STATE IMMUNITY IN CIVIL PROCEEDINGS - COMPARATIVE NOTES AND CRITICAL ANALYSIS

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IMMUNITY FROM JURISDICTION IN CIVIL PROCEEDINGS IN WHICH A FOREIGN STATE IS NOT NAMED AS A PARTY[1]

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[1] The present paper is partly based on an expert opinion provided by the authors at the request of the appellant in the case which led to the judgment of the Court of Appeal of 's-Hertogenbosch discussed below (see *infra*, n. 4). The views and opinions expressed in this paper are solely those of the authors. Unless otherwise indicated, footnotes in citations have been omitted. The authors would like to express their gratitude to Prof. dr. Nicolas Angelet for his kind assistance in obtaining some research materials which would otherwise not have been available to us.

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ABBREVIATIONS

CAVV	Dutch Advisory Committee on questions of international law
ECSI	European Convention on State Immunity
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
ICJ	International Court of Justice
ILC	International Law Commission
NATO	North Atlantic Treaty Organization
UN	United Nations
UNCSI	United Nations Convention on Jurisdictional Immunities of States and Their Property
UNGA	General Assembly of the United Nations
VCLT	Vienna Convention on the Law of Treaties

1. INTRODUCTION

1. Dutch courts are no stranger to civil proceedings involving foreign States, particularly in the past two decades. It goes without saying that the doctrine of State immunity plays a critical role in such proceedings. Generally speaking, this doctrine compels a Dutch court to decline jurisdiction in a case against a foreign State unless an exception applies, for example in case of a voluntary appearance (waiver) or if the claim relates to acts performed by that foreign State as if it were a private individual (*acta iure gestionis*). It also goes without saying that for State immunity from jurisdiction to apply, the foreign State must be a party to proceedings. This is obviously the case where the foreign State is formally named as such because it is one of the defendants. But what if the foreign State is not formally one of the defendants?

2. This question is particularly important because we are currently seeing an increase in proceedings between private parties (or between private parties and the (Government of the) forum State), in which (the lawfulness of) the exercise of public authority by a foreign State is a critical aspect of the proceedings but in which that foreign State is not named as one of the formal defendants. Examples include civil proceedings against private companies or (the Government of) the forum State for their (alleged) complicity in or contribution to human right violations by a foreign State. One such case is a civil lawsuit against several Dutch companies for supplying raw materials for mustard gas later used by the former Iraqi regime in the war with Iran in the 1980s which was brought before the Dutch courts in 2021 by victims of those poison gas attacks.[2] Another example are proceedings brought before the Dutch courts by three interest groups against the State of the Netherlands because it continued to allow the export and transit to Israel of parts for F-35 fighter jets (Joint Strike Fighter).[3] The Dutch courts also had to rule recently in a civil case between two private parties where the claimant company was seeking a court declaration and accompanying injunction against the defendant company because the latter had allegedly acted unlawfully by taking advantage of the withdrawal by the Cuban Government of the claimant company's exclusive brewing rights in Cuba. The defendant company argued that the Dutch courts did not have jurisdiction and relied on Cuba's immunity from jurisdiction.[4]

3. Proceedings like this are not just a Dutch phenomenon, on the contrary. Cases similar to the F-35 case, were or are being heard by courts in many other countries.[5] Civil proceedings regarding the expropriation of property by a foreign

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2 See Rechtbank Den Haag, 15 November 2023, ECLI:NL:RBDHA:2023:17263. For a more detailed description of this case see Annex II, para. 54.

3 See Gerechtshof Den Haag, 12 February 2024, ECLI:NL:GHDHA:2024:191.The judgment has been appealed by the Dutch State to the Supreme Court of the Netherlands. For a more detailed description of this case see Annex II, para. 55.

4 See Gerechtshof 's-Hertogenbosch, 23 July 2024, ECLI:NL:GHSHE:2024:2380. For a more detailed description of this case see Annex II, paras. 56-61.

5 For example in Australia, Canada, Denmark, Germany and the United Kingdom. For a detailed

State and subsequent transfer of such property to a private party have also been heard by courts all over the world.[6] Spanish courts, for example, recently had to rule on a claim initiated by the legal successor of two expropriated Cuban companies against a Spanish hotel chain operating two hotels on the expropriated land, claiming that there had been unjust enrichment because the hotel chain was operating the hotels knowing that the expropriation was unlawful under international law in the absence of any compensation. The Spanish hotel chain *inter alia* relied on Cuba's immunity from jurisdiction. South African courts were recently confronted with a similar question in a case between two companies concerning a telecommunications license in Iran. According to the claimant company, it had obtained a license to operate a GSM network in Iran following a public tender, but the defendant company had bribed Iranian officials to induce Iran to breach that contract, after which the claimant company was replaced by the defendant company. The defendant company *inter alia* relied on Iran's immunity from jurisdiction.[7]

4. In some of these cases an appeal to immunity from jurisdiction was granted, in other cases it was rejected and in some cases immunity from jurisdiction was not even relied on (nor did the court assess *ex officio* whether immunity from jurisdiction applied). Why? What is the dividing line? Is there a 'tipping point' and, if so, how and where is that point to be found? These are the questions at the heart of this paper.

5. The reason to address these questions now is not only the apparent increase of cases where they play a role but also the fact that the Netherlands has recently ratified the United Nations Convention on Jurisdictional Immunities of States and Their Property (UNCSI). As we shall see later on in this paper, Article 6(2)(b) UNCSI explicitly addresses the question of cases in which the foreign State is not formally named as a party and is therefore often cited in recent cases. As we shall see also below, however, the UNCSI has not (yet) entered into force due to a lack of sufficient ratifications. Whether it will ever enter into force is uncertain but this is certainly not to be expected in the short term. That said, we believe the UNCSI cannot and should not be ignored, if only because it could shed light on the current state of customary international law on the topic. For similar reasons we will also briefly discuss the European Convention on State Immunity (ECSI).

6. We have decided to formulate the following research questions for this paper:
   1) A. Does the UNCSI and/or ECSI require a grant of immunity from jurisdiction in civil proceedings between two private parties in which the claimant seeks a declaratory judgment that the defendant has acted unlawfully which will require the forum court, as a preliminary to its ultimate decision, to examine and pronounce an opinion on (the legality of) *acta iure imperii* of a foreign State which itself is not named as a party to the proceedings?
      B. Is this answer different if the plaintiff requests not (only) a declaratory judgment but (also) compensation for damages and/or injunctive relief (such as a court order that the defendant refrain from certain conduct)?
   2) Is the answer to questions 1A and 1B different under customary international law?

7. This paper is structured as follows. We will first discuss Article 6(2)(b) UNCSI (Section 2) and in particular how that article should be interpreted, including by having a look at the rules of treaty interpretation (paragraph 2.2.1), the *travaux préparatoires* of the UNCSI (paragraph 2.2.2), the discussion of Article 6(2)(b) during the ratification procedure in those countries which have already ratified the UNCSI (paragraph 2.3), scholarly writings on Article 6(2)(b) (paragraph 2.4), and the interpretation of Article 6(2)(b) in case law (paragraph 2.5). The ECSI will briefly be touched upon in Section 3. This first part will end with our answer to research question 1 (Section 4). The second part of the paper (Section 5) will focus on customary international law. We will finish this paper with a summary and concluding remarks (Section 6) and some propositions for the discussion (Section 7).

8. Due to its extensive nature, we have included both our research into the *travaux préparatoires* of the UNCSI and our research into immunity legislation and case law in two separate annexes. The conclusions we draw from this research are included in this paper. This paper can be read without recourse to the annexes, but anyone interested in seeing the supporting evidence and sources is recommended to consult the annexes.

2. UNITED NATIONS CONVENTION ON JURISDICTIONAL IMMUNITIES OF STATES AND THEIR PROPERTY

9. As indicated above, the UNCSI explicitly addresses the issue of State immunity in civil proceedings where the foreign State is not formally named as a party to those proceedings. More specifically, Article 6 UNCSI provides:

> Article 6 – Modalities for giving effect to State immunity
> 1. A State shall give effect to State immunity under article 5 by refraining from exercising jurisdiction in a proceeding before its courts against another State and to that end shall ensure that its courts determine on their own initiative that the immunity of that other State under article 5 is respected.
> 2. *A proceeding before a court of a State shall be considered to have been instituted against another State if that other State*:
> (a) is named as a party to that proceeding; or
> (b) *is not named as a party to the proceeding but the proceeding in effect seeks to affect the property, rights, interests or activities of that other State*. [our emphasis; CvdP/TD]

10. Assuming the UNCSI will enter into force one day, the exact meaning of

overview, see <https://armstradelitigationmonitor.org/case-overviews/>; visited on 24 June 2025.

6 For a more detailed description of such cases see Annex II.

7 Supreme Court of Appeal of South Africa, Judgment, *East Asian Consortium B.V. v. MTN Group Limited et al.*, Case No. 225/2023 [2025] *ZASCA* 50 (29 April 2025), 29 April 2025. For a more detailed description of this case see Annex II, paras. 84-86.

Article 6(2)(b) will without doubt be of great importance to the topic discussed in this paper. However, it should be noted that even if and when it enters into force, the UNCSI will only bind a State party in its relations towards another State party.[8] Since ratification by 'just' 30 countries is required for the UNCSI to enter into force[9] (whereas there are more than 190 countries in the world in total),[10] the UNCSI will therefore not be legally binding in the relationship between the Netherlands (or any other State party for that matter) and the vast majority of countries in the world that have not (yet) ratified the UNCSI. In its relations with those non-State parties, the UNCSI is only relevant to the extent that it reflects customary international law. However, in order to establish if this is the case, one must, of course, first establish the meaning of the specific article in the convention that is being relied on.

11. In other words: regardless of whether the UNCSI will enter into force one day (and if it does, if it will be applied in a case involving another State Party), it is critical to establish what Article 6(2)(b) exactly means.[11] Under those circumstances we deem it appropriate to start with a detailed analysis of the meaning of Article 6(2)(b) before moving on to an assessment of the customary law nature of the provision.

2.1 Article 6(2)(b) in context: no immunity-creating provision

12. Before doing so, however, it is important to emphasize that Article 6(2)(b) does *not* create immunity by itself. The provision (only) stipulates in which cases, notwithstanding that a foreign State is not formally named as a defendant to the proceedings, these proceedings must nevertheless be deemed to be brought against this foreign State.

13. Pursuant to Article 6(1), the domestic court must in such a case assess, where necessary *ex officio*, if Article 5 UNCSI applies (which provides that a foreign State enjoys immunity 'subject to the provisions of this Convention'). In other words: even if on the basis of Article 6(2)(b) the proceedings are to be deemed to have been instituted against the formally non-defendant foreign State, this does not automatically mean that there is immunity from jurisdiction. After all, the other provisions of the UNCSI, including those in Part III ('Proceedings in which State Immunity Cannot be Invoked') must still be applied.[12] Conversely, if the foreign State is not formally named a defendant and the proceedings can also not be deemed to have been instituted against this foreign State on the basis of Article 6(2)(b), immunity from jurisdiction simply does not come into play.

2.2 Meaning of Article 6(2)(b) UNCSI

2.2.1 *Treaty interpretation*

14. Having thus placed Article 6(2)(b) in its proper context, we turn to the question of its exact meaning. When are we concerned with a proceeding in which the foreign State is not named as a defendant, but which 'in effect seeks to affect the property, rights, interests or activities of that other State'? This, of course, is a matter of treaty interpretation. The rules in this regard have been confided in articles 31 to 33 of the Vienna Convention on the Law of Treaties (VCLT), which are generally considered to reflect customary international law.[13]

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[8] See also p. 23 of the Commentary to the ILC Draft Articles that would ultimately become the UNCSI ('If the articles became a convention, they would be applicable only as between the States which became parties to it.')

[9] See Art. 30 of the UNCSI.

[10] The United Nations currently has 193 Member States (see <https://www.un.org/en/about-us>), a number which does not (yet) include jurisdictions such as the Holy See, the State of Palestine and the Republic of China (Taiwan).

[11] The only difference is, of course, that in case of (the eventual) entry into force of the UNCSI, the courts of the Contracting States would still be bound by Art. 6(2)(b) even to the extent that it does not reflect customary international law and goes further than the obligations of those States would have under customary international law. In that case, however, another interesting point arises for the States bound by the European Convention on Human Rights (ECHR) namely to what extent the right of access to a court as guaranteed by Art. 6 would not lead to a 'clash' of binding legal obligations for those States. After all, the case law of the European Court of Human Rights (ECtHR) suggests that – as far as State immunity is concerned – a restriction of the right of access to a court will only be considered proportionate if it is in line with '*generally recognized rules of public international law on State immunity*' which would not be the case in this scenario. Interesting as this question may be, it would go beyond the scope of this article to analyse it in more detail, if only in light of the (for now) rather hypothetical nature of the issue since entry into force of the UNCSI is not to be expected any time soon. See also Supreme Court of the United Kingdom, *Argentum Exploration Ltd. v. Republic of South Africa* [2024] *UKSC* 16, 8 May 2024, paras. 111-116 where this question was also touched upon (but ultimately left undecided as the Supreme Court considered that customary international law required a grant of immunity in that case).

[12] In this sense, see also the commentary prepared by the International Law Commission (ILC) on the Draft Articles on Jurisdictional Immunities of States and Their Property underlying the UN Immunities Convention as published in *Yearbook of the International Law Commission*, 1991, vol. II, Part Two, UN Doc. A/CN.4/SER.A/1991/Add.l (Part 2), p. 13 *et seq*. (hereinafter ILC Commentary). The commentary on Art. 6 states, *inter alia*, that '[o]f course, the obligation to give effect to State immunity stated in article 6 applies only to those situations in which the State claiming immunity is entitled thereto under the present draft articles. […] The expression 'shall ensure that its courts' is used to make it quite clear that the obligation was incumbent on the forum State, which is responsible for giving effect to it in accordance with its internal procedures. The reference to article 5 indicates that the provision should not be interpreted as prejudging the question whether the State was actually entitled to benefit from immunity under the present articles.' Earlier reference to this had also been made on behalf of the Drafting Committee. See *Yearbook of the International Law Commission* 1990, vol. I, UN Doc. A/CN.4/SER.A/1990, p. 311 ('With regard to [article 6] paragraph 2, the Drafting Committee had first observed that its purpose was to lay down a criterion whereby it would be possible to determine whether or not a proceeding should be regarded as having been instituted against a State and that it left open entirely the question whether the State concerned would or would not ultimately be recognized as benefiting from immunity.')

[13] See, for example, ICJ, *Sovereignty over Pulau Ligitan and Pulau Sipadan* (Indonesia/Malaysia) (Judgment), 17 December 2002, para. 37. The Dutch Supreme Court also considers Arts. 31-33 VCLT to reflect customary international law. See, for example, Hoge Raad, ECLI:NL:HR:2017:2992, para. 3.4.2.

15. Pursuant to the main rule of Article 31 VCLT, a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose. Paragraph 3 of Article 31 VCLT provides that when interpretating a treaty, account should also be taken of 'any relevant rules of international law applicable in the relations between the parties' which can be said to include customary international law. In fact, as Fortuna puts it 'it is common practice among international courts and tribunals to use customary rules to interpret treaties'.[14] Looked at it from this perspective, our analysis of customary international law – to be discussed later on in this article – is therefore also relevant when interpretating Article 6(2)(b) UNCSI.[15]

16. Although the text and context of a treaty (including customary international law) are thus put front and centre by the VCLT they are not the end of the story. Pursuant to Article 32 VCLT, recourse may be had to supplementary means of interpretation (including the *travaux préparatoires*) to determine the meaning of a treaty provision when the interpretation according to Article 31, (a) leaves the meaning ambiguous or obscure; or (b) leads to a result which is manifestly absurd or unreasonable.

17. In this regard it cannot but be noted that several ILC members had great difficulty with some of the terms used in Article 6(2)(b) (such as 'interests') and both scholars and courts have referred to Article 6(2)(b) UNCSI as 'ambiguous' and 'vague'.[16] As we shall see later on in this article, academic literature, courts and legislators have also struggled to determine the exact meaning of the provision.

[14] See M. Fortuna, 'Interpretation of Customary Rules by Reference to Treaties and General Principles of Law', in: *Customary International Law and Its Interpretation by International Courts Theories, Methods and Interactions*, Cambridge University Press, Cambridge 2024, p. 265 with further references. See also, for example, S. Ratner, 'International Law Rules on Treaty Interpretation', in: *The Law and Practice of the Ireland-Northern Ireland Protocol*, Oxford University Press, 2022, p. 87. A case often cited in this regard is the *Jan Mayen* case, where the ICJ held that Art. 6 of the 1958 Convention on the Continental Shelf was to be interpreted and applied by reference to customary law (See ICJ, Maritime Delimitation in the Area between Greenland and Jan Mayen (*Denmark v. Norway*), Judgment of 14 June 1993, para. 46).

[15] In fact, since rules contained in treaties can aid determination of the existence of rules of customary international law, one could even say the two are in a sense intrinsically linked. See ibid. and Conclusion 11 of the ILC's Draft Conclusions (with commentary) on the 'identification of customary international law', *infra* para. 101.

[16] See Z. Douglas, 'State Immunity for the acts of state officials', *The British Yearbook of International Law* (2012), Vol. 82 No. 1, p. 313: 'This provision is hopelessly ambiguous. When does a proceeding in the forum state 'in effect seeks to affect' the 'interests or activities' of the foreign state? (...)'; Lord Mance in Supreme Court of the United Kingdom, *Belhaj et al. v. Straw et. Al*. [2017] *UKSC* 3, 17 January 2017, para. 25: 'To attach equivalent relevance to the use in a Convention with no binding international status of the ambiguous terminology of article 6(2)(b) is to take Lord Bingham's words out of context'; J. Foakes and E. Wilmshurst, 'UN Convention on Jurisdictional Immunities of States and Their Property', 7 *Business Law International* 2006, No. 2, p. 119: 'But under the Convention [the rules on state immunity; CvdP/TD] also apply even if a state is not sued directly, but if the legal proceedings would affect the property, rights, interests or activities of a state. This is very wide and vague. Should questions of immunity really be raised if the value of a state's embassy, a government's political interests, or its tourist activities is somehow touched on in legal proceedings between other people?'.

Under those circumstances it is not only very interesting to establish how Article 6(2)(b) was intended by the drafters, but an analysis of the *travaux préparatoires* to determine its proper meaning is in our view also warranted in light of Article 32 VCLT. All the more so when taking into account that the Chairman of the Ad Hoc Committee on Jurisdictional Immunities, established by the General Assembly of the United Nations (UNGA) in the final stages of the drafting process of the UNCSI, made the following comment about the importance of the *travaux préparatoires* in understanding the UNCSI:

> Generally, it must be borne in mind that this Convention will have to be read in conjunction with the commentary as prepared by the ILC, at least as far as the text has remained unchanged as submitted by the ILC. The ILC Commentary, the Reports of the Ad Hoc Committee and the UN General Assembly Resolution adopting the Convention will form an important part of the travaux préparatoires of the Convention. This common reading of the text of the Convention and the commentary will certainly clarify the text if certain interpretative questions still remain.[17]

2.2.2 *The* travaux préparatoires *of Article 6(2)(b)*

General introduction

18. The UNCSI was the end result of a decades long process which for the most part unfolded in the International Law Commission (ILC) of the United Nations. The ILC first considered the matter in 1979 by means of a preliminary report of its Special Rapporteur. It concluded its work in 1991 by the adoption, in second reading, of a final set of the Draft Articles on Jurisdictional Immunities of States and Their Property (hereinafter the 'ILC Draft Articles') as well as an accompanying commentary (hereinafter: the 'ILC Commentary').[18] It then took until 2004 – so another 13 years – for these draft articles to be 'transformed' in a convention and formally adopted by the General Assembly of the United Nations (UNGA) as the UNCSI.

19. Article 6(2)(b) in the ILC Draft Articles adopted in 1991 is identical to Article 6(2)(b) in the UNCSI and was not among the controversial issues holding-up adoption of a formal convention.[19] This means that the weight of our analysis of

[17] See Summary Record of the 13th Meeting of the Sixth Committee of the UNGA, UN Doc. A/C.6/59/SR.13, para. 35.

[18] See Draft articles on Jurisdictional Immunities of States and Their Property, with commentaries. Text adopted by the International Law Commission at its forty-third session, in 1991, and submitted to the General Assembly as a part of the Commission's report covering the work of that session (A/46/10, at para. 28).

[19] Instead, the controversial issues were (as summarized in 1993 by the Chairman of the working group set up by the UN General Assembly): 'first, the definition of the term 'State' and of the term 'commercial transaction' (Art. 2, paragraph 1), including the question of the criterion to be applied in determining whether a contract or transaction is a 'commercial transaction' (Art. 2, paragraph 2); second, the question of the legal distinction as the Chairman of the working group summarized

the *travaux préparatoires* of Article 6(2)(b) lies in the coming about of the ILC Draft Articles.

The ILC and its working procedure

20. Given this focus on the ILC Draft Articles it is useful to provide some background on the ILC and how it works. The ILC was established by the UNGA, in 1947, to undertake the mandate of the General Assembly, under Article 13(1)(a) of the Charter of the United Nations to 'initiate studies and make recommendations for the purpose of [...] encouraging the progressive development of international law and its codification'.[20] This dual mandate of the ILC is also reflected in the ILC Statute adopted by the UNGA.[21] Article 15 of this statute ('for convenience') defines 'progressive development' as meaning 'the preparation of draft conventions on subjects which have not yet been regulated by international law or in regard to which the law has not yet been sufficiently developed in the practice of States' and 'codification' as meaning 'the more precise formulation and systematization of rules of international law in fields where there already has been extensive State practice, precedent and doctrine'. However, the ILC itself has on occasion voiced scepticism of the possibility to draw such a strict distinction between progressive development and codification and, in practice, its work on a topic usually involves some aspects of the progressive development as well as the codification of international law, with the balance between the two varying depending on the particular topic.[22]

in 1993, a State and certain of its entities in the matter of State immunity from foreign jurisdiction (a question which the International Law Commission (ILC) had dealt with in Art. 10, paragraph 3, of its draft, and which the Working Group addressed mostly in the framework of Art. 5); third, the exception of 'contracts of employment'; and fourth, the question of immunity from measures of constraint in connection with proceedings before a court.' See Report of the Chairman of the Working Group, A/C.6/48/L.4. See also, for example, the observations by the Netherlands in the UNGA in 1999 referring to three remaining key issues by that time: 'firstly, it was necessary to clarify the distinction between acta jure imperii and acta jure gestionis; secondly, it was necessary to determine which entities could, from the 'legal standpoint, enjoy jurisdictional immunity and, lastly, it was necessary to establish the extent of immunity from execution'. See A/C.6/52/SR.26, p. 5, 11 November 1993, para. 6.

[20] See United Nations General Assembly, Resolution 147 (III), 21 November 1947, UN Doc. A/RES/174(II).

[21] See Art. 1(1) of the Statute of the International Law Commission according to which the ILC 'shall have for its object the promotion of the progressive development of international law and its codification.'

[22] See, for example, *Yearbook of the International Law Commission* 1996, vol. II (Part Two), UN Doc. A/CN.4/SER.A/1996/Add.l (Part 2), Chapter VII, paras. 156-157 ('As is well known, however, the distinction between codification and progressive development is difficult if not impossible to draw in practice, especially when one descends to the detail which is necessary in order to give more precise effect to a principle. Moreover it is too simple to suggest that progressive development, as distinct from codification, is particularly associated with the drafting of conventions. Flexibility is necessary in the range of cases and for a range of reasons. […] Thus the Commission has inevitably proceeded on the basis of a composite idea of 'codification and progressive development'. In other

21. The ILC – currently – has 34 members who must be 'persons of recognized competence in international law'.[23] Members of the ILC sit in their individual capacity and not as representatives of their Governments.[24] In any given year, the ILC usually deals with several topics simultaneously. These topics are primarily selected by the ILC itself although the UNGA (or any other UN organ) may also request the ILC to concern itself with a certain topic.[25]

22. Generally speaking, the ILC's working process in the discussion of a certain topic is as follows.[26] Central in the consideration of any topic is the role of the special rapporteur. Through the preparation of reports, a special rapporteur marks out and develops the topic in question, explains the state of the law and makes proposals for draft articles. Special rapporteurs are appointed by the ILC itself and selected from among its members (such appointments usually being distributed among members from different regions to ensure different approaches and different legal cultures in the formulation of reports and proposals). The designated Special Rapporteur will generally draw up a preliminary report on the topic first, followed by more specific reports introducing a specific set of articles over the course of – what are usually – several years.

23. This (preliminary) report of the Special Rapporteur is then circulated among all ILC members who meet annually to discuss the report in a series of plenary meetings over the course of several weeks (although other topics are, of course, also discussed during these meetings). After this discussion in the plenary ILC, the articles proposed by the Special Rapporteur are forwarded to a Drafting Committee. This committee consists of several ILC members and its task is to give further consideration to the proposed articles from a drafting perspective and to process the observations by the ILC members in a revised draft. The proposal by this Drafting Committee is then again discussed in the plenary ILC after which articles are one by one adopted on first reading. This process continues until an entire set of articles has been (provisionally) adopted on first reading. The entirety of the draft articles is then discussed again in the ILC until they are (all) adopted

words, its work has involved the elaboration of multilateral texts on general subjects of concern to all or many States, such texts seeking both to reflect accepted principles of regulation, and to provide such detail, particularity and further development of the ideas as may be required.')

[23] See Statute of the International Law Commission 1947, Art. 2(1). The members of the Commission are elected by the General Assembly from a list of candidates nominated by the Governments of States Members of the United Nations (Art. 3 of the Statute).

[24] See *Yearbook of the International Law Commission*, vol. II (Part One), document A/CN.4/325, p. 186, para. 4. That said, in practice ICL members sometimes represent their Government in the Sixth Committee in the UNGA. In such a case they are, however, not speaking in their capacity as an ILC member.

[25] Ibid., paras. 158-166 and 177. See also, for example, Art. 18(3) of the ILC Statute.

[26] For a more detailed description of the ILC's working procedure see, for example, Danae Azaria, 'The Working Methods of the International Law Commission: Adherence to Methodology, Commentaries and Decision-Making', in: United Nations (Ed.), *Seventy Years of the International Law Commission: Drawing a Balance for the Future*, Brill & Nijhoff 2020, pp. 172-197 and *Yearbook of the International Law Commission* 1996, vol. II (Part Two), UN Doc. A/CN.4/SER.A/1996/Add.l (Part 2), Chapter VII, para. 173 *et seq*.

on second reading and together with an accompanying commentary, submitted to the UNGA for further consideration, particularly a decision on whether the draft articles are to be turned into a formal convention.

24. Minutes are made of every ILC meeting and these minutes – together with a summary of its activities that year – are sent to the Sixth Committee of the UNGA. Representatives of the various UN Member States discuss these ILC-reports each year and these meetings are also minuted. Some Governments also provide comments in writing over the course of the years (often at the request of the ILC or the UNGA), usually after the adoption on first reading and (again) after the adoption on second reading. As also indicated by the ILC itself, however, there is considerable variation in the extent to which Governments provide information and comments on the ILC's reports and drafts. Some may be content to allow work on a certain topic to develop, others may wish to change the direction of particular work and be more vocal. Many Governments, especially those of developing countries, have very limited resources to devote to the task and do not participate at all.[27]

The *travaux préparatoires* of Article 6(2)(b) and our interim conclusions based thereon

25. It follows from the above that a rather thorough record of the coming about of a set of draft articles on a specific topic is generally available for legal research. That said, in the end there are always gaps. Not all ILC members and Governments will provide comments on each and every aspect of a certain article or involve themselves in each and every debate. This is no different for the ILC's Draft Articles which are at the heart of this paper.

26. Nevertheless, based on the materials that *are* available we were able to reconstruct in a fairly comprehensive manner how Article 6(2)(b) came about. Much more comprehensive we believe than hitherto available in academic literature. Precisely because of this comprehensiveness, however, it would go beyond the scope of this paper to include the reconstruction in full here. On the other hand, the possibility to have recourse to our reconstruction may benefit a proper understanding of our conclusions and other scholars may, perhaps, also find this reconstruction useful for their research of the topic. We have therefore opted for an intermediate solution in which our reconstruction has been annexed to this paper.[28]

27. What conclusions can in our view be drawn from this reconstruction of the *travaux préparatoires* of Article 6(2)(b)? First, and perhaps most importantly, that we found no indication whatsoever that Article 6(2)(b) was perceived or intended to apply in the scenario which is at the heart of this paper and our research questions (in short: cases between private parties in which, by way of a preliminary question, the forum court is required to rule on the lawfulness of *acta iure imperii*

[27] See *Yearbook of the International Law Commission* 1996, vol. II (Part Two), UN Doc. A/CN.4/SER.A/1996/Add.l (Part 2), Chapter VII, para. 180.

[28] See Annex I.

of a foreign State which is not named as a party to the proceedings). On the contrary, it clearly follows from the *travaux préparatoires* that Article 6(2)(b) (and its predecessor Article 7) was not intended to codify the so-called foreign act of State doctrine[29] according to which a court may not decide or determine the claim by one party if the decision or determination of that claim inevitably includes a judgment on the lawfulness or propriety of a sovereign act of another State. It was made clear from the outset by the Special Rapporteur that this doctrine was to be clearly distinguished from State immunity.[30] The discussions in the ILC or in the UNGA also provide no indication that Article 6(2)(b) was understood as including the foreign act of State doctrine.[31]

28. Second, that the ultimate language used in Article 6(2)(b), in particular the phrase ' property, rights, interests or activities', must be assessed and interpreted against the background of the difficulty to reach consensus on (the need of) an acceptable definition of both 'State' and 'State property' throughout most of the drafting process and – by extension – the difficulty of finding an appropriate description of the situations in which a State was not directly named as a party to the proceedings but where State immunity was nevertheless generally accepted.[32] It follows from comments and observations made during this drafting process, however, that two scenarios were firmly on everyone's mind in this regard: on the one hand, cases involving not the State itself but its emanations – *i.e.* its organs, representatives, agents, instrumentalities *etc.* and, on the other hand, cases involving (use of) State property and (common law) concepts related thereto, for example proceedings *in rem* and property related 'interests'.[33] When an appropriate definition of 'State' (but not 'State property' or 'interests') was found after all, general consensus in the ILC was that the provision could be significantly simplified.[34] In our view, this is a clear indication that what remained of Article 6(2)(b) is to be linked to the remaining issue of (use of) State property.

29. Third, the *travaux préparatoires* do not provide concrete hypothetical examples of situations where Article 6(2)(b) (or its predecessor Article 7) would (or should) be applicable that are not already covered by one of the two scenarios mentioned earlier – *i.e.* i) emanation of the State; or ii) (use of) property. The draft ILC Commentary to be adopted after completion of the second reading of the articles initially gave one such example but that was taken out (because it actually

[29] For a more detailed discussion of this doctrine, see also *infra* paragraph 5.4.2.

[30] See Annex I, para. 19.

[31] As far as we were able to ascertain the foreign act of State doctrine is only explicitly referred to in the observations by the Special Rapporteur (see Annex I, para. 19 and n. 21) and Mr. Riphagen (see Annex I, n. 38). As to the latter, we interpret his observations as meaning that although he understood that the purpose of Art. 7(2) (as it stood then) was *not* to 'draw on' the act of State doctrine, he doubted whether the real intention of this paragraph was to do away with that possibility.

[32] See in particular Annex I, para. 16 *et seq*.

[33] See, for a few examples, Annex I, paras. 27, 46 and 48.

[34] See Annex I, *inter alia* paras. 53 and 58.

pertained to Article 6(2)(a)) leaving only the example of *in rem* proceedings.[35] It is certainly striking that even the ILC itself ultimately gave just one example of a situation where Article 6(2)(b) would be applicable and that this example is clearly property related. It is true that several Governments expressed concern about the seemingly broad scope of the articles, but only the United States gave a more or less concrete example in this regard (namely 'litigation involving banking, financial or other regulations that may have an impact upon foreign State activities' which it thought would 'arguably' also fall under the scope of the provision).[36] In an earlier stage the German Government gave the example of proceedings against 'the author of a damage acting in the (special) interest of a State' which 'may be considered to have been instituted against that State itself'.[37] However, this was at a time when Article 7 was still in its original form (*i.e.* with three paragraphs including one which was deemed necessary at the time in the absence of a comprehensive definition of 'State'). Furthermore, the reference to someone 'acting in the (special) interest of a State' strikes us as meaning that the German Government would consider such a person to be an emanation of the State itself.

30. Fourth, the *travaux préparatoires* do not refer to any case law (or state practice for that matter) concerning situations where Article 6(2)(b) (or its predecessor Article 7) would (or should) be applicable and that is not already covered by one of the two scenarios discussed above. In fact, the only reference to case law in connection with a broad interpretation was made by the Dutch Government (which referred to three recent Supreme Court judgments), but this was clearly done to make the exact opposite point, namely that this case law would not support such a broad interpretation.[38]

31. Fifth, explicit references to Article 6(2)(b) and its predecessor Article 7 in the discussions in the ILC always deal with the two aforementioned scenarios. In addition to Article 6 itself, the final ILC Commentary also refers just once to Article 6(2)(b), namely in the commentary to Article 13 which is clearly related to (use of) property.[39]

32. Sixth, objections were raised in both the ILC and the UNGA on multiple occasions regarding usage of the term 'interests' including in Article 6(2)(b) and its predecessor Article 7.[40] This because the term was not commonly used in all legal systems in the world, particularly in non-common law countries. All these observations take as a starting point that the term 'interests' is related to 'property' and (therefore) required definition, particularly for those countries not adhering to the common law. Notwithstanding these concerns, the term was ultimately not taken out because – even though it was not a universally recognized concept – the ILC

[35] See Annex I, para. 64.
[36] See Annex I, para. 67.
[37] See Annex I, para. 51.
[38] See Annex I, para. 40.
[39] See Annex I section 4: Extracts from the ILC commentary.
[40] See, for a few examples, Annex I, paras. 50, 53, 54 and 68.

felt it would be difficult to find a suitable alternative.[41] It also becomes clear from the *travaux préparatoires* that the definition of 'State property' initially introduced by the Special Rapporteur was derived from the definition of the same term in the Draft Articles on Succession of States in respect of State Property, Archives and Debts (and later convention of the same name) which also defines 'State property' as 'property, rights and interests …'.[42] In our view, these are all clear indications that the term 'rights' and 'interests' in Article 6(2)(b) are 'property' related and were not intended to have the broader meaning ascribed to those terms in general usage.

33. Seventh, the final ILC Commentary clearly places Article 6(2)(b) against a 'property' background and only provides examples related to (the use of) State property.[43] Although the commentary opens with the words 'Without closing the list of beneficiaries of State immunities …' (suggesting a broader scope), we note that this particular paragraph was left over from the draft commentary to Article 7 as adopted on first reading,[44] which in turn was taken *verbatim* from an earlier 1981 report by the Special Rapporteur.[45] That report was drawn-up against the background of the failed attempt earlier-on in the drafting process to reach a consensus on the definition of terms such as 'State' and 'State property' as already indicated above. In the absence of these critical definitions, the Special Rapporteur approached the topic in more general terms. By way of background of what he would propose as Article 7, the Special Rapporteur's Third Report provided a topical listing of seven categories of 'beneficiaries' of State immunity, whereby categories (a)-(e) focused on emanations of the State and category (f) on State property.[46] The relevant paragraphs of this Third Report containing a further explanation and concrete examples of beneficiaries for each category, would subsequently also serve as the commentary to Article 7. This included category (f) which was entitled 'Proceedings affecting State property or property in the possession or control of a foreign State' and started with the words 'Without closing the list of beneficiaries of State immunities...'. This origin makes it clear that – in any case at that time – the opening words referred back to the preceding categories of beneficiaries (a)-(e). In other words: the Special Rapporteur – and

[41] See Annex I, para. 56.
[42] See Annex I, para. 15.
[43] See Annex I, section 4: Extracts from the ILC commentary.
[44] See Annex I, section 4: Extracts from the ILC commentary.
[45] Third report on jurisdictional immunities of States and their property by Mr. Sompong Sucharitkul, Special Rapporteur, *Yearbook of the International Law Commission* 1981, vol. II(1), UN Doc. A/CN.4.340 & Corr. 1 and Add. 1 & Corr. 1, p. 140.
[46] The seven categories identified by the Special Rapporteur were: (a) Institution of proceedings against a foreign State; (b) Proceedings against the central Government or head of a foreign State; (c) Proceedings against political subdivisions of a foreign State; (d) Proceedings against organs, agencies or instrumentalities of a foreign State; (e) Proceedings against State agents or representatives of a foreign Government; and (f) Proceedings affecting State property or property in the possession or control of a foreign State. Compare also the draft commentary to Art. 7 as adopted on first reading, Annex I, section 4: Extracts from the ILC commentary.

the draft commentary to Article 7 as adopted on first reading which was based on his report – did not exclude the possibility that there were more emanations of the State and therefore more 'beneficiaries' of State immunity than the (legal) persons falling under category (a)-(e),[47] but simply noted that proceedings involving (the use of) State property were in any case to be considered as proceedings impleading a foreign State. Of course, it is true that these opening words were not deleted from the final ILC Commentary to Article 6(2)(b), even when a satisfactory definition of 'State' was agreed on after all as a result of which the paragraphs in the commentary pertaining to categories (a)-(e) were deleted or moved to the commentary to this definition of 'State' in Article 2. It cannot be excluded that this was a deliberate choice by the ILC and should be seen as an indication that the ILC still thought conceivable that there were more 'beneficiaries' of State immunity. Given the clear background of this paragraph and its former title ('Proceedings affecting State property or property in the possession or control of a foreign State') we deem it more likely, however, that this was simply an oversight during the drafting of the final commentary and the moving around of the various paragraphs in the commentary.[48] However, even if it was a deliberate choice to leave the opening words in, the background thereof strikes us a clear indicator that, if anything, the ILC was thinking about possible further emanations of the State as additional 'beneficiaries' of State immunity which for whatever reason were not already covered by the definition of 'State'.

34. Eight – and related to the previous point – the ILC ultimately deleted a reference in the commentary to Article 6(2)(b) to 'an action instituted against an entity other than the State itself that fell within the definition of the term 'State' laid down in article 2, paragraph 1 (b)'.[49] The commentary (thus) left unanswered the question of whether, outside of cases concerning (use of) State Property, Article 6(2)(b) could be relied on by (legal) persons that cannot be classified under the definition of 'State' of Article 2(1)(b) but – as the United Kingdom Government had eloquently put it in its comments on Article 2(1)(b)[50] – are nevertheless to

[47] See also already Second report on jurisdictional immunities of States and their property by Mr. Sompong Sucharitkul, Special Rapporteur, *Yearbook of the International Law Commission* 1980, vol. II(1), UN Doc. A/CN.4.331 and Add.1, para. 35: 'The list of beneficiaries of State immunity merits some attention at this stage, on the clear understanding that the types of beneficiaries listed may or may not, in any or all cases, be accorded jurisdictional immunities. The list of such potential recipients of State immunity is noteworthy as an indication of possible categories of entities which could in actual State practice participate in the enjoyment of jurisdictional immunities in the name and on behalf of the State of which they form an essential or central part. Such a list may include the following categories (...)'.

[48] For a more detailed analyses of this 'reshuffle' of the commentary see Annex I, para. 62.

[49] See Annex I, para. 64.

[50] See UN Doc. A/47/326, p. 24 ('The reason why international law denies a State the right to exercise jurisdiction over a category of defendants present in its territory or undertaking activity there, is expressed in the *maxim par in parem non habet imperium*. It follows that the notion is bound up, not with how closely the activities of the defendant are connected with a foreign State, but rather with whether the defendant itself forms part of what should be properly understood as the foreign State.')

be considered 'part of what should be properly understood as the foreign State'. However, if the ILC had considered this a proper interpretation of Article 6(2)(b), it seems to us that it would have made sense to point this out in the commentary (for example by amending rather than deleting altogether any reference to Article 2(1)(b) in the commentary and clearly indicating that emanations of the State not covered by Article 2(1)(b) could fall under Article 6(2)(b)). We also note in this regard that although Article 6(2)(b) was not among the stumbling blocks in the process of turning the Draft Articles in a convention, the definition of the term 'State' very much was.[51] The difficult debate on this issue following the adoption of the Draft Articles on second reading (unlike the ILC, Member States were apparently much more divided on this issue) does not sit well with a general understanding that, outside of cases concerning (use of) State Property, Article 6(2)(b) could still cover emanations of the State not included in the definition of that term. That we were unable to find any reference to Article 6(2)(b) in the various views expressed in the context of that debate further underlines in our view that Article 6(2)(b) was not generally understood as being applicable to emanations of the State not covered by the definition of that State.

35. Ninth the text of Article 6(2)(b) was not only simplified in relation to its predecessors but the phrasing used was also amended to limit its scope. In particular, the words 'to bear the consequences of a determination by the court which may affect ..' were deleted 'because it appeared to create too loose a relationship between the procedure and the consequence to which it gave rise for the State in question and thus result in unduly broad interpretations of the paragraph'.[52] The ILC was thus clearly concerned with creating a provision that would be too broad in scope and what remained of the phrase ('proceeding in effect seeks to affect') should in our view be interpreted against the background of this concern.

36. Tenth – and finally – it is clear that ultimately, only a very small number of States provided (written) comments to the ILC Draft Articles. Even ILC members expressed disappointment about this.[53] An even smaller number of States has ratified the UNCSI. Under those circumstances, particularly when seen against the totality of States in the world,[54] the number of Governments expressing support or objections against a certain provision can hardly be considered an indicator of the acceptance (or rejection) by the international community of States as a whole of that provision. As we will see below, that is an important consideration when assessing the customary law nature of Article 6(2)(b) UNCSI.

37. All in all, it can in our view be deduced from the *travaux préparatoires* that what ultimately remained as Article 6(2)(b) was intended – stated succinctly –

[51] See Annex I, para. 69.

[52] See Annex I, para. 58 and the ILC Commentary to Art. 6, para. 13 reproduced in Annex I, section 4: Extracts from the ILC commentary.

[53] See Annex I, paras. 49 and 66.

[54] Of course in the relevant period (1979-2004) the total number of Member States was lower than the current 193 (see *supra* n. 10). By way of example: in 1980, the UN had 154 members, in 1990 150 and in 2000 189. See <https://www.un.org/en/about-us/growth-in-un-membership>.

to apply to proceedings in which the foreign State would lose its (claim to) the property in question if it did not voluntarily appear in those proceedings. Either because it would lose ownership of the property or any other legal right or interest in the property, or because the activity which the foreign State carries out with the property would be terminated against the will of the foreign State. This regardless of whether the property in question (or 'right' or 'interest' therein) is 'owned' by the foreign State itself as 'control', 'possession' or 'use' already suffice. We will hereinafter refer to such proceedings as '(Use of) Property Cases.'

38. To the extent that Article 6(2)(b) was nevertheless to have a wider scope, such a wider scope would, in our view, at most relate to proceedings in which the defendant is an emanation (or alter ego) of the foreign State not covered by the definition of 'State' in Article 2 but which is nevertheless to be considered part of what should be properly understood as a foreign State.

39. We did not find any indication in the *travaux préparatoires* that Article 6(2)(b) was intended to apply in proceedings between two private parties other than in '(Use) of Property Cases' nor that it covers concepts such as the foreign act of State doctrine. On the contrary, as already indicated above, there are clear indications that this was explicitly not the intention.

2.3 Discussion of Article 6(2)(b) in the countries that have already ratified the UNCSI

40. How treaty ratification takes places at the national level obviously varies from State to State. In some States ratification is at the sole discretion of the Head of State who does not need to provide (elaborate) reasoning for ratification. In other States parliamentary approval is required, which usually means that an (extensive) exchange of views takes place between Government and parliament regarding the interpretation and meaning of (the provision of) the treaty in question. However, even in those States, the content and scope of all the provisions of a given treaty are not always fully debated .

41. This has been no different with the UNCSI. To date, the UNCSI has been ratified by 25 States.[55] As far as we have been able to ascertain, the scope of Article 6(2)(b) was not extensively considered in most of these States. To the extent that Article 6(2)(b) was explicitly mentioned most merely cited the literal text of the provision.[56] However, there have also been States in which a more elaborate debate took place and which we will therefore discuss below.

2.3.1 *Finland*

42. Finland ratified the UNCSI on 23 April 2014 after obtaining parliamentary approval. In the explanatory note to the Convention provided to the Finnish Parliament (*Suomen eduskunta*) in this regard, with regard to Article 6(2)(b), no more

[55] See <treaties.un.org/pages/viewdetails.aspx?src=treaty&mtdsg_no=iii-13&chapter=3&clang=_en>.

[56] For example, France and Italy.

is mentioned than the text of the article itself. About Article 13, however, the following is written:

> Ownership, holding and use of property. The general rule of the Convention is that a State and its property shall enjoy immunity from the jurisdiction of the courts of another State. This general rule has been clarified in Article 6(2)(b) of the Convention, which provides that immunity may in principle be claimed even if the proceedings are intended to have an actual effect on the property, rights, interests or activities of another State, even if that other State is not named as a party to the proceedings. Article 13 of the Convention is an exception to this general rule. Immunity cannot be invoked in the situations listed in the article.[57]

2.3.2 *Japan*

43. Japan ratified the UNCSI on 11 May 2010 after obtaining parliamentary approval. At the same time, the 'Act On Civil Jurisdiction Over Foreign States' was introduced by Japan.[58] As part of these legislative processes, the question of the meaning of Article 6(2)(b) UNCSI and whether it would be necessary to include a provision of similar scope in the 'Act On Civil Jurisdiction Over Foreign States' was raised. During the discussion of the bill in the Japanese Parliament (*Diet*), the following was noted on behalf of the Government regarding Article 6(2)(b):

> As you have just read, article 6-2(b) of the Convention is a rather difficult article to understand. This provision is based on the premise that even if a foreign state is not designated as a party to a certain judicial proceeding, the judicial proceeding may affect the property, rights, interests, or activities of the foreign state. This is the premise of the provision. This is something that Japanese lawyers do not often think of, and in fact, it specifically assumes the type of action against property that is seen in Anglo-American law countries. In Japan, this type of lawsuit is not common. In Japan, we do not have such a system of action against property in the first place.[59]

2.3.3 *The Netherlands*

44. The Netherlands acceded to the UNCSI on 23 April 2025 after having obtained parliamentary approval in 2024.[60] No reservation was made to Article 6(2)

[57] See 'Government proposal to Parliament on the approval of the United Nations Convention on the Jurisdictional Immunities of States and their Property and on the enactment of the provisions of the Convention that fall within the scope of its legislation', HE 26/2013 vp 296404. The proposal is available at: <https://www.eduskunta.fi/valtiopaivaasiakirjat/HE+26/2013>. The quote and citation have been translated using Deepl.

[58] On this subject, see also K. Yakushiji, 'Legislation of the Act on Civil Jurisdiction over Foreign States, Acceptance of the U.N. Convention on Jurisdictional Immunity of States and Their Property, and Their Possible Effects upon the Jurisprudence of Japanese Domestic Courts on State Immunity', *Japanese Yearbook of International Law*, vol. 53 (2010), pp. 202-242.

[59] See Report 171st National Diet Legal Affairs Committee No. 5 (Tuesday, April 7, 2009). This report is available online at: <https://www.shugiin.go.jp/internet/itdb_kaigirokua.nsf/html/kaigirokua/000417120090407005.htm> The quote was translated with the help of Deepl and RomajiDesu. On the lack of a provision corresponding to Art. 6(2)(b) Immunity Convention, see also, for example, K. Yakushiji, *infra* n. 101, pp. 208-209.

[60] Kingdom Act of 2 October 2024, approving the United Nations Convention on Jurisdiction and

(b) and such a reservation has not been advised by the Dutch Advisory Committee on questions of international law (CAVV).[61] Neither the CAVV[62] nor the Dutch Government[63] explained during the ratification procedure what it believed the exact scope of Article 6(2)(b) to be. However, in the Explanatory Memorandum to the Kingdom Act approving the UNCSI the connection was made between Article 6(2)(b) and Article 13 of the UNCSI:

> Under article 6(2)(b), a State may invoke immunity from jurisdiction in a proceeding, even if that State is not named as a party to the action, if the claim in the action seeks to deprive the State of property or possessions. Art. 13 formulates an exception to this.[64]

45. This lack of a detailed discussion during the Dutch ratification process of the precise scope of Article 6(2)(b) is quite surprising. After all, during the drafting process the Dutch Government raised questions about the potentially broad scope of its predecessor – the former Article 7(2)/(3) – in the UNGA on more than one occasion.[65] Furthermore, in its advice issued to the Dutch Government in 1988 after adoption of the Draft Articles in first reading, the CAVV also expressed concerns about a potentially broad interpretation of that predecessor:

> The Commission considers that the second paragraph of article 7, as currently worded, goes too far. The words 'may affect' and 'interests or activities' (in addition to 'property and rights') of the State give this provision such a broad meaning that virtually any form of involvement of the State is sufficient for immunity to be granted. This puts anyone who has any relationship with the State at a serious disadvantage in terms of legal protection compared to those who do not. Insofar as the second paragraph and the end of the third paragraph are intended to provide for cases in which the State, as the owner of property in respect of which an action in rem has been brought, requires protection, they are superfluous. In the opinion of the Commission, this is already provided for in article 14 and the articles on 'Measures of constraint.' A specific provision in the chapter entitled 'General principles' is not necessary. In light of the comments made regarding article 3, the third paragraph of article 7 should also be deleted. If the remaining first paragraph is retained as an independent provision, the chapeau needs to be amended.[66]

46. Unfortunately, we were unable to find the Dutch Government's response to this CAVV advice (if any). To what extent it agreed with this advice therefore remains somewhat of a mystery, all the more so since the Dutch Government ultimately did not provide any written comments to the Draft Articles adopted on first reading.[67] On the other hand, the concerns raised by the CAVV to an extent overlap with questions the Dutch Government had itself raised in the UNGA in an earlier stage of the drafting process.[68] Under those circumstances, it certainly cannot be excluded that the Dutch Government shared the concerns by the CAVV but felt that – when it did comment on the final Draft Articles – the amendments in Article 6(2)(b) and commentary thereto were sufficient to address these concerns.

2.3.4 *Norway*

47. Norway ratified the UNCSI on 27 March 2006 after obtaining parliamentary approval. The explanatory note to the Convention provided to the Norwegian Parliament (*Stortinget*) in this regard states the following about Article 6(2)(b):

> An action shall be deemed to be brought against a state before foreign courts if that state is listed as a party to the action, as well as in cases where the state in question is not listed as a party to the action, but the action is directed against that state's property, rights, interests or activities, cf. article 6(2). The emergence of customary international law on state immunity has been particularly linked to the latter alternative, where the state is not expressly listed as a party, for example in connection with the arrest of ships with state affiliation. For an action to be considered to be directed against a for-

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the Immunity of States and Their Property, concluded in New York on 2 December 2004 (*Tractatenblad* 2010, 272), *Staatsblad* 2024, 289.

61 Den Dekker (see *JBPr* 2023/17) is of the view that this lack of a reservation combined with the Dutch Government's statement that there are no points on which the treaty deviates from Dutch legal practice means that 'the matter is well and truly settled as far as application in the Dutch legal order is concerned.' The 's-Hertogenbosch Court of Appeal (23 July 2024, ECLI:NL:GHSHE:2024:2380, para. 3.8.3) has also held that those two circumstances mean 'that applying immunity from jurisdiction in cases where the Foreign State is not a party is not contrary to Dutch law'.

62 (The scope of) Art. 6(2)(b) is not addressed in either of the two opinions on the UNCSI provided by the CAVV during the ratification process. See CAVV Opinion 44 of December 22, 2023 on 'the accession of the Netherlands to the UN Convention on the Immunities of States and Their Property' and Opinion 17 of May 19, 2006 'on the UN Convention on Jurisdictional Immunities of States and Their Property'. The earlier CAVV opinion on the draft articles of the ILC also does not discuss Art. 6(2)(b). See Opinion 2 of July 8, 1992 'On the Draft Articles of the International Law Commission on Jurisdictional Immunities of States and Their Property'.

63 The Explanatory Memorandum to the Kingdom Act approving the UN Immunity Treaty mentions as an explanatory note to Art. 6 only 'A dispute exists when a foreign state is named as a party, or, even if it is not, the dispute is intended to affect property, rights, interests or activities of a foreign state (second paragraph).' See Parliamentary documents II, session 2021-2022, 36 027 (R2160), no. 3, pp. 6-7.

64 See the Explanatory Memorandum to the Ratification Act, *supra* n. 63, p. 12. This connection was already pointed out by the Dutch delegation to the UN General Assembly (41st session, Sixth Committee, 30th meeting, 31 October 1986) regarding an earlier version of the final Art. 6(2)(b) and the final Art. 13, UN Doc. A/C.6/41/SR.30, p. 15.

65 See, for example, Annex I, para. 34.

66 See CAVV, Advice no. 1447 (*Immuniteit van Staten en hun eigendom*), 21 January 1988, pp. 8-9 (our translation CvdP/TD). The remark referred to by the CAVV concerning Art. 3 was: 'In the Commission's view, Art. 3 in its current form is not acceptable. Compared to the European Agreement, it contains an extremely broad concept of 'State'. Accordingly, it opens up the possibility for all entities that, according to national opinion, can be considered part of the State apparatus in a broad sense to invoke immunity before a foreign court (see, for example, Arts. 7 and 13 of the ILC draft). The Commission would like to limit the definition of the term 'State' to 'the State, acting through its various organs of government.' Paragraph 1(b), (c), and (d) would therefore be deleted. The chapeau of this first paragraph should be amended accordingly.' (ibid., p. 7).

67 See Annex I, para. 49.

68 See, for example, Annex I, paras. 34 and 40.

> eign state, there is no requirement that the state is listed as the owner of the disputed property or asset; possession or control is also covered.[69]

48. The same explanatory note also mentions the relationship between Article 6(2)(b) and Article 13 of the UNCSI:

> Pursuant to article 6(2)(b), a state may also invoke immunity in cases where it is not listed as a party to the case, but the objective of the case is to affect that state's property, etc. cf. point 3.2.1. [being the comment above; CvdP/TD]. The exception from immunity in article 13 also covers such cases.[70]

49. It also follows from the explanatory note that one of the consulted ministries (the Norwegian Ministry of Justice) had expressed concerns about the broad scope of Article 6(2)(b). According to the Ministry of Justice, this provision went further than what must currently be assumed to follow from customary law, and set unclear limits for when immunity may be invoked. Furthermore, the Ministry of Justice said that the provision appeared to entail an expansion of the scope of the immunity rules in relation to the later development of state practice and could lead to a freezing of state practice on the question of whether and to what extent it should be possible to assert immunity in cases involving serious human rights violations.[71] To what extent this interpretation (and these concerns) of the Norwegian Ministry of Justice was shared or rejected by other ministries is unclear as is the position of the Norwegian Government as a whole. The explanatory note does indicate, however, that the Norwegian Ministry of Foreign Affairs was of the view that there was no uniform state practice in many areas covered by the UNCSI. It stated that practice may vary from state to state, or from region to region, and the exact content of the immunity rules under customary law could therefore often be difficult to determine.[72] Ultimately, it was proposed to ratify the UNCSI but at the same time provide a declaration *inter alia* indicating that 'Norway understands that the Convention is without prejudice to any future international development in the protection of human rights.' According to the explanatory note, the Norwegian Ministry of Justice could under those circumstances support ratification.[73]

2.3.5 *Sweden*

50. Sweden ratified the UNCSI on 23 December 2009 after obtaining parliamentary approval. In the explanatory statement provided in this regard to the Swedish Parliament (*Riksdag*) regarding the Convention, the following can be read about Article 6(2)(b):

> Under article 6(2), an action brought before a court of a State is deemed to be against another State if that other State is named as a party to the proceedings or if the action is actually directed against the property, rights, interests or activities of that other State.
>
> Thus, the action is considered to be directed against the foreign State if it names as a party the State itself or one of the entities or persons entitled to invoke immunity on its behalf in accordance with the definition of 'State' in article 2(1)(b). An action may also be considered to be directed against a foreign State if it relates to the property of the foreign State, without the foreign State being named as a party. It is mainly through such proceedings that the customary law on state immunity has developed over the years. In particular, there have been proceedings concerning security measures taken against state-owned vessels to cover various claims. For such an action to be considered against a State, it is not necessary for the State to own the property in question. It is sufficient that the property is in the actual possession or control of the foreign State.[74]

51. Incidentally, the above is also consistent with Sweden's earlier communication to the ILC in the context of preparations for the UNCSI in the early 1980s that

> [t]he doctrine that the validity of the public acts of a foreign State must not be questioned finds little support in Swedish judicial practice, which does not a priori exclude an examination of the validity of such acts under international law if the question arises in litigation between private parties. It is clear, on the other hand, that Swedish courts would not consider themselves entitled to entertain proceeding against the foreign State itself in respect of its public acts.[75]

2.3.6 *Interim conclusion based on ratification of UNCSI by States*

52. In the absence of a detailed discussion of Article 6(2)(b) in most of the States which have so far ratified the UNCSI, these ratification procedures shed only limited light on what these States believed Article 6(2)(b) to mean. That said, to the extent that the article was discussed, the 'property' background of the article is often put front and centre (as is the connection with Article 13). We were unable to find indications that States believed Article 6(2)(b) went further than – stated succinctly – proceedings interfering with the ownership, possession and use of property by States, although the Norwegian Ministry of Justice did express concerns in line with such a view. At the same time it also made clear, however, that such a broad interpretation would not be in line with in customary international law.

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[69] See Recommendation of the Ministry of Foreign Affairs, December 9, 2005, St.prp. no. 33 (2005-2006) On consent to ratification of the UN Convention of 2 December 2004 on the immunity of states and their property from the jurisdiction of foreign states, section 3.2.1. The recommendation is available at: <https://www.regjeringen.no/no/dokumenter/stprp-nr-33-2005-2006-/id211800/>. The quote and citation have been translated using Deepl.

[70] Ibid., p. 10.

[71] Ibid., p. 16.

[72] Ibid.

[73] Ibid., pp. 17-18.

[74] Government proposal 2008/09:204 Immunity of States and their property, June 25, 2009, pp. 66-67. This paper is available at: <https://www.regeringen.se/rattsliga-dokument/proposition/2009/07/prop.-200809204>. The quote and citation have been translated using Deepl.

[75] See UN Doc. A/CN.4 /343 ('*Information and materials submitted by Governments*'), p. 75. This was the Swedish response to the ILC's question of whether public acts of a foreign State may be subject to national court review. See further also *infra* n. 219.

2.4 Interpretation of Article 6(2)(b) UNCSI by scholars

53. Different views on the scope of Article 6(2)(b) can be found in the international literature we consulted. In our research, we have limited ourselves to publications that explicitly discuss the interpretation of Article 6(2)(b). We have omitted publications that merely refer to the text of the provision or the ILC Commentary or that merely refer to the views of the authors discussed below (in alphabetical order).

2.4.1 *Angelet*

54. Angelet distinguishes between the exercise of *imperium* and the exercise of *jurisdictio* and examines which of the two triggers immunity from jurisdiction. In doing so, he understands *imperium* to mean the exercise of sovereign powers and *jurisdictio* to mean the adjudicatory functions of the judiciary. In this way, he tries to clarify whether and when immunity from jurisdiction also covers the situation where the foreign State is not a defendant but 'its legal position will be ruled on by necessary implication of the judgment on the dispute between the parties' (which he refers to as *indirect impleading*).[76] In that context, Angelet also discusses Article 6(2)(b) UNCSI. He observes that this provision 'is capable of encompassing a wide range of situations where the third State is not a party to the proceedings, beyond the hypothesis of ex parte proceedings regarding its rights or legal interests in the domestic legal order of the forum State.'[77] Subsequently, Angelet too observes that Article 6(2)(b) can be interpreted both narrowly and broadly. Applying the *imperium* and *jurisdiction* distinction to seven cases analysed in more detail, Angelet concludes that when it comes to *indirect impleading*, immunity from jurisdiction is only at issue if a court not merely adjudicates a case but would also exercise sovereign powers and – as we understand him – Article 6(2)(b) should thus also be limited to proceedings in which (in addition to *jurisdictio*) *imperium* is exercised.[78] According to Angelet, this exercise of *imperium* can take various forms, '[i]t occurs when the judgment sought disposes of the foreign State's rights, e.g., in the case of a property dispute. It also occurs when the foreign State is deprived of the effective exercise of its rights or when that exercise is seriously undermined.'[79] A third case, in Angelet's view, is 'when a foreign State's agent is judged for acts carried out in the exercise of his or her functions. This is because States can only act through their agents, so that judging a foreign State's agent on her or his official acts is akin to an amputation.'[80] However, Angelet goes on,

> [w]here the judging of foreign State agents is concerned, the foreign State's rights and interests in the domestic legal order of the forum are not at stake. Nevertheless, immunity is triggered because judging the agents on their official acts would impede the foreign State's functioning on the international plane.[81]

2.4.2 *Dickinson*

55. During a forum in 2005 on the recently adopted UNCSI organized by Chatham House, Dickinson made the following observations in relation to Article 6(2)(b):

> Under sub-paragraph (b) a proceeding shall be considered to have been instituted against another State if it is not named as a party but 'the proceeding in effect seeks to affect the property, rights, interests, or activities of that other State.' It has been suggested that such a provision has, potentially, a very broad application and that it could bring within the Convention a quasi Act of State doctrine. In the English case Buttes Gas and Oil Company v. Hammer, the English court declined to adjudicate on certain aspects of a defamation suit between private persons on the grounds that that adjudication would involve an enquiry into questions of controversy between sovereign States. Would Article 6.2 take you that far? In my submission, it would not. Again, looking at

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[76] N. Angelet, 'Immunity and the Exercise of Jurisdiction – Indirect Impleading and Exequatur', in: T. Ruys, N. Angelet, & L. Ferro (Eds.), *The Cambridge Handbook of Immunities and International Law*, Cambridge University Press, Cambridge 2019, doi:10.1017/9781108283632.005, p. 81.

[77] Ibid., p. 87. See also Ruys who relies on this quote from Angelet when he notes that 'the additional reference to proceedings affecting the 'rights', 'interests' or 'activities' of a foreign State, strongly suggests that these terms carry autonomous meaning and stretch the concept of 'indirect impleading' beyond proceedings involving goods over which a foreign State holds a (direct) proprietary title' (T. Ruys (2019), 'The role of state immunity and act of state in the NM Cherry Blossom case and the Western Sahara dispute', *ICLQ* vol. 68, p. 74.)

[78] Angelet refers to one English case (*Buttes Gas and Oil Co v. Hammer* (Nos. 2 and 3) [1982] AC 888) that is an exception to this because, according to Angelet, even though that ruling did not involve *imperium* but '*naked jurisdictio*', it nevertheless ended in a finding of '*immunity (if one takes it to be immunity)*' (see Angelet, *supra* n. 76, p. 93). It should be noted in this regard, that in the same contribution Angelet also acknowledges that *Buttes Gas* was not a State immunity case but an act of state case, citing Lord Wilberforce (followed by the other Lords) who had held in *Buttes Gas* that '[t]he doctrine of sovereign immunity does not in my opinion apply since there is no attack, direct or indirect, upon any property of any of the relevant sovereigns, nor are any of them impleaded directly or indirectly.' (see ibid., p. 84). Angelet goes on to point out, however, that in the same judgment 'Lord Wilberforce presented the issue as one of 'immunity from jurisdiction ratione materiae', according to which 'the courts in England will not adjudicate upon acts done abroad by virtue of sovereign authority'.' (ibid.) and, Angelet continues, 'the United Kingdom Court of Appeal in Yukos likewise qualified non- justiciability under the act of State doctrine as 'a form of immunity ratione materiae, closely connected with analogous doctrines of sovereign immunity and … founded on analogous concepts of international law' (ibid.). Although Angelet acknowledges that the various doctrines (State immunity, act of state, non-justiciability) are to be distinguished, his argument seems to be that they can still contribute in determining the limitations of State immunity. Or as Angelet himself puts it: 'The importance of such divergences should perhaps not be overstated. That the act of State doctrine originated in domestic law does not mean that common law courts could adjudicate cases typically falling within the realm of the doctrine without violating international law. Rather, the application of the act of State doctrine pursuant to domestic law releases the courts from considering the international law limits to their powers. At the same time, the doctrine, though uninformed by opinio juris, engenders a State practice of abstention in the exercise of adjudicatory powers which may contribute to delimit an open- textured international immunity rule in favour of the absent State.') (ibid., p. 85).

[79] Angelet, *supra* n. 76, p. 93.

[80] Ibid.

[81] Ibid.

> the preparatory materials to the Convention, it is clear that the words 'seeks to affect' were introduced by the draftsperson with a view to narrowing the scope of Article 6. It seems to me that sub-paragraph (b) is concerned with the formerly very common situation of an action which might not be brought against a State but which involves seizure or attachment of public property or property in the possession or control of a State. Such proceedings might be in rem or might be proceedings against a bailee. In my view, this is what sub-paragraph (b) seeks to address and it is not intended to give any wider protection to States where its interests could be said to come under attack.[82]

2.4.3 *Fox & Webb*

56. Fox & Webb indicate that Article 6(2)(b) can be interpreted narrowly and broadly. The narrower interpretation, they argue, seems to follow from the ILC Commentary and the cases referenced in the commentary:

> From the commentary and cases referred to in its footnotes, it would seem that the main purpose of this subparagraph was to apply the Convention's rules to proceedings in rem brought against any property owned or in the possession of or over which the State had some claim, without making the State itself a named party to the proceeding.

57. It is also this scope that is the subject of Article 13 in Fox & Webb's view:

> The scope of Article 6(2)(b) construed in this narrow manner is examined later under the Convention's provisions relating to the exception to State immunity for immovables and movables.

58. However, according to Fox & Webb, if the provision is interpreted more broadly, it touches on the question of how immunity from jurisdiction relates to, among other things, the foreign act of State doctrine:

> Read in its wider sense, however, the subparagraph touches on the more general questions of the different ways in which a national court's jurisdiction may be excluded where the proceedings affect the interests of a foreign State. Such proceedings in English and US law attract not only the plea of State immunity but the pleas of act of State and non-justiciability, and it is the purpose of this chapter to locate the plea of State immunity alongside the other doctrines in the common law where the interests of another State call either for recognition of that State's national laws or restraint as regards their adjudication or even disregard of them.[83]

59. Although Fox & Webb explain in the remainder of the relevant chapter that

[82] See State Immunity and the New UN Convention, Chatham House, 5 October 2005 – Transcripts and summaries of presentations and discussions, p. 13. This document is available via: <https://www.chathamhouse.org/sites/default/files/public/Research/International%20Law/ilpstateimmunity.pdf>, visited 30 June 2025.

[83] H. Fox, QC & P. Webb, Part I General Concepts, '3. The Plea of State Immunity Distinguished from Act of State and Non-Justiciability', in: *The Law of State Immunity* (Revised and Updated 3rd Edition), Oxford University Press, Oxford 2015, p. 50.

immunity from jurisdiction and the act of State doctrine are distinct concepts, we were unable to find a clear choice by Foxx & Webb as to which interpretation of Article 6(2)(b) they ultimately believe to be the correct one.[84]

2.4.4 *Franchini*

60. Franchini points out that the vagueness of the provision has led to much criticism and that it is generally unclear why State immunity should also apply in cases in which a State is not a defendant. Where Grant argues that the provision refers to the notion of indirect impleading (see paragraph 2.4.5), Franchini points out that this legal figure is recognized only to a limited extent in other common law jurisdictions and is 'virtually absent' in civil law jurisdictions. From that alone, it follows, in his view, that 'indirect impleading may relate more to specific common law peculiarities than to a customary international law rule'. It is also debatable according to Franchini whether the broad wording of Article 6(2)(b) accurately reflects what is covered by the English legal figure of indirect impleading.[85] Be that as it may, indirect impleading, he argues, does not go so far as to include situations other than those involving State property:

> The International Law Commission's (ILC) commentary and travaux préparatoires indicate that Article 6(2)(b) was primarily intended to cover specific cases involving seizure or attachment of properties belonging to a foreign State or under its possession or control. This aligns with the 'classic example' of indirect impleading: actions in rem against a ship owned or operated by a State. [...] According to Grant, another case falling under Article 6(2)(b) of UNCSI is that of proceedings involving parties disputing rights or interests in property, where a third-party State asserts a right or interest in the same property. However, it is unclear whether State immunity applies to all such proceedings. [...] In any event, there is virtually no practice supporting the extension of indirect impleading to situations beyond those involving third-party State property.[86]

61. In Franchini's view, Article 6(2)(b) is (therefore) '*overinclusive*' in its use of

[84] They do indicate in another chapter of the same book that the terms used ('rights or interests') have a potentially broad meaning. However, citing the English Court of Appeal's decision in the *Belhaj* case*,* Fox & Webb argue that these terms must refer to 'a claim for which there is some legal foundation and not merely to some political or moral concern of the State in the proceedings'. (Ibid., p. 307).

[85] D. Franchini, 'State Immunity and third-party limits on the jurisdiction of domestic courts', *ICLQ* 72(3), 2023, 819-835, doi:10.1017/S0020589323000167, p. 5.

[86] Ibid.*,* pp. 5-6. He continues 'Only a few rare dicta can be found in proceedings against former State representatives concerning their official acts. According to these, foreign States would be indirectly impleaded in proceedings against their officials given that they would be expected to satisfy any award of damages. However, this is an unorthodox view on the so-called 'functional' immunity of State officials, given the absence of a State obligation to indemnify its officials under international law. The basis for this type of immunity is typically found in the fact that under international law official acts of State representatives are imputable to the State. In this sense, functional immunity operates as "a mechanism for diverting responsibility to the State", which is the actual defendant in the proceedings.'

the terms '*interests*' and '*activities*' 'which do not reflect customary international law.'[87] and would cause confusion if the UNCSI were to enter into force.[88]

2.4.5 *Grant*

62. Grant notes that the verb 'to affect' in Article 6(2)(b) is not very apt to indicate the limits of the provision, even though they are necessary: 'Limits nonetheless are necessary if the provision is to preserve a rational scheme of jurisdiction.'[89] Grant then seems to seek that limitation in explaining that Article 6(2)(b) refers only to cases where the court's ruling has a specific legal effect on the foreign State:

> The uncertainty, perhaps, is addressed by saying that the effect with which Article 6(2)(b) is concerned is a specifically legal effect, such as the imposition of a lien or a declaration of title, as distinguished from a social, economic, or political effect. Interpreted and applied in this way, the provision would afford a meaningful scope of the protection to States while also recognizing that immunity from jurisdiction cannot serve as a means by which a foreign State can bar any proceeding the prospective outcome of which may not be to its liking.[90]

63. As examples of situations covered by Article 6(2)(b) Grant refers to actions *in rem* and cases where parties dispute as between themselves rights or interests in property and a third-party State asserts a right or interest in the same property.[91] Although he does not refer to Article 13 UNCSI in this regard,[92] Grant does indicate that in this situation a link exists between

> Article 6(2)(b) and Article 8(2)(b). The latter, dealing with implied consent to jurisdiction, provides for the situation in which a State whose property would be affected by proceedings to which the State is not named as a party intervene 'for the sole purpose of ... asserting a right or interest in property at issue in the proceeding'.[93]

Finally, Grant notes that

> [d]epending on the interpretation and application of Article 2(1)(b)(iv) of the Convention, dealing with individual State representatives, it may be that another example of indirect impleading for the purposes of Article 6(2)(b) is where a former State representative is named as respondent to a claim in respect of acts or omissions during his or her time in office and relating to his or her official capacity.[94]

2.4.6 *Kakiuchi*

64. Kakiuchi believes that the prototype of a case to be classified under Article 6(2)(b) 'is an action in rem in the Common Law system.'[95] However, he continues,

> it is also clear that the application of this subparagraph is not limited to this case. Rather, it is likely that it is applicable so far as the exercise of jurisdiction would 'put a foreign sovereign in the position of choosing between being deprived of property or else submitting to the jurisdiction of the Court.' Otherwise, its quite general wording would be inappropriate.[96]

Kakiuchi explains that the Japanese legislature refrained from codifying Article 6(2)(b) in the Japanese Immunity Act ('perplexed by the task of determining the scope of this subparagraph exactly')[97] but that there is also no explicit provision in this Act limiting immunity to a defendant State. As such, Kakiuchi, argues it is an open question. Apart from some rare property-related cases in which the formally non-defendant State could theoretically, under Japanese law, suffer legally binding consequences from a dispute in which it is not a defendant[98] Kakiuchi also

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87 Ibid., p. 7: 'There has never been a suggestion in domestic court practice that immunity should be granted due to proceedings affecting 'interests' or 'activities' of third-party States.'

88 Ibid., p. 7.

89 T. Grant, 'Art. 6', in: *The United Nations Convention on Jurisdictional Immunities of States and Their Property: A Commentary* (eds. R. O'Keefe, C.J. Tams), Oxford University Press, Oxford 2013, p. 110.

90 Ibid., p. 111.

91 Ibid., p. 110.

92 Ibid. The commentary to Art. 13 in the same book does highlight this link. See J.P. Terhechte, 'Article 13', in: *The United Nations Convention on Jurisdictional Immunities of States and Their Property: A Commentary*, *supra* n. 89, p. 231 ('Article 13, like any other of the exceptions to a State's immunity from proceedings enumerated in Parts II and III, may be invoked not only in a proceeding in which a State respondent to a claim asserts its immunity from the jurisdiction of the court of another State but also in a proceeding in which the immunity to be overcome is that of an indirectly impleaded State—that is, where the State 'is not named as a party to the proceeding but the proceeding in effect seeks to affect the property, rights, interests or activities' of the State concerned, in the words of Article 6(2)(b) of the Convention. In this regard, the word 'activities' in Article 6(2)(b) is capable of encompassing the possession and use of property, as both referred to in Article 13(a).')

93 That this link existed can also be deduced from the discussion in the ILC (see Annex I, para. 32), Art. 9 ECSI is also relevant in this regard, see para. 84 *infra*, as well as footnote 86 of the Commentary to Art. 8 of the Final Draft Articles which refers to this provision.

94 Ibid. Grant goes on to note that '[a]s the respondent to the claim, the former State representative well may say, as the main defence, that he or she for purposes of the proceedings is to be considered a State representative under Article 2(1)(b)(iv). As an alternative defence, the former State representative would say that the claim is one that seeks to affect the rights, interests, or activities of the State in whose service he or she once acted, and thus the proceeding is one against the State itself for the purposes of Article 6(2)(b).'

95 See Shusuke Kakiuchi, 'Foreign State Immunity Viewed From The Perspective of Japanese Procedural Law', *Japanese Yearbook of International Law*, vol. 53 (2010), p. 268.

96 Ibid.

97 On this, see also *supra*, para. 43.

98 Kakiuchi lists three: i) extension of res judicata ('Extension of res judicata'), ii) extension of enforceability ('Extension of enforceability') and iii) modification of legal relationships ('Modification of Legal Relationships by Judgment'). The first can be left undiscussed further because, according to Kakiuchi, it is insufficient to justify immunity in any case. The only conceivable example of the second option, according to Kakiuchi, is the purchase of property by the foreign State after the oral hearing of a case claiming transfer of the property. The third option, according to Kakiuchi, is the situation where, for example, a building permit in favour of property belonging to a foreign

discusses two property-related hypothetical situations in which there may be a *de facto* effect for the formally non-defendant foreign State. In the first situation, X starts proceedings against Y seeking the surrender of a property that X claims to own. Y, on the other hand, argues that the property belongs to the foreign State Z and that he is merely acting as administrator. According to Kakiuchi, immunity may be at issue in this situation. It is different in the second situation where X also sues Y for ownership of property. This time, however, Y does not defend himself by claiming that he administers the property for a foreign State but that he acquired it from that foreign State. In this second situation, immunity is not an issue according to Kakiuchi.[99]

2.4.7 *Tobisawa*

65. Tobisawa argues that Article 6(2)(b) has an impact on the right of access to justice and should be applied with caution. For example, mere *de facto* impact, in his view, is therefore not sufficient for the application of Article 6(2)(b). Thus, he writes:

> article 6(2)(b) of the Convention has the effect of not allowing court proceedings in which a foreign country is not a party to proceed, and this affects the right to a trial. Even if there are cases where this applies, the scope needs to be carefully considered. Thus, article 6(2)(b) of the Convention should not apply, for example, when the result of a judicial proceeding has only a de facto effect on a foreign state that is not a party to the proceeding, when it is difficult to assume that a judgment has a countervailing effect on a foreign state that is not a party to the judicial proceeding in which the judgment was issued, or when it is not determined whether such effect will arise until a subsequent action is filed, such as intervening effect.[100]

Tobisawa does not discuss the (precise) scope of Article 6(2)(b) either before or after taking this position.

2.4.8 *Yakushiji*

66. Yakushiji argues that '[t]ermination of a civil or administrative proceeding to which a foreign State is not a party because of immunity the State might enjoy if it were named as a defendant should be cautiously dealt with, because it would disturb the right of an individual to a fair trial'.[101] However, he goes on,

> when the rights or interests in the property of foreign States or activities of State are threatened to be injured, as was illustrated in the Oman Embassy Building case, the domestic courts of Japan should surely examine the applicability of immunity in such cases even if the Act lacks an article corresponding to article 6(2)(b) of the UN Convention.[102]

Yakushiji does not discuss the (precise) scope of Article 6(2)(b) either before or after taking this position.

2.4.9 *Interim conclusion based on literature*

67. It follows from the above that Article 6(2)(b) has also puzzled several international scholars. Most appear to take the position that its application is not restricted to '(Use) of Property Cases'. That said, all seem to agree that to the extent that its scope is broader, application of Article 6(2)(b) is – in any case – limited to proceedings that have legally binding effects for the formally non-defendant State (a *de facto* effect being insufficient).[103]

68. Tempting as it may be, it would go beyond the scope and purpose of this paper to enter into a (detailed) discussion of the views of these various authors. The purpose of this paper is not to point out who we agree with (or not) but to provide an overview of how Article 6(2)(b) is interpreted by scholars. That said, two things should be flagged. First, all these scholars discussing Article 6(2)(b) in more detail refer in some way to the *travaux préparatoires* of the UNCSI (such as the ILC Commentary) in support of their views. The depth of their analysis varies considerably, however, and none of them seems to have formulated views on a full analysis of these *travaux préparatoires* (as we have tried in Annex I and above). With the exception of Kakiuchi, the relevant publications also do not refer to the interpreta-

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State is challenged by an interested party. See Shusuke Kakiuchi, 'Foreign State Immunity Viewed From The Perspective of Japanese Procedural Law', *Japanese Yearbook of International Law*, vol. 53 (2010), pp. 269-270.The examples given underscore, in our opinion, that under Japanese law there will apparently always have to be property-related cases.

99 Ibid., pp. 271-272.

100 See Tomoyuki Tobisawa, Tikujo Kaisetu: Tai-Gaikoku Minji Saibanken Ho: Wagakuni no Shuken-Menjo Hosei ni tuite [Article-by-Article Commentary on the Act on Civil Jurisdiction over Foreign States: About the Legislation Arrangement on Sovereign Immunity in Japan] (2009), p. 22 note 3. The quote was translated with the help of Deepl and RomajiDesu.

101 Kimio Yakushiji, 'Legislation of the Act on Civil Jurisdiction over Foreign States, Acceptance of the U.N. Convention on Jurisdictional Immunity of States and Their Property, and Their Possible Effects upon the Jurisprudence of Japanese Domestic Courts on State Immunity', 53 *Japanese Yearbook of International Law* 202 (2010), p. 210.

102 It follows from the description given by Yakushiji of the Oman Embassy case in the same article that this case revolved around the construction of a new premises for the embassy of the Sultanate of Oman in Tokyo. As such, it is clearly a (Use) of Property Case. According to Yakushiji '[t]he Tokyo High Court, although noting that the issue of immunity prima facie seemed outside the scope of this proceeding because the defendant of this case was not Oman and the issue of a possible suspensive effect of the revocation of the disposition in question was irrelevant to the examination of this proceeding per se, considered however that the court should examine whether Oman was entitled to enjoy immunity from jurisdiction in the proceeding that would seriously affect its interests or activity as if it were a defendant of the proceeding, since the third-party effect of the revocation judgment, if it were rendered, could be blocked and not imposed on Oman because of its immunity from civil jurisdiction. However, the Court concluded that immunity from jurisdiction could not be granted to Oman in this case, mainly because the construction of the building to be used as the premises of the diplomatic mission per se was not a sovereign activity but a private law activity.' (Ibid., p. 210).

103 Whereby Angelet seems to be of the view that such legally binding effects are not limited to the *domestic* legal sphere but may also be found on the *international* legal plane (see Angelet, *supra* n. 76, p. 93), albeit that in the latter case the 'interests of the forum State' in adjudicating the case may ultimately influence whether or not immunity will be granted by the Court (ibid., p. 95).

tion of Article 6(2)(b) in domestic ratification procedures. Secondly, many of the publications are quite old and were unable to take into account more recent case law on the topic which (as we shall see later on in this paper) provides interesting insights in how Article 6(2)(b) is interpreted by courts in practice.

2.5 Article 6(2)(b) UNCSI in case law

69. Many cases in which Article 6(2)(b) UNCSI was referred to either do not discuss the scope of the article in much detail or mainly refer to earlier case law. An important decision in respect of the latter is without doubt the 2017 judgment of the Supreme Court of the United Kingdom in *Belhaj* which would set the scene for various judgments in other (common law) jurisdictions.[104] The *Belha*j case revolved around torture by foreign government officials. *Belhaj et al.* believed that senior UK Government officials were complicit in this torture and held them personally liable for damages suffered. The defendant British government officials invoked State immunity and the foreign act of State doctrine. Both pleas were eventually rejected by the Supreme Court in highest instance.

70. Writing for the majority in *Belhaj*,[105] Lord Sumption considered that there was no need to examine the extent to which Article 6(2)(b) and in particular the final words thereof ('property, rights, interests or activities') represented the 'current consensus of nations' since

> [...] the scope of the final words of article 6(2)(b) are plainly limited by their context. Article 6(2)(b) is concerned only with cases where the proceedings seek to 'affect' the property, rights, interests or activities of a state. It is difficult to envisage a case where this would be true, unless it related to property within the jurisdiction of the domestic forum in which the foreign state had an interest, especially in the context of a Convention which is expressly concerned only with the immunity of the state eo nomine and its property (see article 1). An examination of the travaux confirms this. [...] The essential point about the property cases is that they have the potential directly to affect the legal interests of states notwithstanding that they are not formally parties. In the case of an action in rem, this is obvious. The court's decision binds all the world. But although perhaps less obvious it is equally true of an action in personam, where the court is asked to recognize an adverse title to property in someone else or award possession of property as of right to another. As Lord Porter and Lord Radcliffe put it in Dollfus Mieg [...] the law cannot consistently with the immunity of states require a state to appear before a domestic court as the price of defending its legal interests. None of this reasoning, however, applies in a case where the foreign state has no legal interest to defend because the court's decision in its absence cannot directly affect its legal interests. I would not altogether rule out the possibility that litigation between other parties might directly affect interests of a foreign state other than interests in property. But, as I have observed, it is not easy to imagine such a case. The appellants' argument is in reality an attempt to transform a personal immunity of states into a broader subject matter immunity, ie, one which bars the judicial resolution of certain issues even where they cannot affect the existence or exercise of a state's legal rights. No decision in the present cases would affect any rights or liabilities of the four foreign states in whose alleged misdeeds the United Kingdom is said to have been complicit. The foreign states are not parties. Their property is not at risk. The court's decision on the issues raised would not bind them. The relief sought, namely declarations and damages against the United Kingdom, would have no impact on their legal rights, whether in form or substance, and would in no way constrict the exercise of those rights. It follows that the claim to state immunity fails.

71. Similar views were expressed by Lord Mance in *Belhaj*:[106]

> The drafting history locates article 6 firmly in the context of the case law concerning the arrest of vessels, such as The Parlement Belge, and property in which states claim an interest, such as Dollfus Mieg: see eg the Report of the International Law Commission (Yearbook 1991, Vol II, (2), pp 23-25). The Report also explains the focus of article 6 as avoiding the exercise of State jurisdiction in a way which would put any foreign sovereign in the position of having to choose between being deprived of property or otherwise submitting to the jurisdiction; and it explains the words 'to affect' as having been introduced to replace the prior draft wording 'to bear the consequences of a determination by the court which may affect', in order to avoid 'unduly broad interpretations' of article 6(2)(b). Even so, concerns were expressed at the drafting stage by both Australia and the United States about the potential width of article 6(2)(b): see the Report of the Secretary General of the United Nations A/47/326 of 4 August 1992. But academic commentators have concluded that any uncertainty in its scope should be addressed by recognising that ''interests' should be limited to a claim for which there is some legal foundation and not merely to some political or moral concern of the State in the proceedings': Fox and Webb, The Law of State Immunity, 3rd ed (2015 revision), p 307; and O'Keefe, Tams (eds), The United Nations Convention on Jurisdictional Immunities of States and Their Property (2013), pp 110-111, indicating that some specifically legal effect should be required as distinct from a social, economic or political effect.

72. Subsequent case law from other common law jurisdictions borrows heavily from these findings in *Belhaj*. In South Africa, for example, the High Court (Eastern Cape Local Division, Port Elizabeth – Full Court) agreed in the *Cherry Blossom* case (2017)[107] with the findings in *Belhaj* regarding the scope of Article 6(2)(b). This case revolved around a cargo of phosphate on board of the vessel NM Cherry Blossom that docked in Port Elizabeth (South Africa). The phosphate was

[104] See Supreme Court of the United Kingdom, *Belhaj et al. v. Straw et. Al*. [2017] *UKSC* 3, 17 January 2017. For a more detailed description of this case see Annex II, para. 74.

[105] See Lord Sumption, paras. 195-197 (followed by Lord Hughes and Lord Neuberger, who in turn is followed by Lord Wilson, Lady Hale and Lord Clarke.

[106] See Lord Mance (with whom Lord Neuberger, Lady Hale and Lord Clarke (also) agreed), para. 26. See on the issues of State immunity also paras. 27-31 of the opinion of Lord Mance. It is noted here that Lady Hale and Lord Clarke observed that they agreed with Lord Neuberger (who in turn agreed with Lord Wilson and Lord Mance on the State immunity issue). As such the opinions by both Lord Mance and Lord Wilson can be said to reflect the majority view of the Supreme Court.

[107] High Court of South Africa (Eastern Cape Local Division, Port Elizabeth), Case no. 1487/17 (*Cherry Blossom*), 15 June 2017. Also published in 200 *International Law Reports* 488. For a more detailed description of this case, see Annex II, para. 83.

extracted by a Moroccan company[108] from a mine in Western Sahara, a disputed territory claimed by both Morocco and the unrecognized Sahrawi Arab Democratic Republic (SADR). SADR claimed that the phosphate belonged to the Sahrawi people, while the Moroccan company, supported by its parent company,[109] argued it was the rightful owner. The two Moroccan companies invoked state immunity and the foreign act of State doctrine, as a South African ruling could affect Morocco's legal interests. After citing (in part) the above quote from Lord Sumption,[110] the High Court concluded that the 'legal interests' of Morocco were not at issue in that case. The *Cherry Blossom* did not make it to the Supreme Court of Appeal of South Africa; however, several years later another case did. In *EAC v. MTN* (2025)[111] Unterhalter JA, writing for the majority of the Supreme Court of Appeal of South Africa, first addressed the question of whether Article 6(2)(b) could be said to reflect international customary law. In his view this was not the case.[112] Turning to the question of indirect impleading and in response to the argument that Section 2(2) of the Immunities Act of South Africa had the same scope as Article 6(2)(b), Unterhalter JA, referred in this regard to *Belhaj*, the findings in which he summarized as follows:

> Belhaj thus holds as follows. First, the paradigm case of a state indirectly impleaded are proceedings in which the foreign state's interests in property are affected. Second, the outer reaches of the concept of a state indirectly impleaded require that the legal interests of the state are affected. Third, the concept does not extend to the social, economic, political or moral effects of the proceedings upon the foreign state.[113]

73. After observing that *Belhaj* correctly set out the framework to determine whether a State is indirectly impleaded, Unterhalter JA continued by arguing that extending this doctrine 'beyond a legal interest in property' was to be done with great caution. First, because the immunity at stake was not a functional immunity (*ratione materiae*) in his view but a personal immunity (*ratione personae*) and was also concerned with the relationship between a foreign State and its legal rights. Second, because the concept of indirect impleading turned on the domestic court being required to adjudicate upon the rights (or liabilities) of a foreign State, even in proceedings to which it is not a party, meaning that the issue had (therefore) also been framed as one in which immunity is granted to the foreign State 'to spare it the choice of having to sacrifice either his property or his independence'. If immunity spared the foreign Government the choice of submission or the risk of prejudice to its rights, the immunity then rested on the proceedings posing that risk, Unterhalter JA held.[114] Against the background of those observations, he formulated the applicable test as follows:

> The proceedings in question must affect the legal interest of the foreign state, even though it is not a party to the proceedings. The foreign state has such an interest if the proceedings might affect the legal rights (or liabilities) of the foreign state. Other interests, such as political, moral or diplomatic interests, do not register as relevant interests because courts of law do not give judgments or issue orders that redeem these interests. The foreign state's rights in property fall within the class of legal rights that may indirectly implead the foreign state. That is so because the parties to the proceedings may claim property rights that, if recognised by a court and reflected in its orders, may thereby diminish the bundle of rights in property to which the foreign state claims an entitlement.[115]

74. He continued that, like Lord Sumption in *Belhaj*, he did not believe

> that the class of rights of the foreign state that may give rise to a foreign state being indirectly implead[ed] is confined to rights in property. However, the rights of the foreign state that might qualify for inclusion in the class must have the attributes that the property cases exemplify. In particular, the proceedings must be such that the legal rights of the foreign state would be affected because the judgment and order of the court may diminish or otherwise adversely affect the foreign states' entitlement to these rights, or their exercise.[116]

75. Then he applied this test to the case at hand: a dispute between Turkish telecoms company Turkcell and its subsidiary East Asian Consortium (EAC) against South African telecoms company MTN, that arose after EAC, which had secured a GSM licence in Iran through a public tender, was allegedly replaced by MTN following bribes paid to Iranian officials to induce a breach of contract, Unterhalter JA held there was no indirect impleading in the case and the immunity claim therefore failed:

> No claim is made against the government of Iran as a joint tortfeasor. No property rights of the government of Iran are exposed to jeopardy. EAC does not seek to set aside what it alleges to be the subversion of a competitive tender. The outcome of the tender remains in place. The claims of EAC would not undo the actions of the government of Iran. EAC's claims, if they were to be proven at trial, would establish that EAC acquired rights as against the government of Iran which were breached by that government. But no liability attaches to any such finding. Nor would a finding that the government of Iran may be found to be responsible for the substitution of EAC for MTN International have any adverse entailment upon the legal rights or liabilities of Iran. The liability that would accrue from any award of damages would be borne by the defendants, not Iran. It will suffer no detriment to any of its rights, nor accrue any liability from such a judgment.[117]

[108] Namely Phosphates de Boucraa SA.
[109] Namely OCP SA. The Moroccan Government was at the time the majority (94,12) shareholder of OCP SA. See High Court of South Africa (Eastern Cape Local Division, Port Elizabeth), Case No. 1487/17 (*Cherry Blossom*), *supra* n. 107, paras. 10-11.
[110] Ibid., para. 81.
[111] Supreme Court of Appeal of South Africa, *East Asian Consortium B.V. v. MTN Group Limited* et al., *supra* n. 7.
[112] Ibid., paras. 43-44.
[113] Ibid., para. 49.
[114] Ibid., paras. 51-53.
[115] Ibid., para. 54.
[116] Ibid., para. 55.
[117] Ibid., para. 57. We note that this judgment was not unanimous. Molemela P (Mocumie JA concurring) issued a dissenting opinion from which it follows that he would have upheld the immunity

76. In Canada, the Court of Appeals of British Columbia in *United Mexican States* (2015)[118] also extensively built on the *Belhaj case*, although at the time that case had not yet been decided by the Supreme Court but had just been adjudicated by the Court of Appeal (which insofar as the immunity issue was concerned had come to largely similar findings as the Supreme Court). Justice Harris (who was joined by all the other justices) observed that in *Belhaj*, the Court of Appeal had correctly found that Article 6(2)(b) was to be interpreted as meaning that 'the legal effects engaged should be specifically legal effects, such as the imposition of a lien or declaration of title, rather than social, economic, or political effects. Similarly, the relevant state interests should be confined to legal interests, as opposed to 'interests in some more general sense'[119] He also agreed that 'proceedings will not be barred on grounds of state immunity simply because they will require the court to rule on the legality of the conduct of a foreign state' as an argument along those lines, was not a State immunity argument but relied on the related but separate principles of the act of State doctrine. As the Court of Appeal had correctly found in *Belhaj*

> a wider exemption from jurisdiction extending beyond state immunity in cases of direct or indirect impleader is addressed in this jurisdiction by the act of state doctrine and principles of non-justiciability. The extension of state immunity for which the respondents contend would leave no room for the application of those principles.[120]

claim. His dissenting opinion does not refer to or address Art. 6(2)(b) UNCSI. Instead, Molemela P stated that his inclination was that 'the class of rights of the foreign state that may give rise to a foreign state being indirectly impleaded should not be confined to rights in property and should be extended to a protectable legal interest' and that in his opinion 'it suffices if the pleaded case is of such a nature that the legal rights of the foreign state would be affected because the judgment and/or order of the court might implicate the foreign state's entitlement to those rights, or the exercise thereof.' (para. 139). He therefore disagreed that 'the rights of the foreign state that qualify for inclusion in the class *must* have the attributes that the property cases exemplify.' (ibid.) He was also unable to agree with the proposition that 'a finding that the government of Iran was responsible for the substitution of EAC for MTN International will not have any adverse entailment upon the legal rights or liabilities of Iran because the liability that would accrue from any award of damages would be borne by the defendants, not Iran' nor did he agree with the proposition that 'Iran will suffer no detriment to any of its rights, nor accrue any liability from a judgment that finds it to have been complicit in acts of bribery, corruption and unlawful interference.' (para. 142). Molemela P was of the view that 'EAC's delictual claim against MTN International cannot succeed in a South African court unless that court makes a specific finding, as a matter of law, that the government of Iran acted wrongfully and that it is such unlawful conduct that led to MTN International replacing EAC as the successful bidder and being awarded the GSM license. Without such a finding, the element of causation cannot be proven, and the claim cannot succeed.' (ibid., para. 142). In his view, it was 'not inconceivable that indeterminable reputational damage may ensue for the government of Iran in the marketplace because of evidence denouncing the executive actions of its officials relating to the award of a license, adduced in a forum in which it, as an implicated party, has been denied an opportunity to give its side of the story to refute EAC's claims.' (ibid., para. 143).

[118] Court of Appeal for British Colombia, *United Mexican States v. British Columbia* (Labour Relations Board), 2015 *BCCA* 32, Docket: CA041589, 30 January 2015, para. 46. For a more detailed description of this case see Annex II, para. 13.

[119] Ibid., para. 46.

[120] Ibid., paras. 47-48.

Justice Harris then concluded that in the case at hand – which concerned a union's complaint to the Canadian Labour Relations Board, alleging that Mexico had improperly interfered in a union vote – 'property in the ownership, possession, or control of Mexico' and 'Mexico's legal interests' were not affected and the immunity argument therefore failed.[121]

77. To the extent that case law of civil law jurisdictions refers to Article 6(2)(b), an extensive discussion on (the interpretation) of that provision is usually lacking. In the Belgian *Touax* case (2006) about a civil claim against the Belgian State for damages suffered by Touax and its Romanian subsidiary due to a 1999 NATO bombing near Novisad,[122] the Brussels Court of Appeal cited the provision and subsequently found that the indirect assessment of the legality of a decision of NATO and its member states did not infringe on the 'property, rights, interests or activities' of those member states as referred to in Article 6(2)(b). It therefore declined to dismiss the case on immunity grounds.[123]

78. In Dutch case law, Article 6(2)(b) was referred to by the Court of Appeal (2021) in a civil case against two former officials of the Israeli Defence Forces (IDF) whom the plaintiff held responsible for an air strike which had killed several

[121] Ibid., para. 49.

[122] Brussels Cour d'Appel (2e Chambre), *Touax SCA et Touax ROM c. État Belge,* 16 May 2013. For a more detailed description of this case see Annex II, paras. 8-9.

[123] For the sake of completeness, we also mention the *Puigdemont* case which is reported on in Pierre d'Argent, Alexia de Vaucleroy & Frederic Dopagne, *Jurisprudence Belge Relative au Droit International Public* (2018-2022), 55 *REV. BDI* 539 (2022), p. 564 and described as follows: (our translation) ('The Brussels Court of First Instance heard a civil liability action brought by former members of the Catalan government who considered that they had been wrongfully prosecuted by the Spanish courts following Catalonia's declaration of independence in October 2017 (Civ. Brussels (75th Ch.), March 27, 2020, R.G. 2018/5401/A, unpublished). The plaintiffs had initially sued the investigating judge of the Spanish Supreme Court, accusing him of bias. It is possible that the judge was targeted as a defendant in the case in order to avoid coming up against the State's immunity from jurisdiction. In any event, the Kingdom of Spain very quickly intervened voluntarily in the proceedings in order to defend, precisely, its immunity as a foreign State, clearly considering that this was affected by the action brought formally against its organ. It is true that, according to the text of the New York Convention in any event, proceedings are considered to be brought against a State, even if the latter is not named as a party, when they are 'in fact directed to the property, rights, interests or activities' of that State (Article 6(2)(b)): in this case, it could be considered that the action against the judge was in fact aimed at impairing the 'interests' and/or 'activities' of the Kingdom of Spain itself, since it concerned a challenge to the manner in which criminal justice had been administered by Spanish organs. The court did not have to rule on this point (nor, therefore, on the underlying question of the customary law status of this provision of the New York Convention), as the Spanish State took the initiative to intervene and assert its immunity; it argued its case in this regard in a manner that was all the more 'classic,' exactly as it would have done if it had been the defendant as such, since the plaintiffs sought to extend their claims to it following its voluntary intervention. It should also be noted that the State immunity so actively invoked by Spain, and which the court will recognize in its favor (see below), will also benefit the magistrate himself, who is the defendant in the action: see below, nos. 67-68.') We ultimately managed to obtain a copy of the judgment in question but were unable to find any reference to Art. 6(2)(b) therein. The reference in the case summary to this article therefore strikes us an observation by the authors and not one of the considerations of the Brussels court.

of his family members.[124] The Court of Appeal did not enter into an inquiry of the applicability and meaning of Article 6(2)(b). Rather it confined itself to the finding that ruling on the case would mean Israel's 'interests or activities' were at issue because if the plaintiffs contention that the bombing of his family's home was a war crime were to be found to be correct, that would have significant legal consequences, not only for the two IDF-officials but also, the Court of Appeal found, for the State of Israel to which their actions could be attributed.[125] The Court of Appeal ultimately declined jurisdiction because of the functional immunity of the IDF-officials. The plaintiff appealed to the Dutch Supreme Court which confirmed the ruling of the Court of Appeal. Article 6(2)(b) played no role in this ruling and is not mentioned or referred to by the Supreme Court in its reasoning to uphold the judgment of the Court of Appeal.[126]

79. A Dutch case in which Article 6(2)(b) featured very prominently is the *Cerbuco* case (2024).[127] In this case, the Court of Appeal of 's-Hertogenbosch found that the text of Article 6(2)(b) was clear and was not limited to cases involving property since it also explicitly referred to 'rights, interests and activities' of the State. In light of this clear text, the Court of Appeal found that it would have made sense for States which had already ratified the UNCSI to enter a reservation if they believed that a proper interpretation thereof meant that Article 6(2)(b) should be limited to cases involving property rights. None had done so, however.[128] After reviewing legal literature[129] and case law[130] on the topic, the Court of Appeal found that these confirmed that whether a State's 'property, rights, interests and activities' were at stake depended on the circumstances of the case.[131] Application of the rule of Article 6(2)(b) would therefore not always lead to the same outcome. Ultimately, however, the Court of Appeal did not base its conclusion that adjudication of the case was barred by the immunity of Cuba on an (analogous) application of Article 6(2)(b) – at least that is how we interpret the judgment – as it had already arrived at this conclusion *before* discussing Article 6(2)(b). In these paragraphs preceding its discussion of Article 6(2)(b), the Court of Appeal found that Cuba's immunity from jurisdiction was at stake because the primary issue was whether Cuba had acted unlawfully by withdrawing the exclusivity and preferential rights of the plaintiff company and instead award these rights to the defendant company. According to the Court of Appeal, the plaintiff companies demands were aimed

[124] See Gerechtshof Den Haag, 7 December 2021, ECLI:NL:GHDHA:2021:2374.
[125] Ibid., para. 3.7
[126] Hoge Raad, ECLI:NL:HR:2023:1132, *NJ* 2023/282.
[127] Gerechtshof 's-Hertogenbosch, 23 July 2024, ECLI:NL:GHSHE:2024:2380. For a more detailed description of this case see Annex II, para. 56 *et seq*.
[128] Ibid., para. 3.8.12.
[129] The Court of Appeal referred to Angelet (*supra* n. 76), Foxx & Webb (*supra* n. 83), Kakiuchi (*supra* n. 95), Franchini (*supra* n. 85) and Grant (*supra* n. 89), see ibid., paras. 3.8.8, 3.8.9 and 3.8.11.
[130] The Court of Appeal (see ibid., paras. 3.8.9 and 3.8.10) referred to *Belhaj* (*supra* n. 104), *Touax* (*supra* n. 122), *Cherry Blossom* (*supra* n. 107) and the first instance judgment in the *MTN v. EAC* (which was later overturned by the Supreme Court of Appeal of South Africa, see *supra* n. 7).
[131] Ibid., para. 3.8.12.

at having the defendant company cease its activities in Cuba. Upholding those claims, the Court of Appeal found, would mean that the revocation of the exclusivity and preferential rights by Cuba would *de facto* have no effect. This because in that case it would be established that the defendant company would be acting unlawfully and be liable towards the plaintiff company for its activities in Cuba and would be prohibited from continuing those activities. With such a ruling, a Dutch court would directly influence the exercise by Cuba of its sovereign powers on its own territory and would in fact exercise authority over Cuba.[132] That, the Court of Appeal found, would contravene the principle of *par in parem non habet imperium* which formed the basis of State immunity.[133] A Dutch court should therefore decline jurisdiction in such a case, if necessary *ex officio*.[134] Under those circumstances, the question of whether or not Article 6(2)(b) reflected customary international law (in its entirety) could be left unanswered according to the Court of Appeal although its subsequent findings, which thus appear to be *obiter dicta*, clearly indicate it believed this was the case.[135]

80. Finally, there is the judgment of the International Court of Justice (ICJ) in the *Jurisdictional immunities*[136] case (2012). Among other things, this case revolved around a grant of *exequatur* by the Italian courts of a Greek judgment holding Germany liable for the massacre of civilians in the Greek town of Distomo by SS troops during the Second World War. The ICJ held that '[w]here a court is seised of an application for exequatur of a foreign judgment against a third State, it is itself being called upon to exercise its jurisdiction in respect of the third State in question' and that

> in granting or refusing exequatur, the court exercises a jurisdictional power which results in the foreign judgment being given effects corresponding to those of a judgment rendered on the merits in the requested State. The proceedings brought before that court must therefore be regarded as being conducted against the third State which was the subject of the foreign judgment.[137]

Having arrived at this conclusion the ICJ then cited Article 6(2) UNCSI in its

[132] Ibid., para. 3.8.1.
[133] Ibid., para. 3.8.1.
[134] The Court of Appeal held that the obligation of States to – *ex officio* – respect and implement immunity applied both in cases where the foreign State is a party to the proceedings (direct jurisdiction or direct impleading) and in cases where it is not (indirect jurisdiction or indirect impleading). If that were different, it would mean that a party could circumvent the right of immunity from jurisdiction of a foreign State by not (joining) the foreign State as a defendant to the proceedings, even though the claim is (also) directed against the acts of that State and granting it would infringe the sovereignty of that State. According to the Court of Appeal, the position of a State involved in proceedings that does not appear in those proceedings is no different from the position of a State that is not itself *involved* in proceedings if immunity from jurisdiction is at issue (ibid., para. 3.8.3).
[135] Ibid., paras. 3.8.7-3.8.12
[136] ICJ, Judgment, *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)*, 3 February 2012.
[137] Ibid., para. 128.

entirety and subsequently held that '[w]hen applied to exequatur proceedings, that definition means that such proceedings must be regarded as being directed against the State which was the subject of the foreign judgment.'[138] In our view, it is unclear if the ICJ had Article 6(2)(a) or 6(2)(b) in mind in this regard. The former strikes us as most logical as the judgment in question was one in which Germany was the defendant, Germany had been allowed to object against the grant of *exequatur* and appeal these decisions to the Italian Court of Cassation (which it did so without success). In other words: the ICJ simply considered exequatur proceedings as proceedings in which the foreign State is named as a party to the proceeding (article 6(2)(*a*). However, we also found a scholar who seems to be of the view that the ICJ had Article 6(2)(*b*) in mind because exequatur proceedings are a preliminary step leading to actual execution against the assets of the foreign State.[139]

2.6 Interim conclusion – findings on the meaning of Article 6(2)(b) in case law

81. The case law discussed above clearly recognizes the 'property'-background of Article 6(2)(b). That said, the common denominator of this case law is that, although concrete examples are not *per se* easy to conceive of, the scope of Article 6(2)(b) is broader than what we have earlier referred to as '(Use of) Property Cases'. It can be deduced from the judgments in the *EAC v. MTN* and *Cerbuco* cases that these two courts did not believe this broader application to be limited to defendants who should be considered emanations of the State (but who are not covered by the definition in Article 2(1)(b) of 'State'). That said, we believe it can also be deduced from this case law that Article 6(2)(b) does not come into play simply because the proceedings would require the court to rule on the legality of the conduct of a foreign state which has not been named as a defendant. In other words: more is needed. Although strictly speaking not based on Article 6(2)(b) (the court was applying the South African Immunity Act) it seems that in *EAC v. MTN*, the Supreme Court of Appeal of South Africa found a claim for compensation of damages also to be insufficient to trigger immunity. What would have probably 'tipped' the scales for that court would have been a demand resulting in the outcome of the tender not remaining in place or if its claims would *de facto* undo the actions of the Government of Iran. A similar 'tipping point' can be found in the *Cerbuco* case. Although also strictly speaking not based on Article 6(2)(b) (the court was applying international customary law), what seems to have been decisive for the 's-Hertogenbosch Court of Appeal was that the plaintiff's demands went further than a declaratory judgment or damage claim and also requested a court order to the defendant company cease and desist from any activity that infringed the plaintiff company's exclusive rights, on pain of a penalty payment. Awarding those claims, the 's-Hertogenbosch Court of Appeal found, would mean that Cuba's sovereign decision to withdraw the exclusivity rights would *de facto* be deprived of its effects. As to the ICJ's judgment in *Jurisdictional immunities*, we saw that the interpretation and application of Article 6(2) by the ICJ is rather ambivalent (did it refer to sub a or b?). To the extent that it had Article 6(2)(a) in mind the judgment is not relevant to our analyses (which focusses on cases in which the foreign State is not named as a party). If the ICJ meant to refer to Article 6(2)(b) its ruling is clearly limited to a situation in which *exequatur* is sought of a judgment in which a foreign State was the defendant and as a preliminary step leading to actual execution against the assets of that foreign State (which we would consider a '(Use of) Property Case'). As such – and whatever way the judgment is interpreted – we do not believe it necessarily warrants the conclusion that Article 6(2)(b) has a wider scope than the *travaux préparatoires* or scholars suggest.

82. All in all, the common denominator of the majority of the cases we analysed is an interpretation of Article 6(2)(b) that goes further than an interpretation based on the *travaux préparatoires*. It also goes further than the views advocated by some scholars such as, for example, Franchini. The case law is in line, however, with most of the other scholars discussed above, although to the extent that these views take the position that a mere finding of illegality would already suffice it can be said that such an interpretation is not supported in the case law. Conversely, it should be noted that some case law (*Cerbuco* and perhaps also *EAC v. MTN*) seems to go beyond the general view in the legal doctrine that the application of Article 6(2)(b) is limited to proceedings that have legally binding effects for the formally non-defendant State and that therefore a *de facto* effect is insufficient.

83. As was indicated in our discussion of the legal literature, the purpose of this paper is not necessarily to point out which court we agree with (or not) but to provide an overview of how Article 6(2)(b) has been interpreted. That said, we would also flag here that although most courts refer in some way or the other to the *travaux préparatoires* in support of their decisions, the depth of the analysis varies considerably and no court seems to have formulated views on a full analysis of these *travaux préparatoires* (as we have tried in Annex I and above). With the exception of the 's-Hertogenbosch Court of Appeal most case law also does not refer to the interpretation of Article 6(2)(b) in domestic ratification procedures.

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[138] Ibid., para. 129.

[139] See N. Boschiero, 'Jurisdictional Immunities of the State and Exequatur of Foreign Judgments: a private International Law Evaluation of the Recent ICJ Judgment in Germany v. Italy', *Stato Chiese e pluralismo confessionale*, December 2012, p. 14 ('Secondly, irrespective of the fact that a declaration of enforceability is to be distinguished from actual enforcement, the ICJ was correct in asserting that exequatur proceedings must be regarded as being "directed against" the State which was the subject of the foreign judgment: such proceedings, in fact, are a preliminary step leading to actual execution against the assets of the foreign State. According to the United Nations Convention on Jurisdictional Immunity of the State, proceedings before a court of a State shall be considered to have been instituted against another State (not named as a party to the proceedings) when such a proceeding in effect "seeks to affect the property, rights, interests or activities of that other State". Therefore, Germany was entitled to object to the decision of the Florence Court of Appeal granting exequatur to the Greek decision.')

3. EUROPEAN CONVENTION ON STATE IMMUNITY

84. The ECSI does not contain a definition of 'State' or 'State property' nor does it contain a provision similar to Article 6(2)(b) UNCSI. The ECSI does contain, however, an article similar to Article 13 UNCSI. This Article 9 ECSI also uses the terms 'rights', 'interests' and 'property'.[140]

85. Furthermore, and of particular interest for this paper, Article 13 ECSI provides:

> Paragraph 1 of Article 1 shall not apply where a Contracting State asserts, in proceedings pending before a court of another Contracting State to which it is not a party, that it has a right or interest in property which is the subject-matter of the proceedings, and the circumstances are such that it would have been entitled to immunity if the proceedings had been brought against it.

86. The Explanatory Note to Article 13 reads:

> This article introduces an exception to Article 1, paragraph 1. It concerns the special case in which a State intervenes in proceedings to which it is not a party in order to invoke its immunity. In common law countries, a judicial decision can sometimes affect third parties; such is the case, for example, with actions in rem. By permitting a State to claim immunity in such cases notwithstanding the provisions of Article 1, paragraph 1, Article 13 gives States a chance to safeguard their rights or interests in the property which is the subject of the dispute.[141]

87. It follows from the final ILC Commentary to the Draft Articles that Article 13 ECSI was considered an example of what Article 8(2) (voluntary appearance) set out to do.[142]

88. Unfortunately – insofar as relevant for the topic of this paper – the ECSI has not been the subject of many scholarly articles. Further materials regarding the *travaux préparatoires* are not (in any case not easily) accessible. There is also limited case law where the ECSI played a role, presumably in light of the limited amount of ratifications so far. We will therefore confine ourselves to the observations above and let the ECSI rest in the remainer of this paper and not include it in our answer to the research questions.

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[140] The Explanatory Report notes in this regard: 'Under certain legal systems possession is not strictly speaking a right in the sense attributed to that term. For this reason express reference is made to it in sub-paragraphs (a) and (b) of this article. […] The expressions 'rights', 'use' and 'possession' must be interpreted broadly.' See Explanatory Report to the European Convention on State Immunity Basel, 16.V.1972, p. 10.

[141] *Explanatory Report to the European Convention on State Immunity Basel*, 16.V.1972, p. 12. Sinclair wrote about this exception: 'As an exception to this basic rule, and in order to take account of United Kingdom practice in relation to indirect impleading, it is provided that there is no implied submission to the jurisdiction where a Contracting State asserts, in proceedings to which it is not a party, that it has a right or interest in property which is the subject- matter of the proceedings, and the circumstances are such that the State would have been entitled to immunity if the proceedings had been brought against it (Article 13).' See I.M. Sinclair, *ICLQ* 1973, vol. 22, no. 2, p. 269.

[142] See ILC Commentary to Art. 8, para. 7, footnote 86.

4. IMMUNITY UNDER THE TREATIES – ANSWER TO RESEARCH QUESTION 1

89. Careful study of the *travaux préparatoires* shows that Article 6(2)(b) UNCSI was intended – and generally perceived – as having a significantly more limited scope than the overly broad and ambiguous plain meaning of the text of the article suggests. As a result of the simplification of the article following the adoption of a satisfactory definition of 'State' in the final stages of the drafting process, the original meaning and purpose of the article seems to have been lost out of sight as the legal literature and case law illustrates. Perhaps this should hardly be surprising. All in all, the drafting process lasted several decades and it took another decade for the first cases to start making their way through the courts and draw the attention of legal scholars. At that time, most of what had played out in the context of the *travaux préparatoires* had already been buried deep into archives and is not reflected even in the final ILC Commentary.

90. Be that as it may, fact of the matter is that case law and scholarly writings have started to develop and – as we have seen above – both generally depart from the *travaux préparatoires*.

91. Of course, it is never too late to return to the original purpose of the article when applying it. In fact, as we shall see in the next chapter of this paper, (the further development) international customary can also play a role in the interpretation of Article 6(2)(b) and we find little support in international customary law for a broad interpretation of Article 6(2)(b).

92. That said, based on the case law as it currently stands and taking into account the views of the scholars described above, we would answer research question 1 as follows:

A. The UNCSI does not require a grant of immunity from jurisdiction in civil proceedings between two private parties in which the claimant seeks a declaratory judgment that the defendant has acted unlawfully which will require the forum court, as a preliminary to its ultimate decision, to examine and pronounce an opinion on (the legality of) *acta iure imperii* of a foreign State which itself is not named as a party to the proceedings.

B. If a plaintiff requests not (only) a declaratory judgment but (also) an award of monetary compensation this will not change our answer. However, if injunctive relief (such as a court order that the defendant refrain from certain conduct) is requested this might in the opinion of some courts tip the balance in favour of immunity if such an order would *de facto* undo the *acta iure imperii* and deprive it of its effects (assuming that none of the exceptions to immunity provided for in the UNCSI applies).

5. CUSTOMARY INTERNATIONAL LAW

5.1 Introduction

93. Now that the UNCSI has not yet entered into force, the state of customary international law is for the time being determinative for the answer to our research questions, in any event in the Dutch legal landscape. To answer these questions we will therefore have to establish the state of customary international law on the topic.
94. In this context, we will first briefly explain when it can be said that a rule of customary international law exists (paragraph 5.2). We will then apply this framework to the results of the research we have conducted on current state practice and *opinio juris* as evidenced in particular by domestic legislation and case law (paragraph 5.3) before reaching our conclusion.

5.2 When is there a rule of customary international law?

95. The methodology for determining the existence and content of rules of customary international law has also been a topic at the ILC. The relevant Draft Conclusions (with commentary) were adopted by the ILC on second and final reading in 2018 and endorsed by the UNGA that same year.[143] For the purposes of this paper we will assume that these Draft Conclusions indeed establish the proper method for identifying customary international law.[144]
96. Draft Conclusion 2 ('Two constituent elements') sets out the generally accepted rule that a general state practice and the acceptance of that practice as law *(opinio juris*) are the two constituent elements of customary international law. Or as the ILC Commentary explains:

> This methodology, the 'two-element approach', underlies the draft conclusions and is widely supported by States, in case law, and in scholarly writings. It serves to ensure that the exercise of identifying rules of customary international law results in determining only such rules as actually exist. [...] To establish that a claim concerning the existence or the content of a rule of customary international law is well-founded thus entails a search for a practice that has gained such acceptance among States that it may be considered to be the expression of a legal right or obligation (namely, that it is required, permitted or prohibited as a matter of law). The test must always be: is there a general practice that is accepted as law?[145]

[143] UN General Assembly Resolution 73/203, adopted (without a vote) on 20 December 2018, UN Doc. A/73/PV.62, p. 5. In this resolution, the UNGA welcomed the adoption of the ILC's Draft Conclusions and Comments, annexed the Draft Conclusions to the resolution, brought them to the attention of 'States and all who may be called upon to identify rules of customary international law,' and encouraged 'their widest possible dissemination.'
[144] For an elaborate study of the topic, see M. Wood and O. Sender, *Identification of Customary International Law*, Oxford International Law (2024).
[145] ILC Commentary on Draft Conclusion 2, paras. 1-3.

97. The ILC Commentary further explains that '[i]n each case, a structured and careful process of legal analysis and evaluation is required to ensure that a rule of customary international law is properly identified, thus promoting the credibility of the particular determination as well as that of customary international law more broadly.'[146]
98. Draft Conclusion 8(1), which addresses the first element (general state practice) states that '[t]he relevant practice must be general, meaning that it must be sufficiently widespread and representative, as well as consistent.' This implies, as the ICJ put it in its North Sea Continental Shelf judgment, that the practice in question must be 'both extensive and virtually uniform', it must be a 'settled practice'.[147] This means that the practice of one or two states cannot by itself give rise to a rule of customary international law.
99. Draft Conclusion 9(1), which addresses the second element (*opinio juris*), makes it clear that 'the practice in question must be undertaken with a sense of legal right or obligation'. The ILC Commentary explains that '[i]t is thus crucial to establish, in each case, that States have acted in a certain way because they felt or believed themselves legally compelled or entitled to do so by reason of a rule of customary international law: they must have pursued the practice as a matter of right, or submitted to it as a matter of obligation'.[148]
100. Draft Conclusion 3(2) makes clear that '[e]ach of the two constituent elements is to be separately ascertained. This requires an assessment of evidence for each element.' It follows from the ILC Commentary that 'the presence of only one constituent element does not suffice for the identification of a rule of customary international law'. Put differently: '[w]here the existence of a general practice accepted as law cannot be established, the conclusion will be that the alleged rule of customary international law does not exist'.[149]
101. Draft Conclusion 11 elaborates on the relationship between treaties and international customary law. According to paragraph 1, a rule set forth in a treaty may reflect a rule of customary international law if it is established that the treaty rule: (a) codified a rule of customary international law existing at the time when the treaty was concluded; (b) has led to the crystallization of a rule of customary international law that had started to emerge prior to the conclusion of the treaty; or (c) has given rise to a general practice that is accepted as law (*opinio juris*)

[146] ILC Commentary on Draft Conclusions (*General commentary*), para. 2. Draft Conclusion 3(1) further states that '[i]n assessing evidence for the purpose of ascertaining whether there is a general practice and whether that practice is accepted as law (*opinio juris*), regard must be had to the overall context, the nature of the rule and the particular circumstances in which the evidence in question is to be found.'
[147] ICJ, Judgment, *North Sea Continental Shelf (Federal Republic of Germany/Netherlands)*, 20 February 1969, paras. 74 and 77.
[148] ILC Commentary on Draft Conclusion 9, para. 1. The commentary further clarifies that '[i]t is not necessary to establish that all States have recognized (accepted as law) the alleged rule as a rule of customary international law; it is broad and representative acceptance, together with no or little objection, that is required' (see para. 5).
[149] ILC Commentary on Draft Conclusion 2, paras. 3-4.

thus generating a new rule of customary international law. The commentary remarks that treaties that have obtained 'near-universal acceptance' may be seen as particularly indicative in this respect. Treaties that are not yet in force or which have not yet attained widespread participation 'may also be influential in certain circumstances', particularly where they were adopted without opposition or by an overwhelming majority of States.[150]

102. Decisions of courts and tribunals can play a dual role in identifying international customary law. On the one hand, as follows from Draft Conclusions 6 and 10, they can serve as (one of) the form(s) of practice and as evidence of acceptance as law (*opinio juris*) by the forum State. Draft Conclusion 13 indicates, on the other hand, that such judgments may also serve as a subsidiary means for establishing rules of customary international law when they themselves examine the existence and content of such rules.[151] However, caution is required, as not every judgment is suitable for this purpose:

> Decisions of courts and tribunals on questions of international law, in particular those decisions in which the existence of rules of customary international law is considered and such rules are identified and applied, may offer valuable guidance for determining the existence or otherwise of rules of customary international law. The value of such decisions varies greatly, however, depending both on the quality of the reasoning (including primarily the extent to which it results from a thorough examination of evidence of an alleged general practice accepted as law) and on the reception of the decision, in particular by States and in subsequent case law. Other considerations might, depending on the circumstances, include the nature of the court or tribunal; the size of the majority by which the decision was adopted; and the rules and the procedures applied by the court or tribunal.[152]

103. Finally, it follows from Draft Conclusion 14 that scholarly writings 'may serve as a subsidiary means for the determination of rules of customary international law'. Caution is needed, however, for a few reasons. The authors may not always distinguish between the law as it is and the law as they would like it to be. Also, writings may reflect the national or individual viewpoints of their authors and vary in quality.[153]

104. The output of the ILC itself can be seen as scholarly writing in this regard, but merits special consideration. The Commission's determination on the existence and content of a rule of customary international law may have particular value, as may its conclusion that no such rule exists. This is due to

> the Commission's unique mandate, as a subsidiary organ of the United Nations General Assembly, to promote the progressive development of international law and its codification; the thoroughness of its procedures (including the consideration of extensive surveys of State practice and opinio juris); and its close relationship with the General Assembly and States (including receiving oral and written comments from States as it proceeds with its work).

However, the weight accorded to the Commission's determinations is contingent upon various factors, including the sources utilized by the Commission, the stage of its work, and, most significantly, the reception of its outputs by the States.[154]

5.3 The relationship between the UNCSI and customary international law

105. As we saw above a treaty can influence the state of customary international law and this is, of course, no different for the UNCSI. Before discussing this in more detail it is important to note that the ILC itself made clear in the final commentary to the Draft Articles that (article 5 thereof) 'does not prejudge the question of the extent to which the articles, including article 5, should be regarded as codifying the rules of existing international law.'[155]

106. Some courts, such as the European Court of Human Rights (ECtHR), have made rather sweeping statements suggesting – in any case when not put in context – that the UNCSI as a whole codifies customary international law.[156] Other courts (and advocates-general[157]) have approached the customary law character of the UNCSI with much more restraint such as the ICJ,[158] the Supreme Court of

[150] ILC Commentary on Draft Conclusion 11, para. 3.
[151] ILC Commentary on Draft Conclusion 13, para. 1.
[152] ILC Commentary on Draft Conclusion 13, para. 3.
[153] ILC Commentary on Draft Conclusion 14, para. 3.
[154] ILC Commentary on Part Five, Significance of certain materials for the identification of customary international law (Draft Conclusions 11-14), para. 2 and footnote 774.
[155] ILC Commentary 1991, p. 23.
[156] See for example ECtHR, *Sabeh El Leil v. France* [GC], App. no. 34869/05, para. 18 ('*State immunity from jurisdiction is governed by customary international law, the codification of which is enshrined in the United Nations Convention on Jurisdictional Immunities of States and their Property of 2 December 2004 ('the 2004 Convention')*'). We believe that, when put into context, it becomes clear that this consideration should be limited to the article at issue in that case (Art. 11 UNCSI). That the ECtHR does not consider each and every provision of the UNCSI to reflect customary international law also follows from the *McElhinney* judgment (see *infra* n. 158).
[157] See, for example, opinion by Advocate-General Szpunar in Case C-641/18 (*Rina Spa*), 14 January 2020, para. 38 ('The provisions of the [UNCSI] are sometimes regarded as the expression of the principles of customary international law. Nevertheless, while that convention may serve as a basis for identifying general trends in the law relating to immunity, it can hardly be regarded as a source of any binding, specific guidelines, especially in so far as concerns the provisions of the convention which aroused objections while the convention was being drafted. That applies, in particular, to the precise criteria for distinguishing between transactions performed *iure imperii* and those performed *iure gestionis*.')
[158] See ICJ, Judgment, *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)*, 3 February 2012, paras. 62-79 in which it found that the so-called 'territorial tort'-exception provided for in Art. 12 UNCSI was not a rule of customary international law, in any case insofar as actions of armed forces were concerned. See in this regard also ECtHR, *McElhinney v. United Kingdom* [GC], Appl. No. 31253/96, Nov. 21, 2001, at paras. 38-40.

the United Kingdom,[159] the Supreme Court of Appeal of South Africa [160] and the Dutch Supreme Court,[161] which assess the customary law status of the UNCSI on

[159] See for example, Supreme Court of the United Kingdom, *General Dynamics United Kingdom Ltd v. State of Libya* [2021] *UKSC* 22, 25 June 2021, para. 163 ('[The UNCSI] is not yet in force. Twenty-eight States have signed it, including the United Kingdom. Of these, 21 have ratified it, not including the United Kingdom. It will not come into force until it has been ratified by 30 States. It also cannot yet amount to a widespread representative and consistent practice and is of no value as evidence of such a consensus among nations, see para. 47 of the judgment of the Court of Appeal in *Belhaj v. Straw* (United Nations Special Rapporteur on Torture intervening) [2014] EWCA Civ 1394; [2017] AC 964, 997.') the Supreme Court went on to refer to the Speech of Lord Sumption in *Benkharbouche* in which he considered 'It would be difficult to say that a treaty such as the United Nations Convention which has never entered into force had led to the 'crystallisation' of a rule of customary international law that had started to emerge before it was concluded. For the same reason, it is unlikely that such a treaty could have 'given rise to a general practice that is accepted as law'. These difficulties are greatly increased in the case of the United Nations Convention by the consideration that in the 13 years which have passed since it was adopted and opened for signature it has received so few accessions. The real significance of the Convention is as a codification of customary international law. In Jones v Ministry of the Interior of the Kingdom of Saudi Arabia [2007] 1 AC 270, para. 26 Lord Bingham described it as "the most authoritative statement available on the current international understanding of the limits of state immunity in civil cases". However, it is not to be assumed that every part of the Convention restates customary international law. As its Preamble recites, it was expected to "contribute to the codification and development of international law and the harmonisation of practice in this area". Like most multilateral conventions, its provisions are based partly on existing customary rules of general acceptance and partly on the resolution of points on which practice and opinion had previously been diverse. It is therefore necessary to distinguish between those provisions of the Convention which were essentially declaratory and those which were legislative in the sense that they sought to resolve differences rather than to recognise existing consensus. That exercise would inevitably require one to ascertain how customary law stood before the treaty.' (ibid., para. 164 referring to Supreme Court of the United Kingdom, 18 October 2017, *Benkharbouche v. Secretary of State for Foreign and Commonwealth Affairs [*2017] *UKSC* 62, para. 32) That Lord Bingham's remark should be seen in its specific context was also emphasised by Lord Mance in Supreme Court of the United Kingdom, *Belhaj et al. supra* n. 104, para. 25 ('Lord Bingham referred to the Convention as being, "[d]espite its embryonic status, … the most authoritative statement available on the current international understanding of the limits of state immunity in civil cases", going on to say that "the absence of a torture or jus cogens exception [in it was] wholly inimical to the claimants" contention'. This was a statement made expressly about the 'limits' of state immunity in the context of an issue whether the legal liability of a state official for torture fell outside the scope of such immunity. That was a fundamental question which the Convention, however embryonic, could be expected to cover. To attach equivalent relevance to the use in a Convention with no binding international status of the ambiguous terminology of article 6(2)(b) is to take Lord Bingham's words out of context.').

[160] See our discussion of the *EAC v. MTC* judgment in para. 110 *infra*.

[161] See for example, Hoge Raad, 15 July 2022, ECLI:NL:HR:2022:1084, para. 3.2.4 in which it held (our translation) 'The UN Convention includes a codification of customary international law relating to immunity from jurisdiction and the limits thereof; not all provisions of the UN Convention can be regarded as customary international law.' In the same judgment the Dutch Supreme Court considered Art. 11(2)(a) UNCSI to reflect customary international law. However, the Dutch Supreme Court did not consider to fully reflect customary international law, for example, Art. 18 UNCSI to the extent that it lacked the exception provided for in Art. 19(c) (see Hoge Raad, 30 September 2016, ECLI:NL:HR:2016:2236, para. 3.4.7) or Art. 6(1) to the extent that it requires ex officio review of State immunity (see Hoge Raad, 1 December 2017, ECLI:NL:HR:2017:3054, para. 3.4.4).

an article-by-article or even paragraph-by-paragraph basis. We believe this is the correct approach.

107. Although the General Assembly adopted the UNCSI without a vote,[162] it has so far gathered only 25 ratifications notwithstanding that it is open to all 193 Member States of the UN. The UNCSI is (therefore) yet to enter into force. Although some additional States have signed the UNCSI in the first years following adoption thereof in 2004, ratification by most of these countries has still not taken place almost twenty years later. That is telling and warrants considerable caution. If and when the UNCSI will enter into force therefore remains the question.

108. It should also be reiterated here that only a small number of Member States (mostly from the Western Hemisphere), made written comments during the drafting process (both after the ILC Draft Articles had been adopted on first reading and after their adoption on second reading) and that even ILC members expressed disappointment about this.[163] If a vast majority of UN Member States do not provide written comments at all, the fact that the Member States who did so submitted no objections to a certain article can hardly be equated with general support. Put differently, the absence of objections is not proof of support.

109. Although we certainly do not dispute that many provisions in the UNCSI reflect customary international law, the relevant issue for the purposes of this paper is if Article 6(2)(b) can be said to do so.

110. In *EAC v. MTC*, the Supreme Court of Appeal of South Africa held that it did not:

> The Immunities Convention is not in force. It was adopted by the General Assembly of the United Nations, but it has not secured, thus far, a sufficient number of ratifications to enter into force. While certain courts have considered the Immunities Convention to reflect an international consensus as to the existing rules of customary international law on immunity, greater caution has been expressed by other courts as to whether all of its provisions, including Article 6(2)(b), are an authoritative statement of customary international law. In Belhaj, Lord Sumption found it unnecessary to decide whether Article 6(2)(b) represented 'the current consensus of nations', but observed that the drafting history suggested that some states considered the wording 'to affect the property, rights, interests or activities of that State' too broad. Lord Mance's speech in Belhaj describes Article 6(2)(b) as 'the use in a Convention with no binding international status of ambiguous terminology'. Lord Mance also references academic commentary that the uncertainty as to the scope of the concluding wording of Article 6(2)(b) should be 'limited to a claim for which there is some legal foundation'. Nor do I read Cherry Blossom to have reached any conclusion different to those arrived at

[162] An adoption without a formal vote has been likened by scholars to an adoption by consensus – *i.e.* as the result of a general agreement between the UN Member States. See, for example, M. Argentini, 'The UNCSI as an Attempt to Codify International Law on State Immunity', in: *Sovereign Wealth Funds and State Immunity*, Brill | Nijhoff 2024, p. 74 and footnote 14 referring to R. Higgins *et al*., *Oppenheim's International Law: United Nations,* Oxford University Press 2017, p. 364 ('[T]he concept of 'adoption without a vote' is very close to consensus, and the distinction between the two methods is often blurred.')

[163] See *supra* para. 36 and n. 53.

> by Lords Mance and Sumption in Belhaj, whose speeches on the point are extensively reproduced in Cherry Blossom.
>
> While there may well be circumstances in which an unratified treaty (or certain provisions thereof) may evidence the rules of customary international law, I cannot find that this is so of Article 6(2)(b) of the Immunities Convention, on the basis of what has been placed before us. The drafting history reflects the concern of certain States as to the overbreadth of Article 6(2)(b). An insufficient number of States have ratified the Immunities Convention for it to enter into force. There appears to be no evidence of the subsequent practice of States, including non-parties, that would indicate that Article 6(2)(b) is a rule of customary international law. Nor is there evidence of States acquiescing in its precepts.[164]

111. This position of the Supreme Court of Appeal of South Africa can be contrasted with the findings of the 's-Hertogenbosch Court of Appeal. Although apparently *obiter* dicta, that Court seemed to have little doubt that Article 6 reflected customary international law:

> In the opinion of the court, it follows from the foregoing that there is a consistent practice of states, combined with the widely held conviction that consistent practice of states is not optional but mandatory (opinio iuris), in the sense that the right to immunity from jurisdiction must be applied by national courts, even if the foreign state is not a party to the proceedings in question. Whether the property, rights, interests, or activities of the foreign state are affected in such a way that the immunity from jurisdiction of that state is compromised depends, as is apparent from the case law and literature cited above, on the circumstances of the case. This means that the application of the rule of Article 6(2) of the UN Immunity Convention does not always lead to the same result. However, this does not mean that there is no longer any consistent state practice in which such a rule is applied.[165]

112. In our view, answering the question of the customary law nature of Article 6(2)(b) requires a more nuanced approach than that of both these courts. We believe that there can be little doubt that Article 6(2)(b) can be considered to reflect international customary law insofar as it pertains to measures of constraint.[166]

[164] See Supreme Court of Appeal of South Africa, *EAC v. MTN*, *supra* n. 111, paras. 42-43.

[165] See Gerechtshof 's-Hertogenbosch, 23 July 2024, ECLI:NL:GHSHE:2024:2380, para. 3.9.1.

[166] See also Angelet, *supra* n. 76, p. 86: 'One may, at first, wonder whether this provision codifies customary international law. Whether this is the case cannot, however, be answered in an 'all or nothing' fashion. Rather, the question is to what extent Article 6(2) reflects customary international law. Article 6(2) most certainly aims at confirming that State immunity issues do arise, and must be entertained by the courts on their own initiative, in ex parte proceedings such as attachment proceedings directed against the assets of a foreign State. To that extent, Article 6(2) undoubtedly codifies customary international law, as evidenced notably by the case law regarding the arrest of State-owned vessels, starting with the seminal case of The Schooner Exchange v. McFaddon and others of 1812. The question is whether Article 6(2) goes beyond that hypothesis and also covers instances of immunity from jurisdiction, as opposed to immunity from execution.' The Court 's-Hertogenbosch refers to Angelet (para. 3.8.8) but concludes that also the broader scope reflects customary international law because – stated succinctly – the provision was not objected to by many member states, not one of the controversial articles in the final stages of the drafting process, supported in legal literature and applied by courts in the United Kingdom Belgium and South Africa (see Gerechtshof 's-Hertogenbosch, 23 July 2024, ECLI:NL:GHSHE:2024:2380, paras. 3.8.7-3.8.11).

Whether this is also the case for *in rem* proceedings strikes us as less certain, if only because this type of proceeding does not exist in many (civil law) jurisdictions.[167] This, however, is not the real question we would like to address in this paper so we will let it rest. Instead, the key question is if Article 6(2)(b) can be said to reflect international customary law insofar as the type of cases referred to in our research questions is concerned (in short: cases in which, by way of a preliminary question, the forum court is required to rule on the lawfulness of *acta iure imperii* of a foreign State while that foreign State is not named as a party to the proceedings).

113. We already saw in our discussion of the *travaux préparatoires* of the UNCSI that the entire debate in the context of the coming about of Article 6(2)(b) focused on two scenarios. On the one hand, cases involving not the State itself but its emanations – *i.e*. its organs, representatives, agents, instrumentalities *etc.* and, on the other hand, cases involving (the use of or control over) State property and (common law) concepts related thereto, for example proceedings *in rem* and property related 'interests'. We have already set out that in our view what ultimately remained as Article 6(2)(b) only concerns the latter scenario (which we have dubbed '(Use of) Property Cases') at best to be expanded with emanations of the State not covered by the definition of that term in Article 2(1)(b). We also saw that Article 6(2)(b) was not perceived as incorporating the act of State doctrine in the rules on State immunity (on the contrary). That the language ultimate used in Article 6(2)(b) can also be interpreted more broadly does not change this background which is critical in assessing the customary law nature of Article 6(2)(b), particularly in light of the absence of sufficient ratifications for entry into force, let alone of achieving the status of a universally ratified treaty.

114. Finally, we saw that i) all case law cited in the ILC Commentary is 'property' related, ii) that insofar as domestic ratification procedures shed light on Article 6(2)(b), only the 'property'-background thereof is referred to and iii) that to the extent that a possibly broader scope was acknowledged, it was indicated that such a broad scope would in any event not reflect customary international law.[168]

115. In the light of all these circumstances, we believe that – when tested against the three options identified in Draft Conclusion 11 – the preliminary evidence is clearly against a customary law status of Article 6(2)(b) that would go beyond '(Use of) Property Cases'. In any case insofar as the first two options identified by the ILC in Draft Conclusion 11 are concerned since such a broad interpretation of Article 6(2)(b) cannot be said to have constituted the codification of a rule of cus-

[167] The remarks made in the context of the Japanese ratification procedure (which struggled with the provision as it believed it pertained to a subject so foreign to Japanese law) are quite telling in this regard, see above, para. 43.

[168] See in particular the remarks made in the context of the Norwegian ratification procedure, above para. 49.

tomary international law existing at the time when the UNCSI was adopted nor can such a broad interpretation be considered the crystallization of a rule of customary international law that had started to emerge prior to the adoption of the UNCSI. That leaves the last option of Draft Conclusion 11. Can it be said that Article 6(2)(b) – in a broad interpretation going beyond '(Use) of Property Cases' – has given rise to a general practice that is accepted as law (*opinio juris*) thus generating a new rule of customary international law (even though that rule did not exist at the time of adoption of the UNCSI)? This, of course, cannot be assessed by merely looking back in time but also requires a look at current state practice and *opinio juris*. That said, one certainly can already say that, in the absence of many (let alone sufficient) ratifications of the UNCSI since its adoption, Article 6(2)(b) has not been dealt a particularly good hand in this regard.

116. To assess whether these preliminary findings can be further substantiated (or disproven) as well as to place them against the background of past and present state practice and *opinio juris* on the topic, a more in-depth assessment is necessary which will be the focus of the next paragraph.

5.4 **Research of state practice and *opinio juris***

5.4.1 *Introduction*

117. Our research of state practice and *opinio juris* consisted of mapping legislation and relevant case law in civil cases in several countries around the world with respect to immunity from jurisdiction in the situations which are the focus of our research questions. As indicated above, scholarly writings can be a subsidiary means for the determination of customary international law. Given this subsidiary nature and as a result of time constraints we were not able to conduct an in-depth research into scholarly writings other than the publications on Article 6(2)(b) discussed in the previous chapter and the output of the ILC as summarized in annex I to this paper.[169]

118. In our research we have not included proceedings against clear emanations of the State, such as its Government, its organs (Ministries etc.) and its officials. That these emanations enjoy (functional) immunity (in any case for acts performed in the exercise of their official functions) is undisputed and what we are interested in are cases between private parties neither of which being a foreign State or any of its emanations. We have also excluded (Use of) Property Cases from our research. State immunity in such cases is not really controversial and what we are assessing in this paper is the customary law nature of an interpretation of Article 6(2)(b) going *beyond* (Use of) Property Cases.

119. The following countries were included in our research (in alphabetical order): Australia, Belgium, Canada, Germany, France, Italy, Japan, the Netherlands, Norway, Spain, South Africa, the United Kingdom and the United States.

[169] We note in this regard that the ILC Commentary, the various reports by the special rapporteur and the discussions in the ILC meetings almost exclusively refer to case law and legislation.

120. When considering how to incorporate our findings in this regard, we were faced with more or less the same dilemma as that with respect to our findings on the *travaux préparatoires* of Article 6(2)(b). Do we incorporate everything resulting in this paper growing beyond reasonable proportions? Or do we only incorporate conclusions without making available in any way the factual findings underlying these conclusions? The dilemma was even greater since our research also involved an analysis of many foreign judgments. Not all of this case law is available in English and even if it is, properly understanding a certain ruling almost always requires an understanding of the facts that led to it. Under those circumstances and taking into account the inherent word count constraints of this paper, we again opted for an intermediate solution. Our factual findings (*i.e.* a detailed description of the relevant laws and case law) is set out in a separate annex to this paper.[170] What follows in the next paragraph are the conclusions we draw based on those factual findings.[171]

5.4.2 *The foreign act of State doctrine*

121. In our discussion of the *travaux préparatoires* of Article 6(2)(b) we have already briefly touched on the foreign act of State doctrine which – in short – holds that a domestic court cannot sit in judgment of the acts of a foreign State. We also saw from our discussion of the *travaux préparatoires* that Article 6(2)(b) was not intended, nor understood, as incorporating this doctrine in the rules on State immunity as laid down in the UNCSI (on the contrary, it was perceived as a related yet separate issue that was to be clearly distinguished from State immunity).

122. Although thus clear from the perspective of the *travaux préparatoires*, we have also seen that some scholars (Fox & Webb) suggest that a broad interpretation of the ultimate language used in Article 6(2)(b) touches upon this doctrine.[172] We therefore believe it appropriate to first address the act of State doctrine and assess whether this doctrine can be said to constitute a rule of international customary law or must be considered to have its basis in domestic law. After all, if this doctrine were to have a customary law character and be relevant to State immunity this would have clear implications for our research question. The same applies if it is not a rule of customary international law but a rule of domestic law because in that scenario, even if the act of State doctrine leads to a certain state practice, such state practice is not the result of *opinio juris – i.e.* it is not the result of States acting in a certain way because they felt or believed themselves legally compelled to do so by reason of a rule of *customary international law*.

123. States where the foreign act of State doctrine is applied are mainly common

[170] See Annex II.

[171] It is noted in this regard that some of these conclusions are based on older case law. Although we have carried out substantial research and have not found indications to the contrary there is always the possibility, of course, that in our analysis of foreign jurisdictions we have missed certain more recent cases or developments.

[172] See above, para. 58.

law jurisdictions,[173] with the United States and the United Kingdom as the most pronounced examples. This is not to say, however, that there is a uniform picture within common law countries. For example, the doctrine has been (*de facto*) rejected in Australia[174] and Canada[175] and different views exist in the United States and the United Kingdom about, for example, the exceptions that apply to this doctrine.[176] In fact, what the foreign act of State doctrine entails exactly and what exceptions to it exist in the countries where it is applied is the subject of different views.[177] For the purposes of this paper it will not be necessary to attempt to determine this exact scope of the doctrine and exceptions thereto. This is because it is well established that the foreign act of State doctrine (i) differs substantially from the doctrine of State immunity from jurisdiction and (ii) is, in any event, not a rule of customary international law.

124. Before explaining this in more detail, however, it is important to note that in a number of the cases which emerged in our research, both State immunity from jurisdiction and the foreign act of State doctrine, were relied on by the defendants. In particular, reference can be made in this regard to the *Belhaj case* (United Kingdom),[178] the *Nevsun* case (Canada)[179] and the *EAC v. MTN* case (South Africa).[180] In all these cases it was ultimately held that the defendant(s) could not rely on State immunity from jurisdiction (nor could they rely on the foreign act of State doctrine for that matter). This already illustrates that both are separate legal concepts which are to be distinguished from each other.

125. As for the differences between the foreign act of State doctrine and State immunity from jurisdiction, the first thing to note is that when it comes to immunity from jurisdiction, it is the person of the defendant that is decisive. With the foreign act of State doctrine, on the other hand, it is the foreign governmental act that is decisive and the person of the defendant is irrelevant.[181] There is also a difference

[173] As will be discussed below, there also scholars who argue that this doctrine has also been applied in some civil law countries.

[174] See High Court of Australia, *Moti v. The Queen*, 7 December 2011 [2001] *HCA* 50. For a more detailed description of this case see Annex II, para. 3. That *de facto* rejection is what the ruling in the *Moti* case amounts to was observed by Lord Neuberger in his opinion in the *Belhaj* case who opined that the reasoning applied in that case 'is tantamount to the abolition of the foreign act of state doctrine'. (see Supreme Court of the United Kingdom, *Belhaj et al.*, *supra* n. 104, para. 247).

[175] See Supreme Court of Canada, *Nevsun Resources Ltd. v. Araya* [2020] 1 *S.C.R.* 166, Docket: 37919, 28 February 2020. For a more detailed description of this case see Annex II, para. 14.

[176] Consider, for example, the 'public policy' exception (see *infra* n. 196). This exception does not (yet) appear to be accepted in the United States.

[177] See in this sense also Federal Court of Australia, *Habib v. Commonwealth of Australia*, February 25, 2010 [2010] *FCAFC* 12, para. 38: 'Beyond the certainty that the doctrine exists there is little clarity as to what constitutes it.' Further illustrative in this regard is the *Belhaj* judgment of the British Supreme Court. Although the judges agreed on the outcome (no act of State), their views on the precise scope and exceptions to the foreign act of State doctrine were quite different.

[178] See Supreme Court of the United Kingdom, *Belhaj et al. supra* n. 104.

[179] See Supreme Court of Canada, *Nevsun Resources Ltd.*, *supra* n. 175.

[180] See Supreme Court of Appeal of South Africa, *EAN v. MTC*, *supra* n. 111.

[181] In fact in countries where the foreign act of State doctrine is also considered relevant in proceedings against the foreign State itself but where immunity from jurisdiction is not an issue, for example, in case of *acta iure gestiones* or in proceedings in which the foreign State itself is the plaintiff. An example of the latter situation is United State Supreme Court, *Banco Nacional de Cuba v. Sabbatino*, 376 *U.S.* 398 (1964), March 23, 1964. See further also, for example, C. Flinterman, *De Act of State Doctrine: een rechtsvergelijkende studie naar de plaats van de Act of State doctrine in het Amerikaanse en Nederlandse recht* (dissertation), T.M.C. Asser Institute 1981, p. 116 (our translation) ('If in a judicial proceeding the defendant invokes lack of jurisdiction of the court because sovereign immunity is vested in it, the court must ask itself two thorny questions which in practice often merge: (1) is the respondent a foreign state or an organ thereof (or, in Van Panhuys's view, if it is a private person respondent, is it to be identified with a foreign state); and only when this first question is answered in the affirmative: (2) is the act at issue to be regarded as an act performed "iure imperii". Thus, for the application of the doctrine of sovereign immunity, the status of the defendant party is always decisive. It is entirely different in disputes submitted to the court in which the Act of State doctrine potentially plays a role. The status of the defendant party is irrelevant to this. The court's jurisdiction in such cases is a given. However, the court can only give an opinion on the merits of the case if it has first answered the "Vorfrage" as to whether the foreign state decision to which his law refers is to be considered lawful (under international law). To this end, he should include numerous factors in his considerations. [...] My conclusion based on the foregoing is that both doctrines are different in legal character and relate to different situations.') See also, e.g., R. Ergec, 'La doctrine de l'act of state et la jurisprudence belge', *Revue de droit international et de droit compare*, 1984, p. 67 (our translation) ('[The foreign act of State doctrine] applies regardless of whether the foreign State is a party to the proceedings, and protects foreign acts of government on account of their intrinsic nature, regardless of procedural uncertainties. Moreover, while immunity concerns the admissibility of the claim and applies in limine litis, the act of state operates like a conflict rule: it concerns the determination of the rule applicable to the substance of the case: must the court give effect to the foreign act without first verifying its legality?') and P. Weil, 'Le contrôle par les tribunaux nationaux de la licéité des actes des gouvernements étrangers', *Annuaire français de droit international* 1977, vol. 23, pp. 17-18 (our translation) ('In this respect, our problem must be distinguished from that of the immunity of foreign States from jurisdiction. Immunity is a matter of the admissibility of the application: this prevents the foreign State from finding itself in the position of a defendant before the court of the forum; as the application is blocked in *limite litis*, there is no need for the court to question its power to compare the act of the foreign State with the rules of international law. While immunity entails an exemption from jurisdiction, our problem involves determining the rule applicable to the merits: should the judge apply the foreign act without first verifying its international legality, thus granting it a presumption of legality, or should he make this application subject to a prior verification of its conformity with international law? The problem of the international lawfulness of the foreign act may, moreover, arise even though no question of immunity arises: for example, when the foreign State has made a claim before the national court, thereby waiving any immunity from jurisdiction (as was the case, as in the Sabbatino case); or when the purely commercial character of activity of the defendant is an obstacle to immunity from jurisdiction, but the question remains as to whether the foreign act is internationally legal before the court seised; or again, where the proceedings are between two private persons (for example, the dispossessed owner and the purchaser of an object subject to seizure) without the foreign State being a party to the proceedings.')

[182] See, e.g., United States Supreme Court, *Banco Nacional de Cuba v. Sabbatino*, 376 *U.S.* 398 (1964), 23 March 1964.

in territorial scope. For example, the foreign act of State doctrine is considered to apply only to expropriations that took place within the foreign State's own territory.[182] For State immunity from jurisdiction to apply, on the other hand, it is irrelevant where the foreign State's sovereign acts occurred and a foreign State is as much immune for sovereign acts which occurred on its own territory as for

its sovereign acts abroad.[183] Finally, reference can be made to the public policy exception to the foreign act of State doctrine accepted in the United Kingdom and the balancing of interests (including those of public policy) which takes place in South Africa, which can result in the doctrine not being applied to, for example, foreign governmental acts which violate *jus cogens* rules (such as the prohibition on torture). State immunity from jurisdiction, on the other hand, applies regardless of the seriousness of the alleged act of the foreign state in question.[184]

126. Apart from these *substantive* differences, the *legal basis* is also substantially different. State immunity from jurisdiction is undeniably a rule of customary international law. The foreign act of State doctrine on the other hand lacks any standing under international law.[185] This lack of international law status underscores the

[183] With the possible exception of the so-called 'territorial tort'-exception which entails an exception to immunity if the governmental action took place in the territory of the forum State. However, the customary law status of this exception is highly controversial. See also *supra* n. 158.

[184] As was recently confirmed by the Dutch Supreme Court, see *supra* n. 126, citing international case law including ICJ, Judgment, *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)*, *supra* n. 158.

[185] See, e.g., United States Supreme Court, *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964), 23 March 1964 ('We do not believe that this doctrine [the act of State doctrine; TD/ CvdP] is compelled either by the inherent nature of sovereign authority, as some of the earlier decision seem to imply […] or by some principle of international law. [...] While historic notions of sovereign authority do bear upon the wisdom or employing the act of state doctrine, they do not dictate its existence. That international law does not require application of the doctrine is evidenced by the practice of nations.'); High Court of South Africa (Eastern Cape Local Division, Port Elizabeth) (*Cherry Blossom*), *supra* n. 107, paras. 86 and 95 ('Unlike state immunity, which is a rule of public international law, the doctrine of a foreign act of state is a municipal law rule which derives from common law principles as developed in Anglo-American courts. It is founded upon the principle of mutual respect for equality of sovereign states, the principle of comity. [...] There is no public international law principle which obliges a domestic court to refrain to adjudicate a matter involving a foreign act of state in respect of the subject matter over which the court otherwise has jurisdiction.'); Supreme Court of the United Kingdom, *Belhaj et al.*, *supra* n. 104, para. 200 ('Although international law requires states to respect the immunity of other states from their domestic jurisdiction, it does not require them to apply any particular limitation on their subject matter jurisdiction in litigation to which foreign states are not parties and in which they are not indirectly impleaded. The foreign act of state doctrine is at best permitted by international law. It is not based upon it.'), Supreme Court of the United Kingdom, *Maduro Board' of the Central Bank of Venezuela (Respondent/Cross-Appellant) v. 'Guaidó Board' of the Central Bank of Venezuela (Appellant/Cross-Respondent)* [2021] *UKSC* 57, para. 134 ('It appears therefore that a substantial body of authority, not all of which is obiter, lends powerful support for the existence of a rule that courts in this jurisdiction will not adjudicate or sit in judgment on the lawfulness or validity under its own law of an executive act of a foreign state, performed within the territory of that state. The rule also has a sound basis in principle. It is founded on the respect due to the sovereignty and independence of foreign states and is intended to promote comity in inter-state relations. While the same rationale underpins state immunity, the rule is distinct from state immunity and is not required by international law. It is not founded on the personal immunity of a party directly or indirectly impleaded but upon the subject matter of the proceedings. The rule does not turn on a conventional application of choice of law rules in private international law nor does it depend on the lawfulness of the conduct under the law of the state in question. On the contrary it is an exclusionary rule, limiting the power of courts to decide certain issues as to the legality or validity of the conduct of foreign states within their proper jurisdiction. It operates not by reference

importance of making a sharp distinction between the two doctrines.

127. In all this, it should be noted – finally – that it is generally accepted that any immunity from jurisdiction should be decided *in limine litis* and concerns the court's jurisdiction to hear the dispute. In contrast, the foreign act of State doctrine concerns the merits of the case and comes into play only when the court has jurisdiction. Or as Okeke describes it:

> The Act of State doctrine is both related to and different from the rule of State immunity. It has developed doctrinally in the domestic law of States out of respect for sovereign equality and international comity. But unlike State immunity, the doctrine is neither based upon nor required by international law. The question usually is whether a court should decide a case involving the acts of a foreign State *after the court has determined that it has jurisdiction to hear the case and immunity is not available to the foreign State*. [our emphasis, CvdP/TD][186]

128. It follows from the above that if State immunity from jurisdiction applies, the foreign act of State doctrine does not and cannot come into play. This in turn means

to law but by reference to the sovereign character of the conduct which forms the subject matter of the proceedings. In the words of Lord Cottenham, it applies 'whether it be according to law or not according to law'. I can, therefore, see no good reason to distinguish in this regard between legislative acts, in respect of which such a rule is clearly established (see *infra* paras. 171-179), and executive acts. The fact that executive acts may lack any legal basis does not prevent the application of the rule. In my view, we should now acknowledge the existence of such a rule.'). Bundesverfassungsgericht, 24 October, 1996, 2 *BvR* 1851/94, para. 65 [our translation] ('The "act of state doctrine" invoked by the complainants in accordance with Anglo-American legal concepts cannot be regarded as a general rule of international law within the meaning of Article 25 of the Basic Law, since it is not recognized outside the Anglo-American legal system.') and Supreme Court of Appeal of South Africa, *EAC v. MTC*, *supra* n. 7, para. 63 ('Second, though it shares a justificatory premise with state immunity, that is to say the mutual respect that is due to the equality of sovereign states, it is a distinct doctrine. The doctrine, unlike state immunity, is not based upon personal immunity. It is not a doctrine required by customary international law (though it may be permitted by it) because that body of law does not limit the subject matter jurisdiction of a domestic court to which a foreign state is neither a party, nor indirectly impleaded because that body of law does not limit the subject matter jurisdiction of a domestic court to which a foreign state is neither a party, nor indirectly impleaded.') and 69 ('First, the foreign act of state doctrine is a doctrine of our domestic common law. It is not required by treaty or customary international law. Second, it is a doctrine that provides reasons for a domestic court to decline to decide certain matters, even though the court's jurisdiction has been established.')

[186] E.C. Okeke, *Jurisdictional Immunities of States and International Organizations*, Oxford University Press 2018, p. 205. Compare also High Court of South Africa (Eastern Cape Local Division, Port Elizabeth) (*Cherry Blossom*), *supra* n. 107, para. 55: 'In essence, a claim to state immunity, if successful, has the effect that a domestic court does not have jurisdiction to adjudicate the matter before it, whereas reliance upon the act of state doctrine concerns the justiciability of the suit before the domestic forum notwithstanding its jurisdiction to adjudicate on the matter before it. For this reason, we consider it appropriate to first deal with the claim to state immunity before addressing the defense founded upon the act of state doctrine.', United States Supreme Court, *Republic of Austria et al. v. Altman, 541 U.S. 677,* 7 June 2004 ('Unlike a claim of sovereign immunity, which merely raises a jurisdictional defense, the act of state doctrine provides foreign states with a substantive defense on the merits.') and the observations by the Supreme Court of Appeal of South Africa, *EAC v. MTN* cited in *supra* n. 185 as well as those of Weil cited in *supra* n. 181.

that the foreign act of State doctrine would have no right or reason to be applied in proceedings in which the State is not named as a party if it were to be considered a rule of customary international law that State immunity applies merely because the court is required to 'sit in judgement of a sovereign act of a foreign State' in such proceedings. Or as the Court of Appeal put it in *Belhaj*:

> Such an extension is also unnecessary. Any wider exemption from jurisdiction extending beyond state immunity in cases of direct or indirect impleader is addressed in this jurisdiction by the act of state doctrine and principles of non-justiciability. The extension of state immunity for which the respondents contend would leave no room for the application of those principles.[187]

129. We found various examples of cases in our research from jurisdictions where the foreign act of State doctrine came into play because the case hinged on a finding of unlawfulness of the actions of a foreign State but in none of these did the courts find that they lacked jurisdiction for State immunity reasons.[188] In our view, this clearly underlines that in countries applying the foreign act of State doctrine the mere circumstance that a court must (incidentally) express an opinion on the lawfulness of a sovereign act of a foreign State is insufficient to decline jurisdiction on State immunity grounds.
130. For that reason alone, we believe it can be said that there is no more or less uniform state practice and *opinio juris* that would require us to answer question 2A in the affirmative. Nevertheless and because we will also have to answer question 2B, we will discuss (the remainder of) the outcomes of our research in the next paragraph.

5.4.3 *Country overview*

131. The majority of States we examined allow some form of review of sovereign acts in cases where the foreign State is *not* named as a party to the proceedings. States where such a review is (partially) not permitted have various reasons for this position but immunity from jurisdiction is not considered to be among those reasons.[189]
132. First of all, mention can be made in this regard of States allowing such acts to be tested against its domestic public policy. These States include, for example,

[187] See Court of Appeal, *Belhaj et al*., Case No. A2/2014/0596, 30 October 2014, para. 48. These findings were endorsed by the Court of Appeal for British Colombia in *Mexican States*, *supra* n. 118, paras. 47-48.
[188] See for example, High Court of Australia, *Moti v. The Queen*, *supra* n. 174, United States Court of Appeal (Ninth Circuit), *Doe I v. Unocal Corp*, Nos. 00-56603 00-57197, 18 September 2002 and United States Court of Appeal (Second Circuit), *Kashef et al. v. BNP Paribas*, No. 18-1304, 22 May 2019. For a more detailed description of these cases, see Annex II.
[189] As we shall see, Dutch and French case law shows an (initially) varying picture and will therefore be discussed separately.

Germany,[190] France,[191] Italy,[192] Japan,[193] the Netherlands[194] and Spain.[195] Some States that adhere to the foreign act of State doctrine can also be placed in this category.[196]
133. Furthermore, there are States where it is considered permissible, or in any case considered as not infringing on a foreign State's immunity from jurisdiction, for domestic courts, to, by way of a preliminary question, (implicitly) rule on the lawfulness of sovereign acts of a foreign State. Examples of such countries are Australia,[197] Belgium,[198] Canada,[199] Germany,[200] Norway,[201] Spain[202] and South Africa.[203]

[190] See, for example, Oberlandesgericht Hamburg, 7 January 2005, 1 W 78/04. For further details about this case see Annex II, para. 19.
[191] See, for example, Cour de Cassation, 1re Ch., 17 November 1969 *Bulletin des arrêts* 1969, N° 343, p. 273. For further details about this case see Annex II, para. 28.
[192] In Italy, the courts are even allowed to test against *international* public policy which is part of Italian public policy. See Corte di cassazione, Case No. 4116 (*Texaco*), 10 November 1976, *Poro Italiano*, 1978, I, p. 1063. For a more detailed discussion of this case see Annex II, para. 36.
[193] See for example, High Court of Tokyo (First Civil Affairs Section) 1953. English translation published in 20 *International Law Reports* 1953, pp. 312-316 (*Anglo Iranian Oil Company*). For further details about this case see Annex II, para. 39.
[194] See, for example, Hoge Raad, 17 April 1964, *NJ* 1965/22 (*Escomptobank*). For further details about this case see Annex II, para. 47.
[195] See, for example, Tribunal Supremo, 30 December 2010, STS 747/2010, ECLI:ES:TS:2010:7666 (*Bacardi/Havana*). For further details about this case see Annex II, para. 70.
[196] For example, the United Kingdom, where a public policy exception to the foreign act of State doctrine has been developed, for example, in cases involving a violation of the *jus cogens* prohibition on torture (see in particular Supreme Court of the United Kingdom, *Belhaj et al. supra* n. 104). We would also consider South Africa to belong to this category in light of the recent judgment Supreme Court of Appeal of South Africa, *EAC v. MTN*, cited in *supra* n. 185.
[197] See High Court of Australia, *Moti v. The Queen*, *supra* n. 174.
[198] See, among others, Brussels Cour d'Appel (1reChambre) (*Gécamines*), 25 January 2000, *Journal du Tribunaux 2000*, p. 790 and Brussels Cour d'Appel (2eChambre), *Touax SCA et Touax ROM*, *supra* n. 122. For a more detailed discussion of these cases see Annex II, para. 7 and paras. 8-11 respectively.
[199] See, among others, Supreme Court of Canada, *Nevsun Resources Ltd.*, *supra* n. 175.
[200] See, among others, the cases on military action by the German armed forces in the NATO context (Oberlandesgericht Köln, 28 July 2005, 7 U 8/04, ECLI:DE:OLGK:2005:0728.7U8.04.00; and Oberlandesgericht Köln, 30 April 2015, 7 U 4/14, ECLI:DE: OLGK:2015:0430.7U4.14.00) and the Chilean copper cases (Oberlandesgericht Hamburg, 22 January 1973 (*Sociedad Minera El Teniente Sa v. Norddeutsche Affinerie Ag*), English translation published in 73 *International Law Reports* 1987, p. 230 *et seq.* and Landgericht Hamburg, 13 March 1974, 5 O 80/73, English translation published in 13 *International Legal Materials* 1974, p. 1115 *et seq*.). For a more detailed discussion of these cases see Annex II, paras. 17-18 and 20.
[201] See Borgarting lagmannsrett, No 98-01848 K/04 (*Scancem*), 15 October 1998, Rettens Gang 1999, p. 793 ff. For a more detailed discussion of this case see Annex II, para. 64.
[202] See Audiencia Provincial de Islas Baleares (Sección 3ª), Auto num. 66/2020 (*Melia*), 18 March 2020, ECLI:ES:APIB:2020:37A. For a more detailed discussion of this case see Annex II, paras. 67-69.
[203] See, in particular, Supreme Court of Appeal of South Africa, *EAC v. MTC*, *supra* n. 7 and High Court of South Africa (Eastern Cape Local Division, Port Elizabeth) (*Cherry Blossom*), *supra* n. 107.

134. Some States on the other hand, have explicitly rejected the notion of domestic courts ruling on the lawfulness under *international law* of sovereign acts of a foreign State.

135. Japanese courts, for example, considered that at that time (1953) there were different views on the admissibility of review under international law. In those circumstances, the principles of international comity – based on respect for each other's sovereignty and the maintenance of friendly ties between the various countries – required that such a review be dispensed with. A finding that the Japanese court was *obliged* by customary international law to refrain from such review cannot, in our view, be read into this ruling.[204]

136. German case law is also nuanced in this regard. The reason for dispensing with review under international law was, at least initially, that customary international law did not require it and there were good reasons for dispensing with such a review.[205] Immunity from jurisdiction, however, was not one of these reasons. In fact, the argument that immunity from jurisdiction would prevent incidental review was explicitly rejected.[206] Not surprisingly, German scholars have therefore taken the position that State immunity does not prevent a German court from ruling on the lawfulness of a foreign expropriation.[207] For the sake of completeness we note

[204] We also note that the term 'international comity' is different from customary international law. Although both terms are sometimes used interchangeably in American and British case law, we assume that this judgment refers to the legally non-binding comity between countries (*comitas gentium*). On the concept of international comity, see also *Oppenheim's International Law* (9th edition), 1992, pp. 50-51.

[205] See, e.g., Oberlandesgericht Hamburg, January 22, 1973 (*Sociedad Minera El Teniente Sa v. Norddeutsche Affinerie Ag*), English translation published in 73 *International Law Reports* 1987, p. 230 *et seq.* ('Under modern international law there is no generally recognized principle that the domestic judge is obligated by international law to consider as null and void ab initio a foreign act of sovereignty which is in violation of international law. Neither is there any principle that the recognition of foreign acts which are in violation of international law or, on the other hand, the recognition of a claim for surrender alleged by an earlier owner would itself again violate international law *(cf. Superior Provincial Court of Bremen, August 21, 1959,* ArchVölkR *9 (1961-62), 351 ff.; Soergel/Kegel, BGB, 10th edn., 1970, marginal note 529).* Even if an expropriation was effected under circumstances of discrimination or was pronounced without indemnification, it remains valid if an item of property which was in the expropriating country at the time of the expropriation has subsequently come into a foreign country (Soergel/Kegel, loc. cit., marginal note 535; Superior Provincial Court of Hamburg, May 8, 1951, MDR 1951, 560). Any other position would lead to impossible complications of a political and economic nature and interfere with the international order *(cf. Kegel,* Internationales Privatrecht*,* 3rd edn., 1971, p. 443; Dolle, Internationales Privatrecht*,* 2nd edn., [275] 1972, pp. 5, 16; Raape, Internationales Privatrecht, 5th edn., 1961, p. 663).')

[206] See Landgericht Hamburg, March 13, 1974, 5 O 80/73, English translation published in 13 *International Legal Materials* 1974, p. 1115 *et seq.* ('The view of the intervening party that German jurisdiction is excluded here since the complaint requests the review of Chilean sovereign acts as a preliminary procedural matter (page 135 et seq.) cannot be upheld. *Only if a foreign state is sued directly for an act which by its nature is to be considered a sovereign act is German jurisdiction absent (Federal Constitutional Court, April 30, 1963, decisions of the Federal Constitutional Court 16, 27 ff esp. 64*.' [our emphasis, CvdP/TD].

[207] See, for example, D.H. Deren, *Internationales Enteignungsrecht* (dissertation), Max-Planck-Institut

that more recent case law of German courts implies that judicial review of a foreign State's sovereign acts may be obligatory in cases where the responsibilities of the German State are also at stake. Key case in this regard is the recent *Ramstein – Deployment of Drones* case. This case revolved around Germany's responsibility for the deployment of armed drones in Yemen by American armed forces using technical facilities at the US Air Base in Ramstein, Germany. The German Constitutional Court held in its recent judgment in this case[208] that the German State may be obliged to enforce public international law within its own area of responsibility if other States violate it. This may also be the case if these violations take place in the territory of (other) foreign States or *vis-à-vis* foreign citizens living in those foreign States.[209] That such an incidental review of a foreign State's sovereign acts would not be contrary to the principles of State immunity had already been held in the same case by the *Bundesverwaltungsgericht*, the highest administrative court in Germany.[210]

für ausländisches und internationales Privatrecht, Mohr Siebeck 2015, p. 37 (our translation) ('However, the question of who is the legal owner under German law following expropriation by a foreign state is usually significant as a preliminary issue in proceedings between parties who do not themselves enjoy immunity. Since the German legal system is not required by international law to recognize expropriations by foreign states, it may also make recognition contingent on certain conditions, such as the legality of the measure under the law of the expropriating state or under international law. *The immunity of the expropriating state does not preclude such an incidental review. This also applies if the defendant is the legal successor of the expropriating state and the expropriating state could not have been sued due to its immunity*.'; [our emphasis, CvdP/TD].

[208] See Bundesverfassungsgericht, 15 July 2025, 2 BvR 508/21. For a more detailed discussion of this case see Annex II, paras. 21-24.

[209] At the same time, the German Constitutional Court held that such an extraterritorial duty of protection can only exist under special circumstances. See further Annex II, Annex II, para. 24.

[210] See Bundesverwaltungsgericht, 25 November 2020, BVerwG 6 C 7.19, ECLI:DE:BVerwG:2020:251120U6C7.19.0, para. 59. English translation available via: <https://www.bverwg.de/en/251120U6C7.19.0>. For a more detailed discussion of this case see Annex II, paras. 21-24. More specifically, the Bundesverwaltungsgericht, referring to earlier case law of the German Constitutional Court, held that '[w]hilst such assessment is not a priori exempt from an incidental legal review by national courts; for, the principle recognised under customary international law that a state is not subject to any foreign national jurisdiction (principle of state immunity), does not prohibit judicial decision on the lawfulness of sovereign acts of other states within the context of preliminary questions (see BVerfG, decision of 10 June 1997 – 2 BvR 1516/96 – BVerfGE 96, 68 <90>). However, the legal positions taken by other states carry particular weight in assessments under international law.'. The relevant section of the decision of the German Constitutional Court referred to here by the Bundesverwaltungsgericht reads: 'In addition, an erga omnes effect cannot be based on the argument that otherwise a third State could make acts of the sending State subject to judicial proceedings, thereby violating the latter State's immunity. State immunity does not forbid such proceedings. It applies only if the State as such is party to the judicial proceedings. If the diplomat alone is party as a natural person, only diplomatic immunity comes into question (see Ress, Final Report on Developments in the Field of State Immunity and Proposal for a Revised Draft Convention on State Immunity, International Law Association, Report of the 66th Conference, 1994, p. 453 at 478, 482). Furthermore, judicial decisions concerning sovereign acts of other States, within the framework of preliminary questions, are not prohibited under international law and raise doubts only in the Anglo-American legal systems under the so-called Act of State Doctrine (see: 92 BVerfGE 211 at 322; Verdross/Simma, Universelles Völkerrecht, 3rd edn,

137. Incidental review of the lawfulness under international law of sovereign acts of a foreign State was also rejected by the Italian courts.[211] However, current Italian case law raises the question to what extent this line will still be followed today. After all, in recent years Italian courts have repeatedly ruled, up to the highest instance, that a foreign state is not entitled to invoke immunity from jurisdiction in the event of violations of *jus cogens* international law (such as war crimes).[212]
138. Be that as it may, in our opinion it cannot be said that the countries that (initially) rejected review under international law did so because State immunity from jurisdiction would prohibit such a review and that, of course, is the key issue for the purposes of this paper.
139. At first glance, French case law presents a dual picture. On the one hand, it has long been established case law that review of foreign government acts against French public policy is permissible. For example, expropriations without any form of compensation are considered contrary to French public policy and therefore cannot be recognized.[213] On the other hand, it can be inferred from the *Sempac* case[214] that if – after an expropriation – the successor owner can be 'identified'

1984, pp. 774ff; Steinberger, State Immunity, Encyclopaedia of Public International Law, Part 10 (1987), p. 428 at p. 429; on the United States Act of State Doctrine see Banco Nacional de Cuba v. Sabbatino, 376 US, p. 398 at pp. 421ff; W. S. Kirkpatrick & Co., Inc. et al. v. Environmental Tectonics Corp., International, ILM 29 (1990), p. 184 at p. 187).' See Bundesverfassungsgericht, 10 June 1997 – 2 BvR 1516/96 – BVerfGE 96, 68, p. 90. English translation published in 115 *International Law Reports* 1999, p. 595.

211 See, *inter alia*, Corte di cassazione, Case No. 4116 (*Texaco*), *supra* n. 192. For a more detailed discussion of this case see Annex II, para. 36.

212 See, *inter alia*, the cases on immunity of Germany for crimes of the then Nazi regime (Corte di cassazione, 11 March 2004, Cass no. 5044/04, 87 Rivista di Diritto Internazionale 2004, 539). For further details, see Annex II, para. 37. We fail to see why the Italian courts would currently consider review under international law permissible in proceedings in which the foreign State is the defendant itself but not in cases between private parties. Whatever the case may be, several scholars argue that the (initial) rejection of review under international law should be regarded as the Italian variant of the foreign Act of State doctrine discussed above (see, e.g., B. Conforti and A. Labella, An introduction to international law, Martinus Nijhoff publishers 2012, p. 13 ('When restricted to the question of judicial review of foreign acts in the light of international law, the Act of State doctrine is in principle shared, in common law countries, by the United States and substantively by the United Kingdom. In civil law countries the doctrine is shared for instance by Italy, but clearly rejected by the Netherlands, France and Germany.'); B. Conforti, 'The activities of national judges and the international relations of their State (preliminary report)', Institute of International Law Yearbook, Vol. 65, Part I, Session of Milan 1993 Preparatory work, p. 334 ('We need not dwell in detail on such a well-known doctrine. We should, however, note two things. First of all, it is not a doctrine that is exclusive to common law Countries: on the contrary, it is applied also in continental systems, as can be seen, for example, from a series of decisions of the Italian Court of Cassation') and D. Akande, 'Non-Justiciability and the Foreign Act of State Doctrine in English Law', paper prepared for Duke-Geneva conference on comparative foreign relations law (2015), available via <https://law.duke.edu/sites/default/files/centers/cicl/akande.actofstate.docx>, para. 7 and footnote 15). As we have seen above (para. 126), the foreign act of State doctrine is not a rule of customary international law and should clearly be distinguished from State immunity from jurisdiction.

213 See, for example, Cour de Cassation, 1re Ch., 17 November 1969*, supra* n. 191.

214 See Cour de Cassation, 1re Ch., 2 May 1978, *Sté Algo et autres c v. Sté Sempac et autres*, *Clunet*

with the expropriating foreign State (i.e. is to be considered an *alter ego* thereof), immunity from jurisdiction should be granted even though the successor owner and defendant entity is, strictly speaking, not the foreign State itself but a commercial state-owned enterprise. Such 'identification' was at issue in the *Sempac* case in light of 'the circumstances and conditions under which Sempac managed the establishments whose operation had been entrusted to it by the Algerian State'. However, the *Sempac* case can be contrasted with, for example, the *Lao Import-Export* case[215] which also revolved around an expropriation and the defendant companies were alleged to have profited from that expropriation. In this case, immunity from jurisdiction was not assumed in relation to the (state-owned) defendant companies. In our view, it follows from these rulings that if identification / *alter ego* is not at issue, immunity from jurisdiction does not prevent a claim for damages against commercial (state-owned) companies that are alleged to have profited from an expropriation without any form of compensation.[216]
140. Dutch case law also shows a mixed picture. Lower courts sometimes considered themselves competent to rule on (the legality of) foreign government acts and sometimes not. In our view, this varying picture should be explained by a long-standing impossibility for the Dutch Supreme Court to create legal unity. After all, until 1963, the Dutch Supreme Court did not have jurisdiction to quash a judgment because it violated customary international law.[217] However, the court's case law *after* 1963 makes clear that the Supreme Court considers review of foreign governmental acts against both Dutch public policy and international law permissible. We see no reason to assume that the Supreme Court considers the scope of its considerations in the seminal *Bank voor Handel en Scheepvaart (BHS)* case (in which review under international law was deemed permissible) to be limited to cases in which the foreign State has waived immunity from ju-

(*Journal du droit international*) 1978, p. 904 *et seq*. An English translation was published in 65 *International Law Reports* 1984, p. 73 *et seq*. For a more detailed discussion of this case see Annex II, para. 29.

215 See Cour de Cassation, 1re Ch., 20 October 1987, *Bulletin des arrêts*, 1987 N° 274, p. 197 (*Lao Import-Export*). For a more detailed discussion of this case see Annex II, para. 32.

216 The Cour de Cassation's ruling in the *Epoux Martin* case (Cour de Cassation, 3 November 1952 (*Epoux Martin v. Banque d'Espagne*), 42 *Revue critique de Droit International Privé* 425 (1953), English translation published in 42 *International Law Reports* 1952, p. 202 *et seq*.) as well as lower French case law (e.g. Tribunal de grande instance de Paris, Chambre des saisies immobilières, no 15/00323, 10 November 2016 and the ruling of the Tribunal de Seine from 1925 to which it refers) also indicate that immunity from jurisdiction only comes into play if the act in question was carried out as an agent, on behalf of (or as a contractor of) the formally non-defendant foreign State. In any event, it is clear from the *Epoux Martin* case that the Cour de Cassation clearly distinguishes between reviewing the lawfulness of the sovereign act of a foreign State (not permitted under French law) and immunity from jurisdiction. Incidentally, as far as the impermissibility of pronouncing judgment on the lawfulness of the act of a foreign State is concerned, the Cour de Cassation has not always been consistent, see e.g. Cour de Cassation, 1re Ch., 8 December 1954, *Bulletin des arrêts* 1954, N° 356, p. 298. All the aforementioned cases are described in more detail in Annex II, para. 26 *et seq*.

217 See for a more detailed description of this 'gap' in the Dutch Supreme Court's jurisdiction, Annex II, para. 41.

risdiction by voluntarily appearing in the proceedings or filing a counterclaim.[218]

141. This was apparently also the interpretation of the Dutch Government of said judgment since in reply to an ILC questionnaire in the very early stages of the drafting process of the UNCSI, it informed the UN:

> In a decision of October 17, 1969, NJ 1970, 428, Netherlands Yearbook of International Law 1970, 232, Attorney General of the USA v. N.V. Bank voor Handel en Scheepvaart, the Supreme Court held that:- 'there exists no rule of international law which forbids Dutch courts to examine whether confiscatory acts of another State are contrary to international law.
> *If an opinion on the legality of an action by a foreign State comes up in a case to which the foreign State is not a party (e.g. a dispute over the ownership of confiscated property), the question of the State's immunity does not arise.* In such cases, the competence of the court is governed by the provisions of the Code of Civil Procedure which state the legal grounds on which the competence of the courts to deal with civil cases is based.
> However, State immunity can be successfully invoked if a foreign State is called as defendant in a case concerning a public act, unless the foreign State expressly waives its right of immunity, in which case the foreign State is not being subjected against its will to the jurisdiction of the Dutch courts.[219] [our emphasis TD/CvdP]

142. The Dutch Supreme Court has also since then – in cases where the foreign State had neither voluntarily appeared nor filed a counterclaim – considered that Dutch courts may rule on (wrongful) conduct of foreign States if such a ruling is a *sine qua non* to establish that another person (including the Dutch State itself) acted or would act wrongfully. Illustrative in this regard is the case law of the civil chamber of the Dutch Supreme Court in extradition cases and the unlawfulness of

[218] See also Flinterman, *supra* n. 181, p. 72 (our translation) ('Formulated differently, it can be said that the Supreme Court considers itself competent to review the Act of State doctrine in the light of international law, indifferently whether it concerns a claim in convention in a dispute between private individuals or a claim in counterclaim against a foreign state that has voluntarily submitted to the jurisdiction of the Dutch court.') *Cf.* also Van Panhuys's annotation under the ruling in the HBS case in *NJ* 1970/428 (our translation) ('Of more far-reaching significance is the Court's ruling on the Act of State doctrine, by which reference is made here to an alleged rule of international law that would prohibit the national court, even in a dispute between private individuals, from reviewing foreign measures for their (in this case, international law) legality. This problem arose in particular with respect to the main case, because it concerned a lawsuit between two private litigants, so that there could be no question of lack of jurisdiction ratione personae. Already before, the Supreme Court had to decide a case in which a similar question had arisen, i.e. *Nederlanden van 1845/Escompto Bank* (April 17, 1964, NJ '65, 22). In that case, however, the Supreme Court did not test the foreign confiscatory measures against international law but against Dutch public order. The significance of the present judgment lies mainly in the fact that our highest court has now clearly rejected the Act of State doctrine (in its various shades) as a rule of international law.')

[219] See UN Doc. A/CN.4 /343 ('Information and materials submitted by Governments'), pp. 74-75. The Dutch response was dated July 17, 1980. It concerned a response to the ILC's question '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?'.

an extradition to a foreign State whose officials have been involved in torture of the person whose extradition is requested.[220] We do not see how this line of the Supreme Court would be reconcilable with the view that, because of immunity from jurisdiction, the Dutch court may not express an opinion at all on (the legality) of the actions of a foreign State in proceedings to which that State is not a party.[221]

143. All in all, we believe that it can be inferred from recent Dutch case law that a Dutch court is not bound to consider foreign state acts as lawful without any review.[222] State immunity from jurisdiction does not stand in the way of such a review except in cases where that foreign State (or any of its emanations such as one of its officials) is itself a defendant and named as a party to the proceedings. In our opinion, this is not changed by the 1959 *KPM/Ambon* judgment of the Amsterdam Court of Appeal.[223] On the one hand because this ruling is part of the fluctuating case law characteristic of the pre-1963 period during which the Supreme Court could not create legal unity in matters of customary international law. Moreover, this ruling can be contrasted with several contrary (later) rulings by Dutch courts, including of the same Amsterdam Court of Appeal.[224] Nor is this changed by the

[220] See Hoge Raad, ECLI:NL:HR:2014:1680, *NJ* 2016/14. For a more detailed description of this case see Annex II, para. 52. Extradition cases such as that of Sabir K. are adjudicated by the civil courts in civil proceeding in which the Dutch State is the defendant and the person requested by the foreign State the plaintiff.

[221] Particularly since a judgment in extradition cases directly affects the foreign State in question (after all, extradition is prohibited and the foreign State's extradition case will be without out effect). In our view, the judgment in the *Sabir K.* case therefore underscores that for the permissibility of reviewing a foreign State's sovereign acts under international law, the Supreme Court does not distinguish between cases in which immunity from jurisdiction has been waived. That at the time of the *Sabir K.* judgment (2014) the Supreme Court was still of the opinion that *ex officio* review of immunity from jurisdiction was not mandatory does not change this. First, because it is obvious that the Supreme Court, as the highest court, would not leave such an essential point unmentioned. Second, because it is not obvious that the Supreme Court would formulate a doctrine that could easily be thwarted by an invocation of immunity from jurisdiction. As an aside, it may be noted that the Dutch State was the defendant in the proceedings in question and it also did not argue that the matter was barred by the immunity from jurisdiction of the United States. In this connection we also note that also in later case law in which the *Sabir K.* case law was at issue and *ex officio* review of immunity was mandatory, at no time has it been raised by the Dutch State (or *ex officio* by the court) that such a review runs counter to immunity from jurisdiction, let alone that the court has declared itself incompetent for that reason. See recently, for example, Rechtbank Den Haag, 4 October 2023, ECLI:NL:RBDHA:2023:17581.

[222] *Cf.* also C.G. van der Plas, *De taak van de rechter en het IPR*, Kluwer, 2005, p. 511.

[223] See Gerechtshof Amsterdam 8 februari 1951, *NJ* 1951, 129. For a more detailed description, see Annex II, para. 44.

[224] See for example, Gerechtshof Amsterdam, 13 March 1928, *Weekblad van het Recht*, No. 11816 (*Kon. Ned. Stoomboot-Maatschappij*), Gerechtshof Amsterdam, 4 June 1959, *NJ* 1959/350 (*Senembah*) and Gerechtshof Den Haag, 6 June 1963 (*Escomptobank*). For a more detailed description of these cases see Annex II, p. 42 *et seq*. Incidentally, in (international) legal literature the *KPM/Ambon* decision is considered an example of application of the foreign act of State doctrine in a Dutch case. See, for example, Flinterman, *supra* n. 218, pp. 64-65; and Akande, *supra* n. 212, para. 7 and footnote 15. As an aside, we note that the *KPM/Ambon* case could possibly fall under the limited interpretation of Art. 6(2)(b) nowadays since it revolved around the continued use of ships by Indonesia for military purposes and the aim of the proceedings was precisely to have

Dutch ratification of the UNCSI[225] or the recent ruling of the 's-Hertogenbosch Court of Appeal in the *Cerbuco* case.[226] As indicated above,[227] we do not interpret this ruling as hinging on the fact that the lawfulness of Cuba's sovereign acts was called into question, rather it were the additional demands of the claimant company, particularly the requested injunctions, that seem to have tipped the scales.

144. In light of all the above, our answer to Question 2A is therefore the same as that to Question 1A: State immunity does not apply in the absence of extensive and virtually uniform State practice. At most our research provides support for the contention that atypical emanations and *alter egos* of the State[228] can, under certain circumstances, also rely on State immunity from jurisdiction.

145. Insofar superfluously, we note that this is not changed by the judgments of the International Court of Justice (ICJ) in the *Monetary Gold*[229] and *East Timor*[230] cases sometimes relied on to argue the opposite. It is true that the ICJ found itself without jurisdiction to rule in these cases in the absence of participation in the proceedings by Albania and Indonesia respectively but these rulings must be considered in their specific context, including not least the circumstance that the ICJ is an international court that does not have original jurisdiction. Previous attempts to rely on these rulings to achieve a broad interpretation of State immunity have therefore been consistently rejected by national courts.[231] We also note in this regard that although *Monetary Gold* had already been decided two decades before the ILC would start its work on the topic of jurisdictional immunities, we were unable to find a single reference to this judgment in the *travaux préparatoires*.

146. Our answer to question 2A is also not altered by the doctrine of indirect impleading. This doctrine was developed in common law countries and is applied in cases in which the proceedings revolve around property that the foreign State owns, possesses or controls or otherwise has an interest in.[232] Courts in the United Kingdom[233] and South Africa[234] have also linked this doctrine to another

this use stopped. For the sake of clarity, this does not mean that there would have been immunity had Art. 6(2)(b) been applicable, as the follow-up question would then be if any exception applies (such as if the leasing of ships is to be considered an *acta iure gestionis*).

225 In particular the circumstance that the Dutch Government did not consider a reservation to Art. 6(2)(b) to be necessary and that such a reservation has not been advised by the Dutch Advisory Committee on questions of international law (CAVV). While it is true that this may normally be relevant when it comes to the views of the Netherlands, in our view this is different in this particular situation. Neither the CAVV nor the Dutch Government explained what it understood Art. 6(2)(b) to mean exactly (see also *supra*, para. 44). The CAVV did set out its views in relation to Art. 6(2)(b)'s predecessor (Art. 7) but these views were not adopted by the Dutch Government in its written comments and are difficult to square with earlier observations of the Dutch Government in the UNGA (see also *supra* para. 141 and Annex I, para. 40). Anyway, even if this were different, that would at best mean that *the Netherlands* considers a broad interpretation of Art. 6(2)(b) to reflect customary international law. Of course, this does not mean that it also is customary international law. After all, it is not only the view and practice of the Netherlands that matters as there should be extensive and virtually uniform State practice and *opinion juris*.

226 Gerechtshof 's-Hertogenbosch, 23 July 2024, ECLI:NL:GHSHE:2024:2380.

227 See *supra*, para. 81.

228 See for example Kuwait Airways in House of Lords, *Kuwait Airways Corp v. Iraqi Airways Co and others* [1995] 3 *All ER* 694, 24 July 1995, Sempac in Cour de Cassation, 1re Ch., 2 May 1978, *Sté Algo et autres c v. Sté Sempac et autres*, Clunet (*Journal du droit international*) 1978, p. 904 *et seq*., the construction company in Tribunal de grande instance de Paris, Chambre des saisies immobilières, no 15/00323, 10 November 2016 (*Hulley Enterprises*) and Gazprom in Rechtbank Den Haag, 5 June 2025, ECLI:NL:RBDHA:2025:9883. For a more detailed description of these cases, see Annex II, para. 29 (*Sempac*), 33 (*Hulley Enterprises*), 62 (*Gazprom*) and 73 (*Kuwait Airways*).

229 See ICJ, Judgment, *Monetary Gold Removed from Rome in 1943 (Italy v. France, United Kingdom of Great Britain and Northern Ireland and United States of America)*, June 15, 1954.

230 See ICJ, Judgment, *East Timor (Portugal v. Australia)*, June 30, 1995.

231 See *Touax* (*supra* n. 122), *Belhaj et al. supra* n. 104) and *Cherry Blossom* (*supra* n. 107). The only case in which either of these rulings (at least that in the *East Timor* case) did contribute to a finding of State immunity was the first instance judgment in the *MTN* case. That judgment was overturned, however, on appeal (see Supreme Court of Appeal of South Africa, *EAC v. MTN*, *supra* n. 7). Both ICJ judgments did not play any role in the judgment of the Supreme Court of Appeal of South Africa and even the dissenting judges did not rely on it.

232 See, e.g., Court of Appeals for British Colombia, *United Mexican States v. British Columbia* (Labor Relations Board), *supra* n. 118, para. 41 ('At common law, the courts would not directly implead a state as a party to proceedings, nor would a state be indirectly impleaded. This case does not give rise to a question of direct impleading – Mexico is not a party. Mexico argues, however, that it has been indirectly impleaded in the Board proceedings. 42. The concept of indirect impleading captures proceedings in which the state is not a party but in which proceedings are brought in relation to property in the state's ownership, possession, or control: see *Compania Naviera Vascongado v. S.S. Cristina (The Cristina) [1938] A.C. 485; The Parliament Belge (1879) 5 P.D. 197.*')

233 In particular, the following quote from Lord Bingham's speech in the *Jones* case: 'It is, however, clear that a civil action against individual torturers based on acts of official torture does indirectly implead the state since their acts are attributable to it. Were these claims against the individual defendants to proceed and be upheld, the interests of the Kingdom [of Saudi Arabia] would be obviously affected, even though it is not a named party.' See House of Lords, *Jones et al. v. Saudi Arabia et al*, Session 2005-06 [2006] *UKHL* 26, para. 31. The subsequent *Belhaj* judgment of the Supreme Court of the United Kingdom is more nuanced. For example, Lord Sumption's speech clearly distinguishes the immunity of State officials on the one hand from cases involving indirect impleading on the other. See Supreme Court of the United Kingdom, *Belhaj et al. supra* n. 104, paras. 185-186 ('Two such categories [where state immunity may apply notwithstanding that the relevant foreign state is not itself a party; CvdP/TD] are well established in English law. The first, which does not arise in these appeals, is the case of a civil claim against an employee or other agent of a state in respect of acts which are attributable in international law to that state. [...] The second case comprises actions in which a state, without being a party, is said to be 'indirectly impleaded' because some relevant interest of that state is directly engaged. In England, the only cases in which a foreign state has been held to be indirectly impleaded in this way are those involving the assertion of some right over property of that state situated within the jurisdiction of the English courts.') Compare also the quote from Franchini *supra* para. 60 and *supra* n. 86.

234 See Supreme Court of Appeal of South Africa, *The Minister of Justice and Constitutional Development v. The Southern African Litigation Centre* (867/15) [2016] *ZASCA* 17 (15 March 2016) footnote 41 ('An action in rem against a ship owned by a foreign sovereign is an example of an indirect impleading of a foreign sovereign. See *Compania Naviera Vascongado v. SS Cristina [1938] AC 485; [1938] 1 All ER 719 (HL).* So is a civil action against an individual in respect of actions on behalf of a foreign state, where permitting an action against the individual would circumvent the state's immunity. *Jones v. Ministry of the Interior of the Kingdom of Saudi Arabia (Secretary of State for Constitutional Affairs intervening); Mitchell v. Al-Dali [2006] UKHL 26; [2007] 1 AC 270; [2007] 1 All ER 113 (HL).*')

situation, namely in case of proceedings against an official of a foreign State. In contrast, courts in other common law countries have held that such a situation is not to be considered one of indirect impleading.[235] Whatever the case may be, in our view there is insufficient support for a broader application of the doctrine of indirect impleading beyond these two situations neither of which are relevant for our answer to question 2A. Furthermore, the recent judgment of the Supreme Court of Appeal of South Africa in *EAC v. MTN* underlines that a mere finding of wrongfulness does not suffice for indirect impleading.[236]

147. That leaves the situation addressed in question 2B. Does it make a difference if compensation for damages is being claimed? We believe it does not. We found many examples of cases in various jurisdictions where compensation of damages was being demanded from the non-State defendant and this did not lead to a finding of State immunity.[237]

148. What about injunctive relief, such as a court order that the non-State defendant refrain from certain conduct? We already saw in our discussion of Article 6(2)(b) that it appears that the courts in the *Cerbuco* (Netherlands) and *EAC v. MTN* (South Africa) cases were of the view that if the requested court order would *de facto* undo the *acta iure imperii* and deprive it of its effects, this tips (or would have tipped) the scales in favour of a finding of State immunity. However, two jurisdictions – three if we add Cuba which had explicitly invoked its immunity in *Cerbuco*[238] – is, of course, much too thin a basis for a conclusion of extensive and virtually uniform State practice.[239] Particularly since these cases can be contrasted

[235] See, for example, Irish Supreme Court, *Sáorstát and Continental Steamship Company* v *De las Morenas*, December 18, 1944 [1945] *I.R.* 291 ('There was some discussion at the Bar as to what constitutes an indirect impleadment of a foreign Sovereign or State. The most obvious example, and the instance in which the point most frequently arises, is the case of Admiralty proceedings 'in rem against a ship. In such proceedings no person is named as defendant; but, as has been pointed out, this is merely a convenient way of suing the owners, must either come in and defend the proceedings, or allow their property to go by default. Where a foreign Sovereign claims to be the owner of the ship, it is clear that he is being impleaded. This, however, is only one of many instances that might be cited, in which such a Sovereign might be held to be impleaded. He is also impleaded, though not named as a party, in any proceedings in which the Court seizes or detains, or attempts or is required to enforce its process against, any property which the Sovereign claims to be his, or of which he claims to be in possession or control. Where the Sovereign is not named as a party and where there is no claim against him for damages or otherwise, and where no relief is sought against his person or his property, I fail to see how he can be said to be impleaded either directly or indirectly.') As an aside, we note that the Supreme Court also made no mention of the doctrine of indirect impleading in its decision in the Israeli commanders case (see Hoge Raad, ECLI:NL:HR:2023:1132, *NJ* 2023/282).

[236] See Supreme Court of Appeal of South Africa, *EAC v. MTN*, *supra* n. 111.

[237] See, by way of example, *Touax* (*supra* n. 122), *Belhaj et al.* (*supra* n. 104), *Lao Import-Export* (*supra* n. 215) and *Scancem* (*supra* n. 201).

[238] See Gerechtshof 's-Hertogenbosch, 23 July 2024, ECLI:NL:GHSHE:2024:2380, para. 3.2.

[239] Particularly when in one of the cases (*Cerbuco*), the judgment was not delivered by the highest court in the jurisdiction in question (the Netherlands) and the reasoning for declining jurisdiction was based on the fact that customary international law did in fact require State immunity in that case. It follows from our analysis, however, that such a finding does not have a firm basis in State practice and *opinio juris*.

with several expropriation cases in which State immunity was not considered to apply, notwithstanding that their aim was very much to *de facto* (partially) undo the expropriation or deprive it of its effects.[240] Although these cases did not necessarily involve a requested injunctive relief or court order against a private defendant (but rather the return of expropriated property), they do illustrate, in our view, that the criterium of *de facto* undoing is not consistently applied by courts.

5.5 Immunity under customary international law – answer to research question 2

149. On the basis of the foregoing we conclude that there is insufficient evidence of a state practice, inspired by *opinio juris*, which is extensive and virtually uniform that would require us to answer Question 2A and 2B in the affirmative. Based on our research, we would therefore answer that question as follows:

> A. Customary international law does not require a grant of immunity from jurisdiction in civil proceedings between two private parties in which the claimant seeks a declaratory judgement that the defendant has acted unlawfully which will require the forum court, as a preliminary to its ultimate decision, to examine and pronounce an opinion on (the legality of) *acta iure imperii* of a foreign State which itself is not named as a party to the proceedings.
> B. The answer to question 2A remains the same if the plaintiff requests not (only) a declaratory judgement but (also) compensation for damages and/or injunctive relief (such as a court order that the defendant refrain from certain conduct).

6. SUMMARY AND CONCLUDING REMARKS

150. Courts around the world have increasingly dealt with civil proceedings involving foreign States, where the doctrine of State immunity plays a pivotal role. Traditionally, this doctrine bars jurisdiction unless exceptions apply, such as waiver or when the foreign State acts in a private capacity (*acta iure gestionis*). However, a complex legal issue arises when the foreign State is not formally named as a party, yet its sovereign conduct (*acta iure imperii*) is central to the dispute. This occurs in cases involving private parties (or in cases between a private party and (the Government of) the forum State), where the legality of foreign State actions is indirectly at issue.

151. Examples include proceedings against private companies for supplying materials used in warfare by a foreign State, and disputes between private companies involving expropriation or interference in contractual rights by a foreign State. In such cases, defendants have invoked State immunity, even though they are not themselves (an emanation of) a foreign State nor is that foreign State a formal party to the proceedings. Courts have responded inconsistently – sometimes granting immunity, sometimes not, and occasionally not addressing the issue at all – raising questions about the applicable legal threshold.

[240] See, for example, the German expropriation cases described in Annex I, paras. 19-20.

152. These developments prompted a re-examination of the scope of State immunity, particularly in light of the Netherlands' recent ratification of the UNCSI. Although not yet in force, Article 6(2)(b) UNCSI explicitly addresses situations where a foreign State is not named as a party to the proceedings. The paper explored whether the UNCSI, the ECSI, or customary international law require immunity in such 'indirect cases', and whether the nature of the relief sought – declaratory, compensatory, or injunctive – affects that assessment.

153. After a thorough analysis of the *travaux préparatoires* of the UNCSI we concluded that the intention behind Article 6(2)(b) was, in short, to apply to proceedings in which the foreign State would lose its claim to the property in question if it did not appear voluntarily in those proceedings. This would be either because it would lose ownership of the property or any other legal right or interest in it, or because the activity that the foreign State carries out with the property would be terminated against its will. This applies regardless of whether the property in question (or 'right' or 'interest' therein) is 'owned' by the foreign state, as 'control', 'possession' or 'use' alone are sufficient (which we coined '(Use of) Property Cases'). If Article 6(2)(b) were to have a wider scope, in our view it would at most relate to proceedings in which the defendant is an emanation (or *alter ego*) of a foreign state not covered by the definition of 'State' in Article 2, but which should nevertheless be considered part of a foreign State. In any case, we found no indication in the *travaux préparatoires* that Article 6(2)(b) was intended to apply to proceedings between two private parties, except in (Use of) Property Cases, nor that it covers concepts such as the foreign act of State doctrine.

154. As there has been little detailed discussion of Article 6(2)(b) among the States that have ratified the UNCSI so far, the ratification procedures provide limited insight into how these States interpret Article 6(2)(b). That said, where the article was discussed, the 'property' background of the article was often emphasised (as was the connection with Article 13). We were unable to find any indication that the States believed Article 6(2)(b) went further than (Use of) Property Cases. At the same time Article 6(2)(b) UNCSI has sparked considerable academic debate, with most scholars seeming to agree that its application is not confined to (Use of) Property Cases, though they generally maintain that it only applies where proceedings have legally binding effects on the State not being named as a party – mere *de facto* effects being insufficient.

155. Case law interpreting Article 6(2)(b) UNCSI confirms its roots in property-related disputes but also suggests a broader potential scope than follows from the *travaux préparatoires*, though not triggered merely by the need to assess the legality of a foreign State's conduct when that State is not a party. The rulings in *EAC v. MTN* and *Cerbuco* indicate that a higher threshold – such as claims that would *de facto* undo a foreign sovereign act – is required. It strikes us that this threshold seems not to be in line with the general view in legal doctrine that *de facto* effects on a foreign State's *acta iure imperii* do not suffice for application of Article 6(2)(b) UNCSI.

156. Based on the analyses of the *travaux préparatoires* and the case law as it currently stands and taking into account the views in legal doctrine as well as those expressed in the ratification proceedings, we answered our first research question as follows:

> 1A. The UNCSI does not require a grant of immunity from jurisdiction in civil proceedings between two private parties in which the claimant seeks a declaratory judgment that the defendant has acted unlawfully which will require the forum court, as a preliminary to its ultimate decision, to examine and pronounce an opinion on (the legality of) *acta iure imperii* of a foreign State which itself is not named as a party to the proceedings.
> 1B. If a plaintiff requests not (only) a declaratory judgment but (also) an award of monetary compensation this will not change our answer. However, if injunctive relief (such as a court order that the defendant refrain from certain conduct) is requested this might in the opinion of some courts tip the balance in favour of immunity if such an order would *de facto* undo the *acta iure imperii* and deprive it of its effects (assuming that none of the exceptions to immunity provided for in the UNCSI applies).

157. The research was continued with a focus on the state of customary international law on the issue, which primarily entailed conducting a review of immunity legislation and relevant case law in civil cases across various jurisdictions. The majority of States that were examined permit some form of review of sovereign acts in cases where the foreign State is not named as a party to the proceedings. In the jurisdictions where such a review is (partially) not permitted, the reasons for this position vary but immunity from jurisdiction is not among those reasons. This answers the first part of the second research question:

> 2A. Customary international law does not require a grant of immunity from jurisdiction in civil proceedings between two private parties in which the claimant seeks a declaratory judgment that the defendant has acted unlawfully which will require the forum court, as a preliminary to its ultimate decision, to examine and pronounce an opinion on (the legality of) *acta iure imperii* of a foreign State which itself is not named as a party to the proceedings.

158. Within the case law examined, a substantial number of cases in various jurisdictions have been identified, wherein compensation for damages was sought from the non-State defendant, without State immunity from jurisdiction being granted. Regarding injunctive relief, such as a court order that the non-State defendant refrain from certain conduct, our discussion of Article 6(2)(b) UNSCI showed that in two cases, this tipped (*Cerbuco*) or could possibly tip (*EAC v. MTN*) the scales in favour of a finding of State immunity, if the court order would *de facto* undo the *acta iure imperii* (*EAC v. MTN*) and/or deprive (*Cerbuco*) it of its effects. However, two jurisdictions – three if we add Cuba, which invoked its immunity in *Cerbuco* – is, of course, much too thin a basis for a conclusion of extensive and virtually uniform State practice. Particularly since these cases can be contrasted with several expropriation cases in which State immunity was not considered to apply, notwithstanding that their aim was very much to *de facto* (partially) undo the

expropriation or deprive it of its effects. So the second part of the second research question is answered as follows:

> 2B. The answer to question 2A remains the same if the plaintiff requests not (only) a declaratory judgment but (also) compensation for damages and/or injunctive relief (such as a court order that the defendant refrain from certain conduct).

159. Where do these findings take us? The reluctance of courts in various jurisdictions to rule on the lawfulness of *acta iure imperii* of a foreign State is understandable and seems to be based on the notion that national courts should refrain from making politically sensitive judgments on the sovereign acts of a foreign State. From that perspective, it is also understandable that courts have on occasion also turned to State immunity to avoid making such a sensitive ruling. Quite a few of these judgments were overturned on appeal or can no longer be considered good law in light of subsequent case law (from the same court or a higher court). Nevertheless, the vague and ambiguous language of Article 6(2)(b) comes with the inherent risk that courts will (again) turn to State immunity as the solution for the predicament they can sometimes find themselves in. This risk is even greater in (smaller) jurisdictions that do not provide their courts with other tools in their toolbox to avoid politically sensitive rulings from an international relations perspective (such as the foreign act of State doctrine). It is certainly striking in this regard that, for example, the Netherlands (where courts lack these alternative tools) has seen a significant increase these last couple of years in cases in which Article 6(2)(b) played a role.

160. This paper not only sought to put this provision in its proper (historical) perspective but also tried to show that State immunity is not the solution to the problem as far as customary international law is concerned. Nor should it become this solution in our view. Once established, rules of customary international law are not flexible and very hard to change. After all (and leaving aside regional custom) just as that it requires the larger international community to create the rule it also requires that larger community to change it. The rules cannot be changed by just one country (or likeminded group of countries for that matter), even when opinions or circumstances in that country have fundamentally changed. That amending multilateral conventions such as the UNCSI is no easy feat is equally obvious. Nor is withdrawing from such a convention a solution if the rules provided therein have since become rules of international customary law. Put differently (and more dramatically): expanding the rules of State immunity is like swimming in a fish trap, once in forget about getting out.

161. We do not believe swimming in such a trap is necessary or desirable. As already indicated there are many other solutions that can be based on domestic law that solve the problem in the same way (such as the foreign act of State doctrine). Not only do such alternatives often provide for exceptions as an ‘emergency valve’ to avoid undue limitations on plaintiffs rights (such as public policy or *jus cogens* exceptions) precisely because they are creatures of national law they can also be amended if changes in circumstances or opinions in a country so require.

7. PROPOSITIONS AND POINTS FOR DISCUSSION

162. For the purposes of discussion, we put forward the following propositions based on our research:

1) The Netherlands should issue an interpretative declaration to the UNCSI to make it clear that, in light of the *travaux préparatoires* as well as the past and present state of customary internal law, it does not consider Article 6(2)(b) to apply beyond (Use of) Property Cases. As a consequence, Article 6(2)(b) does not come into play merely because a Dutch court is required to give a preliminary ruling on (the lawfulness of) *acta iure imperii* of a foreign State that is not named as a party in those proceedings. This to avoid misunderstandings with other State Parties to the UNCSI and to prevent an unjustified and overly wide application of Article 6(2)(b) by Dutch courts.
2) State immunity from jurisdiction in cases where a foreign State is not named as a party, the foreign act of State doctrine and a prohibition to test foreign sovereign acts against domestic public policy or against international law are, in essence, different solutions to the same problem: protecting national courts from making politically sensitive judgments on the sovereign acts of a foreign State.
3) Unlike the doctrine of State immunity from jurisdiction, which is a rule of customary international law, the act of State doctrine is a rule of domestic law. That makes the latter doctrine much more flexible to adapt to ever changing legal and public views, including when it comes to possible exceptions for *jus cogens* or gross human rights violations. Instead of widening the scope of immunity from jurisdiction in civil proceedings in which the foreign State is not named as a party beyond (Use of) Property Cases, the Dutch Supreme Court should therefore embrace the act of State doctrine after all.
4) When determining if State immunity applies in proceedings in which the foreign State is not named as a party, it should make no difference if a mere declaratory judgment is sought against the defendant private party (whether or not in combination with a claim for damages) or (also) a prohibition or order with the aim of preventing the unlawful conduct of the defendant private party. Any other conclusion would mean, for example, that a private party aiding and abetting a clear *jus cogens* violation of a foreign State, could be ordered to compensate the victim (or his relatives) but could not be ordered to refrain from this harmful conduct in the first place. Put differently: relatives would have to wait until their loved one dies instead of being able to take legal action to prevent that death. That would be an absurd result.

ANNEX I – The travaux préparatoires of Article 6(2)(b) UNCSI

The *travaux préparatoires* of Article 6(2)(b) UNCSI.

1. ADOPTION OF DRAFT ARTICLES ON FIRST READING (1978-1986)

1.1 Setting the scene, definitions and general framework

1. The Special Rapporteur appointed for the topic of Jurisdictional Immunities was Mr. Sompong Sacharitkul. In his first preliminary report on the matter (1979), he took the view that for an eventual set of draft articles certain key concepts would appear 'to require very precise definitions'.[1]
2. As to the term 'State', the Special Rapporteur wrote in this regard:

> There will be no necessity to define the term 'State' for all purposes, but for the purpose of the current study the need may arise to indicate with certainty, in regard to the question of recipients or beneficiaries of State immunities, whether the expression 'State' should cover only the State as such, or also its sovereign head, its government, and all departments forming part of the central government, thereby excluding all other separate entities and national enterprises. It is possible to envisage a treatment of this problem in separate provisions dealing with the forms of the structural organization of the State to be understood as forming an integral part of the State as a united whole, and those separate entities which, subject to certain limitations and conditions, could enjoy the benefits of State immunities, for instance when acting for or on behalf of the State, and in the exercise of sovereign and governmental functions. With adequate provisions on the extent of State immunities based on the criterion of the nature of the activities, there may be no need to incorporate the question of the form of the State organization or its structure in the definition section, which could be exclusively devoted to clarifying each notional concept by defining its content.[2]

3. And insofar as the term 'State property' was concerned he wrote:

> The concept of 'State property' or 'biens d'Etat' has been made clear in earlier work of the Commission, especially in the context of the draft articles on succession of States in respect of matters other than treaties. Accordingly, a new definition may be superfluous, and the meaning to be ascribed to it could remain as defined, viz., property, rights and interests which are owned by the State according to its internal law. However, the problem of classification of the types of State property for purposes of immunities from jurisdiction and execution will require a fresh and close examination.[3]

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1 See Preliminary Report on jurisdictional immunities of States and their property by Mr. Sompong Sucharitkul, Special Rapporteur, *Yearbook of the International Law Commission*: 1979, vol. II(1), UN Doc. A/CN.4/323, para. 48.
2 Ibid., para. 54.
3 Ibid., para. 55.

4. Having now sketched the first broad lines for the definitions of these (and some other) terms, the Special Rapporteur continued with setting the scene for other important topics which, in his view, should be part of any draft articles on State immunity, namely: i) the formulation a general rule of State immunity, ii) the issue of consent, waiver and other incidental questions; iii) the issue of possible exceptions to the general rule of State immunity, iv) the issue of immunity from execution, and v) the issue of other procedural matters.

5. It is important to discuss two of these topics identified by the Special Rapporteur in a bit more detail as they will help understand some of the issues that will arise later when we discuss the coming about of the article that would ultimately become Article 6(2)(b).

6. First, there is the issue of possible exceptions to the general rule of State immunity. The Special Rapporteur indicated in this regard that, at first fight, two possible approaches for the determination of the precise limits of the application of the doctrine of State immunity could be envisaged:

> One possible solution is to state the circumstances in which a State is entitled to sovereign immunity by listing the types of activities covered by the doctrine, thereby leaving out the uncovered areas of activities as lying outside the province of its application. Another would be to specify the types of activities, or the private or commercial nature of the transactions, or the non-governmental functions or capacities assumed by the State which will be subject to the territorial jurisdiction of another State.[4]

7. Ultimately, the Special Rapporteur opted for a more 'convenient approach', however, in which a general rule of State immunity would be followed by the suggestion and discussion of possible exceptions.[5]

8. Among State activities subject to a possible exception, the Special Rapporteur argued, would be those connected to 'ownership, possession and use of property':

> A State is not immune in respect of activities connected with any interest of the State in, or its possession or use of, immovable property in the territory of another State; or any obligation of the State arising out of its interest in, or its possession or use of, any such property. The rationale of this exception lies in the fact that questions relating to immovable property are normally governed by the law of the forum rei sitae, and the territorial court is the proper forum. […] This exception also covers activities of a State in relation to its interest in movable or immovable property, being an interest arising by way of succession, gift or bona vacantia. […] The same exception applies to the claim of interest a State may have in any property relating to the estates of deceased persons or persons of unsound mind, or to insolvency, the winding up of companies or the administration of trusts within the territorial competence of the forum.[6]

[4] Ibid., para. 69.

[5] Such possible exceptions identified by the Special Rapporteur were: i) commercial transactions, ii) contracts of employment, iii) ownership, possession and use of property, iv) patents, trademarks and other intellectual property, vi) fiscal liabilities, vii) shareholdings and membership of bodies corporate, viii) ships employed in commercial service and ix) arbitration.

[6] Ibid., paras. 74-76.

9. Another exception, the Special Rapporteur argued, were activities related to 'ships employed in commercial service':

> A State is not immune in respect of actions in rem or in admiralty or in personam for enforcing a claim in connection with a ship owned or operated by it in commercial service. This exception, though relating especially to ships as a special category of State property, is a logical reflection of a more general exception of commercial activities of the State. National case law of State immunity has grown out of shipping cases. Several conventions of a universal character have been concluded dealing with sea-going vessels and the operation of State-owned ships in commercial service which are not covered by the immunity of State.[7]

10. The second issue to be discussed in more detail here for a proper understanding of what ultimately became Article 6(2)(b) are the Special Rapporteur's remarks on immunity from attachment and execution. In this regard, he wrote:

> The immunity of a State from attachment and execution in regard to its public property or property in governmental use forms part and parcel of the composite whole of the doctrine of the jurisdictional immunity of States. As has been seen in regard to waiver of immunity from jurisdiction, immunity from execution relates to the second, or post-judgement, stage of judicial process. Immunity from attachment could be involved at any stage, whenever attachment is sought against property of the foreign sovereign State. […] The general rule appears to be that the property of a foreign State – especially property in its possession or control – is exempt from provisional measures of seizure or attachment, as well as from execution. An important question then to be considered is the extent to which this general rule applies in practice. The requirement of ownership, possession or control offers one criterion. The use of the property, or sometimes the purpose of its use, may be relevant to the determination of the question whether, in a particular case, a State property is immune from attachment and execution.

11. Having now set the scene in its entirety, the Special Rapporteur took the position that 'it would be desirable to continue the study of this topic, and not only possible but practicable eventually to prepare draft articles along the lines indicated in this preliminary report'.[8] In other words: a report would be prepared by the Special Rapporteur on each of the topics identified by him accompanied by a proposal for related draft articles. The ILC agreed with this approach[9] and the next year (1980) the Special Rapporteur drew-up a second report which *inter alia* dealt with the issue of definition of terms.

[7] Ibid., para. 80.

[8] Ibid., para. 91.

[9] For the discussion of the Special Rapporteur's Preliminary Report in the ICL, see Summary records of the 1574th and 1575th meeting of the ILC, UN Doc. A/CN.4/SR.1574 and 1575. For a summary of the discussion see Report of the International Law Commission on the work of its Thirty-first session, 14 May-3 August 1979, Official Records of the General Assembly, Thirty-fourth session, UN Doc. A/34/10, pp. 185-186.

1.2 First debates in the ILC: deferring the issue of definitions

12. In his Second Report the Special Rapporteur also included proposals for definitions of the terms (foreign) 'State' and 'State property'.[10] Insofar as the term 'State' was concerned, he proposed two connected articles (articles 2 and 3). Article 2 would set out several overarching definitions (including one which set out in broad lines what was meant by 'foreign State') whereas article 3 would contain a 'further illustration by way of interpretation' of what some of these terms meant in more detail (including the term 'foreign State').[11]

13. Or as the Special Rapporteur put it:

> Upon further analysis, the term 'foreign State', which may seem to have been given sufficient definition and clarification in article 2, paragraph 1 (d), appears to require further explanation, especially in the context of jurisdictional immunities, with reference to the essential components which compose or constitute the 'foreign State' for the purpose of receiving the benefits of State immunity. The list of beneficiaries of State immunity merits some attention at this stage, on the clear understanding that the types of beneficiaries listed may or may not, in any or all cases, be accorded jurisdictional immunities. The list of such potential recipients of State immunity is noteworthy as an indication of possible categories of entities which could in actual State practice participate in the enjoyment of jurisdictional immunities in the name and on behalf of the State of which they form an essential or central part.[12]

14. In line with his Preliminary Report, the Special Rapporteur identified (at least) four of these potential 'beneficiaries' of State immunity, which he also proposed to include in the further definition of 'foreign State', in article 3, namely – in short – the (i) the sovereign or head of State, (ii) the central government and its various organs or departments, (iii) political subdivisions of a foreign State, and (iv) agencies or instrumentalities acting as organs of a foreign State.[13]

15. As to 'State Property', the Special Rapporteur – again in line with his Preliminary Report – proposed to borrow from earlier work of the ILC, namely the definition of 'State Property' used in the Draft Articles on the Succession of States in Respect of Matters Other Than Treaties. In line with that definition, the Special Rapporteur proposed to define 'State property' as 'property, rights and interests which are owned by a State according to its internal law'. [14] It is interesting to note here that in the commentary to these draft articles referred to by the Special Rapporteur, the following is noted in relation to the phrase 'property, rights and interests' in the definition of 'State Property':

> (10) The Commission wishes to stress that the expression 'property, rights and interests' in article 5 refers only to rights and interests of a legal nature. This expression is to be found in many treaty provisions, such as article 297 of the Treaty of Versailles, article 249 of the Treaty of Saint-Germain-en-Laye, article 177 of the Treaty of Neuilly-sur-Seine, article 232 of the Treaty of Trianon and article 79 of the Treaty of Peace with Italy.[15]

16. In the subsequent discussion of this Second Report in the plenary ILC that year, it soon became clear that it was very difficult to reach consensus on the need of definitions as well as their scope, in any event in this stage of the drafting process. A decision on the question of definitions was therefore deferred by the ILC for the time being.[16] Instead, the ILC, and the Special Rapporteur in its

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[10] See Second Report on jurisdictional immunities of States and their property by Mr. Sompong Sucharitkul, Special Rapporteur, *Yearbook of the International Law Commission*: 1980, vol. II(1), UN Doc. A/CN.4/331 and Add.1, paras. 25, 35-42.

[11] Ibid., para. 34.

[12] Ibid. para. 35.

[13] Ibid., paras. 35-42.

[14] Ibid., para. 26 (In the footnote he refers to Arts. 4-14 of the Draft Articles on Succession of States in Respect of Matters Other Than Treaties, and commentaries thereto, as adopted by the Commission at its thirty-first session, ILC Yearbook 1979, vol. II (Part Two), p. 15 et seq., UN Doc. A/34/10, chap. II, sect. B). Art. 5 of these draft articles stated that 'State Property' meant 'property, rights and interests which, at the date of the succession of States, were, according to the internal law of the predecessor State, owned by that State'. These Draft Articles would ultimately be renamed to the Draft Articles on the Succession of States in Respect of State Property, Archives and Debts and Art. 5 would become Art. 8. These Draft Articles would serve as the basis for what would ultimately become a convention of the same name in 1983. This convention has never entered into force, however, due to a lack of sufficient ratifications. Up until today, only, seven States have ratified this convention. See for the latest state of play https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=III-12&chapter=3&clang=_en.

[15] See ILC Yearbook 1979, vol. II(2), UN Doc. A/34/10, p. 7. The same paragraph can be found in the commentary to Art. 8 in the final Draft Articles on the Succession of States in Respect of State Property, Archives and Debts, see UN Doc. A/CN.4/SER.A/1981/Add.1 p. 26. Although not specifically mentioned in the ILC Commentary a similar definition of 'property' had at that time also been used in other instruments such as the Draft Convention on the Protection of Foreign Property (1967). See Art. 9(2) thereof which states that 'Property' means all property, rights and interests, whether held directly or indirectly, including the interest which a member of a company is deemed to have in the property of the company. […]'. The accompanying Explanatory Note stated that this definition 'which is in conformity with international judicial practice, shows that it is meant to be used in its widest sense which includes, but is not limited to, investments'. According to the OECD's website 'The Draft Convention on the Protection of Foreign Property was developed upon a mandate given by the Organisation for European Economic Co-operation (OEEC) in 1960 – the predecessor of the OECD – and prepared by representatives and experts of Governments within the Committee for Invisible Transactions (CMIT) (which was merged with the Committee on International Investment and Multinational Enterprises (CIME) in 2004 to form the Investment Committee). It was intended as a plurilateral instrument but has not entered into force – which would have required the deposit of 10 instruments of ratification, according to its Art. 12. However, the OECD Council adopted the Resolution on the Draft Convention on 12 October 1967 in which it reaffirms the adherence of Members to the principles of international law embodied in the Draft Convention and commends it as a basis for extending and rendering more effective the application of these principles. The Draft Convention, even though never in force, has historical importance for investment treaty policies.' See https://legalinstruments.oecd.org/en/instruments/OECD-LEGAL-0084. The Draft Convention and Explanatory Notes are available via the same website.

[16] See Report of the work of the ILC 1980, UN Doc. A/35/10, para. 112. See also Summary record of the 1947th meeting of the ILC, UN Doc. A/CN.4/SR.1947, para. 24 ('Mr. SUCHARITKUL (Special Rapporteur), summing up the discussion, observed that, during the Commission's discus-

wake, decided to proceed with the more substantive articles first. This included Article 7, the provision that would ultimately become Article 6 (and Article 6(2)(b) in particular).

1.3 Article 7 and the birth of 'property, rights, interests or activities'

17. In his Third Report (1981) the Special Rapporteur proposed this article as Article 7:

> Article 7. Rules of competence and jurisdictional immunity
>
> 1. A State shall give effect to State immunity under article 6 by refraining from submitting another State to its jurisdiction, notwithstanding its authority under its rules of competence to conduct the proceedings in a given case.
>
> ALTERNATIVE A
> 2. A legal proceeding is considered to be one against another State, whether or not named as a party, so long as the proceeding in fact impleads that other State.
>
> ALTERNATIVE B
> 2. In particular, a State shall not allow a legal action to proceed against another State, or against any of its organs, agencies or instrumentalities acting as a sovereign authority, or against one of its representatives in respect of acts performed by them in their official functions, or permit a proceeding which seeks to deprive another State of its property or of the use of property in its possession or control.[17]

18. By way of explanation of the two proposed alternatives for paragraph 2, the Special Rapporteur wrote:

> It has been said that there was no need to include any interpretative provisions to indicate what was meant by 'State'. If that view were accepted, some reference should perhaps be made to the circumstances in which a State was said to be 'impleaded'. He had therefore listed in his third report (A/CN.4/340 and Add.l, paras. 27 et seq.) certain actions which might be regarded as impleading a foreign State: proceedings against a foreign State, proceedings against the central Government or head of a foreign State, proceedings against political subdivisions of a foreign State, and proceedings against organs, agencies or instrumentalities of a foreign State. He had also made a passing reference to State agents or representatives of foreign Governments, including sovereigns, ambassadors, diplomatic agents, consular agents and other types of representatives of foreign Governments attending meetings, whose status and immunities had to some extent been dealt with in other conventions. There were also proceedings affecting State property or property in the possession or control of a foreign State. State practice seemed to suggest that a State would be impleaded if a vessel in its possession or control was attached without due consideration being given to the kind of activity in which the vessel was engaged, with a view to determining the extent of its immunities and how amenable it was to the jurisdiction of the court.[18]

19. The same report of the Special Rapporteur also included a chapter entitled 'Lack of competence on grounds other than jurisdictional immunity'. In this chapter, several legal concepts are discussed which 'are notionally close to jurisdictional immunity and yet conceptually dissociated from immunity'.[19] One of these concepts, the Special Rapporteur wrote, was the so-called 'foreign act of State' doctrine, which he described as a refusal by (mostly American) courts to 'decide or determine the claim by one party because the decision or determination of that claim inevitably includes a judgment on the lawfulness or propriety of a sovereign act of another State'.[20] During the introduction of his report in the ILC plenary meeting, the Special Rapporteur again stressed that

> [t]here was a clear distinction to be drawn between jurisdictional immunity on the ground that the defendant was a sovereign State – though the court would otherwise have been competent – and other cases in which the court had no competence, either because the matter was outside its territorial jurisdiction or because the subject-matter had no connection whatsoever with the court or because, for some other reason, the subject matter was not actionable before the court or was not justiciable before the judicial authority.

As an example of the latter, he referred to the foreign act of State doctrine.[21]

20. In the subsequent discussion in the ILC of the Special Rapporteur's Third Report, several members expressed reservations concerning use of the term 'impleads'.[22] One member, for example, indicated that more precise wording was necessary 'which would indicate that a legal proceeding would be considered as one "against another State" if that State's legal interests were involved to the extent that they would be legally affected by a judgement in the case'.[23]

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sion of the topic some seven years previously, Sir Francis Vallat had urged that the decision on the question of definitions should be deferred.')

17 See Third report on jurisdictional immunities of States and their property by Mr. Sompong Sucharitkul, Special Rapporteur, *Yearbook of the International Law Commission* 1981, vol. II(1), UN Doc. A/CN.4.340 & Corr. 1 and Add.1 & Corr. 1, p. 141.

18 See Summary record of the 1653rd meeting of the ILC, UN Doc. A/CN.4/SR.1653, para. 16.

19 See Third report on jurisdictional immunities of States and their property, *supra* n. 17, para. 19.

20 Ibid., para. 21.

21 See Summary record of the 1653rd meeting of the ILC, UN Doc. A/CN.4/SR.1653, para. 14 ('In regard to the 'act of State' doctrine, it was important to distinguish between non-actionability of acts of a foreign Government and non-justiciability owing to lack of competence and jurisdictional immunity, for, if the court declined jurisdiction on the ground of jurisdictional immunity, the defect was curable either by the State giving its consent, or by conduct, or by waiver. But, if the court declined jurisdiction because it lacked competence, neither waiver nor consent could remedy the defect.')

22 See e.g. the comments by Mr. Sahovic in Summary record of the 1653rd meeting of the ILC, UN Doc. A/CN.4/SR.1655, para. 14 ('Like other members of the Commission, however, he considered that the concept of 'impleading' was not sufficiently clear and should be further clarified.')

23 See the comments by Mr. Tabibi in Summary record of the 1653rd meeting of the ILC, UN Doc. A/CN.4/SR.1653, para. 33. See also the observations of Mr. Riphagen ('While the Special Rapporteur was right in saying that jurisprudence had often considered a State's possession or control of property, rather than its legal relationship to that property, to be the relevant point in that respect,

21. Following this first debate, the Special Rapporteur decided to revise his draft for Article 7 and instead proposed the following:

> Article 7. Obligation to give effect to State immunity
>
> Paragraph 1 – Alternative A
> 1. A state shall give effect to state immunity under, [as stipulated in] article 6 by refraining from subjecting another state to the jurisdiction of its otherwise competent judicial and administrative authorities, [or] and by disallowing the [conduct] continuance of legal proceedings against another state.
>
> Paragraph 1 – Alternative B
> A. A state shall give effect to state immunity under article 6 by refraining from subjecting another state to its jurisdiction [and] or from allowing legal proceedings to be conducted against another State, notwithstanding the existing competence of the authority before which the proceedings are pending.
> 2. For the purpose of paragraph 1, a legal proceeding is considered [deemed] to be one against another State, whether or not named as a party, so long as the proceeding in effect seeks to compel that other State either to submit to local jurisdiction or else to bear the consequences of judicial determination by the competent authority which may [involve] affect the sovereign rights, interests, properties or activities of the State.
> 3. In particular, a proceeding may be considered to be one against another State [when] if it is instituted against one of its organs, agencies or instrumentalities acting as a sovereign authority, or against one of its representatives in respect of acts performed by them as State representatives, or [if] it is designed to deprive another State of its public property or the use of such property in its possession or control.
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> NOTE: Paragraph 3 would constitute an alternative to the text of draft article 3, subpara. 1 (a)[24]

22. Unfortunately – in any case for the purposes of understanding Article 6(2)(b) – the Special Rapporteur provided little (substantive) explanation regarding this new draft for article 7, particularly insofar as paragraphs 2 and 3 were concerned.[25] He did indicate, however, with respect to paragraph 2 that 'it was essential to determine the starting point of jurisdictional immunity, as well as the type of proceedings that could affect the interests of another state. That in turn was closely bound up with the question of who were the beneficiaries of State immunity.'[26] Such proceedings he remarked

> might, in the event, be instituted against an organ or agent of the other State, or against property under its control or in its possession. In many jurisdictions, the possibility of attachment of property existed during the pre-trial period and such attachment could be carried out in rem, without any proceeding being taken directly against a party. For that reason, it was necessary to indicate when the obligation of a State to refrain from subjecting another State to its jurisdiction arose.[27]

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he himself wondered whether the legal relationship was not also of some importance.'; ibid. para. 24) and the observations of Mr. Pinto ('In particular, the phrase "so long as the proceeding in fact impleads that other State", in alternative A, was perhaps not full enough. It was necessary to introduce the idea of a legal relationship involving the interests of the foreign State which needed to be protected by immunity.'; ibid., para. 30).

24 See Report of the International Law Commission on the work of its Thirty-third session, 4 May-24 July 1981, Official Records of the General Assembly, Thirty-sixth session, UN Doc. A/36/10, p. 158. At the time, the proposal for Art. 3(1)(a) read 'the expression "foreign State", as defined in article 2, subparagraph 1 (d) above, includes: "(i) the sovereign or head of State", "(ii) the central government and its various organs or departments", "(iii) Political subdivisions of a foreign State in the exercise of its sovereign authority", and "(iv) agencies or instrumentalities acting as organs of a foreign State in the exercise of its sovereign authority, whether or not endowed with a separate legal personality and whether or not forming part of the operational machinery of the central government".'

25 A more detailed analysis of the original and revised draft of Art. 7(2)/(3) can be found in the remarks that same year (1981) by Brazil's representative (who also happened to be an ILC member) in the UNGA. He explained the changes – in any case as he understood them – as follows: '16. With regard to the rest of article 7, i.e. paragraph 2 in one version and paragraphs 2 and 3 in the other, those provisions set out the principle that State immunity was not a formal immunity and that it applied not only when a State was formally named as a party in a proceeding but also when, even though legal action was instituted against some other entity or even against an individual, the proceeding would ultimately subject the State to the jurisdiction of another State. 17. That principle, which his delegation believed should be included in the draft articles, was a sound one. Its expression in legal terms was not an easy task, however, and the Special Rapporteur had adopted first a general approach, then a more specific approach, indicating cases in which the State would be considered indirectly involved, and finally an approach combining the general and the specific. 18. Under the general approach, the Special Rapporteur had suggested initially that the articles should state that a legal proceeding, was considered a proceeding against another State and therefore not permissible, whether or not the State was named as a party, 'so long as the proceeding in fact impleads that other State'. In a later version, the Special Rapporteur had suggested that a proceeding should be considered a proceeding against another State so long as, in effect, it sought to compel that other State either to submit to local jurisdiction or else to bear the consequences of judicial determination which might affect its sovereign rights, interests, properties or activities. 19. Under the specific approach, the articles would state that a proceeding was considered a proceeding against another State if it was instituted against one of the State's organs, agencies or instrumentalities 'acting as a sovereign authority, or against one of its representatives in respect of acts performed by them in their official functions' or, in a later version, 'as State representatives'. The articles would also exclude proceedings which sought to deprive another State of its property or of the use of property in its possession or control. 20. The Special Rapporteur combined the general and specific approaches in paragraphs 2 and 3 of his latest version of article 7, and he was to be commended for his meticulous dissection of the elements of the problem. However, none of the texts suggested gave his delegation entire satisfaction. With respect to the general approach, his delegation was not entirely happy with the expression 'impleads' and with the references in the variant formula to proceedings that sought 'to compel another State either to submit to local jurisdiction or else to bear the consequences of a judicial determination'. On the other hand, his delegation was not convinced that the Special Rapporteur had gone into enough detail in developing his text under the specific approach; if an enumeration was to be useful, it must be as comprehensive as possible.' (See Summary Record of the 49th meeting of the UNGA (36th Session), UN Doc. A/C.6/36/SR.49, p. 6).

26 Summary record of the 1708th meeting of the ILC, UN Doc. A/CN.4/SR.1708, para. 14.

27 Summary record of the 1714th meeting of the ILC, UN Doc. A/CN.4/SR.1714, para. 9. See also the comments in his Fourth Report in which the Special Rapporteur stated that he had recast the articles 'in the light of the rich and helpful debate at the various meetings of the commission on the topic and at the request of the Chairman of the Drafting Committee, with a view to assisting the Drafting Committee in the expedition of its consideration.' See Fourth report on jurisdictional immunities of States and their property by Mr. Sompong Sucharitkul, Special Rapporteur, *Yearbook*

As to the new paragraph 3, he remarked that if this paragraph were to be adopted, his proposed definition of the term 'foreign State' contained in Article 2(1)(d) would no longer be necessary.[28]

23. In summary, it can thus be said that the Special Rapporteur considered Article 7, paragraphs 2 and 3 to cover the two situations in which the State is not named as a party to the proceedings but should nevertheless be considered impleaded as the true defendants, namely 1) proceedings not against the State itself but against an emanation thereof (i.e. its organs, agencies, representatives, etc.) and 2) proceedings designed to deprive a State of its property or of the use of property in its possession or control.

24. This twofold purpose is also reflected in the new text of paragraph 3 which at closer inspection can be divided into two parts. The first part (… *is instituted against one of its organs, agencies or instrumentalities acting as a sovereign authority, or against one of its representatives in respect of acts performed by them as State representatives* ...) clearly relates to the various emanations of the 'State' whereas the second part (… *is designed to deprive another State of its public property or the use of such property in its possession or control*) clearly relates to (the use of) State property.

25. It is interesting to note here that paragraph 2 as revised is also the first draft featuring the phrase 'rights, interests, properties or activities', the string of words so very much at the heart of what would ultimately become Article 6(2)(b) (and therefore of this paper). Although this first appearance is yet another reason that a more substantive explanation of the Special Rapporteur's revised draft would have been most welcome, we cannot but note two things that may explain its appearance. We already saw that article 7 is being proposed during a stage in the drafting process when it is more likely that the Draft Articles will not contain definitions including – and in particular – of 'State' and 'State property' (in fact, as we saw above that is the entire reason for paragraphs 2 and 3 of Article 7). We also saw that the definition of 'State property' initially proposed by the Special Rapporteur was 'property, rights and interests',[29] a line of phrasing remarkably similar to the first part of the newly introduced word string. Additionally, we saw that in his Preliminary Report, the Special Rapporteur remarked that '[w]ith adequate provisions on the extent of State immunities *based on the criterion of the nature of the activities*, there may be *no need* to incorporate the *question of the form of the State organization or its structure in the definition section*' [our emphasis, TD/CvdP].[30] By extension, we saw that the Special Rapporteur had proposed to approach the topic of exception to immunities of a State by focusing on the activities carried out by the State.[31] It may thus very well be that the phrase 'rights, interests, properties or activities' was also intended as a reflection of the twofold purpose of paragraphs 2 and 3, namely to compensate for the absence of a definition of two key terms and the accompanying necessity to introduce critical concepts related to these two terms namely, on the one hand, *rights, interests, properties* ('State Property') and, on the other hand, *activities* ('State'). To be clear, this does not mean we believe that these two parts of the word string in question are totally unrelated or unconnected. On the contrary, as we already saw – and will see again as we dig further in the *travaux préparatoire*s – a State can also carry out activities with its property.[32] In fact, this was one of the topics the Special Rapporteur intended to discuss in the context of exceptions to immunity (and would also be addressed in the final Draft Articles and UNCSI).

26. That said – and leaving the realm of speculation and returning to the facts – the Special Rapporteur's revised draft of article 7(2)/(3), after having been briefly touched upon in the Sixth Committee of the UNGA,[33] was discussed extensively in the ILC the next year (1982).

1.4 Discussion of the twofold purpose of Article 7 in the ILC and UNGA

27. It can be deduced from this debate that the purpose of this provision was understood as avoiding a scenario in which State immunity could be circumvented by starting proceedings not against the State itself but against one of its emanations (bodies, representatives, agents, instrumentalities, etc.) or against its property,[34]

of the International Law Commission 1982, vol. II(1), UN Doc. A/CN.4.357, para. 8.

28 Ibid. At the time, this proposal for Art. 2(1)(d) read '"foreign State" means a State against which legal proceedings have been initiated within the jurisdiction and under the internal law of a territorial State'. It is not entirely clear if the Special Rapporteur misspoke here or wanted to add to his note to the revised draft Art. 7 (see *supra*, para. 21) which indicated that his proposal for Art. 3(*1*)(*a*) could be left out if paragraph 3 were adopted (for the text of Art. 3(1)(a), see *supra* n. 24). It seems to us the remark was intended as an addition as the Special Rapporteur's proposal for Arts. *2*(1)(*d*) and 3(1)(a) both pertained to the definition of (foreign) State meaning both would also no longer be necessary if paragraph 3 were adopted. See about the connection between the definition of 'State' in Arts. 2 and 3 also *supra*, para. 12.

29 See *supra*, para. 15.

30 See *supra*, para. 2.

31 See *supra*, para. 7 *et seq*.

32 As would later also be highlighted in legal literature. See for example. See J.P. Terhechte, 'Article 13', in: The United Nations Convention on Jurisdictional Immunities of States and Their Property: A Commentary (eds. R. O'Keefe, C.J. Tams), p. 231 ('In this regard, the word 'activities' in Article 6(2)(b) is capable of encompassing the possession and use of property, as both referred to in Article 13(a).')

33 Representatives of several countries commented on the revised draft of Art. 7 but mostly in more general terms and focusing on paragraph 1 of the article (rather than paragraphs 2/3 which are the subject of this paper). To the extent that the other paragraphs were commented on, it was indicated that they required further consideration (For a full summary see Topical Summary 1981, UN Doc. A/CN.4/L.339, pp. 54-55). The representative of Brazil did comment more extensively on Art. 7, paragraph 2/3, see *supra* n. 25.

34 See e.g. the observations by Mr. McCaffrey, Summary record of the 1714th meeting of the ILC, UN Doc. A/CN.4/SR.1714, para. 22 ('The aim of paragraph 2 seemed to be to ensure that the rule of immunity could not be circumvented by not naming the other State as a party'), the observations by Mr. Rasheed Mohamed Ahmed, ibid., para. 28 ('Paragraph 2 was designed to guard against unnecessary litigation by preventing those who were unable to institute proceedings directly from attempting to initiate proceedings indirectly.'), the observations by Mr. Al-Qaysi, Summary record of the 1715th meeting of the ILC, UN Doc. A/CN.4/SR.1715, para. 4 and 6 ('Paragraph 2 of the article was also substantive in that it dealt with legal proceedings against a State, whether or not named as

whereby some members focused more on the former (emanations)[35] and others more on the latter (property).[36]

a party, when the said State was in effect impleaded. That aspect of the matter was part and parcel of the obligation laid down in paragraph 1. Consequently, paragraph 3, despite the note thereto, only provided a partial alternative to the text of article 3, subparagraph 1 (a), since it contained a reference to property, a notion that obviously could not be subsumed under the notion of foreign States. […] In paragraph 3, the phrase 'acting as a sovereign authority' did not seem to convey the precise intent, for the sovereign authority belonged to the State of which the organ or instrumentality formed part. Perhaps it would be better to say 'when acting in the exercise of the sovereign authority of that State', which would be more in keeping with article 3, subparagraph 1 (a) (iv). Lastly, in view of the distinction between immunities ratione materiae and immunities ratione personae of representatives or agents of a foreign Government, he wondered whether the test of acting 'as State representatives' was indeed preferable to the earlier formulation, which spoke of acts performed by representatives 'in their official functions', which was the true crux of the matter.'), the observations by Mr. Calero Rodrigues, ibid., para. 35 ('Paragraphs 2 and 3 were of a different character. Paragraph 2 sought to make it clear that, whether or not a State was implicated by name, it enjoyed immunity from bearing the consequences of a judicial determination by the competent authorities of another State. Paragraph 3, however, went further and regarded proceedings against organs, agencies or instrumentalities or representatives of the State as tantamount to proceedings against the State itself. The formulation of that provision could none the less be made more succinct, and it should be noted that the phrase 'or [if] it is designed to deprive another State of its public property or the use of such property in its possession or control' would be unnecessary if the last part of paragraph 2 was adopted.'), the observations by Mr. Quentin-Baxter, Summary record of the 1717th meeting of the ILC, UN Doc. A/CN.4/SR.1716, para. 22 ('The immunity of the agents of the State and the immunity of its property were two entirely different things. The Special Rapporteur had attempted to deal with the relationship between agents and property in article 7, paragraphs 2 and 3, in connection with which there were no doubt still many difficult questions to be discussed; but in those provisions, the Commission was speaking quite generally and attempting to deal in a comprehensive manner with property.')

35 See e.g. the observations by Mr. Jagota, Summary record of the 1714th meeting of the ILC, UN Doc. A/CN.4/SR.1714, paras. 33-34 ('Again, paragraph 2 had both a purpose and a place in the draft. To illustrate his point, he cited the case of a dispute over goods owned by the Government of India that had arisen between the supplier of the goods and the repairer. The latter had secured an order from the local courts authorizing it to retain the goods as a lien until such time as the supplier had paid over monies due. The Foreign Office had been asked to intervene, since the goods in question were public property, but had replied that it had no power to do so. A case of that kind fell squarely within the terms of paragraph 2: the Government of India had not been named as a party to the legal proceedings and its property had most certainly been affected. […] It was suggested in the footnote to article 7 that paragraph 3 could constitute an alternative to article 3, subparagraph 1 (a), which dealt with the definition of a 'foreign State'. However, the latter part of paragraph 3 also dealt with property, which was not covered by article 3, subparagraph 1 (a). Hence, the footnote did not apply to paragraph 3 in its entirety.'), the observations by Mr. Koroma, Summary record of the 1717th meeting of the ILC, UN Doc. A/CN.4/SR.1717, para. 35 ('The question of property had raised a number of difficulties, as was apparent from the wording of draft article 7, paragraphs 2 and 3. When could a foreign State whose property was affected by a civil action be deemed to have submitted to the exercise of jurisdiction by another State or to have waived immunity from jurisdiction? Was the State bound to prove title or give evidence of possession?').

36 See e.g. the observations by the Special Rapporteur, Summary record of the 1715th meeting of the ILC, UN Doc. A/CN.4/SR.1715, paras. 12-13 ('Since the Commission could not interfere in the internal law of States, it was for States themselves to determine how they would perform their obligation to prevent the impleading of a foreign State. That was why it was necessary to specify in what case a foreign State was impleaded, as was done in the closing lines of paragraph 1. […] Paragraph 2 was designed to shed further light on that point, and paragraph 3 was made necessary

28. Although most ILC members were in general supportive of the twofold approach applied by the Special Rapporteur in his revised article 7 (in any case in the absence of definitions and for the time being) there was also criticism.[37] One member, for example, indicated that he thought the phrasing used ('involve' and 'affect' and the expression 'sovereign rights, interests, properties or activities of the State') was too broad and went too far.[38]

29. Following these discussions, Article 7 was referred to the Drafting Committee, which proposed a slightly revised text (paragraph 1 not reproduced here):

> Article 7. Modalities for giving effect to State immunity
> […]
>
> 2. A proceeding before a court of a State shall be considered to have been instituted against another State, whether or not that other State is named as a party to that proceeding, so long as the proceeding in effect seeks to compel that other State either to submit to the jurisdiction of the court or to bear the consequences of a determination by the court which may affect the rights, interests, properties or activities of that other State.
>
> 3. In particular, a proceeding before a court of a State shall be considered to have been instituted against another State when the proceeding is instituted against one of the organs of that State, or against one of its agencies or instrumentalities in respect of an act performed in the exercise of governmental authority, or against one of the representatives of that State in respect of an act performed in his capacity as a representative, or when the proceeding is designed to deprive that other State of its property or of the use of property in its possession or control.

by the absence of a definition of the term 'State', in order to indicate the beneficiaries of immunity.')

37 For a full topical summary, see Report of the International Law Commission on the work of its Thirty-fourth session, 3 May-23 July 1982, Official Records of the General Assembly, Thirty-seventh session, UN Doc. A/37/10, paras. 185-187.

38 See the observations by Mr. Riphagen, Summary record of the 1715th meeting of the ILC, UN Doc. A/CN.4/SR.1715, paras. 16-18 ('16. Paragraph 2 was designed to preclude the indirect impleading of a foreign State. Such impleading could be done in a number of ways, one of them being to draw on the doctrine of the act of State. There again, he doubted whether the real intention of the paragraph was to do away with that possibility. Moreover, the words 'involve' and 'affect' and the expression 'sovereign rights, interests, properties or activities of the State' encompassed concepts that were too far-reaching. 17. The language of paragraph 3 was likewise too broad. Admittedly, the paragraph spoke of the 'public' property of the State, unlike paragraph 2, which referred to any property or activities of the State, but it also spoke of proceedings 'designed to deprive another State of ... the use of such property in its possession or control'. To illustrate the use of property, one might cite the case of a foreign State that wished to build an extension to one of its embassies, something which would not be immune from all government control. It was common practice in such instances for embassies to seek permission from the national authorities, which permission might or might not be granted. Again, the embassy's neighbours might object, with the result that contentious proceedings would be brought and some authority would sit in judgment on the foreign State. Evidently, the draft should not seek to preclude such a possibility. 18. For all those reasons, he wondered whether the Commission was fully aware of the enormous task that would be involved by establishing a broad obligation of the kind set forth in the article in its present form.')

30. After indicating that this new text substantially reproduced the text submitted by the Special Rapporteur, the Chairman of the Drafting Committee (who happened to be the Special Rapporteur himself) indicated that the changes (the words 'against one of its organs, agencies or instrumentalities acting as a sovereign authority' in former paragraph 3 had been altered to read: 'against one of the organs of that State, or against one of its agencies or instrumentalities in respect of an act performed in the exercise of governmental authority') were made to ensure some uniformity in terminology among the drafts being elaborated by the ILC on different topics and had been borrowed from part 1 of the draft articles on State responsibility for internationally wrongful acts.[39]

31. In the follow-up discussion of this revised draft by the Drafting Committee, most ILC members indicated they could endorse this new text – at least for the time being – although some continued to express reservations about the potentially broad scope of certain terms used, for example the term 'control'.[40]

32. At the same session the proposal for Article 9 (voluntary appearance) was also discussed. This article (which would ultimately become Article 8) *inter alia* contained a specific provision allowing a State to intervene (without waiving immunity) in a proceeding to which it is not a party but which affects its property.[41] During the debate some members referred back to the proposed Article 7, highlighting the link between the issue of voluntary appearance and that article.[42]

[39] See Summary record of the 1749th meeting of the ILC, UN Doc. A/CN.4/SR.1749, para. 47-49.

[40] See observations by Mr. Sucharitkul, ibid., para. 55 ('The CHAIRMAN, speaking as a member of the Commission, said that he could accept article 7 subject to certain reservations. In particular, the word 'control' at the end of paragraph 3 was a common law term which had simply been reproduced in French. Although control was a clear concept in the restrictive practices legislation of most States that had adopted such legislation, as well as in certain international conventions, he would be unable to reach a final decision on article 7 until the Commission had indicated clearly what it meant by 'control'. The notion could be construed so broadly as to make immunity absolute in all cases.') See for a similar remark in earlier ILC discussions, the observations by Mr. Quentin-Baxter, Summary record of the 1715th meeting of the ILC, UN Doc. A/CN.4/SR.1715, para. 41 ('Throughout its consideration of the draft, the Commission would be confronted with the problem of how far it could go in attempting to provide some direction that would help to unify the practice of national courts. Even within the jurisdiction of a single State, judicial opinions could vary widely. As a number of members had indicated, paragraphs 2 and 3 represented a courageous attempt by the Special Rapporteur to give some guidance in that regard, but in doing so he was entering a very difficult area. Anyone familiar with the common law system would be aware of the enormous difficulties posed by the notions of ownership, possession and control, but he was instinctively opposed to any attempt to deal with the question at the level of national courts or other government organs. The aim of international codification must always be to state principles succinctly and clearly. Accordingly, at the present stage the Commission must endeavour to state the quintessence of the rule, rather than pinpoint situations which were so different that it would be impossible to take account of all of them.')

[41] See also Third report on jurisdictional immunities of States and their property, *supra* n. 17, para. 65 ('Alternatively, a claim of interest by a State in a property under litigation is not inconsistent with its assertion of jurisdictional immunity. A State cannot be compelled to come before a court of another State to assert an interest in a property against which an action in rent is in progress, if that State does not choose to submit to the jurisdiction of the court entertaining the proceedings.').

[42] See for example the observations by Mr. Quentin-Baxter, Summary record of the 1717th meeting of the ILC, UN Doc. A/CN.4/SR.1717, para. 22 and the observations by Mr. Koroma, ibid., para. 35.

33. At the end of the 1981 ILC-session, a first draft commentary to Article 7 was also agreed on. This draft commentary drew largely – often *verbatim* – on the Third Report of the Special Rapporteur which had introduced Article 7.[43]

34. During the discussion of the work of the ILC in the UNGA that same year (1982), various Governments also commented on the revised draft of Article 7. These observations (again[44]) focused mostly on Article 7(1), although some Governments also commented on paragraphs 2 and 3.[45] Interesting in this regard are the observations by the representative of the Netherlands (who also happened to be an ILC member):

> 62. Such a comprehensive approach appeared to underlie draft article 7, the operative words of which said that a State should refrain 'from exercising jurisdiction in a proceeding before its courts against another State'. Paragraphs 1 and 2 of the article, taken together, gave the impression that a State was obliged not to let its courts make any determination which might affect the rights, interests, properties or activities of another State. The opening words certainly made it clear that that only applied to the extent that such rights, interests, properties or activities of the foreign State enjoyed 'immunity'. However, by the same token, those paragraphs required a complete enumeration of such immunity in the other provisions of the draft articles.
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> 63. Paragraph 3 of article 7 did not really limit the very wide scope of the first two paragraphs but gave examples, in an apparently non-exhaustive way, of certain elements relevant for the determination that a proceeding had been instituted against a foreign State, even though that State as such was not named as a party to the proceeding. Oddly enough, the same paragraph also referred to the conduct of the foreign State as the basis for the institution of a proceeding, as distinguished from the party against which such a proceeding was instituted. Indeed, the examples given referred

[43] For the text of the full commentary (insofar as relevant), see *infra*, section 4: Extracts from the ILC commentary.

[44] See also the debate in 1981, *supra* n. 33.

[45] For a summary see Topical Summary 1982, UN Doc. A/CN.4/L.352, pp. 171-175. For comments on paragraphs 2 and 3 see also the remarks by Italy, Summary Record of the 47th meeting of the UNGA (37th Session), UN Doc. A/C.6/37/SR.47, para. 31 ('Nevertheless, certain activities of States were excluded from the scope of immunities. care should be taken, by the prudent use of terminology, to avoid presenting as an exception the fact that the rule did not apply to commercial activities. His delegation thus suggested that the Special Rapporteur should attempt to seek a more satisfactory balance in the formulation of article 7. Paragraph 3 of that article dealt with acts performed by representatives of a State, in particular diplomatic representatives acting as such. That qualification was superfluous since the latter always acted in the name of the State they represented, and their acts were thus equated with those performed by the organs of the State. The paragraph also dealt with proceedings instituted in a State to deprive another State of its property or of the use of property in its possession or control. The commentary to article 7 specified that it related to actions involving seizure or attachment, and his delegation understood the concern of the Special Rapporteur to draw a distinction between those measures and measures in satisfaction of judgment, which should be dealt with elsewhere.'). See also the observations by Zaire, on (a lack of) immunity of political subdivisions of another State, Summary Record of the 52nd meeting of the UNGA (37th Session), UN Doc. A/C.6/37/SR.52, para. 25. This particular issue would ultimately prove a very controversial one and a serious impediment to the adoption of a final convention (see also n. 19 of our paper).

to proceedings against organs, agencies and instrumentalities 'in respect of an act performed in the exercise of governmental authority', and against representatives 'in respect of an act performed in his capacity as a representative'. The distinction between acts jure imperii and acts jure gestionis was highly relevant but it was also the core of the scope of the immunity, and that was presumably a matter to be dealt with in other articles.

64. Even more curious was the end of paragraph 3, where the question was not whether a proceeding might affect the interests and activities of the foreign State but whether they were indeed 'immune'. In short, paragraph 3 of draft Article 7, even though it started with the words 'in particular', seemed to prejudge the fundamental question of the scope of the immunity, a matter with which the convention still had to deal.

65. There were three levels or aspects of State immunity. The sweeping statements of draft Article 7 might have a superficial ring of truth at the government level, where a State should refrain from affecting the rights, interests, properties and activities of another State, but other levels had to be taken into account, and a State certainly had no right under international law to send representatives into, have property in, or perform activities within the territory of another State without that State's consent. At the third level, even if such consent was considered to have been tacitly given in respect of non-governmental representatives, property and activities, that certainly did not in itself imply complete immunity of the foreign State from the legal system of the receiving state. In particular, full immunity from the local legal system was clearly excluded when the sending State acted within the territory of the receiving State in competition or in co-operation with private persons. In such cases there was often no alternative to the jurisdiction of the courts or quasi-judicial bodies of the receiving State, for example with respect to the administration of its laws relating to patents, to the internal affairs of companies established under its laws and to the process of arbitration in the receiving State. In such matters, legislative and judicial jurisdiction were inseparable, although the normal enforcement jurisdiction of the receiving State might well be limited in respect of the sending State.[46]

35. Discussion in the ILC the next year (1983) focused on the discussion of the Fifth Report of the Special Rapporteur which introduced a new set of articles setting out certain 'exceptions' to State immunity. Among these new articles was a proposal for Article 15 (which would later become Article 13) dealing with an exception to immunity from jurisdiction in case of 'ownership, possession and use of property'. The Special Rapporteur argued that this issue was closely related to the revised Article 7, the purpose of which he summarized as follows:

> On the other hand, article 7, now entitled 'Modalities for giving effect to State immunity', endeavours to restate, in paragraph 1, the corresponding obligation on the part of the other State to accord immunity or give effect to State immunity by refraining from exercising the jurisdiction of its otherwise competent judicial authority in a given case involving a foreign State. Paragraph 2 identifies what may be considered to be proceedings against another State, even when it is not named as a party, while paragraph 3 gives a general classification of what constitutes a State for the purposes of jurisdictional immunities, namely an organ of the State, an agency or instrumentality of the State in respect of 'an act performed in the exercise of governmental authority', or 'one of the representatives of that State in respect of an act performed in his capacity as a representative'. A State is also impleaded when the proceeding is designed to deprive that State of its property or of the use of property in its possession or control. Article 7 is, indeed, a central provision of part II of the draft articles. Together with article 6, which is to be revised, it contains the main general principles of State immunity.[47]

36. As to the relationship between draft Article 7 and his proposal for Article 15, the Special Rapporteur observed:

> 102. As has been seen in connection with part II, 'General principles', under article 7, paragraph 3, 'a proceeding before a court of a State shall be considered to have been instituted against another State ... when the proceeding is designed to deprive that other State of its property or of the use of property in its possession or control'. State immunity could thus be invoked even though the proceeding is not brought directly against a foreign State but is merely aimed at depriving that State of its property or of the use of property in its possession or control. Without, at this stage, touching on the question of State immunity in respect of attachment and execution of its property, it will suffice to recall that a State is immune when a proceeding affects its ownership of property, or when the use of property in its possession or control is thereby affected.
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> 103. Jurisdictional immunity of a State in respect of its ownership or use of property in its possession or control is recognized as a general principle. It is the purpose of the present draft article to define and delineate the scope of its application. Admittedly, as a general rule, a proceeding seeking to deprive a foreign State of its property or the use of property in its possession or control will be disallowed on application of the principle of State immunity. There are, however, various categories of circumstances or cases in which a proceeding will be permitted even though it may involve ownership of property contested by a foreign State or the use of property in the possession or control of that State.[48]

37. This link between draft Articles 7 and 15 was emphasized as well in the draft commentary to article 15 adopted that same year.[49] It was also referred to by various ILC members in the subsequent discussion of the Special Rapporteur's

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[46] See Summary Record of the 40th meeting of the UNGA (37th Session), UN Doc. A/C.6/37/SR.40, paras. 62-65.

[47] Fifth report on jurisdictional immunities of States and their property, by Mr. S. Sucharitkul, Special Rapporteur, UN Doc. A/CN.4/363 & Corr.1 and Add.1 & Corr.1, para. 27.

[48] Ibid., p. 46.

[49] See para. 1 of the commentary ('It is to be recalled that, under article 7, paragraph 3, ... a proceeding before a court of a State shall be considered to have been instituted against another State ... when the proceeding is designed to deprive that other State of its property or of the use of property in its possession or control. State immunity may thus be invoked even though the proceeding is not brought directly against a foreign State but is merely aimed at depriving that State of its property or of the use of property in its possession or control. Article 15 is therefore designed to set out an exception to the rule of State immunity.')

report[50] as well as by several Governments during the UNGA that year (1983).[51]

38. Debate in the ILC and the UNGA in the years following these first discussions of Article 7 (and 15) focused mostly on other newly introduced articles. One of these articles was Article 19 (which would ultimately become Article 16) which addressed immunity of ships in (commercial) service of a State. A separate article dealing with exceptions was believed to be required in this regard, since – as the Special Rapporteur put it – ships and seagoing vessels had 'a special status distinct from other types of State property'.[52] Although Article 7 is not specifically mentioned in the context of the discussion of this new Article 19, it is nevertheless clear that proceedings related to ships owned by or in possession or control of a foreign State are to be considered as being among the types of cases where a State could be impleaded without expressly being named as a party to the proceedings (because of the possibility of *in rem* and admiralty proceedings against the ship itself) and thus within scope of Article 7, paragraphs 2 and 3. In fact, most of the case law cited by the Special Rapporteur and the commentary on Article 19 can also be found in his report and the commentary on article 7.

[50] See e.g. the observations by Mr. Sinclair, Summary record of the 1805th meeting of the ILC, UN Doc. A/CN.4/SR.1805, para., 83 ('Sir Ian SINCLAIR, referring to paragraph 2, said that he regarded it as a necessary gloss on paragraph 3 of article 7. There were very few cases in which proceedings could be instituted by a natural or legal person against, for example, a bank acting as a bailee in respect of certain property regarding which a foreign State or a series of foreign States might have a claim or interest or which might be in the constructive possession or control of the State or States concerned since they had in fact deposited the property with the bank. A case in point was that of Dollfus Mieg et Cie S.A. v. Bank of England (1950).26 Paragraph 2 of article 15 therefore provided that in such a situation the State was at liberty to intervene in the proceedings to assert its immunity: if the State could not have invoked immunity, then the proceedings could continue; conversely, if it could have invoked immunity, then that immunity had to be upheld. The latter part of the paragraph merely indicated that a State could not automatically assert that it had a claim to or interest in property and that there must be at least some indication that the claim or interest was justified. That explained the reference to prima facie evidence.'), the Special Rapporteur, ibid., para. 86 ('Mr. SUCHARITKUL (Special Rapporteur) said that there were certain peculiarities in the common law system of dealing with the property of a foreign Government, and a closer examination of decided cases might help to shed light on the matter. He continued to think that article 15 was both useful and necessary and that, if it were omitted, paragraph 3 of article 7 would be unnecessary too.'). The discussion in the ILC focused mainly on the proposed paragraph 2 of article 15 which provided – in short – that even if the purpose of the procedure was to deprive a State of property which a) it had in its possession or control; or b) in which it claimed a right or interest, there would be no immunity if i) the State could not have claimed immunity had it been the defendant itself or ii) if the right or interest claimed by the State was not supported by sufficient *prima facie* evidence and that claim was not admitted (we note here that in response to questions, the Chairman of the Drafting Committee confirmed that the condition in the last part of paragraph 2 applied equally to subparagraph (a) and (b) (*ibid*., para. 84). We also note that paragraph 2 of Art. 15 was ultimately dropped as being unnecessary. See also *infra,* para. 59.

[51] See e.g. the observations by Brazil (Summary Record of the 38th meeting of the UNGA (38th Session), UN Doc. A/C.6/38/SR.38, para. 42) and the United Kingdom (Summary Record of the 39th meeting of the UNGA (38th Session), UN Doc. A/C.6/38/SR.39, para. 95).

[52] Sixth report on jurisdictional immunities of States and their property, by Mr. Sompong Sucharitkul, Special Rapporteur, *Yearbook of the International Law Commission*: 1984, vol. II(1), UN Doc. A/CN.4/376 and Add.1 and 2, para. 119.

39. That said – and although not the focus in most of the discussion – Article 7 was explicitly touched upon every now and then. Not only by the Special Rapporteur but also in observations in the ILC and in the UNGA.

40. For example, in 1984 Mexico indicated in the UNGA that, with respect to paragraph 2 of draft article 7, it believed that 'it was not sufficient that a State should have been the object of the proceeding against it, but also that the result indicated was produced'.[53] Of interest are also the observations by the representative of the Netherlands that same year who – referring to recent case law of the Dutch Supreme Court – expressed concern about an overly broad scope of Article 7:

> More serious was the problem posed by article 7, paragraph 2, whereby the judge of the State of the forum must declare that he had no jurisdiction, even where the foreign State was not party to the proceeding, in cases where a determination which might affect the rights, interest, properties or activities of that State was to be obtained. Netherlands jurisprudence took a different position, as could be seen from three decisions recently rendered by its Court of Cassation. That jurisprudence could no doubt be explained by a desire not to give the State of the act a monopoly over the determination on rights, interests or property which might belong not to it but to someone else, for example a national of the State of the forum, and by the fact that the judge of the individual's nationality was all too often the only one to whom he had access in practice. His delegation fully understood that article 7, paragraph 2 should be read in the light of the exceptions to the principle of State immunity set forth in part III of the draft articles (arts. 12 to 18),but wondered if those exceptions were capable of allaying the misgivings underlying that jurisprudence.[54]

41. Coincidently, this observation also underlines the Dutch Government's understanding that the word string 'rights, interests or property' (which as we saw matches earlier definitions of 'State Property') is property related. Had it been otherwise, use of the phrase ' … which might belong not to it but to someone else …' makes little sense.

[53] See Summary Record of the 44th meeting of the UNGA (39th Session), UN Doc. A/C.6/39/SR.44, p. 12. Mexico continued that 'Paragraph 3 should include the concept that the State itself had the right to determine, in conformity with its national legislation, which should be considered its organs, agencies or instrumentalities. Further, it would be more appropriate to refer to 'functionaries with respect to an act performed in that capacity', since 'representatives' might be confused with diplomatic and consular agents, who had a different legal status in international law.'(ibid., para. 52). Mexico also believed that '[t]wo paragraphs should be added to article 7, the first requiring States to enact legislation on State immunity from the jurisdiction of the courts of other States and the second establishing the duty of the State to take the necessary measures to prevent physical or legal persons of the nationality of the State of the forum from abusing the procedures under their national legislation to the detriment of other States.' (ibid., para. 53).

[54] Summary Record of the 34th meeting of the UNGA (39th Session), UN Doc. A/C.6/39/SR.34, para. 26.

1.5 Article 7 revisited: immunity of State property from attachment and execution

42. The relationship between 'property' and article 7 was put in the limelight again in 1985 when the Special Rapporteur proposed a set of draft articles on immunity of State property from attachment and execution. In his Seventh Report, the Special Rapporteur observed:

> 6. The first important area of close connection between State property and State immunity was identified by Lord Atkin in The 'Cristina' (1938) as proceedings indirectly impleading a foreign sovereign. In an oft cited dictum, Lord Atkin said:
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> > The foundation for the application to set aside the writ and arrest of the ship is to be found in two propositions of international law engrafted into our domestic law which seem to me to be well established and to be beyond dispute. The first is that the courts of a country will not implead a foreign sovereign, that is, they will not by their process make him against his will a party to legal proceedings whether the proceedings involve process against his person or seek to recover from him specific property or damages. The second is that they will not by their process, whether the sovereign is a party to the proceedings or not, seize or detain property which is his or of which he is in possession or control.
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> 7. The fact that proceedings affect State property or property in the possession or control of a State may constitute an important factor in determining whether a State may claim jurisdictional immunity by virtue of either of the two propositions of international law cited by Lord Atkin. Thus paragraph 2 of article 7, provisionally adopted by the Commission, contains a provision on which State property appears to have had an important bearing:
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> > 2. A proceeding before a court of a State shall be considered to have been instituted against another State, whether or not that other State is named as a party to that proceeding, so long as the proceeding in effect seeks to compel that other State either to submit to the jurisdiction of the court or to bear the consequences of a determination by the court which may affect the rights, interests, properties or activities of that other State.
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> 8. As noted with regard to part III of the draft (Exceptions to State immunity), several specific areas may deserve special attention in an effort to delineate the extent or limits of State immunity. Thus, as provided in article 15, questions of ownership, possession and use of property may, in appropriate circumstances, be determined by a court of the State where the property is situated (forum rei sitae) without another State which claims a right or interest in such property being able to invoke jurisdictional immunity. Similarly, proceedings relating to intellectual or industrial property which enjoys legal protection in the State of the forum will not be barred by the rule of State immunity.' 9. In another entirely separate connection, property comes into direct contact with jurisdictional immunities of States. Under part IV of the draft, States are immune not only in respect of property belonging to them, but also invariably in respect of property in their possession or control or in which they have an interest, from attachment, arrest and execution by order of a court of another State. Property connections with State immunity in this more direct manner may occur in the form of pre-trial or rather pre-judgment attachment or arrest, or may take the form of post-judgment measures by way of execution. The question of jurisdictional immunities relates, in this property connection, to the nature of the use of State property or the purpose to which property is devoted rather than to the particular acts or activities of States which may provide a criterion to substantiate a claim of State immunity.[55]

43. During the subsequent discussion of this Seventh Report in the ILC, several members discussed the relationship between this new set of articles and Article 7 as well as the difficulties arising from the use of such terms as 'properties in its possession or control or in which it has an interest'.[56] Several members, however,

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[55] Seventh report on jurisdictional immunities of States and their property by Mr. Sompong Sucharitkul, Special Rapporteur, *Yearbook of the International Law Commission* 1985, vol. II(1), UN Doc. A/CN.4.388. See also his remarks in the ILC as summarized in the report presented to the UNGA. See *Yearbook of the International Law Commission* 1985, UN Doc. A/CN.4/SER.A/1985/Add.l (Part 2), para. 217 ('In introducing part IV, the Special Rapporteur recalled that many members of the Commission had thought, at an earlier stage of the consideration of the topic, that it would be better to concentrate on immunities of States from jurisdiction and to leave aside the question of immunity from attachment and execution. He believed, however, that, in the course of studying the topic, the Commission would necessarily have to deal with the property aspects of immunity in a number of instances. His view had been confirmed. The question of property bore an important relationship to article 7, paragraph 2, and article 15 of the draft articles. In a separate connection, property bore a direct relation to the jurisdictional immunities of States inasmuch as States, under part IV of the draft, were immune, not only in respect of property belonging to them but also, invariably, in respect of property in their possession or control or in which they had an interest, from attachment, arrest and execution by order or pursuant to an order of a court of another State.') For remarks by the Special Rapporteur emphasizing the relationship between emanation of the State and Art. 7, see e.g. Sixth Report on jurisdictional immunities of States and their property by Mr. Sompong Sucharitkul, Special Rapporteur, *supra* n. 52, para. 10 ('But article 7 covers wider ground than modalities for fulfilment of the obligation to give effect to State immunity. It also sets out the circumstances when a State is said to be impleaded, whether directly or indirectly, and the different situations or occasions in which a proceeding not instituted against a State as such is still regarded as being against a State. Inherent in the provisions of article 7 is the differentiation between the higher and lower echelons of bodies forming part of the State or under its administration or control, and the requirement for acts to be performed in the exercise of governmental or sovereign authority for State immunity to be extended to cover agencies and instrumentalities of more remote connection with the central organ or machinery of government. Similarly, representatives of a State are immune only in respect of acts performed in their representative capacities and not otherwise, except for diplomatic agents who are entitled to immunity ratione personae in addition to their immunity ratione materiae, both of which belong to the sending State in the ultimate analysis and which can be waived only by the sending State.'

[56] See e.g. the observations by Mr. Flitan, Summary record of the 1920th meeting of the ILC, UN Doc. A/CN.4/SR.1920, para. 28 ('The words 'In accordance with the provisions of the present articles' at the beginning of paragraph 1 of article 22 were superfluous and could be deleted. The words 'property in which a State has an interest' required further clarification, especially as to the nature of the interest and its importance. The words 'property... is protected by the rule of State immunity from attachment, arrest and execution' in the same paragraph were not sufficiently in line with two other provisions of the draft articles. First, according to article 7, paragraph 2, a proceeding before a court of a State was considered to have been instituted against another State so long as the proceeding sought to compel that other State to bear the consequences of a determination by the court which might affect its rights, interests, properties or activities. Secondly, article 6,

stressed the need of this provision to cover cases where a State was not the owner of a certain property but nevertheless had an 'interest' therein, as for example was at issue in the famous *Dollfus Mieg* case.[57]

44. Or as the Special Rapporteur observed:

> 32. Questions had also been raised with regard to the meaning of the expression 'property in which a State has an interest'. He wished to make it clear that the term 'interest' as used in that context had nothing to do with the concept of a 'controlling interest' in a company, a matter which was governed by company law. The question of the participation of a State in a company as a shareholder, whether with a controlling interest or not, was governed by article 18. In draft article 22, the term 'interest' was used in the same sense as the French term interet in the expression droits, avoirs et interets and referred to the type of interest in property recognized by the property law of a particular country.
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> 33. A good illustration of 'property in which a State has an interest' was provided by the Dollfus Mieg case, mentioned by Sir Ian Sinclair at the 1922nd meeting. France, the United Kingdom and the United States of America had had an interest in the gold bars involved in that case. A State could thus have an interest in a property without having any title of ownership to it. Another interesting example was provided by Vavasseur v. Krupp, which dated back to 1878 and related to cannon and ammunition which had been ordered by the Emperor of Japan for the Imperial Navy. Following a claim of breach of patent, an attempt had been made to seize the cannon and ammunition before they could be delivered to Japan. A United Kingdom court had, however, released the attachment because the Emperor of Japan had had an interest in the cannon and ammunition, having ordered and paid for them.
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> 34. Situations that could arise in connection with the continental shelf provided a further example of interest without ownership. When two States could not agree on the delimitation of the continental shelf, they sometimes decided to treat the part of the continental shelf in question as a joint development area. The two States would thus have a real interest in that area, although ownership had not yet been established. There was no doubt, however, that the property in question was unattachable.[58]

45. The next year (1986), the ILC would revisit much of this debate as it finished its adoption of the draft articles in first reading, including Articles 21 and 22 (State immunity from measures of constraint) and the definitional articles 2 and 3 which were to include a definition of 'State' after all.

46. This debate again underlined the close link between not only (the definition of) 'State property' and Article 7,[59] but also between the definition of 'State' and Article 7.[60] In fact, the introduction of an article defining the term 'State' (art.

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paragraph 1, indicated not that property was 'protected', but only that a State was 'immune from the jurisdiction of another State'; the Commission might borrow that wording, which did not imply any idea of compulsory protection, in drafting paragraph 1 of article 22.').

[57] See e.g. the observations by Mr. Sinclair, Summary record of the 1922nd meeting of the ILC, UN Doc. A/CN.4/SR.1922, paras. 28-29 ('28. During the discussion, a certain amount of criticism had been levelled at the use of the expression 'property in its possession or control or in which it has an interest'. The difficulties to which a formula of that kind could give rise were illustrated by the Dollfus Mieg case, which had been decided soon after the Second World War. Gold bars in occupied France had been seized by the Allied Forces and handed over to the Tripartite Commission for the Restitution of Monetary Gold. The ownership of the gold bars had not then been known and they had been deposited with the Bank of England by the Governments of the United Kingdom, the United States of America and France. Those Governments had not claimed ownership, but the gold bars had clearly been either property of which the three States were in possession or control, or property in which they had an interest. The Dollfus Mieg company had instituted proceedings against the Bank of England in the English courts, claiming title to the gold bars. At a later stage in the proceedings, the Governments of France and the United States had intervened and rightly claimed sovereign immunity, which was duly accorded. 29. A situation of that kind could arise not only in the context of the exercise of jurisdiction by the courts of the forum, but also in the context of possible measures of execution. Other examples of that kind could be given, particularly shipping cases, where a State often asserted an interest in a ship in the context of in rem proceedings. He accordingly believed that inclusion of the phrase 'property in its possession or control or in which it has an interest' was essential.'); and the Special Rapporteur (ibid., para. 33-34) Earlier, the special rapporteur had already observed that 'the term 'interest' as used in that context had nothing to do with the concept of a 'controlling interest' in a company, a matter which was governed by company law. The question of the participation of a State in a company as a shareholder, whether with a controlling interest or not, was governed by article 18.' (ibid., para. 32).

[58] See Summary record of the 1922nd meeting of the ILC, UN Doc. A/CN.4/SR.1922, paras. 33-34.

[59] See e.g. the observations by Mr. Riphagen, Summary record of the 1968th meeting of the ILC, UN Doc. A/CN.4/SR.1968, para. 93 ('Article 21 dealt with three things: property of the State; property in the possession or control of the State; and property in which the State had a legally protected interest. In the last two cases, if proceedings were instituted against an owner who was not the State, or even against the physical object itself, article 7, paragraph 2, would apply. If the combined effect of article 21 and article 7, paragraph 2, was to make the physical object immune from measures of constraint, that would benefit the non-State owner of the property. In his view that result could be acceptable in the case of an object in the possession or control of a State, since measures of constraint on the use of the object were likely to affect the activities of that State. That did not apply, however, to legally protected interests in an object, which might indeed be manifold, but in the determination of which a foreign State often did not enjoy immunity. For that reason, he thought it would be best to delete the phrase in square brackets in articles 21 and 22.') Coincidently this observation by Mr. Riphagen also underlines that the term 'activities' can be related to the use of State property ('… since measures of constraint on the use of the object were likely to affect the activities of that State.'). See in this regard also *supra* para. 8.

[60] See e.g. the observations by Mr. Ushakov, Summary record of the 1945th meeting of the ILC, UN Doc. A/CN.4/SR.1945, para 29 ('The attempt to arrive at a definition of 'State' was pointless when paragraph 3 of article 7 as provisionally adopted explained that a proceeding against an organ of the State was a proceeding against that State. The Commission could simply stipulate that an organ of the State meant an organ considered as such under the internal law of the State concerned.') and the observations by the Special Rapporteur, Summary record of the 1947th meeting of the ILC, UN Doc. A/CN.4/SR.1947, para. 30 ('Referring to the interpretative provision on the expression 'State' in draft article 3, paragraph 1(a), he drew attention to the terms of article 7, paragraph 3, according to which ... a proceeding before a court of a State shall be considered to have been instituted against another State when the proceeding is instituted against one of the organs of that State, or against one of its agencies or instrumentalities in respect of an act performed in the exercise of governmental authority ... Since that provision dealt with practically all the points he had wished to cover in paragraph 1(a) of draft article 3, he would have no objection to the latter subparagraph being deleted. The similarity of coverage was illustrated further by the Commission's commentary to article 7, adopted at the thirty-fourth session in 1982. The question of proceedings against political subdivisions of another State was dealt with at length in paragraphs (9) to (12) of that commentary, which made abundant use of case-law. Paragraphs (13) to (15) dealt with proceedings against organs, agencies or instrumentalities of another State.')

3(2)) prompted the Drafting Committee to also (slightly) amend article 7 (paragraph 1 not reproduced here):[61]

> Article 7. Modalities for giving effect to State immunity
> […]
>
> 2. A proceeding before a court of a State shall be considered to have been instituted against another State, whether or not that other State is named as party to that proceeding, so long as the proceeding in effect seeks to compel that other State either to submit to the jurisdiction of the court or to bear the consequences of a determination by the court which may affect the property, rights, interests or activities of that other State.
> 3. In particular, a proceeding before a court of a State shall be considered to have been instituted against another State when the proceeding is instituted against one of the organs of that State, or against one of its political subdivisions or agencies or instrumentalities in respect of an act performed in the exercise of sovereign authority, or against one of the representatives of that State in respect of an act performed in his capacity as a representative, or when the proceeding is designed to deprive that other State of its property or of the use of property in its possession or control.

47. The debate concluding the first reading of the draft articles in the ILC that year also underlined the difficulties several members had with the use of terms not commonly used in all legal systems, such as the term 'interests'.[62] One aspect

[61] See also the explanation given by the Chairman of the Drafting Committee, Summary record of the 1968th meeting of the ILC, UN Doc. A/CN.4/SR.1968, para. 16 ('In consequence of the adoption of the interpretative provision in article 3, the Drafting Committee had adjusted article 7, paragraph 3, by introducing the notion of 'political subdivisions' and replacing the reference to 'governmental authority' by a reference to 'sovereign authority').

[62] See e.g. the observations by Mr. McCaffrey, Summary record of the 1945th meeting of the ILC, UN Doc. A/CN.4/SR.1945, para. 32 ('Mr. McCaffrey agreed that it might be better to speak in draft article 2, paragraph 1 (e), of 'legally protected interests', rather than 'interests', so as to avoid any difficulties of transposition between languages and between legal systems. However, since the word 'interest' was used in article 15, which had already been provisionally adopted, the matter could perhaps be left for the time being and the Commission could revert to it on second reading. It might also be preferable to delete the word 'otherwise' from the expression 'owned, operated or otherwise used', given the recognized distinction made in most legal systems between ownership and use of property.'); the observations by Mr. Arangio-Ruiz (ibid., para. 41) ('Mr. ARANGIO-RUIZ said that, in draft article 2, paragraph 1 (e), it had to be made clear what was meant by 'interests', particularly since it was difficult to link the idea of purely material interests, which were in some sense over and above the law, with the idea of operation or use.'); Mr. Reuter (ibid., para. 57) ('With regard to draft article 2, paragraph 1 (e), the desire to clarify the meaning of the words 'property, rights and interests' was understandable, but it was doubtful whether any efforts in that direction would prove productive. The article dealt with elements of a patrimonial nature and it was probably that notion that should be retained.'), the observations by Mr. Calero Rodrigues, Summary record of the 1946th meeting of the ILC, UN Doc. A/CN.4/SR.1946, para. 22 ('As to the definition of 'State property' in paragraph 1 (e) of draft article 2, the main need was to adjust the language to that of articles 15 and 22 and possibly article 21 if it were retained. In the form in which it was likely to emerge from the Drafting Committee, article 22 would refer to State property as property which was owned by a State or was in its possession or control, or in which the State had a legally protected interest. 23. The language used in paragraph 1 (e) was not consonant with the general principles of the law of property in many countries. For example, the Civil Code of Brazil drew a distinction between property or ownership, and possession, use and other rights. The term 'interests' was difficult to understand in the context. The important point was the relationship between a thing and a person. Ownership conferred the widest range of rights; possession was one of the elements of ownership, and the possessor could be someone other than the owner. There were also other rights, such as that of use, which could be shared by several persons. The word 'operated' had no precise legal meaning and the corresponding words used in French and Spanish were likewise unsuitable.'). Contrast, however, the observations by Mr. Razafindralambo (*ibid*., para. 14) ('In his view the terms 'property, rights and interests', which were used several times in article 15, expressed perfectly clear concepts and could not be interpreted in different ways. He did not see why the expression 'otherwise' should be deleted. A State could certainly use property in different capacities, for example as owner, as possessor or as a mere user.')

of this discussion (namely to what extent immunity from measures of constraint should also extend to 'property in which it has a legally protected interest') was even explicitly put to the Member States for further input.[63] Furthermore, given the difficulties in arriving at a satisfactory definition of 'State property', it was ultimately decided to forego attempts to define this term, delete the proposed definition in Article 2(1)(e) altogether and instead rely on the phrasing of the various articles concerning 'property'.[64]

48. During the UNGA that same year (1986), several Governments commented that draft Article 7(3) appeared repetitive and unnecessary in light of the new draft Article 3(1) which now contained a definition of 'State'.[65] Others emphasized the link with 'property' again. The Government of the Netherlands, for example, observed:

> Another, perhaps minor, matter, on which the Commission – in paragraph 4 of the comment on draft article 21 – requested reactions from Governments, concerned the words in square brackets in that, article, 'or property in which it has a legally protected interest'. That provision should be read in conjunction with draft article 7, paragraph 2. Accordingly, when a proceeding, as mentioned in article 21, was instituted against an entity which was the owner of a particular property, or which had the property in its

[63] Summary record of the 1968th meeting of the ILC, UN Doc. A/CN.4/SR.1968, para. 84 ('The phrase 'or property in which it has a legally protected interest' had been placed in square brackets. That was due to a difference of opinion in the Drafting Committee on whether it was proper to provide protection in the case of a State having a legally protected interest in property, but not owning, possessing or controlling that property. Some members had thought it unnecessary to provide protection for such a low level of State interest in property, which would only inure to the benefit of the actual owner of the property. Others had thought that, since the State's 'interest' in property was covered in part III by article 14 [15], it was only logical to include corresponding protection in part IV, which would cover a number of cases in which a State could have a concrete interest in property even though it was not, or not yet, in possession or control of that property. The comments of Governments were requested on that particular point.')

[64] See Summary record of the 1968th meeting of the ILC, UN Doc. A/CN.4/SR.1968, para. 6 ('The Special Rapporteur had proposed a definition of the term 'State property' for inclusion in paragraph 1; but in the light of the discussion and of the articles in parts III and IV relating to property of the State, the Drafting Committee had considered it unnecessary to include such a definition in article 2. The relevant articles themselves were believed to provide sufficient guidance as to what was meant by 'State property' in the context of each article.')

[65] See Topical Summary 1986, UN Doc. A/CN.4/L.410, p. 39.

possession or control, but which was not a foreign State, the proceeding was nevertheless considered to have been instituted against the foreign State under the conditions set forth in article 7, paragraph 2, namely 'so long as the proceeding in effect seeks to compel that other State either to submit to the jurisdiction of the court or to bear the consequences of a determination by the court which may affect the property, rights, interests or activities of that other State'. That interpretation of article 7, paragraph 2, of course, did not in itself create an immunity for that foreign State, which would also benefit the entity which was not a State. The latter consequence was addressed in article 21. Thus, it would seem that in any case the wording of the two provisions should be reconciled. When article 7, paragraph 2, applied, it would appear that the immunity depended on the status of the 'affected' property, rights, interests or activities of the foreign State. The mere fact that the foreign State had a legally protected interest in the property did not seem to justify an immunity, which would also benefit the non-State owner of the property, who was subject to the jurisdiction of the court. That matter should be given further consideration, and it seemed relevant to look at other situations in which a foreign State, by its own volition, entered into what could be called a situation of common interest with a non-State, subject to the jurisdiction of the court. In that sense, articles 14, 15 and 17 might be relevant, in as much as they also dealt with mixed situations.[66]

2. SECOND READING (1986-1991)

2.1 Governmental observations and finetuning article 7 in light of the overlap with the definition of 'State'

49. A set of draft articles now having been adopted by the ILC in first reading, Governments were requested to also provide comments and observations in writing. Rather surprisingly – and to the disappointment of several ILC members[67] – only a small number of Governments (29) put in the effort to do so. The majority of these countries could be considered 'Western countries' and almost half came from just one continent (Europe).[68] The Netherlands did not submit any written observations nor did it comment in the Sixth Committee of the UNGA on the draft articles adopted on first reading.[69]

50. Insofar as relevant for the purposes of this article, the German Democratic Republic (GDR) – echoing similar comments in both the ILC and the UNGA – pointed out in its comments that article 7 (as well as certain other draft articles) contained expressions 'which are used only by a few legal systems and even there are not sufficiently clearly defined. Such terms, notably "interests ... of ... [a] State" and "property in its ... control", in the view of the German Democratic Republic, are unsuitable and would tend to complicate the application of the future convention. Therefore, care should be taken not to use such terms in any of the draft articles.'[70] Similar concerns were expressed by Switzerland, which indicated that the definitional articles should be expanded since 'some other expressions would merit definition, such as the rather vague terms "interest" or "property" of a State' (which Switzerland said were used in, for example, Article 14).[71]

51. Several other Governments again pointed out that there was unnecessary overlap between draft Article 7(3) and the definition of 'State' in draft Article 3.[72] Specifically with respect to draft Article 7(2)/(3), Australia indicated that it considered the article as 'too wide' and that a 'narrower formulation would be preferable'.[73] The Federal Republic of Germany (FRG) made a more indirect comment in its discussion of draft Article 13 (Personal injuries and damage to property).[74] Although seemingly supportive of this article, the German Govern-

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66 Summary Record of the 30th meeting of the UNGA (41st Session), UN Doc. A/C.6/41/SR.30, para. 62, p. 15.

67 See the observations by Mr. Koroma, Summary record of the 2120th meeting of the ILC, UN Doc. A/CN.4/SR.2120, para. 4 ('It was apparent that only a few States had submitted comments on the draft articles. The views of many more would therefore have to be canvassed if the interests and decisions not reflected in the report were to be taken into account.'), the observations by Mr. Diaz Gonzalez, ibid., para. 20 ('The set of articles was a compromise text arrived at after lengthy debate and should be viewed in that light as the second reading commenced. It could not be inferred that one approach had prevailed over another. Nearly half of the few States that had submitted comments were European countries, but even they were not unanimous in agreeing that the 1972 European Convention on State Immunity was relevant to the Commission's exercise. There was a wide divergence of opinion about the criteria that should be used for the principle of immunity. The opinions of most African, Asian and Latin-American countries were not available, and it was impossible to draw definitive conclusions from the comments made by States.'), the observations by the Special Rapporteur, Summary record of the 2120th meeting of the ILC, UN Doc. A/CN.4/SR.2120, para. 59 ('He had had great expectations of the written comments and observations of Governments. Unfortunately, of all the African countries, only the Government of Cameroon had responded to the General Assembly's request for comments. He had duly taken account of that point of view, but could not deduce that it represented the view of the majority of countries in that part of the world.'),

68 See UN Doc. A/CN.4/410 and Add. 1-5.

69 This is quite odd given the rather critical advice of the CAVV to be discussed in our paper (see para. 45). The Netherlands did indicate it hoped for an extension of the deadline, see Summary Record of the 43rd meeting of the UNGA (42nd Session), UN Doc. A/C.6/42/SR.43, para. 71 ('His delegation hoped that the time-limit for submission of comments would be extended to 1 January 1989, in order to give States more time to study the two sets of draft articles'). The Netherlands did provide some written comments on 12 June 1986 but these pertained to the previous (37th) session of the ILC, not the draft articles adopted on first reading (see UN Doc. A/41/406).

70 See UN Doc. A/CN.4/410 and Add.1-5, p. 68.

71 See UN Doc. A/CN.4/410 and Add.1-5, p. 94. Japan would make a similar comment in the UNGA two years later. See Summary Record of the 35th meeting of the UNGA (44th Session), UN Doc. A/C.6/44/SR.35, para. 29 ('With regard to article 14, on ownership, possession and use of property, and article 21, on State immunity in respect of property from measures of constraint, it was desirable, in order to clarify the scope of the articles, either to delete or to replace terms such as 'interest' that might lead to abuse in the application of the provisions.')

72 See UN Doc. A/CN.4/410 and Add.1-5, in particular the observation by Australia, Austria, Switzerland, Venezuela and the United Kingdom.

73 See UN Doc. A/CN.4/410 and Add.1-5, p. 52.

74 Draft Art. 13 would ultimately become Art. 12 of the UNCSI and contains the so-called 'territorial tort' exception which – in short – boils down to an exclusion of immunity in cases relating to pecuniary compensation for death or injury to the person, or damage to or loss of tangible property, caused by an act or omission which is alleged to be attributable to the State, if the act or omission occurred in whole or in part in the territory of that other State and if the author of the act or omis-

ment indicated that it believed there was a danger that this article would lead to the reverse conclusion that 'immunity can always be invoked for transborder injuries or damage' and that 'it must be made clear in article 13 that this is not the case'.[75] According to the FRG's Government this was 'even more critical because, according to article 7, paragraphs 2 and 3, of the draft, proceedings against the author of a damage acting in the (special) interest of a State may be considered to have been instituted against that State itself. This would apply even in cases where a detrimental emission may have resulted from an incident caused by negligence.'[76] Mexico pointed out in relation to article 7(3) that '[a]n action instituted against a State official or representative for acts performed in the exercise of his official duties should be regarded as a suit against the foreign State, even if instituted against the official in his personal capacity' as well that provision should be made in this paragraph 'for cases in which the purpose of the proceeding is to prevent or restrict the free exercise of functions or rights by a State or an agency or subdivision thereof, even when this fact is not explicitly stated in the suit'.[77] Venezuela pointed out that article 7(3) was designed to 'specify when a proceeding before a court of a State is considered to have been instituted against another State'.[78] Madagascar approved of the interpretation given to the term 'State' because 'it would clarify article 7, paragraph 2' but argued that '[t]he link between the phrase 'or property in which it has a legally protected interest' and article 7, paragraph 2, as well as articles 14 and 15, should be stressed more clearly in the commentaries'. Madagascar also observed that various terms would require a definition, including the term 'interests'.[79] Finally, the United Kingdom observed that Article 7(3) had been provisionally adopted 'at a time when the draft seemed likely to contain no definition of "State"' and that given that such a definition was now included after all, the 'whole of paragraph 3 appears to be otiose, since all but the last clause merely reproduces the effect of paragraphs 1 and 2 (read together with article 3, paragraph 1), while the last clause appears to add nothing to the last clause of paragraph 2.'[80]

52. Taking into accounts these comments, the new Special Rapporteur (Ogiso) proposed a slightly revised version of article 7 (paragraph 1 not reproduced here):[81]

sion was present in that territory at the time of the act or omission.

75 See UN Doc. A/CN.4/410 and Add.1-5, p. 71.

76 See UN Doc. A/CN.4/410 and Add.1-5, p. 71.

77 See UN Doc. A/CN.4/410 and Add.1-5, p. 75.

78 See UN Doc. A/CN.4/410 and Add.1-5, p. 90.

79 See the observations by Madagascar, Summary Record of the 37th meeting of the UNGA (43rd Session), UN Doc. A/C.6/43/SR.37, paras. 113 and 124.

80 See UN Doc. A/CN.4/410 and Add.1-5, p. 86.

81 See Preliminary report on jurisdictional immunities of States and their property, by Mr. Motoo Ogiso, Special Rapporteur, *Yearbook of the International Law Commission*: 1988, vol. II(1), UN Doc. A/CN.4/415 and Corr.1, para. 79.

> Article 7. Modalities for giving effect to State immunity
> […]
>
> 2. A proceeding in a forum State shall be considered to have been instituted against a foreign State, whether or not the foreign State is named as party to that proceeding, so long as the proceeding in effect seeks to compel the foreign State either to submit to the jurisdiction of the court or to bear the consequences of a determination by the court which may affect the rights, interests, properties or activities of the foreign State.
>
> 3. In particular, a proceeding in a forum State shall be considered to have been instituted against a foreign State when the proceeding is instituted against any organ of a State referred to in subparagraphs (a) to (d) of article 3, paragraph 1, or when the proceeding is designed to deprive that foreign State of its property or of the use of property in its possession or control.

53. By way of explanation of this revised draft, the Special Rapporteur observed that there was 'a need to examine in the Drafting Committee the use of such terms as "interests" in paragraph 2 and "control" in paragraph 3 since those terms were not clearly understood in certain legal systems'. He also accepted the suggestion by a number of Governments that 'paragraph 3 could be simplified by avoiding the lengthy definition of the term "State', which was already dealt with in paragraph 1 of article 3'.[82]

54. In the subsequent discussion of this draft in the ILC, the proposed new text of Article 7 was generally accepted as a substantial improvement.[83] That said, it follows from the observations of several ILC members – insofar as relevant here – that some continued to question its need and that, in any case, it was not without shortcomings which required improvement.[84] For example, it was suggested to clarify the meaning of the phrase 'so long as the proceeding...' in paragraph 2[85] and to consider the deletion or merger of paragraphs 2 and 3 in light of the new

82 Ibid., para. 76. The Special Rapporteur had also accepted the suggestion by Australia to replace the expressions 'a State' and 'another State' by 'a forum State' and 'a foreign State', respectively, so as to clarify the article's proper context (*ibid*. para. 77). See also the summary of his observations in Report of the International Law Commission on the work of its forty-first session (2 May-21 July 1989), UN Doc. A/44/10, para. 465.

83 Ibid., para. 467.

84 See e.g. the observations by Mr. Rao, Summary record of the 2117th meeting of the ILC, UN Doc. A/CN.4/SR.2117, para. 75 ('He was also not sure whether article 7 was really necessary. It appeared to duplicate the provisions of articles 1 and 2 and to state only what was already obvious. In any case, as it now stood, it gave rise to problems of interpretation; it should be reconsidered and shortened, as suggested by the Australian Government.'), the observations by Mr. Thiam, *ibid*., para. 20 ('Article 7 was also unnecessary and its title difficult to understand. Moreover, a look at the elements composing the text showed that paragraph 3 referred to the 'organs' of a State, whereas the term 'State' had been defined in an earlier article.')

85 See e.g. the observations by Mr. Tomuschat, Summary record of the 2116th meeting of the ILC, UN Doc. A/CN.4/SR.2116, para. 4 ('The problem raised by article 7 lay in the words 'so long as the proceeding', in paragraph 2, which were ambiguous. If the intention was to rely on a specific point in time, the text should specify the moment at which the proceeding was initiated.')

draft Article 2 which now contained a definition of 'State'.[86] Others called for a simplification of the language of paragraphs 2 and 3,[87] as well as to delete such terms as 'interests' and 'control' or replace them with more commonly accepted legal terms.[88]

[86] See e.g. the observations by Mr. Razafindralambo, Summary record of the 2116th meeting of the ILC, UN Doc. A/CN.4/SR.2116, para. 27 ('In essence he did not object to article 7, but it might in practice duplicate the provisions of article 3, paragraph 1, or paragraph 1 (b) of the new article 2. In fact, the definition in article 7 reflected the 'interpretative provisions' of article 3 and it should be reviewed by the Drafting Committee.'), the observations by Mr. Ajibola, Summary record of the 2120th meeting of the ILC, UN Doc. A/CN.4/SR.2120, para. 75 ('Paragraphs 2 and 3 [of article 7] should be transferred to the article on the use of terms, as should the provisions of article 11.') See, however, the observations by Mr. Reuter, who believed that 'article 3, paragraph 1, had to be read in conjunction with article 7, paragraph 3, which supplemented it'. (see Summary record of the 2115th meeting of the ILC, UN Doc. A/CN.4/SR.2115, para. 45). See also the observations by *inter alia* Mr. Barsegov who had raised concerns in this regard, Summary record of the 2116th meeting of the ILC, UN Doc. A/CN.4/SR.2116, para. 51 ('In paragraph 1 of article 3, the division of State organs into categories did not embrace all the existing forms of State. Also, the terms used in the provision – 'agencies or instrumentalities of the State', 'its various organs of government' and 'political subdivisions of the State' – were unclear and did not facilitate an understanding of the term 'State'. In defining the content of that concept, it must be remembered that States exercised their international legal capacity through the activities of the bodies or persons representing them, whose powers were defined by national legislation. In order to carry out their functions, those organs and persons were vested with the sovereign authority of the State and were entitled to invoke jurisdictional immunity.')

[87] See e.g. the observations by Mr. Rao, *supra* n. 84, the observations by Mr. Koroma, Summary record of the 2118th meeting of the ILC, UN Doc. A/CN.4/SR.2118, para. 19 ('Paragraphs 2 and 3 should perhaps be incorporated under the consolidated provisions of articles 2 and 3, but, if they were kept in article 7, he agreed with Australia's comments that they should be formulated in different terms.'), the observations by Mr. Al Qaysi, Summary record of the 2116th meeting of the ILC, UN Doc. A/CN.4/SR.2116, para. 43 ('In the proposed new text, the opening words of paragraph 2, 'A proceeding in a forum State', were correct: they were a clear reference to a court. The new wording of paragraph 3 referred to the provisions of paragraph 1 of former article 3, rather than to those of the new article 2 that was the outcome of merging former articles 2 and 3. Paragraph 3 thus referred to 'subparagraphs (a) to (d) of article 3, paragraph 1', an overloaded cross-reference that could be made simpler and more accurate by saying: '. . . when the proceeding is instituted against any State as defined in article 2, paragraph 1 (b)...'). Mr. Al-Khasawneh agreed with this observation, see Summary record of the 2119th meeting of the ILC, UN Doc. A/CN.4/SR.2119, para. 50.

[88] See e.g. the observations by Mr. Barsegov, Summary record of the 2116th meeting of the ILC, UN Doc. A/CN.4/SR.2116, para. 57 ('With regard to article 7, he shared the doubts expressed concerning the expressions "interests ... of ... [a] State" and "property in its ... control" and agreed with the Special Rapporteur that the Drafting Committee should examine those terms.'), the observations by Mr. Pawlak, Summary record of the 2118th meeting of the ILC, UN Doc. A/CN.4/SR.2118, para. 47 ('Article 7, as redrafted by the Special Rapporteur (A/CN.4/415, para. 79), posed no difficulty, especially with the adoption of Australia's drafting suggestion concerning the expressions "forum State" and "foreign State". However, he deprecated the use of terms such as "interests" and "control" and would prefer them to be deleted or replaced.'), the observations by Mr. Graefrath, Summary record of the 2120th meeting of the ILC, A/CN.4/SR.2120, para. 29 ('The notions of "interests of a State" and "property in the control of a State", in article 7, caused some difficulty and should be either deleted or precisely defined. He welcomed the introduction of the expressions 'forum State' and 'foreign State' and trusted that they would be consistently used in other articles for ease of comprehension. The use of the terms 'agencies' and 'instrumentalities' would be appropriate only

55. Based on these observations, Special Rapporteur Ogiso proposed another revised draft for Article 7 for consideration in the Drafting Committee of the ICL (paragraph 1 omitted):[89]

> Article 7: Modalities for giving effect to State immunity
> […]
>
> 2. A proceeding in a forum State shall be considered to have been instituted against a foreign State, whether or not the foreign State is named as a party to that proceeding, so long as the proceeding in effect seeks to compel the foreign State either to submit to the jurisdiction of the court or to bear the consequences of a determination by the court which may affect the property, rights, interests or activities of the foreign State.
> 3. In particular, a proceeding before a court of a forum State shall be considered to have been instituted against a foreign State when the proceeding is instituted against any organ or other entity of a State or its representative referred to in article 2, paragraph 1 (b).

if they were more precisely defined in article 2.') Similar observations were made in relation to Arts. 14, 21 and 22 which dealt with property. See e.g. the observations by Mr. Carlo Rodrigues, Summary record of the 2119th meeting of the ILC, UN Doc. A/CN.4/SR.2119, para. 22 ('He also agreed to the deletion of the words in square brackets, "or property in which it has a legally protected interest" [in Art. 21; CvdP/TD], whose meaning was uncertain. The problem of the concept of "rights and interests", which had caused some difficulty on first reading, arose once again, but in a more serious form. Indeed, what was a right but "a legally protected interest"?)', the observations by Mr. Mahiou, ibid., para. 35 ('The concept of a "legally protected interest" might well be peculiar to certain legal systems. The concept of "interest" was, however, broader than that of "right" and, since the Commission was working in an area in which measures of execution had to be limited as much as possible, it would be wiser to retain that expression for the time being, both in article 21 and in article 22.'), the observations by Mr. Tomuschat, ibid., para. 68 ('In many legal systems, the reference to an "interest" in immovable property might be confusing. As a matter of principle, a universal treaty should never bear the hallmark of a single legal system.'). Mr. Reuter, agreed with these observations, see ibid., para. 76 ('[T]he word "interest" [in Art. 14; CvdP/TD] should be deleted for the reasons given by Mr. Tomuschat; failing that, the word should be replaced by an expression which did not come from the vocabulary of the common law.'), the observations by Mr. Bennouna, Summary record of the 2120th meeting of the ILC, UN Doc. A/CN.4/SR.2120, para. 6 ('Admittedly the expression "legally protected interest" [in Art. 21; CvdP/TD] was not entirely satisfactory, and he would suggest that it be replaced by a reference to property in which the State had a right in rem. The same could be done in article 22.'). See also the observations by Mr. Razafindralambo the next year (1990), Summary record of the 2159th meeting of the ILC, UN Doc. A/CN.4/SR.2159, para. 17 ('The reference to "property in its possession or control" would also not appear in the new text. While that was a welcome simplification, he wondered whether it did not leave a gap that it would be difficult to fill. The concept of 'interest' was distinct from that of "property", as the Special Rapporteur had not failed to underline and as the Commission itself had recognized in its final draft articles on succession of States in respect of State property, archives and debts, adopted in 1981. In the commentary to article 8 of that draft, the Commission had stressed that the expression "property, rights and interests" referred to "rights and interests of a legal nature". That was the meaning attached to the expression "legally protected interest" used in articles 21 and 22 of the present draft as adopted on first reading. In any event, it would be possible to revert to the original wording and to speak of 'property in which [the State] has an interest'.)

[89] Third report on jurisdictional immunities of States and their property, by Mr. Motoo Ogiso, Special Rapporteur, *Yearbook of the International Law Commission*: 1990, vol. II(1), UN Doc. A/CN.4/431 and Corr.1, p. 10.

56. By way of explanation, the Special Rapporteur observed that he had 'considerably shortened' paragraph 3 'to avoid duplication with Article 2, paragraph 1 (b)'. He had also deleted the final portion of paragraph 3 (starting with the words 'or when the proceeding is designed to deprive') in order to avoid duplication with paragraph 2. As to the suggestion (by the GDR) that the words 'interests' and 'control' should be replaced by more commonly used legal terms, the Special Rapporteur indicated that '[a]lthough those words may not be used very frequently or may be used with slightly different meanings outside the common-law countries, it would be difficult in fact to find suitable alternatives.' Furthermore, he believed that '[a]s a result of the aforementioned deletion of the final portion of paragraph 3, the problem concerning 'control' no longer exists as far as the present article is concerned. Although the reservation on the part of the members not belonging to the common-law system concerning the use of the word 'interests' is understandable, it would be difficult to avoid using it entirely in the present articles.'[90]

2.2 Radical trimming and simplification by the Drafting Committee: Article 6(2)(b) is born

57. The Drafting Committee of the ILC went even further than the Special Rapporteur that same year. The article was brought back to just two paragraphs and renumbered to Article 6 as a result of the merger of the definitional Articles 2 and 3. This new article 6 then read (paragraph 1 not reproduced here):

> Article 6 – Modalities for giving effect to State immunity
> […]
> 2. A proceeding before a court of a State shall be considered to have been instituted against another State if that other State:
> (a) is named as a party to that proceeding;
> (b) is not named as a party to the proceeding but the proceeding in effect seeks to affect the property, rights, interests or activities of that other State.

58. By way of explanation, the Chairman of the Drafting Committee observed:

> 47. With regard to paragraph 2, the Drafting Committee had first observed that its purpose was to lay down a criterion whereby it would be possible to determine whether or not a proceeding should be regarded as having been instituted against a State and that it left open entirely the question whether the State concerned would or would not ultimately be recognized as benefiting from immunity. The Committee had noted that the wording adopted on first reading was too condensed and seemed to allow the possibility—which was barely conceivable—that a State, although not named as a party to the proceeding, could be compelled to submit to the jurisdiction of the court. The Committee had therefore deemed it necessary to draw a clear distinction between the two cases covered by the provision, namely between the case in which the State was named as a party to the proceeding and the case in which it was not. The first of those cases was dealt with in subparagraph (a) and the second in subparagraph (b).
> 48. Subparagraph (a) called for no explanation. Subparagraph (b) applied to situations in which the State was not named as a party to the proceeding, but was indirectly involved, for example in the case of an action in rem concerning State property, such as a warship, or an action instituted against an entity other than the State itself that fell within the definition of the term 'State' laid down in article 2, paragraph 1 (b). The Drafting Committee had simplified the wording adopted on first reading. It had first deleted the clause 'so long as the proceeding in effect seeks to compel that other State either to submit to the jurisdiction of the court', which, in the case under consideration, was meaningless. The Committee had considered that the words 'to bear the consequences of a determination by the court which may affect' created too loose a relationship between the proceeding and the consequences to which it gave rise for the State in question and could thus result in unduly broad interpretations of the paragraph. To make the text more precise in that regard, it had therefore replaced those words by 'to affect'.
> 49. Lastly, the Drafting Committee had deleted paragraph 3, which, given the very elaborate definition of the term 'State' contained in article 2, no longer had any purpose.[91]

59. Of further note is that during the same session (1990), the Drafting Committee also proposed a slimmed down version of Article 13 (Ownership, possession and use of property) (formerly Article 14). Paragraph 2 of this article originally contained an exception to State immunity notwithstanding that the proceedings were intended to deprive property in possession or control of a State.[92] This proposed exception received supportive and critical comments, both from members of the ILC[93] and Governments in the UNGA.[94] This debate showed that the understanding of the exact scope and purpose of this proposed exception varied considerably[95] and the Drafting Committee, ultimately proposed to delete paragraph 2 alto-

[90] Ibid.

[91] See Summary record of the 2191st meeting of the ILC, UN Doc. A/CN.4/SR.2191, paras. 47-49.

[92] See also *supra* n. 50.

[93] See e.g. the observations by Mr. Ushakov, Summary record of the 1805th meeting of the ILC, UN Doc. A/CN.4/SR.1805, para. 78, the observations by Mr. Mahiou (ibid., paras. 80 and 85) and the observations by Mr. Sinclair (ibid., para. 83) as well as the observations by Mr. Calero Rodrigues, Summary record of the 2119th meeting of the ILC, UN Doc. A/CN.4/SR.2119, para. 17 and the observations by Mr. Tomuschat (ibid., para. 68).

[94] For a description of some of these views see Preliminary report on jurisdictional immunities of States and their property, by Mr. Motoo Ogiso, Special Rapporteur, *supra* n. 81, paras. 149-150.

[95] Contrast, for example, the observations by Mr. Razafindralambo, Summary record of the 2159th meeting of the ILC, UN Doc. A/CN.4/SR.2159, para. 7 ('Paragraph 2 (a) of article 14 seemed to contradict paragraph 3 of article 7 as adopted on first reading. The latter text provided that a proceeding before a court of a State should be considered to have been instituted against another State when it was designed to deprive that other State of its property or of the use of property in its possession or control. In such a case, under paragraph 1 of article 7, the foreign State enjoyed immunity before the courts of the forum State. Paragraph 2 (a) of article 14, however, provided that a court of the forum State could exercise jurisdiction in such a case, notwithstanding the fact that the proceeding was designed to deprive the foreign State of property in its possession or control. The foreign State was thus rendered powerless simply because the proceeding had not been brought

gether. The Drafting Committee had taken account of the link between paragraph 2 of Article 13 (formerly Article 14) and paragraph 2 of Article 6 (formerly Article 7) but said it had 'considered it self-evident that the presence of a State should not be an obstacle to a proceeding between two private individuals, since the State would be able to invoke immunity only if the proceeding had been instituted against it. The Drafting Committee had therefore deleted paragraph 2.'[96]

60. Insofar as the use of the terms 'right' and 'interest' in Article 13 (formerly Article 14) was concerned, the Chairman of the Drafting Committee observed:

> [T]he Drafting Committee had noted that reservations had been expressed with regard to the concept of an 'interest', which was not known in some legal systems. However, it had taken the view that, if no reference were made to that concept, problems would arise in countries where the concept was in customary use, whereas the reverse would not be true. It had therefore decided to retain the formula 'right or interest'.[97]

61. These revised texts of both Articles 6 and 13 were apparently acceptable and adopted by the ILC in second reading the next year (1991) with little further substantive debate.[98]

62. Following the adoption of the articles as a whole on second reading that same year,[99] the official commentaries to the draft articles were also amended. Insofar as relevant for this article, these amendments to the commentaries to Articles 2 (use of terms), 6 (modalities for giving effect to state immunity) and 13 (ownership, possession and use of property) consisted mostly of moving around paragraphs of the earlier commentary and deleting paragraphs that had either lost their relevance or had become unnecessary duplicative. More specifically, vast parts of

against it directly. The new text proposed by the Special Rapporteur for paragraph 3 of article 7 seemed to provide a remedy for that situation.') with those of Mr. Illueca, Summary record of the 2161st meeting of the ILC, UN Doc. A/CN.4/SR.2161, para. 25 ('Paragraph 2 [of Art. 14; CvdP/TD] might also be deleted, since it seemed to duplicate paragraph 3 of article 7.')

96 See Summary record of the 2191st meeting of the ILC, UN Doc. A/CN.4/SR.2191, para. 84. Particular the last part of these observations echoed the comments by Mr. Tomuschat, Summary record of the 2119th meeting of the ILC, UN Doc. A/CN.4/SR.2119, para. 68 ('Paragraph 2 of article 14 should be deleted: immunity should never be invoked in a case against a private individual.')

97 See Summary record of the 2191st meeting of the ILC, UN Doc. A/CN.4/SR.2191, para. 82. Compare also the remarks by Mr. Mahiou the next year (1991) in the ILC, Summary record of the 2219th meeting of the ILC, UN Doc. A/CN.4/SR.2219, para. 35 ('The Drafting Committee had decided after a lengthy discussion to retain the notion of interest, even though it realized that it might give rise to some problems under certain legal systems, because it felt that there were more advantages to retaining it than disadvantages.')

98 See Summary record of the 2218th meeting of the ILC, UN Doc. A/CN.4/SR.2218, p. 72 and Summary record of the 2219th meeting of the ILC, UN Doc. A/CN.4/SR.2219, p. 77. Only Art. 6(2)(b) was slightly amended as the word 'or' was added in paragraph 2. See also Summary record of the 2218th meeting of the ILC, UN Doc. A/CN.4/SR.2218, para. 45 ('Mr. EIRIKSSON suggested that the word "or" should be inserted in paragraph 2 at the end of subparagraph (a) in order to link it with subparagraph (b).')

99 See Summary record of the 2221st meeting of the ILC, UN Doc. A/CN.4/SR.2221, p. 96.

the old commentary to paragraph 3 of Article 7 (which tried to define the concept of 'State') was moved to the commentary on Article 2 which now contained a definition of 'State'.[100] What remained as commentary to Article 6(2)(b) therefore ended up being considerably shorter than the original commentary to Article 7, albeit that additional wording – copied more or less *verbatim* from the remarks by the Chairman of the Drafting Committee – was included to describe the changes made on second reading.[101]

63. With respect to the final commentary to the Draft Articles, two further comments are warranted in light of the topic of this paper.

64. First, the final commentary to Article 6(2)(b) ultimately did not include the remark by the Chairman of the Drafting Committee (see above) that 'an action instituted against an entity other than the State itself that fell within the definition of the term 'State' laid down in article 2, paragraph 1 (b)' was also an example of a situation where Article 6(2)(b) would be applicable (in addition to *in rem* proceedings).[102] The original draft of the commentary to Article 6(2)(b) had contained this sentence[103] but one ILC member indicated during the discussion of this draft commentary that in his view this scenario was already covered by (the commentary to) Article 6(2)(a).[104] The ILC apparently agreed and the sentence was taken out leaving only the example of *in rem* proceedings.

65. Secondly, as already indicated, paragraph 2 of Article 13 (formerly Article 14) had been deleted by the Drafting Committee. Oddly enough, the reasons provided by the Drafting Committee (see *supra*, para. 59) which are usually the basis for the commentary, cannot be found in the final commentary. Instead, this final

100 See for example, para. 14 (commentary Art. 7 old), which became para. 10 (commentary Art. 2 new), para. 15 (commentary Art. 7 old), which became para. 16 (commentary Art. 2 new), the second part of para. 6 (commentary Art. 7 old), which was added to para. 7 (commentary Art. 2 new), the last sentence of para. 7 (commentary Art. 7 old), which was added to para. 9 (commentary Art. 2 new), the first sentence of para. 8 (commentary Art. 7 old), which became para. 8 (commentary Art. 2 new), para. 17 (with the exception of the first sentence) (commentary Art. 7 old), which was added to para. 18 (commentary Art. 2 new), para. 18 (commentary Art. 7 old), which became para. 19 (commentary Art. 2 new),

101 See for the full text of the relevant commentary, *infra*, section 4: Extracts from the ILC commentary.

102 See Summary record of the 2191st meeting of the ILC, UN Doc. A/CN.4/SR.2191, para. 43 (cited in full *supra*, para. 58).

103 That is the same sentence but in the present tense. See the draft Commission Report, UN Doc. A/CN.4/L.462/Add.1, p. 37. ('Subparagraph (b) applies to situations in which the State is not named as a party to the proceeding, but is indirectly involved, as for instance in the case of an action in rem concerning State property, such as a warship, or an action instituted against an entity other than the State itself that falls within the definition of the term "State" laid down in article 2, paragraph 1 (b).'

104 See Summary record of the 2191st meeting of the ILC, UN Doc. A/CN.4/SR.2191, para. 43 ('Mr. EIRIKSSON proposed that the end of the first sentence, beginning with the words "or an action instituted", should be deleted since the matter was already covered by the commentary to paragraph (10).') Para. 10 of the commentary to Art. 6(2)(a) referred to by Mr. Eiriksson reads: 'Paragraph 2, subparagraph (a), applies to all proceedings naming as a party the State itself or any of its entities or persons that are entitled to invoke jurisdictional immunity in accordance with article 2, paragraph 1, subparagraph (b).'

commentary states that paragraph 2 had been deleted 'in view of the fact that the definition of the term "State" having been elaborated in article 2, paragraph 1 (b)' as a result of which 'the possibility of a proceeding being instituted in which the property, rights, interests or activities of a State are affected, although the State is not named as a party, has been much reduced'. The new commentary went on to continue that '[e]ven if such a case arose' the State in question 'could avoid its property, rights, interests or activities from being affected by providing prima facie evidence of its title or proof that the possession was obtained in conformity with the local law'.[105]

3. SUBSEQUENT DEBATE IN THE UNGA AND ADOPTION OF THE UNCSI

66. Now that the ILC had adopted a set of draft articles on second reading, Governments were again invited to submit written comments.[106] As was the case with the draft articles adopted on first reading, few Governments did so although the Netherlands did file written comments this time around.[107] Initially, only 19 Governments submitted comments.[108] Over the course of the following years, a handful of Governments filed (additional) comments, mostly focusing on the particularly divisive issues.[109]

67. In the various observations submitted, only two Governments explicitly referred to Article 6(2)(b). Australia reiterated its belief that Article 6(2)(b) was 'too wide' and that a 'narrower formulation was preferable'.[110] The United States also expressed concerns about the article:

> With respect to paragraph 2 (b) of article 6, we are concerned about the potential breadth of a provision that considers that a proceeding has been instituted against a State in any case in which 'the proceeding in effect seeks to affect the property, rights, interests or activities of that other State'. The commentary notes (A/46/10, p. 43) that actions involving seizure or attachment of State property have been considered in the practice of States to be proceedings that in effect implicate the foreign sovereign (even though it may not be named as a party to the proceeding). However, paragraph 2 (b) is not limited to such actions; it also includes proceedings that affect the ..interests' or 'activities' of a foreign State – terms that are sufficiently expansive to reach many other kinds of cases. For example, litigation involving banking, financial or other regulations that may have an impact upon foreign State activities would also be encompassed within this provision. Moreover, it is unclear what obligations the parties to any such proceeding, or the court itself, may have towards the affected foreign State; for example, must notice be provided to the foreign State, by whom, and within what time period? We believe that. further consideration should be given to these issues.[111]

68. Finally, Switzerland reiterated its objections against the word 'interest' (which, it said, was used in several places) and indicated that this term 'is extremely vague', 'is not defined anywhere' and that a 'simple solution to the resulting problem would be to replace the word "interest" each time it appears with the word "right", since, as everyone knows, "rights" are "legally protected interests"'.[112]

69. As indicated above, it would take another 13 years to reach a comprise on the major remaining issues holding up the adoption of a convention based on the ILC Draft Articles. Article 6(2)(b) was not one of these issues but the scope of the definition of 'State' certainly was.[113] Some Member States believed this definition was overinclusive, for example by its inclusion of 'constituent units of a federal State'.[114] The UNCSI was ultimately adopted by the UNGA on 2 December 2004.[115]

4. EXTRACTS FROM THE ILC COMMENTARY:[116]

4.1 **Commentary pertaining to Article 7 as adopted on first reading (1982):[117]**

(1) In draft article 7, an attempt is made in paragraph 1 to identify the content of the obligation to give effect to State immunity and the modalities for giving effect to that obligation. The rule of State immunity may be viewed from the standpoint of the State giving or granting jurisdictional immunity, in which case a new point of departure is warranted. Emphasis is placed not so much on the sovereignty of the State claiming immunity, but more precisely on the independence and sover-

[105] See *infra*, section 4: Extracts from the ILC commentary.
[106] See General Assembly resolution 46/55 of 9 December 1991, UN Doc. A/RES/46/55.
[107] See for the disappointing number of comments on the draft articles adopted on first reading, *supra*, para. 49.
[108] Namely Australia, Austria, Brazil, Cuba, Denmark, Spain, Switzerland, the United Kingdom and the United States (UN Doc. A/47/326), later supplemented with observations by China, Germany and Turkey (UN Doc. A/47/326.Add.1), Greece, Mexico and Poland (UN Doc. A/47/326.Add.2), Italy and Venezuela (UN Doc. A/47/326.Add.3), the Netherlands (UN Doc. A/47/326,Add.4) and France (UN Doc. A/47/326.Add.5).
[109] In 1993 observations were received from Belgium (UN Doc. A/48/313) and Bulgaria (UN Doc. A/C.6/48/3). Following a specific call for observations regarding to remaining issues (see General Assembly resolution 49/61, UN Doc. A/RES/49/61), supplemental observations were filed in 1997 by Argentina and Bolivia (UN Doc. A/52/294), in 1998 by Austria and France (UN Doc. A/53/274) and Germany (UN Doc. A/53/274/Add.1) and in 2000 by Chile, Libya, Pakistan and Saudi Arabia (UN Doc. A/55/298). For an overview of the particularly divisive issues, see n. 19 of our paper.
[110] See UN Doc. A/47/326, p. 4. See for a similar observation by Australia, *infra* para. 51 and n. 73.
[111] See UN Doc. A/47/326, p. 29.
[112] See UN Doc. A/47/326, p. 21. See for a similar observation by Switzerland, *infra* para. 50 and n. 71.
[113] For an overview of the particularly divisive issues, see n. 19 of our paper.
[114] See, for example, the observations by the Netherlands (UN Doc. A/47/326/Add.4) and the United Kingdom (UN Doc. A/47/326, pp. 24-25)
[115] See United Nations General Assembly Resolution 59/38 of 2 December 2004, UN Doc. A/59/49.
[116] Footnotes have been omitted.
[117] See Report of the International Law Commission on the work of its Thirty-fourth session, 3 May-23 July 1982, Supplement No. 10, Official Records of the General Assembly, Thirty-seventh session, *Yearbook of the International Law Commission*: 1982, vol. II(2), UN Doc. A/37/10, pp. 100-107.

eignty of the State which is required by international law to recognize and accord jurisdictional immunity to another State. Of course, the obligation to give effect to State immunity stated in article 7 applies only to those situations in which the State claiming immunity is entitled thereto under these articles. Since immunity, under draft article 6, is expressly from the 'jurisdiction of another State', there is a clear and unmistakable presupposition of the existence of 'jurisdiction' of that other State over the matter under consideration; otherwise, it would be totally unnecessary to invoke the rule of State immunity in the absence of jurisdiction. There is as such an indispensable and inseparable link between State immunity and the existence of jurisdiction of another State with regard to the matter in question.

(2) The same initial proposition could well be formulated in reverse, taking the jurisdiction of a State as a starting-point; after having established the firm existence of jurisdiction, the new formulation could stipulate an obligation to refrain from exercising such jurisdiction in so far as it involves, concerns or otherwise affects another State that is entitled to immunity and is unwilling to submit to the jurisdiction of the former. This restraint on the exercise of jurisdiction is prescribed as a proposition of international law and should be observed in accordance with detailed rules to be examined and clarified in subsequent draft articles.240 From the point of view of the absolute sovereignty of the State exercising its jurisdiction in accordance with its own internal law, any restraint or suspension of that exercise based on a requirement of international law could be viewed as a limitation. The first prerequisite to any question involving jurisdictional immunity is therefore the existence of a valid 'jurisdiction', primarily under internal law rules of a State, and, in the ultimate analysis, the assumption and exercise of such jurisdiction not conflicting with any basic norms of public international law. It is then and only then that the applicability of State immunity may come into play. There appears to be a close relationship between the existence of valid jurisdiction on the matter under consideration by the court and the consequential possibility of a claim of jurisdictional immunity. Without evidence of valid jurisdiction, there is no necessity to proceed to initiate, let alone substantiate, any claim of State immunity. It should, however, be emphasized that the Commission is not concerned in the consideration of this topic with the compatibility with general international law of a State's internal law on the extent of jurisdiction.

(3) Paragraph 2 deals with the notion of proceedings before the courts of one State against another State, while paragraph 3 deals with the various entities which could be classified as beneficiaries of State immunity.

(4) Proceedings before the courts of one State are considered as having been instituted against another State if an attempt is made to compel that other State against its will to submit to the jurisdiction of the former. There are various ways in which a State can be impleaded or implicated in a litigation or a legal proceeding before the court of another State.

(a) Institution of proceedings against another State

(5) A State is indubitably implicated in litigation before the courts of another State if a legal proceeding is instituted against it in its own name. The question of immunity arises only when the defendant State is unwilling or does not consent to be proceeded against. It does not arise if the State agrees to become a party to the proceeding.

(6) Although, in the practice of States, jurisdictional immunity has been granted more frequently in cases where a State as such has not been named as party to the proceeding, in reality there is a surprising collection of instances of direct implication in proceedings in which States are actually named as defendants. For the purpose of State immunity, a definition of 'State' may be needed. Whatever the definition, it is clear from the practice of States that the expression 'State' for the purposes of the present articles includes, in the first place, fully sovereign and independent foreign States, but by extension also entities that are sometimes not completely foreign and at other times not fully independent or only partially sovereign. Certainly the cloak of State immunity covers all foreign States regardless of their form of government, whether a kingdom, empire or republic, a federal union, a confederation of States or otherwise.

(b) Proceedings against the central Government or head of State of another State

(7) A State need not be expressly named as party to a litigation to be directly implicated. For instance, an action against the Government of a State clearly implicates the State itself as, for all practical purposes, the central Government is identified or identifiable with it. A State is generally represented by the Government in most, if not all of its international relations and transactions. The central Government is therefore the State itself and a proceeding against the Government *eo nomine* is not distinguishable from a direct action against the State. State practice has long recognized the practical effect of a suit against a foreign Government as identical with a proceeding against the State.

(8) A foreign sovereign or a head of State of a foreign State, often considered as a principal organ of a State, is also entitled to immunity to the same extent as the State itself on the ground that the crown, the reigning monarch, the sovereign head of State or indeed a head of State may be assimilated to the central Government. In point of fact, it is not inaccurate to state that in some countries the practice of allowing immunities in favour of foreign sovereigns or foreign potentates developed well before that in respect of a foreign State or Government. State immunity, as it is understood today, may be said in some jurisdictions to have been an extension of sovereign immunity. States have come to be identified with their reigning sovereigns who were in their own right entitled to immunity; or to put it in reverse, the sovereign heads of State have been identified with the States they represent.

(c) Proceedings against political subdivisions of another State

(i) Absence of uniform State practice

(9) It is important to note that there is neither uniformity nor consistency in the practice of States on the precise legal status of political subdivisions of a foreign State before national authority. On the whole, State practice seems to suggest a trend in favour of local jurisdiction. Political subdivisions of a foreign State such as member States of a federal union, and part sovereign States, such as protected States which lack full external sovereignty, are apparently in danger of not being clothed with State immunity, being neither sovereign States nor one of the recognized agencies of the central Government. An action against a political subdivision of a foreign State is therefore not automatically regarded as an action against the State itself. Such action is not necessarily considered as instituted against the foreign State of which the political subdivision forms a part. Such autonomous entities, lacking international personality and external sovereignty, and not being identified with the federal union or the federation, may be proceeded against in their own name without implicating the foreign State concerned.

(ii) Proceedings considered not to be against another State

(10) A judgement handed down in France in 1933 by the Cour de cassation, in a case concerning the State of Ceara of the Republic of Brazil, is illustrative of the general attitude of municipal courts in regard to autonomous entities such as political subdivisions of a foreign State.230 The practice of American, French, Italian and Belgian courts generally supports the view that such political subdivisions are subject to local jurisdiction for lack of external sovereignty and international personality, being distinguishable from the central Government. It should be observed, on the other hand, that on not infrequent occasions political subdivisions of a State or even colonial dependencies are treated, as a mark of courtesy, with a privileged status within the same federal union by fictitiously assimilating the position of the domestic entities to that of a foreign sovereign State.

(iii) Proceedings considered to be against another State

(11) It is not difficult to envisage circumstances in which political subdivisions of a foreign State may in fact be exercising governmental authority assigned to them by the federal union, and proceedings are brought against them for acts performed by them on behalf of the State. Such proceedings could be regarded as in effect directed against the State. There are cases where, dictated by expediency, the courts have refrained from entertaining suits against such autonomous entities, holding them to be an integral part of the foreign Government.

(12) Whatever the status of a political subdivision of a State, there is nothing to preclude the possibility of such autonomous entities being constituted or acting as organs of the central Government or as State agencies performing sovereign acts of the foreign State. A constituent State of a federal union normally enjoys no immunity as a sovereign State, unless it can establish that the proceeding against it in

fact implicates the foreign State. This uncertain status of political subdivisions of a State is further preserved by regional agreements such as the European Convention on State Immunity, 1972.

(d) Proceedings against organs, agencies or instrumentalities of another State

(13) Proceedings against organs, agencies or instrumentalities of another State may, as indeed they often do, implicate the foreign State concerned, especially in regard to the activities performed by such State agencies or instrumentalities in the exercise of governmental authority of the State. State organs, agencies or instrumentalities may vary in their formation, constituent components, functions and activities, depending upon the political, economic and social structures of the State and ideological considerations. It is not possible to examine every variety or variation of the organs, agencies and instrumentalities of a State. It is nevertheless useful to illustrate some of the more usual denominations and practical examples which, for the sake of convenience, could be grouped under two headings: State organs and departments of government, and agencies or instrumentalities of State.

(i) State organs and departments of government

(14) Just as the State is represented by its Government, which is identified with it for most practical purposes, the Government is often composed of State organs and departments or ministries that act on its behalf. Such organs of State and departments of government can be and are often constituted as separate legal entities within the internal legal system of the State. Lacking as they do international legal personality as a sovereign entity, they could nevertheless represent the State or act on behalf of the central Government of the State, which they in fact compose as integral parts of it. Such State organs or departments of government comprise the various ministries of a Government, including the armed forces, the subordinate divisions or departments within each ministry, such as embassies, special missions and consular posts, and offices, commissions, or councils which need not form part of any ministry but are themselves autonomous State organs answerable to the central Government, or to one of its departments, or administered by it. Other principal organs of the State such as the legislature and the judiciary of a foreign State would be equally identifiable with the State itself if an action were or could be instituted against them in respect of their public or official acts.

(ii) Agencies or instrumentalities of State

(15) There is in practice no hard-and-fast line to be drawn between agencies or instrumentalities of a State and State organs and departments of government under the previous subheading. The expression ‘agencies or instrumentalities’ indicates the interchangeability of the two terms. Proceedings against an agency of a foreign Government or an instrumentality of a foreign State, whether or not incorporated as a separate entity, could be considered to be a proceeding against the foreign State, particularly when the cause of action relates to the activities conducted by

the agency or instrumentality of a State in the exercise of governmental authority or part of the sovereign power of that State.

(e) Proceedings against State agents or representatives of a foreign Government

(16) It is not likely that the types of beneficiaries or categories of recipients of State immunities as so far listed are exhaustive or in any way comprehensive of the growing list of persons and institutions to which State immunity may apply. Another important group of persons who, for want of a better terminology, will be called agents of State or representatives of government should also be mentioned. Proceedings against such persons in their official or representative capacity, such as personal sovereigns, ambassadors and other diplomatic agents, consular officers and other representatives of government may be said to be against the foreign State they represent in respect of an act performed by such representatives on behalf of the foreign Government in the exercise of their official functions.

(i) Immunities ratione materiae

(17) Actions against such representatives or agents of a foreign Government in respect of their official acts are essentially proceedings against the State they represent. The foreign State, acting through its representatives, is immune ratione materiae. Such immunities characterized as ratione materiae are accorded for the benefit of the State and are not in any way affected by the change or termination of the official functions of the representatives concerned. Thus, no action will be successfully brought against a former representative of a foreign State in respect of an act performed by him in his official capacity. State immunity survives the termination of the mission or the office of the representative concerned. This is so because the immunity in question not only belongs to the State, but is also based on the sovereign nature or official character of the activities, being immunity ratione materiae.

(ii) Immunities ratione personae

(18) Of all the immunities enjoyed by representatives of Government and State agents, two types of beneficiaries of State immunities deserve special attention, namely, the immunities of personal sovereigns and those of ambassadors and diplomatic agents. Apart from immunities ratione materiae by reason of the activities or the official functions of representatives, personal sovereigns and ambassadors are entitled, to some extent in their own right, to immunities ratione personae in respect of their persons or activities that are personal to them and unconnected with official functions. The immunities ratione personae, unlike immunities ratione materiae which continue to survive after the termination of the official functions, will no longer be operative once the public offices are vacated or terminated. All activities of the sovereigns and ambassadors which do not relate to their official functions are subject to review by the local jurisdiction, once the sovereigns or ambassadors have relinquished their posts. Indeed, even such immunities inure not to the personal benefit of sovereigns and ambassadors but to the benefit of the States they represent, to enable them to fulfil their representative functions or for the effective performance of their official duties. This proposition is further reflected, in the case of diplomatic agents, in the rule that diplomatic immunities can only be waived by an authorized representative of the sending State and with proper governmental authorization.

(f) Proceedings affecting State property or property in the possession or control of a foreign State

(19) Without closing the list of beneficiaries of State immunities, it is necessary to note that actions involving seizure or attachment of public properties or properties belonging to a foreign State or in its possession or control have been considered in the practice of States to be proceedings which in effect implicate the foreign sovereign or seek to compel the foreign State to submit to the local jurisdiction. Such proceedings include not only actions in rem or in admiralty against State-owned or State-operated vessels used for defence purposes and other peaceful uses, but also measures of prejudgment attachment or seizure (saisie conservatoire) as well as execution or measures in satisfaction of judgment (saisie executoire). The post-judgment or execution order will not be considered in the present part of the report, since it concerns not only immunity from jurisdiction but beyond that, also immunity from execution, a further stage in the process of jurisdictional immunities.

(20) As has been seen, the law of State immunities has developed in the practice of States not from proceedings instituted directly against foreign States or Governments in their own name, but more indirectly through a long line of actions for the seizure or attachment of vessels for maritime liens or collision damages or salvage services. State practice has been rich in instances of State immunities in respect of their men-of-war, visiting forces, ammunitions and weapons and aircraft. The criterion for the foundation of State immunity is not limited to the claim of title or ownership by the foreign Government, but clearly encompasses cases of property in actual possession or control of a foreign State. The Court should not so exercise its jurisdiction as to put a foreign sovereign to election between being deprived of property or else submitting to the jurisdiction of the Court.

(21) The obligation of paragraph 3 dispenses with the need to have a separate definition of a ‘foreign State’, as it seems to specify the entities which could be classified as the beneficiaries of State immunity, without attempting to define the term ‘State’ for the present purpose. These entities are entitled to State immunity whether or not forming an integral part of the foreign State and whether or not organized as legal persons with separate legal personality under the internal law of a State. For the purposes of State immunity, State organs and agencies or instrumentalities are entities organized as such under the internal law of the State of which they form part.

4.2 Commentary pertaining to Article 6(2)(b) as adopted on second reading (1991):[118]

(6) Paragraph 2 deals with the notion of proceedings before the courts of one State against another State. There are various ways in which a State can be impleaded or implicated in a litigation or a legal proceeding before the court of another State.
(7) Proceedings before the courts of one State are considered as having been instituted against another State if that other State is named as a party to the proceeding, or in a case where that other State itself is not a party to the proceeding, if the proceeding in effect seeks to affect the property, rights, interests or activities of that other State. The wording has been modified on second reading, in order to draw a clear distinction between two cases.

Paragraph 2 (a)
(8) A State is indubitably implicated in litigation before the courts of another State if a legal proceeding is instituted against it in its own name. The question of immunity arises only when the defendant State is unwilling or does not consent to be proceeded against. It does not arise if the State agrees to become a party to the proceeding.
(9) Although, in the practice of States, jurisdictional immunity has been granted frequently in cases where a State as such has not been named as a party to the proceeding, in reality there is a surprising collection of instances of direct implication in proceedings in which States are actually named as defendants.
(10) Paragraph 2, subparagraph (a), applies to all proceedings naming as a party the State itself or any of its entities or persons that are entitled to invoke jurisdictional immunity in accordance with article 2, paragraph 1, subparagraph (b).

Paragraph 2 (b)
(11) Without closing the list of beneficiaries of State immunities, it is necessary to note that actions involving seizure or attachment of public properties or properties belonging to a foreign State or in its possession or control have been considered in the practice of States to be proceedings which in effect implicate the foreign sovereign or seek to compel the foreign State to submit to the local jurisdiction. Such proceedings include not only actions *in rem* or in admiralty against State-owned or State-operated vessels used for defence purposes and other peaceful uses, but also measures of prejudgment attachment or seizure (*saisie conservatoire*) as well as execution or measures in satisfaction of judgment (*saisie executoire*). The post-judgment or execution order will not be considered in the context of the present article, since it concerns not only immunity from jurisdiction but, beyond that, also immunity from execution, a further stage in the process of jurisdictional immunities.

[118] See Report of the International Law Commission on the work of its forty-third session, 29 April to 19 July 1991, *Yearbook of the International Law Commission*, 1991, vol. II(2), pp. 24-25.

(12) As has been seen, the law of State immunities has developed in the practice of States not so much from proceedings instituted directly against foreign States or Governments in their own name, but more indirectly through a long line of actions for the seizure or attachment of vessels for maritime liens or collision damages or salvage services. State practice has been rich in instances of State immunities in respect of their men-of-war, visiting forces, ammunitions and weapons and aircraft. The criterion for the foundation of State immunity is not limited to the claim of title or ownership by the foreign Government, but clearly encompasses cases of property in actual possession or control of a foreign State. The Court should not so exercise its jurisdiction as to put a foreign sovereign in the position of choosing between being deprived of property or else submitting to the jurisdiction of the Court.
(13) Subparagraph *(b)* applies to situations in which the State is not named as a party to the proceeding, but is indirectly involved, as for instance in the case of an action *in rem* concerning State property, such as a warship. The wording adopted on first reading has been simplified on second reading. First, the clause 'so long as the proceeding in effect seeks to compel that . . . State . . . to submit to the jurisdiction of the court' was deleted as it was, in the case under consideration, meaningless. The words 'to bear the consequences of a determination by the court which may affect', in the last part of the sentence was also deleted, because it appeared to create too loose a relationship between the procedure and the consequences to which it gave rise for the State in question and could thus result in unduly broad interpretations of the paragraph. To make the text more precise in that regard, those words have therefore been replaced by the words 'to affect'. Lastly, the Commission has deleted paragraph 3, which, given the very elaborate definition of the term 'State' contained in article 2, no longer had any point.

4.3 Commentary pertaining to article 13 as adopted on second reading (1991):[119]

(1) Article 13 deals with an important exception to the rule of State immunity from the jurisdiction of a court of another State quite apart from State immunity in respect of its property from attachment and execution. It is to be recalled that, under article 6, paragraph 2 (b), State immunity may be invoked even though the proceeding is not brought directly against a foreign State but is merely aimed at depriving that State of its property or of the use of property in its possession or control. Article 13 is therefore designed to set out an exception to the rule of State immunity. The provision of article 13 is, however, without prejudice to the privileges and immunities enjoyed by a State under international law in relation to property of diplomatic missions and other representative offices of a government, as provided under article 3.
(2) This exception, which has not encountered any serious opposition in the judicial and governmental practice of States, is formulated in language which has

[119] Ibid., pp. 46-47.

to satisfy the differing views of Governments and differing theories regarding the basis for the exercise of jurisdiction by the courts of another State in which, in most cases, the property – especially immovable property – is situated. According to most authorities, article 13 is a clear and well-established exception, while others may still hold that it is not a true exception since a State has a choice to participate in the proceeding to assert its right or interest in the property which is the subject of adjudication or litigation.

(3) Article 13 lists the various types of proceedings relating to or involving the determination of any right or interest of a State in, or its possession or use of, movable or immovable property, or any obligation arising out of its interest in, or its possession or use of, immovable property. It is not intended to confer jurisdiction on any court where none exists. Hence the expression 'which is otherwise competent' is used to specify the existence of competence of a court of another State in regard to the proceeding. The word 'otherwise' merely suggests the existence of jurisdiction in normal circumstances had there been no question of State immunity to be determined. It is understood that the court is competent for this purpose by virtue of the applicable rules of private international law.

[…]

(7) Former paragraph 2, which was included in the text of the article adopted provisionally on first reading notwithstanding the contention of some members, has been deleted in view of the fact that the definition of the term 'State' having been elaborated in article 2, paragraph 1 (b), the possibility of a proceeding being instituted in which the property, rights, interests or activities of a State are affected, although the State is not named as a party, has been much reduced. Even if such a case arose, that State could avoid its property, rights, interests or activities from being affected by providing prima facie evidence of its title or proof that the possession was obtained in conformity with the local law.

ANNEX II – Overview immunity legislation and case law per jurisdiction

Overview immunity legislation and case law per jurisdiction.[1]

1. AUSTRALIA

1. State immunity is regulated in Australia by the Foreign States Immunities Act 1985 (FSIA 1985). Outside cases of immunity from execution (Section 30 *et seq.*) and *in rem* claims against certain property in use by the foreign State (Section 18), the FSIA 1985 provides for immunity only to the extent that the State (or part thereof) is itself a defendant in the proceedings. Under Section 27 FSIA 1985, the Australian court is obliged to review *ex officio*[2] whether immunity is at issue if the foreign State has not appeared in the proceedings as a default judgment can only be entered if – in addition to proper service – 'the court is satisfied that, in the proceeding, the foreign State is not immune'. It follows from Australian case law that 'State' should be understood to include (former) government officials.[3] It further follows from this jurisprudence that immunity will not arise if the State is not a defendant, even if its interests and activities are at stake or even if judgments have to be made on the lawfulness of its actions. The *Habib* and *Moti* cases are particularly important in this regard.

2. The *Habib* case (2010) revolved around an Australian citizen (Mamdouh Habib) who claimed to have been detained and tortured in Pakistan, Egypt and Afghanistan by local government officials. He was then transferred to Guantanamo Bay where, he claimed, he was tortured again, this time by US officials. After several years of detention, Habib was ultimately released from Guantanamo Bay without any charge. Having returned to Australia, Habib sued the Australian State for damages, claiming that Australian officials had been complicit in the torture.

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1 The quotations in this document from non-English texts are machine translations that have been checked by us. Apart from the Japanese and the Dutch/Flemish original texts, the original texts have been added in the footnotes.

2 We were unable to ascertain for all countries whether and to what extent the domestic courts were obliged to review immunity *ex officio* if the foreign State did not appear in the proceedings. If there is no mention of this in the discussion of the relevant country, we have not been able to find sufficient information on this. Nonetheless, we believe that case law from countries with regard to which we have not been able to establish this with certainty and in which immunity is not explicitly discussed still has relevance. This is because it seems illogical that in proceedings between private parties in which immunity from jurisdiction has not been invoked and not tested *ex officio*, the court would deem it permissible to rule on (the lawfulness of) foreign government actions, but – because of the same necessity to rule on (the lawfulness of) government actions – would consider itself incompetent in those proceedings if immunity had been invoked.

3 *Cf.* for example the cases that led to New South Wales Court of Appeal, *Zhang v. Zemin* [2010] *NSWCA* 255, 5 October 2010; and High Court of Australia, *Li and Ors v. Zhou and Anor* [2014] *HCA* Trans 281, 12 December 2014.

It was not disputed that Habib's claim could only succeed if the Australian court found that the foreign government officials had tortured him, because only then could there be complicity in this by Australian officials.[4] It was not argued by the Australian State that State immunity existed for that reason but it did invoke the foreign act of State doctrine. According to the Australian State, a plaintiff could not be allowed to do *indirectly* (bring a claim against Australian officials for complicity in torture by foreign officials) what he could not do *directly* (bring a claim against the foreign officials) because of State immunity.[5] This argument was rejected, however, by the Federal Court of Australia which held that, in any case, the foreign act of State doctrine does not apply in cases involving allegations of torture.[6]

3. Reference may also be made to a decision of the Australian High Court, Australia's highest court, in the *Moti* case (2011).[7] The case revolved around the legality of a deportation of a suspect (Julian Moti) from the Solomon Islands to Australia. Moti, resident in the Solomon Islands, was suspected by the Australian authorities of sexual abuse of a minor. Since Moti was Attorney-General of the Solomon Islands at the time of the offences, the Solomon Islands refused to extradite him to Australia. However, when the Solomon Islands Government was overthrown due to political circumstances, Moti was deported to Australia a few days later. That deportation, according to Moti, was unlawful because his appeal against it was still pending before the courts of the Solomon Islands. Once he arrived in Australia, Moti argued that his criminal case was an 'abuse of process' and could not proceed further because the Australian authorities had been involved in his unlawful deportation to Australia (including by issuing visas). The lower court dismissed this appeal on the grounds that the Australian court would not have jurisdiction to rule on the legality of the Solomon Islands' actions.[8] In the final instance, the Australian High Court ruled otherwise. According to the High Court, there was not a 'general and universally applicable rule that Australian courts may not be required (or do not have or may not exercise jurisdiction) to form a view about the lawfulness of conduct that occurred outside Australia by reference to foreign law'.[9] It follows, the High Court continued, 'that there will be occasions when to decide the issues that must be determined in a matter an Australian court must state its conclusions about the legality of the conduct of a foreign government or persons through whom such a government has acted'.[10] According to the

[4] *Cf.* Federal Court of Australia, *Habib v. Commonwealth of Australia*, 25 February 2010 [2010] *FCAFC* 12, paras. 22 and 70.
[5] Ibid., paras. 22 and 85.
[6] Ibid., para. 121 *et seq.*
[7] Although the underlying case concerned a criminal prosecution, the considerations of the High Court are worded in general terms and do not appear to be confined to criminal cases. We have therefore included it in this analysis.
[8] *Cf.* Supreme Court of Queensland, *R v. Moti,* 15 December 2009 [2009] *QSC* 407, para. 43.
[9] *Cf.* High Court of Australia, *Moti v. The Queen*, 7 December 2011 [2011] *HCA* 50, para. 50.
[10] Ibid., para. 51.

High Court, Australian courts are 'free to consider and pronounce an opinion upon the exercises of sovereign power by a foreign government, if the consideration of those acts of a foreign government only constitutes a preliminary to the decision of a question [...] which in itself is subject to the competency of the Court of law'.[11] This was the case in this instance because the lawfulness of Moti's deportation from the Solomon Islands, although carried out by the Solomon Islands Government, was a preliminary to the question of whether Moti's prosecution should be discontinued.[12] According to the High Court, there was no doubt that the deportation was illegal and by facilitating it, the Australian authorities had forfeited their right to prosecute Moti.

2. BELGIUM

4. Belgium has no special immunity law. State immunity – with the exception of immunity from execution[13] and where no treaty applies – is governed in Belgium by customary international law, which applies by operation of law in the Belgian legal order.[14] As regards Belgian case law on cases in which a foreign State is not a defendant but (the lawfulness of) governmental acts of that State are at stake, the following judgments can be pointed out.

5. First, there is the *Eisman/Meltzer* case (1938). The case revolved around a Jewish trader in hops who sold them to, among others, a Belgian entrepreneur. As a result of the increasing oppression of Jews in Nazi Germany, the trader fled to Belgium. Thereafter, under 'security measures' imposed by the Nazi regime, the trader was denied management authority over all his property and debtors were ordered to pay (to Nazi authorities) in Nuremberg from now on. Uncertain to whom payment should now be made, the Belgian buyer had himself summoned to the Brussels court. By judgment of 9 June 1938, it ruled[15] that the 'security measure' imposed could not have any effect outside German territory, even if it were considered to be a personal measure concerning the power of disposal of persons (which can have extraterritorial effect). Indeed, the 'security measure' was obviously not imposed in the interest of the person concerned but was in fact a punishment. Even if this were to be thought otherwise, the court considered

[11] Ibid., para. 52.
[12] Ibid., para. 52. See also para. 58 ('In the particular circumstances of this case, only if the appellant's deportation was illegal would any action of Australian authorities in connection with that deportation bear upon the allegation of abuse of process. And the significance that is to be given to what Australian authorities did or did not do in connection with the appellant's deportation cannot be assessed without first deciding not only whether the deportation was illegal but, if so, why it was illegal.').
[13] See Art. 1412ter *et seq.* of the Judicial Code.
[14] See, among others, A. Henkes, 'Het Hof van Cassatie en de internationale gewoonte – van territoriale agressie tot staatsimmuniteit – actuele beschouwingen 2022'. Available online via: https://courdecassation.be/pdf/Mercuriales/NL/2022.pdf.
[15] See Tribunal de Commerce de Bruxelles (1re Chambre), 9 June 1938, *La Belgique Judicaire*, 1938, p. 563.

the 'security measure' to be contrary to Belgian international public policy since 'it deprived the plaintiff, without any limitation in time or space, of the essential characteristic of property, by imposing an absolute prohibition on disposing of all his commercial property' so that it 'must in fact be considered a measure of actual expropriation without compensation'.[16]

6. Reference can also be made to the *Propetrol* case (1939). Central to this case was the nationalisation[17] of the Mexican oil industry in the 1930s. A consignment of petrol sold since then by the nationalised oil companies arrived by ship in the port of Antwerp, upon which the expropriated private oil companies levied attachments.[18] The new owner (a private oil trader) subsequently claimed in summary proceedings that this attachment should be lifted. The Antwerp court granted this claim on 21 February 1939.[19] According to the court, for the time being, it had not been sufficiently proven that the petrol on board the ship actually came from the nationalised stocks so that already for this reason the right of ownership of the expropriated oil companies was not established with sufficient certainty. The court considered, for the sake of completeness, that the measures had moreover been taken by the Mexican Government on its own territory and against one of its own 'legal subjects' so that '[t]he lawfulness of the measures does not in any way concern Belgian public policy'. Furthermore, according to the court, 'the legal disputes to which they would give rise in the cited circumstances, namely concerning the transactions of which the attached petrol would have been the subject, before its arrival at Antwerp, cannot – according to international law – be made dependent on the authority of the Belgian legal powers'. For this reason too, therefore, the attachment had to be lifted.

7. Also of interest is the case *Gécamines v. Bourguignon* (2000). This case revolved around a doctor ('Bourguignon') employed by the Congolese state company Générale (Congolaise) des Carrières et des Mines ('Gécamines'). In the late 1970s, the Congolese Government – on the advice of the International Monetary Fund – decided to freeze the wages of all expatriates in the country. A few years later, Bourguignon was fired due to long-term illness. The latter then started civil proceedings against Gécamines before the Belgian courts[20] in which he claimed that he should still be paid an inflation-adjusted salary. The Brussels Court of Appeal finally ruled on 25 January 2000[21] that the Congolese Government's freezing order constituted force majeure for Gécamines. Although its legality was challenged by Bourguignon, the Court of Appeal ruled that it 'has no business interfering with the expediency of decisions taken by the political authorities of Zaire, except where the exercise of such sovereignty is contrary to international law'.[22] However, such restrictions on sovereignty were, according to the Court of Appeal, 'to be interpreted restrictively' and 'the court may only exercise its control if there are reliable and universally recognised rules on the subject'.[23] In this case, according to the Court of Appeal, the issue was not the sanctioning of the Congolese Government's decision but the analysis of its application between two private parties and, in particular, whether it constituted *force majeure* for Gécamines. According to the Court of Appeal, this was the case because the Congolese Government was authorised by the constitution to take the measure and it was further justified by socio-economic circumstances. Private parties (including Gécamines) therefore had to respect it and Bourguignon's claim was dismissed.

8. Finally, reference can be made to the *Touax* case (2006). This was a civil claim against the Belgian State for damages suffered by Touax and one of its Romanian subsidiaries as a result of a 1999 NATO bombing operation around Novisad in which, among other things, a bridge over the Danube River was severely damaged. Touax sought compensation only from Belgium (which itself had not directly participated in the military operation). Other NATO member states and NATO itself were not defendants. By a judgment of 18 May 2006, the Brussels Court of First Instance declared (nonetheless) that, on the basis of immunity from jurisdiction of NATO and its member states, it lacked jurisdiction to hear the claims 'in so far as it concerns a decision on the legality under international law of the decision of NATO member states, including Belgium, to intervene militarily in Kosovo, and of the implementation of that decision, in particular through the destruction of bridges over the Danube'.[24] According to the District Court, the actions of NATO and its

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16 Our translation from French original ('*Attendu, en effet, que puisqu'elle enlève au demandeur, sans aucune limitation dans le temps ou dans l'espace, l'attributent essentiel de la propriété, en édictant une défense absolue de disposer de l'ensemble de son patrimoine commercial, elle doit être regardée comme une mesure de véritable expropriation sans indemnité qui heurte le principe d'ordre international belge déposé dans l'article 11 de la Constitution et qui ne saurait, en conséquence, sortir ses effets en Belgique'*).

17 In this case-law overview, we will use the terms 'nationalization' and 'expropriation' interchangeably in accordance with common parlance. For the sake of completeness, however, we note that the terms 'nationalization', 'expropriation' and 'confiscation' can have different (legal) meanings, with 'nationalization' encompassing both 'expropriation' and 'confiscation'. Generally speaking, the distinction between 'confiscation' and 'expropriation' is whether the measure is accompanied by the payment of fair compensation. On these concepts, see further e.g. R.D. Kollewijn, '"Nationalisation" Without Compensation and the Transfer of Property', *Netherlands International Law Review* 1959, Vol.6 (2), pp. 140-173.

18 This was therefore not an attachment of property of a foreign State at the expense of a foreign State.

19 See Burgerlijke Rechtbank te Antwerpen, 21 February 1939, *Rechtskundig Weekblad* 1939, No. 30, p. 1200.

20 According to the employment contract, although Congolese law applied, the Brussels court had jurisdiction to rule on disputes.

21 See Brussels Cour d'Appel (1re Chambre), 25 January 2000, *Journal du Tribunaux 2000*, p. 790.

22 Our translation. The French original reads '*Attendu que la cour n'a pas à s'immiscer dans les décisions d'opportunité du pouvoir politique zaïrois, sauf lorsque l'exercice de cette souveraineté viole le droit international (R. Ergec, 'La doctrine de l'Act of State et la jurisprudence belge', R.D.I.D.C. 1984, p. 86)'.*

23 Our translation. The French original reads '*que les limitations a la souveraineté doivent toutefois s'interpréter restrictivement; que le juge ne doit exercer son contrôle que lorsqu'il existe en la matière des règles sûres et universellement reconnues*'.

24 Civ. Bruxelles (4ème Ch.), 18 mai 2006, *Touax c. Etat belge*, RG n° 2003/13232/A, quoted in P. d'Argent, 'Jurisprudence Belge Relative Au Droit International Public (2004-2007)', *Revue Belge De Droit International* 2007/1, p. 175. Our translation from French original. ('*sans juridiction*

member states on the one hand and that of Belgium on the other could not be separated. The court could not see how 'it could find the Belgian State guilty of such a violation of international obligations without ipso facto condemning the international organisation within which those decisions were taken, and consequently the other Member States that participated in that decision and its implementation'.[25]

9. Touax *et al.* appealed this judgment. On that occasion, the Belgian State reiterated its position that the Belgian court lacked jurisdiction to rule on the legality of the NATO operation and Belgium's involvement in the bombing. According to the Belgian State, this would violate (i) Belgian private international law and (ii) the immunity of NATO and its member states following from public international law.[26] The Brussels Court of Appeal rejected both submissions by judgment of 16 May 2013. On the invocation of immunity, the Court of Appeal was brief. Referring to Article 6(2)(b) UN Immunity Convention, it considered that

> to the extent that the misconduct of which the Belgian State is accused consists in having participated in a decision (by refusing to oppose it) of an international organisation, the assessment of the lawfulness of that decision necessarily implies an indirect assessment of the lawfulness of the decision of that organisation and its member states. However, that assessment cannot be presumed to affect the property, rights, interests or activities of the organisation's member states.[27]

The Belgian State, the Court of Appeal said, 'is therefore wrong to assert that the appellants' application requires the Belgian court to rule on the responsibility of NATO and its member states, since only its own responsibility is at issue'.[28]

pour statuer sur la demande en tant qu'elle implique un jugement de la légalité, au regard du droit international, de la décision prise par les Etats membres de l'OTAN, en ce compris la Belgique, d'intervenir militairement au Kosovo, et de la mise en oeuvre de cette décision, notamment par la destruction de ponts sur le Danube.')

25 Civ. Bruxelles (4ème Ch.), 18 mai 2006, *Touax c. Etat belge*, RG n° 2003/13232/A, quoted in P. d'Argent, 'Jurisprudence Belge Relative Au Droit International Public (2004-2007)', *Revue Belge De Droit International* 2007/1, p. 175. ('[*L*]*e tribunal n'aperçoit pas comment il pourrait considérer l'Etat belge comme coupable d'avoir violé ainsi des obligations internationales sans censurer, ipso facto, l'organisation internationale au sein de laquelle ces décisions ont été prises et, partant, les autres Etats membres qui ont participé à cette décision et à sa mise en oeuvre*').

26 See Brussels Cour d'Appel (2e Chambre), 16 May 2013, *Touax SCA et Touax ROM c. État Belge*, para. II.2.

27 Ibid., para. II.9. Our translation from French original ('*Dans la mesure où la faute reprochée à l'État belge consiste à avoir pris part à une décision (en refusant de s'y opposer) prise par un organisation internationale, juger de la licéité de cette décision implique nécessairement que soit indirectement appréciée la licéité de la décision de cette organisation et de ses États membres. Pour autant, il ne peut être considéré que cette appréciation emporte une atteinte aux biens, droits, intérêts ou activités des États membres de l'organisation*.') In a footnote, the Court refers to a quote from an article by D'Argent which – our translation – reads as follows: 'It seems unreasonable to think that the interests or activities of a State that is not a party to the dispute are undermined when asked to assess the conduct of the forum State, even though the latter may have acted in concert with the former.'

28 Ibid., para. II.10 Our translation from French original ('*L'État belge se méprend dès lors en affirmant que la demande des appelantes implique de la part des juridictions belges de juger de la responsabilité de l'OTAN et de ses États membres, seule sa responsabilité propre étant en cause*.').

10. Finally, the Belgian State had also relied on the *Monetary Gold*[29] and *Timor*[30] judgments of the International Court of Justice, from which it would also follow that the Belgian court would lack jurisdiction because the non-defendant NATO member states and NATO itself would have the status of 'indispensable third party'. However, this submission was also rejected by the Court of Appeal, already because this procedural rule applies only to international courts and not to national courts.[31]

11. Although the reliance on immunity was thus rejected, the claims of Touax *et al.* were dismissed on substantive grounds by the Brussels Court of Appeal. The cassation appeal lodged by Touax *et al.* against this judgment – in which State immunity no longer played a role – was dismissed by the Belgian Supreme Court.[32]

3. CANADA

12. State immunity in Canada is governed by the State Immunity Act. Outside cases of immunity from execution (Section 12) and *in rem* actions against certain property in use by the foreign State (Section 7), this Act provides for immunity only to the extent that the State (or part thereof) is itself a defendant in the proceedings. It follows from the decision of the Canadian Supreme Court in the *Kazemi* case that 'State' includes (former) Government officials.[33] It follows from case

29 ICJ, Case Of The Monetary Gold Removed From Rome In 1943 (Preliminary Question) (*Italy v. France, United Kingdom of Great Britain and Northern Ireland and United States of America*), Judgment, 15 June 1954.

30 ICJ, Case concerning East Timor (*Portugal v. Australia*), Judgment, 30 June 1995.

31 Moreover, the Belgian court's finding of fault by Belgium would not jeopardise the interests of NATO and its member states and would not give them 'indispensable third party' status. See Brussels Cour d'Appel (2e Chambre), 16 May 2013, Touax SCA et TOUAX ROM c. État Belge, para. II.10 ('*Cette règle de procédure s'applique au juge international – et non au juge national – et implique des États en litige qu'ils obtiennent l'intervention d'un État tiers dont les intérêts pourraient être lésés par la décision à intervenir, intervention qui ne se conçoit pas devant le juge national. En outre, la reconnaissance éventuelle d'une faute dans le chef de l'État belge ne met pas en cause les intérêts de l'OTAN ou de ses États membres et ne leur confère pas le statut de 'parties tierces indispensables'*.')

32 See Belgian Supreme Court, 9 February 2017, Case no. C.13.0528.F/1.

33 Supreme Court of Canada, *Kazemi Estate v. Islamic Republic of Iran* [2014] 3 *SCR* 176, Docket: 35034, 10 October 2014. The *Kazemi* case revolved around a Canadian citizen who visited Iran in 2003 as a freelance photographer and journalist. She was arrested, detained and interrogated by Iranian authorities. During her detention, she was beaten, sexually abused and tortured. She later died of a brain injury she suffered while in Iranian custody. Several years later, the victim's son initiated civil proceedings in Canada against the Republic of Iran and some of its (former) office holders. The Canadian Supreme Court ruled that the defendant (former) office holders also fell within the definition of 'foreign state'. Specifically, because personally suing a (former) office holder for official acts 'has many of the same effects as suing the state, effects that the SIA seeks to avoid. Allowing civil claims against individual public officials would in effect require our courts to scrutinise other states' decision making as carried out by their public officials. The foreign state would suffer very similar reputational consequences, could be forced to defend itself in Canada,

law that immunity does not exist if the State is not a defendant, even if the interests and activities of that State are at stake or even if judgments must be made on the lawfulness of that State's actions. Of particular relevance in this regard are the *United Mexican States* and *Nevsun* cases.

13. The *United Mexican States* case (2015) revolved around a union's complaint to the Canadian Labour Relations Board. The complaint alleged, among other things, that Mexico had improperly interfered in a union vote. Although not a defendant, Mexico joined the proceedings with an incidental claim in which it argued that under the doctrine of State immunity, as codified in SIA, the Labour Relations Board could not rule on its conduct. The Court of Appeal of British Colombia[34] ultimately held that immunity could not exist and that the Labour Relations Board was entitled to rule that the union vote was invalid because there had been undue interference by Mexico. Indeed, according to the Court of Appeal, the Labour Relations Board did not exercise jurisdiction over Mexico when it considered whether Mexico's conduct amounted to improper interference with the employees of the Union for the purpose of exercising its discretion to refuse to cancel the Union's certification. The Board made no orders in relation to property in the ownership, possession, or control of Mexico. It did not affect Mexico's legal interests.[35]

14. The *Nevsun* case (2020) involved three Eritrean workers who claimed they were forced to work in a mine in Eritrea by the Eritrean army and that during this forced labour, they were also subjected to violent, cruel and inhuman treatment. The mine in question was owned by the Canadian company Nevsun Resources Ltd ('Nevsun'). The Eritrean workers – who had since fled to Canada – initiated civil proceedings in the Canadian courts, seeking damages from Nevsun. They believed Nevsun was complicit in the actions of the Eritrean army. It was clear that this claim could only succeed if Eritrea's actions violated public international law.[36]

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and could still potentially suffer the same costs than if it were found liable itself (if, for example, the individual defendants attempted to obtain indemnification from the state domestically).'

34 Earlier, Mexico had been ruled against by both the Labour Relations Board and the Supreme Court of British Columbia.

35 Court of Appeal for British Colombia, *United Mexican States v. British Columbia* (Labour Relations Board), 2015 *BCCA* 32, Docket: CA041589, 30 January 2015. According to the Court of Appeal, what Mexico was actually trying to do was 'to expand the scope of state immunity by reference to the related, but different, doctrine of act of state. As I will explain, the doctrine of act of state may confer a subject matter immunity that will lead a court to decline to adjudicate matters involving the sovereign acts of foreign states even in circumstances where there is no state immunity under the SIA'. (para. 5) and 'In my view, the argument advanced by Mexico is not a state immunity argument. Rather, to the extent that it has merit, the argument invokes the related but separate principles of the act of state doctrine. Mexico did not argue act of state as an independent ground supporting a conclusion that the Board could not inquire into the sovereign acts of Mexico within its own territory. It has not argued that proposition on appeal.' (para. 48).

36 *Cf.* Court of Appeal for British Colombia, *Araya v. Nevsun Resources Ltd*, 2017 *BCCA* 401 Docket: CA44025, 21 November 2017, para. 92 ('[T]he company could be liable "if and only if" Eritrea, its officials or agents were found to have violated fundamental international norms and Nevsun were shown to have been complicit in such conduct. It is for this reason, one might infer, that

Nonetheless – and even in light of the broad interpretation previously given to the term 'foreign state' in the Canadian State Immunity Act[37] – the Canadian courts ruled that there was no civil action against Eritrea itself. An immunity derived from Eritrea for Nevsun under the Act was thus not at issue.[38] The Canadian Supreme Court ultimately ruled that the foreign act of State doctrine also did not preclude the Eritrean workers' claim as this doctrine had never become part of Canadian law.[39]

4. GERMANY

15. Germany has no special immunity law. Under the German *Gerichtsverfassungsgesetz* (in particular Article 20), the jurisdiction of the German courts is limited if customary international law or a treaty so provides. In the absence of an applicable treaty, immunity from jurisdiction is therefore regulated by customary international law (which, furthermore, under Article 25 of the German Constitution, is directly applicable in the German legal order and takes precedence over German law). Germany has not yet ratified the UN Immunity Convention. It is settled case law that German courts are required to review *ex officio* whether immunity from jurisdiction arises.[40]

16. As to relevant case law, first of all two cases related to military action by the German armed forces in the NATO context can be pointed out.

Nevsun takes the position that the act of state doctrine applies to shield Eritrea from having a British Columbia court "sit in judgment" over its sovereign acts, even though Eritrea itself and its officials are undoubtedly protected by state immunity.').

37 See *Kazemi* ruling, *supra* n. 33

38 *Cf.* Supreme Court of Canada, *Nevsun Resources Ltd. v. Araya* [2020] 1 *S.C.R.* 166, Docket: 37919, 28 February 2020, para. 121 ('However, the State Immunity Act protects "foreign states" from claims, not individuals or corporations.'). The lower courts in this case had also previously reached this conclusion. See Court of Appeal for British Colombia, *Araya v. Nevsun Resources Ltd*, 2017 *BCCA* 401 Docket: CA44025, 21 November 2017, para. 188 ('Each of Bouzari, Jones and Kazemi involved, of course, claims made against foreign states. The case at bar does not, nor does it involve claims against "servants or agents" of a state. Because of that, the SIA is not applicable and the salience of arguments based on international comity and equality is obviously attenuated: those values are clearly less relevant to a claim against a British Columbia corporation.'); and Supreme Court of British Columbia, *Araya v. Nevsun Resources Ltd*, 2016 BCSC 1856 para. 368 ('Here, the State of Eritrea is not a party and the issue is not whether one or both of the SIA and the act of state doctrine are engaged, only whether the act of state doctrine is engaged in circumstances quite different from those in United Mexican States.').

39 *Cf.* Supreme Court of Canada, *Nevsun Resources Ltd. v. Araya* [2020] 1 *S.C.R.* 166, Docket: 37919, 28 February 2020. However, the Supreme Court did find sufficient evidence that – even to the extent that the Eritrean workers' compensation claim was based on customary international law – it was not '*plain and obvious*' that they had no chance of success ('Customary international law is part of Canadian law. Nevsun is a company bound by Canadian law. It is not "plain and obvious" to me that the Eritrean workers' claims against Nevsun based on breaches of customary international law cannot succeed. Those claims should therefore be allowed to proceed.').

40 See, *inter alia*, Bundesgerichtshof, 9 July 2009, II *ZR* 46/08, para. 20 with reference to earlier case law. It is unclear to us to what extent this is merely if the foreign State did not appear in the proceedings.

17. The first of these cases is a 2005 case broadly similar to the *Toaux* case from Belgium discussed above. In this case, however, the Federal Republic of Germany was the defendant and the action was brought by a group of plaintiffs who claimed to have suffered damage as a result of a NATO air strike on the Varvarin Bridge in Serbia. The Federal Republic – like Belgium – primarily invoked immunity from jurisdiction. This appeal was rejected. On appeal, the Oberlandesgericht Köln ruled that immunity could not exist already because no State other than the Federal Republic of Germany had been sued. Nor was the liability of foreign States or State organisations at issue. However – so the Oberlandesgericht Köln considered – even

> if, as a preliminary question in the proceedings, it had to be assessed whether the attack on the Varvarin Bridge was unlawful (under international law) and therefore – since it is undisputed that fighter aircraft of the Federal Republic of Germany did not carry out the attack themselves – acts of NATO or other (unknown) States would necessarily come into the picture

there could be no immunity from jurisdiction. Indeed, according to the Oberlandesgericht, there would only be 'an incidental examination of an issue of international law, which does not specifically refer to other states in terms of liability or responsibility, but focuses on the attack as such.' This does not become different if – as an inevitable consequence – 'it would be recognised that NATO or another State has committed an act in violation of (international) law'. Again, this does not affect foreign immunity because even in that case 'no State or State organisation other than the Federal Republic of Germany would be judged.'[41]

18. Ten years later, the Oberlandesgericht Köln reached a similar judgment in a case concerning the involvement of German forces in a NATO airstrike in Kunduz, Afghanistan. That this airstrike had been carried out on the basis of NATO's ISAF

[41] See Oberlandesgericht Köln, 28 July 2005, 7 U 8/04, ECLI:DE:OLGK:2005:0728.7U8.04.00. Our translation of the German original ('*Aber selbst wenn im Rahmen des Verfahrens darüber hinaus gegebenenfalls als Vorfrage zu beurteilen wäre, ob der Angriff auf die Brücke von Varvarin (völker) rechtswidrig war und damit – da unstreitig Kampfflugzeuge der Bundesrepublik Deutschland den Angriff jedenfalls nicht selbst durchgeführt haben – notwendigerweise Handlungen der NATO bzw. anderer (unbekannter) Staaten in den Blick geraten würden, könnte die Zulässigkeit nicht verneint werden. Denn dabei würde lediglich inzidenter eine völkerrechtliche Frage geprüft, die keinen haftungsrechtlichen oder eine Verantwortung begründenden konkreten Bezug zu anderen Staaten aufweisen, sondern lediglich auf den Angriff als solchen abstellen würde. Soweit dabei als unvermeidbarer Reflex gegebenenfalls die Erkenntnis anfallen würde, dass die NATO bzw. ein anderer Staat eine (völker)rechtswidrige Handlung begangen hat, wäre auch dies im Hinblick auf § 20 GVG unschädlich, da eine fremde Immunität eben nicht konkret berührt wird. Es würde auch in diesem Fall über keinen anderen Staat oder eine Staatenorganisation geurteilt als die Bundesrepublik Deutschland*.') Although the German court thus had jurisdiction, the claim was dismissed on substantive grounds. The plaintiffs appealed this to the Federal Supreme Court and later the Federal Constitutional Court, which upheld this rejection. Immunity from jurisdiction was no longer raised in these judgments (including *ex officio*). See Bundesgerichtshof, 2 November 2006, III *ZR* 190/05; and Bundesverfassungsgericht, 13 August 2013, 2 BvR 2660/06, ECLI:DE :BVerfG:2013:rk20130813.2bvr266006.

mandate did not preclude the German court's jurisdiction because the claim was not against a foreign State or an inter- or supranational organisation but against the Federal Republic of Germany. Furthermore, the Oberlandesgericht reiterated that 'even if the legality of a sovereign measure of a foreign State or an inter- or supranational organisation were to be decided incidentally in these proceedings' the jurisdiction of the German court was not at issue 'because a foreign immunity is not specifically affected, but also in this case no State or organisation other than the Federal Republic of Germany is being judged.'[42]

19. In addition to these rulings on military action, from a German perspective, case law in foreign expropriation cases is also important. Briefly put, this case law takes as its starting point that an expropriation carried out abroad is recognised in Germany if the expropriated property was in the territory of the expropriating State at the time of the expropriation. This is different only if such recognition would constitute a violation of German public policy. This can only be the case if there is a sufficient relationship with Germany (the so-called *Inlandbeziehung*). The mere fact that the expropriated property is now in Germany is insufficient for this. By way of illustration, reference can be made to a judgment of the Oberlandesgericht Hamburg from 2005 which concerned the expropriation of a coffee plantation in Zimbabwe.[43] Referring to established case law on this point, the Oberlandesgericht held that the expropriation had taken place in Zimbabwe so that – subject to sufficient *Inlandbeziehung* – it had to be recognised in Germany. However, there was no sufficient *Inlandbeziehung* in the present case as the expropriation was not directed against a German citizen or a German company, nor was Germany the habitual residence of the plaintiff or its directors. According to the Oberlandesgericht, the mere fact that the coffee in question had entered Germany through a chain of sales transactions was insufficient to constitute a sufficient *Inlandbeziehung*.[44]

20. German judges came to similar outcomes in earlier cases on, for example,

[42] Oberlandesgericht Köln, 30 April 2015, 7 U 4/14, ECLI:DE:OLGK:2015:0430.7U4.14.00. Our translation of the German original ('*Selbst wenn in diesem Verfahren inzident über die Rechtmäßigkeit einer hoheitlichen Maßnahme eines ausländischen Staats oder einer inter- oder supranationalen Organisation zu entscheiden wäre, stünde das der Zulässigkeit der Klage nicht entgegen, weil eine fremde Immunität eben nicht konkret berührt, sondern auch in diesem Fall über keinen anderen Staat oder Organisation als die Bundesrepublik Deutschland geurteilt wird (vgl. OLG Köln, Urteil vom 28.07.2005, 7 U 8/04, NJW 2005, 2860, Rn. 74 nach juris)*.') Although the German court thus had jurisdiction, the claim was dismissed on substantive grounds. The plaintiffs appealed to the Federal Supreme Court which upheld this rejection. State immunity from jurisdiction, however, was not raised as an issue in this judgment (including *ex officio*). See Federal Supreme Court, 6 October 2016, III *ZR* 140/15, ECLI:DE:BGH:2016: 061016UIIIZR140.15.0.

[43] Oberlandesgericht Hamburg, 7 January 2005, 1 W 78/04.

[44] Ibid., para. 11.

Indonesian[45] and Chilean[46] expropriation measures in the 1970s. In one of these Chilean cases concerning the nationalisation of mines, the Oberlandesgericht Hamburg held that international law does not require a foreign State's Government action to be tested against that same international law.[47] In doing so, it referred approvingly to the considerations of the Oberlandesgericht Bremen in an Indonesian case. In that case, it had been held that it could be said that there was no rule that required such a review but that undertaking such a review did not violate international law either. The court thus has 'a free hand' to make its own choice.[48] In any case, immunity from jurisdiction does not prevent this. Thus, the Hamburg Landgericht explicitly considered that the assertion

[45] See Oberlandesgericht Bremen, I U 159/1959, I U 201/1959, 21 August 1959, *Archiv des Völkerrechts*, 9. Bd., No. 3 (September 1961), pp. 318-363. An English translation of this judgment was published in 28 *International Law Reports* 1963, p. 16 *et seq.* On this judgment, see also further *infra* n. 103.

[46] See, e.g., Oberlandesgericht Hamburg, 22 January 1973 (*Sociedad Minera El Teniente Sa v. Norddeutsche Affinerie Ag*), English translation published in 73 *International Law Reports* 1987, p. 230 *et seq*.

[47] See, e.g., Oberlandesgericht Hamburg, 22 January 1973 (*Sociedad Minera El Teniente Sa v. Norddeutsche Affinerie Ag*), English translation published in 73 *International Law Reports* 1987, p. 230 *et seq*. ('Under modern international law there is no generally recognised 'principle that the domestic judge is obligated by international law to consider as null and void ab initio a foreign act of sovereignty which is in violation of international law. Neither is there any principle that the recognition of foreign acts which are in violation of international law or, on the other hand, the recognition of a claim for surrender alleged by an earlier owner would itself again violate international law (cf. Superior Provincial Court of Bremen, 21 August 1959, ArchVölkR 9 (1961-62), 351 ff.; Soergel/Kegel, BGB, 10th edn., 1970, marginal note 529. Even if an expropriation was effected under circumstances of discrimination or was pronounced without indemnification, it remains valid if an item of property which was in the expropriating country at the time of the expropriation has subsequently come into a foreign. country (Soergel/Kegel, loco cit., marginal note 535; Superior Provincial Court of Hamburg, 8 May 1951, MDR 1951, 560). Any other position would lead to impossible complications of a political and economic nature and interfere with the international order (cf. Kegel, Internationales Privatrecht, 3rd edn., 1971, p. 443; Dolle, Internationales Privatrecht, 2nd edn., [275] 1972, pp. 5, 16; Raape, Internationales Privatrecht, 5th edn., 1961, p. 663).').

[48] Oberlandesgericht Bremen, I U 159/1959, I U 201/1959, 21 August 1959, published *inter alia* in *Archiv des Völkerrechts*, 9. Bd., No. 3 (September 1961), pp. 318-363. An English translation of this judgment was published in 28 *International Law Reports* 1963, pp. 16 *et seq.* ('If, however, in a dispute the opinions more or less counterbalance each other, as in the present case [...] then one might share Seidl-Hohenveldern's view (loc. cit, pp. 106 et seq.) neither the recognition of acts of confiscation contrary to international law nor the recognition of a claim for restoration asserted by a former owner is contrary to international law, and that therefore an adjudicating court has a free hand to decide one way or the other (cf. also Professor Beitzke's private opinion (p. 37), where it is stated that the obligation in international law to pay compensation does not affect the property right in civil law). Thus the petitioners have not succeeded in satisfying the Court, as was required in these proceedings, that the rule they rely on has replaced the hitherto valid rule. The Court is therefore justified in taking the view which, on the basis of the positive effect of the principle of territoriality, allows a national court to recognise an act of sovereignty contrary to international law by another State and leaves it to the court to decide whether it will apply the saving clause of Section 30 of the Introductory Law to the German Civil Code.').

that German jurisdiction is excluded here since the complaint requests the review of Chilean sovereign acts as a preliminary procedural matter (page 135 et seq.) cannot be upheld. Only if a foreign State is sued directly for an act which by its nature is to be considered a sovereign act is German jurisdiction absent (Federal Constitutional Court, April 30, 1963, decisions of the Federal Constitutional Court 16, 27 ff esp. 64.).[49]

21. Finally, reference can be made to the *Ramstein – Deployment of Drones* case (2025).[50] The case was brought by three Yemeni plaintiffs who argued that the German government failed in a duty to protect relatives who they claimed were killed in a 2012 US air strike carried out by drones controlled with support from a US military base in Germany. In 2015, the Verwaltungsgericht dismissed the action.[51] It assumed - in favour of the plaintiffs – that there was a sufficient territorial connection to the Federal Republic of Germany suitable to trigger a fundamental right of protection. At the same time, however, it held that there was no duty for the German Government to act, as its actions to date satisfied the minimum requirements for fulfilling its duty to protect. The German Government had not remained passive and had proceeded on the basis of an assessment under international law that was at least reasonable. In consultations with the US government, it had insisted on American use of the Ramstein Air Base only in a manner consistent with applicable German and international law. The US government had also agreed to this. Such political consultations by the German Government were not manifestly unsuitable, but rather a classic means of foreign policy to assert foreign policy interests, according to the Verwaltungsgericht.

22. This decision was partially overturned by the Nordrhein-Westfalen Oberverwaltungsgericht on an appeal brought by the plaintiffs.[52] The Oberverwaltungsgericht ordered the Federal Republic of Germany to take appropriate measures to ensure that the US Air Base Ramstein was not used for missions involving unmanned aircraft from which missiles are fired to kill people in the territory of the Republic of Yemen (Hadramaut province, in particular in the district of Al-Qutn, in the village of Khashamer, at the plaintiffs residential addresses) unless these missions were in accordance with international law (as set out in the grounds for the judgment). Insofar as necessary, the Federal Republic of Germany also had to ensure that the United States would comply with this.

23. This time the Federal German Government appealed and the Bundesverwaltungsgericht, the highest administrative court in Germany, overturned the ruling.[53] The Bundesverwaltungsgericht *inter alia* held that, contrary to the opinion

[49] Landgericht Hamburg, 13 March 1974, 5 O 80/73, English translation published in 13 *International Legal Materials* 1974, p. 1115 *et seq*.

[50] Although strictly speaking an administrative case, the considerations of the German courts in this case are worded in general terms and do not appear to be limited to administrative cases. We have therefore included it in this analysis.

[51] See Verwaltungsgericht Köln, 27 May 2015, 3 K 5625/14, ECLI:DE:VGK:2015:0527.3K5625.14.00.

[52] See Oberverwaltungsgericht Nordrhein-Westfalen, 19 March 2019, 4 A 1361/15, ECLI:DE:OVGNRW:2019:0319.4A1361.15.00.

[53] See Bundesverwaltungsgericht, 25 November 2020, BVerwG 6 C 7.19, ECLI:DE:BVerwG:2020:

of the Oberverwaltungsgericht, a duty to protect fundamental rights can only arise if, due to the number and circumstances of violations of international law that have already occurred, it can be specifically expected that comparable acts of the other state contrary to international law will also occur in the future, which would impair or jeopardise fundamental rights. According to the Bundesverwaltungsgericht, an imminent danger of violations of international law would not be sufficient in this regard as it would lead to a practically unlimited responsibility of the German State for extraterritorial matters. Instead, it was needed to establish a practice of acts contrary to international law by the other State that would go beyond isolated individual cases and against the continuation of which the German State may have to intervene on the basis of its duty to protect. Insofar as this assessment of the actions of other States under international law was concerned, the Bundesverwaltungsgericht referred to earlier case law of the German Constitutional Court and held that

> [w]hilst such assessment is not a priori exempt from an incidental legal review by national courts; for, the principle recognised under customary international law that a state is not subject to any foreign national jurisdiction (principle of state immunity), does not prohibit judicial decision on the lawfulness of sovereign acts of other states within the context of preliminary questions (see BVerfG, decision of 10 June 1997 – 2 BvR 1516/96 – BVerfGE 96, 68 <90>). However, the legal positions taken by other states carry particular weight in assessments under international law.[54]

Although the lower court's ruling had thus been based on an incorrect legal standard, the Bundesverwaltungsgericht refrained from remanding the case. This because it followed from the findings of the Oberverwaltungsgericht that the Federal Republic of Germany had in any case sufficiently fulfilled its duty to protect.

24. The plaintiffs subsequently filed a constitutional complaint which was rejected by the German Constitutional Court.[55] It held that the general mandate of the Federal Republic of Germany under Germany's Basic Law to safeguard fundamental human rights and the core principles of international humanitarian law extended to cases involving foreign countries. The Federal Republic of Germany may therefore also be obliged to enforce public international law within its own area of responsibility if public international law is violated by foreign States, including in the territory of (other) foreign States and towards foreign citizens living there.[56] At the same time, the German Constitutional Court held that such an extraterritorial duty of protection can only exist under special circumstances. A first requirement in this regard is that of a sufficient link between the danger prompting the need for protection and the sovereign powers of the Federal Republic of Germany. A second requirement is that there must be a serious risk of a systematic violation of the rules of international humanitarian law and international human rights which serve the protection of life. According to the German Constitutional Court, this does not require that a systematic violation of public international law has already taken place. However, there must be substantial indications that such violations are not only a possibility but also a genuine concern.[57] In the present case, the German Constitutional Court held, there was no serious risk of a systematic violation of applicable international law meaning that a specific duty to protect did not materialize.

5. FRANCE

25. France has no special immunity law. State immunity – with the exception of immunity from execution[58] and where no treaty applies – is governed in France by customary international law. In 2007 France ratified the UN Immunity Convention.[59] As far as we have been able to ascertain, French courts were not obliged – at least until France's ratification of the UN Immunity Convention in 2010[60] – to test *ex officio* whether immunity from jurisdiction exists if a defendant foreign State does not appear in the proceedings.[61]

251120U6C7.19.0. An English translation of the ruling is available via: https://www.bverwg.de/en/251120U6C7.19.0.

54 Ibid., para. 59. The relevant section of the decision of the German Constitutional Court referred to here by the Bundesverwaltungsgericht reads: 'In addition, an erga omnes effect cannot be based on the argument that otherwise a third State could make acts of the sending State subject to judicial proceedings, thereby violating the latter State's immunity. State immunity does not forbid such proceedings. It applies only if the State as such is party to the judicial proceedings. If the diplomat alone is party as a natural person, only diplomatic immunity comes into question (see Ress, Final Report on Developments in the Field of State Immunity and Proposal for a Revised Draft Convention on State Immunity, International Law Association, Report of the 66th Conference, 1994, p. 453 at 478, 482). Furthermore, judicial decisions concerning sovereign acts of other States, within the framework of preliminary questions, are not prohibited under international law and raise doubts only in the Anglo-American legal systems under the so-called Act of State Doctrine (see: 92 BVerfGE 211 at 322; Verdross/Simma, Universelles Völkerrecht, 3rd edn, 1984, pp. 774ff; Steinberger, *State Immunity, Encyclopaedia of Public International Law*, Part 10 (1987), p. 428 at p. 429; on the United States Act of State Doctrine see Banco Nacional de Cuba v. Sabbatino, 376 US, p. 398 at pp. 421ff; W. S. Kirkpatrick & Co., *Inc. et al. v. Environmental Tectonics Corp*., International, ILM 29 (1990), p. 184 at p. 187).' See Bundesverfassungsgericht, 10 June 1997 – 2 BvR 1516/96 – BVerfGE 96, 68, p. 90. English translation published in 115 *International Law Reports* 199, p. 595.

55 See Bundesverfassungsgericht, 15 July 2025, 2 BvR 508/21.

56 At the same time, the Constitutional Court also considered that the scope of this duty towards individuals resident in foreign countries does not necessarily have to be the same as the duty towards individuals who live within Germany. This in light of the limitations on the exercise of sovereign power imposed on Germany by public international law, meaning it does not have the same range of options to provide protection to individuals resident in foreign countries as it has in purely domestic matters.

57 The German Constitutional Court *inter alia* referred in this regard to the judgment of the Court of Appeal of the Hague in the F-35 case (see *infra* para. 55).

58 See Art. 111-1-1 *et seq.* of the Code des procédures civiles d'exécution.

59 See https://treaties.un.org/pages/ViewDetails.aspx?src=IND&mtdsg_no=III-13&chapter=3&clang=_en.

60 Under the sole article of the French adoption law (Law 2011-734 of 28 June 2011), the treaty will be implemented as if it were national law ('*La présente loi sera exécutée comme loi de l'Etat.*'). We have not been able to find out whether this already applies during the period when the treaty has not yet entered into force.

61 See Cour de Cassation, 1re Ch., 12 Octobre 1999, *Bulletin des arrêts* 1999, N° 262, p. 171.

26. Review of foreign state acts – other than against French public policy, see below – has been rejected in French case law. However, this is not because it would violate the immunity from jurisdiction of a foreign State but because the French courts do not otherwise have jurisdiction to do so. This follows, *inter alia*, from the case *Epoux Martin* (1952). The plaintiffs in this case had acquired a large number of Spanish banknotes in France. However, these had been taken from Spain without the necessary export licence. Moreover, the Spanish Government had since decided that all old banknotes should be exchanged for new ones. The claimants had subsequently presented the banknotes for exchange at an establishment of the Banque d'Espagne in Spain. Although the old banknotes were stamped (and thereby invalidated) the plaintiffs were not issued new ones. They then started civil proceedings against the Banque d'Espagne in the French courts. Both at first instance and on appeal, the French court declined jurisdiction. The Supreme Court[62] eventually ruled that although the Banque d'Espagne '*endowed with its own legal personality*' is normally not entitled to immunity from jurisdiction, this is different when – as in the present case – there are no commercial operations and 'when it is required to carry out stamping or exchange of expired banknotes, an operation carried out under conditions strictly imposed by the Spanish State on behalf of the latter'.[63] In such a case, it must be held that the Banque d'Espagne 'was an agent of the Spanish State, carrying out an act of public authority to the full extent of its powers'. Moreover, according to the Supreme Court, the acts in question 'even if the principle of immunity from jurisdiction is disregarded' constituted 'acts of authority beyond any French judicial review'.[64]

27. Incidentally, French case law (of the Supreme Court) is not entirely consistent on this point. For example, the case *Schmerber v. Schrecker* revolved around the (legality of the) annexation of the Alsace-Lorraine (Alsace-Lotheringen) region by Nazi Germany during World War II. Schrecker had been convicted by the German authorities of smuggling goods into this region after which the van used to transport these goods was confiscated and sold to Schmerber. After the war, however, Schrecker managed to have this conviction overturned and – taking matters into his own hands – took his van back. Schmerber then turned to the French courts

[62] Cour de Cassation, 3 November 1952 (*Epoux Martin v. Banque d'Espagne*), 42 *Revue critique de Droit International Privé* 425 (1953). An English translation was published in 42 *International Law Reports* 1952, p. 202 *et seq.*

[63] Our translation of the French original: *'attendu que s'il est loisible à la Banque d'Espagne, dotée d'une personnalité propre, d'effectuer normalement des actes de commerce, activité dont elle répond alors et dont elle est justiciable dans les mêmes conditions qu'un commerçant, il en est autrement lorsqu'elle est sommée d'opérer un estampillage, ou un échange de billets périmés, opération accomplie dans des conditions rigoureusement imposées par l'État espagnol par représentation de ce dernier*.'

[64] Our translation of the French original: '*attendu qu'à juste titre l'arrêt déclare que la Banque, en la circonstance, n'a été qu'un agent de l'État espagnol, accomplissant dans la plénitude de ses pouvoirs un acte de la puissance publique; que, dès lors, les actes critiqués, même abstraction faite du principe de l'immunité de juridiction, constituaient des actes d'autorité échappant à tout contrôle juridictionnel français*.'

arguing that he was the rightful owner because he had bought it from the German authorities. This claim by Schmerber was rejected. The Supreme Court ruled that the Court of Appeal had correctly considered that the German authorities had lacked any right to sell the van, in particular because 'it is contrary to international law and to the provisions of the armistice agreement of 23 June 1940 for Germany to have placed the three aforementioned departments under its civil administration and to have separated them from the other French departments'.[65] For this reason, Schmerber could also not be considered *bona fide*. As he had bought the van from the German authorities illegally establishing themselves in France, he should have had doubts as to its unlawful origin.[66]

28. Be that as it may, since both these rulings, the French Supreme Court has confirmed on several occasions that review of foreign sovereign acts under French public policy is permissible. Thus, in 1969, in the context of an Algerian expropriation case, it ruled 'that in France no legal effect can be attached to an expropriation by a foreign State without first establishing fair compensation'.[67] However, this does not mean that an action for damages brought against the successor owner will therefore always be awarded by the French court.

29. Indeed, of interest in this context is a decision of the Supreme Court in the *Sempac* case (1978). The case revolved around two French companies operating in Algeria. After Algeria gained independence in the early 1960s, the industrial assets of both French companies were nationalised by the Algerian Government and transferred to the *Societe Nationale des Semouleries, Meuneries* (Sempac), an Algerian state-owned company. In subsequent civil proceedings in the French civil court, the two French companies claimed, among other things, damages from Sempac because of the expropriation. Sempac invoked immunity from jurisdiction. This appeal was upheld by the Paris Court of Appeal. The French Supreme Court upheld that judgment on 17 November 1978.[68] According to the Supreme Court, the Court of Appeal – as the court responsible for establishing the facts – could rule that, in view of

[65] See Cour de Cassation, 1re Ch., 8 December 1954, *Bulletin des arrêts* 1954, N° 356, p. 298. Our translation of the French original: '*que c'est en violation du droit des gens et à l'encontre des clauses de la convention d'armistice du 23 juin 1940, que l'Allemagne a soumis les trois départements susvisés à son administration civile, en les séparant des autres départements français par l'organisation d'une police douanière à leur limite occidentale'.*

[66] Ibid., ('*Attendu, en effet, que l'absence de bonne foi est une question de fait que les juges du fond résolvent souverainement; qu'à cet égard la Cour d'Appel relève que si en cas de révision, les droits légitimes acquis par les tiers sont respectés, Schmerber ne saurait bénéficier de ce principe; qu'ayant acheté le véhicule litigieux à une autorité allemande illégalement établie en France, il devait se douter de la provenance irrégulière de la voiture à lui cédée, et qu'il est à considérer comme possesseur de mauvaise foi.*').

[67] See Cour de Cassation, 1re Ch., 17 November 1969, *Bulletin des arrêts* 1969, N° 343, p. 273. Our translation of the French original: '*qu'aucun effet de droit ne peut être reconnu en France a une dépossesion opérée par un État étranger, sans qu'une indemnité équitable soit préalablement fixée.*'.

[68] *Cf.* Cour de Cassation, 1re Ch., 2 May 1978, *Sté Algo et autres c v. Sté Sempac et autres*, *Clunet* (*Journal du droit international*) 1978, p. 904 *et seq.* An English translation was published in 65 *International Legal Reports* 1984, p. 73 *et seq.*

> the circumstances and conditions under which Sempac managed the establishments whose operation had been entrusted to it by the Algerian State, by virtue of a sovereign act of the Algerian State it held the assets of [the two French companies] without compensation and that the claims for compensation made by those companies on the basis of their expropriation are in fact against the Algerian State itself.[69]

30. The ruling in *Sempac* can again be contrasted with later rulings that also concerned foreign expropriations.

31. First, reference can be made to the *Sonatrach* case (1979). This was a claim for damages brought against some Algerian oil companies, including Petropar, by the heirs of a French owner of an office building in Algiers. Prior to Algerian independence, this office building was leased to Petropar. After independence, however, Petropar was nationalised and transferred to Sonatrach, an Algerian Government-controlled oil and gas company. The leased office building was then declared 'vacant' and taken possession of by Sonatrach. The heirs claimed rent and compensation from, among others, Sonatrach. The lower French courts granted this claim. The French Supreme Court upheld that judgment. According to the Supreme Court, the Paris Court of Appeal could rule that an expropriation without compensation was contrary to French public policy and could therefore have no effect there as French law only provided for a declaration of vacancy if no owner was known. Moreover, the non-payment of rent by the companies that had occupied the office building – and were therefore the beneficiaries of the expropriation – justified payment of compensation to the French owner.[70]

32. Second, reference can be made to the *Lao Import-Export* case (1987) which concerned an expropriation in Laos. The *Société internationale de plantations d'heveas* ('SIPH') claimed damages before the French court for an expropriation without compensation of its tin mining-related properties in Laos. The defendants were the State of Laos and a trio of companies that SIPH claimed had benefited from the expropriation, namely Société Lao Import Export (a state-owned company to whom the State of Laos had entrusted the exploitation and marketing of the expropriated assets) and Miu Thai and Chip Thai Realty (a Singaporean and Malaysian company to whom Société Lao Import Export had sold parts of the tin reserves accumulated before nationalisation). The French court declared

[69] Our translation of the French original: '*Mais attendu qu'ayant estimé, par une appréciation souveraine des circonstances et conditions dans lesquelles la Sempac assurait la gestion des établissements dont l'exploitation lui avait été confiée par l'Etat algérien, que c'est en vertu d'un acte de souveraineté de l'Etat algérien qu'elle dispose sans indemnité des biens des sociétés Marcel Lavie et Sapai et que les demandes d'indemnités de ces sociétés fondées sur leur dépossession sont en fait dirigées contre l'Etat algérien lui-même, la Cour d'appel a par ce seul motif légalement justifié ce chef de sa décision*.'

[70] *Cf.* Cour de Cassation, 1re Ch., 23 January 1979, *Bulletin des arrêts,* 1979 N° 27, p. 22. This judgment concerned the period 1973-1976. The French court came to a similar judgment a few years later for the period 1977-1979. The enforcement of both judgments subsequently led to an enforcement dispute that eventually also ended up before the Cour de Cassation. See Cour de Cassation, 1re Ch., 14 March 1984, *Bulletin des arrêts* 1984 N° 97. An English translation is published in 80 *International Law Reports* 1989, p. 433ff.

ex officio a lack of jurisdiction due to immunity from jurisdiction insofar as the claim was against the State of Laos. As far as the three defendant companies were concerned, the French court did consider itself competent but dismissed the claim on substantive grounds.[71] According to the French Supreme Court, the Paris Court of Appeal could have ruled so because 'these companies had only benefited from the nationalisation decision of the State of Laos' so that the three companies 'could not be held liable for any fault'.[72] In other words, SIPH was still left emptyhanded albeit on substantive grounds and not because of State immunity from jurisdiction.

33. Finally, reference can be made to the *Hulley Enterprises* case (2016).[73] This case revolved around the enforcement of an arbitral award against the Russian Federation. As part of its enforcement in France, *Hulley Enterprises* had a Russian cultural centre under construction seized and initiated civil proceedings to have work on the cultural centre stopped. The defendants in these proceedings were the Russian Federation and a construction company (Bouygues). The Russian Federation and the construction company invoked immunity from jurisdiction.[74] Regarding immunity from jurisdiction of the Russian Federation, the *juge de l'execution* of the district court of Paris considered that the construction of a cultural centre was not a commercial act. Since the Russian Federation's ownership of the property in question was not at issue, the exception under Article 13 of the UN Immunity Convention did not arise either. The appeal was therefore well-founded. The same applied to the construction company's invocation of immunity from jurisdiction. In support, the *juge de l'execution* referred to a 1925 decision of the *Tribunal Civil de Seine* which had ruled that, under circumstances, a co-contractor of the State could also claim immunity.[75]

[71] On appeal, see Cour d'Appel de Paris, 7 November 1983, *Revue critique* 1984, p. 344 *et seq*. An English translation of this judgment was published in 80 *International Law Reports* 1989, p. 430 *et seq*.

[72] *Cf.* Cour de Cassation, 1re Ch., 20 October 1987, *Bulletin des arrêts*, 1987 N° 274, p. 197. Our translation of the French original: '*Attendu que la SIPH reproche encore à la cour d'appel d'avoir déclaré mal fondée l'action introduite contre les sociétés exploitantes et acquéreurs de ses avoirs nationalisés sans indemnité, alors, selon le moyen, que l'exploitation et la commercialisation, en connaissance de cause, d'un actif nationalisé sans indemnité, constitue une faute qui présente un lien de causalité nécessaire avec le préjudice ; Mais attendu que la cour d'appel, qui relève que ces sociétés avaient seulement tiré profit de la décision de nationalisation prise par l'Etat du Laos, a pu estimer qu'aucune faute ne peut être retenue à leur charge; que le moyen doit être écarté*.'

[73] Tribunal de grande instance de Paris, Chambre des saisies immobilières, no 15/00323, 10 November 2016. Although, in our opinion, this is obviously a case concerning an attachment at the foreign State's expense of property of that foreign State, we will nevertheless discuss it in view of the considerations devoted to immunity from jurisdiction as regards the construction company also involved in the proceedings.

[74] The Russian Federation additionally invoked immunity from execution. This appeal was also upheld.

[75] This concerns the so-called '*Esnault-Pelterie*' ruling (Tribunal Civil de la Seine, 1 April 1925, *Clunet* 1925, p. 702. This case revolved around aircraft commissioned by the British Government during World War I in which an invention of the French company Esnault-Pelterie was used. Esnault-Pelterie subsequently sued the British manufacturers in France for infringing its patent.

6. ITALY

34. Italy has no special immunity law. State immunity – if no treaty applies – is governed in Italy by customary international law. Under Article 10 of the Italian Constitution, Italian law must be in line with international law. In 2013 Italy ratified the UNCSI.[76]

35. As far as relevant Italian case law is concerned, the *Anglo-Iranian* cases can be pointed out first. In brief, these cases revolved around the nationalisation of the Iranian oil industry as a result of a law passed by Iran on 1 May 1951. Specifically, this law had the effect of transferring all interests and properties of the Anglo Iranian Oil Company ('Anglo Iranian') into the hands of the Iranian Government. Cargoes of oil from Anglo Iranian's former Iranian concessions ended up in Italy, among others, after being acquired by the Italian company Unione Petrolifera Per L'Oriente, S.p.a. ('S.U.P.O.R.'). Anglo Iranian subsequently initiated several civil proceedings in Italy against S.U.P.O.R. in which it claimed that, despite the nationalization, it still had a claim to the oil in question. The first of these proceedings revolved around a cargo of oil acquired by S.U.P.O.R. on board the vessel the Miriella that had been delivered to Venice. Anglo Iranian applied for a prejudgment attachment of this cargo at the expense of the new private owner (S.U.P.O.R.).[77] According to Anglo Iranian, recognition of the nationalisation would be contrary to Italian public policy as no financial relief had been granted. S.U.P.O.R. opposed the request because, in its view, granting it would mean undoing the Iranian nationalisation law. The Venice Court (President) rejected the application for attachment on 11 March 1953.[78] Contrary to S.U.P.O.R.'s argument, the court held that the Italian court had jurisdiction to review whether recognition of the Iranian nationalisation law would be contrary to Italian public policy. According to the court, however, there was no conflict with Italian public policy because – in short – although compensation had not yet been paid by Iran, it had been promised. Anglo Iranian's second procedure (on the merits) concerned the same cargo of oil and some other cargoes and was brought before the Rome Court. Anglo Iranian also failed in this procedure. The Rome Court ruled on 13 September 1954[79] that the Italian court

> has the power and the duty, from the point of view of mere legitimacy, to examine the foreign law to determine whether it is contrary to the constitution of the foreign country, or to international public policy, or to the generally recognised norms of international law, and this on the basis of art. 31 of the Italian Civil Code and art. 10 of our Constitution. Consequently, the Italian court must refuse the application in Italy of a foreign law ordering expropriation not for reasons of public interest, but for purely political, persecutory, discriminatory, racial or confiscatory reasons. The Italian court must also refuse to apply in Italy a foreign law which, even if for non-political and non-persecutory reasons, orders an expropriation of a foreigner without compensation.[80]

According to the court, however, there was no conflict with these norms:

> in the present case, the Iranian nationalisation laws of 1951-1952 can be applied in Italy on the basis of these principles, since they do not violate the Iranian Constitution, international public policy or generally recognised norms of international law, since they provide by law for expropriation for reasons of Iran's public interest and not for persecutory or political or confiscatory or discriminatory reasons, and recognise the right of expropriated foreigners to compensation.[81]

36. Reference may also be made to the *Texaco* case (1976). This case also involved a cargo of oil, albeit this time oil that the Liechtenstein company (Villanelle Etablissement) had bought from the Libyan National Oil Corporation. After purchase, the oil was presented to the Italian company Montedison for refining. Once there, two US companies, Texaco Overseas Petroleum Company and California Asiatic Oil Company, started civil proceedings in the Italian courts claiming that they – and not Villanelle Etablissement – should be recognised as the rightful

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The Tribunal Civil de la Seine ruled that the British companies had acted on the instruction and under the supervision of the British Government acting within its sovereign powers. The mutual independence of States, according to the Tribunal, applied not only to a claim against a Government itself but also against those acting as agents, representatives or co-contractors of that Government in so far as acts done by them in that capacity or by order of the State were concerned. The French original quote reads '*Attendu, en effet, que la règle de l'indépendance réciproque des Etats doit s'appliquer non seulement aux demandes dirigées contre le Gouvernement lui-même, mais encore à celles introduites contre les agents, mandataires, ou cocontractants de ce Gouvernement, à raison des actes qu'ils accomplissent en cette qualité, ou en vertu des ordres dudit Etat.*'

[76] Article 2 of the Italian Law of Approval (Law 5/2013 of 6 May 2013) stipulates that the UNCSI shall be fully implemented in Italy 30 days after its entry into force. To date, the UNCSI has not entered into force for lack of sufficient ratifications.

[77] So again, this case did not involve attachment of property of a foreign State at the expense of a foreign State.

[78] Tribunale di Venezia, 11 March 1953, *Foro Italiano*, 78 (1953), i, p. 719. English translation published in published in 22 *International Law Reports* 1988, pp. 19-23.

[79] Tribunal di Roma, Sentenza, 13 September 1954, *Foro Italiano*, 1955, I, p. 256. English translation published in published in 22 *International Law Reports* 1988, pp. 23-45.

[80] Our translation. The Italian original reads: '*Questo Collegio ritiene invece, come sopra rilevato, che al giudice italiano competa il potere-dovere di sin dacare, sotto il profilo della mera legittimità, la legge stra niera, per stabilire se essa è in contrasto con la Costituzione del paese straniero, o con l'ordine pubblico internazionale, o con le norme del diritto internazionale generalmente rico nosciute, e ciò per effetto degli art. 31 disp. att. cod. civ. it. e 10 della nostra Costituzione. Conseguentemente deve il giudice italiano negare applicazione in Italia ad una legge straniera che disponga una espropriazione non per motivi di pubblico interesse, ma per motivi meramente politici, persecutori, discriminatori, razziali e confiscatori. Deve inoltre il giudice italiano negare applicazione in Italia alla legge straniera che, sia pure per motivi non politici e per secutori, disponga espropriazione nei confronti di uno stra niero senza indennità*.'

[81] Our translation. The Italian original reads: *'Ritiene il Collegio che nella specie le leggi nazionalizza trici iraniane del 1951-1952 possono, alla stregua di tali principi, essere applicate in Italia, non essendo contrarie nè alla Costituzione iraniana, nè all'ordine pubblico internazionale, nè alle norme di diritto internazionale generalmente riconosciute, in quanto dispongono per legge una espropria zione per motivi di interesse pubblico dell'Iran e non per motivi persecutori o politici o confiscatori o discriminatori, e riconoscono il diritto degli stranieri espropriati all'indennizzo*.'

owner of the oil. This was because the oil in question came from concessions expropriated by Libya in 1973. According to Texaco *et al.*, this expropriation constituted a flagrant violation of the general principles of international law relating to the expropriation of foreign property, as no provision had been made for any compensation. On this basis, they believed that the Libyan National Oil Corporation had not lawfully acquired ownership of the oil under international law. The subsequent sale of the oil to the Liechtenstein-based Villanelle Etablissement was thus also invalid, according to Texaco *et al.* They also argued that the 1973 Libyan expropriation law did not apply in Italy, either because it was contrary to public policy or because it was contrary to the general principles of international law that Italian courts were required to apply under Article 10(1) of the Italian Constitution. According to Montedison, the Libyan National Oil Corporation and Vilanelle Etablissement, the Italian courts did not have jurisdiction to assess the legality under international law of an expropriation. Through preliminary proceedings, this question of law was then referred to the Italian Supreme Court. In its ruling of 10 November 1976,[82] the Italian Supreme Court ruled that the Italian courts have jurisdiction to assess whether a particular foreign law was contrary to Italian public policy, which should also include international public policy. However, according to the Italian Supreme Court, Italian courts do not have jurisdiction to assess whether a foreign expropriation violates international law. This because it involves 'a question of international law, that is, a question that affects relations between states and which the Italian court, even if it has jurisdiction over a particular private law relationship, obviously cannot rule on, even incidentally'.[83]

37. Since this ruling, there have been developments in Italian case-law on State immunity from jurisdiction. In particular, the Italian Constitutional Court and the Supreme Court have ruled – in short – that within the Italian legal order there is no room for State immunity in cases of serious violations of international law.[84]

[82] Corte di cassazione, 10 November 1976, Case No. 4116, *Poro Italiano*, 1978, I, p. 1063. English translation published in 77 *International Law Reports* 1988, pp. 584-586.

[83] Our translation. The Italian original reads, '*Sotto il secondo profilo si è in presenza di una questione di diritto internazionale, cioè ad una questione che interessa i rapporti fra gli Stati e di cui il giudice italiano, ancorché investito dalla giurisdizione in ordine ad un determinato rapporto privatistico, non può ovviamente conoscere neppure incidentalmente*.'

[84] These were proceedings in which the foreign State itself was a defendant (see also n. 212 of our paper), see, *inter alia*, Corte di cassazione, 11 March 2004, Cass no 5044/04, 87 *Rivista di Diritto Internazionale* 2004, 539 (*Ferrini v. Germany*). The impasse that arose following this ruling led to proceedings before the International Court of Justice, which ruled in 2012 that, as a result of this decision, Italy had violated Germany's immunity. However, the Italian Constitutional Court 'stood its ground' and ruled in 2014 that application of the ICJ ruling would violate the right to legal protection guaranteed by the Italian Constitution (Corte costituzionale, 22 October 2014, Sentenza No. 238/2014, ECLI:IT:COST:2014:238). Germany subsequently initiated new proceedings before the ICJ. In the meantime, however, a new legal regulation was adopted providing for a national compensation procedure whereby compensation was paid by the Italian State. The Constitutional Court did not consider this scheme to be contrary to the Italian Constitution (Corte costituzionale, 4 July 2023, Sentenza 159/2023, ECLI:IT:COST:2023:159). This seemed to have taken the sting out of the dispute with Germany, which has since withdrawn its application for interim measures (the case on the merits is still pending). However, this does not take away from the fact that the Italian Supreme Court has stuck to its case law. For example, in 2021, it held that a State's immunity does not preclude exequatur proceedings against a foreign State when those proceedings seek the recognition and enforcement of a foreign court decision holding that State responsible for serious human rights violations (see Corte di cassazione, 10 December 2021, n. 39391, *Stergiopoulos v. Islamic Republic of Iran*).

7. JAPAN

38. Immunity from jurisdiction is regulated in Japan by the 2009 'Law concerning Japan's civil jurisdiction over foreign countries'. This law was adopted as part of Japan's ratification of the UNCSI. It follows from the parliamentary consideration of this law that the Japanese legislator was somewhat puzzled by the situation referred to in Article 6(2)(b) UNCSI in which the State is not a formal defendant but must nevertheless be regarded as such.[85] We have not been able to find any relevant Japanese case law explicitly addressing this situation. However, we can point to the following two judgments that pre-date 2009.

39. Both rulings were made in civil proceedings arising from the nationalisation of the Iranian oil industry in the early 1950s, discussed above.[86] The case – like the Italian cases already discussed above (see para. 35) – also revolved around a cargo of oil originating from former Iranian concessions held by the Anglo Iranian Oil Company ('Anglo Iranian'). This time about a cargo acquired by Japanese oil company Idemitsu Kosan Kabushiki Kaisha ('Idemitsu'). Anglo Iranian requested the Japanese court to attach the oil on a precautionary basis. To this end, it argued in particular that – since no compensation had been awarded – the expropriation should be ignored so that Idemitsu should not be considered the new owner of the cargo of oil.[87] At first instance, the Tokyo District Court dismissed the application – in short – on the grounds that there was no compensation-free expropriation since compensation had been promised by Iran.[88] The Tokyo Court of Appeal upheld this decision.[89] It held that there is a generally recognised principle of international law that expropriation may not take place without adequate financial compensation. However, according to the court, there was no uniform state practice as to whether the court of a third country is obliged to recognise the effects of an expropriation law such as the one at issue in the present case or whether it is permissible to examine the invalidity of such a law and possibly refuse to recognise it. Since the Iranian expropriation law promised compensation, the court did not consider itself competent to examine the validity of that law by ascertaining whether the compensation promised met the requirements to be imposed on it. In effect, the court

[85] On this, see in more detail our paper, para. 43.

[86] See *supra* Italy, para. 35

[87] Thus, this case too did not involve attachment of property of a foreign State at the expense of that foreign State.

[88] See District Court of Tokyo (Civil Ninth division) 1953. English translation published in 20 *International Law Reports* 1953, pp. 305-312.

[89] See High Court of Tokyo (First Civil Affairs Section) 1953. English translation published in 20 *International Law Reports* 1953, pp. 312-316.

acknowledged, it thus actually recognized the validity of the law. However, if it should be held that the expropriation law was contrary to Japanese public order and morality, it could not be applied in Japan.[90] According to the court, this solution (no examination of validity, but an assessment of compatibility with Japanese public policy) was 'in conformity with the principles of international comity based on the necessity of mutually respecting the sovereignty of, and maintaining friendly relations among, independent sovereigns'. According to the court, however, there was no conflict with Japanese public policy and morality because it could not be said that the expropriation would take place without compensation.

8. THE NETHERLANDS

40. The Netherlands has no special immunity law. The doctrine of immunity from jurisdiction has long been regulated in the Netherlands – via Article 13a of the General Provisions Act – by customary international law as applied in case law. Until 2018, Dutch courts were not required to review *ex officio* whether a foreign State not appearing in the proceedings was entitled to immunity from jurisdiction.[91]

41. Until the early 1970s, Dutch lower case law on the competence of Dutch courts to rule in lawsuits against foreign States and on their sovereign acts fluctuated.[92] The reason for this was that, for a long time, a violation of customary international law did not provide a ground for cassation, so that the Supreme Court could not create unity of law and lower courts reached different outcomes.[93] It was not until 1963 that the Supreme Court's scope of review was widened and extended to include violations of both statutory and non-statutory law, the latter cassation ground also including customary international law.[94]

42. To illustrate this varying jurisprudence, reference can be made, for example, to the case law of the Amsterdam Court of Appeal. A case from 1928[95] revolved around the expropriation of tobacco by the then authorities of Constantinople (Istanbul) in (the aftermath of) the Turkish-Greek War (1919-1922). The tobacco, which had been stored in a warehouse of the *Regié co-intéressee des tabacs de l'Empire Ottoman* ('Régie'), was publicly auctioned after the expropriation by

[90] This under Section 30 of the then Horei Act ('Law No. 10 of 1898 Concerning the Application of Laws in General')

[91] See Hoge Raad, 1 December 2017, ECLI:NL:HR:2017:3054, *NJ* 2019/137.

[92] See in this sense also E. Ruppert, *State Immunity in Dutch Civil Proceedings: Dutch Law of Civil Procedure and the United Nations Convention on State Immunity*, Wolters Kluwer, Deventer 2017, p. 111.

[93] *Cf.* also C. Flinterman, *De Act of State Doctrine: een rechtsvergelijkende studie naar de plaats van de Act of State doctrine in het Amerikaanse en Nederlandse recht* (dissertation), T.M.C. Asser Institute 1981, p. 55.

[94] See Act of 20 June 1963, *Staatsblad* 1963/272: 'schending van het recht' replaced the old phrase of 'schending van de wet'.

[95] Gerechtshof Amsterdam, 13 March 1928, *Weekblad van het Recht*, No. 11816.

the Constantinople authorities and purchased by a British trading company called Whittal & Co Ltd. This had the bales of tobacco shipped to Amsterdam by the N.V. Koninklijke Nederlandse Stoomboot-Maatschappij ('KNSM'). Once there, the original owner (a merchant from Constantinople named Papadopolous) placed a revindicatory attachment on the tobacco under the KNSM.[96] In the civil proceedings that followed, the Amsterdam District Court ruled that

> although none of the powers involved in this case were themselves parties to the dispute, the assessment of the legality of the acts was, by the rules of international law, removed from the assessment of the Dutch court, because the court may not affect the sovereignty of a foreign state, which it would do by declaring the acts in question unlawful and allocating the seized goods to the appellant, since it would thereby undo the acts in question.

The Amsterdam Court of Appeal overturned this decision:

> that the view of the District Court is not endorsed by the Court of Appeal in a case such as the present one, but only in cases where one of the States itself is a party to the proceedings in which the unlawfulness of acts of the sovereign Government of one of the States is alleged, including the act of a military occupation in time of war, thereby exercising de facto State power, which view is supported, in connection with the provision of Article 13a of the General Provisions Act, by the writings of authoritative writers on international law
> that, however, as the District Court itself acknowledged, the contrary view where the unlawfulness is invoked in a dispute between two individuals, is also supported by the teachings of many authors on international law
> that the Court erred in assuming that the challenged acts would be undone by a judgement, to be given on the claim of ownership of tobacco;
> that, after all, even if the Kon. Nederl. Stoomboot-Maatschappij had to hand over the tobacco landed here to the appellant, the actual measures of power of the military authorities would not be undone, namely: the removal first of the 450, later of the 878 bales of tobacco from the Regie's warehouse, the withdrawal of the tobacco from confiscation by the Turkish authorities, the auctioning of the tobacco in public, the deposit of the purchase price in Constantinople at a Bank and the removal of the tobacco from Turkey to another country;
> that, where all those measures remain in force, it is not appropriate to regard as an infringement of the sovereignty of a foreign State any decision to the effect that those acts constituted misappropriation within the meaning of Turkish law, so that, if the appellant was originally the owner of the tobacco, there would be reason to assume that he remained so notwithstanding those acts;
> that the Dutch court, as an independent judicial body of the Dutch State, is obliged to give a judgement in a dispute about property, occurring on Dutch territory, and in respect of which its competence has otherwise been established, the Dutch Government cannot legally be held responsible vis-à-vis a foreign Government for a judicial decision, in which acts of that foreign Government are declared unlawful;
> that therefore the grievance, considered in isolation, is well-founded.[97]

[96] Thus, it did not concern attachment of property of a foreign State at the expense of that foreign State.

[97] In the end, however, the Constantinople merchant was also unsuccessful before the Amsterdam

43. However, sometime later – in 1942 – the same Amsterdam Court of Appeal ruled otherwise in a similar case regarding an expropriation in the, then, Soviet Union.[98] Leaving aside the fact that the Republic of Latvia as a defendant itself enjoyed immunity from jurisdiction, the Amsterdam Court of Appeal also deemed itself incompetent for another reason. After all, it held (by way of *obiter dictum*):

> By virtue of a principle also contained in international law, the courts of one State have no jurisdiction to review the legality of acts or measures taken by another sovereign State jure imperii, in application of which principle it is of course indifferent whether that other State itself or a third party is a party to the proceedings (lack of jurisdiction ratione materiae).[99]

44. The Amsterdam Court of Appeal came to a similar judgment a few years later in the *K.P.M./Ambon* case of 1951.[100] This case revolved around ships leased by the Republic of Indonesia from the Koninklijke Paketvaart Maatschappij ('K.P.M.') in order to transport troops and materials for the purpose of the armed struggle in the Moluccas which had declared its independence from the Republic of Indonesia a year before. K.P.M. claimed to be (contractually) obliged to perform this lease. The plaintiff (the Republic of the South Moluccas) claimed in preliminary relief proceedings that K.P.M. was prohibited from making its ships available to the Republic of Indonesia because in their view this contributed to the suppression of the legitimate resistance of the Moluccans against the Republic of Indonesia. At first instance, the interim relief judge had granted this ban. The Amsterdam Court of Appeal annulled this decision and declared the Dutch courts without jurisdiction. It held in this regard:

> that the rule of international law is that a sovereign State, at least as far as acts performed by such State de jure imperii are concerned, is not subject to the jurisdiction of another State unless it voluntarily submits to it.
> that this rule is based on the fact that sovereign States are, in principle, on an equal footing with one another in international relations, which is incompatible with the fact that the judicial bodies of one State may pass judgement on acts carried out by another State on a de jure imperial basis, such as the acts of war attributed to the R.I. in the writ of summons;
> that this rule of international law also applies even though the State, whose acts must be adjudicated upon, is not a party to the proceedings and that this must certainly be assumed in a case such as the present, in which adjudication of the action brought depends on the unlawfulness of the aforementioned acts of the R.I. and in which the R.I. could oppose such adjudication as an intervening or joined party, if it wished to submit to the jurisdiction of the Netherlands courts for that purpose;

Court of Appeal. This was because, according to the Court of Appeal, under the 1923 Lausanne Peace Treaty, recognition of measures taken by the authorities in Constantinople during the war was compulsorily and disputes about them could only be submitted to a mixed arbitration tribunal. This made the Amsterdam Court of Appeal consider that the merchant's claims were not admissible and that the first instance judgment (albeit for a different reason) had to be upheld.

98 Gerechtshof Amsterdam, 3 December 1942, *NJ* 1943/340.

99 Flinterman rightly notes that this consideration is superfluous and should therefore be regarded as *obiter dictum*. See Flinterman, *supra* n. 93, p. 64.

100 Gerechtshof Amsterdam 8 februari 1951, *NJ* 1951, 129.

The court then ruled that the acts of war in question had to be regarded as *acte iure imperii* so that 'however unlawful the Dutch courts might consider the acts of war and attack described in the writ of summons' of the Republic of Indonesia 'and even if they were contrary to fundamental human rights and freedoms' the Dutch courts did not have jurisdiction to rule on them.

45. Eight years later, in 1959, the Amsterdam Court of Appeal backtracked on this strict line in the *Senembah* case. This case revolved around the administration of Dutch companies by the Republic of Indonesia.[101] The company put under administration (*Senembah*) claimed in summary proceedings the surrender of bearer shares in a batch of tobacco deposited with the Twentsche Bank in Amsterdam. These bearer shares served as collateral for a claim by Bank Indonesia against Senembah. However, according to Senembah, the administrator appointed by Republic of Indonesia had since transferred another batch of tobacco from Senembah to Bank Indonesia without entitlement (after which it had been sold). Since the value of this second batch of tobacco far exceeded Bank Indonesia's claim, it had nothing more to claim from it, according to Senembah. This meant that the collateral was also no longer needed and the bearer shares had to be returned to Senembah. Bank Indonesia opposed the granting of the claim, arguing primarily that the Dutch courts would not have jurisdiction to review the legality of sovereign acts of the Republic of Indonesia (such as the putting under administration of Senembah that was central to the dispute).[102] However, both the interim relief judge and the Amsterdam Court of Appeal considered themselves competent to do so. More specifically, the court considered:

> Considering that the Pres. [of the court in first instance; TD/CvdP] has accepted as correct the position of Senembah just reproduced, against which Bank Indonesia argues, with reference to the 'Act of State doctrine', that under applicable international law, the legality of the putting under administration of Senembah's companies, and of the management conducted over them by P.P.N.-Baru, is not at issue in this

101 Gerechtshof Amsterdam, 4 June 1959, ECLI:NL:GHAMS:1959:AG2036, *NJ* 1959/350.

102 Although (possibly) part of the Republic of Indonesia, immunity of Bank Indonesia as a litigant was not an issue, a according to the Amsterdam Court of Appeal, already because the loan agreement as such concerned a purely private law legal relationship. ('Considering in response to the first grievance, that it must be stated first and foremost that the Republic of Indonesia, whose Government took the measure of subordination challenged by the President, is not a party to these proceedings, and that Bank Indonesia, as it itself admits, has been summoned in these proceedings by Senembah as a party to a loan agreement with Senembah which it concluded with Senembah, thus in respect of a purely private law legal relationship, so that Bank Indonesia in its capacity as a State body of the Republic of Indonesia is not a party to these proceedings; Considering. that there is therefore no place in these proceedings for a declaration of lack of jurisdiction on the ground of immunity to which Bank Indonesia is entitled, especially as it has not applied for such a declaration of lack of jurisdiction and has raised an unreserved counterclaim in the counterclaim.')

case, because the Dutch court, as a foreign court vis-à-vis the Indonesian Government, may not pass judgement in that respect;
Considering in that regard, that it cannot be said to be a universally accepted rule of international law; that it may be assumed, however, that the court generally does not and should not rule on the lawfulness of acts performed by or on behalf of a foreign Government de jure imperii, but that an exception should be made to this principle where the governmental acts in question are to be regarded as manifestly contrary to international law;

The Court of Appeal then held that in the case at hand such a flagrant violation of international law had occurred. This was because the order putting Senembah's companies under administration was unmistakably discriminatory since it was directed only against Dutch companies and resulted from the Dutch position on (the future of) New Guinea. Moreover, no form of compensation had been promised by the Republic of Indonesia. Apart from being contrary to international law, the Amsterdam Court of Appeal therefore considered recognition of the administration order also to be contrary to Dutch public order. [103]

46. A similarly varying picture emerges from the case law of the Court of Appeal of The Hague. By way of illustration, reference may first be made to a judgment from 1939.[104] This case – like the decision of the Antwerp District Court discussed earlier (see above para. 6) – revolved around the nationalisation of the Mexican oil industry. A batch of petrol from the expropriated concessions had been sold by the Mexican Government to an American trader who resold it to the French Petroservice S.A. The petrol was then shipped to the Netherlands and in the meantime resold again (this time to the French Crédit Minier Franco-Roumain S.A.). The expropriated dealer in Mexico (Compania Mexicana de Petroleo 'El Aguila') then had the consignment placed under a revindicatory attachment in the Netherlands.[105] Petroservice and Franco-Roumain sought to have this attachment lifted. The Court of Appeal of The Hague eventually granted this claim. Unlike the District Court of Rotterdam,[106] the court of appeal held that the Dutch courts did

[103] In first instance the District Court had already ruled along these lines (District Court of Amsterdam 22 December 1958, *NJ* 1959/73: 'that at least the subject measure of the Indonesian Government is so contrary to the notions of morality prevailing in the Netherlands, that under no circumstances can the Dutch court be required to accept an appeal thereon'). The effect of both decisions was that the Indonesian tobacco market largely moved to Germany (Bremen). There, too, the Dutch entrepreneurs tried to secure their interests, this time without success. The Oberlandesgericht Bremen (see *supra* n. 45) ruled that the Dutch entrepreneurs had failed to prove that they were owners of the tobacco crops under Indonesian law and that – even if this were otherwise – this ownership had in any case been lost again as a result of the subordination. In the absence of *an Inlandbeziehung,* the Oberlandesgericht did not consider there to be violation of German public order.

[104] Gerechtshof Den Haag, 4 December 1939, *NJ* 1940/27.

[105] As in the Antwerp case, therefore, this case was not about attachment of property of a foreign State at the expense of a foreign State.

[106] The Rotterdam District Court (interim relief judge) had ruled that section 13a of the General Provisions Act did not preclude such a review because 'the Mexican State and its organs are not parties to these proceedings, and the judgment to be rendered by the Dutch court does not impose any burden

not have jurisdiction to rule on the underlying claim for release because it 'may not enter into an assessment of the legality of the acts of the Mexican authorities in question, but must respect the legal relationship created in Mexico by virtue of the measures referred to by that State with regard to goods located in that State and belonging to a Mexican company'. The fact that the expropriation had taken place without compensation (and therefore constituted confiscation) and was contrary to Mexican law did not make this different, according to the court of appeal, because a judgment in this matter 'requires the court to enter into an independent investigation into the validity and affectability of government acts of a foreign State and the Dutch courts should refuse to do so'.[107]

47. The Hague Court of Appeal came to a different ruling in 1963 in the *Escomptobank* case. This case revolved (again) around the putting under administration of Dutch companies by the Republic of Indonesia. Some of these companies had assigned their claims against the Escomptobank for collection to the Dutch parent company (NV Assurantie Maatschappij der Nederlanden van 1845). This parent company then sued the Escomptobank in the Dutch courts and claimed payment of the assigned claims. The Escomptobank's defence included that the assignment of the claims was invalid because the directors of the subsidiaries that had agreed to it were no longer authorised to represent these subsidiaries as a result of the Indonesian administration. The parent company argued that this subordination should be ignored given its discriminatory nature. The district court agreed and upheld the claims.[108] On appeal, Escomptobank argued, *inter alia*, that the court

or obligation on them, and only two commercial companies are parties, whose relationship must be judged according to civil or commercial law, albeit that for the assessment thereof the legality of the acts of the Mexican Government may have to be assessed.' (See Rechtbank Rotterdam, 1 September 1938, *NJ* 1939/115.

[107] The case eventually ended up before the Dutch Supreme Court, which upheld the ruling (Hoge Raad, 7 February 1941, *NJ* 1941/923). However, in the light of the Supreme Court's limited powers of review at the time (see *supra* para. 40), the Supreme Court could not decide whether the Court of Appeal had rightly assumed the existence of a rule of international law as defined by that court. See in this sense also Flinterman, *supra* n. 93, p. 63: 'Under the cassation rules of section 99 R.O., then in force, the Supreme Court was not entitled to rule on the question whether the Court of Appeal had erred in that respect.' The Supreme Court further held that Dutch public policy did not preclude recognition of the transfer of ownership as a result of the expropriation 'even though this compensation was not paid and even though, as the ground of appeal argues, the payment was not to be guaranteed'. Flinterman reads in this consideration (a first indication) that the Supreme Court is of the opinion – unlike what the Court of Appeal had held – that Dutch courts have jurisdiction to assess compatibility with Dutch public policy of foreign government acts that took place within their own territory (ibid., p. 64). For a different view, see Scholten in his annotation of the Supreme Court's judgment in *NJ.* According to Scholten reliance on a public order exception was rejected by the Supreme Court (however unsatisfactory that outcome may be). Whatever this difference in interpretation, what is clear is that in the *Escomptobank* case to be discussed below, the Supreme Court unambiguously deemed review of compatibility with Dutch public policy permissible.

[108] See Rechtbank Den Haag, 20 February 1962. The court considered, *inter alia*, 'that it is true that in general the court will, also in private law litigation, have to abstain from judging the lawfulness of iure imperii acts performed by a foreign Government, but this internationally accepted principle cannot be considered applicable to cases in which the foreign Government, according to generally

had thus 'wrongly considered itself competent to assess the validity of the legislative and executive measures of the Republic of Indonesia referred to in this case, insofar as they removed or limited the power of disposition of the directors of the Indonesian subsidiaries of the Nederlanden van 1845 over claims against Escomptobank'. However, The Hague Court of Appeal also rejected this argument with considerations similar to those of the Amsterdam Court of Appeal in the *Senembah* case (see above para. 45):

> that starting from the rule that, in general, a Dutch court is not to rule on the legality of acts performed by a foreign power de jure imperii, that same court is bound, in a dispute between private companies, to disapply such government acts and consider them non-existent when they are contrary to (unwritten) rules of international law protecting private interests.
> that since the putting under administration followed by confiscation of the Indonesian subsidiaries of de Nederlanden van 1845 without any compensation, a measure taken exclusively against companies owned by Dutch nationals or Dutch legal persons in Indonesia, constitutes a serious violation of the aforementioned rules of international law and, as such, cannot be recognised by the Dutch courts and the measures taken to that end must therefore be considered non-existent.[109]

48. What further makes the *Escomptobank* case special compared to the cases discussed earlier is that, as far as we have been able to ascertain, it was the first relevant case to be submitted to the Supreme Court *after* the amendment of the Dutch Judicial Organisation Act which had made the Supreme Court competent to rule on violations of (unwritten) international law. In cassation, Escomptobank therefore complained, among other things, that the Court of Appeal of The Hague had wrongly assumed that the putting under administration could not be recognised in the Netherlands because it was discriminatory in nature and therefore in violation of international law.[110] In the end, the Supreme Court did not express an opinion on the question whether the order putting the subsidiaries under administration was contrary to international law and instead confined itself to finding that Dutch public policy does not tolerate that measures such as those at issue in the case, which harmed Dutch interests, have effect in the Netherlands. As a result, the Supreme Court ruled, any incompetence of the directors of the subsidiaries as a result of the putting under administration could already be ignored by the court of appeal for that reason alone. This meant that Escomptobank had no interest in a ruling by the

accepted views, by its measures unmistakably acts contrary to what can be regarded as permissible and justified under international law; that it is indeed difficult to assume that the court administers justice in accordance with international law when it attributes legal effects to acts which have been carried out in breach of international law.' Considerations taken from *NJ* 1965/22.

109 Gerechtshof Den Haag, 6 June 1963 (considerations taken from the Supreme Court decision in this case to be discussed below).

110 The appeal in cassation complained, *inter alia*, that the Hague Court had thus violated the rule of law that 'a sovereign State is not subject to the jurisdiction of another State against its will in respect of acts done by it in the exercise of its public authority within its own territory'.

Supreme Court on its complaint about the court of appeal's considerations on the illegality under international law of the putting under administration.[111]

49. Thus, where the Supreme Court in the *Escomptobank* case still avoided ruling on the admissibility of review under international law of sovereign acts of foreign States,[112] it came to a judgment on this issue after all in the BHS case in 1969.[113] This case revolved around a claim by De Nederlandse Bank voor Handel en Scheepvaart NV (BHS) on the Union Banking Corporation (UBC). To secure this claim, BHS had seized (possible) property of UBC under de Rotterdamsche Trustees Kantoor (RTK) after which it brought proceedings on the merits before the Rotterdam District Court. In these proceedings, the United States subsequently intervened, claiming that it had issued various vesting orders against the Union Banking Corporation (UBC) during World War II under the Trading with the Enemy Act. As a result of which not only the shares in UBC had been expropriated (in Dutch: '*genaast*')[114] but also all third-party claims against UBC (including the claim that BHS argued that it had). UBC was subsequently liquidated by the United States in which context UBC had also settled the debt to BHS (albeit to the United States as a result). In other words, according to the United States, BHS had nothing more to claim from UBC. On the contrary, it was exactly the opposite. The attachment levied under RTK accrued to the United States because these were also properties subject to the operation of the vesting orders. As an intervening party, the United States therefore claimed, *inter alia*, that the attachment should be handed over to it. BHS defended itself against these views of the United States by arguing that the vesting orders and the (expropriation) measures based thereon could not have legal effect (in the Netherlands) because they were contrary to, *inter alia*, international law. It further brought a counterclaim seeking a declaration to that effect. The United States countered that the Dutch court had no jurisdiction to review official acts of the United States (under international law or otherwise). Both the Rotterdam District Court and the Court of Appeal of The Hague rejected this defence. This was because the United States based its claim in the main action on the vesting order so that the Dutch court had jurisdiction to rule on its (international law) validity, including in the counterclaim.[115] Both further held that the

111 See Hoge Raad, 17 April 1964, ECLI:NL:HR:1964:AD8436, *NJ* 1965/22.

112 See also C. Flinterman, *De Act of State Doctrine: een rechtsvergelijkende studie naar de plaats van de Act of State doctrine in het Amerikaanse en Nederlandse recht* (dissertation), *supra* n. 93, p. 69 (our translation): 'The Supreme Court thus favoured the private international law route of review of public policy, but did not (yet) express an opinion on review of the foreign government act under international law.'.

113 Hoge Raad, 17 October 1969, ECLI:NL:HR:1969:AB5108, *NJ* 1970/428 with an annotation by H.F. van Panhuys.

114 The original owners/shareholders of UBC were members of the Thyssen family, who were of German and/or Hungarian nationality and therefore 'enemies' within the meaning of the Trading with the Enemy Act.

115 Unlike the district court, however, the court of appeal considered that this applied only to the vesting order invoked by the United States. With regard to some other vesting orders also included in the declaratory judgment sought by BHS, the court of appeal found that it lacked jurisdiction.

vesting order and the expropriation based thereon were contrary to international law and could not be recognised by the Dutch court. BHS' claims in the main action against RTK and in counterclaim against the United States were therefore upheld. The United States' claims were all dismissed. The United States then filed an appeal in cassation, again arguing that the Dutch courts were not permitted to assess whether the expropriation was contrary to international law. According to the United States, this was not altered by the fact that it had intervened in the main action between BHS and RTK and had relied in that context on the expropriation in question. The Supreme Court rejected this argument:

> that this section [of the ground of appeal; TD/CvdP] rests on the contention that a rule of international law prohibits the Dutch court from adjudicating on the question whether or not an expropriation carried out by another State was done in violation of international law.
> however, that the existence of such a rule of international law cannot be assumed;
> Nor can the existence of a more limited rule of international law such as that referred to in the section, according to which a Dutch court may not rule on the validity under international law of an expropriation carried out by another State if the expropriated assets were situated within the territory of the neighbouring State, be assumed;
> that the same applies to the allegedly even more limited rule, according to which such judgement would be denied to a Dutch court if it does not appear that the seizure found its ground in the fact that the owners of the seized assets are Dutch citizens or are domiciled in the Netherlands or that otherwise Dutch interests are also involved in the seizure;
> that this ground of appeal therefore fails;[116]

Unlike the District Court and the Court of Appeal, the Supreme Court apparently did not consider it relevant for this power of review that the United States had intervened in the proceedings (and thus to that extent had subjected itself to the jurisdiction of the Dutch court).[117] Incidentally, the case ultimately ended well for

[116] See Hoge Raad, 17 October 1969, *supra* n. 113.

[117] In our opinion Flinterman, therefore, rightly writes that it can be inferred from this judgment that (our translation) 'the Supreme Court considers itself competent to review in the light of international law, regardless of whether the case concerns a claim in convention in a dispute between private individuals or a claim in counterclaim against a foreign state, which has voluntarily submitted to the jurisdiction of the Dutch courts'. See Flinterman, *supra* n. 93, p. 72. *Cf.* also the annotation by Van Panhuys of the judgment in the BHS case published in *NJ* 1970/428 (our translation): 'Of more far-reaching significance is the Supreme Court's ruling on the Act of State doctrine, by which reference is made here to an alleged rule of international law that would prohibit the national court, even in a dispute between private individuals, from reviewing foreign measures for their (in this case, international law) lawfulness. This problem arose in particular with regard to the main case, because it was a lawsuit between two private litigants, so that there could be no question of lack of jurisdiction ratione personae. Already earlier, the Supreme Court had to decide a case in which a similar question had arisen, namely Nederlanden van 1845/Escompto Bank (17 April 1964, NJ '65, 22). In that case, however, the Supreme Court tested the foreign confiscatory measures not under international law but under Dutch public policy. The significance of the present judgment lies mainly in the fact that our highest court has now clearly rejected the Act of State doctrine (in its various shades) as a rule of international law.'

the United States because, according to the Supreme Court, the dispossession in question could not be deemed to have been contrary to international law.

50. With this judgment, the Supreme Court seems to have definitively settled the issue surrounding the competence of the Dutch court to review *acte iure imperii* of foreign States under international law in proceedings in which the foreign State itself is not a party. It already followed from the *Escomptobank* that the Dutch court may review such acts against Dutch public policy.

51. We have found no rulings since the BHS-case indicating that the Supreme Court has backtracked on this line and is now of the opinion that the immunity of jurisdiction granted to a foreign State precludes a Dutch court from ruling on (the legality of) the actions of that foreign State in proceedings in which that State itself is not a party. There are several rulings, however, from which it follows, in our view, that the Supreme Court (and other lower courts) see no obstacles in this regard.

52. First of all, reference can be made in this context to summary proceedings against the State of the Netherlands for alleged illegality of an impending extradition. Illustrative in this context is the extradition case of *Sabir K.* whose extradition was requested by the United States for alleged involvement in terrorist offences. Sabir K. opposed his extradition, arguing, among other things, that he had been tortured in Pakistan by the Pakistani secret service at the hands of US authorities. That Sabir K. had indeed been tortured in Pakistan was not in dispute. What was in dispute was if the US authorities had had a hand in it in some way. Sabir K. eventually initiated summary proceedings in the civil courts to stop his extradition. The defendant in these civil proceedings was the State of the Netherlands. Although the decisive issue for the case was whether the US authorities had been involved in the torture, at no point did the State argue that the Dutch court should not rule on this issue because of the immunity from jurisdiction of the United States. Ultimately, the Court of Appeal of The Hague prohibited the extradition of Sabir K. because it considered it sufficiently plausible that the United States had brought about Sabir K.'s torture. The Dutch State appealed against that judgment but the Supreme Court rejected this appeal.[118] More specifically, the Supreme Court ruled – as far as relevant here:

> If, in the proceedings before the civil court, it must be presumed that the wanted person has been tortured by or partly through the actions of officials of the requesting State in connection with the matter for which extradition is sought, the Minister's decision or its implementation, also in view of the rule formulated by the extradition judge referred to above in 3.4.4, is plainly unlawful and the extradition must be prohibited by the civil court. A different view does not fit with the purpose and scope of the prohibition of torture, as laid down in Article 3 ECHR, Article 7 of the Covenant on Civil and Political Rights (Trb. 1978/177), and the Conven-

[118] See Hoge Raad, 11 July 2014, ECLI:NL:HR:2014:1680, *NJ* 2016/14.

tion against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Trb. 1985/69). Indeed, that prohibition is of mandatory law, has an absolute character, and aims to prevent torture throughout the world (cf. the aforementioned judgement of 15 October 1996, para. 5.5.3).[119]

The Supreme Court then ruled that the Court of Appeal's finding that US officials had brought about the torture of Sabir K. since they knew (or should have known) that torture would be the almost inevitable consequence of the arrest and that Sabir K.'s extradition should therefore be prohibited did not constitute an error of law and was adequately reasoned.[120]

53. Of further relevance is a 2017 ruling by the District Court of The Hague in the Crystallex/PVDSA case. The case revolved around the exploitation rights of a gold mine in Venezuela. Crystallex was the holder of these exploitation rights but at some point was expropriated by Venezuela. Crystallex then initiated arbitration proceedings based on a bilateral investment treaty (BIT) between Venezuela and Canada. Those proceedings eventually led to an arbitral award in favour of Crystallex by the International Centre for Settlement of Investment Disputes (ICSID). The ICSID panel ruled that Venezuela had breached Articles II and VII of the applicable BIT and awarded Crystallex damages of over USD 1.3 billion. As the ICSID award was not complied with by Venezuela, Crystallex placed various (third-party) attachments including in the Netherlands at the expense of Petrólos de Venezuela S.A. (PDVSA). Subsequently, Crystallex commenced proceedings on the merits in the Netherlands before the District Court of The Hague in which it claimed, among other things, a declaratory judgment that PDVSA had acted unlawfully vis-à-vis Crystallex, or at least that PDVSA had been unjustly enriched at Crystallex's expense.[121] PDVSA subsequently raised a procedural incident in which it claimed that the District Court should decline jurisdiction because of, *inter alia*, immunity from jurisdiction. The District Court rejected this claim of immunity from jurisdiction.[122] In doing so, the District Court stated first that Venezuela was not a party to these civil proceedings while these proceedings also did not relate to Venezuela's sovereign actions that led to the ICSID award.[123] As to the claim regarding PDVSA's own unlawful actions and unjust enrichment, the District Court ruled that these were independent acts of PDVSA both in factual and legal terms and were not governmental acts. The fact that these acts would not have occurred if there had been no expropriation did not, according to the District Court, mean that the alleged acquisition and sale of the rights by PDVSA were governmental acts after all.[124]

[119] Ibid., para. 3.4.6.
[120] Ibid., para. 3.5.2.
[121] These were the subsidiary and more subsidiary claims (primarily, a declaratory judgment that PDVSA and Venezuela could be identified for the purposes of execution of the ICSID judgment was sought). In both the subsidiary and more subsidiary claims, it was also claimed that PDVSA should be ordered to pay compensation for the damage suffered by Crystallex as established in the ICSID judgment.
[122] Rechtbank Den Haag, 18 October 2017, ECLI:NL:RBDHA:2017:11906.
[123] Ibid., para. 5.14.
[124] Ibid., para. 5.17. Earlier on in its judgment, the District Court had already dismissed the reliance on State immunity as regards the primary claim (identification / alter ego). This was because, in the District Court's opinion, it did not relate to the performance of a government task (neither viewed in terms of the nature of the act nor in terms of its purpose) so that for that reason alone there could be no immunity from jurisdiction (see para. 5.16).

54. Reference can also be made to a ruling of the District Court of The Hague revolving around alleged involvement of Dutch companies in the supply of raw materials for mustard gas used by the then Iraqi regime in the war with Iran in the 1980s. Five victims of these poison gas attacks held the Dutch companies liable for this. The court dismissed these claims with the exception of that against the company that did not appear in the proceedings. State immunity from jurisdiction of Iraq was not raised in these proceedings by any of the parties nor *ex officio* by the District Court.[125]

55. Also relevant are the summary proceedings against the State of the Netherlands on the export and transit to Israel of components for the F-35 fighter jet ('Joint Strike Fighter'). Three interest groups argued that the Dutch State acted unlawfully by not prohibiting these exports and transits as this would contribute to alleged violations by Israel of international humanitarian law.[126] Although it was essential to the assessment of the claims whether there was a clear risk of serious violations of humanitarian law of war as a result of Israel's deployment of the F-35, it was not argued by the Dutch State that Dutch courts lacked jurisdiction to rule on these claims in light of State immunity from jurisdiction of Israel. This notwithstanding that a judgment upholding the interest groups' claims would have consequences for Israel's activities. The interim relief judge – who eventually dismissed the claims – also did not express an opinion on this immunity question *ex officio*.[127] The three interest groups appealed against the dismissal. In this appeal, too, the Dutch State did not invoke Israel's immunity from jurisdiction, nor did the court of appeal rule on this *ex officio*. However, the Court of Appeal did rule that there was 'a clear risk that F-35 components to be exported to Israel will be used in committing serious violations of international humanitarian law' and that the Dutch State acted unlawfully by not preventing the export and transit of F-35 parts to Israel.[128] This case is currently pending before the Supreme Court.[129]

56. Another recent and relevant case is the *Cerbuco* case.[130] Cerbuco Brewing Inc. ('Cerbuco') had acquired exclusive rights to produce, distribute and sell beer in the Republic of Cuba through a joint venture (Bucanero S.A.). These rights had

[125] See Rechtbank Den Haag, 15 November 2023, ECLI:NL:RBDHA:2023:17263.
[126] For a somewhat similar case on the supply of military goods to Egypt, see Gerechtshof Den Haag, 17 May 2022, ECLI:NL:GHDHA:2022:834. In this case, too, the Dutch State did not invoke Egypt's immunity from jurisdiction, nor was this immunity considered *ex officio* by either the District Court or the Court of Appeal.
[127] See Rechtbank Den Haag, 15 December 2023, ECLI:NL:RBDHA:2023:19744.
[128] See Gerechtshof Den Haag, 12 February 2024, ECLI:NL:GHDHA:2024:191, para. 5.19.
[129] In his advisory opinion the Advocate-General does not refer to the doctrine of immunity from jurisdiction. See Opinion of 29 November 2024, ECLI:NL:PHR:2024:1279.
[130] Gerechtshof 's-Hertogenbosch, 23 July 2024, ECLI:NL:GHSHE:2024:2380, *JOR* 2024/276 with an annotation by G.R. den Dekker. The present paper is partly based on an expert opinion provided by the authors at the request of the appellant in this case.

been granted by the Cuban Government in a series of government decrees (known as 'Acuerdos') and were revoked in 2019 by Acuerdo no. 8557. Cerbuco then initiated civil proceedings in the Netherlands against the companies involved in a new brewery in Cuba. Cerbuco claimed that these parties had unlawfully benefited from the revocation of its exclusive rights. It requested the court to 1) declare that the respondent companies are individually or jointly committing an unlawful act against Cerbuco by taking advantage of the violation of Cerbuco's exclusive right or, at least, its preferential right, 2) order the respondent companies to cease and desist from any activity that infringes Bucanero's exclusive right or, at least, its preferential right in Cuba, on pain of a penalty, 3) order the respondent companies to compensate Cerbuco for the damage it has suffered and will suffer as a result of the unlawful act committed by them, to be determined at a later date and 4) order the respondent companies to repay the unjust enrichment to Cerbuco.

57. Even though Cuba was not named as a party to the proceedings, the defendant companies – supported by a diplomatic note from Cuba invoking State immunity which was also submitted to the Dutch authorities – argued that the Dutch courts lacked jurisdiction due to Cuba's immunity from jurisdiction. The District Court of Oost-Brabant agreed.[131] It held – in short – that the proceedings were intended to affect the property, rights, interests, or activities of the Republic of Cuba and the fact that a judgment could not be enforced directly against the Republic of Cuba did not alter this. According to the District Court, a ruling on the (il)legality of the agreements in question (typical acts of government) undeniably affected the sovereign interests of the State of Cuba.[132]

58. Cerbuco unsuccessfully appealed this judgment. According to the 's-Hertogenbosch Court of Appeal the main question in these proceedings was whether the Republic of Cuba acted unlawfully when it revoked the exclusivity and preferential rights of Cerbuco and Bucanero (qualified as *acta iure imperii* by the Court[133]). It followed from the wording thereof that Cerbuco's claims were aimed at stopping the respondent companies from continuing their activities in the Republic of Cuba and that upholding these claims would mean that Acuerdo no. 8557 (revoking Cerbuco's and Bucanero's exclusive and preferential rights) would in effect be rendered null and void. According to the Court of Appeal if it would be established that the respondent companies are acting unlawfully and are liable to Cerbuco for their activities in the Republic of Cuba, and would be prohibited from continuing those activities, the Dutch courts would directly influence the exercise by the Republic of Cuba of its sovereign powers on its own territory and, in effect, exercise authority over the Republic of Cuba.[134]

59. The Court of Appeal clarified that these findings did not concern an application of the so-called foreign act of State doctrine. According to the Court of Appeal, it is generally accepted that this doctrine does not apply under Dutch law and Dutch courts are free to determine what legal consequences should be attributed in the Netherlands to the actions of a foreign State. However, this case did not concern the legal consequences to be attributed in the Netherlands to the actions of the Republic of Cuba, but rather the fact that the purpose of the proceedings was to deprive the Republic of Cuba of the effect of its withdrawal of the exclusivity and preferential rights in Cuba. This, the Court of Appeal held, was a question of State immunity, because it affected the sovereign rights and interests of the Republic of Cuba.[135]

60. In the last part of its ruling the Court of Appeal addressed the question of whether Article 6(2)(b) of the UN Immunity Convention had the status of customary international law. Although the Court of Appeal considered that in this case that question could be left open, it held, after examining case law and literature, that the provision reflected customary international law. However, whether the property, rights, interests or activities of the foreign State were affected to such an extent that State immunity from jurisdiction of that foreign State would be at stake depended on the circumstances of the case.[136]

61. We understand that this judgment of the 's-Hertogenbosch Court of Appeal was not appealed to the Supreme Court and has become final.

62. Lastly, reference can be made to a recent judgment of the District Court of The Hague in which it declined jurisdiction due to the Russian Federation's jurisdictional immunity in *exequatur* proceedings in which Gazprom was the defendant. These *exequatur* proceedings concerned a Ukrainian court judgment that held Gazprom jointly and severally liable for claims against the Russian Federation because Gazprom could be identified with (was an alter ego of) the Russian Federation ('Gazprom judgment'). The Gazprom judgment followed a default judgment from the Ukrainian courts against the Russian Federation, which ordered it to pay compensation to a Ukrainian agricultural company for grain losses caused by the Russian Federation's invasion of Ukraine in 2022 ('RF judgment'). As the request for recognition and enforcement of the Gazprom judgment was not based on any independent action by Gazprom, and since the actions of the Russian Federation that formed the basis of the RF judgment (which was not the subject of the *exequatur* proceedings) were *acta iure imperii*, the District Court concluded that the Russian Federation's jurisdictional immunity was at issue in the *exequatur* proceedings regarding the Gazprom judgment.[137] The District Court of the Hague reached a similar judgment several weeks later in another case involving Gazprom and Ukrainian plaintiffs.[138]

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131 Rechtbank Oost-Brabant, 5 October 2022, ECLI:NL:RBOBR:2022:4157, *JBPr* 2023/17 with an annotation by G.R. den Dekker.

132 Ibid., in particular para. 4.13.

133 Gerechtshof 's-Hertogenbosch, 23 July 2024, *supra* n. 130, paras. 3.7.1-3.7.8.

134 Ibid., para. 3.8.1.

135 Ibid., para. 3.8.5.

136 Ibid., paras. 3.8.6-3.8.12.

137 Rechtbank Den Haag, 5 June 2025, ECLI:NL:RBDHA:2025:9883.

138 See Rechtbank Den Haag, 17 July 2025, ECLI:NL:RBDHA:2025:14067. This judgment of the District Court of the Hague and the one mentioned in n. 137 can be contrasted with a recent judgment of the Amsterdam District Court which also concerned several Gazprom entities and a Ukrainian plaintiff. In this case, however, the argument of the Ukrainian plaintiff was not that

9. NORWAY

63. Norway has no special immunity law. The doctrine of immunity from jurisdiction is regulated in Norway through national legislation[139] which refers back to the limitations following from international treaties to which Norway is a party or generally accepted rules of international law. In 2005 Norway ratified the UNCSI.[140]

64. In terms of relevant case law, reference can be made to the *Scancem* case (1998). This case revolved around a cement factory in Sierra Leone of which the plaintiffs were majority shareholders. By decree of 7 February 1994, all assets of the cement factory were expropriated by the Government of Sierra Leone. Subsequently, these assets were transferred by agreement to Scancem International ANS (Scancem), a Norwegian company. The shareholders of the cement plant subsequently initiated civil proceedings in Norway. In these proceedings, they claimed damages from Scancem because, according to the plaintiffs, Scancem knew, or at least should have known, that the expropriation was unlawful and that Scancem acted unlawfully prior to, at and after entering into its agreement with the authorities of Sierra Leone. Scancem filed an incidental claim in response in which it argued, *inter alia*, that the Norwegian courts lacked jurisdiction because ruling on the claims would violate Sierra Leone's immunity. Norwegian review of the expropriation decision would, *inter alia*, 'violate the rights, interests and activities' of Sierra Leone, according to Scancem (thereby presumably referring to ILC Draft Articles that had already been adopted by then and would eventually become the UNCSI). The Borgarting Court of Appeal[141] rejected this argument and held that

the Gazprom entities were an *alter ego* of the Russian Federation. but rather - in short - that the Gazprom entities had committed an independent tort by facilitating the Russian invasion of Ukraine and could therefore be held jointly and severally liable under Ukrainian law for the damage this had caused to the plaintiff. On that basis the Amsterdam District Court distinguished the case from the two judgments of the District Court of the Hague and held that it was "at least defensible" that Russia's immunity from jurisdiction would not stand in the way of the Dutch courts ruling in the *exequatur* proceedings. See Rechtbank Amsterdam, 14 August 2025, ECLI:NL:RBAMS:2025:5971. It should be noted that this judgment did not concern *exequatur* proceedings as such but rather summary proceedings initiated by the Gazprom entities with the aim of having an attachment lifted which had been levied on some of their assets pending the *exequatur* proceedings. In such proceedings the relevant test insofar as immunity from jurisdiction is concerned is - stated succinctly - whether immunity from jurisdiction would result in the claims of the Ukrainian plaintiff being *prima facie* unfounded (*summierlijk ondeugdelijk*). For the sake of transparency it is noted that the Ukrainian plaintiff relied on an expert opinion drawn up by one of the authors of the present paper (Prof. Van der Plas) and that this opinion *inter alia* referred to some of the - at that time still draft - findings and conclusions of the present paper.

139 Initially this was section 36 of the Civil Procedure Code (Act of 13 August 1915 No. 6), later replaced by sections 1 and 2 of The Dispute Act (Act of 17 June 2005 no. 90. See also R. Fife and K. Jervel, 'Elements of Nordic Practice 2000: Norway', *Nordic Journal of International Law*, 70(4) 2001, p. 549; and A. Kravik, 'State Immunity in Norwegian Courts Recent Developments, Current Challenges and the Way Forward', *Nordic Journal of International Law*, 90(4) 2021, p. 437.

140 See https://treaties.un.org/pages/ViewDetails.aspx?src=IND&mtdsg_no=III-13&chapter=3&clang=_en.

141 See Borgarting lagmannsrett, No. 98-01848 K/04, 15 October 1998, *Rettens Gang* 1999 p. 793 ff (the judgment is described in R. Fife and K. Jervel, 'Elements of Nordic Practice 2000: Norway', *Nordic Journal of International Law*, 70(4) 2001, pp. 551-552). Earlier, the Oslo Court had reached the same conclusion. As far as we have been able to ascertain, the judgment was not appealed to the Norwegian Supreme Court.

Sierra Leone's immunity from jurisdiction was not affected by the proceedings:

> 'The defendant is not a foreign State but a company based in Norway, and the issues regarding the legality of the expropriation decision will only have preliminary significance. It will therefore not be relevant to determine anything regarding the legal status of a foreign State,' the Borgarting Court of Appeal held.[142] It added that this would be no different if it were the case that the success of the claim 'depends on the court's finding that the expropriation decision is unlawful.'[143]

10. SPAIN

65. Article 21(2) of the Spanish Ley Orgánica 6/1985 (Judicial Organisation)[144] provides that the jurisdiction of the Spanish courts does not extend to claims relating to persons or property that enjoy immunity under Spanish law and norms of public international law.[145] This is further elaborated on in Ley Orgánica 16/2015 (State Immunity).[146] Article 2 of this Ley Orgánica provides a definition of 'State' namely (i) the State and its various organs of Government; (ii) the constituent parts of a federal State or political subdivisions of the State, authorised to perform acts in the exercise of sovereign authority and acting in that capacity; (iii) agencies and institutions of the State and other public bodies, even if they have separate legal personality, provided that they are authorised to perform acts in the exercise of the State's sovereign authority and are acting in that capacity; and (iv) representatives of the State when acting in that capacity.[147] Article 4 then states

142 Ibid., The Norwegian original reads: '*Det kan imidlertid ikke sees at Sierra Leones jurisdiksjonsimmunitet er berørt av saksanlegget. Saksøkte er ikke en fremmed stat, men et selskap med hjemting i Norge, og problemstillingene knyttet til lovligheten av ekspropriasjonsdekretet vil kun ha prejudisiell betydning. Det vil således ikke være aktuelt å fastsette noe med hensyn til en fremmed stats rettsstilling*.'

143 Ibid., The Norwegian original reads: '*Lagmannsretten legger til at dette må bli konklusjonen, selv om det skulle være slik at muligheten for å nå frem med erstatningskravet avhenger av at retten kommer til at ekspropriasjonsdekretet var urettmessig*.'

144 In full: Ley Orgánica 6/1985, de 1 de julio, del Poder Judicial.

145 The Spanish original of Article 21(2) reads '*No obstante, no conocerán de las pretensiones formuladas respecto de sujetos o bienes que gocen de inmunidad de jurisdicción y de ejecución de conformidad con la legislación española y las normas de Derecho Internacional Público*.'

146 In full: Ley Orgánica 16/2015, de 27 de octubre, sobre privilegios e inmunidades de los Estados extranjeros, las Organizaciones Internacionales con sede u oficina en España y las Conferencias y Reuniones internacionales celebradas en España.

147 Our translation. The Spanish original reads: '*(i) El Estado y sus diversos órganos de gobierno; ii) Los elementos constitutivos de un Estado federal o las subdivisiones políticas del Estado, que estén facultados para realizar actos en el ejercicio de la autoridad soberana y actúen en tal capacidad; iii) Los organismos e instituciones del Estado y otras entidades públicas, unque tengan personalidad jurídica diferenciada, siempre que estén facultados para realizar actos en el ejercicio de la autoridad soberana del Estado y que actúen en tal capacidad; y iv) Los representantes del Estado cuando actúen en esa condición.*'

'any foreign State and its possessions shall enjoy immunity from jurisdiction and enforcement before Spanish courts, under the conditions and provisions provided for in this Organic Law'.[148] Article 51 of Ley Orgánica 16/2015 further provides that 'for the purposes of this Organic Law, proceedings shall be deemed to have been brought before the Spanish courts against any of the entities or persons who, in accordance with this Organic Law, enjoy immunity, if any of them is mentioned as a party against whom the proceedings are brought'.[149] In 2011 Spain ratified the UN Immunity Convention.[150]

66. The question to what extent a foreign State in Spain enjoys immunity from jurisdiction in proceedings in which it is not named as a defendant but the (legality) of its actions is at stake is not – as far as we have been able to check – explicitly answered in Spanish legislation. However, there is relevant Spanish case law on this point.

67. First, reference can be made to the recent *Melia Hotels* case. The case revolved around the expropriation by the Cuban Government in the early 1960s of land belonging to two Cuban companies. The expropriated land included the area around Playa Esmeralda in south-eastern Cuba. This area contains two hotels owned by the Cuban state-owned company Gaviota S.A. The hotels are operated by Melia Hotels International S.A. ('Melia'), a Spanish hotel chain based in Palma de Mallorca. The American company Central Santa Lucia L.C. ('Santa Lucia'), which claimed to be the legal successor of the two expropriated Cuban companies, initiated civil proceedings in Palma de Mallorca (Spain) against Melia in 2019. In these proceedings, Santa Lucia claimed unjust enrichment because Melia operated the hotels, knowing that, in the absence of any compensation, the expropriation was unlawful under international law. Melia invoked, among other things, Cuba's State immunity. The Palma District Court found this appeal to be well-founded and declared that it had no jurisdiction to hear Santa Lucia's claims.[151] It held that, although the claim was not formally directed against the Cuban State (but against a private company), its real basis was a finding of the illegality of the property right that Cuba has over the Playa Esmeralda piece of land, where Melia operated the two hotels, and the responsibility that Melia may have had for profiting from this piece of land, despite knowing how it came into the hands of the State of Cuba. Santa Lucia's claims were thus based, according to the Palma District Court, on the legal assessment of acts carried out by a subject protected by immunity from

[148] Our translation. The Spanish original reads, '*Todo Estado extranjero y sus bienes disfrutarán de inmunidad de jurisdicción y ejecución ante los órganos jurisdiccionales españoles, en los términos y condiciones previstos en la presente Ley Orgánica*.'

[149] Our translation. The Spanish original reads, *'A los efectos de la presente Ley Orgánica, se entenderá que se ha incoado un proceso ante los órganos jurisdiccionales españoles contra cualquiera de los entes o personas que, de conformidad con la presente Ley Orgánica, gozan de inmunidad, si alguno de ellos es mencionado como parte contra la que se dirige el mismo.'*

[150] See https://treaties.un.org/pages/ViewDetails.aspx?src=IND&mtdsg_no=III-13&chapter=3&clang=_en.

[151] See Juzgado de Primera Instancia No. 24 Palma de Mallorca, Auto num. 153/2019, 2 September 2019, ECLI:ES:JPI:2019:6A.

jurisdiction, Cuba, in the context of its sovereignty. Moreover, the proceedings concerned Cuba's property so that immunity also existed for that reason.

68. Santa Lucia appealed against this ruling. By decision of 18 March 2020, the Palma de Mallorca Court of Appeal upheld this appeal and referred the case back to the court of first instance.[152] According to the Court of Appeal, Santa Lucia's claim was not against the Republic of Cuba. Melia's argument that, under UNCSI, it is sufficient that the claim was aimed at depriving the property, rights, interests etc. of that other State was rejected. According to the Court of Appeal, such an interpretation of the UNCSI could not be substituted for the provisions of Article 51 of Ley Orgánica 16/2015 (State Immunity) which requires that the immunity-granting party be a defendant.[153] As no action had been brought against a foreign State or its assets, the Spanish courts thus had jurisdiction and the appeal was well founded. In this context, the Court of Appeal also referred to the *Barcadi/Havana Club* ruling of the Spanish Supreme Court, to be discussed below, and the consideration therein that while it is not the role of the Spanish courts to review the legality of a Cuban expropriation, claimants are entitled to indirect review by the Spanish courts where legal effects of such an expropriation in Spain are concerned.[154] Since, according to the Court of Appeal, the Spanish courts had jurisdiction, the case was referred back to the Palma District Court to be heard on the merits.

69. After referral, Melia invoked the plea of *falta de litisconsorcio pasivo necesario* existing under Spanish law and argued that the Republic of Cuba and the current owner of the area around Playa Esmeralda, the Cuban state-owned company Gaviota S.A., were indispensable defendants in the civil proceedings. This plea was upheld by the Palma District Court and Melia did not appeal this decision. Melia then sued Cuba and Gaviota S.A. as co-defendants in the proceedings. Thereupon, the Spanish Foreign Ministry was invited to comment on whether Cuba was entitled to immunity in the proceedings.[155] The Spanish Ministry subse-

[152] See Audiencia Provincial Palma de Mallorca (Sección 3ª), Auto num. 66/2020, 18 March 2020, ECLI:ES:APIB:2020:37A.

[153] According to the Court of Appeal, the requirement of being a defendant was also reflected in Article 49 of Ley Orgánica 16/2015 (State Immunity), which obliges Spanish courts to assess *ex officio* the immunity issues referred to in that law and refrain from hearing cases brought before them 'when a complaint or lawsuit has been filed or proceedings have otherwise been initiated or an enforceable measure has been requested in relation to any of the entities, persons or property enjoying immunity in accordance with this Organic Law'. (our translation. The Spanish original reads '*cuando se haya formulado demanda, querella o se haya iniciado el proceso de cualquier otra forma o cuando se solicite una medida ejecutiva respecto de cualquiera de los entes, personas o bienes que gocen de inmunidad conforme a la presente Ley Orgánica*').

[154] According to the court of appeal, Santa Lucia also did not claim that it should be compensated by the Cuban State while the mere knowledge of the effects of the application of Spanish rules to the Cuban expropriation did not qualify as direct control over Cuba. ('*Ocurre en el supuesto de autos que la parte actora no pretender ser resarcida por el Estado cubano, ni a través del conocimiento de los efectos de la aplicación de sus normas se ejerce sobre ello un control que pudiera calificarse como directo*.')

[155] Pursuant to Article 27(2) of Ley Orgánica Ley 29/2015 (International Legal Cooperation in Civil Matters), Spanish courts shall inform this Ministry 'of the existence of any proceedings against

quently indicated that the expropriation was to be considered an *acta iure imperii* protected by immunity from jurisdiction before the Spanish courts. Cuba itself, by diplomatic note, subsequently also formally invoked immunity from jurisdiction. By judgment of 27 January 2023, the Palma District Court thereupon declined to hear Melia's claims in light of Cuba's immunity from jurisdiction. According to the court, the joinder of Cuba in the proceedings had created a new situation when compared to that in the earlier decision of the Palma de Mallorca Court of Appeal and, notwithstanding that earlier decision, it was therefore required to decline jurisdiction.[156] This judgment was confirmed on appeal.[157]

70. The *Bacardi/Havana Club* case referred to by the Palma de Mallorca Court of Appeal revolved around a nationalisation in the 1960s by the Cuban Government of all properties, rights and shares of José Arechabala SA. This company was engaged in the manufacture and sale of rum and the expropriated rights included the brand name 'Havana Club' which was (also) registered in Spain. After several transfers since the expropriation, this brand name eventually came into the hands of Havana Club Holding SA, which was also registered as the holder of the brand in Spain. No longer able to achieve its goals, the nationalised owner, José Arechabala SA, eventually decided to cease operations but not after its 'rights' to the *Havana Club* brand name were transferred to, eventually, Bacardi & Company Limited ('Bacardi'). Bacardi (and its former owners), several years later, in 1999, commenced civil proceedings in Spain seeking to revoke the registration of the 'Havana Club' brand name in favour of Havana Club Holding SA and to reinstate its own Spanish registration of that brand. Underlying these claims was Bacardi *et al*.'s contention that the illegality of the expropriation resulted in the absolute invalidity of the registrations in the Spanish trademark register and that the subsequent transfers of the trademark should never have been registered in the first place. The defendants in these proceedings were Havana Club Holding SA and its predecessors.[158] Both at first instance and on appeal, Bacardi *et al*.'s claims were dismissed. In short – because the claims were time-barred. Bacardi *et al*. then appealed to the Spanish Supreme Court (*Tribunal Supremo*). In its ruling of 30 December 2010,[159]

a foreign State, for the sole purpose of drawing up a report on issues relating to immunity from jurisdiction and enforcement, which shall be forwarded to the competent court by the same route.' (our translation. Spanish original: '*Los órganos jurisdiccionales españoles comunicarán al Ministerio de Asuntos Exteriores y de Cooperación la existencia de cualquier procedimiento contra un Estado extranjero a los solos efectos de que aquel emita informe en relación con las cuestiones relativas a la inmunidad de jurisdicción y ejecución, del que dará traslado al órgano jurisdiccional competente por la misma vía*.')

156 See Juzgado de Primera Instancia No 24 Palma de Mallorca, Nº de Recurso: 542/2019 27 January 2023, ECLI:ES:JPI:2023:17A.

157 Audiencia Provincial Palma de Mallorca (Sección 4), Auto num. 74/2024, 18 March 2020, ECLI:ES:APIB:2024:47A.

158 The Republic of Cuba was also one of the defendants but did not appear in the proceedings. Default was therefore granted against Cuba after which the proceedings against Havana Club Holding SA *et al.* continued.

159 Tribunal Supremo, 30 December 2010, STS 747/2010, ECLI:ES:TS:2010:7666.

this court – citing previous case law of the Spanish Constitutional Court and the public order exception in the Spanish Civil Code[160] – considered that it is not the task of the Spanish court to review the legality of expropriations applied by law by Cuba in its own territory. Nevertheless,

> given the significance of the existence and legality of the legal basis in our system of property allocation, it is necessary to assess it to the extent necessary to establish the validity of the new ownership resulting from the expropriation of trademark number 99,789, and published by the Industrial Property Registry. The plaintiffs are fully entitled to this indirect control, in accordance with our legal system.[161]

The Spanish Supreme Court then ruled that since the expropriation had taken place without any compensation, it could not be recognised within the Spanish legal system. This, in turn, meant that the acquisition of the trademark

> by the State of Cuba, even if subject to the laws of this country, does not constitute a valid reason to have the registration in the Spanish register of industrial property declared invalid in favour of José Arechabala SA as owner of this intangible asset, or, in other words, to trigger the corresponding change of ownership challenged in the petition.[162]

Nevertheless, the appeal was dismissed because the lower court had rightly ruled that the claims of Bacardi *et al.* were time-barred.

11. UNITED KINGDOM

71. State immunity is regulated in the United Kingdom by the State Immunity Act 1978 (SIA 1978). Outside cases of immunity from execution and *in rem* claims against certain property in use by the foreign State (Sections 10 and 13), the SIA 1978 only provides for immunity to the extent that the State (or part thereof) is itself a defendant in the proceedings. It follows from case law that 'State' should be understood to include (former) Government officials and agents.[163] A defendant

160 Art. 12(3) ('*En ningún caso tendrá aplicación la ley extranjera cuando resulte contraria al orden público*.'. Our translation: '*In no case shall foreign law apply if it is contrary to public order.'*).

161 Our translation. The Spanish original reads: '*dada la significación que en nuestro sistema de atribución patrimonial tienen la existencia y la licitud de la causa, valorarlas en la medida en que sea necesario para determinar la validez de la nueva titularidad causada por la expropiación de la marca número 99.789, y publicada por el registro de la propiedad industrial. A ese control indirecto tienen pleno derecho los demandantes, conforme a nuestro ordenamiento*.'

162 Our translation. The Spanish original reads: *'la adquisición de la marca número 99.789] por el Estado de Cuba, pese a estar regulada por el ordenamiento de dicho país, no pudo constituir causa lícita apta para provocar, en el registro de la propiedad industrial español, la válida cancelación del asiento que proclamaba la titularidad sobre dicho bien inmaterial a favor de José Arechabala, SA o, con otras palabras, el correlativo cambio de titularidad registral impugnado en la demanda*.'

163 *Cf.* Court of Appeal of England and Wales, Propend Finance Pty Ltd v. Sing and another (1997) 111 *ILR* 611 and House of Lords, *Jones et al. v. Saudi Arabia et al*, Session 2005-06 [2006] *UKHL* 26.

'separate entity' (i.e. not being the State or part thereof) can claim immunity under Section 14 SIA 1978 if it is sued for '*anything done by it in the exercise of sovereign authority'* and the foreign State – had it carried out this act itself – could claim immunity. Under Section 1(2) SIA 1978, courts are obliged to review *ex officio* whether immunity is at issue if the foreign State did not appear in the proceedings.

72. It follows from case law that if the State (or any of its subdivisions or officials) is neither a defendant nor a 'separate entity' that can claim immunity under Section 14 SIA 1978, immunity cannot apply even if the interests and activities of that State are at stake or judgments have to be made on the legality of that State's actions. Of particular relevance in this regard are the *Kuwait Airways* and *Belhaj* cases.

73. The *Kuwait Airways* case (1995) revolved around the seizure and transfer to Iraq of aircraft after the outbreak of the first Gulf War (invasion of Kuwait by Iraq) in August 1990. The aircraft were owned by Kuwait Airways Corp (KAC). At the instruction of the Iraqi Transport Minister, these aircraft were transferred to Iraq by pilots from Iraqi Airways Co (IAC). Sometime later, KAC was dissolved by the Iraqi authorities by Revolutionary Command Council decree 369 and its assets transferred to IAC, which then took charge of the aircraft. In 1991, KAC commenced civil proceedings in London against IAC and others in which it sought compensation for the losses it had suffered. In its reply IAC, *inter alia*, relied on Iraq's immunity from jurisdiction as well as on the foreign act of State doctrine. With regard to the plea of State immunity, it was not in dispute that IAC was a separate entity from the State of Iraq. Under Article 14 SIA 1978, already referred to above, State immunity could only apply in such a case if it was held that IAC was sued for '*anything done by it in the exercise of sovereign authority*'. A majority of the House of Lords[164] – at the time the highest court in civil cases in England and Wales – eventually ruled in the highest instance that insofar as the seizure and transfer of the aircraft was concerned, IAC could invoke Article 14 SIA since in those acts it had acted as an extension of the Iraqi Government and was therefore acting in the exercise of sovereign authority. However, this was different for the period after Decree 369 – *i.e.* the incorporation of the aircraft into IAC's fleet and their subsequent continued use by IAC.[165] In particular, the majority considered that '[p]lainly, a separate entity of a state which receives nationalised property from the state cannot ipso facto claim sovereign immunity in respect of a claim by the former owner, though it may well be able to plead, by way of defence, that its actions were not unlawful'. The question of whether the foreign act of State doctrine could still be invoked in respect of these acts was also eventually answered in the negative by the same House of Lords several years later. The majority of the lords were of the opinion that the foreign act of State doctrine does not apply

[164] See the speech by Lord Goff of Chieveley joined by Lord Jauncey of Tullichette and Lord Nicholls of Birkenhead. The other two lords believed that IAC could claim immunity from all conduct.

[165] House of Lords, *Kuwait Airways Corp v. Iraqi Airways Co and others* [1995] 3 *All ER* 694, 24 July 1995.

where a State's acts are manifestly contrary to international law.[166]

74. A second judgment of relevance in this context is that of the Supreme Court of the United Kingdom in the *Belhaj* case (2017). Like the *Habib* case (Australia) discussed above, the *Belhaj* case also revolved around torture by foreign government officials. *Belhaj et al.* believed that senior UK Government officials were complicit in this torture and held them personally liable for damages suffered. The defendant British government officials invoked State immunity and the foreign act of State doctrine. Both pleas were eventually rejected by the Supreme Court in highest instance.[167] With regard to State immunity, the Supreme Court held, with reference to earlier British case law and (the *travaux préparatoires* of) Article 6(2)(b) UNCSI, that this can only be applicable if the foreign State is directly or indirectly affected in a legal sense in any way by the claims as filed. It follows from the Supreme Court's considerations that it found it difficult to imagine this to be the case in cases other than those involving State property. As in the *Touax* (Belgium) case,[168] the Supreme Court rejected an analogous application of the International Court of Justice's rulings in the *Monetary Gold*[169] and *East Timor*[170] cases to arrive at a broader concept of immunity.[171] The Supreme Court ultimately concluded that State immunity did not apply because the foreign States concerned (Malaysia, Thailand, the United States and Libya) were not defendants and their

[166] House of Lords, *Kuwait Airways Corp v. Iraqi Airways Co and others* [2002] *UKHL* 19, 16 May 2002.

[167] Supreme Court of the United Kingdom, *Belhaj et al. v. Straw et al*. [2017] *UKSC* 3, 17 January 2017.

[168] See *supra* para. 10.

[169] See *supra* n. 29.

[170] See *supra* n. 30.

[171] *Cf.* Supreme Court of the United Kingdom, *Belhaj et al. v. Straw et al.* [2017] UKSC 3, 17 January 2017, judgment of Lord Mance, at para. 27 ('Reliance was also placed by the appellants on two decisions of the international Court of Justice, the first the Case of The Monetary Gold removed from Rome in 1943 [...] The [Monetary Gold] case is distinct from the present. The International Court was, above all and as in the domestic case of Dollfus-Mieg, being asked to determine the immediate destination of specific property. In the courts below, Leggatt J at para 78 distinguished East Timor and the Court of Appeal at para 42 distinguished Monetary Gold as cases about international jurisdiction, required in the case of the International Court to be based upon consent, in contrast with which domestic courts exercise compulsory jurisdiction over those within their reach. That is correct as far as it goes, but states' domestic jurisdiction also depends on consent in contexts where state immunity otherwise exists. The situation is therefore nuanced. Nevertheless, Monetary Gold is not about state immunity, and does not on its facts assist on the issue now before the court, even by way of analogy.' and para. 28 ('The same applies to the East Timor case. [...] The subject matter of any judgment would have been, in essence, whether Portugal or Indonesia had the right to administer, and so enter into treaties relating to, East Timor, an issue about territorial title.') as well as Lord Sumption's judgment, para. 193 ('Both cases had two features which in combination account for the outcome. First, the rights or liabilities of the non-party state were the very subject matter of the dispute between the parties. Secondly, although the judgment would have bound only the parties, each of the parties would have been bound to deal with the non-party in accordance with it. Even on the assumption (and it is a large one) that the principle applied in these cases can readily be transposed to the domestic law plane, the mere fact that the rights or liabilities of the non-party were in issue would not be enough.').

position was not directly or indirectly affected in any legal sense by the claims as brought against the British Government officials who were the defendants. Or as Lord Mance summarised it:

> No decision in the present cases would affect any rights or liabilities of the four foreign states in whose alleged misdeeds the United Kingdom is said to have been complicit. The foreign states are not parties. Their property is not at risk. The court's decision on the issues raised would not bind them. The relief sought, namely declarations and damages against the United Kingdom, would have no impact on their legal rights, whether in form or substance, and would in no way constrict the exercise of those rights. It follows that the claim to state immunity fails.[172]

On the issue of the foreign act of State doctrine, the Supreme Court was united on the outcome (it did not apply) but divided on the path to reach that outcome. This division concerned in particular the definition and scope of an act of State. However, the judges were unanimous that however one defines an act of State and however many different categories of it can be distinguished, the doctrine does not apply, in any case, if there is a conflict with public policy. Given the seriousness of the allegations (torture, etc.), that exception was applicable in the case at hand.

12. UNITED STATES

75. State immunity is primarily regulated in the United States by the Foreign Sovereign Immunities Act (FSIA). Outside cases of immunity from execution and *in rem* claims against certain property in use by the foreign State (see Sections 1605 and 1609), the FSUA provides for immunity only to the extent that the State (or part thereof) is itself a defendant in the proceedings.[173] It is settled case law that courts must test *ex officio* whether immunity from jurisdiction exists if the foreign State has not appeared in the proceedings.[174]

76. It follows from case law that immunity does not apply if the State (or a former official) is not a defendant, even if the interests and activities of that State are at stake or a judgment has to be made on the legality of that foreign State's actions. However, in such a case the foreign act of State doctrine can apply in certain circumstances. In particular, reference can be made in this regard to the *Sabbatino, Kirkpatrick, Unocal Corp* and *BNP Paribas* cases.

77. The *Sabbatino* case (1964) revolved around sugar expropriated by Cuba. The American buyer of this sugar, after receiving it in the United States, did not pay the Cuban Government (as the new owner) but a representative of the expropriated original owner. The Cuban Government then initiated civil proceedings against the representative for the purchase price of the sugar. The lower courts ruled in favour of the representative because the Cuban expropriation violated international law. The Supreme Court overturned this decision.[175] It held that in this particular case, the foreign act of State doctrine precluded a ruling on the legality of the expropriation. In this regard, the Supreme Court first considered that the foreign act of State doctrine itself was not a rule of international law – let alone a mandatory one. Instead, it rested on constitutional arguments.[176] Further, the Supreme Court clarified that the foreign act of State doctrine only applies if (i) there is an official act of a foreign power in its *own* territory (i.e. not *outside* that territory); and (ii) the relief sought or defence interposed requires the court to declare that official act invalid. However, even if the doctrine strictly speaking applies, courts retain a discretion not to apply it on the basis of a balancing test. Relevant factors in this regard are whether (i) there is a high degree of codification or agreement in a particular area of international law; (ii) the extent to which foreign relations are at stake; and (iii) whether the foreign power that performed the act still exists.[177]

78. In response to this ruling, Congress passed the so-called 'Second Hickenlooper' amendment which – in short – stipulated that the foreign act of State doctrine should not be applied in expropriation cases unless the president of the United States determines otherwise in a specific case.[178]

79. The *Kirkpatrick* case (1990) revolved around a dispute over the construction of a military airfield in Nigeria. Two American companies, among others, had participated in the tender, which was eventually won by one of them. The losing

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[172] Supreme Court of the United Kingdom, *Belhaj et al. v. Straw et al.* [2017] *UKSC* 3, 17 January 2017, judgment of Lord Sumption, para. 197. *Cf.* also Lord Mance's judgment, para. 31 ('I consider that the issues now before the Supreme Court do not attract state immunity, because the legal position of the foreign states, the conduct of whose officials is alleged to have been tortious in the places where such conduct occurred, will not be affected in any legal sense by proceedings to which they are not parties.').

[173] It follows from the US Supreme Court's decision in Samantar that the FSIA does not apply if the defendant is a (former) official of the foreign State. According to the Supreme Court, the question whether a (former) office holder enjoys immunity is determined by the common law. See United States Supreme Court, *Samantar v. Yousuf*, 1 June 2010, 560 *U.S.* 305 (2010). For a *post* Samantar example in which this common law assessment was applied, see United States District Court, District of Columbia, *Rusesabagina et al. v. The Republic of Rwanda et al.*, CIVIL 22-469 (RJL), 23 January 2023.

[174] See, *inter alia*, United States Supreme Court, *Verlinden BV v. Central Bank of Nigeria*, 461 *U.S.* 480 (1983), 23 May 1983.

[175] See United State Supreme Court, *Banco Nacional de Cuba v. Sabbatino*, 376 *U.S.* 398 (1964), 23 March 1964.

[176] Namely, 'the basic relationships between branches of government in a system of separation of powers. It concerns the competency of dissimilar institutions to make and implement particular kinds of decisions in the area of international relations. The doctrine, as formulated in past decisions, expresses the strong sense of the Judicial Branch that its engagement in the task of passing on the validity of foreign acts of state may hinder, rather than further, this country's pursuit of goals both for itself and for the community of nations as a whole in the international sphere.'

[177] Ibid., *Cf.* also H.M. Ahmad, 'The Jurisdictional Vacuum: Transnational Corporate Human Rights Claims in Common Law Home States', *The American Journal of Comparative Law*, vol. 70, no. 2, June 2022, p. 261.

[178] See 22 *U.S.C.* 2370(e)(2). Incidentally, the FSIA contains a provision that also explicitly excludes immunity of a foreign State if there is expropriation of property of non-citizens of that State 'in violation of international law' (see Section 1605 FSIA).

company (Environmental Tectonics) later found out that the winner (W.S. Kirkpatrick & Co.) had obtained the contract by paying bribes to Nigerian officials. Environmental Tectonics subsequently initiated civil proceedings against Kirkpatrick in which it claimed damages. The lower courts ruled variably on whether the foreign act of State doctrine precluded this claim. The Supreme Court ultimately ruled that it did not. It reiterated that the act of State doctrine only applies if the case requires the court to declare the official act of the foreign power invalid.[179] This was not the case in this instance. The mere fact that 'in order to prevail, respondent must prove that petitioner Kirkpatrick made, and Nigerian officials received, payments that violate Nigerian law, which would, they assert, support a finding that the contract is invalid under Nigerian law' was, according to the Supreme Court, insufficient to lead to application of the act of State doctrine. The same applies to the circumstance that factual findings must be made in the course of a case 'that may cast doubt upon the validity of foreign sovereign acts'.[180]

80. The *Unocal* case (2002) revolved around the construction of an oil pipeline in Myanmar by, among others, American (Unocal) and French (Total) companies. The plaintiffs were farmers and villagers from the area where the work was taking place who claimed that Unocal, through the Myanmar authorities, had used (and continued to use) violence and intimidation to displace entire villages, enslave farmers living in the area of the proposed pipeline, and steal farmers' property for the purpose of building the pipeline. The plaintiffs alleged, among other things, that Unocal and its executives knew or should have known about the practices of forced labour and forced relocations when they agreed to invest in the gas pipeline project, and that despite this knowledge, they agreed that the Myanmar authorities would provide labour for the joint venture and be responsible for clearing the way for the pipeline and providing security. In addition, the plaintiffs alleged that Unocal and its executives benefited from the use of forced labour to support the gas pipeline project. In addition to Unocal and Total, the defendants in the case were a Myanmar State oil company and the Myanmar (military) Government. However, immunity was assumed only in respect of the latter two.[181] Unocal's reliance on the foreign act of State doctrine was rejected both at first instance and on appeal, with the exception of an expropriation claim. Not at issue was that to find Unocal liable, 'the court must decide that the conduct by the Myanmar Military violated international law in order to hold Unocal liable for aiding and abetting that conduct'.[182]

[179] United States Supreme Court, *Kirkpatrick & Co. v. Evtl. Tectonics*, 493 *U.S.* 400 (1990), 17 January 1990. The foreign act of State doctrine thus only applies when 'a court must decide – that is, when the outcome of the case turns upon – the effect of official action by a foreign sovereign. When that question is not in the case, neither is the act of state doctrine.'

[180] Ibid.

[181] See United States District Court for the Central District of California, *Doe I v. Unocal Corp*, No CV 96-6959 RAP (BQRx), 25 March 1997.

[182] United States Court of Appeal (Ninth Circuit), *Doe I v. Unocal Corp*, Nos. 00-56603 00-57197, 18 September 2002. See in particular under 'C. Plaintiffs' claims against Unocal are not barred by the Act of State Doctrine.' In the light of *Kirkpatrick* and the decision in *BNP Paribas* to be discussed below, one can still question whether this is sufficient for the foreign act of State doctrine to apply at all. After all, the court in Unocal was not asked to declare the relevant Myanmar state action invalid.

However, after applying the balancing test provided for in the *Sabbatino* ruling, the United States Court of Appeal (9th Circuit) held that the foreign act of State doctrine did not bar the claim, particularly since it involved serious violations of international law (torture, murder, slavery).[183]

81. A similar outcome was reached in the *BNP Paribas* case (2018). This case revolved around the circumvention of sanctions imposed against Sudan. Despite these sanctions, BNP Paribas continued to do business with sanctioned entities as a result of which the Sudanese regime had continued to have access to US financial markets. Victims of the genocide in Darfur, Sudan, held BNP Paribas liable for this in a civil suit. According to the plaintiffs, BNP Paribas had conspired with, and aided and abetted the Sudanese regime in committing the widespread atrocities. State immunity was not pleaded by BNP Paribas (nor was it raised *ex officio* by the court). However, BNP Paribas did invoke the foreign act of State doctrine. At first instance, this plea was upheld. This because the plaintiffs' claim 'would require the Court to pass judgment on the acts of the Government of Sudan'. After all, for it to succeed the court would have to conclude 'that the Government of Sudan's actions amounted to tortious conduct including battery, assault, false arrest and imprisonment, wrongful taking, and wrongful death'.[184] On appeal, however, this ruling was overturned. The United States Court of Appeal (2nd Circuit) ruled that the case did not require invalidating state acts, only a finding that they had occurred. Moreover, the Court of Appeal held, these were serious violations of international law so that 'the atrocities to which BNPP asks us to defer can never be the basis of a rule of decision capable of triggering the act of state doctrine'.[185]

13. SOUTH AFRICA

82. State immunity in South Africa is governed by the Foreign States Immunities Act 1981 (FSIA 1981). Outside cases of immunity from execution (Section 14) and *in rem* claims against certain property in use by the foreign State (Section 18), the FSIA 1981 provides for immunity only to the extent that the State (or part thereof) is itself a defendant in the proceedings. Under Section 1(2) FSIA 1981, the South African court is obliged to review *ex officio* whether immunity is at issue if the foreign State has not appeared in the proceedings.

83. As regards relevant South African case law, reference can first be made to a ruling in the *Cherry Blossom* case (2017). The case revolved around a vessel (the 'NM Cherry Blossom') calling at the Port Elizabeth (South Africa) port to bunker. On board of the ship was a cargo of phosphate extracted by a Moroccan company

[183] Ibid.

[184] See United States District Court (Southern District of New York), *Kashef et al. v. BNP Paribas*, 16-cv-3228 (AJN), 30 March 2018 under 'A. Act of State Doctrine'.

[185] United States Court of Appeal (Second Circuit), *Kashef et al. v. BNP Paribas*, No. 18-1304, 22 May 2019. See under 'Discussion Act of State Doctrine'.

from a mine located in northern Western Sahara. Western Sahara is a disputed territory on the north-west coast of Africa claimed by Morocco and the – not universally recognised – Sahrawi Arab Democratic Republic (SADR). In essence, the *Cherry Blossom* case revolved around who rightfully owned the cargo of phosphate. According to the claimants (SADR *et al*.), this was the people of Western Sahara; according to the Moroccan company, supported by its parent company,[186] it was the rightful owner because the phosphate had been lawfully extracted under Moroccan legislation and licences. The Moroccan companies invoked State immunity and the foreign act of State doctrine since a judgment by the South African court would implicate (the legal interests of) Morocco. The High Court (Eastern Cape Local Division, Port Elizabeth) – in Full Court composition – considered that since the foreign act of State doctrine can only be at issue if there is jurisdiction, the plea of State immunity had to be discussed first.[187] As regards the framework applicable to State immunity, the High Court followed the UK Supreme Court's considerations in the *Belhaj* case, discussed above.[188] It was clear that Morocco was not a defendant in the case, nor was the shipment of phosphate its property. According to the Moroccan companies, however, there should nevertheless be State immunity because 'the determination by a South African domestic court that title in the phosphate cargo vests in the SADR necessarily implies that the title conferred upon OCP and Phosboucraa by Morocco is invalid, and therefore that the legal rights of Morocco are thereby affected.'[189] The High Court dismissed this appeal. 'Morocco', the High Court held, 'is not a party to the proceedings. It is accordingly not bound by any finding or judgment to be made in relation to the issues between the parties. It has no proprietary interest in the matter which the SADR and the PF seek to prosecute by way of the vindicatory action.'[190] The fact that the South African court had to rule on the Moroccan companies' defence that they had carried out the mining activities under Moroccan law (and that these activities were not otherwise *per se* illegal) did not alter this, according to the High Court:

> A finding on these issues by a South African court applying South African law, which includes customary international law by virtue of s 232 of the Constitution, cannot in any legal sense affect the rights of Morocco at international law. [...] A finding by a domestic forum that OCP's and Phosboucraa's exploitation of minerals in Western Sahara does not comply with the UN framework and is illegal also can have no effect upon the legal rights of Morocco. It is after all OCP's and Phosboucraa's case that they conduct their activities as incorporated legal entities wholly separate from the state of Morocco.[191]

It may well be, the High Court said, 'that such a determination carries with it an effect upon the interests of Morocco but such effect falls within the realm of political or moral interests and cannot have legal effect. It follows therefore that the claim to state immunity cannot be upheld'.[192] As for the reliance on the foreign act of State doctrine, the High Court ruled that it was premature to decide this at this stage and that it could be raised on the occasion of the hearing of the main case.[193]

84. Secondly, reference can be made to a ruling in the case of *EAC v. MTN* (2025). This case revolves around a dispute between Turkish telecoms company Turkcell and its subsidiary East Asian Consortium (EAC) against South African telecoms company MTN over a telecoms licence in Iran. According to EAC, it had obtained a licence to operate a GSM network in Iran following a public tender. However by bribing Iranian officials, MTN had managed to persuade Iran to breach the contract after which EAC was replaced by MTN. Although Iran (or any Iranian official) was not a defendant in the case (which was brought purely against MTN and its affiliated (legal) persons), MTN *et al.* invoked State immunity and the foreign act of State doctrine. The High Court (Gauteng Division, Johannesburg) – in *unus judex* composition – found both appeals well-founded. According to the High Court, conduct by the Iranian Government was central to the case. If that conduct were not found to be unlawful, EAC's claim could not succeed either.[194] Unlike in the *Cherry Blossom* case, the High Court first addressed the foreign act of State doctrine and considered that it was applicable given that the way the claim was formulated meant that 'a South African Court is required to inquire into the conduct, and in this case, unlawful conduct, of the government of Iran'.[195] For this same reason, the High Court also held that the claim of immunity was well-founded. According to the High Court, there was 'indirect impleading' because Iran's interests 'would be adversely affected by findings of the nature that a court would be required to make regarding its unlawful conduct'.[196]

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[186] Namely OCP SA. The Moroccan Government was at the time the majority (94,12) shareholder of OCP SA. See High Court of South Africa (Eastern Cape Local Division, Port Elizabeth), Case No. 1487/17, 15 June 2017, 200 *International Law Reports* 488 (*Cherry Blossom*), paras. 10-11.

[187] Ibid. para. 56 ('In essence, a claim to state immunity, if successful, has the effect that a domestic court does not have jurisdiction to adjudicate the matter before it, whereas reliance upon the act of state doctrine concerns the justiciability of the suit before the domestic forum notwithstanding its jurisdiction to adjudicate on the matter before it. For this reason we consider it appropriate to first deal with the claim to state immunity before addressing the defence founded upon the act of state doctrine.')

[188] Ibid., paras. 66-81. The High Court also rejected the reliance placed on the ICJ's rulings in *Monetary Gold* (see *supra* n. 29) and *East Timor* (see *supra* n. 30), see paras. 69-74.

[189] Ibid., para. 82. The case thus turned on the possibility left open by Lord Sumption that, in such a case, the 'legal interests' of the non-defendant foreign State might nevertheless be at stake.

[190] Ibid., para. 83.

[191] Ibid., para. 84.

[192] Ibid., para. 85.

[193] Ibid., paras. 94-100.

[194] *Cf.* High Court of South Africa (Gauteng Division, Johannesburg). Case No. 2013/44462, 30 November 2022, *inter alia,* at para. 31 ('It is my view, that the conduct of the Iranian government is integral to the case. If it did not act wrongfully, there could never have been a delictual cause of action as all other acts were acts of preparation which could only lead to the final delictual conduct, despite the conduct of MTN on its own alleged to have been wrongful. The finding regarding the unlawful actions of the Iranian government, in my view, is sine quo non to establish a delict. Its pivotal role looms large and central in the claim.')

[195] Ibid., *inter alia,* para. 84.

[196] Ibid., para. 92. *Cf.* also para. 93 ('In this matter, the court will be required to make adverse findings

85. EAC appealed this ruling to the Supreme Court of Appeal of South Africa which upheld the appeal. It held that the High Court's decision on State immunity could not stand in appeal because proceeding with EAC's claims would not affect Iran's rights or liabilities:

> No claim is made against the government of Iran as a joint tortfeasor. No property rights of the government of Iran are exposed to jeopardy. EAC does not seek to set aside what it alleges to be the subversion of a competitive tender. The outcome of the tender remains in place. The claims of EAC would not undo the actions of the government of Iran. EAC's claims, if they were to be proven at trial, would establish that EAC acquired rights as against the government of Iran which were breached by that government. But no liability attaches to any such finding. Nor would a finding that the government of Iran may be found to be responsible for the substitution of EAC for MTN International have any adverse entailment upon the legal rights or liabilities of Iran. The liability that would accrue from any award of damages would be borne by the defendants, not Iran. It will suffer no detriment to any of its rights, nor accrue any liability from such a judgment.[197]

As a consequence Iran was not indirectly impleaded and the State immunity defence failed.

86. EAC's appeal against the High Court's decision insofar as it concerned the foreign act of State doctrine was also successful. The Supreme Court of Appeal held that although part of South African law, the foreign act of State doctrine as applicable in South Africa rested upon a broader weighing test than its equivalent in English law.[198] This weighing exercise favored adjudicating EAC's claim:

> In sum, the illegality of the conduct of the government of Iran looms large in the formulation of EAC's claims. In the end, what weighs more heavily in the balance is the strength of the South African courts' duty to adjudicate cases which allege that South Africans have used bribery and corruption to suborn highly placed officials of the South African government for commercial gain. These allegations are not incidental or peripheral to the case. They implicate grave constitutional interests. For these reasons deference must yield to the court's greater duty to uphold the South African constitutional order.[199]

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regarding the unlawful acts of Iran as a finding will affect the interests or activities of Iran. In my view the provisions of the Immunities Act result in this court having no jurisdiction to entertain the matter as pleaded by EAC and the special plea is to be upheld.').

[197] Supreme Court of Appeal of South Africa, *East Asian Consortium B.V. v. MTN Group Limited and Others* (225/2023) [2025] ZASCA 50, 29 April 2025, p. 28.

[198] Ibid., p. 28.

[199] Ibid., p. 50.

IMMUNITY FROM EXECUTION
A QUEST FOR THE RULE OF (CUSTOMARY INTERNATIONAL) LAW*

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Links to websites referred to in this paper were last verified on 27 July 2025.

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ABBREVIATIONS

ECHR	European Convention of Human Rights
ECtHR	European Court of Human Rights
HR	Dutch Supreme Court (*Hoge Raad*)
ILC	United Nations' International Law Commission
ILC Report	ILC's *Draft conclusions on identification of customary international law*, adopted by the UN General Assembly in 2018
UN Convention	United Nations Convention on Jurisdictional Immunities of States and their Property, adopted by the UN General Assembly in 2004

1. INTRODUCTION

Creditors of foreign states wishing to enforce their legal title against assets held by their debtor in the Netherlands face significant obstacles. In practice, it is rare for a creditor to successfully enforce a legal title against assets of a foreign state in the Netherlands. The Dutch approach to immunity from execution makes it markedly more difficult to pursue such enforcement than in other Western jurisdictions. While shielding certain specific categories of foreign state assets from creditor claims can be supported by principles of state immunity under public international law, the Dutch interpretation of customary international law is notably more restrictive than in several other jurisdictions. In practice, it prevents enforcement actions against e.g. foreign state assets held in commercial banks or against monetary claims arising from commercial contracts with Netherlands-based companies. This situation stands in stark contrast to the approaches taken in other jurisdictions.

The above statements will be explained and elaborated upon in this article.

What distinguishes the Dutch legal framework from many other jurisdictions is that Dutch judges are legally obliged to apply customary international law on the issue of immunity from execution, rather than relying on a domestic immunity statute – which is lacking in the Netherlands – that might offer a legal basis to apply different norms. Other jurisdictions, with immunity acts or statutes, have the option to tailor the scope of state immunity based on their own legal considerations. Dutch judges are required to adhere to the customary international law rules. However, the Dutch interpretation of these rules has, in practice, been less than convincing (I even argue, incorrect), severely limiting creditors' ability to enforce legal claims against foreign state assets in the Netherlands without solid legal grounds.

While legal obstacles may be problematic for creditors in achieving their goals, this aspect is not at the heart of the problem set out in this article. Rather, the real concern lies in the lack of a convincing legal justification for the Dutch approach on immunity from execution. The Dutch courts' stance clearly seems at odds with customary international law, which the courts invariably purport to apply. There is no apparent legal rationale to account for this discrepancy.

It may be that geopolitical considerations – such as the Netherlands' desire to maintain friendly relations with foreign states or international organisations – are influencing the judiciary's interpretation of immunity. While such considerations may be valid from a political perspective, they should not influence legal interpretation. The concern here is not with the political context but with the legal integrity of the Dutch judicial system, which appears to be diverging from the Netherlands' obligations under international law. Legal certainty, consistency, and the principle of equal access to justice demand that Dutch courts adhere to the applicable international norms and that adjudicative decisions can verifiably be based on the applicable legal norms. If the Dutch State wishes to steer away from the rules of customary international law on immunity from execution, an immunity act should be introduced, providing a legal basis for judicial decisions that are in line with the applicable legal framework.

I consider it necessary to state the following. As an attorney, I have been involved

in a number of cases concerning immunity from execution, including a number of the cases mentioned in this article. Inevitably, one might assume that this article is intended to favour current or future clients wishing to enforce their legal title against assets owned by foreign states in the Netherlands. Apart from the fact that a significant part of my practice is advising and representing states, this is not the purpose of this article, which is written as an academic contribution. As will be seen towards the end of the article, I would welcome Dutch legislation on immunities, irrespective of the scope and content thereof, which will obviously depend on political choices – which I will not discuss in this article. The main takeaway from this article is not that the current Dutch standard of immunity from execution should necessarily be made more lenient. The main takeaway is that the grounds for application of the standard should be traceable, understandable, and coherent. If the Dutch legislator were to enact a Dutch law on immunities that provides a sound legal basis for an approach that is as strict as – or even stricter than – the current stance (the current stance being inadequately based on customary international law), then at least the flaws that are described here, and which relate to a lack of consistency and logic in the underlying legal basis, will have been addressed. From the point of view of the rule of law, that would be a significant improvement. That being said, as a personal note, it strikes me as odd and unjust that a State, having entered into a contract with a private entity, having agreed to an arbitration clause or forum selection clause, having raised defences in subsequent proceedings on the merits, and then, having been ordered to pay damages, might refuse to comply with that legal obligation and is then granted almost full immunity from execution in respect of assets in the Netherlands.[1] To the extent that the foreign state's sovereign tasks are hampered by execution measures, one can have sympathy for the policy of preventing such measures. However, I see no justification for such immunity in situations where the functioning of the foreign state's apparatus is not noticeably affected by the execution measure. In such circumstances, I fail to see a justification for a state to side-step its established legal obligations towards its counterparty.[2] But, as stated, this latter issue is not

[1] See also Th.M. de Boer in his commentary to HR 28 June 2013, ECLI:NL:HR:2013:45, *NJ* 2014/453 (*Ahmad/Staat*), para. 2: 'In particular, one might wonder nowadays to what extent the immunity doctrine is compatible with the fundamental right of access to justice and a fair trial. After all, that right does not amount to much if a foreign state can successfully rely on immunity from jurisdiction, but even less if the execution of a judgment given against that state can be blocked on the basis of immunity from execution.' In the Dutch original: '*Met name kan tegenwoordig de vraag gesteld worden in hoeverre de immuniteitsleer zich verdraagt met het grondrecht op toegang tot de rechter en een eerlijk proces. Dat recht stelt immers al niet veel voor als een vreemde staat zich met succes kan beroepen op immuniteit van jurisdictie, maar nog minder als de tenuitvoerlegging van een tegen die staat gewezen vonnis op grond van de immuniteit van executie kan worden geblokkeerd.*'

[2] As aptly stated by Nicolas Angelet, professor of International Law at the *Université libre de Bruxelles*: 'The preamble of the Vienna Convention on Diplomatic Relations states that "the purpose of such [diplomatic] privileges and immunities is not to benefit individuals but to ensure the efficient performance of the functions of diplomatic missions as representing States". Along the same lines, the purpose of State immunity is to ensure sovereign equality between States, and the efficient and independent performance of governmental functions. But it is not the purpose of State immunity to assist States in evading compliance with valid judgments rendered against them.' See Nicolas Angelet, 'Immunity and the Exercise of Jurisdiction – Indirect Impleading and Exequatur' in Tom Ruys, Nicolas Angelet and Luca Ferro (eds.), *The Cambridge Handbook of Immunities and International Law*, CUP 2019, at p. 101.

the topic of this article and should be reserved for a later, separate discussion.
Below, I will first briefly set out the applicable legal framework on immunity issues (Section 2). Thereafter, the approach taken by the Dutch Supreme Court as to immunity from execution will be summarised (Section 3) and critically analysed (Section 4). In Section 5, the method of identifying a rule of customary international law is set out by reference to a recent report of the United Nations' International Law Commission. This is in preparation for Section 6, in which international case law is discussed which suggests that the Supreme Court's statement that it is applying rules of customary international law is debatable. In Section 7, I discuss whether the Supreme Court could be understood as applying 'a Dutch version' of customary international law. Section 8 touches upon the issue of whether the Dutch application of immunity is compatible with article 6 ECHR. Section 9 discusses the Netherlands' recent ratification of the United Nations Convention on Jurisdictional Immunities of States and their Property (the UN Convention) and its expected implications for future Dutch case law. In Section 10, I will discuss certain potential alternatives for future application of immunity from execution in the Netherlands. Section 11 contains the conclusions.
Translations of texts cited in this article are my own unless indicated otherwise. Where the original texts are available online, a reference to the original text is included. If the original text is not readily available or if the cited text is brief, the original text is cited in the footnotes.
For the avoidance of misunderstanding, the following does not address issues of immunity from jurisdiction. Nor does it relate to issues of immunity from execution that are governed by treaties.

2. THE LEGAL FRAMEWORK

There is no Dutch statute on immunity law. Under Dutch law, limitations on the jurisdiction of Dutch courts, and on the possibility of enforcing a legal title against assets located in the Netherlands, must be based on international law. This is confirmed in article 1 of the Dutch Code of Civil Procedure (for jurisdiction) and in article 13a of the Dutch General Provisions Act, the provisions of which read as follows:

> Article 1 of the Dutch Code of Civil Procedure:
> Notwithstanding what is stipulated regarding jurisdiction in treaties and EU regulations and notwithstanding Article 13a of the General Provisions Act, the jurisdiction of the Dutch court is governed by the following provisions.
>
> Article 13a of the Dutch General Provisions Act:
> The jurisdiction of the judge and the enforceability of judicial rulings and authentic acts are limited by the exceptions recognised in international law.

Article 13a of the Dutch General Provisions Act seeks to prevent the exercise of authority by Dutch courts from infringing the Dutch State's[3] obligations under public international law. To this effect, article 3a of the Bailiffs Act obliges a bailiff to notify the Minister of Justice and Security whenever he or she receives an order to perform an official act which could arguably be considered to be in conflict with the State's obligations under international law. The Minister may then decide that the act must not be performed or must be undone. The Dutch court will in all such cases be allowed to assess whether, indeed, the bailiff's act infringes, or would have infringed, the Dutch State's obligations under international law.[4]
The State's obligations under public international law can stem from either treaties or customary international law. In the context of immunity from execution, there are a number of treaties that could apply, depending on the facts of the case and on the identity of the debtor.[5] However, in practice, these treaties rarely apply, either because of a limited number of signatories or because of a limited scope. In cases where no treaty applies, the question of whether the Dutch State is under an obligation under international law to restrain its jurisdiction and/or to prevent enforcement measures, is thus governed by customary international law. The Dutch Supreme Court stated in its *Morning Star* judgment:

> The enforceability of judicial decisions is limited by exceptions recognised in international law (Article 13a of the General Provisions Act). Insofar as this is not provided for in a treaty, as in the relationship between Gabon and the Netherlands, it concerns unwritten public international law.[6]

[3] In this publication, I use, for brevity, the term 'state' whereas, in the context of public international law, the appropriate legal entity is not the state (which is a civil law entity under Dutch law), but the Kingdom of the Netherlands, which is the subject of public international law. For a discussion on the difference between the two and some of its intriguing consequences, see H.G. Hoogers, 'Het Koninkrijk als rechtspersoon', 12 *TvCR* (2021) pp. 20-38.

[4] A notice by the minister to lift an attachment (pursuant to Art. 3a (2) Bailiffs Act), must be based on the argument that the attachment 'is in breach of the State's obligations under international law'. See e.g. *Parliamentary History II*, 1992–1993, 23 081, No. 3 (Explanatory Memorandum), p. 5; and Amsterdam Court of Appeal 7 April 2015, ECLI:NL:GHAMS:2015:1337, *JOR* 2015/346 (*Servaas/State*), para. 3.6 ('The State will in that case be under the obligation to prevent an attachment of that nature from constituting a breach of the State's obligations under international law. (...) it concerns the State's own responsibility to comply with its obligations under international law').

[5] See e.g. the European Convention on State Immunity (Basel, 16 May 1972) (1973) Treaty Series 43, which applies between Belgium, Cyprus, Germany, Luxembourg, the Netherlands, Austria, the United Kingdom and Switzerland; Arts. 22(3), 30 and 31 of the Vienna Convention on Diplomatic Relations (1961) (1962) Treaty Series 101; the International Convention for the Unification of Certain Rules relating to the Immunity of State-owned Vessels (Brussels, 10 April 1926) and Additional Protocol (Brussels, 24 May 1934) (1937) 176 LNTS 4062; Art. 3(1) of the Protocol on the Privileges and Immunities to the European Patent Convention (1973) (1976) Treaty Series 101; Art. 3 of the Convention on the Seat of the Permanent Court of Arbitration (The Hague, 30 March 1999) (1999) Treaty Series 68; and Art. XI(2) of the Protocol on the Status of International Military Headquarters set up pursuant to the North Atlantic Treaty (Paris, 28 August 1952).

[6] Dutch Supreme Court 30 September 2016, ECLI:NL:HR:2016:2236, *NJ* 2017/190 (*Morning Star/Gabon and State*), with commentary from Th.M. de Boer, para. 3.4.2.

As there are no relevant sources of unwritten public international law that oblige a state from granting immunity from execution other than customary international law rules, the latter are decisive. This aspect, i.e. that issues of immunity from execution are governed by customary international law if no treaty applies, is uncontroversial in the Dutch legal system.

3. SYNOPSIS OF DUTCH SUPREME COURT'S CASE LAW

3.1 **Discussion of Supreme Court's case law**

Whereas immunity from execution is currently a topical and somewhat controversial issue in the Netherlands, it did not frequently arise in Dutch case law prior to the Supreme Court's *Azeta* judgment in 2008. Since 2008, the number of cases on immunity from execution has grown significantly. During this period, the Dutch Supreme Court applied a progressively restrictive stance on attaching assets owned by foreign states. In doing so, the Supreme Court claims to apply customary international law (or, as will be discussed in Section 7, a Dutch version of it).
In this section, the Supreme Court's judgments on immunity from execution are briefly discussed.

3.1.1 *HR 26 October 1973 (SEEE – Yugoslavia)*

The first Dutch Supreme Court judgment that, if only in passing, dealt with immunity from execution seems to be the 1973 judgment in the case of *SEEE – Yugoslavia*.[7] SEEE had applied to the Dutch courts for leave to enforce an arbitral award rendered against Yugoslavia (*exequatur*). In the proceedings before the Dutch Supreme Court, one of the issues under review was whether initiating proceedings to obtain an *exequatur* was to be considered a measure of execution.[8] The Supreme Court explained that such an issue did not need to be resolved because, in any event, there exists no rule of international law precluding any and all execution of a foreign state's assets located in the territory of another state.[9] In other words:

[7] HR 26 October 1973, ECLI:NL:HR:1973:AD7487, *NJ* 1974/361 *(SEEE/Joegoslavië), with commentary* from P. Zonderland & H.F. van Panhuys. Dutch case law on immunity from jurisdiction can be traced back further; *cf.* e.g. Rotterdam District Court 25 September 1916; Maastricht District Court 23 November 2016, *NJ* 1917, pp. 12-15; Dutch Supreme Court 2 December 1932, *NJ* 1933, p. 980; Dutch Supreme Court 13 May 1960, *NJ* 1960/494 (notably the Procurator-General's advisory opinion in that case).

[8] The Court of Appeal had decided that it was not. In the Dutch original: '*dat verder het vragen van verlof tot tenuitvoerlegging van een scheidsrechterlijke uitspraak niet is een daad van executie, immers slechts dient om tot het doen verrichten van een zodanige daad in staat te worden gesteld*'. Source: ECLI:NL:HR:1973:AD7487, citing from para. 4 of Yugoslavia's statement of defence in cassation proceedings, citing in turn para. 8.e of the Court of Appeal's decision.

[9] HR 26 October 1973, ECLI:NL:HR:1973:AD7487, *NJ* 1974/361 *(SEEE/Joegoslavië), with commentary* from P. Zonderland & H.F. van Panhuys. In the Dutch original: '*overwegende dat het vragen van verlof tot tenuitvoerlegging van de onderhavige uitspraak alleen dan in strijd geacht zou kunnen worden met de aan een vreemde staat naar volkenrecht toekomende immuniteit van*

the Supreme Court held that there is no rule of international law granting foreign states absolute immunity from execution.

3.1.2 *HR 28 May 1993 (Russian Federation/Pied-Rich)*

Two decades later, the Supreme Court allowed the conservatory attachment of a vessel owned by the Russian Federation, considering that the state-owned vessel was being used for commercial shipping. The Supreme Court held that customary international law does not contain a rule according to which attachment on a state-owned vessel that is being used for commercial shipping can only be levied if there is a connection between the vessel and the claim.[10] The Supreme Court thus implicitly acknowledged that customary internation law recognises or contains the principle of immunity from enforcement, and then established that there is no customary international law rule on immunity from enforcement with the scope and content as alleged by the Russian Federation.

3.1.3 *HR 11 July 2008 (Azeta – JCR)*

A more substantive decision on the scope of sovereign immunity was rendered in 2008, in the case *Azeta – JCR*.[11] Azeta had levied a conservatory attachment on a dividend tax claim by the Republic of Chile against the Dutch company JCR. The Dutch Supreme Court lifted the attachment, holding that the Chilean tax claim was immune from execution:

> Pursuant to the rules currently accepted in the Netherlands as customary international law, immunity from execution is (...) not absolute. However, state property having a public purpose is in any case not susceptible to forced execution. (…) Tax claims must generally be regarded as goods having a public purpose and are therefore not subject to execution.[12]

The Supreme Court, in its *Azeta – JCR* judgment, did not mention the burden of proof in immunity cases, and did not mention the UN Convention (which had been adopted by the UN General Assembly in 2004).[13]

3.1.4 *HR 28 June 2013 (Ahmad – Staat)*

The Supreme Court elaborated upon its general statement in its *Azeta* judgment, i.e. that '*state property having a public purpose is in any case not susceptible to forced execution*', in a judgment of 28 June 2013.[14] The case (*Ahmad – Staat*) concerned a conservatory attachment levied by creditor Ahmad in September 2009, on a building that had functioned as the Democratic Republic of Congo's embassy in the Netherlands until mid-2009. At the moment of the attachment, the building was vacated and not in use. The diplomatic mission of the Democratic Republic of Congo in the Netherlands had been moved to Brussels, as a combined diplomatic post servicing Belgium, Luxembourg, and the Netherlands.[15] A year after the attachment, squatters moved into the building.
The Dutch Supreme Court held that the former embassy building was not protected by immunity from execution under the 1961 Vienna Convention on Diplomatic Relations, because article 22 (3) of this Convention, read in conjunction with its article 1 (i), offered immunity from execution only to premises of the mission that, at the moment of the attachment, were being used for the purposes of the mission.[16] The Supreme Court went on to assess, however, whether the former mission building was immune from execution measures on the basis of customary international law.[17] Stating that it was applying customary international law, the court held that the former mission was immune from execution measures notwithstanding the fact that it was no longer in use. After all, the Supreme Court held that:

> State properties with a public destination are in any case not susceptible to forced execution (cf. HR 11 July 2008, LJN BD1387, NJ 2010/525). In this context, a further requirement that state property is actually used for public purposes does not apply.[18]

As a substantiation for this ruling, the Supreme Court referred to Article 21 of the UN Convention, which convention it held to 'contain a codification of customary international law on the subject of immunity from jurisdiction and immunity from

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executie indien geoordeeld zou moeten worden dat het volkenrecht zich verzet tegen iedere executie van aan een vreemde staat toebehorend vermogen dat zich op het grondgebied van een andere staat bevindt; dat een zodanige regel van volkenrecht echter niet bestaat'.

10 HR 28 May 1993, ECLI:NL:HR:1993:ZC0974, *NJ* 1994/329 (*Russian Federation/Pied-Rich*), with commentary from J.C. Schultsz, para. 3.3. In the Dutch original: '(…) *dat het onderdeel in feite alleen de vraag aan de orde stelt of het schip naar regels van commuun volkenrecht vatbaar is voor beslag. Het onderdeel neemt terecht tot uitgangspunt dat het antwoord op voormelde vraag niet wordt gegeven door enige tussen Nederland en de Russische Federatie geldende verdragsbepaling en dus moet worden gevonden in ongeschreven regels van volkenrecht. Er bestaat evenwel geen regel van ongeschreven volkenrecht die zou inhouden dat (conservatoir) beslag op een voor de commerciële handelsvaart bestemd staatsschip slechts toelaatbaar is indien het beslag wordt gelegd ter verzekering of tot verhaal van een uit de exploitatie van het schip voortvloeiende ("maritieme") vordering.*'

11 HR 11 July 2008, ECLI:NL:HR:2008:BD1387, *NJ* 2010/525 (*Azeta/Japan Collahuasi Resources B.V.*), with commentary from Th.M. de Boer.

12 For the Dutch text, see <https://deeplink.rechtspraak.nl/uitspraak?id=ECLI:NL:HR:2008:BD1387>, para. 3.5.

13 In the advisory opinion to the Supreme Court, Advocate General Strikwerda had elaborated on both items. See A-G Strikwerda, advisory opinion to the Dutch Supreme Court, 9 May 2008, ECLI:NL:PHR:2008:BD1387 (*Azeta/JCR*), paras. 14-21.

14 HR 28 June 2013, ECLI:NL:HR:2013:45, *NJ* 2014/453 (*Ahmad/Staat*), with commentary from Th.M. de Boer.

15 A-G Vlas, advisory opinion to the Dutch Supreme Court, 5 April 2013, ECLI:NL:PHR:2013:BZ7195, (*Ahmad/Staat*), para. 1.1.

16 HR 28 June 2013, ECLI:NL:HR:2013:45, *NJ* 2014/453 (*Ahmad/Staat*), with commentary from Th.M. de Boer, para. 3.5.2.

17 For a critical assessment of this approach, see Th.M. de Boer in his commentary to HR 28 June 2013, ECLI:NL:HR:2013:45, *NJ* 2014/453 (*Ahmad/Staat*), para. 4.

18 HR 28 June 2013, ECLI:NL:HR:2013:45, *NJ* 2014/453 (*Ahmad/Staat*), with commentary from Th.M. de Boer. For the Dutch text, see <https://deeplink.rechtspraak.nl/uitspraak?id=ECLI:NL:HR:2013:45>, para. 3.6.1.

execution and the boundaries thereof'. According to the Supreme Court, Article 21 of the UN Convention grants immunity from execution to 'property (…) which is used *or intended for use* in the performance of the functions of the diplomatic mission' (emphasis added). From this phrase, the Supreme Court derived that, if the asset is intended to be used for diplomatic purposes at any given time in the future, it is immune from executory measures.[19] As the Democratic Republic of Congo had indicated to the Dutch government (through a *note verbale*, issued a year after the attachment had been levied)[20] that it wished to use the premises again, the attachment on the premises was held to be contrary to customary international law.

3.1.5 *HR 30 September 2016 (Morning Star/Gabon and State)*

In 2016, the Supreme Court rendered three judgments on immunity from execution, in which possibilities for creditors to enforce judgments or awards against foreign states' assets in the Netherlands were largely denied. These three judgments were rendered on 30 September and 14 October 2016 and are commonly referred to in Dutch publications as the Supreme Court's 'autumn judgments' (*herfstarresten*).
The first autumn judgment was *Morning Star*. Morning Star had levied conservatory third-party attachments on monetary claims, if any, of the Republic of Gabon on a number of banks and oil companies based in the Netherlands.[21] The Amsterdam District Court referred the case to the Supreme Court. In the ensuing Supreme Court judgment, it was held, on the basis of a reference to the UN Convention, that there is a presumption of immunity from execution, that the creditor thus has the burden of proof that the asset sought after is not protected by immunity from execution, and that the foreign state does not have to explain what the purpose or intended purpose of the attached asset is. The Supreme Court held:

> 3.5.2. It is consistent with the purport of immunity from execution – the aim of which is to respect the sovereignty of foreign states – to take as a starting point that property of foreign states is not subject to attachment and execution unless and insofar as it has been established that it is intended to be used for a purpose that is not incompatible with this. This is consistent with article 19 subsection (c) UN Convention, which, as has been held in 3.4.6 above, is to be regarded as a rule of customary international law on this issue. It is also appropriate to the aforementioned purport of immunity from execution that foreign states are not under an obligation to provide information indicating that their property has an intended use that prohibits attachment and execution.

[19] Ibid., para. 3.6.2.

[20] The following dates appear from the published judgments: The embassy building was abandoned by the DRC mid-2009. The conservatory attachment was levied on 20 August 2009. The squatters moved into the building in October 2010. The The Hague District Court rendered judgment on the merits in favour of Ahmad on 3 November 2010, ordering the DRC to pay USD 23 million to Ahmad (the service of which resulted in the conservatory attachment being transformed into an executory attachment). The first *note verbale* dates from 4 November 2010.

[21] See Amsterdam District Court, summary judgment of 29 February 2016, ECLI:NL:RBAMS:2016:1197 (*Morning Star/Gabon and Dutch State*), para. 3.2 (summarising Morning Star's arguments).

> 3.5.3 It is consistent with what has been held in 3.5.2 above, that the obligation to furnish facts and the burden of proof with regard to the susceptibility for attachment and execution are on the creditor who attaches, or wants to attach, assets of the foreign state and that, even if the foreign state fails to appear in the proceedings, it will each time have to be established that the assets in question are susceptible to attachment. The above means that the creditor will each time have to provide information on the basis of which it can be established that the assets are in use or intended for use by the foreign state for, briefly put, other than public purposes.
>
> 3.5.4 From the above it also follows that, also when it comes to funds and credits which are used by the foreign state for various purposes, both public and (exclusively) commercial or otherwise, the creditor who attaches, or wants to attach, property of the foreign state, will have to allege and argue convincingly that and to what extent those funds and credits are susceptible to attachment and execution (see also paragraphs 3.5 and 3.7 of the *Azeta – JCR* judgment mentioned in 3.4.3 above).[22]

This reasoning will be elaborated upon and discussed below, in Section 4.

3.1.6 *HR 14 October 2016 (Servaas – Staat and N.N./Staat)*

The second and third 'autumn judgments' were rendered two weeks later, on 14 October 2016.
Servaas had levied executory third-party attachments on claims, if any, of the Republic of Iraq on a number of Netherlands-based oil companies pursuant to production sharing agreements concluded between Iraq and the oil companies.
In the other case, referring to N.N. but concerning claimants Anatolie Stati, Gabriel Stati, Ascom Group S.A. & Terra RAF Trans Trading Ltd,[23] conservatory third-party attachments had been levied 'on bank deposits and securities portfolios at a number of banks and among a large number of companies established in the Netherlands'.[24] These assets were the property of the Republic of Kazakhstan.
The ensuing Supreme Court judgments (*Servaas – Staat*[25] and *N.N./Staat*[26]) refer to, and cite from, the *Morning Star* judgment and do not contain new or additional considerations on the scope of immunity that cannot be derived from *Morning*

[22] Supreme Court of the Netherlands 30 September 2016, ECLI:NL:HR:2016:2236, NJ 2017/190 (Morning Star/Gabon and State), with commentary from Th.M. de Boer. For the Dutch text, see <https://deeplink.rechtspraak.nl/uitspraak?id=ECLI:NL:HR:2016:2236>, paras. 3.5.2-3.5.4.

[23] This can be derived from District Court Amsterdam 23 January 2018, ECLI:NL:RBAMS:2018:1791, para. 2.6. Yet another case involving, in part, the same entities, is discussed below as the *Kazakhstan/Samruk – Ascom Group c.s. (2020)* case (para. 3.1.8). See also the Swedish Supreme Court's judgment of 18 November 2021, Case No. Ö 3828-20 (*Ascom Group, Terra Raf Trans Trading c.s. – Republic of Kazakhstan and The National Bank of Kazakhstan*), discussed below in paragraph 6.2.3.

[24] HR 14 October 2016, ECLI:NL:HR:2016:2371, *NJ* 2017/192 (*N.N./Staat*), with commentary from Th.M. de Boer, paragraph 3.1 (ii).

[25] HR 14 October 2016, ECLI:NL:HR:2016:2354, *NJ* 2017/191 (*Staat/Servaas*), with commentary from Th.M. de Boer.

[26] HR 14 October 2016, ECLI:NL:HR:2016:2371, *NJ* 2017/192 (*N.N./Staat*), with commentary from Th.M. de Boer.

Star. In both cases, the attachments levied were held to infringe the foreign state's immunity from execution.

3.1.7 *HR 1 December 2017 (Iraq & Central Bank of Iraq)*

This case, which was decided by the Dutch Supreme Court on 1 December 2017, largely revolved around immunity from jurisdiction. In a brief finding on immunity from execution, the Supreme Court clarified that a foreign state is not entitled to such immunity generally (i.e. without considering the specific assets at stake). Rather, a Dutch court needs to assess in respect of each individual asset whether such asset is protected by immunity from execution.[27]

3.1.8 *HR 18 December 2020 (Kazakhstan/Samruk – Ascom Group c.s.) & HR 22 September 2023 (Samruk – Ascom Group c.s. – Kazakhstan)*

This case, as the case of *N.N./Staat* described in paragraph 3.1.6 above, relates to the dispute between Anatolie Stati, Gabriel Stati, Ascom Group S.A. and Terra RAF Trans Trading Ltd (*investors*) on the one hand, and the Republic of Kazakhstan on the other. After having obtained a favourable arbitral award in Sweden (granting some USD 500 million pursuant to the Energy Charter Treaty),[28] the creditors sought to enforce the award *inter alia*[29] in the Netherlands, where they levied a conservatory[30] attachment on shares that the Kazakh National Welfare Fund Samruk held in the Dutch limited liability company KMG Kashagan B.V. (KMGK). Leaving aside, for present purposes, the resulting debate on whether the award against Kazakhstan could be executed against assets owned by Samruk, the issue relevant here was whether, if Samruk could in principle invoke immunity from execution, the shares in KMGK were assets with a public purpose. The Amsterdam Court of Appeal held that the creditor should convincingly show that, at least, the immediate/direct purpose of the shares was commercial, and that it was not decisive whether the ultimate purpose of the shares was commercial. The Court of Appeal added that to rule otherwise would '*de facto make it impossible for creditors to enforce their rights*'.[31,32]

[27] HR 1 December 2017, ECLI:NL:HR:2017:3054, *NJ* 2019/137 (*Iraq & Central Bank of Iraq*), with commentary from A.I.M. van Mierlo, para. 3.7.2.

[28] The arbitral award dated 19 December 2013 is available online. See e.g. <https://www.italaw.com/sites/default/files/case-documents/italaw3083.pdf>.

[29] See for a judgment relating to enforcement measures in Sweden: paragraph 6.2.3 *infra*.

[30] Conservatory rather than executory, as the creditors had not yet obtained a Dutch *exequatur* for the arbitral award when they levied the attachment.

[31] Amsterdam Court of Appeal 7 May 2019, ECLI:NL:GHAMS:2019:1566, JOR 2019/242, with commentary from C.G. van der Plas (Samruk & Kazachstan/Ascom). For the Dutch text, see <https://deeplink.rechtspraak.nl/uitspraak?id=ECLI:NL:GHAMS:2019:1566>, para. 3.7.

[32] The Amsterdam Court of Appeal had issued a similar ruling in its judgment of 31 July 2018, ECLI:NL:GHAMS:2018:2736 (Instrubel/Ministry of Industry of the Republic of Iraq), <https://deeplink.rechtspraak.nl/uitspraak?id=ECLI:NL:GHAMS:2018:2736>, para. 3.9 ('This conclusion implies that the court rejects the State's view that the attaching creditor must state and prove, or at least make sufficiently plausible, that not the immediate, but the final (ultimate) destination of the receivables is a destination other than public (…). According to the court, such a far-reaching interpretation of the Supreme Court's case law – leading to unacceptable consequences for individual attaching creditors because it makes it de facto impossible for them to assert their rights – is not implied therein.'

Samruk and the Republic of Kazakhstan initiated cassation proceedings against this decision, bringing the case before the Dutch Supreme Court.
Advocate General Vlas advised the Supreme Court to accept the Court of Appeal's ruling as being in line with customary international law. He opined that a requirement that the creditor should convincingly show that the shares (also) ultimately served non-public purposes would entail a return to absolute immunity from execution, which would not be in conformity with customary international law. He wrote:

> In my opinion, when assessing whether a property is intended for use for non-public purposes as referred to in Article 19, section c, of the UN Convention, the judge need not consider the ultimate destination of a property to be decisive. The objection, which is also mentioned in the literature, is that it can be argued that with regard to all assets that a state uses for commercial purposes, the proceeds thereof ultimately flow into the state treasury and are therefore ultimately intended to be used for public government purposes. If the ultimate destination of an asset is decisive, the exception for properties that are used or intended for use for non-public purposes will prove to be nothing more than an empty shell. In fact, absolute state immunity from execution will then still apply, which is contrary to the exception accepted in international customary law for properties intended for (in short) 'commercial use'. In addition to the actual use of the assets, the use that is known and directly intended at the time the conservatory or enforcement measures are instituted is decisive. If a state does not need the assets directly (or in the immediate future) for the exercise of its sovereign tasks at the time of the attachment or execution, the attachment/execution does not constitute a disproportionate infringement of the sovereignty of that state. In my opinion, the 'immediate destination' of the assets proposed in the literature and applied in the lower courts offers a useful criterion.[33]

The Supreme Court did not follow Vlas's advisory opinion. Instead, it quashed the judgment of the Amsterdam Court of Appeal. In doing so, the Supreme Court first repeated, in paragraph 3.2.3, its ruling from the *Morning Star* judgment (paragraphs 3.5.2 and 3.5.3 thereof, cited above at paragraph 3.1.5). It then added two further obstacles to attempts to take recourse against the shares in KMGK held by Samruk:

> The requirement applied by the court of appeal, that it is decisive whether the immediate destination of the seized goods is other than a public destination does not

[33] Advocate General P. Vlas in his advisory opinion to the Dutch Supreme Court, ECLI:NL:PHR:2020:649 (Kazachstan/Ascom), paragraph 3.23, and (in identical wording) in his advisory opinion in the (joined) case ECLI:NL:PHR:2020:650 (Samruk/Ascom), para. 3.39. For the Dutch text, see <https://deeplink.rechtspraak.nl/uitspraak?id=ECLI:NL:PHR:2020:649>, para. 3.23. See also the approving comments to these considerations – and the corresponding disappointment in relation to the ensuing judgment – by C.G. van der Plas in her annotation of the judgment in Ondernemingsrecht 2021/51, para. 3.

> correspond to the rules set out in 3.2.3 above and therefore demonstrates an incorrect legal view. These rules amount to the fact that, under international law, a presumption of immunity from execution applies to goods of a foreign state, which presumption is discarded only if it has been established that the goods in question are used by the foreign state or are intended for purposes other than public purposes, and that it is up to the party invoking an exception to immunity from execution to provide information on the basis of which this can be established. It follows from these rules that immunity from execution is not limited to goods whose immediate destination is a public one.
>
> Furthermore, the court of appeal's judgement that the destination of the shares in KMGK held by Samruk is other than a public destination, demonstrates an incorrect legal view, or that judgement is insufficiently reasoned. In light of the circumstances put forward by Samruk and Kazakhstan (…) it is not clear without further reasoning why it can be assumed as established that the shares in KMGK held by Samruk have a destination other than a public destination. After all, the fact that the proceeds from the shares in KMGK are intended to increase the national prosperity of Kazakhstan indicates in principle that they have a public destination.[34]

After the Supreme Court's ruling, the case was remitted to the The Hague Court of Appeal for further consideration. The Court of Appeal, without reviewing customary international law, recalled that the Supreme Court's case law shows that there is a presumption of immunity from execution and that this is in conformity with Article 19(c) of the UN Convention.[35] It accepted the plea for immunity, considering that:

> even if it is assumed that Samruk manages its investments in a commercial manner and its investment in KMGK is aimed at long-term value maximisation, this does not alter the fact that Samruk's objective is in any case also to contribute to the economic development of Kazakhstan and to increase the national prosperity of that country. [36]

This judgment of the The Hague Court of Appeal was subsequently put to the Supreme Court. Advocate General Vlas wrote in his advisory opinion to the Supreme Court that the statement in the Court of Appeal's judgment, that Samruk's objective, apart from its possible commercial activities, 'in any case is also to contribute to the economic development of Kazakhstan and to increase the national prosperity of that country', was not disputed by Stati c.s. in cassation proceedings.[37] Therefore, Vlas stated, it was legally determined that the shares held by Samruk in the Dutch subsidiary (or the proceeds from them) in any event *also* had a public purpose – either in full or in part. As it was not shown in what part the shares, or the proceeds from them, were intended for non-public purposes, the assets were immune from execution, even if these assets were to be considered 'mixed funds'.[38] The Supreme Court subsequently summarily rejected the appeal.[39]

[34] HR 18 December 2020, ECLI:NL:HR:2020:2103, NJ 2021/242 (Samruk & Kazachstan/Ascom), with commentary from Th.M. de Boer, paras. 3.2.4-3.2.5. For the Dutch text, see <https://deeplink.rechtspraak.nl/uitspraak?id=ECLI:NL:HR:2020:2103>.

[35] The Hague Court of Appeal 14 June 2022, ECLI:NL:GHDHA:2022:977, paras. 3.11(b) and 3.12.

[36] Ibid., para. 3.14.

[37] Advocate General P. Vlas in his advisory opinion to the Dutch Supreme Court, 16 June 2023, ECLI:NL:PHR:2023:611 (*Ascom*/*Kazachstan*), para. 2.11.

[38] Ibid., para. 2.12.

[39] Dutch Supreme Court 22 September 2023, ECLI:NL:HR:2023:1281, *RvdW* 2023/900 (*Ascom*/*Kazachstan*).

3.1.9 *HR 6 July 2021 (Central Bank of Suriname)*

In July 2021, the Supreme Court decided a criminal law case which also involved immunity from execution.[40] The Dutch public prosecutor had seized a shipment of some €20 million in cash, which the Suriname Central Bank had intended to ship from Suriname, via the Netherlands, to the Bank of China in Hong Kong. The money was owned by three Suriname commercial banks. The Suriname Central Bank filed a complaint in respect of the seizure, claiming immunity from criminal enforcement measures. The seizure was based on a suspicion of money laundering, but the Suriname Central Bank was not a suspect in the case.
The Supreme Court considered that while the UN Convention does not apply to criminal proceedings, it should be assumed that state immunity in criminal law cases is no more limited than immunity in civil law cases. On that basis, the Supreme Court proceeded to apply the UN Convention. Without going into the detail of this criminal law case, it is striking that the Supreme Court, deviating from the Advocate General's advisory opinion, *rejected* Suriname's Central Bank's plea of immunity from execution in this particular case. Also in this case, however, the Supreme Court's reasoning has been subject to substantive criticism.[41]
For present purposes, it is relevant that the Supreme Court stated that not all provisions of the UN Convention can be considered to reflect customary international law. The Supreme Court added: 'It is relevant in this connection that the legislation and case law of many other states assume less far-reaching immunity for central banks'.[42] Considering the diverging sources in other jurisdictions that were discussed in a comparative law report (*viz*. M. Bsaisou, *Vollstreckungsimmunität von Zentralbanken*, Mohr Siebeck 2020), the Supreme Court held:

> Partly in the light of this comparative law research, it can be concluded, at most, that a generally applicable, unwritten rule of customary international law can be held to ex-

[40] HR 6 July 2021, ECLI:NL:HR:2021:1042, NJ 2022/121 (Central Bank of Suriname), with commentary from Th.M. de Boer. The Dutch text of the judgment is available at <https://deeplink.rechtspraak.nl/uitspraak?id=ECLI:NL:HR:2021:1042>.

[41] *Cf*. the commentary by Th.M. de Boer to the judgment, in *NJ* 2022/121. De Boer argues (i) that the UN Convention should not be applied to criminal seizures, and (ii) that the Supreme Court misinterprets the term 'property' within the meaning of the UN Convention. His criticism appears to be justified (see e.g. ECLI:NL:PHR:2023:487 (16 May 2023), para. 5.4, citing a letter from the Suriname Minister of Justice, and compare paragraph 22 of the Swedish Supreme Court judgment in Case No. Ö 3828-20, discussed below in paragraph 6.2.5, which is at odds with the Dutch Supreme Court's finding). Still, this criticism does not relate to the issues discussed in this publication and is therefore not elaborated upon further in this chapter.

[42] Dutch Supreme Court 6 July 2021, ECLI:NL:HR:2021:1042, NJ 2022/121 (Central Bank of Suriname), with commentary from Th.M. de Boer, paragraph 6.2.3 *infra*. For the Dutch text, see <https://deeplink.rechtspraak.nl/uitspraak?id=ECLI:NL:HR:2021:1042>.

ist according to which a central bank can claim immunity from seizure and execution insofar as it relates to 'property' of the central bank that is intended or used for the performance of the central bank's tasks in relation to monetary and exchange rate policy.[43]

3.1.10 *HR 22 March 2024 (Russian Federation/Hulley Enterprises, Yukos c.s.)*

The last in the series of Dutch Supreme Court judgments discussed here is noteworthy in that the court did not consider it necessary to comment on the preceding decision of the Court of Appeal, which had *rejected* the Russian Federation's plea of immunity from execution. The Supreme Court, in its judgments of 22 March 2024, invoked Article 81 of the Dutch Judicial Organization Act, allowing it to omit its reasoning as to why the ground for cassation, as argued by the Russian Federation, was unsuccessful.[44] Apparently, it was sufficiently clear to the Supreme Court why the Court of Appeal had refused immunity from execution in this case to the extent that the Supreme Court considered that the matter did not raise significant legal questions.[45]

The case heard by the The Hague Court of Appeal concerned efforts by former Yukos shareholders in enforcing three Permanent Court of Arbitration awards rendered against the Russian Federation in 2014, granting some USD 50 billion in damages to the claimants. The former Yukos shareholders have been trying to enforce the awards in several jurisdictions ever since. In one of these attempts, they levied attachments on IP rights (e.g. trademark rights and logos) used to market and sell vodka, which were held by the state-owned company FKP. The IP rights were, however, the property – or held to be the property – of the Russian Federation. As far as relevant for present purposes, the Court of Appeal held that these IP rights, assuming they were indeed the property of the Russian Federation, were not protected by immunity from execution. After all, the Court of Appeal held that these IP rights are used for the commercial sale of goods (such as vodka). Moreover, it had been established that FKP transferred 25 percent of its annual profits to the Russian Federation, and that 75 percent of its income was used to cover the costs of FKP and to maintain FKP, so that the vast majority of proceeds was used for non-public purposes.[46]

As stated above, the Supreme Court rejected the grounds for cassation lodged against this judgment, without seeing the need to state the reasons for rejecting them.

[43] Ibid., para. 6.2.4. See for a subsequent ruling on this case (not relevant for purposes of immunity): Dutch Supreme Court 27 June 2023, ECLI:NL:HR:2023:980, *NJ* 2023/266 (*Central Bank of Suriname*), with commentary from P.A.M. Mevis.

[44] Art. 81 RO (Judicial Organization Act) allows the Dutch Supreme Court to confine itself to such statement if it finds that a cassation complaint is to be rejected without requiring the court to provide an answer in the interest of legal unity or legal development.

[45] Dutch Supreme Court 22 March 2024, ECLI:NL:HR:2024:464, *JBPR* 2024/42, with commentary from I.M.A. Lintel (*Russian Federation/Hulley Enterprises, Yukos c.s.*), para. 3.5.

[46] The Hague Court of Appeal 28 June 2022, ECLI:NL:GHDHA:2022:1159 (*Russian Federation/Hulley Enterprises, Yukos c.s.*), *JBPR* 2022/77, with commentary from M.C. van Leyenhorst, para. 5.34. In para. 9 of said commentary, it was noted that 25% of profit plus 75% of income does not add up to 100% of a meaningful amount.

For a critical assessment of the Court of Appeal's judgment, and of the Advocate General's advisory opinion to the Supreme Court, see paragraph 4.3 below.

3.2 Conclusions as to Dutch Supreme Court's stance on immunity from execution

From the above case law from the Supreme Court, the following rules in respect of immunity from execution can be ascertained:

(i) in determining the scope of immunity from execution, Dutch law refers to and applies customary international law;[47]
(ii) there is no rule of international law granting foreign states absolute immunity from execution;[48]
(iii) the assessment on immunity from execution is to be performed *vis-à-vis* each individual asset against which the creditor seeks enforcement separately; [49]
(iv) state property having a public purpose is in any case not susceptible to forced execution;[50]
(v) tax claims must generally be regarded as goods having a public purpose and are therefore not subject to execution;[51]
(vi) property of foreign states is immune from execution unless the creditor alleges and proves that the property is used or intended to be used for a purpose other than public purposes;[52]
(vii) foreign states are not under an obligation to provide information on the use or intended use of the relevant property. The burden of proof is on the creditor (even if the foreign state fails to appear in the proceedings);[53]
(viii) if funds and credits are used by the foreign state for various purposes, the creditor will have to allege and show that and to what extent those funds and credits are used or intended to be used for other than public purposes;[54]
(ix) state property that is not actually used for public purposes, but that is intended, at any point in time, for a public purpose, is immune from execution;[55]

[47] *Cf. Russian Federation/Pied-Rich* (paragraph 3.1.2 *supra*), *Ahmad – Staat* (paragraph 3.1.4 *supra*) and *Morning Star/Gabon and State* (paragraph 3.1.5 *supra*).

[48] *Cf. SEEE – Yugoslavia* (paragraph 3.1.1 *supra*), *Azeta – JCR* (paragraph 3.1.3 *supra*) and *Morning Star/Gabon and State* (paragraph 3.1.5 *supra*).

[49] *Cf. Morning Star/Gabon and State* (paragraph 3.1.5 *supra*) and *Iraq & Central Bank of Iraq* (paragraph 3.1.7 *supra*).

[50] *Cf. Azeta – JCR* (paragraph 3.1.3 *supra*), *Ahmad – Staat* (paragraph 3.1.4 *supra*), *Morning Star/Gabon and State* (paragraph 3.1.5 *supra*) and *Kazakhstan/Samruk – Ascom Group c.s.* (paragraph 3.1.8 *supra*).

[51] *Cf. Azeta – JCR* (paragraph 3.1.3 *supra*).

[52] *Cf. Morning Star/Gabon and State* (paragraph 3.1.5 *supra*) and *Kazakhstan/Samruk – Ascom Group c.s.* (paragraph 3.1.8 *supra*).

[53] Ibid.

[54] *Cf. Morning Star/Gabon and State* (paragraph 3.1.5 *supra*).

[55] *Cf. Ahmad – Staat* (paragraph 3.1.4 *supra*).

(x) when assessing the question of whether a particular asset is used or intended to be used for public purposes, one cannot limit such assessment to the direct/immediate use (or the direct/immediate intended use).[56]

In his commentary to the *Samruk* judgment by the Supreme Court, prof. Th.M. de Boer lamented that the case law of the Supreme Court makes one despondent.[57] Creditors of foreign states trying to enforce their legal title in the Netherlands will undoubtedly agree. I agree too, if only for legal and 'rule of law' considerations, which will be elaborated upon below.

4. CRITICAL ANALYSIS OF *MORNING STAR* AND SUBSEQUENT JUDGMENTS

4.1 **Morning Star**

4.1.1 *The Supreme Court's findings*

In *Morning Star*, the Supreme Court held that the UN Convention concerns a codification of customary international law on the rules of immunity from execution and its boundaries.[58] It then reasoned, on the basis of the UN Convention, that there is a presumption of immunity from execution and a burden of proof on the creditor to show that the asset is used for other than public purposes.
This reasoning will be scrutinised below. To that end, the relevant parts of the *Morning Star* judgment are cited here in translation:

> 3.4.3. Pursuant to customary international law as currently applicable in the Netherlands, foreign states enjoy immunity from execution, but not in an absolute sense. Property of a state having a public purpose, are however in any case not subject to enforcement measures (cf. Supreme Court 11 July 2008, ECLI:NL:HR:2008:BD1387, NJ 2010/525 (*Azeta – JCR and State*) and Supreme Court 28 June 2013, ECLI:NL:HR:2013:45, NJ 2014/453 (*Ahmad – State*)).
>
> 3.4.4. In the *Ahmad – State* judgment it was held that the decision expressed in 3.4.3 above is supported by the Convention on Jurisdictional Immunities of States and their Property (hereinafter: the UN Convention), which was adopted on 2 December 2004 by the General Assembly of the United Nations, but which has not been ratified by the Netherlands and has not yet entered into force, and that this convention entails a codification of customary international law in relation to immunity from jurisdiction and immunity from execution and the boundaries thereof. This view is supported by the preamble to the convention in question, which inter alia reads as follows: 'Considering that the jurisdictional immunities of States and their property are generally accepted as a principle of customary international law', 'Believing that an international convention on the jurisdictional immunities of States and their property would enhance the rule of law and legal certainty, particularly in dealings of States with natural or juridical persons, and would contribute to the codification and development of international law and the harmonization of practice in this area' and 'Taking into account developments in State practice with regard to the jurisdictional immunities of States and their property'.
>
> It does not follow from the foregoing that all provisions of the UN Convention are to be regarded as customary international law. (…)
>
> 3.4.5. The immunity of states is provided for in articles 18 and 19 of the UN Convention. Article 19 prevents the taking of measures of constraint against property of a foreign state, unless and except to the extent that (subsection a) the State has expressly consented to the taking of such measures as indicated therein, (subsection b) the State has allocated or earmarked property for the satisfaction of the claim which is the object of that proceeding; or (subsection c) it has been established that the property is specifically in use or intended for use by the State for other than government non-commercial purposes and is in the territory of the State of the forum, (provided that post-judgment measures of constraint may only be taken against property that has a connection with the entity against which the proceeding was directed).
>
> (…)
>
> 3.4.6. As follows from the reasoning of the Ahmad – State judgment referred to above in the opening line of 3.4.4, article 19 UN Convention may be regarded as a codification of customary international law. In the present case no decision needs to be given on the question as to whether this also applies to the so-called connection requirement mentioned at the end of part c of that provision, being the phrase between brackets in 3.4.5 above.
>
> (...)
>
> 3.5.2 It is consistent with the purport of immunity from execution – the aim of which is to respect the sovereignty of foreign states – to take as a starting point that property of foreign states is not subject to attachment and execution unless and insofar as it has been established that it is intended to be used for a purpose that is not incompatible with this. This is consistent with article 19 subsection (c) UN Convention, which, as has been held in 3.4.6 above, is to be regarded as a rule of customary international law on this issue. It is also appropriate to the aforementioned purport of immunity from execution that foreign states are not under an obligation to provide information indicating that their property has an intended use that prohibits attachment and execution.
>
> 3.5.3 It is consistent with what has been held in 3.5.2 above, that the obligation to furnish facts and the burden of proof with regard to the susceptibility for attachment and execution are on the creditor who attaches, or wants to attach, assets of the foreign state and that, even if the foreign state fails to appear in the proceedings, it will each time have to be established that the assets in question are susceptible

[56] *Cf. Kazakhstan/Samruk – Ascom Group c.s.* (paragraph 3.1.8 *supra*).
[57] Th.M. de Boer, commentary to HR 18 December 2020, ECLI:NL:HR:2020:2103, *NJ* 2021/242 (*Samruk & Kazachstan/Ascom*), para. 1 (in the Dutch original: '*Het is om moedeloos van te worden*').
[58] The same had already been decided by the Supreme Court of the Netherlands – albeit within the context of an analysis of Art. 21 UN Convention – in its judgment of 28 June 2013, ECLI:NL:HR:2013:45, *NJ* 2014/453 (*Ahmad/State*), with commentary from Th.M. de Boer, paras. 3.6.1–3.6.2. See *supra*, paragraph 3.1.4.

to attachment. The above means that the creditor will each time have to provide information on the basis of which it can be established that the assets are in use or intended for use by the foreign state for, briefly put, other than public purposes.

3.5.4 From the above it also follows that, also if funds and credits are concerned which are used by the foreign state for various purposes, both public and (exclusively) commercial or otherwise, the creditor who attaches, or wants to attach, property of the foreign state, will have to allege and argue convincingly that and to what extent those funds and credits are susceptible to attachment and execution (see also paragraphs 3.5 and 3.7 of the *Azeta – JCR* and *State* judgment mentioned in 3.4.3 above).[59]

4.1.2 *What does the Supreme Court mean?*

Two preliminary remarks to the first-cited paragraph of the *Morning Star* judgment (i.e. paragraph 3.4.3) are in order.
First, the Supreme Court states that it analyses the content of 'customary international law as currently applicable in the Netherlands'. This phrasing is confusing. Does the court mean that it purports to analyse customary international law – which by definition applies in an identical or almost identical manner in all relevant jurisdictions – or does the court mean that the rules of customary international law are, or could theoretically be, applied differently in the Netherlands from how they are applied in other jurisdictions? In the latter scenario, the obvious question arises to what extent the court indeed seeks to apply customary international law.[60]
Second, the court stipulates that, pursuant to customary international law ('as currently applicable in the Netherlands'), property of a foreign state having a public purpose is not subject to enforcement measures. The crucial element in this phrase is '*having a public purpose*'. This phrasing is used in each of the Supreme Court's judgments dating from 2008 onward in which immunity from execution was assessed. The phrase appears to be intended as an abbreviation of, and synonym of, the phrase 'other than government non-commercial purposes', used in Article 19(c) of the UN Convention. The phrase is central to the court's case law. Yet in none of the Supreme Court's judgments is the scope and/or content of the phrase explained or elaborated upon. This is problematic because the court's case law cannot properly be understood without an understanding of what the court means by an asset having a public purpose.
A public purpose, in a broad interpretation, may refer to any purpose that ultimately seeks to benefit society. In this connotation, a children's playground, any revenue derived from a commercial contract, and any amount held by a state at a commercial bank (i.e. any asset owned by a state) qualifies as an asset having a public purpose. If this is the meaning implicitly ascribed to the phrase by the Supreme Court, then it cannot easily be reconciled with the Supreme Court's repeated

[59] Supreme Court of the Netherlands 30 September 2016, ECLI:NL:HR:2016:2236, NJ 2017/190 (Morning Star/Gabon and State), with commentary from Th.M. de Boer. For the Dutch text, see <https://deeplink.rechtspraak.nl/uitspraak?id=ECLI:NL:HR:2016:2236>, paras. 3.4.3-3.5.4.
[60] See also Section 7 *infra*.

assurance that immunity from execution is not absolute.[61] If, on the other hand, the Supreme Court understands the reference to '*public purpose*' as sovereign purposes, i.e. purposes which are intrinsically sovereign, such as diplomatic, military and central bank purposes,[62] then the scope of immunity from execution granted in the cases discussed above cannot be aligned with this reading. The Supreme Court's lack of explanation of what it considers to be the meaning and the limits of 'public purposes' thus appears to blur an inherent lack of logic and consistency in the Supreme Court's case law.

4.1.3 *Does the Supreme Court logically substantiate that Article 19 UN Convention reflects customary international law?*

The UN Convention has not come into force. It was adopted by the General Assembly without a vote on 2 December 2004. The Convention will become effective once it has been ratified by at least 30 countries.[63] At this moment the Convention has been ratified by 25 countries.[64] The Netherlands ratified the Convention on 23 April 2025,[65] but as the number of ratifications has not yet reached 30, the Convention does not apply in the Netherlands (or elsewhere). The Convention not being applicable as a treaty, immunity is governed, in the Netherlands, by customary international law.
In paragraph 3.4.6 of the *Morning Star* judgment, the Supreme Court holds that 'article 19 UN Convention may be regarded as a codification of customary international law'. It adds the caveat that this finding may perhaps not apply to part of subsection (c) of Article 19.[66] Article 18 of the UN Convention does not reflect customary international law, the court states.
This finding, from a rule of law point of view, is questionable. It suggests that the court's findings are based on customary international law as being reflected in Article 19, but (i) it does not establish what the purported content of the rule of customary international law is, and (ii) it is not based on a logical substantiation.

[61] *Cf. SEEE – Yugoslavia* (paragraph 3.1.1), *Azeta – JCR* (paragraph 3.1.3) and *Morning Star/Gabon and State* (paragraph 3.1.5).
[62] *Cf.* Art. 21(1)(a), (b) and (c) of the UN Convention.
[63] Art. 30 of the UN Convention.
[64] <https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=III-13&chapter=3&clang=_en>.
[65] See Section 8 *infra*.
[66] Art. 19 UN Convention reads: 'No post-judgment measures of constraint, such as attachment, arrest or execution, against property of a State may be taken in connection with a proceeding before a court of another State unless and except to the extent that: (a) the State has expressly consented to the taking of such measures as indicated: (i) by international agreement; (ii) by an arbitration agreement or in a written contract; or (iii) by a declaration before the court or by a written communication after a dispute between the parties has arisen; or (b) the State has allocated or earmarked property for the satisfaction of the claim which is the object of that proceeding; or (c) it has been established that the property is specifically in use or intended for use by the State for other than government non-commercial purposes and is in the territory of the State of the forum, provided that post-judgment measures of constraint may only be taken against property that has a connection with the entity against which the proceeding was directed.'

The Supreme Court's substantiation for its statement that Article 19 of the UN Convention (apart perhaps from the last part of the sentence of Article 19(c)) represents a codification of customary international law consists of no more than a reference to the *Ahmad – State* judgment,[67] which in turn is substantiated by no more than a reference to selected phrases in the preamble to the UN Convention, *viz*.:

> Considering that the jurisdictional immunities of States and their property are generally accepted as a principle of customary international law,
>
> (…)
>
> Believing that an international convention on the jurisdictional immunities of States and their property would enhance the rule of law and legal certainty, particularly in dealings of States with natural or juridical persons, and would contribute to the codification and development of international law and the harmonization of practice in this area,
>
> Taking into account developments in State practice with regard to the jurisdictional immunities of States and their property…

The Supreme Court's reasoning is unsound. Logically, one cannot conclude on the basis of the generically phrased preamble of the UN Convention that Article 19 (or part thereof) reflects a rule of customary international law, whereas Article 18 does not. The Supreme Court acknowledges this fallacy where it states: 'It does not follow from the foregoing that all provisions of the UN Convention are to be regarded as customary international law.' This is correct. Given this, it is unclear from the *Morning Star* judgment's reasoning on what basis the Supreme Court concludes that, specifically, Article 19 (or part thereof) codifies a rule of customary law. It is essentially a blanket statement.[68]
Moreover, the reference by the court to the UN Convention's preamble is unpersuasive. Contrary to the Supreme Court's suggestion, the preamble does not indicate that the Convention contains customary law regarding the boundaries of immunity from execution. The preamble merely acknowledges, in general terms, the existence of the legal concept of immunity from jurisdiction and execution as a part of customary international law:

> Considering that the jurisdictional immunities of States and their property are generally accepted as a principle of customary international law…

Interestingly, the Supreme Court stopped citing[69] the Convention's preamble at the penultimate paragraph, leaving out its last paragraph, which clearly suggests that, in fact, one has to distinguish between the contents of the Convention and the contents of customary international law:

> Affirming that the rules of customary international law continue to govern matters not regulated by the provisions of the present Convention…

Moreover, the phrase in the Convention's preamble cited by the Supreme Court, that the Convention 'would contribute to the codification and development of international law and the harmonization of practice in this area', does not justify the conclusion that this particular convention embodies a codification of customary law. This recital merely mirrors the general objective of the drafters of the Convention, the International Law Commission (ILC). Article 1 of the Statute of the ILC reads: 'The International Law Commission shall have for its object the promotion of the progressive development of international law and its codification.' This provision, in turn, copies the stated objective of any study initiated by the United Nations' General Assembly, i.e. 'encouraging the progressive development of international law and its codification'.[70] It is thus inappropriate to draw any conclusions in respect of the content of the UN Convention from the reference to this very basic UN text.
Moreover, the ILC's website states the following:

> In practice, the Commission's work on a topic usually involves some aspects of the progressive development as well as the codification of international law, with the balance between the two varying depending on the particular topic' [71]

It cannot therefore be deduced from the preamble to the UN Convention to what extent the UN Convention aims to contribute to 'progressive development' and to what extent the convention would be a codification – the preamble merely refers to the object of the ILC at large.
In respect of immunity from jurisdiction, the commentary to the UN Convention specifically indicates that the Convention does not intend to codify, or fix, rules of customary international law. In the explanatory notes to Article 5 of the Convention, which provides that states enjoy immunity from jurisdiction in accordance with the provisions of the Convention, the ILC writes as follows:

> In formulating the text of article 5, the Commission has considered all the relevant doctrines as well as treaties, case law and national legislation, and was able to adopt

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67 Supreme Court of the Netherlands 30 September 2016, ECLI:NL:HR:2016:2236, *NJ* 2017/190 (*Morning Star/Gabon and State*), with commentary from Th.M. de Boer, para. 3.4.6, referring to the *Ahmad/State* judgment, summarised by the court in para. 3.4.4.

68 Even if the UN Convention were a treaty that entered into force, a reference to its Art. 19 would not suffice to conclude that it represents a rule of customary international law. See the *ILC Report* discussed in Section 5 *infra*, Commentary (2) and (4) to Conclusion 11: 'in and of themselves, treaties cannot create a rule of customary international law or conclusively attest to its existence or content'; 'The words "if it is established that" make it clear that establishing whether a conventional rule does in fact correspond to an alleged rule of customary international law cannot be done just by looking at the text of the treaty: in each case the existence of the rule must be confirmed by practice (together with acceptance as law).'

69 In para. 3.4.4 of the *Morning Star* judgment.

70 Art. 13(1)(a) of the United Nations Charter.

71 <https://legal.un.org/ilc/work.shtml>.

> a compromise formula (…). (…) it was considered that any immunity or exception to immunity accorded under the present articles would have no effect on general international law and would not prejudice the future development of State practice. If the articles became a convention, they would be applicable only as between the States which became parties to it. Article 5 is also to be understood as the statement of the principle of State immunity forming the basis of the present draft articles and does not prejudge the question of the extent to which the articles, including article 5, should be regarded as codifying the rules of existing international law.[72]

Also if one considers this commentary to relate to immunity from jurisdiction only, the conclusion must be that the UN Convention did not attempt to codify 'customary international law in relation to immunity from jurisdiction and immunity from execution and the boundaries thereof', as the Dutch Supreme Court held in paragraph 3.4.4 of its *Morning Star* judgment. And if the ILC drafted the Convention as a compromise rather than as a codification in respect of immunity from jurisdiction, then one would expect some express statement that codification *was* intended in respect of immunity from execution.[73] No such wording can be found in either the Convention or its commentary. Indeed, the Dutch Minister of Justice explained in parliament, in December 1993, that the then current draft of the UN Convention 'takes a more conservative approach to the possibility of execution than the Dutch judge and judges in some other countries generally do'. [74]
This comment is in line with the fact that during the protracted period in which the draft articles were drawn up, a number of aspects of immunity, including the boundaries of immunity from execution, were extensively debated. This debate did not result in an agreement on a rule on immunity from execution that was generally believed to exist, but rather in the adoption of a compromise text. Subsequently, even after the compromise texts had been adopted by the ILC in 1991,[75] the ILC spent a further two decades debating the issue of immunity from execution and seeking a compromise text that would be acceptable to representatives of the different views.[76] While it may be true that the drafters of the UN Convention had

[72] ILC's Commentary to the UN Convention, UN Doc. A/46/10, p. 23. Available at <https://legal.un.org/ilc/documentation/english/reports/a_46_10.pdf>.

[73] See also the Dutch Advisory Committee on Issues of Public International Law (CAVV), Advice No. 4 of 14 October 1999 regarding Art. 18 of (what in those days was still) the ILC Draft: 'This article [18] forms part of part IV of the ILC draft and acts as a counterbalance to part III, thus causing the whole of the draft to become a compromise between those in favour of absolute state immunity and those in favour of state immunity of a more restrictive nature.' For the Dutch text, see <https://www.adviescommissievolkenrecht.nl/publicaties/adviezen/1999/10/14/immuniteit-van-staten-en-hun-eigendom>, para. 2.4.1.

[74] Dutch Parliamentary History (*kamerstukken*), 23 081, nr. 5 ('*Nota naar aanleiding van het verslag*'), 1993–1994, p. 5.

[75] Draft Articles on Jurisdictional Immunities of States and Their Property, 1991, <https://legal.un.org/ilc/texts/instruments/english/commentaries/4_1_1991.pdf>.

[76] For an overview of the developments in the period 1991–2004 see the following UN documents: Resolution 46/55 of 9 December 1991, Decision 47/414 of 25 November 1992, Decision 48/413 of 9 December 1993, Resolution 49/61 of 9 December 1994, Resolution 52/151 of 15 December 1997, Resolution 53/98 of 8 December 1998, Resolution 54/101 of 9 December 1999, Resolution 54/111 of 9 December 1999, Resolution 55/150 of 12 December 2000, Resolution 56/78 of 12 December 2001, Resolution 57/16 of 19 November 2002, Resolution 58/74 of 9 December 2003, Resolution 59/38 of 2 December 2004.

hoped to come to a convention that would contribute to harmonisation in the field of law and that might (also) codify a number of rules that were accepted to all those involved as being customary international law (such as perhaps the immunity for the property listed in Article 21(1)(a)–(c) of the UN Convention), this does not mean that the UN Convention as it was finally drawn up represents a codification of the boundaries of immunity from execution. It appears from the legislative history of the Convention that there has been no question of codification and/or unanimity regarding immunity from execution.
Last but not least, the ILC – which drafted the UN Convention – later published its report on the methods for the identification of rules of customary international law (adopted by the UN General Assembly in 2018). The report, which is discussed in Section 5 below, specifically states that one cannot derive a rule of customary law from a provision of a treaty.[77] The fact that one cannot derive a rule of customary law from a treaty that has entered into force obviously means that such a rule *a fortiori* cannot be derived from a provision of a treaty that has not yet entered into force, such as the UN Convention.
It follows from the above that the Supreme Court's ruling, that Article 19 of the UN Convention (or part thereof) codifies a rule of customary international law, is unpersuasive. Also, without delimiting and interpreting the phrase 'other than government non-commercial purposes' in Article 19(c) of the UN Convention, it cannot be meaningfully stated that the Convention provides for the boundaries of immunity of execution.

4.2 **Kazakhstan – Samruk**

As a general comment to the Supreme Court's judgment in *Samruk – Kazakhstan*, I note that, in rejecting the Amsterdam Court of Appeal's ruling that assets are immune from execution only if their immediate purpose is public, the Supreme Court appears to close the door for creditors wishing to enforce their title against a foreign state in the Netherlands. After all, if, according to the Supreme Court, immunity from execution is not limited to assets whose immediate/direct purpose is public, the logical conclusion is that assets whose direct purpose is commercial but whose ultimate purpose is public, are also immune from execution.[78] It is conceptually difficult to see which state assets could then still be attached by a creditor.

[77] ILC Report, <https://legal.un.org/ilc/reports/2018/english/a_73_10_advance.pdf>, Commentary (2) and (4) to Conclusion 11. See also *supra*, n. 70.

[78] It appears that Th.M. de Boer, in his commentary to the Supreme Court's judgment in *NJ* 2021/242, para. 3, assumes that the Supreme Court's reference to the 'immediate purpose' is a timing issue, rather than referring to an immediate/ultimate purpose distinction (he writes that the Supreme Court incorrectly holds that account must be taken of a destination that the asset did not have (or did not yet have) at the time of the seizure) (in Dutch: '[*daaruit volgt*] *niet dat er rekening gehouden moet worden met een bestemming die zij (nog) niet hadden ten tijde van de beslagprocedure*'). In my reading of the Supreme Court's judgment, I do not see an intended reference to a timing issue.

In the *Kazakhstan – Samruk* judgment,[79] the Supreme Court ruled that 'the fact that the proceeds from the shares in KMGK are intended to increase the national prosperity of Kazakhstan indicates in principle that they have a public destination'. To clarify: this ruling relates to the purpose of the attached shares that the Kazakh National Welfare Fund Samruk holds in the Dutch limited liability company KMGK. In order to determine the purpose of the shares, the Supreme Court looks at the proceeds of them and the dividends that are paid out to, first, Samruk and ultimately the Kazakh state. The Dutch Supreme Court does not consider it decisive whether the Dutch subsidiary conducts commercial activities and/or whether the payment of resulting dividends is to be considered commercial in nature. What is held to be relevant is that the proceeds from the relevant assets are intended to be paid out to Samruk, which entity's corporate goal is 'to increase the national prosperity' of the Republic of Kazakhstan.[80] Such a purpose of the owner, or beneficiary, of the asset hardly seems to be a distinctive criterion, as the same applies to any state holding assets.

Similarly, the Amsterdam Court of Appeal apparently deemed relevant that the shares in KMGK were fully (though indirectly) owned by the Kazakh state and that these could not be divested without the permission of the state. Again, this seems a peculiar distinctive criterion as, again, this applies to any asset of a state. If holding assets for the ultimate purpose of increasing the national welfare of the state is indeed the Dutch standard for establishing whether assets are intended for public purposes, one may wonder why, in 1993, the Russian vessel that was used for commercial purposes (and thus, one would expect, yielded revenue to the Russian state budget), was held not to enjoy immunity from execution.[81] Similarly, one might ask whether, in the perspective of the Supreme Court, immunity from execution also applies to money that has been in a dormant commercial bank account in the name of the state for ten (or a hundred) years,[82] to a right of a state to be paid € 1,000 in litigation costs by a counterparty in state court proceedings,[83] and to a diamond that a state's ministry found in its basement and that it puts up for sale.[84] Such assets, and most other assets of a state, are not 'in use', will not have a particular purpose, but will, if collected or sold, ultimately benefit the state's budget, and are therefore, arguably, indirectly and ultimately intended to increase, however minimally, the national prosperity of the state. If these examples are to be distinguished from the KMGK dividends that the Supreme Court considers to be immune from execution, it is not clear what the distinctive criterion is or could be. If, on the other hand, these examples cannot meaningfully be distinguished from the shares held by Samruk in

79 Paragraph 3.1.8 *supra*.

80 See subsequent judgment from the The Hague Court of Appeal, 14 June 2022, ECLI:NL:GHDHA:2022:977, para. 3.7 (iii) and its footnote 2, referring to Art. (1) of the Law of the Republic of Kazakhstan on the National Welfare Fund. Incidentally; based on the version of the law that I found online, this provision reads '*Деятельность Фонда основывается на следующих принципах: 1) соблюдения интересов государства как единственного акцион1ера Фонда*' which according to Google Translate has a more restricted meaning: 'The Fund's activities are based on the following principles: 1) compliance with the interests of the state as the sole shareholder of the Fund'. See also paragraph 3.13 of the judgment, where it is stated that Samruk's purpose is 'to contribute to the economic development of Kazakhstan and increase national prosperity through optimal management of its state-owned holdings' (in the Dutch original: *'om door een optimaal beheer van de door haar gehouden staatsdeelnemingen bij te dragen aan de economische ontwikkeling van Kazachstan en de nationale welvaart te vergroten'*). One may wonder whether such is not the purpose of any state. Does that suffice to conclude that all assets held by that entity, or that state, serve a public purpose and are therefore immune from execution?

81 *Cf. Russian Federation/Pied-Rich* (paragraph 3.1.2 *supra*).

82 A Dutch court has granted immunity from execution in a situation wherein the relevant asset was not in use. See judgment of the The Hague District Court 1 March 2023, ECLI:NL:RBDHA:2023:5434 (Ahmad – Staat), in which case immunity from execution was granted (again: see paragraph 3.1.4 *supra* for an earlier instance) in respect of the former embassy building of the Democratic Republic of Congo, in which connection the court considered that the asset was not used: 'There is therefore no question of the building being used for commercial or other purposes; the salient point is precisely that the building is not currently being used by the DRC.' See for the Dutch text: <https://deeplink.rechtspraak.nl/uitspraak?id=ECLI:NL:RBDHA:2023:5434>, para. 5.13. As the creditor could not show that the unused asset was intended to be used for commercial purposes, the presumption of immunity was applied and immunity was granted.

83 In a case that was governed by a provision of Dutch law (Art. 703 of the Dutch Code of Civil Procedure) rather than by customary international law, the Rotterdam District Court has ruled that a claim of a foreign state to be paid litigation costs is not immune, even though the amount would flow to the state's budget. Rotterdam District Court 1 December 2005, (Georgia/Sierra Oil Enterprises), not published, case number 247936/KG ZA 05-928, para. 4.4: 'Of course, these funds [from a legal costs award; MvL], if paid, flow into the state treasury of Georgia, but these funds do not, as a result thereof, fall under the prohibition of attachment of article 703 DCCP. As argued by Sierra, it must be held that in the absence of a specific public purpose that would be frustrated as a result of the attachment, it cannot be said that the attachment is not allowed.' In the Dutch original: *'Uiteraard vloeien deze gelden, indien wordt betaald, in de staatskas van Georgië, doch daarmee vallen die gelden niet onder het beslagverbod van artikel 703 Rv. Met Sierra moet worden geoordeeld dat bij gebreke van een concrete publieke bestemming, die als gevolg van het beslag zou worden gefrustreerd, niet kan warden gezegd dat het beslag niet mogelijk is.'* Similarly, The Hague District Court 12 January 2005, ECLI:NL:RBSGR:2005:AS3470, NJF 2005/77 (gemeente Janswoude/Kompier), r.o. 3.7 (also decided pursuant to Dutch, rather than international law): 'The municipality's argument essentially boils down to the fact that the mere fact that the funds that the defendant has seized belong to it is sufficient to be able to regard them as intended for the public service. This argument fails. Whether the goods belong to a government agency is, contrary to what the claimant apparently believes, not decisive for the question of whether they are intended for the public service. Also in view of the origin of the funds affected by the seizure – the claimant confirmed at the hearing when asked that the attachment was made on funds that she collected from the defendant – it is not certain in advance that these are intended for the public service. The mere assertion of the claimant that it wishes to use these funds in the context of its maintenance and functioning, and thus for the benefit of the public service, is insufficient in this regard.' For the Dutch text, see <https://deeplink.rechtspraak.nl/uitspraak?id=ECLI:NL:RBSGR:2005:AS3470>, para. 3.7.

84 In this connection, one may consider a case that was decided by a district court, applying Dutch law rather than international law: Leeuwarden District Court 27 May 2009, ECLI:NL:RBLEE:2009:BI5222 (*gemeente Sneek/Projectontwikkeling Friesland BV*). The court established that a municipality that was refusing to comply with a valid legal title was not impecunious and therefore held that it was simply unwilling to pay. In respect of the municipality's bank accounts that had been attached, the court held that invoking immunity from execution (under Dutch statutory law) for no other reason than to avoid performance of an obligation to pay, was an abuse of right. In respect of the local government's furniture that was attached, the court held that the municipality had insufficiently shown that its public services could not properly function without these specific assets. The court held that it was up to the municipality to persuade the court, in respect of each of the individual assets, that it was necessary for the proper functioning of the public services.

KMGK, then the conclusion would seem that the Dutch Supreme Court effectively returned to the theory of absolute immunity from execution.

4.3 Russian Federation/Hulley Enterprises, Yukos c.s.

The lack of clarity in respect of the scope and rationale of immunity granted by the Supreme Court to Samruk is amplified by the tacit acceptance by the Supreme Court of the The Hague Court of Appeal's rejection of immunity in the case against the Russian Federation on the vodka IP rights. The two cases – whereby immunity was granted to Samruk – Kazakhstan but denied to FKP/the Russian Federation – cannot easily be reconciled.

To recall: the Court of Appeal had ruled that IP rights that were used by state-owned company FKP – but deemed the property of the Russian Federation – were not protected by immunity from execution.[85] The court stated two reasons for this, which were later summarised by the Advocate General, as the combination of the following: (i) the immediate/direct purpose of the seized IP rights was commercial (i.e. the exploitation of alcoholic beverages) and (ii) the proceeds from the IP rights were largely intended for a non-public purpose (namely for the maintenance and the covering of costs of the state-owned company FKP).[86]

By contrast, the shares held by Samruk in the Dutch company KMGK were held to be immune. KMGK derives its income from participation in oil recovery operations in the North Caspian Sea,[87] which would be a commercial activity. For the Supreme Court, however, this was irrelevant. What was decisive was that profits made by KMGK (by its commercial activities) were paid out to Samruk, whose purpose was to increase the Kazakh national prosperity.[88] If this is indeed the decisive criterion, then why would the IP rights in the *Yukos* case not be similarly immune from execution? The fact that the proceeds from IP rights were generated by commercial activities should, according to the Supreme Court, not be decisive. So apparently, the decisive factor that rendered the IP rights not immune from execution, was the fact that only 25 percent of the profits was paid out to the Russian Federation. The Advocate General, in his advisory opinion in the FKP case, reasoned as follows in this respect:

> In this case, the ground for cassation [advanced by the Russian Federation] apparently defends the view that part of the seized IP rights enjoys immunity from execution, insofar as the proceeds thereof accrue annually to the budget of the Russian Federation (25% of FKP's net profit), because it has not been established that this part is ultimately used for commercial purposes. I believe that this view is incorrect. Firstly, it has not been demonstrated that this part (25%) can be traced back to specific seized IP rights for which immunity from execution would apply. In that case, it should also be deducible that no immunity would apply to other seized IP rights (i.e. those IP rights which account for the remaining 75% of FKP's net profit). That seems to me to be an impossible exercise for the court and certainly in summary proceedings in an enforcement dispute. Secondly, the court of appeal established – which is uncontested in these cassation proceedings – that the seized IP rights are used for purposes other than non-commercial government purposes, namely the commercial exploitation of alcoholic beverages. This purpose applies to all seized IP rights. [The former Yukos shareholders] have after all stated that the seized IP rights have a purpose other than a public purpose and serve to distinguish the types of beverages sold under these rights and, where appropriate, to take enforcement action (see paragraph 5.32). The Russian Federation has acknowledged in cassation that the immediate use of the IP rights by FKP is aimed at a commercial purpose, namely the promotion of the sale of the alcoholic beverages in question that are traded with the aid of the IP rights. Against this background, I believe that the Court of Appeal was right to hold that the IP rights – taken as a whole – are used or intended to be used specifically for purposes other than non-commercial government purposes, so that the presumption of immunity from execution must yield. There is no violation of customary international law.[89]

I fail to see the logic in this reasoning. Moreover, and separately, I fail to see how this reasoning fits with the earlier case law of the Supreme Court. Considering that the earlier case law of the Supreme Court does not correctly reflect the applicable rules of customary international law, and that the advisory opinion of the Advocate General suggests the application of the Supreme Court's case law but seems at odds with it, the resulting legal situation in the Netherlands has become challenging to comprehend, at best. Some of the issues that arise upon reading the cited part of the advisory opinion are the following:

- It seems entirely artificial to demand that a party should explain which IP rights resulted in the 25 percent of profits that were paid out to the shareholder, and which other IP rights generated the remaining 75 percent of profits. Such a question is not merely an impossible exercise for a judge in summary proceedings (as Vlas states); it is intrinsically impossible to try and link percentages of profits of a sizeable company to specific IP rights owned by such company.
- If one assumes that 25 percent of profits are paid out to the Russian Federation and 75 percent is used to be reinvested in the company FKP, should the Supreme Court's case law then not require that all IP rights are held to be immune from execution? After all, would the IP rights then not be held to *also* have a public purpose – either in full or in part? And if so, and it is indeed impossible to show in what part the IP rights, or the proceeds from them, were intended for non-public purposes, should the assets not be considered immune from execution *in toto*, considering the Supreme Court's case law in respect of 'mixed funds'?[90]
- Why was it considered relevant that the immediate purpose of the IP rights was commercial? How does that tie into the Supreme Court's earlier judgments that clearly indicated that the immediate purpose is irrelevant? The Advocate General states in paragraph 3.40 of his advisory opinion: 'If I read the ground

[85] See paragraph 3.1.10 *supra*.

[86] Advocate General P. Vlas in his advisory opinion to the Dutch Supreme Court, 22 September 2023, ECLI:NL:PHR:2023:821 (*Russian Federation/Hulley Enterprises, Yukos c.s.*), paras. 3.43, 3.44 and 3.46.

[87] <https://www.kbv.kz/en/>.

[88] See para. 3.2.5 of the Supreme Court's judgment, cited in paragraph 3.1.8 *supra*.

[89] Advocate General P. Vlas in his advisory opinion to the Dutch Supreme Court, 22 September 2023, ECLI:NL:PHR:2023:821 (Russian Federation/Hulley Enterprises, Yukos c.s.). For the Dutch text, see <https://deeplink.rechtspraak.nl/uitspraak?id=ECLI:NL:PHR:2023:821>, para. 3.46.

[90] See paragraph 3.1.8, last paragraph, *supra*, elaborated upon in paragraph 6.2.5 *infra*.

for cassation correctly, it is argued that, in short, the immediate destination of the IP rights is commercial. In that case, there is no immunity from execution so that the argument fails on this basis already.'[91] How this statement is to be reconciled with the Supreme Court's case law is not explained.

- If the immediate purpose of assets (or proceeds thereof) is not decisive, but their ultimate purpose is, then why is the alleged 75 percent of profits from IP rights that is used to reinvest in the company of FKP – a state-owned company whose profits that are not needed to maintain the company itself are distributed to the state's budget – not considered to have a public purpose as well?
- Does it really make sense to let the issue of immunity from execution for assets that are used to yield revenue for the state depend on the question as to the extent to which the company is profitable (in a certain period)? Suppose that FKP had been much more profitable, so that only 5 percent of the profits sufficed to fully collect the funds needed to maintain the company. This would have meant that 95 percent of the profits could be paid out to the state. Would the IP rights in such a situation have been immune from execution because the proceeds were predominantly paid out to the state's budget? Would immunity on the same IP rights no longer apply if FKP suffered from worsened market conditions one year later, resulting in a decrease or lack of profits?[92]

The advisory opinion claimed to apply customary international law. Unfortunately, no verifiable research was performed into the existence of a relevant rule of customary international law that was allegedly applied to the case at hand. Nevertheless, and irrespective of the questions that arise as to the compatibility of the advisory opinion with the Supreme Court's previous case law, the Supreme Court decided to reject the cassation without – as to the issue of immunity – providing any explanation.

It can be concluded that the Dutch Supreme Court's case law is unclear, seems contradictory, and is in any event not verifiably based on a concrete and well delineated rule of alleged customary international law. Moreover, as will be set out below, the Dutch case law is not based on a proper identification of a rule of customary international law.

5. THE IDENTIFICATION OF CUSTOMARY INTERNATIONAL LAW

If the Dutch Supreme Court could not have derived from the preamble of the UN Convention that Article 19 thereof (or part thereof) represents a codification of customary international law on immunity from execution and its boundaries, the question arises how one should establish whether there is a rule of customary international law on immunity from execution and if so, how one should establish what the content of such rule is.

The answer to that question should be uncontroversial. In order to establish the existence and content of a rule of customary international law, one has to establish a consistent state practice, in combination with the widely held view that such consistent state practice is considered to be mandatory (*opinio juris*).[93]

These two constituent elements were confirmed and elaborated upon in the ILC's *Draft conclusions on identification of customary international law*, which were adopted by the UN General Assembly in 2018 (the '*ILC Report*').[94] The ILC's conclusions 'concern the way in which the existence and content of rules of customary international law are to be determined'.[95] In doing so, the conclusions seek to offer guidance, including to 'those involved with national courts', 'on how the existence of rules of customary international law, and their content, are to be determined'.[96]

The report confirms that an assessment of consistent state practice and an *opinio juris* is required in order for the existence and the content of a rule of customary international law to be determined:

> **Conclusion 2**
> To determine the existence and content of a rule of customary international law, it is necessary to ascertain whether there is a general practice that is accepted as law (opinio juris).
> (…)
> **Conclusion 3**
> (…)
> Each of the two constituent elements is to be separately ascertained. This requires an assessment of evidence for each element.

The ILC's commentary adds:

> In each case, a structured and careful process of legal analysis and evaluation is required to ensure that a rule of customary international law is properly identified, thus promoting the credibility of the particular determination as well as that of customary international law more broadly.[97]

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[91] In the Dutch original: '*Lees ik het onderdeel goed, dan wordt dus betoogd dat, kort gezegd, de onmiddellijke bestemming van de IE-rechten commercieel is. In dat geval is geen sprake van immuniteit van executie en stuit het onderdeel hierop reeds af.*'

[92] See also my commentary to the judgment rendered by the The Hague Court of Appeal 28 June 2022, ECLI:NL:GHDHA:2022:1159 (*Russian Federation/Hulley Enterprises, Yukos c.s.*), *JBPR* 2022/77, para. 10.

[93] See for example P.H. Kooijmans, *Internationaal publiekrecht in vogelvlucht*, 10th edition, 2008, para. 2.1; North Sea Continental Shelf (*Federal Republic of Germany v. Denmark*; *Federal Republic of Germany v. Netherlands*) (Judgment) [1969] *ICJ Rep* 3, paras. 74 and 77; and Limburg District Court 8 February 2017, ECLI:NL:RBLIM:2017:1002, *NJF* 2017/125 (*Supreme/SHAPE*), para. 4.11.

[94] Report of the International Law Commission on the work of its seventieth session, UN General Assembly Official Records, 73rd Session, Supplement No 10, UN Doc. A/73/10 (2018). See also <https://legal.un.org/ilc/texts/instruments/english/commentaries/1_13_2018.pdf>. The General Assembly adopted the Conclusions by Resolution A/RES/73/203 dated 20 December 2018, bringing 'them to the attention of States and all who may be called upon to identify rules of customary international law, and encourages their widest possible dissemination': <https://digitallibrary.un.org/nanna/record/1660343/files/A_RES_73_203-EN.pdf?withWatermark=0&withMetadata=0&version=1&registerDownload=1>.

[95] *ILC Report*, Conclusion 1.

[96] *ILC Report*, general commentary (2).

[97] *ILR Report*, general commentary, para. 2.

The importance of properly establishing whether there is a rule of customary international law, by reviewing state practice and seeking evidence of an *opinio juris*, is explained in a book by Michael Wood (the chairman of the *ILC Report*'s drafters), stating that if a rule of customary law is accepted and applied loosely, this ultimately undermines the legitimacy of international law as a whole:

> Determining the existence of rules without a degree of assurance that the international community is committed to them as obligatory under law 'risks the effectiveness and legitimacy of customary international law not only with respect to the individual rules, but ultimately with respect to the system as a whole.[98]

As to the element of state practice, the ILC writes in its commentary:

> First, the practice must be sufficiently widespread and representative. Second, the practice must exhibit consistency. In the words of the International Court of Justice in the North Sea Continental Shelf cases, the practice in question must be "both extensive and virtually uniform": it must be a "settled practice". As is explained below, no absolute standard can be given for either requirement; the threshold that needs to be attained for each has to be assessed taking account of context. In each case, however, the practice should be of such a character as to make it possible to discern a virtually uniform usage. Contradictory or inconsistent practice is to be taken into account in evaluating whether such a conclusion may be reached.[99]

Not only should a rule with a specific content be consistently applied internationally, but such practice should also be based on the conviction that states are under an obligation to act in compliance with that rule. This was phrased as follows by the ICJ in the *North Sea Continental Shelf Cases*:

> The States concerned must therefore feel that they are conforming to what amounts to a legal obligation. The frequency, or even habitual character of the acts is not in itself enough. There are many international acts, e.g., in the field of ceremonial and protocol, which are performed almost invariably, but which are motivated only by considerations of courtesy, convenience or tradition, and not by any sense of legal duty.[100]

An *opinio juris* may appear from various sources. Conclusion 10(2) states in this respect:

> Forms of evidence of acceptance as law (opinio juris) include, but are not limited to: public statements made on behalf of States; official publications; government legal opinions; diplomatic correspondence; decisions of national courts; treaty provisions; and conduct in connection with resolutions adopted by an international organization or at an intergovernmental conference.

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98 Michael Wood and Omri Sender, '*Introduction'*, *Identification of Customary International Law*, Oxford University Press 2024, para. 1.3, p. 5.

99 *ILC Report*, Commentary (2) to Conclusion 8, p. 136.

100 North Sea Continental Shelf (Federal Republic of Germany v. Denmark; Federal Republic of Germany v. Netherlands) (Judgment) [1969] ICJ Report 3, para. 77. Available at <http://www.icj-cij.org/files/case-related/51/051-19690220-JUD-01-00-EN.pdf>.

Importantly, where either of the two constituent elements cannot be established after the 'structured and careful process of legal analysis and evaluation', the ILC stipulates that the conclusion must be that the alleged rule of customary international law does not exist:

> Where the existence of a general practice accepted as law cannot be established, the conclusion will be that the alleged rule of customary international law does not exist.[101]

6. TO WHAT EXTENT DOES A GENERAL PRACTICE, ACCEPTED AS LAW (*OPINIO JURIS*), EXIST ON THE BOUNDARIES OF IMMUNITY FROM EXECUTION?

6.1 **Consistent state practice on the principle, not on the scope**

The Dutch Supreme Court's case law is grounded on a stated application of customary international law. The existence of a rule of customary international law requires a consistent state practice in conformity with such rule. As stated by the International Court of Justice in the North Sea Continental Shelf Cases, 'State practice, including that of States whose interests are specially affected, should have been both extensive and virtually uniform in the sense of the provision invoked'.[102] The application of the rule by the several jurisdictions of the international community should be 'a settled practice'.[103]

The question thus arises whether there is an extensive and virtually uniform state practice of applying immunity from execution in a way that underpins the Dutch Supreme Court's case law.

The reasoning of the Supreme Court's case law itself does not include a reference to any conducted research as to the existence and content of the customary international law standard on immunity from execution. It thus cannot be established from published judgments that the Supreme Court, or the relevant courts of appeal, carried out such an investigation.[104] As such, the Supreme Court's method of determining the existence and scope of a rule of customary international law on immunity from execution does not verifiably meet the standard set by the ILC.[105]

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101 *ILC Report*, Commentary (3) to Conclusion 2, p. 125.

102 North Sea Continental Shelf (Federal Republic of Germany v. Denmark; Federal Republic of Germany v. Netherlands) (Judgment) [1969] ICJ Report 3, para. 74. Available at <http://www.icj-cij.org/files/case-related/51/051- 19690220-JUD-01-00-EN.pdf>.

103 Ibid., para. 77.

104 Except, to a limited extent, in the *Central Bank of Suriname* case. See paragraph 3.1.9 *supra*.

105 See also C.M.J. Ryngaert, 'Ascertaining Customary International Law: An Inquiry into the Methods Used by Domestic Courts',65(I) *Netherlands International Law Review* (2018) p. 23 ('It remains that from a doctrinal perspective, a serious legal analysis of all available materials is called for. Ultimately, courts, and especially domestic courts, which function in a state governed by the rule of law, are supposed to identify and apply the law, regardless of the political ramifications of their decisions. Therefore, a rigorous application of the two-elements approach to customary

Moreover, as will be demonstrated below, a review of decisions of courts in a variety of jurisdictions contradicts the existence of a widespread, consistent and representative rule on the boundaries of immunity from execution. In particular, the tenet that immunity from execution applies to any asset with a public purpose in the broad interpretation used by the Dutch Supreme Court cannot be substantiated by reference to a consistent state practice. Similarly, the Supreme Court's stance that there is a presumption of immunity from execution (so that the burden of proof is always on the creditor), cannot be substantiated by reference to a consistent state practice either. Nor can other aspects of the Dutch Supreme Court's case law be said to be part of an internationally 'settled practice'; examples are discussed in paragraphs 6.2.5 and 6.2.6. below.
It follows from the judgments discussed below that a number of courts in other jurisdictions apply a substantially more limited rule on immunity from execution. In doing so, many courts state that they apply customary international law, as does the Dutch Supreme Court. Other courts may apply national statutory rules on immunity from execution, and courts often refer to the UN Convention. Either way, the existence of substantially different approaches on the application and scope of immunity from execution indicates, by definition, the absence of a rule of customary international law as assumed to exist – or at least, as applied – by the Dutch courts. This will be elaborated upon in Section 7.

6.2 International case law on sovereign purpose/public purpose/ government non-commercial purposes

As discussed above, the Dutch Supreme Court states that, under customary international law, state property having a public purpose is in any case not susceptible to forced execution. The phrase '*public purpose*' is used by the Supreme Court as a synonym of the term '*government non-commercial purposes*' in Articles 19(c) and 21(1) of the Convention.

6.2.1 *How is the phrase 'intended for public purposes' applied internationally?*

As far as I have been able to ascertain, state practice on immunity from execution is uniform to the extent that a principle of immunity from execution as such seems to be universally accepted.[106]

law identification by domestic courts is called for.'). I will not discuss the issue of whether and to what extent Art. 79 (2) of the Dutch Judicial Organization Act (*Wet RO*) restricts the Supreme Court in identifying the existence and scope of a rule of customary international law. See *Asser Procesrecht/Korthals Altes & Groen 7*, 2015/121.

[106] In the past, it appeared that Turkey did not grant states immunity from execution at all. Such could be derived from a decision by the Turkish Cour de Cassation of 11 June 1993 (Société X c./U.S.A.) and of the Turkish Tribunal d'Exécution of 21 February 2001 (Société c./Azerbaijan). Both judgments have been summarized in French and published in Council of Europe (ed.), State Practice regarding State immunities, 2006, pp. 675-678 (as TR/6 and TR/9 respectively). In the

State practice regarding the boundaries of immunity from execution is less uniform. Until recently, China adhered to the doctrine of absolute immunity, both in respect of jurisdiction and execution.[107] A number of Western jurisdictions apply a less restrictive version of immunity from execution. Many other jurisdictions have no known relevant state practice or case law at all. As will be seen below, the content of the case law in several jurisdictions differs substantially from that of the Dutch case law.

6.2.2 *Case law on immunity for property intended for sovereign purposes*

On the basis of a review of published judgments in various jurisdictions, it would appear that a generally accepted principle is that, at least, property intended for sovereign duties of a state enjoys immunity. The rule applies in any event to property used in the performance of diplomatic functions, military equipment and central bank assets that are used for central bank purposes.[108]
Several Dutch sources confirm that the rationale of immunity from execution is to prevent the performance of a foreign state's sovereign functions from being hampered by the levying of attachments.[109]

IBA's jurisdiction-by-jurisdiction guide on Cross-border enforcement of judgments against states, however, the contemporary approach of the Turkish judiciary appears to be more nuanced. Cf. Tolga Danışman, S. Elif Köse Özgüç, and Mina Çobanoğlu, report on Turkey (<https://www.ibanet.org/document?id=cross-border-enforcement-Turkey>), para. 6.

[107] Dahai Qi, 'State Immunity, China and Its Shifting Position', 7(2) Chinese Journal of International Law (2008) pp. 307-337. See also the IBA's jurisdiction-by-jurisdiction guide on Cross-border enforcement of judgments against states, report on China. Cf. Yanli Zheng, report on People's Republic of China (<https://www.ibanet.org/document?id=cross-border-enforcement-China>), para. 6. With the enactment of the Law of the People's Republic of China on Foreign State Immunity, which entered into force on 1 January 2024, the principle of absolute immunity from execution was replaced by a relative – though still expansive – immunity. See Art. 14 of the act, available in an English translation at <http://en.moj.gov.cn/2023-12/15/c_948359.htm>.

[108] These assets are listed in Art. 21(1)(a) – (c) of the UN Convention. See also Van Alebeek, 'Staatsimmuniteit', in Horbach, Lefeber & Ribbelink (eds.), Handboek Internationaal Recht, The Hague, T.M.C. Asser Press 2007, p. 260, referring to Art. 21 of the UN Convention: 'The first three categories reflect customary international law as well as Dutch practice, whereas the last two for the time being are merely convention law. It would appear that ratification of the convention therefore slightly limits the possibilities of execution.' As to central bank assets, cf. Dutch Advisory Committee on Issues of Public International Law (CAVV), Advice No. 4 of 14 October 1999 regarding Art. 19 of (at the time) the ILC Draft, available at <https://www.adviescommissievolkenrecht.nl/binaries/cavv/documenten/adviezen/1999/10/14/immuniteit-van-staten-en-hun-eigendom/Immuniteit_van_Staten_en_hun_eigendom_CAVV-advies-4_199910.pdf>, para. 2.4.4: 'With respect to article 19 [nowadays 21; MvL] (1) (c) ("property of the central bank or other monetary authority of the State") the Dutch Advisory Committee is in favour of adding a phrase such as "held by it for central banking purposes", as was also done in article VIII, C3, of the ILA text and article 4 (2) (c) of the text of the Institut de Droit International 1992.'

[109] Advocate General Vlas, for instance, uses the more generic term 'public purposes' but clearly links the phrase to assets without which the functioning of the foreign state's apparatus is negatively affected: 'No enforcement measures may be taken on assets owned by the foreign state if these assets are intended for the public service of that state. After all, by taking enforcement measures with regard to such assets, the performance of public tasks by the foreign state would be jeopardised and one sovereign state would thus interfere with the performance of the public tasks by the other

More important in view of an assessment of customary international law is that, internationally, a number of judgments from several jurisdictions clearly refer to the sovereign duties of the state, rather than to the arguably wider term public purposes. The following judgments may be referred to:

> German Bundesverfassungsgericht (Federal Constitutional Court), 1977:
> Execution (...) against a foreign State issued in relation to non-sovereign action (acta iure gestionis) of that State upon things of that State located or occupied in the national territory of the forum State is inadmissible without assent of the foreign State, insofar as these things at the time of commencement of the enforcement measure serve sovereign purposes of the foreign State.[110]

> Swiss Tribunal fédéral, 1985:
> Immunity can therefore only be claimed by reason of the nature of the assets subjected to attachment where those assets are allocated in an identifiable manner for the performance of a sovereign function, as in the case of those services necessary for the maintenance of diplomatic relations (embassy buildings).[111]

> Spanish Tribunal Constitucional, 1992:
> Thus, as a general rule it may be said that where a particular activity, or the use to which a particular asset is put, does not involve a foreign State's sovereignty, then neither international law, nor by extension Spanish domestic law, justify the nonexecution of a judgment (…).[112]

sovereign state.' For the Dutch text, see <https://deeplink.rechtspraak.nl/uitspraak?id=ECLI:NL:PHR:2016:552>, para. 2.5. Similarly, Th.M. de Boer writes in his commentary to Dutch Supreme Court 6 July 2021, ECLI:NL:HR:2021:1042, NJ 2022/121 (Central Bank of Suriname): 'In principle, the property of a foreign state is not subject to seizure, because that state would thereby be hindered in the exercise of its public duties.' In the Dutch original: *'Goederen van een vreemde staat zijn in beginsel niet vatbaar voor uitwinning, omdat die staat daardoor zou worden belemmerd in de uitoefening van zijn publieke taken.'*

110 Bundesverfassungsgericht 13 December 1977 (BVerfGE, Vol. 46, p. 342; 65 International Law Reports (1977) p. 150. The text quoted is a translation available at <https://law.utexas.edu/transnational/foreign-law-translations/german/case.php?id=584>. The original text is available at <http://www.servat.unibe.ch/dfr/bv046342.html>: *'Die Zwangsvollstreckung (...) gegen einen fremden Staat, der über ein nicht-hoheitliches Verhalten (acta iure gestionis) dieses Staates ergangen ist, in Gegenstände dieses Staates, die sich im Hoheitsbereich des Gerichtsstaats befinden oder dort belegen sind, ist, soweit diese Gegenstände im Zeitpunkt des Beginns der Vollstreckungsmaßnahme hoheitlichen Zwecken des fremden Staates dienen, ohne Zustimmung des fremden Staates unzulässig.'*

111 Swiss Tribunal fédéral, BGE 111 Ia 62, 24 April 1985, International Law Reports, Vol. 82, p. 35 (Libyan Arab Socialist People's Jamahiriya v. Actimon SA). Original text available at <http://relevancy.bger.ch/php/clir/http/index.php?highlight_docid=atf%3A%2F%2F111-IA-62%3Ade&lang=de&type=show_document>: *'Immunität im Hinblick auf die Natur der verarrestierten Sache kann somit nur dann beansprucht werden, wenn diese in erkennbarer Weise einem konkreten hoheitlichen Zweck gewidmet ist, wie etwa der Pflege diplomatischer Beziehungen (Botschaftsgebäude).'*

112 Spanish Constitutional Court, 1 July 1992, Decision 107/92 (Abbott v. Republic of South Africa), Revista Española de derecho internacional, Vol. 44, 1992, p. 565; International Law Reports, Vol. 113, p. 422. Original text available at <https://www.cahdidatabases.coe.int/Contribution/Details/246> (under 'attachments' section): '*Por ello, con carácter general, cuando en una determinada actividad o cuando en la afectación determinados bienes no esté empeñada la soberanía*

> Swiss Tribunal fédéral, 1998:
> Furthermore, what applies to immunity from jurisdiction also applies in principle to immunity from execution, the latter being merely a consequence of the former, subject only to the condition that the enforcement measures do not concern property intended for the performance of acts of sovereignty.[113]

> Austrian Oberster Gerichtshof, 2012:
> According to the prevailing doctrine of limited or relative state immunity in enforcement proceedings, the state is granted immunity from enforcement (only) if the object of enforcement serves sovereign purposes.[114]

See also for example the recital of the Vienna Convention on Diplomatic Relations, in which the immunity granted in respect of *inter alia* embassy buildings is premised on the understanding 'that the purpose of such privileges and immunities is not to benefit individuals but to ensure the efficient performance of the functions of diplomatic missions as representing States'. This again reflects that the purpose of immunity from execution is to prevent the proper functioning of the foreign state's official/sovereign apparatus.

6.2.3 *Case law on distinction between sovereign purposes and other public purposes*

Over the last couple of years, a number of judgments have surfaced that deal with the question of whether, and if so to what extent, property that does not serve sovereign purposes but serves public purposes more in general is immune from execution.
One such judgment is that rendered by the Supreme Court of Sweden in 2011.[115]

del Estado extranjero, tanto el ordenamiento internacional como, por remisión, el ordenamiento interno desautorizan que se inejecute una sentencia (...)'.

113 Swiss Tribunal fédéral, 20 Augustus 1998, 124 III 382 (Banque Bruxelles Lambert (Suisse) SA et al. v. République du Paraguay). Original text available at <https://search.bger.ch/ext/eurospider/live/fr/php/clir/http/index.php?lang=fr&type=highlight_simple_query&page=1&from_date=&to_date=&from_year=1954&to_year=2025&sort=relevance&insertion_date=&from_date_push=&top_subcollection_clir=bge&query_words=+ATF+124+III+382&part=all&de_fr=&de_it=&fr_de=&fr_it=&it_de=&it_fr=&orig=&translation=&rank=1&highlight_docid=atf%3A%2F%2F124-III-382%3Afr&number_of_ranks=26&azaclir=clir>: '*Par ailleurs, ce qui vaut pour l'immunité de juridiction vaut en principe aussi pour l'immunité d'exécution, la seconde n'étant qu'une simple conséquence de la première, sous la seule réserve que les mesures d'exécution ne concernent pas des biens destinés à l'accomplissement d'actes de souveraineté.*' It should be noted that the Swiss approach to immunity from execution is linked to immunity from jurisdiction, as transpires from this citation. This is not the prevailing view internationally. See for other examples: C.M.J. Ryngaert, 'Staatsimmuniteit van executie: beslagmogelijkheden voor crediteuren na de herfstarresten van de Hoge Raad', TCR 2017/3, p. 112.

114 Austrian Oberste Gerichtshof, 11 July 2012 (3 Ob 18/12m), para. 2.4. Original text available at <https://newyorkconvention1958.org/doc_num_data.php?explnum_id=2502>: '*Nach der herrschenden Lehre von der beschränkten bzw relativen Staatenimmunität im Vollstreckungsverfahren kommt dem Staat Vollstreckungsimmunität (nur) dann zu, wenn der Vollstreckungsgegenstand hoheitlichen Zwecken dient (...).*'

115 Swedish Supreme Court, 1 July 2011, Case No. Ö 170-10 (Russian Federation/Sedelmayer). The

The case concerned the seizure by Franz Sedelmayer, a German businessman, of an apartment complex near Stockholm owned by Russia, and of the rental income enjoyed by Russia in that connection. Russia had alleged that 'the property is exclusively in use for the official purposes of the Russian Federation'. Sedelmayer had disputed this argument and had submitted documents indicating that the apartment complex housed two Swedish companies and was the home of sixty residents, none of whom was a diplomat. Russia had stated its views to the contrary. The Swedish court referred to the UN Convention and ruled as follows:

> The 2004 convention must be considered to state the principle currently accepted by many states that enforcement may be taken with respect to at least some state property, namely with respect to property that is used for other purpose than government non-commercial purposes (see Article 19 (c)). However, there is an apparent disagreement – with respect to subject matter and over time – on what should be considered a holding for government non-commercial purposes. Thus, the meaning of the phrase must be narrowed down. In this context, the phrase must generally be considered to entail that immunity from enforcement measures can be claimed at least with respect to property that is in use for a state's official functions. However, the phrase cannot be considered to mean that immunity from enforcement measures can be successfully claimed solely based on the fact that a property is owned by a state and used for a non-commercial purpose. Enforcement measures should however be held impermissible if the purpose of the holding of the property is of a more specific nature, such as when the property is used for state acts proper and similar purposes of official nature or when the property is of such particular nature as stated in Article 21 of the 2004 UN convention.[116]

The court considered that 'according to what the [Russian] Federation stated before the Court of Appeal, 15 apartments were used for diplomats or personnel, and two premises were used as archive and storage of diplomatic vehicles'.[117] The majority of the apartment complex was held to be in use 'for purposes under private law but that were of non-commercial, but also non-official nature'. Therefore, it was held by the Swedish Supreme Court that the property was to a substantial part not used for the official purposes of the Russian Federation so that it was not entitled to immunity.[118] With regard to the rental income, it was decided that 'typically it is an asset that is of a commercial nature'.[119] Consequently, the creditor was allowed to proceed with the execution of both assets.

judgment is available in an English translation at <http://www.arbitrations.ru/files/articles/uploaded/Supreme_Court_of_Sweden_01072011.pdf>.

116 Ibid. It should be noted that the translation contains an error in the above-cited para. 14, in that it contains the phrase 'used for government non-commercial purposes'. The word 'government' does not appear in this meaning in the original Swedish version (available at <https://lagen.nu/dom/nja/2011s475>). The Swedish original reads as follows: '*att egendomen i fråga ägs av en stat och används av den för ett icke-kommersiellt ändamål*', which Google Translate translates as: 'that the property in question is owned by a state and is used by the country for a non-commercial purpose.'

117 Ibid., para. 21.

118 Ibid., paras. 22-23.

119 Ibid., para. 24.

The Swedish Supreme Court confirmed this approach in 2021, in a judgment on enforcement measures taken by Ascom Group c.s. against the Republic of Kazakhstan.[120] The creditors had arranged the attachment *inter alia* of shares in several listed Swedish companies that were held on a securities deposit at a commercial bank and funds on a cash account at the same bank. The court assessed the issue of immunity from execution on the basis of customary international law.[121] It referred to the above judgment, summarising it as follows:

> In the legal case entitled "Lidingöhuset" NJA 2011, p. 475 (p. 14),[122] the Supreme Court judged that in this respect, the Convention expresses the principle now recognised by many States that enforcement may take place at least for property that is used for purposes other than State and non-commercial purposes. The Supreme Court has thereby specified the principle by means of a delimitation against cases where enforcement cannot take place. According to the Court, there are obstacles due to State immunity from enforcement regarding property which is owned by a foreign State when the State's objective for possessing the property is a qualified objective such as when the property is used for the State's acts by right of dominion and similar official tasks. In this context, the legal case also mentions such specific property as indicated in Article 21 of the UN Convention.[123]

The court proceeded in analysing whether execution measures against assets managed by the Kazakh Central Bank were prohibited under a rule of customary international law, thereby referring to the specific categories of property listed in Article 21 of the UN Convention. It decided that central bank assets are indeed protected by immunity from execution, but only in as far as the assets concerned are used by the central bank in its activities in the area of monetary policy.[124] Other central bank assets should be assessed in accordance with the principles expressed in Article 19 of the Convention.
In that context, the Supreme Court held that, whereas the purpose of holding real estate is usually apparent from the actual use, it may be more difficult to assess the purpose of holdings of financial assets. The fact that the assets concerned are held or managed by a sovereign wealth fund is not in itself decisive for the assessment. Rather, the purpose of the invested assets is decisive. In this respect, assets

120 See paragraphs 3.1.6 and 3.1.8 *supra* for Dutch immunity-related proceedings involving the same parties.

121 Swedish Supreme Court, 18 November 2021, Case No. Ö 3828-20 (Ascom Group, Terra Raf Trans Trading c.s. – Republic of Kazakhstan and The National Bank of Kazakhstan), para. 14. The judgment is available in an English translation at <https://www.domstol.se/globalassets/filer/domstol/hogstadomstolen/avgoranden/engelska-oversattningar/o-3828-20-eng.pdf> and at <https://jusmundi.com/en/document/pdf/decision/en-ascom-group-s-a-anatolie-stati-gabriel-stati-and-terra-raf-trans-traiding-ltd-v-republic-of-kazakhstan-i-decision-of-the-supreme-court-of-sweden-thursday-18th-november-2021>. The latter translation is used herein.

122 This refers to the judgment re. *Russian Federation/Sedelmayer*.

123 Swedish Supreme Court, 18 November 2021, Case No. Ö 3828-20 (*Ascom Group, Terra Raf Trans Trading c.s. – Republic of Kazakhstan and The National Bank of Kazakhstan*), para. 19.

124 Ibid., paras. 23-24: 'The special level of protection to be enjoyed by central banks should therefore be limited to such property as has a clear connection with the central bank's activities in the area of monetary policy.'

which are invested so as to generate a return in the long term for an as-of-yet undetermined use are less likely to benefit from immunity from execution than government bonds and bank deposits (savings) that are reserved for use in the near future for a particular purpose. The court added:

> Anyone investing in listed shares and similar securities indirectly exposes themself to the same business-related risks as the companies in which the investments are made. A State's primary motive for exposing itself to such risks can typically be assumed to be the same as that of other investors in shares, i.e. to achieve a greater value increase and a higher yield than on an investment whose purpose is solely to safeguard the actual value of the assets. If the State's motive for the investment is no more than the latter, it cannot usually be seen as emanating from the State's act by right of dominion. In order for immunity to still apply to such property, apart from such almost commercial motives, there is a need for qualified act by right of dominion-type objectives which are clearly and concretely expressed in the State's regulation of the way in which the property will be utilised. Only the circumstance that the State will in the future have the option of utilising the value of the property for State activities or that the value will benefit future generations cannot be considered to be sufficient.[125]

Also a state's savings, which may serve a general macroeconomic function, will not automatically be regarded as a sovereign activity:

> For that to be the case, a more concrete connection between the form of saving and the State's monetary policy or other act by right of dominion must be required.[126]

The Swedish Supreme Court ultimately decided that Kazakhstan had not specified what specific public purposes were served by the shares held in the securities deposit and that the mere fact that these assets, or long term savings, might be intended generally as savings for future needs was insufficient to invoke immunity.[127] Where the purpose of the assets is to contribute in the long run to the increase of the national wealth for future use, such purpose does not justify immunity from execution.[128]

A similar decision was rendered, in a similar situation between the same parties, by the Brussels Court of Appeal. The Brussels Court of Appeal, also in 2021, allowed the execution against amounts held in a bank account, the purpose of which was 'to increase the long-term profitability of assets' (...), or in other words: 'to earn money by making investments'.[129] More specifically, the funds were stated to be intended 'to accumulate and preserve funds through the sale of non-renewable energy for future generations in order to guarantee long-term returns with an appropriate level of risk'.[130] Clearly in deviation from the Dutch Supreme Court's case law, the Brussels Court of Appeal decided that such funds are not protected by immunity from execution.

Without suggesting that the above description of selected international case law in paragraphs 6.2.2 and 6.2.3 above completes the 'structured and careful process of legal analysis and evaluation' that is required in the identification of a rule of customary international law and its content,[131] one may derive from the above judgments from the highest courts of Germany, Switzerland, Spain, Austria and Sweden – and the Brussels Court of Appeal – that immunity from execution is applied in relation to assets that are used for the performance of a sovereign function, but not in relation to assets used, or intended for use, for undisclosed or unspecified public purpose.[132] While there are of course also more stringent rulings by other courts, one cannot conclude that there is an extensive and virtually uniform state practice that supports the Dutch Supreme Court's case law.[133] The Dutch Supreme Court's case law thus cannot be soundly based on a rule of customary international law.

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[125] Ibid., para. 28.
[126] Ibid., para. 29.
[127] Ibid., paras. 45-46.
[128] Ibid., paras. 45-48.
[129] Brussels Court of Appeal (17th chamber) 29 June 2021, AR: 2018/AR/1209 (*Kazachstan/Stati, Ascom Group, Terra Raf Trans Trading LTD – National Bank of the Republic of Kazakhstan, Bank of New York Mellon*), b-Arbitra 2022/1, p. 101. In the Dutch (Flemish) original: '*'de rentabiliteit van het vermogen op lange termijn te verhogen' (...), of nog anders gezegd: 'geld verdienen door investeringen te doen'*.'
[130] Ibid. In the Dutch (Flemish) original: '*fondsen te cumuleren en te behouden door de verkoop van niet-hernieuwbare energie voor toekomstige generaties teneinde lange termijn opbrengsten te garanderen met een gepast risico-niveau.*'
[131] See the ILC's general commentary, para. 2, discussed in Section 5 *supra*.
[132] See also W.J. Habscheid, 'Die Immunität Ausländischer Staaten nach Völkerrecht und deutschem Zivilprozeßrecht', in: Berichte der deutschen Gesellschaft für Völkerrecht, Vol. 8, 1968, p. 258: '*Weiterhin wird bei einem Zwangsvollstreckungsverfahren nicht in jeden im Urteilsstaat befindlichen Vermögensgegenstand des ausländischen Staates exekutiert werden können – z. B. nicht in Büroeinrichtungen diplomatischer Missionen oder in auf Gastreisen weilende Kriegsschiffe. Es werden Gegenstände und Vermögensbereiche abzugrenzen sein, die mit hoheitlich-politischen Fragen des ausländischen Staates in direktem Zusammenhang stehen, und die, damit der ausländische Staat seine Staatsaufgaben erfüllen kann, von der Vollstreckung ausgenommen sein müssen.*' See also Bundesverfassungsgericht 13 December 1977 (BVerfGE, Vol. 46, p. 342; International Law Reports, Vol. 65, p. 146; <https://law.utexas.edu/transnational/foreign-law-translations/german/case.php?id=584>. In its decision, the Bundesverfassungsgericht refers to rather ancient sources: 'The Court of Cassation of the Kingdom of Italy ruled similarly in 1926 in re State of Romania v. Trutta (AJIL 26 [1932] supp. p. 711f.); it was held to be beyond doubt that except for things indispensable for the functioning of the official administration of the foreign State, all property of government was subject to execution'; and 'According to an established view, which began to emerge even before Grotius (De iure belli ac pacis, L. II, c. XVIII, 9), and Bynkershoek (Foro Legatorum, sec.ed. 1744, Cap.XVI, XXIII), in the case of measures of security or execution against a foreign State, under international law things at the relevant time serving its diplomatic mission in carrying out its official functions may not be seized.'
[133] For further case law that deviates from the Dutch Supreme Court's case law, see the Dutch Advisory Committee on Public International Law's (CAVV's) Advice No. 44 dated 22 December 2023, footnote 40. The advice is available at <https://www.adviescommissievolkenrecht.nl/publicaties/adviezen/2023/12/22/vn-verdrag-staatsimmuniteit>. It is striking that the CAVV, when summarising the Dutch Supreme Court's autumn judgments in its report (pp. 9-10), does so without any reservation or comment as to the question of whether these autumn judgments can be reconciled with customary international law and/or with the ILC Report on the identification of customary international law.

6.2.4 *Case law on the burden of proof*

Similarly, contrary to what the Dutch Supreme Court has repeatedly stated, or at least implied,[134] one cannot dissect a rule of customary international law (i.e. a 'settled practice') according to which a creditor has the full and unconditional burden of proof that an asset is not immune from execution. Several courts of appeal in the Netherlands decided cases in the past, rejecting such burden of proof for creditors, but these decisions were subsequently quashed by the Supreme Court.[135] Also internationally, a number of judgments held that, if a foreign state wishes to invoke immunity from execution, the state will have to allege and demonstrate that and why the attached property enjoys immunity from execution. Reference is made to the following case law:

> Swiss Tribunal fédéral, 1960:
> The absence of a specific purpose [of the seized asset] allows the validity of an attachment in Switzerland of the assets of a foreign State to be admitted.[136]

> Swiss Tribunal fédéral, 1985:
> It cannot be stated that the burden of proof rests with the respondent [i.e. the attaching party; MvL] to establish that the act at issue was performed iure gestionis. (...) Forced execution on the property of a foreign State which is allocated for the performance of sovereign functions is inadmissible. But it cannot be said that all property of foreign States and their national banks is automatically allocated for the performance of sovereign functions. In addition to administrative assets (Verwaltungsvermögen) the State also normally owns private fiscal assets (Finanzvermögen), which are comparable to property owned by natural or legal persons under private law. Immunity can therefore only be claimed by reason of the nature of the assets subjected to attachment where those assets are allocated in an identifiable manner for the performance of a sovereign function, as in the case of those services necessary for the maintenance of diplomatic relations (embassy buildings). According to the predominant opinion, a plea of immunity is inadmissible, in respect of money and securities, unless the documents or specified sums have been designated for the performance of such tasks (…).[137]

> Italian Corte Suprema di Cassazione Civile, 1997:
> When, therefore, as in the present case, funds of the foreign state maintained with banks are subject to expropriation, it is up to the state, if it intends to confirm that the funds originate from the payment of amounts used by the state for the performance of its public functions, to lodge an objection to the execution and to set out the current factual circumstances of the case of which it alleges that it is connected with the exemption from attachment of the property.[138]

> Italian Tribunale di Roma, 2009:
> On the other hand, it has to be affirmed that merely depositing interchangeable assets, such as sums of money, with a credit institution, in itself constitutes an act under private law which bears no relation to its intended use. It merely serves to provide the foreign state with funds for the performance of its functions, which may be either iure imperi or iure privatorum. Money that, by having been deposited, is deemed to form part of the debtor's assets. In the absence of any specific limitations on its intended use as provided for by the law, it remains up to the party against which enforcement is sought (the other party) to specifically and for each individual case prove the actual intended use of the funds, so as to rule out that they might be liable to attachment.[139]

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[134] The Supreme Court holds that it is 'consistent with' the purpose of immunity from execution that the burden of proof lies with the creditor. See e.g. Supreme Court of the Netherlands 30 September 2016, ECLI:NL:HR:2016:2236, *NJ* 2017/190 (*Morning Star/Gabon and State*), with commentary from Th.M. de Boer, para. 3.5.3. This, however, is not the relevant criterion. The decisive question – in view also of Art. 13a of the Dutch General Provisions Act – is whether the limitations imposed upon a creditor by the Supreme Court are required because of obligations of the Kingdom of the Netherlands under international law. In other words: are these rules of customary international law obliging the State of the Netherlands to impose such limitations upon the enforceability of judgments?

[135] *Cf.* e.g. Amsterdam Court of Appeal, 7 April 2015, ECLI:NL:GHAMS:2015:1337, *JOR* 2015/346 (*Staat-Servaas*), where the court held that (i) public international law acknowledges that certain categories of assets, such as embassy buildings, bank accounts held by embassies, military assets and central bank assets are generally intended for public purposes and are thus immune from execution; (ii) that the assets attached by Servaas are not of any of the categories of which it is generally acknowledged to be of a public purpose nature; (iii) that the Dutch State's argument, that there is a general presumption of immunity and that the creditor must prove that the specific asset that is attached is not intended for public purposes, must be rejected; and (iv) that, in situations in which the foreign state did not issue a statement as to the purpose of the relevant assets, and in which the nature of the assets does not provide any indication that the asset has a public purpose, a presumption of immunity from execution cannot be derived from principles of customary international law, nor from the UN Convention. The judgment was quashed in cassation proceedings; see HR 14 October 2016 (*Servaas – Staat*), paragraph 3.1.6 *supra*.

[136] Swiss Tribunal fédéral, 10 February 1960 (BGE 86 I 23), 55(1) *American Journal of International Law* (1960) p. 170. Original text: '*L'absence d'une affectation précise permet d'admettre la validité d'un séquestre opéré en Suisse sur les avoirs d'un Etat étranger.*'

[137] Swiss Tribunal fédéral, BGE 111 Ia 62, 24 April 1985, International Law Reports, Vol. 82, pp. 30-36. Original text available at <https://search.bger.ch/ext/eurospider/live/de/php/clir/http/index.php?lang=de&type=highlight_simple_query&page=1&from_date=&to_date=&from_year=1985&to_year=1985&sort=relevance&insertion_date=&from_date_push=&top_subcollection_clir=bge&query_words=BGE+111+Ia+62&part=all&de_fr=&de_it=&fr_de=&fr_it=&it_de=&it_fr=&orig=&translation=&rank=1&highlight_docid=atf%3A%2F%2F111-IA-62%3Ade&number_of_ranks=1&azaclir=clir>.

[138] Italian Corte Suprema di Cassazione Civile, 1 July 1997, no. 5888 (Repubblica Indonesia/Vincenzo), available at <https://www.altalex.com/documents/news/2004/10/19/cassazione-civile-ss-uu-sentenza-01-07-1997-n-5888>. In the original: '*Quando, perciò, come nel caso, siano stati sottoposti ad espropriazione, presso banche, crediti dello Stato estero, se esso intenda affermare che i crediti derivano dal deposito di somme di cui si avvale per l'espletamento di proprie funzioni pubbliche, lo Stato deve proporre opposizione all'esecuzione ed allegare la concreta situazione di fatto cui afferma si ricolleghi l'impignorabilità del bene.*'

[139] Tribunale di Roma, 3 June 2009, no. 5986 (*Repubblica dell'Iraq/En. S.p.A.*). In the original: '*Deve, invece, affermarsi la tesi che il mero deposito di beni fungibili quali le somme di danaro presso un istituto di credito di per sé costituisce un atto di diritto privato che non reca alcuna imputazione quanto alla destinazione delle stesse. Ha il solo significato di mettere a disposizione dello Stato estero danaro per l'esercizio di attività che possono essere sia iure imperi che iure privatorum. Danaro che, per l'effetto del deposito, entra nel patrimonio del debitore. E, in assenza di specifici vincoli di destinazione stabiliti per legge operante nel nostro ordinamento, rimane onere dell'esecutato opponente dimostrare, in concreto e caso per caso, l'effettiva destinazione del danaro a fini pubblici per escluderne la pignorabilità.*'

Brussels Court of Appeal, 2010:
The Democratic Republic of Congo maintains that this technical account is necessary for the exercise of public authority insofar as it is allocated to the operation of the Consulate General in Antwerp of the Democratic Republic of Congo, and that it is therefore covered by immunity from execution. As the Democratic Republic of Congo is unable to demonstrate that this assertion is correct while Mr Mabibi-ma-Kibebi [the creditor; MvL] is unable to demonstrate the opposite (the allocation for private purposes of this account) and as the Democratic Republic of Congo does not file any document and does not provide any convincing explanation on this subject, it must be admitted that for the amount crediting this account, the Democratic Republic of Congo cannot claim immunity from execution.[140]

Austrian Oberster Gerichtshof, 2012:
In principle, the burden of assertion and proof for those facts that justify immunity from enforcement rests with the party invoking them (…).
Whether an exception should be made to the principle of "in dubio pro jurisdictione" if, at first glance, there is a presumption that the object of enforcement is being used for sovereign purposes (…) does not require examination here, because such a case does not exist: This concerns the seizure of tangible property (works of art), where a sovereign purpose is in any case not a priori obvious.[141]

See also the judgments of the Swedish Supreme Court rendered in 2011 and 2021, discussed in paragraph 6.2.3 above.
The above case law indicates that there is no customary international rule imposing the burden of proof of the purpose of an asset on the creditor of the foreign state.
In *Morning Star*, the Supreme Court also held that '*foreign states are not under an obligation to provide information from which it would follow that their property is*

[140] Cour d'Appel de Bruxelles, 26 April 2010, M v. The Democratic Republic of Congo, Fortis Bank SA, The State of Belgium and the French Community, 2008/AR/2441, Oxford Reports on International Law in Domestic Courts 1623 (BE 2010), <https://www.rdc-tbh.be/article/?docEtiq=rdc_tbh2014_1p76&pdf=true>: '*La République Démocratique du Congo soutient que ce compte technique est nécessaire à l'exercice de la puissance publique dans la mesure où il est affecté au fonctionnement du Consulat Général à Anvers de la République Démocratique du Congo, et que dès lors il est couvert par l'immunité d'exécution. Comme la République Démocratique du Congo n'est pas en mesure de démontrer que cette affirmation est exacte alors que Monsieur Mabibi-ma-Kibebi* [the creditor; MvL] *se trouve dans l'impossibilité de démontrer le contraire (l'affectation à des fins privées de ce compte) et comme la République Démocratique du Congo ne dépose aucune pièce et ne fournit aucune explication convaincante à ce sujet, il y a lieu d'admettre que pour le montant créditant ce compte, la République Démocratique du Congo ne peut pas se prévaloir d'une immunité d'exécution'*. Also contained in: C.M.J. Ryngaert, 'Embassy Bank Accounts and State Immunity from Execution: Doing Justice to the Financial Interests of Creditors', Leiden Journal of International Law (2013) p. 78, n. 27.

[141] Austrian Oberste Gerichtshof, 11 July 2012 (3 Ob 18/12m), paras. 3.4.1 and 3.4.3, available at <https://newyorkconvention1958.org/doc_num_data.php?explnum_id=2502>: '*Grundsätzlich trifft die Behauptungs- und Beweislast für jene Tatsachen, die Vollstreckungsimmunität begründen, die Partei, die sich darauf beruft (...). Ob von dem Grundsatz "in dubio pro jurisdictione" dann eine Ausnahme zu machen wäre, wenn bereits nach dem ersten Anschein die Vermutung für eine Verwendung des Exekutionsobjekts zu hoheitlichen Zwecken spricht, (...) bedarf hier keiner Prüfung, weil ein solcher Fall nicht vorliegt: Hier geht es um die Pfändung körperlicher Sachen (Kunstgegenstände), wobei ein hoheitlicher Verwendungszweck jedenfalls nicht a priori augenscheinlich ist.*'

[immune from execution]' and that the burden of proof rests on the creditor also if the foreign state fails to appear in the proceedings.[142]
Such strict application of the burden of proof is not standard practice either, even in jurisdictions where the burden of proof rests, initially, on the creditor seeking to enforce its legal title. The Belgian *Cour de Cassation* recently rendered a judgment on the interplay between the creditor's burden of proof and the foreign state's obligation to counter such initially proffered evidence. The Belgian court reviewed and confirmed the Belgian Court of Appeal's judgment, that had started its assessment by establishing that, pursuant to Article 1412quinquies(1) of the Belgian Judicial Code, it was up to the creditor to show that the asset under attachment was not immune from execution, subject to the general obligation of parties to Belgian litigation to collaborate in the collection of evidence. The Court of Appeal had decided, in the judgment under scrutiny in the cassation proceedings, that the foreign state was obliged to cooperate in the collection of evidence, not merely because of the statutory Belgian rule but also:

> in that it is clear that [the defendants] do not have access to all the information useful for resolving the dispute available to the other parties to the case, the latter are also required to collaborate in the administration of evidence.[143]

The Court of Appeal had subsequently held that the creditor had at least made a *prima facie* case that the attached assets were, at least partially, intended for commercial purposes, and that they were, thus, not exclusively intended for non-commercial public purposes. Under these circumstances, the Court of Appeal had held:

> for these assets, it is up to the seized debtor to demonstrate and indicate the proportion of the seized assets that is actually allocated to a sovereign activity and that which is not, which the creditor is not able to do as he does not have access to this information (…).[144]

In the absence of any evidence proffered by the foreign state, which could provide a basis to distinguish the commercial use from the allegedly sovereign use of the attached assets, immunity was denied by the Court of Appeal. The Belgian *Cour de Cassation* confirmed this ruling.[145]
The fact that the *Cour de Cassation*'s judgment is based on Belgian (i.e. national) procedural law is immaterial for the conclusion that Belgian courts do not consider

[142] Supreme Court of the Netherlands 30 September 2016, ECLI:NL:HR:2016:2236, *NJ* 2017/190 (*Morning Star/Gabon and State*), with commentary from Th.M. de Boer, para. 3.5.2.

[143] Belgian Cour de Cassation, 19 December 2024, ECLI:BE:CASS:2024:ARR.20241219.1F.3 (Eurocontrol). Original text available at <https://juricaf.org/arret/BELGIQUE-COURDECASSATION-20241219-C230366FC230416FC230418F>: '*en ce qu'il est manifeste que [les défendeurs] n'[ont] pas accès à toute l'information utile à la solution du litige dont disposent les autres parties à la cause, ces dernières sont également tenues de collaborer à l'administration de la preuve.*'

[144] Ibid. In the original language: '*pour ces biens, il appartient au débiteur saisi de démontrer et d'indiquer la proportion des biens saisis affectée réellement à une activité souveraine et celle qui ne l'est pas, ce que le créancier n'est pas en mesure de faire, n'ayant pas accès à ces informations* (…).'

[145] Belgian *Cour de Cassation*, 19 December 2024, ECLI:BE:CASS:2024:ARR.20241219.1F.3 (*Eurocontrol*).

it to be a mandatory (*opinio juris*) rule of international law that a creditor always bears the burden of proof as to the purpose of a state-owned asset.
Thus, the Dutch Supreme Court's considerations with regard to the burden of proof in cases involving immunity differ from what is held by courts in countries around us in similar cases. Nevertheless, it seems that the Dutch Supreme Court takes the view that its case law is in line with a consistent state practice, for it rendered its judgment in response to questions that had been referred to it for a preliminary ruling on what is provided in international law in respect of the law of evidence.[146]

6.2.5 *Case law on mixed funds*

In paragraph 3.5.4 of the *Morning Star* judgment, the Supreme Court held that

> also if funds and balances are concerned which are used by the foreign state for various purposes, both public and (exclusively) commercial or otherwise, the creditor who attaches, or wants to attach, property of the foreign state, will have to allege and argue convincingly that and to what extent those funds and balances are susceptible to attachment and execution.[147]

This finding appears to be based[148] on the advisory opinion of Advocate General Vlas, who had advised the Supreme Court as follows with respect to mixed funds:

> These are funds used by the state to finance matters that partly are, and partly are not, part of governmental tasks. A foreign state can use the funds of a 'mixed fund' to serve a commercial purpose, but also use these funds, or part thereof, to perform a government task, e.g. creating educational facilities, facilities for public health etc. 'Mixed funds' as such do not fall outside the scope of the rule for immunity from execution. This is only the case if the party that has attached funds of a foreign state has demonstrated that those funds, or part thereof have a non-public purpose.[149]

In substantiation of this view, Advocate General Vlas referred to a prior advisory opinion by Advocate General Strikwerda, in relation to the judgment of the Supreme Court of the Netherlands of 11 July 2008 (*Azeta – State*). In the paragraph referred to by Advocate General Vlas, Advocate General Strikwerda had stated:

> If the private party has not demonstrated which part of an asset that is to be regarded as a 'mixed fund' has a non-public purpose, the asset as a whole falls under the immunity rule. Reinisch, op. cit., p. 831, refers to many (European) case-law data, including the influential ruling of the German Bundesverfassungsgericht of 13 December 1977, NJW 1978, p. 485, concerning bank balances of the Philippine diplomatic mission in the FRG, and speaks of 'the idea of a rebuttable presumption in favour of the public purpose of state-owned property' as the prevailing view, particularly when it comes to 'mixed funds'. See also Spiegel, op. cit., p. 177-185 and Van Alebeek, op. cit., p. 260-261.[150]

The Supreme Court's ruling that a foreign state need not provide any information on the use and purpose of assets (such as funds and balances) that are used by the foreign state for both public and commercial purposes, is thus apparently based on the above sources mentioned by Strikwerda, i.e. Reinisch, the Bundesverfassungsgericht, Spiegel and Van Alebeek. One cannot be certain as the Supreme Court did not mention its sources of public international law. Neither did it state whether it had reviewed the sources mentioned above.
Be that as it may, it appears that these sources do not relate to immunity from execution in respect of assets generally, but to immunity from execution that is granted to, specifically, bank accounts held by an embassy, of which the purpose might in part be for sovereign purposes and in part for commercial purposes. It is in that specific context of mixed embassy bank accounts that Reinisch, the Bundesverfassungsgericht and Van Alebeek[151] indicate that a foreign state cannot be forced to disclose the purpose of the funds in such accounts, as this would constitute interference in matters within the exclusive competence of the foreign state. Spiegel, in respect of such embassy bank accounts, refers approvingly to authors who advocate that attachment on such bank accounts should be permissible if it is not immediately clear that the purpose of such funds is, exclusively, the maintenance of the embassy.[152] Spiegel also – and separately – discusses the possibility

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146 Supreme Court of the Netherlands 30 September 2016, ECLI:NL:HR:2016:2236, *NJ* 2017/190 (*Morning Star/Gabon and State*), with commentary from Th.M. de Boer, paras. 3.3 and 3.5.1-3.5.5.

147 Ibid., para. 3.5.4.

148 The Supreme Court, in para. 3.5.4 of its *Morning Star* judgment, refers to paras. 3.5 and 3.7 of its *Azeta* judgment. However, these paragraphs do not contain any decision or source on the status of mixed funds.

149 Advocate General Vlas in his advisory opinion (ECLI:NL:PHR:2016:551) preceding the judgment of the Supreme Court of the Netherlands of 30 September 2016, ECLI:NL:HR:2016:2236, *NJ* 2017/190 (*Morning Star/Gabon and State*), with commentary from Th.M. de Boer, para. 2.9. The same reasoning appears in his opinion preceding the judgment of the Supreme Court of the Netherlands of 14 October 2016, ECLI:NL:HR:2016:2354, *NJ* 2017/191 (*State/Servaas*), with commentary from Th.M. de Boer, para. 2.13.

150 Advocate General Strikwerda in his opinion preceding the judgment of the Supreme Court of the Netherlands of 11 July 2007, ECLI:NL:HR:2015:BD1387, *NJ* 2010/525 (*Azeta/State*), with commentary from Th.M. de Boer, para. 25. In the Dutch original: '*Is met betrekking tot een als een "mixed fund" aan te merken goed door de private partij niet aangetoond welk deel daarvan een niet-publieke bestemming heeft, dan valt het goed in zijn geheel onder de immuniteitsregel. Reinisch, a.w., blz. 831, spreekt onder vermelding van veel (Europese) rechtspraakgegevens, waaronder de invloedrijke uitspraak van het Duitse Bundesverfassungsgericht van 13 december 1977, NJW 1978, blz. 485, inzake banksaldi van de Filippijnse diplomatieke vertegenwoordiging in de BRD, van "the idea of a rebuttable presumption in favour of the public purpose of state-owned property" als heersende opvatting, met name als het gaat om "mixed funds". Zie ook Spiegel, a.w., blz. 177-185 en Van Alebeek, a.w., blz. 260-261.*'

151 R. van Alebeek, *Staatsimmuniteit*, in N. Horbach, R. Lefeber en O. Ribbelink (eds.), *Handboek Internationaal Recht*, 2007, pp. 260-261.

152 J. Spiegel, *Vreemde Staten voor de Nederlandse rechter, Immuniteit van jurisdictie en van executie*, diss. 2001, 4.5.3 (pp. 177-180). Spiegel states in relation to embassy bank accounts: 'It is by no means an exaggeration to state that if the foreign state wants to protect its assets against execution, it will have to demonstrate which assets deserve such protection - a declaration to that effect will not suffice. That the scope of such assets should then be limited as much as possible, both in number and in time, is also not an exaggerated demand.' In the Dutch original: '*Het is geenszins overdreven om te stellen dat wil de vreemde staat zijn goederen tegen executie beschermen, hij zelf*

of attaching ordinary bank accounts of a foreign state.[153] She adopts a balanced view on the matter, which does not correspond to, and is therefore unlikely to have been the basis for, the reasoning of Advocate General Strikwerda.
If the Supreme Court's ruling on mixed funds generally is based on the above-mentioned sources, that would be unpersuasive given the specific nature and context of embassy bank accounts that were the topic of these sources. As noted earlier, the immunity to be granted to an embassy's bank accounts, as well as the restraint exercised in demanding that states provide proof of the intended use of funds held in bank accounts *of such a nature*, is of a substantially different order from immunity (and the possibility of requiring proof) with regard to ordinary assets of a foreign state. Incidentally, recent case law of the ECtHR in respect of immunity from jurisdiction suggests that state courts may be under an obligation to actively verify and establish the relevant facts in cases of immunity and should not be deterred from doing so by a fear of interference with the foreign state's sovereign policies.[154]
Insofar as I have been able to ascertain in foreign case law, there is no other country that applies such a stringent approach of 'mixed funds' generally. In any case, there is no identifiable consistent state practice in accordance with the doctrine adhered to by the Dutch Supreme Court. As such, it cannot correctly be stated to apply a rule of customary international law.

6.2.6 *Case law on future intended use*

Article 19(c) of the UN Convention refers to property that 'is specifically in use or intended for use' for government non-commercial purposes. The relevant moment at which the use or intended use is to be assessed, is 'at the time the proceeding for attachment or execution is instituted'.[155]
For a number of cases on the temporal scope of sovereign immunity in respect of, specifically, past and/or future embassy buildings, reference is made to judgments of the Supreme Restitution Court for Berlin, holding that a remote intention on the part of a foreign state to use, or re-use, property owned by it for diplomatic mission purposes, is not sufficient to create immunity.[156] In one of these cases, the

zal moeten aantonen - waarbij een verklaring van die strekking dus niet volstaat - welke goederen die bescherming verdienen. Dat de omvang van die goederen dan zoveel mogelijk dient te worden beperkt, zowel in aantal als in tijd, is ook geen overdreven eis.'

153 J. Spiegel, *Vreemde Staten voor de Nederlandse rechter, Immuniteit van jurisdictie en van executie*, diss. 2001, 4.5.4.

154 See e.g. ECtHR judgment dated 25 October 2016, *Radunovic and Others v. Montenegro*, ECLI:CE:ECHR:2016:1025JUD004519713, para. 77; French *Cour de Cassation* dated 27 November 2019, *B. v. Republiek Ghana*, nr. 18-13.790, ECLI:FR:CCASS:2019:SO01629, para. 5. Both judgments relate to immunity from jurisdiction under Art. 11 of the UN Convention, but the *rationale* seems to be useful more generally.

155 ILC's Commentary to the UN Convention, UN Doc. A/46/10, p. 58, para. 11. Available at <https://legal.un.org/ilc/documentation/english/reports/a_46_10.pdf>.

156 Supreme Restitution Court for Berlin, decisions dated 10 July 1959: 28 ILR 369 (*Tietz and others v. People's Republic of Bulgaria*); 28 ILR 385 (*Weinmann v Republic of Latvia*); 28 ILR 392 (*Bennett and Ball v. People's Republic of Hungary*); and 28 ILR 396 (*Cassirer and Geheeb/Japan*).

Supreme Restitution Court held that

> [a]bsent the elements of possession and of actual use, a mere intention to use such premises for diplomatic purposes in the future, prior to their actual use, is of no legal significance for the question of the resurrection of the privilege of immunity', and '[e]ven where there is present possession, intention to use is of no legal significance unless it is immediately prior to actual use, and during the preparatory period when such premises are being furnished and equipped for actual use in the very near future.[157]

See also a more recent judgment of the Quebec Court of Appeal, rejecting immunity from execution in respect of an abandoned embassy building.[158]
In the more recent Swedish judgment in the Sedelmayer case, the Swedish Supreme Court disregarded Russia's argument that its intention was to use the seized building shortly – with effect from 1 July 2010 – for the exclusive purpose of housing diplomats. The court considered such intention, expressed after the seizure, to be irrelevant, holding that the actual purpose for which the building was used at the time of the seizure is the decisive factor.[159]
The 2013 judgment of the Dutch Supreme Court in the *Ahmad – State* case adopted another approach, while implicitly adopting a rule of settled state practice.[160] In that case, the Supreme Court held that if a former embassy building is intended to be re-used for diplomatic purposes at any given time in the future, it is immune from executory measures.[161] In that respect, the court accepted a *note verbale* issued by the foreign state a year after the attachment had been levied,[162] stating that it wished to re-occupy the building at some point in the future.
As this approach cannot be aligned with case law from other jurisdictions as set out above, the Dutch Supreme Court ruling cannot be justified on the basis of a rule of customary international law.

The cases related both to aspects of immunity from jurisdiction and execution.

157 Supreme Restitution Court for Berlin, 10 July 1959, 28 ILR 396 (*Cassirer and Geheeb/Japan*), para. 411.

158 Quebec Court of Appeal, 29 august 2003 (Iraq/Export Development Corp.), 2003 A.C.W.S.J. Lexis 9972, available at <https://citoyens.soquij.qc.ca/php/decision.php?ID=E4A3B3A0BBB931F445D0D8AD43A179DF&page=1>.

159 Swedish Supreme Court, 1 July 2011, Case No. Ö 170-10 (*Russian Federation/Sedelmayer*), paras. 19-20.

160 Supreme Court of the Netherlands 28 June 2013, ECLI:NL:HR:2013:45, *NJ* 2014/453 (*Ahmad/State*), with commentary from Th.M. de Boer. See paragraph 3.1.4 *supra*.

161 See paragraph 3.1.4 *supra*, including n. 21.

162 The following dates appear from the published judgments: The embassy building was abandoned by the DRC mid-2009. The conservatory attachment was levied on 20 August 2009. The squatters moved into the building in October 2010. The The Hague District Court rendered judgment on the merits in favour of Ahmad on 3 November 2010, ordering the DRC to pay USD 23 million to Ahmad (the service of which resulted in the conservatory attachment being transformed in an executory attachment). The first *note verbale* dates from 4 November 2010.

7. ‘CUSTOMARY INTERNATIONAL LAW AS CURRENTLY APPLICABLE IN THE NETHERLANDS’

7.1 Introduction

It was set out above that, indeed, there appears to be a rule of customary international law pursuant to which a state is entitled to immunity from execution in respect of assets that are held by the state for genuinely sovereign purposes, such as embassy buildings, military equipment and assets held by central banks for central bank purposes.
It was subsequently set out, by reference to case law from a variety of European jurisdictions, that a more expansive rule of customary international law on the application of immunity from execution cannot be found. At the very least, there is no consistent state practice granting immunity from execution in respect of assets that are not clearly allocated to a sovereign purpose. Also, one cannot conclude on the basis of a review of international state practice that there is a widespread consistent application of immunity from execution in respect of assets that, merely indirectly, have an ultimate, general, public purpose.
The conclusion is that the Dutch Supreme Court applies immunity from execution in a different manner from many other European courts. Such conclusion, in and of itself, might not necessarily be controversial or worrying.
When viewed from the perspective of the legal framework applicable in the Netherlands, however, this conclusion raises significant issues of legitimacy and the rule of law. For if the Dutch courts are to apply customary international law to issues of immunity from execution, can Dutch case law that clearly deviates from case law in other European countries still be considered to be correctly based on applicable customary international law rules? I submit that it cannot.
In assessing this issue, we need to consider whether the Dutch Supreme Court is in fact applying rules that cannot be based on a rule of customary international law. Perhaps there is an alternative narrative for the Supreme Court. That is, the court may have meant that a rather general or unspecific rule of immunity from execution is part of customary international law, that the precise content and boundaries thereof are not crystalised, and that the Dutch judiciary can therefore fill in the gaps and thereby make the rather general rule of customary international law more concrete and more specific to whatever case that needs to be adjudicated. Below, it will be discussed whether this could conceivably be the Dutch judiciary’s approach and if so, whether it holds water.

7.2 Does the Dutch judiciary purport to apply, in concrete cases, a general theory of immunity from execution?

The ‘discretionary’ application of a general maxim of immunity from execution under customary international law to the specific case at hand, might indeed be what the Supreme Court had in mind when it used the phrase ‘customary international law as currently applicable in the Netherlands’.[163] After all, it clearly suggests that the customary international law rules (or principle) as applied in the Netherlands, might deviate from the rules (or the principle) that apply elsewhere.
Other elements of the Supreme Court’s judgments likewise suggest that the court indeed seeks to apply a rather general customary international law ‘base rule’ of immunity from execution to the concrete cases, by narrowing down, or specifying, the base rule in its consecutive judgments. For instance, the Supreme Court, in its *Morning Star* judgment, stated that ‘[i]t is *consistent with the purport of immunity from execution* (…) to take as a starting point that property of foreign states is not subject to attachment and execution unless (…)’.[164] In the same vein, the court added that it ‘*is consistent with*’ such ruling (as just cited, from its paragraph 3.5.2) to put the burden of proof on the creditor.[165]
So perhaps the Dutch Supreme Court is not mistaken in assuming that a rule of customary international law exists that mirrors its case law; perhaps the court rather seeks to apply a general principle of state immunity from execution, in a manner that it considers appropriate in the given circumstances, whereby the scope and content of such immunity are determined and ‘filled in’ by Dutch law principles and ideas.
On the other hand, the more recent approach of the Supreme Court suggests that the court does not ‘simply’ apply a general public international law theory as it seems fit, but that the court, in line with the conclusions set out in the *ILC Report*, analyses what the scope and boundaries are of a particular rule of customary international law.
For instance, in the *Central Bank of Suriname* case, the Dutch Supreme Court did not limit its review to the issue of whether there is, in international law, a virtual uniform acceptance of a general theory of immunity from execution of central bank assets, but reviewed the specific scope and boundaries on the topic by reviewing what the minimal scope of the rule was that is uniformly accepted:

> Partly in the light of this comparative law research, it can be concluded, *at most*, that a generally applicable, unwritten rule of customary international law can be held to exist according to which a central bank can claim immunity from seizure and execution *insofar as it relates to “property” of the central bank that is intended or used for the performance of the central bank’s tasks in relation to monetary and exchange rate policy*.[166]

In other words; because the Supreme Court could not establish that it is internationally generally accepted that the rule of immunity from execution for central bank assets – which, as a general tenet, certainly is part of customary international

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[163] See Supreme Court of the Netherlands 30 September 2016, ECLI:NL:HR:2016:2236, *NJ* 2017/190 (*Morning Star/Gabon and State*), with commentary from Th.M. de Boer, paras. 3.4.3, cited above in paragraph 4.1.1.
[164] *Cf. Morning Star/Gabon and State* (paragraph 3.1.5 *supra*), para. 3.5.2.
[165] *Cf. Morning Star/Gabon and State* (paragraph 3.1.5 *supra*), para. 3.5.3.
[166] HR 6 July 2021, ECLI:NL:HR:2021:1042, *NJ* 2022/121 (*Central Bank of Suriname*), with commentary from Th.M. de Boer, discussed at paragraph 3.1.9 *supra*.

law – also covers other assets than property that is used for the central bank's tasks, the Dutch court did not hold that, under a 'Dutch application or interpretation' of customary international law, such other property is also immune.
Similarly, in the 1993 judgment of *Pied-Rich* (see paragraph 3.1.2 above), the Supreme Court decided the matter by holding that the particular rule of customary international law, as advanced by the Russian Federation, did not exist, rather than accepting the general principle of state immunity from execution and then applying 'a Dutch approach'.
So, it cannot be stated with certainty whether the Dutch Supreme Court indeed intends to apply the general principle of state immunity from execution that is generally accepted, by specifying and adopting it by implicit reference to Dutch law principles and ideas. The case law is not conclusive in this respect.

7.3 Would a 'Dutch application' of a general theory of immunity from execution be in conformity with international law?

It was explained above that if the Dutch Supreme Court purports to be applying a rule of customary international law on issues of immunity from execution it is not doing so correctly as its case law deviates from case law in other jurisdictions and thus does not reflect a general practice.
If, on the other hand, the Supreme Court purports to be applying merely the general principle of immunity from execution, applying and adopting the principle in a manner that is considered to be in line with the Dutch approach, then neither is this a correct application of international law.
Immunity from execution can be applied in a particular case only if and to the extent that a rule of customary international law obliges the Dutch state to do so in the circumstances of the particular case. In the absence of a rule of customary international law that mandatorily prescribes the granting of immunity from execution in a situation that applies in the case at hand, a national court cannot justifiably decide to apply 'immunity from execution' as a general tenet in whatever manner it sees fit.
In this connection, one may refer to the *Lotus* case that was decided by the Permanent Court of International Justice (PCIJ) in 1927. The predecessor of the ICJ explained that it follows from the very nature of international law that restrictions upon the independence or sovereignty of States cannot be presumed but must be based on a rule of international law.[167] In the context of the boundaries that international law places upon the sovereign authority of states to have their courts exercise jurisdiction, the court held that it is limited only by prohibitive rules established under international law. The PCIJ concluded in that context that 'all that can be required of a State is that it should not overstep the limits which international law places upon its jurisdiction; within these limits, its title to exercise jurisdiction rests in its sovereignty.'[168] In addition, the PCIJ held that both the existence of a

[167] Permanent Court of International Justice, Judgment of 7 September 1927, *The Case of the S.S. Lotus*, Series A. No. 10, p. 18, para. 44.
[168] Ibid., p. 19, para. 47.

rule (in the context of the PCIJ judgment, a system), as well as the applicability of such rule (or system) to a particular case, depends on whether there is a rule of international law establishing it.[169]
While the *Lotus* judgment did not relate to state immunity, the PCIJ's reasoning was based on general principles of applying international law. I would hold that the PCIJ confirmed that restrictions on the sovereignty of a state – and its courts – are limited only if and to the extent that there is a mandatory rule limiting the court's authority in the specific case. Thus, the authority of a state court to allow execution within its jurisdiction upon a foreign state's asset is likewise limited only in so far as a mandatory rule of international law so dictates. In this connection, one can establish the existence of a rule of customary international law only if the settled practice relates to 'precedents offering a close analogy to the case under consideration; for it is only from precedents of this nature that the existence of a general principle applicable to the particular case may appear.'[170] In my opinion, this reasoning precludes the position of the Dutch Supreme Court, that there could be a Dutch version of a rule of customary international law that significantly deviates from the application of such a rule in similar cases in other jurisdictions. As aptly phrased by the UK Supreme Court in the *Benkharbouche* case: 'substantial differences of practice and opinion within the international community upon a given principle are not consistent with that principle being law'.[171]
Such understanding is in line with Article 13a of the Dutch General Provisions Act, which, similarly, stipulates that the enforceability of legal titles in the Netherlands is limited 'by the exceptions recognised in international law'. If a specific Dutch law application of a generally accepted theory is not applied internationally in a virtually uniform manner – i.e. is not a 'settled practice' – then such application cannot be said to be an exception recognised by international law.
Also, reference is made to the ILC's report on the *identification of customary international law* (discussed in Section 5 above). The report sets out the manner in which – not only the existence but also – the 'content of rules of customary international law [is] to be determined'.[172] The ILC's commentary states:

> The reference to determining the 'existence and content' of rules of customary international law reflects the fact that while often the need is to identify both the existence and the content of a rule, in some cases it is accepted that the rule exists but its precise content is disputed. This may be the case, for example, where the question arises as to whether a particular formulation (usually set out in texts such as treaties or resolutions) does in fact correspond precisely to an existing rule of customary international law, or whether there are exceptions to a recognised rule of customary international law.[173]

[169] Ibid.
[170] Ibid., p. 21.
[171] Benkharbouche v. Secretary of State for the Foreign and Commonwealth Affairs [2017] UKSC 62, <https://supremecourt.uk/uploads/uksc_2015_0063_judgment_d03c145e03.pdf>, para. 31.
[172] ILC Report, <https://legal.un.org/ilc/reports/2018/english/a_73_10_advance.pdf>, Conclusion 1.
[173] Ibid., Commentary (4) to Conclusion 1, p. 124.

and:

> The requirement that the practice be consistent means that where the relevant acts are divergent to the extent that no pattern of behaviour can be discerned, no general practice (and thus no corresponding rule of customary international law) can be said to exist. For example, in the Fisheries case, the International Court of Justice found that 'although the ten-mile rule has been adopted by certain States … other States have adopted a different limit. Consequently, the ten-mile rule has not acquired the authority of a general rule of international law'.[174]

Of course, the above does not mean that the approach chosen by the Dutch Supreme Court – at least until recently; the *Central Bank of Suriname* case may indicate a shift – was prohibited by international law. It was not. Under international law, a State may curb the jurisdiction and authority of its courts as it sees fit. So, if the Dutch State wishes to enact legislation which grants immunity from execution generously so as to limit creditors' possibilities of taking recourse against foreign state's assets in the Netherlands, there is no rule of international law that prohibits such choice.[175] That is, however, not the relevant issue. The question is not whether a Dutch statute of immunity (which is lacking) infringes international law, but whether there is a rule of customary international law – which is the decisive legal context for Dutch courts – obliging the Dutch courts to prevent execution upon certain assets. The relevant issue thus is whether the authority of Dutch courts to allow the enforcement of legal titles in the Netherlands is restricted by a prohibitive rule of international law. In the absence of a rule of customary international law (a 'settled practice') that mirrors and obligates the Dutch approach, the conclusion can only be that it is not.

8. IMMUNITY FROM EXECUTION AND THE ECHR

Article 6 ECHR guarantees the right to fair trial, including access to a court. In the case of *Kalogeropoulou and Others v. Greece and Germany*, which was decided by the European Court of Human Rights (ECtHR) in 2002, it was held that a restriction to the right to enforce a legal title amounts to a restriction imposed on the fundamental right of access to a court.[176]
The ECtHR decided that such restriction – when based on state immunity – 'pursues the legitimate aim of complying with international law to promote comity and good relations between States'. As to the separate question of whether the application of immunity of execution was also proportionate to the aim pursued, the ECtHR referred to Article 31(3)(c) of the Vienna Convention on the Law of Treaties, stipulating that, when interpreting a treaty (such as the ECHR), account is to be taken of 'any relevant rules of international law applicable in the relations between the parties'. The ECHR should therefore be interpreted in harmony with other rules of international law of which it forms part, including those relating to the granting of State immunity, the ECtHR held.[177] Therefore, the granting of immunity from execution 'which reflect generally recognised rules of public international law on State immunity cannot generally be regarded as imposing a disproportionate restriction on the right of access to a court as embodied in Article 6 §1', the ECtHR held, adding:

> Just as the right of access to a court is an inherent part of the fair trial guarantee in that Article, so some restrictions on access must likewise be regarded as inherent, an example being those limitations generally accepted by the community of nations as part of the doctrine of State immunity (…).[178]

The Dutch Supreme Court adopted this approach in its case law. In its *Morning Star* judgment, it stated that 'according to settled case-law of the ECtHR, the granting of immunity from jurisdiction and execution in accordance with public international law does not constitute a violation of Article 6 ECHR'.[179] The Supreme Court concluded on this basis that its application of immunity from execution – in the manner that was cited in paragraph 3.1.5 above – does not infringe Article 6 ECHR.[180]
The Supreme Court's conclusion obviously hinges on the implicit assumption that the application of immunity from execution by the Dutch Supreme Court is indeed 'in accordance with public international law', or, in the words of the ECtHR, 'reflect[s] generally recognised rules of public international law on State immunity'.[181]
As outlined above, I would conclude that it is not, because the Supreme Court's case law does not reflect, and is thus not mandated by, customary international law. Rather, it grants immunity from execution to a substantially further extent than

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[174] Ibid., Commentary (5) to Conclusion 8, p. 136. See also footnote 713 of the *ILC Report*.
[175] *Cf.* also e.g. Diego P. Fernández Arroyo and Makane Moïse Mbengue, 'Public and Private International Law in International Courts and Tribunals: Evidence of an Inescapable Interaction', 56 *Columbia Journal of Transnational Law* (2018) 797-854, at p. 818, footnote 81: 'While sovereign immunity is considered to be part of customary international law, there is no consensus on, or Convention in place dealing with, all aspects of sovereign immunity. Thus, domestic rules on sovereign immunity still vary significantly.'
[176] ECtHR 12 December 2002, No. 59021/00, *Kalogeropoulou and Others v. Greece and Germany*, ECLI:CE:ECHR:2002:1212DEC005902100, para. D(1)(a). The same applies *mutatis mutandis* to the right to '*peaceful enjoyment of possession*', guaranteed by Art. 1 of the First Protocol.
[177] Ibid.
[178] Ibid. See also e.g. ECtHR judgment dated 21 November 2001, Fogarty v. the United Kingdom [GC], No. 37112/97, ECHR 2001-XI, para. 36 (<https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-59886%22]}>) and ECtHR judgment dated 23 March 2010, Cudak v. Lithuania, No. 15869/02, ECLI:CE:ECHR:2010:0323JUD001586902 (<https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-97879%22]}>), para. 57.
[179] Supreme Court of the Netherlands 30 September 2016, ECLI:NL:HR:2016:2236, NJ 2017/190 (Morning Star/Gabon and State), with commentary from Th.M. de Boer, para. 3.6.2. For the Dutch text, see <https://deeplink.rechtspraak.nl/uitspraak?id=ECLI:NL:HR:2016:2236>.
[180] Ibid.
[181] Cf. also ECHR, Guide to Article 6, 2013, para. 52 (<https://rm.coe.int/1680700aaf>): 'Measures taken by a member State which reflect generally recognised rules of public international law on State immunity do not automatically constitute a disproportionate restriction on the right of access to court.'

what is, internationally, a 'settled practice'. As such, my conclusion would be that the Supreme Court's case law cannot, at least not by a simple reference to settled case law of the ECtHR, be held to be in conformity with Article 6 ECHR.[182]
Such conclusion was also drawn by the Supreme Court of the United Kingdom in the *Benkharbouche* case of 18 October 2017.[183] The UKSC, in a matter relating to immunity from jurisdiction, set out the following as to the connection between customary international law and an infringement of Article 6 ECHR:

> What justifies the denial of access to a court is the international law obligation of the forum state to give effect to a justified assertion of immunity. A mere liberty to treat the foreign state as immune could not have that effect, because in that case the denial of access would be a discretionary choice on the part of the forum state: see Al Jedda v United Kingdom (2011) 53 EHRR 23; Nada v Switzerland (2012) 56 EHRR 593, paras 180, 195; Perincek v Switzerland (2016) 63 EHRR 6, paras 258-259. To put the same point another way, if the legitimate purpose said to justify denying access to a court is compliance with international law, anything that goes further in that direction than international law requires is necessarily disproportionate. I conclude that unless international law requires the United Kingdom to treat Libya and Sudan as immune as regards the claims of Ms Janah and Ms Benkharbouche, the denial to them of access to the courts to adjudicate on their claim violates article 6 of the Human Rights Convention.[184]

It follows that, if and to the extent that the Dutch Supreme Court's application of immunity from execution goes further than the Dutch State's obligations under international law, such application infringes Article 6 ECHR.

[182] See also C.M.J. Ryngaert, 'Immunity from Execution and Diplomatic Property', in The Cambridge Handbook of Immunities and International Law, Cambridge University Press, 2019, pp. 285-306 (chapter 15, paragraph IV); and the Dutch Advisory Committee on Public International Law's (CAVV's) Advice No. 44 dated 22 December 2023, p. 8 (on the compatibility of applying immunity from jurisdiction with Art. 6 ECHR): 'The ECtHR takes as its starting point that States may not grant immunity in excess of what is required by customary law.' In the Dutch original: '*Het EHRM neemt daarbij als uitgangspunt dat staten niet méér immuniteit mogen toekennen dan het gewoonterecht vereist.*' The advice is available at <https://www.adviescommissievolkenrecht.nl/publicaties/adviezen/2023/12/22/vn-verdrag-staatsimmuniteit>.

[183] This judgment, and the relation between immunity from execution and Art. 6 ECHR, is discussed more elaborately in F. Boschma, 'Shifting goalposts in the enforcement against sovereigns', NIPR 2024/3. An extended version of this publication can be found at <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4648650>.

[184] Benkharbouche v. Secretary of State for the Foreign and Commonwealth Affairs [2017] UKSC 62, <https://supremecourt.uk/uploads/uksc_2015_0063_judgment_d03c145e03.pdf>.

9. THE NETHERLANDS' RATIFICATION OF THE UN CONVENTION

As noted above,[185] the Netherlands ratified the UN Convention on 23 April 2025. In doing so, it issued a declaration[186] and a reservation. The reservation relates to the application of Article 18 of the Convention.[187]
As long as the UN Convention is not ratified by at least 30 states, the ratification of the Convention does not change its status within the Dutch legal system. At least, that would be the conclusion on the basis of the Dutch Supreme Court's principal judgment on the anticipatory application of a treaty. In that judgment, of 25 September 1992 (*Balenpers*), the Dutch Supreme Court ruled that a Dutch court may apply a treaty provision before the date on which it is formally applicable in the Netherlands if, *inter alia*, it is expected that the treaty will enter into force for the Netherlands in the foreseeable future.[188] This criterion is not met, considering that five additional states still need to ratify the UN Convention for it to take effect. It took a decade for the five most recent ratifications to occur. An anticipatory application of the UN Convention therefore does not seem to be a viable option. The same conclusion can be drawn on the basis of Article 25 of the Vienna Convention on the Law of Treaties in conjunction with Article 30 of the UN Convention.
Of course, if and to the extent that the Supreme Court finds that a provision from the UN Convention reflects a rule of customary international law, such rule can and should be applied – not as a treaty provision but as a rule of customary international law.[189]

[185] Paragraph 4.1.3 *supra*.

[186] The Declaration relates to the issue of restricted immunity in cases of war crimes and/or military activities. It is not relevant for the purposes of this article. The Declaration can be found at <https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=III-13&chapter=3&clang=_en#EndDec>.

[187] See <https://treaties.un.org/pages/viewdetails.aspx?src=treaty&mtdsg_no=iii-13&chapter=3&clang=_en#EndDec>: 'The Kingdom of the Netherlands accepts the provisions of article 18 of the Convention subject to the reservation that the conditions laid down in article 19, subparagraph (c) of the Convention regarding post-judgment measures of constraint also apply to pre-judgment measures of constraint against property of a State. Pre-judgment measures of constraint may be taken if it has been established that the property is specifically in use or intended for use by the State for other than government non-commercial purposes and is in the territory of the State of the forum, provided that pre-judgment measures of constraint may only be taken against property that has a connection with the entity against which the dispute was directed.'

[188] It should be noted that the Supreme Court deviated from this case law in one particular case; see Dutch Supreme Court 2 February 2018, ECLI:NL:HR:2018:147, *NJ* 2018/409 with – yet another critical – commentary from Th.M. de Boer.

[189] *Cf.* also, in a different context, the concurring opinion of judges Cabral Barreto and Popović in the *Cudak v. Lithuania* case (see n. 181): 'In my opinion, a State can never be bound by the provisions of an international treaty that it has not ratified; ratification is necessary for those provisions to become binding. It is the customary international law that is binding, whether or not it has been codified.'

10. THE WAY FORWARD: POTENTIAL AVENUES TO IMPROVEMENT

In the above, the Dutch Supreme Court's case law has been summarised, analysed and criticised. In summary, my findings are that the Dutch judiciary inappropriately assumes – or at least assumed – that the UN Convention codifies customary international law as to the boundaries of immunity from execution. Moreover, I concluded that the Dutch judiciary's application of immunity from execution goes well beyond the Dutch State's obligations under international law (which is the relevant yardstick in the Netherlands). Moreover, it has been found that the Dutch approach fails to comply with the requirements of identifying a rule of customary international law – and its content – in the manner set out in the *ILC Report*.

That being said, it does seem that the Supreme Court may be gradually changing its course. Firstly, the Supreme Court has, in recent years, gradually but significantly nuanced its initial statement from the *Ahmad – State* case[190] that the UN Convention must be understood to 'contain a codification of customary international law on the subject of immunity from jurisdiction and immunity from execution and the boundaries thereof'. In *Morning Star*, the Supreme Court acknowledged that Article 18 of the UN Convention was not a codification of customary international law.[191] It explicitly left unanswered the issue of whether the so-called connection requirement mentioned at the end of part c of Article 19 of the Convention could be considered a reflection of customary international law.[192] One year later, in *Iraq & Central Bank of Iraq*, the court held that Articles 6 and 23 of the UN Convention could not be understood to reflect customary international law.[193] One year later still, in the *Central Bank of Suriname* case, the same was held to apply to Article 21(1)(c) of the Convention.[194] All in all, the initial statement that the UN Convention simply contains a codification of customary international law, must be deemed to be outdated and to have been corrected. Secondly, and related; the Supreme Court based its latter decision, in the *Central Bank of Suriname* case, on the consideration 'that the legislation and case law of many other states adopts a less extensive application of immunity'.[195] Such decision seems to be the first one wherein the Supreme Court makes a more or less explicit reference to the question of whether there is a generally accepted and consistent state practice. In that respect, the decision is in line with the requirements of identifying a rule of customary international law and its content in the manner set out in the *ILC Report*.

[190] See paragraph 3.1.4 *supra*.

[191] Supreme Court of the Netherlands 30 September 2016, ECLI:NL:HR:2016:2236, NJ 2017/190 (Morning Star/Gabon and State), with commentary from Th.M. de Boer, para. 3.4.7. For the Dutch text, see <https://deeplink.rechtspraak.nl/uitspraak?id=ECLI:NL:HR:2016:2236>.

[192] Ibid., para. 3.4.6.

[193] HR 1 December 2017, ECLI:NL:HR:2017:3054, *NJ* 2019/137 (*Iraq & Central Bank of Iraq*), with commentary from A.I.M. van Mierlo, para. 3.4.4.

[194] Dutch Supreme Court 6 July 2021, ECLI:NL:HR:2021:1042, NJ 2022/121 (Central Bank of Suriname), with commentary from Th.M. de Boer, paras. 4.2.2, 6.2.3 and 6.2.4. For the Dutch text, see <https://deeplink.rechtspraak.nl/uitspraak?id=ECLI:NL:HR:2021:1042>.

[195] Ibid., para. 6.2.3.

Such recent case law may be indicative of the Supreme Court moving towards an improved and more tailor-made method of identifying the contents and boundaries of a rule of customary international law on immunity from execution. If that is indeed the case, all we need to do is wait for further case law confirming this seemingly new approach.

If, on the other hand, such indication is overly optimistic – so that these recent signals are misconceived and are in fact not indicative of a tendency to identify a rule of customary international law in conformity with the *ILR Report* – then the avenue to improvement may be longer, but still straightforward. Improvement of the situation in the Netherlands would then entail adjusting the Dutch case law to the contents of the *ILR Report* and to the proper identification of a rule of customary international law. In performing the 'structured and careful process of legal analysis and evaluation'[196] that is required in that context, *inter alia* the decisions of the Swedish Supreme Court and the Brussels Court of Appeal, discussed in paragraph 6.2.3 above, should be taken into consideration.

Either way, chances are that the initiative to pave the way for the future application of immunity from execution in the Netherlands will have to come from the district courts and the courts of appeal. It is for these judges to determine that the law applicable to issues of immunity from execution is customary international law (unless a treaty applies), and to investigate whether there is a rule of customary international law that, in the specific case at hand, obliges the Dutch State to grant immunity. In doing so, a mere reference to the autumn judgments of the Supreme Court will not be sufficient as these judgments are not in line with a settled state practice. Courts may find some reassurance in deviating from the autumn judgments by the fact that the Supreme Court's decisions on immunity from execution have been criticised, in one form or another, in a variety of legal writings. For instance, the Amsterdam Court of Appeal,[197] the The Hague District Court,[198] the Joint Court of Justice of Aruba, Curaçao, Sint Maarten, Bonaire, Saint Eusta-

[196] *ILR Report*, general commentary, para. 2.

[197] See judgments of the Amsterdam Court of Appeal dated 7 April 2015 (*Staat-Servaas*), *cf. supra*, n. 138; 31 July 2018 (*Instrubel/Ministry of Industry of the Republic of Iraq*), *cf.* n. 34 *supra*; and 7 May 2019 (*Samruk & Kazachstan/Ascom*), *cf. supra*, n. 33.

[198] Judgment dated 18 October 2017, ECLI:NL:RBDHA:2017:11906, NJF 2018/18 (Crystallex/PDVSA), para. 5.36 ('It is firstly set out that the immediate purpose of the seized assets or of the use of the proceeds thereof, is relevant. Therefore, the fact that the proceeds ultimately flow into the state treasury is not decisive.') For the Dutch text, see <https://deeplink.rechtspraak.nl/uitspraak?id=ECLI:NL:RBDHA:2017:11906>.

tius and Saba,[199] Advocate General Vlas,[200] prof. Ryngaert,[201] prof. De Boer,[202] prof. Van der Plas,[203] prof. Van Mierlo,[204] F. Boschma[205] and M. Teekens[206] have indicated that they believe (or believed) that the Dutch Supreme Court's stance on immunity from execution is incorrect and/or inappropriate under customary international law.

Even so, courts may be reluctant to deviate from the autumn judgments. Given the Supreme Court's repeated quashing of judgments rendered by courts of appeal that had tried to curb the Supreme Court's earlier case law, it is perhaps not surprising that recent case law, also by lower courts, simply follows the Supreme Court's rulings. On the other hand, it should be borne in mind that the Supreme Court does not, and cannot, decide what the contents of customary international law rules are. And even if this were different, Dutch courts are not duty bound to accept the teachings of the Supreme Court. There is no principle of *stare decisis* in the Dutch judicial system. Courts are allowed, and indeed required, to independently assess each case and to decide the case pursuant to their belief of the correct application of the applicable law. In immunity of execution cases, this entails that judges should not for convenience copy and paste the rulings of the Supreme Court. Indeed, as former Supreme Court judge Coen Drion wrote, a judge may well feel the need to render judgment:

> that is in flagrant contradiction with decades of established case law of the Supreme Court. It may be unwise, but not a mortal sin. In fact: is it not sometimes, conversely, to be considered very wise; for is it not true that many legal developments that are later much applauded originate in the 'bold' judge in first or second instance, who thought that things really had to be decided differently now?[207]

[199] Order dated 19 March 2019, ECLI:NL:OGHACMB:2019:86, paragraph 2.12 ('In the substantive assessment of the claim for immunity from execution, it is firstly set out that this concerns the immediate purpose of the intended objects of attachment. Interpreting the term 'purpose' as 'ultimate purpose' is unreasonable, because proceeds from government property ultimately always flow, or should flow, into the state treasury and can be used for government purposes that can be considered 'public'. In this interpretation, the foreign state would always enjoy immunity from execution in respect of state property that is being sold, which would render the exception referred to in paragraph 2.9 meaningless. This cannot be the intention.'). For the Dutch text, see <https://deeplink.rechtspraak.nl/uitspraak?id=ECLI:NL:OGHACMB:2019:86>.

[200] See his advisory opinions in ECLI:NL:PHR:2020:649 (*Kazachstan/Ascom*) and ECLI:NL:PHR:2020:650 (*Samruk/Ascom*): see *supra*, n. 35.

[201] See e.g. C.M.J. Ryngaert, 'Staatsimmuniteit van executie: beslagmogelijkheden voor crediteuren na de herfstarresten van de Hoge Raad (2-016)', *TCR* 2017/3, pp. 111-118.

[202] Th.M. de Boer, *inter alia* in his commentary to HR 18 December 2020, ECLI:NL:HR:2020:2103, *NJ* 2021/242 (*Samruk & Kazachstan/Ascom*): see *supra*, n. 59.

[203] C.G. van der Plas, *Ondernemingsrecht* 2021/51, para. 3: see *supra*, n. 35.

[204] See *inter alia* A.I.M. van Mierlo, commentary to HR 1 December 2017, ECLI:NL:HR:2017:3054, *NJ* 2019/137 (*Iraq & Central Bank of Iraq*).

[205] Francisca Boschma, 'Shifting Goalposts in the Enforcement Against Sovereigns: Immunity from Execution – the Unsustainability of the Dutch Supreme Court's Application and Interpretation of Article 19(c)' (2024) *Netherlands Journal of Private International Law* (NIPR) 20243, 455.

[206] M. Teekens in his commentary to HR 18 December 2020, ECLI:NL:HR:2020:2103, *JIN* 2021/28 (*Samruk & Kazachstan/Ascom*).

[207] C.E. Drion, 'Stare decisis', *NJB 2014/620*. In the Dutch original: '(…) *indien die kantonrechter een uitspraak doet die in flagrante tegenspraak is met reeds decennia lang bestaande vaste rechtspraak van de Hoge Raad. Het is misschien onverstandig, maar geen doodzonde. Sterker nog: is het soms niet, omgekeerd, juist heel verstandig te noemen; want is het niet juist zo dat menige, later zeer toegejuichte, rechtsontwikkeling zijn oorsprong vond in de 'stoute' rechter in eerste of in tweede aanleg, die vond dat het nu toch echt anders moest?*'.

Alternatively, the Dutch legislator might choose to enact a law on immunity from execution. This way, the applicable legal framework in the Netherlands would no longer be the international law obligations of the Dutch State (i.e. either treaties or customary international law). Implementing a national law on immunity from execution (and potentially also on immunity from jurisdiction) could more clearly establish the political will of Dutch parliament as to the scope and application of immunity in the Netherlands. Clearly, the Netherlands may choose in that process to opt for an immunity from execution with a wider scope than that prescribed by customary law; doing so would be a political choice. A number of Anglo-Saxon countries have made such a choice. However, as long as the Netherlands does not decide on the basis of national legislation that foreign states enjoy far-reaching immunity from execution in the Netherlands, such greater immunity cannot be granted on legal grounds, for it is customary international law which is decisive at this moment – and hence only the minimum rule in respect of which there is a consistent state practice and *opinio juris*.

Following on from the foreign case law discussed in this article, it would in my opinion be advisable to lay down in legislation which property may be attached, and which property may not. In so doing, the lawmaker should consider if and to what extent the Netherlands wishes to comply with what is customary internationally and whether the Netherlands wishes to grant greater immunity from execution to foreign states for political reasons.

11. CONCLUSIONS AND CLOSING COMMENTS

The Dutch Supreme Court's rather strict case law on immunity from execution, which started to develop in 2008–2013 with the *Azeta-JCR* and *Ahmad-Staat* judgments, has unfortunately proven not to be short-lived. Indeed, although several courts of appeal tried to curb the Supreme Court's case law or to limit its negative consequences for creditors, the Supreme Court has nonetheless consistently confirmed its rulings. Furthermore, the possibilities for creditors of foreign states to enforce their title against assets in the Netherlands have diminished further as a result of the Supreme Court's judgments of, in particular, 2016 (*Morning Star*) and 2020 (*Kazakhstan/Samruk – Ascom c.s.*). As stated in the introduction, such limited enforcement possibilities could potentially be based on a political choice and would, in that scenario, not be problematic from a rule of law perspective – provided that the human rights protection of Article 6 ECHR is not infringed.

The trouble with the Supreme Court's case law is that it is difficult to reconcile it with applicable law which, as long as the UN Convention does not enter into force, undoubtedly is customary international law. Presumably the Supreme Court acknowledges the method of establishing the existence and content of a rule of

customary international law. It is hoped that the same applies to the ILC's conclusion that where the existence of a general practice accepted as law cannot be established, the conclusion must be that the rule of customary international law does not exist. Under these circumstances, one cannot but wonder what legal reasoning underlies the Supreme Court's case law.

In recent years, the Supreme Court has, on occasion, rendered judgments in other fields of law in which it meticulously set out the applicable legal rules and the correct application of them.[208] Also, the Supreme Court has on occasion decided that its former case law should be adjusted. One could hope that the Supreme Court is willing to consider doing both, or either, in relation to the issue of immunity from execution (instead of invoking Article 81 RO).

If we are to advocate for the application of the rule of law in our judicial system, I would argue that one of the following two approaches is urgently required: either the Dutch Supreme Court's case law is explained in such a manner that its roots in sources of customary international law are shown, or the case law is, with respect, discarded and replaced by a form of adjudication whereby the following principles are considered and applied:

(i) What is the applicable law?
(i) If customary international law applies, how is its content to be identified and established?
(i) If state practice is decisive: is there a consistent, virtually uniform rule in the international case law (and other sources) according to which immunity from execution must be granted in the situation being adjudicated?

If no such state practice can be established, the conclusion must be that there is no international law obligation on the Dutch State, including its judiciary, to restrain enforcement of a valid legal title against a foreign state in the Netherlands.

As long as the Dutch legislator does not enact national legislation on immunity, courts are to apply customary international law if they seek to preserve the rule of law.

12. PROPOSITIONS AND POINTS FOR DISCUSSION

(i) Article 13a of the Dutch General Provisions Act confirms that, in the absence of relevant national legislation, the authority of a Dutch court to allow enforcement measures is limited only if public international law so prescribes.
(ii) This aligns with the obligations of courts under Article 6 ECHR, in that a wider granting of immunity than obligatory under international law would be disproportionate.
(iii) The Supreme Court does not convincingly argue that the rules on immunity it applies in its case law are indeed based on an international obligation – both as to the extent of the immunity granted and to the distribution of the burden of proof.
(iv) The Supreme Court's method of identifying the content of customary international law in respect of immunity from execution does not meet the standards set by the ILC.
(v) The Supreme Court's Advocate General's office and the Dutch Advisory Committee on Public International Law (CAVV) should raise the issue of whether the Dutch Supreme Court – and the Dutch State, which, as a matter of course, refers to the Supreme Court's case law – correctly identifies rules of customary international law.
(vi) Creditors of foreign states can still successfully enforce their legal title against assets of their debtor, for instance by attaching …?
(vii) It might be prudent to add a public international law specialist to the civil chamber of the Dutch Supreme Court.

[208] See e.g. Supreme Court 13 April 2018, ECLI:NL:HR:2018:604, *NJ* 2019/108, with commentary from H.B. Krans (on the legal consequences of a judge stepping down before a judgment is rendered by a court in which he/she sat), and Supreme Court 20 December 2019, ECLI:NL:HR:2019:2026, *NJ* 2020/425 (*Strandhotel*), with commentary from A.I.M. van Mierlo (on suspension of the enforceability of Dutch judgments).