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

**29th meeting/29e reunion
Strasbourg, 17-18 March/mars 2005**

**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: Andorra, Austria, Belgium, Croatia, Cyprus, Czech Republic, Denmark, Finland, France, Germany, Greece, Hungary, Ireland, Iceland, Italy, Netherlands, Norway, Poland, Portugal, Romania, Russian Federation, Slovakia, Slovenia, Spain, Sweden, Switzerland, Turkey, 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: Andorre, Autriche, Belgique, Croatie, Chypre, République Tchèque, Danemark, Finlande, France, Allemagne, Grèce, Hongrie, Irlande, Islande, Italie, Pays-Bas, Norvège, Pologne, Portugal, Roumanie, Fédération de Russie, Slovaquie, Slovénie, Espagne, Suède, Suisse, Turquie, 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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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;9ObA244/90; 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.

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|-----|---|---|
| (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 | <p>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.</p> <p>Cet arrêt consacre le principe d'une immunité de juridiction restreinte ou relative.</p> <p>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.</p> |
| (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 relèvent 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'excipe 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 inaliénables;

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 qui l'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 enfin 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 des 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; que si l'Etat étranger fonde sur des motifs d'éter-

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 soustraite par l'Etat néerlandais, défendeur, pour la gestion d'une de ses 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. — Rapp. M. van Maldeghem. — Concl. conf. M. Terlinden, premier avocat général. — Pl. MM. Beernaert, Delacroix, Leciercq et Despret.

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| (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 IMMUNITIEIT.

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, n^{os} 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.

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|-----|---|--|
| (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 COUTUME 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 préexistante.

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, JJTB, 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. — Sida.

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

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|-----|---|---|
| (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. Vermylen, 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-arrest-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-arrest 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 étran-
ger 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-arrest querellée;

Par ces motifs :

La Cour,

Met le jugement entrepris à néant;

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

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| (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.</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-arrest.

ANNEXE B/5

ETAT ETRANGER. — SAISIE-ARRET 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-arrest 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'un 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-arrest 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-arrest 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-arrests 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-arrests 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 avenue 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 comme 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 prémices 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 *jus 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'écarteraient 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 requerrait 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 cantonnement ou de caution.

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| (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><u>Pour ce qui trait à l'immunité de 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><u>Pour ce qui trait à l'immunité d'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</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-ARRET-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 :

- a) 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 opposition a été formée par exploit d'huissier signifié le 15 mai 1992 à la demande des opposants,
- b) 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,
- c) les conclusions additionnelles déposées le 8 décembre 1992 au greffe de la cour, par lesquelles les opposants, forment un appel incident,
- d) 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-arrest conservatoire en saisie-arrest-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 superflue 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-arrière-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 soustendre, 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 dénuée 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.

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|-----|---|--|
| (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. : MMes 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 extérieure 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 extérieure 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 saisie-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 "distraindre 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;

Décrète 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 Tréfileries 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.

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|-----|--|--|
| (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. Racs 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-

érieure 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 attein-
tes 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'occupa-
tion 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-
sement 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 rè-
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-arrest pour le reste

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| (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 pré-judice peut être imputé à chacune d'elles » (*idem*, n° 423);

Attendu que ce principe ne souffre pas d'exception en ce qui concerne les restitutions et les dommages-intérêts;

que contrairement à ce que soutient l'intimé, l'article 50, alinéa 3 (et non 2) « permet au juge d'exempter tous ou quelques-uns des condamnés de la solidarité quant au paiement des frais. Mais il doit indiquer le motif de cette dispense et, en outre, déterminer la proportion des frais que chacun des condamnés aura à supporter individuellement (...) Mais cette dérogation à la solidarité ne s'applique qu'aux frais (...) D'après Crahay, l'article 50, alinéa 3, recevra son application dans les cas où certains prévenus ont nécessité des frais auxquels d'autres n'ont pas donné lieu (...) » (*idem*, n° 427);

Attendu que le jugement du 26 mars 1990 qui condamne M... et A... pour les mêmes infractions tient lieu de titre exécutoire contre chacun d'eux pour la totalité des dommages-intérêts dus aux parties civiles du chef de ces infractions;

Attendu qu'aucune disposition légale ne dispose que les intérêts compensatoires s'appliquent de plein droit quoique le jugement ait omis de le préciser; que si on comprend que les appelantes s'étonnent de l'asymétrie entre les condamnations prononcées à leur profit, la créance de la KBC étant majorée des intérêts légaux depuis la date des faits à l'inverse de celle de L... V..., il n'est pas possible au stade de l'exécution d'ajouter au jugement ce que celui-ci ne prévoit pas et il appartenait au second intéressé de faire le nécessaire pour faire revoir la décision sur ce point, soit par la juridiction d'appel, soit par la juridiction qui l'avait prononcée s'il estimait être confronté à une erreur matérielle;

que n'ayant fait ni l'un ni l'autre, il n'est pas fondé à exciper de la mauvaise foi de l'intimé qui entend s'en tenir au jugement tel qu'il existe, pour obtenir que la dette soit néanmoins considérée comme porteuse d'intérêts, au mépris des règles régissant tant l'appel que la procédure en rectification;

que le moyen pris à titre subsidiaire de ce qu'il y aurait lieu de saisir le tribunal correctionnel sur la base des articles 793 et suivants du Code judiciaire est irrecevable, une telle demande ne pouvant être introduite que suivant les règles de la comparution personnelle ou la forme ordinaire des citations devant le juge qui a rendu la décision à rectifier (art. 795 et 796 dudit Code), et certainement pas incidemment par voie de conclusions devant une autre juridiction;

Attendu que les parties s'opposent quant à l'imputation des paiements effectués sans autre précision par l'intimé en mains du mandataire des deux créanciers;

que l'intimé postule qu'ils soient imputés en priorité sur la dette qu'il a envers la KBC dans la mesure où elle porte intérêts tandis que les appelantes les ont imputés d'abord sur la créance de L... V..., puis à l'apurement de celle-ci, sur la créance de l'assureur;

Attendu que l'intimé admet, comme le plaident les appelantes, « que les articles 1254 et

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'applique pas à une dette trouvant sa source dans un acte illicite (notamm. 23 sept. 1986, *Pas.*, 1987, I, 87; 23 févr. 1988, *Pas.*, 1988, I, 751; 7 févr. 1997, *Pas.*, 1997, I, 70) au terme d'un raisonnement englobant la place occupée par cet article dans le Code civil en sorte de conduire à la même conclusion pour les articles 1253, 1255 et 1256 qui forment avec l'article 1254 l'ensemble des règles d'imputation des paiements que le Code civil réserve à la matière contractuelle;

Attendu que tant l'ancien article 22 de la loi du 11 juin 1874 que l'actuel article 41 de la loi du 25 juin 1992 sur le contrat d'assurance terrestre consacrent le principe que la subrogation de l'assureur qui a payé l'indemnité, à concurrence du montant de celle-ci, dans les droits et actions de l'assuré contre les tiers responsables du dommage ne peut nuire à l'assuré qui n'aurait été indemnisé qu'en partie et qui, dans ce cas, peut exercer ses droits, pour ce qui lui reste dû, de préférence à l'assureur;

que l'intimé n'est pas fondé à s'opposer à cette cause de préférence que le législateur lui-même accorde à la victime qui n'a pas été complètement indemnisée par son assureur et qui n'est qu'une application supplémentaire du principe, qu'il considère comme essentiel à l'ordre moral, que la partie lésée doit être indemnisée avant tout; qu'à cet égard, la contestation soulevée dans le seul but de voir supplanter cet intérêt supérieur de la victime par l'intérêt propre du responsable du dommage n'est pas sans heurter l'ordre public;

Attendu qu'il demeure que le relevé de compte sur la base duquel les appelantes exécutent la saisie immobilière doit être revu en ce qu'il comptabilise à tort des intérêts sur la créance de L... V...; que les débats seront rouverts aux fins qu'à l'occasion de ce nouveau décompte, les appelantes justifient de l'imputation à leurs dates des paiements effectués par l'intimé, ce qu'elles n'établissent pas en l'état de leur dossier;

Par ces motifs :

La Cour,

Statuant contradictoirement,

Reçoit l'appel et l'extension de demande;

Réformant le jugement entrepris sauf en ce qu'il retire le droit à des intérêts à l'appelant V...;

Dit que l'intimé est tenu solidairement des dommages-intérêts dus aux appelantes qui sont fondés à en poursuivre l'exécution forcée pour la totalité;

Statuant pour le surplus en application de l'article 1068, alinéa 1^{er}, du Code judiciaire;

Dit que les paiements de l'intimé doivent être imputés en priorité sur la dette à l'égard de L... V...;

Ordonne la réouverture des débats pour le surplus, les appelantes devant produire un décompte excluant tout intérêt sur la créance de L... V... et établissant l'imputation à leurs dates des paiements de l'intimé.

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

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

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

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

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.

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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 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. Sahnoun 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. notamment, *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.



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par Bernard LOUVEAUX

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| (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) | Author(ity) | 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) | Author(ity) | 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 | |
| (l) | Summaries | |

| | | |
|------------|-------------------------------|--|
| (a) | Registration No. | HR/3 |
| (b) | Date | 25 May 2001 |
| (c) | Author(ity) | 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) | Author(ity) | 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) | Author(ity) | 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) | Author(ity) | 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) | Author(ity) | 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) | Author(ity) | 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 Immoveable 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 Immoveable 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 im-
movable
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
communi-
cation.

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 taxa-
tion 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 | 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> |

CZ/1

Appendix 1

§47

Vynětí z pravomoci československých soudů

(1) Pravomoci československých soudů nejsou podrobeny cizí státy a osoby, jež podle mezinárodních smluv nebo jiných pravidel mezinárodního práva anebo zvláštních československých právních předpisů požívají v Československé socialistické republice imunity.

(2) Ustanovení odstavce 1 platí i ohledně doručování písemností, předvolávání uvedených osob za svědky, výkonu rozhodnutí nebo jiných procesních úkonů.

(3) Pravomoc československých soudů je však dána, jestliže:

a) předmětem řízení je nemovitý majetek států a osob uvedených v odstavci 1, nacházející se v Československé socialistické republice, nebo jejich práva na takových nemovitých věcech patřících jiným osobám, jakož i práva z poměru nájemního k takovým nemovitým věcem, pokud není předmětem řízení placení nájemného,

b) předmětem řízení je dědictví, v němž osoby uvedené v odstavci 1 vystupují mimo rámec svých úředních funkcí,

c) předmět řízení se týká výkonu povolání nebo obchodní činnosti, které osoby uvedené v odstavci 1 provádějí mimo rámec svých úředních funkcí,

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

(4) Doručení v případech uvedených v odstavci 3 zprostředkuje ministerstvo zahraničních věcí. Nelze-li takto doručit, ustanoví soud opatrovníka pro přijímání písemností, popřípadě k obhájení práv.

CZ/1

Appendix 2

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) | Author(ity) | 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. | O.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 |



UNITED NATIONS
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Thirty-third session
4 May-24 July 1981

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.

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; immovable escheats to the State on the territory of which the immovable 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."

A/CN.4/343/Add.3

English

Page 8

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) | Author(ity) | 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 |

CZ/3

Appendix

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) | Author(ity) | The Supreme Court of the Czechoslovak Socialist Republic (Nejvyšší soud Ěskoslovenské socialistické republiky) / Supreme Court Opinion Cpjf 27/86 published as Rc 26/1987 |
| (d) | Parties | - |
| (e) | Points of law | <p>The Supreme Court expresses the opinion that:</p> <p>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,</p> <p>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,</p> <p>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.</p> |
| (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 | <p>Appendix 1: Extract from Supreme Court Opinion</p> <p>Appendix 2: English translation of the extract</p> |

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 vůči českému soudem neznamena 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.

CZ/4

Appendix 2

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) | Author(ity) | 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 Dièín-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 |

CZ/5

Appendix

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) | Author(ity) | 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 | <p>The Court stated in the decision that:</p> <p>a) The Embassy of the State of Palestine does not have legal personality - it is merely an authority of the State of Palestine;</p> <p>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.</p> |
| (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 | <p>Appendix 1: Copy of the decision of the District Court for Prague 6 of 15 December 1997, No. E 1426/97</p> <p>Appendix 2: English translation of the summary of the decision</p> |

CZ/6

Appendix 1



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 č.j. 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 nabyt 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 Velvyslancství 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.

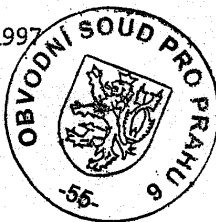
Soud nápravu vadného soudního rozhodnutí učinil tak, že prohlásil dle § 268 odst. 1.písm. h o.s.ř. nařízený výkon rozhodnutí za nepřipustný, neboť ho nelze vykonat ze nedodržení podmínky řízení spočívající v nedostatku pravomoci českých soudů.

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



CZ/6

Appendix 2

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) | Author(ity) | 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 | <p>The court stated in its decision that:</p> <p>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;</p> <p>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).</p> |
| (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 | <p>Appendix 1: Copy of the decision of the Superior Court in Prague of 31 August 1995, No. 10 Cmo 418/95-16</p> <p>Appendix 2: English translation of the summary of the decision</p> |

CZ/7

Appendix 1

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) | Author(ity) | 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.

DENMARK

| | | |
|------------|---|---|
| (a) | Registrations no. | DK/1 |
| (b) | Date | 28 October 1982 |
| (c) | Author(ity) | Supreme Court (Højesteret) |
| (d) | Parties | Den Czekoslovakiske Socialistiske Republiks Ambassade (Embassy of The Socialist Republic of Czechoslovakia) vs. Jens Nielsen Bygge-Entrepriser (private construction company) |
| (e) | Points of law | The embassy had entered into a contract with a private contractor agreeing that any dispute between the embassy and the contractor should be settled in a Danish court of law. Upon the termination of the agreed work, the contractor initiated legal proceedings against the embassy for the payment of additional work related to the contract. The Court established that the embassy was a legal entity against which legal actions could be brought, and that the payment for the additional work of the contractor was in accordance with the agreed contract. According to the findings of the Court neither the provisions of the Vienna Convention on Diplomatic Relations nor the rules of public international law on State immunity provided immunity in relation to proceedings based on a contract governed by private law including a clause which determined that disputes were to be settled in a Danish court of law |
| (f) | Classification no. | 0.b.1, 1.b, 2.c |
| (g) | Source(s) | Published in full text in the Danish law review "Ugeskrift for Retsvæsen", 1982, page 1128. |
| (h) | Additional information | The ruling of the Supreme Court affirmed the ruling of the Eastern High Court (Østre Landsret) on 23 June 1982. |
| (i) | Full text –extracts – translation – summaries/ | |

| | | |
|------------|--|---|
| (a) | Registrations no. | DK/2 |
| (b) | Date | 9 March 1992 |
| (c) | Author(ity) | Supreme Court (Højesteret) |
| (d) | Parties | Den Franske Republik (France) vs. Intra ApS (company) |
| (e) | Points of law | The French embassy had concluded a contract with a private company concerning the lease of office space for its trade department. Based on the disagreement which followed the private company's announcement of its intention to raise the rent, the private company initiated legal proceedings against the Embassy. The French State raised objections and claimed jurisdictional immunity from further proceedings in the Danish courts. The Court established that the leasing contract was governed by private law and that the rules of public international law concerning State immunity did not exempt foreign states for legal actions concerning such matters in Denmark. |
| (f) | Classification no. | 0.b.1, 1.b, 2.c |
| (g) | Source(s) | Published in full text in the Danish law review "Ugeskrift for Retsvæsen", 1992, page 453. |
| (h) | Additional information | The ruling of the Supreme Court affirmed the ruling of the Eastern High Court (Østre Landsret) on 26 November 1990. |
| (i) | Full text –extracts – translation – summaries | |

| | | |
|------------|--|---|
| (a) | Registrations no. | DK/3 |
| (b) | Date | 19 May 1993 |
| (c) | Author(ity) | Eastern High Court (Østre Landsret) |
| (d) | Parties | Italien (The Italian Stat) vs. Amaliegade 21 A-D (privately owned property company) |
| (e) | Points of law | <p>The Italian Embassy had built a garage in the courtyard of the private residence of the Italian ambassador, which the residence shared with the privately owned adjoining house. According to the public registration (tinglysning) from 1924 governing the relationship between the two neighbouring buildings regarding their common courtyard, new buildings could not be constructed without the consent of both parties. The garage was built without the consent of the property company.</p> <p>The City Court of Copenhagen rejected the legal action brought before the court by the private company stating that according to the customs and principles of public international law on State immunity the Italian State has immunity before a Danish court and that the provisions of the registration from 1924 on the common courtyard could not lead to a cessation of State immunity. However, on appeal the Eastern High Court rejected the decision of the City Court stating that the provisions of the registration was governed by the rules of private law and that the principles of state immunity did not exempt foreign states for legal actions in such matters. Consequently, the Italian State was ordered by the Court to pull down the garage.</p> |
| (f) | Classification no. | 0.b.1, 1.b, 2.b |
| (g) | Source(s) | A summary of the case is published in the Danish law review "Ugeskrift for Retsvæsen", 1994 B, page 213. |
| (h) | Additional information | |
| (i) | Full text –extracts – translation – summaries | |

| | | |
|------------|--|---|
| (a) | Registrations no. | DK/4 |
| (b) | Date | 5 March 1999 |
| (c) | Author(ity) | Supreme Court (Højesteret) |
| (d) | Parties | Pakistans Ambassade (Pakistan) vs. Shah Travel ved Hermunir Hussein Shah (private travel agency) |
| (e) | Points of law | <p>A travel agency initiated legal proceedings against the Embassy of Pakistan claiming payment of 6 airplane tickets in total value of DKK 30,000. The tickets were booked for a member of the Embassy staff and his family, and subsequently used. However, the Embassy held the opinion that the tickets had already been cancelled. Since the legal action was brought against the Embassy as such, and not against any individual member of the Pakistani representation the Court established that the appropriate rules governing the matter were those of State immunity and not the provisions in the Vienna Convention on Diplomatic Relations.</p> <p>The Court established that the dispute concerning a commercial transaction was governed by private law and that the provisions of public international law concerning state immunity did not apply to the Pakistani State in the matter under consideration.</p> |
| (f) | Classification no. | 0.b.3, 1.b, 2.c |
| (g) | Source(s) | Published in full text in the Danish law review "Ugeskrift for Retsvæsen", 1999, page 939. |
| (h) | Additional information | The ruling of the Supreme Court affirmed the ruling of the Eastern High Court (Østre Landsret) on 7 April 1998. |
| (i) | Full text –extracts – translation – summaries | |

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 | FIN/1 |
| (b) | Date | 1 February 2002 |
| (c) | Author(ity) | 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 | 0.a, 1.a, 2.c |
| (g) | Source(s) | Civil Action No. 99-6080 (JWB) |
| (h) | Additional information | 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 | Full text: Appendix 1 |

FIN/1

Appendix 1

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEYKOMET INC., and
KONETEHIDAS OY KOMET,

Plaintiffs,

v.

REPUBLIC OF FINLAND and
JOHN DOE,

Defendants.

Civil Action No. 99-6080 (JWB)

O P I N I O NAPPEARANCES:HOWARD A. MILLER, ESQUIRE
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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.

DISCUSSION

A. 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 of 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

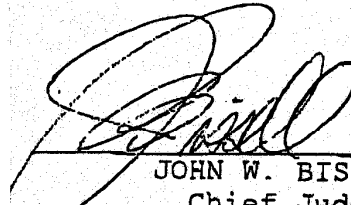
Plaintiffs have offered nothing that addresses these difficulties with their waiver theory. Accordingly, the Court determines that plaintiffs have failed to demonstrate that a § 1605 exception applies in this case. In the absence of an applicable § 1605 exception, the FSIA compels a finding that Finland 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.

A handwritten signature in black ink, appearing to read "J. Bissell", is written over a horizontal line.

JOHN W. BISSELL
Chief Judge
United States District Court

DATED: February 1st, 2002

| | | |
|-----|---|---|
| (a) | Registration no | FIN/2 |
| (b) | Date | 30 September 1993 |
| (c) | Author(ity) | 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 | 0.a, 1.a, 2.c |
| (g) | Source(s) | Korkeimman oikeuden ratkaisuja 1993 II at 563. |
| (h) | Additional information | 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 - summeries | 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 | FIN/3 |
| (b) | Date | 3 July 2002 |
| (c) | Author(ity) | 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 | 0.a, 1.c, 2.c |
| (g) | Source(s) | |
| (h) | Additional information | |
| (i) | Full text – extracts – translation - summaries | 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 | FIN/4 |
| (b) | Date | Plaintiff filed the Complaint on 5 March 2002. |
| (c) | Author(ity) | 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 | 0.a, 2.c |
| (g) | Source(s) | Case No. 02 CV-1471 (CBA)(LB) |
| (h) | Additional information | |
| (i) | Full text – extracts – translation - summeries | |

| | | |
|------------|---|---|
| (a) | Registration no | FIN/5 |
| (b) | Date | 6 August 2001 |
| (c) | Author(ity) | 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 | 0.a, 1.a, 2.c |
| (g) | Source(s) | |
| (h) | Additional information | |
| (i) | Full text – extracts – translation - summeries | |

| | | |
|-----|---|---|
| (a) | Registration no | FIN/6 |
| (b) | Date | Action was filed on 12 April 2000. |
| (c) | Author(ity) | 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 | 0.a, 1.a, 2.c |
| (g) | Source(s) | |
| (h) | Additional information | |
| (i) | Full text – extracts – translation - summeries | 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 | FIN/7 |
| (b) | Date | 11 November 2001 |
| (c) | Author(ity) | 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 | 0.a, 1.a, 2.c |
| (g) | Source(s) | |
| (h) | Additional information | |
| (i) | Full text – extracts – translation - summeries | |

| | | |
|-----|---|--|
| (a) | Registration no | FIN/8 |
| (b) | Date | 26 March 1999 |
| (c) | Author(ity) | Ministry for Foreign Affairs of Finland |
| (d) | Parties | Distraint 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 | 0.b, 1.b, 2.b |
| (g) | Source(s) | - |
| (h) | Additional information | 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 | 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 | FIN/9 |
| (b) | Date | 19 November 1998 |
| (c) | Author(ity) | 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 | |
| (i) | Full text – extracts – translation - summeries | 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 | FIN/10 |
| (b) | Date | July 2001 |
| (c) | Author(ity) | 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 | |
| (i) | Full text – extracts – translation - summaries | 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 | FIN/11 |
| (b) | Date | 31 March 1999 |
| (c) | Author(ity) | 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 | The default judgment was vacated by the Court when it confirmed the friendly settlement of the parties. |
| (i) | Full text – extracts – translation - summeries | 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 | FIN/12 |
| (b) | Date | Judgment was received by the Embassy of Finland on 6 July 2000. |
| (c) | Author(ity) | 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 | See also the case No. FIN/3. |
| (i) | Full text – extracts – translation - summaries | 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 | FIN/13 |
| (b) | Date | 11 July 2001 |
| (c) | Author(ity) | 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 | 0.b, 1.b, 2.c |
| (g) | Source(s) | Case No. 00/23021 |
| (h) | Additional information | |
| (i) | Full text – extracts – translation - summeries | 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 | FIN/14 |
| (b) | Date | 14 November 2000 |
| (c) | Author(ity) | 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 | 0.a, 1.a, 2.c |
| (g) | Source(s) | Case No. 00/1467 |
| (h) | Additional information/ | 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 - summeries | 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 | FIN/15 |
| (b) | Date | 29 October 1999 |
| (c) | Author(ity) | 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 | 0.b, 1.c, 2.c |
| (g) | Source(s) | Case No. 95/3561 |
| (h) | Additional information | |
| (i) | Full text – extracts – translation - summeries | |

| | | |
|-----|---|---|
| (a) | Registration no | FIN/16 |
| (b) | Date | 21 January 1998 |
| (c) | Author(ity) | 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 | 0.b, 1.b, 2.c |
| (g) | Source(s) | Case No. 95/19597 |
| (h) | Additional information | 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 - summeries | 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.

Tableau analytique des fiches

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| 2. Contrats de travail et immunités de juridiction | F/2 |
| B. Champ d'application personnel | |
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| C. Renonciation à l'immunité d'Etat et renonciation à l'immunité diplomatique | F/10 |

| | | |
|-----|--|--|
| (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 |

Cour de cassation

Chambre civile 1

Audience publique du 25 février 1969

Rejet

Publié au bulletin

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 portefaitage 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.

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| (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 indemnités 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 donnaient 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"> • 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) | Texte complet- extraits- traductions-résumés | Annexe - Extrait |

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

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| (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 |

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| | | <p>été conférée par l'Etat et qu'il n'est pas relevé [qu'il] eût agi dans un intérêt autre que celui du service".</p> <ul style="list-style-type: none"> • <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- traductions-résumés | |

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| (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° | 0.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 : <i>Gazette du Palais</i> 1925, 1, p.389 pour les départements colombiens) |
| (i) | Texte complet- extraits- traductions-résumés | |

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| (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 |

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 privé 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 attaque 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

Jurisclasser 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

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| (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 | <p>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>.</p> <p>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.</p> |
| (i) | Texte complet- extraits- traductions-résumés | |

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| (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 affectés à une activité publique. |
| (i) | Texte complet - extraits-traductions-résumés | Annexe - Extrait |

Cour de cassation

Chambre civile 1

Audience publique du 1 octobre 1985 Rejet

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

République française
au nom du peuple français

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 prive 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 fonde ;

Par ces motifs : rejette le pourvoi.

Publication : Bulletin 1985 I N° 236 p. 211

Jurisclassseur Périodique 1986 n° 20566, note Hervé SYNDET.

Décision attaquée : Cour d'appel de Paris, chambre des urgences 1, 1984-02-10

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| (a) | N° d'enregistrement | F/8 |
| (b) | Date | 18 novembre 1986 |
| (c) | Auteur | Cour de cassation (1 ^{re} 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 |

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. DELVOLLE. Journal du droit international, mars 1987, p. 120, note B. OPPETIT.

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|-----|--|--|
| (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 |

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.

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|------------|---|---|
| (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)

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|-----|--|--|
| (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)

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|-----|---|--|
| (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 |
| (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 Salzdettfurth 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 court shall seek a ruling from the Federal Constitutional Court." (Official translation published by the Press and Information Office of the Federal Government)</p> |

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| (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: <i>Decisions of the Bundesverfassungsgericht – Federal Constitutional Court – Federal Republic of Germany, Volume I/1: International Law and Law of the European Communities 1952-1989</i> (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

international 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 | |

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 I/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 <i>et seq.</i> |
| (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</i> des <i>Bundesverfassungsgerichts</i> Vol.96, p.68 et seq |
| (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> |

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|------------|---|--|
| (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). |

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|-----|---|--|
| (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. |

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| (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. |

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| (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. |

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| (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. |

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| (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. The Court found that Case d'Italia where the applicant was employed is part of the Italian embassy in Athens and, as such fulfils functional needs of the defendant State. |

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| (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 |

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| (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. |

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| (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. |

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| (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. |

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|-----|---|---|
| (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. |

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| (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. |

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| (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. |

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|-----|---|--|
| (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. |

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| (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. |

HUNGARY

A summary of the relevant State practice regarding State immunities in Hungary (A preliminary response to the Pilot Project of the Council of Europe)

Introduction:

State immunity should be examined from two aspects. On one hand, in legal relations of the State in civil law matters, no distinction can be made between the State or any other legal entity in respect of liability, irrelevant of the legal relation having any foreign element to it. On the other hand, in legal relations arising in the context of the exercise of public authority, it is only in certain cases that the State does not enjoy immunity from the jurisdiction of other States: the State can only exceptionally be drawn under the jurisdiction of other States.

In the field of civil law jurisdiction, the State as a legal person does not enjoy any general, *ab ovo* immunity. Pursuant to the 1959 Civil Code, the State, when being a subject of property related legal relations, is to be considered as a legal person. The State is represented by the Minister of Finance in civil law legal relations, who may exercise this power via, or may transfer this power to, other State agencies. As a legal person the State has legal capacity too. Unless otherwise provided by law, the legal capacity of a legal person shall extend to all those rights and obligations that do not inherently pertain solely to individual human beings. The State shall not in general bear liability for acts of State organs; the State may be directly sued only in the event provided for by law. Specific forms of State liability is established by separate laws which set out those cases when the State shall be under the obligation to make compensation for damage or harm caused to third persons in relation to an act carried out by a State organ. Such laws include: the Penal Code, the laws on criminal proceedings, on health care, on medicinal products for human use, on the prevention of catastrophes, on national defence, on plant protection, on animal health protection, on the protection of the wildlife, on the protection of the nature, on fire-fighting, on nuclear energy, on the railway, on water transport, on water management.

Proceedings instituted against the Hungarian State:

Most of the actions filed against the Hungarian State relate to claims for compensation for an injury allegedly suffered by the claimant.¹ In respect of these claims, the State enjoys immunity only in those proceedings which are related to the omission by the State of its legislative obligations, or, in general, with the legislative power of the Parliament. Liability of the State is strongly limited (not by law, but by principles established in case-law) in such proceedings too, where citizens submit their claims in direct reference to a grievance that arises out of an alleged breach of one of their rights guaranteed in the Constitution.

At present, the exact number of proceedings under way against the State cannot be established, which fact is due to the somewhat inconsistent legal regulation on how the representation of the State in respect of actions concerning State property is assumed. According to the relevant law, it is the Treasury Property Directorate that represents the State in proceedings concerning pieces of real estates belonging to the treasury property. In addition, between 1998 and 2000, as a temporary solution, it was this very State Agency that was authorized to represent the State in all proceedings initiated against the State. At the

¹ Of all ongoing proceedings in which the Minister of Finance assumes the representation of the State, 60% has been initiated against the State to seek compensation. 7% of the actions filed against the State relates to property right claims, 5% has to do with securities, and 3% concerns invalidity of contracts. The remaining 25% of actions cannot be categorized, being individualistic in character.

1. Law Decree No. 13 of 1979 on International Private Law

This Law Decree was significantly amended by **Law No. CX of 2000 Amending Certain Legislative Acts Concerning Jurisdiction and the Recognition and Enforcement of Foreign Decisions**, with an effect as of 1 May 2001. This latter Law has – when amending the Law Decree – taken into account to a large extent the institutions and solutions provided for in the Lugano Convention of 16 September 1988 on Jurisdiction and the Enforcement of Judgements in Civil and Commercial Matters with a view to modernizing the domestic framework of international private law and, in general, of civil procedural law, and thus, to preparing the Hungarian legal system for the eventual accession by Hungary to the Lugano Convention after Hungary will have become a Member of the European Union. By placing the rules on jurisdiction in civil law matters on new grounds, and by modernizing the rules on recognition and enforcement of foreign court decisions, an appropriate domestic legal infrastructure has been created that will allow Hungary to conclude further bilateral agreements providing for reciprocity in the field of mutual recognition and enforcement of judgements³.

The issue of State immunity arises in the context of international private law and procedural law as a twofold problem: 1) Which law is applicable to the legal relations of the State?; 2) How does the State become subject to the jurisdiction of a foreign court?. Our relevant Law in force deals with the issue of jurisdiction on the basis of the principle of functional (relative) immunity, making a distinction between the legal relations of the State in the context of exercising public authority (in a capacity *iure imperii*) and the private law relations of the State (*iure gestionis*). In its private law relations, the State does not enjoy immunity from the jurisdiction of a foreign court. It is to be noted that the Law Decree on International Private Law contains a regulation in conformity with the Council of Europe's Convention on State Immunity of 16 May 1972 in respect of matters considered typically as *acta iure gestionis*.

The Law Decree on International Private Law sets out those cases when the Hungarian authorities exercise exclusive jurisdiction in proceedings initiated against the State.⁴ However, even in these cases Hungarian jurisdiction is not exclusive, if the Hungarian State renounces its immunity, or if the subject matter of the action filed against it constitutes such a legal relation of the State which has a foreign element to it, and in respect of which the foreign State would not enjoy immunity from the jurisdiction of Hungarian organs either.⁵

² See also the attachment to this summary that contains the relevant provisions cited or referred to in this Summary.

³ Up to now it is only Germany, France, Greece and Cyprus among the Western European States with which Hungary has a bilateral agreement in force in this field.

⁴ See Article 62/A.

⁵ Article 62/E lists those cases where it is the Hungarian court or other authority which has jurisdiction in an action filed against a foreign State or foreign State agency.

Pursuant to the Law Decree, Hungarian authorities cannot exercise jurisdiction – that is Hungarian jurisdiction is excluded – in respect of other States in the very same instances when jurisdiction would be reserved for the Hungarian State itself in actions filed against Hungarian State agencies.⁶

The Law Decree enumerates also those cases where in general, but not without exception, jurisdiction of Hungarian courts is excluded.⁷ In a proceeding filed against a foreign State or foreign State agency, or a foreign citizen acting as a diplomatic agent in Hungary, Hungarian jurisdiction – as a general rule – is excluded, unless the State/agency/person concerned has explicitly renounced its immunity, or unless the civil law legal relation of the foreign State constitutes the subject matter of the proceeding.

In the event of lack of jurisdiction, the jurisdiction of the Hungarian court may also be established by the defendant making a statement on the merits of the case (admission of suit), unless, of course, the jurisdiction of the Hungarian court is excluded under the provisions of this Law.

It is also this Law Decree which provides for the law applicable in proceedings against the Hungarian State.⁸ As a main rule, the Hungarian law shall be applicable to the legal relations of the Hungarian State; the exceptions are listed in the relevant Article of the Law Decree.

Chapter XI of the Law Decree contains the rules on the recognition and enforcement of foreign decisions.⁹ These rules show that the recognition of foreign decisions depends on that whether the matter in question concerns an exclusive Hungarian jurisdiction, or whether the jurisdiction of Hungarian authorities is excluded in respect of that matter, or whether there is concurrent jurisdiction:

- in the case of exclusive Hungarian jurisdiction, a foreign decision may be recognized only if it is a judgement dissolving the marriage of a Hungarian citizen, and if the recognition is sought by this Hungarian citizen.
- in the case of excluded Hungarian jurisdiction, foreign decisions shall be recognized without prejudice to any reciprocity, provided that these decisions are construed as definitive by the foreign law, and there exist no grounds of non-recognition.
- in the case of concurrent jurisdiction, foreign decisions shall be recognized in Hungary under certain conditions, as specified in the Law Decree.

Although recognition of foreign decisions takes place by virtue of the Law Decree, without any special procedure, there are certain conditions (jurisdiction of the foreign authority having issued the decision; definitive character of the decision; reciprocity; lack of ground of refusal) that the domestic authority, before which the party makes reference to a particular foreign decision, needs to examine.

In the case of foreign decisions that require execution, a special procedure needs to be pursued in order to establish whether the conditions for domestic recognition and enforcement are met. Here, reference is to be made to **Law No. LIII of 1994 on Judicial Execution**: any foreign decision may only be executed in Hungary, if the court issues a decree of confirmation of execution, which is to assert that the decision may be executed in accordance with Hungarian law in the same way as a decision of a Hungarian court.¹⁰

In respect of executing a decision against a foreign State, the Law Decree sets out a rule of guarantee: those assets of a foreign State in Hungary that serve the carrying out of public

⁶ See Articles 62/C and 62/D.

⁷ See Articles 62/E and 62/F.

⁸ See Articles 17 and 63. See also Articles 3 to 5 and 7 to 9 concerning questions of the applicable law.

⁹ Articles 70 to 74/A.

¹⁰ See Articles 205 to 210.

functions by that State or support the functioning of its agencies cannot be attached on the basis of any adverse ruling against that State.¹¹

Matters of international legal aid and request are also governed by the Law Decree.¹² In such matters, Hungarian courts shall establish contact with foreign courts and other authorities through the Minister of Justice, while other authorities shall get in contact with foreign authorities through the Minister of Foreign Affairs, via the Minister exercising supervision. At the request of a foreign court or another authority, a Hungarian court or another authority shall provide legal aid on the basis of an international treaty or in the case of reciprocity. Legal aid shall be refused, if the performance of the request were to be in contravention of the Hungarian public order.

The Law Decree sets out among its General Provisions that its provisions cannot be applied to such questions that are governed by an international treaty.¹³ It should be mentioned here that **Circular No. 8001/2001 of the Minister of Justice on the Administration of Matters Involving an International Element** names those international treaties and contains those detailed rules that are to be respected by both the Hungarian and the foreign authorities in the course of their action in international matters. The First Chapter of the Circular sets out the general rules relating to the application of the Law Decree (international treaties; jurisdiction; applicable law; reference to international treaties; getting in contact by courts with foreign authorities and persons abroad; documents filed in foreign language; use of language; formalities of documents to be used abroad; authentic and certified copies), while Chapters II and III contain the provisions concerning legal aid requested by Hungarian and foreign authorities, respectively. Chapter IV deals with the attestation of official documents, and Chapter V has detailed rules on maintenance obligations, child placement and child abduction. Chapter VI governs legacy issues, while Chapter VIII criminal matters. Detailed rules of execution in international matters are set out in Chapter VII, and finally, Chapter IX provides for the procedure to be followed in respect of persons enjoying diplomatic or other immunities.

2. Law No. IV of 1959 on the Civil Code.

The Civil Code contains the rules concerning the legal personality and representation of the State. The State, as a subject of property related legal relations, shall be deemed a legal person. Unless otherwise provided for by law, the Minister of Finance shall represent the State in civil law legal relations; he may exercise such power by way of other State agencies, or may transfer this power to other State agencies.¹⁴

3. Law No. III of 1952 on Civil Law Procedure.

This Law governs the proceedings instituted before Hungarian courts in the course of applying Hungarian law. Pursuant to this Law, the filing of an action shall be refused, if the jurisdiction of Hungarian courts is excluded by a domestic law or an international agreement. As we have seen, it is Law Decree No. 13 of 1979 which sets out the cases where the jurisdiction of Hungarian courts is excluded.¹⁵

¹¹ Article 62/E.

¹² See Articles 67 to 69.

¹³ Article 2.

¹⁴ Article 28.

¹⁵ Article 62/C.

IRELAND

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| (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 * |

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| (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

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| (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. Arnfríður 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.

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| (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-Bingeyjarsýsla.

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 Keflavíkurflugvöllur, 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 thereof. 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/Hrollaugstaðafjall. 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 it 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.

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| (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 hereby 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 Powell, 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 gestiorum*). 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.

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|-----|---|--|
| (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 | 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. | 0.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)– Yugoslavia (State) |
| (e) | Points of law | The decree declares the existence of reciprocity between Italy and Yugoslavia 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. | I/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.

*

| | | |
|-----|---|--|
| (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)– Yugoslavia (State) |
| (e) | Points of law | The decree declares the existence of reciprocity between Italy and Yugoslavia 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 | Calì (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 | Iasbez (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. thorough 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: immuniteit van jurisdictie en van executie, 2001. (Thesis, VU Amsterdam; English summary added)'.

| | | |
|------------|-------------------------------|---|
| (a) | Registration no. | NL/ 1 |
| (b) | Date | 15 May 1829 |
| (c) | Author(ity) | Beatrix, Queen of the Kingdom of the Netherlands. |
| (d) | Parties | Article 13a of the Act on General Provisions of Kingdom Legislation (Wet Algemene Bepalingen, more commonly known as Wet AB) |
| (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 | |

NL/1

Appendix

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 | Article 3a Bailiffs' Act |
| (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. |

NL/2

Appendix

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) | Autho(rity) | The minister of Justice and the minister of Foreign Affairs |
| (d) | Parties | Explanatory memorandum to the Bill for the approval of the European Convention on State Immunity |
| (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 | |

NL/3

Appendix

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) | Author(ity) | The deputy Minister of Justice |
| (d) | Parties | Explanatory memorandum to the amendment of the Bailiffs' Act |
| (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. |

NL/4
Appendix

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) | Author(ity) | 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 | 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. |

NL/5

Appendix

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> |

NL/6

Appendix

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 | <p>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.</p> <p>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.</p> <p>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.</p> <p>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 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</p> |

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| | | <p>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 | <p>KG 1987, 38.</p> <p>English summary: NYIL 1988, p. 439-443.</p> |
| (h) | Additional information | See also the documents NL/2 and NL/ 4 on the Bailiffs' Act. |

NL/7

Appendix

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. [...]

⁴ This article was replaced by article 3a of the Bailiffs' Act from 26 January 2001. See document NL/ 2.

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 (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.

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|-----|-------------------------------|--|
| (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 | |

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.. [...]

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|-----|-------------------------------|---|
| (a) | Registration no. | NL/ 9 |
| (b) | Date | 18 February 1988 |
| (c) | Author(ity) | Court of Appeal of The Hague |
| (d) | Parties | Republic of Zaire v. J.C.M. Duclaux |
| (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. |

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) | Author(ity) | 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 | |

NL/10

Appendix

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.

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|-----|-------------------------------|---|
| (a) | Registration no. | NL/ 11 |
| (b) | Date | 28 September 1990 |
| (c) | Authority | Supreme Court |
| (d) | Parties | W.L. Oltmans v. the Republic of Surinam |
| (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. |

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) | Author(ity) | 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 | |

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> |

NL/13

Appendix

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 | The United States of America v. A.F.W. Delsman |
| (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 | |

NL/14

Appendix

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] [...].

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| (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 | <p>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.</p> <p>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.</p> <p>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.</p> <p>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.</p> |
| (f) | Classification | 0.a, 1.c, 2.a |
| (g) | Source | KG 1998, 251. English summary: NYIL 2000, p. 264-267. |
| (h) | Additional information | |

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Appendix

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.

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| (a) | Registration no. | NL/ 16 |
| (b) | Date | 12 November 1999 |
| (c) | Author(ity) | 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. |

NL/16

Appendix

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. [...]