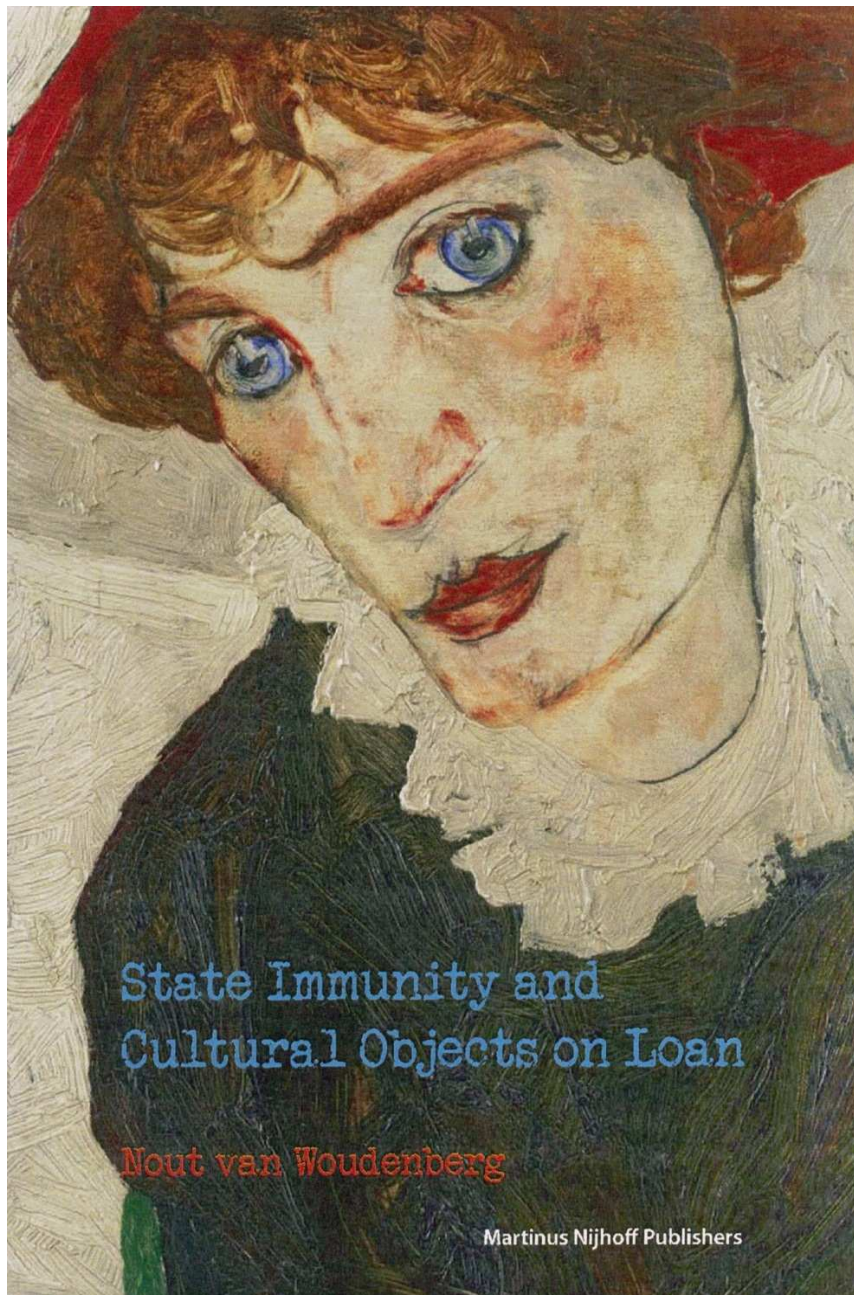


STATE IMMUNITY AND CULTURAL OBJECTS ON LOAN

Are cultural objects belonging to foreign States while on loan immune from seizure on the basis of customary international law?



Prague, 23 April 2012

Introduction

For centuries, cultural objects have been ‘on the move’, transported to foreign countries and safely returned to the lending countries. So it is safe to say that borrowing and lending cultural objects is not a new phenomenon. In the beginning of the 1960s, for instance, it had been agreed that Leonardo da Vinci’s masterpiece the *Mona Lisa* would be loaned by France to the United States. Questions ensuing from such an art loan concerned packing, securing, shipping, insuring, handing, *etc.* But there were no concerns about immunity from seizure. Nobody seemed to worry that an individual or a company might think of seizing the painting. However, meanwhile, the issue of immunity from seizure for travelling cultural objects has become more and more a concern for States and museums. This is mainly due to an increasing number of legal disputes over the ownership of cultural objects, particularly as a result of claims made by heirs to those objects expropriated by Communist regimes in Eastern Europe, as well as Holocaust-related claims.

During the course of time, it occurred to me that it was not clear whether States actually knew what the current state of affairs was with regard to immunity from seizure of cultural objects belonging to foreign States while on loan abroad. In 2004 a convention on jurisdictional immunities of States and their property had been established under auspices of the United Nations, addressing, among other things, immunity for cultural State property on loan. That convention, however, has not yet entered into force. I thus considered it necessary to investigate whether another rule of international law was already applicable: a rule of customary international law. After all, that rule would be binding upon States, without necessarily becoming a party to a convention. And so I did: I investigated whether a rule of customary international law exists, to the effect that cultural objects belonging to foreign States are immune from seizure while on loan to another State for a temporary exhibition. And if such a rule does not yet exist, is it emerging? And if such a rule does exist, what are its limitations? In the autumn of 2011, I finalized my study, and later in this presentation, I will share my conclusions with you. It is my aim that my study can provide more clarity and legal certainty in the field of lending and borrowing cultural State property.

What is immunity from seizure?

The term ‘immunity’ stems from the Latin term ‘*immunitas*’, which means freedom from taxes or freedom from services. With regard to my use of the term ‘seizure’, it needs to be

emphasized that I use this term in an overall meaning. All forms of seizure are supposed to be included in this term, such as attachment, execution, sequestration, forfeiture, requisition, foreclosure, replevin, detinue, *etc.*

I prefer the following description of ‘immunity from seizure’ for the purpose of my presentation: “The legal guarantee that cultural objects on temporary loan from another State will be protected against any form of seizure during the loan period.” This description originates from the 2006 ‘Action Plan for the EU Promotion of Museum Collection Mobility and Loan Standards’.

Why may someone wish to seize a cultural object on loan?

In practice there appear to be two main situations in which someone may wish to seize a cultural object that is temporarily on loan. First, if there is an ownership dispute over a cultural object on loan. A claimant may attempt to file a claim in the borrowing State and to try to seize the object if he believes that his chances are better, legally speaking, in the State where the cultural object is temporarily on loan, than they are in the State where the object is normally located. Second, if a claimant (an individual or a company) asserts that the owner of the cultural object on loan owes a debt (not necessarily related to the object) to the claimant, and this claimant has doubts regarding the possibility of enforcing a judgment or arbitration award in the State of residence of the owner. But there may be other situations. For instance, in the context of a criminal investigation, law enforcement officers may wish to seize certain cultural objects in order to preserve evidence. Or it may be the case that a third party, such as a carrier handling the cultural objects in connection with the exhibition, could have a lien on the object until he is paid for services provided.

Let me give examples of the two first situations as described above.

The first situation is relatively easy to imagine: An heir of a Holocaust victim, or an heir of a collector under Tsarist Russia, is of the opinion that the lending State expropriated a cultural object that belonged to his or her family. The heir may be of the view that the chances for restitution under the jurisdiction of the borrowing State are better than in the jurisdiction of a lending State. He or she therefore may try to seize the cultural object concerned, after which (s)he will initiate legal proceedings for recovery.

A typical example regards the painting *The Dance* painted by Matisse in 1909. In 1918, the painting (together with many of other cultural objects) had been taken by decree of Lenin and without adequate compensation from Sergei Shchukin, one of the main art collectors at the time in Russia. During the last two decades, this painting has travelled a lot. It has been on exhibitions in Paris, Dusseldorf, Rome, London, and Amsterdam. Heirs of Shchukin (first his daughter, then after her death his grandson) have several times tried to seize the artwork.

Let me give an example of what happened in France, in 1993. In that year, Centre Pompidou in Paris held a Henri Matisse exhibition, where some 130 paintings by Matisse were exhibited. The paintings came among other places from the Hermitage Museum in Saint Petersburg (Russia) and the Pushkin Museum in Moscow. The daughter of the Shchukin took advantage of the presence in France of the works and went to the Paris court, claiming for a sequestration order of 21 works by Matisse, which originally belonged to her father. Reason for the order should be, that the expropriation in 1918 was illegal and contrary to the French order. She asked in her claim the Centre Pompidou to become a depository of the works until the ownership claim would have been settled. Russia claimed State immunity in this case, which had been awarded by the court. The daughter filed an appeal, but meanwhile, the exhibition was ended and the works were sent back to Russia.

After this time, the Shchukin heirs filed claims in some other States, like Italy and the United States of America. According to the grandson of Shchukin, not so much because the heirs wanted the painting back into their ownership, but first and foremost to draw attention to the way Shchukin had been expropriated by the Russian Communist regime in 1918. In their view, the Russian Federation should institute an agreement that reasonably compensates and pays a percentage of the material benefits that have accrued to the State from the exploitation of these expropriated cultural objects. Due to its fame, *The Dance* is often taken as an example.

The second category of cases is much more insecure than the first one, as this category has nothing to do with an ownership dispute, neither necessarily with the cultural object concerned. The *Noga* case in Switzerland illustrates quite well the second situation in which someone may wish to seize cultural objects temporarily on loan:

In November 2005, the Swiss company *Noga* tried to seize a collection of 54 French masterpieces belonging to the Pushkin Museum in Moscow. Among the works were paintings by Renoir, Monet, Manet, Degas, Van Gogh and Gauguin. The masterpieces had been exhibited from June to November 2005 in Martigny, Switzerland. *Noga* claimed that the Russian Federation owed it hundreds of millions of dollars in alleged debts and compensation. In 1997, a Swedish Arbitration Institute had ruled that the Russian government had to pay *Noga* 63 million US dollars. In order to execute that ruling, *Noga* obtained an order from the court in Wallis authorising the seizure; the paintings were subsequently seized on 13 November 2005 as they were leaving Switzerland to return to Russia. On the initiative of the federal authorities, the Swiss Federal Council ruled on 16 November 2005 that the cultural objects should be allowed to leave the country and should be sent back to the Russian Federation. The ruling of the Swiss Federal Council was based on an article of the Swiss Constitution which allows for “necessary measures to protect national interests” and emphasised that “in international law, national cultural treasures are public property and are not subject to confiscation”. The ruling went into immediate effect with no possibility for appeal. But a lot of harm was already done.

Let me give another example, probably even more familiar to you: the so-called *Diag Human* case.

In May 2011, a Viennese District Court ordered the seizure of three cultural objects owned by the Czech Republic and lent to an exhibition in the Austrian National Gallery Belvedere in Vienna. The objects concerned were a painting by the Czech artist Emil Filla, *Two Women* (coming from the Moravian Gallery in Brno), a painting by fellow Czech national Vincenc Benes, *The Dancer* and a sculpture by the Czech artist Otto Gutfreund, called *The Embrace* (both coming from the National Gallery in Prague). The Belvedere was appointed as the court’s custodian of the objects.

The background of this case was the following: in the beginning of the 1990s, the company *Diag Human* wanted to trade in blood plasma from Czech transfusion centres, but stated that it failed to do so after the then Czech Minister of Health referred to the company in seemingly negative terms. *Diag Human* started a legal case, asking for compensation from the Czech

Republic. In August 2008, *Diag Human* received an arbitral award, ordering the Czech Republic to pay a sum of almost 9 billion Czech crowns to the company. The Czech Republic appealed against this ruling, but there are differences of view on the question whether the appeal was signed by duly authorised Czech officials. According to *Diag Human*, the arbitral decision became final and effective, but the Czech authorities are of the opinion that the legal case is still pending.

On 1 June 2011, the Austrian Ministry of Justice sent an email to the court, originating from the Austrian Ministry of Foreign Affairs. In the email it was said that under customary international law, the Czech Republic was immune from seizure with regard to its three cultural objects, as it regarded property of a State forming part of an exhibition of objects of scientific, cultural or historical interest. The Czech authorities were also of the opinion that the seizure of the cultural objects by the Austrian court was to be considered a breach of international law, as it regarded Czech property with a sovereign, non-commercial purpose.

On 21 June 2011, the Viennese District Court ordered that seizure had to be lifted, on the basis of generally acknowledged rules of international law. Although the 2004 UN Convention on jurisdictional immunities of States and their property had not entered into force, the court was of the opinion that the contents of the convention provided sufficient indications of State practice to assume that a rule of customary international law exists, immunising cultural State property on loan. In the end, the objects returned to the Czech Republic.

The claims in this category are harder to predict: When loaning objects from a certain State, it is unfeasible to (fully) investigate whether the lending State has unpaid debts and/or whether it would cross the mind of the creditor to try to execute its rights in a foreign State under the jurisdiction of that State.

Why can immunity from seizure be desirable?

Basically, the reason for providing cultural objects with immunity from seizure is to prevent cultural objects on loan from being used as ‘hostages’ in trade and/or ownership disputes. Immunity from seizure can serve as a means to overcome the reluctance of lenders to send their cultural objects temporarily abroad.

We also have to keep in mind that many States have committed themselves through international legal instruments to supporting the exchange of cultural objects. It can be said that nowadays there is a well-established and universally shared interest to protect and enhance the international cooperation of museums and other cultural institutions. Moreover, in the literature, links have been made between cultural objects and diplomatic relations: international art loans can symbolise and foster these diplomatic relations. Cultural objects can break the ice of misunderstandings and can be the first steps in new bilateral ties. They are sometimes referred to as ‘good will ambassadors’. Immunity from seizure facilitates inter-State art loans. That background may serve as a proper explanation why immunity from seizure for cultural State property on loan is understandable.

Customary international law

Since I examined the question whether cultural objects belonging to foreign States are immune from seizure on the basis of customary international law while loaned to another State for a temporary exhibition, a short explanation in regard to customary international law cannot be absent. Customary law is one of the various sources of international law, next to, for instance, treaty law. It happens regularly that certain States are not a Party to important conventions. If the rules in those conventions can be considered as customary law, then those States are bound by these rules. Furthermore, there may be areas where a convention does not yet exist. It can thus be important to know whether a rule of customary international law is existing.

In order to be considered as a rule of customary law, a rule needs to be based on a widespread, representative and virtually uniform practice of States, accompanied by the conviction that this practice is accepted as law, often referred to as *opinio juris*. This has been stated several times by the International Court of Justice (ICJ). The ICJ stated as well, that it is not necessary that a rule is entirely accepted worldwide. Practice should reflect wide acceptance among the States particularly involved in the relevant activity. In the words of the ICJ, “States whose interests are specially affected” must belong to those participating in the creation of the rule. The absence of practice by other States does not prevent the creation of a rule of customary law. Thus, in determining whether a rule of customary international law exists with regard to immunity from seizure of loaned cultural objects belonging to foreign States, special

attention needs to be paid to those States which are the most active and involved in the field of lending and borrowing cultural objects for temporary cross-border exhibitions.

In principle, any act or statement by a State from which views about customary law may be inferred can serve as a source or evidence of State practice, as long as it is reasonably recognisable. Examples are judgments, diplomatic correspondence, policy statements, legal advice by governmental legal counsels, rules and regulations, reservations and declarations when signing or ratifying treaties or memoranda of understanding. It is important, even essential, that States act out of a certain legal belief or conviction and that they do not regard their behaviour as merely a political or moral gesture. It may be very difficult and largely theoretical to strictly separate the elements of practice and legal conviction. Quite often, the same act reflects both practice and legal conviction. But in order to discover a possible rule customary international law, it was still necessary for me to investigate whether States are providing immunity from seizure because they feel there is a legal obligation to do so, or whether they just want to act as pragmatically as possible. Based on my investigations, I have the impression that the practice of States in the field of my study is primarily based on a combination of both legal belief that cultural State property on loan deserves protection and pragmatism in order to be seen as a ‘trustful and safe haven’ for international art loans.

2004 UN Convention on Jurisdictional Immunities of States and Their Property

I already referred to the recently adopted global legal instrument on State immunity: the UN Convention on Jurisdictional Immunities of States and Their Property. On 2 December 2004, the UN General Assembly adopted the convention by consensus.

Part IV of the 2004 UN Convention regards State immunity from seizure. It provides in general, but subject to certain limitations, for the immunity of a State from all forms of seizure in respect of *its property* or *property in its possession or control*. The term used in this convention is ‘measures of constraint’, and the convention makes a distinction between pre-judgment measures of constraint and post-judgment measures of constraint. The rule in regard to pre-judgment measures of constraint is rather absolute under the convention. With regard to the question whether property is entitled to post-judgment measures of constraint (also called immunity from execution), it is important to determine whether the property serves a commercial purpose (in which case no immunity applies), or whether the property

has a sovereign, governmental purpose (which makes the property entitled to immunity). This part of the convention also contains an article where State property is listed which shall not be considered as commercial property. Consequently, this property is immune from seizure (unless the State to which the property belongs has explicitly consented to seizure or has allocated the property for the satisfaction of the connected claim). The relevant article, Article 21, aims to secure the protection for certain specific categories of property. One category of property reads “property forming part of an exhibition of objects of scientific, cultural or historical interest and not placed or intended to be placed on sale.” State-owned exhibits for industrial or commercial purposes are not covered by this category. It should be borne in mind that the gist of Article 21, and especially the cultural category, has neither been disputed during the negotiations. Not only does that mean that the international community of States agreed with the interpretation contained in it (or at least was not against it), but it can also serve as an indication of the possible existence of a rule of customary international law.

In my view, the fact that cultural objects can be important for the identity of a State, the fact that cultural objects may help to understand the culture, history and development of a State, as well as the fact that cultural objects can be used as a means in the promotion of international cultural exchanges (codified in several international agreements) and the strengthening of bilateral or multilateral diplomatic relations, makes it fair to consider these cultural objects on loan as a category of protected State property.

What is a State and what is State property?

When we speak about a State, we should ask ourselves for a moment what is meant by that. Different national and international legal instruments each follow their own approach in regard to the definition of a State, and some have a more, and some a less inclusive definition.

With regard to a State museum, it may not be all that simple to state whether it is generally included within a definition of a State or not. The decisive question may be, whether the State museum is performing a governmental (or sovereign) act (*act jure imperii*) or essentially a commercial act (*act jure gestionis*). How to consider an art loan? On the one hand art loans do have the earmarks of a commercial act, as a ‘commercial act’ is generally described as an act which can also be performed by an individual private person. Thus, according to the *nature* of the act, an art loan should be regarded as an *act jure gestionis*. On the other hand, there may

be reasons to attach a public purpose to the art loan, as States have committed themselves to supporting the exchange of cultural objects through international legal instruments. Indeed, it seems quite plausible that lending and borrowing States act with a public, non-commercial, aim, for instance mutual understanding for each other's (cultural) history or re-establishment of bilateral diplomatic relations. It could thus indeed very well be that the *purpose* of the art loan has to be considered as one *jure imperii*. However, in regard to the question how an act is to be considered, in most jurisdictions solely or primarily the nature of the act is taken into account. That would then mean that an art loan is considered to be a commercial act and that the State museum performing this act does not fall within the definition of a State.

If an entity, such as a State museum, cannot be considered as included within the definition of a State, that does not mean that the cultural objects housed in that State museum are subject to seizure by definition. Immunised State property would be broader than solely property that is *owned* by a State. In the 2004 UN Convention property *owned* by the State and property *in its possession or control* would most likely be covered by the immunity provisions, although the exact scope has not yet been determined in practice. Based on my investigation, it would be fair to say that in any case property that is *State-owned* or of which the State serves as a *custodian* or has a *right of disposal* would fall under the immunity.

When would we be able to speak of a relationship between the objects concerned and the State as custodian (or as having a right of disposal)? In any case, it should be possible for the State to exercise certain rights and the State should have the legal authority to do so; the property should be in the possession of the State or else the State should have possibilities and capacities of determining the use of the objects. For instance, it should not be possible for the State to sell the objects, but it should be possible for the State to determine whether the objects could be loaned or not. In any case the exact limitations have not been properly established yet.

Thus, the cultural objects located in a (State) museum can under circumstances still be immune from measures of constraint when on loan abroad. After all, such a museum can house numerous different cultural objects; some of those objects may be owned by a State, a State may be able to exercise control over other objects, and some objects may not have a link with the State at all. In case a State has a connection through ownership, possession or control

with these objects, and the objects form part of an exhibition of scientific, cultural or historical interest and are not placed or intended to be placed on sale, then the objects would fall under the protection of immunity.

Opinions of States

I will now refer to some opinions of several of the important States in the field of international art loans on the question whether cultural State property on loan is immune from seizure under international law.

Within the European Union, the promotion of the mobility of collections is regarded as a key issue since the beginning of the millennium. Some years ago, an Expert Working Group ‘Mobility of Collections’ has been established under auspices of the European Commission. One of the subgroups of this Expert Working Group dealt with immunity from seizure. In 2009, the subgroup sent an enquiry of to all 27 Member States of the European Union. The most relevant question of the enquiry in regard to this presentation read: “Does your country, on the basis of (customary) international law, treat cultural property belonging to foreign States as goods intended for public use, and as meaning that those goods are considered to be non-commercial?” In answering that question, approximately half of the EU Member States have stated that they, on the basis of (customary) international law, treat cultural property belonging to foreign States as goods intended for public use and consider this cultural property as non-commercial goods by definition. These States were *Belgium, Cyprus, Denmark, Estonia, Finland, Malta, the Netherlands, Poland, Portugal, Romania, Slovenia, Spain* and *the United Kingdom*. It can be considered that the abovementioned States gave two messages: first, that they consider cultural property belonging to foreign States as goods intended for public, non-commercial, use. And second, that they do so on the basis of the belief that an underlying rule of customary international law exists. The fact that the other half of the EU Member States did not answer the aforementioned question to the affirmative does not mean that they had a different opinion. As a matter of fact, only Sweden answered the aforementioned question with a straightforward “no”. Many states did not have a firm opinion, or said that they doubted whether a rule of customary international law had already sufficiently developed.

I did not mention *Austria* in my listing. Austria answered the enquiry of the EU subgroup ‘Immunity from Seizure’ by stating that it did not wish to rely on a possible rule of customary international law. It considered a rule of customary international law prohibiting the seizure of cultural objects belonging to foreign States as insufficiently developed. However, in October 2005 at the time of the national ratification process of the earlier mentioned 2004 UN Convention, Austria stated that “the convention reflects the codification of existing customary international law with regard to State immunity in the field of civil law”. In June 2011, the Austrian Ministry of Foreign Affairs, competent in questions concerning immunity and international law, argued before the Austrian court in the *Diag Human* case that customary international law has been codified in Articles 18 to 21 of the 2004 UN Convention and that with regard to cultural State property on loan Article 21 of the 2004 UN Convention, with its protected categories, can be considered as the reflection of a rule of customary international law. Representatives of the *Czech Republic* were of the same opinion.

With regard to *Germany*, it is interesting to mention that in 2010 the Berlin Court of Appeals ordered that seizure of cultural objects belonging to a foreign State and temporarily on loan would be impermissible, as the objects served a sovereign, governmental purpose, and that these objects fell under the general principles of State immunity.

Switzerland has made very clear in public that it considers cultural objects belonging to foreign States and temporarily on loan as objects with a sovereign purpose and immune from seizure on the basis of customary international law. In November 2005, the Swiss Federal Ministry of Foreign Affairs stated: “Cultural goods of States are, based on international law, to be considered as public property, which can as a matter of principle not be subject to measures of constraint.” No opposing or rejecting reactions have been given by any other State to this. Moreover, when ratifying the 2004 UN Convention, the Swiss authorities stated that the Federal Court had determined that the convention should be seen as a codification of customary international law.

The Ministry of Foreign Affairs of the *Russian Federation* has stated that cultural State property on loan must be considered as goods intended for government non-commercial purposes on the basis of a rule of customary international law. Already in 2005, when confronted with the seizure of its own cultural objects on loan in Switzerland (the *Noga* case),

the Russian Federation firmly stated towards the Swiss authorities that on the basis of customary international law, these objects were protected against seizure, as it concerned objects with a sovereign, public purpose. The fact that the Russian Federation demands immunity from seizure guarantees from borrowing States has nothing to do with uncertainty about the existence of a rule of customary international law, but with the conditions as set forth in Article 30 of the Russian Law on Export and Import of Cultural Property, which demands, *inter alia*, a return guarantee from the borrowing State.

The *United States* sees an obligation to immunise cultural objects belonging to foreign States or foreign institutions against seizure and to facilitate cultural exchanges between States. Moreover, when cultural objects belonging to foreign States have been the focus in different court cases, the US authorities were very vocal in expressing towards the judiciary that these cultural objects should be immune from seizure. Regardless of the belief that it is necessary to protect these objects against seizure, the US authorities do not merely wish to rely on a possible underlying rule of customary international law.

Legislation of States

In 1965, the *United States* was the first country ever to enact immunity from seizure legislation. Several underlying constituent States have legislation as well, to name New York, Rhode Island and Texas. *France* was the first State within the European Union in 1994, followed by *Germany* (1999), *Austria* (2003), *Belgium* (2004) and the *United Kingdom* (2007). Also, *the Netherlands* has immunity from seizure legislation, although not specifically referring to cultural objects but to State owned objects intended for public service (which could include cultural objects as well – I will come to that in a while). *Switzerland* enacted legislation in 2005, *Liechtenstein* in 2007, and *Finland* and the *Czech Republic* in 2011. Currently, legislation is in development in *Hungary*, *Poland* and *Italy*.

Israel has enacted legislation in 2007. *Canada* does not have a federal immunity from seizure Act which is specially addressed towards cultural objects, but five provinces adopted immunity legislation in the late 1970's and the early 1980's: British Columbia, Ontario, Quebec, Alberta and Manitoba. *Japan* enacted immunity legislation for cultural State property in 2010, in order to implement the 2004 UN Convention, and for other cultural

property in 2011. Also the *territory of Taiwan* has its own immunity legislation for cultural objects on loan.

Why did States enact legislation? Some States which already accept the existence of a rule of customary international law have also enacted specific immunity from seizure legislation. Examples are Belgium, Switzerland, the United Kingdom and Finland. But with the exception of Belgium, the legislation of these States protects more than cultural property belonging to foreign States, namely also privately owned cultural objects, so that may be a reason for the legislation. Dualist States may also enact legislation in order to implement rules of international law in their domestic legal system. Another reason for legislation may be, that it helps to guide the judiciary in its assessments, so that it does not need to determine *proprio motu* the possible existence of a rule of international law, as well as its limitations. Moreover, a reason for enacting legislation may also have been, that because of the wishes of *other* States, those States enacting legislation wanted to show that objects of the lending States would in any event be safe in their jurisdiction. But generally the borrowing States also felt themselves that they had a legal obligation to protect the objects.

Situation in the Netherlands

The Netherlands has a rather interesting legislative system concerning immunity for States and their property. The combination of provisions contained in the Act on General Provisions of Kingdom Legislation, the Code of Civil Procedure and the Court Bailiffs Act gives a fairly overlapping protection, whereby it is of course always the judiciary which has the last say when it comes to the judicial interpretation of these provisions.

The Netherlands has repeatedly expressed the opinion that, based on customary international law, cultural objects belonging to foreign States and on temporary loan in the Netherlands are to be considered as property intended for public service, as long as the objects do not clearly have a commercial goal (e.g. are offered for sale). As such, these objects are immune from seizure.

The Netherlands has two relevant Articles in its Code of Civil Procedure which state that “goods intended for public service may not be seized”. Article 436 of the Code of Civil Procedure regards post-judgment measures of constraint, whereas Article 703 regards pre-

judgment measures of constraint. As stated, it is established practice to treat cultural objects of a foreign State that are in the Netherlands temporarily for an exhibition as goods intended for public service. For the protection under the Code of Civil Procedure, it is not by definition necessary that the objects concerned are State property. Decisive is whether the objects are intended for public service. Thus also objects belonging to a museum, but intended for public service, can fall under the protection of the Code of Civil Procedure.

In addition to the provisions of the Code of Civil Procedure, and with reference to the Dutch view as just expressed, Section 13a of the Act on General Provisions of Kingdom Legislation applies. That section contains a very general directive for the Judicial Branch, *viz.*: “The jurisdiction of the courts and the execution of judicial decisions and deeds are subject to the exceptions recognised in international law.” It is thus recognised that under conventional and customary international law certain persons or institutions cannot be made defendants in proceedings in Dutch courts and certain property cannot be made the subject of enforcement proceedings. And cultural State property falls within that category, according to the Dutch government.

In the unlikely event that a cultural object of a foreign State is at risk of seizure, Section 3a of the Court Bailiffs Act applies. That section empowers the State to intervene if it considers that the service of a notification of seizure would be contrary to the obligations of the Netherlands under international law. And as we have seen, the Netherlands considers it an obligation under international law to protect cultural State property on loan against seizure.

Under this Section 3a, a bailiff who is instructed to perform an official act shall immediately notify the Minister of Justice if he has reason to believe that performing the seizure might be incompatible with the Netherlands' obligations under international law. In turn, the Minister may notify a bailiff that an act of seizure which the bailiff is planning to perform is incompatible with the Netherlands' obligations under international law. When preparing this notification, the Minister of Justice will consult the International Law Division of the Ministry of Foreign Affairs as to whether or not the act of seizure in question would be in breach of international law. The advice of the Ministry of Foreign Affairs in these matters is usually followed. The consequence of the notification is that the bailiff is no longer competent in performing the act.

Although it is the intent of the law that, because of the obligation to inform, the Minister has the chance to act timely in order to prevent seizures which would be contrary to international law, one cannot exclude that situations could occur where prevention is not possible, for example because the minister was not informed beforehand of the seizure. In the unlikely event that State property has already been seized, the seizure must be cancelled on the basis of the Minister's notice.

What one should keep in mind at all times, is that whatever notification the Executive can give, the final ruling is always up to the judiciary. The Judicial Branch, however, concedes that when interpreting and applying customary international law in particular, the courts should take into account the fact that the government, as the representative of the State in dealings with other States, also helps sculpting the law by disseminating its views on what the law is.

Since the beginning of the 21st century, the Netherlands issues so-called 'Guarantor's Declarations', which are actually letters of comfort. From a legal point of view, such a 'letter of comfort' cannot be considered as 'hard law', contrary to immunity from seizure legislation, but merely as a reassurance to the lender and as a commitment of effort that in case an attempt to seize the objects would be made, the authorities of the borrowing State (in this case, the Netherlands) will do everything in their power to prevent or stop that. Approximately twenty such declarations are issued by the Dutch Government each year and mostly requested by the Russian Federation, but occasionally also by the United States, Turkey, Germany and one or more other States. The Ministry of Foreign Affairs is currently charged with issuing such declarations.

Within the *European Union*, the Netherlands is not the only State which acts accordingly. Fourteen Member States issue, or have issued, 'letters of comfort', which are described as written confirmations from a representative of the government that the borrowing State will do everything within its power to safeguard the item from seizure. These States are Cyprus, Estonia, Finland, Greece, Hungary, Italy, Lithuania, the Netherlands, Poland, Portugal, Romania, Slovenia, Spain and the United Kingdom. Other States also have the possibility to issue such letters, for instance, the Russian Federation and Japan.

It should be emphasised that this Dutch commitment in the form of a best endeavours obligation regards all cultural objects on loan, thus not only cultural objects belonging to foreign States, although because of the 2004 UN Convention and the applicable Dutch legislation cultural State property on loan in the Netherlands enjoys more protection than privately owned cultural objects.

Conclusions

I have almost reached the end of my presentation. What did I conclude on the basis of my investigations? First of all, it occurred to me that in recent years, there is a growing State practice pointing towards protection against the seizure of cultural objects on loan belonging to foreign States. Many States consider cultural objects belonging to foreign States and on temporary loan as State property in use or intended for use for government non-commercial purposes and already for that reason immune from measures of constraint. They sometimes count on the general rule of customary international law that State property in use or intended for use for government non-commercial purposes is immune from measures of constraint, but a considerable number of States also count on the existence of a *specific rule* of international law immunising cultural State property on loan.

With regard to the existence of such a separate specific rule of customary international law, I would come to the conclusion that indeed a relatively young rule of customary international law exists, although not yet firmly established or well defined in all its aspects, stating that cultural objects belonging to foreign States and on temporary loan for an exhibition are immune from seizure. The rule only applies to cultural objects in use or intended for use by the State for government non-commercial purposes, so the objects should, for instance, not be placed or intended to be placed on sale. I would say that the rule applies not only to State-owned property, but also to property in possession or control of a State.

Is there cultural State property which does not fall under immunity under customary international law?

It became clear to me that although States want to immunise cultural objects on loan, they also want to prevent and to combat illicit acquisition or unlawful removal of cultural objects and strive for the return to the State of origin.

I have stated earlier, that in order to be considered as a rule of customary law, a rule needs to be based, among other things, on a widespread, representative and virtually uniform practice of States. It is not necessary that a rule is entirely accepted worldwide, but the practice should reflect wide acceptance among the States particularly involved in the relevant activity.

With regard to some categories of cultural State property, this wide, virtually uniform acceptance is absent. The first category regards cultural objects plundered during armed conflict. The plunder of cultural objects during armed conflict is nowadays quite generally considered as a serious breach of an obligation arising under a peremptory norm of general international law (a norm accepted and recognised by the international community of States as a whole as a norm from which no derogation is permitted; also called a *jus cogens* norm). Under international law, States are obliged to refrain from recognising such a situation as lawful and should not assist in the maintenance of that situation or its consequences. Based on my study, I would say that, generally speaking, the main sentiment among States is indeed that such objects should not deserve protection. Although not legally but certainly morally binding, many States subscribed to the 1998 Washington Principles on Holocaust Era Assets, the 2000 Vilnius Declaration on Holocaust Era Looted Cultural Assets or the 2009 Terezin Declaration on Holocaust Era Assets and Related Issues. Moreover, several States established Restitution or Spoliation Committees in order to restitute cultural objects to heirs of World War II victims. And currently in the United States of America, draft legislation is currently under assessment of the Senate which would make it impossible for cultural property illicitly taken during the Holocaust to enjoy immunity.

When it comes to the relationship between immunity from seizure for cultural State property on loan on the one hand, and return obligations under the *1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property*, the *1995 Unidroit Convention on Stolen or Illegally Exported Cultural Objects*, or the *Council Directive 93/7/EEC on the return of cultural goods unlawfully removed from the territory of a Member State* on the other, the outcome is more or less the same. Although here we are not confronted with a so-called *jus cogens* norm and neither with the immense harm doing during armed conflict, it became clear to me during my investigations that there is no uniform, even sometimes contrary State practice in this regard: different States have different opinions (and act differently) as to whether immunity from seizure can be set aside by international or community law with which it may be at odds, or as

to whether immunity from seizure for cultural objects on loan extends to objects which are subject to international or European return obligations. Some states are of the opinion that in case a return obligation to the State of origin exists under international or European law, the cultural objects concerned cannot be eligible for immunity, whereas other States are of the opinion that in such a situation the immunity remains untouched. It is purely based on the fact that I noted a lack of the virtually uniform State practice, necessary for the establishment of a rule of customary international law, that I had to conclude that a rule of customary international law does not apply to these cultural objects.

Annex 1: Applicable legislation in the Netherlands

Code of Civil Procedure

Article 436

Goods intended for public service may not be seized.

[relates to seizure of assets under a writ of execution]

Article 703

Goods intended for public service may not be seized.

[relates to pre-judgment seizure]

Act on General Provisions of Kingdom Legislation

Section 13a

The jurisdiction of the courts and the execution of judicial decisions and deeds are subject to the exceptions recognised in international law.

Court Bailiffs Act

Section 3a

1. A court 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 court 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.

5. If, when he receives notification as referred to in subsection 2, the court 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 invalid.

6. If, when a court bailiff receives notification as referred to in subsection 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 subsection 5 and the obligations referred to in subsection 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.

Annex 2: Information letter, provided by the Government of the Netherlands, as annex to its guarantor's declaration

Below is an explanation of the guarantor's declaration for art objects on loan from a foreign State for exhibition in the Netherlands.

Property forming part of the cultural heritage of a foreign State is, to a large extent, immune from seizure in the Netherlands under Dutch law (see below) and international law.

First, the Dutch Code of Civil Procedure (Wetboek van Burgerlijke Rechtsvordering) contains two provisions prohibiting the seizure of goods intended for public service. (One of the provisions bans pre-judgment seizure, the other bans seizure of assets under a writ of execution to levy a judgment debt.) It is established judicial practice to treat cultural goods of a foreign State that are in the Netherlands temporarily for an exhibition as goods intended for public service. Support for this practice can be found in international law. Article 21 of the 2004 UN Convention on Jurisdictional Immunities of States and Their Property explicitly states that 'property forming part of an exhibition of objects of scientific, cultural or historical interest and not placed or intended to be placed on sale' should be considered goods intended for public service. When the Convention was drafted, there was no controversy whatsoever among the States Parties concerning this matter. Consequently, it may be explicitly assumed that this is an applicable rule of international law.

In addition to the aforementioned provisions of the Code of Civil Procedure, section 13a of the General Legislative Provisions Act (Wet Algemene Bepalingen) applies. This provision states that the courts must take into account exceptions recognised by international law when determining whether they have jurisdiction. International law recognises, for example, that certain categories of persons and property enjoy immunity from the jurisdiction of foreign courts. This applies to property forming part of the cultural heritage of a foreign State that is temporarily on loan for an exhibition. The aforementioned exception does not apply to property that serves a commercial purpose in that it is placed or intended to be placed on sale.

On the basis of the aforementioned legislation and the cited provision of international law, firmer guarantees can be given for cultural goods that are the property of foreign States than privately owned cultural goods.

A guarantor's declaration relates to immunity from seizure and declares that the State of the Netherlands will do everything that is legally within its power to prevent the seizure of such goods.

In the unlikely event that a cultural object of a foreign State is at risk of seizure, section 3a of the Court Bailiffs Act (Gerechtsdeurwaarderswet) applies. Before carrying out the intended seizure of the object, the bailiff levying the seizure is required to contact the Ministry of Justice, which will ask the International Law Division of the Legal Affairs Department of the Ministry of Foreign Affairs to determine whether seizure would be contrary to the State's obligations under international law. If so, the Minister of Justice can issue a notice to the bailiff stating that the object may not be seized. In the unlikely event that such an object has already been seized, the seizure must be nullified on the basis of the Minister's notice.

Due to the aforementioned legislation and judicial practice in the Netherlands, the risk of property forming part of the cultural heritage of a foreign State being subject to seizure in the Netherlands is minimal.

There is, however, one important exception to the aforementioned rule. The plunder of cultural objects during armed conflict is to be considered as a serious breach of an obligation arising under a peremptory norm of general international law. Under international law, States are obliged to refrain from recognising such a situation as lawful and should not assist in the maintenance of that situation or its consequences. The provision of immunity for such illicitly acquired objects would be at odds with this obligation. The guarantor's declaration does, therefore, not apply to such cultural objects (including *judaica*).

Should you require more information about the legal aspects of the guarantor's declaration and immunity of cultural goods, please contact the International Law Division of the Legal Affairs Department of the Ministry of Foreign Affairs (Nout van Woudenberg, tel. +31 (0)70 348 6144). If you have any questions about this Ministry's provenance and research policy,

please contact the International Cultural Policy Unit (Gerdien Verheuver, tel. +31 (0)70 348 6581).



