State immunity and cultural objects on loan
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Chapter 5  Situation in Canada and Central and South America

In this chapter, I will give a short outline regarding the situation in Canada and Central and South America. I could have opted for one chapter describing the situation on the continents of North and South America. In my opinion, however, because of the extensiveness of its legislation as well as the amount of case law, the situation in the United States deserved a separate chapter.

5.1  Situation in Canada

5.1.1  State immunity

The Canadian State Immunity Act\(^1\) has originally been enacted in 1980 and came into force on 15 July 1982.\(^2\) The Act does not apply to criminal proceedings or proceedings in the nature of criminal proceedings.\(^3\)

Section 2 gives a definition of a State, at least it states what a foreign State includes, namely

“(a) any sovereign or other head of the foreign state or of any political subdivision of the foreign state while acting as such in a public capacity,
(b) any government of the foreign state or of any political subdivision of the foreign state, including any of its departments, and any agency of the foreign state, and
(c) any political subdivision\(^4\) of the foreign state[.]”

The same section refers to an agency of a foreign State as “any legal entity that is an organ of the foreign state but that is separate from the foreign state[.]”

\(^3\) Section 18.
\(^4\) A political subdivision means according to the Act a province, state or other like political subdivision of a foreign state that is a federal State.
A commercial activity has been defined in Section 2 as “any particular transaction, act or conduct or any regular course of conduct that by reason of its nature is of a commercial character[].”

Under the Act, a foreign State is immune from the jurisdiction of any court in Canada, except as provided by the Act. One of the exceptions of State immunity is a commercial activity: “[a] foreign state is not immune from the jurisdiction of a court in any proceedings that relate to any commercial activity of the foreign state.”

According to Section 12(1)(b) of the Act, “property of a foreign state that is located in Canada is immune from attachment and execution and, in the case of an action in rem, from arrest, detention, seizure and forfeiture except where [...] the property is used or is intended for a commercial activity [...].”

This is subject to Section 12(2) and (3), whereby subsection (3) regards military property and subsection (2) states that

“property of an agency of a foreign state is not immune from attachment and execution and, in the case of an action in rem, from arrest, detention, seizure and forfeiture, for the purpose of satisfying a judgment of a court in any proceedings in respect of which the agency is not immune from the jurisdiction of the court by reason of any provision of this Act.”

So, in that event, the fact that there is no immunity from jurisdiction for the State agency makes that the property of that agency is not immune from measures of constraint either.

With regard to the United States, Canada enacted in 1997 the Order Restricting Certain Immunity In Relation to the United States. As the US Foreign Sovereign Immunities Act only accords immunity to an agency or instrumentality of a foreign State that is a separate legal person if a majority of its shares or other ownership interest is owned by the foreign

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5 Section 3(1).
6 Section 5.
7 This is a similar provision to that of Section 13(2), of the State Immunity Act of the United Kingdom, to which I shall come infra, in Ch. 7.
8 “Property of a foreign state that is used or is intended to be used in connection with a military activity, and that is military in nature or is under the control of a military authority or defence agency is immune from attachment and execution and, in the case of an action in rem, from arrest, detention, seizure and forfeiture.”
9 SOR/97-121, dated 18 February 1997.
State or a political subdivision of the foreign State,10 and Canada was of the opinion that the Canadian State Immunity Act exceeded the immunities accorded by the FSIA, Canada decided to follow an approach of reciprocity. Section 1 of the Order therefore states that

“[t]he immunity accorded under the State Immunity Act, in relation to the United States, shall not extend to a legal entity, whether or not it is a corporate entity, wherever registered, that is acting on behalf of, on instructions from or at the request of the United States, unless a majority of the shares or other ownership interest of the legal entity is owned by the United States or a political subdivision of the United States.”

Based on the above, the central question thus seems once more to be how an international art loan should be seen: as a sovereign act, or as a commercial activity? As the State Immunity Act reflects the approach that the nature of the act is decisive, it is likely that the art loan will be considered to be a commercial activity. Consequently, the State or State agency will not enjoy immunity, and also its cultural property may be vulnerable to seizure.

It should therefore be concluded that the State Immunity Act does not provide immunity from seizure for cultural State property on loan. It has therefore to be considered, whether Canada has specific immunity legislation for these cultural objects, or whether Canada counts on a rule of customary international law, immunising these objects.

5.1.2 Immunity from seizure of cultural objects

With respect to immunity from seizure legislation currently in force in Canada, Canada is a federal State, and under the Canadian Constitution, the exercise of jurisdiction over the attribution of immunity from seizure to property in general falls predominantly within the ambit of the provinces, rather than the federal government. Consequently, Canada does not have a federal immunity from seizure act, specially addressed to cultural objects. The Canadian federal authorities were not able to express an explicit opinion with regard to the question whether immunity of cultural State property on loan is covered by a rule of customary international law.11

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10 See the FSIA, 28 U.S.C. Section 1603(b).
11 Regular email exchange between the author and a qualified representative of the Canadian Federal authorities, as well as involvement of the Royal Netherlands Embassy in Ottawa, did not lead to concrete results.
Five of its provinces adopted immunity legislation in the late 1970s and the early 1980s.\textsuperscript{12} These provinces are British Columbia, Ontario, Québec, Alberta and Manitoba. In each case, this legislation is specific to cultural objects, and does not distinguish between (foreign) State-owned and non State-owned cultural property.

In \textit{Manitoba}, the Foreign Cultural Property Immunity from Seizure Act has been enacted in 1976.\textsuperscript{13} It states in the first Section:

\begin{quote}
“When any work of art or other object of cultural significance from a foreign country is brought into Manitoba pursuant to an agreement between the foreign owner or custodian thereof and the Government of Manitoba or any cultural or educational institution, providing for the temporary exhibition or display thereof, in Manitoba by the Government of Manitoba or the cultural or educational institution, no proceeding or action shall be taken or permitted in any court and no judgment, decree or order shall be enforced in Manitoba for the purpose of, or having the effect of depriving the Government of Manitoba or the institution or any carrier engaged in transporting the work or object within Manitoba, of the custody or control thereof, if, before the work or object is brought into Manitoba the Lieutenant Governor in Council where the agreement is with the Government of Manitoba, on the recommendation of the member of the Executive Council who executed the agreement for and on behalf of the Government of Manitoba and where the agreement is with a cultural or educational institution, on the application of the institution determines
(a) that the work or object is of cultural significance; and
(b) that the temporary exhibition or display thereof in Manitoba is in the interest of the people of Manitoba;
and the Order in Council is published in the Manitoba Gazette.”
\end{quote}

Thus, the Government of Manitoba has to determine that the cultural object is of cultural significance and that the temporary exhibit is in the interest of the people of Manitoba. The notice of the determination has to be published in the \textit{Manitoba Gazette} before the cultural object is imported into Manitoba.

This provision is more or less similar to the US Foreign Immunity from Seizure Act.\textsuperscript{14}

Section 2 states that Section 1

\textsuperscript{13} C.C.S.M. c. F140; To be found at: http://www.canlii.org/mb/laws/sta/f-140/20080818/whole.html. [Last visited 7 March 2011.]
\textsuperscript{14} See supra, Ch. 4.3.1.
“does not preclude any judicial action for or in aid of the enforcement of any of the terms of an agreement referred to in that section or the enforcement of the obligation of a carrier under any contract for the transportation of the work or object in the fulfilment of any obligation assumed by the Government of Manitoba or the cultural or educational institution pursuant to the agreement.”

The Foreign Cultural Objects Immunity from Seizure Act in Ontario has been enacted in 1978.\(^\text{15}\) It follows the same approach as the Manitoba Act. It states in Section 1(1) that

“[w]hen any work of art or other object of cultural significance from a foreign country is brought into Ontario pursuant to an agreement between the foreign owner or custodian thereof and the Government of Ontario or any cultural or educational institution in Ontario providing for the temporary exhibition or display thereof in Ontario administered, operated or sponsored by the Government of Ontario or any such cultural or educational institution, no proceeding shall be taken in any court and no judgment, decree or order shall be enforced in Ontario for the purpose or having the effect of depriving the Government of Ontario or such institution, or any carrier engaged in transporting such work or object within Ontario, of custody or control of such work or object if, before such work or object is brought into Ontario, the Minister\(^\text{16}\) determines that such work or object is of cultural significance and that the temporary exhibition or display thereof in Ontario is in the interest of the people of Ontario and notice of the Minister’s determination is published in The Ontario Gazette.”

Subsection 2 states that subsection 1

“does not preclude any judicial action for or in aid of the enforcement of the terms of any such agreement or the enforcement of the obligation of any carrier under any contract for the transportation of any such work or object or the fulfilment of any obligation assumed by the Government of Ontario or such institution pursuant to any such agreement.”

In Ontario, an object is also immune while en route to an exhibition.

The Alberta Foreign Cultural Property Immunity Act\(^\text{17}\) has been enacted in 1985 and has a specific definition of cultural property in Section 1.\(^\text{18}\)

\(^{15}\) R.S.O. 1990, Ch. F.23 ; to be found at: http://canlii.org/on/laws/sta/f-23/20040128/whole.html. [Last visited 7 March 2011.]

\(^{16}\) According to Section 3, ‘Minister’ means the Minister of Culture or such other member of the Executive Council to whom the administration of the Foreign Cultural Objects immunity from Seizure Act may be assigned under the 2002 Executive Council Act.

\(^{17}\) R.S.A. 2000 c. F-17; to be found at: http://www.canlii.org/ab/laws/sta/f-17/20070813/whole.html. [Last visited 7 March 2011.]

\(^{18}\) In the Act, ‘cultural property’ means property belonging to any one or more of the following categories:
“(a) collections and specimens of fauna, flora, minerals and objects of paleontological interest;
(b) property relating to history, including the history of science and technology and military and social history, to national leaders, academics and scientists and to events of national importance;
Section 2(1) states that

“[w]hen any cultural property ordinarily kept in a foreign State is brought into Alberta pursuant to an agreement between the owner or custodian of the cultural property and the Government of Alberta or any cultural, educational or research institution for the purpose of the temporary exhibition or display of the cultural property or the temporary use of the cultural property for research purposes by the Government of Alberta or the institution, no proceedings shall be taken in any court and no judgment, decree or order shall be enforced in Alberta for the purpose of, or having the effect of, depriving the Government of Alberta or the institution or any carrier engaged in transporting the cultural property into, within or out of Alberta of the custody or control of the cultural property if, before the cultural property is brought into Alberta,

(a) the Lieutenant Governor in Council, by order, determines that the cultural property is of significance, and

(b) the order is published in The Alberta Gazette.”

Subsection 3 states that subsection 1

“does not preclude any judicial action for or in aid of the enforcement

(a) of any of the terms of an agreement referred to in subsection (1), or

(b) of the obligation of a carrier under any contract for the transportation of the cultural property in the fulfilment of any obligation assumed by the Government of Alberta or the cultural, educational or research institution pursuant to an agreement referred to in subsection (1).”

The Alberta Act is broader than the immunity Acts in the other Canadian provinces, as it also offers coverage to cultural objects that are brought into Alberta for use in research and need not be on display or exhibition.19

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In British Columbia, the Court Order Enforcement Act\(^{20}\) is the applicable legislation. The protection under the Act is automatic, so without any application process, unlike the acts in the other provinces. It provides the broadest protection, compared with the other Canadian provinces. Section 72 regards ‘art exempt from seizure’. The first subsection states: “Works of art or other objects of cultural or historical significance brought into British Columbia for temporary public exhibit are exempt from seizure or sale under any process at law or in equity.” However, the second subsection states that Section 72(1) does not apply “(a) to execution on a judgment respecting a contract for the transportation or warehousing or exhibition in British Columbia of the work or object, or (b) to a work or object that is offered for sale”.

Furthermore, the Law and Equity Act\(^{21}\) states in Section 55(1)\(^{22}\) that “[a] proceeding for possession or for a property interest must not be brought in respect of works of art or objects of cultural or historical significance brought into British Columbia for temporary public exhibit.” The second subsection states that subsection (1) does not apply “(a) to proceedings in respect of a contract for transportation, warehousing or exhibition in British Columbia of the work or object, or (b) to a work or object that is offered for sale.”

In Québec the Code of Civil Procedure\(^{23}\) states in Section 553(1) that

“[w]orks of art or historical property brought into Québec and placed or intended to be placed on public exhibit in Québec are [also] exempt from seizure if the Government declares them so and for such time as it determines. Such works or property must not have been originally conceived, produced or created in Québec. […] Exemption from seizure as prescribed in this article does not prevent the execution of judgments rendered to give effect to service contracts relating to the transportation, warehousing and exhibition of the works and property referred to in the first paragraph.”

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\(^{20}\) R.S.B.C. 1996 Ch. 78; to be found at: http://www.bclaws.ca/EPLibraries/bclaws_new/document/ID/freeside/00_96078_01. [Last visited 7 March 2011.]

\(^{21}\) R.S.B.C. 1996, Ch. 253; to be found at: http://www.bclaws.ca/EPLibraries/bclaws_new/document/ID/freeside/00_96253_01#section55. [Last visited 7 March 2011.]

\(^{22}\) Also called ‘art exempt from seizure’.

5.1.3 Exhibition of the Dead Sea Scrolls

From 27 June 2009 until 3 January 2010, the Royal Ontario Museum in Toronto exposed, in cooperation with the Israel Antiquities Authority, seventeen of the Dead Sea Scrolls.

The Dead Sea Scrolls were found in eleven caves on the northwest shore of the Dead Sea in Qumran in different phases from 1947 until 1956. They contain original, 2000 years old, texts from the Bible (Old Testament) as well as writings that tell about the laws and society of the Jewish culture. They belonged to a Jewish religious group that lived in the settlement of Qumran and hid the texts in the surrounding caves in order to keep them away from the advancing Roman troops around the year 68 A.D.

When the exhibition was coming to an end, Jordan asked Canada to seize the Dead Sea Scrolls. Jordan argued that Israel had illegally seized the ancient texts in East Jerusalem during the six-day war in 1967. According to the Jordanian Minister for Tourism, the scrolls came under the control of the Jordanian Government at the end of the 1940s after Bedouins found them in caves near the Dead Sea. A similar request for seizure was received from the Palestinian Authority, which did its request already in April 2009, so before the exhibition started.


The texts are considered invaluable to our knowledge of Judaism in the Greco-Roman period (3rd century B.C. until 1st century A.D.)

Through the Canadian Embassy in Amman, Jordan.


When the Dead Sea Scrolls were discovered, the area where the scrolls were found, as well as East Jerusalem, was occupied and administered by the Emirate of Transjordan, which in 1949 changed its name to the Hashemite Kingdom of Jordan. The majority of the scrolls found its way into the Palestine Archaeological Museum / Rockefeller Museum in East Jerusalem (the first seven scrolls were sold to Israel). In August 1966, Jordan nationalised the scrolls, and in 1966 the Palestine Archaeological Museum. In June 1967 the museum came into Israeli hands, and from that moment, the Israel Antiques Authority acted as a custodian. In 1968 the scrolls were transported to West Jerusalem, and form part of the collection of the Israel Museum from that moment on.

However, the Canadian authorities were of the opinion that this was an issue that should be settled between Jordan and Israel, and that it would not be appropriate for Canada to intervene as a third party.31 Jordan and the Palestinian Authority argued that they did not want Canada to determine who should be the legitimate owner, but that Canada would act as a safekeeper until the ownership had been determined.32 But Canada refused and the scrolls could leave Toronto unhindered.33

Israel is not asserting ownership of the scrolls. According to the Israel Antiquities Authority, Israel considers itself as custodian or trustee, and states that it has accordingly a right to exhibit and conserve the scrolls.34

After the exhibition in Toronto, the Dead Sea Scrolls have been exhibited at the Milwaukee Public Museum from 22 January 2010 until 6 June 2010, and at the Minnesota Science Museum in St. Paul, from 12 March to 24 October 2010. The Jordanian Minister for Tourism stated that she would write the US Government in another attempt to seize the scrolls.35

5.2 Situation in Central and South America

States in Central and South America are known for their rich cultural heritage. Loans concern mostly cultural heritage in the form of ethnological objects, with generally a clear

31 Before the exhibition was due to start, Israel asked Canada for an anti-seizure declaration. This was refused by Canada, as its province Ontario has its own immunity from seizure legislation, and such a declaration therefore was considered as unnecessary. Information: Royal Netherlands Embassy in Ottawa, Canada, 6 July 2010, obtained from the Canadian Ministry of Foreign Affairs.

32 Op. cit. n. 27.


35 ‘Jordan to ask U.S. and Italy to seize visiting Dead Sea Scrolls’, Deutsche Presse-Agentur, 14 January 2010. To be found at: http://www.monstersandcritics.com/news/middleeast/news/article_1525509.php/Jordan-to-ask-US-and-Italy-to-seize-visitin-Dead-Sea-Scrolls. [Last visited 7 March 2011.] However, in December 2010, the US State Department denied (in an interview with the author) that Jordan filed a request for seizure; a reason could be, that the United States is not a party to the (First) Protocol to the 1954 Hague Convention for the Protection of Cultural Objects in the Event of Armed Conflict, and that Jordan in its request to Canada primarily based its return claim on that (First) Protocol.
provenance.\textsuperscript{36} When it comes to lending and borrowing works of art, these States seem to be less in the vanguard. As a consequence, the focus in the legislation is more with regard to the protection of its own cultural heritage than with the issue of immunity from seizure for cultural objects on loan. \textit{Venezuela}, for instance, has several laws with regard to cultural heritage, such as legislation on how to protect Venezuelan cultural heritage, or how to export cultural objects from Venezuela. But the legislation contains no provisions regarding to immunity from seizure for foreign cultural objects.\textsuperscript{37} The same goes, for instance, for \textit{Colombia}\textsuperscript{38} and various other States of the region.

\textit{Guatemala}, however, can maybe called an exception to the rule.\textsuperscript{39} Chapter III of the Law on the Protection of Cultural Heritage of the Nation,\textsuperscript{40} entitled ‘Exhibitions of archaeological, historical, ethnological and artistic objects’, has an Article 19\textsuperscript{41} that reads in the second paragraph: “The included cultural property of the exhibition cannot be seized and the receiving country will guarantee its protection and safe return.”\textsuperscript{42} However, it is my impression that this provision does not regard foreign cultural objects temporarily on Guatemalan soil, but that it expresses the condition that Guatemala imposes on borrowing States.

\textit{Mexico} has put in its loan contracts a clause stating that its loaned objects are the property of the Mexican nation, inalienable and not subject to an action of revindicación or any permanent or temporary dispossession.\textsuperscript{43} It signed the 2004 UN Convention on Jurisdictional Immunities of States and Their Property on 25 September 2006.

\textsuperscript{36} We thereby also have to realise that through the years many (archaeological or ethnological) objects belonging to the cultural heritage of Central or South American States have been expropriated. The Museums Association of the Caribbean (MAC) adopted a resolution during its annual meeting in St. Kitts in November 2008, stating: “MAC will consult with museums and other institutions around the world to identify and inventory tangible artifacts, records of intangible heritage and research records which relate to the Caribbean, for further research, and the economic and cultural benefit for the people of the Caribbean.” (With thanks to Ieteke Witteveen, Director, National Archaeological Anthropological Memory Management, Curaçao.)
\textsuperscript{37} Information obtained from the Royal Netherlands Embassy in Caracas, 22 September 2010.
\textsuperscript{38} Information obtained from the Royal Netherlands Embassy in Bogota, 14 September 2010.
\textsuperscript{39} Information obtained from the Royal Netherlands Embassy in Guatemala City, 18 August 2010.
\textsuperscript{41} As amended by Decree No. 81-98 of the Congress of the Republic of Guatemala.
\textsuperscript{42} In original Spanish language: “Los bienes culturales incluidos en la exposición son inembargables y el país receptor garantizará su protección y devolución.”
\textsuperscript{43} Information obtained from the Royal Netherlands Embassy in Mexico City, 11 August 2010.
With regard to State immunity, I should mention that Argentina enacted specific legislation, *viz.* the Act on Immunity of Foreign States from Jurisdiction of Argentine Courts of 31 May 1995.\(^{44}\) The Statute was preceded by a 1994 decision of the Supreme Court in which the court followed for the first time the restrictive approach of State immunity.\(^{45}\) Article 1 gives the basic rule that foreign States\(^{46}\) are immune from the jurisdiction of the Argentine courts. Article 2(c) states that “[f]oreign States may not invoke jurisdictional immunity […] where the claim affects a commercial or industrial activity carried out by the foreign State and the jurisdiction of the Argentinean Courts is applicable under the corresponding contract or under international law[.]” Article 7 states that “[i]f a claim is brought against a foreign State, the Ministry of Foreign Affairs, International Commerce and Culture may express its opinion on any factual or legal issue before the intervening court, in its role as ‘friend of the court’.\(^{1}\)” The Act regards only immunity from jurisdiction and does not contain provisions with regard to (immunity from) measures of constraint.

*Paraguay* signed the 2004 UN Convention on Jurisdictional Immunities of States and Their Property on 16 September 2006.

Finally, I shortly refer to the 1976 Convention on the Protection of the Archaeological, Historical, and Artistic Heritage of the American Nations,\(^{47}\) adopted by the members of the Organization of American States, and to which I shall come in Chapter 11.1.5. Argentina, Bolivia, Costa Rica, Ecuador, El Salvador, Guatemala, Haiti, Honduras, Nicaragua, Panama, Paraguay and Peru are parties to the convention, whereas Chile only signed the convention. Article 16 of that convention states that “articles on loan to museums, exhibitions or scientific institutions that are outside the state to whose cultural heritage they belong shall not be subject to seizure as a result of public or private lawsuits.”

### 5.3 Concluding

In North, Central and South America, excluding the United States, States seem not to be too involved when it comes to the international borrowing and lending of (non ethnological)

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\(^{46}\) The Act does not contain a definition of a foreign State.

\(^{47}\) Also called the Convention of San Salvador. See also *infra*, Ch. 11, n. 79.
cultural objects. Even less States do feel the need for enacting specific legislation. Most States did not face a problem so far, and did therefore not think of enacting specific legislation or regulations, or did not linger over the legal basis for immunity from seizure for cultural objects.

According to the Canadian State Immunity Act, property of a foreign State that is located in Canada is immune from attachment and execution and, in the case of an action *in rem*, from arrest, detention, seizure and forfeiture except where, *inter alia*, the property is used or is intended for a commercial activity. As under the Act the nature of the activity is decisive, and the Act does not offer the possibility to take a possible purpose into account, it is likely that international art loans are to be seen as commercial activities. Consequently, cultural objects on loan and belonging to foreign States may not be immune from seizure under the Act.

Although Canada does not have specific provisions on immunity from seizure for cultural objects in its federal State Immunity Act, nor does it have federal immunity from seizure legislation especially for cultural objects, five of its provinces did adopt immunity legislation in the late 1970s and the early 1980s. These provinces are British Columbia, Ontario, Québec, Alberta and Manitoba.

When the Dead Sea Scrolls where on loan in Toronto and both Jordan and the Palestinian Authority filed a claim, the federal Canadian authorities did not only refer to the immunity from seizure legislation of Ontario (as cultural aspects are considered to fall within the ambit of the Canadian provinces), it also refused to take the scrolls into custody itself, as it did not want to be caught up in an ownership dispute between Israel, Jordan and the Palestinian Authority. Thus, although there is no immunity from seizure legislation for cultural objects on loan on a federal level, the objects left Canada unhindered.

The question whether cultural objects belonging to foreign States are immune from seizure on the basis of customary international law does not seem to have arisen so far in Canada. But keeping in mind that five of the Canadian provinces have immunity from seizure legislation, that there are no dissenting sounds within Canada, and that the federal Canadian authorities refused to act upon Jordanian and Palestinian seizure requests, it can be regarded that Canadian State practice supports the immunity from seizure for cultural objects on loan.
With regard to States in Central and South America, it is safe to say that these States are known for their rich cultural heritage. Nevertheless, also these States do not seem to be confronted with the issue of immunity for cultural objects on loan. They seem to be more concerned with the protection of their own cultural heritage than with the issue of immunity from seizure (although 12 States are party to the 1976 Convention on the Protection of the Archaeological, Historical, and Artistic Heritage of the American Nations, which has an anti-seizure provision). Guatemala can be called an exception to the rule, although it seems that Guatemala especially wants to make sure that its cultural objects are immune from seizure when on loan abroad.