

STATE IMMUNITY FROM ENFORCEMENT MEASURES

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I. THE PROBLEM

When dealing with problems of State immunity courts generally make a distinction between State immunity from jurisdiction and State immunity from enforcement measures. Immunity from jurisdiction can be defined as a limitation on the forum State to exercise jurisdiction over a foreign State. State immunity from enforcement measures prevents courts of the forum State from imposing measures of constraint on the foreign State.

In the last decades States have generally accepted the restrictive doctrine of State immunity from jurisdiction, which means that States are only granted immunity in respect of their governmental acts, but not in respect of their commercial acts.¹ However, with regard to State immunity from enforcement measures States tend to be far more reluctant, since enforcement measures are considered to more drastically affect State sovereignty than the mere assumption of jurisdiction.² Despite this hesitancy, state immunity from enforcement measures can generally no longer be regarded as absolute. Yet, the conditions for denying immunity from enforcement measures are still controversial. Consequently, immunity from jurisdiction and immunity from enforcement measures are not always correlative and a judgement creditor cannot always obtain satisfaction.

The purpose of this paper is to analyse, in the light of conventions, national statutes and decisions of national and international courts, the conditions under which immunity from enforcement measures can be lifted. The last part of this paper is devoted to specific problems of State immunity from enforcement measures, as the attachment of mixed bank accounts, the attachment of property of State entities and pre-judgement attachment.

¹ P. Malanczuk, *Akehurst's Modern Introduction to International Law*, 119 (1997).

² C. Schreuer, *State Immunity: Some Recent Developments*, 126 (1988); Hafner & Lange, *La Convention des Nations Unies sur les Immunités Juridictionnelles des Etats et de leurs Biens*, 50 *Annuaire Francais de Droit International* 45, 68 (2004).

II. MULTILATERAL TREATIES ON THE LAW OF STATE IMMUNITY

There exist various soft law instruments, but only two multilateral treaties on the law of State immunity. These treaties are the European Convention on State Immunity of 1972³ and the UN Convention on Jurisdictional Immunities of States and their Property of 2004 (hereinafter UN Convention)⁴. The European Convention on State Immunity is currently ratified by 8 States. With regard to immunity from enforcement measures, the European Convention on State Immunity does not codify customary international law. It combines an obligation of States to comply with judgements rendered in member States against them with a rule prohibiting enforcement measures against States.⁵

The 2004 UN Convention is currently signed by 17 States and Norway is the sole State, which has already ratified the Convention. It will enter into force upon deposit of 30 instruments of ratification. The UN Convention is not a codification of customary international law concerning enforcement measures either, since it introduces new categories of State property, which are immune from execution. Moreover, it contains a connection requirement of property serving commercial purposes with the entity against which the claim was directed, which is a novelty in international law.

III. CONDITIONS FOR ENFORCEMENT AGAINST STATE PROPERTY

III.A. Existence of an Enforceable Decision

Obviously, if a decision against a foreign State is rendered in the same State where enforcement is sought, the State must not be entitled to immunity from jurisdiction. If the foreign State already enjoys immunity from jurisdiction, it cannot be party to a lawsuit before a national tribunal. Hence, no judgement can be rendered and no enforcement measures can be taken against such a State. Consequently, the problem of admissibility of enforcement measures in such cases can only appear where a State acted commercially and is therefore, deprived of its immunity from jurisdiction.⁶

³ European Convention on State Immunity 1972, 16 May 1972, ETS No. 74, reprinted in 11 ILM 470 (1972).

⁴ United Nations Convention on Jurisdictional Immunities of States and Their Property, 2 December 2004, Annex, UN-Doc. A/RES/59/38.

⁵ Para. 92, Explanatory Report on the European Convention on State Immunity, reprinted in A. Dickinson et al. (eds.), *State Immunity: Selected Materials and Commentary*, 61 (2004).

⁶ *Phillippine Embassy Bank Account Case*, Federal Republic of Germany, Federal Constitutional Court, 13 December 1977, 65 ILR 146, 164; *Socobelge v. The Hellenic State*, Belgium, Civil Tribunal of Brussels, 30 April 1951, 18 ILR 3, 7-8.

Moreover, in international law a State is barred from taking measures of constraint against a foreign State based on a decision violating the rules of State immunity from jurisdiction.⁷ In this context it is also essential to note that a decision rendered in a third State violating international law on State immunity from jurisdiction must not be considered a valid basis for enforcement by the State where enforcement is sought.⁸ Consequently, the courts of the State where enforcement is sought are entitled to examine, firstly, the conditions for immunity from jurisdiction (*acta iure imperii* or *acta iure gestionis*), and secondly, the purpose of the object of execution.⁹ For example, the German Federal Court of Justice examined whether the judgement of a Greek court against Germany could be recognised in the Federal Republic of Germany. The Greek judgement allowed for a restriction of state immunity from jurisdiction in cases of violations of *ius cogens* norms. However, the German Federal Court of Justice came to the conclusion that recognition was not feasible, since the judgement contravened international law on immunity from jurisdiction, which at present does not know such an exception to State immunity.¹⁰

Another problem in that respect, not dealt with in the UN Convention, is that of judgements rendered in a foreign State and against that State, which are sought to be enforced abroad. In *AIC Ltd v. Nigeria* a Nigerian judgement against Nigeria, on the ground of a commercial activity, was sought to be registered and enforced in the United Kingdom. The British court came to the conclusion that the judgement could not be registered, since the proceedings before the British court related to the registration of a judgement and not a commercial activity. Consequently, no exception to immunity from jurisdiction was applicable. Moreover, the Nigerian judgement related to a purely domestic matter, a situation in which immunity from jurisdiction cannot be lifted.¹¹ This is ambiguous because, the purpose of the State Immunity Act is to enable British courts to enforce commercial liabilities engaged in by States, irrespective of the place the liability was engaged in. On the other hand, this judgement related to a purely internal affair, not having any jurisdictional links to Britain,

⁷ Schaumann, *Die Immunität ausländischer Staaten nach Völkerrecht und deutschem Zivilprozessrecht*, 8 Berichte der Deutschen Gesellschaft für Völkerrecht, 138 (1968); H. Damian, *Staatenimmunität und Gerichtszwang*, 167 (1985).

⁸ Schaumann, *Die Immunität ausländischer Staaten nach Völkerrecht und deutschem Zivilprozessrecht*, 8 Berichte der Deutschen Gesellschaft für Völkerrecht, 137 (1968); H. Damian, *Staatenimmunität und Gerichtszwang*, 169 (1985).

⁹ Schaumann, *Die Immunität ausländischer Staaten nach Völkerrecht und deutschem Zivilprozessrecht*, 8 Berichte der Deutschen Gesellschaft für Völkerrecht, 137 (1968).

¹⁰ Germany, German Federal Court of Justice, 26 June 2003, Case No. III ZR 245/98, <http://www.bundesgerichtshof.de>; Hartwig, *Völkerrechtliche Praxis der Bundesrepublik Deutschland im Jahre 2003*, 65 ZaöRV 241, 251-254 (2005).

¹¹ *AIC Ltd v. Federal Government of Nigeria and Attorney General of Federation of Nigeria*, United Kingdom, England and Wales High Court (Queen's Bench Division), 13 June 2003, [2003] EWHC 1357 (QB), <http://www.bailii.org/ew/cases/EWHC/QB/2003/1357>.

which would permit British courts to exercise jurisdiction. In this important area of State immunity there is still room for development.

However, in cases of a State's waiver and express submission to enforcement measures in the State where enforcement is sought, no decision by a court or tribunal is needed, since the State thereby demonstrates its will to subject itself to enforcement measures.¹² Moreover, no enforcement measures must be taken against a foreign State being the legal successor of the debtor of the decision, if the foreign State would have been immune from jurisdiction in a proceeding against itself.¹³

III.B. Alternative Conditions for Enforcement Measures requiring the State's Consent

Each of the following two conditions suffices in itself to impose enforcement measures on a foreign State, regardless of the purpose of the property. Even property serving sovereign purposes can be attached if the State either waived immunity from enforcement measures or the property was especially earmarked or allocated.¹⁴

III.B.1. Waiver of Immunity from Enforcement Measures

Immunity from enforcement measures may be waived by the defendant State according to Article 19(a) of the UN Convention¹⁵, Article 23 European Convention on State Immunity¹⁶, Article VIII(A) of the International Law Association's Draft Articles on a Convention on State Immunity¹⁷ and Article 5 of the Resolution of l'Institut de Droit International on Contemporary Problems Concerning the Immunity of States in Relation to Questions of Jurisdiction and Enforcement¹⁸. Apart from those international instruments, also national laws on State immunity allow for a possibility to waive immunity from jurisdiction.¹⁹

¹² H. Damian, *Staatenimmunität und Gerichtszwang*, 170 (1985).

¹³ H. Damian, *Staatenimmunität und Gerichtszwang*, 170 (1985).

¹⁴ Art. 21 (2), United Nations Convention on Jurisdictional Immunities of States and Their Property, 2 December 2004, Annexe, UN-Doc. A/RES/59/38.

¹⁵ Art. 19(1), United Nations Convention on Jurisdictional Immunities of States and Their Property, 2 December 2004, Annexe, UN-Doc. A/RES/59/38.

¹⁶ Art. 23, European Convention on State Immunity 1972, 16 May 1972, ETS No. 74, reprinted in 11 ILM 470 (1972).

¹⁷ Art. VIII(A), Revised Draft Articles for a Convention on State Immunity, ILA Report of the 66th Conference (Buenos Aires 14-20 August 1994).

¹⁸ Art. 5, Resolution of l'Institut de Droit International on Contemporary Problems Concerning the Immunity of States in Relation to Questions of Jurisdiction and Enforcement, 2 September 1991.

¹⁹ Section 1610(a)(1), United States Foreign Sovereign Immunities Act 1976, reprinted in 15 ILM 1388 (1976); Section 13(3), United Kingdom State Immunity Act 1978, reprinted in 17 ILM 1123 (1978); Section 31, Australia Foreign States Immunities Act 1985, reprinted in 25 ILM 715 (1986); Art. 12(1)(a), Canada State Immunity Act 1982, reprinted in 21 ILM 798 (1982); Section 14(3), Pakistan State Immunity Ordinance 1981; Section 15(3) Singapore State Immunity Act 1985; Section 14(2), South Africa Foreign States Immunities Act 1981.

Generally, a waiver of immunity from jurisdiction does not encompass a waiver of immunity from enforcement measures, rather a separate waiver is required for that purpose.²⁰ Additionally, such a waiver of immunity from enforcement measures has to be made expressly, which means that an international agreement, an arbitration agreement, a written contract, a declaration before the court or a written communication after a dispute between the parties has arisen, is indispensable.²¹ In *Embassy of the Russian Federation in France v. Compagnie NOGA d'Importation et d'Exportation* the Paris Court of Appeal even held that the mere mentioning in the contracts at issue that “the loan taker waives its right to immunity as concerns the enforcement of an arbitral award rendered against it with respect to the present contract” is not sufficient to prove the unambiguous intention of the State to waive its right to rely on diplomatic immunity from enforcement measures.²²

Although only the United States Foreign Sovereign Immunities Act, the Canada State Immunity Act and the ILC's Draft Articles allow for an implied waiver²³, the French Cour de Cassation found that a State's consent to arbitration in accordance with rules of the International Chamber of Commerce (Article 24 providing for an effective implementation of the award without delay) suffices to constitute a waiver of immunity in respect of execution of the arbitral award.²⁴ The consent by the State to waive immunity with regard to enforcement measures can be withdrawn under the terms of the international agreement or of the arbitration agreement or the contract. However, once a declaration of consent or a written communication has been made in front of the court, it cannot be withdrawn. This means that once a proceeding before a court has started, a withdrawal of the consent is impossible.²⁵ According to national laws, the head of a State's diplomatic mission or the person for the time

²⁰ Art. 20, United Nations Convention on Jurisdictional Immunities of States and Their Property, 2 December 2004, Annexe, UN-Doc. A/RES/59/38; Art. 5(2) Resolution of l'Institut de Droit International on Contemporary Problems Concerning the Immunity of States in Relation to Questions of Jurisdiction and Enforcement, 2 September 1991; Section 13(3) United Kingdom State Immunity Act 1978, reprinted in 17 ILM 1123 (1978); Crawford, *Execution of Judgments and Foreign Sovereign Immunity*, 75 AJIL 820, 860 (1981).

²¹ Art. 20, United Nations Convention on Jurisdictional Immunities of States and Their Property, 2 December 2004, Annexe, UN-Doc. A/RES/59/38; Art. 5(1) Resolution of l'Institut de Droit International on Contemporary Problems Concerning the Immunity of States in Relation to Questions of Jurisdiction and Enforcement, 2 September 1991;

²² *Russian Federation v. Compagnie NOGA d'Importation et d'Exportation*, France, Paris Court of Appeal, 10 August 2000, 127 ILR 156, 160.

²³ Art. VIII(A)(1), Revised Draft Articles for a Convention on State Immunity, ILC Report of the 66th Conference (Buenos Aires 14-20 August 1994); Section 1610(a)(1), United States Foreign Sovereign Immunities Act 1976, reprinted in 15 ILM 1388 (1976); Section 12(1)(a), Canada State Immunity Act 1982, reprinted in 21 ILM 798 (1982)

²⁴ *Creighton Ltd v. Minister of Finance of Qatar and Others*, France, Court of Cassation, 6 July 2000, 127 ILR 154, 155; *Libyan American Oil Company v. Libya*, Svea Court of Appeal, 18 June 1980, Case No. Ö 261/79, 20 ILM 893, 895 (1981).

²⁵ ILC Draft Articles on Jurisdictional Immunities of States and Their Property, 2 (2) YBILC 58 (1991), UN-Doc. A/46/10.

being performing his functions, shall be deemed to have authority to consent to measures of constraint on behalf of the State.²⁶

III.B.2. Earmarked Property

Property which has been allocated or earmarked by the State for the satisfaction of the claim, which is the object of that proceeding, is subject to enforcement measures by the forum state.²⁷ According to the ILC, the reason for the restriction of attachment of the earmarked property to the object of the proceeding is to prevent extraneous claimants from impeding the State's intention to satisfy specific claims or to pay admitted liabilities.²⁸ The term "earmarking" means that the State creates and identifies a fund to meet its liability. The English House of Lords, when addressing a claim of immunity regarding an Embassy's bank account, held that there is an exception under English law if the Embassy had opened the bank account for the sole purpose of dealing with liabilities engaged in commercial transactions.²⁹ Likewise, French courts found that immunity from enforcement measures can be lifted exceptionally where the State intended to allocate certain assets for the performance of a purely commercial operation.³⁰ However, in a South African case, a former mercenary, who had served in the Congolese army, tried in vain to attach an account which had been specifically created for the purpose of paying Congolese mercenaries in South Africa. The Court held that the moneys were designated for sovereign purposes and, hence, could not be attached.³¹

III.C. Alternative Condition for Enforcement Measures not requiring the State's Consent

In cases where neither a State's waiver nor a State's earmarking of property for the purpose of execution has taken place, enforcement measures can still be imposed on the foreign State

²⁶ Section 13(5), United Kingdom State Immunity Act 1978, reprinted in 17 ILM 1123 (1978); Section 31(5) Australia Foreign States Immunities Act 1985, reprinted in 25 ILM 715 (1986);

²⁷ Art. 18(b), Art. 19(b), United Nations Convention on Jurisdictional Immunities of States and Their Property, 2 December 2004, Annexe, UN-Doc. A/RES/59/38; Art. 4(3)(a), Resolution of l'Institut de Droit International on Contemporary Problems Concerning the Immunity of States in Relation to Questions of Jurisdiction and Enforcement, 2 September 1991.

²⁸ ILC Draft Articles on Jurisdictional Immunities of States and Their Property, 2 (2) YBILC 58 (1991), UN-Doc. A/46/10.

²⁹ *Alcom Ltd v. Republic of Colombia*, United Kingdom, House of Lords, 12 April 1984, [1984] 2 All ER 6, 74 ILR 170, 187.

³⁰ *Islamic Republic of Iran v. Société Eurodif and Others*, France, Court of Cassation, First Civil Chamber, 14 March 1984, 77 ILR 513, 515 (1988); *Société Sonatrach v. Migeon*, France, Court of Cassation, First Civil Chamber, 1 October 1985, 77 ILR 525, 527 (1988); *Creighton Ltd v. Minister of Finance of Qatar and Others*, France, Court of Cassation, 6 July 2000, 127 ILR 154, 155.

³¹ *Parkin v. Government of the République Démocratique du Congo and Another*, South Africa, Supreme Court (Witwatersrand Local Division), 28 October 1970, 64 ILR 668, 671.

without its consent. Thus, absolute State immunity from enforcement measures is no longer a rule of international law, rather there exists today an exception with regard to property serving commercial purposes.³² Pursuant to Article 19(c) of the UN Convention, property in use or intended for use by the State for other than governmental non-commercial purposes, which is located in the territory of the forum State and has a connection with the entity against which the proceeding was directed, can be attached by the forum State.³³ Similar exceptions to immunity from enforcement measures can be found in the ILA's Draft Articles for a Convention on State Immunity and various national immunity statutes.³⁴ Also most European courts recognise that property used for commercial purposes can be attached for enforcement measures.³⁵

III.C.1. Property in use or intended for use by the State for other than governmental non-commercial purposes

Under the UN Convention this exception is subject to three conditions: Firstly, the property which is intended to be attached has to be “in use or intended for use for other than governmental non-commercial purposes”. Secondly, that property has to be located within the forum State. Thirdly, there has to exist a connection between the property and the entity.

III.C.1.a. Purpose of the Property

Article 19(c) of the UN Convention is rather awkwardly worded when referring to property that is in use or intended for use by the State for *other than governmental non-commercial purposes*. This basically means that only property in use or intended for use for commercial purposes can be subjected to enforcement measures. The term “is” indicates that the crucial moment for the determination of the commercial purpose of the property is the time when the

³² *Phillippine Embassy Bank Account Case*, Federal Republic of Germany, Federal Constitutional Court, 13 December 1977, 65 ILR 146, 184 (1984); *Condor and Filvem v. Minister of Justice*, Italy, Constitutional Court, 15 July 1992, 101 ILR 394, 401; *Socobelge v. The Hellenic State*, Belgium, Civil Tribunal of Brussels, 30 April 1951, 18 ILR 3, 7-8.

³³ Art. 19(c), United Nations Convention on Jurisdictional Immunities of States and Their Property, 2 December 2004, Annex, UN-Doc. A/RES/59/38.

³⁴ Art. VIII(A)(2), Revised Draft Articles for a Convention on State Immunity, ILA Report of the 66th Conference (Buenos Aires 14-20 August 1994); Section 1610(a)(2), United States Foreign Sovereign Immunities Act 1976, reprinted in 15 ILM 1388 (1976); Section 12(1)(b), Canada State Immunity Act 1982, reprinted in 21 ILM 798 (1982); Section 13(4), United Kingdom State Immunity Act 1978, reprinted in 17 ILM 1123 (1978); Section 32, Australia Foreign States Immunities Act 1985, reprinted in 25 ILM 715 (1986); Section 14(2)(b), Pakistan State Immunity Ordinance 1981; Section 15(4), Singapore State Immunity Act 1985; Section 14(3), South Africa Foreign States Immunities Act 1981.

³⁵ Reinisch, *State Immunity from Enforcement Measures*, Analytical Report of the Council of Europe, Pilot Project on State Practice regarding State Immunities, CAHDI, 3, 9 (2004).

proceedings for enforcement are instituted. The ILC pointed out that the identification of “an earlier time could unduly fetter States’ freedom to dispose of their property”.³⁶

This exception is specified in Article 21 of the UN Convention listing five categories of State property, which must not be regarded as property specifically in use or intended for use by the State for other than governmental non-commercial purposes. As already mentioned above, those kinds of property can only be attached by earmarking of the State or by the State’s express waiver.³⁷ The categories of property which are exempt from attachment are: firstly, diplomatic property including bank accounts, secondly, military objects, thirdly, property of central banks, fourthly, property belonging to the cultural heritage of the State, and lastly, property belonging to an exhibition of objects of scientific, cultural or historical interest.³⁸

i) Diplomatic Property

The immunity from execution of diplomatic property is well established in international law.³⁹ Its legal basis is to be found in treaties and customary international law relating to diplomatic immunities.⁴⁰ Additionally, specific provisions have been included in national laws and international instruments, apart from the UN Convention, which reaffirm the immunity from execution of diplomatic property.⁴¹ Also state practice of national courts is consistent in exempting embassy buildings and premises from attachment.⁴² They even extend this protection to cultural centres and information offices, since they too have to be regarded as

³⁶ ILC Draft Articles on Jurisdictional Immunities of States and Their Property, 2 (2) YBILC 58 (1991), UN-Doc. A/46/10.

³⁷ Art. 21(2), United Nations Convention on Jurisdictional Immunities of States and Their Property, 2 December 2004, Annex, UN-Doc. A/RES/59/38.

³⁸ Art. 21(1), United Nations Convention on Jurisdictional Immunities of States and Their Property, 2 December 2004, Annex, UN-Doc. A/RES/59/38.

³⁹ H. Fox, *The Law of State Immunity*, 390 (2002); C. Schreuer, *State Immunity: Some Recent Developments*, 145 (1988); Crawford, *Execution of Judgments and Foreign Sovereign Immunity*, 75 AJIL 820, 861 (1981); Reinisch, *State Immunity from Enforcement Measures*, Analytical Report of the Council of Europe, Pilot Project on State Practice regarding State Immunities, CAHDI, 3, 10 (2004).

⁴⁰ Art. 22(3), Art. 30, Vienna Convention on Diplomatic Relations 1961, 18 April 1961, 500 UNTS 95; Art. 31, Vienna Convention on Consular Relations 1963, 24 April 1963, 596 UNTS 261.

⁴¹ Art. VIII(C)(1), Revised Draft Articles for a Convention on State Immunity, ILC Report of the 66th Conference (Buenos Aires 14-20 August 1994); Art. 4(2)(a), Resolution of l’Institut de Droit International on Contemporary Problems Concerning the Immunity of States in Relation to Questions of Jurisdiction and Enforcement, 2 September 1991; Section 1610(a)(4)(B), United States Foreign Sovereign Immunities Act 1976, reprinted in 15 ILM 1388 (1976); Section 16(1), United Kingdom State Immunity Act 1978, reprinted in 17 ILM 1123 (1978).

⁴² *767 Third Avenue Associates v. Permanent Mission of the Republic of Zaire to the United Nations*, 805 F Supp. 701 (2nd Cir., 1992), 4 March 1993, 99 ILR 195, 204; *SS Machinery Co. v. Masinexportimport*, 802 F Supp. 1109 (1992), 8 October 1992, 107 ILR 239, 240-241; *Embassy Eviction Case*, Greece, Tribunal of First Instance, Athens, 1965, 65 ILR 248, 252.

serving governmental non-commercial purposes.⁴³ Most cases with regard to diplomatic property deal with embassy bank accounts, which are used for the financing of the diplomatic mission. The leading case in this respect is the *Philippine Embassy Bank Account Case* of 1977 before the Federal Constitutional Court of Germany. In that case, the plaintiff obtained judgement against the Philippines for payment of 95 000 DM for arrears of rent and repair costs, since the building of the Philippine Embassy belonged to the plaintiff. The plaintiff sought to attach balances of the Philippines held in its account at Deutsche Bank in Bonn. The Federal Constitutional Court, after an in-depth examination of treaty practice and national court decisions, found that the bank account could not be attached, as its purpose was to cover the embassy's costs and expenses, which is a sovereign non-commercial purpose.⁴⁴ Another landmark case is *Alcom versus Colombia* before the House of Lords. In his reasoning Lord Diplock followed the reasoning of the German Constitutional Court, stating that an Embassy bank account used to cover the day-to-day expenses of an Embassy clearly served sovereign purposes and, hence, was immune from enforcement measures.⁴⁵ Likewise, the Austrian Supreme Court decided that attachment of embassy bank accounts is only possible, if the bank account is held for purely commercial purposes. Thereby it departed from its prior judgement, in which it prohibited the attachment of an embassy bank account only if the account was used for exclusively sovereign purposes.⁴⁶ Whereas a Swiss court held that also accommodation expenses for embassy staff are protected from attachment, since they are considered to serve sovereign purposes used for financing the diplomatic mission, a Czech court found that embassy bank accounts could only be attached in cases of waiver.⁴⁷

ii) Military Property

⁴³ *Kingdom of Spain v. Company X SA*, Switzerland, Federal Tribunal, 30 April 1986, 82 ILR 38; *Arabe Republic of Egypt v. Cinetelevision International Registered Trust and Another*, Switzerland, Federal Tribunal, 20 July 1979, 65 ILR 425, 534-535.

⁴⁴ *Philippine Embassy Bank Account Case*, Federal Republic of Germany, Federal Constitutional Court, 13 December 1977, 65 ILR 146 (1984).

⁴⁵ *Alcom Ltd v. Republic of Colombia*, United Kingdom, House of Lords, 12 April 1984, [1984] 2 All ER 6, 74 ILR 170, 186.

⁴⁶ *Leasing West v. Democratic Republic of Algeria*, Austria, Supreme Court, 30 April 1986, Case No. 3 Ob 38/86, 116 ILR 526, 529.

⁴⁷ *Z. v. Geneva Supervisory Authority for the Enforcement of Debts and Bankruptcy*, Switzerland, Federal Tribunal, 31 July 1990, 102 ILR 205, 207; *General Health Insurance Company of the Czech Republic v. Embassy of the State of Palestine in the Czech Republic*, Czech Republic, District Court for Prague 6, 15 December 1997, Case No. E 1426/97, http://www.coe.int/t/e/legal_affairs/legal_cooperation/public_international_law/state_immunities/documents/CAHDI_2005_6%20bil%20Part%20I%20CZECH%20REPUBLIC.pdf.

Warships have long been considered immune from enforcement measures, as evidenced by a number of multilateral treaties.⁴⁸ The 1926 Brussels Convention for the Unification of Certain Rules Relating to the Immunity of State-Owned Vessels makes a distinction between normal State-owned ships and such State-owned ships that exclusively serve governmental non-commercial purposes, the latter being immune from enforcement measures.⁴⁹ Normal State-owned ships, however, were to be treated the same way as privately owned ships.⁵⁰ Similarly the Convention on the High Seas and the Convention on the Territorial Sea and the Contiguous Zone exempt state-owned ships used for commercial purposes from immunity from execution.⁵¹ Today those provisions are incorporated in the UN Convention on the Law of the Sea.⁵² An example of State practice is the decision of the Amsterdam District Court that attachment of a Peruvian warship is prohibited. Even though the 1926 Brussels Convention did not even apply, the court obviously considered this provision a rule of customary international law.⁵³ However, not only warships and state-owned ships used for sovereign purposes are immune from enforcement measures, today this category has been broadened. An exception of military property from enforcement measures is found in national immunity statutes⁵⁴ as well as international documents⁵⁵. The 1991 Commentary to the ILC Draft Articles states that property of a military character includes navy, air force and army property.⁵⁶ Property of a military character within the meaning of the US Foreign Sovereign Immunity Statute comprises weapons, ammunition, communications equipment, warships, tanks and military transport, if its present or future use is military.⁵⁷ The consequence of such

⁴⁸ Crawford, *Execution of Judgments and Foreign Sovereign Immunity*, 75 AJIL 820, 862 (1981).

⁴⁹ Art. 1, Art. 3, Brussels Convention for the Unification of Certain Rules Relating to the Immunity of State-owned Vessels, 10 April 1926, 176 LNTS 199.

⁵⁰ Art. 2, Brussels Convention for the Unification of Certain Rules Relating to the Immunity of State-owned Vessels, 10 April 1926, 176 LNTS 199.

⁵¹ Art. 22, Convention on the Territorial Sea and the Contiguous Zone, 29 April 1958, 516 UNTS 205; Art.8, Art.9, Convention on the High Seas, 29 April 1958, 450 UNTS 11.

⁵² Art. 32, United Nations Convention on the Law of the Sea, 10 December 1982, 1833 UNTS 3.

⁵³ *Wijsmuller Salvage BV v. ADM Naval Services*, The Netherlands, District Court of Amsterdam, 19 November 1987, 20 Netherlands Yearbook of International Law 294, 296.

⁵⁴ Section 1611(b)(2), United States Foreign Sovereign Immunities Act 1976, reprinted in 15 ILM 1388 (1976); Section 32(3)(a), Australia Foreign States Immunities Act 1985, reprinted in 25 ILM 715 (1986); Art. 12(3), Canada State Immunity Act 1982, reprinted in 21 ILM 798 (1982).

⁵⁵ Art. 21(1)(b), United Nations Convention on Jurisdictional Immunities of States and Their Property, 2 December 2004, Annexe, UN-Doc. A/RES/59/38; Art. VIII(C)(2), Revised Draft Articles for a Convention on State Immunity, ILC Report of the 66th Conference (Buenos Aires 14-20 August 1994); Art. 4(2)(b), Resolution of l'Institut de Droit International on Contemporary Problems Concerning the Immunity of States in Relation to Questions of Jurisdiction and Enforcement, 2 September 1991.

⁵⁶ ILC Draft Articles on Jurisdictional Immunities of States and Their Property, 2 (2) YBILC 59 (1991), UN-Doc. A/46/10.

⁵⁷ Legislative History of the Foreign Sovereign Immunities Act 1976, House Report No. 74-1487, 94th Congress, 2nd Sess. 12, 15 ILM 1398, paras. 30-31; A. Dickinson et al. (eds.), *State Immunity: Selected Materials and Commentary*, 326 (2004).

an immune category is that sales of military equipment are immune from jurisdiction.⁵⁸ The broad wording of Article 21(b) of the UN Convention (“property of a military character or used or intended for use in the performance of military functions”) could lead to protection from attachment of ordinary commercial things which may be used for a military purpose, as for example, food or clothing.

iii) Central banks

Central banks often have accounts at banks abroad for official purposes, like the keeping of foreign exchange reserves.⁵⁹ Those are, however, also sometimes used for commercial operations. Central banks enjoy various common characteristics, namely, their substantial autonomy from the parent State, which sets them up, their function as a supervisor and regulator of the monetary policy of the State and their holding on deposit of the national reserves and sometimes the reserves of other States or international organisations.⁶⁰ Before the entry into force of the various national immunity statutes, courts did not treat central bank accounts differently from ordinary bank accounts. In this context, especially the *Trendtex* case is noteworthy. The Nigerian Central Bank, a separate legal entity from the Nigerian Government, issued a letter of credit in favour of Trendtex, a Swiss company, to pay for cement ordered by the Nigerian Ministry of Defence for military purposes. After the overthrow of the Government of Nigeria, the new Government ordered the Central Bank not to pay for the cement. Consequently, Trendtex sued the Central Bank and demanded the payment. The Court of Appeal found that the bank was not entitled to immunity, since it was a separate legal entity.⁶¹ The same approach was taken in *Hispano Americana Mercantil S.A. v. Central Bank of Nigeria*, where the facts were similar to those in *Trendtex*, hence, attachment was allowed.⁶²

Subsequently, the UK State Immunity Act came into force, which stipulates in Section 14(4) that a central bank’s property shall not be considered as property in use or intended for use for commercial purposes.⁶³ In cases where a central bank is a separate entity, a waiver of immunity from execution is necessary in order to attach the property. Consequently, the

⁵⁸ Fox, *International Law and Restraints on the Exercise of Jurisdiction by National Courts of States*, in: M.D. Evans (ed.), *International Law*, 357, 373 (2003).

⁵⁹ C. Schreuer, *State Immunity: Some Recent Developments*, 156 (1988).

⁶⁰ H. Fox, *The Law of State Immunity*, 360 (2002).

⁶¹ *Trendtex Trading Corporation v. Central Bank of Nigeria*, United Kingdom, Court of Appeal, Civil Division, 13 January 1977, 64 ILR 111, 134-135.

⁶² *Hispano Americana Mercantil S.A. v. Central Bank of Nigeria*, United Kingdom, Court of Appeal, Civil Division, 25 April 1979, 64 ILR 221.

⁶³ Section 14(4), United Kingdom State Immunity Act 1978, reprinted in 17 ILM 1123 (1978).

Trendtex and *Hispano Americana Mercantil* cases would have been decided differently under the UK State Immunity Act, namely, in favour of the Nigerian Central Bank.

The wording of Section 1611(b)(1) of the US Foreign Sovereign Immunity Act is slightly different, since it refers to “property of a foreign central bank or monetary authority held for its own account”.⁶⁴ Funds held for the central bank’s own account are funds used for central bank functions as normally understood, even if used for commercial purposes.⁶⁵

Another difference between the US and the UK Act is the possibility of waiver of a central bank of immunity from pre-judgement attachment, since this opportunity is only provided for in the UK Act. Under US law, central banks can only waive immunity from attachment with regard to post-judgement attachment.⁶⁶

Similar to other international instruments⁶⁷, the UN Convention provides for immunity of property of a central bank or other monetary authority from execution.⁶⁸ This codification expressly retains the possibility of the State to consent to pre-judgement as well as post-judgement enforcement measures in respect of central bank property.⁶⁹

iv) Cultural heritage and exhibitions of scientific, cultural or historical objects

The UN Convention in Article 21(1) paragraph (c) and paragraph (d) includes two new categories of property, which are exempted from enforcement measures. According to paragraph (c) property forming part of the cultural heritage of the State or part of its archives and pursuant to paragraph (d) property forming part of an exhibition of objects of scientific, cultural or historical interest must not be considered to be in use or intended for use for commercial purposes.⁷⁰ State-owned objects forming part of an exhibition for commercial or industrial purposes are protected from enforcement measures.⁷¹ Additionally, in both cases, the property must not be placed or intended to be placed on sale, otherwise, it is not worth protection from enforcement measures, since even the State itself does not have interest to

⁶⁴ Section 1611(b)(1), United States Foreign Sovereign Immunities Act 1976, reprinted in 15 ILM 1388 (1976).

⁶⁵ A. Dickinson et al. (eds.), *State Immunity: Selected Materials and Commentary*, 326 (2004).

⁶⁶ H. Fox, *The Law of State Immunity*, 393 (2002); A. Dickinson et al. (eds.), *State Immunity: Selected Materials and Commentary*, 326 (2004).

⁶⁷ Art. 4(2)(c), Resolution of l’Institut de Droit International on Contemporary Problems Concerning the Immunity of States in Relation to Questions of Jurisdiction and Enforcement, 2 September 1991; Art. VIII(C)(3), Revised Draft Articles for a Convention on State Immunity, ILA Report of the 66th Conference (Buenos Aires 14-20 August 1994).

⁶⁸ Art. 21(1)(c), United Nations Convention on Jurisdictional Immunities of States and Their Property, 2 December 2004, Annexe, UN-Doc. A/RES/59/38.

⁶⁹ Art. 21(2), United Nations Convention on Jurisdictional Immunities of States and Their Property, 2 December 2004, Annexe, UN-Doc. A/RES/59/38.

⁷⁰ Art. 21(1)(d), Art. 21(1)(e), United Nations Convention on Jurisdictional Immunities of States and Their Property, 2 December 2004, Annexe, UN-Doc. A/RES/59/38.

keep the property. Nevertheless, it is not clear whether these provisions are declaratory of customary international law, due to the lack of constant, extensive and uniform State practice.⁷²

III.C.1.b. Proof of Purpose

Essential for the determination of immunity from enforcement measures is proof of the purpose of the State property. As evidenced in the *Philippine Embassy Bank Account Case* there is a presumption in international law that State property serves a sovereign purpose.⁷³ This reasoning has been confirmed in other national court decisions, equally referring to a presumption of the public purpose of State property and placing the burden of proof on the plaintiff to rebut the presumption.⁷⁴ Moreover, it is laid down in the UK State Immunity Act that the head of a diplomatic mission, or the person for the time being performing his functions, shall be deemed to have authority to certificate that any property is not in use or intended for use by or on behalf of the State for commercial purposes.⁷⁵ This is accepted as sufficient evidence of the fact, unless the contrary is proven by the plaintiff. Cross-examination of the ambassador could help to clarify the facts, but is normally prohibited pursuant to Article 31(2) of the Vienna Convention on Diplomatic Relations.⁷⁶ As a consequence, it is nearly impossible for the plaintiff to prove the intended use of the property. The Australian Foreign States Immunities Act intends to reverse the burden of proof with respect to property that is apparently vacant or not in use, but restricts this presumption by allowing evidence to convince the court that it has been set aside otherwise than for commercial purposes.⁷⁷ Similarly, attachment of a general fund not allocated for any specific

⁷¹ ILC Draft Articles on Jurisdictional Immunities of States and Their Property, 2 (2) YBILC 59 (1991), UN-Doc. A/46/10.

⁷² *North Sea Continental Shelf (Federal Republic of Germany v. Denmark, Netherlands)*, 1969 ICJ 3, para. 72 (Judgm., February 20); *Asylum Case (Colombia v. Peru)*, 1950 ICJ 265, 276 (Judgm., November 20); H. Fox, *The Law of State Immunity*, 394 (2002).

⁷³ *Philippine Embassy Bank Account Case*, Federal Republic of Germany, Federal Constitutional Court, 13 December 1977, 65 ILR 146, 186.

⁷⁴ *Alcom Ltd v. Republic of Colombia*, United Kingdom, House of Lords, 12 April 1984, [1984] 2 All ER 6, 127 ILR 170, 187; *Leasing West v. Democratic Republic of Algeria*, Austria, Supreme Court, 30 April 1986, Case No. 3 Ob 38/86, 116 ILR 526, 529; *Leica AG v. Central Bank of Iraq and State of Iraq*, Belgium, Brussels Court of Appeal, 15 February 2000, [http://www.coe.int/t/e/legal_affairs/legal_cooperation/public_international_law/state_immunities/documents/Cahdi%20\(2005\)%206%20bil%20PartI%20Belgique.pdf](http://www.coe.int/t/e/legal_affairs/legal_cooperation/public_international_law/state_immunities/documents/Cahdi%20(2005)%206%20bil%20PartI%20Belgique.pdf); *State of the Netherlands v. Azeta B.V.*, The Netherlands, District Court of Rotterdam, 14 May 1998, 31 Netherlands Yearbook of International Law 264, 264-267.

⁷⁵ Section 13(5), United Kingdom State Immunity Act 1978, reprinted in 17 ILM 1123 (1978).

⁷⁶ Art. 31(2), Vienna Convention on Diplomatic Relations 1961, 18 April 1961, 500 UNTS 95.

⁷⁷ Section 32(3)(b), Australia Foreign States Immunities Act 1985, reprinted in 25 ILM 715 (1986).

purpose was granted by a Swiss court, although the money had originally even been allocated for sovereign purposes.⁷⁸

Belgian courts tried to effect a complete shift of the burden of proof on the foreign State in a case where the property, sought to be vacated from attachment, was in the possession of a third person. The court required the foreign State to evidence that the property had been allocated for sovereign purposes. However, the judgements have been reversed on appeal.⁷⁹ Likewise, a dissenting Judge in *Abbott v. South Africa* favoured a shift of the burden of proof on the defending State, requiring it to prove by argument and evidence that the assets at issue were intended in their entirety for sovereign purposes. He considered a mere declaration insufficient.⁸⁰

III.C.1.c. Territorial Limitation

The second limitation under Article 19 (c) of the UN Convention, apart from the commercial purpose of the property, is that the property has to be located in the State of the forum. This excludes the possibility of attaching State property located in a third State by means of a treaty on the enforcement of judgements. EC Regulation No. 44/2001, of 22 December 2000 on jurisdiction and the recognition and enforcement of judgements in civil and commercial matters, aims to simplify the formalities for recognition and swift enforcement of any judgement delivered by a court in another Member State of the European Community by a simple and uniform procedure. However, its Article 71 provides that, this regulation shall not affect any conventions to which the Member States are parties and which in relation to particular matters, govern jurisdiction or the recognition or enforcement of judgements.⁸¹ Moreover, in cases where a convention on a particular matter to which both the Member State of origin and the Member State addressed are parties lays down conditions for the recognition or enforcement of judgements, those conditions shall apply.⁸² In this context it is essential to note that Article 19 of the UN Convention and Article 71 of the EC Regulation deal with

⁷⁸ *United Arab Republic v. Mrs. X*, Switzerland, Federal Tribunal, 10 February 1960, 65 ILR 384, 392.

⁷⁹ *Iraq v. Dumez*, Belgium, Civil Court of Brussels, 27 February 1995, 106 ILR 285, 290; reversed: *Iraq v. Vinci*, Belgium, Brussels Court of Appeal, 4 October 2002, 127 ILR 101, 105-106; *Zaire v. D'Hoop Belgium*, Belgium, Brussels Circuit Court, 9 March 1995, 106 ILR 294, 296; reversed: *Zaire v. D'Hoop Belgium*, Belgium, Brussels Court of Appeal, 8 October 1996, [http://www.coe.int/t/e/legal_affairs/legal_cooperation/public_international_law/state_immunities/documents/Cahdi%20\(2005\)%206%20bil%20PartI%20Belgique.pdf](http://www.coe.int/t/e/legal_affairs/legal_cooperation/public_international_law/state_immunities/documents/Cahdi%20(2005)%206%20bil%20PartI%20Belgique.pdf).

⁸⁰ *Abbott v. South Africa*, Spain, Constitutional Court (2nd Chamber), 1 July 1992, 113 ILR 412, 428.

⁸¹ Art. 71(1), Council Regulation (EC) No 44/2001, 22 December 2000 on jurisdiction and the recognition and enforcement of judgements in civil and commercial matters, Official Journal L 012 , 16/01/2001 P. 0001 – 0023.

⁸² Art. 71(2), Council Regulation (EC) No 44/2001, 22 December 2000 on jurisdiction and the recognition and enforcement of judgements in civil and commercial matters, Official Journal L 012 , 16/01/2001 P. 0001 – 0023.

different matters, since the UN Convention sets forth which kind of State property is subject to enforcement measures, whereas the EC Regulation concerns the recognition of a foreign judgement on enforcement measures.

III.C.1.d. Connection with the entity

The third condition to the exception from immunity from enforcement measures in Article 19(2) of the UN Convention is that there has to exist a connection with the entity against which the proceedings were directed.⁸³ The 1991 ILC Draft Articles differed in that regard, by requiring a connection with the subject-matter of the proceedings.⁸⁴ The wording of the UN Convention is certainly broader and allows attachment against all property of the entity involved in the proceedings, irrespective of the subject matter of the suit. The Annex to the UN Convention contains Understandings with respect to, *inter alia*, Article 19, which stipulates that the connection with the entity is to be understood as broader than ownership or possession.⁸⁵ This could mean that also a lien or an indirect interest in the asset of the defendant suffices to allow attachment. Additionally, there is an Understanding defining the word “entity against which the proceedings are directed” as the State as an independent legal personality, a constituent unit of a federal State, a subdivision of a State, an agency or instrumentality of a State or other entity, which enjoys independent legal personality.⁸⁶ This Understanding narrows the scope of property that can be attached, since enforcement will not be against State property, but only against property of the “entity”. Questions concerning the piercing of the corporate veil and related ones are to be solved according to domestic law. This connection-requirement with the entity is a novelty in international law and the interpretation of this requirement will be left to courts when deciding the first cases under the UN Convention.

Under the US Foreign Sovereign Immunity Act, similar to the 1991 ILC Draft, it is necessary to prove a connection with the subject-matter of the proceedings.⁸⁷ The reason for the incorporation of that restriction was to avoid that also assets of American enterprises abroad

⁸³ Art. 19(c), United Nations Convention on Jurisdictional Immunities of States and Their Property, 2 December 2004, Annex, UN-Doc. A/RES/59/38.

⁸⁴ ILC Draft Articles on Jurisdictional Immunities of States and Their Property, 2 (2) YBILC 58-59 (1991), UN-Doc. A/46/10.

⁸⁵ Annex, United Nations Convention on Jurisdictional Immunities of States and Their Property, 2 December 2004, Annex, UN-Doc. A/RES/59/38.

⁸⁶ Annex, United Nations Convention on Jurisdictional Immunities of States and Their Property, 2 December 2004, Annex, UN-Doc. A/RES/59/38.

⁸⁷ Section 1610(a)(2), United States Foreign Sovereign Immunities Act 1976, reprinted in 15 ILM 1388 (1976).

not having such a specific connection with the subject-matter of the claim could be attached.⁸⁸ Consequently, usually only State property specifically allocated or earmarked for commercial purposes will satisfy this requirement.⁸⁹ Moreover, it is noteworthy that this condition for enforcement only applies with regard to the State itself, not with regard to State agencies or instrumentalities. It was argued in that respect that each State agency would have its own assets and would act as a separate entity, analogously to an American corporation.⁹⁰ French law knows a similar requirement of a link between the property to be attached and the subject-matter of the claim in respect of State property, but enlarges it to include prejudgement attachment.⁹¹ No other national immunity statute contains such a connection-condition.⁹²

IV. SPECIAL PROBLEMS

IV.A. Mixed bank accounts

The most frequent problem in the field of immunity from enforcement measures is the attachment of mixed bank accounts, meaning that part of the account is used for sovereign purposes and another part is used for commercial purposes. As already outlined above, the leading decision of the German Constitutional Court in the *Philippine Embassy Bank Account Case* states that “claims against a general current bank account of the embassy of a foreign State which exists in the forum and the purpose of which is to cover the embassy’s costs and expenses are not subject to forced execution by the State of the forum”.⁹³ The Court held that according to the Vienna Convention on Diplomatic Relations, the principle of the unimpeded functioning of the diplomatic mission precludes enforcement measures where they might impair the exercise of diplomatic duties. The Court found the abstract danger to be decisive, not the specific risk. Even if the origin and purpose of the bank account could be established in isolated cases, this was likely to constitute an intrusion into the internal sphere of the

⁸⁸ United States: Draft Legislation on the Jurisdictional Immunities of Foreign States, 26 January 1973, 12 ILM 118, 152 (1973).

⁸⁹ H. Fox, *The Law of State Immunity*, 403 (2002).

⁹⁰ United States: Draft Legislation on the Jurisdictional Immunities of Foreign States, 26 January 1973, 12 ILM 118, 152-153 (1973).

⁹¹ *Soci t  Sonatrach v. Migeon*, France, Court of Cassation, First Civil Chamber, 1 October 1985, 77 ILR 525, 527; *Islamic Republic of Iran v. Soci t  Eurodif and Others*, France, Court of Cassation, First Civil Chamber, 14 March 1984, 77 ILR 513, 515.

⁹² Section 13(4), United Kingdom State Immunity Act 1978, reprinted in 17 ILM 1123 (1978); Section 31, Australia Foreign States Immunities Act 1985, reprinted in 25 ILM 715 (1986); Art. 12(1)(b), Canada State Immunity Act 1982, reprinted in 21 ILM 798 (1982); Section 14(2)(b), Pakistan State Immunity Ordinance 1981; Section 15(4) Singapore State Immunity Act 1985; Section 14(3), South Africa Foreign States Immunities Act 1981.

⁹³ *Philippine Embassy Bank Account Case*, Federal Republic of Germany, Federal Constitutional Court, 13 December 1977, 65 ILR 146, 187.

foreign State, which is prohibited under international law. Moreover, the Court consciously accepted the consequence that a foreign State might use a general current bank account as a shield for financial transactions not directly related to the functions of a diplomatic mission.⁹⁴ Equally, the Austrian Supreme Court found that in order to be liable to attachment, the State property has to be shown to serve solely commercial purposes, mixed bank accounts cannot be attached.⁹⁵

Another important decision in that respect is *Alcom v. Republic of Colombia*, where an English court held that a general mixed bank account of an Embassy was immune from enforcement measures and the funds could not be dissected into commercial and sovereign purposes. Only if the money was specifically earmarked for present or future commercial use by the State, it could be subject to attachment.⁹⁶

On the contrary, a US District Court in 1980 held that an analysis of the purposes, for which the embassy bank account was held, was feasible. Moreover, it refused to accept the loophole that any property could be made immune by using it only one time for some minor sovereign purpose.⁹⁷

However, in a later decision another District Court refused to attach a mixed embassy bank account on the grounds that it would be contrary to the obligation of the receiving State under the Vienna Convention on Diplomatic Relations to afford full facilities to the diplomatic mission of the receiving State.⁹⁸

In the Australian Foreign States Immunities Act a compromise regime is adopted, since the Australian Law Commission refused any presumption either for or against commercial use in cases of mixed bank accounts.⁹⁹ Section 32(3)(a) defines commercial property as property, other than diplomatic or military property, that is in use by the foreign State concerned substantially for commercial purposes.¹⁰⁰ Diplomatic property on the other hand is defined as property that is in use predominantly for the purpose of establishing or maintaining a

⁹⁴ *Phillippine Embassy Bank Account Case*, Federal Republic of Germany, Federal Constitutional Court, 13 December 1977, 65 ILR 146, 190.

⁹⁵ *Leasing West v. Democratic Republic of Algeria*, Austria, Supreme Court, 30 April 1986, Case No. 3 Ob 38/86, 116 ILR 526, 529; *I GmbH v. A*, Austria, Supreme Court, 25 August 1998, Case No. 1 Ob 100/98g.

⁹⁶ *Alcom Ltd v. Republic of Colombia*, United Kingdom, House of Lords, 12 April 1984, [1984] 2 All ER 6, 74 ILR 170, 187.

⁹⁷ *Birch Shipping Corp. v. Embassy of the United Arab Republic of Tanzania*, United States, 18 November 1980, 507 F Supp. 311 (DD Cir. 1980), 63 ILR 524, 527.

⁹⁸ *Liberian Eastern Timber Co. v. The Government of the Republic of Liberia*, United States, 16 April 1987, 659 F Supp. 606 (DDC 1987), 89 ILR 360, 363.

⁹⁹ H. Fox, *The Law of State Immunity*, 407 (2002).

¹⁰⁰ Section 32(3)(a), Australia Foreign States Immunities Act 1985, reprinted in 25 ILM 715 (1986).

diplomatic or consular mission of a foreign State to Australia.¹⁰¹ Hence, the Australian Act defines the purpose of the property with respect to its predominant use.

The UN Convention expressly excludes bank accounts used or intended for use in the performance of the functions of the diplomatic mission from enforcement measures, unless the State has waived immunity or allocated or earmarked the property in that respect.¹⁰² This reference to bank accounts, however, does not clarify whether mixed bank accounts can be attached. It simply includes bank accounts of a diplomatic mission into the category of protected diplomatic property, since under the mere wording of Article 22 of the Vienna Convention on Diplomatic Relations bank accounts would not be protected. This provision only stipulates that the premises of the mission, their furnishings and other property thereon and the means of transport of the mission shall be immune from attachment or execution.

It has been suggested in literature to effect a shift of the burden of proof on the foreign State in order to solve the problem of shielding commercial funds by mixing them with money destined for sovereign purposes. The foreign State should prove firstly, the sovereign and commercial portions of the bank account and, secondly, the serious interference of enforcement measures with its official functions. The German Constitutional Court's criterion of an abstract danger should be replaced by the prerequisite of an immediate and genuine threat to the foreign State's official functions.¹⁰³

IV.B. State entities

A separate entity of the State is defined as an entity which is distinct from the executive organs of the government of the State and capable of suing and being sued.¹⁰⁴ The ability to sue and be sued is to be determined according to the law of the place of incorporation of the entity. To determine whether the necessary degree of distinctiveness from the State is fulfilled the entity's constitution, functions, powers and activities and its relationship with the State have to be examined.¹⁰⁵ Additional advice can be found in the explanatory notes to the European Convention on State Immunity, which cites political subdivisions or national banks and railway administrations as examples of State entities.¹⁰⁶

¹⁰¹ Section 3(1), Australia Foreign States Immunities Act 1985, reprinted in 25 ILM 715 (1986).

¹⁰² Art. 21(1)(a), United Nations Convention on Jurisdictional Immunities of States and Their Property, 2 December 2004, Annexe, UN-Doc. A/RES/59/38.

¹⁰³ C. Schreuer, *State Immunity: Some Recent Developments*, 155 (1988).

¹⁰⁴ Section 14(1), United Kingdom State Immunity Act 1978, reprinted in 17 ILM 1123 (1978); Para. 108, Explanatory Report on the European Convention on State Immunity, reprinted in A. Dickinson et al. (eds.), *State Immunity: Selected Materials and Commentary*, 62 (2004).

¹⁰⁵ A. Dickinson et al. (eds.), *State Immunity: Selected Materials and Commentary*, 404 (2004).

¹⁰⁶ Para. 109, Explanatory Report on the European Convention on State Immunity, reprinted in A. Dickinson et al. (eds.), *State Immunity: Selected Materials and Commentary*, 62 (2004).

The basic principle is that a State entity does not enjoy immunity from jurisdiction in cases where it is not involved in sovereign activities, and, hence, also lacks immunity from enforcement.¹⁰⁷ Under the UK State Immunity Act State entities are immune from jurisdiction if the proceedings relate to activities carried out in the exercise of sovereign authority.¹⁰⁸ Only if the separate entity submits to the jurisdiction of the Court, though being entitled to immunity, it enjoys the same immunity from enforcement as the State itself.¹⁰⁹ The same provision can be found in other national immunity statutes.¹¹⁰

Section 1610(b) US Foreign Sovereign Immunities Act stipulates that any property of an agency or instrumentality of the State, which engages in commercial activity is subject to execution if the claim relates to an activity for which it enjoys no immunity from jurisdiction.¹¹¹ In contrast to enforcement measures against the State itself, there exists no connection-requirement with the subject-matter of the claim. Moreover, any property of the State agency is open to enforcement, irrespective of being used for commercial or sovereign purposes. But enforcement is limited to property of the specific entity, no execution is possible against property of another State agency. Likewise, no enforcement measures are allowed against State agencies if the judgement has been issued against the State itself.¹¹²

Thus, the Statutes all contain an irrebuttable presumption that property of State entities engaged in commercial activities is destined for commercial purposes. The underlying reason is a sanction against mixing sovereign and commercial funds in a State entity's account.¹¹³

The UN Convention makes no differentiation between the State and State entities to the extent that they are entitled to perform and are actually performing acts in the exercise of sovereign authority of the State.¹¹⁴

The practice of national courts, however, reveals that they do not abandon the distinction between sovereign and commercial purposes of the property of State entities. An important decision in this regard is the *National Iranian Oil Company Revenues (NIOC) from Oil Sales Case*. Although NIOC was found to be a separate State entity, the German Constitutional Court dealt in-depth with the question of the purpose and nature of the funds involved. It

¹⁰⁷ Art. 12(2), Canada State Immunity Act 1982, reprinted in 21 ILM 798 (1982).

¹⁰⁸ Section 14(2), United Kingdom State Immunity Act 1978, reprinted in 17 ILM 1123 (1978).

¹⁰⁹ Section 14(3), United Kingdom State Immunity Act 1978, reprinted in 17 ILM 1123 (1978).

¹¹⁰ Section 35(2), Australia Foreign States Immunities Act 1985, reprinted in 25 ILM 715 (1986); Section 15(3), Pakistan State Immunity Ordinance 1981; Section 16(3) Singapore State Immunity Act 1985; Section 15(2), South Africa Foreign States Immunities Act 1981.

¹¹¹ Section 1610(b), United States Foreign Sovereign Immunities Act 1976, reprinted in 15 ILM 1388 (1976).

¹¹² *Letelier and Others v. Republic of Chile and Linea Aerea Nacional-Chile*, United States, Court of Appeals, Second Circuit, 20 November 1984, 79 ILR 561, 565-566.

¹¹³ C. Schreuer, *State Immunity: Some Recent Developments*, 143 (1988).

¹¹⁴ Art. 2(1)(b), United Nations Convention on Jurisdictional Immunities of States and Their Property, 2 December 2004, Annexe, UN-Doc. A/RES/59/38.

upheld the attachment orders and found that the funds held in bank accounts in Germany, which were destined for transfer to an account of a foreign state at its central bank serving to cover State budgetary expenditure, were not to be classified as assets serving sovereign purposes.¹¹⁵ Ownership of the assets by the State entity was merely seen as evidence against a sovereign purpose of the property.

IV.C. Pre-judgement Attachment

The term “pre-judgement attachment” of State property refers to interim orders for seizure or attachment made prior to adjudication of the claim on the merits. These instruments are very important in order to secure funds which might eventually serve as objects of execution. Generally, States are more reluctant to accept pre-judgement than post-judgement attachment, since they fear attachment of property without a thorough examination by the courts of the merits of the case.

The UK State Immunity Act does not contain an express reference to pre-judgement attachment, but in Section 13(4) it omits the phrase “giving of relief”, which results in the permission of pre-judgement attachment if the State has given its prior written consent, but not where attachment is sought on the basis of the use or intended use of the property for commercial purposes.¹¹⁶ However, in *Trendtex* and *Hispano Mercantil S.A.*, which were both decided under common law and not under the UK State Immunity Act, pre-judgement attachment of State assets in commercial use was allowed.¹¹⁷

Section 1610(d) of the US Foreign Sovereign Immunities Act permits prejudgement-attachment if the State has explicitly waived immunity from attachment prior to judgement and the purpose of the attachment is to secure satisfaction of a judgement but not to obtain jurisdiction.¹¹⁸ The last part of the sentence excludes the possibility of establishing jurisdiction by mere attachment of assets (*jurisdictio ad fundandum*). Contrary to the waiver of immunity from post-judgement enforcement measures, waiver of immunity from pre-judgement enforcement has to be explicit, which requires that the foreign State has to demonstrate unambiguously its intention to waive its immunity from pre-judgement attachment.¹¹⁹

¹¹⁵ *National Iranian Oil Company Revenues from Oil Sales Case*, Federal Republic of Germany, Federal Constitutional Court, 12 April 1983, 65 ILR 215, 243.

¹¹⁶ H. Fox, *The Law of State Immunity*, 409 (2002).

¹¹⁷ *Trendtex Trading Corporation v. Central Bank of Nigeria*, United Kingdom, Court of Appeal, Civil Division, 13 January 1977, 64 ILR 111 (1984); *Hispano Americana Mercantil S.A. v. Central Bank of Nigeria*, United Kingdom, Court of Appeal, Civil Division, 25 April 1979, 64 ILR 221 (1984).

¹¹⁸ Section 1610(d), United States Foreign Sovereign Immunities Act 1976, reprinted in 15 ILM 1388 (1976).

¹¹⁹ A. Dickinson et al. (eds.), *State Immunity: Selected Materials and Commentary*, 326 (2004).

The ILA Draft Articles also allowed pre-judgement attachment in exceptional circumstances, namely only if a “party presents a *prima facie* case that such assets within the territorial limits of the forum State may be removed, dissipated or otherwise dealt with by the foreign State before the Tribunal renders judgement and there is a reasonable probability that such actions will frustrate execution of any such judgement”.¹²⁰

The UN Convention allows pre-judgement attachment in cases of consent by the State or if the State has specially earmarked or allocated property for that purpose.¹²¹ The waiver can take the form of an international agreement, an arbitration agreement or a written contract, or a declaration before the court or a written communication after a dispute has arisen.¹²²

V. CONCLUSION

Unlike in respect of immunity from jurisdiction, which is today governed by the doctrine of restrictive immunity, foreign States continue to be largely immune from enforcement measures against their property. Therefore, ILC Special Rapporteur Sucharitkul defined immunity from enforcement measures as “the last bastion of State immunity”.¹²³ The reason for States’ reluctance to accept the restrictive concept of immunity also for measures of constraint is their more drastic effect on state sovereignty than the mere adjudication, which might lead to diplomatic disputes.¹²⁴ However, some exceptions also with respect to immunity from enforcement measures evolved over the last decades, so that immunity from execution can no longer be regarded as absolute. Interestingly, Turkey refuses grant foreign States immunity from enforcement measures at all, although this remains an exception in State practice.¹²⁵ Still, immunity from jurisdiction and immunity from enforcement measures are not entirely coherent, since the former concept refers to the nature of the act as the decisive

¹²⁰ Art. VIII(D), Revised Draft Articles for a Convention on State Immunity, ILA Report of the 66th Conference (Buenos Aires 14-20 August 1994).

¹²¹ Art. 18, United Nations Convention on Jurisdictional Immunities of States and Their Property, 2 December 2004, Annexe, UN-Doc. A/RES/59/38.

¹²² Art. 18(a), United Nations Convention on Jurisdictional Immunities of States and Their Property, 2 December 2004, Annexe, UN-Doc. A/RES/59/38.

¹²³ ILC Draft Articles on Jurisdictional Immunities of States and Their Property, 2 (2) YBILC 56 (1991), UN-Doc. A/46/10.

¹²⁴ I. Brownlie, *Principles of Public International Law*, 338 (2003).

¹²⁵ *Société X c. États-Unis d’Amérique*, Turquie, Cour de Cassation, 11 juin 1993, http://www.coe.int/t/e/legal_affairs/legal_co-operation/public_international_law/state_immunities/documents/Cahdi%20_2005_%206%20bil%20PartII%20TURQUIE.pdf; *Société X c. Ambassade du Turkménistan*, Turquie, Tribunal de Grande Instance, 18 décembre 2002, http://www.coe.int/t/e/legal_affairs/legal_co-operation/public_international_law/state_immunities/documents/Cahdi%20_2005_%206%20bil%20PartII%20TURQUIE.pdf; *Société c. La République Azerbaïdjan*, Turquie, Tribunal d’exécution, 21 février 2001, http://www.coe.int/t/e/legal_affairs/legal_co-operation/public_international_law/state_immunities/documents/Cahdi%20_2005_%206%20bil%20PartII%20TURQUIE.pdf.

criterion, whereas immunity from enforcement is to be determined according to the purpose of the act.¹²⁶ Today, a State's waiver of immunity from execution and its earmarking of assets for such purposes constitute exceptions from immunity from enforcement measures with respect to both pre-judgement and post-judgement attachment. Moreover, there is an exception in international law with regard to attachment of property in use or intended for use for commercial purposes even without the State's consent. However, problems, *inter alia*, with regard to mixed bank accounts remain topical, since courts tend to grant immunity in cases of unclear designation. This is even emphasised by placing the burden of proof of their commercial nature on the judgement creditor to rebut the presumption of their sovereign nature. Consequently, a loophole is created for States to shield their commercial assets from being subjected to enforcement by using part of the funds at one time or another for minor sovereign purposes.

Still, Article 19 of the recent UN Convention on Jurisdictional Immunities of States and their Property has to be seen as a great achievement, since it allows execution also without the consent of the foreign State and without requiring a connection between the subject-matter of the claim and the property, unlike the US Foreign Sovereign Immunities Act. It only contains a connection-requirement with the entity, which constitutes a much wider exception. In contrast to that, the European Convention on State Immunity completely lacks provisions allowing for enforcement measures, in principle relying on voluntary compliance of States with the judgements rendered against them. Moreover, the UN Convention introduces a new category of immune property in respect of cultural property on loan for exhibition purposes, which is to be worthwhile to encourage enjoyment of the cultural heritage of the world.

¹²⁶ Neuhold / Hummer / Schreuer (eds.), *Österreichisches Handbuch des Völkerrechts*, Band I, 170 (2004).

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