour Court (*Arbetsdomstolen*) on 4 May 1988.

Douglas H (individual) vs. Korea Trade Center (KTC). Douglas H sued KTC for damages on account of having been given notice to quit without grounds of fact. KTC claimed state immunity for being an entity of the Korean State. The Stockholm City Court asked for a statement by the Swedish Ministry for Foreign Affairs on the question of immunity. In the statement (appendix 3) the Ministry concluded that the information sent by the Swedish Embassy in Seoul implied that KTC acted as a public entity (*jure imperii*), why it would enjoy immunity according to the interpretation of public international law claimed by Sweden before the UN. Based on the information about KTC's activities and its close connections with the Korean State, the Stockholm City Court found that it had been made clear that KTC enjoyed immunity. Douglas H appealed to the Svea Court of appeal that affirmed the City Court's dismissal of the appeal on the same grounds. Douglas H appealed to the Supreme Court, which found that the claim referred to a dispute that should have been appealed to the Labour Court. Therefore, the Supreme Court sat aside the decision of the Court of Appeal and handed over the case to the Labour Court. Finally, the Labour Court affirmed the decision of the Stockholm City Court.

Registration No.	S/5
Date	18 November 1992
Author(ity)	Svea Court of Appeal (<i>Svea hovrätt</i>) Decision
Parties	Praktikertjänst AB Pensionsstiftelse vs. Kronofogdemyndigheten i Stockholm (<i>Stockholm Enforcement Service</i>)
Points of law	The Court of Appeal finds that the Enforcement Service is prevented from trying an application for an order to pay directed to an embassy according to the summary proceedings, since these proceedings exclude the kind of examination that is necessary to try the question of possible jurisdictional immunity for the defendant
Classification No.	0.c, 1, 2.c
Sources	- <i>Rättsfall från Hovrätterna 1993</i> , Case No. 1993:31 - http://www.infotorg.sema.se
Additional information	- Svea Court of Appeal decision 18 June 1980 (<i>Rättsfall från Hovrätterna 1981</i> , Case No. 76:81) - Supreme Court decision 30 December 1999 (<i>Nytt Juridiskt Arkiv 1999, Avd I</i> , Case No. 1999:112)
Full text – extracts – translation – summaries	Appendix 1: Full text * Appendix 2: Summary in English

S/5 Appendix 2: Summary in English

Decision of the Svea Court of Appeal (*Svea hovrätt*) on 18 November 1992.

Praktikertjänst AB Pensionsstiftelse (hereinafter the Foundation) vs. Kronofogdemyndigheten i Stockholm (*Stockholm Enforcement Service*). The Foundation had let apartments to an embassy and sent an application for an order to pay rents that were overdue to the Enforcement Service. The Stockholm Enforcement Service dismissed the application on the grounds that the embassy enjoyed immunity. The Foundation appealed to the Svea Court of Appeal. The court pointed out that the Foundation had not sued the embassy before a court but had filed an application with the enforcement service within the scope of the so-called "*summariska processen*" (summary proceedings). According to these proceedings the authority has essentially to grant the application if the defendant has not contested it on due time. The court pointed out that the aim of these proceedings is *inter alia* to avoid matters of judgement, why the court found that the summary proceedings essentially exclude the kind of examination that is necessary to try the question if the defendant enjoys jurisdictional immunity in a civil case. Therefore, the Svea Court of Appeal established that the Enforcement Service had been prevented from trying the Foundation's application.

Registration No.	S/6
Date	20 November 1993
Author(ity)	Market Court (<i>Marknadsdomstolen</i>) Decision
Parties	N.N. (individual) vs. Portugal (State)
Points of law	The Market Court dismisses an application according to the Market Court Law since the state of Portugal is found not to be considered as a "manufacturer"
Classification No.	0.a, 1.c, 2.c
Sources	- Marknadsdomstolens avgöranden 1993, Case No. 1993:21 - http://www.infotorg.sema.se
Additional information	Market Court decision 2 February 1994
Full text – extracts – translation – summaries	Appendix 1: Full text * Appendix 2: Summary in English

S/6 Appendix 2: Summary in English

Decision of the Market Court (*Marknadsdomstolen*) on 20 November 1993.

N.N. (individual) vs. Portugal (State). In an application N.N. claimed that the Market Court should prohibit the State of Portugal to advertise in Sweden guaranteeing safe investment in Portugal, and also to do publicity for a functioning legal framework in Portugal. N.N. claimed that misleading marketing had taken place through a magazine published by Portugal's Tourist Agency and through a booklet published by Portugal's Trading Centre, and that the State of Portugal had to be considered as the responsible authority for these two institutions and for the information given.

The Market Court established that the State of Portugal was not to be considered as a "manufacturer" by carrying out the activities commented above. Therefore, the activities could not give rise to any action according to the Marketing Act, why the application was dismissed.

Registration No.	S/7
Date	2 February 1994
Author(ity)	Market Court (<i>Marknadsdomstolen</i>) Decision
Parties	N.N. (individual) with Industrial Cleaning Consulting vs. ICEP (Portugal's Trading Centre)
Points of law	The Market Court dismisses an application according to the Market Court Law since ICEP is found to not be considered as a "manufacturer"
Classification No.	0.a, 1.c, 2.c
Sources	- Marknadsdomstolens avgöranden 1994, Case No. 1994:2 - http://www.infotorg.sema.se
Additional information	Market Court decision 20 November 1993
Full text – extracts – translation – summaries	Appendix 1: Full text * Appendix 2: Summary in English

S/7 Appendix 2: Summary in English

Decision of the Market Court (*Marknadsdomstolen*) on 2 February 1994.

N.N. (individual) with Industrial Cleaning Consulting vs. ICEP (Portugal's Trading Centre). In an application N.N. claimed that the Market Court should prohibit ICEP to advertise in Sweden guaranteeing safe investment in Portugal, and also to do publicity for a functioning legal framework in Portugal. N.N. claimed that misleading marketing had taken place through a booklet published by Portugal's Trading Centre, and that the State of Portugal had to be considered as responsible for the marketing as the responsible authority for ICEP, which in itself should be considered to act with the State's authorisation.

According to the information that the Market Court obtained from ICEP's representation in Stockholm, ICEP is a governmental body principally financed by the State and subordinated to the Ministry for Trade and Tourism.

The Market Court noted that ICEP is a Portuguese State institution. Furthermore, the Court found no reason to judge the activities differently than it had done in the decision of 20 November 1993. Taking all this into consideration the Court found that the prerequisites of the Marketing Act were not fulfilled, why the application was dismissed.

Registration No.	S/8
Date	30 December 1999
Author(ity)	Supreme Court (<i>Högsta domstolen</i>) Decision
Parties	Västerås kommun (The Local Authority of the Municipality of Västerås) vs. Icelandic Ministry of Education and Culture
Points of law	The Supreme Court points out that immunity can be invoked only in disputes relating to sovereign acts as such, but not in disputes concerning matters of a commercial nature; and furthermore the Court establishes criteria for such a categorisation finding that the practical solution is to make an assessment in each particular case of the circumstances that support one position or the other.
Classification No.	0.a, 1.b, 2.c
Sources	- <i>Nytt Juridiskt Arkiv</i> 1987, Avd I, Case No. 1999:112 - http://www.infotorg.sema.se - Mahmoudi Said, "Local Authority of Västerås v. Republic of Iceland", <i>American Journal of International Law</i> , 2001, Vol. 95 No. 1, pp. 192-197
Additional information	- Supreme Court decision 21 December 1972 (<i>Nytt Juridiskt Arkiv</i> 1972, Avd. I, Case No. 1972c434) - Labour Court decision 16 November 2001 (<i>Arbetsdomstolens domar 2001</i> , Case No. AD 2001 Nr. 96)
Full text – extracts – translation – summaries	Appendix 1: Full text * Appendix 2: Summary in English

S/8 Appendix 2: Summary in English

Decision of the Supreme Court (*Högsta domstolen*) on 30 December 1999.

Västerås kommun (The Local Authority of the Municipality of Västerås) vs. Icelandic Ministry of Education and Culture. The Local Authority of Västerås had given flight-technician education to Icelandic students according to a contract between the Local Authority and the Icelandic Ministry of Education and Culture. In the contract a reference was made to a Nordic agreement on common education. After having given the education, the Local Authority sued the Republic of Iceland claiming that Iceland had to defray costs for the students according to the above mentioned contract. The Republic of Iceland claimed immunity.

The Västerås District Court found that the contract between the parties had a public-law character, which indicated that the dispute concerned a public act. Therefore, Iceland enjoyed immunity. The Svea Court of Appeal affirmed the ruling of the District Court whereupon the Local Authority appealed to the Supreme Court.

Initially, the Supreme Court pointed out that it is a general principle of international law that an independent state cannot be compelled to appear as a party before a court of another state, or be subject to a compulsory action by the authorities of that state. The Court also noted that this immunity has long been recognised in Swedish law although it has also been presumed that there may be cases in which immunity could be denied. According to the Court immunity can only be invoked in disputes relating to sovereign acts as such, but not in disputes concerning matters of a commercial or private-law nature. Furthermore, the Court commented that in establishing criteria for such a categorisation of states' acts it is disputed whether the criteria should be the form and nature of the act or the purpose of the state with the act. The Court found that it would be difficult to formulate a distinction that is applicable in all circumstances and that it in this regard was equally difficult to speak of an established practice of states. The Court concluded that the practical solution was to make an assessment in each particular case of the circumstances that support one position or the other.

In the case before it, the Supreme Court noted that the contract between the parties concerned a subject that is typically of a public-law nature, and that it had also been regulated by an intergovernmental agreement mentioned in the contract. Therefore, the Court established that Iceland's act of concluding a contract with the Local Authority had to be considered as a sovereign act that gave Iceland the right to invoke immunity.

Finally, the Court found that Iceland had not waived its immunity in spite of the contract's choice-of-law clause, which selected Swedish law. The Court was of the view that the clause did not constitute an unequivocal declaration of willingness on behalf of Iceland to subject itself to the jurisdiction of the Swedish courts with respect to disputes under the contract. The Supreme Court left the appeal without assent.

Registration No	S/9
Date	16 November 2001
Author(ity)	Labour Court (<i>Arbetsdomstolen</i>) Decision
Parties	GP (individual) vs. Cypriotiska Statens Turistorganisation, CST (Cyprus' Tourist Organisation)
Points of law	The Labour Court refers to the ruling of the Supreme Court in Case No. 1999:112 when it makes an assessment of the circumstances in the case before it, and finds that CST is entitled to invoke immunity regarding the employment of GP
Classification No.	0.a, 1.b, 2.c
Sources	<i>Arbetsdomstolens domar 2001</i> , Case AD 2001 Nr. 96 - http://www.infotorg.sema.se
Additional information	- Supreme Court decision 30 December 1999 (<i>Nytt Juridiskt Arkiv 1999, Avd I</i> , Case No. 1999:112)
Full text – extracts – translation – summaries	Appendix 1: Full text * Appendix 2: Summary in English

S/9 Appendix 2: Summary in English

Decision of the Labour Court (*Arbetsdomstolen*) on 16 November 2001.

GP (individual) vs. Cypriotiska Statens Turistorganisation, CST (Cyprus' Tourist Organisation). GP was a former employee of CST who sued the latter for damages on account of having been given notice to quit without grounds of fact. CST claimed state immunity.

Considering the aims and activities of CST, The Stockholm City Court found that CST could enjoy immunity. Furthermore, it found that there was a lot that indicated that the transfer of GP – which GP considered to be a notice to quit – had been carried out by Cyprus in its capacity as a sovereign state. Finally, the Stockholm City Court made an assessment of the circumstances in the case, and concluded that CST enjoyed immunity why the plaintiff's case should be dismissed. GP appealed to the Labour Court.

Initially, the Labour Court established that the investigations of the case revealed that CST was to be considered as the kind of legal entity that may invoke immunity. Thereafter, the Court pointed out that immunity can only be invoked in disputes relating to sovereign acts as such, but not in disputes concerning matters of a commercial or private-law nature. In establishing criteria for such a categorisation of states' acts, the Court referred to the statement of the Supreme Court in case No. 1999:112 that the practical solution was to make an assessment in each particular case of the circumstances that support one position or the other.

In the case before it, the Court commented that as regards employment agreements between entities of immunity and its employees, it has been claimed in the doctrine that immunity should from a general point of view apply according to public international law. Furthermore, the Court pointed out that this was also in line with the ruling of the Labour Court in the case AD 1958 No. 7. The Court thereafter noted that the European Convention on State Immunity, had Sweden been a party to it, would not have constituted an obstacle to CST to claim immunity. In making an assessment of the circumstances, the Court stated that it also paid attention to the position of GP at CST and to other circumstances regarding his employment at CST. The Labour Court's conclusion of the assessment of the circumstances was that CST had the right to invoke immunity.

Registration No.	S/10 (Sweden/Executive power)
Subject	Draft European Convention on State Immunity
Date	12 November 1970
Author(ity)	Ministry for Foreign Affairs Preliminary statement before the Council of Europe
Parties	L. Kellberg, Head of the Legal Department, Ministry for Foreign Affairs to the Secretary General of the Council of Europe
Points of law	Preliminary observations by Swedish authorities on the draft Convention regarding <i>inter alia</i> the distinction between kinds of activities; the relation between diplomatic immunity and state immunity; the obligation to give effect to judgements; the regional arrangement of the draft Convention
Classification	O.c, 1, 2
Sources	- Archives of the Ministry for Foreign Affairs (not published)
Additional information	- Ministry for Foreign Affairs, Internal Memorandum, 26 October 1983 - Ministry for Foreign Affairs, Statement, 17 March 1986
Full text – extracts – translation – summaries	Appendix 1: Full text in English

S/10

Appendix 1

Rättsavdelningen

Stockholm, November 12, 1970.

ds Reuterswård, II



Dnr		
440		
Avd	Grp	Mål
HP	59	I

Sir,

With reference to your letter of August 27, 1970 (J/4.085 Div II), regarding the draft European Convention on State Immunity, I have the honour to inform you that the competent Swedish authorities, although they have not yet completed their study of this draft Convention, wish to submit the following preliminary observations.

1. The Committee of Experts on State immunity has chosen to propose a regional arrangement between the member States of the Council of Europe on this subject. The Committee's mandate was, however, to study the question of State immunity in all its aspects. A regional arrangement, in itself, represents of course only a partial solution of the problem. The question remains what rules should be applied by States parties to the proposed Convention in their relations with other States. The Committee of Experts, in its report, does not offer any comments on this question.
2. In view of the inconvenience of having to apply different principles of State immunity to some States than to others, the Swedish authorities, for their part, are of the opinion that at least the direct rules of non-immunity of the draft Convention should be formulated in such a way that they can be applied to any State. For this purpose, it would seem that the "catalogue" of the draft should be based, to a greater extent, on a distinction

Secretary General
Council of Europe

STRASBOURG

between different kinds of activities of a State. Particularly in the area of the contractual obligations of a State, the provisions of the draft go too far in excluding immunity regardless of the nature of the State activities which have given cause for proceedings against the State. The most far-reaching of these provisions are contained in Article 4. The Swedish authorities are of the opinion that this article should be confined to contractual obligations assumed by a State in connection with activities jure gestionis in the commercial, industrial and financial fields.

3. The Swedish authorities have noted with some concern the divergent views which have been expressed within the Committee of Experts on the interpretation of the general reservation made in Article 32 with regard to diplomatic and consular immunities. It seems important that the question of the implications of the draft Convention as regards the immunity of States in connection with the activities of their embassies and consulates should be clarified.

4. According to the provisions of Article 25 of the draft Convention, States having made the declaration provided for in Article 24 would in their mutual relations be bound, under certain conditions, to give effect to judgments which are not covered by the "catalogue". It seems unsatisfactory that a State under these provisions may have to give effect to a judgment given by a court of another State even if its own courts would have accorded immunity to the other State in a similar case. The Swedish authorities are of the opinion that there should be reciprocity as regards the obligation to give effect to judgments. It should be considered whether this aim could be achieved by confining Article 25 to judgments rendered in connection with State activities jure gestionis in the commercial, industrial or financial field.

5. The Swedish authorities reserve themselves the right to comment on other provisions of the draft Convention at a later stage.

I avail myself of this opportunity, Sir, to renew to you the assurance of my highest consideration.

For the Minister:

L. Kellberg
Head of the Legal Department

Registration No.	S/11
Subject	European Convention on State Immunity
Date	26 October 1983
Author(ity)	Ministry for Foreign Affairs Internal Memorandum
Parties	--
Points of law	Swedish objections to the Convention regarding Articles 4, 15, 20, 32 and also regarding the fact that rules of the Convention are only applicable between the Contracting States
Classification No.	O.c, 1, 2
Sources	- Archives of the Ministry for Foreign Affairs (not published)
Additional information	- Ministry for Foreign Affairs, Preliminary statement, 12 November 1970 - Ministry for Foreign Affairs, Statement, 17 March 1986
Full text – extracts – translation – summaries	Appendix 1: Full text * Appendix 2: Summary in English

Appendix 2

Ministry for Foreign Affairs, Internal Memorandum of 26 October 1983 entitled The European Convention on State Immunity and its Additional Protocol.

In the memorandum the main objections that Sweden had raised against the Convention during its preparation are discussed. The first of these objections concerned the fact that rules of the Convention are only applicable between the Contracting States. Sweden was of the view that it would have been better if at least the Convention's rules regarding restrictions of immunity had been formulated in such a way that they could apply to relations with all states. Furthermore, Sweden found that the Convention is too far-reaching when it comes to restrictions of immunity in its Article 4. The Swedish point of view was that restrictions of immunity should be restricted to *acta jure gestionis*. According to Article 32 the Convention shall not have any effect on diplomatic or consular immunities. However, during the preparation of the Convention different interpretations emerged that Sweden did not share and regretted, since the Convention may leave room for different interpretations. According to Article 20 a Contracting State is under certain conditions obliged to give effect to a judgement given against it by a court of another Contracting State. Sweden was of the view that the Convention should not deal with the legal force of judgements, which traditionally belongs to the Hague Conference on Private International Law. According to Article 15 a Contracting State shall be entitled to immunity if the proceedings do not fall within Article 1 to 14. Sweden found that such a formulation prevents further restrictions on immunity that might be desirable. Finally, it is commented in the memorandum that no Swedish decision, for or against Convention, is to be found in the archives.

Registration No.	S/12
Subject	European Convention on State Immunity
Date	17 March 1986
Author(ity)	Ministry for Foreign Affairs Statement
Parties	Ministry for Foreign Affairs to Ministry of Justice
Points of law	Sweden's earlier objections regarding the Convention are discussed (Articles 15, 32 and that the Convention is only applicable between Contracting States) whereupon it is commented that these objections might now be less valid
Classification No.	O.c, 1, 2
Sources	- Archives of the Ministry for Foreign Affairs (not published)
Additional information	- Ministry for Foreign Affairs, Preliminary statement, 12 November 1970 - Ministry for Foreign Affairs, Internal Memorandum, 26 October 1983
Full text – extracts – translation – summaries	Appendix 1: Full text * Appendix 2: Summary in English

S/12 Appendix 2: Summary in English

Ministry for Foreign Affairs, Statement made to the Ministry of Justice on 17 March 1986 regarding Sweden's position on the European Convention on State Immunity.

As regards Sweden's position during the preparation of the Convention, the statement basically repeats the objections that are discussed in the internal memorandum of 26 October 1983. In the statement it is said that Sweden's main objections during the preparation were the fact that rules of the Convention are only applicable between the Contracting States, and that according to Article 15 a Contracting State shall be entitled to immunity if the proceedings do not fall within Article 1 to 14, and finally also that the Convention leaves room for different interpretations regarding Article 32. Thereafter it is said that the above mentioned objections to the Convention might now be less valid, and that the Convention is supposed to be re-examined aiming at a possible accession to the Convention with its Additional Protocol during 1987.

Registration No.	S/13
Subject	ILC Draft Articles on State Immunity
Date	21 December 1987
Author(ity)	Governments of Denmark, Finland, Iceland, Norway and Sweden Statement
Parties	Governments of Denmark, Finland, Iceland, Norway and Sweden to the International Law Commission
Points of law	Comments of the Nordic Countries on ILC Draft Articles regarding Articles 3, 6, 11, 18, 19, 21, 23 and 24 and also regarding the heading of Part III and the distinction between <i>acta jure imperii</i> and <i>acta jure gestionis</i>
Classification No.	0.c, 1, 2.c
Sources	- Archives of the Swedish Ministry for Foreign Affairs (not published)
Additional information	Governments of the Nordic Countries, Statement, 11 June 1992
Full text – extracts – translation – summaries	Appendix 1: Full text in English

Appendix 1

Comments of the Governments of Denmark, Finland, Iceland, Norway and Sweden on draft Articles on Jurisdictional Immunities of States and their Property in accordance with Articles 16 and 21 of the Statute of the International Law Commission

The following is the comments and observations of the Governments of Denmark, Finland, Iceland, Norway and Sweden on the draft Articles on "Jurisdictional Immunities of States and their Property" as adopted by the International Law Commission at its 1972nd meeting in June 1986 (A/41/498).

1. The Governments of the Nordic Countries are in favour of the concept of restrictive State immunity and support the Special Rapporteur's endeavours to draw workable lines of distinction between activities of States performed in the exercise of sovereign authority, acta jure imperii, which are covered by immunity, and other State activities, acta jure gestionis, which should not be covered by immunity due to their commercial character or other adherence to the province of private law. The draft Articles on immunity from lawsuit and execution are in

general harmony with this restrictive view which more or less corresponds to the trend in current international law on State immunity.

2. As regards draft Article 3, paragraph 2, it is therefore the view of the Governments of Denmark, Finland, Iceland, Norway and Sweden that in determining whether a contract for the sale or purchase of goods or the supply of services is commercial, reference should only be made to the nature of the contract and not to the purpose of the contract. By taking into account the purpose of the contract and the practice of a State, the general distinction between acta jure imperii and acta jure gestionis - the central idea of the restrictive theory - is in jeopardy. It is a necessity to develop a uniform practice of this concept. Hence, in determining whether a contract is commercial, weight should only be attached to an objective criterion, i.e. the nature of the contract.

3. With regard to the fundamental Article 6 in the draft a formula should be chosen that takes into account the future development of international law through the practice of States, national legislation and judicial proceedings of national courts. The law in this field is not advanced or ripe enough to warrant a final codification, or a legal "freeze", covering all situations. The Governments of the Nordic Countries consequently support the inclusion of the bracketed language at the end of draft Article 6, namely the words "and the relevant rules of general international law".

4. The heading of Part III should read "Limitations on State Immunity" (and not "Exceptions to State Immunity") in order to

reflect a less static approach to the subject. Cf. the argumentation in para. 3 above.

5. Article 11 on commercial contracts is carefully formulated to present accurately this the most important of limitations to State immunity. The Governments of Denmark, Finland, Iceland, Norway and Sweden agree with the supporters of the current wording that the application of the rules of private international law is probably a more suitable criterion for giving effect to this limitation than the possible existence in the State of the forum of, e.g., an office or bureau. On another point, however, difficulties in the application of this Article might arise. In recent years, State activity in the private sector has taken on diverse and complex forms for which reason the question of when a State can be said to have entered into a commercial contract will often be difficult to decide in concrete cases. The said Governments expect that it might at some stage during the codification process be beneficial to the solution of such difficulties to introduce and include in Article 11 a criterion concerning the structural relationship between the State and the commercial contract in question.

6. With regard to draft Article 18 on State-owned and State-operated ships, the Governments of the Nordic Countries are of the firm opinion that the concepts of "commercial service" and "commercial purposes" should not be confused by the added qualification of "non-governmental". The bracketed phrase should be deleted so as not to blur the distinction between acta jure gestionis and acta jure imperii.

7. Regarding Article 19 on "Effect of an arbitration agreement", the Governments of the

Nordic Countries are of the view that it would not be in line with existing customary law to restrict the scope of non-immunity in arbitration matters to disputes over commercial contracts. Consequently, with regard to the two bracketed alternatives, "commercial contract" contra "civil or commercial matter", the latter should be chosen.

8. With regard to Part IV of the draft Articles, the Governments of Denmark, Finland, Iceland, Norway and Sweden are of the opinion that in general the right balance has been struck between the interests of the acting State, the territorial State and the private claimant. The principles laid down in Articles 21 - 23 furthermore seem to reflect a major trend in current State practice.

9. As to draft Article 21, the bracketed sentence "or property in which it has a legally protected interest" might permit a widening of the present scope of State immunity from execution which has little to say for it since the preceding words "on the use of its property or property in its possession or control" must be regarded as covering all State interest in property that is neither marginal nor, by its very nature, unaffected by the various measures of constraint. Hence, the identical bracketed sentence in Article 22 should also be deleted.

Furthermore, the Governments of the Nordic Countries agree that it was rightly pointed out in the debate in the Sixth Committee that the current doctrine of restrictive immunity rests on the assumption that once a foreign State has entered the market place it should be treated in the same way as others in the market place.

Hence, with reference to sub-paragraphs (a) and (b) of Article 21, the right to execute should not be limited to property that "has a connection with the object of the claim" or property that "has been allocated or earmarked by the State for the satisfaction of the claim"; the right to execute should apply to all property specifically in use for commercial purposes or intended for such use.

10. With regard to draft Article 23 on categories of property that shall not be considered in use for commercial purposes the Governments of the Nordic Countries have the following comment. In paragraph 1 (c) property of central banks in the territory of other States is unconditionally excluded from execution. This rule seems to be based on the view that because central banks are instruments of sovereign authority any activity they undertake must be covered by immunity from execution. However, if the foreign property of a central bank is used or intended for use by the State for commercial purposes it might be logic not to treat it differently from other State property that fulfils this condition.

11. Finally, the Governments of Denmark, Finland, Iceland, Norway and Sweden should like to make a comment as regards draft Article 24 on "Service of process". Paragraph 1 (a) provides for the possibility of special arrangements for service of process between the claimant and the State concerned. In many national legal systems special arrangements of this kind between the parties can not be taken into account. Article 24 therefore seems to be drafted on the assumption that States would be willing to modify their domestic rules of civil procedures if a national ratification or accession would

require that. In that sense, draft Article 24 seems to be overambitious.

Copenhagen, Helsinki, Reykjavik, Oslo and
Stockholm, 21 December 1987.

Registration No.	S/14
Subject	ILC Draft Articles on State Immunity
Date	11 June 1992
Author(ity)	Governments of Denmark, Finland, Iceland, Norway and Sweden Statement
Parties	Governments of Denmark, Finland, Iceland, Norway and Sweden to the International Law Commission
Points of law	Observations of the Nordic Countries on ILC Draft Articles and the possibilities to draw up a convention whose aim according to the Nordic Countries should be to draw workable lines of distinction between <i>acta jure imperii</i> and <i>acta jure gestionis</i> ; and furthermore observations on the importance to secure most procedural questions before an international conference is convened
Classification No.	0.c, 1, 2.c
Sources	- United Nations, <i>Report of the Secretary General</i> , UN document A/47/326, p. 17 - Archives of the Swedish Ministry for Foreign Affairs
Additional information	Governments of the Nordic Countries, Statement, 21 December 1987
Full text – extracts – translation – summaries	Appendix 1: Full text in English

Appendix 1

The Permanent Representative of Denmark to the United Nations presents his compliments to the Secretary-General of the United Nations and, with reference to the Secretary-General's Note LA/COD/23 of 20 December 1991 regarding General Assembly resolution 46/55 of 9 December 1991 concerning the final draft articles on jurisdictional immunities of States and their property adopted by the International Law Commission at its forty-third (1991) session, has the honour, on behalf of the Nordic countries, Denmark, Finland, Iceland, Norway and Sweden, to convey the following observations.

In the opinion of the five Nordic countries, the draft articles adopted by the International Law Commission form a solid basis for consideration at a diplomatic conference to draw up a convention on this topic. In accordance with the general trend in current international law on State immunity as reflected in the draft articles the aim of the convention should be to draw workable lines of distinction between activities of States performed in the exercise of sovereign authority, acta iure imperii, which should continue to be covered by immunity, on the one hand, and State activities, acta iure gestionis, which should not be covered by immunity due to their commercial character or other adherence to the province of private law, on the other. A functional approach should be adopted in this respect.

Furthermore, it is considered of the utmost importance that general agreement be secured on most procedural questions, and to the extent possible on the basic substantive issues, before an international conference is convened. In this regard the Nordic countries are ready to participate actively in the work of the open-ended working group of the Sixth Committee which shall consider issues of substance and procedural matters regarding the conclusion of a convention on jurisdictional immunities of States and their property.

The Permanent Representative of Denmark to the United Nations avails himself of this opportunity to renew to the Secretary-General of the United Nations the assurances of his highest consideration.

Registration No.	S/15
Subject	ILC Draft Articles on State Immunity
Date	17 September 1992
Author(ity)	Ministry for Foreign Affairs Internal Memorandum
Parties	--
Points of law	Comments on Articles 2, 10 and 18 of the Draft Articles and also on a deleted article regarding fiscal matters
Classification No.	O.c, 1, 2
Sources	- Archives of the Ministry for Foreign Affairs (not published)
Additional information	- Ministry for Foreign Affairs, Fax to Permanent Mission of Sweden to the UN in New York, 29 September 1992
Full text – extracts – translation – summaries	Appendix 1: Full text * Appendix 2: Summary in English

S/15 Appendix 2: Summary in English

Ministry for Foreign Affairs, Internal Memorandum of 17 September 1992 on the coming discussion within the UN regarding State immunity.

Initially, the memorandum briefly discusses the background of the work with the ILC Draft Articles as well as the difference between *acta jure imperii* and *acta jure gestionis*. International State practice as well as possible ways of reaching a codification of State immunity are also mentioned.

As regards the Draft Articles it is stated that the criticism of the West has among other things concerned Article 2 regarding the extent of the expression "commercial transactions". The Article states that primarily the objective method is to be used in this respect, but it also leaves room for the subjective method, and according to the West it is not acceptable that the purpose of one of the parties with an activity can decide the classification of the activity. Moreover, the criticism concerns Article 18 regarding limitations of enforcement activities against state property. The principal rule is that such activities are prohibited even in cases when a state cannot claim immunity. Article 10 regarding activities by State owned companies is criticised, since it would be easy for a state to evade the limitations on immunity that the Article states for such companies. Finally, the memorandum mentions that an article on "fiscal matters" has been deleted. The Article included an exception from immunity for tax debts.

Registration No.	S/16
Subject	ILC Draft Articles on State Immunity
Date	29 September 1992
Author(ity)	Ministry for Foreign Affairs Fax
Parties	Ministry for Foreign Affairs Stockholm to the Permanent Mission of Sweden to the United Nations in New York
Points of law	Preliminary observations on Draft Articles, especially on "fiscal matters"
Classification No.	O.c, 1, 2
Sources	- Archives of the Ministry for Foreign Affairs (not published)
Additional information	- Ministry for Foreign Affairs, Internal Memorandum, 17 September 1992 - Governments of Nordic Countries, Statement, 3 December 1987
Full text – extracts – translation – summaries	Appendix 1: Full text * Appendix 2: Summary in English

S/16 Appendix 2: Summary in English

Ministry for Foreign Affairs, Stockholm to Permanent Mission of Sweden to the United Nations in New York.

The fax concerns the coming work of the UN Working Group on State immunity. As regards observations it is referred to the earlier comments of the Nordic Countries and also to the internal memorandum of 17 September 1992 (see S/E 6), which is to be regarded as preliminary observations. Finally, it is also said that the comments of the internal memorandum annexed to the fax are to be regarded as preliminary observations regarding “fiscal matters” and State immunity.

The internal memorandum annexed to the fax was drafted at the Ministry of Finance on 21 September 1992 and is entitled “Fiscal Matters and State Immunity”. It states that foreign states can be liable to taxation in various situations in Sweden, and that this is necessary to maintain fair competition between for example a Swedish private company and a foreign state that run the same kind of activity in Sweden. Consequently, it is commented that it would be totally unacceptable if a foreign state could evade liability to pay taxes by claiming State immunity. Therefore, it is recommended in the memorandum that an article such as the deleted Article 15 regarding “fiscal matters” is included again.

Registration No.	S/17
Subject	ILC Draft Articles on State Immunity and the coming work of the UN Working Group on State Immunity
Date	6 October 1992
Author(ity)	Ministry for Foreign Affairs Internal Memorandum
Parties	--
Points of law	Comments on the Draft Articles 1-3, 5, 6, 8, 10, 11, 16, 18-22
Classification No.	O.c, 1, 2
Sources	- Archives of the Ministry for Foreign Affairs (not published)
Additional information	- Governments of Nordic Countries, Statement, 3 December 1987 - Documents annexed
Full text – extracts – translation – summaries	Appendix 1: Full text * Appendix 2: Ministry of Justice, Internal Memorandum, 5/10/92 * Appendix 3: Ministry for Foreign Affairs, Internal Memorandum, 30/9/92 * Appendix 4: Ministry for Foreign Affairs, Internal Memorandum, 2/10/92 * Appendix 5: Summary in English

S/17 Appendix5: Summary in English

Ministry for Foreign Affairs, Internal Memorandum of 6 October 1992 on the coming work of the UN Working Group on State immunity.

The memorandum comments on various of the ILC Draft Articles on State immunity. Initially, it is commented that the general structure of the Draft is not all satisfactory. To establish immunity as a principal rule, to avoid the terminology of *acta jure imperii* and *acta jure gestionis* as well as to regulate a rather extensive immunity without possibilities to modify it in practice appear to almost obstruct the development.

The memorandum comments specifically on Articles 1-3, 5, 6, 8, 10, 11, 16, 18-22 of the Draft Articles. In this respect it is referred to *inter alia* the internal memoranda annexed to the document.

The first of the annexed memoranda was drafted at the Ministry of Justice on 5 October 1992 (appendix 2). It comments that the Draft Articles are in need of a rather extensive revision. It is also noticed that in the Draft the question whether a State is immune is not always separated from the question whether another State has jurisdiction. Various Articles are also individually commented. As regards Article 16 it is noted that it seems to extend the immunity in several aspects compared with the Convention of Brussels from 1926 (the International Convention for the Unification of Certain Rules Concerning the Immunity of State Owned Ships).

In appendix 3 State immunity is initially discussed from a general point of view, after which some comments regarding the ILC Draft Articles follows. The use of the expression "commercial transactions" instead of *acta jure imperii* and *acta jure gestionis* is regretted as is the method of establishing State immunity as the principal rule. It is commented that it would have been better to establish the cases when State immunity could not be claimed, and at the same time point out that the list was not exhaustive to leave room for a further development through customary international law. Furthermore, the statement regarding "state enterprises" in Article 10 is regretted as it opens up for a state to evade its responsibility through a state owned enterprise doing unfair business. Finally, it is commented that ILC's Draft contains several other problems as well.

Appendix 4 is an internal memorandum drafted, just as the one included in appendix 3, at the Ministry for Foreign Affairs. It deals with ILC Draft Articles and immunity against enforcement (Articles 18 and 19). It is commented that according to current customary international law immunity against enforcement is probably only granted when it comes to *acta jure imperii*, and that in granting immunity with a few exceptions the Draft has to be regarded as a step backwards in this respect. It is further commented that the regulation of the Draft Articles is not likely to be accepted by several States. The conclusion is that unless there is a considerable improvement of the Draft, there is no meaning to conclude a global convention on State immunity and in particular not for Countries that acknowledge the principle of restrictive immunity.

Registration No.	S/18
Subject	National Inquiries on State Immunity
Date	13 November 1981
Author(ity)	Ministry for Foreign Affairs Official Letter
Parties	Hans Björk, Director, Ministry for Foreign Affairs to Mr Jens Pedersen
Points of law	In response to an inquiry, the Ministry for Foreign Affairs comments that its practice is to not make the kind of statement questioned for
Classification No.	0.c, 1.c, 2
Sources	- Archives of the Ministry for Foreign Affairs and of the Stockholm Enforcement Service (not published)
Additional information	- Documents annexed
Full text – extracts – translation – summaries	Appendix 1: Full text * Appendix 2: Mr Jens Pedersen, Inquiry to the Ministry for Foreign Affairs, 10/11/81* Appendix 3: Stockholm Enforcement Service, Request for information, 4/11/81* Appendix 4: Stockholm Enforcement Service, Request for information under a penalty of a fine, 13/11/81 * Appendix 5: Summary in English

S/18 Appendix 5: Summary in English

Ministry for Foreign Affairs, Official Letter of 13 November 1981 to Mr Jens Pedersen regarding the inquiries of the latter for a statement by the Ministry.

In connection with an application for execution, the Stockholm Enforcement Service on 16 October 1981 requested Mr Jens Pedersen to leave information regarding claims that the Republic of Uganda was said to have on a client's account of his. Mr Jens Pedersen refused to do so claiming that Uganda enjoyed immunity as a sovereign State against enforcement activities, why the application for execution should have been dismissed. On 4 November 1981, the Enforcement Service responded that it through a study of relevant literature had found that Uganda did not enjoy immunity against enforcement activities in consideration of the kind of dispute that was before the Enforcement Service. (Appendix 3)

On 10 November 1981, Mr Jens Pedersen wrote to the Ministry for Foreign Affairs asking for its point of view in the case regarding the question of immunity.

(Appendix 2)

On 13 November 1981, the Ministry for Foreign Affairs wrote to Mr Jens Pedersen explaining that the practice of the Ministry in cases like the present one was to not make the kind of statement that he asked for. Mr Jens Pedersen was recommended to turn to experts in public international law at the Swedish universities for advice. (Appendix 1)

As is apparent from appendix 4, the Stockholm Enforcement Service continued to handle the application for execution claiming that Uganda did not enjoy immunity.

Registration No.	S/19
Subject	National Inquiries on State Immunity
Date	8 April 1982
Author(ity)	Ministry for Foreign Affairs Official Letter
Parties	Hans Björk, Acting Director-General for Legal Affairs, Ministry for Foreign Affairs to National Tax Board
Points of law	Aeroflot is considered as a government-owned company, which should not be granted State immunity as its acts are commercial (<i>jure gestionis</i>) and not public (<i>jure imperii</i>), but it is also noted that Swedish case-law is very scarce on the matter why statements have to be made with a certain reservation
Classification No.	0.b.3, 1.b, 2.c
Sources	- Archives of the Ministry for Foreign Affairs (not published)
Additional information	
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S/19 Appendix 2: Summary in English

Ministry for Foreign Affairs, Official Letter of 8 April 1982 to the National Tax Board in response to the Board's inquiry for a statement on the question of immunity for the Soviet airline company Aeroflot.

In the response to the Board it is initially stated that Aeroflot is to be regarded as a government-owned company. Thereafter and regarding the question of State immunity it is found that Aeroflot should probably not be considered to enjoy such immunity, since its acts are commercial (*jure gestionis*) and not public (*jure imperii*). However, it is also noted that Swedish case-law on State immunity is very scarce, why statements have to be made with a certain reservation.

Registration No.	S/20
Subject	National Inquiries on State Immunity
Date	4 January 1985
Author(ity)	Ministry for Foreign Affairs Statement
Parties	Ministry of Foreign Affairs to the Supreme Administrative Court
Points of law	On the question whether the trading centre enjoys immunity, the Ministry notes that in the agreement between DDR and Sweden concerning the establishment of diplomatic relations it is stated that if a trading office is established it shall not be seen as a part of the diplomatic mission, and that no regulations are included regarding immunity or privileges for the trading office
Classification No.	0.c, 1, 2.c
Sources	- <i>Regeringsrättens årsbok 1986</i> , Case No. 1986 ref 66 - Archives of the Ministry for Foreign Affairs
Additional information	- Supreme Administrative Court judgement (<i>Regeringsrättens årsbok 1986</i> , Case No. 1986 ref 66)
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S/20 Appendix 2: Summary in English

Ministry for Foreign Affairs, Statement of 4 January 1985 to the Supreme Administrative Court on the question whether DDR's trading centre in Gothenburg enjoyed immunity or not.

On 11 December 1984, the Supreme Administrative Court made an inquiry at the Ministry for Foreign Affairs regarding the question of immunity for DDR's trading centre in Gothenburg. In the statement, the Ministry for Foreign Affairs noted that in the Agreement concerning the establishment of diplomatic relations between Sweden and DDR (SÖ 1972:37), it had been stated that if a trading office was established it should not be seen as a part of the diplomatic mission. Furthermore, the Ministry for Foreign Affairs noted that in the said agreement there had not been included any regulations regarding immunity or privileges for the trading office.

Registration No.	S/21
Subject	National Inquiries on State Immunity
Date	19 March 1985
Author(ity)	Ministry for Foreign Affairs Statement
Parties	Ministry for Foreign Affairs to the Stockholm City Court
Points of law	The Ministry states that the information received implies that Korea Trade Centre acts as a public entity (<i>jure imperii</i>), why it would enjoy immunity according to the interpretation of public international law claimed by Sweden before the UN
Classification No.	0.a, 1, 2.c
Sources	- Riksarkivet (<i>National Archives</i>), Arbetsdomstolens arkiv, Inkomna mål 1987, Vol. EI:1219, Case No. B 41/87 - Archives of the Ministry for Foreign Affairs
Additional information	- Labour Court decision 4 May 1988 (Case No. B 41/87)
Full text – extracts – translation – summaries	Appendix 1: Full text * Appendix 2: Ministry for Foreign Affairs, Swedish Embassy in Seoul, Internal Memorandum, 13/3/85 * Appendix 3: Summary in English

S/21 Appendix 3: Summary in English

Ministry for Foreign Affairs, Statement of 19 March 1985 to the Stockholm City Court regarding the question of immunity for Korea Trade Centre (KTC) in Sweden.

The Swedish Embassy in Seoul sent a memorandum to Sweden regarding KTC (appendix 2) informing that Korea Trade Promotion Corporation (KOTRA) was established by the State and that it is subordinated to the Ministry of Commerce. Furthermore, the Embassy informed that KOTRA is a non-profit organization and that the staff is paid by the State. KTC, one of KOTRA's trading offices abroad, has a liability to report to the Ambassador in Stockholm. It is concluded that KOTRA should probably be regarded as a State organ that runs non-profit activities.

In the statement (appendix 1), the Ministry concludes that the information sent by the Swedish Embassy in Seoul implies that KTC acts as a public entity (*jure imperii*), why it would enjoy immunity according to the interpretation of public international law claimed by Sweden before the UN.

Registration No.	S/22
Subject	National Inquiries on State Immunity
Date	25 January 1996
Author(ity)	Ministry for Foreign Affairs Statement
Parties	Ministry for Foreign Affairs to Swedish Competition Authority
Points of law	State immunity <i>ex officio</i> ; Swedish practice regarding State immunity; the question of immunity regarding a contract on ferry-service
Classification No.	0.b.3, 1.b, 2.c
Sources	- Archives of the Ministry for Foreign Affairs (not published)
Additional information	- Document annexed - Swedish Competition Authority, Decision, 20 March 1998 (Dnr 300/95)
Full text – extracts – translation – summaries	Appendix 1: Full text * Appendix 2: Swedish Competition Authority, Request for Statement by the Ministry for Foreign Affairs, 7/12/95 * Appendix 3: Summary in English

S/22 Appendix 3: Summary in English

Ministry for Foreign Affairs, Statement of 25 January 1996 to the Swedish Competition Authority regarding the question of State immunity in general as well as regarding a specific case before the Competition Authority.

The Competition Authority sent a request for a statement to the Ministry for Foreign Affairs on 7 December 1995 (appendix 2). In the request it was explained that the Authority dealt with a case regarding the ferry-service between Sweden and Estonia. The company Nordström & Thulin AB (N&T) had concluded an agreement in 1989 with the Soviet Estonian Transport Committee (ETC). The Government of Estonia later on decided to transfer said agreement to the Estonian Shipping Company. The agreement established a joint company Estline, which was given the exclusive right to run the ferry-service between Stockholm and Tallinn without competition during ten years. The Competition Authority investigated the matter according to Sweden's Competition Law and made inquiries at the Ministry for Foreign Affairs about the question of State immunity. The question regarded Swedish practice in general on State immunity, and in the present case if N&T's party in the agreement could enjoy State immunity.

The Ministry initially stated that the right to State immunity should be considered *ex officio*, and that establishing a contact with the foreign State's Ministry for Foreign Affairs might give an advance notification regarding the State's point of view on State immunity. Thereafter, it is stated that practice as well as literature indicate that Sweden has adopted the restrictive theory even though many questions remain to be solved. Furthermore, it is noted that according to Swedish literature in the matter it is likely that the subjective method should be used in Sweden to distinguish between *acta jure imperii* and *acta jure gestionis*.

As regards the case before the Competition Authority, the Ministry was of the view that according to the information included in the request, it seemed as if the purpose of the disputed act mainly had been to establish a commercial ferry-service between Stockholm and Tallinn. Therefore, the Ministry found that the act seemed to belong to acts *jure gestionis*, why it then would be difficult for the State of Estonia to invoke immunity before a court. The Ministry, however, pointed out that this naturally was a question to be settled by the court. Furthermore, the Ministry noted that the Estonian party to the agreement was a State owned business company, which also spoke against the right to invoke immunity.

Registration No.	S/23 (Sweden/Legislative power)
Date	Issued on 17 June 1938
Author(ity)	Swedish Parliament (<i>Sveriges Riksdag</i>) Act of Parliament
Parties	--
Points of law	Certain regulations regarding foreign State-owned vessels and their cargo
Classification No.	0.c, 1, 2
Sources	- Swedish Statute-book, SFS 1938:470 (<i>Svensk författningssamling</i> , SFS 1938:470) - http://www.infotorg.sema.se
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Swedish Parliament, Act of Parliament issued on 17 June 1938 with certain regulations regarding State-owned Vessels and their cargo.

In its first paragraph the Act states that the fact that a vessel is State-owned or used by a foreign State or that the cargo belongs to such a State, does not constitute an obstacle for a court in Sweden to hear a case regarding a debt owing to the use of the vessel or the transfer of the cargo, or to take measures of constraint because of such a debt.

In the second and third paragraphs exceptions to the principal rule of the first paragraph are stated. These exceptions concern *inter alia* warships used for sovereign acts as well as the cargo freighted with such ships, and also cargo belonging to the foreign State that is freighted with merchant vessels for non commercial purposes. These exceptions include jurisdictional immunity and immunity of execution.

Registration No.	S/24
Date	Issued on 4 January 1939
Author(ity)	Swedish Parliament (<i>Sveriges Riksdag</i>) Act of Parliament
Parties	--
Points of law	Immunity from embargo for certain aircraft
Classification No.	0.c, 1.c, 2
Sources	- Swedish Statute-book, SFS 1939:6 (<i>Svensk författningssamling</i> , SFS 1939:6) - http://www.infotorg.sema.se
Additional information	
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Swedish Parliament, Act of Parliament issued on 4 January 1939 regarding immunity from embargo for certain aircraft.

In the first paragraph it is *inter alia* stated that aircraft, which are used by foreign States exclusively for sovereign purposes, may not be embargoed. In the fourth paragraph it is established that the Act only apply to foreign aircraft, if the Government has declared so according to agreement with foreign State.

SUISSE**Avant-Propos**

Ce travail est rédigé en tenant compte de la pratique suisse en matière d'immunité de juridiction et d'exécution depuis les années soixante-dix environ. Toutefois, et dans la mesure où certains arrêts de principe du Tribunal fédéral suisse ont été la source de cette pratique, il nous a paru opportun de les faire figurer également dans la présente contribution. Nous fondons la présente contribution sur des arrêts que nous citons dans leurs langues originales, soit en allemand, en français ou en italien.

La structure de la présente contribution suit celle généralement opérée en doctrine: dans un premier temps nous présenterons les principes fondamentaux et les raisons qui soutiennent l'instauration d'un régime d'immunité (§1). Dans un deuxième temps, nous esquisserons les diverses sources de l'immunité (§2), puis parlerons du régime de l'immunité des Etats et des organisations internationales (§3), respectivement des Chefs et des représentants d'Etat (§4). Nous traiterons ensuite de la distinction entre l'immunité de juridiction et d'exécution (§5). Nous émettrons aussi quelques considérations d'ordre pratique sur les questions de procédures devant les juridictions suisses (§7), non sans avoir esquissé les délicats problèmes des sanctions internationales et de leur compatibilité avec le régime de l'immunité (§6). Finalement, nous nous projeterons dans le futur et dresserons quelques perspectives d'avenir concernant le régime de l'immunité (§8).

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§8. Perspectives futures

§1. L'IMMUNITÉ EN TANT QU'ÉLÉMENT DES RELATIONS DIPLOMATIQUES. PHILOSOPHIE ET BUT POURSUIVI

"Les immunités de l'Etat sont destinées à garantir le respect de sa souveraineté lorsque ses agents, sa législation ou ses biens sont en rapport direct avec la souveraineté territoriale d'un autre Etat. (...). *Stricto sensu*, les immunités de l'Etat protègent ses biens qui se trouvent dans un territoire étranger et ses actes juridiques, contestés à l'étranger."⁵

En particulier, l'immunité est un des aspects des relations diplomatiques. En ce sens, elle revêt un rôle pratique important, mais a une portée également symbolique (rapports basés sur la confiance), comme le rappelle le Tribunal Fédéral suisse (CH/12):

"L'ensemble du droit diplomatique et consulaire est fondé sur les rapports de confiance particuliers qu'entretiennent les Etats contractants. A l'obligation internationale de l'Etat accréditaire de s'abstenir de tout comportement susceptible d'empêcher l'Etat accréditant de s'occuper convenablement de ses affaires, correspond l'obligation de l'Etat accréditant de veiller à ce que les diplomates qui dépendent de lui n'outrepassent pas le cadre de leurs fonctions dans l'Etat accréditaire. La Convention de Vienne souligne, dans son préambule, que les privilèges et immunités ne sont pas destinés à avantager des individus, mais à "assurer l'accomplissement efficace de leurs fonctions par les postes consulaires au nom de leurs Etats respectifs". Il en découle que les relations consulaires, empreintes de formalisme dans leur établissement, ont pour corollaire un degré élevé de confiance réciproque entre les Etats qui se les accordent."

Pour la Suisse et sa structure fédérale, le risque de tensions diplomatiques se trouve accentué :

"Le caractère politiquement sensible de la question de l'immunité réservée aux Etats étrangers explique que les autorités fédérales rappellent, non sans une certaine insistance, les principes applicable en la matière, en soulignant la nécessité d'une application uniforme. Le Département fédéral de justice et police s'est adressé par voie de *circulaire* (JAAC 1980 n°54 p.226) aux autorités cantonales concernées, résumant les principes dégagés par la jurisprudence du Tribunal fédéral."⁶

§2. LES SOURCES

Même si les enjeux sont toujours internationaux, la question de l'immunité relève en grande partie du droit national. En ce sens, il y a pluralité de sources, ainsi que l'admet le Tribunal fédéral suisse (CH/7):

"En ce domaine, il n'existe pas de principes généraux de rang supranational qui régiraient la matière de manière exhaustive. Les conceptions varient selon les époques ou les groupes culturels. Le droit des immunités est dans une large mesure un droit de rang national, même si l'on peut rattacher au droit coutumier international un minimum de protection en faveur des Etats étrangers. Aussi la question de savoir si la défenderesse est soumise ou non à la juridiction suisse doit-elle être résolue à la lumière des principes généraux du droit international public tels qu'ils peuvent être dégagés de la jurisprudence, de la doctrine, ainsi que des solutions qui ont été retenues dans les conventions internationales réglant les conflits de juridiction entre Etats."

⁵ NGUYEN/DAILLIER/PELLET, Droit international public, 6ème éd., Paris, 1999, n°289, p. 446

⁶ BUCHER, Droit international privé suisse, 2ème éd., Bâle, 1998, n°868, p.262

La doctrine est également d'avis que l'immunité trouve son origine essentiellement dans le droit national⁷:

"Le droit des immunités est d'origine à la fois interne et internationale. L'immunité de l'Etat consistant en une série d'abstentions des autorités juridictionnelles et administratives, des Etats dont les règles seraient appliquées à tout autre sujet non privilégié, c'est nécessairement dans une pratique *interne* qu'elle s'ancre : la jurisprudence, et quelquefois la législation venant la systématiser."

A. La Convention de Vienne du 18 avril 1961 sur les relations diplomatiques

La Convention de Vienne traite exclusivement de l'immunité et des privilèges des *agents diplomatiques et consulaires*. En ce sens, et comme le rappelle le Tribunal Fédéral suisse (CH/15), elle est lacunaire puisqu'elle ne traite pas des *Chefs d'Etat*:

"L'immunité personnelle est le pendant de l'immunité dont jouit l'Etat étranger quand il agit "*iure imperii*", c'est-à-dire dans ses attributs de puissance publique; la Convention de Vienne sur les relations diplomatiques du 18 avril 1961 (ci-après: la Convention de Vienne) traduit simplement dans un acte normatif un concept issu du droit international public coutumier. (...) Le privilège de l'immunité de juridiction pénale des chefs d'Etat, dégagé par la coutume internationale, n'a pas été repris en toutes lettres dans la Convention de Vienne. Les art. 31 ss de celle-ci traitent en effet exclusivement de l'immunité de juridiction des agents diplomatiques, c'est-à-dire des chefs de missions ou des membres du personnel diplomatique de ces dernières. On ne saurait en déduire que les textes normatifs élaborés sous l'égide des Nations-Unies établiraient pour les chefs d'Etat étrangers une protection inférieure à celle des représentants diplomatiques de l'Etat qu'ils dirigent ou qu'ils représentent universellement."

C'est également sur la base de la Convention de Vienne qu'est basée l'immunité de juridiction et d'exécution dont jouissent les *membres du personnel des missions permanentes* auprès des organisations internationales. Ainsi, en Suisse, les membres du personnel des missions permanentes et les fonctionnaires internationaux sont titulaires d'une carte de légitimation délivrée par le DFAE (par l'entremise de la Mission suisse). Chaque carte de légitimation précise, au dos, l'immunité dont jouit son titulaire (immunité de juridiction et d'exécution pénale, administrative et civile totale ou accordée dans l'exercice de la fonction, privilège d'inviolabilité).

B. La Convention européenne du 16 mai 1972 sur l'immunité des Etats

La Convention européenne du 16 mai 1972 sur l'immunité des Etats (ci-après la Convention), tente d'établir un régime uniforme du traitement de l'immunité à un niveau régional. En effet, "l'homogénéité de plus en plus visible [des] pratiques nationales, même si elle n'est pas totale, a cependant permis d'y voir des règles internationales coutumières et d'en envisager la codification⁸":

"La Convention adopte une voie originale, différente de la solution retenue en Suisse, en ce sens qu'elle "entend définir en détail les domaines réservés, respectivement, à l'immunité de juridiction et à l'immunité d'exécution, sans se référer expressément à la distinction entre actes *iure imperii* et actes *iure gestionis*. Les critères déterminants tiennent à la nature du rapport de droit et aux liens de rattachement avec le for."⁹

Toutefois, peu d'Etats européens ont ratifié la Convention, de sorte que, dans sa jurisprudence la plus récente, le Tribunal fédéral en refuse systématiquement l'application aux pays non-signataires. Cela est d'autant plus compréhensible que la Convention prévoit un système à mi-chemin entre l'immunité absolue et l'immunité relative (CH/23 ; voir l'extrait

⁷ COMBACAU/SUR, Droit international public, 2ème éd., Paris, 1995, p. 247

⁸ COMBACAU/SUR, *op. cit.*, p. 247

⁹ BUCHER, *op. cit.*, n°882, p.265

reproduit *infra* §3B3b) alors que la pratique suisse opte pour une interprétation restrictive et stricte de la théorie de l'immunité relative (CH/23):

"Dès lors, toute référence éventuelle à la convention en tant qu'expression de tendances récentes du droit international public doit tenir compte de ce que, sur des points importants, cet accord repose sur des conceptions qui divergent de celles qui fondent la jurisprudence du Tribunal fédéral."

Dans un arrêt rendu le 16 novembre 1994 (CH/7), le Tribunal fédéral suisse dresse l'évolution de la pratique relative à l'application de la Convention à des Etats non-signataires. Il rappelle ainsi qu'elle a passablement fluctué, mais arrive à la conclusion qu'il y a lieu d'interpréter la Convention de manière *restrictive*. En effet, une application extensive pousserait à revoir entièrement la pratique suisse et à élargir le champ d'application de l'immunité (CH/7):

"L'évolution de la jurisprudence révèle qu'il est extrêmement délicat de tenter de se prononcer sur l'immunité d'un Etat en s'inspirant d'une convention qui ne le lie pas. Cela est d'autant plus vrai que la convention invoquée n'a pour parties qu'un petit nombre d'Etats européens et que l'Etat qui allègue son immunité dans le présent litige appartient à un autre continent. Au surplus, la Convention est conçue comme un catalogue qui indique les points de rattachement retenus pour éviter qu'un Etat puisse être attiré devant un tribunal étranger lorsque l'objet du litige n'a pas de relations suffisantes avec le territoire de l'Etat du for. Pour limiter la possibilité des Etats contractants d'invoquer l'immunité de juridiction, elle ne se réfère pas à la distinction entre les actes *jure gestionis* et *jure imperii*, mais ne fait que définir une série de situations dans lesquelles cette exception ne peut être invoquée. Aussi, lorsque, comme c'est ici le cas, la Convention n'est pas applicable, la plus grande réserve s'impose même pour de simples références aux solutions fournies par ce traité. Une telle réserve est d'autant plus de mise si la disposition à laquelle il est fait appel constitue une exception ponctuelle à une solution de principe, elle aussi ponctuelle, ce qui est le cas du paragraphe 2 lettre a de l'article 5 de la Convention par rapport au paragraphe 1 de la même disposition, ainsi que dudit article par rapport à l'article 4. Les mêmes réserves doivent être formulées en ce qui concerne d'éventuelles références à des conventions qui seraient encore à l'état de projets."

C. Les Conventions bilatérales

Il se peut que les questions d'immunité soient réglées par des traités bilatéraux ou par échange de notes.

Des *traités bilatéraux* avec un pays sont rares. En général, de tels traités précisent les conditions et la portée des juridictions suisses vis-à-vis d'un pays, ainsi que les voies d'exécution forcée dont celles-ci pourraient user sur leur territoire. Ce sont en outre des traités d'immunité réciproque.

Les traités bilatéraux avec une organisation internationale sont beaucoup plus fréquents. Ainsi, et pour les organisations internationales établies en Suisse, la référence de base est toujours l'accord de siège qui détermine les privilèges et immunités de l'organisation et de ses fonctionnaires en Suisse. En principe, dans les organisations internationales, le statut diplomatique est accordé aux membres de la haute direction et aux hauts fonctionnaires.

Les *traités par échange de notes*, même s'ils ne sont pas légion, sont conclus entre le Département fédéral des affaires étrangères (DFAE) et un pays ou une organisation internationale (si celle-ci n'a pas son siège en Suisse; autrement, la question sera généralement intégrée et résolue dans l'accord de siège) voire une autre entité juridique ou quasi-juridique (Protocole sur la capacité juridique, les privilèges et les immunités de l'Association Européenne de Libre-Echange). Les traités institués par échange de notes permettent généralement de résoudre les problèmes d'immunité qui se posent lors de conférences internationales ou d'établissement de tribunaux arbitraux ayant leur siège en Suisse.

Exemples de quelques traités passés avec des organisations internationales :

- Accord sur les privilèges et immunités de l'Agence internationale de l'énergie atomique (RS 0.192.110.127.32);
- Accord général sur les privilèges et immunités du Conseil de l'Europe (RS 0.192.110.3);
- Accord sur les privilèges et immunités de la Cour pénale internationale;
- Protocole sur les privilèges et immunités de l'Autorité internationale des fonds marins;
- Accord sur les privilèges et les immunités du Tribunal international du droit de la mer;

Exemple de conventions conclues par échanges de notes :

- Définir le statut, les privilèges et les immunités dont bénéficiaient les membres de la délégation américaine et de la délégation soviétique aux pourparlers bilatéraux tenus en Suisse en 1972 (pourparlers bilatéraux sur la limitation des armes stratégiques SALT), en 1973 (pourparlers bilatéraux entre les Commissions consultatives permanentes chargées d'assurer l'application des buts et des dispositions de certains accords entre les USA et l'URSS issus de la première phase des pourparlers sur la limitation des armes stratégiques [SALT]), en 1980 (pourparlers bilatéraux sur le contrôle des armes nucléaires en Europe [TNF]) et 1985 (pourparlers bilatéraux sur les armes nucléaires et spatiales);
- Définir le statut, les privilèges et l'immunité du Tribunal institué par le compromis d'arbitrage entre Israël et l'Egypte (territoire de Taba);
- Définir le statut, les privilèges et l'immunité du Tribunal arbitral chargé de la délimitation du plateau continental entre la France et le Royaume-Uni;
- Définir le statut, les privilèges et l'immunité du Tribunal arbitral dans l'affaire du détroit de Beagle;
- Définir le statut, les privilèges et l'immunité du Tribunal arbitral appelé à se prononcer sur le différent entre la France et le Canada en matière de pêche;
- Protocole sur la capacité juridique, les privilèges et les immunités de l'Association Européenne de Libre-Echange;

D. Les lois nationales

Il se peut aussi que certains Etats règlent les régimes d'immunité sur la base d'une loi nationale. La Suisse ne dispose pas d'une telle loi.

E. La Jurisprudence

Dans la plupart des arrêts récents, le Tribunal Fédéral suisse a résolu les questions litigieuses d'immunités à la lumière de sa jurisprudence (CH/7) :

"En l'absence de convention internationale applicable en l'espèce, le problème controversé sera donc résolu à la lumière des principes qui ont été posés par la jurisprudence du Tribunal fédéral, laquelle n'est, au demeurant, nullement immuable puisqu'elle ne fait que refléter l'état actuel de l'évolution des conceptions dans le domaine considéré."

§3. L'IMMUNITÉ DES ETATS ET DES ORGANISATIONS INTERNATIONALES

A. Début de l'immunité

Pour les *Etats*, l'immunité est garantie dès le moment où des relations diplomatiques sont nouées. En fait, et comme le rappelle le Tribunal Fédéral suisse, l'immunité de juridiction et d'exécution découle directement de la personnalité juridique internationale.

Pour les *organisations internationales*, les règles relatives à l'immunité sont généralement contenues dans les accords de siège (voir ci-dessus ce qui a été dit au sujet des sources). Elles ne découlent donc pas directement de leur statut de sujet de droit international, comme le rappelle le Tribunal fédéral suisse (CH/9):

"Acquérant leur personnalité juridique interne par une disposition de leurs actes constitutifs, les organisations interétatiques disposent de la personnalité juridique internationale en vertu d'une règle de droit international général, à condition cependant de réunir un ensemble de critères objectifs. En particulier, il appartient aux Etats Membres de dire si une telle organisation possède la personnalité juridique internationale; ainsi, pour l'Etat hôte, la reconnaissance de la personnalité juridique internationale d'une organisation trouvera son fondement dans l'accord de siège (...).

L'immunité de juridiction des organisations internationales ne découle pas directement de leur personnalité juridique internationale. N'étant pas, contrairement aux Etats, des sujets pléniers du droit international, ces organisations tiennent toujours leur immunité d'un instrument de droit international public, que ce soit de conventions multilatérales entre Etats Membres d'une organisation ou par des accords bilatéraux, les accords de siège avec l'Etat hôte venant au premier rang (...). Les organisations internationales bénéficient d'une immunité absolue et complète, ne comportant aucune restriction (...). Le principe de l'immunité dite relative consacré, en particulier, par la Convention européenne sur l'immunité des Etats (...) ne s'applique qu'aux Etats, la distinction entre actes de *jure imperii* et de *jure gestionis* ne valant pas pour les organisations internationales (...). Les raisons de cette différence doivent, notamment, être recherchées dans le fondement juridique même de l'immunité octroyée aux organisations internationales, à savoir une convention internationale et non pas une règle de droit international général; de surcroît, les organisations internationales ne disposent d'aucune assise territoriale (...)."

Qu'en est-il des *organisations non-gouvernementales* ou "*quasi-gouvernementales*" ? La pratique suisse dans ce domaine est empreinte de pragmatisme et dans la mesure où les décisions pour l'octroi de l'immunité ou de privilèges relèvent du droit national et par conséquent des autorités nationales, des considérations politiques entrent en ligne de compte. Ainsi, il se peut que l'autorité traite une telle organisation comme une OIG, du fait de son importance pratique ou du prestige qui l'entoure. Le Conseil fédéral a ainsi reconnu que l'Association de transport aérien international (IATA) et l'Union interparlementaire sont des organisations internationales semi-officielles qui présentent un caractère intergouvernemental prédominant. Des accords ont donc été prévus de manière à régler le statut juridique de ces organisations en Suisse, et qui confèrent aux fonctionnaires de ces associations non seulement des exemptions fiscales, mais aussi, dans certaines limites, une immunité de juridiction et d'autres privilèges accordés normalement aux diplomates. (CH/22)

B. L'immunité *ratione materiae*

Avant de parler de la traditionnelle distinction entre le *ius imperii* (2) et le *ius gestionis* (3), nous émettrons quelques considérations sur le fondement de la doctrine de l'immunité relative, telle que celle-ci est pratiquée en Suisse depuis de nombreuses années (CH/1).

1. Fondement de la doctrine de l'immunité relative

Le contenu et la portée de l'immunité ont fait l'objet de nombreuses controverses, comme le rappelle la doctrine :

"La pratique internationale a longtemps été partagée quant à la portée des immunités *ratione materiae* : alors que les pays de *common law* les accordaient aux autres Etats quelle que fût l'activité donnant prise à la tentative d'exercice de la juridiction ou de l'exécution de l'Etat du for (doctrine de l'immunité absolue), d'autres estimaient

qu'elles devaient être réservées à certains types d'activités (doctrine de l'immunité restreinte).¹⁰

Les raisons de cette controverse sont finalement assez simples :

La pratique de l'immunité est née à un moment où l'Etat bornait son action aux fonctions que lui assignait l'idéologie libérale, et qui comportaient l'usage de sa puissance ; lorsque à l'ère de l'Etat-gendarme a succédé celle de l'Etat providence, il en a résulté une intervention massive des Etats dans des activités laissées jusqu'alors à la société marchande, certaines étant érigées en services publics, et d'autres non, et livrées à un mode de fonctionnement qui, réserve faite des pays socialistes, ne fait pas appel à des modes de gestion différents de ceux qu'utilisent les acteurs privés. Dès lors, il apparaît choquant que les Etats et leurs démembrements, notamment lorsqu'il s'agit de véritables entreprises, continuent de bénéficier d'une protection qui leur avait été accordée dans leur qualité de souverain et alors qu'ils usaient de leurs prérogatives de puissance publique (*jus imperii*), alors même qu'ils agissent selon le droit des simples particuliers, *jus gestionis*, et se dépouillent de leur qualité éminente; l'exclusion des immunités dans ce second cas serait requise non seulement par l'intérêt des demandeurs, qu'une extension excessive des privilèges de l'Etat conduit au déni de justice, mais même par le souci de ne pas dissuader des contractants virtuels d'entrer en relations conventionnelles avec un Etat autre que leur Etat national par crainte de les voir opposer un jour.¹¹

La Suisse, à l'instar de nombreux pays européens, s'en tient à la théorie de l'immunité relative et établit une distinction lorsqu'un Etat (ou une organisation internationale) agit *de iure imperii* ou que des biens sont affectés à une activité en relation avec l'exercice de sa souveraineté (CH/2) ou lorsqu'un Etat (ou une organisation internationale) agit comme un particulier (*de iure gestionis*) ou dispose de biens qui ne sont pas (ou plus) affecté à une activité relevant de sa souveraineté. (CH/3).

L'arrêt de principe, par lequel la Suisse a abandonné le principe de l'immunité absolue des Etats étrangers pour consacrer celui de l'immunité relative remonte à 1918; pourtant la jurisprudence ainsi dégagée n'a jamais été fondamentalement remise en question. Au contraire, elle a même été appliquée de plus en plus sévèrement, de sorte que la Suisse a une conception relativement restrictive de l'immunité des Etats et de ses agents:

"Cette pratique relative à l'immunité des Etats étrangers, comme le rappelle la doctrine, constitue un aspect important et délicat de la politique suisse, tant au niveau des relations diplomatiques que sur le plan économique. Cependant, le privilège accordé à un Etat étranger s'accorde parfois mal avec le fait que cet Etat s'engage dans une relation commerciale internationale dont il n'acceptera finalement pas d'assumer toutes les conséquences. Les réponses appropriées et suffisamment nuancées sont donc difficiles à trouver. C'est pourquoi le Tribunal fédéral souligne que sa jurisprudence n'est nullement immuable puisqu'elle ne fait que refléter l'état actuel de l'évolution des conceptions dans ce domaine(CH/7)¹²."

En principe, un Etat ou une organisation internationale ne peut faire l'objet d'une procédure pénale ou administrative. Dans de telles procédures, les Etats et organisations internationales sont au bénéfice de l'immunité absolue. Seuls les dirigeants pourraient être déférés devant une justice pénale, p.ex. dans le cadre des Tribunaux sur l'ex-Yougoslavie et le Rwanda.

La question centrale sera donc de traiter de l'immunité de juridiction lorsqu'un Etat ou une organisation internationale a affaire à des prétentions ou des litiges d'ordre civil.

2. L'immunité pour les biens et les actes passés *de iure imperii*

¹⁰ CAMBACAU/SUR, *op. cit.*, p. 248

¹¹ CAMBACAU/SUR, *op. cit.*, p. 248

¹² BUCHER, Droit international privé suisse, T I/1, Bâle 1998, n°866, p.261

Certains actes et biens de l'Etat sont également au bénéfice de l'immunité (de juridiction et d'exécution) lorsqu'ils sont en relation directe avec l'exercice de la souveraineté de l'Etat. On parle généralement de biens ou d'actes passés *de iure imperii*.

Le Tribunal fédéral suisse, dans sa jurisprudence récente, classe les **actes de l'Etat** suivants comme étant effectués *de iure imperii* (CH/12) :

"La jurisprudence range ainsi parmi les *actes* accomplis *iure imperii* les activités militaires, les actes analogues à une expropriation ou une nationalisation (CH/11), les décisions de saisie d'objets d'une valeur historique ou archéologique (CH/6)."

Outre les actes bénéficiant de l'immunité, certains **biens de l'Etat** étranger peuvent également servir à la poursuite d'un acte de puissance public. Le Tribunal fédéral relève cependant que la pratique se fonde sur une notion large des biens affectés à une tâche publique (CH/10):

"Dans certaines circonstances, l'affectation des biens appartenant à l'Etat étranger peut conduire à soustraire ceux-ci à l'exécution forcée ; tel est le cas lorsqu'il s'agit de biens destinés à l'accomplissement d'actes de souveraineté – et non seulement de biens appartenant au patrimoine fiscal : à l'instar des actes accomplis *jure imperii* eux-mêmes, de tels biens sont protégés par l'immunité de juridiction et, partant, par celle d'exécution. Le Tribunal fédéral a ainsi estimé qu'un Centre de rencontre et de culture hispanique servait des intérêts relevant du *ius imperii* et que, par conséquent, bénéficiait de l'immunité de juridiction et d'exécution."

Le patrimoine administratif est donc généralement au bénéfice de l'immunité et ne peut faire l'objet d'une poursuite : un séquestre ne saurait frapper sans distinction tout les biens d'un Etat étranger ; Le Tribunal Fédéral suisse le précise fort bien dans son arrêt Cinetel c/ RAE (CH/23) puisqu'il invalide un séquestre au motif que celui-ci porte sur *tous* les biens d'un organisme d'un Etat étranger (en l'occurrence l'Office d'information et de tourisme de la République Arabe d'Egypte à Genève); en effet,

"(...) seuls les biens patrimoniaux de ces collectivités peuvent être saisis, les biens administratifs étant en revanche insaisissables, car ils forment le patrimoine de la collectivité et sont affectés directement à l'accomplissement de ses tâches de droit public. (...)"

En ce qui concerne le patrimoine fiscal, celui-ci bénéficie de l'immunité que s'il est suffisamment identifié. Une immunité générale n'existe pas. Ainsi, des biens qui ne sont pas ou plus en relation avec la souveraineté de l'Etat ne bénéficient pas de l'immunité. Ainsi des comptes en banque servant au fonctionnement d'une ambassade ou d'un consulat sont en général insaisissables, sauf si l'agent de l'Etat mélange ses propres fonds nécessaires à son activité d'homme d'affaire avec les fonds nécessaires au bon fonctionnement des bâtiments diplomatiques (CH/3):

"L'autorité cantonale a considéré que s'il avait été possible de déterminer exactement les deniers personnels du recourant qui servent à faire fonctionner le consulat, notamment par la production d'une comptabilité, le séquestre aurait pu être levé dans la mesure où les biens séquestrés étaient affectés au service consulaire. Elle ajoute que, faute de précisions sur ce point, il ne saurait être question de soustraire purement et simplement à la mainmise des créanciers du recourant l'ensemble des biens de ce dernier pour le motif que ceux-ci seraient destinés non seulement au recourant et à son activité d'homme d'affaires, mais également en partie à son activité de consul. Au reste, relève-t-elle, il est douteux que cette activité diplomatique soit très importante et qu'elle puisse entraîner des frais élevés. Quoi qu'il en soit, aux yeux de l'autorité cantonale, l'immunité d'exécution forcée ne peut bénéficier à des biens qui n'appartiennent pas à un Etat étranger et sur lesquels ce dernier ne peut pas faire valoir des droits. Si le recourant met à la disposition de l'Etat tchadien des fonds qui lui appartiennent, ajoute-t-elle, il le fait à bien plaisir, sans que la République du Tchad puisse revendiquer ces biens ou exiger que ceux-ci soient couverts par l'immunité d'exécution."

(...) Non seulement les fonds en question appartiennent au débiteur personnellement, mais ils ne sont de surcroît pas affectés exclusivement à l'activité diplomatique du recourant, mais aussi à son activité commerciale privée. Le séquestre qui les frappe est destiné à garantir une obligation contractée dans le cadre de l'activité d'homme d'affaires du recourant. Ainsi donc, dans la mesure où le recourant réclame l'immunité d'exécution sur la totalité des fonds bloqués sur le compte litigieux, sa revendication apparaît beaucoup trop générale pour qu'il y soit donné suite sous cette forme. (...)

On doit concéder au recourant qu'en sa qualité de consul honoraire il jouit également de l'immunité diplomatique et que, partant, il ne peut être soumis à l'exécution forcée chaque fois que - et dans la mesure où - les obligations qu'il a contractées s'inscrivent dans le cadre de sa fonction officielle. Toutefois, il va sans dire qu'une telle immunité ne peut s'étendre à des actes juridiques accomplis par ledit consul à titre privé ou en relation avec son activité professionnelle ou commerciale (...).

Le Tribunal fédéral suisse l'a rappelé tout récemment : *une immunité toute générale n'est pas défendable* (cf. CH/24). Dans l'arrêt en cause, des commissions résultant de remise de concessions pétrolières dans la République X. transitent par des sociétés écrans jusque sur un compte en Suisse dont le bénéficiaire est la République X. Dans le cadre d'une entraide judiciaire, les autorités cantonales font saisir les fonds. La République X. plaide l'immunité des fonds dont elle est bénéficiaire. Le Tribunal fédéral suisse n'est pas convaincu (CH/24):

"Le fait que ces fonds aient été conservés, "dans l'attente de leur utilisation future pour des tâches de l'Etat, soit pour le paiement direct de l'Etat X., soit encore pour être gérés et retransférés sur des comptes de la l'Etat X en Suisse ou à l'étranger", ne saurait à lui seul permettre de reconnaître l'immunité. (...) Les fonds de l'Etat sont toujours, en définitive, affectés à des tâches publiques."

Les **Organisations sous contrôle étatique** (comme une corporation de droit public CH/12; une banque nationale CH/16 et CH/20) peuvent bénéficier d'une immunité de juridiction lorsqu'elles agissent *iure imperii*. Mais le simple fait qu'elles soient affiliées de près ou de loin à l'Etat ne suffit pas à les soustraire automatiquement à une juridiction étrangère. Le critère décisif tient à la *nature de l'activité exercée* et non à leur statut de droit public étranger.

Il en va de même en ce qui concerne leurs *biens*. Ainsi, lorsque de telles organisations font l'objet d'une saisie, l'immunité ne peut être invoquée que lorsque les choses ou les fonds litigieux sont consacrés *d'une manière reconnaissable* à un but concret relevant de l'exercice de la puissance publique, p.ex. l'entretien des bâtiments diplomatiques (CH/16).

Par contre, **les sociétés privées et leurs comptes en banque**, même si elles ont pour bénéficiaires économiques l'Etat ou des personnes au bénéfice de l'immunité, ne peuvent prétendre échapper à la juridiction helvétique. La jurisprudence l'a relevé dernièrement. Le but est d'éviter que l'argent d'une éventuelle corruption ou d'un éventuel blanchiment d'argent ne puisse être soustrait aux autorités par le biais de l'immunité (Arrêt République X. c/ OFJ, non publié).

Dans le même ordre d'idée, le Tribunal fédéral a été appelé à se pencher tout récemment sur un recours contre une saisie frappant les biens d'une **société écran** dont le bénéficiaire économique était une personne au bénéfice de l'immunité. Il a toutefois refusé d'annuler le jugement cantonal qui déniait la qualité pour agir à l'ayant droit économique et n'octroyait la qualité pour défendre qu'à la société-écran (CH/24):

"Le fait qu'ils [les recourants] bénéficient de l'immunité de juridiction et d'exécution en qualité de Chef d'Etat en fonction, respectivement d'agent diplomatique, ne saurait s'opposer à cette mesure dès lors que la saisie ne porte pas sur des biens dont ils ont la maîtrise de fait ou de droit et qui ne sont pas directement visés par la mesure de contrainte. L'immunité de juridiction pourrait tout au plus leur être reconnue si

l'entité dont ils prétendent être les ayants droit économiques était un établissement de droit public de la République X."

Dans l'arrêt CH/24 précité, le Tribunal fédéral suisse insiste alors sur le recours évident au système financier privé : Les mouvements de fonds décrits par l'office central permettent d'affirmer que l'Etat étranger a agi selon un processus propre au droit privé. Les fonds versés par les compagnies pétrolières ont d'abord abouti sur les comptes "escrow", et ont été répartis par la banque d'affaires sur divers comptes bancaires détenus par des sociétés de droit privé, dont les ayants droits étaient des dignitaires de l'Etat X. La banque d'affaires est intervenue dans le cadre d'un mandat de conseil et d'assistance à l'occasion de négociations et de l'exécution des conventions relatives aux concessions pétrolières, chargée dans un premier temps de recevoir les paiements, puis de les répartir sur les comptes des sociétés offshore, la République X. ne désirant pas apparaître pour des raisons de discrétion. Dans ces circonstances, la recourante ne peut se voir reconnaître le privilège de l'immunité d'Etat.

En ce qui concerne les **Organisations Inter-Gouvernementales**, le Tribunal Fédéral suisse, dans une jurisprudence récente, a clarifié la *position particulière* des OIG disposant de leur siège en Suisse pour les actes civils que celles-ci passent avec des particuliers (CH/9). En substance le Tribunal fédéral suisse reconnaît aux OIG une *immunité absolue et complète ne comportant aucune restriction*¹³; même les actes passés *de iure gestionis* (dont nous parlerons un peu plus loin) ne sont pas applicables aux OIG.

Dès lors, et dans la mesure où le règlement de conflits avec des particuliers ne peut se résoudre qu'à travers l'arbitrage, le TF estime qu'une clause compromissoire ne vaut pas renonciation, comme cela est généralement le cas pour des Etats (CH/9 ; voire aussi l'arrêt CH/1, où la question de la renonciation à l'immunité suite à une clause compromissoire est toutefois laissée ouverte dans la mesure où l'acte incriminé ne comporte pas un rattachement suffisant avec la Suisse)

"Les organisations internationales bénéficient d'une immunité absolue et complète, ne comportant aucune restriction (...). Le principe de l'immunité dite relative (...) ne s'applique qu'aux Etats, la distinction entre *acta de jure imperii* et *de jure gestionis* ne valant pas pour les organisations internationales (...). Les raisons de cette différence doivent, notamment, être recherchées dans le fondement juridique même de l'immunité octroyée aux organisations internationales, à savoir une convention internationale et non pas une règle de droit international général; de surcroît, les organisations internationales ne disposent d'aucune assise territoriale (...).

L'immunité leur garantissant d'échapper à la juridiction des tribunaux étatiques, les organisations internationales au bénéfice d'un tel privilège s'engagent envers l'Etat hôte (...) à prévoir un mode de règlement des litiges pouvant survenir à l'occasion de contrats conclus avec des personnes privées. Cette obligation de prévoir une procédure de règlement avec les tiers constitue la contrepartie à l'immunité octroyée (...). Sauf rares exceptions, les organisations internationales considèrent qu'une renonciation pure et simple à leur immunité va à l'encontre de leur autonomie. D'une manière générale, ces organisations voient dans l'arbitrage le seul mode de règlement des litiges relatifs aux contrats passés avec les personnes privées. (...)

En définitive, contrairement à ce qui vaut pour les Etats, la soumission des organisations internationales à une clause compromissoire ne vaut pas renonciation à leur immunité. L'arbitrage auquel elles participent reste à l'abri de toute intervention d'une juridiction nationale."

3. L'absence d'immunité pour les biens et les actes passés *de iure gestionis*

Comme nous avons eu l'occasion de le préciser, la pratique suisse dénie l'immunité lorsque l'Etat ou une organisation sous contrôle d'Etat (mais non une organisation internationale qui bénéficie d'une immunité absolue) agit comme le ferait n'importe quel particulier. En d'autre

¹³ A propos de cette conception et de l'arrêt CH/9, voir la critique de BUCHER, *op. cit.*, n°886, p.267

terme, il y aura lieu d'établir si l'acte ou le bien litigieux sert à l'Etat à exercer ses fonctions souveraines ou s'il s'agit d'un acte de gestion comme il y en a tous les jours entre de simples particuliers (**critère de l'affectation**).

Dans sa jurisprudence la plus récente, le Tribunal fédéral a synthétisé sa pratique en matière de distinction. Il semble opportun de le citer (CH/11 et CH/12) :

"La distinction des actes *iure gestionis* et *iure imperii* ne saurait se faire sur la seule base de leur rattachement au droit public ou au droit privé. Ce critère dépend en effet de la définition, malaisée, du droit public, laquelle diffère selon les Etats; il ne saurait être pris en considération qu'à titre d'indice, parmi d'autres (...). De même, le but poursuivi par l'Etat dans sa transaction ne saurait être déterminant, car ce but vise toujours, en dernière analyse, un intérêt étatique. On recherchera donc prioritairement quelle est la nature intrinsèque de l'opération: il s'agit de déterminer si l'acte qui fonde la créance litigieuse relève de la puissance publique, ou s'il s'agit d'un rapport juridique qui pourrait, dans une forme identique ou semblable, être conclu par deux particuliers (CH/2 ; CH/20)."

Un indice sérieux pour voir dans une activité un acte *iure gestionis* réside dans le fait que la relation avec un particulier s'est établie hors du territoire de l'Etat étranger (CH/8, CH/20, CH/2) ou que l'employé, engagé au lieu de l'Ambassade, n'a pas la nationalité de l'Etat employeur (CH/2). Le fait que la nationalité du travailleur est celle de l'Etat défendeur ne constitue cependant qu'un indice, étant donné qu'elle peut se révéler sans rapport avec la nature du travail exercé (CH/7).¹⁴

Tout dernièrement, le Tribunal fédéral suisse restreint encore l'immunité lorsque l'Etat noue des relations en matière commerciale (CH/24) :

"Longtemps controversée, la question de l'immunité dont jouit l'Etat en matière commerciale est désormais résolue dans le sens du refus de tout privilège. (...) L'exception d'activité commerciale peut être reconnue indépendamment du fait que les activités commerciales concernées ont pour but ultime de favoriser le développement économique. Si l'exploitation des ressources naturelles est incontestablement une activité du service public, il n'en résulte pas que l'immunité doit être accordée dès qu'un litige se rattache à l'exercice d'une telle activité. Il se peut en effet que les contrats passés par une entité chargée de la mise en valeur des richesses d'un Etat ne soient nullement des actes de souveraineté."

Pour les **organisations sous contrôle étatique**, un acte *iure gestionis* existe lorsque cette organisation agit comme un particulier (sur les critères de distinction, cf. infra), p.ex. lorsqu'elle contracte des "Time Deposit" et s'engage à les rembourser; cette opération n'est absolument pas singulière dans la mesure où n'importe quelle banque d'affaires dans le monde en fait de même (CH/20). Le fait qu'il s'agisse d'une banque nationale ne suffit pas à qualifier ce contrat d'acte *iure imperii*.

"Sont [ainsi] des actes accomplis *iure gestionis* les emprunts de l'Etat ou d'une banque centrale souscrits sur le marché monétaire (CH/20), les garanties de financement de contrats de développement industriel accordées par un Etat – via l'intermédiaire d'un agent diplomatique – à un syndicat bancaire (CH/12), les contrats portant sur la location de films entre une société et un organisme de télévision dépendant d'un Etat (Arrêt Cinetel c/ RAE in ASDI 1981 p. 211-212), le contrat de vente d'actions d'une société chargée de tâches publiques (ASDI 1975 p. 219) les contrats d'entreprise (CH/10 ; CH/16), de bail (CH/8), ou les contrats de travail passés par une représentation diplomatique avec des travailleurs remplissant une fonction subalterne (CH/7 ; CH/5). L'autorité appelée peut recourir à des critères extérieurs; elle verra, par exemple, un indice d'un acte accompli *iure gestionis* dans le fait que l'Etat qui se prévaut de son immunité est entré en relation avec un particulier en dehors de son territoire, c'est-à-dire sur le territoire d'un autre Etat,

¹⁴ BUCHER, *op. cit.*, n°870 p. 262

sans que ses relations avec ce dernier soient en cause (CH/20). Ces activités commerciales, telles des accords de livraison de marchandises ou de prestations de service, ou des engagements financiers comme, en particulier, des contrats de prêt ou de garantie, ne sont évidemment pas couvertes par l'immunité diplomatique.¹⁵

"La réponse à donner dans chaque espèce dépendra ensuite d'une comparaison de l'intérêt de l'Etat étranger à bénéficier de l'immunité, avec celui de l'Etat du for à exercer sa souveraineté juridictionnelle et celui du demandeur à obtenir une protection judiciaire de ses droits. De tout temps, la pratique suisse a marqué une tendance à restreindre le domaine de l'immunité (CH/2 et les références ; CH/8)."

Par contre, le fait que l'Etat recoure à des sociétés privées, dont l'Etat n'est d'ailleurs pas lui-même l'ayant droit, et au système financier privé permet de douter de l'existence d'une immunité diplomatique, indépendamment de la prétendue affectation des fonds à des tâches publiques (CH/24).

"En l'espèce l'affaire met en cause un circuit insolite de versement de commissions en contrepartie de l'acquisition de droits d'exploitation de ressources naturelles de la République X. Les commissions, provenant de sociétés pétrolières internationales, sont versées à des sociétés écrans, dont les bénéficiaires économiques sont des hauts dirigeants de la République X. Une de ces sociétés écrans a par la suite versé de l'argent à une banque en Suisse sur un compte numéroté dont le titulaire est le Trésor du Ministère des finances de la République X."

Le simple fait que l'acte soit qualifié comme étant *iure gestionis* ne suffit toutefois pas à fonder la compétence de la juridiction suisse. L'Etat étranger ne peut en effet être recherché devant les tribunaux suisses et faire l'objet de mesures d'exécution forcée qu'à la condition que le rapport de droit auquel il est partie soit rattaché au territoire suisse (**critère de rattachement**), c'est-à-dire qu'il y soit né, ou doive y être exécuté, ou tout au moins que le débiteur ait accompli certains actes de nature à y créer un lieu d'exécution (CH/23, CH/4, CH/8, CH/20). Ce critère, repris du droit national et non du droit international (CH/1) permet ainsi d'affaiblir la doctrine de l'immunité relative.

"Le principe de l'immunité de juridiction des Etats étrangers n'est pas une règle absolue. Si l'Etat étranger a agi en vertu de sa souveraineté (*jure imperii*), il peut invoquer le principe de l'immunité de juridiction; si, en revanche, il a agi comme titulaire d'un droit privé ou au même titre qu'un particulier (*jure gestionis*), l'Etat étranger peut être assigné devant les tribunaux suisses, à condition toutefois que le rapport de droit privé auquel il est partie soit rattaché de manière suffisante au territoire suisse ("*Binnenbeziehung*"; CH/7)."

Tel est le cas lorsque :

- Le contrat prévoit que l'obligation est portable et exécutable en Suisse (ASDI 1986, p. 64).
- Le contrat ou un avenant a été conclu en Suisse (Arrêt CH/23 *a contrario*).
- Les parties ont conclu une prorogation de for en faveur de la Suisse (CH/8).
- Le lieu de paiement est en Suisse (CH/8 et CH/23).
- Un emprunt stipulé en francs suisses devait être remboursé auprès d'une banque suisse (CH/20).

Tel n'est dès lors pas le cas lorsque :

- Une société qui n'a pas son siège en Suisse et un Etat étranger signent à l'étranger un contrat et que les loyers prévus dans le contrats sont payables à l'étranger, quand bien même la société a donné l'ordre irrévocable à la banque encaissant les loyers de les transmettre directement en Suisse (CH/23, c.1b 1ère partie).

¹⁵ cf. ég. CH/24, c.4a

- Une société étrangère cède sa créance à une société située en Suisse (CH/4).
- Un emprunt par obligations permet au créancier d'indiquer le lieu où il entend être remboursé (CH/4).
- Pour un emprunt qui n'avait pas été conclu en Suisse et ne devait pas y être remboursé, même si les titres de l'emprunt étaient cotés en bourse en Suisse, en l'absence de domicile de paiement en Suisse (ATF 56 I 237).
- Un arbitre étranger fixe le siège du tribunal arbitral en Suisse (CH/1).

Le Tribunal fédéral suisse a laissé la question ouverte lorsque :

- Un séquestre est requis sur la base de conventions extrajudiciaires conclues en Suisse et qui prévoient le versement de diverses sommes afin de mettre fin à un litige entre deux parties et qui prévoient des versements directs sur des comptes en Suisse effectués par des organismes d'Etat différents de ceux qui ont conclu les conventions extrajudiciaires; en l'espèce, le TF admet qu'il n'y a pas d'accord définitif fixant un lieu d'exécution en Suisse ce qui laisse douter du rattachement à la Suisse. Toutefois, il laisse la question ouverte et annule le séquestre en raison de la nature des biens séquestrés (CH/23, c.1b 2ème partie).

C. Fin de l'immunité

Nous avons déjà quelque peu esquissé les solutions retenues en matière de fin d'immunité. Nous nous bornerons dès lors à quelques rappels.

Pour les **Etats**, l'immunité ne peut être levée ou prendre fin dans une affaire donnée que sur décision volontaire de ceux-ci. En général, on attendra une renonciation expresse, mais dans certains cas, une renonciation par actes concluants peut suffire. La renonciation peut être faite aussi bien ultérieurement à la survenance du litige, que de manière préventive dans une clause d'arbitrage, par exemple. Le Tribunal fédéral suisse (CH/19) admet ainsi que lorsqu'un Etat s'en remet à un arbitre (CH/9 c.1b *in fine* et *a contrario* ; CH/1 où la question est laissée ouverte) ou saisit un tribunal étranger, il se soumet spontanément à la juridiction de ce dernier :

"Lorsqu'un Etat est spontanément devant la juridiction d'un autre Etat, il se soumet au principe de la territorialité de celui-ci par le fait même qu'il recourt à sa juridiction. Il s'abstient par là de faire valoir sa propre souveraineté à l'encontre de la puissance publique de l'Etat à la juridiction duquel il recourt, renonçant implicitement à son immunité. Il en va ainsi notamment quand l'Etat étranger agit comme demandeur devant les tribunaux locaux; il se soumet alors ipso facto aux demandes reconventionnelles connexes à la demande principale et ne peut dès lors soulever à leur encontre l'immunité de juridiction."

Nous avons vu que le régime d'immunité des **organisations internationales** est particulier. En effet, celles-ci ne bénéficient pas d'une immunité de juridiction et d'exécution totale. De la sorte, la seule manière pour elle de trancher des litiges est de recourir à l'arbitrage. Dès lors, il n'y a pas lieu de considérer qu'en procédant de la sorte, l'organisation entend renoncer à son immunité comme cela serait le cas pour un Etat (CH/9) :

"En définitive, contrairement à ce qui vaut pour les Etats, la soumission des organisations internationales à une clause compromissoire ne vaut pas renonciation à leur immunité. (...)."

La fin de l'immunité d'une organisation internationale qui résout ses conflits par l'arbitrage n'est donc, en principe, pas susceptible d'être portée devant des tribunaux nationaux (CH/9):

"L'arbitrage auquel les organisations internationales participent reste à l'abri de toute intervention d'une juridiction nationale à moins toutefois que l'organisation renonce à son immunité ou que l'accord de siège en dispose autrement ou encore que l'organisation accepte que l'arbitrage soit soumis à une loi nationale, généralement celle du siège (...). Ce n'est que si l'arbitrage renvoie à un droit national qu'il peut impliquer l'intervention éventuelle du juge étatique dans la procédure. Mais un tel

renvoi n'est, en pratique, jamais utilisé par les grandes organisations internationales (...)."

§4. L'IMMUNITÉ DES CHEFS D'ÉTAT, DES DIPLOMATES ET AUTRES AGENTS

Nous traiterons de l'immunité des Chefs d'état, des diplomates et autres agents de la même manière que ce qui a été fait précédemment, c'est-à-dire en le début de l'immunité (A), le contenu *rationae materiae* de l'immunité (B) et la fin de l'immunité (C).

A. Début de l'immunité

Pour un **Chef d'Etat**, il semble logique que son immunité débute au moment de son intronisation et de la reconnaissance du gouvernement par les autres pays.

Pour un **agent de l'Etat**, l'immunité ne commence qu'au moment où l'Etat accréditant transmet une nomination à l'autorité étrangère compétente (en Suisse: le Département Fédéral des Affaires Etrangères). A défaut d'un tel avis et d'une décision d'accréditation, l'agent en question ne peut bénéficier sur sol étranger de l'immunité de juridiction et d'exécution (CH/18).

B. L'immunité *ratione materiae*

Nous ne revenons pas sur ce qui a déjà été dit à propos de la théorie de l'immunité relative. Pour le reste, nous nous bornerons à adopter le même plan, c'est-à-dire: traiter des actes et des biens effectués *de iure imperii* (1) et de ceux effectués comme le ferait n'importe quel particulier, *de iure gestionis* (2).

1. L'immunité pour les actes passés *de iure imperii*

En ce qui concerne l'immunité des **agents de l'Etat**, la pratique dégagée par la coutume internationale a été codifiée et reprise en toutes lettres dans la Convention de Vienne aux articles 31 et suivants. En substance, la Convention prévoit que l'immunité des agents de l'Etat demeure tant et aussi longtemps que l'immunité n'est pas venue à terme (fin de mandat) ou n'a pas été levée par l'Etat. L'immunité porte en premier lieu sur les poursuites pénales et administratives engagées contre l'agent; dans une certaine mesure, l'agent pourra également bénéficier de l'immunité en cas de litiges d'ordre civil portant sur des actes ou des biens passés *de iure imperii*.

En ce qui concerne les **Chefs d'Etat**, le Tribunal fédéral a récemment été appelé à traiter le cas d'un ancien chef d'Etat poursuivi par les autorités américaines et qui ont déposé une demande d'entraide judiciaire aux autorités suisses (CH/21 et CH/15). En effet, cet ancien chef d'Etat invoquait son immunité pénale et contestait la compétence du juge suisse en tant que celui-ci autorisait l'entraide. En substance, le juge suisse, appliquant la Convention de Vienne par analogie, estime que l'immunité pénale perdure tant et aussi longtemps que le chef d'Etat est en fonction ou que l'Etat qu'il dirige ne lui a pas retiré expressément son immunité. Mais dans tous les cas, il bénéficie de l'immunité pénale pour les actes qu'il a passés durant son mandat de chef d'Etat, à moins d'une renonciation *expresse* de l'Etat à l'immunité que le droit international public lui a reconnu, non comme un avantage personnel, mais en faveur de l'Etat qu'il dirigeait (CH/15):

"Le droit international coutumier a de tout temps reconnu aux chefs d'Etat - ainsi qu'aux membres de leur famille et à leur suite lorsqu'ils séjournent dans un Etat étranger - les privilèges de l'inviolabilité personnelle et de l'immunité de juridiction pénale (...). Cette immunité de juridiction est également reconnue au chef d'Etat qui séjourne dans un Etat étranger à titre privé et s'étend, dans ces circonstances, aux membres les plus proches de sa famille qui l'accompagnent, ainsi qu'aux membres de sa suite ayant un rang élevé. Ces personnes ne peuvent par conséquent faire l'objet de poursuites pénales ou même d'une assignation à comparaître devant un tribunal (...). Le droit international public coutumier a reconnu de tels privilèges "ratione personae" aux chefs d'Etat autant pour tenir compte de leurs fonctions et du symbole de souveraineté qu'ils portent qu'en raison de leur caractère représentatif

dans les relations interétatiques. Bien que la théorie de l'exterritorialité ait été critiquée et abandonnée depuis longtemps comme justification de l'immunité des chefs d'Etat ou des agents diplomatiques (...), les chefs d'Etat sont absolument exempts, "ratione personae", de toute contrainte étatique et de toute juridiction d'un Etat étranger en raison d'actes qu'ils auraient commis, où que ce soit, dans l'exercice de fonctions officielles. Au contraire de l'immunité de juridiction civile, toujours discutée et relativisée, l'immunité de juridiction pénale du chef de l'Etat est totale (...). Cette immunité paraît également englober, sans réserve, les activités privées des chefs d'Etat (...).

Le privilège de l'immunité de juridiction pénale des chefs d'Etat, dégagé par la coutume internationale, n'a pas été repris en toutes lettres dans la Convention de Vienne. (...) On ne saurait en déduire que les textes normatifs (...) établiraient pour les chefs d'Etat étrangers une protection inférieure à celle des représentants diplomatiques de l'Etat qu'ils dirigent ou qu'ils représentent universellement. (...) Les chefs d'Etat bénéficient donc d'une immunité de juridiction totale dans les Etats étrangers (...). Ce privilège, reconnu pour le profit de l'Etat étranger à son plus haut dignitaire, trouve ses limites, d'une part, dans la volonté de cet Etat et, d'autre part, dans la durée des fonctions du chef d'Etat. Les art. 32 et 39 de la Convention de Vienne doivent donc s'appliquer par analogie aux chefs d'Etat. Aux termes de l'art. 32, l'Etat accréditant peut renoncer à l'immunité de juridiction de ses agents, mais il doit toujours le faire expressément, des actes concluants étant insuffisants. Selon l'art. 39, lorsque les fonctions d'une personne bénéficiant de privilèges et immunités prennent fin, ces privilèges et immunités cessent au moment où cette personne quitte le pays de réception, mais l'immunité subsiste en ce qui concerne les actes qu'elle a accomplis dans l'exercice de ses fonctions comme membre de la mission diplomatique (...).

S'agissant de l'immunité dont X et son épouse paraissent se prévaloir à l'égard des juridictions suisses, elle n'entre manifestement en considération, en tant qu'obligation faite à la Suisse par le droit des gens, qu'à l'égard des chefs d'Etat en fonction, situation qui n'est à l'évidence plus celle de X(...). L'immunité personnelle est en effet le pendant de l'immunité dont jouit l'Etat étranger quand il agit "iure imperii", c'est-à-dire dans ses attributs de puissance publique. La Convention de Vienne sur les relations diplomatiques traduit simplement dans un acte normatif un concept issu du droit international coutumier. L'immunité qu'elle accorde est un privilège en faveur de magistrats ou de fonctionnaires en activité dans l'intérêt de l'Etat qu'ils représentent, et non en faveur de particuliers, ceux-ci eussent-ils exercé naguère les plus hautes charges publiques dans le pays étranger. Il serait à tout le moins contraire au système qu'un particulier, qui n'est plus chargé de représenter un Etat, puisse invoquer son immunité personnelle à l'encontre des intérêts mêmes de cet Etat."

Les évolutions récentes du droit international (cf. ég. §7) ont toutefois également relativisé l'immunité du Chef d'Etat encore en fonction. Les Statuts des Tribunaux internationaux pour l'Ex-Yougoslavie et le Rwanda prévoient ainsi que la qualité officielle d'un accusé, par exemple comme Chef d'Etat, ne l'exonère pas de sa responsabilité pénale. Lorsqu'il n'est plus en exercice, le Chef d'Etat ne jouit en principe que d'une immunité pour les actes accomplis dans l'exercice de ses fonctions officielles. L'affaire Pinochet a toutefois alimenté le débat relatif aux anciens Chefs d'Etat : l'immunité du Général Pinochet, en tant qu'ancien Chef d'Etat, a été rejetée pour les crimes de torture. Plus récemment encore, des sanctions internationales ont été prises à l'encontre du Zimbabwe et de son Chef d'Etat, Robert Mugabe pour les violations répétées des droits de l'homme perpétrées dans ce pays. En l'occurrence, la Suisse a pris des sanctions tant à l'égard du pays que du Président et de ses biens (cf. §6)

2. L'absence d'immunité pour les biens et les actes passés *de iure gestionis*

Sur ce point, nous renvoyons à ce qui a été dit plus haut en matière d'actes et de biens de l'Etat passés *de iure gestionis*

C. Fin de l'immunité

En ce qui concerne les **diplomates, consuls et autres agents d'Etat** au bénéfice de l'immunité, nous avons vu plus haut que leur immunité prend fin soit au terme de leur mandat (fin de mandat de chef d'Etat, fin de mission d'un diplomate ou d'un agent consulaire), soit à la suite d'une levée de l'immunité sur révocation *expresse* de l'Etat qu'ils représentent (CH/15). L'immunité d'un agent d'Etat peut également être levée provisoirement lorsque celui-ci agit devant des tribunaux de l'Etat étranger et qu'il se soumet à leur juridiction. Le Tribunal Fédéral suisse admet ainsi qu'en agissant de la sorte, l'agent ne peut invoquer son immunité pour invalider d'éventuelles demandes reconventionnelles intentées contre lui (CH/19). Par analogie avec les Etats, on doit également admettre qu'un agent d'Etat qui conclut un contrat avec clause compromissoire renonce de manière implicite à son immunité et se soumet à l'éventuel verdict de l'arbitre.

En ce qui concerne le **personnel des Missions permanentes**, l'immunité prend fin de la même manière que pour les agents d'Etat, c'est-à-dire soit à l'échéance du mandat, soit suite à une levée de l'immunité.

§5. DISTINCTION ENTRE IMMUNITÉ DE JURIDICTION ET D'EXÉCUTION

A titre de rappel, et avant de voir comment cette distinction est traitée en pratique (C), nous esquisserons brièvement ce en quoi consiste l'immunité de juridiction (A) et l'immunité d'exécution (B).

A. L'immunité de juridiction

"L'immunité de juridiction est une exception de procédure selon laquelle un Etat ne peut, sans son consentement exprès, être traduit devant les tribunaux d'un autre Etat.¹⁶"

B. L'immunité d'exécution

"L'immunité d'exécution permet à un Etat d'empêcher toute mesure portant atteinte à ses biens et à son droit d'en disposer librement. Dans les pays qui la reconnaissent, elle offre à l'Etat davantage de garanties que l'immunité de juridiction, dans la mesure où, de manière générale, la distinction entre actes d'autorité et de gestion n'est pas pratiquée à l'égard de ce type d'immunité. Ainsi, même si un Etat est jugé à l'étranger pour des activités *iure gestionis*, le jugement ne peut pas être soumis aux procédures d'exécution forcée, mais il est en principe à l'origine d'une action diplomatique, voire d'une procédure judiciaire internationale. La délimitation des domaines bénéficiant de l'immunité a donné lieu à de larges controverses, notamment en raison du fait que l'étendue de ces immunités n'est pas définie par le droit international.¹⁷"

"Deux conditions supplémentaires élargissent l'immunité d'exécution, même par rapport aux actes accomplis *iure gestionis*. En premier lieu, des mesures d'exécution forcée ne peuvent être ordonnées en raison de l'*affectation des objets visés*, lorsqu'il s'agit de biens servant à l'exercice des relations diplomatiques de l'Etat étranger ou à d'autres tâches qui lui incombent en tant que détenteur de la puissance publique. En second lieu, l'Etat étranger ayant agi *iure gestionis* ne peut faire l'objet de mesures d'exécution forcée qu'à la condition que le rapport de droit auquel il est partie soit *rattaché au territoire suisse*.¹⁸"

C. La distinction en pratique

¹⁶ NICOLAS MICHEL, Polycopié de droit international public, Fribourg, 1999, p.64

¹⁷ NICOLAS MICHEL, *op. cit.*, p.64

¹⁸ BUCHER, *op. cit.*, n°875 et 878, pp. 263s.

La pratique suisse en la matière, et notamment le Tribunal Fédéral suisse, considèrent l'immunité d'exécution comme une simple conséquence de l'immunité de juridiction: l'Etat étranger qui, dans un cas déterminé, ne jouit pas de celle-ci ne peut pas non plus se prévaloir de celle-là, à moins que les mesures d'exécution concernent des biens destinés à l'accomplissement d'actes de souveraineté (CH/8, CH/12 et CH/23). En effet, l'exécution forcée ne peut pas être exercée sur des avoirs ou biens affectés à l'exercice de tâches publiques (voir en ce sens CH/23).

La pratique suisse se distingue dès lors, sur ce point, de la solution retenue dans la Convention européenne sur l'immunité des Etats puisque le Tribunal fédéral suisse précise (CH/23) :

"En ce qui concerne les Etats en tant que tels, la convention fait quant à elle une nette distinction entre l'immunité de juridiction, qu'elle traite à son chapitre I, et celle d'exécution, qui fait l'objet du chapitre III. Il ressort de l'article 15 de la convention que dans tous les cas autres que ceux prévus par les articles premier à 14, l'Etat contractant bénéficie –d'office– de l'immunité de juridiction, même s'il agit *iure gestionis*; à cet égard, la convention traduit un compromis entre la théorie de l'immunité absolue et celle de l'immunité relative. En revanche, il résulte clairement de l'article 23 de la convention que les Etats contractants bénéficient dans tous les cas de l'immunité d'exécution, à moins qu'ils n'y renoncent expressément et par écrit; c'est précisément parce que l'exécution forcée est interdite que, d'une part, l'article 20, chiffre premier, lettre a, pose pour principe que l'Etat contractant doit donner effet à un jugement rendu contre lui par le tribunal d'un autre Etat contractant lorsqu'il ne pouvait invoquer l'immunité de juridiction et que, d'autre part, l'article 21 prévoit certaines garanties judiciaires propres à assurer l'observation effective de cette obligation."

§6. LE CAS PARTICULIER DES SANCTIONS INTERNATIONALES

Notre exposé sur la pratique ne serait pas totalement complet si nous ne parlions pas des sanctions internationales. On distingue en principe les sanctions internationales selon leur portée (les sanctions globales – rares¹⁹ – et les sanctions ciblées) et selon leur contenu (refus de vendre des armes, interdiction de déplacement et gel des avoirs).

Le chapitre VII de la Charte des Nations-Unies prévoit qu'à certaines conditions, les Etats peuvent adopter des sanctions contre des pays et leurs biens situés à l'étranger. Plus récemment, on a vu se développer des sanctions contre des pays, alors même que celles-ci n'avaient pas été décidées dans le cadre des Nations-Unies. Tel est généralement le cas lorsque le pays incriminé viole de manière flagrante et répétée les droits de l'homme et l'ordre juridique mondial.

En principe, le blocage, respectivement le gel des fonds détenus à l'étranger par un Etat ou par ses représentants sont interdits par le droit international coutumier. Néanmoins, la pratique récente des Etats et la doctrine estiment que le droit international public autorise un Etat à ne pas respecter cette interdiction de manière absolue lorsqu'il s'agit d'adopter, en réponse à une grave violation du droit international, des mesures qui constituent une réaction proportionnée. Dans le cas d'espèce, quand bien même la mesure envisagée ne fait pas l'objet d'une résolution du Conseil de Sécurité de l'ONU, elle se justifie en raison de violations massives et répétées du droit international, lesquelles constituent des atteintes graves à l'ordre public international. La Suisse est donc légitimée à prendre la mesure envisagée comme elle l'a déjà fait dans le passé, par exemple lors du gel des avoirs des représentants de la RF de Yougoslavie en 1998.

¹⁹ On ne relève qu'un seul cas de sanctions globales : il s'agit du cas irakien. Les effets négatifs de ces sanctions sur les populations locales ont conduit à abandonner les sanctions globales pour se concentrer uniquement sur des sanctions ciblées.

Les sanctions décidées par la Suisse se basent sur l'article 184 al. 3 de la Constitution fédérale de la Confédération suisse, lequel autorise le Conseil fédéral à adopter pour une durée limitée des ordonnances visant à sauvegarder les intérêts du pays. Dans l'ordonnance est généralement intégrée la liste des personnes – s'agissant de sanctions ciblées – qui feront l'objet des sanctions.

Les sanctions visent en principe des anciens dirigeants (Pinochet). Plus récemment, la Suisse a toutefois été amenée à prendre des sanctions à l'égard des dirigeants en exercice (Zimbabwe).

De par son appartenance à l'ONU, la Suisse est tenue d'adopter les sanctions onusiennes. Par contre, d'autres sanctions ont été décidées par l'Union européenne. La Suisse, après avoir effectué une pesée des intérêts en présence, a également adopté des sanctions contre les pays incriminés, à savoir l'ex-Yougoslavie, le Myanmar ainsi que le Zimbabwe. Dans ce dernier cas, le fait que le Président en exercice ainsi que le Premier Ministre soient en tête de liste a posé la question de la compatibilité de ces sanctions avec le principe d'immunité généralement reconnu aux dirigeants. Les sanctions prises par la Suisse sont compatibles avec le régime de l'immunité, dans la mesure où les sanctions n'empêchent pas les personnes visées de s'acquitter librement et efficacement de leur fonction, ce qui constitue le but même des privilèges et immunités.

§7. LA MISE EN OEUVRE ET LA PROCEDURE

A. L'action intentée contre une personne titulaire de l'immunité

1. L'action intentée contre un Etat

La qualité pour défendre appartient uniquement à des sujets du droit international public. La qualité pour agir ou pour défendre ne se pose pas pour les organismes d'Etat non dotés de la personnalité juridique, puisque c'est alors l'Etat qui agit (voir CH/23 précité). Ainsi une Mission permanente n'a pas la personnalité juridique et il y a lieu d'attaquer l'Etat qu'elle représente. Tel est également le cas lorsque des biens de l'Office du tourisme, lui-même rattaché administrativement au Ministère du Tourisme, sont séquestrés à l'étranger (CH/23).

Lorsqu'un Etat est déféré devant une juridiction civile (un Etat étant absolument soustrait aux autorités pénales et administratives), celui-ci peut s'opposer d'entrée de cause à la tenue du procès par voie d'exception en arguant de son immunité. Dans de tels cas, le Tribunal fédéral suisse, à titre de procédure préalable, établira s'il a compétence pour juger du cas (CH/3):

"Dans le cas d'un séquestre, le TF a également reconnu au préposé, en vertu du pouvoir de contrôle limité qui lui est reconnu, le droit de refuser d'exécuter une ordonnance de séquestre (...) lorsque les biens à séquestrer appartiennent, de toute évidence ou au dire même du créancier, à un Etat étranger qui les affecte à des tâches publiques, en particulier lorsqu'ils sont destinés au financement de la représentation diplomatique de ce dernier en Suisse où a lieu le séquestre."

2. L'action intentée contre un agent de l'Etat

Avant de pouvoir agir contre une personne au bénéfice de l'immunité, il y a lieu d'obtenir la levée de celle-ci. En effet, les personnes jouissant d'une immunité de juridiction et d'exécution ne peuvent être astreintes devant un tribunal suisse sans qu'au préalable leur immunité n'ait été levée. Il en va de même pour la notification d'un acte judiciaire (convocation par exemple).

La partie demanderesse doit demander la levée de l'immunité de la partie défenderesse. En cas de plainte pénale, le Procureur général ou le juge de la procédure pénale devra solliciter la levée de l'immunité de la personne afin d'être en mesure d'instruire l'affaire.

Pour les membres du personnel des organisations internationales, c'est le Directeur ou Secrétaire général qui a la compétence de lever l'immunité de l'un de ses fonctionnaires. Pour les membres du personnel des missions permanentes, c'est le Ministère des affaires étrangères qui a la compétence de lever l'immunité de l'un de ses fonctionnaires.

Une demande de levée d'immunité, motivée et accompagnée des documents utiles, doit être adressée à la Mission suisse. S'il s'agit d'un membre du personnel d'une organisation internationale, la Mission suisse présentera la demande de levée d'immunité au Service juridique de l'organisation concernée. S'il s'agit d'un membre du personnel d'une mission permanente, la Mission suisse transmettra la demande au DFAE qui, à son tour, demandera à l'Ambassade suisse sur place de présenter la demande de levée d'immunité au Ministère des affaires étrangères de l'Etat concerné.

B. L'action intentée par une personne titulaire de l'immunité

Les personnes qui ne bénéficient que de l'immunité de fonction n'ont aucune difficulté à déposer une *plainte pénale* dans le cadre privé. En revanche, la question se pose pour ceux qui bénéficient de l'immunité de juridiction pénale absolue. Ces personnes peuvent déposer une plainte pénale, que l'infraction soit poursuivie sur plainte ou d'office, et leur plainte doit être enregistrée. Leur immunité de juridiction pénale ne doit en effet pas les empêcher de pouvoir saisir la justice de l'Etat hôte.

Une fois la plainte pénale déposée, l'immunité de juridiction pénale est un obstacle à la continuation par le Procureur général ou le juge de la procédure pénale (convocation; audition, même en qualité de témoin; etc.). Le plaignant devra alors présenter une renonciation expresse à son immunité émanant de son Etat ou, dans le cas du haut fonctionnaire, de son organisation. Cette renonciation doit être présentée au Procureur général par l'entremise de la Mission suisse.

En ce qui concerne les *plaintes civiles*, nous avons déjà vu (dans le cadre de la fin de l'immunité) qu'un Etat ou un agent de l'Etat au bénéfice de l'immunité peut sans autre saisir la juridiction d'un autre Etat comme le rappelle le Tribunal fédéral suisse (CH/19 et CH/14):

"Sa qualité d'Etat ne le prive pas du droit d'agir en justice comme demandeur, alors qu'elle pourrait, le cas échéant, le dispenser d'ester en qualité de défendeur."

Ainsi, il renonce de manière implicite à son immunité. Les personnes au bénéfice de l'immunité ont donc qualité pour agir devant les juridictions suisses.

C. Les voies de recours en cas de violation de l'immunité

1. Le principe : pas de voie de recours sauf dénonciation (CH/23):

"*En principe* l'Etat étranger qui agit *jure imperii*, soit en qualité de sujet de droit international public souverain, ne peut saisir le Tribunal fédéral d'un recours de droit public (RDP) pour violation d'un traité international ou d'une règle du droit des gens. Cela découle de la Constitution fédérale et de la loi qui prévoient que le Tribunal fédéral ne connaît de tels recours que s'ils sont le fait de particuliers. D'ailleurs, l'Etat étranger qui agit dans l'exercice de sa souveraineté ne peut non plus recourir auprès du Conseil fédéral; il peut en revanche adresser à celui-ci une dénonciation [au sens de l'article 71 LPA]."

2. L'exception : Le recours de droit public (RDP) pour violation du principe d'immunité en cas de séquestre:

"*Cependant*, la jurisprudence constante reconnaît aux Etats étrangers la qualité pour former, à l'encontre d'un séquestre, un recours de droit public fondé sur la violation de l'immunité de juridiction et d'exécution. En effet, quand bien même c'est précisément en sa qualité de sujet de droit international que l'Etat peut se prévaloir de cette immunité, l'ordonnance de séquestre et son exécution le frappe de la même manière qu'un particulier (CH/23)."

"La recevabilité du recours a été admise tantôt pour violation de traités internationaux, soit pour violation des prescriptions de droit fédéral sur la délimitation

de la compétence des autorités à raison de la matière ou à raison du lieu, tantôt encore sur la base de l'une et l'autre des dispositions précitées (CH/23)."

"Il n'est pas nécessaire que les moyens de droit cantonal aient été épuisés avant le dépôt du recours de droit public. (...) Il est vrai que si, en ces matières, le recourant n'est pas tenu d'épuiser d'abord les moyens de droit cantonal, il lui est cependant loisible de le faire. Aussi bien certains de ces moyens ont-ils été utilisés en l'espèce (opposition, action en contestation du cas de séquestre, procédure de revendication). D'autres pourront l'être (action en libération ou en reconnaissance de dette dans le cadre de l'opposition faite à la poursuite). On peut se demander dès lors s'il y a lieu, comme le requiert l'intimée, de suspendre l'instruction du recours de droit public jusqu'à droit connu sur ces différentes procédures cantonales. D'après la jurisprudence, la solution de cette question dépend de motifs d'opportunité. En l'espèce, il convient d'observer d'une part que la question de l'immunité de juridiction, dont dépend essentiellement la validité du séquestre attaqué, est une pure question de droit qui peut être jugée sur la base du dossier tel qu'il est constitué, d'autre part que, si l'immunité de juridiction dont se prévaut le recourant est admise, le séquestre devra être annulé de telle sorte que les différentes procédures cantonales en cours deviendront sans objet. Dans ces conditions, pour simplifier la procédure, il est opportun qu'à l'exemple de la solution adoptée dans d'autres affaires analogues, le Tribunal fédéral statue sans plus attendre sur les griefs qui sont recevables. (CH/4)."

Dans un cas particulier, le Tribunal fédéral suisse est aussi entré en matière sur un recours de droit public intenté par un particulier, domicilié en Suisse, qui s'est vu refuser l'autorisation de séquestre de biens de propriété d'un Etat étranger, pour le motif que celui-ci serait au bénéfice de l'immunité de juridiction. Le Tribunal fédéral suisse relève ainsi:

"Certes, cette personne ne saurait prétendre que ses intérêts juridiques sont protégés d'une façon quelconque, par cette règle du droit des gens qu'est le principe de l'immunité de juridiction, lequel consacre exclusivement le privilège en faveur des Etats étrangers. Il lui est cependant loisible de prétendre, comme il le dit implicitement, que les dispositions procédurales du droit commun relatif à l'exécution en Suisse des obligations ont été violées à son préjudice, du fait de la portée erronée donnée au principe de l'immunité juridictionnelle" (CH/11).

Dans une autre affaire (CH/6), le Tribunal fédéral suisse est également entré en matière sur un recours de droit public qui ne portait pas sur un séquestre ni sur une saisie conservatoire, mais sur une forme s'apparentant à ces mesures (CH/6).

Si l'Etat tarde à réagir (ou refuse de réagir alors que ses biens sont séquestrés) et qu'il laisse expirer le délai légal, son recours est en principe irrecevable. Si par contre le séquestre, même validé et converti en saisie définitive porte sur des biens considérés ultérieurement comme étant au bénéfice de l'immunité de juridiction et d'exécution, il peut alors être annulé en tout temps (CH/8).

§8. PERSPECTIVES FUTURES

Comme nous avons pu le voir, le 20ème siècle a vu l'institution de l'immunité se lézarder : d'une immunité absolue au bénéfice de l'Etat, de ses dirigeants et de ses représentants, nous sommes passés à un régime d'immunité relative, qui, à certaines conditions, autorise des particuliers à les poursuivre.

Il semble que le 21ème siècle ira plus loin et permettra de battre en brèche également le principe d'immunité pénale. Les statuts des Tribunaux pénaux internationaux pour le Rwanda et l'ex-Yougoslavie ainsi que l'affaire Pinochet ont:

"(...) démontré une tendance à établir une distinction selon que le chef d'Etat est encore en fonction ou non et selon la nature des actes qui lui sont reprochés (actes accomplis dans l'exercice des fonctions et autres actes).

Il paraît de plus en plus largement admis que les chefs d'Etat ne bénéficieront plus d'immunités pour la commission d'actes constitutifs de génocides, de crimes contre l'humanité et de crimes de guerre. Une délicate question restera celle de l'immunité des chefs d'Etat en fonction, lorsque leurs actes se situent en dehors du champ d'application du statut d'un tribunal pénal international.²⁰

²⁰ MICHEL, *op. cit.*, p.65

(a)	N° d'enregistrement	CH / 1
(b)	Date	19 juin 1980
(c)	Service / auteur	1ère Cour de droit public du Tribunal fédéral Suisse
(d)	Parties	République socialiste du peuple arabe de Lybie – Jamahiriya contre Lybian American Oil Company (LIAMCO)
(e)	Points de droit	Mesures d'exécution forcée contre un Etat étranger ; immunité en droit international public Conditions auxquelles sont soumises les mesures d'exécution forcée contre un Etat étranger : principe de l'immunité restreinte. Exigence d'un lien juridique suffisant avec la Suisse.
(f)	n°	0.b.4., 1.c, 2.c.
(g)	Source(s)	ATF 106 la 142 ; www.bger.ch
(h)	Renseignements complémentaires	Recevabilité du recours de droit public pour des Etats touchés comme des particuliers (séquestre) : ATF 82 I 85, CH/4 Jurisprudence constante du Tribunal fédéral en matière d'immunité restreinte : ATF 44 I 53 (arrêt de principe) ATF 104 la 368, CH/20 ATF 86 I 27, CH/8 ATF 82 I 85, CH/4 ATF 56 I 247
(i)	Texte complet – Extraits – Traduction - Résumé	Texte complet sur Internet (en allemand) Résumé du texte en allemand : voir ci-dessous

Résumé

Faits

A.- Das Gesetz Nr. 25 des Königreiches Libyen vom 21. April 1955 bestimmte, dass alles im Boden befindliche Erdöl dem Staat gehöre und niemand berechtigt sei, ohne Bewilligung oder Konzession ("permit or concession") Erdöl zu fördern. Auf den 12. Dezember 1955 erteilte das Königreich Libyen der Libyan American Oil Company (LIAMCO) unter anderem die Konzessionen 16, 17 und 20, die letztere berechtigten, in bestimmten umschriebenen Gebieten für die Dauer von 50 Jahren Öl zu fördern. Die sowohl vom Erdölministerium als auch von der LIAMCO unterzeichneten Konzessionen enthielten eine Schiedsklausel. Danach sind alle Streitigkeiten im Zusammenhang mit den erteilten Konzessionen durch ein Schiedsgericht zu entscheiden. Sollte eine der beiden Parteien auf Aufforderung der Gegenpartei hin keinen Schiedsrichter benennen, dann hat nach dieser Bestimmung der Präsident des Internationalen Gerichtshofes einen Einzelschiedsrichter zu bezeichnen, der den Sitz des Schiedsgerichts zu bestimmen und den Streit endgültig zu entscheiden hat.

Am 1. September 1969 wurde in Libyen die Republik ausgerufen. Mit Gesetzen Nr. 66 und Nr. 10 enteignete in der Folge der libysche Staat sämtliche Konzessionsrechte, Förder- und Produktions-einrichtungen der LIAMCO. Diese sollte indes nach den erwähnten Gesetzen entschädigt werden, wobei die Entschädigung durch eine dreiköpfige Kommission festzusetzen war, deren Mitglieder je durch den libyschen Justiz-, Finanz- und Erdölminister bezeichnet werden sollten.

Mitte November 1973 verlangte die LIAMCO die Durchführung des Schiedsverfahrens gemäss der Konzessionsurkunden. Da der libysche Staat sich weigerte, einen Schiedsrichter zu benennen, bestimmte der Präsident des Internationalen Gerichtshofes den libanesischen Staatsangehörigen Sobhi Mahmassani zum Einzelschiedsrichter. Dieser hielt am 9. Juni 1975 in London eine erste Sitzung ab und bestimmte alsdann Genf als Sitz des Schiedsgerichts. Weil sich der libysche Staat auf das Verfahren nicht einliess, erliess der Schiedsrichter am 12. April 1977 in Genf ein Versäumnisurteil. Mit diesem verpflichtete er "the Libyan Arab Republic" zur Zahlung von insgesamt US \$ 80'065'677.-- nebst Zins zu 5% seit Urteilsdatum an die LIAMCO. Das Schiedsgerichtsurteil blieb unangefochten; namentlich wurde die nach genferischem Recht zulässige Nichtigkeitsbeschwerde nicht ergriffen. Am 13. Februar 1979 erliess der Einzelrichter im summarischen Verfahren am Bezirksgericht Zürich auf Begehren der LIAMCO einen Arrestbefehl, und zwar für die Forderungssumme von Fr. 134'944'349.-- nebst Zins zu 5%. Der Arrestbefehl betrifft sämtliches Finanzvermögen des libyschen Staates und staatlicher libyscher Organisationen bei sechs in Zürich domizilierten Banken. Gestützt auf diesen Arrestbefehl belegte das Betreibungsamt Zürich 1 bei verschiedenen Banken Vermögensgegenstände staatlicher libyscher Organisationen mit Arrest. Am 17. Mai 1979 erwirkte sodann die LIAMCO beim Betreibungsamt Zürich 1 gegen die Sozialistische Libysche Arabische Volks-Jamahiriya einen Zahlungsbefehl für die im Arrestbefehl genannte Forderungssumme.

Die Sozialistische Libysche Arabische Volks-Jamahiriya führt beim Bundesgericht staatsrechtliche Beschwerde wegen Verletzung ihrer völkerrechtlichen Immunität. Sie verlangt die Aufhebung des Arrestbefehls und des gestützt darauf erfolgten Arrestbeschlags sowie die Ungültigerklärung des Zahlungsbefehls.

Extrait des considérants:

2.- a) Die Beschwerdeführerin rügt mit der staatsrechtlichen Beschwerde die Verletzung ihrer völkerrechtlichen Immunität. Einem als Völkerrechtssubjekt auftretenden fremden Staat steht die staatsrechtliche Beschwerde grundsätzlich nicht offen, ergibt sich doch aus [der Bundesverfassung], dass das Bundesgericht nur über "Beschwerden betreffend Verletzung verfassungsmässiger Rechte der Bürger sowie über solche von privaten wegen Verletzung von Konkordaten und Staatsverträgen" zu urteilen hat. Der fremde Staat, der die Verletzung der Vorschriften eines Staatsvertrages oder der Regeln des Völkerrechtes rügen will, muss

das vielmehr mit einer Aufsichtsbeschwerde an den Bundesrat tun, der gegebenenfalls einschreiten könnte.

Anders verhält es sich freilich, wenn in der Schweiz liegende Vermögensgegenstände eines fremden Staates mit Arrest belegt werden sollen. Diesfalls ist der fremde Staat - selbst wenn er in den fraglichen Belangen an sich als Völkerrechtssubjekt auftritt - betroffen wie ein einzelner, dessen Vermögen verarrestiert wird. Es rechtfertigt sich daher, dem fremden Staat die Möglichkeit zu öffnen, in solchen Fällen beim Bundesgericht gegen die Zwangsvollstreckungsmassnahmen staatsrechtliche Beschwerde zu führen. (...)

b) Die Beschwerdeführerin stützt ihre Beschwerde sowohl auf Art. 84 Abs. 1 lit. c OG als auch auf lit. d derselben Bestimmung. Nach Art. 84 Abs. 1 lit. c OG kann beim Bundesgericht wegen "Verletzung von Staatsverträgen mit dem Ausland" Beschwerde geführt werden, während dies gemäss Art. 84 Abs. 1 lit. d OG wegen "Verletzung bundesrechtlicher Vorschriften über die Abgrenzung der sachlichen oder örtlichen Zuständigkeit der Behörden" möglich ist. Staatsrechtliche Beschwerden, die sich auf eine der beiden erwähnten Bestimmungen stützen, setzen die Erschöpfung des kantonalen Instanzenzuges nicht voraus, sondern können unmittelbar im Anschluss an den Hoheitsakt, der Anlass zur Beschwerde gibt, erhoben werden.

Staatsrechtliche Beschwerden eines fremden Staates wegen Verletzung seiner gerichtlichen oder vollstreckungsrechtlichen Immunität lässt das Bundesgericht selbst dann zu, wenn kein Staatsvertrag angerufen werden kann, da es die Regeln des Völkergewohnheitsrechts einem Staatsvertrag gleichstellt ([BGE 82 I 82](#), CH/4). Zulässig ist eine solche staatsrechtliche Beschwerde aber auch, da in der Anrufung der völkerrechtlichen Immunität zugleich die Bestreitung der Zuständigkeit der schweizerischen Behörden liegt ([BGE 82 I 82](#), CH/4 ; 44 I 53). Da die Frage, wann die Arrestnahme gegen fremde Staaten als zulässig zu betrachten ist, hat das Bundesgericht an Hand der Natur und Eigenart der in Betracht kommenden rechtlichen Verhältnisse selbständig die Grundsätze aufzustellen, die für das Verhalten der inländischen Zwangsvollstreckungs- und Gerichtsorgane als massgebend zu gelten haben. Das hat es selbst dann zu tun, wenn die Prüfung auf Grund von Art. 84 Abs. 1 lit. c OG ergeben hat, dass die Völkerrechtliche Immunität des beschwerdeführenden fremden Staates an sich zu verneinen ist.

c) Nach dem Gesagten ist auf die staatsrechtliche Beschwerde gegen den Arrestbefehl einzutreten, und zwar ohne dass der kantonale Instanzenzug zuvor hätte durchlaufen werden müssen. Zulässig ist es nach der Rechtsprechung sodann auch, wenn die Beschwerdeführerin die Beschwerde auf den Arrestbeschluss sowie auf den Zahlungsbefehl, mit dem der Arrest prosequiert wurde, ausdehnt, da - wenn die Beschwerde gegen den Arrestbefehl gutgeheissen würde - die Grundlage für diese Zwangsvollstreckungsmassnahmen dahinfiel ([ATF 86 I 27](#), CH/8 ; 82 I 79, CH/4 ; 51 I 337).

3.- Es gibt keinen Staatsvertrag über Fragen der Staatenimmunität, an dem sowohl die Beschwerdeführerin als auch die Schweizerische Eidgenossenschaft als Vertragspartner beteiligt sind. Ob die Beschwerdegegnerin gegen die Beschwerdeführerin einen Arrest hat herausnehmen dürfen, beurteilt sich somit nach den sich aus dem Völkerrecht ergebenden Regeln, aber auch nach den Vorschriften des innerstaatlichen Rechts.

a) Nach einer allgemeinen völkerrechtlichen Regel wird die Souveränität eines jeden Staates durch die Immunität der andern Staaten, namentlich in Erkenntnis- und Vollstreckungsverfahren, begrenzt. Vor fremden innerstaatlichen Gerichten und Behörden kann ein Staat danach grundsätzlich nicht zur Rechenschaft gezogen werden (*par in parem non habet iurisdictionem*). Während diese Regel früher uneingeschränkt zum Zuge kam, ist das in neuerer Zeit nicht mehr der Fall. Weit aus die meisten Staaten, mit Ausnahme insbesondere von Grossbritannien und den sozialistischen Staaten, bekennen sich vielmehr zum Grundsatz der beschränkten Immunität fremder Staaten. Danach kommt dem fremden Staat Immunität nur hinsichtlich seiner hoheitlichen Tätigkeit (für *acta iure imperii*) zu, nicht aber dort, wo er als Träger von Privatrechten (*iure gestionis*) gleich einem Privaten auftritt (...). Den Grundsatz der beschränkten Immunität befolgen heute die meisten Staaten in ihrer Praxis, und zwar in der Überzeugung, dazu von Völkerrechts wegen verpflichtet zu sein. Er

gehört daher dem Völkergewohnheitsrecht an (...). Regeln des Völkergewohnheitsrechts sind aber vom Bundesgericht auf staatsrechtliche Beschwerde heranzuziehen ([BGE 82 I 82](#), CH/4 ; 61 I 259). Das Bundesgericht hat sich denn auch in BGE 44 I 53 der Theorie der beschränkten Immunität fremder Staaten angeschlossen, und es hat diese Rechtsprechung in der Folge wiederholt bestätigt ([BGE 104 Ia 368](#), CH/20 ; 86 I 27, CH/8 ; 82 I 85, CH/4 ; 56 I 247). Von dieser Rechtsprechung abzugehen, besteht kein Anlass.

b) Ein Erkenntnis- oder Vollstreckungsverfahren gegen einen fremden Staat lässt das Bundesgericht nicht schon dann zu, wenn feststeht, dass der fremde Staat als Träger von privaten und nicht von hoheitlichen Rechten auftritt. Das Bundesgericht fordert vielmehr, dass das in Frage stehende Rechtsverhältnis auch eine genügende Binnenbeziehung zum schweizerischen Staatsgebiet aufweist. Es müssen daher - selbst wenn der Rechtsstreit auf nichthoheitliches Handeln des fremden Staates zurückzuführen ist - Umstände vorliegen, die das Rechtsverhältnis so sehr an die Schweiz binden, dass es sich rechtfertigt, einen fremden Staat vor schweizerischen Behörden zur Verantwortung zu ziehen, denn es besteht kein Anlass und ist auch von der Sache her nicht sinnvoll, die Rechtsverfolgung gegen fremde Staaten zuzulassen, wenn eine einigermaßen intensive Binnenbeziehung fehlt. Die Interessen der Schweiz erfordern ein solches Vorgehen nicht; im Gegenteil könnten dadurch leicht politische und andere Schwierigkeiten entstehen.

Eine genügende Binnenbeziehung bei Zwangsvollstreckungsmassnahmen gegen fremde Staaten wurde vom Bundesgericht stillschweigend bereits in ATF 44 I 55 gefordert; in den späteren Entscheiden ([ATF 104 Ia 370](#), CH/20 ; 86 I 27, CH/8 ; 82 I 85, CH/4 ; 56 I 249 ff.) geschah das dann ausdrücklich. Das Erfordernis einer solchen Binnenbeziehung entspringt indes nicht den erwähnten völkerrechtlichen Regeln, gehört somit nicht dem Völkergewohnheitsrecht an. Ebenso wenig ist ein Staat von Völkerrechts wegen verpflichtet, das Erkenntnis- oder Vollstreckungsverfahren gegen fremde Staaten für nichthoheitliche Belange zuzulassen. Vielmehr ist er dazu befugt, sich im Rahmen seines innerstaatlichen Rechtes in dieser Hinsicht eine gewisse Selbstbeschränkung aufzuerlegen. Nach seinem Landesrecht hat daher jeder Staat durch Regelung der örtlichen Zuständigkeit seiner Behörden die Grenzen zu bestimmen, innerhalb derer er sich zur Entscheidung von aus nichthoheitlichem Handeln fremder Staaten sich ergebenden Streitfragen berufen fühlt (...). Da im SchKG eine Vorschrift fehlt, die die Zuständigkeit für solche Fälle regeln würde, ist es Sache des Bundesgerichts, die Zuständigkeit der schweizerischen Behörden auf staatsrechtliche Beschwerde hin festzulegen. Das Erfordernis der genügenden Binnenbeziehung ist daher Ausdruck schweizerischen Landesrechts.

4.- Die Beschwerdegegnerin macht vor Bundesgericht geltend, die Beschwerdeführerin habe auf ihre völkerrechtliche Immunität verzichtet, weil sie seinerzeit die Schiedsklausel unterzeichnet habe, die Anlass zu dem zu vollstreckenden Schiedsgerichtsurteil gab. Die Frage kann offenbleiben, wenn sich ergibt, dass im vorliegenden Falle eine genügende Binnenbeziehung fehlt. Da das Bundesgericht das letztere Erfordernis, wie dargelegt, aus dem Landesrecht ableitet, kann es in dieser Hinsicht von vornherein keine Rolle spielen, ob ein Staat auf die ihm von Völkerrechts wegen zustehenden Garantien verzichtet hat oder nicht. Selbst wenn die Beschwerdeführerin entsprechend den Vorbringen der Beschwerdegegnerin auf ihre völkerrechtliche Immunität verzichtet haben sollte, bestünde nämlich kein Anlass, den schweizerischen Gerichtsapparat für die Regelung eines Rechtsstreites zur Verfügung zu stellen, der keine oder nur unbedeutende Berührungspunkte zur Schweiz aufweist und in den ein fremder Staat verwickelt ist. Fehlt eine Binnenbeziehung, so kann weiter auch Offenbleiben, ob der Rechtsstreit zwischen den Parteien auf hoheitliche oder nichthoheitliche Handlungen der Beschwerdeführerin zurückzuführen ist. Vielmehr wäre in diesem Falle die staatsrechtliche Beschwerde mangels einer genügenden Binnenbeziehung kraft Landesrechts gutzuheissen, und die angefochtenen Zwangsvollstreckungsmassnahmen wären aufzuheben.

5.- Eine ausreichende Binnenbeziehung im umschriebenen Sinne liegt nach der Rechtsprechung dann vor, wenn das in Frage stehende Schuldverhältnis in der Schweiz begründet wurde oder abzuwickeln ist oder wenn der fremde Staat als Schuldner Handlungen vorgenommen hat, die geeignet sind, in der Schweiz einen Erfüllungsort zu

begründen ([BGE 104 Ia 370](#), CH/20 ; 86 I 30, CH/8 ; 82 I 85, CH/4). Die Tatsache allein, dass Vermögenswerte des Schuldners in der Schweiz liegen, vermag eine solche Binnenbeziehung nicht zu schaffen.

Auszugehen ist im vorliegenden Falle davon, dass ein in Genf ergangenes Schiedsgerichtsurteil vorliegt, dem von der Genfer Cour de Justice die Vollstreckbarkeitsbescheinigung erteilt worden ist, so dass es an sich einem Vollstreckbaren schweizerischen Gerichtsurteil gleichsteht (Art. 44 des Konkordates über die Schiedsgerichtsbarkeit) und daher in der ganzen Schweiz vollstreckbar ist. Das ist aber nur darauf zurückzuführen, dass das Schiedsgericht Genf als seinen Sitz gewählt hat. Gemäss Art. 2 Abs. 1 des Konkordates kann der Sitz des Schiedsgerichts nämlich "durch Vereinbarung der Parteien oder durch die von ihnen beauftragte Stelle oder in Ermangelung einer solchen Wahl durch Beschluss der Schiedsrichter bezeichnet" werden. Wird der Sitz des Schiedsgerichts durch Dritte oder durch das Schiedsgericht selber gewählt, so ergibt sich daraus indes noch keine ausreichende Binnenbeziehung zur Schweiz, jedenfalls dann nicht, wenn das Schiedsgericht mit der Entscheidung über einen Rechtsstreit aus einem Rechtsverhältnis betraut ist, das an sich mit der Schweiz keine Berührungspunkte hat. Das Bundesgericht verneint denn auch eine genügende Binnenbeziehung zur Schweiz, wenn eine Vertragspartei gemäss den vertraglichen Abmachungen die Erfüllung der Schuld an irgendeinem Orte fordern kann und sie auf Grund dieser allgemeinen Klausel den Erfüllungsort in der Schweiz gewählt hat ([BGE 82 I 92](#), CH/4). Keine näheren Berührungspunkte gibt es auch hier, wo es gemäss den in den Konzessionsurkunden enthaltenen Schiedsabreden Sache des Einzelschiedsrichters war, den Sitz des Schiedsgerichts zu bestimmen. Diese Sitzbestimmung durch den Einzelschiedsrichter bildet den einzigen Anknüpfungspunkt zur Schweiz. Demgegenüber beschlug der vom Einzelschiedsrichter beurteilte Streitgegenstand in seiner Gesamtheit im Ausland gelegene Interessen, ging es doch im Schiedsverfahren um die von der Beschwerdeführerin enteigneten Konzessionsrechte der Beschwerdegegnerin, einer amerikanischen Ölgesellschaft, die in Libyen Öl gefördert hatte. Verhält es sich aber so, dann entfällt eine ausreichende Binnenbeziehung des zu beurteilenden Rechtsverhältnisses zum schweizerischen Hoheitsgebiet, was die Zuständigkeit der schweizerischen Behörden zum Erlass der angefochtenen Massnahmen nach dem Gesagten ausschliesst. Die Beschwerde ist daher gutzuheissen.

Demnach erkennt das Bundesgericht:

Die Beschwerde wird gutgeheissen, und es werden aufgehoben:

- a) der Arrestbefehl Nr. 24 des Einzelrichters im summarischen Verfahren am Bezirksgericht Zürich vom 13. Februar 1979;
- b) der gestützt darauf erfolgte Arrestbeschluss durch das Betreibungsamt Zürich 1;
- c) der Zahlungsbefehl Nr. 1833 des Betreibungsamtes Zürich 1 vom 17. Mai 1979.

(a)	N° d'enregistrement	CH / 2
(b)	Date	22 mai 1984
(c)	Service / auteur	1ère Cour de droit civile du Tribunal fédéral Suisse
(d)	Parties	S. contre Etat indien
(e)	Points de droit	Immunité diplomatique, immunité d'un Etat et juridiction en cas de litiges portant sur des rapports de travail entre un membre d'une mission ayant la nationalité d'un Etats tiers et l'Etat accréditant.
(f)	n°	0.b.1, 1.b., 2.c.
(g)	Source(s)	ATF 110 II 255 ; www.bger.ch
(h)	Renseignements complémentaires	Jurisprudence constante du Tribunal fédéral sur la distinction entre immunité absolue et immunité restreinte : ATF 106 la 147, CH/1 (et les arrêts s'y rapportant) Jurisprudence concernant un exemple d'acte iure gestionis : ATF 86 I 29 (contrat de bail)
(i)	Texte complet – Extraits – Traduction – Résumé	Texte complet sur Internet (en français) Résumé du texte en français : voir ci-dessous

Résumé

Faits

S. citoyen italien est engagé par l'Ambassade indienne à Berne le 13 janvier 1958. Les rapports de travail prennent fin le 30 juin 1979. S. attaque l'Etat indien en vue du paiement de CHF 20'000.- La Cour d'appel du canton de Berne, lequel s'est limité à titre préjudiciel à l'examen de l'immunité étatique et diplomatique, rejette la demande sans examiner la question quant au fond. Elle estime au surplus que la juridiction helvétique n'est pas compétente pour connaître du litige étant donné que S. est lui-même soumis au régime d'immunité et qu'il n'a pas obtenu l'aval de l'ambassade indienne pour agir en justice. S. recourt au Tribunal fédéral. En conclusion, il demande que la compétence des tribunaux suisses soit reconnue et que l'affaire soit renvoyée à l'instance cantonale pour un examen quant au fond.

Le Tribunal fédéral admet le recours.

Extrait des considérants:

La Cour d'appel nie la compétence juridictionnelle au motif que le recourant est membre du personnel administratif et technique de l'ambassade indienne et que, à ce titre, il bénéficie du régime d'immunité diplomatique conformément à la Convention de Vienne. La supposition de l'instance inférieure qui part du principe que le recourant dispose de l'autorisation de l'Etat accréditant pour déposer recourt repose sur un avis de droit du Département fédéral de Justice, lequel ne motive pas plus avant sa position. Selon la Convention de Vienne, un représentant diplomatique bénéficie de l'immunité devant les juridictions de l'Etat accréditaire ; il n'est pas non plus obligé de tester. Il ne ressort cependant pas de la lettre de l'article 31 qu'inversement une personne bénéficiant de l'immunité n'a aucune possibilité d'agir en justice sans l'autorisation de l'Etat accréditant. L'article 32 chiffre 3 confirme cette idée (droit d'action autonome des diplomates) puisqu'il prévoit que s'ils ont agi en justice, ils ne peuvent, en cas de demande reconventionnelle, s'excuser de leur responsabilité en arguant de leur immunité de juridiction. La doctrine est également de cet avis.

Il ne reste finalement qu'à examiner si la conclusion et l'accomplissement des rapports de travail litigieux relèvent d'un acte de souveraineté de l'Etat accréditant. En effet, la doctrine et la jurisprudence admettent qu'un Etat étranger n'est pas soumis à la juridiction nationale du pays accréditaire lorsqu'il agit de manière souveraine (*acta iure imperii* par opposition aux *acta iure gestionis*). La Cour d'appel considère qu'en l'espèce, il s'agit d'un acte de gestion et non d'un acte de souveraineté, dans la mesure où le recourant a habité et travaillé pendant vingt ans à Berne et que c'est à cet endroit que les rapports de travail ont été conclus et exécutés. S'agissant d'un acte de gestion, celui-ci ne bénéficie pas de l'immunité et est, par conséquent, entièrement soumis au droit privé du lieu de travail. Le défendeur, au contraire, estime que le recourant accomplissait des devoirs relevant de la souveraineté de l'Etat. Dès lors, ceux-ci doivent être qualifiés de *iure imperii*.

Lorsqu'il s'agit de délimiter un acte de souveraineté d'un acte de gestion, la question principale est de savoir si l'Etat, en tant que sujet de droit privé, a agi comme un particulier (ATF 106 Ia 147, CH/1). La jurisprudence du Tribunal fédéral estime qu'il y a indice sérieux d'acte de gestion lorsque l'Etat a établi des contacts avec des particuliers en dehors de son territoire. De plus, il y a lieu de chercher à qualifier l'activité à la lumière du sens et du but de l'institution de l'immunité des Etats. Celle-ci vise en premier lieu à protéger les fonctions souveraines d'un Etat étranger à l'extérieur, en deuxième lieu à protéger la souveraineté et l'indépendance d'un Etat étranger ainsi qu'à prévenir des conflits internationaux. Ainsi il y a lieu de confronter et de mettre en balance les raisons qui justifient l'immunité, d'une part, et les intérêts de l'Etat accréditaire à exercer son pouvoir de juridiction face à l'intérêt du recourant à voir ses droits subjectifs effectivement protégés d'autre part. Actuellement, la jurisprudence et de la doctrine récente tendent à limiter le champ d'application de l'immunité ; la pratique helvétique emprunte également cette voie.

Le Tribunal fédéral n'a jamais eu à se prononcer sur la question de savoir si un cas de conclusion et de continuation de rapports de travail entre un Etat étranger et un employé d'ambassade qui n'est pas citoyen de ce pays doit être considéré comme un acte de souveraineté. Dans un ATF 86 I 29, un contrat de bail par lequel un particulier loue sa villa en tant qu'ambassade est considéré comme un acte de gestion. Le Tribunal fédéral estime qu'en l'espèce, le fait que l'Etat étranger noue des rapports commerciaux hors de son territoire et que les relations diplomatiques entre ce pays et la Suisse ne sont pas altérées indique qu'il y a plutôt lieu de parler d'un acte de gestion. Le Tribunal constitutionnel allemand arrive à la même conclusion dans un cas de contrat portant sur des travaux de réparation d'une installation de chauffage dans les bâtiments d'une ambassade. A la place de l'Etat étranger, n'importe quel particulier aurait pu passer le contrat. Cela vaut également pour le cas d'espèce où, à la place du défendeur, n'importe quel particulier aurait pu engager le recourant comme radiotélégraphiste. Il n'existe pas de critères suffisants qui permettent de retenir que cet engagement avait pour but de transmettre des informations dans une mission diplomatique ; dans ce cas, il aurait fallu s'en remettre d'une manière générale sur le but poursuivi et il eût fallu, dans les deux arrêts cités ci-dessus, admettre l'immunité diplomatique. Il ne suffit cependant pas d'admettre que le fonctionnement normal d'une mission relève des compétences souveraines de l'Etat et que le recrutement du personnel constitue dès lors un acte *iure imperii*. Le but d'un rapport juridique peut fournir un indice, mais n'est en soi pas un critère suffisant pour préjuger la nature juridique d'un rapport. Des contrats de vente ou de bail ne sont par exemple jamais des actes souverains, quand bien même ils portent sur des bâtiments diplomatiques.

(a)	N° d'enregistrement	CH / 3
(b)	Date	23 décembre 1982
(c)	Service / auteur	Tribunal fédéral Suisse, Chambre des poursuites et faillites
(d)	Parties	Griessen c/ autorité de surveillance des offices de poursuite pour dettes et de faillite du canton de Genève
(e)	Points de droit	<p>Séquestre ; immunité d'exécution</p> <p>L'immunité d'exécution doit-elle protéger les biens appartenant à un particulier qui, agissant à titre de consul, les affecte de son propre chef au fonctionnement de la représentation consulaire d'un Etat étranger auprès de l'Etat de résidence, comme s'il s'agissait de biens appartenant à l'Etat étranger lui-même? Question laissée ouverte.</p> <p>Distinction, du point de vue de l'immunité consulaire dont jouit un consul honoraire, entre les actes que ce dernier accomplit dans le cadre de sa fonction officielle, d'une part, à titre privé ou en relation avec son activité professionnelle ou commerciale, d'autre part.</p>
(f)	n°	0.b.1, 1.b., 2.b.
(g)	Source(s)	ATF 108 III 107 ; www.bger.ch
(h)	Renseignements complémentaires	
(i)	Texte complet – Extraits – Traduction – Résumé	<p>Texte complet sur Internet (en français)</p> <p>Résumé du texte en français : voir ci-dessous</p>

Résumé

Faits

La société Acli Commodity Service S.A. a obtenu un séquestre au préjudice de Jean-Jacques Griessen, Consul honoraire de la République du Tchad à Genève. Parmi les biens à séquestrer figurait un compte no 301 485 Zorro en main de la Banque Cantrade, Ormond, Burrus S.A., ouvert au nom de M. le Consul Jean-Jacques Griessen, à l'adresse du consulat. A cette adresse se trouvent également des bureaux commerciaux où Griessen déploie une activité d'homme d'affaires. L'autorité de surveillance des offices de poursuite pour dettes et de faillite du canton de Genève a rejeté la plainte interjetée par Griessen contre l'exécution du séquestre précitée. Elle a constaté que le compte séquestré avait été utilisé par Griessen pour son activité commerciale et professionnelle et que ce dernier n'avait fourni aucune précision sur la nature et l'importance des frais occasionnés par le fonctionnement du consulat qu'il prétendait assumer. Jean-Jacques Griessen recourt auprès du Tribunal fédéral contre la décision de l'autorité cantonale de surveillance. Il reproche entre autres à cette dernière d'avoir ignoré l'attestation établie par le chargé d'affaires a.i. de l'Ambassade de la République du Tchad à Paris, selon laquelle les fonds actuellement déposés sur le compte litigieux sont destinés à couvrir les frais de fonctionnement du service consulaire de la République du Tchad à Genève. Il invoque la Convention de Vienne selon laquelle il bénéficierait, en sa qualité de consul honoraire, de l'immunité d'exécution forcée. Le Tribunal fédéral rejette le recours.

Extrait des considérants:

L'Office des poursuites est en principe tenu d'exécuter une ordonnance de séquestre telle qu'elle a été rendue par le juge compétent. Toutefois, selon la jurisprudence, le préposé peut, en vertu du pouvoir de contrôle limité qui lui est reconnu à cet égard, refuser d'exécuter une ordonnance de séquestre (...). Le préposé peut également refuser d'exécuter le séquestre lorsque les biens à séquestrer appartiennent, de toute évidence ou au dire même du créancier, à un Etat étranger qui les affecte à des tâches publiques, en particulier lorsqu'ils sont destinés au financement de la représentation diplomatique de ce dernier en Suisse où a lieu le séquestre. L'immunité d'exécution protège de tels biens lorsque l'Etat auquel ils appartiennent - fût-il lui-même le débiteur - les affecte à son service diplomatique ou à d'autres tâches lui incombant comme détenteur de la puissance publique. La situation est différente lorsque les biens à séquestrer appartiennent non pas à un Etat étranger, mais à un particulier qui déclare de son propre chef les affecter en tout ou partie au fonctionnement de la représentation diplomatique d'un Etat étranger auprès de l'Etat de résidence; il s'agit en effet d'une décision arbitraire de la part de ce particulier, que ce dernier ne saurait opposer à ses créanciers. On peut néanmoins se demander si l'on ne devrait pas accorder au particulier qui agit en qualité de consul honoraire ou à un autre titre diplomatique le bénéfice de l'immunité d'exécution sur la partie de ses biens affectée à de telles fins comme s'il s'agissait en réalité de biens appartenant à l'Etat étranger. Une pareille assimilation paraît à première vue douteuse. A tout le moins faudrait-il, pour l'admettre, que la prétendue affectation du patrimoine privé à des tâches publiques soit prouvée immédiatement ou en tout cas rendue vraisemblable tant dans son principe que dans son existence.

Il est constant que le compte litigieux appartient au débiteur désigné dans l'ordonnance de séquestre, à savoir Jean-Jacques Griessen personnellement. Sans doute le recourant a-t-il toujours affirmé - et l'attestation établie par le chargé d'affaires a.i. de l'Ambassade du Tchad à Paris compétent également pour la Suisse tend-elle à confirmer - que les fonds déposés sur le compte servaient en même temps à l'accomplissement de tâches du consulat. Mais il n'en est pas moins vrai que la banque auprès de laquelle est ouvert le compte précité, a honoré des traites du recourant qui se rapportaient à son activité commerciale, sans que ce dernier ait jamais prétendu que les fonds ainsi versés à ses créanciers privés provinssent d'autres sources que du compte litigieux. C'est la raison pour laquelle l'autorité cantonale a demandé au recourant des précisions quant à la nature et à l'importance des frais que le

fonctionnement du consulat représentait. Or le recourant n'a pas fourni les précisions demandées.

L'autorité cantonale a considéré que s'il avait été possible de déterminer exactement les deniers personnels du recourant qui servent à faire fonctionner le consulat, notamment par la production d'une comptabilité, le séquestre aurait pu être levé dans la mesure où les biens séquestrés étaient affectés au service consulaire. Elle ajoute que, faute de précisions sur ce point, il ne saurait être question de soustraire purement et simplement à la mainmise des créanciers du recourant l'ensemble des biens de ce dernier pour le motif que ceux-ci seraient destinés non seulement au recourant et à son activité d'homme d'affaires, mais également en partie à son activité de consul. Au reste, relève-t-elle, il est douteux que cette activité diplomatique soit très importante et qu'elle puisse entraîner des frais élevés. Quoi qu'il en soit, aux yeux de l'autorité cantonale, l'immunité d'exécution forcée ne peut bénéficier à des biens qui n'appartiennent pas à un Etat étranger et sur lesquels ce dernier ne peut pas faire valoir des droits. Si le recourant met à la disposition de l'Etat tchadien des fonds qui lui appartiennent, ajoute-t-elle, il le fait à bien plaisir, sans que la République du Tchad puisse revendiquer ces biens ou exiger que ceux-ci soient couverts par l'immunité d'exécution.

Le seul argument que fait valoir le recourant à l'encontre de ce point de vue est que l'Etat étranger qui utilise des biens mis à sa disposition en vue de l'accomplissement d'actes juridiques lui incombant comme détenteur de la puissance publique agit "jure imperii", même si, dans ce cadre, il fait des actes juridiques relevant du droit privé. Cet argument tombe à faux. Il n'est en effet nullement établi, ni même allégué, que la République du Tchad aurait chargé le recourant d'exécuter des actes, relevant du droit privé, en vue de l'accomplissement de tâches qu'elle-même assume en tant que détentrice de la puissance publique et qui seraient à l'origine du séquestre en cause. Non seulement les fonds en question appartiennent au débiteur personnellement, mais ils ne sont de surcroît pas affectés exclusivement à l'activité diplomatique du recourant, mais aussi à son activité commerciale privée. Le séquestre qui les frappe est destiné à garantir une obligation contractée dans le cadre de l'activité d'homme d'affaires du recourant. Ainsi donc, dans la mesure où le recourant réclame l'immunité d'exécution sur la totalité des fonds bloqués sur le compte litigieux, sa revendication apparaît beaucoup trop générale pour qu'il y soit donné suite sous cette forme. Dans la mesure où l'on admettrait de faire bénéficier de l'immunité consulaire des fonds appartenant au recourant personnellement, et non à l'Etat qu'il représente, mais que le recourant aurait affectés à des tâches relevant de la puissance publique de ce dernier sans toutefois y être tenu par une obligation claire et précise, on devrait constater que cette immunité ne pourrait être reconnue en l'espèce, dès l'instant que l'on ignore quelle partie du compte séquestré est affectée aux besoins de l'Etat représenté et qu'il est en revanche constant que le même compte sert aussi à l'activité commerciale privée du recourant.

Il est vrai que l'autorité cantonale ne se prononce pas expressément dans la décision attaquée au sujet de l'attestation du chargé d'affaires a.i. de l'Ambassade de la République du Tchad à Paris. Toutefois, on ne saurait y voir, comme paraît le soutenir le recourant, une erreur ou une inadvertance manifeste de sa part. (...) L'autorité cantonale, si elle n'a pas retenu l'affirmation du recourant selon laquelle les fonds déposés sur le compte litigieux serviraient à couvrir les frais de fonctionnement du consulat, n'a nullement, pour autant, ignoré l'attestation en question. Cette dernière n'affirme en effet pas que le compte litigieux sert exclusivement à couvrir les frais de fonctionnement du consulat. L'autorité cantonale a donc pu constater, sans se mettre en contradiction avec la pièce invoquée, que le même compte sert aussi à couvrir les obligations assumées par le recourant en sa qualité d'homme d'affaires privé. Ce faisant, et compte tenu de l'interdépendance (locaux communs, liens financiers) existant entre l'activité consulaire du recourant et son activité d'homme d'affaires, elle n'a contrevenu à aucune disposition du droit fédéral. Le recourant ne doit donc s'en prendre qu'à lui-même si l'autorité cantonale n'a pu sans autre, du moment que les fonds servant à faire fonctionner le consulat n'étaient pas clairement et nettement séparés de ses

avoirs personnels, prêter foi à ses affirmations ni attacher une portée exclusive à l'attestation - formulée en termes très généraux - de la représentation diplomatique du Tchad à Paris et si elle s'est vue obligée de lui demander des précisions à ce sujet.

On doit concéder au recourant qu'en sa qualité de consul honoraire il jouit également de l'immunité diplomatique et que, partant, il ne peut être soumis à l'exécution forcée chaque fois que - et dans la mesure où - les obligations qu'il a contractées s'inscrivent dans le cadre de sa fonction officielle. Toutefois, il va sans dire qu'une telle immunité ne peut s'étendre à des actes juridiques accomplis par ledit consul à titre privé ou en relation avec son activité professionnelle ou commerciale, ainsi que le relève avec pertinence l'autorité cantonale. A cet égard, la Convention de Vienne sur les relations consulaires opère elle-même une nette distinction entre ces deux champs d'activité. Il n'est que de citer à cet égard l'art. 61 de cette convention qui garantit l'inviolabilité des archives et documents consulaires, à condition qu'ils soient séparés des autres papiers et documents, en particulier de la correspondance privée du chef de poste consulaire, ainsi que des biens, livres ou documents se rapportant à sa profession ou à son commerce. Comme le relève justement l'autorité cantonale, ce qui vaut pour les archives et documents vaut également pour la comptabilité et les fonds nécessaires au fonctionnement du consulat. En l'espèce, ces fonds étant mélangés aux deniers personnels du recourant, il ne saurait être question d'accorder à celui-ci, sur la base de l'art. 61 précité, une immunité d'exécution forcée indistinctement sur l'ensemble de ses biens.

(a)	N° d'enregistrement	CH / 4
(b)	Date	6 juin 1956
(c)	Service / auteur	Chambre de droit public du Tribunal fédéral suisse
(d)	Parties	Royaume de Grèce contre Banque Julius Bär & Cie
(e)	Points de droit	<p>Séquestre sur les biens d'un Etat étranger. Principe de l'immunité de juridiction.</p> <p>Recevabilité du recours de droit public contre un séquestre et contre les actes de poursuite subséquents.</p> <p>La loi sur les poursuites n'exclut pas le recours de droit public.</p> <p>Epuisement des moyens de droit cantonal quand le recours est fondé sur une violation du principe de l'immunité de juridiction.</p> <p>Lorsque l'Etat étranger a agi dans le rapport de droit litigieux en vertu de sa souveraineté (jure imperii), il peut invoquer de façon absolue le principe de l'immunité de juridiction. Lorsqu'il a agi comme titulaire d'un droit privé (jure gestionis), il peut être recherché devant les tribunaux suisses et faire en Suisse l'objet de mesures d'exécution forcée, pourvu toutefois que le rapport de droit litigieux soit rattaché au territoire suisse, c'est-à-dire qu'il soit né ou doive être exécuté en Suisse ou tout au moins que le débiteur ait accompli certains actes de nature à créer un lieu d'exécution en Suisse.</p>
(f)	n°	0.b.3., 1.c., 2.c.
(g)	Source(s)	ATF 82 I 75 ; www.bger.ch
(h)	Renseignements complémentaires	
(i)	Texte complet – Extraits – Traduction – Résumé	

Résumé

Faits

A.- Le 30 juin 1926, la Svenska Tändsticks Aktiebolaget à Stockholm (ci-après STAB), société contrôlée par Ivar Kreuger et appartenant au trust d'allumettes dirigé par lui, a accordé un prêt d'un million de livres Sterlings à l'Etat grec, constitué alors en république. En contrepartie, le Gouvernement Hellénique a vendu à la STAB des obligations de la République Hellénique pour le même montant.

L'emprunt serait ainsi remboursé par versements annuels égaux dans une période de vingt-huit années, le remboursement de ces obligations ayant lieu soit à Athènes, soit à New-York, soit à Londres, soit à toute autre place au choix du prêteur.

La somme prêtée a été payée au gouvernement grec par les soins de la banque Higginson & Cie à Londres, qui l'avait prélevée sur le compte personnel de J. Kreuger.

B.- Le 30 juin 1926 également, le Gouvernement hellénique a conclu avec la société anonyme "The Alsing Trading Company Ltd", à Londres, un contrat de fourniture exclusive d'allumettes pour une durée de vingt-huit années, les engagements et obligations pris dans la convention engageant solidairement les deux Sociétés The Alsing Trading Company Ltd et la Svenska Tandsticks aktiebolaget ..."

Il a été convenu en outre que, si la STAB n'exécutait pas le contrat de prêt, le Ministre des Finances du gouvernement grec pourrait le déclarer nul et non avenue et prendre la même décision en ce qui concerne la convention passée avec la Société "The Alsing Trading Company Ltd".

C.- Le montant afférent aux obligations no 1 à 5 a été régulièrement payé. En revanche, l'obligation no 6 n'a jamais été remboursée. Torsten Kreuger l'a cédée à la banque Julius Bär & Cie à Zurich.

D.- Le 14 février 1955, le Tribunal de Ire instance de Genève, agissant à la requête de la banque Julius Bär a ordonné le séquestre, jusqu'à concurrence de 2 500 000 fr. de "tous [biens] se trouvant en mains de banques genevoises au nom ou pour le compte du Royaume de Grèce de ses Ministères ou leur revenant directement ou indirectement notamment dans les successions Achillopoulo et Theotoky". Le séquestre a été exécuté les 21 février et 27 mai 1955.

En temps utile, la banque Julius Bär a validé ce séquestre en faisant notifier au Royaume de Grèce un commandement de payer. Le Royaume de Grèce a fait opposition à cette poursuite. La banque Julius Bär a obtenu la mainlevée provisoire de cette opposition. La Cour de justice du canton de Genève, saisie d'un appel interjeté contre ce prononcé, a décidé de "surseoir à statuer" jusqu'à droit connu sur le recours de droit public déposé par le Royaume de Grèce contre l'ordonnance de séquestre et le commandement de payer.

D'autre part, le Royaume de Grèce a intenté à la banque Julius Bär une action en contestation du cas de séquestre. Il a fait valoir que les biens frappés n'étaient pas susceptibles de faire l'objet d'un séquestre en Suisse et que, de plus, dans la mesure où ces biens dépendaient des successions Georges Achillopoulo et Hélène Theotoky, ils étaient la propriété d'une fondation de droit public, distincte et indépendante du Royaume de Grèce. Cette procédure a été suspendue également jusqu'à droit connu sur le recours de droit public précité. La fondation Achillopoulo a d'ailleurs intenté à Julius Bär & Cie une action en revendication d'une partie des biens séquestrés.

E.- Agissant par la voie du recours de droit public, le Royaume de Grèce requiert le Tribunal fédéral d'annuler l'ordonnance de séquestre et le commandement de payer. Il se plaint d'une violation (...) "des principes du droit des gens inhérents au droit fédéral". Il entend en particulier se mettre au bénéfice du principe de l'immunité de juridiction des Etats étrangers (...).

(...)

Extrait des considérants:

1.- (...) En principe les plaintes en matière de poursuite et faillite ne sont pas susceptibles de faire l'objet d'un recours de droit public, puisque cette voie n'est pas ouverte tant que le Tribunal fédéral peut être saisi d'une autre manière. La jurisprudence fait cependant une exception à cette règle quand la révocation d'un séquestre attaqué en temps utile entraîne de plein droit la caducité des actes de poursuite subséquents, du commandement de payer en particulier. Tel est le cas en l'espèce. En effet, si l'ordonnance de séquestre est annulée, la poursuite devra nécessairement l'être aussi. Le recourant est donc recevable à demander non seulement l'annulation de l'ordonnance de séquestre mais aussi celle du commandement de payer.

3.- Si le débiteur séquestré peut interjeter un recours de droit public directement contre l'ordonnance de séquestre, il a aussi la faculté de se défendre par d'autres moyens : action en contestation du cas de séquestre, opposition à la poursuite, action en libération de dette, réponse à l'action en reconnaissance de dette. Aussi bien le recourant a-t-il utilisé ces moyens en faisant opposition à la poursuite et en intentant une action en contestation du cas de séquestre. Comme ces procédures ne sont pas achevées, on peut se demander si le recours est irrecevable pour défaut d'épuisement des moyens de droit cantonal. La solution de cette question dépend des griefs que le recourant fait valoir. (...)

Le recourant se plaint d'autre part d'une violation (...) des "principes du droit des gens", c'est-à-dire du principe de l'immunité de juridiction des Etats étrangers. Pour examiner la question de l'épuisement des instances cantonales, il faut assimiler à ce dernier grief le moyen soulevé par le recourant et consistant à dire que, le droit international interdisant le séquestre des biens d'un Etat étranger affectés à un but d'utilité publique, les valeurs, propriété de la fondation Achillopoulo, ne peuvent être séquestrées, parce que cette fondation poursuit elle-même un but d'intérêt général.

En ce qui concerne ces différents griefs, il n'est pas nécessaire que les moyens de droit cantonal aient été épuisés avant le dépôt du recours de droit public. (...) Quant à l'inobservation des "principes du droit des gens", elle doit, conformément à la jurisprudence, être assimilée à la violation d'un traité, de telle sorte que, sur ce point aussi, le recours de droit public est recevable sans épuisement préalable des instances cantonales. D'ailleurs en Suisse, les principes du droit des gens sont considérés comme du droit interne. Lors donc qu'un débiteur attaque un séquestre en se fondant sur le principe de l'immunité de juridiction des Etats étrangers, il soulève une contestation qui doit être assimilée à un conflit né de la violation "de prescriptions de droit fédéral sur la délimitation de la compétence des autorités ... à raison du lieu" (ATF 44 I 53 ; ATF 56 I 246 ; ATF 61 I 259). Or les conflits de ce genre peuvent être portés devant le Tribunal fédéral par la voie du recours de droit public sans épuisement préalable des instances cantonales (ATF 51 I 132 ; ATF 52 I 142 ; ATF 53 I 62).

Il est vrai que si, en ces matières, le recourant n'est pas tenu d'épuiser d'abord les moyens de droit cantonal, il lui est cependant loisible de le faire. Aussi bien certains de ces moyens ont-ils été utilisés en l'espèce (opposition, action en contestation du cas de séquestre, procédure de revendication). D'autres pourront l'être (action en libération ou en reconnaissance de dette dans le cadre de l'opposition faite à la poursuite). On peut se demander dès lors s'il y a lieu, comme le requiert l'intimée, de suspendre l'instruction du recours de droit public jusqu'à droit connu sur ces différentes procédures cantonales. D'après la jurisprudence, la solution de cette question dépend de motifs d'opportunité. En l'espèce, il convient d'observer d'une part que la question de l'immunité de juridiction, dont dépend essentiellement la validité du séquestre attaqué, est une pure question de droit qui peut être jugée sur la base du dossier tel qu'il est constitué, d'autre part que, si l'immunité de juridiction dont se prévaut le recourant est admise, le séquestre devra être annulé de telle sorte que les différentes procédures cantonales en cours deviendront sans objet. Dans ces conditions, pour simplifier la procédure, il est opportun qu'à l'exemple de la solution adoptée dans d'autres affaires analogues (notamment ATF 56 I 183), le Tribunal fédéral statue sans plus attendre sur les griefs qui sont recevables. Il suffira d'observer encore que l'intimée ne peut conclure à l'irrecevabilité du recours en faisant valoir que la créance, dont le séquestre tend à assurer le paiement, dérive d'un acte accompli par le Royaume de Grèce jure

gestionis, et que, lorsqu'ils agissent en cette qualité, les Etats étrangers ne sauraient invoquer le principe de l'immunité de juridiction. Cette question relève du fond et sa solution peut, suivant les cas, conduire à l'admission ou au rejet du recours, mais non à son irrecevabilité.

III. - Violation du principe de l'immunité de juridiction.

7.- Il n'existe aucune disposition légale précisant si et jusqu'à quel point un Etat étranger peut être soumis à la juridiction des tribunaux suisses et faire l'objet de mesures d'exécution forcée sur le territoire de la Confédération. Aussi bien cette question a-t-elle été réglée par la jurisprudence. Selon le Tribunal fédéral, le principe de l'immunité de juridiction des Etats étrangers n'est pas une règle absolue et d'une portée toute générale. Il faut au contraire faire une distinction suivant que l'Etat étranger agit en vertu de sa souveraineté (*jure imperii*) ou comme titulaire d'un droit privé (*jure gestionis*). C'est dans le premier cas seulement qu'il peut invoquer de façon absolue le principe de l'immunité de juridiction. Dans le second, en revanche, il peut être recherché devant les tribunaux d'un autre Etat et faire dans cet Etat l'objet de mesures d'exécution forcée (arrêt Dreyfus, ATF 44 I 49 ss.; arrêt Walder, ATF 56 I 237 ss.; arrêts non publiés du 7 octobre 1938 dans la cause Sogerfin, p. 8, du 12 avril 1940 dans la cause Seckel, p. 7/8, du 17 mai 1955 dans la cause *Repubblica italiana*, p. 5/6). Cependant, même dans cette seconde hypothèse, le Tribunal fédéral n'admet pas sans autre condition la juridiction suisse. Il exige au contraire une circonstance de rattachement. Tout rapport de droit privé assumé par un Etat étranger ne peut pas donner lieu à des mesures de procédure en Suisse. Il faut au moins que ce rapport de droit ait certains liens avec le territoire suisse. Cette exigence a été posée dans l'arrêt Dreyfus déjà, encore qu'implicitement. Dans cette affaire en effet, le Tribunal fédéral a admis que des autorités suisses pouvaient ordonner un séquestre sur les biens de l'Etat autrichien afin de garantir le remboursement d'un emprunt contracté par ledit Etat. La raison essentielle de la solution adoptée a été que l'emprunt avait été émis en Suisse, que l'Autriche s'était obligée à le rembourser en Suisse et en monnaie suisse, de telle sorte qu'en définitive la Suisse apparaissait comme le théâtre de toutes les opérations. Il y avait donc manifestement un lien de rattachement entre le rapport de droit litigieux et le territoire suisse. Dans son arrêt Walder, le Tribunal fédéral a précisé encore sa jurisprudence en ce qui concerne l'exigence du rattachement: pour qu'un rapport de droit, auquel un Etat étranger est partie, puisse être considéré comme rattaché au territoire suisse, il faut ou qu'il soit né ou qu'il doive être exécuté en Suisse, ou tout au moins que le débiteur ait accompli certains actes de nature à créer en Suisse un lieu d'exécution. Sur ce point spécial, la jurisprudence a été encore confirmée dans les arrêts Seckel et *Repubblica italiana*. Contrairement à l'opinion de l'intimée, il n'y a aucune raison de la modifier. Elle n'est d'ailleurs pas particulière à la Suisse et n'est pas devenue depuis son adoption - il y a près de quarante ans - contraire aux règles du droit international en raison du fait que ces règles auraient changé.

8.- Les principes qui viennent d'être exposés ont trouvé leur application dans différents traités signés récemment par la Suisse. (...). Ces différents traités sont conformes à la jurisprudence du Tribunal fédéral en ce sens qu'ils excluent l'immunité de juridiction quand l'Etat est partie à un rapport de droit privé et quand ce rapport de droit a des relations avec le territoire du pays dans lequel il est invoqué. Ainsi, non seulement l'exigence du rattachement posée par le Tribunal fédéral n'est pas contraire aux règles du droit international, mais elle a été codifiée dans certains traités. C'est une autre raison de ne pas l'abandonner.

9.- Il serait d'ailleurs faux de croire que cette jurisprudence est en contradiction avec les arrêtés pris par le Conseil fédéral les 12 juillet 1918 et 24 octobre 1939. Il est vrai que l'arrêté de 1918 exclut complètement le séquestre et les mesures d'exécution forcée à l'égard des biens d'un Etat étranger. Mais, outre qu'il s'agit d'un arrêté pris par le gouvernement en vertu de ses pleins pouvoirs et dans une période profondément troublée, il y a lieu de rappeler qu'en 1923, l'Assemblée fédérale a refusé de reprendre les principes de l'arrêté dans une loi fédérale, en observant que le Tribunal fédéral était compétent pour trancher les contestations relatives à des mesures d'exécution forcée ordonnées à l'égard d'un Etat étranger et qu'il y avait ainsi toutes garanties qu'en cette matière la jurisprudence

fédérale soit uniforme (ATF 56 I 246). De la sorte, l'Assemblée fédérale s'en est en quelque sorte remise au Tribunal fédéral, même si certains de ses membres estimaient qu'il était incompatible avec les règles du droit international d'ordonner des mesures d'exécution forcée à l'égard des biens des Etats étrangers. Aussi bien, le 8 juillet 1926, le Conseil fédéral a-t-il abrogé son arrêté du 12 juillet 1918. Quant à l'arrêté de 1939, pris aussi en vertu des pleins pouvoirs en une période de troubles, et d'ailleurs abrogé depuis le 3 septembre 1948, il n'excluait pas le séquestre ou les mesures d'exécution forcée à l'égard des biens appartenant à un Etat étranger. Il se bornait à les soumettre à l'assentiment du Conseil fédéral. C'est donc bien qu'en principe la mesure était possible.

10.- Le recourant voudrait, il est vrai, que la jurisprudence du Tribunal fédéral, telle qu'elle a été exposée dans les considérants qui précèdent, soit revue sur deux points. Il se demande tout d'abord s'il n'y a pas lieu de faire une distinction entre les actes de juridiction et les actes d'exécution et s'il ne convient pas de reconnaître aux Etats étrangers une immunité absolue en ce qui concerne les actes d'exécution. Cependant, cette question doit être résolue négativement. Dès l'instant qu'on admet dans certains cas qu'un Etat étranger peut être partie devant les tribunaux suisses à un procès destiné à fixer ses droits et ses obligations découlant d'un rapport juridique dans lequel il est intervenu, il faut admettre aussi qu'il peut faire en Suisse l'objet des mesures propres à assurer l'exécution forcée du jugement rendu contre lui. Sinon ce jugement serait dépourvu de ce qui est l'essence même de la sentence d'un tribunal, à savoir qu'elle peut être exécutée même contre le gré de la partie condamnée. Il serait réduit à n'être qu'un simple avis de droit. D'ailleurs, pour être ressenti peut-être de façon moins immédiate que l'exécution, ce simple avis n'en porterait pas moins, comme elle, atteinte à la souveraineté de l'Etat étranger. Si donc, sous prétexte de ménager cette souveraineté, on voulait interdire les actes d'exécution contre un Etat étranger, il faudrait, pour être logique, en faire autant et de manière générale quant aux actes de juridiction, ce qui serait contraire à la pratique couramment suivie dans ce domaine. Le recourant allègue, il est vrai, que la Belgique et l'Italie, qui dérogent dans une mesure particulièrement importante au principe de l'immunité absolue de juridiction, se refusent à admettre des actes d'exécution à l'égard des Etats étrangers ou ne les admettent qu'avec restriction. Toutefois, le Tribunal fédéral s'est déjà exprimé à ce sujet dans son arrêt Walder (ATF 56 I 248/249) et les explications qu'il a données à l'époque sont valables aujourd'hui encore. Il suffit d'ajouter sur ce point que, si les autorités belges en particulier refusent de procéder à des actes d'exécution à l'égard des Etats étrangers, c'est essentiellement par souci d'égalité parce qu'en Belgique l'Etat belge lui-même ne peut faire l'objet d'aucune mesure de ce genre. Pareil motif serait dépourvu de toute valeur en ce qui concerne le droit suisse, qui admet l'exécution forcée contre la Confédération et, dans certaines limites, contre les cantons et les communes. On ne saurait dire non plus que, depuis les principaux arrêts formant la jurisprudence en cette matière, l'opinion dominante se soit modifiée en Suisse sur la question de savoir s'il faut ou non faire une distinction entre les actes d'exécution et de juridiction et accorder aux Etats étrangers l'immunité absolue quant aux actes d'exécution. Au contraire, si l'arrêté pris par le Conseil fédéral le 12 juillet 1918, d'ailleurs dans des circonstances très spéciales, excluait complètement le séquestre et les mesures d'exécution forcée à l'égard des Etats étrangers, celui du 24 octobre 1939 les admettait en principe, moyennant, il est vrai, le consentement du Conseil fédéral. Quant aux récents traités rappelés plus haut, ils admettent également le principe de l'exécution forcée. Sur le plan international, l'opinion ne s'est pas non plus profondément modifiée. En ce qui concerne le domaine législatif, il faut rappeler la loi grecque, citée du reste par le recourant en réplique et qui se borne à soumettre au consentement du Ministère de la justice le séquestre et l'exécution forcée à l'égard d'un Etat étranger. En droit grec, des mesures de ce genre sont donc en principe possibles. Quant à la doctrine et à la jurisprudence étrangères, leur examen ne permet pas d'affirmer qu'aujourd'hui une opinion unanime ou dominante se prononce sans réserve en faveur d'une immunité absolue quant aux actes d'exécution. D'ailleurs l'art. 5 des Résolutions adoptées par l'Institut de droit international le 30 avril 1954 n'exclut le séquestre et l'exécution forcée à l'égard des biens d'un Etat étranger que si ces biens "sont affectés à l'exercice de l'activité gouvernementale qui ne se rapporte pas à une exploitation économique quelconque". Il n'y a dès lors aucune raison de

modifier la jurisprudence du Tribunal fédéral dans la mesure où elle résout le problème de l'immunité de manière semblable pour les actes de juridiction et pour les actes d'exécution.

Le recourant demande en second lieu que la jurisprudence soit revue en tant qu'elle distingue les actes "jure imperii" et les actes "jure gestionis" et qu'elle limite la sphère d'application de l'immunité de juridiction aux actes de la première catégorie seulement. Toutefois au regard de l'état le plus récent de la question dans les pays étrangers, l'argumentation du recourant ne saurait être admise. Ainsi, même les Etats-Unis et la Grande-Bretagne, qui ont défendu longtemps la théorie de l'immunité intégrale, en viennent à l'abandonner. En Grèce, les actes "jure gestionis" d'un Etat étranger ne peuvent pas non plus donner lieu à l'immunité de juridiction. Enfin, si l'art. 1er des Résolutions adoptées le 30 avril 1954 par l'Institut de droit international prévoit que "les tribunaux d'un Etat ne peuvent connaître des litiges ayant trait à des actes de puissance publique accomplis par un Etat étranger, ou par une personne morale relevant d'un Etat étranger", l'art. 3 dispose en revanche que "les tribunaux d'un Etat peuvent connaître des actions contre un Etat étranger et les personnes morales visées à l'article premier, toutes les fois que le litige a trait à un acte qui n'est pas de puissance publique". Dans ces conditions, il n'y a pas lieu non plus de modifier la jurisprudence du Tribunal fédéral en ce qui concerne la distinction entre les actes jure imperii et les actes jure gestionis.

IV. - Examen du cas d'espèce.

11.- Dans les arrêts Dreyfus et Walder, le Tribunal fédéral a admis que les Etats qui avaient émis des emprunts publics avaient accompli un acte jure gestionis. En l'espèce, l'emprunt a été contracté par l'Etat auprès d'une société, en relation avec un contrat de fournitures. Il n'est pas nécessaire de déterminer si cet emprunt est un acte de la puissance publique ou un acte de droit privé; car, en tout cas, la condition exigée par la jurisprudence relative au rattachement n'est pas réalisée. En effet, l'emprunt litigieux n'a pas été contracté en Suisse, mais en Suède auprès d'une société anonyme suédoise, et la somme prêtée a été versée au gouvernement hellénique par une banque anglaise. Le débiteur, c'est-à-dire l'Etat de Grèce, n'a pas accompli certains actes qui seraient de nature à créer en Suisse un lieu d'exécution. Enfin, il ne s'est pas obligé à rembourser l'emprunt en Suisse, puisque le paiement des obligations et des intérêts devait avoir lieu en principe à Athènes, à New-York ou à Londres. Il est vrai que l'art. 3 du contrat de prêt prévoit que le remboursement pourra avoir lieu "à toute autre place au choix du prêteur, le gouvernement hellénique étant avisé à cet effet deux ... mois avant l'échéance de chaque obligation". Toutefois, cette clause toute générale, qui n'indique ni une localité en Suisse ni la Suisse comme telle, mais qui laisse au créancier toute liberté de désigner le lieu où il entend recevoir le paiement de ses obligations, ne permet pas de considérer que les parties ont convenu que l'exécution aurait lieu en Suisse. En tout cas, une clause de ce genre, qui permet de rattacher le lieu d'exécution à n'importe quel pays, ne constitue pas un lien particulier avec la Suisse. Peu importe d'ailleurs que le remboursement des obligations soit réclamé aujourd'hui par un créancier domicilié en Suisse et qui s'est fait "céder" les titres. Cette "cession", indépendante d'ailleurs de la volonté du débiteur, ne change rien au fait que le rapport de droit litigieux ne saurait, étant donné son contenu et les circonstances qui ont entouré sa naissance, avoir de lien avec le territoire suisse. Du moment que ce rapport de droit ne peut être rattaché à la Suisse, le Royaume de Grèce est fondé à invoquer le principe de l'immunité de juridiction des Etats étrangers. L'ordonnance de séquestre du 14 février 1955 et le commandement de payer no 174804 doivent donc être annulés.

Par ces motifs, le Tribunal fédéral admet le recours dans la mesure où il est recevable, annule l'ordonnance de séquestre et le commandement de payer de l'Office des poursuites de Genève

(a)	N° d'enregistrement	CH / 5
(b)	Date	13 décembre 1994
(c)	Service / auteur	1ère Cour civile du Tribunal fédéral Suisse
(d)	Parties	R. c/ République d'Irak
(e)	Points de droit	<p>Contrat de travail. Immunité de juridiction des Etats étrangers.</p> <p>Critères permettant de distinguer les actes accomplis jure imperii des actes accomplis jure gestionis. Application de ces critères au cas d'un traducteur-interprète travaillant pour le compte de l'Etat accréditant.</p>
(f)	n°	0.b.2., 1.b., 2.b.
(g)	Source(s)	ATF 120 II 408 ; www.bger.ch
(h)	Renseignements complémentaires	
(i)	Texte complet – Extraits – Traduction – Résumé	<p>Texte complet sur Internet (en français)</p> <p>Résumé du texte en français : voir ci-dessous</p>

Résumé

Faits

A.- Le 18 juin 1990, la Mission permanente de la République d'Irak auprès de l'Office des Nations Unies à Genève (ci-après: la Mission) a engagé R., ressortissant marocain, en qualité de traducteur-interprète. Le travail confié à cette personne consistait dans la traduction de l'arabe en français de tous documents et lettres de la Mission adressés à des destinataires de langue française et dans la traduction en arabe de la correspondance reçue en français. S'y ajoutait la rédaction de certaines lettres. R. fonctionnait aussi comme interprète lorsque des conférences avaient lieu dans les locaux de la Mission. L'ambassadeur auprès de ladite Mission l'a, en outre, chargé d'assister ses enfants dans leurs tâches scolaires.

Les rapports de travail ont apparemment pris fin en 1992.

B.- Le 18 janvier 1993, R. a assigné la République d'Irak devant les tribunaux genevois en vue d'obtenir le paiement d'un montant qu'il a arrêté à 73'405 fr. 60. La défenderesse a excipé de son immunité de juridiction.

Le Tribunal des prud'hommes du canton de Genève a admis cette exception et prononcé l'irrecevabilité de la demande. Saisie par le demandeur, la Chambre d'appel des prud'hommes du canton de Genève a confirmé ce jugement, au motif que le demandeur avait été engagé pour s'acquitter de tâches étroitement liées à l'exercice de la puissance publique, circonstance qui justifiait d'admettre l'exception d'immunité de juridiction dans le cas particulier.

C.- Le demandeur interjette un recours en réforme tendant à l'annulation de l'arrêt cantonal, au rejet de l'exception soulevée par la défenderesse et au renvoi de la cause à la juridiction des prud'hommes pour qu'elle statue sur le fond. A l'appui de ce recours, il fait valoir, en résumé, qu'il n'était qu'un employé subalterne de l'Etat défendeur, car il ne disposait d'aucun pouvoir de décision.

Le Tribunal fédéral admet le recours et fait droit aux conclusions du demandeur.

Extrait des considérants:

5.- a) Il est admis, d'une manière générale, que le privilège de l'immunité diplomatique n'est pas une règle absolue. L'Etat étranger n'en bénéficie que lorsqu'il agit en vertu de sa souveraineté (*jure imperii*). Il ne peut, en revanche, s'en prévaloir s'il se situe sur le même plan qu'une personne privée, en particulier s'il agit en qualité de titulaire d'un droit privé (*jure gestionis*).

Les actes accomplis *jure imperii*, ou actes de souveraineté, se distinguent des actes accomplis *jure gestionis*, ou actes de gestion, non par leur but mais par leur nature. Pour qualifier un acte donné, l'autorité appelée à statuer peut également recourir à des critères extérieurs à cet acte. Elle procédera aussi, dans chaque cas d'espèce, à une comparaison de l'intérêt de l'Etat étranger à bénéficier de l'immunité avec celui de l'Etat du for à exercer sa souveraineté juridictionnelle et celui du demandeur à obtenir une protection judiciaire de ses droits. Enfin, de tout temps, la jurisprudence suisse a marqué une tendance à restreindre le domaine de l'immunité (pour l'ensemble de ces principes, cf. l'[ATF 113 Ia 172](#), CH/11 et les arrêts cités).

b) En matière de contrat de travail, la jurisprudence admet que, si l'Etat accréditant peut avoir un intérêt important à ce que les litiges qui l'opposent à des membres de l'une de ses ambassades exerçant des fonctions supérieures ne soient pas portés devant des tribunaux étrangers, les circonstances ne sont pas les mêmes lorsqu'il s'agit d'employés subalternes. En tout cas lorsque l'employé n'est pas un ressortissant de l'Etat accréditant et qu'il a été recruté puis engagé au for de l'ambassade, la juridiction du for peut être reconnue dans la règle. L'Etat accréditant n'est alors pas touché dans l'exercice des tâches qui lui incombent en sa qualité de titulaire de la puissance publique ([ATF 110 II 255](#), CH/2).

Pour décider si le travail accompli par une personne qui est au service de l'Etat accréditant ressortit ou non à l'exercice de la puissance publique, il faut partir des constatations souveraines de la dernière autorité cantonale touchant l'activité litigieuse, telle qu'elle a été déployée dans le cas concret, sans tenir compte des allégations contraires ou nouvelles des parties à ce sujet. En effet, à défaut de législation déterminant quelles fonctions permettent à l'Etat accréditant de se prévaloir, à l'égard de leurs titulaires, de son immunité, la désignation de la fonction exercée ne saurait être, à elle seule, un critère décisif. Aussi bien, selon les tâches qui lui sont confiées, tel employé apparaîtra comme un instrument de la puissance publique alors que tel autre, censé occuper un poste identique, devra être classé dans la catégorie des employés subalternes. L'activité de traducteur-interprète n'échappe pas à la règle, nonobstant les tentatives qui ont été faites, ici et là, de la rattacher, in abstracto, à l'une des deux catégories en présence ([ATF 110 II 255](#) p. 264 in limine, où le Tribunal fédéral range les traducteurs dans la catégorie du personnel de bureau CH/2).

c) En l'espèce, le demandeur, qui n'est pas un ressortissant de l'Etat défendeur, a été recruté au moyen d'une annonce que la défenderesse avait fait paraître dans un hebdomadaire genevois et il a été engagé au for de la Mission. Touchant un salaire modeste, il a assuré la traduction de l'arabe en français, et vice versa, de l'ensemble des documents concernant la Mission, a rédigé lui-même certaines lettres et a participé, comme interprète, à des conférences ou réceptions organisées dans les locaux de la Mission. Outre ces activités, il a assisté les enfants de l'ambassadeur dans leurs tâches scolaires. Ce dernier travail ne constituait assurément pas un acte *jure imperii*. La même conclusion s'impose s'agissant de l'activité de traducteur-interprète proprement dite, même si l'on se trouve sans doute en présence d'un cas limite. En effet, le traducteur-interprète ne participe pas, en règle générale, à la formation de la volonté de celui qui l'emploie, mais s'attache uniquement à rendre le plus fidèlement possible le sens de ce qu'il lit ou entend. Certes, une telle activité peut revêtir un caractère confidentiel marqué, suivant la teneur des écrits à traduire ou des propos à interpréter. Ce n'est toutefois pas là un élément décisif pour qualifier l'activité en question, puisqu'aussi bien d'autres personnes travaillant au service de l'Etat accréditant sont amenées soit à accomplir des tâches confidentielles, soit à prendre connaissance de données ou informations de cette nature, bien qu'elles occupent des postes subalternes, tels les secrétaires, les dactylos, les archivistes, les chauffeurs, les membres du service de sécurité, etc. Par conséquent, hormis l'aspect intellectuel du travail confié au demandeur, rien ne distinguait, en l'occurrence, cette activité, sous l'angle du pouvoir décisionnel, de celle accomplie par le personnel administratif et technique de la Mission. Que le traducteur-interprète ait encore rédigé lui-même certaines lettres n'y change rien, car il n'est pas établi, ni même allégué, qu'un tel travail ait dépassé les limites usuelles, c'est-à-dire la formulation de la pensée d'autrui sur les indications et sous le contrôle des signataires desdites lettres. Dans ces conditions, il n'est pas possible de voir, dans l'activité litigieuse, autre chose que l'exercice d'une fonction subalterne.

Cependant, cette circonstance ne suffit pas à elle seule pour que la Suisse puisse connaître du litige. Tout rapport de droit privé assumé par un Etat étranger ne peut pas donner lieu à des mesures de procédure en Suisse. Encore faut-il que le rapport de droit en cause ait certains liens avec le territoire suisse ("*Binnenbeziehung*"), c'est-à-dire qu'il y soit né ou doive y être exécuté ou, tout au moins, que le débiteur ait accompli certains actes de nature à y créer un lieu d'exécution ([ATF 106 Ia 142](#), CH/1). En l'occurrence, le demandeur, qui séjournait en Suisse depuis 1983, a été recruté et engagé à Genève, ville dans laquelle il a exercé son activité. La relation avec la Suisse est ainsi incontestable.

Force est, dès lors, de constater, au terme de cet examen, que l'exception d'immunité soulevée par la défenderesse est mal fondée, contrairement à l'avis des juridictions genevoises, ce qui entraîne l'admission du recours, l'annulation de l'arrêt attaqué et le renvoi de la cause à la cour cantonale pour qu'elle se prononce sur le fond après avoir examiné, le cas échéant, les autres questions de recevabilité qui pourraient se poser.

(a)	N° d'enregistrement	CH / 6
(b)	Date	6 février 1985
(c)	Service / auteur	1ère Cour de droit public du Tribunal fédéral Suisse
(d)	Parties	Italie c/ X. et Cour d'appel du canton de Bâle-ville
(e)	Points de droit	<p>Immunité en droit international public; procès civil contre un Etat étranger.</p> <p>Admissibilité du recours de droit public formé par un Etat étranger en ce qui concerne non seulement l'immunité d'exécution mais aussi l'immunité de juridiction.</p> <p>Conditions de recevabilité d'un procès civil contre un Etat étranger; Principe de l'immunité restreinte; nature de la réclamation de l'Etat étranger en tant que critère de distinction. Prise en considération - mais non pas application - du droit public étranger pour déterminer la nature de cette réclamation.</p>
(f)	n°	0.a., 1.a., 2.c.
(g)	Source(s)	ATF 111 la 52 ; www.bger.ch
(h)	Renseignements complémentaires	<p>Jurisprudence constante du Tribunal fédéral en matière d'immunité limitée :</p> <p>ATF 44 I 53 (arrêt de principe)</p> <p>ATF 104 la 368</p> <p>ATF 86 I 27</p> <p>ATF 82 I 85, CH / 4</p> <p>ATF 56 I 247</p>
(i)	Texte complet – Extraits – Traduction – Résumé	<p>Texte complet sur Internet (en allemand)</p> <p>Résumé du texte en français : voir ci-dessous</p>

Résumé

Faits

A.- X. verlangt unter Berufung auf ihr Eigentumsrecht vom Staat Italien die Herausgabe historischer Grabplatten, welche dieser als Beweismittel in einem Strafverfahren von der Schweiz auf dem Rechtshilfeweg erlangt hatte. Das Zivilgericht des Kantons Basel-Stadt trat auf die Klage nicht ein. Es erachtete die Berufung des Staates Italien auf seine völkerrechtliche Immunität als begründet, weshalb es seine Zuständigkeit zur Behandlung des Rechtsstreits verneinte. X. zog dieses Urteil an das Appellationsgericht des Kantons Basel-Stadt weiter, welches das Verfahren auf die Zuständigkeitsfrage beschränkte. Mit Urteil vom 11. Mai 1984 hob das Appellationsgericht den vorinstanzlichen Entscheid auf und wies die Sache zur materiellen Beurteilung an das Zivilgericht zurück. Der Staat Italien führt mit Eingabe vom 29. Juni 1984 staatsrechtliche Beschwerde beim Bundesgericht. Er rügt eine Verletzung der völkerrechtlichen Immunität und der Zuständigkeit und beantragt, das angefochtene Urteil aufzuheben. Das Bundesgericht heisst die Beschwerde gut.

Extrait des considérants:

2.- ...

a) Der Staat Italien rügt mit der staatsrechtlichen Beschwerde eine Verletzung seiner völkerrechtlichen Immunität sowie "der Zuständigkeit". Einem als Völkerrechtssubjekt auftretenden fremden Staat steht die staatsrechtliche Beschwerde grundsätzlich nicht offen. (...). Der fremde Staat, der die Verletzung der Vorschriften eines Staatsvertrags oder der Regeln des Völkerrechts rügen will, kann das nur mit einer Aufsichtsbeschwerde an den Bundesrat tun ([BGE 106 Ia 144/145](#), CH / 1).

b) Anders verhält es sich, wenn in der Schweiz liegende Vermögensgegenstände eines fremden Staates mit Arrest belegt werden sollen. In diesem Fall ist der fremde Staat - selbst wenn er als Völkerrechtssubjekt auftritt - betroffen wie ein Privater. Das Bundesgericht hat denn auch seit Jahrzehnten staatsrechtliche Beschwerden fremder Staaten gegen solche Zwangsvollstreckungs-massnahmen zugelassen ([BGE 106 Ia 142](#), CH / 1 ; [104 Ia 367](#), CH / 20 und in diesen Urteilen zitierte ältere Entscheide bis zurück zu BGE 44 I 49 ff.). Soweit ersichtlich, ist denn auch die Legitimation fremder Staaten zur staatsrechtlichen Beschwerde in diesem Umfang in der Literatur der letzten Jahrzehnte nie mehr in Frage gestellt worden.

Im vorliegenden Fall geht es allerdings nicht um eine Arrestnahme. Auch steht keine Zwangsvollstreckungsmassnahme des kantonalen Rechts in Frage, die für das Gebiet des Sachenrechts wohl als einem Arrest gleichwertig betrachtet werden müsste; eine solche Zwangsvollstreckung käme indessen erst dann in Frage, wenn ein Sachurteil zugunsten der Beschwerdegegnerin vorläge und sich zudem die vom Urteilsdispositiv erfassten Sachen im örtlichen Zugriffsbereich der schweizerischen Behörden befänden. Zu prüfen ist somit, ob die staatsrechtliche Beschwerde wegen Verletzung der völkerrechtlichen Immunität eines fremden Staates auch dann zulässig ist, wenn dieser lediglich veranlasst werden soll, sich auf eine Zivilklage einzulassen, Zwangsmassnahmen jedoch noch nicht in Aussicht stehen.

c) Sämtliche veröffentlichten Urteile des Bundesgerichts zur Frage der völkerrechtlichen Immunität fremder Staaten hängen mit Arrestverfahren nach dem Schuldbetreibungs- und Konkursrecht zusammen. Daraus lässt sich indessen nicht schliessen, die staatsrechtliche Beschwerde wegen Verletzung der Immunität sei ausschliesslich in diesem Fall zulässig. Sieht man vom Bereich des Familienrechts ab, so geht es bei der überwiegenden Zahl der Zivilprozesse um Geldforderungen. Für Prozesse dieser Art gegen einen ausländischen Staat wird aber in der Regel kein schweizerischer Gerichtsstand gegeben sein, es sei denn, die klagende Partei begründe ihn durch Arrestierung von Vermögenswerten. Es dürfte weitgehend an diesem äusseren Umstand liegen, dass die veröffentlichten Urteile des Bundesgerichts zur Frage der Staatenimmunität durchwegs mit einem solchen Arrest zusammenhängen. Der Staat Italien beruft sich für die Zulässigkeit der staatsrechtlichen

Beschwerde gegen seinen Einbezug in ein gerichtliches Erkenntnisverfahren auf ein Urteil vom 19. Juni 1980 ([BGE 106 Ia 142](#), CH / 1). Dort wird an drei Stellen von der Immunität fremder Staaten "im Erkenntnis- und Vollstreckungsverfahren" gesprochen, ohne dass zwischen diesen beiden Formen der Immunität unterschieden würde; der hier zu erörternden Frage kam keine praktische Bedeutung zu. Dagegen hat das Bundesgericht in zwei früheren Urteilen zwischen der Immunität im Erkenntnisverfahren ("immunité de juridiction") und jener im Vollstreckungsverfahren ("immunité d'exécution") unterschieden ([BGE 86 I 23](#) ff, CH / 8 ; [82 I 75](#), CH / 4). Das Bundesgericht kam in beiden Urteilen zum Schluss, es sei nicht gerechtfertigt, die beiden Immunitätsansprüche eines fremden Staates verschieden zu behandeln. Im erstgenannten Fall verneinte es zunächst die Immunität der Vereinigten Arabischen Republik im Erkenntnisverfahren ([BGE 86 I 29/30](#), CH / 8). Anschliessend führte es aus, das Vollstreckungsrecht folge aus der Rechtsprechungshoheit, weshalb auch keine Vollstreckungsimmunität gegeben sei ([BGE 86 I 30/31](#), CH / 8). Einlässlicher wurden diese Fragen im zweitgenannten Urteil erörtert. In jener Sache hatte das Königreich Griechenland u.a. den Standpunkt eingenommen, den fremden Staaten sollte im Vollstreckungsverfahren absolute Immunität zuerkannt werden, im Gegensatz zum Erkenntnisverfahren, wo unterschieden wird, ob der ausländische Staat in Ausübung seiner Hoheitsgewalt (iure imperii) oder als Subjekt von Privatrechtsverhältnissen (iure gestionis) gehandelt hat. Nach einlässlicher Auseinandersetzung mit Literatur und Praxis gelangte das Bundesgericht zum Schluss, dass kein Anlass zur Änderung der Rechtsprechung bestehe, wonach der Immunitätsschutz für fremde Staaten im Erkenntnis- und im Vollstreckungsverfahren in gleicher Weise gilt ([BGE 82 I 88](#), CH 4).

Verhält es sich so, ist nicht ersichtlich, weshalb ein fremder Staat zum Schutz seiner Immunität das Bundesgericht im Erkenntnisverfahren nicht ebenso mit staatsrechtlicher Beschwerde anrufen können sollte wie im Vollstreckungsverfahren. Es hätte wenig praktischen Sinn, den ausländischen Staat zu verpflichten, als Partei in einem Erkenntnisverfahren bis zum rechtskräftigen Urteil mitzuwirken, bevor feststeht, ob er sich nicht im späteren Vollstreckungsverfahren auf seine Immunität berufen könne. Wenn das Bundesgericht im genannten Entscheid ausgeführt hat, das Urteil liefe in einem solchen Fall auf ein blosses Rechtsgutachten hinaus ([BGE 82 I 89](#), CH / 4), so mag das vielleicht etwas absolut ausgedrückt sein; so wäre es denkbar, dass sich der fremde Staat im Hinblick auf die Wahrung guter Beziehungen zum Urteilsstaat freiwillig einem rechtskräftigen Urteil unterwirft. Indessen bleibt der Grundgedanke richtig, wonach es jedenfalls ein Gebot der Zweckmässigkeit ist, dass der fremde Staat, der seine Immunität geltend machen will, dazu bereits im Erkenntnisverfahren ermächtigt sein soll.

d) Seit die beiden erwähnten Urteile ergingen, sind zwei Rechtsänderungen von Bedeutung eingetreten. In materieller Hinsicht ist zu beachten, dass die Schweiz mit Wirkung ab 7. Oktober 1982 dem Europäischen Übereinkommen über Staatenimmunität vom 16. Mai 1972 beigetreten ist. In formeller Hinsicht ist auf die am 1. Oktober 1969 in Kraft getretene Änderung des Bundesgesetzes über die Organisation der Bundesrechtspflege zu verweisen. Was das Übereinkommen betrifft, so geht dieses zwar in der Frage, unter welchen Voraussetzungen die Immunität der Vertragsstaaten im Vollstreckungsverfahren anzuerkennen sei, weiter als die schweizerische Praxis, wie sie in der zitierten Rechtsprechung des Bundesgerichts zum Ausdruck kommt. Die erweiterte Vollstreckungsimmunität unter den Mitgliedstaaten bildet jedoch kein entscheidendes Argument dagegen, dass die staatsrechtliche Beschwerde wie bisher bereits im Erkenntnisverfahren zugelassen wird. Allerdings müssen dabei im Verhältnis zwischen den Mitgliedstaaten nunmehr materiell andere Gesichtspunkte wegleitend sein als für den Entscheid über die Vollstreckungsimmunität.

Die Änderung des Bundesgesetzes über die Organisation der Bundesrechtspflege hat für das Gebiet der staatsrechtlichen Beschwerde keine unmittelbaren Neuerungen gebracht und generell die Zuständigkeit des Bundesgerichts jedenfalls nicht eingeschränkt. Die staatsrechtliche Beschwerde könnte auf einem Gebiet, wo sie vorher zulässig war, durch die Revision nur ausgeschlossen worden sein, wenn ein anderes Verfahren zur Verfügung gestellt worden wäre, in dem die nämlichen Rügen erhoben werden können (Art. 84 Abs. 2

OG). Das trifft im vorliegenden Fall nicht zu; namentlich kann der fremde Staat nicht mit Beschwerde gemäss Art. 73 VwVG an den Bundesrat gelangen.

e) Der Staat Italien stützt seine Beschwerde auf Art. 84 Abs. 1 lit. c und d OG. Staatsrechtliche Beschwerden dieser Art setzen die Erschöpfung des kantonalen Instanzenzugs nicht voraus, sondern können unmittelbar im Anschluss an den Hoheitsakt erhoben werden, der Anlass zur Beschwerdeführung gibt ([BGE 106 Ia 145/146](#), CH / 1 mit Hinweisen). Die vorliegende, im Anschluss an einen Rückweisungsentscheid erhobene Beschwerde erweist sich somit auch unter diesem Gesichtswinkel als zulässig.

f) Auf die staatsrechtliche Beschwerde ist demnach einzutreten, soweit mit ihr eine Verletzung der völkerrechtlichen Immunität des Staates Italien gerügt wird. Nicht völlig klar ist, ob der daneben erhobenen Rüge der Verletzung von Bestimmungen über die örtliche Zuständigkeit selbständige Bedeutung zukommt. Soweit das zutreffen sollte, ist auf die Beschwerde nicht einzutreten (vgl. E. 2a). Die Rüge ist jedoch in jedem Fall zulässig, soweit sie sich unmittelbar aus der Anrufung der völkerrechtlichen Immunität ergibt ([BGE 107 Ia 174](#), CH / 19).

3.- Zwischen der Schweiz und Italien besteht kein Staatsvertrag, der sich auf die Frage der gegenseitigen Immunität der beiden Staaten beziehe. Wie erwähnt, ist die Schweiz zwar dem Europäischen Übereinkommen über Staatenimmunität beigetreten; doch gehört Italien dem Übereinkommen bis heute nicht an. In der Beschwerde wird denn auch nicht geltend gemacht, das angefochtene Urteil verletze eine staatsvertragliche Bestimmung. Der Rechtsstreit ist daher aufgrund der ungeschriebenen Regeln des Völkerrechts zu entscheiden (...). Die im Übereinkommen enthaltenen Grundsätze können immerhin als Ausdruck der Entwicklungstendenz des modernen Völkerrechts betrachtet und in diesem Sinne mit herangezogen werden ([BGE 104 Ia 368/369](#), CH / 20).

4.- a) Es kann heute als unbestritten gelten, dass im Erkenntnisverfahren dem ausländischen Staat jedenfalls dann Immunität zukommt, wenn sich der Rechtsstreit auf seine hoheitliche Tätigkeit (*ius imperii*) bezieht. Ist er dagegen als Träger von Privatrechten aufgetreten, hat er mithin *iure gestionis* gehandelt, so lässt die bundesgerichtliche Rechtsprechung die Klage gegen ihn zu, sofern das zu beurteilende Rechtsverhältnis eine genügende Binnenbeziehung zur Schweiz aufweist ([BGE 106 Ia 147/148](#), CH / 1 ; [104 Ia 369](#), CH / 20 mit Hinweisen auf ältere Urteile). Beim Entscheid darüber, ob der Streit auf "*ius imperii*" oder auf "*ius gestionis*" beruhe, kann nur die Natur des Anspruchs massgebend sein, auf den sich der fremde Staat beruft. Auf der Seite der klagenden Privatperson ergäbe diese Unterscheidung keinen Sinn.

Im vorliegenden Fall stützt der Staat Italien seinen Eigentumsanspruch nicht auf rechtsgeschäftliches Handeln (*ius gestionis*); er leitet ihn vielmehr aus seiner öffentlichrechtlichen Gesetzgebung über den Schutz von Gegenständen von historischem und archäologischem Wert ab (Art. 826 Abs. 2 des italienischen *codice civile*). Das war nie ernsthaft bestritten und liegt auf der Hand. Geht es aber um einen Anspruch an einer beweglichen Sache, den der Staat Italien als Hoheitsträger (*iure imperii*) geltend macht, so kann er sich grundsätzlich auf seine völkerrechtliche Immunität berufen. Dabei kommt es nicht darauf an, ob dieser Anspruch sich im Prozess auch als begründet erwiese. Über die Immunität ist vorfrageweise zu entscheiden. Dieses Institut verlöre seinen Sinn, wenn nicht auf die Natur des Anspruchs abgestellt würde, sondern wenn der Staat die Berechtigung dieses Anspruchs zunächst im Prozess unter Beweis stellen müsste.

b) Nicht geteilt werden kann die Auffassung des Appellationsgerichts, wonach die Zuerkennung der Immunität an den Staat Italien unter den hier gegebenen Voraussetzungen auf die Anerkennung ausländischen öffentlichen Rechts hinauslaufen würde, was nicht zulässig sei. Das Gericht folgt dabei dem von der Beschwerdegegnerin im kantonalen Verfahren eingeholten Privatgutachten von Professor Pierre Lalive. Der Gutachter stützt seine Auffassung auf einen Entscheid des Bundesgerichts aus dem Jahre 1956 ([BGE 82 I 196](#)). In jenem Urteil ging es um die Frage, ob ein ausländischer Enteignungsakt in der Schweiz anzuerkennen sei. Das Bundesgericht führte dazu aus, ausländisches öffentliches

Recht könne in der Schweiz weder angewendet noch vollzogen werden, es sei denn, die schweizerische Rechtsordnung verlange dies. Hieran wäre unter vergleichbaren Verhältnissen festzuhalten. Indessen war damals nicht darüber zu befinden, ob einem ausländischen Staat kraft völkerrechtlichen Gewohnheitsrechts gerichtliche Immunität zustehe. In einem Verfahren dieser Art muss notwendigerweise zum Entscheid über die Frage der Immunität ausländisches öffentliches Recht berücksichtigt werden. Gerade die von der Schweiz stets vertretene Auffassung, wonach zwischen Handlungen "iure imperii" und "iure gestionis" zu unterscheiden ist, liesse sich nicht durchsetzen, wenn das ausländische öffentliche Recht unbeachtet bleiben müsste. Das Bundesgericht hat denn auch in früheren Urteilen über die Immunität fremder Staaten auf ausländisches öffentliches Recht Bezug genommen ([BGE 104 Ia 375](#), CH / 20). Auch in Auslieferungs- und Rechtshilfesachen könnten die zuständigen schweizerischen Behörden ihre Aufgabe ohne Mitberücksichtigung des ausländischen öffentlichen Rechts oft nicht erfüllen. Allerdings ist das ausländische öffentliche Recht nicht materiell anzuwenden; es ist nicht darüber zu entscheiden, ob der Anspruch begründet ist, sondern nur, welcher Natur er ist. Zwischen der im genannten Urteil geäusserten Auffassung ([BGE 82 I 197](#)) und der hier vertretenen besteht somit kein unüberbrückbarer Widerspruch.

5.- (...)

d) Wie sich aus de[m] vorstehenden Erwägung 4a (...) ergibt, hat dieser Entscheid nicht den Sinn, dass nunmehr Beweise zu erheben wären; vielmehr ist die Immunität des Beschwerdeführers zu bejahen. (...)

(a)	N° d'enregistrement	CH / 7
(b)	Date	16 novembre 1994
(c)	Service / auteur	1ère Cour civile du Tribunal fédéral Suisse
(d)	Parties	M. c/ République Arabe d'Egypte
(e)	Points de droit	<p>Contrat de travail. Immunité de juridiction des Etats étrangers.</p> <p>En l'absence de traité international liant l'Etat accréditant et l'Etat du for, la plus grande réserve s'impose quant à la référence à une convention - en l'occurrence, la Convention européenne du 16 mai 1972 sur l'immunité des Etats - que l'Etat défendeur n'a pas signée, lorsqu'il s'agit de statuer sur l'immunité de juridiction de cet Etat.</p> <p>Rappel des principes jurisprudentiels touchant l'immunité de juridiction, notamment en matière de contrat de travail. Le fait que le demandeur est un ressortissant de l'Etat défendeur ne justifie pas à lui seul l'admission de l'exception d'immunité de juridiction.</p>
(f)	n°	0.b.2., 1.b., 2.c.
(g)	Source(s)	ATF 120 II 400 ; www.bger.ch
(h)	Renseignements complémentaires	
(i)	Texte complet – Extraits – Traduction – Résumé	<p>Texte complet sur Internet (en français)</p> <p>Résumé du texte en français : voir ci-dessous</p>

Résumé

Faits

A.- M. est un ressortissant égyptien. Arrivé en Suisse en 1979, il a travaillé à Genève pour le compte du Consulat d'Arabie Saoudite, de 1984 à 1987, puis pour celui du Consulat d'Egypte, en 1987 et 1988. En 1988, M. a été engagé à plein temps comme deuxième chauffeur de la Mission permanente de la République Arabe d'Egypte auprès de l'Office européen des Nations Unies, à Genève. A la fin janvier 1992, le chef de cette Mission l'a congédié

B.- Le 10 juin 1992, M. a ouvert action contre la République Arabe d'Egypte pour obtenir le paiement de 15'045 fr. 10. D'entrée de cause, la défenderesse a excipé de son immunité diplomatique. Le Tribunal des prud'hommes du canton de Genève a admis cette exception et déclaré la demande irrecevable. La Chambre d'appel des prud'hommes du canton de Genève a confirmé ce jugement. A son avis, un Etat étranger peut invoquer valablement son immunité de juridiction lorsqu'il est cité devant les tribunaux suisses par l'un de ses ressortissants employé comme agent, même subalterne, dans son ambassade ou sa mission diplomatique en Suisse.

C.- Le demandeur interjette un recours en réforme. Le Tribunal fédéral admet le recours.

Extrait des considérants:

2.- Aucune convention à laquelle la République Arabe d'Egypte et la Suisse seraient parties ne règle la question litigieuse. En ce domaine, il n'existe pas de principes généraux de rang supranational qui régiraient la matière de manière exhaustive. Les conceptions varient selon les époques ou les groupes culturels. Le droit des immunités est dans une large mesure un droit de rang national, même si l'on peut rattacher au droit coutumier international un minimum de protection en faveur des Etats étrangers. Aussi la question de savoir si la défenderesse est soumise ou non à la juridiction suisse doit-elle être résolue à la lumière des principes généraux du droit international public tels qu'ils peuvent être dégagés de la jurisprudence, de la doctrine, ainsi que des solutions qui ont été retenues dans les conventions internationales réglant les conflits de juridiction entre Etats. La compétence de la juridiction suisse a été reconnue pour trancher un litige issu des rapports de travail d'un ressortissant italien occupé comme

radiotélégraphiste, puis comme aide de bureau, à l'ambassade indienne en Suisse ([ATF 110 II 255](#), CH / 2). Le Tribunal fédéral a considéré que, si des doutes pouvaient exister quant au caractère subalterne de l'activité de radiotélégraphiste, il n'en allait pas de même pour celle d'aide de bureau, exercée en second lieu et pendant plusieurs années par le travailleur en question. Il en a déduit que, dans son ensemble, le travail exécuté par cette personne ne relevait pas du domaine d'activité souverain de l'Etat accréditant (*acta jure imperii*) mais constituait une activité semblable à celle que tout particulier aurait pu déployer (*acta jure gestionis*). Cette cause se distingue de la présente affaire tant en ce qui concerne le travail confié à l'employé qu'au regard de la nationalité de celui-ci. L'arrêt cité et la cause en litige ont, en revanche, ceci de commun que l'Etat défendeur n'est pas partie à la Convention européenne sur l'immunité des Etats conclue à Bâle le 16 mai 1972. Dans ledit arrêt, la portée de cette convention a néanmoins été examinée. La décision attaquée s'y réfère aussi. Il convient donc de rechercher, en premier lieu, si et, le cas échéant, dans quelle mesure les règles contenues dans la Convention peuvent être prises en considération lorsque l'Etat accréditant n'y est pas partie (consid. 3). Il s'agira ensuite de rappeler les autres principes dégagés par la jurisprudence en matière d'immunité diplomatique dans les litiges portant sur des prétentions issues d'un contrat de travail (consid. 4).

3.- a) La Convention énonce, à son article 4, le principe selon lequel, sous réserve des dispositions de l'article 5, un Etat contractant ne peut invoquer l'immunité de juridiction devant un tribunal d'un autre Etat contractant si la procédure a trait à une obligation de l'Etat qui, en vertu d'un contrat, doit être exécutée sur le territoire de l'Etat du for, sauf dans trois hypothèses non réalisées en l'espèce.

L'article 5 règle de manière spéciale la question de l'immunité en matière de litiges ayant pour objet un contrat de travail. Aux termes de son paragraphe 1, un Etat contractant ne peut invoquer l'immunité de juridiction devant un tribunal d'un autre Etat contractant si la procédure a trait à un contrat de travail conclu entre l'Etat et une personne physique, lorsque le travail doit être accompli sur le territoire de l'Etat du for. Ce principe ne s'applique toutefois pas dans certaines hypothèses, en particulier lorsque la personne physique a la nationalité de l'Etat employeur au moment de l'introduction de l'instance (art. 5 par. 2 let. a de la Convention). En l'espèce, le demandeur se trouve dans une telle situation puisqu'il est ressortissant de l'Etat défendeur.

b) Quant à la portée de la Convention à l'égard d'un Etat qui ne l'a pas signée, la jurisprudence a passablement fluctué. Dans un premier arrêt, rendu le 15 novembre 1978, le Tribunal fédéral a jugé que les principes contenus dans la Convention peuvent être considérés comme l'expression des tendances modernes du développement du droit des gens, notamment en Europe occidentale, et conduisent à un résultat ne s'écartant guère de la pratique suisse dominante, encore qu'ils soient moins larges que celle-ci dans l'admission de l'immunité des Etats étrangers ([ATF 104 Ia 367](#), CH / 20).

La jurisprudence s'est ensuite montrée plus restrictive. Dans un arrêt de 1979, rendu en matière d'immunité d'exécution, le Tribunal fédéral a précisé qu'en l'absence de tout traité liant l'Etat recourant et la Suisse en matière d'immunité, il convient de s'en tenir à la jurisprudence de la Suisse dans ce domaine. En conséquence, toute référence éventuelle à la Convention, en tant qu'expression de tendances récentes du droit international public, doit tenir compte de ce que, sur des points importants, ce traité repose sur des conceptions qui divergent de celles qui fondent la jurisprudence du Tribunal fédéral (arrêt du 20 juillet 1979, dans la cause République Arabe d'Egypte c. Cinetelevision International Registered Trust (Cinetel), consid. 4c, publié partiellement in: Annuaire suisse de droit international [ASDI], 37/1981, p. 207 ss, 211). Se référant à ce précédent, le Tribunal fédéral a souligné

ultérieurement que l'[ATF 104 Ia 367](#) (CH / 20) ne signifiait pas que la Convention reflétait l'état actuel du droit des gens, ajoutant qu'elle ne saurait, en particulier, traduire l'état du droit coutumier dans les domaines qu'elle a réglés justement afin d'éviter les difficultés qui étaient apparues dans le passé relativement à l'étendue de l'immunité de juridiction dans ces domaines-là ([ATF 110 II 255](#), CH / 2).

Cependant, dans un autre arrêt rendu deux mois plus tôt, le Tribunal fédéral en était revenu à sa conception première qui permettait de prendre en considération la Convention, en tant qu'expression de la tendance la plus récente du droit des gens, même lorsqu'elle ne s'appliquait pas dans un cas donné ([ATF 110 Ia 43](#) CH / 13). Il a exprimé la même opinion l'année d'après ([ATF 111 Ia 52](#), CH / 6).

Depuis lors, la jurisprudence a pris à nouveau un tour plus restrictif. Ainsi, dans un arrêt rendu en matière d'exécution des jugements, le Tribunal fédéral, après avoir souligné que le système de la Convention constitue une unité, en a tiré la conclusion qu'un tel système ne peut être appliqué de manière raisonnable qu'en tant qu'ensemble cohérent ou ne pas être appliqué du tout, partant que l'application de dispositions isolées de ce traité international à des Etats qui ne l'ont pas signé n'est pas justifiée (consid. 4, non publié, de l'[ATF 111 Ia 62](#), traduit in: SJ 1986 p. 38/39). Par la suite, la jurisprudence n'a plus changé de cap ([ATF 113 Ia 172](#), CH / 11 ; [112 Ia 148](#), CH / 10).

c) [En doctrine]

d) L'évolution de la jurisprudence révèle qu'il est extrêmement délicat de tenter de se prononcer sur l'immunité d'un Etat en s'inspirant d'une convention qui ne le lie pas. Cela est d'autant plus vrai que la convention invoquée n'a pour parties qu'un petit nombre d'Etats

européens et que l'Etat qui allègue son immunité dans le présent litige appartient à un autre continent. Au surplus, la Convention est conçue comme un catalogue qui indique les points de rattachement retenus pour éviter qu'un Etat puisse être attiré devant un tribunal étranger lorsque l'objet du litige n'a pas de relations suffisantes avec le territoire de l'Etat du for. Pour limiter la possibilité des Etats contractants d'invoquer l'immunité de juridiction, elle ne se réfère pas à la distinction entre les actes *jure gestionis* et *jure imperii*, mais ne fait que définir une série de situations dans lesquelles cette exception ne peut être invoquée. Aussi, lorsque, comme c'est ici le cas, la Convention n'est pas applicable, la plus grande réserve s'impose même pour de simples références aux solutions fournies par ce traité. Une telle réserve est d'autant plus de mise si la disposition à laquelle il est fait appel constitue une exception ponctuelle à une solution de principe, elle aussi ponctuelle, ce qui est le cas du paragraphe 2 lettre a de l'article 5 de la Convention par rapport au paragraphe 1 de la même disposition, ainsi que dudit article par rapport à l'article 4. Les mêmes réserves doivent être formulées en ce qui concerne d'éventuelles références à des conventions qui seraient encore à l'état de projets.

En l'absence de convention internationale applicable en l'espèce, le problème controversé sera donc résolu à la lumière des principes qui ont été posés par la jurisprudence du Tribunal fédéral, laquelle n'est, au demeurant, nullement immuable puisqu'elle ne fait que refléter l'état actuel de l'évolution des conceptions dans le domaine considéré.

4.- a) Il est admis, d'une manière générale, que le privilège de l'immunité diplomatique n'est pas une règle absolue. L'Etat étranger n'en bénéficie que lorsqu'il agit en vertu de sa souveraineté (*jure imperii*). Il ne peut, en revanche, s'en prévaloir s'il se situe sur le même plan qu'une personne privée, en particulier s'il agit en qualité de titulaire d'un droit privé (*jure gestionis*).

Les actes accomplis *jure imperii*, ou actes de souveraineté, se distinguent des actes accomplis *jure gestionis*, ou actes de gestion, non par leur but mais par leur nature. Pour qualifier un acte donné, l'autorité appelée à statuer peut également recourir à des critères extérieurs à cet acte. Elle procédera aussi, dans chaque cas d'espèce, à une comparaison de l'intérêt de l'Etat étranger à bénéficier de l'immunité avec celui de l'Etat du for à exercer sa souveraineté juridictionnelle et celui du demandeur à obtenir une protection judiciaire de ses droits. Enfin, de tout temps, la jurisprudence suisse a marqué une tendance à restreindre le domaine de l'immunité (pour l'ensemble de ces principes, cf. [l'ATF 113 Ia 172](#), CH/11 et les arrêts cités).

En matière de contrat de travail, la jurisprudence admet que, si l'Etat accréditant peut avoir un intérêt important à ce que les litiges qui l'opposent à des membres de l'une de ses ambassades exerçant des fonctions supérieures ne soient pas portés devant des tribunaux étrangers, les circonstances ne sont pas les mêmes lorsqu'il s'agit d'employés subalternes. En tout cas lorsque l'employé n'est pas un ressortissant de l'Etat accréditant et qu'il a été recruté puis engagé au for de l'ambassade, la juridiction du for peut être reconnue dans la règle. L'Etat accréditant n'est alors pas touché dans l'exercice des tâches qui lui incombent en sa qualité de titulaire de la puissance publique ([ATF 110 II 255](#), CH/2).

b) En l'espèce, le demandeur a travaillé comme chauffeur, ce qui est une fonction subalterne. Les tâches accomplies par un chauffeur ne sont, en effet, pas de celles qui relèvent de l'exercice de la puissance publique; sa situation s'apparente à celle des portiers, jardiniers, cuisiniers, etc. La défenderesse ne tente d'ailleurs pas de démontrer le contraire.

Cependant, cette circonstance ne suffit pas à elle seule pour que la Suisse puisse connaître du litige. Tout rapport de droit privé assumé par un Etat étranger ne peut pas donner lieu à des mesures de procédure en Suisse. Encore faut-il que le rapport de droit en cause ait certains liens avec le territoire suisse ("*Binnenbeziehung*"), c'est-à-dire qu'il y soit né ou doive y être exécuté ou, tout au moins, que le débiteur ait accompli certains actes de nature à y créer un lieu d'exécution ([ATF 106 Ia 142](#) consid. 3b). En l'occurrence, le demandeur a été recruté à Genève, ville dans laquelle il a exercé son activité et où il vit avec son épouse marocaine. Il y habitait depuis 1979 alors que l'engagement litigieux est intervenu en 1988. Après quatre ans d'études, il avait travaillé dans cette ville pour le

Consulat d'Arabie Saoudite puis pour celui d'Egypte. La relation avec la Suisse est ainsi incontestable dans le cas particulier. Que le demandeur soit ressortissant de l'Etat accréditant, dans lequel il ne retourne qu'occasionnellement pour des vacances, ne paraît dès lors pas suffisant pour

faire échec au principe selon lequel un litige tel que celui qui est à l'origine de la présente procédure relève de la juridiction suisse. Au surplus, le dossier ne révèle pas quel intérêt la défenderesse pourrait avoir à se prévaloir de son immunité dans ces conditions, alors que l'intérêt du demandeur à pouvoir plaider à Genève résulte déjà de simples considérations d'ordre pratique.

La solution retenue ici est d'ailleurs conforme à la tendance générale qui va dans le sens d'une limitation du champ d'application de l'immunité des Etats étrangers. La Convention, à laquelle la défenderesse n'est pas partie, n'est, au demeurant, pas applicable en l'espèce. L'exception tirée de la nationalité du travailleur ne saurait donc être accueillie dans toute sa rigueur et sans nuances. Le fait que le demandeur est un ressortissant de l'Etat défendeur ne constitue dès lors qu'une circonstance parmi d'autres, qu'il convient de prendre en considération, non pas pour elle-même, mais bien plutôt dans le cadre de l'examen global de la situation. A cet égard, il ne ressort pas de l'arrêt attaqué que la nationalité de l'intéressé ait joué un rôle déterminant lors de l'engagement du demandeur. De plus, toutes les circonstances qui viennent d'être rappelées, notamment la nature de l'activité exercée par le demandeur et le fait que celui-ci a aussi travaillé comme chauffeur pour un pays tiers, confirment que la nationalité du travailleur ne revêt pas en l'occurrence une importance décisive pour trancher la question de l'immunité de juridiction. Pour le reste, point n'est besoin de tenter de définir in abstracto les cas dans lesquels le fait qu'un travailleur a la nationalité de l'Etat qui l'a engagé permet à ce dernier de se prévaloir de son immunité. Force est ainsi de constater, au terme de cet examen, que l'exception

d'immunité soulevée par la défenderesse est mal fondée.

(a)	N° d'enregistrement	CH / 8
(b)	Date	10 février 1960
(c)	Service / auteur	Tribunal fédéral Suisse
(d)	Parties	République Arabe Unie contre dame X.
(e)	Points de droit	<p>Recevabilité du recours de droit public contre une ordonnance de séquestre (consid. 1).</p> <p>Immunité de juridiction des Etats étrangers. Etendue. Critère de distinction entre l'acte de gouvernement et l'acte de gestion (consid. 2).</p> <p>Immunité d'exécution des Etats étrangers. Etendue. Possibilité de pratiquer un séquestre pour une créance non encore établie (consid. 4).</p> <p>Séquestre de biens appartenant à un Etat étranger et non affectés à un but déterminé (consid. 5).</p>
(f)	n°	0.b.4., 1.b., 2.b.
(g)	Source(s)	ATF 86 I 23 ; www.bger.ch
(h)	Renseignements complémentaires	<p>Recevabilité du recours de droit public contre une ordonnance de séquestre ; violation des principes du droit international ; non-épuisement des voies de recours cantonales :</p> <p>ATF 82 I 75, CH / 4</p>
(i)	Texte complet – Extraits – Traduction – Résumé	<p>Texte complet sur Internet (en français)</p> <p>Résumé du texte en français : voir ci-dessous</p>

Résumé

Faits

A.- Dame X., domiciliée à Zurich, loua au Ministre d'Egypte en Autriche, agissant au nom de la représentation étrangère du Royaume d'Egypte en Autriche, une villa qu'elle possède à Vienne. L'immeuble devait être utilisé pour les services de la mission diplomatique égyptienne et pour la résidence du ministre. Il fut convenu notamment que le loyer serait payable à la Banque cantonale de Schwyz (art. IV) et que le for compétent serait au tribunal ordinaire de Zurich-Ville (art. XIII).

B.- En automne 1957, X., se plaignant que le locataire ne respectait pas ses obligations, dénonça le bail et réclama 187 671.62 shillings autrichiens. En garantie de cette prétention, elle obtint du Tribunal de première instance de Genève une ordonnance de séquestre. Les objets à séquestrer, à concurrence d'un montant de 31 682.16 francs suisses plus intérêts et frais, se trouvaient à l'agence de Genève du Crédit suisse.

Un double de l'ordonnance de séquestre ainsi que le commandement de payer destiné à la valider furent remis au Département politique fédéral pour être notifiés à la République égyptienne par voie diplomatique. L'Ambassade de Suisse au Caire fit une démarche à cette fin auprès du Ministère égyptien des affaires étrangères. Ce dernier refusa cependant de transmettre les documents à l'autorité compétente et d'en accuser réception. Il alléguait que le séquestre et la poursuite n'étaient pas compatibles avec l'immunité de juridiction et d'exécution de l'Etat égyptien.

L'Ambassade de Suisse au Caire établit une attestation certifiant qu'elle avait tenté de remettre les pièces en cause au Ministère égyptien des affaires étrangères. Cette attestation fut transmise à l'Office des poursuites de Genève. Ce dernier, constatant que le commandement de payer n'avait pas été frappé d'opposition, convertit le séquestre en une saisie définitive.

C.- Au printemps 1959, le ministre de la République Arabe Unie (RAU) à Vienne - la RAU, qui comprend notamment l'ancienne Egypte, a repris les obligations de cette dernière - évacua les locaux. X. fit alors expertiser l'immeuble et le mobilier loués. Elle fut ainsi amenée à augmenter sa réclamation et obtint du Tribunal de première instance de Genève un séquestre pour un montant supplémentaire de 91 500 fr.

Une copie de l'ordonnance de séquestre ainsi que le commandement de payer destiné à la valider furent également transmis par voie diplomatique au gouvernement de la RAU, au Caire. Toutefois, le Ministère des affaires étrangères de la RAU refusa de recevoir ces documents, ces "formalités étant", selon lui, "diamétralement opposées aux principes du droit international".

D.- La présence en Suisse de fonds appartenant à l'Egypte s'explique par des contrats d'achat de matériel de guerre que cette dernière a passés en 1953 avec la société Rexim SA à Genève. Pour garantir le paiement du prix d'achat, l'Egypte avait ouvert, par l'intermédiaire de sa banque nationale, des accreditifs au bénéfice de la société Rexim pour un montant d'environ 8 millions. Ces contrats ne furent toutefois exécutés que dans une très faible mesure. En effet Rexim SA obtint un sursis concordataire et l'homologation d'un concordat par abandon d'actif. Le 1er décembre 1959, la RAU et Rexim SA passèrent une transaction pour "mettre fin à l'amiable à tous les litiges les séparant". Le Crédit suisse devait mettre les sommes à la disposition du gouvernement de la RAU. C'est ce qu'il fit, en conservant toutefois 150 000 fr. en couverture des deux séquestres opérés par X.

E.- Agissant par la voie du recours de droit public, la RAU requiert le Tribunal fédéral d'annuler ces deux séquestres ainsi que les actes de poursuite qui les ont suivis. Elle soutient essentiellement que ces actes ne lui ont pas été régulièrement notifiés et qu'ils violent le principe de l'immunité de juridiction des Etats étrangers.

Extrait des considérants:

1.- Si les ordonnances de séquestre étaient annulées, les poursuites qui ont été intentées pour les valider devraient nécessairement l'être aussi, puisque les conditions dont dépend le for spécial auquel elles ont été intentées ne seraient plus réunies. Le recours est dès lors recevable non seulement contre les ordonnances de séquestre, mais aussi contre les commandements de payer qui les ont suivies (RO 82 I 79/80, CH / 4).

Le recours est recevable également du point de vue de la subsidiarité du recours de droit public (art. 84 al. 2 OJ). En effet, les ordonnances de séquestre ne sont susceptibles ni des recours ordinaires énumérés à l'art. 36 LP ni d'une autre voie de droit auprès d'une autorité fédérale (RO 82 I 80, CH / 4).

Enfin, les conditions posées par la loi quant à l'épuisement des moyens de droit cantonal sont remplies, du moment que la recourante se plaint d'une violation du principe de l'immunité de juridiction des Etats étrangers et qu'elle peut dès lors saisir directement la Cour de céans (RO 82 I 82, CH / 4).

2.- Selon la jurisprudence du Tribunal fédéral, le principe de l'immunité de juridiction des Etats étrangers n'est pas une règle absolue et d'une portée toute générale. Il faut au contraire faire une distinction suivant que l'Etat étranger agit en vertu de sa souveraineté (*jure imperii*) ou comme titulaire d'un droit privé (*jure gestionis*). C'est dans le premier cas seulement qu'il a le droit d'invoquer le principe de l'immunité de juridiction. Dans le second, en revanche, il peut être recherché devant les tribunaux suisses et faire, en Suisse, l'objet de mesures d'exécution forcée, à la condition toutefois que le rapport de droit auquel il est ainsi partie soit rattaché au territoire de ce pays, c'est-à-dire qu'il y soit né, ou doive y être exécuté ou tout au moins que le débiteur ait accompli certains actes de nature à y créer un lieu d'exécution (RO 82 I 85/86, CH / 4 et la jurisprudence citée).

Les principes qui guident le Tribunal fédéral inspirent du reste également la jurisprudence de nombreux tribunaux étrangers. Ainsi en va-t-il en Autriche (...), en Allemagne (...), en Italie et en Belgique (...), dans une certaine mesure aussi en France (...). Il semble même que les autorités britanniques et américaines ne soient plus aussi fermement attachées que par le passé à la règle de l'immunité absolue (...). Quant à l'Egypte, même depuis la suppression des tribunaux mixtes, elle limite également l'immunité de juridiction aux actes de puissance publique (...).

Pour distinguer les actes de gestion des actes de gouvernement, le juge doit se fonder non sur leur but, mais sur leur nature, et examiner si, à cet égard, l'acte relève de la puissance publique ou s'il est semblable à celui que tout particulier pourrait accomplir (...). En appliquant la distinction suivant la nature de l'acte, le juge peut du reste s'aider de critères extérieurs à cet acte lui-même. De ce point de vue, le lieu où l'Etat étranger a agi peut fournir parfois certaines indications. Ainsi, lorsqu'un Etat entre en relation avec un particulier en dehors de ses frontières et sur le territoire d'un autre Etat sans que ses relations (diplomatiques) avec ce dernier soient en cause, il y a là un indice sérieux qu'il accomplit un acte *jure gestionis*.

3.- En l'espèce, les rapports de droit en litige ont leur source dans un contrat de bail. Ce contrat a été passé entre X., propriétaire et bailleuse de l'immeuble, et le Ministre d'Egypte en Autriche, locataire au nom de la représentation étrangère du Royaume d'Egypte en Autriche, c'est-à-dire au nom de l'Etat égyptien. Bien que conclue entre un Etat et un particulier, cette convention présente toutes les caractéristiques d'un accord entre deux personnes privées. En effet, aucune des dispositions du contrat ne permet de penser que X. se serait trouvée, vis-à-vis de l'Etat égyptien, dans la situation du simple citoyen en face de l'Etat souverain. L'ensemble de la convention démontre au contraire que les deux parties étaient sur un pied de parfaite égalité. X. a assumé certaines obligations et l'Etat égyptien en a fait autant pour ce qui le concerne. Ces obligations ressortissent du reste au droit privé et les parties l'ont si bien compris qu'elles sont convenues de soumettre leur litige à un tribunal civil ordinaire. Qui plus est, l'Etat égyptien a accepté que ce tribunal ne fût pas celui qui eût été naturellement compétent. Dès lors, en signant le contrat, il a agi de la même manière que n'importe quel particulier louant un immeuble pour s'y loger. Il a donc accompli un acte de gestion.

Le contrat de bail litigieux étant, par sa nature, un acte de gestion, il reste à savoir s'il est rattaché au territoire suisse, comme l'exige la jurisprudence du Tribunal fédéral. Tel est certainement le cas, puisque le loyer était payable en main de la Banque cantonale de Schwyz et que les conflits relatifs au contrat devaient être jugés par les tribunaux zurichois. La recourante ne saurait dès lors se prévaloir de l'immunité de juridiction des Etats étrangers.

4.- La recourante invoque aussi l'immunité d'exécution. Elle se heurte cependant à la jurisprudence du Tribunal fédéral, selon laquelle le pouvoir d'exécution découle du pouvoir de juridiction (RO 82 I 88/89, CH / 4). Certes, la doctrine et la jurisprudence hésitent à admettre le pouvoir d'exécution dans la même mesure que le pouvoir de juridiction des autorités d'un Etat à l'égard d'un Etat étranger. Ces hésitations ne sont cependant pas justifiées en Suisse, où la jurisprudence ne reconnaît le pouvoir de juridiction des autorités locales que dans des limites précises, c'est-à-dire uniquement à l'égard des actes de gestion rattachés au territoire suisse. (...).

La recourante croit, il est vrai, discerner une raison d'opposer au séquestre l'immunité d'exécution dans le fait que la mesure frappant ses biens est intervenue sans que l'existence de sa dette fût établie. Elle omet cependant que, dans le système du droit suisse, le séquestre est une mesure conservatoire qui précède souvent l'introduction de l'action. D'autres pays du reste admettent la légitimité de telles mesures (...). Il en va de même de l'article 5 des résolutions adoptées par l'Institut de droit international à sa session d'Aixen-Provence, en tant du moins qu'il ne s'agit pas des biens affectés à l'exercice de l'activité "gouvernementale qui ne se rapporte pas à une exploitation économique quelconque" (...).

5.- La recourante excipe enfin de la destination des biens séquestrés. Elle rappelle que l'Etat égyptien avait déposé ces fonds en Suisse afin de financer des achats d'armes qu'il se proposait de faire auprès de la société Rexim SA. Les sommes en cause étaient donc affectées aux besoins de la défense nationale et, partant, ne pouvaient être séquestrées.

Cette argumentation ne tient cependant pas compte de la réalité des faits. En septembre 1959, à l'époque du second séquestre opéré par dame X., il n'était en effet plus question que Rexim SA livrât les armes commandées. La société était en liquidation concordataire depuis presque trois ans. Bien plus, les liquidateurs, loin de chercher à exécuter les contrats de fourniture de matériel de guerre, avaient au contraire entamé des négociations avec les fournisseurs de la société et la RAU pour obtenir l'extinction de toutes les obligations résultant des conventions. Certes, bien que les armes ne dussent plus être livrées, la somme de quelque 8 000 000 de francs suisses, séquestrée au profit de Rexim SA, devait être affectée en premier lieu au règlement de comptes avec cette société. Cependant, le solde, qui comprenait la plus grande partie de la somme, devenait disponible. Au moment du second séquestre, les biens saisis n'étaient donc plus affectés à un but précis touchant à la défense nationale. Dans la mesure où ils n'étaient pas séquestrés, la RAU pouvait en user librement. La question est dès lors de savoir si l'intimée pouvait faire séquestrer ces biens, qui appartenaient à un Etat étranger et qui, n'étant affectés à aucun but précis, pouvaient être utilisés pour n'importe quelle tâche de l'Etat.

Lorsqu'un Etat possède des fonds dans un autre Etat et qu'il les affecte à son service diplomatique ou à une autre mission lui incombant en sa qualité propre de puissance publique, il peut s'opposer à ce qu'ils fassent l'objet d'un séquestre. En effet, les fonds sont alors destinés à l'accomplissement d'actes de souveraineté. Comme ces derniers, ils sont protégés par l'immunité de juridiction et, partant, par l'immunité d'exécution.

La situation est différente quand les biens ne sont, comme en l'espèce, destinés à aucun but déterminé. L'absence d'une affectation précise permet d'admettre la validité d'un séquestre opéré en Suisse sur les avoirs d'un Etat étranger. C'est ainsi que, dans son arrêt RO 44 I 49, le Tribunal fédéral a confirmé la validité d'un séquestre portant sur un avoir de l'Etat autrichien, qui n'avait pas de destination déterminée. Dans les arrêts RO 56 I 237 et 82 I 75, le séquestre avait aussi pour objet des biens dont l'utilisation n'avait pas été fixée, et, s'il a été annulé, ce n'est pas pour cette raison, mais uniquement parce que les créances en

poursuite n'étaient pas rattachées au territoire suisse. La Chambre de droit public n'a pas de raison d'adopter une solution différente en l'espèce. Le second séquestre est donc valable à tous points de vue.

Quant au premier séquestre converti en saisie définitive, la RAU ne l'a attaqué par la voie du recours de droit public qu'après l'échéance du délai légal. Sur ce point, son recours est donc irrecevable. Il est vrai que, si le séquestre violait l'ordre public international, il pourrait être attaqué après l'expiration du délai légal, à l'occasion d'une mesure d'exécution (arrêt non publié du 7 octobre 1938 dans la cause Etat yougoslave contre SA Sogerfin). Toutefois, il n'y a pas eu en l'espèce de mesures d'exécution du premier séquestre dans les trente jours. Pour le premier séquestre, le recours est donc de toutes manières tardif. Il serait du reste mal fondé. En effet, la recourante ne démontre pas que le 10 octobre 1957, date du premier séquestre, Rexim SA était encore tenue de livrer les armes commandées et que, par conséquent, les fonds égyptiens déposés en Suisse étaient spécialement affectés, comme à l'origine, au paiement des fournitures de matériel de guerre.

Par ces motifs, le Tribunal fédéral:

Rejette le recours en tant qu'il est recevable.

(a)	N° d'enregistrement	CH / 9
(b)	Date	21 décembre 1992
(c)	Service / auteur	1ère Cour civile du Tribunal fédéral Suisse
(d)	Parties	Groupement d'Entreprises Fougerolle et consorts c/ CERN
(e)	Points de droit	<p>Arbitrage et immunité de juridiction d'une organisation internationale.</p> <p>1. Disposant de la personnalité juridique de droit international, le CERN bénéficie d'une immunité de juridiction absolue et complète.</p> <p>2. En contrepartie de l'immunité octroyée, le CERN s'est engagé à soumettre tout litige pouvant survenir à l'occasion de contrats conclus avec des personnes privées à un arbitrage constitué ad hoc, à l'abri de tout contrôle judiciaire étatique.</p>
(f)	n°	1.a.
(g)	Source(s)	ATF 118 Ib 562 ; www.bger.ch
(h)	Renseignements complémentaires	
(i)	Texte complet – Extraits – Traduction – Résumé	<p>Texte complet sur Internet (en français)</p> <p>Résumé du texte en français : voir ci-dessous</p>

Résumé

Faits

Pour abriter un grand collisionneur à électrons-positrons, appelé LEP, le CERN a décidé de construire un tunnel circulaire de quelque 27 kilomètres de circonférence. Le CERN a adjugé les travaux au Groupement d'Entreprises Fougerolle (ci-après: Groupement Fougerolle), rassemblant 5 entreprises. Le contrat entre le CERN et le Groupement Fougerolle prévoyait de soumettre tout litige à un tribunal arbitral, dont le siège est à Genève.

Le 25 mai 1986, le Groupement Fougerolle a mis en oeuvre la procédure arbitrale pour obtenir 430'000'000 francs au titre "d'augmentation équitable du prix de l'ouvrage".

Par sentence du 27 décembre 1991, le Tribunal arbitral a, notamment, condamné le CERN à payer au Groupement Fougerolle 44'621'190 francs à titre de frais entraînés par l'accélération des travaux.

Le Groupement Fougerolle forme un recours de droit public, concluant, en particulier, à l'annulation de la sentence arbitrale. Le CERN s'est prévalu d'une immunité de juridiction absolue à l'égard de toute action judiciaire devant les tribunaux nationaux de l'Etat hôte.

Le Tribunal fédéral a déclaré le recours irrecevable; il a reconnu au CERN l'immunité de juridiction.

Extrait des considérants:

1.- Il importe d'examiner en premier lieu la question de l'immunité de juridiction invoquée par le CERN.

a) Acquérant leur personnalité juridique interne par une disposition de leurs actes constitutifs, les organisations interétatiques disposent de la personnalité juridique internationale en vertu d'une règle de droit international général, à condition cependant de réunir un ensemble de critères objectifs. En particulier, il appartient aux Etats Membres de dire si une telle organisation possède la personnalité juridique internationale; ainsi, pour l'Etat hôte, la reconnaissance de la personnalité juridique internationale d'une organisation trouvera son fondement dans l'accord de siège (...).

L'immunité de juridiction des organisations internationales ne découle pas directement de leur personnalité juridique internationale. N'étant pas, contrairement aux Etats, des sujets pléniers du droit international, ces organisations tiennent toujours leur immunité d'un instrument de droit international public, que ce soit de conventions multilatérales entre Etats Membres d'une organisation ou par des accords bilatéraux, les accords de siège avec l'Etat hôte venant au premier rang (...). Les organisations internationales bénéficient d'une immunité absolue et complète, ne comportant aucune restriction (...). Le principe de l'immunité dite relative consacré, en particulier, par la Convention européenne sur l'immunité des Etats (...) ne s'applique qu'aux Etats, la distinction entre *acta de jure imperii* et de *jure gestionis* ne valant pas pour les organisations internationales (...). Les raisons de cette différence doivent, notamment, être recherchées dans le fondement juridique même de l'immunité octroyée aux organisations internationales, à savoir une convention internationale et non pas une règle de droit international général; de surcroît, les organisations internationales ne disposent d'aucune assise territoriale (...).

b) L'immunité leur garantissant d'échapper à la juridiction des tribunaux étatiques, les organisations internationales au bénéfice d'un tel privilège s'engagent envers l'Etat hôte, généralement dans l'accord de siège, à prévoir un mode de règlement des litiges pouvant survenir à l'occasion de contrats conclus avec des personnes privées. Cette obligation de prévoir une procédure de règlement avec les tiers constitue la contrepartie à l'immunité octroyée (...). Sauf rares exceptions, les organisations internationales considèrent qu'une renonciation pure et simple à leur immunité va à l'encontre de leur autonomie. D'une

manière générale, ces organisations voient dans l'arbitrage le seul mode de règlement des litiges relatifs aux contrats passés avec les personnes privées.

Cependant, l'immunité de juridiction comporte incontestablement des incidences sur le droit qui sera applicable à la procédure arbitrale. En réalité, la pratique a démontré que les organisations internationales connaissent plusieurs types d'arbitrages pouvant entrer en considération. Les litiges qui les opposent à leurs cocontractants peuvent ainsi être réglés soit par des organisations internationales de caractère arbitral, soit par une juridiction administrative interne de l'organisation qui statuera à titre arbitral, soit encore par une institution permanente d'arbitrage, comme la Chambre de commerce international de Paris, soit enfin par un tribunal arbitral constitué ad hoc (...). Si l'organisation internationale choisit un arbitrage ad hoc, la compatibilité du droit applicable à la procédure avec l'immunité de juridiction de l'organisation ne se pose pas. En effet, l'organisation intègre directement dans ses contrats des clauses prévoyant, en cas de différend, la mise en place d'un tribunal ad hoc; elle peut aussi procéder par le biais de "conditions générales" jointes à ses contrats, prévoyant en détail la constitution et le fonctionnement du tribunal arbitral (...). La sentence rendue dans le cadre d'une telle procédure arbitrale est à l'abri de tout contrôle judiciaire en raison même de l'immunité de juridiction. Les dispositions relatives à cet arbitrage ad hoc sont généralement conçues de telle manière que celui-ci ne relève pas d'un droit national (...).

En définitive, contrairement à ce qui vaut pour les Etats, la soumission des organisations internationales à une clause compromissaire ne vaut pas renonciation à leur immunité. L'arbitrage auquel elles participent reste à l'abri de toute intervention d'une juridiction nationale à moins toutefois que l'organisation renonce à son immunité ou que l'accord de siège en dispose autrement ou encore que l'organisation accepte que l'arbitrage soit soumis à une loi nationale, généralement celle du siège (...). Ce n'est que si l'arbitrage renvoie à un droit national qu'il peut impliquer l'intervention éventuelle du juge étatique dans la procédure. Mais un tel renvoi n'est, en pratique, jamais utilisé par les grandes organisations internationales (...).

2.- a) Aux termes de l'art. IX de la Convention pour l'établissement d'une Organisation européenne pour la recherche nucléaire passée à Paris le 1er juillet 1953 (...), le CERN jouit de la personnalité juridique sur le territoire métropolitain de chaque Etat Membre. Selon cette même disposition, les accords qui seront conclus entre l'Organisation et les Etats Membres sur le territoire desquels sont situés les laboratoires contiendront, en plus des dispositions relatives au privilège et immunité, celles qui sont nécessaires pour le règlement des rapports particuliers entre l'Organisation et lesdits Etats Membres. Le 11 juin 1955, le Conseil fédéral suisse et l'Organisation Européenne pour la Recherche nucléaire ont passé un accord pour déterminer le statut juridique du CERN en Suisse (...). Selon l'art. 6 de cet accord, l'Organisation bénéficie, pour elle-même, ses propriétés et ses biens, quel que soit le lieu où ils se trouvent ou la personne qui les détient, de l'immunité à l'égard de toute forme d'action judiciaire, sauf dans la mesure où cette immunité a été formellement levée par le Conseil de l'Organisation ou la personne par lui déléguée. L'alinéa 2 prévoit que les propriétés et biens de l'Organisation, quel que soit le lieu où ils se trouvent ou la personne qui les détient, bénéficient de l'immunité à l'égard de toute mesure de perquisition, réquisition, confiscation, expropriation et de toute autre forme de saisie ou d'ingérence de toute autorité publique de quelque nature que ce soit. Alors que l'art. 23 de cet accord de siège a pour objet d'empêcher tout abus des privilèges, immunités et facilités accordés au CERN, l'art. 24 traite des différends d'ordre privé. Il a la teneur suivante:

"L'Organisation prend des dispositions appropriées en vue du règlement satisfaisant:

a) de différends résultant de contrats auxquels l'Organisation est partie et d'autres différends portant sur un point de droit privé;

b) ..."

Eu égard aux principes exposés au considérant précédent, le caractère de personne juridique de droit international doit être reconnu au CERN sur la base de l'accord de siège liant cette organisation internationale avec la Suisse.

b) En conformité de son engagement pris dans l'accord de siège précité du 11 juin 1955, le CERN a, dans des "Conditions générales", mis en place une procédure arbitrale pour vider tout litige pouvant survenir entre lui-même et ses cocontractants. L'art. 33 de ces "Conditions générales" prévoit, en particulier, la constitution d'un Tribunal arbitral de trois membres; en cas de désaccord sur la désignation du tiers arbitre devant présider le Tribunal arbitral, il appartient alors au Président du Tribunal Administratif de l'Organisation Internationale du Travail d'intervenir. La règle précitée dispose également que les parties "apportent d'elles-mêmes aux arbitres l'aide qu'elles sont en mesure de leur fournir"; elle indique le délai dans lequel doit être rendue la sentence et soumet toute question de procédure non réglée par elle au code de procédure civile du canton de Zurich, applicable par analogie. Enfin, la sentence "est définitive et lie les parties qui, par avance, renoncent à tout recours possible". En réalité, dans l'acte de mission, les parties ont dérogé à la clause d'arbitrage précitée dans la faible mesure où le Tribunal arbitral ne se référera pas au code de procédure civile du canton de Zurich, mais appliquera les principes généraux de la procédure civile. La clause d'arbitrage contenue à l'art. 33 des "Conditions générales" consacre le choix du CERN de soumettre les litiges le divisant d'avec les particuliers à un arbitrage constitué ad hoc. En effet, le CERN a prévu en détail la mise en place ainsi que le fonctionnement du Tribunal arbitral. Est, à cet égard, caractéristique la procédure prévue par l'Organisation internationale précitée en cas de désaccord des parties sur le choix du surarbitre, à savoir l'intervention d'une tierce personne de niveau élevé (...). Cela tend à démontrer que l'Organisation a choisi un type d'arbitrage la mettant à l'abri de tout contrôle judiciaire étatique. Et l'art. 33 des "Conditions générales" est conçu de telle manière que la procédure ne puisse prendre appui sur un droit national, en particulier le droit suisse de l'arbitrage. Ainsi, eu égard au droit applicable à la procédure arbitrale convenue entre les parties, la soumission du CERN à un tel arbitrage ne peut en aucune manière valoir renonciation à son immunité de juridiction, dès lors qu'est exclue toute intervention du juge étatique dans la procédure. Au demeurant, compte tenu des règles applicables à cette procédure arbitrale, on peut se demander si, en réalité, le Tribunal fédéral ne devrait pas se déclarer purement et simplement incompétent (...). Il importe toutefois peu de trancher ce point en l'occurrence, puisque l'immunité de juridiction invoquée a, de toute façon, été reconnue au CERN.

(a)	N° d'enregistrement	CH / 10
(b)	Date	30 avril 1986
(c)	Service / auteur	1ère Cour de droit public du Tribunal fédéral Suisse
(d)	Parties	Espagne c/ X SA, Office des poursuites du canton de Berne et Président du Tribunal d'arrondissement 4 du canton de Berne
(e)	Points de droit	<p>Immunité en droit international public; ordonnance de séquestre.</p> <p>L'Etat étranger ne bénéficie d'aucune immunité d'exécution ni de juridiction lorsqu'il s'agit d'une créance à son encontre fondée sur un contrat d'entreprise, ou éventuellement un mandat, car une telle créance ne relève de toute évidence pas de sa souveraineté.</p> <p>S'agissant d'un centre que l'Etat étranger projette d'ouvrir en Suisse pour des activités sociales et culturelles au profit de ses ressortissants, le caractère public de l'affectation, à tout le moins comparable à un acte de souveraineté, prédomine. C'est pourquoi il faut tout de même reconnaître l'immunité, limitée à la réalisation forcée des biens immobiliers destinés à ce centre.</p>
(f)	n°	0.a., 1.a., 2.a.
(g)	Source(s)	ATF 112 la 148 ; www.bger.ch
(h)	Renseignements complémentaires	
(i)	Texte complet – Extraits – Traduction – Résumé	Texte complet sur Internet (en allemand) Résumé du texte en allemand : voir ci-dessous

Résumé

Faits

A.- Am 23. Mai 1985 erliess der Gerichtspräsident IV von Bern auf Antrag der Firma X. S.A., Generalunternehmung in Genf, einen Arrestbefehl gegen den spanischen Staat für eine Forderungssumme von Fr. 1'042'715.30. Als Arrestgegenstände sind die Liegenschaften Kirchenfeldstrasse 73 und 75 Kreis IV in Bern angeführt. Mit Zahlungsbefehl wurde der Arrest für die nämliche Summe zuzüglich Arrestkosten prosequiert. Arrestbefehl und Zahlungsbefehl wurden dem spanischen Staat auf diplomatischem Wege zugestellt.

Am 25. Oktober 1985 liess das Königreich Spanien durch einen schweizerischen Rechtsanwalt staatsrechtliche Beschwerde erheben, mit welcher - soweit hier wesentlich - beantragt wird: "Es sei der Arrestbefehl des Gerichtspräsidenten IV des Amtsgerichtes Bern (Einzelrichter im summarischen Verfahren) infolge völkerrechtlicher Immunität des Beschwerdeführers als ungültig zu erklären, und es seien der gestützt auf diesen Arrestbefehl erfolgte Arrestbeschluss des Betreibungsamtes Bern sowie der Zahlungsbefehl des Betreibungsamtes aufzuheben."

Extrait des considérants:

3.- a) Zwischen der Schweiz und Spanien besteht kein Staatsvertrag über die gegenseitige Immunität der beiden Staaten und allenfalls der mit ihnen verbundenen öffentlichrechtlichen Körperschaften im Zwangsvollstreckungsverfahren. Der Beschwerdeführer spielt zwar auf das Europäische Übereinkommen über die Staatenimmunität vom 16. Mai 1972 an (...), das vom Bundesgericht schon als auch im Verhältnis zu Nichtvertragsstaaten bis zu einem gewissen Grade beachtlicher Ausdruck neuerer völkerrechtlicher Tendenzen gewürdigt worden ist ([BGE 111 Ia 56](#), CH/6 ; [110 Ia 45](#), CH/13 ; [104 Ia 372](#), CH/20); er stützt jedoch seinen Anspruch auf Immunität zu Recht nicht auf dieses Übereinkommen, dem er selbst nicht beigetreten ist. Wie bereits im Urteil [BGE 111 Ia 56](#) kurz bemerkt wurde und hier zu bestätigen ist, weicht das System des Übereinkommens jedenfalls insoweit von der herrschenden schweizerischen Rechtsprechung ab, als es zwar einerseits eine absolute gegenseitige Immunität der Vertragsstaaten gegenüber Zwangsvollstreckungsmassnahmen vorsieht (Art. 23), andererseits aber auch eine beinahe ebenso weitreichende gegenseitige Pflicht zur Anerkennung und Erfüllung rechtskräftiger gerichtlicher Entscheidungen begründet (Art. 20). Bei dieser Sachlage ist es klar, dass das Übereinkommen nur entweder als Ganzes oder überhaupt nicht Anwendung finden kann. Kein Staat kann Rechte daraus ableiten, ohne auch die entsprechenden Pflichten übernommen zu haben.

b) Damit bleibt es bei der bisherigen ständigen schweizerischen Rechtsprechung, wonach dem ausländischen Staat sowohl im Erkenntnis- als auch im Vollstreckungsverfahren dann Immunität zukommt, wenn er in der streitigen Sache eine hoheitliche Tätigkeit ausgeübt, also iure imperii gehandelt hat. Ist er dagegen als Träger von Privatrechten aufgetreten, hat er mithin iure gestionis gehandelt, so lässt die bundesgerichtliche Rechtsprechung sowohl eine Klage als auch Vollstreckungsmassnahmen gegen ihn zu, sofern das zu beurteilende Rechtsverhältnis eine ausreichende Binnenbeziehung zur Schweiz aufweist ([BGE 111 Ia 57/58](#), 65/66 CH/10 mit zahlreichen Hinweisen). Es ist unbestritten, dass sich die streitige Forderung, für die ein Arrest bewilligt wurde, auf Renovationsarbeiten an zwei dem Beschwerdeführer gehörenden, in Bern gelegenen Liegenschaften bezieht. Derartige Forderungen aus Werkvertrag, evtl. Auftrag, sind klarerweise nicht hoheitlicher Natur, sondern werden iure gestionis eingegangen. Die Funktion des Staates als Besteller gegenüber dem Unternehmer unterscheidet sich nicht von derjenigen eines Privaten ([BGE 106 Ia 145](#), CH / 1 ; [104 Ia 369](#), CH / 20 ; [86 I 29](#), CH / 8).

Zwar hat sich der Beschwerdeführer vorbehalten, die hoheitliche Natur des Rechtsverhältnisses "in einem späteren Zeitpunkt darzutun"; doch wären solche nachträgliche Vorbringen einerseits prozessual unzulässig und andererseits offensichtlich aussichtslos. Es ist daher davon auszugehen, dass dem Beschwerdeführer für Forderungen

aus dem erwähnten Häuserumbau in der Schweiz keine generelle Immunität im Erkenntnis- und Vollstreckungsverfahren zukommt.

4.- a) Indessen ist unbestritten, dass völkerrechtlich neben dieser generellen Immunität auch eine Immunität hinsichtlich bestimmter Objekte anerkannt wird. Vom Vollstreckungsverfahren auszunehmen sind demnach unabhängig von der Natur des Rechtsstreites "Vermögenswerte, die der ausländische Staat in der Schweiz besitzt und die er für seinen diplomatischen Dienst oder für andere ihm als Träger öffentlicher Gewalt obliegende Aufgaben bestimmt hat" (...). Die entscheidende Frage liegt somit im vorliegenden Fall darin, ob die mit Arrest belegten Liegenschaften hoheitlichen Zwecken dienen oder nicht. (...)

b) Der Standpunkt der Parteien hinsichtlich der hoheitlichen oder nichthoheitlichen Zweckbestimmung der beiden mit Arrest belegten Häuser lässt sich wie folgt zusammenfassen: Der Beschwerdeführer macht geltend, Gegenstände des Verwaltungsvermögens seien nicht arrestierbar; es genüge, wenn die Sache einer öffentlichen Aufgabe gewidmet sei, ohne dass diese notwendigerweise hoheitlichen Charakter zu tragen brauche. (...). Konkret legt der Beschwerdeführer dar, die beiden verarrestierten Häuser sollten nach dem Umbau als "Casa de España" dienen, d.h. als Treffpunkt für in der Schweiz lebende Spanier. Geplant seien folgende Aktivitäten: allgemeine Information; Ausstellungen; Saal für Theater und Musik; Lesebereich und Treffpunkt; Versammlungssaal; Büro des Direktors; Bibliothek; eventuell für den spanischen Attaché für Arbeits- und Sozialfragen bestimmte Wohnung; Materialarchiv.

Der erwähnte Attaché werde in den Gebäuden hoheitliche Funktionen ausüben. Jedenfalls stelle die Betreuung der spanischen Auswanderer in der Schweiz eine eminent öffentliche Aufgabe dar. Eine Vermietung von Räumen an Dritte sei nicht vorgesehen.

Dem hält die Beschwerdegegnerin entgegen, die "Casa de España" solle nicht nur ein Begegnungszentrum für spanische Staatsangehörige werden, sondern ein solches für Angehörige aller spanisch sprechenden Länder. Im übrigen stelle der Betrieb eines Versammlungszentrums keine hoheitliche Funktion des Staates dar. Schliesslich habe der Beschwerdeführer auch bereits versucht, die beiden Liegenschaften an einen Berner Unternehmer zu verkaufen, was gegen die Annahme von Verwaltungsvermögen spreche.

c) Es scheint zweckmässig, an dieser Stelle auch den Entscheid des Eidgenössischen Departementes für auswärtige Angelegenheiten betreffend den Erwerb des einen der beiden Grundstücke, Kirchenfeldstrasse 73, zu erwähnen. Es wurde dort ausgeführt, der spanische Staat beabsichtige, die Liegenschaft dem "Instituto Español de Emigración" zur Verfügung zu stellen, um darin ein Erziehungs- und Kulturzentrum zu errichten. Bei diesem "Instituto" handle es sich um eine öffentlichrechtliche Anstalt mit eigener Rechtspersönlichkeit, die administrativ dem spanischen Arbeitsministerium zugeordnet sei und der die Aufgabe zukomme, die staatliche Politik auf dem Gebiete der Emigration auszuführen. Die spanische Kolonie in der Schweiz habe im August 1979 47'130 kontrollpflichtige Arbeitskräfte umfasst; Spanien stelle das drittgrösste Kontingent an ausländischen Arbeitskräften in der Schweiz. Das vorgesehene Erziehungs- und Kulturzentrum sei dazu bestimmt, eine Entfremdung dieser Personen von ihrer Heimat zu verhindern. Damit werde nicht zuletzt auch eine spätere Wiedereingliederung im Herkunftsland erleichtert. Das Anliegen des spanischen Staates erscheine als legitim; es stehe "in engerem Zusammenhang mit den öffentlichen Aufgaben", die dieser in der Schweiz gemäss Völkerrecht auszuüben befugt sei. (...).

In seiner Vernehmlassung zu dieser Verfügung bringt der Beschwerdeführer vor, sie bestätige seine These, wonach die fraglichen Grundstücke für öffentliche Zwecke bestimmt seien und daher nicht mit Arrest belegt werden dürften; ein abweichender Entscheid im vorliegenden Verfahren würde zu einem Widerspruch führen. Andererseits hält auch die Beschwerdegegnerin an ihrem Standpunkt fest und betont, die Schaffung eines Versammlungszentrums für ideelle und gesellige Veranstaltungen sei keine Aufgabe des Staates und jedenfalls keine solche hoheitlicher Art.

5.- a) In rechtlicher Hinsicht ist zunächst festzustellen, dass der Beschwerdeführer seinen Standpunkt, wonach ein Arrest auf den fraglichen Liegenschaften nicht zulässig sei, vor

allem damit begründet, diese gehörten zu seinem Verwaltungsvermögen. Mit der Verwendung dieses Begriffs und dem Hinweis auf [die Rechtsprechung] nimmt er Bezug auf die Regelung des internen schweizerischen Rechts über Betreibungen gegen öffentlichrechtliche Körperschaften (...). Die Anwendung der nämlichen Regeln im internationalen Verhältnis ist jedoch keineswegs zwingend und - wie sich aus der vorstehenden Darlegung der Rechtsprechung ergibt - auch nicht üblich. Im Zusammenhang mit der Frage der völkerrechtlichen Immunität wird durchwegs der Begriff des hoheitlichen Zwecken dienenden Vermögens verwendet, der etwas enger ist als derjenige des Verwaltungsvermögens. Die Verwendung dieses engeren Begriffs hat einen guten Sinn, stehen doch dem Privaten zur Durchsetzung finanzieller Ansprüche gegen ein inländisches Gemeinwesen in der Regel auch andere Mittel als dasjenige der Zwangsvollstreckung zur Verfügung, die im internationalen Verhältnis oftmals fehlen. Andererseits darf diese Unterscheidung auch nicht überbewertet werden. Es steht fest, dass der Begriff des hoheitlichen Zwecken dienenden Staatsvermögens in der völkerrechtlichen Praxis eher weit ausgelegt wird. So sind z.B. schon Bahnwagen einer staatlichen Eisenbahnunternehmung mit Rücksicht auf ihre Zweckbestimmung als von der Zwangsvollstreckung ausgenommen erklärt worden (...), ferner die Bankkonten einer ausländischen Botschaft, und zwar ohne Abklärung ihrer Zweckbestimmung (...).

b) Zieht man die hier gegebenen konkreten Verhältnisse in Betracht, so liegt ein Grenzfall vor. Einerseits lässt sich nicht sagen, der Betrieb eines als Treffpunkt, Bildungs- und Erholungsstätte dienenden Zentrums, wie es hier vorgesehen ist, stelle ein Verhalten dar, dem die Ausübung staatlicher Hoheitsmacht im engeren Sinne zugrunde läge; andererseits kann aber offensichtlich auch von einer wirtschaftlichen Betätigung, wie sie regelmässig den sogenannten *acta iure gestionis* zugrunde liegt (vgl. etwa [BGE 111 Ia 63](#), CH/6 und 110 Ia 43, CH/13), nicht die Rede sein. Sieht man von der durch nichts belegten Behauptung der Beschwerdegegnerin ab, der Beschwerdeführer habe bezüglich der Liegenschaften schon Verkaufsgespräche geführt, und lässt man weiter die spanisch sprechenden Angehörigen südamerikanischer Staaten, die das Institut möglicherweise ebenfalls besuchen werden, wegen ihrer verglichen mit den spanischen Staatsangehörigen offenbar geringen Zahl ausser acht, so scheint doch der öffentliche, mit einem hoheitlichen mindestens vergleichbare Zweck zu überwiegen. Die Wahrung der Interessen der Angehörigen des ausländischen Staates im Inland stellt eine typische konsularische Aufgabe dar (...), und es ist naheliegend, die soziale und kulturelle Betreuung ausländischer Gastarbeiter zu dieser Interessenwahrung zu zählen. Jedenfalls scheinen Gesichtspunkte dieser Art der vorstehend erwähnten Verfügung des Eidgenössischen Departementes für auswärtige Angelegenheiten zugrunde zu liegen, und das Bundesgericht hat keinen ausreichenden Anlass, davon abzuweichen. Dies gilt namentlich auch deshalb, weil die Schweiz selbst daran interessiert ist, dass den der Landessprachen zum Teil nicht kundigen ausländischen Arbeitskräften von ihrem Heimatstaat Einrichtungen der hier in Frage stehenden Art zur Verfügung gestellt werden, die es ihnen erlauben, ihre Freizeit sinnvoll zu verbringen und insbesondere auch den Kontakt zu ihrem Land aufrechtzuerhalten, in das sie grösstenteils früher oder später zurückkehren werden.

Aus allen diesen Gründen erscheint es als gerechtfertigt, anzuerkennen, dass die beiden mit Arrest belegten Liegenschaften hoheitlichen Zwecken dienen sollen. Demgemäss ist die Beschwerde gutzuheissen, und es sind der Arrestbefehl, der Arrestbeschluss und der gestützt darauf ergangene Zahlungsbefehl aufzuheben.

(a)	N° d'enregistrement	CH / 11
(b)	Date	19 janvier 1987
(c)	Service / auteur	1ère Cour de droit public du Tribunal fédéral Suisse
(d)	Parties	S. c/ République socialiste de Roumanie et Cour des poursuites et faillites du Tribunal cantonal du canton de Vaud
(e)	Points de droit	<p>Immunité des Etats; séquestre.</p> <p>Qualité d'un particulier pour former un recours contre le refus d'une autorisation de séquestrer des biens propriété d'un Etat étranger mis au bénéfice de l'immunité de juridiction. Immunité de juridiction et acte de souveraineté.</p> <p>Les actes accomplis jure imperii, ou actes de souveraineté, se distinguent des actes accomplis jure gestionis, ou actes de gestion, non pas par leur but, mais par leur nature.</p> <p>En l'espèce, la créance du recourant résulte d'un acte de transfert obligatoire de ses biens immobiliers dans la propriété de l'Etat roumain; il y a donc acte de souveraineté, accompli jure imperii en vertu du droit public étranger.</p>
(f)	n°	0.a., 1.a.
(g)	Source(s)	ATF 113 la 172 ; www.bger.ch
(h)	Renseignements complémentaires	<p>Séquestres opérés sur des biens appartenant à des Etats ou des organisations internationales</p> <p>ATF 112 la 148, CH / 6 ;</p> <p>111 la 52, CH / 6 ;</p> <p>106 la 142, CH / 1 ;</p> <p>104 la 367, CH / 20 ;</p> <p>86 I 23, CH / 8 ;</p> <p>82 I 75, CH / 4</p>
(i)	Texte complet – Extraits – Traduction – Résumé	<p>Texte complet sur Internet (en français)</p> <p>Résumé du texte en français : voir ci-dessous</p>

Résumé

Faits

A.- Par décision du 3 août 1982, l'autorité municipale compétente de Bucarest a ordonné le transfert à titre onéreux, dans la propriété de l'Etat roumain, d'une quote-part indivise (1/2) de l'appartement propriété de S., qui venait d'obtenir l'autorisation de quitter définitivement son pays. Cette mesure se fondait notamment sur le décret No 223 concernant la réglementation de la situation de certains biens, adopté le 3 décembre 1974 par le Conseil d'Etat de la République socialiste de Roumanie. Aux termes des art. 1er et 2 de ce décret, les immeubles situés sur le territoire de l'Etat roumain ne peuvent être la propriété de personnes physiques que si celles-ci ont leur domicile dans le pays. Les personnes qui s'approprient à quitter le pays sont par conséquent tenues de vendre à l'Etat les immeubles dont elles sont propriétaires sur le territoire de celui-ci. Le prix de vente de l'immeuble ainsi acquis par l'Etat a été fixé conformément à l'art. 2 du décret No 467 du 28 décembre 1979.

Le 23 juillet 1985, S. a requis le Juge de paix du cercle de Lausanne d'ordonner, au préjudice de la Roumanie, le séquestre d'avoirs détenus sur le compte de chèques postaux de l'entreprise R., à Lausanne, pour garantir le recouvrement d'une créance de 40'000 fr.s. avec intérêt à 5% dès le 3 août 1982. Ce montant correspondait à la contre-valeur en francs suisses de l'indemnité fixée pour l'acquisition par l'Etat de sa quote-part d'appartement. Le Juge de paix a refusé d'autoriser le séquestre, estimant que la créance résultait d'un acte accompli jure imperii par l'Etat roumain. La Cour des poursuites et faillites du Tribunal cantonal du canton de Vaud a rejeté un recours pour déni de justice formé contre cette décision.

Le Tribunal fédéral a rejeté le recours de droit public interjeté par S. contre cet arrêt, pour les motifs suivants:

1.- Le recourant soutient que l'autorité intimée a commis un déni de justice en violant grossièrement les principes généraux institués par la jurisprudence en matière de séquestre au préjudice d'Etats étrangers. La question ainsi soulevée est celle de l'immunité de juridiction reconnue, en droit international public, aux Etats étrangers.

Le principe de l'immunité de juridiction des Etats étrangers est une règle du droit des gens assimilable à un traité ([ATF 107 Ia 174](#), CH/19 ; 106 Ia 146, CH/1 et les arrêts cités). Il en résulte, d'un point de vue strictement formel, que les Etats peuvent se prévaloir de la violation de ce principe par la voie d'un recours de droit public pour violation de traités internationaux (...). Le recours de droit public fondé sur l'immunité de juridiction des Etats étrangers est néanmoins recevable également sur [une autre base légale], car, en se prévalant de son immunité, l'Etat étranger conteste la compétence de l'autorité suisse ([ATF 107 Ia 174](#), CH/19 ; 106 Ia 146, CH/1 et les arrêts cités). Les arrêts publiés rendus en cette matière par le Tribunal fédéral en tant que juridiction de droit public (tel n'est pas toujours le cas: cf. [ATF 110 II 255](#), CH/2) l'ont été généralement sur la base de recours formés par des Etats étrangers ou d'autres organisations ou personnes étrangères se disant détentrices de la puissance publique, et cela, ordinairement, à propos de décisions par lesquelles une autorité cantonale avait autorisé le séquestre de biens du recourant (cf. [ATF 112 Ia 148](#), CH/10 ; 111 Ia 52, CH/6 ; 106 Ia 142, CH/1 ; 104 Ia 367, CH/20 ; 86 I 23, CH/8 ; 82 I 75, CH/4).

Le présent recours est toutefois formé par un particulier, domicilié en Suisse, qui s'est vu refuser l'autorisation de séquestre de biens propriété d'un Etat étranger, pour le motif que celui-ci serait au bénéfice de l'immunité de juridiction. Certes, cette personne ne saurait prétendre que ses intérêts juridiques sont protégés d'une façon quelconque, par cette règle du droit des gens qu'est le principe de l'immunité de juridiction, lequel consacre exclusivement un privilège en faveur des Etats étrangers. Il lui est cependant loisible de prétendre, comme il le dit implicitement, que les dispositions procédurales du droit commun relatives à l'exécution en Suisse des obligations ont été violées à son préjudice, du fait de la portée erronée donnée au principe de l'immunité juridictionnelle. (...) Appelé ainsi à

déterminer la portée, dans le cas particulier, du principe de l'immunité juridictionnelle, le Tribunal fédéral jouit d'un libre pouvoir d'examen ([ATF 82 I 85](#), CH / 4).

2.- Il n'existe entre la Suisse et la République socialiste de Roumanie aucun traité en matière d'immunité réciproque qui préciserait si et jusqu'à quel point l'Etat roumain peut être soumis à la juridiction des tribunaux suisses et faire l'objet de mesures d'exécution forcée sur le territoire de la Confédération. La Roumanie n'est pas non plus partie à la Convention européenne sur l'immunité des Etats du 16 mai 1972 (...). Sont dès lors applicables en l'espèce les règles dégagées par la jurisprudence du Tribunal fédéral ([ATF 112 la 150](#), CH / 10). Le privilège de l'immunité de juridiction n'est pas une règle absolue. L'Etat étranger n'en bénéficie que lorsqu'il agit en vertu de sa souveraineté (*jure imperii*). Il n'en bénéficie en revanche pas s'il se situe sur le même plan qu'une personne privée, en particulier s'il agit en qualité de titulaire d'un droit privé (*jure gestionis*) ([ATF 111 la 57/58](#), CH/6 ; 106 la 147, CH/1 et les références). Dans ce dernier cas, il peut être recherché devant les tribunaux suisses et faire, en Suisse, l'objet de mesures d'exécution forcée, à la condition toutefois que le rapport de droit auquel il est ainsi partie soit rattaché au territoire de ce pays, c'est-à-dire qu'il y soit né, ou doive y être exécuté ou tout au moins que le débiteur ait accompli certains actes de nature à y créer un lieu d'exécution ([ATF 106 la 150](#), CH/1 ; 86 I 28, CH/8 ; 82 I 86, CH/4).

Les actes accomplis *jure imperii*, ou actes de souveraineté, se distinguent par conséquent des actes accomplis *jure gestionis*, ou actes de gestion, non pas par leur but, mais par leur nature ([ATF 111 la 58](#), CH/6 ; 104 la 371, CH/20). En d'autres termes, la question à résoudre est celle de savoir si l'acte sur lequel se fonde la créance litigieuse relève de la puissance publique ou s'il s'agit d'un acte que tout particulier pourrait accomplir. L'autorité appelée à se prononcer sur cette question peut recourir à des critères extérieurs à cet acte; elle verra, par exemple, un indice d'un acte accompli *jure gestionis* dans le fait que l'Etat qui se prévaut de son immunité est entré en relation avec un particulier en dehors de son territoire, c'est-à-dire sur le territoire d'un autre Etat, sans que ses relations avec ce dernier soient en cause ([ATF 104 la 371](#), CH/20). La réponse à donner dans chaque espèce dépendra ensuite d'une comparaison de l'intérêt de l'Etat étranger à bénéficier de l'immunité, avec celui de l'Etat du for à exercer sa souveraineté juridictionnelle et celui du demandeur à obtenir une protection judiciaire de ses droits. De tout temps, la pratique suisse a marqué une tendance à restreindre le domaine de l'immunité (cf. [ATF 110 II 259/260](#), CH/2 et les références ; 86 I 28, CH/8).

3.- L'acte qui a donné naissance à la créance pour laquelle le recourant a demandé le séquestre d'avoirs roumains situés en Suisse est un acte d'acquisition de la propriété foncière. De toute évidence, il ne s'agit toutefois pas d'une vente conclue de gré à gré entre les parties, même si, en déposant sa demande de départ définitif pour l'étranger, le recourant ne pouvait ignorer que ses biens immobiliers passeraient dans la propriété de l'Etat et qu'il acceptait d'emblée, implicitement, cette conséquence automatique de sa démarche. Le décret adopté par le Conseil d'Etat roumain, sur lequel se fondent ces mesures, ne laisse en effet aucune liberté de choix au propriétaire privé concerné par elles. L'acquéreur obligé et exclusif est l'Etat, et le prix payé par celui-ci est fixé au terme d'une procédure qui s'apparente, formellement, aux procédures d'estimation en cas d'expropriation. La décision du 3 août 1982 n'a donc pas consacré un accord intervenu entre le propriétaire et l'Etat qui se serait placé sur un pied d'égalité avec lui. Elle a au contraire consisté dans un acte d'autorité, par lequel l'Etat s'est approprié un bien immobilier dans le but d'intérêt public (...). L'opinion qu'on peut avoir sur l'étendue de cet intérêt public est sans importance. Ce qui compte, c'est que l'Etat a procédé, de la sorte, à un acte analogue à une expropriation, voire à une nationalisation. On se trouve dès lors en présence d'un acte de souveraineté, accompli *jure imperii* en vertu du droit public étranger, et non pas d'un acte qu'un particulier aurait pu tout aussi bien accomplir selon les mêmes formes, en vertu du droit privé, c'est-à-dire d'un acte *jure gestionis*.

C'est donc avec raison que l'autorité intimée a mis l'Etat roumain au bénéfice de l'immunité de juridiction et a refusé d'autoriser le séquestre demandé par le recourant.

(a)	N° d'enregistrement	CH / 12
(b)	Date	20 août 1998
(c)	Service / auteur	1ère Cour de droit civil du Tribunal fédéral Suisse
(d)	Parties	Banque Bruxelles Lambert (Suisse) et consorts c/ République du Paraguay et Sezione speciale per l'assicurazione del credito all'esportazione
(e)	Points de droit	Immunité de juridiction d'un Etat. Même si elle relève également du fond, la question de l'immunité de juridiction d'un Etat doit être tranchée d'entrée de cause. Distinction entre les actes accomplis jure gestionis et jure imperii. En l'espèce, en accordant des garanties analogues à celles d'un établissement bancaire, l'Etat a agi jure gestionis. Pouvoirs de représentation d'un consul en Suisse.
(f)	n°	0.b.3.,
(g)	Source(s)	ATF 124 III 382 ; www.bger.ch
(h)	Renseignements complémentaires	
(i)	Texte complet – Extraits – Traduction – Résumé	Texte complet sur Internet (en français) Résumé du texte en français : voir ci-dessous

Résumé

Faits

Dans le cadre de projets industriels développés au Paraguay, deux sociétés italiennes ont conclu des contrats de construction d'usines avec deux sociétés paraguayennes. Le financement de ces opérations, incluant le prix des fournitures et équipements étrangers, a fait l'objet de deux contrats de prêts accordés par deux syndicats de banques, comprenant la Banque Bruxelles Lambert (Suisse) SA, à Genève (BBL), et divers établissements à l'étranger. Les prêts ont été mis en place par Overland Trust Bank, à Genève (ci-après: OTB), en qualité d'agent des banques.

Deux contrats de garantie sont venus se greffer sur ces contrats de prêts: d'une part, Gustavo Gramont Berres, Consul à Genève, au nom de la République du Paraguay, a émis deux garanties le 5 juin 1986 et le 1er septembre 1987 à l'égard des deux syndicats de banques, avec élection de for, de la part de la République du Paraguay, en faveur des tribunaux suisses; d'autre part, la Sezione Speciale per l'Assicurazione del Credito all'esportazione, organisme d'assurance-crédit de droit public italien créé en 1977, dont le siège est à Rome (ci-après: la SACE), a elle-même donné sa garantie à l'engagement de la République du Paraguay par polices d'assurance du 26 août 1986 et du 1er octobre 1987.

Les sociétés paraguayennes n'ayant pas remboursé les prêts consentis, et ni la République du Paraguay, ni la SACE n'ayant honoré leurs garanties, les banques ont ouvert action devant les tribunaux genevois, d'une part contre la République du Paraguay afin d'obtenir le paiement des sommes garanties, d'autre part contre la SACE, afin d'obtenir la constatation du défaut de paiement, de manière à lier cet organisme d'assurance-crédit.

Par jugement incident du 19 décembre 1996, le Tribunal de première instance a débouté les défenderesses des exceptions d'immunité de juridiction et d'incompétence *ratione loci* qu'elles avait soulevées.

Statuant le 14 novembre 1997 sur l'appel de ces parties, la Cour de justice du canton de Genève a confirmé le jugement en tant qu'il déboutait la République du Paraguay de ses exceptions d'immunité de juridiction et d'incompétence *ratione loci*, et en tant qu'il déboutait la SACE de son exception d'incompétence *ratione loci* à l'égard de BBL. La Cour de justice a en revanche annulé ledit jugement pour le surplus et, statuant à nouveau, a déclaré irrecevable, pour cause d'incompétence *ratione loci* des tribunaux genevois, l'action dirigée contre la SACE par les établissements bancaires étrangers. La prorogation de for en faveur des tribunaux italiens, figurant dans les contrats d'assurance antérieurement au litige, n'était pas opposable aux banques en vertu de l'art. 12 ch. 2 de la Convention de Lugano concernant la compétence judiciaire et l'exécution des décisions en matière civile et commerciale. Les banques pouvaient agir, en vertu de l'art. 8 al. 1 ch. 2 CL, au domicile du preneur d'assurance; toutefois, ce dernier n'était pas OTB, simple représentant, mais bien les banques elles-mêmes. A l'exception de BBL, sise à Genève, les demandeurs ne pouvaient donc pas agir à Genève contre la SACE.

Le Tribunal fédéral a été saisi de trois recours en réforme interjetés par diverses banques à l'étranger (recours I), par la République du Paraguay (recours II) et par la SACE (recours III). Le Tribunal fédéral a rejeté, dans la mesure où il était recevable, le recours II portant sur l'immunité de juridiction invoquée par la République du Paraguay; il a rejeté le recours III contestant la compétence *ratione loci* des tribunaux genevois et suisses pour connaître de l'action intentée par BBL contre la SACE; il a admis le recours I et annulé l'arrêt attaqué dans la mesure où celui-ci déclarait irrecevable, faute de compétence *ratione loci*, l'action intentée devant les tribunaux genevois par les banques à l'étranger.

Extrait des considérants:

1.- a) [Jonction des causes]

b) [Ordre d'examen des recours]

Recours II (Immunité de juridiction invoquée par la République du Paraguay)

2.- [Recevabilité et examen des faits]

3.- La cour cantonale a présumé, au stade de la recevabilité de la demande, l'existence des pouvoirs de représentation de Gramont Berres et, partant, de l'élection de for et de la renonciation à l'immunité de juridiction figurant dans les actes de garantie. (...) La Cour de justice a en effet considéré que, lorsque la question des pouvoirs de représentation se pose à la fois pour déterminer la compétence du juge saisi et pour la solution au fond de la prétention litigieuse, ce fait doublement pertinent doit être résolu une fois pour toutes à l'occasion de l'examen du fond. Certes peu satisfaisante du point de vue de la méthode, cette manière de procéder permettrait au défendeur d'opposer l'exception de chose jugée à une action qui pourrait être introduite ultérieurement à un for alternatif (...).

a) Sans remettre en cause, à ce stade, l'appréciation de la cour cantonale s'agissant de la compétence *ratione loci* des tribunaux genevois, la République du Paraguay conteste cette application de la théorie des faits de double pertinence en ce qui concerne l'exception d'immunité dont elle se prévaut. Elle estime que cette théorie s'applique avant tout aux contestations relatives au for, et tend à permettre au défendeur d'obtenir une décision sur le fond à opposer au demandeur en cas de nouvelle demande à un for alternatif. Elle ne s'appliquerait pas, en revanche, à la question de l'immunité de juridiction invoquée par un Etat. Dans un tel cas, l'exception devrait être examinée d'entrée de cause, quant bien même elle relèverait aussi du fond, car il ne serait pas acceptable d'imposer à l'Etat de procéder devant un tribunal dont la compétence est contestée. (...)

b) Lorsque l'Etat défendeur se prévaut de l'immunité de juridiction, cette question paraît devoir être tranchée d'entrée de cause; il ne serait en effet guère compatible avec le principe même de l'immunité de forcer un Etat à procéder sur le fond alors qu'il entend, en invoquant sa souveraineté, se soustraire à toute juridiction d'un autre Etat. Comme le relève la recourante, la possibilité de renvoyer à l'examen du fond les questions de procédure possédant une double pertinence est admise à titre exceptionnel, dans l'intérêt du défendeur (...). Or, l'intérêt de l'Etat qui se prévaut de son immunité de juridiction commande au contraire que cette question soit résolue avant toute autre.

c) En l'espèce, la Cour de justice a certes présumé, à ce stade de la procédure, les pouvoirs de représentation de Gramont Berres, signataire des contrats de garantie. Elle ne l'a toutefois fait que pour admettre la validité de l'élection de for figurant dans ces garanties, question qui ne fait pas, en tant que telle, l'objet du présent recours. En revanche, s'agissant de l'immunité de l'Etat requérant, la cour cantonale a considéré que les garanties, données par l'Etat recourant dans le cadre d'opérations commerciales, relevaient clairement d'actes accomplis *jure gestionis*. Cette considération, dont le bien-fondé est examiné ci-dessous, suffisait à rejeter l'exception d'immunité, sans qu'il y ait à rechercher, comme l'a fait la cour cantonale à titre subsidiaire, si la renonciation figurant dans les contrats de garantie engageait valablement la République du Paraguay. Le recours, qui porte essentiellement sur cette dernière question, tombe ainsi à faux.

4.- a) Le principe de l'immunité de juridiction permet aux Etats étrangers qui en invoquent le bénéfice d'exclure à leur égard la compétence des tribunaux suisses dans les domaines relevant de leur souveraineté. (...).

La recourante invoque le bénéfice de la Convention européenne du 16 mai 1972 sur l'immunité des Etats, tout en reconnaissant que cette convention, ratifiée par la Suisse, n'est pas applicable en l'espèce, faute pour le Paraguay d'y être partie. Même si les traités internationaux sont considérés, par la jurisprudence, comme couverts par la notion de prescriptions de "droit fédéral" (...), la convention précitée n'est effectivement pas applicable en l'espèce. Seules le sont les règles générales du droit international relatives à l'immunité de juridiction.

Depuis 1918 (ATF 44 I 49), le Tribunal fédéral s'est rallié à une conception restrictive de l'immunité des Etats. Selon cette jurisprudence, le principe de l'immunité de juridiction des Etats étrangers n'est pas une règle absolue. Si l'Etat étranger a agi en vertu de sa

souveraineté (*jure imperii*), il peut invoquer le principe de l'immunité de juridiction; si, en revanche, il a agi comme titulaire d'un droit privé ou au même titre qu'un particulier (*jure gestionis*), l'Etat étranger peut être assigné devant les tribunaux suisses, à condition toutefois que le rapport de droit privé auquel il est partie soit rattaché de manière suffisante au territoire suisse ("*Binnenbeziehung*"; [ATF 120 II 400](#), CH / 7). La distinction des actes *jure gestionis* et *jure imperii* ne saurait se faire sur la seule base de leur rattachement au droit public ou au droit privé. Ce critère dépend en effet de la définition, malaisée, du droit public, laquelle diffère selon les Etats; il ne saurait être pris en considération qu'à titre d'indice, parmi d'autres (...). De même, le but poursuivi par l'Etat dans sa transaction ne saurait être déterminant, car ce but vise toujours, en dernière analyse, un intérêt étatique. On recherchera donc prioritairement quelle est la nature intrinsèque de l'opération: il s'agit de déterminer si l'acte qui fonde la créance litigieuse relève de la puissance publique, ou s'il s'agit d'un rapport juridique qui pourrait, dans une forme identique ou semblable, être conclu par deux particuliers ([ATF 110 II 255](#), CH / 2 ; [104 Ia 367](#), CH / 20). La jurisprudence range ainsi parmi les actes accomplis *iure imperii* les activités militaires, les actes analogues à une expropriation ou une nationalisation ([ATF 113 Ia 172](#), CH / 11), les décisions de saisie d'objets d'une valeur historique ou archéologique ([ATF 111 Ia 52](#), CH / 6); sont en revanche des actes accomplis *iure gestionis* les emprunts de l'Etat ou d'une banque centrale souscrits sur le marché monétaire ([ATF 104 Ia 376](#), CH / 20), les contrats d'entreprise ([ATF 112 Ia 148](#), CH / 10 ; [111 Ia 62](#), CH / 16), de bail ([ATF 86 I 23](#), CH / 8), ou les contrats de travail passés par une représentation diplomatique avec des travailleurs remplissant une fonction subalterne ([ATF 120 II 400](#), CH / 7 ; [ATF 120 II 408](#), CH / 5). La jurisprudence recourt aussi à des critères extérieurs à l'acte en cause. Elle voit par exemple l'indice d'un acte accompli *jure gestionis* dans le fait que l'Etat est entré en relation avec un particulier sur le territoire d'un autre Etat, sans que ses relations avec ce dernier soient en cause ([ATF 104 Ia 367](#), CH / 20 ; [86 I 23](#), CH / 8). Ces activités commerciales, telles des accords de livraison de marchandises ou de prestations de service, ou des engagements financiers comme, en particulier des contrats de prêt ou de garantie, ne sont évidemment pas couvertes par l'immunité diplomatique.

Par ailleurs, ce qui vaut pour l'immunité de juridiction vaut en principe aussi pour l'immunité d'exécution, la seconde n'étant qu'une simple conséquence de la première, sous la seule réserve que les mesures d'exécution ne concernent pas des biens destinés à l'accomplissement d'actes de souveraineté.

b) En l'espèce, c'est à juste titre que la Cour de justice a exclu la recourante et défenderesse du bénéfice de l'immunité de juridiction. C'est en vue du financement de contrats de développement industriel que la République du Paraguay a garanti aux deux syndicats des banques demanderesse le remboursement des fonds engagés. Dans le document établi le 5 juin 1986 et signé par l'ambassadeur en mission spéciale Gustavo Gramont Berres, la République du Paraguay, garant, s'oblige à verser aux banques ou détenteurs tous montants dus par la société paraguayenne et impayés par elle. Comme le relève la cour cantonale, sans être sérieusement contredite par la recourante, il s'agit d'engagements similaires à ceux qui sont régulièrement assumés par des établissements bancaires ou par d'autres particuliers. Sur le vu des principes rappelés ci-dessus, il apparaît en effet que, de par leur nature et leur portée économique pour l'Etat en cause, ces actes juridiques tombent dans le champ des actes accomplis *jure gestionis*. Un Etat ne saurait ainsi opposer son immunité à un particulier pour prétendre faire échec à la revendication des garanties auxquelles il a consenti. L'Etat recourant est manifestement intervenu au même titre qu'une personne privée (*jure gestionis*), dans le cadre d'une opération typiquement commerciale. La prorogation de for en faveur des tribunaux suisses constitue enfin, elle aussi, l'indice d'un acte "*jure gestionis*".

c) Ces considérations suffisent à sceller le sort du recours. Dès lors que l'Etat recourant ne peut se prévaloir de son immunité de juridiction, il n'y a en principe pas à rechercher s'il y a valablement renoncé. Toutefois, la question de la validité des pouvoirs de représentation de Gramont Berres, signataire des contrats (question qui fait l'objet principal du recours), conserve une pertinence pour juger de la validité de la prorogation de for en faveur des

tribunaux suisses. Quand bien même elle relève pour le surplus du fond, cette question peut être résolue, au stade actuel de la procédure, à la faveur des considérations suivantes.

aa) La recourante et défenderesse prétend que les garanties seraient des faux; les autorités pénales paraguayennes auraient condamné Gramont Berres pour faux, falsification de sceaux officiels et violation des devoirs de fonction. La recourante ne conteste toutefois pas que Gustavo Gramont Berres a été régulièrement annoncé comme consul auprès du Consulat du Paraguay à Genève, ainsi qu'il ressort d'une attestation du Département fédéral des affaires étrangères (DFAE). La même attestation précise qu'il n'existait, à l'époque, aucune ambassade du Paraguay à Berne, et que Gustavo Gramont Berres n'était pas accrédité en Suisse en tant qu'ambassadeur en mission spéciale.

bb) L'ensemble du droit diplomatique et consulaire est fondé sur les rapports de confiance particuliers qu'entretiennent les Etats contractants. A l'obligation internationale de l'Etat accréditaire de s'abstenir de tout comportement susceptible d'empêcher l'Etat accréditant de s'occuper convenablement de ses affaires, correspond l'obligation de l'Etat accréditant de veiller à ce que les diplomates qui dépendent de lui n'outrepassent pas le cadre de leurs fonctions dans l'Etat accréditaire. La Convention de Vienne souligne, dans son préambule, que les privilèges et immunités ne sont pas destinés à avantager des individus, mais à "assurer l'accomplissement efficace de leurs fonctions par les postes consulaires au nom de leurs Etats respectifs". Il en découle que les relations consulaires, empreintes de formalisme dans leur établissement, ont pour corollaire un degré élevé de confiance réciproque entre les Etats qui se les accordent.

cc) En l'espèce, l'établissement des relations consulaires entre la Suisse et le Paraguay s'est fait par consentement mutuel. De manière générale, les fonctions consulaires consistent notamment à favoriser le développement de relations commerciales, économiques, culturelles et scientifiques entre l'Etat d'envoi et l'Etat de résidence et à promouvoir de toute autre manière des relations amicales entre eux. La reconnaissance par le DFAE des fonctions officielles de consul à Genève de Gustavo Gramont Berres suppose que les formalités liées à la lettre de provision et à l'exequatur, soit l'autorisation de l'Etat de résidence d'admettre le chef de poste consulaire à l'exercice de ses fonctions à Genève ont été régulièrement accomplies. Il en découle que les opérateurs économiques qui ont été amenés à traiter avec Gustavo Gramont Berres pouvaient légitimement partir de l'idée que le consul était dûment habilité à traiter avec eux. Sous l'angle du droit consulaire, même la désignation par le Président de la République du Paraguay, de Gramont Berres en qualité d'ambassadeur en mission spéciale, et les précisions données par le Ministre des finances sur la nature des fonctions qui étaient confiées à l'intéressé, n'était pas de nature à susciter a priori la méfiance des interlocuteurs européens de Gramont Berres, puisque la Convention de Vienne envisage dans certaines circonstances qu'un fonctionnaire consulaire puisse, dans un Etat où l'Etat d'envoi n'a pas de mission diplomatique, être chargé d'accomplir certains actes diplomatiques. Il en résulte que l'Etat défendeur doit assumer les pouvoirs à tout le moins apparents créés en faveur de celui qu'il considère maintenant comme un falsus procurator.

Le recours II doit par conséquent être rejeté en tant qu'il est recevable.

Recours III (champ d'application matériel de la Convention de Lugano; notion de "matière civile et commerciale" au sens de l'art. 1 al. 1 CL)

5.- (...)

6.- [Contestation de l'application ratione materiae de la Convention de Lugano par la demanderesse aux motifs qu'une entité publique appartenant à l'Etat italien, et contrôlée par lui, ne saurait être partie à des rapports juridiques relevant de la "matière civile et commerciale" au sens de l'art. 1er CL]

a) [Application ratione personae et temporis de la Convention de Lugano]

Seule reste litigieuse la question de l'application ratione materiae de la Convention. A ce propos, la Cour de justice s'est référée à la doctrine (...) pour relever que ce qui importe, c'est bien l'objet du litige, et l'existence éventuelle d'un rapport de subordination entre

parties. Or en l'espèce, si la SACE est un organisme étatique italien financé par les deniers publics et les primes d'assurance, son but est de promouvoir l'exportation et d'assumer la sécurité des transactions commerciales avec certains Etats. Les contrats conclus par la SACE avec l'intimée constituaient des contrats analogues à ceux que peut conclure un assureur privé. Le fait que les contrats d'assurance litigieux renvoyaient eux-mêmes aux règles du code civil italien (applicable en complément de la loi spéciale italienne sur la SACE, qui ne règle que la question des risques et des opérations commerciales à assurer et des conditions contractuelles) et que ces contrats ne comportent aucune trace d'un rapport de subordination entre cocontractants, permettait de conclure que les contrats d'assurance litigieux relevaient effectivement de la "matière civile et commerciale" et que la Convention de Lugano s'appliquait au litige.

b) [Référence aux jugements de la Cour de justice des Communautés européennes (CJCE) et sur les conclusions développées par certains avocats généraux devant elle, concernant les dispositions de la Convention de Bruxelles]

c) [Interprétation de la Convention de Lugano avec prise en compte des arrêts des autres tribunaux]

d) [Jurisprudence de la CJCE relative à la notion de "matière civile et commerciale" ; interprétation autonome de cet article]

e) [Admission de l'interprétation "autonome" par le Tribunal fédéral] (...) Il y a lieu de considérer que les critères retenus par la CJCE dans le cadre de son interprétation autonome peuvent être repris par le Tribunal fédéral dans le cadre interprétatif rappelé ci-dessus. En d'autres termes, le critère des personnes (privées ou publiques) parties au rapport juridique considéré n'est pas déterminant, mais bien davantage la question de savoir si, au regard de l'objet du litige, l'autorité en question a agi "jure gestionis" ou "jure imperii". (...)

f) En l'espèce, la SACE, malgré son statut d'organisme étatique italien, financée par le budget de l'Etat et les primes d'assurance, a bien conclu des contrats d'assurance comparables aux contrats que peut passer un assureur privé.

(...) La police d'assurance conclue à Rome le 26 août 1986 entre la SACE et l'Overland Trust Bank (Genève) [et les clauses y figurant] (...) sont typiques de contrats d'assurance privés. Ce contrat - pas plus que les circonstances ayant mené à sa conclusion - ne fait apparaître aucun rapport de subordination entre la SACE et l'OTB ou les banques, de sorte que l'on doit admettre que la SACE a agi pour l'essentiel comme une personne privée. Comme le Tribunal fédéral l'a récemment relevé, l'applicabilité de la Convention de Lugano ne saurait être exclue du seul fait que l'une des parties en litige est une collectivité publique (...).

g) En résumé et en conclusion, la SACE, en concluant le contrat d'assurance litigieux, n'a pas agi dans l'exercice de prérogatives de la puissance publique, mais bien plutôt comme l'aurait fait un simple particulier ("jure gestionis"), en traitant sur un pied d'égalité avec son cocontractant: il s'ensuit qu'aux fins de l'application de la Convention de Lugano, la matière couverte par le contrat peut être qualifiée de "civile et commerciale" au sens de l'art. 1er al. 1 CL et que les dispositions des art. 7 ss CL sont bien

applicables.

Le recours III doit, en conséquence, être rejeté.

(a)	N° d'enregistrement	CH / 13
(b)	Date	21 mars 1984
(c)	Service / auteur	1ère Cour de droit public du Tribunal fédéral Suisse
(d)	Parties	Banco de la Nación, Lima c/ Banca cattolica del Veneto, Vicenza
(e)	Points de droit	Immunité de juridiction des organismes dotés d'une personnalité juridique propre. Les corporations, dotées selon le droit de leur siège d'une personnalité juridique propre, ne peuvent en principe se prévaloir de l'immunité de juridiction dont bénéficient les Etats étrangers. Des exceptions ne sont envisageables que dans la mesure où de telles corporations ont agi en vertu d'un pouvoir de souveraineté.
(f)	n°	
(g)	Source(s)	ATF 110 Ia 43 ; www.bger.ch
(h)	Renseignements complémentaires	Confirmation de la jurisprudence antérieure relative à l'immunité de juridiction des organismes publics reliés à l'Etat. ATF 104 Ia 373 (CH / 20)
(i)	Texte complet – Extraits – Traduction – Résumé	Texte complet sur Internet (en allemand) Résumé du texte en allemand : voir ci-dessous

Résumé

Faits

A.- Der Banco de la Nación und die mit der Gruppe des Banco Ambrosiano S.p.A., Mailand, verbundene Banca cattolica del Veneto traten 1979 in Geschäftsbeziehungen. Diese überwies dem Banco de la Nación hohe Beträge als Festgeld auf bestimmte Zeit, die diese Bank zu einem grossen Teil unter Erhöhung des Zinssatzes um 1/4% an Gesellschaften der Ambrosiano-Gruppe weiterleitete.

Im Sommer 1982 verfügten die italienischen Behörden die Zwangsliquidation des Banco Ambrosiano. Der Banco de la Nación anerkennt, dass in diesem Zeitpunkt ein Guthaben der Banca cattolica aus Festgeldanlagen von 32,5 Mio. Dollar bestand. Er bestreitet jedoch für den grösseren Teil dieser Summe (...)

B.- Am 18. März 1983 erliess der Einzelrichter im summarischen Verfahren am Bezirksgericht Zürich auf Begehren der Banca cattolica gegen den Banco de la Nación einen Arrestbefehl für die Forderungssumme von Fr. 64'087'667.--. Der Arrest sollte sämtliche Guthaben und Wertgegenstände des Banco de la Nación bei verschiedenen Zürcher Banken erfassen. Bei zwei der Banken wurden Guthaben des Banco de la Nación im Betrag von Fr. 989'932.35 verarrestiert.

C.- Der Banco de la Nación führt staatsrechtliche Beschwerde mit dem Antrag, den Arrestbefehl infolge völkerrechtlicher Immunität des Beschwerdeführers als ungültig zu erklären sowie Arrestbeschlagnahme und Zahlungsbefehl aufzuheben.

Extrait des considérants:

4.- a) Nach den bisherigen Entscheiden ([BGE 106 Ia 147](#), CH/1 ; [104 Ia 368](#), CH/20 ; [86 I 27](#), CH/8.; [82 I 85](#), CH/4 ; 56 I 249) können sich Körperschaften, denen nach dem Recht ihres Sitzes eigene Rechtspersönlichkeit zukommt, nicht auf die Immunität des hinter ihnen stehenden Staates berufen. Das Bundesgericht hat in [BGE 104 Ia 373](#) (CH/20) Zweifel daran geäussert, ob an dieser Rechtsprechung in jedem Falle festzuhalten sei, ohne jedoch daraus Folgerungen zu ziehen. Die Zweifel wurden damit begründet, dass heute im Rechtsleben den wirtschaftlichen Zusammenhängen allgemein grössere Bedeutung beigemessen werde als noch vor Jahrzehnten, und es wurde auf die Europäische Konvention über Staatenimmunität hingewiesen, deren Art. 27 gegen die Annahme spreche, dass mit dem Staat eng verbundene selbständige öffentlichrechtliche oder privatrechtliche Körperschaften sich von vornherein nicht auf die staatliche Immunität berufen könnten. Die damals nur gestreifte Frage muss heute entschieden werden; denn da im vorliegenden Fall im Unterschied zum früheren unbestrittenemassen eine Binnenbeziehung des streitigen Rechtsverhältnisses zur Schweiz fehlt, könnte sich der Beschwerdeführer auf die Immunität berufen, wenn diese auch nichtstaatlichen Organisationen zukäme.

b) Die neuere Lehre scheint einhellig der Auffassung zuzuneigen, es bestehe kein Anlass, die Staatenimmunität auf selbständige Institute von der Art des Beschwerdeführers auszudehnen. (...)

Nach Art. 27 Abs. 1 des Europäischen Übereinkommens über Staatenimmunität "schliesst der Ausdruck Vertragsstaat einen Rechtsträger eines Vertragsstaates nicht ein, der sich von diesem unterscheidet und die Fähigkeit hat, vor Gericht aufzutreten, selbst wenn er mit öffentlichen Aufgaben betraut ist". Abs. 2 dieser Bestimmung lautet dahin, die in Abs. 1 bezeichneten Rechtsträger könnten vor den Gerichten anderer Vertragsstaaten wie eine Privatperson in Anspruch genommen werden; doch könnten diese Gerichte nicht über in Ausübung der Hoheitsgewalt (iure imperii) vorgenommene Handlungen entscheiden.

Unter Berücksichtigung der Auffassung der zitierten Autoren sowie des Europäischen Übereinkommens, das zwar hier nicht anwendbar ist, aber als Ausdruck neuerer

völkerrechtlicher Tendenzen Beachtung verdient, ist die in [BGE 104 Ia 373](#) (CH / 20) dargelegte Rechtsauffassung dahin zu verdeutlichen, dass Organismen mit eigener Rechtspersönlichkeit grundsätzlich keine staatliche Immunität beanspruchen können und dass Ausnahmen nur denkbar sind, soweit sie mit staatlicher Hoheitsgewalt (*iure imperii*) gehandelt haben. Weitere Ausführungen über den Ausnahmefall erübrigen sich, da die Parteien übereinstimmend und zutreffend davon ausgehen, bei den zwischen ihnen abgewickelten Bankgeschäften handle es sich nicht um eine hoheitliche Tätigkeit. Dieses die Immunität eher einschränkende Ergebnis ist allein praktisch befriedigend. Es wäre unbillig, wenn eine finanziell eng mit einem ausländischen Staat verbundene Bank in internationalen Finanztransaktionen mit den privatrechtlich organisierten Banken beliebig in Wettbewerb treten dürfte, sich aber den gerichtlichen und vollstreckungsrechtlichen Folgen unter Berufung auf Immunität entziehen könnte.

(a)	N° d'enregistrement	CH / 14
(b)	Date	7 mai 1991
(c)	Service / auteur	Chambre des poursuites et des faillites du Tribunal fédéral Suisse
(d)	Parties	G. O. C / autorité cantonale de surveillance en matière de poursuites et faillites du canton de Genève
(e)	Points de droit	Art. 31 et 32 ch. 3 de la Convention de Vienne. L'agent diplomatique au bénéfice de l'immunité de juridiction civile peut engager un procès civil, puis des poursuites.
(f)	n°	1
(g)	Source(s)	ATF 117 III 15 ; www.bger.ch
(h)	Renseignements complémentaires	
(i)	Texte complet – Extraits – Traduction – Résumé	Texte complet en français : voir ci-dessous

Résumé

Faits

A.- A la réquisition de P.-R. et C. A., à Montevideo, l'Office des poursuites de Genève notifia le 7 février 1991 à G. O. un commandement de payer 5'895 fr. 15, plus accessoires. Cet acte de poursuite indiquait un jugement du Tribunal des baux du 13 février 1990 comme titre de la créance ou cause de l'obligation. Le poursuivi forma opposition à cette poursuite.

B.- Il porta ensuite plainte auprès de l'autorité cantonale de surveillance et requit l'annulation de ce commandement de payer, en faisant valoir que le poursuivant ne pouvait, en qualité de diplomate brésilien, agir en justice tant que son immunité n'était pas levée et que le jugement invoqué en poursuite n'était pas exécutoire. Il invoquait aussi sa situation personnelle.

Par décision du 17 avril 1991, l'autorité de surveillance rejeta cette plainte.

C.- G. O. interjette recours au Tribunal fédéral contre cette décision et requiert l'annulation de la poursuite.

Extrait des considérants:

1.- Le recourant soutient principalement que, vu le statut d'agent diplomatique du créancier, celui-ci ne pouvait engager des poursuites contre lui.

Le poursuivant était rattaché à la Mission permanente du Brésil auprès des Nations Unies à Genève. Conformément à l'art. IV, section 9, let. g, de l'Accord sur les privilèges et immunités de l'Organisation des Nations Unies conclu entre le Conseil fédéral suisse et le Secrétaire général de l'Organisation des Nations Unies les 11 juin/1er juillet 1946, il jouissait des privilèges, immunités et facilités reconnus aux agents diplomatiques. Ces droits et usages, en particulier l'immunité de juridiction, sont codifiés par la Convention de Vienne sur les relations diplomatiques du 18 avril 1961, ratifiée, sans réserves, le 30 octobre 1963 par la Suisse et le 25 mars 1965 par le Brésil.

Cette convention pose, en faveur de l'agent diplomatique et sous réserve d'exceptions précises, le principe de l'immunité de la juridiction civile et administrative de l'Etat accréditaire (art. 31). Mais le bénéfice de cette immunité n'a pas pour conséquence de priver l'agent diplomatique de la possibilité d'agir en justice, car la Convention de Vienne prévoit que l'agent diplomatique qui engage une procédure n'est plus recevable à invoquer l'immunité de juridiction à l'égard des prétentions reconventionnelles liées à sa demande principale (art. 32 ch. 3). Cette règle, qui régit les conséquences, quant à l'immunité, de l'ouverture d'une procédure par un agent diplomatique, suppose qu'une telle action est possible. Malgré son statut diplomatique, le créancier pouvait donc engager une action judiciaire et les mesures d'exécution qui en découlent.

Il faut au surplus remarquer que, au moment de l'introduction des poursuites, le créancier n'était plus agent diplomatique en poste en Suisse.

(a)	N° d'enregistrement	CH / 15
(b)	Date	2 novembre 1989
(c)	Service / auteur	1ère Cour de droit public du Tribunal fédéral Suisse
(d)	Parties	Ferdinand et Imelda Marcos c/ Office fédéral de la police
(e)	Points de droit	<p>Entraide internationale en matière pénale (USA); Convention de Vienne sur les relations diplomatiques du 18 avril 1961 ; immunité de juridiction pénale des chefs d'Etat.</p> <p>Les chefs d'Etat bénéficient d'une immunité de juridiction pénale totale à l'étranger. Ce privilège, reconnu par la coutume internationale, dans l'intérêt de l'Etat, à son plus haut dignitaire, trouve ses limites dans la volonté de cet Etat et dans la durée des fonctions du chef de l'Etat, les art. 32 et 39 de la Convention de Vienne s'appliquant par analogie. Immunité levée en l'espèce, par la déclaration d'un organe dirigeant, dont la Suisse peut admettre qu'elle lie l'Etat représenté.</p>
(f)	n°	0a ; 1a ; 2a
(g)	Source(s)	ATF 115 Ib 496 ; www.bger.ch
(h)	Renseignements complémentaires	
(i)	Texte complet – Extraits – Traduction – Résumé	Texte complet sur Internet (en français) Résumé du texte en français : voir ci-dessous

Résumé

Faits

A.- Le 2 février 1988, le Département de la justice des Etats-Unis d'Amérique a adressé à l'Office fédéral de la police une demande d'entraide judiciaire en matière pénale fondée sur le Traité conclu entre la Confédération suisse et les Etats-Unis d'Amérique (ci-après: le Traité). Cette demande était faite pour les besoins d'une instruction ouverte par le Ministère public des Etats-Unis pour le district méridional de l'Etat de New York, entre autres contre les époux Ferdinand et Imelda Marcos. Les infractions poursuivies consistaient en d'importants détournements de fonds (...) et d'oeuvres d'art (...) que Marcos et son épouse auraient commis au préjudice des USA et de la République des Philippines alors qu'ils exerçaient dans ce dernier Etat, respectivement, les fonctions de Président de la République et celles de ministre des Affaires sociales et de Gouverneur du district métropolitain de Manille.

L'Etat requérant demandait en particulier à la Suisse de lui procurer des documents détenus par des établissements bancaires, fiduciaires et de courtage ayant leur siège à Genève, pour lui permettre de clarifier les opérations sur lesquelles enquêtait le Ministère public américain.

L'Office fédéral ayant décidé d'entrer en matière sur la demande d'entraide, Marcos et son épouse ont fait opposition, en faisant valoir, entre autres arguments, que les autorités américaines ne seraient pas compétentes pour poursuivre les faits décrits dans la demande d'entraide. Déboutés, ils se sont adressés au Tribunal fédéral par la voie d'un recours de droit administratif.

Invité en cours de procédure à vérifier si l'Etat requérant était au bénéfice d'une déclaration des autorités compétentes de la République des Philippines quant à la levée de l'immunité des époux Marcos, l'Office fédéral de la police a déposé à cet égard une note du 17 octobre 1988 adressée à l'Ambassade des Etats-Unis à Manille, dont le texte sera reproduit ci-après dans la mesure utile.

Le Tribunal fédéral a admis partiellement le recours de droit administratif au sens des considérants, admettant la demande d'entraide dans la mesure où elle se rapportait à la répression des infractions consistant dans le remboursement des bons du trésor philippins et dans l'appropriation des tableaux appartenant à la République des Philippines et se trouvant sur le territoire des Etats-Unis.

Extrait des considérants:

5.- Les recourants contestent la juridiction de l'Etat requérant en se prévalant de l'immunité dont ils jouiraient en leur qualité d'anciens dirigeants d'un Etat étranger.

a) Dans l'arrêt de principe qu'il a rendu le 1er juillet 1987 (CH/21), sur la base d'un recours de droit administratif déposé par les époux Marcos contre des mesures provisoires adoptées suite à une demande d'entraide de la République des Philippines, le Tribunal fédéral s'est déjà penché sur le privilège de l'immunité personnelle que le droit des gens reconnaît aux chefs d'Etat. Il a rappelé que l'immunité personnelle est le pendant de l'immunité dont jouit l'Etat étranger quand il agit "iure imperii", c'est-à-dire dans ses attributs de puissance publique; la Convention de Vienne sur les relations diplomatiques du 18 avril 1961 (ci-après: la Convention de Vienne) traduit simplement dans un acte normatif un concept issu du droit international public coutumier. S'agissant à l'époque de l'immunité d'exécution dont un ancien chef d'Etat et son épouse entendaient se prévaloir à l'encontre du pays qu'ils avaient dirigé, il a considéré que ce privilège était reconnu dans l'intérêt de cet Etat et qu'il serait contraire au système qu'un particulier, qui n'est plus chargé de le représenter, puisse invoquer ce privilège à l'encontre des intérêts mêmes de son pays. D'un autre point de vue, le Tribunal fédéral a jugé dans le même arrêt qu'il n'appartenait pas à l'Etat requis de dire si un ancien chef d'Etat bénéficie encore après sa destitution de l'immunité que le droit de son pays lui garantissait pour les actes officiels accomplis durant son mandat. C'est en effet là

une question qui ne peut être résolue qu'à la lumière du droit interne autonome de l'Etat requérant ([ATF 113 Ib 275](#) CH/21).

b) En l'espèce, il s'agit de savoir si les recourants jouissent d'une immunité de juridiction pénale faisant obstacle à la poursuite d'actes commis dans l'exercice des fonctions officielles dont ils étaient titulaires dans la République des Philippines.

Selon la jurisprudence du Tribunal fédéral suisse concernant l'immunité de juridiction des Etats étrangers, les principes du droit des gens font partie intégrante du droit interne suisse. Les tribunaux suisses appliquent donc les règles du droit international coutumier de la même manière que s'il s'agissait d'un traité international ([ATF 106 Ia 142](#), CH/1 ; 82 I 75, CH/4 ; 56 I 237 ; ...).

Le droit international coutumier a de tout temps reconnu aux chefs d'Etat - ainsi qu'aux membres de leur famille et à leur suite lorsqu'ils séjournent dans un Etat étranger - les privilèges de l'inviolabilité personnelle et de l'immunité de juridiction pénale (...). Cette immunité de juridiction est également reconnue au chef d'Etat qui séjourne dans un Etat étranger à titre privé et s'étend, dans ces circonstances, aux membres les plus proches de sa famille qui l'accompagnent, ainsi qu'aux membres de sa suite ayant un rang élevé. Ces personnes ne peuvent par conséquent faire l'objet de poursuites pénales ou même d'une assignation à comparaître devant un tribunal (...). Le droit international public coutumier a reconnu de tels privilèges "ratione personae" aux chefs d'Etat autant pour tenir compte de leurs fonctions et du symbole de souveraineté qu'ils portent qu'en raison de leur caractère représentatif dans les relations interétatiques. Bien que la théorie de l'exterritorialité ait été critiquée et abandonnée depuis longtemps comme justification de l'immunité des chefs d'Etat ou des agents diplomatiques (...), les chefs d'Etat sont absolument exempts, "ratione personae", de toute contrainte étatique et de toute juridiction d'un Etat étranger en raison d'actes qu'ils auraient commis, où que ce soit, dans l'exercice de fonctions officielles. Au contraire de l'immunité de juridiction civile, toujours discutée et relativisée, l'immunité de juridiction pénale du chef de l'Etat est totale (...). Cette immunité paraît également englober, sans réserve, les activités privées des chefs d'Etat (...).

c) Le privilège de l'immunité de juridiction pénale des chefs d'Etat, dégagé par la coutume internationale, n'a pas été repris en toutes lettres dans la Convention de Vienne. Les art. 31 ss de celle-ci traitent en effet exclusivement de l'immunité de juridiction des agents diplomatiques, c'est-à-dire des chefs de missions ou des membres du personnel diplomatique de ces dernières. On ne saurait en déduire que les textes normatifs élaborés sous l'égide des Nations-Unies établiraient pour les chefs d'Etat étrangers une protection inférieure à celle des représentants diplomatiques de l'Etat qu'ils dirigent ou qu'ils représentent universellement. La Convention sur les missions spéciales conclue à New York le 8 décembre 1969, désigne par exemple nommément, à son art. 21, le chef de l'Etat d'envoi comme l'un des titulaires de l'immunité de juridiction pénale à l'égard des autorités de l'Etat de réception (art. 31) lorsqu'il est en visite officielle. La Convention sur la prévention et la répression des infractions contre les personnes jouissant d'une protection internationale, y compris les agents diplomatiques, signée à New York le 14 décembre 1973, entend par "personne jouissant d'une protection internationale" tout chef d'Etat, y compris chaque membre d'un organe collégial remplissant en vertu de la Constitution de l'Etat considéré les fonctions de chef d'Etat (art. 1er ch. 1 let. a, 1re phrase; ...). Dans le rapport qu'elle a présenté en 1986 à l'Assemblée générale sur sa trente-huitième session consacrée en partie aux "immunités juridictionnelles des Etats et de leurs biens", la Commission du droit international a souligné, en commentant l'art. 4 de son avant-projet sur ce problème, l'étendue des privilèges et immunités que le droit international reconnaît "ratione personae" aux chefs d'Etat et que cet article du projet réserve expressément (...). Les chefs d'Etat bénéficient donc d'une immunité de juridiction totale dans les Etats étrangers pour tous les actes qui tomberaient ordinairement sous la juridiction de ces Etats, quel que soit le critère de rattachement des actes incriminés. Ce privilège, reconnu pour le profit de l'Etat étranger à son plus haut dignitaire, trouve ses limites, d'une part, dans la volonté de cet Etat et, d'autre part, dans la durée des fonctions du chef d'Etat. Les art. 32 et 39 de la Convention de Vienne doivent donc s'appliquer par analogie aux chefs d'Etat. Aux termes de l'art. 32,

l'Etat accréditant peut renoncer à l'immunité de juridiction de ses agents, mais il doit toujours le faire expressément, des actes concluants étant insuffisants. Selon l'art. 39, lorsque les fonctions d'une personne bénéficiant de privilèges et immunités prennent fin, ces privilèges et immunités cessent au moment où cette personne quitte le pays de réception, mais l'immunité subsiste en ce qui concerne les actes qu'elle a accomplis dans l'exercice de ses fonctions comme membre de la mission diplomatique (ch. 2). Les conditions dans lesquelles un chef d'Etat a abandonné le pouvoir et le fait qu'il a quitté l'Etat qu'il dirigeait, même pour vivre en exil dans l'Etat qui entend le poursuivre, sont sans importance (...).

d) L'immunité de fonction dont jouissaient ainsi les recourants a donc perduré pour les actes délictueux éventuellement commis alors qu'ils exerçaient encore le pouvoir dans la République des Philippines. Leur mise en accusation devant les juridictions américaines ne pouvait et ne peut entrer en ligne de compte qu'en vertu d'une renonciation expresse de l'Etat philippin à l'immunité que le droit international public leur a reconnue non comme un avantage personnel, mais en faveur de l'Etat qu'ils dirigeaient (...). C'est la raison pour laquelle le Tribunal fédéral a, le 7 juillet 1989, invité l'Office fédéral de la police à vérifier si les Etats-Unis d'Amérique étaient au bénéfice d'une déclaration des autorités compétentes de la République des Philippines quant à la levée de l'immunité des époux Marcos. Interpellé à ce sujet par l'autorité intimée, l'Etat requérant a produit une note verbale adressée le 17 octobre 1988 par le Département des affaires étrangères de la République des Philippines à l'Ambassade des Etats-Unis d'Amérique à Manille, note dont il convient d'extraire le passage suivant (traduction): "... Prenant note de ce Traité (d'entraide judiciaire conclu entre les deux Etats), le gouvernement philippin renonce par la présente à toute immunité (1) d'Etat, (2) de chef d'Etat ou (3) diplomatique, dont l'ancien Président philippin Ferdinand Marcos et son épouse Imelda Marcos pourraient jouir ou dont ils pourraient avoir joui sur la base du droit américain ou du droit international, y compris, mais non exclusivement, sur la base de l'art. 39 al. 2 de la Convention de Vienne, en vertu des fonctions que ces personnes ont exercées naguère dans le gouvernement de la République des Philippines. Cette renonciation s'étend à la poursuite de Ferdinand et Imelda Marcos dans l'affaire mentionnée ci-dessus (enquête conduite dans le district méridional de l'Etat de New York), ainsi qu'à tout acte criminel ou à toute autre affaire connexe dans lesquels ces personnes tenteraient de se référer à leur immunité. Elle ne touche pas en revanche le gouvernement philippin lui-même ou tout membre ancien ou actuel de ce gouvernement.

En ce qui concerne l'application éventuelle de la doctrine américaine de l'acte d'Etat, le gouvernement philippin tient à souligner qu'à son point de vue toute acquisition de richesses personnelles par les époux Marcos ne saurait constituer des actes publics, gouvernementaux ou officiels du gouvernement philippin, même si de tels enrichissements ont été réalisés par l'utilisation ou la prétendue utilisation de l'autorité gouvernementale.

Il relève qu'il serait contraire aux intérêts des Philippines et de la justice que ces personnes puissent bénéficier de la doctrine de l'acte d'Etat..."

Cette déclaration a été transmise au mandataire des recourants. Dans leur détermination du 1er septembre 1989, ceux-ci font valoir que la levée d'immunité est intervenue selon une procédure irrégulière, que cet acte est de toute façon contraire à la Constitution philippine et aux principes du droit international coutumier, qu'il n'indique pas que les autorités philippines auraient renoncé à leur juridiction pour les actes énoncés dans la demande d'entraide américaine et que la déclaration de levée d'immunité n'a pas été produite par le Gouvernement des Etats-Unis dans le cadre de la procédure actuellement pendante devant le Tribunal fédéral du district méridional de l'Etat de New York.

Ces objections ne sont pas pertinentes. Du point de vue matériel, la déclaration contenue dans la note diplomatique du 17 octobre 1988 répond au souci qu'a exprimé le Tribunal fédéral lors de sa délibération du 28 juin 1989 de ne pas coopérer à une violation éventuelle du droit des gens par l'Etat requérant. Du point de vue formel, il est décisif que cette déclaration émane de l'un des organes dirigeants des Philippines, que le Tribunal fédéral peut considérer comme un représentant qualifié de cet Etat. Le point de savoir si cette renonciation est conforme au droit formel et matériel de la République des Philippines est une question de droit étranger que le Tribunal fédéral n'a pas à résoudre. Il en va de même

du problème de la portée que les juridictions américaines entendent donner à la déclaration en question. C'est devant le juge du fond que les parties devront développer de tels arguments en se prévalant, le cas échéant, des jugements qui auront été rendus entre-temps à ce propos.

(a)	N° d'enregistrement	CH / 16
(b)	Date	24 avril 1985
(c)	Service / auteur	1ère Cour de droit public du Tribunal fédéral Suisse
(d)	Parties	République socialiste du peuple arabe de Lybie-Jamahiriya c/ Actimon SA
(e)	Points de droit	<p>Mesures d'exécution forcée contre un Etat étranger; immunité en droit international public.</p> <p>La question de savoir si une somme séquestrée doit ou non être sortie des biens frappés de séquestre, en raison de son affectation à un but relevant de l'exercice de la puissance publique, est étroitement liée au droit de l'Etat à l'immunité. Il se justifie dès lors, à cet égard, d'entrer en matière sur le recours de droit public, sans exiger l'épuisement des instances cantonales.</p> <p>Admissibilité de l'exécution forcée sur les biens de l'Etat étranger, lorsque ceux-ci ne servent pas à des buts relevant de l'exercice de la puissance publique. L'immunité en droit international public, eu égard à la nature de la chose séquestrée, peut seulement être revendiquée, lorsque cette chose est consacrée d'une manière reconnaissable à un but concret relevant de l'exercice de la puissance publique.</p>
(f)	n°	0.b.3. ; 1.b. ; 2.b.
(g)	Source(s)	ATF 111 la 62 ; www.bger.ch
(h)	Renseignements complémentaires	<p>Recevabilité d'un recours de droit public sans épuisement des voies de recours cantonales pour les cas litiges portant sur l'immunité des Etats :</p> <p>ATF 111 la 57, CH/6 ; 110 la 43, CH/13 ; 106 la 142, CH/1 ; 104 la 367, CH/20 ; 86 I 23, CH/8</p>
(i)	Texte complet – Extraits – Traduction – Résumé	<p>Texte complet sur Internet (en allemand)</p> <p>Résumé du texte en allemand : voir ci-dessous</p>

Résumé

Faits

A.- Am 21. Juni 1980 schloss die in Genf niedergelassene Firma Actimon SA mit der Libyschen Arabischen Sozialistischen Volks-Jamahiriya einen Vertrag über die Lieferung und Montage einer kompletten Milch-Pasteurierungsanlage in Fataeh zum Preise von 10'718'000 französischen Franken. Bei der Abwicklung des Vertrages ergaben sich Meinungsverschiedenheiten vor allem hinsichtlich der Inanspruchnahme der Garantiesumme durch die Bestellerin. Die Unternehmerin hält dafür, sie habe gegenüber jener aus dem Werkvertrag noch einen Anspruch von insgesamt SFr. 460'593.20.

Am 2. Februar 1984 stellte die Actimon SA durch ihren Anwalt beim Einzelrichter im summarischen Verfahren des Bezirkes Zürich gegen die Bestellerin ein Arrestbegehren für die genannte Forderung. (...). Der Einzelrichter bewilligte den Arrest für die auf den Namen der Libyschen Arabischen Sozialistischen Volks-Jamahiriya lautenden Vermögenswerte, wies ihn dagegen ab, soweit die Arrestierung von Vermögenswerten der Central Bank of Libya verlangt wurde.

Gegen die Verweigerung des Arrestes bezüglich der auf den Namen der Central Bank of Libya lautenden Vermögenswerte erhob die Actimon SA durch ihren Anwalt beim Obergericht des Kantons Zürich Rekurs. Dieser wurde mit Beschluss gutgeheissen, und der Einzelrichter im summarischen Verfahren des Bezirks Zürich wurde angewiesen, den verlangten Arrestbefehl auch bezüglich der auf diese Bank lautenden Vermögenswerte auszustellen. Der Einzelrichter erliess gestützt hierauf am 30. April 1984 einen entsprechenden Arrestbefehl. Dieser führte zur Verarrestierung eines im Depot der Central Bank of Libya bei der Schweizerischen Nationalbank liegenden Schuldscheines der International Bank for Reconstruction and Development im Betrage von SFr. 1'000'000.--. Bereits am 28. Februar 1984 hatte das Betreibungsamt Zürich 1 für die nämliche Forderung einen Zahlungsbefehl gegen die Libysche Arabische Sozialistische Volks-Jamahiriya erlassen, gegen den der Anwalt der Betriebenen innert der von der Zustellung an laufenden gesetzlichen Frist Rechtsvorschlag erhob.

Die Libysche Arabische Sozialistische Volks-Jamahiriya führt beim Bundesgericht staatsrechtliche Beschwerde u.a. wegen Verletzung ihrer völkerrechtlichen Immunität; sie macht geltend, das Obergericht habe in willkürlicher Weise angenommen, für ihre Schulden könnten Aktiven der Central Bank of Libya in Anspruch genommen werden; im Eventualstandpunkt beruft sie sich auf fehlende Arresttauglichkeit des verarrestierten Aktivums.

Extrait des considérants:

7.- a) Ihren Eventualstandpunkt begründet die Beschwerdeführerin damit, die verarrestierten Wertschriften der Central Bank of Libya seien nicht arresttauglich, weil sie zur Erfüllung hoheitlicher Aufgaben bestimmt seien. Die Zentralbank habe lediglich die Aufgabe, Münzen und Banknoten auszugeben sowie die Landeswährung zu schützen; sie übe somit ausschliesslich hoheitliche Funktionen aus. Das kommerzielle Bankgeschäft obliege dagegen in Libyen einer Reihe von anderen, staatlich kontrollierten Banken. (...). Das Bundesgericht hat sich schon im Urteil [BGE 86 I 23](#), CH / 8 mit der Frage befasst, ob die verarrestierten Beträge nicht wegen hoheitlicher Zweckbestimmung vom Arrestbeschluss auszunehmen seien. Es handelt sich hierbei um eine mit dem Immunitätsanspruch des Staates eng zusammenhängende Frage, weshalb es sich rechtfertigt, auf die staatsrechtliche Beschwerde auch in diesem Punkt einzutreten, ohne eine Erschöpfung des kantonalen Instanzenzuges zu verlangen (vgl. [BGE 111 Ia 57](#), CH/6 ; [110 Ia 43](#), CH/13 ; [106 Ia 142](#), CH/1 ; [104 Ia 367](#), CH/20 mit Hinweisen).

b) Die Zwangsvollstreckung in Vermögenswerte des ausländischen Staates, die hoheitlichen Zwecken dienen, ist unzulässig. Indessen lässt sich nicht sagen, ausländische Staaten oder ihre Staatsbanken könnten nur Vermögenswerte besitzen, die hoheitlichen Zwecken gewidmet sind. Neben dem Verwaltungsvermögen besitzt die öffentliche Hand in

der Regel auch Finanzvermögen, das mit dem Vermögen von natürlichen oder juristischen Personen des Privatrechts durchaus vergleichbar ist. Immunität im Hinblick auf die Natur der verarrestierten Sache kann somit nur dann beansprucht werden, wenn diese in erkennbarer Weise einem konkreten hoheitlichen Zweck gewidmet ist, wie etwa der Pflege diplomatischer Beziehungen (Botschaftsgebäude). Für Bargeld und Wertschriften kann nach herrschender Auffassung so lange keine Immunität beansprucht werden, als nicht bestimmte Summen oder Titel für derartige Zwecke ausgeschieden worden sind ([BGE 108 III 109](#), CH/3 mit Hinweisen; [86 I 32](#), CH/8; ...). LUDWIG GRAMLICH vertritt allerdings eine für die ausländischen Zentralbanken vorteilhaftere Auffassung. Er hält dafür, Guthaben ausländischer Zentralbanken seien als Währungsreserven regelmässig von der Zwangsvollstreckung auszunehmen (...). Dieser Standpunkt vermag indessen nicht voll zu überzeugen, hätte es doch sonst jeder ausländische Staat in der Hand, sich durch Anlage beliebiger Mittel im Ausland auf den Namen seiner Zentralbank eine praktisch unbeschränkte Vollstreckungsimmunität zu sichern, also ein Ergebnis zu erreichen, das ihm nach den vorstehenden Darlegungen jedenfalls nach schweizerischer Rechtsauffassung von der Sache her nicht zusteht.

Im vorliegenden Falle ist Arrestgegenstand ein im Depot der Central Bank of Libya bei der Schweizerischen Nationalbank liegender Schuldschein über SFr. 1'000'000.--, ausgestellt von der International Bank for Reconstruction and Development. Die Beschwerdeführerin hat über die Zweckbestimmung dieses Arrestobjektes keinerlei Ausführungen gemacht, wenn man von der allgemeinen Behauptung absieht, es diene hoheitlichen Zwecken. Demnach kann nicht gesagt werden, der Schuldschein sei im Hinblick auf seine Bestimmung kein taugliches Arrestobjekt; er kann durchaus auch zum gewöhnlichen Finanzvermögen der Libyschen Zentralbank gehören. Bei dieser Sachlage erweist sich die Auffassung der Beschwerdeführerin, wonach das Arrestobjekt aus Immunitätsgründen untauglich sei, als nicht begründet. Die staatsrechtliche Beschwerde ist daher abzuweisen, soweit darauf eingetreten werden kann.

(a)	N° d'enregistrement	CH / 17
(b)	Date	15 avril 1987
(c)	Service / auteur	1ère Cour de droit public du Tribunal fédéral Suisse
(d)	Parties	Banca del Gottardo c/ Chambre de recours pénale du Tribunal d'appel du canton du Tessin
(e)	Points de droit	<p>Entraide judiciaire internationale en matière pénale.</p> <p>Actes d'entraide requérant l'adoption de mesures de contrainte; immunité en droit international public.</p> <p>a) Ne jouissent pas de l'immunité en Suisse les administrateurs d'un établissement d'un Etat tiers qui n'a pas le statut diplomatique en Suisse, ni les biens que cet Etat a déposés dans des banques suisses et qui ne sont pas directement affectés à des buts relevant de l'exercice de la puissance publique: ces biens peuvent donc faire l'objet de mesures de contrainte en vue de l'octroi de l'entraide à la Partie requérante.</p> <p>b) La question de savoir si les personnes poursuivies jouissent de l'immunité diplomatique dans l'Etat requérant et ne sont donc pas soumises à la juridiction de cet Etat n'a pas à être résolue par le juge suisse de l'entraide, mais par le juge étranger compétent sur le fond.</p>
(f)	n°	0.b.3., 1.b., 2.b.
(g)	Source(s)	ATF 113 Ib 157 ; www.bger.ch
(h)	Renseignements complémentaires	
(i)	Texte complet – Extraits – Traduction – Résumé	Texte complet sur Internet (en italien) Résumé du texte en italien : voir ci-dessous

Résumé

Faits

A.- L'Ufficio d'istruzione penale presso il Tribunale civile e penale di Milano procede dal 1982 contro parecchie persone a suo modo di vedere implicate nel clamoroso dissesto del Banco Ambrosiano S.p.A. con sede in Milano, dichiarato in stato d'insolvenza con sentenza del Tribunale civile di Milano del 25 agosto 1982. Accanto a componenti del consiglio d'amministrazione e del collegio sindacale, a dirigenti e funzionari di detto istituto e ad altri terzi, sono oggetto dell'inchiesta anche amministratori dell'Istituto per le Opere di Religione (I.O.R.) con sede nella Città del Vaticano, tra i quali Mons. Paul Marcinkus, presidente dell'Ufficio amministrativo di tale ente. Secondo i Giudici istruttori di Milano Pizzi e Bricchetti, è configurabile nei confronti di queste persone il concorso in fatti di bancarotta fraudolenta pluriaggravata nonché nel reato di false comunicazioni ed illegale ripartizione di utili.

Il 30 aprile/6 maggio 1983 il Procuratore generale della Repubblica presso la Corte d'appello di Milano trasmetteva al Dipartimento federale di giustizia e polizia una commissione rogatoria del 9 aprile dei dott. Pizzi e Bricchetti, contenente la descrizione dei fatti e postulante tra l'altro, nei confronti

della Banca del Gottardo in Lugano, la trasmissione (in copia o fotocopia certificate conformi) dei conti del Banco Ambrosiano Andino di Lima, del Banco Ambrosiano Overseas Limited di Nassau (BAOL), dell'Ambrosiano Group Banco Comercial di Managua, facenti capo al Banco Ambrosiano Holding di Lussemburgo, come pure dei conti dello I.O.R. e di società, nominativamente designate, da esso patrocinate, ivi compresi i documenti comprovanti la provenienza del denaro accreditato e la destinazione ad esso data; inoltre la trasmissione, con le stesse modalità, delle pratiche e dei documenti relativi riguardanti le società che la Banca del Gottardo amministrava sino alla data delle lettere con le quali la direzione di tale istituto aveva trasmesso i dossier concernenti la Manic S.A. e la United Trading Corporation (UTC) all'Ambrosiano Services di Lussemburgo (18 novembre 1981). Postulava inoltre la rogatoria l'assunzione quali testimoni dei signori G., D. e B., rispettivamente presidente, ex presidente e direttore generale della Banca del Gottardo.

L'Ufficio federale di polizia (UFP) trasmetteva il 27 maggio 1983 al Giudice istruttore sottocenerino la rogatoria, pregandolo di darvi seguito, dopo averne esaminato l'ammissibilità prima facie ai sensi dell'art. 78 AIMP. Il 30 ottobre 1985 l'UFP trasmetteva al magistrato ticinese un'ulteriore rogatoria, stesa dal dott. Bricchetti, e contenente l'elenco delle domande da sottoporre ai testi G. e B. Nel frattempo, il Giudice istruttore sottocenerino si era pronunciato sulla richiesta d'assistenza italiana. Innanzitutto, con citazione 2 dicembre 1983, aveva convocato per essere sentiti i suddetti testi. In seguito, con decreto 13 dicembre 1983, egli aveva ordinato il sequestro degli atti bancari presso la Banca del Gottardo concernenti i conti del Banco Ambrosiano Andino, del BAOL, dell'Ambrosiano Group Banco Comercial Managua, i conti I.O.R. e delle società da esso patrocinate, nonché il sequestro di tutta la documentazione e degli atti riguardanti le società collegate che la Banca del Gottardo amministrava fino alla trasmissione dei dossier completi della Manic Holding S.A. e dell'UTC all'Ambrosiano Services in Lussemburgo.

Contro il decreto di sequestro e la convocazione dei testimoni, la Banca del Gottardo interponeva reclami il 12 e 16 dicembre 1983 alla Camera dei ricorsi penali del Tribunale di appello (CRP), chiedendone l'annullamento e postulando il rifiuto dell'assistenza.

La CRP ha respinto questi reclami con decisione del 13 gennaio 1986, che la Banca del Gottardo ha tempestivamente impugnato con ricorso di diritto amministrativo: essa ha chiesto in via principale che la domanda d'assistenza italiana venga respinta e che di conseguenza vengano annullati i sequestri e le citazioni testimoniali; in via subordinata, che l'audizione dei testi sia eseguita in assenza delle autorità straniere e sulla base di una lista di precise domande sulle quali dovrà pronunciarsi il Giudice istruttore sottocenerino con decisione formale, che lo stesso Giudice istruttore precisi la documentazione da sequestrare e che, prima della trasmissione all'Italia, i documenti siano vagliati dall'UFP a tutela dei terzi.

Il Tribunale federale ha respinto il ricorso, in quanto ricevibile, nel senso dei considerandi.

Extrait des considérants:

3.- Parimenti infondata è l'obiezione secondo cui le relazioni dello I.O.R. presso banche svizzere o gli amministratori di tale istituto della Città del Vaticano non potrebbero esser oggetto in Svizzera di misure coercitive in vista della concessione di assistenza giudiziaria ad uno Stato che - come l'Italia - ha aderito alla CEAG, perché godrebbero d'immunità diplomatica e sarebbero soggetti unicamente alla giurisdizione del Sommo Pontefice. Né le persone fisiche contro le quali si dirige l'inchiesta italiana godono d'un qualsiasi statuto diplomatico nello Stato richiesto (...), né i beni, cioè i conti sui quali porta l'indagine presso la Banca del Gottardo - dato e non concesso che tale aspetto possa aver rilevanza in una procedura di assistenza accessoria - appaiono costituiti e destinati dallo Stato pontificio "iure imperii", per perseguire direttamente scopi rivolti all'attuazione di compiti statali ([ATF 112 la 149](#), CH/10): si tratta di depositi di mezzi finanziari costituiti "iure gestionis", parificabili a quelli che potrebbero avere in Svizzera uno Stato o una banca estera di Stato ([ATF 111 la 65](#), CH/16 ; 110 la 44, CH/13 ; 106 la 147, CH/1 ; 104 la 368, CH/20). Di una mancanza del requisito di doppia punibilità per motivo d'immunità non si può neppur lontanamente parlare, e non fa dubbio che, si fossero i fatti verificati in Svizzera, sussisterebbe giurisdizione.

(...)

(a)	N° d'enregistrement	CH / 18
(b)	Date	2 juillet 1959
(c)	Service / auteur	2ème Cour de droit civil du Tribunal fédéral Suisse
(d)	Parties	B. c/ C.
(e)	Points de droit	Conditions de l'immunité diplomatique.
(f)	n°	0.c., 1.c., 2.c.
(g)	Source(s)	ATF 85 II 153 ; www.bger.ch
(h)	Renseignements complémentaires	
(i)	Texte complet – Extraits – Traduction – Résumé	Texte complet sur Internet (en allemand) Résumé du texte en allemand : voir ci-dessous

Résumé

Faits

A.- Am 29. September 1950 heiratete der iranische Staatsangehörige B., geb. 1914 (...) vor Zivilstandsamt Montreux die damals 19jährige Schweizerin K. Nachdem die Ehegatten zwei Monate in einem Hotel in Montreux zusammen gelebt hatten, kehrte die Ehefrau zu ihren Eltern nach Bern zurück (...). Am 22. Juli 1951 gebar sie in Bern ein Mädchen.

B.- Am 30. Juni 1952 leitete die Ehefrau in Bern, wo sie eine Stelle angenommen hatte, Scheidungsklage ein. Am 11. September 1952 schloss sie mit dem Ehemann eine Vereinbarung (...), die u.a. bestimmte: "I. Die Parteien vereinbaren hiermit, dass der Scheidungsprozess bis zum 31. Dezember 1952 einzustellen ist. Herr B. wird unterdessen in Teheran die Auflösung der Ehe erwirken. Herr B. verpflichtet sich, dafür besorgt zu sein, dass nach erfolgter Auflösung der Ehe durch das zuständige Organ in Teheran Frau B. die nötigen Ausweisschriften erhält, aus welchen sich in rechtsgenügender Form die Auflösung der Ehe ergibt (...)".

Gemäss übereinstimmender Darstellung der Parteien wurde die Ehe am 24. November 1952 in Teheran nach iranischem Rechte geschieden. Ein Scheidungsurteil liegt nicht vor. Die Ehefrau erklärt, sie habe ein solches nie zu sehen bekommen.

Am 14. Dezember 1953 verheiratete sich Frau K. gesch. B. mit dem Schweizerbürger M.

C.- Am 7. Juli 1958 leitete Frau M.-K. gegen ihren frühern Ehemann B. in Luzern "Urteilsabänderungsklage" ein mit den Begehren: "Das Ehescheidungsurteil des Ehescheidungs-gerichtshofes von Teheran ... vom 24. November 1952 sei abzuändern (...)".

(...)

Der Beklagte erstattete eine "nichteinlässliche Rechtsantwort" mit dem Begehren, es sei zu erkennen, dass er nicht gehalten sei, einlässlich zu antworten. Er bestritt die Angaben der Klägerin über seinen Wohnsitz und den Zweck seines Aufenthalts in der Schweiz nicht, zog aber aus der Tatsache, dass er in Teheran Wohnsitz habe und dass die Ehe in Iran nach dortigem Rechte geschieden worden sei, den Schluss, die luzernischen Gerichte seien zur Beurteilung der vorliegenden Klage nicht zuständig. Zur materiellen Begründung der Klage nahm er nicht Stellung. Am 30. Oktober 1958 erkannte das Amtsgericht, er habe sich auf die Klage einzulassen.

Gegen dieses Urteil rekurrierte der Beklagte an das Obergericht des Kantons Luzern. Er legte dem Rekurs u.a. die beglaubigte Übersetzung eines vom Bâtonnier de l'ordre des avocats in Teheran am 4. September 1958 ausgestellten Zeugnisses bei, das besagt, er sei "avocat du premier rang au Palais de Justice" mit Wohnsitz in Teheran und halte sich seit einiger Zeit zu Studienzwecken in der Schweiz auf. Mit Urteil vom 26. Januar 1959 hat die II. Kammer des Obergerichts den Rekurs abgewiesen.

D.- Mit der vorliegenden Berufung an das Bundesgericht beantragt der Beklagte: "Die Berufung sei gutzuheissen und der Entscheid des luzernischen Obergerichtes aufzuheben ; Die schweizerischen Gerichte seien als unzuständig zu erklären ; Der Berufungskläger sei nicht gehalten, sich auf die Klage einzulassen, bzw. es sei auf die Klage nicht einzutreten."

In der Berufungsschrift machte der Beklagte neu geltend, er unterstehe nicht der schweizerischen Gerichtsbarkeit, weil er "im Genusse der diplomatischen Privilegien (Exterritorialität)" sei, was vom Bundesgericht bestehenden Verbot neuer Vorbringen berücksichtigt werden müsse, da der neu erhobene Einwand sich auf die Prozessvoraussetzungen beziehe. Er legte eine Bescheinigung des Chefs der "Délégation permanente de l'Iran auprès de l'Office européen des Nations Unies et des institutions spécialisées" vor, die lautet: "Je certifie que Me B., Avocat, est mon secrétaire personnel aux affaires juridiques et fait partie du personnel de la Mission diplomatique auprès des Nations-Unies à Genève."

Ausserdem berief er sich auf ein Schreiben der Abteilung für Internationale Organisation des Eidg. Politischen Departements an Advokat G. in Genf, worin - ohne Bezugnahme auf seinen Fall – gesagt wird: "... Par décision du 31 mars 1948, le Conseil fédéral a déterminé le statut juridique des délégations permanentes et de leur personnel en l'assimilant mutatis mutandis à celui des missions diplomatiques et de leur personnel à Berne. Le personnel des missions diplomatiques accréditées en Suisse jouit de l'immunité de juridiction."

Die Klägerin beantragt, auf die Berufung sei nicht einzutreten; eventuell sei sie abzuweisen und das angefochtene Urteil zu bestätigen.

E.- Auf eine Erkundigung des Instruktionsrichters hin hat das Eidg. Politische Departement dem Bundesgericht mitgeteilt, der Beklagte sei von der ständigen Delegation von Iran beim europäischen Sitz der Vereinten Nationen bis heute nicht akkreditiert worden. Sein Name erscheine auch nicht in dem von dieser Organisation monatlich herausgegebenen Verzeichnis des Personals der ständigen Delegationen der Mitgliedstaaten. Ebensovienig habe die Abteilung für Internationale Organisationen des Politischen Departements von der iranischen Botschaft in Bern Mitteilung über seine Ernennung erhalten. Die Gewährung diplomatischer Vorrechte sei mit der Erfüllung gewisser Formalitäten verbunden. Für das diplomatische Personal in Bern bestünden diese in der offiziellen Anmeldung beim Protokoll des Politischen Departements durch die zuständige ausländische Vertretung und in der ausdrücklichen Anerkennung des neuen Beamten durch die erstgenannte Amtsstelle. Durch Bundesratsbeschluss seien den Mitgliedern der ständigen Delegation in Genf, ihrem Rang entsprechend, die gleichen Privilegien eingeräumt worden, wie sie dem Personal der diplomatischen Vertretungen in Bern gewährt werden. Bei der Anmeldung eines neuen Beamten seien daher die gleichen Regeln anzuwenden. Punkt 4 des erwähnten Bundesratsbeschlusses bestimme:

"La création d'une délégation permanente, les arrivées et les départs des membres des délégations permanentes sont annoncées au département politique par la mission diplomatique à Berne de l'Etat intéressé. Le département politique délivre aux membres des délégations une carte de légitimation attestant les privilèges et immunités dont ils bénéficient en Suisse."

Da mit Bezug auf den Beklagten die elementare Voraussetzung der Anmeldung nicht erfüllt worden sei, könne er auf die Befreiung von der Gerichtsbarkeit keinen Anspruch erheben.

Extrait des considérants:

1.- (...)

2.- In Übereinstimmung mit dem Eidg. Politischen Departement ist anzunehmen, dass einer Person, die als Mitglied einer diplomatischen Mission in der Schweiz bezeichnet worden ist, die diplomatischen Vorrechte nur zugebilligt werden können, wenn der Sendestaat die Ernennung der zuständigen schweizerischen Stelle, dem Politischen Departement, mitgeteilt und diese Behörde den neu ernannten Beamten anerkannt hat (...). Da die Zugehörigkeit des Beklagten zu einer diplomatischen Mission dem Politischen Departement nicht einmal gemeldet, geschweige denn von ihm anerkannt worden ist, beansprucht der Beklagte die diplomatische Immunität zu Unrecht.

(...)

(a)	N° d'enregistrement	CH / 19
(b)	Date	1er octobre 1981
(c)	Service / auteur	2ème Cour de droit civil du Tribunal fédéral Suisse
(d)	Parties	Universal Oil Trade Inc. c/ République islamique d'Iran
(e)	Points de droit	Lorsqu'un Etat agit comme créancier séquestrant (ou comme demandeur) devant la juridiction d'un autre Etat, il renonce implicitement à son immunité : le juge suisse qui entre en matière sur une réquisition de séquestre présentée par un Etat étranger ne méconnaît donc pas l'immunité de juridiction de cet Etat.
(f)	n°	0.c., 1.c., 2.c.
(g)	Source(s)	ATF 107 la 171 ; www.bger.ch
(h)	Renseignements complémentaires	L'immunité de juridiction des Etats étrangers constitue une règle du droit des gens assimilable à un traité. Le recours de droit public fondé sur l'immunité de juridiction des Etats étrangers est donc recevable, car, en se prévalant de son immunité, l'Etat étranger conteste la compétence de l'autorité suisse (ATF 106 la 146 , CH/1)
(i)	Texte complet – Extraits – Traduction – Résumé	Texte complet sur Internet (en français) Résumé du texte en français : voir ci-dessous

Résumé

Faits

A.- Par ordonnance du 12 mai 1981, le président de la 3e Chambre du Tribunal de première instance de Genève a ordonné, en faveur de la République islamique d'Iran, le séquestre de tous les biens, appartenant à Universal Oil Trade Inc. ou au compte de tiers, notamment au nom ou au chiffre de Ahmad Heidari et/ou de Ahmad Sarakbi, auprès de la Compagnie financière méditerranéenne COFIMED S.A., pour une créance de 106'538'736 fr., avec intérêt à 5% du 19 février 1981, contre-valeur de 53'269'368 US \$.

Universal Oil Trade Inc. a formé un recours de droit public, pour arbitraire, contre cette ordonnance, dont elle demandait l'annulation. Le Tribunal fédéral a rejeté ce recours dans la mesure où il était recevable.

Extrait des considérants:

4.- Sous le chapitre de la qualité pour agir de la prétendue créancière, la recourante fait valoir que celle-ci est au bénéfice de l'immunité de juridiction, de sorte qu'elle ne relève pas des tribunaux suisses, et qu'en admettant la requête de séquestre sans examiner ce point le premier juge a violé le principe de l'immunité de juridiction des Etats étrangers, tombant dans l'arbitraire.

La recourante ne démontre nullement comment la méconnaissance de l'immunité de juridiction constituerait l'arbitraire au sens de l'art. 4 Cst [Principe d'égalité]. En réalité, en faisant état de l'immunité de juridiction, elle invoque implicitement la violation de traités internationaux. Il est en effet de jurisprudence que l'immunité de juridiction des Etats étrangers constitue une règle du droit des gens assimilable à un traité ([ATF 106 la 146](#), CH/1 et les références). Le recours de droit public fondé sur l'immunité de juridiction des Etats étrangers est également recevable, car, en se prévalant de son immunité, l'Etat étranger conteste la compétence de l'autorité suisse ([ATF 106 la 146](#), CH/1 et les références).

Toutefois, le moyen est mal fondé. En effet, contrairement aux précédents cités, l'Etat étranger n'est, en la présente espèce, ni le recourant ni le débiteur séquestré, mais bien le créancier séquestrant. Sa qualité d'Etat ne le prive pas du droit d'agir en justice comme demandeur, alors même qu'elle pourrait, le cas échéant, le dispenser d'ester en qualité de défendeur. S'agissant de mesures de procédure ou d'exécution dirigées contre un Etat étranger, le principe de la territorialité et celui de la souveraineté entrent en conflit. Selon le principe de la territorialité, tout ce qui se trouve dans l'espace de la puissance publique de l'Etat relève de sa juridiction. Selon le principe de la souveraineté, la puissance publique de l'un des Etats ne peut être restreinte par celle de l'autre ([ATF 104 la 369](#), CH/20).

b). Lorsqu'un Etat est spontané devant la juridiction d'un autre Etat, il se soumet au principe de la territorialité de celui-ci par le fait même qu'il recourt à sa juridiction. Il s'abstient par là de faire valoir sa propre souveraineté à l'encontre de la puissance publique de l'Etat à la juridiction duquel il recourt, renonçant implicitement à son immunité. Il en va ainsi notamment quand l'Etat étranger agit comme demandeur devant les tribunaux locaux; il se soumet alors ipso facto aux demandes reconventionnelles connexes à la demande principale et ne peut dès lors soulever à leur encontre l'immunité de juridiction.

Comme, en l'espèce, l'Etat iranien a lui-même saisi la juridiction suisse en demandant le séquestre objet du présent recours, la question de son immunité ne se posait donc pas: le juge du séquestre n'a ainsi pas méconnu un traité ou un principe du droit des gens, ni admis à tort sa compétence, lorsqu'il a fait droit à la demande du créancier séquestrant qui se plaçait spontanément sous sa juridiction. Le moyen soulevé doit donc être rejeté.

(a)	N° d'enregistrement	CH / 20
(b)	Date	15 novembre 1978
(c)	Service / auteur	Cour de droit public du Tribunal fédéral Suisse
(d)	Parties	Banque centrale de la République de Turquie c/ Weston Compagnie de Finance et d'Investissement SA
(e)	Points de droit	Immunités dont jouissent les Etats en matière d'exécution forcée, conditions. Une société par actions de droit étranger dotée d'une personnalité juridique propre qui remplit des fonctions de droit public peut-elle invoquer la théorie de l'immunité des Etats? Question indécise. Des restrictions étatiques en matière de paiements qui obligent l'emprunteur à ne rembourser que par le canal de la banque d'Etat n'affectent en rien la nature privée de l'opération ni, partant, celle de la créance en remboursement.
(f)	n°	0.b.3., 1.b.
(g)	Source(s)	ATF 104 Ia 367 ; www.bger.ch
(h)	Renseignements complémentaires	
(i)	Texte complet – Extraits – Traduction - Résumé	Texte complet sur Internet (en allemand) Résumé du texte en allemand : voir ci-dessous

Résumé

Faits

A.- Im Jahre 1977 gewährte die Firma The Lloyds Bank International Ltd in Zürich der Türkiye Garanti Bankasi A.S. in Istanbul ein Time Deposit in der Höhe von einer Million SFr. Die Rückzahlung hätte am 3. Mai 1978 geleistet werden sollen und zwar auf Grund der türkischen Devisengesetzgebung unter Einschaltung der Banque Centrale de la République de Turquie, der türkischen Staatsbank. Nachdem sie nicht fristgerecht erfolgt war, trat die Lloyds Bank ihren Anspruch ab an die Weston Compagnie de Finance et d'Investissement S.A. (nachfolgend Weston Cie. genannt).

Am 30. Juni 1978 erliess der zuständige Einzelrichter des Bezirksgerichts Zürich auf Begehren der Weston Cie. gegen die Banque Centrale de la République de Turquie einen ersten Arrestbefehl für die Forderungssumme von Fr. 1'000'000.- nebst Zinsen und Kosten. Der Arrest, der sich auf Guthaben der Arrestschuldnerin bei drei schweizerischen Grossbanken in Zürich erstreckte, wurde vollzogen und die Arresturkunde ausgestellt. Mit Zahlungsbefehl prosequierte die Weston Cie. den Arrest. Am 25. Juli 1978 erging ein zweiter Arrestbefehl für die nämliche Forderung, gerichtet auf sämtliche Vermögenswerte der Arrestschuldnerin in den Räumen ihrer Repräsentanz in Zürich. Der Vollzug erfolgte am 26. Juli 1978, die Arresturkunde wurde am 31. Juli 1978 ausgestellt. Die Banque Centrale de la République de Turquie erhob hierauf staatsrechtliche Beschwerde, mit welcher sie beantragte, die beiden Arrestbefehle wie deren Vollzug und der Zahlungsbefehl seien aufzuheben. Sie macht geltend, die angefochtenen betreibungsrechtlichen Verfügungen verletzen ihre völkerrechtliche Immunität. Das Bundesgericht weist die Beschwerde ab.

Extrait des considérants:

2.- a) Zwischen der Schweiz und der Türkischen Republik besteht kein Staatsvertrag, der sich auf die Frage der gegenseitigen Immunität der beiden Staaten und ihrer öffentlichrechtlichen Körperschaften bezöge. Auch ist kein internationales Abkommen anwendbar. Wohl besteht eine "Convention européenne sur l'immunité des Etats", doch wurde diese von der Schweiz zwar unterzeichnet, aber bis heute noch nicht ratifiziert. Die Türkei ist der Konvention nicht beigetreten. Die Sache ist daher auf Grund der ungeschriebenen Regeln des Völkerrechtes zu entscheiden, die sich in Lehre und Rechtsprechung - für die Schweiz insbesondere in derjenigen des Bundesgerichtes - widerspiegeln. Die in der "Convention européenne" enthaltenen Grundsätze können immerhin als Ausdruck der Entwicklungstendenz des modernen Völkerrechtes betrachtet und in diesem Sinne mit herangezogen werden.

b) Sollen gegen einen fremden Staat prozessuale oder Zwangsvollstreckungsmassnahmen getroffen werden, so stehen sich zunächst zwei völkerrechtliche Prinzipien gegenüber : nach dem Grundsatz der Territorialität untersteht der Gerichtsbarkeit des Staates all das, was sich auf seinem Hoheitsgebiet befindet ; nach dem Grundsatz der Souveränität kann die Hoheit des einen Staates nicht durch einen andern eingeschränkt werden (...).

Lehre und Rechtsprechung vieler zum europäisch/amerikanischen Kulturkreis gehörenden Staaten haben seit Beginn des 19. Jahrhunderts versucht, zwischen diesen beiden Extremen für die Praxis brauchbare Mittellösungen zu finden.

c) Das Bundesgericht hat bereits in BGE 44 I 49 ff. (Fall Dreyfus) in Anlehnung an die italienische und belgische Rechtsprechung den Standpunkt eingenommen, es sei hinsichtlich der Gerichtsbarkeit über fremde Staaten zu unterscheiden je nachdem, ob der fremde Staat in Ausübung seiner Hoheitsgewalt (iure imperii) oder als Subjekt von Privatrechtsverhältnissen (iure gestionis) handle. Es hat demgemäss einen Arrest für eine Rückforderung aus in der Schweiz ausgegebenen österreichischen Staatsschatz-Anweisungen zugelassen. In BGE 56 I 237 ff. (Fall Walder) hielt das Bundesgericht an dieser Rechtsprechung grundsätzlich fest, betonte jedoch in vermehrtem Masse den schon

im vorstehend erwähnten Entscheid angedeuteten Satz, dass es für die Zulässigkeit der Arrestnahme nicht genüge, wenn ein auf dem *ius gestionis* beruhendes Rechtsgeschäft vorliege; es müsse vielmehr hinzukommen, dass die streitige Forderung "dem schweizerischen Gebiet angehöre", d.h. dass sie entweder vom Schuldner hier begründet, eingegangen oder durchzuführen gewesen sei oder dass mindestens Handlungen vorlägen, aus denen auf die Schweiz als Erfüllungsort zu schliessen sei. Mangels einer solchen Binnenbeziehung wurde ein Arrest schweizerischer Gläubiger gegen die Hellenische Republik für Guthaben aus Obligationen, die von einer in der Zwischenzeit verstaatlichten Eisenbahn-Aktiengesellschaft ausgegeben worden waren, als unzulässig erklärt. Im Urteil [BGE 82 I 75](#) (CH/4) wurde unter ausdrücklicher Bestätigung dieser Rechtsprechung und unter Hinweis auf die erwähnten sowie auf mehrere nicht veröffentlichte Entscheide wiederum festgestellt, es fehle die nötige Beziehung zwischen dem Schuldverhältnis und der Schweiz, weshalb der Arrest (gegen Griechenland) unzulässig sei. In [BGE 86 I 23](#) (CH/8) schliesslich wurde der Arrest einer in der Schweiz wohnhaften Privatperson gegenüber der Vereinigten Arabischen Republik für eine in der Schweiz zahlbare Mietzinsschuld betreffend eine an die ägyptische Botschaft in Wien vermietete Villa als zulässig erklärt. Hinsichtlich der Abgrenzung zwischen Geschäften auf Grund des *ius imperii* und des *ius gestionis* finden sich in diesem Urteil einige wesentliche Präzisierungen, die auch als Weiterentwicklung der Rechtsprechung im Sinne einer gewissen Einschränkung der Immunität zugunsten des Territorialitätsprinzips (...) verstanden werden können. In den Urteilsabwägungen wird dargelegt, bei der schwierigen Unterscheidung zwischen Handlungen *iure imperii* und solchen *iure gestionis* sei nicht auf den Zweck, sondern auf die Natur des Rechtsverhältnisses abzustellen, das in der Schweiz durchgesetzt werden solle. Es komme darauf an, ob die dieses Rechtsverhältnis begründende Handlung auf der staatlichen Gewalt beruhe oder ob sie derjenigen eines Privaten vergleichbar sei. Anhaltspunkte für die Unterscheidung könne z.B. auch der Ort des Handelns liefern. Trete der fremde Staat ausserhalb seiner Grenzen mit einem Privaten in Beziehung, ohne dass dabei die diplomatischen Beziehungen zwischen den beiden Staaten im Spiele seien, so liege darin ein ernsthaftes Indiz für einen Akt *iure gestionis*. Weiter wird in diesem Urteil festgestellt, es bestehe kein Anlass, um Zwangsvollstreckungsmassnahmen und insbesondere die Arrestnahme gegenüber fremden Staaten in weitergehendem Masse einzuschränken als die schweizerische Zivilgerichtsbarkeit als solche ([BGE 86 I 30](#), CH/8). Neuere Entscheide des Bundesgerichtes zum Problem der Immunität fremder Staaten sind nicht bekannt.

d) [Praxis des Auslandes]

e) Die erwähnte, hier nicht anwendbare "Convention européenne sur l'immunité des Etats" vom 16. Mai 1972 (...) regelt die staatliche Immunität zur Hauptsache in der Form, dass eine ganze Reihe von Tatbeständen umschrieben sind, in denen die Immunität gegenüber einem anderen Staat nicht angerufen werden kann. Für den hier zu entscheidenden Fall sind die Art. 4 und 27 von Interesse. Sie lauten (im französischen Originaltext) wie folgt:

"Article 4

1. Sous réserve des dispositions de l'article 5, un Etat Contractant ne peut invoquer l'immunité de juridiction devant un tribunal d'un autre Etat Contractant si la procédure a trait à une obligation de l'Etat qui, en vertu d'un contrat, doit être exécutée sur le territoire de l'Etat du for.

2. Le paragraphe 1 ne s'applique pas:

(a) lorsqu'il s'agit d'un contrat conclu entre Etats;

(b) lorsque les parties au contrat en sont convenues autrement;

(c) lorsque l'Etat est partie à un contrat conclu sur son territoire et que l'obligation de l'Etat est régie par son droit administratif."

"Article 27

1. Aux fins de la présente Convention, l'expression "Etat Contractant" n'inclut pas une entité d'un Etat Contractant distincte de celui-ci et ayant la capacité d'ester en justice, même lorsqu'elle est chargée d'exercer des fonctions publiques.

2. Toute entité visée au paragraphe 1 peut être atraite devant les tribunaux d'un autre Etat Contractant comme une personne privée; toutefois, ces tribunaux ne peuvent pas connaître des actes accomplis par elle dans l'exercice de la puissance publique (*acta iure imperii*).

3. Une telle entité peut en tout cas être atraite devant ces tribunaux lorsque ceux-ci, dans des circonstances analogues, auraient pu connaître de la procédure si elle avait été engagée contre un Etat Contractant."

Die Konvention, die als Ausdruck moderner westeuropäischer Rechtsauffassungen betrachtet werden kann, entfernt sich somit im Ergebnis kaum von der herrschenden schweizerischen Praxis, wenn auch eine gewisse Tendenz zu weiterer Einschränkung der Immunität unverkennbar ist (ausdrücklich statuierte Ausnahme für vertragliche Verpflichtungen, die in dem Staate zu erfüllen sind, dessen Gerichtsstand in Anspruch genommen wird; Vermutung gegen die Immunität bei juristischen Personen des öffentlichen Rechts).

3.- Die Beschwerdeführerin ist, wie sie selbst ausführt, eine Aktiengesellschaft mit eigener Rechtspersönlichkeit, die dem türkischen Privatrecht untersteht. Mindestens 51% der Aktien müssen sich im Besitze des türkischen Staates befinden. Die Beschwerdeführerin hat die Funktion einer Noten- und Zentralbank. Ihr Gouverneur wird auf Vorschlag des Verwaltungsrates durch den Ministerrat ernannt. Rechtlich besteht somit zwischen der Beschwerdeführerin und der Türkischen Republik keine Identität. Es stellt sich daher die Frage, ob sich jene überhaupt auf die Lehre von der Immunität der Staaten berufen könne. Die ältere Rechtsprechung des Bundesgerichtes hat dies verneint für Körperschaften, denen nach dem Recht ihres Sitzes eigene Rechtspersönlichkeit zukommt (...). Ob an dieser Rechtsprechung festgehalten werden könne, steht allerdings nicht ausser jedem Zweifel. Es wird heute in der schweizerischen und ausländischen Rechtsprechung allgemein den wirtschaftlichen Zusammenhängen grössere Bedeutung beigemessen als vor Jahrzehnten; ja es wird des öftern mit Rücksicht auf diese sogar über die nach aussen in Erscheinung tretende Rechtsform hinweggesehen (...). Auch der vorstehend angeführte Art. 27 der "Convention européenne" spricht gegen die Annahme, dass mit dem Staat eng verbundene selbständige öffentlichrechtliche oder privatrechtliche Körperschaften sich von vornherein nicht auf die staatliche Immunität berufen können. Die Frage kann jedoch offen bleiben, wenn die Immunität aus anderen Gründen zu verneinen ist.

4.- Von der Sache her bleiben somit die beiden Fragen zu entscheiden, ob die mit dem angefochtenen Arrest geltend gemachte Verpflichtung auf der Herrschaftsgewalt des türkischen Staates (*ius imperii*) oder auf einer anderen, einem privatrechtlichen Verhältnis gleichwertigen Rechtsgrundlage (*ius gestionis*) beruhe; ferner ob die auch bei Annahme eines auf dem *ius gestionis* beruhenden Verhältnisses notwendige Binnenbeziehung zur Schweiz bestehe.

a) Bei der Unterscheidung zwischen Verpflichtungen *iure imperii* und solchen *iure gestionis* ist nicht auf den Zweck, sondern auf die Natur des Rechtsverhältnisses abzustellen. Es ist zu prüfen, ob ein für die öffentliche Gewalt kennzeichnender Akt vorliege oder ein Rechtsverhältnis, wie es in gleicher oder ähnlicher Form auch zwischen Privaten eingegangen werden könnte ([BGE 86 I 29](#), CH/8). Im vorliegenden Falle geht es um die Rückforderung eines sogenannten "Time Deposit". (...) Es handelt sich um ein Rechtsgeschäft zwischen zwei Handelsbanken, nämlich der Lloyds Bank in Zürich und der Türkiye Garanti Bankasi in Istanbul, wie es in ähnlicher Weise zwischen Banken der ganzen Welt abgeschlossen zu werden pflegt. Der türkische Staat war nicht Vertragspartei, so dass sich die Frage, ob ein Akt *iure imperii* vorgelegen haben könnte, hinsichtlich des Geschäftes als solches überhaupt nicht stellt.

b) Die Beschwerdeführerin legt entscheidendes Gewicht auf die türkische Devisengesetzgebung. Deren wesentlicher Inhalt lässt sich dahin zusammenfassen, dass Darlehen in ausländischer Währung über die Beschwerdeführerin als Staatsbank geleitet

werden müssen. Diese schreibt der kreditnehmenden Bank den Gegenwert in türkischer Währung gut und leistet nach Ablauf der Vertragsdauer die Rückzahlung in ausländischen Devisen, nachdem sie von der Kreditnehmerin Deckung in türkischer Währung erhalten hat. Die Beschwerdeführerin macht geltend, sie handle bei diesem Vorgehen in Ausführung von Weisungen des Finanzministeriums, und sie will daraus ableiten, es liege ihr gegenüber ein Rechtsverhältnis vor, das auf der staatlichen Herrschaftsgewalt beruhe.

Diesem Standpunkt kann nicht beigespflichtet werden. Entscheidend ist, wie bereits dargetan, die Rechtsnatur des Grundverhältnisses und nicht die Art, wie dieses von Seite des ursprünglichen türkischen Vertragspartners erfüllt werden kann. Könnte die Lloyds Bank oder ihre Rechtsnachfolgerin direkt gegen die Türkiye Garanti Bankasi vorgehen, so würde es sich um die Abwicklung eines gewöhnlichen zivilrechtlichen Geschäftes handeln. Die staatlichen Zahlungsrestriktionen ändern daran nichts. Zwar untersteht die Türkiye Garanti Bankasi dem türkischen Devisenrecht und damit dem auf diesem Gebiet vom Staat in Anspruch genommenen *ius imperii*; dagegen hatte die Lloyds Bank mit dessen Herrschaftsmacht überhaupt nichts zu tun, wenn man davon absieht, dass sie sich von vornherein den geltenden Bedingungen über die Rückzahlung des Darlehens in von der Türkei aus gesehen fremder Währung unterzogen hat. Auf Grund der einlässlich dargelegten Lehre und Rechtsprechung kann nicht angenommen werden, dass durch solche reine Zahlungsvorschriften ein privatwirtschaftliches Geschäft in ein solches des *ius imperii* umgestaltet werde. Weder die zitierten BGE 86 I 29 (CH/8) und 82 I 90 (CH/4) noch die in der "Convention européenne" und in der neuen deutschen und englischen Rechtsprechung zum Ausdruck gelangenden Tendenzen lassen einen solchen Schluss zu.

c) Die Beschwerdeführerin scheint die heutigen Beziehungen zwischen ihr und der Weston Cie. völlig losgelöst vom ursprünglichen Vertragsverhältnis zwischen der Türkiye Garanti Bankasi und der Lloyds Bank betrachten zu wollen. Nur so könnte sich überhaupt die Frage nach einem Akt auf Grund des *ius imperii* stellen. Diese Betrachtungsweise geht aber am Kern der Sache vorbei; denn die Weston Cie. hat in den angefochtenen Arrestbefehlen klar zum Ausdruck bringen lassen, dass ihre Forderung auf einem bestimmten, auf Grund seiner Ordnungsnummer durch die Beschwerdeführerin ohne weiteres identifizierbaren "Time Deposit" beruhe. Von einem neuen, selbständigen Rechtsverhältnis kann somit keine Rede sein.

Eine andere Frage ist allerdings die, ob die Beschwerdeführerin zivilrechtlich für die Rückerstattung des Darlehens in Schweizer Franken hafte. Die Weston Cie. hatte dies im Arrestbewilligungsverfahren nicht zu beweisen, sondern lediglich glaubhaft zu machen. Der Einzelrichter hielt dieses Erfordernis wohl auf Grund der vorgelegten Auszüge aus der türkischen Devisengesetzgebung und eines Schreibens der Beschwerdeführerin an die Weston Cie. vom 16. März 1978, in dem die Rückzahlung des Darlehens zugesichert wurde, als erfüllt. Dies schliesst nicht aus, dass die Beschwerdeführerin im Arrestprosequierprozess ihre Passivlegitimation - wie auch die Aktivlegitimation der Weston Cie. - bestreiten kann. Im vorliegenden Verfahren, in dem es lediglich um die Frage der Immunität geht, ist hierauf nicht weiter einzutreten.

d) Nach der zitierten Rechtsprechung wäre - vorbehaltlich der Frage nach den in der Person der Beschwerdeführerin liegenden Voraussetzungen - deren Immunität gegenüber Zwangsvollstreckungs-massnahmen des schweizerischen Rechtes trotz Vorliegens eines auf dem *ius gestionis* beruhenden Rechtsverhältnisses dann zu bejahen, wenn eine Binnenbeziehung dieses Verhältnisses zur Schweiz fehlen würde. Die Frage dieser Binnenbeziehung ist jedoch im vorliegenden Falle nicht streitig. Es steht vielmehr fest, dass die Darlehenssumme in Schweizer Franken bei einer schweizerischen Bank hätte zurückerstattet werden müssen (vgl. [BGE 86 I 30](#), CH/8). Auch unter diesem Gesichtswinkel kann sich somit die Beschwerdeführerin nicht auf den Grundsatz der staatlichen Immunität berufen.

(a)	N° d'enregistrement	CH / 21
(b)	Date	1er juillet 1987
(c)	Service / auteur	1ère Cour de droit public du Tribunal fédéral Suisse
(d)	Parties	Marcos et consorts c/ Chambre d'accusation du canton de Genève
(e)	Points de droit	Entraide judiciaire internationale en matière pénale. Immunité en droit international public: l'immunité personnelle est le pendant de celle dont jouit l'Etat étranger agissant "iure imperii"; elle est un privilège en faveur de magistrats ou de fonctionnaires en activité dans l'intérêt de l'Etat qu'ils représentent, et non en faveur de particuliers, ceux-ci eussent-ils exercé naguère les plus hautes charges publiques dans le pays étranger.
(f)	n°	O.c., 1
(g)	Source(s)	ATF 113 Ib 257 ; www.bger.ch
(h)	Renseignements complémentaires	
(i)	Texte complet – Extraits – Traduction – Résumé	Texte complet sur Internet (en français) Résumé du texte en français : voir ci-dessous

Résumé

Faits

A.- Par notes verbales du 18 avril 1986 (demande informelle), puis du 25 avril 1986 (demande formelle), l'Ambassade de la République des Philippines en Suisse a adressé à l'Office fédéral de la police une demande d'entraide judiciaire internationale établie le 7 avril 1986 par l'Avocat général de cet Etat, à Manille. Cette démarche était accomplie dans le cadre d'une enquête ouverte par la Commission présidentielle pour un gouvernement honnête que la Présidente de la République, Corazon Aquino, avait instituée sitôt après la chute du régime de Ferdinand E. Marcos, qui avait gouverné le pays sans interruption depuis 1966. La Commission présidentielle a pour tâche prioritaire de prêter assistance au nouveau chef de l'Etat en vue de la récupération de toute la fortune qu'auraient acquise illicitement, dans l'exercice de leurs fonctions publiques, Marcos, ses familiers et ses proches, qui avaient précipitamment quitté le pays le 25 février 1986 pour se réfugier aux Etats-Unis d'Amérique (Etat d'Hawaï). L'Ambassade a informé l'Office fédéral de la police que l'enquête préliminaire conduite devant la Commission présidentielle avait notamment pour but la mise en accusation de Marcos et consorts devant le Sandiganbayan, cour spéciale établie par deux décrets édictés par le Président Marcos lui-même sur la base d'une délégation du Batasang Pambasa (Parlement). (...) Le Sandiganbayan est un tribunal spécial ayant juridiction sur les affaires pénales et civiles touchant à la corruption, aux transactions malhonnêtes et aux autres délits commis par des officiers de la fonction publique et des employés, y compris ceux qui se trouvent dans des sociétés appartenant au gouvernement ou contrôlées par lui, dans l'exercice de leurs fonctions légales.

Les faits allégués par l'Etat requérant ont été principalement exposés dans la note verbale du 25 avril 1986 et dans ses annexes. Ils ont ensuite été précisés à plusieurs reprises. Ces documents fournissent des renseignements détaillés sur les charges qui pèsent individuellement sur chacune des personnes poursuivies. Celles-ci auraient usé de leur pouvoir politique pour prélever sur les affaires de l'Etat des bénéfices dont le montant total pourrait s'élever à 100 milliards de pesos philippins. Vingt milliards de pesos (équivalant, au moment de la demande, à 1 milliard de dollars US) auraient été transférés sur des comptes ouverts en Suisse auprès de divers établissements bancaires, selon une déclaration du Procureur général des Philippines datée du 7 avril 1986. Ces détournements de fonds auraient été opérés par divers mécanismes. Ces faits tomberaient sous le coup de la loi de la République des Philippines, réprimant la corruption et les pratiques corrompues, et du code pénal philippin révisé.

La demande d'entraide concluait à la mise en oeuvre de recherches aux fins de déterminer les avoirs placés en Suisse par les intéressés, à la communication de tous renseignements relatifs à ces avoirs, à l'adoption par les autorités suisses des mesures conservatoires et, en définitive, à la remise des avoirs saisis à l'Etat requérant.

Le 21 avril 1986, l'Office fédéral de la police a transmis la demande initiale et informelle de la République des Philippines aux autorités d'exécution des cantons dans lesquels les banques concernées ont leur siège, et notamment au Juge d'instruction du canton de Genève. Il invitait celui-ci à ordonner immédiatement des mesures provisionnelles, qui ont aussitôt été prises.

Marcos et consorts se sont opposés au blocage des avoirs litigieux. Les opposants ont demandé d'avoir accès à toutes les pièces de la procédure d'entraide, droit que le Juge d'instruction a limité, en l'état de la procédure, le 2 juillet 1986.

Par décision du 30 octobre 1986, le Juge d'instruction du canton de Genève a rejeté les oppositions. Il a simultanément ordonné aux banques concernées de lui faire parvenir les renseignements et documents qu'il leur avait demandés le 6 juin 1986. Il a informé les opposants qu'une fois en possession de ces renseignements, il statuerait sur leur transmission à l'Etat requérant par l'intermédiaire de l'Office fédéral de la police et rendrait une décision de clôture de la procédure.

Marcos et consorts ont recouru contre cette décision auprès de la Chambre d'accusation du canton de Genève. (...). Du point de vue matériel, ils soutenaient, entre autres, que la demande d'entraide n'était pas admissible, aucune procédure pénale n'étant pendante dans l'Etat requérant, dont les institutions ne garantiraient au demeurant pas le standard minimum offert aux prévenus par la Convention européenne des droits de l'homme.

Par ordonnance du 4 février 1987, la Chambre d'accusation du canton de Genève a rejeté les recours.

Agissant par la voie de cinq recours de droit administratif distincts, Marcos et consorts demandent au Tribunal fédéral d'annuler cette décision et de dire qu'il n'y a pas lieu de faire droit à la demande d'entraide judiciaire de la République des Philippines. Ils concluent subsidiairement au renvoi de la cause à l'une des deux autorités intimées. Certains recourants demandent aussi l'annulation des décisions prises par le Juge d'instruction les 6 juin, 2 juillet et 30 octobre 1986.

La Chambre d'accusation du canton de Genève propose le rejet des recours. L'Office fédéral de la police conclut principalement à leur irrecevabilité et subsidiairement à leur rejet.

Extrait des considérants:

7.- Le moyen tiré de la prétendue immunité de Marcos et des membres de sa famille ne résiste pas à l'examen. S'agissant de l'immunité dont Marcos et son épouse paraissent se prévaloir à l'égard des juridictions suisses, elle n'entre manifestement en considération, en tant qu'obligation faite à la Suisse par le droit des gens, qu'à l'égard des chefs d'Etat en fonction, situation qui n'est à l'évidence plus celle de Marcos depuis fin février 1986. L'immunité personnelle est en effet le pendant de l'immunité dont jouit l'Etat étranger quand il agit "iure imperii", c'est-à-dire dans ses attributs de puissance publique. La Convention de Vienne sur les relations diplomatiques traduit simplement dans un acte normatif un concept issu du droit international coutumier. L'immunité qu'elle accorde, notamment à ses art. 31 et 37, est un privilège en faveur de magistrats ou de fonctionnaires en activité dans l'intérêt de l'Etat qu'ils représentent, et non en faveur de particuliers, ceux-ci eussent-ils exercé naguère les plus hautes charges publiques dans le pays étranger. Il serait à tout le moins contraire au système qu'un particulier, qui n'est plus chargé de représenter un Etat, puisse invoquer son immunité personnelle à l'encontre des intérêts mêmes de cet Etat.

La question de savoir si la personne poursuivie au sens de l'art. 11 EIMP jouit de l'immunité diplomatique dans l'Etat requérant doit être résolue non par le juge suisse de l'entraide, mais par celui du fond. Il n'appartient donc pas à la Suisse en l'occurrence de trancher le point de savoir si l'ancien chef de l'Etat doit être mis au bénéfice de l'immunité qui lui était garantie par l'art. VII al. 17 de la Constitution philippine du 17 janvier 1973 pour les actes officiels accomplis durant son mandat.

Il suffit dès lors de constater en l'espèce que les mesures de contrainte requises peuvent être ordonnées parce que l'état de fait exposé dans la demande correspond aux éléments objectifs d'une infraction réprimée par le droit suisse.

Par ces motifs, le Tribunal fédéral rejette les recours dans la mesure où ils sont recevables.

(a)	N° d'enregistrement	CH / 22
(b)	Date	4 octobre 1978
(c)	Service / auteur	1ère Cour de droit public du Tribunal fédéral Suisse
(d)	Parties	Jenni, Mouvement Vigilance et Groupe Vigilant du Grand Conseil genevois c/ Conseil d'Etat du canton de Genève
(e)	Points de droit	<p>Approbation donnée par un gouvernement cantonal à la conclusion d'un accord entre le Conseil fédéral et une organisation internationale.</p> <p>L'approbation donnée par un gouvernement cantonal en application de l'arrêté fédéral concernant la conclusion ou la modification d'accords avec des organisations internationales en vue de déterminer leur statut juridique en Suisse constitue-t-elle un acte attaquant par la voie du recours de droit public? Question laissée indécise.</p> <p>En l'espèce, le Gouvernement genevois, en donnant son assentiment à un accord conclu avec l'IATA, n'a pas violé le droit de vote des citoyens.</p>
(f)	n°	
(g)	Source(s)	ATF 104 Ia 350 ; www.bger.ch
(h)	Renseignements complémentaires	
(i)	Texte complet – Extraits – Traduction – Résumé	<p>Texte complet sur Internet (en français)</p> <p>Résumé du texte en français : voir ci-dessous</p>

Résumé

Faits

A.- L'Association de transport aérien international (en abrégé: IATA), créée à La Havane en avril 1945, a pour buts statutaires d'encourager le développement de transports aériens surs, réguliers et économiques, de favoriser le commerce aérien, de fournir les moyens propres à une collaboration des entreprises de transports aériens, engagées directement ou indirectement dans les services de transports aériens internationaux, et de coopérer avec l'Organisation de l'aviation civile internationale (OACI) et autres organisations internationales. Elle constitue une association incorporée selon le droit canadien par loi du 18 décembre 1945; son siège est fixé à Montréal. L'IATA a dans le canton de Genève un siège subsidiaire. Selon un accord conclu entre les autorités genevoises et cette organisation, les membres étrangers du personnel de cette association bénéficiaient d'un abattement de 40% sur leurs impôts. Cet accord ayant été dénoncé par le Gouvernement genevois, l'IATA s'est adressée au Département politique fédéral en vue de régler le statut fiscal de ses services et de son personnel en Suisse. La Mission permanente de la Suisse près les organisations internationales à Genève a soumis au Conseil d'Etat du canton de Genève, à la demande du Département politique fédéral, le texte d'un projet d'accord. Ce dernier devait être conclu sur la base des dispositions de l'arrête fédéral concernant la conclusion ou la modification d'accords avec des organisations internationales en vue de déterminer leur statut juridique en Suisse. L'arrête prévoit que si un accord comporte des dispositions contraires au droit cantonal du siège de l'organisation internationale (par exemple, droit fiscal), l'approbation du canton intéressé devra être obtenue. La Mission permanente priait le Conseil d'Etat genevois de faire connaître dès que possible l'avis des autorités genevoises sur ce projet d'accord, tendant notamment à exonérer, sous certaines réserves, l'IATA des impôts directs et indirects ainsi que des taxes fédéraux, cantonaux et communaux, et à exonérer également de tous impôts fédéraux, cantonaux et communaux sur les traitements, émoluments et indemnités versés par l'IATA les membres du personnel de celle-ci qui n'ont pas la nationalité suisse.

Par lettre du 13 octobre 1976, le Conseil d'Etat a fait savoir à la Mission permanente qu'il était "en principe d'accord" avec le texte proposé. Il a cependant exprimé le voeu que trois articles complémentaires soient inclus dans le texte, en ce qui concerne le but des privilèges, la levée des immunités et la non-responsabilité de la Suisse.

Le 20 décembre 1976, le Conseil fédéral et l'IATA ont conclu un accord "pour régler le statut fiscal des services et du personnel de cette organisation en Suisse". Le texte définitif de cet accord est presque identique à celui qui avait été soumis au Conseil d'Etat genevois.

Ayant appris par la lecture d'un article paru dans un quotidien genevois du 28 janvier 1977 l'existence de l'accord du 20 décembre 1976, Hermann Jenni, à Genève, le "Mouvement Vigilance" et le Groupe Vigilant du Grand Conseil genevois ont adressé au Tribunal fédéral un recours contre la décision du Conseil d'Etat de Genève visant à exonérer les employés étrangers de l'Association internationale des transporteurs aériens.

Le Tribunal fédéral n'est pas entré en matière sur le recours formé par le Groupe Vigilant du Grand Conseil genevois; pour le surplus, il a rejeté le recours en tant qu'il était recevable.

Extrait des considérants:

1.- b) (...) Le recours formé par Jenni est irrecevable en tant qu'il est fondé sur la violation de droits constitutionnels (absence de base légale, séparation des pouvoirs et parallélisme des formes, égalité de traitement).

c) En revanche, Jenni a en principe qualité pour recourir dans la mesure où il invoque la violation de son droit de vote, alors même qu'il ne serait pas personnellement lésé par l'acte attaqué. Il est donc recevable à agir dans la mesure où il soutient que le Conseil d'Etat a pris une décision que seul le législateur aurait pu prendre, en privant ainsi les citoyens du droit de référendum facultatif que leur reconnaît la constitution cantonale.

6.- Le recours de droit public n'est en principe recevable que contre une décision ou un arrêté cantonal. La jurisprudence considère comme tels les actes de souveraineté émanant d'une autorité cantonale, accomplis en vertu de la puissance publique dont elle est investie et affectant d'une façon quelconque la situation de l'individu en lui imposant, soit sous la forme d'un arrêté de portée générale, soit sous celle d'une décision particulière, une obligation de faire, de s'abstenir ou de tolérer.

a) Le Conseil d'Etat conteste en l'espèce l'existence d'un tel acte de souveraineté. Il prétend même qu'il n'y a eu aucun acte du gouvernement cantonal, en soutenant que les "quelques observations" présentées à l'autorité fédérale et concernant le projet d'accord avec l'IATA n'avaient pas de portée juridique. Il se fonde à cet égard sur la loi générale sur les contributions publiques (LPC), aux termes de laquelle "sont exonérés des impôts sur le revenu et sur la fortune, dans la mesure où le prévoient les conventions, accords et arrangements avec les organisations internationales publiques: a) les organisations internationales; b) les membres des conseils, les représentants et les fonctionnaires des organisations internationales". La reconnaissance de l'IATA comme organisation internationale par l'autorité fédérale lierait le canton, de telle sorte que la LCP s'appliquerait automatiquement. L'exonération de l'organisation et de ses fonctionnaires découlant de la loi précitée, l'accord conclu ne dérogerait donc pas au droit cantonal et l'approbation du canton, prévue à l'art. 4 de l'arrêté fédéral concernant la conclusion ou la modification d'accords avec des organisations internationales en vue de déterminer leur statut juridique en Suisse (ci-après: arrêté fédéral), ne serait pas nécessaire. Cette argumentation doit être rejetée. L'art. 7 LCP n'exonère les organisations internationales et leurs fonctionnaires que "dans la mesure où le prévoient les conventions, accords et arrangements avec les organisations internationales publiques". L'imposition est donc la règle, l'exonération l'exception. Tant qu'un accord n'a pas été conclu, les organisations internationales et leurs fonctionnaires sont en principe imposables. La conclusion d'un accord entre une organisation internationale et la Confédération, prévoyant une exonération d'impôt sur le plan cantonal, est subordonnée à l'approbation du canton. Le fait que l'autorité fédérale reconnaisse à l'organisation en cause le statut d'organisation internationale n'a nullement pour conséquence d'obliger le canton à donner cette approbation. Par ailleurs, on ne saurait soutenir que l'art. 7 LCP ne laisse à cet égard aucune possibilité de choix à l'autorité cantonale. Celle-ci reste libre d'approuver ou de ne pas approuver le projet d'accord qui lui est soumis.

b) Il convient en outre d'observer que, devant le Grand Conseil, qui a discuté des problèmes évoqués par l'actuel recours, le chef du Département des finances et contributions a admis que le Conseil d'Etat avait donné son approbation au projet d'accord:

"Le Conseil fédéral nous a posé la question l'été dernier: savoir si nous acceptions qu'il conclût un accord de siège avec l'IATA. Nous avons été placés devant une situation difficile:.. Ayant pesé les avantages et les inconvénients, nous nous sommes rendu compte qu'il était préférable, pour maintenir cette organisation sur le territoire genevois, avec les possibilités de travail qu'elle offre, l'impulsion qu'elle donne à notre économie, d'accepter l'idée qu'un accord de siège soit conclu, cela dans l'intérêt bien évident de notre canton.)... En conclusion.)... si l'IATA devait finalement quitter notre territoire, la perte générale qui aurait pu en résulter pour la commune de Meyrin aurait été nettement plus importante que l'inconvénient qu'elle subira du fait de l'application de ces nouvelles dispositions prises, avec notre accord il est vrai, par le Conseil fédéral."

Ces explications ont été confirmées par les déclarations faites par le même conseiller d'Etat à la séance du Grand Conseil du 1er avril 1977:

"Sollicité par la Confédération de donner son accord à une exonération fiscale, non seulement à l'institution comme telle, mais également à ses employés et fonctionnaires, le Conseil d'Etat a mis en balance le manque à gagner fiscal que cette mesure allait provoquer avec les avantages que le maintien de l'institution sur notre territoire pouvait procurer à l'économie genevoise."

Ainsi, le gouvernement fédéral a bien demandé l'assentiment du gouvernement cantonal, comme le Département politique fédéral l'a relevé dans sa lettre du 12 mai 1977 et comme le chef du Département genevois des finances et contributions l'a admis dans ses déclarations faites au Grand Conseil. Cet assentiment a été donné "en principe" par la lettre du Conseil d'Etat du 13 octobre 1976, et les réserves qui y ont été formulées ont été prises en considération dans l'accord définitif. L'assentiment donné par le Gouvernement genevois constitue donc l'approbation requise par l'art. 4 de l'arrêté fédéral.

c) Cette constatation ne suffit cependant pas pour que l'on en déduise que l'"approbation" donnée par l'autorité cantonale au projet d'accord soumis par le Conseil fédéral constitue nécessairement un acte attaquant par la voie du recours de droit public. Cette approbation n'impose aucune obligation ni ne confère aucun droit aux particuliers, mais constitue une décision prise dans le cadre du processus ouvert par le Conseil fédéral en vue d'accorder une exonération d'impôt aux services de l'IATA et aux membres du personnel de cette organisation. Elle est un maillon d'une procédure prévue par le droit fédéral et qui est destinée à permettre au Conseil fédéral de prendre une décision définitive et de conclure un accord. L'approbation ne déploie aucun effet direct sur le plan de la législation cantonale; elle est seulement la condition nécessaire d'une décision prise par l'autorité fédérale. Il paraît dès lors douteux qu'elle puisse faire l'objet d'un recours de droit public. Mais la question peut rester indéfinie.

d) Il convient [maintenant] d'examiner si l'approbation donnée par le Conseil d'Etat constitue un acte qui est susceptible de porter atteinte aux droits politiques. Cette question doit être résolue par l'affirmative.

Les recourants soutiennent en effet que le Conseil d'Etat, en donnant l'assentiment du canton à la conclusion de l'accord avec l'IATA, a empiété sur les compétences du pouvoir législatif; l'exonération d'une organisation non gouvernementale - telle que l'association précitée - et de son personnel nécessitait, selon les recourants, la modification de la loi sur les contributions, en particulier celle de l'art. 7 LCP qui ne s'applique, d'après son texte, qu'aux "organisations internationales publiques". En empiétant sur les compétences de l'autorité législative, le Conseil d'Etat a privé les électeurs de la faculté de faire usage du droit de référendum prévu par la constitution cantonale. Si l'on suit l'argumentation développée par les recourants, force est de constater que l'approbation donnée par le Conseil d'Etat, seul acte en cause, violait le droit de vote des citoyens. Ceux-ci peuvent donc l'attaquer par la voie du recours [pour violation des droits politiques].

7.- a) Ni la législation fédérale, ni la constitution ou la législation cantonales ne contiennent de dispositions sur le point de savoir quelle est, dans le canton, l'autorité compétente pour donner l'approbation requise par l'arrêté fédéral. Cependant, les recourants ne contestent pas que cette compétence eût appartenu au Conseil d'Etat si l'IATA avait été une organisation intergouvernementale, soit "une organisation internationale publique" au sens de l'art. 7 LCP. Par ailleurs, il n'est pas non plus contesté que le Conseil d'Etat, chargé d'appliquer la loi sur les contributions publiques, est, par l'intermédiaire du Département des finances ou collégalement, l'autorité à laquelle il incombe normalement de constater la réalisation des conditions exigées par l'art. 7 LCP. Dans ces conditions, il convient d'admettre qu'en donnant son assentiment au projet d'accord avec l'IATA, le Conseil d'Etat s'est prononcé sur le statut de cette association en lui reconnaissant la qualité d'"organisation internationale publique" au sens de la disposition précitée. La question litigieuse in casu est ainsi celle de l'interprétation qu'il convient de donner à la notion de "conventions, accords et arrangements avec les organisations internationales publiques".

b) Le Conseil d'Etat soutient qu'il était lié par la décision de l'autorité fédérale d'assimiler l'IATA à une organisation internationale. Il considère donc que l'association à laquelle le Conseil fédéral reconnaît le statut d'organisation internationale pouvant conclure un accord sur la base de l'arrêté fédéral, constitue une "organisation internationale publique" au sens de l'art. 7 LCP. Cette interprétation n'est pas insoutenable.

Par ailleurs, si l'on devait admettre, avec les recourants, que le Conseil d'Etat n'est pas lié par la décision de l'autorité fédérale quant au statut de l'organisation en cause, il faudrait

alors constater que l'autorité exécutive n'est pas tombée dans l'arbitraire en considérant l'IATA comme une organisation internationale publique, en tenant compte des fonctions exercées par cette association et du rôle qu'elle joue dans un domaine important des relations interétatiques. On peut à cet égard relever qu'à l'avis de certains auteurs, l'IATA doit être considérée comme une organisation "quasi gouvernementale" (...). C'est dans le même sens, semble-t-il, que postérieurement aussi à l'adoption de l'arrêté fédéral, le Conseil fédéral a conclu avec l'Union interparlementaire, organisation "semi-officielle" ayant son siège à Genève, mais non créée par accord intergouvernemental, un accord destiné à régler le statut juridique de cette organisation en Suisse, et qui confère aux fonctionnaires du bureau de l'Union non seulement des exemptions fiscales, mais aussi, dans de certaines limites, une immunité de juridiction et d'autres privilèges accordés normalement aux diplomates. Le Conseil fédéral a considéré que cette institution présentait un caractère intergouvernemental prédominant (...).

C'est ainsi sans arbitraire que le Conseil d'Etat a considéré l'IATA comme une organisation internationale publique au sens de l'art. 7 LCP. Dès lors, il lui appartenait de donner l'approbation du canton requise par l'arrêté fédéral, et cet assentiment ne dépendait pas du vote par le Grand Conseil d'une loi soumise au référendum facultatif. Il n'y a donc pas eu en l'espèce violation du droit de vote des citoyens. Le présent recours doit ainsi être rejeté.

(a)	N° d'enregistrement	CH / 23
(b)	Date	20 juillet 1979
(c)	Service / auteur	Chambre de droit public du Tribunal fédéral suisse
(d)	Parties	République Arabe d'Egypte c/ Cinetel.
(e)	Points de droit	Immunité de juridiction et d'exécution forcée des Etats étrangers : procédure pour invoquer ces immunités en droit suisse ; Distinctions entre immunité de juridiction et d'exécution, entre actes accomplis <i>jure imperii</i> et <i>jure gestionis</i> et entre biens administratifs et patrimoniaux de l'Etat
(f)	n°	0.b.3., 1.a., 2.a.
(g)	Source(s)	ASDI 1981 p.206
(h)	Renseignements complémentaires	
(i)	Texte complet – Extraits – Traduction – Résumé	Arrêt original en français Extraits ci-dessous en français

Résumé

Faits

Agissant à la requête de la société liechtensteinoise Cinetelevision International Registered Trust (Cinetel), le Président du Tribunal de première instance de Genève avait séquestré les avoirs en Suisse de la Fédération de la radiodiffusion et de la télévision de la République Arabe d'Egypte (TVRAE), de la Banque centrale d'Egypte (BCE) et de la Banque nationale d'Egypte (BNE) (...). Il était précisé que le débiteur, pris conjointement et solidairement, constituait des "organismes d'Etat (...) formant une même entité économique avec l'Etat, leur maître économique". Le séquestre portait sur les fonds (...) de l'Etat (...), notamment [ceux détenus] par l'Office d'information et de tourisme (OIT) de la République Arabe d'Egypte à Genève. Les ordonnances de séquestre furent exécutées auprès de l'OIT.

Agissant par voie du recours de droit public, la République Arabe d'Egypte (RAE) invoqua l'immunité de juridiction et d'exécution forcée des Etats étrangers et demanda au Tribunal fédéral d'annuler les trois ordonnances de séquestre et leur exécution par l'Office des poursuites de Genève, dans la mesure où elles portaient sur des biens situés à Genève et affectés par l'Etat au fonctionnement de l'OIT. A l'appui de son recours, la RAE fait valoir que l'OIT n'était qu'une branche administrative de son Ministère du tourisme à qui appartenaient dès lors les biens de l'OIT. Etant ainsi affecté à une tâche publique de l'Etat, ces biens étaient insaisissables. La RAE soutint en outre qu'elle était une entité juridique distincte des trois débiteurs contre qui les séquestres étaient dirigés et que ces séquestres ne visaient nullement la RAE en qualité de débitrice, de sorte que les mesures en cause ne pouvaient être accordées puisqu'elles devaient garantir des prétentions dont il n'était pas établi que la RAE fût débitrice.

Le Tribunal fédéral déclara les recours recevables et les admit quant au fond.

Extrait des considérants:

3.- En principe, l'Etat étranger qui agit *jure imperii*, soit en sa qualité de sujet de droit international public souverain ne peut saisir le Tribunal fédéral d'un recours de droit public pour violation d'un traité international ou d'une règle du droit des gens. (...)

Cependant, la jurisprudence constante reconnaît aux Etats étrangers la qualité pour former, à l'encontre d'un séquestre, un recours de droit public fondé sur la violation de l'immunité de juridiction et d'exécution. En effet, quand bien même c'est précisément en sa qualité de sujet de droit international que l'Etat étranger peut se prévaloir de cette immunité, l'ordonnance de séquestre et son exécution le frappent de même manière qu'un particulier. (...)

(...) du reste, indépendamment même de l'existence d'un principe reconnu du droit des gens, il appartient au Tribunal fédéral de définir en toute indépendance, en matière d'immunité d'exécution, les principes auxquels doivent se conformer les autorités judiciaires et celles qui sont chargées de procéder à l'exécution forcées.

La République Arabe d'Egypte fait valoir que la poursuite n'est pas dirigée contre l'Etat égyptien en qualité de débiteur. On ne saurait toutefois conclure à l'irrecevabilité de ce moyen. En effet, s'il est vrai que la requête et les ordonnances de séquestre indiquent en qualité de débitrices deux banques et la télévision égyptiennes, il y est précisé qu'il s'agit d'organismes d'Etat formant une même entité économique avec celui-ci ; en outre, la liste des biens à séquestrer ne fait nullement état de créances que les débitrices auraient contre l'OIT, mais mentionne notamment tout bien se trouvant à l'OIT "au nom ou pour le compte de la RAE, notamment de l'un de ses Ministères (...) ou organismes d'Etat". Le moyen ainsi soulevé est par conséquent indissolublement lié au grief de violation de l'immunité de juridiction et d'exécution, si bien que la recourante peut le faire valoir.

4.- (...) Le principe dit de l'immunité relative distingue selon que l'Etat agit *jure imperii* ou *jure gestionis*, soit comme simple particulier titulaire d'un droit privé, auquel cas il ne peut

invoquer le principe de l'immunité de juridiction et d'exécution ; consacré en 1918, ce principe a constamment été confirmé depuis lors. Toutefois, même s'il s'agit d'un acte de gestion, l'Etat étranger ne peut être recherché devant les tribunaux suisses et faire l'objet de mesures d'exécution forcée qu'à la condition que le rapport de droit auquel il est ainsi partie soit rattaché au territoire suisse.

Un ATF 104 la 369 (CH/20) mentionnait également, quand bien même elle était inapplicable en l'espèce, la Convention européenne sur l'immunité des Etats ; il relevait que les principes qu'elle contient peuvent être considérés comme l'expression de la doctrine et de la jurisprudence récentes de l'Europe occidentale en la matière, qui tendent à restreindre la portée du principe de l'immunité davantage que ne le fait la pratique suisse. Il convient cependant de préciser que la convention et la jurisprudence du Tribunal fédéral conçoivent de manière différente l'immunité d'exécution, qui est en cause dans le cas présent.

Le Tribunal fédéral considère l'immunité d'exécution comme une simple conséquence de l'immunité de juridiction : l'Etat étranger qui, dans un cas déterminé, ne jouit pas de celle-ci ne peut non plus se prévaloir de celle-là, à moins que les mesures d'exécution concernent des biens destinés à l'accomplissement d'actes de souveraineté.

En ce qui concerne les Etats en tant que tels, la convention fait quand à elle une nette distinction entre l'immunité de juridiction et celle d'exécution. Il ressort de l'article 15 de la convention que tous les autres cas autres que ceux prévus par les articles premier à 14, l'Etat contractant bénéficie d'office de l'immunité de juridiction, même s'il s'agit d'actes *jure gestionis* ; à cet égard, la convention traduit un compromis entre la théorie de l'immunité absolue et celle de l'immunité relative. En revanche, il résulte clairement de l'article 23 de la convention que les Etats contractants bénéficient dans tous les cas de l'immunité d'exécution, à moins qu'il n'y renoncent expressément par écrit ; c'est précisément parce que l'exécution forcée est interdite que, d'une part, l'article 20 l/a pose pour principe que l'Etat contractant doit donner effet à un jugement rendu contre lui par le tribunal d'un autre Etat contractant lorsqu'il ne pouvait invoquer l'immunité de juridiction et que, d'autre part, l'article 21 prévoit certaines garanties judiciaires propres à assurer l'observation effective de cette obligation.

La convention est doublement inapplicable en l'espèce. La Suisse l'a signée, mais non ratifiée ; quand à la République Arabe d'Egypte, elle n'est pas membre du Conseil de l'Europe et il n'a pas été fait usage à son égard de la clause relative à l'adhésion d'Etats non membres. En l'absence de tout traité liant la requérante et la Suisse en matière d'immunité, il convient donc de s'en tenir à la jurisprudence du Tribunal fédéral dans ce domaine. Dès lors, toute référence éventuelle à la convention en tant qu'expression de tendances récentes du droit international public doit tenir compte de ce que, sur des points importants, cet accord repose sur des conceptions qui divergent de celles qui fondent la jurisprudence du Tribunal fédéral.

5.- a) Pour distinguer les actes de gestion des actes de gouvernement, il y a lieu de se fonder, non sur leur but, mais sur leur nature, et d'examiner si, à cet égard, l'acte considéré relève de la puissance publique ou s'il est semblable à celui que tout particulier pourrait accomplir. Or, le présent litige trouve son origine dans un contrat portant sur la location de films conclu entre Cinetel et l'Organisme de la télévision de la République Arabe Unie (TVRAU), devenu depuis lors la TVRAE ; il est indubitable qu'il s'agit là d'un contrat du droit des obligations, que pourraient parfaitement passer entre elles deux personnes privées. Il doit donc être qualifié d'acte de gestion, quand bien même une des parties contractantes est un organisme de l'Etat égyptien et nonobstant le fait qu'il s'agissait, selon celui-ci d'un contrat destiné à permettre l'accomplissement de tâches découlant de sa souveraineté.

b) Il ne suffit cependant pas qu'il s'agisse d'actes de gestion, accomplis par l'Etat en tant que simple particulier, pour admettre l'exécution. Encore faut-il, comme on l'a rappelé, que le rapport de droit considéré soit rattaché au territoire suisse, c-à-d qu'il y soit né, ou doive y être exécuté, ou tout au moins que le débiteur ait accompli certains actes de nature à y créer un lieu d'exécution (CH/20 ; CH/8 ; CH/4).

Le contrat originaire convenu entre la TVRAU et Cinetel n'avait aucun rapport avec le territoire suisse. (...) Cinetel n'est pas domiciliée en Suisse et rien n'indique que le contrat

en question y ait été conclu ; en outre, le loyer convenu pour les films, qui devaient être livrés en Egypte, était payable au Caire auprès de la BCE, au compte de Cinetel qui avait donné à cette banque l'ordre irrévocable de virer sur son compte en Suisse toute les sommes versées par la TVRAU.

Cependant, les ordonnances de séquestre qui sont à l'origine du présent recours de droit public ont été requises sur la base de trois accords transactionnels, tous conclus à Genève par la TVRAU et Cinetel dans le but de mettre fin au litige né entre elles. Selon la convention principale, un montant transactionnel de USD 1'380'000.--, devait être déposé par la TVRAU sur un compte libellé en livre égyptiennes, non-résidents C, ouvert auprès de la BNE au Caire au nom de l'Union de banques suisses (UBS) à Genève ; il devait être transféré sans frais ni retenues à Genève, en faveur de l'UBS par l'entremise de la BNE et de la BCE, agissant à la demande de la TVRAU. Ces deux banques étaient qualifiées, dans la convention d'"institutions étatiques de la RAU, seules compétentes pour procéder au transfert de devises à l'étranger en règlement des sommes dues à des étrangers non-résidents". Pour sa part, Cinetel s'engageait à faire procéder, dès réception par l'UBS à Genève du montant convenu, à la levée de tout séquestre exécuté à Genève contre les banques égyptiennes et à se désister également d'une action judiciaire qu'elle avait intentée.

(...)

Les trois accords en question sont doublement en relation avec le territoire suisse. D'une part, ils ont été conclus à Genève ; d'autre part, c'est dans cette ville que devaient être finalement transférés les sommes que la TVRAU s'engageait à déposer sur un compte ouvert, au nom de l'UBS, auprès de la BNE au Caire. On peut cependant hésiter à considérer qu'il y a là des circonstances de rattachement suffisamment étroites, au sens de la jurisprudence, pour admettre la mesure d'exécution à l'encontre de la République Arabe d'Egypte.

Tant la convention principale que le "projet d'arrangement" prévoyaient expressément que si les transferts de fonds qu'ils stipulaient n'étaient pas effectués dans les délais fixés, l'une et l'autre parties, c-à-d Cinetel et la TVRAU, reprendraient leur pleine liberté d'action. Cela revenait à dire que les accords transactionnels n'acquerraient force obligatoire qu'après que les sommes convenues seraient transférées et qu'à ce défaut, les parties se trouveraient à nouveau régies par la situation contractuelle antérieure, soit par le contrat initial conclu en 1964, lequel n'a aucun rapport avec le territoire suisse. L'arrivée des fonds à Genève ne dépendait cependant pas de la TVRAU ; signataire de la convention principale, celle-ci s'engageait uniquement à verser les sommes convenues au Caire et à requérir leur transfert à Genève auprès de la BNE et de la BCE, définies comme des institutions étatiques, seules compétentes pour transférer des devises à l'étranger. Or ces deux banques, du comportement desquelles dépendait en définitive le caractère obligatoire des accords transactionnels, n'étaient nullement parties à ceux-ci, puisqu'elles n'avaient signé ni la convention principale, ni les "Projets d'arrangement". Dans ces conditions, on pourrait soutenir qu'il n'y avait pas d'accord définitif fixant un lieu d'exécution en Suisse et qu'il n'appartenait à l'Etat égyptien de décider unilatéralement, par l'intermédiaire de la BNE et de la BCE, si tel serait le cas ou non. Cela étant, et compte tenu de ce qu'en l'espèce, il s'agit précisément de déterminer si la République Arabe d'Egypte elle-même _ et non la TVRAU, la BNE ou la BCE, en leur qualité d'institutions étatiques disposant d'une autonomie relative – peut se prévaloir du principe de l'immunité, on pourrait douter de l'existence d'un lien d'exécution en Suisse.

Cette question peut néanmoins demeurer irrésolue, comme peut rester indéterminé le point de savoir si le seul fait que les accords transactionnels ont été conclus à Genève constitue une circonstance de rattachement au territoire suisse suffisante pour refuser à l'Etat recherché en raison d'actes accomplis *jure gestionis* le bénéfice de l'immunité. Le recours de droit public doit en effet être de toute façon admis, en raison de la nature des biens séquestrés.

c) Les ordonnances de séquestre ont été rendues non à l'encontre de l'Etat égyptien, mais bien contre la BCE, la BNE et la TVRAU ; elles précisaient toutefois qu'il s'agissait là d'organismes d'Etat, formant une même entité économique avec ce dernier, désigné

comme étant leur maître économique. En outre, la liste des objets à séquestrer auprès de tiers, au nombre desquels figurait l'OIT, faisait mention de tous biens détenus "au nom et pour le compte de l'Etat de la RAE, notamment de l'un de ses ministères (...) ou organismes d'Etat".

Une telle désignation permettrait indubitablement de séquestrer tous les biens et tous les avoirs de l'OIT. Or, celui-ci est un organisme de l'Etat égyptien ; quand bien même elle revêt un aspect économique, l'activité qu'il déploie, et à laquelle ses biens et avoirs sont – en partie du moins – affectés, constitue une tâche qui incombe à la RAE en sa qualité de puissance publique. La fonction que remplit l'OIT est en fait semblable à celle qu'assurent les offices cantonaux du tourisme ou ceux que la Suisse entretient à l'étranger, qui sont des organismes de droit public. Or d'après les articles 7-9 de la loi sur les poursuites pour dettes contre les communes et autres collectivités de droit public cantonal, seuls les biens patrimoniaux de ces collectivités peuvent être saisis, les biens administratifs étant en revanche insaisissables, car ils forment le patrimoine de la collectivité et sont affectés directement à l'accomplissement de ses tâches de droit public. D'ailleurs, la doctrine limite également l'exécution forcée à l'égard des Etats étrangers aux seuls biens patrimoniaux. Quant au Tribunal fédéral, il admet que, dans certaines circonstances, l'affectation de biens appartenant à l'Etat étranger peut conduire à soustraire ceux-ci à l'exécution forcée ; tel est le cas lorsqu'il s'agit de biens destinés à l'accomplissement d'actes de souveraineté – et non seulement de biens appartenant au patrimoine fiscal : à l'instar des actes accomplis *jure imperii* eux-mêmes, de tels biens sont protégés par l'immunité de juridiction et, partant, par celle d'exécution.

En l'espèce, les ordonnances litigieuses permettraient précisément la saisie de tels biens. Il résulte par conséquent de ce qui précède que les recours de droit public doivent être admis.

(a)	N° d'enregistrement	CH / 24
(b)	Date	25 juin 2001
(c)	Service / auteur	1ère Cour de droit public du Tribunal fédéral suisse
(d)	Parties	République X c/ OFJ
(e)	Points de droit	Entraide internationale en matière judiciaire ; principe d'immunité des Etats ; recours à des circuits financiers privés et à des sociétés écrans
(f)	n°	0.b.3., 1.b., 2.b.
(g)	Source(s)	Arrêt non publié
(h)	Renseignements complémentaires	
(i)	Texte complet – Extraits – Traduction – Résumé	Extrait en français : voir ci-dessous

Résumé

Faits

A.- Le 30 août 2000, l'Office fédéral de la justice (ci-après : OFJ) est entré en matière sur une demande d'entraide judiciaire formé le 12 juin 2000 par le Ministère de la Justice des Etats-Unis, complétée le 17 août suivant, dans le cadre d'une enquête dirigée contre le citoyen américain A. et autres, soupçonnés d'avoir transmis des montants importants provenant de compagnie pétrolières et destinés à de hauts responsables de la République X., en particulier son Président et un ancien premier ministre. L'autorité requérante se fonde sur des renseignements transmis spontanément par le Juge d'instruction genevois, chargé d'une enquête pour corruption et blanchiment d'argent, à raison des mêmes faits. Elle demande des renseignements concernant un compte numéroté dans une banque suisse, et tout compte détenu par A. et les personnes physiques et morales impliquées. L'OFJ a considéré que les principes de la double incrimination et de la proportionnalité étaient respectés. Les autorités genevoises étaient chargées de l'exécution des actes d'entraide.

Précédemment, l'office central avait ordonné le blocage de différents comptes auprès de la Banque B., à Genève ainsi que d'un compte "Trésor de la République X." auprès de la Banque C., bénéficiaire d'un versment de USD 84 millions effectué le 6 août 1999. Cette décision a fait l'objet d'une opposition le 7 juillet 2000, motivée le 1er septembre 2000, de la part de la République X.

Le juge d'instruction genevois a requis de la Banque C. la production de toute la documentation bancaire relative au compte "Trésor de la République X." – à l'exception des pièces déjà obtenues dans le cadre de la procédure pénale –, documentation non limitée au versment des 84 millions précités. Un recours adressé à la Chambre d'accusation genevoise a été déclaré irrecevable, décision confirmée par arrêt du Tribunal fédéral du 2 mars 2001.

B.- Par mémoire des 11 septembre et 30 octobre 2000, la République X a formé opposition contre la mesure de blocage du compte "Trésor de la République X." et contre la décision d'entrée en matière. Elle expliquait que la Banque B. était chargée d'assister le gouvernement de la République X. dans le cadre des privatisations en cours dans cet Etat, et dans les négociations relatives aux concessions de droits pétroliers. Les droits payés par les compagnies pétrolières étaient versés sur des comptes "escrow", et répartis, sur instructions de la République X., sur des comptes dont les ayants droit seraient le Chef de l'Etat ou ses proches. Se fondant sur un avis de droit, elle soutenait que les avoirs déposés seraient affectés au service public, et partant, couverts par l'immunité de juridiction. Dans une ordonnance rendue dans le cadre de la procédure pénale genevoise, la Chambre d'accusation avait considéré qu'il n'était pas exclu que les fonds déposés sur le compte de la République X. soient affectés à des tâches *de iure imperii*. La même conclusion s'imposait dans le cadre de la procédure d'entraide. La demande d'entraide américaine était en outre viciée, car elle reposait sur des informations transmises par la Suisse en violation de la loi sur l'entraide internationale en matière pénale (EIMP). L'opposante demandait en outre l'accès partiel au dossier d'entraide, afin de connaître la documentation transmise spontanément aux autorités américaines, ce qui lui avait été refusé précédemment.

C.- Par décision du 11 avril 2001, l'OFJ a statué simultanément sur les oppositions relatives au blocage des fonds et à la décision d'entrée en matière. La transmission spontanée se rapportait à des informations et non à des moyens de preuve ; elle était soumise à la surveillance de l'OFJ, mais ne pouvait faire l'objet d'un recours ; le contenu de ces informations ressortait clairement de la demande d'entraide américaine, dûment notifiée à l'opposante. La décision de la Chambre d'accusation, reconnaissant *prima facie* l'immunité de juridiction à propos du compte détenu par la République X., ne liait pas l'office central ; il n'y avait pas eu de transmission illicite de renseignements, et il ne se justifiait donc pas d'en donner accès à l'opposante. Celle-ci ne pouvait invoquer son immunité en se contentant d'affirmer que les fonds étaient affectés à des tâches publiques : ce critère n'était pas déterminant à lui seul. Les fonds détenus auprès de la Banque B. provenaient de compagnies pétrolières, en contrepartie de droits et de concessions pétrolières ; ils avaient

été versés sur le compte de la société O., société dont le capital était détenu par S., dont le bénéficiaire était le Président de la République X. La structure financière utilisée pour ces placements permettait de penser que l'Etat étranger avait agi *iure gestionis*. Le versement de USD 84 millions sur le compte de la République X auprès de la Banque C. avait eu lieu de manière abrupte, et pouvait être interprété comme une tentative d'abuser de l'immunité diplomatique pour échapper aux investigations en cours.

D.- La République X. forme un recours de droit administratif contre cette dernière décision. Elle en demande l'annulation, ainsi que l'irrecevabilité de la demande d'entraide et l'annulation des décisions de blocage et d'entrée en matière. Subsidièrement, elle conclut à l'annulation des décisions de l'OFJ en tant qu'elles portent sur le compte "Trésor de la République X.", et au rejet de la demande d'entraide dans la même mesure. Plus subsidièrement, elle conclut au renvoi de la cause à l'OFJ pour nouvelle décision dans le sens des considérants du Tribunal fédéral. L'OFJ conclut au rejet du recours.

Extrait des considérants:

- 1.- [Base légale sur laquelle l'OFJ fonde sa décision]
- 2.- [Pas de violation en l'espèce du droit de consulter le dossier]
- 3.- [Les informations spontanément fournies par la justice genevoise ne constituent pas des preuves illégales dans la mesure où les conditions de l'entraide judiciaire sont remplies]
- 4.- La recourante reprend enfin ses arguments relatifs à l'immunité d'exécution. Elle produit un avis de droit, rappelant que cette immunité couvre tous les biens affectés au service public, tels les fonds destinés à la promotion touristique. Les fonds déposés auprès de la Banque B., affectés à la politique du développement des ressources naturelles, présenteraient le même caractère. On en trouverait pas dans le cas où l'Etat tente d'invoquer son immunité pour se dérober à ses obligations financières, constatées par jugement. Si, comme l'estiment le juge d'instruction et l'autorité requérante, les fonds litigieux étaient le produit d'actes de corruption et de détournements, la République X. en serait la victime et la saisie de ces fonds ne se justifierait pas.

a) Le Tribunal fédéral a déjà examiné ces arguments dans le cadre de recours de droit public formés, notamment par la recourante, à l'encontre des décisions de blocage des comptes détenus auprès de la Banque B. Dans ses arrêts du 8 décembre 2000, dont la teneur est reprise dans la décision attaquée, le Tribunal fédéral a rappelé que la distinction des actes *iure gestionis* et *iure imperii* ne saurait se faire sur la seule base de leur attachement au droit public ou au droit privé, ni même au regard du but poursuivi, car ce but vise toujours un intérêt étatique. On recherchera donc prioritairement quelle est la nature intrinsèque de l'opération mise sur pied par l'Etat : il s'agit de déterminer si l'acte relève de la puissance publique, ou s'il s'agit d'un rapport juridique qui pourrait, dans une forme identique ou semblable, être conclu par deux particuliers (ATF 110 II 255, CH/2 ; ATF 104 la 367, CH/20). La jurisprudence range ainsi parmi les actes accomplis *iure imperii* les activités militaires, les actes analogues à une expropriation ou une nationalisation (ATF 113 la 172, CH/11) ; sont en revanche des actes accomplis *iure gestionis* les emprunts de l'Etat ou d'une banque centrale souscrits sur un marché monétaire (ATF 104 la 376, CH/20) et les contrats, par exemple d'entreprise (ATF 112 la 148, CH/10 ; ATF 111 la 62, CH/16). La jurisprudence recourt aussi à des critères extérieurs à l'acte en cause. Elle voit par exemple l'indice d'un acte accompli *iure gestionis* dans le fait que l'Etat est entré en relation avec un particulier sur le territoire d'un autre Etat, sans que ses relations avec ce dernier soient en cause (ATF 104 la 367, CH/20 ; ATF 86 I 23, CH/8). Ces activités commerciales, tels des accords de livraison de marchandises ou de prestations de service, ou des engagements financiers comme, en particulier, des contrats de prêt ou de garantie, ne sont évidemment pas couvertes par l'immunité diplomatique.

Dans les arrêts précités, le Tribunal fédéral a estimé que le recours à des sociétés privées, dont l'Etat n'était d'ailleurs pas lui-même l'ayant droit, permettait de douter de l'existence d'une immunité diplomatique, indépendamment de la prétendue affectation des fonds à des tâches publiques.

b) Ces considérations, émises au stade des mesures de blocage dans le cadre de la procédure pénale nationale, conservent leur pertinence dans la présente cause. Compte tenu de l'intervention de plus en plus fréquente des Etats dans une activité laissées jusque-là à la société marchande, et selon un mode de fonctionnement analogue à ceux qu'utilisent les acteurs privés, la conception restrictive de l'immunité d'Etat est aujourd'hui généralisée, tant dans les droits nationaux que dans les conventions régissant la matière, notamment la convention européenne de 1972 sur l'immunité des Etats, à laquelle la Suisse n'est pas partie. *Ratione materiae*, l'immunité n'est ainsi admise que pour un type restreint d'activités, soit pour les activités dites "souveraines", qui impliquent l'usage de prérogatives de la puissance publique. Elle est en revanche exclue lorsque l'action de l'Etat se rapporte à une transaction commerciale, ou au statut d'un bien immobilier ou d'un droit incorporel de l'Etat. *Ratione personae*, seuls bénéficient de l'immunité l'Etat lui-même, ou les entités remplissant une mission de souveraineté, compte tenu de la nature de l'acte accompli et du statut de son auteur. Les sociétés contrôlées par l'Etat ne sauraient normalement en bénéficier.

c) Longtemps controversée, la question de l'immunité dont jouit l'Etat en matière commerciale est désormais résolue dans le sens de refus de tout privilège. L'exception d'activité commerciale ne se limite pas à une série d'actes ; il doit en outre exister un lien suffisant entre le rapport en cause et le territoire suisse.

L'exception d'activité commerciale peut être reconnue indépendamment du fait que les activités commerciales concernées ont pour but ultime de favoriser le développement économique. Si l'exploitation des ressources naturelles est incontestablement une activité de service public, il n'en résulte pas que l'immunité doit être accordée dès qu'un litige se rattache à l'exercice d'une telle activité. Il se peut en effet que les contrats passés par une entité chargée de la mise en valeur des richesses d'un Etat ne soient nullement des actes de souveraineté.

d) Selon les explications de la recourante elle-même, celle-ci n'a fait que négocier les droits relatifs à des concessions pétrolières. Elle s'est comportée, dans ce cadre, à l'instar de tout privé offrant un bien ou un service et aboutissant, au terme de négociations menées sur un pied d'égalité, à la conclusion de contrats. Le fait que ces fonds aient été conservés, "dans l'attente de leur utilisation future pour des tâches de l'Etat, soit pour le paiement direct de l'Etat, soit encore pour être gérés et retransférés sur des comptes de la République en Suisse ou à l'étranger", ne saurait à lui seul permettre de reconnaître l'immunité. Comme cela est relevé ci-dessus, les fonds de l'Etat sont toujours, en définitive, affectés à des tâches publiques. Ce qui est déterminant en l'espèce, c'est que l'Etat recourant s'est comporté, dans la gestion des comptes, comme n'importe quel particulier. Les mouvements de fonds décrits par l'office central permettent d'affirmer que l'Etat étranger a agi selon un processus propre au droit privé. Les fonds versés par les compagnies pétrolières ont d'abord abouti sur les comptes "escrow", et ont été répartis par la Banque B. sur divers comptes bancaires détenus par des sociétés de droit privé, dont les ayants droit étaient des dignitaires de l'Etat. La Banque B. est intervenue, comme l'admet la recourante elle-même, dans le cadre d'un mandat de conseil et d'assistance à l'occasion de négociations et de l'exécution des conventions relatives aux concessions pétrolières, chargée dans un premier temps de recevoir les paiements, puis de les répartir sur les comptes de sociétés offshore, la République X ne désirant pas apparaître pour des raisons de discrétion. Dans ces circonstances, la recourante ne peut se voir reconnaître le privilège de l'immunité d'Etat. Il n'est pas nécessaire, cela étant, de rechercher si le versement de USD 84 millions, intervenu subitement le 6 août 1999, peut être interprété comme une tentative d'abuser de l'immunité d'Etat pour échapper aux investigations en cours.

Pour ces motifs, le Tribunal fédéral rejette le recours

(a)	N° d'enregistrement	CH / 25
(b)	Date	8 mars 1999
(c)	Service / auteur	1ère Cour de droit public du Tribunal fédéral suisse
(d)	Parties	D.-A. c/ Elf Aquitaine et A.S. ; O. B. c/ Chambre d'accusation du canton de Genève
(e)	Points de droit	Procédure pénale ; décision de saisie ; principe d'immunité ; il n'y a pas d'immunité pour un Chef d'Etat ou un agent diplomatique si ceux-ci sont bénéficiaires économiques (directement ou indirectement) d'une société-écran de droit panaméen
(f)	n°	0.b.3., 1.b., 2.b.
(g)	Source(s)	Arrêt non publié
(h)	Renseignements complémentaires	
(i)	Texte complet – Extraits – Traduction – Résumé	Extrait en français : voir ci-dessous

Résumé

Faits

A.- Les autorités judiciaires françaises ont saisi leurs homologues genevoises de plusieurs commissions rogatoires en relation avec des actes aggravés de gestion déloyale dont le groupe Elf Aquitaine aurait été la victime.

Le 25 septembre 1997, le Procureur général du canton de Genève a ordonné une instruction préparatoire des chefs de blanchiment d'argent et défaut de vigilance en matière d'opérations financières (art. 305bis et ter CP) contre toute personne justiciable des tribunaux genevois.

A la suite de plaintes pénales déposées par la société anonyme Elf Aquitaine S.A., ce magistrat a ouvert contre A.S. et divers consorts deux informations pénales pour faux dans les titres, obtention frauduleuse d'une constatation fautive et blanchiment d'argent, qu'il a jointes à la procédure pénale principale.

B.- Par ordonnance de perquisition et de saisie du 11 mai 1998 fondée sur les art. 178ss du Code de procédure pénale genevoise (CPP gen.), le Juge d'instruction chargé du dossier a invité la banque C. à Genève, à lui remettre la documentation bancaire relative à un compte débité le 3 juin 1991 de la somme de USD 1,5mio en faveur d'un compte ouvert le 9 juillet 1990 auprès de la Banque D. à Lausanne. Ce dernier compte avait pour titulaire économique A.S. ; il a été soldé le 14 janvier 1994.

Selon les documents remis par la banque, le compte en question avait été ouvert le 24 avril 1987 par la société panaméenne D. Associated S.A. Constituée le 6 mars 1987 à Panama, cette société a été dissoute par acte notarié du 18 février 1993. Les documents d'ouverture du compte ont été signés par D.-A. D. Associated est également désignée sur la formule A/CDB [formulaire d'identification du bénéficiaire économique] comme étant "en mains" de ce dernier.

D.-A. est l'époux de l'Ambassadrice de la République G. en Suisse et bénéficie d'un passeport diplomatique établi le 2 mars 1987 par la République G. Il déclare avoir agi à titre fiduciaire pour le Président de la République G, O. B., dont il est le conseiller personnel.

C.-Le 25 mai 1998, D.-A. a recouru contre l'ordonnance du Juge d'instruction du 11 mai 1998 auprès de la Chambre d'accusation du canton de Genève, en invoquant le bénéfice de l'immunité diplomatique. O.B. a également interjeté recours contre la décision le concernant par acte séparé du même jour.

La veille de l'audience de plaidoirie, D.-A. a versé au dossier une attestation de l'étude d'avocat à Panama, du 25 août 1998, selon laquelle D. Associated avait été dissoute le 18 février 1993 et n'avait plus d'existence légale. O.B. a pour sa part produit une lettre du 25 août 1998 du conseil de la Banque C., à Genève, attestant que "l'ayant droit ultime du compte ouvert par la société D. Associated en ses livres n'était autre que la Présidence de la République G."

Statuant le 22 octobre 1998 par deux décisions distinctes, la Chambre d'accusation a déclaré les recours irrecevables pour défaut de qualité pour agir. Selon elle, seule D. Associated, en tant que titulaire du compte faisant l'objet de la saisie litigieuse, était habilitée à contester cette mesure, à l'exclusion de ses ayants droit économiques. Les pièces versées au dossier ne permettaient pas de tenir pour établi le fait que cette société avait valablement été dissoute et qu'elle n'avait plus d'existence juridique ni de représentants susceptibles de contester la saisie. La Chambre d'accusation a par ailleurs considéré qu'une instruction destinée à établir le droit étranger en vue d'élucider ce point n'était pas indispensable ; à supposer que la jurisprudence rendue en matière d'entraide judiciaire internationale reconnaissant à titre exceptionnel la qualité pour agir aux ayants droit économiques d'une société dissoute devait être appliquée – hypothèse qu'elle a expressément écartée – les

recourants n'avaient de toute façon pas prouvé leur qualité d'ayants droit économiques, dès lors que D.-A. s'était faussement désigné comme tel et que le Président O.B. ne pouvait se prévaloir d'un contrat de fiducie.

D.- Agissant par la voie du recours de droit public pour violation du principe d'égalité (art. 4 aCst) et du principe de propriété (art. 22ter aCst), D.-A. demande au Tribunal fédéral d'annuler la décision de la la Chambre d'accusation rendue à son encontre. Selon lui, cette autorité aurait violé son droit d'être entendu en ne lui donnant pas l'occasion de compléter ses moyens de preuve dès lors qu'elle estimait que l'attestation de l'étude d'avocats ne constituait pas une preuve suffisante de la dissolution de D. Associated. Elle aurait fait en outre une application arbitraire du droit de procédure cantonal et commis un déni de justice en lui déniait la qualité pour recourir, en tant que tiers saisi, contre l'ordonnance de saisie de documents bancaires dont il est l'ayant droit économique. Elle aurait enfin établi les faits de manière arbitraire en considérant qu'il n'avait pas rapporté la preuve que D. Associated avait effectivement été dissoute et n'avait plus d'existence légale malgré l'attestation de l'étude d'avocats panaméenne et en refusant de tenir le Président de la République G. pour l'ayant droit économique final du compte litigieux en dépit des déclarations concordantes des parties et de l'attestation de la banque C.

O.B. a également formé un recours de droit public contre la décision le concernant en prenant des conclusions semblables.

La Chambre d'accusation se réfère aux considérants de ses ordonnances. Le Juge d'instruction a renoncé à se déterminer. Le procureur général conclut au rejet des recours dans la mesure de leur recevabilité. Elf Aquitaine S.A. conclut à leur admission et à l'annulation des décisions attaquées. A.S. s'en rapporte à justice.

E.- Par ordonnance du 8 décembre, le Président de la 1ère Cour de droit public a rejeté la demande d'effet suspensif présentée par D.-A.

F.- Le 8 mars 1999, le Tribunal fédéral rejette le recours dans la mesure où il est recevable, et ce, pour les motifs suivants :

Extrait des considérants:

- 1.- [Jonction de cause]
 - 2.- [Procédure : le recours de droit public ne peut être en principe formé que contre des décisions finales ; en l'espèce, si les ordonnances attaquées ne mettent pas fin à la procédure pénale, elles présentent cependant les traits d'une décision finale]
 - 3.- [Procédure : violation du droit d'être entendu]
 - 4.- Les recourants reprochent à la Chambre d'accusation de leur avoir dénié la qualité pour agir (...)
- a) [Procédure : examen du recours sous l'angle restreint de l'arbitraire]
 - b) (...) Dans une jurisprudence constante calquée sur celle rendue par le Tribunal fédéral en matière d'entraide judiciaire pénale internationale, l'autorité intimée reconnaît au seul titulaire du compte au sujet duquel les renseignements sont demandés la qualité pour contester une ordonnance de saisie visant à la production de documents en application de la procédure pénale genevoise (...) en tant que tiers saisi. Elle la dénie en revanche à celui qui charge une société-écran d'effectuer des opérations bancaires sous sa raison sociales, mais pour son propre compte, en vertu d'un rapport de représentation indirecte.

En l'espèce, la titulaire du compte bancaire faisant l'objet de l'ordonnance de saisie litigieuse est la société panaméenne D. Associated, de sorte que seule cette entité avait en principe qualité pour recourir contre cette décision. Les recourants prétendent néanmoins tirer leur vocation pour recourir de leur qualité d'ayants droit économique de la société, respectivement du compte ouvert au nom de cette dernière, en se prévalant de la jurisprudence rendue en application de l'art. 80h EIMP, qui reconnaît exceptionnellement à ceux-ci le droit de s'opposer à une mesure de saisie lorsque la société a, comme en

l'espèce, été dissoute et qu'elle ne peut agir elle-même ou par le biais de ses liquidateurs ou de ses repreneurs.

L'autorité intimée a refusé de mettre les recourants au bénéfice de cette exception sous prétexte qu'elle n'avait pas pour objectif de "favoriser des situations comme la présente, où dans un premier temps des opérations bancaires sont effectuées sur le compte d'une société offshore, laquelle – pourtant constituée initialement pour un temps indéterminé – semble disparaître, opportunément, peu après que l'essentiel de ces opérations bancaires aient été accomplies avec en outre la faculté d'être procéduralement remplacée par toute personne qui viendrait simplement s'autoproclamer son ayant droit économique". Les recourants tiennent cette manière de procéder pour arbitraire. Il serait choquant de se référer à la jurisprudence rendue en matière d'entraide judiciaire internationale dans son principe et de ne pas la suivre dans ses exceptions.

Ce faisant, ils perdent de vue qu'en l'absence de normes fédérales régissant la question, les cantons sont en principe libres d'aménager à leur guise les voies de recours cantonales à l'encontre d'une mesure de saisie ordonnée dans le cadre d'une procédure pénale. Ils n'ont à cet égard aucune obligation d'appliquer, dans un domaine relevant de leur compétence, une solution consacrée par le droit fédéral sur une question analogue, pour autant que celle choisie respecte les garanties minimales découlant du droit constitutionnel. De même, l'autorité cantonale qui interprète le droit cantonal à la lumière des catégories de la jurisprudence fédérale n'est pas tenue d'en faire siens tous les prolongements. En d'autres termes, la Chambre d'accusation pouvait sans arbitraire définir la qualité pour agir au sens du code de procédure genevois de manière plus étroite que ne le fait le Tribunal fédéral dans le contexte de l'article 80h EIMP.

La solution attaquée n'aboutit par ailleurs pas à un résultat choquant qu'il appartiendrait au Tribunal fédéral de sanctionner dans le cadre restreint de son pouvoir d'examen, dès lors qu'il suffit à l'ayant droit économique d'une société de s'opposer à la dissolution de cette entité pour sauvegarder ses droits. Le refus de reconnaître à l'actionnaire unique ou à l'ayant droit économique d'une société anonyme la qualité pour recourir contre une mesure prise à l'encontre de celle-ci en raison de la dualité juridique existant entre eux n'est pas au demeurant propre au domaine de l'entraide judiciaire pénale internationale, mais constitue un principe généralement reconnu, sous réserve d'un abus de droit éventuel, de sorte que l'on ne saurait raisonnablement reprocher à l'autorité intimée de s'être inspirée de la jurisprudence rendue en ce domaine dans son principe sans en appliquer les exceptions.

La Chambre d'accusation n'a dès lors pas fait preuve d'arbitraire en refusant de reconnaître aux recourants la qualité de tiers saisis au sens de l'art. 191CPPgen. et, par conséquent, le droit de contester l'ordonnance de saisie litigieuse. Le fait qu'il bénéficient de l'immunité de juridiction et d'exécution en qualité de Chef d'Etat en fonction, respectivement d'agent diplomatique, ne saurait s'opposer à cette mesure dès lors que la saisie ne porte pas sur des biens dont ils ont la maîtrise de fait ou de droit et qui ne sont pas directement visés par la mesure de contrainte. L'immunité de juridiction pourrait tout au plus leur être reconnue si l'entité dont ils prétendent être les ayants droit économiques était un établissement de droit public de la République G., ce qui n'est manifestement pas le cas de la société panaméenne D. Associated.

5.- Les recours doivent ainsi être rejetés, dans la mesure où ils sont recevables.

TURQUIE**Avant-propos**

L'article 33 de la Loi sur le Droit Privé International et la Procédure est la principale disposition du droit interne turc sur l'immunité de juridiction des Etats étrangers. Les arrêts des juridictions nationales sont basés sur cet article. Selon cette disposition, un Etat ne peut jouir d'une immunité de juridiction pour les litiges relevant d'un acte du droit privé et une notification peut se faire aux agents diplomatiques pour ces litiges. Donc, en Turquie, un Etat étranger jouit d'une immunité de juridiction pour ces actes de souverainetés; les actes de gestion ne lui permettent pas une immunité de juridiction.

L'article 82 et 83 de la Loi sur la saisie et la faillite oppose l'insaisissabilité des biens de l'Etat. La juridiction turque limite l'interprétation de cet article comme l'insaisissabilité des biens de l'Etat turc et arrête des mesures conservatoires et la saisie des biens de l'Etat étranger pour les litiges relevant des actes de gestions.

Quant au droit international; la Turquie est partie à la Convention de Vienne du 18 avril 1961 sur les relations diplomatiques.

(a)	No d'enregistrement	TR/1
(b)	Date	18 septembre 1991
(c)	Service / Auteur	Grande Chambre de la Cour de cassation
(d)	Parties	Individu c. / Ambassade du Liban
(e)	Points de droit	Un Etat étranger ne jouit pas d'une immunité de juridiction relevant d'un acte de gestion.
(f)	Classification no	0.b.1, 1.b
(g)	Source(s)	HGK, E.1991/6-299, K.406, T.18.09.1991 Prof. Çelikel & Prof. Nomer, p. 450-452
(h)	Renseignements complémentaires	
(i)	Résumés	Le litige consiste sur l'immunité de juridiction de l'Etat défendeur contre lequel est engagé une action pour l'évacuation de la propriété immobilière. Les tribunaux turcs ont le pouvoir de juridiction sur les personnes physiques et morales qui se trouvent sur le territoire de la Turquie. Cette règle générale peut être soumise quelques exceptions: les tribunaux turcs ne peuvent pas juger un Etat étranger et les agents diplomatiques qui jouissent d'une immunité ne peuvent être suivis aux tribunaux turcs. La règle générale sur l'immunité de juridiction de l'Etat étranger n'est pas absolue. Les litiges relevant d'un acte de gestion ne permettent pas l'application de l'immunité de juridiction qui a pour origine un acte de souveraineté de l'Etat jugé. L'article 33 de la Loi sur le Droit Privé International et la Procédure ordonne qu'un Etat ne peut jouir d'une immunité de juridiction pour les litiges relevant d'un acte du droit privé et qu'une notification peut se faire aux agents diplomatiques pour ces litiges. L'immunité prévue par la Convention de Vienne sur les relations diplomatiques et les autres traités bilatéraux et multilatéraux dont la Turquie fait partie, est pour les agents diplomatiques et non pour l'Etat dont ils sont les représentants.

(a)	No d'enregistrement	TR/2
(b)	Date	17 mars 1986
(c)	Service / Auteur	Cour de cassation
(d)	Parties	Individu c. / République d'Iraq
(e)	Points de droit	L'immunité de juridiction résulte de la coutume internationale. L'immunité de juridiction ne s'applique pas aux litiges d'un acte de gestion. Les actes illicites des aéronefs de guerre sont une disposition de souveraineté.
(f)	Classification no	0.a, 1.b
(g)	Source(s)	Y.4.H.D. E.1985/9190; K.1986/2436; T.17.03.1986, Revue des Décisions de la Cour de Cassation, Vol.9, 1986, p.1271
(h)	Renseignements complémentaires	
(i)	Résumés	Le plaignant allègue que son bateau citerne contenant du pétrole brut, a été attaqué par les aéronefs de guerre de la République d'Iraq et que cet acte illicite a eu pour conséquence la mort de deux marins et la perte du bateau citerne et demande un dédommagement matériel et moral de la République d'Iraq. Le point essentiel de ce litige réside dans la possibilité de juger la République d'Iraq au tribunal turc. L'immunité de juridiction consiste à l'impossibilité de juger un Etat aux tribunaux d'un autre Etat. Le fondement de l'immunité de juridiction est la coutume internationale. Donc, l'immunité de juridiction d'un Etat étranger est un obstacle de jugement dont le contenu et le cadre est défini par le droit international. L'article 33 de la Loi sur le Droit Privé International et la Procédure ordonne qu'un Etat ne peut jouir d'une immunité de juridiction pour les litiges relevant d'un acte du droit privé. Il est clair qu'un dommage causé par un aéronef d'un des Etats en guerre qui endommage un ressortissant d'un Etat tiers n'est pas un acte de droit privé. Le fait concret a eu lieu en dehors du territoire de la Turquie. C'est un évènement qui résulte d'un acte de souveraineté. Donc la République d'Iraq ne peut être jugé aux tribunaux turcs pour un acte de souveraineté.

(a)	No d'enregistrement	TR/3
(b)	Date	12 octobre 1987
(c)	Service / Auteur	Cour de cassation
(d)	Parties	Individus c. / URSS
(e)	Points de droit	Le principe de l'égalité des Etats. L'immunité de juridiction des navires de guerre. L'immunité de juridiction est limitée par un acte de souveraineté.
(f)	Classification no	0.a, 1.a, 2.a
(g)	Source(s)	Y.4.H.D. E.1987/7309 ; K.1987/7373 ; T.12.10.1987, Revue des Décisions de la Cour de Cassation, Vol.14, S.I, 1988, p.29
(h)	Renseignements complémentaires	
(i)	Résumés	Suite au décès de leur parent dans un abordage entre un navire de guerre turc et un navire de guerre soviétique, les plaignants demandent une indemnité de l'URSS. L'immunité de juridiction d'un Etat dans un autre Etat est un principe de l'égalité des Etats. L'immunité de juridiction pour les actes de souverainetés est absolue, tandis que les actes de gestion d'un Etat ne peuvent lui permettre une immunité de juridiction. Les navires de guerre constituent le symbole de l'Etat du pavillon. De ce point de vue, les navires de guerre jouissent aussi d'une immunité de juridiction. Le litige doit être considéré dans l'évolution du droit international, les notions du droit international et le droit positif. Paragraphe 1 de l'article 33 de la Loi sur le Droit Privé International et la Procédure ordonne qu'un Etat ne peut jouir d'une immunité de juridiction pour les litiges relevant d'un acte du droit privé. L'analyse du motif de cet article, signale que seulement les actes souveraineté d'un Etat lui permettent l'immunité de juridiction. Les actes commerciaux, les actes faits en tant que personne du droit privé n'empêchent pas la juridiction de l'Etat. La décision du premier jugement, qui rejette la demande du plaignant en raison de l'immunité de juridiction de l'URSS est approuvée par la Cour de cassation.

(a)	No d'enregistrement	TR/4
(b)	Date	7 juillet 1986
(c)	Service / Auteur	Cour de cassation
(d)	Parties	Individu c. / Autriche
(e)	Points de droit	Un Etat étranger jouit d'une immunité de juridiction seulement pour ses actes de souverainetés.
(f)	Classification no	O.b.1, 1.b
(g)	Source(s)	Y.4.H.D. E.1986/2254 ; K.1986/5420 ; T.07.07.1986 ; Bulletin du Droit International et du Droit International Privé, 1986/2, p.209-210
(h)	Renseignements complémentaires	
(i)	Résumés	Le plaignant qui a été blessé par un paquet explosif, demande une indemnité de l'Autriche en alléguant un manque de soin de la part de son agent. La décision du premier jugement a accepté la responsabilité de l'Etat de l'Autriche. Le motif de l'article 33 de la Loi sur le Droit Privé International et la Procédure, signale que seulement les actes de souveraineté d'un Etat lui permettent l'immunité de juridiction. Le fait concret n'est pas un acte de souveraineté. Pour cette raison, la décision du premier jugement qui juge en faveur de la responsabilité de l'Autriche est juste. La doctrine approuve aussi l'immunité de juridiction pour les actes de souverainetés. La Cour de cassation rejette l'appel de l'Autriche.

(a)	No d'enregistrement	TR/5
(b)	Date	16 novembre 1989
(c)	Service / Auteur	Cour de cassation
(d)	Parties	Individu c. / Consulat des Etats-Unis d'Amérique
(e)	Points de droit	Un Etat étranger ne jouit pas d'une immunité de juridiction relevant d'un acte de gestion.
(f)	Classification no	0.b.1, 1.b
(g)	Source(s)	Y.13.H.D. E.1989/3896 ; K.1989/6648; T.16.11.1989, Revue des Décisions de la Cour de Cassation, 1990, S.6, p.882-883.
(h)	Renseignements complémentaires	
(i)	Résumés	<p>Le plaignant qui a loué ses deux appartements au Consulat des Etats-Unis d'Amérique demande la créance relevant des factures de téléphone et une indemnité pour le mauvais usage des deux appartements. Le Consulat des Etats-Unis d'Amérique se défend en se référant au droit international et à la Convention de Vienne sur les relations consulaires et prétend ne pas avoir la qualité pour ester en justice. Le premier jugement a décidé que l'immunité de juridiction du Consulat des Etats-Unis d'Amérique est un obstacle de jugement. Le plaignant a eu recours à l'appel. Le bail est conclu entre le Consulat des Etats-Unis d'Amérique et le plaignant. Comme le Consulat est le représentant des Etats-Unis d'Amérique, dans le fait concret le bail est entre l'Etat des Etats-Unis d'Amérique et le plaignant. L'article 33 de la Loi sur le Droit Privé International et la Procédure daté de 1982, oppose que l'Etat étranger ne peut jouir d'une immunité de juridiction dans ses relations relevant du droit privé. Le deuxième paragraphe du même article oppose pour ce genre de litige, la possibilité de notification au agent diplomatique de l'Etat concerné. Dans le fait concret, le bail est un acte du droit privé. Le plaignant qui est parti au bail, demande la créance relevant des factures de téléphone et une indemnité pour le mauvais usage des deux appartements. La nature du fait entre les Parties est une opposition à l'applicabilité de l'immunité de juridiction. La décision du premier jugement est sujette de cassation.</p>

(a)	No d'enregistrement	TR/6
(b)	Date	11 juin 1993
(c)	Service / Auteur	Cour de cassation
(d)	Parties	Société X c. / Etats-Unis d'Amérique
(e)	Points de droit	Un Etat étranger ne peut jouir d'une immunité d'exécution. Les biens d'un Etat étranger peuvent être saisi en Turquie.
(f)	Classification no	0.b.1., 1.b,
(g)	Source(s)	
(h)	Renseignements complémentaires	
(i)	Résumés	Suite à un arrêt indemnitaire, la demande de saisie des comptes et des biens du débiteur les Etats-Unis d'Amérique par le créancier, a été rejetée par l'Autorité d'exécution. L'article 82 et 83 de la Loi sur la saisie et la faillite qui oppose l'insaisissabilité des biens de l'Etat, sont applicable seulement pour les biens de l'Etat turque. Donc pour le fait concret, la Cour a conclu la saisie des biens d'un Etat étranger.

(a)	No d'enregistrement	TR/7
(b)	Date	18 décembre 2002
(c)	Service / Auteur	Tribunal de grande instance
(d)	Parties	Société X c. / Ambassade du Turkménistan
(e)	Points de droit	Les biens mobiliers et immobiliers d'un Etat étranger peuvent être sujet de mesures conservatoires.
(f)	Classification no.	0.b.1, 1.b
(g)	Source(s)	
(h)	Renseignements complémentaires	
(i)	Résumés	La société plaignante qui avait effectué le transport de céréales subventionnées par la Turquie, demande des mesures conservatoires sur les avions appartenant à l'exploitation aérienne et aux comptes en banque de l'Ambassade et du Consulat de l'Etat défendeur qui n'a pas payé les frais ce transport depuis 1993. Le Tribunal de grande instance a arrêté des mesures conservatoires sur les avions appartenant à l'exploitation aérienne et aux comptes en banque de l'Ambassade et du Consulat de l'Etat défendeur.

(a)	No d'enregistrement	TR/8
(b)	Date	21 octobre 2002
(c)	Service / Auteur	Tribunal de grande instance
(d)	Parties	Société c. / Ambassade du Turkménistan
(e)	Points de droit	Les biens d'un Etat étranger peuvent être sujet de mesures conservatoires.
(f)	Classification no	0.b.1, 1.b
(g)	Source(s)	
(h)	Renseignements complémentaires	
(i)	Résumés	Le plaignant allègue qu'il a conclu un contrat qui prévoyait l'administration et l'exploitation d'un hôtel pour l'Etat défendeur; que l'Etat défendeur a transféré la propriété et l'administration et l'exploitation de l'hôtel en contradiction avec les dispositions du contrat; qu'il n'a pas notifié le changement selon les dispositions du contrat; qu'il a obtenu une décision de l'arbitre qui a été prévu au contrat ; que pour obtenir la décision de l'exequatur de la décision de l'arbitre, il faut, selon les dispositions de la Convention de New York dont la Turquie fait partie, prendre des mesures conservatoires sur les biens mobiliers et immobiliers et sur les comptes en banque de l'Etat défendeur. Le Tribunal de grande instance a arrêté la prise des mesures conservatoires sur les biens mobiliers et immobiliers et sur les comptes en banque de l'Etat défendeur.

(a)	No d'enregistrement	TR/9
(b)	Date	21 février 2001
(c)	Service / Auteur	Tribunal d'exécution
(d)	Parties	Société c. / La République Azerbaïdjan
(e)	Points de droit	Les biens d'un Etat étranger peuvent être saisi.
(f)	Classification no	0.b.1, 1.b
(g)	Source(s)	
(h)	Renseignements complémentaires	
(i)	Résumés	Suite à une poursuite pour dettes faites selon les dispositions de l'article 33 de la Loi sur le Droit Privé International et la Procédure qui oppose la possibilité de notification au agent diplomatique de l'Etat concerné pour les litiges des actes de gestion, le plaignant demande la saisie des biens mobiliers et immobiliers de l'Etat défendeur en se référant à l'article 82 de la Loi sur la saisie et la faillite qui oppose que l'insaisissabilité des biens de l'Etat seulement pour les biens de l'Etat turque. Le Tribunal d'exécution a décidé de la saisie des biens mobiliers et immobiliers de l'Etat défendeur.

UNITED KINGDOM

Introduction

1. There are two main sources of law which are relevant in examining UK law and practice on State immunity: legislation and the common law. The common law consists of the uncodified principles of the legal system, which are interpreted and developed through the decisions of the courts. The rules of customary international law form part of the common law.

2. The rule of *stare decisis*, or binding precedent, is strictly applied in relation to both the common law and to the interpretation of statutes. Thus a decision of a court on a point of law (or precedent) will generally be binding in future cases, unless such future cases can be distinguished in some way, or a hierarchically superior court overrules the precedent.

3. The hierarchy of the English courts is as follows:

- The Court of first instance in substantial cases is the *High Court* - the High Court is divided into three Divisions,:

- (a) the *Queen's Bench Division* (which deals mainly with the law of civil obligations including contract and tort),

- (b) the *Chancery Division* (which deals essentially with property matters, including issues of company law) and

- (c) the *Family Division* (which deals with matters of family law);

- Appeals from the High Court are generally made to the *Court of Appeal*;

- A further appeal may be made to the highest court, the *House of Lords*.

4. There are certain specialist tribunals in the English legal system, the most relevant for present purposes being in the field of employment law. Complaints in most employment cases will be made to a specialist Employment Tribunal at first instance. A decision of an Employment Tribunal may be appealed to the Employment Appeal Tribunal (EAT). The EAT is made up of a panel of two lay persons presided over by a High Court Judge. A further appeal from the EAT may be permitted to the Court of Appeal.

5. Legislation in the UK takes two forms:

Primary legislation which consists of Acts of Parliament, which pass through full processes of debate and scrutiny in Parliament; and

Secondary legislation consisting of statutory instruments, made by virtue of an enabling power in primary legislation and passed in Parliament under summary procedures. Secondary legislation is thus most often used to provide detailed regulations within the framework of a piece of primary legislation.

6. By virtue of the constitutional principle of the supremacy of Parliament, in case of conflict between a rule of common law and an Act of Parliament, the latter will be applied.

7. Treaties do not automatically form part of domestic law upon ratification, but rather require to be incorporated by legislation.

The State Immunity Act 1978

8. The State Immunity Act 1978 is based upon the European Convention on State Immunity, though it does not replicate the terms of the Convention exactly. The Act is also intended to be compatible with the 1926 Brussels Convention on the Immunity of State-owned Ships. The Act came into force on 22 November 1978, and establishes a firm foundation for the restrictive doctrine of State immunity in UK law, and consolidates the incremental steps in this direction that had been made in the common law.

9. The Act sets out a general rule of immunity for foreign States in section 1, and then in sections 2-11 sets out a number of specific exceptions to immunity in respect of various private law activities. Sections 12 and 13 deal with procedural privileges, including immunities from execution. Section 14 deals with the definition of the State and the degree to which separate entities of the State are entitled to immunity. Section 15 allows for some fine-tuning of immunities in the case of particular States. Thus it enables secondary legislation to be made, either to reduce the level of immunities granted to a State, where that State would grant a reduced level of immunity to the United Kingdom (on the principle of reciprocity), or to extend immunities to particular States where this is required under a treaty. Section 16 excludes certain matters from the scope of the Act (see below), and section 17 deals with interpretation of particular terms in this part of the Act.

10. The remaining parts of the Act deal with slightly different questions. Sections 18 and 19 deal with recognition of judgments against the UK in accordance with the European Convention scheme. Section 20 deals with the immunities of foreign Heads of State (and provides that they enjoy a similar level of immunities to the head of a diplomatic mission). Finally section 21 deals with the provision of evidence by means of a conclusive certificate of the Executive on certain questions (see below).

11. There has been limited secondary legislation made by virtue of the enabling powers contained in the Act. Statutory Instruments have been passed to extend the provisions of the Act to the UK's Overseas Territories; to grant immunity to the Austrian Provinces and the German Länder.

12. There is a growing body of caselaw under the State Immunity Act (a recent Lexis search under the terms "State Immunity Act" yielded about 130 results). A sample of this caselaw is attached as indicative of the main trends and areas of controversy. Particular themes are:

- the definition of a commercial transaction;
- the characterisation of acts of sovereign authority;
- the relationship of immunity from jurisdiction and immunity from execution;
- the extent of immunity from execution;
- the extent of procedural privileges;
- the scope of jurisdictional immunity in employment cases;
- the relationship of diplomatic immunities and State immunity;
- the persons entitled to claim State immunity; and
- the question of immunity in relation to breaches of international law.

13. Related to this last issue is, of course, the landmark decision of the House of Lords in the *Pinochet* case ([2000] AC 151). However that decision has not been included for present

purposes, given that its focus was on the immunities of a former Head of State in relation to criminal proceedings.

The common law

14. Until the entry into force of the State Immunity Act the common law was the sole source of law on State immunity applied by the English courts. Even now, since the State Immunity Act excludes certain matters from its scope (section 16), those residual matters continue to be governed by the common law. These include the matters of direct taxation, the activities of visiting forces, and criminal proceedings.

15. Traditionally the courts adhered strictly to absolute immunity. However the mid- 1970's saw the courts move towards restrictive immunity, first in relation to actions *in rem* against State-owned trading ships and subsequently in relation to actions *in personam* in respect of commercial transactions of foreign States.

16. The major turning point came in 1977, in the case of *Trendtex Trading Corporation v. Central Bank of Nigeria*, when the Court of Appeal found that the common law should reflect the restrictive doctrine of immunity that had emerged in customary international law. That finding was subsequently approved by the House of Lords in the case of *1° Congreso del Partido*, in which it was found that certainly as far back as 1975 the restrictive rule of immunity was part of customary international law. There is little doubt that today the common law adopts the restrictive doctrine.

17. The most recent common law cases have involved the immunities a foreign State in respect of acts of its visiting forces in the UK (matters excluded from the scope of the State Immunity Act by virtue of section 16(2)). In these cases the courts have applied the distinction between acts *iure imperii* and acts *iure gestionis*. In doing so they have accepted that in principle the characterisation of an act ought to be made by reference to its nature rather than its purpose. However the courts have also stressed the importance of considering the act in its context.

LIST OF MATERIALS IN RESPECT OF THE UNITED KINGDOM

1. Legislation

The following legislative acts are attached

A. Primary Legislation:

State Immunity Act 1978 *;

Diplomatic Privileges Act 1964 *;

B. Secondary Legislation:

(1) The State Immunity (Federal States) Order 1979 (SI No 457/1979) – by which the Austrian Provinces enjoy immunity *;

(2) The State Immunity (Federal States) Order 1993 (SI No 2809/1993) – by which the German Länder enjoy immunity *;

2. Executive Acts or Statements

The Executive plays a limited role in decisions on State immunity, this being a matter for the Courts. However upon request by the court or by both parties to a dispute, the Executive will provide a certificate on certain matters which are exclusively within its own knowledge or appreciation. Thus under section 21 of the State Immunity Act, provision is made that a certificate of the Secretary of State for Foreign and Commonwealth Affairs shall be conclusive on the following questions:

(a) whether any country is a State for the purposes of the Act, or similarly whether a territory is a constituent territory of federal State, or whether a person or persons is to be regarded as the Head or the government of a State;

(b) whether a State is a party to the 1926 Brussels Convention;

(c) whether a State is a party to the European Convention on State Immunity;

(d) whether a document has been served or received in accordance with section 12 of the Act (which provides for the service of the document instituting proceedings and/or any judgment via the Foreign and Commonwealth Office on the Ministry of Foreign Affairs of the respondent State).

Such certificates are made on a case by case basis. No examples are attached.

3. Decisions of National Courts and Tribunals

Copies of the decisions cited below are provided from relevant law reports, those reports commence with a “headnote” summarising the facts and legal points decided, and this is followed by the full texts of the judgments.

A. Decisions under the State Immunity Act

GB/1. *Intpro Properties (UK) Ltd v. Sauvel* (CA), 29.3.83, [1983] 2 WLR 908, 64 ILR 384 *

GB/2. *Alcom Ltd v. Republic of Colombia*, HL, 12.4.84, [1984] 2 All ER 6 *

GB/3. *Maclaine Watson and co. Ltd v. Department of Trade and Industry and others*, CA, 27.4.88, [1988] 3 WLR 1033, 80 ILR 49 *

- GB/4. *A. Co. Ltd v. Republic of X*, QBD (Commercial Court), 21.12.89, 87 ILR 412
- GB/5. *Re Rafidain Bank*, Ch D (Companies Court), 9.7.91, 101 ILR 332 *
- GB/6. *Ahmed v. Government of the Kingdom of Saudi Arabia*, CA, 6.7.95, [1996] 2 All ER 248 *
- GB/7. *Kuwait Airways Corp. v. Iraqi Airways Corp.*, HL, 24.7.95, [1995] 1 WLR 1147, 103 ILR 340 *
- GB/8. *Al-Adsani v. Government of Kuwait*, CA, 12.3.96, 107 ILR 536 *
- GB/9. *Propend Finance pty and others v. Sing and others*, CA, 17.4.97, 111 ILR 611 *
- GB/10. *An International Bank plc v. Republic of Zambia*, QBD (Commercial Court), 23.5.97, 118 ILR 602 *
- GB/11. *Banca Carige SpA Cassa di Risparmio di Genova e Imperia v. Banco Nacional de Cuba*, Ch.D, 11.4.01, [2001] 3 All ER 923 *

B. Decisions at common law:

- GB/12. *Trendtex Ltd v. Central Bank of Nigeria*, CA, 13.1.77, [1977] 2 WLR 979, 64 ILR 111 *
- GB/13. *Sengupta v. Republic of India*, EAT, 17.11.82, 64 ILR 352 *
- GB/14. *1° Congreso del Partido*, HL, 16.7.81, [1981] 3 WLR 328 *
- GB/15. *R. v. Inland Revenue Commissioners, ex parte Camacq Corp and another*, CA, 3.8.89, [1990] 1 WLR 191 *
- GB/16. *Littrell v. USA (No.2)*, CA, 12.11.93, [1995] 1 WLR 82 *
- GB/17. *Holland v. Lampen-Wolfe*, HL, 20.07.00, [2000] 3 All ER 833 *

UK Treaty Practice

UK is party to the European Convention on State Immunity, the declarations made at the time of ratification are attached. The UK is also a party to the 1926 Brussels Convention for the Unification of certain Rules concerning the Immunity of State-owned Ships, and the UK reservation on ratification is attached.

(a)	Registration no.	GB/1
(b)	Date	29 March 1983
(c)	Authority	Court of Appeal
(d)	Parties	<i>Intpro Properties (UK) Ltd v. Sauvel and others</i>
(e)	Points of law	<p>1) A State is not immune from the jurisdiction of the UK courts in proceedings relating to the possession or use of immovable property (section 6(1) State Immunity Act), unless the property in question is used for the purposes of a diplomatic mission (section 16(1)(b) State Immunity Act);</p> <p>2) An apartment leased by a foreign State for use as the private residence of one of its diplomatic agents in the UK (other than the head of the diplomatic mission), is not “property used for the purposes of a diplomatic mission”. A foreign State is therefore not immune in proceedings relating to the lease of such property;</p>
(f)	Classification	0.b.1, 1.b
(g)	Source	[1983] 2 WLR 908; 64 ILR 384
(h)	Additional information	

(a)	Registration no.	GB/2
(b)	Date	12 April 1984
(c)	Authority	House of Lords
(d)	Parties	Alcom Ltd v. Republic of Colombia
(e)	Points of law	<ol style="list-style-type: none"> 1) Under customary international law the bank account of a diplomatic mission used for defraying the expenses of running the mission, enjoys immunity from execution in the receiving State; 2) The State Immunity Act should be construed so far as possible to accord with the requirements of customary international law; 3) The bank account of a foreign embassy in the UK used for the day to day running of that embassy is used both for the supply of goods and services and for sovereign purposes. Since the account is indivisible, it is not property "in use or intended for use for commercial purposes" within section 13(4) of the State Immunity Act, and is therefore immune from measures of execution; 4) If an embassy bank account is earmarked by the foreign State solely for commercial transactions, it will not be immune from measures of execution. However it is for the judgment creditor to prove this, and a certificate from the head of the diplomatic mission that the account is not in use or intended for use for commercial purposes is sufficient evidence of that fact, unless the contrary is proved.
(f)	Classification	0.b1, 0.b.3, 2.b
(g)	Source	[1984] 2 All ER 6
(h)	Additional information	

(a)	Registration no.	GB/3
(b)	Date	27 April 1988
(c)	Authority	Court of Appeal
(d)	Parties	<i>Maclaine Watson and Co Ltd v. Department of Trade and Industry</i> <i>Maclaine Watson and Co Ltd v International Tin Council</i>
(e)	Points of law	<ol style="list-style-type: none"> 1) The issue of immunity must be determined as a preliminary issue, before the substantive action can proceed; 2) The contracts of the International Tin Council in question were commercial transactions; if the plaintiffs had been able to establish either a primary or a secondary liability for the obligations of the ITC on the part of the member States they would not enjoy immunity; 3) The EEC was not entitled to State immunity.
(f)	Classification	0.b, 0.b.1, 0.b.3, 1.b
(g)	Source	
(h)	Additional information	<p>NB. Extracts only of the case are attached, since the issues of State immunity were secondary to those of the status and nature of the International Tin Council, and the question of the possible liability of the member States for its debts.</p> <p>The decision of the Court of Appeal was appealed to the House of Lords which gave its judgment on 26 October 1989 ([1989] 3 All ER 523). However the judgment of the House of Lords does not deal explicitly with the question of State immunity, but rather the questions of status of the ITC and the liability of its member States for its debts.</p>

(a)	Registration no.	GB/4
(b)	Date	21 December 1989
(c)	Authority	High Court, Queen's Bench Division
(d)	Parties	A Co. Ltd v. Republic of X
(e)	Points of law	A contractual waiver of State immunity from jurisdiction and enforcement, will not be sufficient to waive the inviolability and immunity of either the premises and/or property of a diplomatic mission, or the private residence and/or property of a diplomatic agent, enjoyed under, respectively, Articles 22 and 30 of the Vienna Convention on Diplomatic Relations.
(f)	Classification	0.b.1, 2.b
(g)	Source	[1990] 2 Lloyds Rep.520, 87 ILR 412
(h)	Additional information	

(a)	Registration no.	GB/5
(b)	Date	9 July 1991
(c)	Authority	High Court, Chancery Division
(d)	Parties	Re Rafidain Bank
(e)	Points of law	In the context of the liquidation of a commercial company owned by a foreign State, monies owed by the company to that foreign State are not protected by State immunity and can not therefore be paid out by the liquidators in preference to other creditors (section 6(3) State Immunity Act).
(f)	Classification	0.b.1, 1.c
(g)	Source	101 ILR 332
(h)	Additional information	

(a)	Registration no.	GB/6
(b)	Date	6 July 1995
(c)	Authority	Court of Appeal
(d)	Parties	<i>Ahmed v. Government of the Kingdom of Saudi Arabia</i>
(e)	Points of law	<ol style="list-style-type: none"> 1) A foreign State enjoys immunity from the UK courts in respect of proceedings arising out of employment contracts of all members of its diplomatic mission, including locally engaged members of the technical and administrative staff; 2) The requirement that a waiver of immunity must be by way of prior written agreement, must be an express and complete agreement to submit to the jurisdiction, made by the head of the diplomatic mission or some other person endowed with the authority of the sending State.
(f)	Classification	0.b.3, 1.b
(g)	Source	[1996] 2 All ER 248
(h)	Additional information	

(a)	Registration no.	GB/7
(b)	Date	24 July 1995
(c)	Authority	House of Lords
(d)	Parties	<i>Kuwait Airways Corp. v. Iraqi Airways Co.</i>
(e)	Points of law	<ol style="list-style-type: none"> 1) Service of proceedings on a foreign State must be done through the Foreign and Commonwealth Office on the Ministry of Foreign Affairs of that State; 2) The seizure and removal of property by a State-owned entity of a foreign State on the orders of that foreign State, in the context of an armed invasion of another State, was an act in the exercise of sovereign authority; 3) The subsequent retention and use of that property by the State-owned entity, following a formal legislative act vesting the property in the entity, were not acts in the exercise of sovereign authority.
(f)	Classification	0.a, 0.b, 1,1.b
(g)	Source	[1995] 1 WLR 1147, 103 ILR 340
(h)	Additional information	

(a)	Registration no.	GB/8
(b)	Date	12 March 1996
(c)	Authority	Court of Appeal
(d)	Parties	Al-Adsani v. Government of Kuwait
(e)	Points of law	<p>A foreign State enjoys immunity in the UK in relation to proceedings in respect of torture committed outside the UK. The exception to immunity in respect of acts occasioning personal injury or death, applies only when they are caused by acts or omissions in the UK (section 5, State Immunity Act).</p> <p>There is no general exception to immunity in respect of acts of torture or other violations of international law.</p>
(f)	Classification	0.a, 1.b
(g)	Source	107 ILR 536
(h)	Additional information	

(a)	Registration no.	GB/9
(b)	Date	17 April 1997
(c)	Authority	Court of Appeal
(d)	Parties	<i>Propend Finance Pty Ltd v. Sing and others</i>
(e)	Points of law	An official of a foreign State enjoys immunity in respect of his official acts on behalf of that State, to the extent that that State would itself enjoy immunity in respect of those acts if the proceedings had been brought against it.
(f)	Classification	0.a, 1.b
(g)	Source	111 ILR 611
(h)	Additional information	

(a)	Registration no.	GB/10
(b)	Date	23 May 1997
(c)	Authority	High Court, Queen's Bench Division, (Commercial Court)
(d)	Parties	<i>An International Bank v. Republic of Zambia</i>
(e)	Points of law	Submission to jurisdiction and waiver of the privileges of a State in relation to service of proceedings, do not imply a waiver of immunities/procedural privileges in relation to service of a default judgment against a foreign State and execution.
(f)	Classification	0.b, 0.b.1, 0.b.3, 1.b, 2
(g)	Source	118 ILR 602
(h)	Additional information	

(a)	Registration no.	GB/11
(b)	Date	11 April 2001
(c)	Authority	High Court, Chancery Division (Companies Court)
(d)	Parties	<i>Banca Carige SpA Cassa Di Risparmio Geneva E Imperia v. Banco Nacional De Cuba and another</i>
(e)	Points of law	The immunity from enforcement proceedings of a central bank (section 14(4) State Immunity Act), is a relevant factor for a Court to consider when deciding whether to exercise a discretion allowing proceedings to be served outside the jurisdiction
(f)	Classification	0.b.3, 2.a
(g)	Source	[2001] 3 All ER 923
(h)	Additional information	

(a)	Registration no.	GB/12
(b)	Date	13 January 1977
(c)	Authority	Court of Appeal
(d)	Parties	<i>Trendtex Trading Corporation v. Central Bank of Nigeria</i>
(e)	Points of law	<ol style="list-style-type: none"> 1) The restrictive doctrine of State immunity as recognised in customary international law is part of the common law; 2) The question as to whether a separate legal entity of a foreign State is entitled to immunity depends upon the degree of control exercised by the State over that entity and the functions which the entity performed; 3) (By majority) The Central Bank of Nigeria was not an emanation of the State entitled to claim immunity; 4) Since the Bank was not immune its funds were not immune from seizure or injunction.
(f)	Classification	0.b.1, 0.b.3, 1.b, 2.b
(g)	Source	[1977] 2 WLR 356, 64 ILR 111
(h)	Additional information	

(a)	Registration no.	GB/13
(b)	Date	17 November 1982
(c)	Authority	<i>Employment Appeal Tribunal</i>
(d)	Parties	<i>Sengupta v. Republic India</i>
(e)	Points of law	<p>1) In a case to which the State Immunity Act did not apply it was necessary to apply the common law of State immunity, which incorporated the distinction made in customary international law between acts <i>iure imperii</i> and acts <i>iure gestionis</i>;</p> <p>2) In determining whether a contract of employment was an act <i>iure imperii</i> or <i>iure gestionis</i>, it was necessary not only to look at the nature of the a contract, but to ask the following questions :</p> <p>(a) Was the contract of a kind which a private individual could enter into?</p> <p>(b) Did the performance of the contract involve participation of both parties in the public functions of the foreign State, or was it purely collateral to such functions?</p> <p>(c) What was the nature of the breach of contract or other act of the foreign State giving rise to the proceedings?</p> <p>(d) Will the investigation of the claim by the Tribunal involve investigation into the public or sovereign acts of the foreign State?</p> <p>3) The plaintiff's employment as a clerical officer in the diplomatic mission of a foreign State would involve his participation in the public acts of a foreign sovereign. His dismissal concerned the performance of a public function i.e. the running of diplomatic mission. An investigation into the fairness of that dismissal would involve the Court in an investigation of, and interference with, a public function of a foreign sovereign.</p>
(f)	Classification	0.b.2, 1.b
(g)	Source	64 ILR 352
(h)	Additional information	

(a)	Registration no.	GB/14
(b)	Date	16 July 1981
(c)	Authority	House of Lords
(d)	Parties	<i>1° Congreso Del Partido</i>
(e)	Points of law	<ol style="list-style-type: none"> 1) The restrictive doctrine of State immunity in customary international law forms part of the common law. A foreign State can not therefore claim State immunity in respect of acts <i>iure gestionis</i>; 2) In characterising an act as <i>iure imperii</i> or <i>iure gestionis</i>, a court should in general consider the nature, rather than the purpose or motive, of the act in question. However the Court must consider the whole context against which the claim against the foreign State is made; 3) (By majority) The breaches by the defendant State, as owner of the ships, of its obligations towards the owners of the two cargoes in this case, were acts <i>iure gestionis</i>, notwithstanding their political motivation.
(f)	Classification	0.b, 0.b3, 1.b
(g)	Source	[1981] 3 WLR 328
(h)	Additional information	

(a)	Registration no.	GB/15
(b)	Date	3 August 1989
(c)	Authority	Court of Appeal
(d)	Parties	<i>R. v. Inland Revenue Commissioners ex parte Camacq Corporation</i>
(e)	Points of law	<ol style="list-style-type: none"> 1) Questions of the application of direct taxation to foreign sovereigns, fall outside the scope of the State Immunity Act (section 16(5)); 2) The Inland Revenue is entitled to refuse to pay the whole of a tax credit to a foreign sovereign, where it was clear that the transaction in question was artificially arranged to take advantage of the UK tax rules; there is no binding rule that the IR had to give consent to payment of the amount of the tax credit direct to a foreign State.
(f)	Classification	O.c, 1.c
(g)	Source	[1990] 1 WLR 191
(h)	Additional information	

(a)	Registration no.	GB/16
(b)	Date	12 November 1993
(c)	Authority	Court of Appeal
(d)	Parties	<i>Littrell v. USA (No.2)</i>
(e)	Points of law	<ol style="list-style-type: none"> 1) The State Immunity Act does not apply to acts of the armed forces of a foreign State whilst present in the UK. The issue of whether a foreign State enjoyed immunity in respect of a claim arising out of the standard of medical treatment of one of its servicemen stationed at one of its bases within the UK was determined under the common law of sovereign immunity, which incorporates customary international law in this respect; 2) In applying the distinction between acts <i>iure imperii</i> and <i>iure gestionis</i>, the court should consider the nature of the act, rather than its purpose, but the nature of the act must be appreciated in its context; 3) The context included the location of the act, the identity of the persons involved and the kind of act it was; 4) The terms of the relationship between a foreign State and its own servicemen, and in particular the standard of medical care which that foreign State affords its servicemen, is a matter within its own sovereign authority.
(f)	Classification	0.a, 1.b
(g)	Source	[1994] 4 All ER 203, 100 ILR 438
(h)	Additional information	

(a)	Registration no.	GB/17
(b)	Date	20 July 2000
(c)	Authority	House of Lords
(d)	Parties	Holland v. Lampen-Wolfe
(e)	Points of law	<ol style="list-style-type: none"> 1) A contract with a civilian of the sending State to teach members of a military base of that State on the territory of the UK, is a matter which is excluded from the State Immunity Act, which does not apply to “anything done by or in relation to the armed forces of a State whilst present in the UK” (s.16(2)). It is therefore governed by the common law of State immunity; 2) In determining whether it was an act <i>iure imperii</i> or <i>iure gestionis</i>, the defendant’s assessment of the plaintiff’s provision of educational services to members of the base had to be viewed in its context, including taking account the persons involved and the place in which the acts took place; 3) The impugned assessment of the plaintiff’s teaching related to the standard of education which the sending State afforded to its own servicemen. It was therefore a matter within its own sovereign authority; 4) In recognising the immunity of the sending State in this case, there was no violation of Article 6 of the European Convention on Human Rights. Article 6 provides procedural guarantees in relation to due process, but does not in itself provide a basis of jurisdiction where this is not permitted under international law.
(f)	Classification	0.a, 1.b
(g)	Source	[2000] 3 All ER 833
(h)	Additional information	

JAPAN

(a)	Registration no.	J/1
(b)	Date	March 14, 1997
(c)	Author(ity)	Tokyo District Court
(d)	Parties	X v. the United States of America
(e)	Points of law	The Court ruled that jurisdiction of Japan cannot be exercised against foreign country, and dismissed the claims of plaintiffs
(f)	Classification no.	0.a l.a
(g)	Source(s)	The Japanese Annural of International Law No.41, 1998
(h)	Additional information	
(i)	Full text – extracts – translation - summaries	Appendix: Summary in English

Demand for the Cessation of Nighttime Takeoffs and Landings by United States Military Aircrafts at Yokota Air Base, Japan, and for Compensation for the Suffering Caused by the Aircraft Noise — State Immunity

Tokyo District Court, Hachioji Branch, Judgment, March 14, 1997; H.J. (1612) 101 [1997]

X et al. v. the United States of America

The plaintiffs X et al., who reside near the Yokota Air Base, brought an action against the government of the United States of America with regard to what they consider intolerable noise levels caused by the taking off and landing of military aircraft at the base. They demanded an injunction against all flights between the hours of 9 p.m. and 7 a.m., and sought compensation for past suffering as well as future suffering to be caused by noise levels exceeding 60 phons during the remaining hours, such compensation to be paid jointly by the Japanese government.

Held: '1. The demands of X and the others is dismissed.
2. The costs of the litigation shall be borne by the plaintiffs.'

Upon the grounds stated below:

'It is a well known fact that the respondent is a foreign country.'

'1. According to principles of international law, the judicial jurisdiction of Japan cannot be exercised against a foreign country that is sued. (Daishinin [Supreme Court under the Meiji Constitution of Japan], Decision, December 28, 1928; 7 Daishinin Minji Hanreishu (12) 128 [1928].) However, in exceptional cases when such a state voluntarily appears before the court with the express intention of being subject to Japanese adjudicatory jurisdiction, or when the subject of the action brought directly involves real estate in Japan, jurisdiction can be exercised over that state.

2. If that principle is applied to this case it is clear that the subject does not directly concern real estate in Japan. Therefore, it is necessary to determine whether

the respondent has the intention of being subject to the jurisdiction of Japan voluntarily.... Judging from the dossier, the respondent does not have such an intent. Adjudicatory jurisdiction of Japan thus cannot be exercised over the respondent in this case.'

(a)	Registration no.	J/2
(b)	Date	December 25, 1998
(c)	Author(ity)	Tokyo High Court
(d)	Parties	X v. the United States of America
(e)	Points of law	The Court ruled that jurisdiction over the appellee could not be exercised in this case under the Article 18 paragraph 5 of the Japan-US Agreement Regarding Facilities and Areas and the Status of United States Armed Forces in Japan, even if the Court were to embrace the restrictive theory of immunity as the appellants argue
(f)	Classification no.	0.a 1.c
(g)	Source(s)	The Japanese Annals of International Law No.42, 1999
(h)	Additional information	This case is the appeal of the case J/1
(i)	Full text – extracts – translation - summaries	Appendix: Summary in English

Demand for the Cessation of Nighttime Takeoffs and Landings by United States Military Aircraft and for Compensation for the Suffering Caused by the Aircraft Noise — State Immunity — Immunity Based on Article 18(5) of the Japan-U.S. Agreement under Article VI of the Japan-U.S. Treaty of Mutual Cooperation and Security

Tokyo High Court, Judgment, December 25, 1998; H.J. (1665) 64 [1999]

X et al. v. the United States of America

The appellants are Japanese citizens who reside near the United States Armed Forces' air base in Yokota, Tokyo. They originally brought their claim against the United States Government to the Tokyo District Court, requesting that the nighttime takeoffs and landings by the U.S. Air Force be stopped, and seeking compensation for past as well as future injuries caused or to be caused by the aircraft noise. The Tokyo District Court in its judgment of March 14, 1997⁽¹⁾ dismissed their claim. The original judgment, based on the doctrine of State immunity, was in harmony with the Great Court of Judicature's decision of December 28, 1928, widely regarded as a landmark decision adopting the absolute theory of immunity. The citizens appealed to the present court.

Held: 1. 'The appeal is dismissed.'
2. 'The cost of litigation shall be borne by the appellants.'

Upon the grounds stated below:

- (1) Jurisdictional Immunity under the Japan-U.S. Agreement
'Article 18, §5 of the Japan-U.S. Agreement Regarding Facilities and Areas and

(1) 41 JAIL 91 [1998]

the Status of United States Armed Forces in Japan, arranged pursuant to Article VI of the Japan-U.S. Treaty of Mutual Cooperation and Security, provides that the Japanese Government, not the United States Government, by appropriate means including formal adjudication, shall deal with claims for damages (other than contractual claims) arising out of acts or omissions of members or employees of the United States Armed Forces, done in the performance of official duty, or out of any other act, omission, or occurrence for which the U.S. Armed Forces are legally responsible (§5(a)). It also provides that the Japanese Government shall make payment for such claims if necessary (§5(b)), and that Japanese court orders directing such payment shall be binding upon the United States as well as upon Japan (§5(c)). The parties are to defray the costs in satisfying such claims as stipulated in §§5(d) and 5(e) of the Agreement (According to §5(e), Japan shall pay twenty-five percent of the amount and the United States shall pay seventy-five percent where the United States alone is responsible for the wrong, and each party shall pay fifty percent where both are responsible).

Resorting to this provision, a Japanese citizen who suffered injuries as a result of an act of a member or employee of the U.S. Armed Forces may bring an action in Japan against the Japanese Government, but not against the United States Government. If he or she prevails in court, he or she will receive the full amount from the Japanese Government. Japanese courts, however, lack jurisdiction where such a citizen chooses to sue the United States Government.

It could be argued that Japanese courts may exercise jurisdiction over "members or employees of the United States Armed Forces" as private citizens, for Article 18, §5(f) of the Agreement provides that "members or employees of the United States Armed Forces . . . shall not be subject to any proceedings for the enforcement of any judgment given against them in Japan in a matter arising from the performance of their official duties." Yet this section cannot be interpreted as indicating the jurisdiction of Japanese courts over the United States itself.

On the contrary, based on the Japan-U.S. Treaty of Mutual Cooperation and Security, the provision explained above immunizes the United States against the jurisdiction of Japanese courts, making sure that neither the United States nor the U.S. Armed Forces will be embroiled in legal disputes concerning acts of the U.S. Armed Forces or their members stationed in Japan, done in the performance of official duty. It makes clear that Japan abdicates its jurisdiction over the United States in this context.

Such a provision is not unique to the Japan-U.S. relationship. The 1976 Foreign Sovereign Immunities Act (FSIA) of the United States (28 U.S.C. §§1604 et seq.) has adopted the so-called restrictive (or relative) theory, enumerating acts to which the doctrine of sovereign immunity does not apply (§1605). Although the United States may exercise jurisdiction over wrongful acts committed by foreign

States as well as over commercial transactions (§1605(a)(5)), the Act provides at the same time that the existing treaties are to prevail where there are conflicts between the FSIA and the treaties (§1604). Accordingly, an American citizen who suffered injuries as a result of an act of the foreign military stationed in the United States as part of the North Atlantic Treaty Organization's troops may bring an action for damages only in the United States and only against the United States Government, as stipulated in the agreement concerning the status of the NATO troops. If such a citizen prevails, the United States Government will pay the entire judgment found for him or her; the United States may then demand a contribution from the foreign State responsible for the wrong, pursuant to the agreement. American courts, on the other hand, are not authorized to exercise jurisdiction where such a citizen sues the foreign State itself.

Likewise, although the 1972 European Convention on State Immunities prepared by the Council of Europe provides that the courts of each member State may exercise jurisdiction over foreign States with respect to their tortious acts, which is an exception to the doctrine of state immunity (§11), it declares that the immunities of foreign States as to their military are out of its reach (§31). Obviously, §31 was drafted with the agreement on the status of the NATO troops in mind.'

(2) Jurisdiction as to Actions Seeking Injunctions

'Article 18, §5 of the Japan-U.S. Agreement is, on its face, a provision concerning claims for damages, caused by wrongful acts committed in the course of official duty. Actions seeking injunctions are nowhere stipulated in the Agreement. It is, however, reasonable to apply the insight expressed in the provision concerning claims for damages to actions seeking injunctions by analogy. Noting that courts of most States nowadays do have jurisdiction over foreign States with respect to their wrongful acts and commercial transactions, Article 18, §5 of the Agreement apprehends that Japanese courts may exercise jurisdiction over the United States, following the approach of most courts in the world. It therefore dares to immunize the United States against their jurisdiction as to the U.S. Armed Forces members' wrongful acts, done in the performance of official duty. It is unthinkable that the drafters of the Agreement intended to maintain the jurisdiction as to actions for injunctions, for the necessity for immunity is much the same for such actions.

Whereas the Agreement allows an aggrieved Japanese citizen to file a lawsuit against the Japanese Government in lieu of the United States Government with respect to his or her right to compensation, it apparently does not provide such a citizen with an option to apply for an injunction. We find no authority maintaining that a citizen may seek an injunction in this context, either. Such a position may not be totally inconceivable, of course. Nevertheless, should the provision concerning actions for damages be applied to actions for injunctions by analogy, it would follow

that Japanese citizens affected by the aircraft noise may bring an action against the Japanese Government in a Japanese court, requesting that the U.S. Armed Forces' flights be stopped. It would also follow that, if the plaintiffs win the case, the Japanese Government must negotiate with the United States and take appropriate measures, and that the U.S. Armed Forces must cease to undertake flights in response to the Japanese Government's request, pursuant to their obligation under the Agreement. It is unnatural to interpret the Agreement as imposing such a duty upon the United States without any express provision. Following the two judgments of the First Petty Bench of the Supreme Court, handed down on February 25, 1993, in which the Bench held that the High Court's judgments dismissing similar applications for injunctions as unenforceable were erroneous, but that the applications were nonetheless groundless, since the Japanese Government could not restrain the U.S. Armed Forces' activities authorized by the Japan-U.S. Treaty of Mutual Cooperation and Security without distinct foundation in the Treaty itself and in domestic laws enacted thereby, the present court concludes that Japanese citizens may not demand in court that the Japanese Government see to it that the U.S. Armed Forces discontinue nighttime takeoffs and landings. It could be argued that the Agreement is flawed in that it shields the United States Government from the jurisdiction of Japanese courts with respect to actions for injunctions and provides no alternative remedies for aggrieved Japanese citizens; however, this is a matter of diplomatic or legislative policy.

As a result, Japanese citizens cannot obtain injunctive relief in a Japanese court as to the U.S. Armed Forces' flights, whether they sue the United States Government or the Japanese Government. Yet this is the inescapable consequence under the existing law.

Needless to say, Japanese citizens may petition for the Government's diplomatic efforts: In fact, the Government negotiated with the United States, and the two states entered into the "Japan-U.S. Joint Committee's Agreement on Measures to Control the Noise at Yokota Air Base," which stipulates that "the United States Armed Forces shall refrain from making flights or engaging in ground activities between 10:00 p.m. and 6:00 a.m., unless such flights or activities are urgently needed for the U.S. Armed Forces' operations." Aside from seeking such efforts, however, citizens affected by noise cannot directly settle the matter in court by bringing actions for injunctions under the existing law.

Although the appellants cite various provisions in the Agreement and contend that they provide good grounds for extending this court's jurisdiction over the appellee in the present case, the Agreement, on the contrary, makes clear that the appellee is not subject to the jurisdiction of Japanese courts, as explained above. The appellants' claim is therefore groundless.'

(3) Restrictive Theory of Immunity

Recently, due to changed international circumstances, a strong argument has been made against the validity of the Great Court of Judicature's decision of December 28, 1928, as the appellants point out. The decision espoused the absolute theory of State or sovereign immunity, that is, the view that Japanese courts may not exercise jurisdiction over foreign States unless the defendant State appears without raising a jurisdictional objection or real property located in Japan is involved. We, too, are aware that a number of notable scholars consider the 1928 decision as outdated and having very little precedential value.

Although the absolute theory, according to which States were rarely subject to the jurisdiction of other States, was once widely recognized as custom in international law, most States thereafter changed their position and adopted the restrictive (or relative) theory of immunity, save a few former socialist States. This is because, as the range of governmental activities widened, and as States came to engage themselves more actively in economic activities, including commercial transactions, serious problems arose under the absolute theory. For example, since adverse parties in commercial transactions were not legally protected under the absolute theory, States' economic activities themselves were eventually constrained. The restrictive theory holds that courts of one State may exercise jurisdiction over another State where the latter's act in the private law sphere (such as employment, commercial transactions, and business administration) is in question; however, even under the restrictive theory, jurisdiction is not authorized where a foreign State's act as a sovereign (act in the public law sphere) is involved.

If we are to go against the tide and adhere to the absolute theory of immunity, it will definitely be detrimental to various activities, including economic activities, of Japan. Moreover, the restrictive theory is the more reasonable of the two from a practical point of view. Thus, the present court appreciates the appellants' argument, which insists that the original judgment was erroneous in that it followed the Great Court of Judicature's outdated decision, and that we should abandon the absolute theory.

In addition to the above-mentioned Foreign Sovereign Immunities Act of the United States and the European Convention on State Immunities, there are express provisions that exclude tortious acts of foreign governmental agencies and their members from the coverage of the doctrine of sovereign immunity in the 1978 State Immunities Act of the United Kingdom, in various statutes of other States relating to foreign sovereign immunities, in the 1982 Draft Treaty on State Immunities proposed by the International Law Association (revised in 1994), and in the 1991 Draft Treaty on State Immunities prepared by the United Nations' International Law Commission. It appears that the world trend is to authorize courts of the State where the allegedly tortious act took place to exercise jurisdiction over the wrongdoing

States.

It is true that no judicial decision manifestly embracing the restrictive theory of immunity has been rendered in Japan, but this in fact was due to the dearth of fitting cases in the past. It is even possible to maintain that Japan has already abandoned the absolute theory and adopted the restrictive, in light of the above-mentioned Article 18, §5 of the Agreement, for it is conceivable that the drafters inserted this provision because they believed that otherwise the jurisdiction of Japanese courts would be authorized in cases brought against the United States or the U.S. Armed Forces concerning tortious acts committed by the U.S. Armed Forces in the performance of official duty.

As explained above, however, we cannot exercise jurisdiction over the appellee in the present case under Article 18, §5 of the Agreement, even if we are to embrace the restrictive theory of immunity as the appellants argue.

(a)	Registration no.	J/3
(b)	Date	March 14, 2002
(c)	Author(ity)	Supreme Court
(d)	Parties	X v. the United States of America
(e)	Points of law	The Court ruled that; the nighttime take offs and landings in question were the very public acts of the United States Armed Forces based in Japan, and judging from the purpose or the nature of these activities, it is clear that they were sovereign acts. Therefore, there is no doubt that under international customary law, these activities of the United States Armed Forces based in Japan are not subject to the civil jurisdiction of Japanese courts.
(f)	Classification no./n°	0.a l.a
(g)	Source(s)	Hanrei Jihou (Japanese) No. 1786 p. 2002
(h)	Additional information	This case is the final appeal of the case J/1
(i)	Full text – extracts – translation - summaries	Appendix: Summary in English (translation. from the original text)

Demand for the Cessation of Nighttime Takeoffs and Landings by the United States Military Aircraft and for Compensation for the Suffering Caused by the Aircraft Noise – State Immunity

Supreme Court, Judgement, April 12, 2002; H. J. (1786) 44 [2002]

X et al. v. the United States of America

The appellants of the present case are Japanese citizens who reside near the United States Armed Forces' Air Base in Yokota, Tokyo. They brought their claim against the United States Government, requesting that the nighttime takeoffs and landings shall be stopped, and seeking compensation for past as well as future injuries caused or to be caused by the aircraft noise. Both the Tokyo District Court (March 14, 1997) and the Tokyo High Court (December 25, 1998) dismissed their claim. The citizens appealed to the present court.

Held: 1. 'The appeal is dismissed'
2. 'The cost of litigation shall be borne by the appellants.'

Upon the grounds stated below:

(1) The appellants of the present case brought their claim against the United States, requesting the cessation of the nighttime takeoffs and landings and compensation for damages, on the ground that the nighttime aircraft noise infringed their rights of personality.

(2) The judgement by the Tokyo High Court was based on Article 18 (5) of the Japan-U.S. Agreement Regarding Facilities and Areas and the Status of United States Armed Forces in Japan, arranged pursuant to Article VI of the Japan-U.S. Treaty of Mutual Cooperation and Security. The Tokyo High Court held that Article 18 (5) grants immunity to the United States against the jurisdiction of Japanese courts, with respect to the claim for compensation based on wrongful act done in the performance of official duty by the U.S. forces based in Japan; and that by analogy, therefore, the object and purpose of this provision is applicable to the case on the claim for the cessation, and so the appeal is inadmissible and shall be dismissed.

(3) However Article 18 (5) shall not be interpreted as providing for civil jurisdictional immunity to the United States, as its purpose is to create a system on the dealings of the claim arising from wrongful act done by the United States Armed Forces based in Japan, which are the organs of foreign states.

As of civil jurisdictional immunity to foreign states, the theory of absolute immunity had traditionally been considered as international customary law. With expansion of the scope of state activities, the school of idea has arisen that it is not appropriate to grant civil jurisdictional immunity to private law acts and acts *jure gestionis*. State practices of foreign states, limiting the scope of immunity granted to state activities, have also been accumulated. Even under these circumstances, however, it can be approved that there still exists international customary law to the effect that jurisdictional immunity shall be given to sovereign acts (or acts *jure imperii*). The nighttime takeoffs and

landings in question are the very public acts of the United States Armed Forces based in Japan, and judging from the purpose or the nature of these activities, it is clear that they are sovereign acts. Therefore there is no doubt that under international customary law, these activities of the United States Armed Forces based in Japan are not subject to the civil jurisdiction of Japanese courts.

Accordingly, it should be held that the present suit is inadmissible. The conclusion of the original judgement can be approved in that the suit is dismissed. But the grounds of the original judgement cannot be adopted.

(a)	Registration no.	J/4
(b)	Date	November 30, 2000
(c)	Author(ity)	Tokyo District Court
(d)	Parties	X v. the Nauru Finance Corporation, the Republic of Nauru
(e)	Points of law	The Court ruled that; considering the need to protect the legal status of their own nationals, and to secure the basis of foreign State's international economic activities, the restrictive theory has been accepted. In view of the facts in this case, i.e., the commercial nature of the issuance of bonds under the guarantee of a government and the express waiver of sovereign immunity by a prior written agreement on the bonds, we come to conclusion that there are no grounds for the arguments of defendants which demand immunity from Japanese jurisdiction.
(f)	Classification no.	0.b.1 i.b
(g)	Source(s)	The Japanese Annual of International Law No. 44, 2001
(h)	Additional information	
(i)	Full text – extracts – translation - summaries	Appendix: Summary in English

Claims for Compensation — The Issuance of Bonds — Foreign Sovereign State — Immunity from Suit — Absolute Theory — Restrictive Theory — Acts *Jure Imperii* or Acts *Jure Gestionis* — Practicing Attorneys Act — Prohibition of Execution of the Rights Taken Over

Tokyo District Court, Judgment, November 30, 2000; H.J.(1740) 54 [2000]

Cresh Co., Ltd. v. the Nauru Finance Corporation, the Republic of Nauru

In 1989, Y1 (the defendant), the Nauru Finance Corporation, which had been created by a special law of the Republic of Nauru, issued bonds for the amount of five billion yen (five billion yen), under the guarantee of Y2 (the defendant), the Republic of Nauru. Y1 could not redeem the bonds on the due date (27 July 1994). On 12 August 1994, Y1, Y2 and all the bondholders agreed to change and reschedule the terms and conditions of the bonds. As a result, the maturity date on the bonds was extended to 22 August 1994, 22 December 1994 and 27 April 1995. But until now, the principal together with interest has not yet been paid.

The following conditions were contained in the bonds: with respect to all disputes arising under or relating to the bonds, Y1 shall be subject to the jurisdiction of the Tokyo District Court and its upper court, explicitly, unconditionally and irrevocably; with respect to proceedings relating to Y1 itself or its property, Y1 shall waive its immunity (where it derives from its sovereignty or not) to which it is entitled at the present and will be entitled in the future, from the judicial proceedings (whether it be the service of process, acquisition of judgment, attach-

ment, execution or other proceedings) irrevocably and unconditionally, to the extent that the applicable law permits; with respect to service of judicial documents, the consul of Y2 shall be designated as an agent of Y1 to receive the documents in Japan. As to the proceedings on the guarantee of Y2, similar agreements were reached on the terms and conditions of the guarantee.

X (the plaintiff), an English company, has carried on a sales business of bad debts. The bonds in the amount of one billion yen (¥1,000,000,000) were assigned to X after the rescheduling of their maturity date. On 18 May 1995, X registered the date in accordance with the *Shasaitou Touroku Ho* (Act concerning the Legislation on Debentures, etc). On 1 June 1995, X brought this action in the Tokyo district court seeking the payment of the principal and interest on the bonds.

The Tokyo District Court asked Y1 and Y2 whether they would appear for the proceedings, and both responded that they had no intention of appearing. Thus, as of 30 May 1997, the court requested the serving of a summons (on 19 March 1998, at 10 am) and a complaint, in accordance with Article 175 of the Old Code of Civil Procedure⁽¹⁾, transmitted from the Ministry of Foreign Affairs of Japan to the Ministry of Foreign Affairs of Y2, and to the Supreme Court of Y2. The Secretary of State of Y2 refused to receive the summons and the complaint on the grounds of sovereign immunity. However, just before the date of the oral argument, the attorney for Y1 and Y2, with a letter of attorney, appeared in the case before the Tokyo District Court. The clerk of the court served the summons and complaint to this attorney in accordance with Article 100 of the Code of Civil Procedure⁽²⁾, and the oral argument of the proceedings was held.

Held: 'The defendants shall pay to the plaintiff one billion yen (¥1,000,000,000), with interest at the rate of 7 percent per annum from July 28, 1994, until

(1) Minji Soshō Ho (the Old Code of Civil Procedure) [1890 Law No.29 as amended by 1948 Act No.149, etc] Article 175 (the current Code of Civil Procedure maintains the rule in Article 108):

'Service which is to be made in a foreign country shall be made by the presiding judge entrusting the matter to the competent governmental authorities of such country or to the Japanese ambassador, minister envoy or consul stationed in such country.'

(2) Minji Soshō Ho (the current Code of Civil Procedure) [1996 Law No.109, which went into effect on January 1, 1998] Article 100:

'A court clerk may effect service in person on a person who has appeared in a case before the court to which the court clerk belongs.'

the payment is completed.'

'The cost of the action shall be borne by the defendants.'

Upon the grounds stated below:

'1. We conclude that neither Y2 nor Y1 is entitled to sovereign immunity, upon the grounds stated below.

The cause of action in this case is an issuance of bonds under the guarantee of a foreign government. The issuance of bonds is an example of an economic activity being carried out largely and usually as an international financial transaction in international society at the present time. In addition, the defendant agreed by a written clause on the bonds that the court of another State of which the defendants are not nationals has jurisdiction and they waived their immunity explicitly from that jurisdiction. Under such circumstances, it cannot be considered that a foreign State or the agency of a foreign State, which is acting as a subject in commercial transactions, is entitled to sovereign immunity and that this is affirmed under international customary law as "the established international norm" under Article 98 (2) of the Japanese Constitution.

Our view is clearly supported by the world trend in treaties among nations, and the statutes or decisions of other nations. The doctrine of sovereign immunity developed from the practice of national courts in the nineteenth century. One consequence of the rule that all States enjoyed sovereign equality was that no State could claim jurisdiction over another. A foreign State could bring proceedings in another country as a plaintiff, but a foreign State could not be made a defendant in proceedings unless it was voluntary subject to the jurisdiction...'

'Although this doctrine, the so-called absolute theory, was once widely accepted, the circumstances have changed in the twentieth century. As the range of governmental activities widened, and as States came to engage in economic activities which used to fall within the sphere of private parties' activities, a number of countries have recognized that serious problems arose under the absolute theory. That is, the absolute theory would infringe on the legal status of their own nationals doing business with foreign States, infringe on economic predictability, and constrain states' economic activities themselves. Thus considering the need to protect the legal status of their own nationals, and to secure the basis of foreign States' international economic activities, the restrictive theory (this theory divides the States' activities into two categories according to their functions; one relates to acts of a sovereign nature (acts *jure imperii*), and the other relates to acts of a commercial/private nature (acts *jure gestionis*), and this theory gives immunity only to acts of a sovereign nature and rejects the absolute theory) has been accepted...'

'We consider the present case in relation to the circumstances of international

society on sovereign immunity described above. In view of the facts in this case, i.e., the commercial nature of the issuance of bonds under the guarantee of a government and the express waiver of sovereign immunity by a prior written agreement on the bonds, we come to the conclusion that there are no grounds for the arguments of Y1 and Y2 which demand immunity from Japanese jurisdiction, without judging the other remaining points, such as, the characteristics of Y1 as a state agency or the purpose of the issuance of the bonds.'

'2. Article 73 of the *Bengashi Ho* (the Practicing Attorneys Act)⁽³⁾ provides: "No person shall perform the business to enforce the rights he took over from others by litigation, mediation, conciliation, or other means." Article 73 concerns a situation where, if a person is allowed to perform enforcing the rights he took over as his economic purpose, the assignment of a right and the enforcement of the right would be easily subject to the unrestricted pursuit of profits, and the assignee would abuse legal proceedings or make an illegitimate request in the name of negotiation. Thus the objective and purpose of the Article are to prevent such an untoward influence and to secure legal stability by the general prohibition against performing the business of enforcing the rights taken over from others.

On the other hand, the assignment of a right is one of most important means for a creditor to dispose of his property. When... a debtor is unlikely to perform his duty and litigation or other means of dispute settlement should be considered to collect the debt, if Article 73 is read as a broad prohibition on performing the business to take over a right in expectation of such means of dispute settlement, it would unilaterally prejudice the value of the rights held by the creditor by substantially preventing a method to dispose of his rights. Moreover, it would create a situation where the debtor not performing his duty has the advantage over the creditor.

When Article 73 is interpreted in a reasonable way to balance the requirement to maintain an impartial relationship between a creditor and a debtor and the requirement to secure legal stability, which is the ultimate purpose of the Article, the scope of applicability of the Article is considered to be limited. That is, even if, at the time of the assignment, the person performing the business to take over a right from others is expecting the necessity to enforce the right through dispute settlement such as litigation, it should not be immediately found that the act is inconsistent with Article 73. We should take into account all the circumstances of the act, such as, the type of the right, the possibility and the extent of the dispute, the nature of the debtor, the purpose and modality of the obligatory right, the purpose and modality of the assignment, including a means to determine the value, and the modality of enforcing the right after the assignment including ways to demand the

(3) *Bengashi Ho* (the Practicing Attorneys Act) [1949 Law No.205]

performance of the debtor. It is proper to conclude that the person is acting inconsistently with his obligation under Article 73 only when the person is acting for the purpose of gaining interest by intervening in the dispute of others, and the act will bring an untoward influence and prejudice legal stability, contrary to the objective of the Article.'

(a)	Registration no.	J/5
(b)	Date	October 6, 2000
(c)	Author(ity)	Tokyo District Court
(d)	Parties	X v. Republic of the Marshall Islands
(e)	Points of law	The Court ruled that; though there are several opinions regarding the extent of Japan's jurisdiction over foreign states, at all events it is generally considered that Japan's jurisdiction does not extend over a civil suit concerning foreign state's fundamental public law actions and authoritative actions like the granting of the right of permanent residence.
(f)	Classification no./n°	0.a l.a
(g)	Source(s)	The Japanese Annual of International Law No.45 2002
(h)	Additional information	
(i)	Full text – extracts – translation - summaries	Summary in English

The course of the negotiations between the Dutch delegation and the Japanese delegation [the negotiations to conclude the Peace Treaty of San Francisco (added by the translator)] indicates that the two parties settled for the understanding that although "certain types of private claims of Allied nationals that the Japanese Government is willing to address will remain" as a result of the Peace Treaty, Allied nationals will not obtain satisfaction regarding such claims.

Judge Shigeki Asao (presiding)
 Judge Yukio Nishijima
 Judge Toshio Hara

The State's Jurisdictional Immunity — the Granting of the Right of Permanent Residence and the Jurisdictional Immunity

Tokyo District Court, Judgment, October 6, 2000; H. T. (1067)263[2001]

X et al. v. Republic of the Marshall Islands

The plaintiffs concluded, with the defendant the Republic of the Marshall Islands, the agreement that they acquired the right of permanent residence from the United States of America five years after they acquired the right of permanent residence from the Republic of the Marshall Islands (the agreement on the procedures of an acquisition program of the right of permanent residence of the United States of America) and paid a consideration. However, the defendant did not implement the obligation under the agreement, so the plaintiffs declared their intention of a rescission of the agreement and claimed for the return of the consideration having been paid to the defendant under the right of an application for return of unjust enrichment.

Held: 1: All of the plaintiffs' claims are dismissed.
 2: All costs of the action shall be borne by the plaintiffs.

Upon the grounds stated below:

According to the plaintiffs, the defendant's obligation under this agreement does not only mean the plaintiffs' acquisition of the right of permanent residence from the United States of America, but also, as a precondition of this, the inspection of the plaintiffs and the granting of the right of permanent residence from the Republic of

the Marshall Islands, which is the core and indispensable element of the agreement.

Incidentally, though there are several opinions regarding the extent of Japan's jurisdiction over foreign states, at all events it is generally considered that Japan's jurisdiction does not extend over a civil suit concerning foreign a state's fundamental public law actions and authoritative actions like the granting of the right of permanent residence, exclusive of a case in which a foreign state accepts *ex proprio motu* another state's jurisdiction.

According to the relevant documents, it is not accepted that the defendant has the intention of responding to the action under this suit, so there is no other way to determine that Japan's jurisdiction does not extend over this suit.

Judge Kitaru Narita (presiding)
 Judge Kenji Takamiya
 Judge Masanori Atsuji

The Principle of Non-Refoulement — Article 33(1) of the Convention Relating to the Status of Refugees — Article 31(2) of the Convention Relating to the Status of Refugees — Refugees and Compulsory Deportation Procedures

Tokyo District Court, Decision, November 5, 2001; not yet reported

X v. Chief Inspector of the Tokyo Immigration Bureau

The circumstances of this case are analogous, though not identical, to those of the above-mentioned case, decided by the same tribunal on March 1, 2002, and thus are omitted here.

The plaintiff X demanded the suspension of the confinement order against himself, claiming that it violates Article 31(2) of the Convention Relating to the Status of Refugees.

Held: '1. The complaint is dismissed.
 2. The cost of litigation shall be borne by the plaintiff.'

Upon the grounds stated below:

'Article 33(1) of the Convention Relating to the Status of Refugees, which prohibits the deportation of a refugee to a country where he or she would be persecuted, would matter only at the moment of designation of the destination of deportation, and Article 53 (3) of the Immigration Control and Refugee Recognition Act ensures

(a)	Registration no.	J/6
(b)	Date	December 19, 2000
(c)	Author(ity)	Tokyo High Court
(d)	Parties	X v. Republic of the Marshall Islands
(e)	Points of law	The Court dismissed the claims of the appellants on the same ground as the original judgement (see the case J/5). It also ruled that restrictive theory of sovereign immunity could not be adopted unless there would be relevant treaties or national legislation.
(f)	Classification no./n°	0.a l.a
(g)	Source(s)	Jurist (Japanese) No.1224, 2002
(h)	Additional information	This is the appeal of the case J15
(i)	Full text – extracts – translation - summaries	Appendix: Summary in English (translation from the original text)

Restitution of Unjust Enrichment – State Immunity

Tokyo High Court, December 19, 2000; Jurist (1224) 307 [2002]

X et al. v. the Republic of the Marshall Islands

In July 1996, the Plaintiffs (X), wishing to acquire the right of permanent residence in the United States of America and responding to a newspaper advertisement recruiting permanent residents placed by the Defendant (Y, being the Republic of the Marshall Islands), concluded with Y an "Agreement on the procedure for the programme of acquiring permanent resident status of the United States"(hereinafter "the Agreement"). Under the terms of the Agreement, X were to acquire the US permanent resident status five years after X had acquired permanent resident status in the Marshall Islands.

In August 1996, as directed by Y, X paid to Y a fee of three million yen required for the procedure. Y, however, only issued short-term tourist visas to X, and no further progress was made on the procedure with regard to permanent residence. After sending, in September, a request for performance of the obligation within an appropriate period, X declared in November that they had terminated the agreement and filed the present action with the Tokyo District Court, claiming the restitution of unjust enrichment from Y.

X claimed that the contract under the Agreement was "a civil law contract between genuinely private persons" based on the relationship of "delegation, quasi-delegation or contract" for acquiring the US permanent resident status, and therefore the principle of jurisdictional immunity would not apply even if Y was a State. In the present appellate proceedings, X further claimed that the central obligation of Y was to provide a real property and facilities necessary for establishing residence in Y's territory, and not the granting of permanent resident status. Furthermore, Y's obligation to return the money upon the termination of the contract due to Y's non-performance would be a purely private law obligation.

The District Court dismissed X's claim on the ground that Japan had no jurisdiction over such public law acts of a foreign State as the granting of permanent residence.

Held: 1. 'The appeal is dismissed.'

2. 'The cost of litigation shall be borne by the appellants.'

Upon the grounds stated below:

(1) Under the terms of the Agreement, X were obligated to pay the sum of ¥3 million to Y in consideration of Y's obligation to grant them permanent residence in the Republic of Marshall Islands under certain conditions, and to enable X to acquire permanent resident status of the United States five years thereafter. It was therefore expected that X would become eligible for US permanent residence only upon expiry of five years after they had become permanent residents of the Republic. The "central and essential element of the obligations" for Y was thus to grant the permanent resident status of the Republic to X.

(2) "Various opinions have been put forward regarding the acts of a foreign State to which Japan's jurisdiction should extend. However, at least in civil law proceedings like the present one, where essentially public law acts of a foreign State such as the granting of permanent resident status are involved, it should be interpreted that Japan cannot extend its jurisdiction unless that State voluntarily accepts it."

(3) Since Y has not indicated its willingness to respond to X's claim, Japan cannot exercise its jurisdiction over the present case.

APPENDIX

Guidelines for the implementation of the activity

i. Objectives

The aim of the project is to ascertain whether it is possible to initiate the collection of data on State practice in the Council of Europe member States with regard to States' Immunities and subsequently make it accessible to all member States of the Council of Europe. This will encourage those member States whose State practice is not at present documented, to start building a collection in this field. The final aim is to present, on behalf of the Council of Europe, a publication on State practice of the members of the Council of Europe, including possibly an analytical report prepared on the basis of the material gathered. This work would represent a practical contribution to the work in this field carried out at the UN level.

The target groups or users of documentation on State practice are primarily the executive, the legislature and the judiciary of the member States, international organisations, and law firms, industry and the academic world.

ii. Definition of State practice

Documentation on State practice should contain official documents and statements issued by public authorities which illustrate relevant State practice regarding State Immunities.

The term "State Immunity" covers both *jurisdictional immunities* and *immunity of execution*.

The term "public authorities" is intended to embrace all organs of the State and its component units, such as those forming part of the executive, legislative and, especially, judicial powers.

As far as the executive power is concerned, reference can be made to diplomatic notes, government press releases, reports, internal memoranda, explanatory memoranda, answers to parliamentary questions, statements before international organisations, statements presented before international judicial or arbitral authorities and instruments concerning the conclusion and/or ratification of treaties.

As far as the legislative power is concerned, the collection should include, *inter alia*, the texts of Acts of Parliament and statutory regulations, as well as resolutions and, where appropriate, the approval of treaties to the extent that they contain views of the legislature.

Lastly, and most importantly, documents originating from national courts and tribunals including decisions.

The examples given under the above paragraphs are of a non-exhaustive nature.

iii. Sources

State practice as defined above is documented in many diverse sources. Most of these are national publications, although publications of an international nature containing information on State practice must also be consulted. Moreover, in many cases the practice of the executive, as well known, is not published. Therefore the executive power will have to be consulted, in order to determine to what extent internal memoranda may be included in the collection, and also encouraged to publish such documents.

The most obvious sources are :

- as regards the executive: parliamentary reports, documents originating from international organisations which incorporate State practice, surveys of the practice of the ministry of foreign affairs, the official gazette, treaty series;
- as regards the legislature: treaty series, parliamentary reports, statute book, official gazette;
- as regards the national courts and tribunals: national court reports and legal journals.

iv. Collection

For obvious reasons, it would be advisable to collect documentation on a decentralised basis. The aim should be to appoint a **national co-ordinator for each member State**²¹, i.e. a central authority, institution or person with ultimate responsibility for the collection of documentation on the national level. Where appropriate, the CAHDI delegate could fulfil this role.

In member States where collection is already under way, the best course of action would be to ask the individuals or institutes concerned to take part in the project. This would ensure that work is not duplicated and would make the best possible use of existing expertise. It is important to know who is doing this work in order to determine the individuals and institutes to be approached. It is up to each State to determine who is the appropriate person (a government official, an institute, a private person) to carry out this work. Nevertheless, it would be essential to guarantee continuity of participation in the project.

v. Selection

For the purpose of this exercise, it is suggested that this pilot project will cover State practice which is as representative as possible of developments at domestic level regarding State Immunities. Recent State practice is particularly important in this respect.

However, the CAHDI will be called upon to decide on the exact time span that the activity would cover.

vi. Processing

The material shall be collected and the relevant information shall be included in standard forms exclusively by the national co-ordinator (for an example of a standard form, see Appendix).

The processing of the material selected involves the identification, drafting and recording of the various data pertaining to each document. The first step is to determine what data should be selected and how this should be done. The results may vary depending, for example, on whether the document originated from the executive, the legislature or the judiciary.

The national co-ordinator should be in possession of the full text of the original document or a copy of it. A copy of this document should, where appropriate, be sent to the Council of Europe Secretariat together with the standard form and attached documents.

Each document sent by the national co-ordinator to the Council of Europe Secretariat shall be accompanied by a standard form. The standard form completed in one of the official languages of the Council of Europe (English or French) will contain the following particulars, which are explained below:

- (a) registration number

²¹ National delegations are invited to communicate to the Secretariat the full postal address, telephone, fax and e-mail of the national co-ordinator by 30 November 2001.

- (b) date
 - (c) author(ity)
 - (d) parties
 - (e) points of law
 - (f) classification number
 - (g) source
 - (h) additional information
 - (i) full text - extracts - translation - summaries.
- (a) Registration number

This number serves to distinguish the various documents being processed. There should be an indication of the country from which the document originates (the designation conforming to the codes in the following list), followed by a running number given by the national co-ordinator to each document processed throughout the whole period of the pilot project.

Country	Code
Albania	AL
Andorra	AND
Armenia	ARM
Austria	A
Azerbaijan	AZ
Belgium	B
Bulgaria	BG
Croatia	HR
Cyprus	CY
Czech Republic	CZ
Denmark	DK
Estonia	EW
Finland	FIN
France	F
Georgia	GE
Germany	D
Greece	GR
Hungary	H
Iceland	IS
Ireland	IRL
Italy	I
Latvia	LV
Liechtenstein	FL
Lithuania	LT
Luxembourg	L
"the former Yugoslav republic of Macedonia"	MK
Malta	M
Moldova	MD
Netherlands	NL
Norway	N

Poland	PL
Portugal	P
Romania	RO
Russian Federation	RUS
San Marino	RSM
Slovakia	SK
Slovenia	SLO
Spain	E
Sweden	S
Switzerland	CH
Turkey	TR
Ukraine	UA
United Kingdom	GB
Bosnia-Herzegovina	BIH
Canada	CA
Israel	IL
Japan	J
Mexico	MEX
New Zealand	NZ
United States	USA

(b) Date

The relevant date for pronouncements or documents is the date indicated in the publication itself.

(c) Author(ity)

This heading refers to the organ of the executive which made the pronouncement, the court or tribunal which made the ruling or to the legislative bodies. The nature of the document will also be mentioned under this heading (e.g. a bilateral treaty, a judgment). Where appropriate, original names of the relevant organs may be translated into one of the official languages of the Council of Europe.

(d) Parties

This heading mentions the parties to the document: parties in a case before the courts or the parties to a bilateral treaty. In the case of a multilateral treaty, it suffices to refer to it as a multilateral treaty. Possibly, a description of the parties nature should be given where (e.g. whether they are States, State own companies, individuals, legal persons, etc.).

(e) Points of law

The contents of a document will be recorded by way of a list on the points of law contained in it. Particularly where court decisions are concerned, it is important to indicate the court's decision regarding the type of immunity recognised (cf. table below).

(f) Classification number

The national co-ordinator should include the category or categories in which the document is placed within the appended model plan for the classification of documentation on State practice relating to State Immunities (see table below).

Description	Code
State acts in the context of	
- <i>Jus Imperii</i>	0.a
- <i>Jus gestionis</i>	0.b
- civil law (incl. property)	0.b.1
- labour law	0.b.2
- commercial law	0.b.3
- other	0.b.4
- Unknown - Not applicable	0.c
State Immunity	
Jurisdictional Immunity	1
- Absolute	1.a
- Limited	1.b
- Unknown - Not applicable	1.c
Immunity of execution	2
- Absolute	2.a
- Limited	2.b
- Unknown - Not applicable	2.c

(g) Source

This heading should refer to readily available publications in which the document is published in full. These are usually national publications, although reference may be made to additional sources, such as extracts or translations published in journals or reviews. If the original text has not been officially published in one of the official languages of the Council of Europe but has, to the knowledge of the national co-ordinator, been unofficially translated into one or more of these languages, these additional sources should also be indicated, as such, for easy reference.

(h) Additional information

Under this heading reference may be made, depending on the type of document, to similar or previous pronouncements made by the executive or to previous or subsequent judgments in the same case. Details on what the document has to say about, for example, the signature, ratification, entry into force, provisional application or denunciation of treaties, are also to be covered by this heading. Furthermore, names of treaties and articles applied in judicial rulings may be stated here.

(i) Full text - extracts - translation - summaries

Short texts or extracts shall be quoted. If the document is written in a language other than one of the official languages of the Council of Europe, a translation of the text or a summary of the substantive content should be given.

vii. Co-ordination

The national co-ordinator, responsible for the collection, selection and processing of the material, shall send all completed standard forms and attached documents to the Council of Europe Secretariat Department responsible for this activity:

Rafael A. Benitez
Secretary of the CAHDI
Department of Public Law
Directorate General of Legal Affairs
Council of Europe, F - 67075 Strasbourg Cedex, France
Tel. 33 3 88413479, Fax 33 3 88412764, e-mail: rafael.benitez@coe.int; cahdi@coe.int
Secretariat: Mrs Francine NAAS, Tel: 33 3 90214600, same fax, e-mail:
francine.naas@coe.int

Appendix

Pilot Project of the Council of Europe on State practice on States' Immunities**Standard form/ Fiche-type**

(Completed as an example – this information does not necessarily reflect an actual case or its facts, points of law, etc.)

(a)	Registration no./ N° d'enregistrement	E/2
(b)	Date	10 February 1986
(c)	Author(ity)/(Service) auteur	Supreme Court (<i>Tribunal Supremo</i>)
(d)	Parties	<u><i>Maria Pérez (individual) vs. Ecuatorial Guinea (State)</i></u>
(e)	Points of law/ Points de droit	The Court establishes that Spanish courts are competent to consider labour disputes involving local employees of foreign missions and consular offices
(f)	Classification no./n°	0.b.3, 1.b, 2.c
(g)	Source(s)	<i>Aranzadi</i> , 1986, No. 727
(h)	Additional information/Renseignements complémentaires	Confirmed by decision of the Supreme Court of 1 December 1986 (<i>Aranzadi</i> , 1986, No. 7231)
(i)	Full text - extracts - translation - summaries/ Texte complet - extraits – traduction - résumés	Summary: Appendix 1 Full text: Appendix 2 Summary English: Appendix 3

Directives pour la mise en œuvre de l'activité

i. Objectifs

Le projet a pour but de voir s'il est possible d'entreprendre la collecte de données sur la pratique des Etats membres du Conseil de l'Europe concernant les immunités des Etats et ensuite de les rendre accessibles aux Etats membres du Conseil de l'Europe. Ce projet devrait inciter les Etats membres dont la pratique n'est pas documentée à l'heure actuelle à commencer à constituer une collection dans ce domaine. Le but final est de présenter, sous l'égide du Conseil de l'Europe, une publication sur la pratique des Etats membres du Conseil de l'Europe et éventuellement un rapport analytique préparé sur la base des informations réunies, en vue de faire une contribution pratique aux travaux entrepris dans ce domaine au niveau des Nations Unies.

Les groupes cibles ou utilisateurs de la documentation sur la pratique des Etats sont avant tout l'exécutif, le législatif et le judiciaire des Etats membres, les organisations internationales, ainsi que les cabinets juridiques, l'industrie et le monde universitaire.

ii. Définition de la pratique des Etats

La documentation sur la pratique des Etats devrait contenir des documents officiels et des déclarations émanant des pouvoirs publics qui illustrent la pratique pertinente des Etats en matière d'immunité des Etats.

L'expression "immunité des Etats" couvre à la fois les *immunités juridictionnelles* et *l'immunité d'exécution*.

L'expression "pouvoirs publics" vise à embrasser tous les organes de l'Etat et de ses unités constituantes, tels que ceux qui font partie des pouvoirs exécutif, législatif et, plus spécialement les pouvoirs judiciaires.

S'agissant du pouvoir exécutif, référence peut être faite aux notes diplomatiques, aux communiqués de presse gouvernementaux, rapports, notes de service internes, exposés des motifs, réponses aux questions parlementaires, déclarations faites devant des organisations internationales, exposés présentés devant les instances judiciaires ou arbitrales internationales, et instruments concernant la conclusion et/ou la ratification des traités.

S'agissant du pouvoir législatif, la collection devrait contenir, entre autres, les textes de mesures législatives ou réglementaires, ainsi que les résolutions et, le cas échéant, la ratification des traités dans la mesure où elles expriment les vues des organes du pouvoir législatif.

Finalement, et ce qui est le plus important, les documents émanant des cours et tribunaux nationaux incluant les décisions.

Les exemples donnés sous les paragraphes ci-dessus n'ont pas de caractère exhaustif.

iii. Sources

La pratique des Etats telle que définie précédemment se trouve dans des documents provenant de sources diverses. L'essentiel est constitué de publications nationales, mais les publications de caractère international contenant des informations sur la pratique des Etats devront elles aussi être consultées. Par ailleurs, comme on le sait fort bien, le plus souvent la pratique de l'exécutif ne fait pas l'objet de publications. Le pouvoir exécutif devra dès lors être consulté pour déterminer dans quelle mesure les notes de service internes peuvent figurer dans la collection, et également être encouragé à publier de tels documents.

Les sources les plus évidentes sont :

- en ce qui concerne l'exécutif: les rapports parlementaires, les documents provenant d'organisations internationales qui incorporent la pratique des Etats, les études de la pratique du Ministère des Affaires étrangères, le Journal Officiel, les séries des traités;
- en ce qui concerne le législatif: les séries des traités, les rapports parlementaires, les codes, le Journal Officiel;
- en ce qui concerne les cours et tribunaux nationaux: les recueils de jurisprudence nationale et les revues juridiques.

iv. Collecte

Pour des raisons évidentes, il serait souhaitable de rassembler la documentation sur une base décentralisée. L'idée serait de nommer **pour chaque Etat membre un coordinateur national**²², c'est-à-dire un service central, une institution ou une personne qui aurait la responsabilité ultime de la collecte de documentation sur le plan national. Si cela paraît approprié, l'expert du CAHDI pourrait remplir ce rôle.

Dans les Etats membres où la collecte est déjà en cours, la meilleure façon d'opérer serait de demander aux particuliers ou aux instituts concernés de prendre part au projet. Ceci permettrait de veiller à ce qu'il n'y ait pas de double emploi et que l'on fasse le meilleur usage possible des connaissances spécialisées existantes. Il est important de savoir qui s'occupe de ce travail, pour définir les particuliers ou les instituts à contacter. Il appartient à chaque Etat de déterminer quelle est la personne adéquate (un fonctionnaire, un institut, une personne privée) pour effectuer ce travail. Cependant, il est important de garantir la continuité d'une participation au projet.

v. Sélection

Dans le cadre de cet exercice, il est suggéré que ce projet pilote couvre la pratique des Etats la plus représentative possible des développements au niveau interne concernant l'immunité des Etats. La pratique récente des Etats est particulièrement importante à cet effet.

Cependant le CAHDI sera appelé à décider de la durée exacte que l'activité couvrira.

vi. Traitement

La collecte du matériel et l'enregistrement de toute information pertinente sur des fiches-type sera effectué exclusivement par le coordinateur national (un exemple de fiche-type complétée se trouve en Annexe).

Le traitement des documents retenus comporte l'identification, l'élaboration et l'enregistrement des données relatives à chaque document. La première étape est de déterminer quelles données retenir et comment. Les résultats dépendront par exemple du point de savoir si le document émane de l'exécutif, du législatif ou du judiciaire.

Le coordinateur national devrait être en possession du texte intégral du document original ou d'une copie du document original. Le cas échéant, une copie de ce document devrait être envoyée au Secrétariat du Conseil de l'Europe, avec la fiche-type et les documents joints.

Chaque document envoyé par le coordinateur national au Secrétariat du Conseil de l'Europe sera accompagné d'une fiche-type. La fiche-type complétée dans une des langues officielles du Conseil de l'Europe (anglais ou français) contiendra les détails suivants:

²² Les délégations nationales sont invitées à communiquer au Secrétariat l'adresse postale complète, le téléphone, le fax et l'adresse e-mail de leur coordinateur national avant le 30 novembre 2001.

- (a) numéro d'enregistrement
 - (b) date
 - (c) (service) auteur
 - (d) parties
 - (e) points de droit
 - (f) numéro de classification
 - (g) source(s)
 - (h) renseignements complémentaires
 - (i) texte complet - extraits - traduction - résumés.
- (a) Numéro d'enregistrement

Ce numéro sert à distinguer les divers documents traités. Il faudra indiquer le pays d'où émane le document (indication semblable aux initiales des pays utilisées pour les automobiles) suivi d'une numérotation chronologique donnée par le coordinateur national à chaque document traité au cours de toute la durée du projet pilote.

Pays	Code
Albanie	AL
Andorre	AND
Arménie	ARM
Autriche	A
Azerbaïdjan	AZ
Belgique	B
Bulgarie	BG
Croatie	HR
Chypre	CY
République tchèque	CZ
Danemark	DK
Estonie	EW
Finlande	FIN
France	F
Géorgie	GE
Allemagne	D
Grèce	GR
Hongrie	H
Islande	IS
Irlande	IRL
Italie	I
Lettonie	LV
Liechtenstein	FL
Lituanie	LT
Luxembourg	L
"l'ex république yougoslave de Macédoine"	MK

Malte	M
Moldova	MD
Pays Bas	NL
Norvège	N
Pologne	PL
Portugal	P
Roumanie	RO
Fédération de Russie	RUS
Saint Marin	RSM
Slovaquie	SK
Slovénie	SLO
Espagne	E
Suède	S
Suisse	CH
Turquie	TR
Ukraine	UA
Royaume-Uni	GB
Bosnie-Herzégovine	BIH
Canada	CA
Israël	IL
Japon	J
Mexique	MEX
Nouvelle Zélande	NZ
Etats-Unis	USA

(b) Date

Pour les déclarations ou documents la date pertinente est celle qu'indique la publication elle-même.

(c) (Service) auteur

Cette rubrique fait référence à l'organe exécutif qui a édicté le texte, à la cour ou au tribunal qui a rendu la décision, ou aux organes législatifs. Elle mentionnera également la nature du document (par exemple un traité bilatéral, un jugement). Le cas échéant, les noms originaux des organes concernés peuvent être traduits dans une des langues officielles du Conseil de l'Europe.

(d) Parties

Cette rubrique mentionne les parties d'un document: les parties dans une affaire en justice ou les Parties à un traité bilatéral. S'il s'agit d'un traité multilatéral, il suffit de le mentionner. Eventuellement, il conviendra de donner une description de la nature des parties en question, par exemple, s'il s'agit d'un Etat, d'un société ou entreprise publique, d'un individu, d'une personne morale, etc.

(e) Points de droit

Le contenu d'un document sera décrit sous forme d'une liste des points de droit dont traite le document. Notamment dans le cas de décisions des tribunaux, il importe d'indiquer la position retenue par le tribunal concernant le type d'immunité (cf. tableau de classification ci-après).

(f) Numéro de classification

Le coordinateur national devrait inclure la catégorie ou les catégories dans laquelle/lesquelles le document est à classer selon le plan modèle annexé de classement des documents relatif à la pratique des Etats concernant les immunités des Etats (voir tableau ci-dessous).

Description	Code
Actes de l'Etat relevant du	
- <i>lus Imperii</i>	0.a
- <i>lus gestionis</i>	0.b
- droit civil (y compris patrimoine)	0.b.1
- droit du travail	0.b.2
- droit commercial	0.b.3
- autres	0.b.4
- Non indiqué ou sans objet	0.c
Immunités des Etats	
Immunité de juridiction	1
- Absolue	1.a
- Limitée	1.b
- Non indiqué ou sans objet	1.c
Immunité d'exécution	2
- Absolue	2.a
- Limitée	2.b
- Non indiqué ou sans objet	2.c

g. Source(s)

Cette rubrique fait référence aux publications immédiatement accessibles où l'on peut trouver le texte intégral du document. Il s'agit généralement de publications nationales, mais s'agissant des traités, référence peut être faite à des sources supplémentaires telles que des extraits ou des traductions publiés dans un "journal" (recueil) ou une revue. Lorsque le texte original n'a pas été publié officiellement dans une des langues officielles du Conseil de l'Europe, mais qu'à la connaissance du coordinateur national il a été traduit officieusement dans une ou plusieurs de ces langues, cette source supplémentaire devrait être indiquée, en tant que telle, comme support de référence.

h. Renseignements complémentaires

Sous cette rubrique référence peut être faite, selon le type de document, aux déclarations analogues ou antérieures faites par l'exécutif ou aux jugements antérieurs ou ultérieurs rendus dans la même affaire. Cette rubrique recouvre également des détails sur ce que le document indique par exemple quant à la signature, la ratification, l'entrée en vigueur, la mise en application provisoire ou la dénonciation d'un traité. En outre, le nom du traité et les articles appliqués dans la décision de justice peuvent être spécifiés ici.

i. Texte complet - extraits - traduction - résumés

Les textes courts et les extraits seront cités textuellement. Lorsqu'un texte est rédigé dans une langue autre qu'une des langues officielles du Conseil de l'Europe, une traduction du texte ou un résumé du contenu substantiel devrait être donné.

vii. Coordination

Le coordinateur national, responsable de la collecte, la sélection et le traitement du matériel, enverra toutes les fiches-type complétées et les documents joints au Service du Conseil de l'Europe responsable de cette activité.

Rafael A. BENITEZ
Secrétaire du CAHDI
Service du Droit Public
Direction générale des Affaires Juridiques
Conseil de l'Europe, F - 67075 Strasbourg Cedex
Tel. 33 3 88413479, Fax 33 3 88412764, e-mail: rafael.benitez@coe.int;
cahdi@coe.int

Secrétariat: Mme Francine NAAS, Tel: 33 3 90214600, même fax, e-mail:
francine.naas@coe.int

Annexe

Projet pilote du Conseil de l'Europe sur la pratique des Etats concernant les immunités des Etats

Standard form/ Fiche-type

(Remplie à titre d'exemple – cette information ne reflète pas nécessairement le cas concret ni ses faits, points de droit, etc.)

(a)	Registration no./ N° d'enregistrement	E/2
(b)	Date	10 février 1986
(c)	Author(ity)/(Service) auteur	Cour suprême (<i>Tribunal Suprêmeo</i>)
(d)	Parties	<u>Maria Perez (individu) contre Guinée équatoriale (Etat)</u>
(e)	Points of law/Points de droit	La Cour établit que la juridiction espagnole est compétente pour connaître des différends en matière du droit du travail concernant les employés locaux des missions étrangères et bureaux consulaires
(f)	Classification no./n°	0.b, 1.b, 2.c
(g)	Source(s)	<i>Aranzadi</i> , 1986, No. 727
(h)	Additional information/Renseignements complémentaires	Décision confirmée par la décision de la Cour suprême du 1er décembre 1986 (<i>Aranzadi</i> , 1986, No. 7231)
(i)	Full text – extracts – translation – summaries/ Texte complet – extraits – traduction - résumés	Sommaire: Annexe 1 Texte complet: Annexe 2 Sommaire en français: Annexe 3