AUSTRIA

LEGAL BASIS

1. **Is your State a party to international legal instruments guaranteeing the immunity of State owned cultural property on loan (including bilateral agreements) such as the *United Nations Convention on Jurisdictional Immunity of States and Their Property* (2004)?**

Austria is a party to both the **United Nations Convention on Jurisdictional Immunity of States and Their Property** of 2004 (ratified on 14 September 2006). On the occasion of a request made by Albania regarding the loan of the so-called Skanderbeg objects for an exhibition, Austria, in 2012, entered into a **bilateral agreement with Albania** (Agreement between the Republic of Austria and the Republic of Albania on Cooperation regarding the loan of objects belonging to their State Movable Cultural Heritage for exhibitions on each other’s territory, Federal Law Gazette III No. 180/2012) which, inter alia, provides for the compulsory jurisdiction of the International Court of Justice.

It is further noted that Austria is also party to the **European Convention on State Immunity** of the Council of Europe of 1972 (ratified on 10 July 1974), which does not contain specific provisions on cultural property.

2. **Does your State recognise the customary international law nature of Part IV of the *United Nations Convention on Jurisdictional Immunity of States and Their Property* (2004)? More specifically, does your State consider that, pursuant to a rule of customary international law, cultural property owned by a foreign State while on temporary loan is not considered as property specifically in use or intended for use by the State for other than government non-commercial purposes?**

Austria considers state-owned cultural heritage and cultural objects while on temporary loan abroad to be so for sovereign public purposes and thus to be immune from execution. It is of the opinion that the immunity of state-owned cultural objects from measures of constraint provided for in **Articles 19 and 21 of the UN Convention** is a **reflection of the current state of customary international law**. As the UN Convention is not yet in force and in order to increase the acceptance of this rule as being part of customary international law, Austria, together with the Czech Republic developed the idea of drafting a **non-legally binding declaration** that could be signed by states supporting the immunity of state-owned cultural property from measures of constraint. The final draft of the declaration was presented to CAHDI in September 2013. The CAHDI secretariat has agreed to function as depositary of the declaration.

3. **Has your State adopted a national legislation on immunity concerning:**

a. **Specifically cultural objects of foreign States; or**
b. **more generally, property of foreign States intended for official/public use; or**
c. **more generally, cultural objects either owned by foreign States or by private individuals?**

If so, please provide information concerning national legislations (in particular title, source and content; if possible, please provide official translations in French or in English and/or references to online sources).

In 2003, Austria adopted an **anti-seizure statute** (Federal Law on the temporary immunity of cultural objects on loan for public exhibitions, Federal Law Gazette I 133/2003). According to this statute, the competent ministry (now the Federal Chancellery) may grant temporary immunity to foreign cultural objects **either owned by a foreign state or a private individual**

at the request of the Austrian museum concerned. Only such cultural objects can be protected from seizure that are

temporarily in Austria
for the purpose of an exhibition in the public interest
taking place at or being organized by one of the Austrian Federal Museums (Austrian state-owned museums).

The guarantee issued by the Federal Chancellery ("rechtsverbindliche Immunitätszusage") can neither be withdrawn nor revoked and has the effect that no rights can be asserted by a third party against the lender's right to the return of the cultural object(s). The entire duration of the immunity for a specific cultural object can effectively amount to a maximum of one year following its import into Austria.

The Austrian anti-seizure statute does not make a distinction between state-owned and privately owned cultural objects; cultural objects owned by private individuals can enjoy temporary immunity as well. It applies however only to foreign cultural objects on loan to one of the Austrian Federal Museums or to a public exhibition (co-) organized by one of the Austrian Federal Museums. The anti-seizure statute therefore is only partly congruent with customary international law.

ad a) Under the conditions referred to above, **all kinds of foreign state-owned** (as well as privately owned) **cultural objects** on temporary loan are eligible for temporary immunity.

ad b) According to the Austrian anti-seizure statute, only state-owned (as well as privately owned) cultural objects **shown in an exhibition of public interest taking place at or being organized by an Austrian Federal Museum** can enjoy temporary immunity.

ad c) **Both state-owned and privately owned cultural objects** are covered by the Austrian anti-seizure statute.

4. **Does your State consider that there are limitations to the rule of immunity of State owned cultural property on loan, in particular in the event of an armed conflict or when there are return obligations deriving from international or European law?**

There is no Austrian practice regarding **limitations to the rule of immunity of state-owned cultural property on loan**, provided that the property of the state concerned is **beyond doubt**.

5. **Does your State consider that the rule of immunity of cultural property extends to other categories of property other than those owned by a State, i.e. property in possession or control of a State (such as property belonging to a State museum)?**

According to Austria, the relevant provisions of customary international law as codified in Articles 19 and 21 of the UN Convention only cover cultural objects owned by states. **Cultural objects owned by state museums** (which are, *per definitionem*, directly or indirectly owned by the state) are, in Austria's opinion, **part of a state's property**.

NATIONAL PRACTICE AND PROCEDURE

1. **Is there national case-law in the field of immunity of State owned cultural property on loan? If so, please provide information on these decisions (date of the judgment, authority that issued the judgment, name of the parties, main points of law, French or English translation of the judgment or summary of the judgment in English or in French).**

See the information on the **Diag Human case** on the seizure of Czech cultural objects on loan to the Austrian Federal Museum "Österreichische Galerie Belvedere", date of judgment: 25 October 2011, in the appendix.

2. **Does your State resort to "letters of comfort" or other practice guaranteeing the recognition of the immunity from seizure of State owned cultural property on loan?**

Under the conditions explained above, the Austrian Federal Chancellery issues a guarantee of the immunity. If an immunity guarantee as provided for in the Austria anti-seizure statute cannot be issued by the Federal Chancellery, e.g. because the Austrian museum intending to display the foreign cultural object is not a state-owned museum but a private foundation, the Austrian Federal Ministry for Europe, Integration and Foreign Affairs issues a declaration expressing the legal opinion of the Austrian Federal Government: It recalls, with reference to the relevant customary international law as codified in Articles 19 and 21 UN Convention, that state-owned cultural objects forming part of an exhibition in Austria are considered to be for sovereign public purposes and thus immune from execution.

3. **Is the immunity granted automatically to State owned cultural property on loan or is it subject to approval by a State authority?**

Austria is of the opinion that the immunity of state-owned cultural objects from measures of constraint provided for in Articles 19 and 21 of the UN Convention is a reflection of the current state of customary international law. Customary international law is **transformed into municipal law** by way of Article 9 (1) of the Austrian Constitution. Therefore, the Austrian courts are obligated to **respect it *ex officio***, *i.e.* without any further approval by a state authority. In addition, the guarantee according to the Austrian anti-seizure statute is issued after the request of an Austrian Federal Museum concerned has been **approved by the Federal Chancellery**. The **different scopes** of the relevant provisions of customary international law and the Austrian anti-seizure statute are explained in detail above.

APPENDIX TO THE REPLY OF AUSTRIA

DIAG HUMAN CASE

Date of the judgment: 25 October 2011

Exact title of the authorities which handed down the judgment: Landesgericht für Zivilrechtssachen Wien (Regional Court of Vienna for Civil Matters)

Name of the parties in the cases: D. H. SE vs. Czech Republik (Ministry of Health)

Main points of law established: Pursuant to customary international law, State owned cultural objects enjoy immunity from execution and seizure

Sources, i.e. available publications in which the document is published in full (reference may also be made to additional sources, such as extracts or translations published in journals or reviews):
Summary published in: Tichy, H. / Schusterschitz, G. / Bittner, P.: Recent Austrian practice in the field of international law. Report for 2011, in: Zeitschrift für öffentliches Recht (Journal of Public Law), Volume 67 (2012), p. 157

Translation: English or French translation of the judgment or, if not available, an English or French summary of the substantive content of the judgment:

Summary in English:

The Czech Republic had concluded a contract in the 1990ies with a pharmaceutical company based in Liechtenstein. Following a dispute on the fulfilment of contractual obligations the company claimed damages from the Czech Republic before an arbitral tribunal, as provided for in the contract. In 2008, the arbitral tribunal awarded the payment of damages and interests to the company. In April 2011, the company applied for execution of the award in Austria on the basis of the New York Convention of 1958 on the Recognition and Enforcement of Arbitral Awards. In particular, it requested the attachment of two paintings and one sculpture owned by the Czech Republic and at the time on loan in the Austrian museum Belvedere in Vienna for an exhibition on cubism and futurism.

The competent Austrian civil court of first instance, in the course of its proceedings, requested an opinion of the Foreign Ministry via the Ministry of Justice pursuant to Article IX (3) of the Law on Jurisdiction in Civil Matters on the issue of immunity. As the final days of the exhibition came close and the works of art were to be returned to the Czech Republic, the court decided on 16 May 2011 to authorise the attachment without examining whether the Czech Republic enjoyed immunity from measures of constraint. The three works of art were subsequently attached on 25 May 2011, shortly before the end of the exhibition.

In its opinion, which was about to be delivered at the time of attachment, the Foreign Ministry argued in favour of the Czech Republic's immunity for its three works of art. It considered the rules laid down in Article 18 to 21 of the UN Convention on Jurisdictional Immunities of States and Their Property (hereinafter: UN Convention) as reflecting customary international law. International law allows for measures of constraint against property of foreign states only in very limited circumstances. In particular, measures of constraint may only be taken if the foreign state has given its consent or earmarked the property, or uses or intends to use the property for other than government non-commercial purposes (Article 19 of the UN Convention). Conversely, property used for sovereign public purposes may not be subject to measures of constraint. Article 21 of the UN Convention lists specific categories of property considered to be for sovereign public purposes and thus immune from execution. This list includes cultural heritage and cultural objects forming part of an exhibition (Article 21 (1) (d)

and (e) of the UN Convention). As a supportive argument the Foreign Ministry referred to the ILC drafting history of Article 21 of the UN Convention. Already in 1986, the ILC had included the immunity of cultural heritage and cultural objects in its draft articles. This was part of a compromise to counterbalance the relatively wide exception for property in commercial use.

Following the attachment the Czech Republic appealed against the decision of the court of first instance on the grounds that it enjoyed immunity and that the arbitral award was not yet final. On the basis of the appeal and the opinion of the Foreign Ministry the court of first instance decided on 21 June 2011 to review its decision of 16 May 2011 and to discontinue the proceedings ex officio. It noted that immunity had to be observed ex officio and that its earlier decision had not examined the issue of immunity. The court firstly inquired whether the Czech Republic had applied for and received a legally binding consent to immunity for its three works of art, which can be granted by the federal minister competent for arts in accordance with the Austrian anti-seizure statute, the Federal Law on the temporary immunity of cultural objects on loan for public exhibitions. Since the Czech Republic had not applied for the legally binding consent, the anti-seizure statute was not applicable and any immunity had to be based on the general rules of international law which, pursuant to Article 9 (1) B-VG form part of Austrian law. It also clarified that the anti-seizure statute was without prejudice to existing customary international law. Although the UN Convention has not yet entered into force, the court found that there was sufficient state practice for immunity of cultural objects as set out in Article 21 (1) (e) of the UN Convention. By paraphrasing the government bill for the ratification of the UN Convention, the court held that the protection of property of scientific, cultural or historic interest corresponds to the protection of the self-conception and self-expression of a state. To support its argument, the court referred to the intervention of the Swiss government against an attachment of Russian paintings on loan in Switzerland on the basis of an award against the Russian Federation. For these reasons, it concluded that the Czech Republic enjoyed immunity for its three works of art.

However, the works of art could not be returned to the Czech Republic immediately, as the claimant appealed against the decision of 21 June 2011; they could only be released after the decision of the Regional Court of Vienna for civil matters (Landesgericht für Zivilrechtssachen Wien). In its decision of 25 October 2011 the Regional Court quashed the decision of 16 May 2011 and declared the subsequent proceedings null and void, including the decision of 21 June 2011. The application of the claimant for execution against the Czech Republic was rejected for lack of jurisdiction. In the ensuing days the works of art concerned were returned to the Czech Republic.

In its reasons, the Regional Court recalled the principle of state immunity and the historic development during recent decades to limit it to *acta iure imperii*. In particular, it noted that it was not state immunity that had to be established, but that state immunity was a principle founded in customary international law. On the contrary, exceptions to it had to be established. In case of doubt there was thus a presumption in favour of state immunity. The court further noted that immunity from measures of constraint had to be distinguished from immunity from jurisdiction and that the Czech Republic had consented in its contract with the company only to the latter. With regard to measures of constraint, a state enjoyed immunity only to the extent that the property at issue was not in use or not intended for use for other than sovereign public purposes.

In the present case, the Regional Court continued, it thus had to be asked whether the three works of art on loan for the exhibition in Austria had to be considered as serving sovereign public purposes. By referring to the Austrian standard textbook for international law, the court found that it was not clear whether cultural institutions of a state and their property served sovereign public purposes. It recalled the cases of Italian stone tablets in Switzerland, Russian paintings in Switzerland and France, and Syrian art in Berlin, but concluded that these cases might not be sufficient to establish general and consistent state practice. However, they might indicate the correct application of the general rule of immunity. The Regional Court then sought to demonstrate that the administration of cultural property was part of the

responsibilities of the public administration. It did so by referring to the widely ratified UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property of 1970, the existence of laws in many states on the protection of cultural property, the fact that many states subsidise the cultural sector, and the aspect of state representation through the exhibition of cultural objects.

The court also referred to the UN Convention. Although it had not yet entered into force, the court agreed that its provisions reflect to a large part customary international law. In the view of the court, however, there seems not to be sufficient state practice to establish Article 21 (1) (e) concerning the immunity from execution of cultural objects forming part of an exhibition as a rule of customary international law. The court acknowledged that there was some recent practice (see above), but denied the consistency of this practice. Nevertheless, the court continued, the lack of a consistent practice did not exclude cultural objects from the general rule of immunity of state property used for sovereign public purposes from execution. The existing, but not consistent, practice as well as the fact that states subscribed to the UN Convention by their signature might not establish customary international law, but might serve as a relevant indication to understand the existing rules of international customary law.

Finally, the Regional Court confirmed the findings of the court of first instance that the existence of the anti-seizure statute did not exclude customary international law providing for a wider protection of state property.