State immunity and cultural objects on loan
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Chapter 8  Situation in the Netherlands

8.1  State immunity in the Netherlands

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

8.1.1  Act on General Provisions of Kingdom Legislation

Article 13a of the Act on General Provisions of Kingdom Legislation\(^2\) only contains a very general directive for the Judicial Branch, \textit{viz.}: “The jurisdiction of the courts and the execution of judicial decisions and deeds are subject to the exceptions recognised in international law.”\(^3\) It is thus recognised that under conventional and customary international law certain persons or institutions cannot be made defendants in proceedings in Dutch courts and certain property cannot be made the subject of enforcement proceedings.\(^4\) However, the content and the scope of this exemption recognised by international law are being determined


\(^{2}\) Wet Algemene Bepalingen.

\(^{3}\) “De regtsmagt van den regter en de uitvoerbaarheid van regterlijke vonnissen en van authentieke akten worden beperkt door de uitzonderingen in het volkenrecht erkend.”

by the Judicial Branch. This means in practice that the Dutch law of State immunity is to a large extent formed by the case law of the courts.

Article 13a of the Act on General Provisions of Kingdom Legislation was introduced through the Act on the Prevention of Infringement of International Legal Obligations by the State,\(^5\) of 26 April 1917. A conflict between the Judicial and the Executive Branch in regard to State immunity was the reason for introducing this provision. The Rotterdam District Court had awarded a claim, whereby a Dutch plaintiff\(^6\) was seeking compensation for damages sustained in Belgium as a result of action undertaken by the German State during World War I and intended the seizure of German State-owned railway carriages.\(^7\) The Minister of Justice communicated that he considered the verdict contrary to international law and that he wanted to prevent the enforcement of the verdict on the objects which were on Dutch territory but belonged to the German State. In order to prevent that judgments would be contrary to applicable rules of international law as much as possible, which judgments consequently could be executed by bailiffs, and to accomplish that eventually the Executive Branch could intervene in order to prevent execution, the government initiated this draft legislation on 12 January 1917, which became law on 26 April 1917.\(^8\)

Also Article 13(4), of the Regulations concerning the Bailiff\(^9\) owes its creation to this Act on Prevention of Infringement of International Legal Obligations by the State. This paragraph reads:

“The bailiff shall be bound to refuse serving a writ where he has been informed by or on behalf of the Minister [of Justice] that serving a writ would be contrary to the obligations of the State under international law. Such refusal shall not entail liability to the parties involved.”

In the specific case referred to, the Minister of Justice had requested the Public Prosecutor on behalf of the Minister of Foreign Affairs to take action to prevent or obstruct enforcement measures. Because this request could at the time not be based on any known statutory

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\(^5\) In Dutch: Wet tot Voorkoming van Inbreuk op de Volkenrechtelijke Verplichtingen van de Staat.
\(^6\) Mr. De Booy.
\(^7\) *De Booy v. the German Empire*, District Court Rotterdam, 22 September 1916, W. 10022, *NJ* 1917, 13. See also: *op. cit.* n. 4 (Voskuil), p. 260.
\(^8\) M. Teekens, *De gerechtsdeurwaarder [The Court Bailiff]*, Deventer 1973, p. 74.
\(^9\) Gerechtsdeurwaardersreglement.
provision, shortly thereafter provisions to that end were made through the introduction of Article 13(4) of the Regulations concerning the Bailiff.\footnote{I shall revisit the Regulations concerning the Bailiff later in this chapter.}

In reference to Article 13a of the Act on General Provisions of Kingdom Legislation, the Hague Court of Appeals stated in 1968 that judgments against a foreign State are in principle enforceable, but may not in any case be enforced against property destined for public use.\footnote{N.V. Cabolent v. National Iranian Oil Company, Court of Appeals The Hague of 28 November 1968, \textit{NJ} 1969, 484. The basis of the claim was an agreement between the National Iranian Oil Company (NIOC) en Sapphire Petroleums Limited, a Canadian company, concerning the exploitation of petroleum in South Iran. A Swiss arbitration tribunal ordered NIOC to pay a certain sum. Now, N.V. Cabolent claimed payment of the award in the Netherlands and validation of a conservatory attachment of debts payable to the defendant. See also: \textit{Netherlands Yearbook of International Law}, 1970, Vol. I, pp. 225-229.}
The court stated that

“it had already been decided that the international rule of sovereign immunity in this case does not bar the jurisdiction of the Dutch court; that a judicial decision is by its very nature enforceable; that if immunity does not bar jurisdiction, it also does not, in principle, bar execution; that, however, as also appears from Article 13a of the Act on General Provisions of Kingdom Legislation, it is possible for a rule of international law to restrict enforceability; that the only public international rule applicable to this case is the rule that property destined for public use is not subject to measures of execution in another country.”

In 1973, the Dutch Supreme Court clearly emphasised the relative concept of State immunity in the case \textit{SEEE} v. \textit{Yugoslavia}.\footnote{Société Européenne d'Études et d'Entreprises en liquidité volontaire (SEEE) v. Socialist Federal Republic of Yugoslavia, Supreme Court 26 October 1973, \textit{NJ} 1974, 361. The plaintiff applied for an enforcement order with regard to a Swiss arbitral award of 2 July 1956, obtained against the Socialist Federal Republic of Yugoslavia, on the basis of which Yugoslavia was ordered to pay a certain sum of money. Yugoslavia pleaded immunity from jurisdiction. The background of the case was a private law agreement between the former Kingdom of Yugoslavia and SEEE, on the basis of which SEEE constructed a railway, but Yugoslavia was behind in its payments.} The Supreme Court came to the conclusion that there is no rule of international law that considers the jurisdictional immunity to which foreign States are entitled as absolute; there is clearly a tendency apparent in the international practice of treaties and in literature, as well as in the case law of national courts, to limit the extent to which a State may invoke immunity before a foreign court. The Supreme Court continued by noting that this trend has been induced by, \textit{inter alia}, the fact that in many States the government had increasingly engaged in activities in areas of society where the relations are governed by private law, and where, consequently, the State enters into a legal relationship based on equal footing with private individuals. In such cases, it was considered reasonable by the court to grant a similar legal protection to the (private) opposing party of the State concerned, as
would be granted if that party had dealt with an individual instead of with a State. The court did not consider ‘commercial activities’ as a separate category, but qualified them as private law acts, wherein the State placed itself on an equal footing with private individuals. It was therefore considered reasonable that both parties enjoyed the same degree of legal protection, with the consequence that the State could no longer hide behind its State immunity.

In the same court ruling the question of enforcement of awards was further examined. The Supreme Court took the following position:

“to apply for a grant of enforcement of the current award could be deemed to be contrary to the immunity from execution to which a foreign State is entitled under international law only if international law is opposed to any execution against foreign State-owned property situated in the territory of another State; however, such a rule does not exist under international law.”

Therefore, because there is no case of absolute immunity of execution, the Supreme Court deemed that there was no conflict with international law to grant enforcement. However: where property was involved that is meant for public service of the foreign State concerned (in casu Yugoslavia) and that actually was to be executed, the possibility remained to seek resort to immunity from execution.13

With regard to Article 13a of the Act on General Provisions of Kingdom Legislation, it is interesting to note that recently, there has been a process to insert a reference to that Article in Article 1 of the Code of Civil Procedure, in an effort to make sure that Dutch courts are taking internationally recognised exceptions into account. Article 1 of the Code of Civil Procedure originally stated: “Without prejudice to the content of treaties and EC-regulations concerning jurisdiction, the jurisdiction of the courts in the Netherlands is determined by the following provisions”14 (meaning the provisions of the Code of Civil Procedure). However, the jurisdiction is not only limited by the jurisdictional provisions in treaties and EC-regulations, but also by other obligations under international law, such as for example rules of customary international law. The latter was not apparent in the text of Article 1. As we have seen above, Article 13a of the Act on General Provisions of Kingdom Legislation mentions that the jurisdiction of the courts is restricted by ‘exceptions recognised in international law’. These

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13 See also: Judith Spiegel, Vreemde staten voor de Nederlandse rechter [Foreign States in Dutch courts], Amsterdam 2001, pp. 128-129.

14 In Dutch: “Onverminderd het omtrent rechtsmacht in verdragen en EG-verordeningen bepaalde wordt de rechtsmacht van de Nederlandse rechter beheerst door de volgende bepalingen.”
‘exceptions’ encompass, amongst others, the existing immunities of jurisdiction and execution under international law. The State of the Netherlands is obliged to respect these immunities under international law. To more emphatically point out the existence of immunities under international law to a law enforcer, a reference is made to Article 13a of the Act on General Provisions of Kingdom Legislation in Article 1 of the Code of Civil Procedure. The amended article now reads: “Without prejudice to the content of treaties and EC-regulations concerning jurisdiction as well as the content of Article 13a of the Act on General Provisions of Kingdom Legislation,}\(^{15}\) the jurisdiction of the courts in the Netherlands is determined by the following provisions.”\(^{16}\) Through this reference to Article 13a of the Act on General Provisions of Kingdom Legislation the exercise of jurisdiction which is in conflict with Dutch obligations concerning State immunity should be prevented.\(^{17}\) The amendment has become effective on 1 July 2011.

8.1.2 Code of Civil Procedure

When it comes to the question of immunity from measures of constraint, the Dutch court bases itself not only upon Article 13a of the Act on General Provisions of Kingdom Legislation, but also upon the provisions in the Code of Civil Procedure. As it was deemed inexpedient to have the performance of public duties thwarted by the seizure of properties intended for the fulfilment of these duties, a rule has been introduced in the Code barring enforcement proceedings which are liable to affect the public interest. This rule exempts ‘goods intended for public service’ from seizure and, consequently, from all forms of execution performed through seizure.\(^{18}\) Article 436 of the Code of Civil Procedure regards post-judgment measures of constraint, whereas Article 703 regards pre-judgment measures of constraint.

\(^{15}\) Emphasis by the author.

\(^{16}\) ‘Amendment to the Judiciary (Organisation) Act, the Judiciary (Territorial Division) Act, the Code of Civil Procedure and various other statutes following the evaluation of the modernisation of the judicial system and in connection with the provisions governing the right of complaint about acts of judicial officers (Act to evaluate the modernisation of the judicial system)’; Amended Bill, *Parliamentary Papers Senate*, 2009-2010, 32021, No. A.

\(^{17}\) ‘Amendment to the Judiciary (Organisation) Act, the Judiciary (Territorial Division) Act, the Code of Civil Procedure and various other statutes following the evaluation of the modernisation of the judicial system and in connection with the provisions governing the right of complaint about acts of judicial officers (Act to evaluate the modernisation of the judicial system)’; Explanatory Memorandum, *Parliamentary Papers House of Representatives*, 2008-2009, 32021, No. 3.

\(^{18}\) “Beslag mag niet worden gelegd op goederen, bestemd voor de openbare dienst.”
The Articles 436 and 703 of the Code of Civil Procedure have been originally enacted for domestic purposes. Yet their scope has in practice been extended to cover foreign public property, not just State-owned but all property intended for public service (*publicis usibus destinata*). The District Court of Amsterdam ruled that neither the text nor the scope [of Article 436] leads to the conclusion that the protection should be limited to Dutch Government bodies. Also the District Court of The Hague followed the line that Article 703 of the Code of Civil Procedure not only refers to Dutch public service, but to public service by foreign States as well.22

The decisive factor is not whether the objects belong to a central or lower public body. On the one hand such objects need not be intended for public service *per se*, while on the other hand other public bodies such as those mentioned in Article 134 of the Constitution or other legal entities can also perform a public service. The true purpose of the public service determines whether these objects are or are not immune from seizure. Based upon those statutory definitions the only question that needs to be answered is whether the property is intended for

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19 See also: op cit. n. 4 (Voskuil), p. 262.
20 *The Arab Republic of Egypt v. Hong Kong Southern Pacific Properties (Middle East) Limited*, District Court Amsterdam, 5 April 1984, KG 1984, 123: “Text nor interpretation thereof bear foundation on which to limit the effects of the article [436] to Dutch public bodies.” [In this case a seizure had been enforced upon the AMRO Bank at the expense of Egypt, that resulted in freezing the bank account of the Egyptian Embassy.] Th.M. de Boer stated: “It can be argued that this provision is also applicable in international cases, as issues of procedural law, including issues regarding (admissibility of) attachment and execution, are covered by the *lex fori*.” See: *Azeta v. Japan Collahuasi Resources and the State of the Netherlands*, Dutch Supreme Court, 11 July 2008, with annotation by Th.M. de Boer, *Nederlandse Jurisprudentie; Uitspraken in burgerlijke en strafzaken [Dutch Jurisprudence; Rulings in civil and penal cases]*, 2010, No. 42, pp. 5176-5187, at p. 5185, para. 2.
21 District Court The Hague, 10 August 2006, LJN AY6030, KG 06/839 (*Republic of Kenya v. Nedermar Technology*).
22 A seizure had been enforced upon the Republic of Kenya under a claim of Nedermar Technology BT Ltd. upon three properties as well as a third party seizure upon the ABN AMRO Bank NV, where the Embassy of Kenya hold all its accounts. Kenya was allegedly in default concerning the payment of an amount of money intended for payment of the design and construction of a communication centre by Nedermar in Kenya.
23 Article 134 Constitution:

1. Public bodies for the professions and trades and other public bodies may be established and dissolved by or pursuant to Act of Parliament.
2. The duties and organisation of such bodies, the composition and powers of their administrative organs and public access to their meetings shall be regulated by Act of Parliament. Legislative powers may be granted to their administrative organs by or pursuant to Act of Parliament.
3. Supervision of the administrative organs shall be regulated by Act of Parliament. Decisions by the administrative organs may be quashed only if they are in conflict with the law or the public interest.”
public service.\textsuperscript{26} In that case seizure is not allowed, regardless of whether the seizure \textit{in fact} hinders the public service or not. The presumption on which the articles are based seems to be that a seizure acts restrictively and that there is no need to examine the exact nature of the restriction as such.\textsuperscript{27} I shall return to this later in reference to the case \textit{Llanos v. the Republic of Colombia et al.}

In 1998, the President of the District Court of Rotterdam, at the request of the Dutch State, lifted the seizure of the bank account of the Chilean Embassy on the basis of Article 436.\textsuperscript{28} The Dutch company \textit{Azeta} had arranged for the credit balances of the Chilean Embassy in an account at a Dutch bank\textsuperscript{29} in Amsterdam to be attached by way of execution of a judgment against Chile. After the bank had informed the Chilean ambassador of the attachment, he lodged a protest with the Dutch Ministry of Foreign Affairs. The ambassador demanded that the Minister would take steps to have the attachment terminated on the ground of the Netherlands’ obligation under international law to respect the immunity of the diplomatic mission of Chile from attachment. On 14 May 1998, the District Court of Rotterdam held that as a point of departure - pursuant to (unwritten) international law - a foreign State is entitled to immunity from execution when execution measures are employed against the State concerned involving the attachment of property intended for the public service of that State.\textsuperscript{30} The court also stated that in principle more importance should be attributed to the rules of international law than to the rules of Dutch (procedural) law.\textsuperscript{31} The District Court then nullified the seizure with immediate effect.\textsuperscript{32}

\textsuperscript{26} Th.M. de Boer states that the wording ‘goods intended for public service’ should be interpreted in line with internationally accepted criteria, as opposed to Dutch criteria, if it regards foreign State property. Article 13a of the Act on General Provisions of Kingdom Legislation refers directly to international law, and as a consequence a rule of Dutch attachment law that would be at odds with the international rules regarding immunity from measures of constraint can be set aside by Article 13a. De Boer concludes that thus the primacy lies with the rules of international law and not with provisions in Dutch Codes. See: \textit{op. cit.} n. 20 (De Boer), p. 5186, para. 2.

\textsuperscript{27} However, in the so called \textit{Nedermar} case the District Court of The Hague was of the opinion that the functioning of the representation of Kenya wasn’t hindered by the actual measure of constraint, and that it therefore was allowed. See for the \textit{Nedermar} case also \textit{supra}, nn. 21-22 and \textit{infra}, n. 44.


\textsuperscript{29} ABN AMRO.

\textsuperscript{30} Para. 3.2.

\textsuperscript{31} With the result that the interest of the uninterrupted functioning of a diplomatic mission should in this case prevail over the interests of executing (by expeditious means) a judgment given in the Netherlands. See para. 3.3.

\textsuperscript{32} \textit{Azeta} did not file an appeal against this decision.
This first Azeta case was followed by a second Azeta case. In this case, the question was whether foreclosure by means of third party seizure of a foreign State’s tax claim is irreconcilable with the rules of State immunity from execution under public international law.

The Amsterdam Court of Appeals overruled the earlier ruling of the District Court of Amsterdam (which court had allowed the seizure) by judgment of 7 December 2006, and had the seizure lifted. The Court of Appeals ruled:

“In principle a creditor can recover his claim on all properties of his debtor. However, one must presume that international law accepts an exception to this rule as meant by Article 13a of the Act on General Provisions of Kingdom Legislation, which entails that property which is meant for public service in a foreign State is exempt from measures of constraint within the Netherlands. The claim of the Republic of Chile also falls under this exception [...].”

Azeta appealed to the Supreme Court. The Supreme Court confirmed the ruling of the Court of Appeals on 11 July 2008. The Supreme Court declared inter alia:

“The immunity of execution under current unwritten public international law as accepted by the Netherlands [...] is not absolute. State property with a public purpose is in any case not subject to forced execution [...].”

Annexed to the Supreme Court ruling was an conclusion by Supreme Court Attorney General L. Strikwerda. He concluded among others things:

33 Azeta v. Japan Collahuasi Resources and the State of the Netherlands.
34 Due to its ownership of shares in a Chilean partnership, Japan Collahuasi Resources BV [JCR] owed the amount of around 1.3 million euros in dividend to the Republic of Chile. In 1984 the Republic of Chile was ordered by default by the District Court of Rotterdam to pay Azeta an amount of US $ 15 million, increased with the expense of interest. In May 1998, the Republic of Chile contested that ruling. The President of the District Court of Amsterdam (judge in interlocutory proceedings) approved a third party seizure for Azeta in March 2005 upon JCR to secure its claim upon the Republic of Chile. JCR demanded annulment of the seizure by offering the argument that by virtue of Article 436 and 703 of the Code of Civil Procedure this seizure is impossible, because it has been enforced upon financial resources that are intended for the public service of the Republic of Chile. The President of the District Court of Amsterdam stated that the tax revenues to be paid that were involved in this case had not yet been appropriated towards a specific governmental body. That is the reason why the annulment of the seizure was not awarded. On appeal, the Court of Appeals had allowed the State of the Netherlands to intervene as separate party in the process. The State demanded that the court would order the annulment of the third party seizure by Azeta, primarily on the basis that the tax claim of the Republic of Chile towards JCR was not eligible for seizure based upon international law of immunity from measures of constraint. Complemented by the decree dated 21 December 2006. Published in JBPr 2008, 7.
35 These facts are phrased in the ruling of the Supreme Court dated 11 July 2008, Nr. C07/054HR. Also: NJ 2010, 525; see also: op. cit. n. 20 (De Boer). Consideration 4.5.
36 NJ 2010, 525; see also: op. cit. n. 20 (De Boer). Consideration 3.5.
“Like the rule that a State cannot unwillingly be subjected to the jurisdiction of a court of another State (immunity from jurisdiction), the rule that property of a State cannot be subject to measures of constraint of another State (immunity from execution), is not an absolute one under the currently prevailing views. However, the willingness to allow exceptions to the immunity from execution, that pertain to pre-judgment measures of constraint as well as to post-judgment measures of constraint, is in fact not as far-reaching as with regard to the immunity from jurisdiction. Property of a State with a public purpose is in any case not subject to forced execution, not even if the execution is founded upon a claim that is based upon an ‘actum iure gestionis’ of the foreign State and thus falls outside the boundaries of the immunity from jurisdiction. Only in cases where it is possible to determine that the property of the foreign State is not meant for a public service and will be used for commercial ends, under the prevailing views of a growing number of States, including the Netherlands, the invocation of immunity from execution can be denied.”

In 2009 before the Court of Appeals of The Hague in the case Llanos Oil Exploration Ltd v. the Republic of Colombia, the State of the Netherlands and Ecopetrol S.A.

the question was raised whether Llanos was allowed to make the official residence of the ambassador of Colombia subject to seizure in a claim against Colombia. Llanos claimed that it was allowed to do so under international law, if the seizure would not impair the functioning of the machinery of government.

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40 It is customary in the Netherlands that a ruling of the Supreme Court is preceded by a ‘conclusion’ by the Attorney General. That conclusion is annexed to the ruling.

41 Conclusion Attorney General at the Supreme Court L. Strikwerda, 9 May 2008, para. 14. In the case Russian Federation v. Pied-Rich, Supreme Court 28 May 1993, NJ 1994, 329, Attorney General Strikwerda came to a similar conclusion: “Willingness to tolerate exceptions to immunity from execution is not as far-going and general as with regard to immunity from jurisdiction. After all, the enforcement of execution measures against a foreign State is more serious and will lead to more ‘political embarrassment’. In any case, State property with a public purpose is not susceptible to forced execution. Only in the case where the property is not destined for public service and is applied towards commercial ends, it is possible to deny a plea for immunity from execution according to the current opinions in public international law. In general in this context there is no distinction between pre-judgment and post-judgment measures of constraint.” [Paragraph 16]

42 The Hague Court of Appeals, 19 May 2009, LJN BI3872.

43 Llanos stated to have quite a substantial claim against, amongst others Colombia concerning the wrongful termination of a concession agreement which was entered into with Ecopetrol, a privatised State enterprise of which Colombia is principal shareholder. Amongst others Llanos wanted to make the diplomatic residence of the ambassador of Colombia subject to seizure as guarantee for this claim. The President of the District Court of The Hague had denied granting permission to this end, because he ruled that the diplomatic residence serves a public purpose and Article 703 of the Code of Civil Procedure impedes the intended seizure.

44 The basis of the Llanos defence was formed by a memorandum by Prof. P.J.I.M. de Waart, retired professor of international law, Vrije Universiteit Amsterdam. The core of the memo was that measures of constraint upon the diplomatic residence of the ambassador or other embassy buildings are admissible under current international law, in such a fashion that the constraint does not limit or frustrate the ‘hard core of immunity of the diplomatic residence’ (in this case entering of such buildings by the hosting State without permission from the sending State). De Waart seemed to base himself upon the judgment in the Nedermar case by the District Court of The Hague, where the President of the court stated 10 August 2006: “The question whether a number of buildings that have become subject to seizure are objects designated for the public service of Kenya, and whether these seizures already for that reason should now be nullified, has to be answered negatively. […] it is important that serving these public duties is not frustrated by these seizures, especially those pertaining to the representation of
The Court of Appeals rejected this view. According to Article 31(1) of the Vienna Convention on the Law of Treaties, a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in its context and within the scope of its object and purpose. According to the Court of Appeals, the ordinary meaning of the relevant articles of the Vienna Convention on Diplomatic Relations was clear: measures of constraint on the residence of the ambassador are not permitted. The Court of Appeals refrained from examining whether the functioning of the mission was truly impaired. The court decided that it would be impossible to demand that such cases each separately be assessed. Consequently, the court decided that, also in accordance to Article 13a of the Act on General Provisions of Kingdom Legislation, the diplomatic residence is not subject to seizure. The ruling was based on diplomatic immunity as embodied in the 1961 Vienna Convention on Diplomatic Relations. The court did not address the question whether its ruling (also) extended to properties intended for public service, as mentioned in Articles 436 and 703 of the Code of Civil Procedure. The State of the Netherlands did argue the case to this extent.

The State of the Netherlands stated before the Supreme Court that there was no basis for seizure of the diplomatic residence of the ambassador of Colombia, which is owned by the Republic of Colombia. Not upon the basis of unwritten rules of public international law concerning (general) State immunity from execution as applied in the Netherlands, nor on the basis of the (internal) law of the Netherlands.\(^45\)

Attorney General L. Strikwerda concluded in the \textit{Llanos} case that according to the common interpretation of the law, the Articles 436 and 703 of the Code of Civil Procedure were also applicable – either directly or by virtue of Article 13a of the Act on General Provisions of Kingdom Legislation – to objects present in the Netherlands that were meant for the public service.\(^45\)

Kenya in the Netherlands. It cannot be said that in that situation these real estate properties would be affected by an injunction under Article 703 Code of Civil Procedure[...].” [\textit{Republic of Kenya v. Nedermar Technology.}] The Dutch State emphatically disputed De Waart’s point of view during the court session of the \textit{Llanos} case of 9 April 2009, under reference to the Supreme Court ruling of 11 July 2008 (\textit{Azeta} case). The Supreme Court formulation “State property with a public purpose is in any case not subject to forcible execution” does with regard to objects destined for public service not leave any leeway to differentiate in the ‘level of immunity’ as to how much such public protection would actually be impeded by measures of constraint. Rosanne van Alebeek finds the \textit{Nedermar}-ruling “rather odd” See: \textit{op. cit.} n. 1 (Van Alebeek), p. 262; also the Dutch State has stated in subsequent defences in other cases that it does not consider the decision to be correct.

\(^45\) Thus, the State of the Netherlands had a more all-encompassing approach than just on the basis of the Vienna Convention on Diplomatic Relations. Attorney General Strikwerda arrived at a similar conclusion. Conclusion regarding \textit{Llanos Oil Exploration Ltd. v. the Republic of Colombia, the State of the Netherlands and Ecopetrol S.A.}, 11 June 2010.
service of a foreign State. The Supreme Court confirmed the judgment of the Hague Court of Appeals.

How should it be determined that certain objects are meant for the public service? In the Netherlands goods have been considered intended for public service when an ambassador declares that the properties or assets that have been seized or which are under threat of seizure are intended for public service, just as we saw, for example, in the British legislation concerning State immunity. In the middle of the 1980s, the President of the Judicial Division of the Council of State had to assess, whether bank accounts of the Turkish Embassy in The Hague should be considered as goods intended for public service. The President ordered that although there is no rule of international law that prohibits executions levied on the assets of a foreign State which are in the territory of another State, it is equally beyond doubt that rules of customary law prescribe immunity from execution if the execution relates to assets intended for public purposes. The Turkish Embassy provided a note verbale, which declared that all the money in the bank accounts was necessary and intended for the functioning of the Turkish Embassy. The President of the Judicial Division of the Council of State held that such a declaration must be deemed sufficient proof that these funds were intended for public purposes of the Turkish Republic, as petitioner could not convince the Council of the opposite, and the Council had no reason to doubt the correctness of the declaration given by Turkey. In other cases the Judicial Branch has also ruled that a declaration of the embassy is deemed as sufficient proof of the public purpose of the assets.

46 Ibid. (Strikwerda), para. 31.
47 Llanos Oil Exploration v. the Republic of Colombia, the State of the Netherlands and Ecopetrol S.A., 24 September 2010, NJ 2010, 507.
49 Op. cit. n. 28 (Azeta), consideration 3.2: “[…] The plaintiff has lodged in this connection a letter of 8 May 1998 from the deputy Foreign Minister of the Republic of Chile and a ‘note verbale’ from the Chilean Embassy in The Hague of 11 May 1998, in which it is stated that the credit balances in the attached bank account are intended for the running of the Chilean Embassy. Contrary to what the defendant has alleged in this connection, the President [of the court] considers that these statements are sufficient in this case to support the assumption that the present moneys are intended for the public service of the Republic of Chile […].” See also the case Sodipo v. ABN AMRO, District Court Amsterdam 24 February 1999, NJ 1999, 622. By verdict of the President of the District Court of The Hague of 24 April 1997, Nigeria was sentenced by default to pay 70,000 guilders (approx. 32,000 Euros) to its former employee Sodipo for overdue salary and damages. In connection with this sentence Sodipo served a writ of garnishment on ABN AMRO Bank freezing assets of Nigeria pursuant to a judgment order. By a letter of June 1997 the Nigerian Embassy stated that the Embassy of Nigeria’s accounts with ABN AMRO in the Netherlands were meant for the day to day running of the Embassy of Nigeria and as such are immune. As a consequence, the bank stated that the accounts should be considered as goods intended for public service and that measures of constraint would be at odds with Article 436 of the Code of Civil Procedure. The District Court agreed.
Finally, a brief reference to another article on the basis of which attention can be asked for aspects of State immunity: Article 44 of the Code of Civil Procedure. In the first paragraph, this article mentions that where the Public Prosecutor is not a party to the proceedings, he may still be heard in cases where he has shown the wish to be heard.\textsuperscript{50} This is a way for the Public Prosecutor to make sure that the court takes notice of all aspects of State immunity in its rulings. In proceedings in the Netherlands, this possibility is rarely used. In appeals in cassation before the Supreme Court, however, the Attorney General of the Supreme Court is always heard.\textsuperscript{51}

So, the legislation of the Netherlands does not allow measures of constraint in respect of property belonging to a foreign State and ‘intended for public service’, even though it is situated in the Netherlands.\textsuperscript{52} One might question whether cultural objects are intended for the public service of a State. It may not be possible to determine unequivocally that cultural property affects the public functioning of the State. However, it is possible to claim that the exchange and exhibition of cultural objects could be seen as part of the public function of a State. After all, such international cultural exchanges are frequently part of treaties in which States have committed themselves to each other. It is an important factor in preserving and promoting cultural heritage and also an awakening to cultural identity that cultural objects are shown in exhibitions, not only within their own territory, but also in the territory of foreign States. All this gives reason to believe that cultural objects should be considered to serve a public purpose for the State concerned, as has been stated by Article 21 of the 2004 UN Convention as well, and to which I shall come back in Chapter 8.1.4.

8.1.3 Regulations concerning the Bailiff and Court Bailiffs Act

\textsuperscript{50} Article 44(1): “If the Public Prosecution Service does not appear as a party it will be heard, either at the request of the judge or otherwise, if it has expressed a wish to this effect.”

\textsuperscript{51} Article 44(2) Code of Civil Procedure: “The Procurator General at the Supreme Court will always be heard in cassation appeal proceedings.” (The Procurator General is assisted by several Attorney Generals.) Another possibility could be offered, perhaps, by Article 217 Code of Civil Procedure: “Any person who has an interest in an action pending between other parties may apply to be joined or to intervene in the action.” Within the context of this study I will not further elaborate on this option.

Acts of post-judgment measures of constraint and pre-judgment measures of constraint for the preservation of rights are acts by a bailiff carried out on the basis of a court judgment or a court consent.\footnote{Article 700(1) Code of Civil Procedure.} Granting of such consent is generally a rather simple operation, as the summary trial judge decides after ‘summary review’.\footnote{Article 700(2) Code of Civil Procedure.} By means of Article 767 of the Code of Civil Procedure, Dutch legislation recognises the so called \textit{forum arresti}.\footnote{Op. cit. n. 13 (Spiegel), p. 136. See also \textit{supra}, Ch. 1, n. 16.} Jurisdiction can be created by means of seizure. In cases where seizure is nullified by judicial ruling or when seizure is not allowed based upon national and international rules of State immunity, jurisdiction is non-existent. In general the \textit{forum arresti} is deemed an exorbitant forum, because it stands in tense opposition to the natural forum, being the place of residence of the defendant.\footnote{Judith Spiegel is of the opinion that notices by the Minister of Justice (either with regard to pre-judgment measures of constraint or with regard to post-judgment measures of constraint) as referred to in Article 13(4) are in infringement upon the independence and autonomy of the Judicial Branch. See: Ibid. (Spiegel), p. 249. I do not follow this line. After all, also according to the legislation, the Judicial Branch has always the last say. See also the final part of Ch. 8.1.3 \textit{infra}.} 

Article 13(4) of the Regulations concerning the Bailiff made it mandatory for the bailiff to refuse serving a writ (notification) in cases where by or on behalf of the Minister of Justice notice has been given that the writ is in conflict with obligations of the State under international law.\footnote{There is not foreseen in sanctions for non-compliance.} This paragraph empowered the Minister of Justice to intervene if he was of the view that the service of a notification would be contrary to the obligations of the Netherlands under international law. As we saw earlier in this chapter, it reads:

“\textit{The bailiff shall be bound to refuse serving a writ where he has been informed by or on behalf of the Minister [of Justice] that serving a writ would be contrary to the obligations of the State under international law. Such refusal shall not entail liability to the parties involved.}”\footnote{There is not foreseen in sanctions for non-compliance.}
In November 1986, the President of the Judicial Division of the Council of State,\(^{59}\) ordered with regard to that Article:

“It should be said at the outset that the State and its organs are obliged to refrain from acts or omissions in relation to another State and its organs which are in breach of the obligations to which a State is subject under international law. In this context, Article 13(4) of the Regulations concerning the Bailiff empowers the respondent [the State Secretary for Justice] to intervene if he considers that the service of a notification would be contrary to these obligations. Only in this case may the respondent use his power and is also therefore bound to do so, in view of the obligations to which the Dutch State is subject in this case. There is therefore no scope for a weighing of the interests and everything that the petitioner has submitted on this subject, notably her argument that an indemnity should not have been omitted in any weighing of the interests, does not need to be taken into consideration. The dispute therefore revolves around the question whether the execution of the judgment would be contrary to the obligations of the State under international law.”

There has been renewed interest dating back to the beginning of the 1990s concerning the question how measures can be taken to prevent the State of the Netherlands from being compromised by the fact that a civil procedure is brought against a foreign State, or property of a foreign State is seized in the Netherlands, both in a situation that this could be contrary to obligations of the Dutch State under international law. At the root of this query lie judicial proceedings where the question arose whether a Dutch court would be competent to declare a foreign State bankrupt. In one of such cases ‘cassation appeal in the interest of the law’\(^{60}\) was filed by the Supreme Court Procurator General, after which the Supreme Court decided by ruling of 28 September 1990\(^{61}\) that a Dutch court did not have jurisdiction to declare a foreign power bankrupt.

\(^{59}\) Op. cit. n. 48 (M.K.). The Dutch plaintiff was employed as secretary at the Turkish Embassy in The Hague. She was dismissed without the consent of the Director of the Regional Employment Office and without observing the statutory period of notice. The court declared her dismissal to be void and ordered Turkey to pay a sum of nearly 8,000 guilders (3,500 euros). As payment did not occur, she instructed a bailiff in The Hague to attach a bank account of the Republic of Turkey at the Algemene Bank Nederland (ABN) in Amsterdam, by way of execution of an earlier judgment. The State Secretary for Justice gave notice in written form to the bailiff under Article 13(4) of the Regulations concerning the bailiff that he should refuse to serve any notification in connection with the execution of the judgment since that would be contrary to the international obligations of the State of the Netherlands. Plaintiff appealed against that decision to the Judicial Division of the Council of State.

\(^{60}\) In Dutch: Cassatie in belang der wet. The definition of cassation given in the Oxford Companion to Law is “[a] mode of review of judicial decisions found in civil law countries under which a decision may be brought up to a superior court and its rightness in law challenged. If the Court of cassation upholds the challenge it does not, as in an appeal, substitute its own ruling on law and also the decision of the court below, but strikes down (casser) the decision as incorrect and remits the case to another inferior court of the same grade to decide the case afresh [...].” Cassation appeal in the interest of the law is a power vested in the Procurator General at the Supreme Court to institute cassation proceedings in order to allow the Supreme Court to assess the correctness of a judgment that has become res judicata.

The government decided that additional legislative measures were necessary to provide the government better means to realise and substantiate its international legal obligations. Therefore, the decision was made in 1993 to amend a 1992 draft of the Court Bailiffs bill and to supplement it with a number of stipulations for further definition of the consequences of the actions performed by bailiffs that are contrary to the international legal obligations of the State. The Explanatory Memorandum stated: “Although the case is not black and white and there may be differences of opinion, it is possible to state that in accordance with written and unwritten customary law concerning the property of a foreign State one must assume immunity of execution.”

In case seizure of objects intended for public service is imminent or has already taken place, the Minister of Justice has since 2001 the possibility to prevent or forbid it, or order to lift it under Article 3a of the 2001 Court Bailiffs Act. The article empowers the State to intervene if it considers that the service of a notification of seizure would be contrary to the obligations of the Netherlands under international law. One can say that for the Dutch State Article 3a of the Court Bailiffs Act is a new and improved version of Article 13(4) of the Regulations concerning the Bailiff, as will be explained infra. Under this Article 3a, a bailiff who is instructed to perform an official act shall immediately notify the Minister of Justice if he has reason to believe that performing the seizure might be incompatible with the Netherlands'
obligations under international law. In turn, the Minister may notify a bailiff that an official act which the bailiff has been or will be instructed to perform or which the bailiff has already performed is incompatible with the Netherlands’ obligations under international law. When preparing this notification, the Minister of Justice will consult the Ministry of Foreign Affairs as to whether or not the official act in question would be in breach of international law. The advice of the Ministry of Foreign Affairs in these matters is usually followed. The consequence of the notification is that the bailiff is no longer competent in performing the official act. In case he already performed it, the bailiff has to cancel the seizure. The Court Bailiffs Act has been further implemented by means of the Court Bailiffs (Notification of Official Acts) Order.67

The first four paragraphs of Article 3a of the Act read:68

“1. A bailiff who is instructed to perform an official act shall, if he must reasonably take account of the possibility that performing the act in question would be incompatible with the State’s obligations under international law, immediately inform Our Minister of the instruction in the manner prescribed by ministerial order.
2. Our Minister may notify a bailiff that an official act which he has been or will be instructed to perform or which he has performed is incompatible with the State’s obligations under international law.
3. Such notification may only be given ex officio. If the matter is urgent, notification may be given verbally, in which case it must be confirmed in writing without delay.
4. The notification shall be published by being issued in the Government Gazette.”70

The first paragraph brings a requirement for court bailiffs into effect to provide information concerning official acts which in all fairness could be contrary to obligations of the State under international law. After all, a Minister of Justice is not always informed or aware on time of the intended service of a writ or any other official act by a bailiff.71 This requirement to provide information is new (and thus for the State an improvement in comparison with Article 13(4) of the Regulations concerning the Bailiff). Generally speaking this concerns all cases in which serving a writ has been commissioned against a foreign power or an

67 Order of the State Secretary for Justice containing rules regarding the notification of official acts of court bailiffs that are incompatible with the obligations of the State under international law; 9 July 2001/No. 5107250/801.
68 Staatsblad 2001, 327.
69 The Minister of Justice.
70 In Dutch: Staatscourant.
71 See also: op. cit. n. 13 (Spiegel), p. 250, in which Judith Spiegel states that if the Dutch Government was informed, this usually happened very late in the process, for example because the foreign State informed the Dutch Ministry of Foreign Affairs of the fact that it was party to a pending procedure.
international organisation. The abovementioned requirement to provide information as referred to in this article is meant to provide the Government of the Netherlands with the means to be more alert than before in taking measures in cases where it seems necessary to observe obligations of the State under international law. The requirement to provide information does not disqualify the bailiff from serving notice. This only happens by notification based upon the second paragraph of the article.

Paragraphs 5 and 6 deal with the effect of the notification and read:

“5. If, when he receives notification as referred to in paragraph 2, the bailiff has not yet performed the official act, the effect of the notification shall be that the bailiff is not competent to perform the official act. An official act performed contrary to the first sentence shall be void.
6. If, when the bailiff receives notification as referred to in paragraph 2, the official act has already been performed and involved a writ of seizure, the bailiff shall immediately serve the notification on the person on whom the writ was served, cancel the seizure and reverse its consequences. The costs of serving the notification shall be borne by the State.”

The consequence of this sixth paragraph is that the State itself can take measures without court intervention, in order to nullify an already existing seizure in cases where the seizure is considered contrary to the international legal obligations of the State.

Although it is the intent of the law that, because of the obligation to inform, the Minister has the chance to act timely in order to prevent seizures which would be contrary to international law, one cannot exclude that situations could occur where prevention is not possible, for example because the minister was not informed beforehand of the seizure. Before, it could come to pass that a wrongfully undertaken seizure could only be lifted through the institution by the State of legal proceedings, which is a laborious and time-consuming path to follow. As it is dictated by international law that measures of constraint against the property of a foreign State, intended for public service, are forbidden it was therefore considered

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72 Amendment of the Court Bailiffs Act for further regulation of the consequences of official acts by court bailiffs that are contrary to obligations of the State under public international law’, Memorandum in response to the further report, Parliamentary Papers House of Representatives, 1999-2000, 23081, No. 8, p. 2.
74 The annulment has no retroactive effect.
76 This was the case in the ‘first’ Azeta case.
necessary to have a more effective instrument for annulling a seizure that had already been
wrongfully enforced.

It is possible to challenge the decision of the Minister of Justice before the court. In practice
this would take place in interim injunction proceedings by the President of the District Court.
But this does not in any way diminish the jurisdiction of the ordinary courts as such. The
seventh paragraph of Article 3a of the 2001 Court Bailiffs Act was prompted by the idea that
adequate legal protection should be available where a notification by the Minister has been
served. It was logical that civil law protection came to mind, because the consequences of
serving the notification are in nature governed by proprietary law. Without further definition
such a notification would be a governmental decision against which basically protection under
administrative law is available, as laid down in the General Administrative Law Act.78 The
government thought that such protection under administrative law would be less fortunate and
preferred to formulate the legal protection against serving of notice within the context of civil
law, thereby attempting to connect it with the process of seizure and also taking into account
the implicated interests of proprietary law.79 The seventh paragraph now reads:

“7. A judge hearing applications for provisional relief may, in interim injunction
proceedings, terminate the effect of the notification referred to in the first sentence of
paragraph 5 and the obligations referred to in paragraph 6, without prejudice to the
powers of the ordinary courts. If the official act involves seizure, Article 438(4) of the
Code of Civil Procedure shall apply.”

What one should keep in mind at all times, is that whatever notification the Executive can
give, the final ruling is always up to the judiciary. I refer once more to the 1986 case M.K. v.
State Secretary for Justice where the President of the Judicial Division of the Council of State
stuck to the principle that a right of appeal exists under the Administrative Decisions Appeals
Act,80 and that neither Article 13a of the Act on General Provisions of Kingdom Legislation,
nor Article 13(4) of the Regulations concerning the Bailiff restricts the freedom of the
assessment given to the Judicial Division and that any such restriction cannot be based solely
on the history of legislative provisions.81 The Judicial Division could, however, concede that
when interpreting and applying customary international law in particular, the courts should
take into account the fact that the government, as the representative of the State in dealings

78 In Dutch: Algemene Wet Bestuursrecht.
80 In Dutch: Wet Administratieve Rechtspraak Overheidsbeschikkingen.
81 The same would apply to Article 3a of the Court Bailiffs Act.
with other States, also helps mould the law by disseminating its views on what the law is and by endeavouring to observe in its dealings the practice based upon these views. Justice can be done to the government’s special position if the courts hear the government’s advisers on international law to ascertain its views on legal positions, either *ex officio* or at the government’s request, and accord the deference to this opinion which is due on account of the special position of the government, thus the Judicial Division of the Council of State. As we have seen, Article 44 of the Code of Civil Procedure provides this possibility in civil law cases.

### 8.1.4 Relationship with the 2004 UN Convention on Jurisdictional Immunities of States and Their Property

As already referred to in Chapter 3.3.1, in *Llanos Oil Exploration v. the Republic of Colombia, the State of the Netherlands and Ecopetrol S.A.*, the State of the Netherlands declared before the District Court as well as before the Supreme Court that the 2004 UN Convention on Jurisdictional Immunities of States and Their Property is an important and recent source for international legal practice, as well as in providing an answer to the question if and to which extent foreign States enjoy immunity from execution in the Netherlands. The State of the Netherlands declared that even though the 2004 UN Convention has not yet entered into force, the provisions included therein concerning immunity from execution do offer an important guideline in answering the question whether immunity from execution should be enjoyed. The 2004 UN Convention offers an important clue in putting the current standard of views on the immunity from execution into perspective, according to the State of the Netherlands. Articles 18 to 21 of the 2004 UN Convention show that in principle measures of constraint are not allowed where State property is concerned save certain exceptions.

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82 There is also a possibility to make the attachment ‘grey’. Summarising this would mean that the party upon whom attachment is to be placed can vent their objections towards the attachment beforehand with the President of the District Court. If a request for attachment is subsequently made, than the President has to take the previously made objections into account.


84 Written defence of the Dutch State at the Supreme Court, 20 November 2009, para. 3.3.2. On file with the author.
In the opinion of the Netherlands, cultural objects, belonging to a foreign State are considered to be included in the notion of public, non-commercial use. This view has been expressed consistently. As we will see in the next subchapter, each time Dutch authorities issue a guarantor’s declaration (also known as letter of comfort) with regard to immunity from seizure for cultural objects on loan, an explanatory letter is attached to this declaration. In that letter, it is stated among other things:

“It is established judicial practice to treat cultural objects of a foreign State that are in the Netherlands temporarily for an exhibition as goods intended for public service. Support for this practice can be found in international law. Article 21 of the 2004 UN Convention on Jurisdictional Immunities of States and Their Property explicitly states that ‘property forming part of an exhibition of objects of scientific, cultural or historical interest and not placed or intended to be placed on sale’ should be considered goods intended for public service. When the Convention was drafted, there was no controversy whatsoever among the States Parties concerning this matter. Consequently, it may be explicitly assumed that this is an applicable rule of international law.”

In the ‘enquiry addressed to each Member State concerning immunity from seizure of cultural objects on temporary loan’, initiated by the European Union Expert Working Group on Mobility of Collections (subgroup ‘Immunity from Seizure’) the Netherlands answered on 24 April 2009:

“Based on (customary) international law, the Netherlands considers cultural property of foreign States as ‘goods intended for public service’, as long as they do not have a clearly commercial goal (e.g. offered for sale). Also on the basis of (customary) international law, the Netherlands considers that property as immune from measures of constraint. This has been reflected in national legislation as well […]. And it is also the reason why in its letter of comfort […] the Netherlands refers to the corresponding rules in the 2004 UN Convention on Jurisdictional Immunities of States and their Property, although the Netherlands has not yet ratified the Convention […].”

In conclusion, it can be stated that the Netherlands considers Article 13a of the Act on General Provisions of Kingdom Legislation, Articles 436 and 703 of the Code of Civil Procedure and Article 3a of the Court Bailiffs Act applicable to cultural objects belonging to foreign States on temporary loan, as will also be addressed in the next subchapter.

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86 I already referred to this enquiry supra, in Ch. 6.2.
87 Answers in possession of the author.
8.2 Immunity from seizure for cultural objects belonging to foreign States

Since the beginning of the 21st century, the Netherlands issues so-called ‘Guarantor’s Declarations’, which are actually letters of comfort. Approximately fifteen to twenty such declarations are issued each year, and mostly requested by the Russian Federation, but occasionally also by the United States, Turkey, Germany and one or more other States. However, before these declarations were issued by the Dutch Government, it tried - on an occasional basis - to protect cultural objects on loan in a different manner.

8.2.1 The situation during the last decades of the 20th century

It happened once, namely in 1978, that the Netherlands - in guaranteeing immunity from seizure - chose to conclude a bilateral agreement with the lending State. The aim was to organise an exhibition called Gods and Pharaohs in the first half of the year 1979 in the Boijmans Van Beuningen Museum in Rotterdam. The exhibition contained exhibits of objects from the Pharaonic and the Greek and Roman periods which objects were in the possession of the Egyptian Museum of Cairo and the Greek and Roman Museum in Alexandria.

At first the Egyptian Government was not inclined to send this exhibition on to the Netherlands, which originally was only intended for Germany. But several Dutch diplomatic efforts eventually led to result. For Egypt it was, however, a conditio sine qua non, that analogous to the agreement with Germany, an agreement was entered into that primarily honoured the Egyptian wish that the objects forming the exhibition, as well as any possible insurance benefits, would be exempt from seizure.

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88 See also: op. cit. n. 1 (Van Woudenberg).
89 Agreement between the German Republic and Egypt, 15 April 1978.
90 On two earlier occasions the Netherlands had chosen to sign a bilateral agreement to facilitate a specific exhibition with foreign cultural objects. In November 1970 an agreement was entered into with Guatemala concerning an exhibition of Mayan Art (Exchange of letters between the Government of the Netherlands and of Guatemala with regard to an exhibition to be held in Rotterdam of Maya art in Guatemala, Guatemala, 11 and 25 November 1970, Dutch Treaty Series 1971, 52) and in October 1974 an agreement with China was concluded concerning an exhibition on archaeological treasures (agreement between the Kingdom of the Netherlands and the People’s Republic of China regarding the Exhibition of Archaeological Treasures of the People’s Republic of China, Beijing, 24 October 1974, Dutch Treaty Series 1974, 239). These agreements however did not contain declarations of immunity. What they did define were issues of security and the agreements also included articles on indemnity. Moreover, in August 1965, the Netherlands entered into an agreement with the United States of America concerning a scientific (so non-cultural) exhibition on nuclear energy (Exchange of notes between the
The Netherlands seemed, however, not yet ready for the idea. In April 1977, the Legal Adviser of the Ministry of Foreign Affairs communicated to the Cultural Heritage Department within the same Ministry that it might be advisable for the Minister of Foreign Affairs to issue a statement to ensure the success of the exhibition. The text of such a statement could, however, not exceed the competence of the Minister; ‘assurance of non-seizure’ as initially requested would be too far-reaching and for that reason it was important that the text would not arouse false expectations to that effect. The last sentence in such a statement could be: “[...] I declare that all available legal measures which are applicable will be taken to guarantee the safe return of these objects to the States that have made them available.”

It was, however, doubtful whether this would be sufficient for Egypt, and within the Ministry of Foreign Affairs the question arose whether a bilateral agreement would not be the best option. A memorandum from the Legal Adviser to the Cultural Heritage Department of August 1977 stated that it was within reason to assume that objects, owned by Egypt (or another State), which arrived in the Netherlands for an exhibition could become subject to seizure in this country by request of someone who believed to have a claim against the owner (in this case Egypt). Different options were discussed in the memorandum in order to convince Egypt to agree with the loan, such as the option that the Netherlands, or the Dutch museum which would have the objects on loan, could demand annulment of the seizure by offering the argument that the exhibited objects were meant for the ‘public service’ of Egypt; or the option that the Netherlands or the involved Dutch museum would offer Egypt indemnity for the financial consequences of any possible seizure, in such a manner that the Netherlands or the museum would commit itself to provide a guarantee to the same amount as the claim, in the case that a seizure was enforced. However, to offer real protection against seizure, it was considered as the best option that the Netherlands and Egypt would enter into


91 Memorandum of 22 April 1977, in possession of the author.

92 After all, there was not too much jurisprudence with regard to State immunity, and it was therefore considered as insecure whether immunity promises would still be able to stand before a court.

93 It was considered that false expectations might arise more easily when the Minister of Foreign Affairs would make a statement, because it can be expected that he communicated on behalf of the Government of the Netherlands.

94 It is remarkable that in the current letters of comfort issued by the State of the Netherlands a similar clause still appears. We now believe that there are stronger securities available, on the one hand because of the developments within international law [customary international law, 2004 UN Convention] and on the other hand because of current national legislation and the relevant jurisprudence.

95 Memorandum of 18 August 1977, in possession of the author.
an agreement that would define this protection explicitly. It was viewed that such an agreement could limit the applicability of Dutch national legislation as recognised by Article 13a of the Act on General Provisions of Kingdom Legislation.

In the end, a bilateral agreement was indeed agreed upon, signed in Cairo on 25 October 1978. The agreement followed the same approach as Germany and Egypt had chosen concerning the same exhibition. In the agreement a provision was included that safeguarded Egypt against seizure by anyone in the Netherlands who would be of the opinion it had grounds for a claim against Egypt. Article 1(4) read:

“[…] The Government of the Kingdom of the Netherlands undertakes to observe the right of ownership of the loaners in respect of the exhibits and to protect those exhibits in respect of the loaners’ rights of ownership within the framework of its statutory powers from any kind of seizure, attachment or any form of damage.”

No claims were filed.

After years of silence, on 6 April 1999, the Dutch Ministry of Education, Culture and Science was approached to issue an immunity from seizure declaration for an exhibition in the Jewish Historical Museum in Amsterdam called UP FOR AUCTION; The Variegated Collection of David Henigues de Castro.

In April 1999, the Head of the Cultural Heritage Department of the Ministry of Education, Culture and Science explained by memorandum to the Director General of Culture of that Ministry, that as a rule the Netherlands did not provide this type of immunity guarantee, as it did not want to relinquish its possibilities for seizure of cultural objects of which there was a real suspicion that a third party could have a valid property claim. However, as in this case

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96 Besides the Ministry of Foreign Affairs this was also approved by the Ministries of Culture, Recreation and Social Work (now Education, Culture and Science) and of Justice (now Security and Justice).

97 Dutch Treaty Series 1979, 2.

98 Agreement between the Government of the Federal Republic of Germany and the Government of the Arab Republic of Egypt regarding the exhibition entitled Göttler und Pharaonen, (Gods and Pharaohs), dated 15 April 1978. Article 1(3): “…The Government of the Federal Republic of Germany undertakes to observe the rights of ownership of the Egyptian Museum, Cairo, and of the Greek and Roman Museum, Alexandria, in respect of the exhibits and to protect the exhibits in respect of the loaners’ rights of ownership within the framework of its statutory powers from any kind of seizure, attachment or any form of damage.”

99 The agreement also contained provisions concerning claims for compensation, insurance and arbitration.

100 Letter of Rivka Weiss-Blok, General Director of the Jewish Historical Museum to Rick van der Ploeg, the then State Secretary for Culture, dated 6 April 1999.

101 Memorandum of 26 April 1999, in possession of the author.
the cultural object concerned (*De Castro Pentateuch*, a richly illustrated bible\(^{102}\) owned by the Israel Museum in Jerusalem) had been subject to extensive provenance research and as it turned out that there had been no doubts raised regarding the provenance, the Ministry agreed to make an exception to the rule and was willing to issue a declaration.

As a consequence, in a letter of 3 May 1999, the Ministry of Education, Culture and Science informed the Director of the Israel Museum in Jerusalem\(^{103}\) that “The State of the Netherlands hereby undertakes not to confiscate or seize the bible *De Castro Pentateuch* and to respect the right of the ownership.”\(^{104}\) However, in an accompanying letter to the Jewish Historical Museum, the Ministry explained, that in this case the State of the Netherlands only represented the organs of the central government, not of the lower provincial and local organs. Moreover, “the Netherlands Government cannot vouch for its nationals, who on the basis of […] the Civil Code may be entitled to claim the ownership of objects unlawfully possessed by others.”\(^{105}\) It may be seriously questioned whether this can be called a genuine ‘immunity from seizure declaration’. However, the museum accepted the declaration, and no seizures occurred.

### 8.2.2 The situation since the beginning of the 21st century

Over the past years, Dutch museums increasingly demanded, often at the request of foreign museums, that the Dutch Government would issue a declaration granting an exemption from judicial seizure for the cultural objects they were planning to borrow from these foreign museums or institutions.\(^{106}\) In the Netherlands, the Ministry of Foreign Affairs is currently charged with issuing such declarations. The declarations are provided by the International Cultural Policy Unit and signed by the Secretary General of the Ministry of Foreign Affairs.

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\(^{102}\) From the year 1344.

\(^{103}\) Which was the original petitioner of the declaration.

\(^{104}\) Letter by Jan Riezenkamp, Director General of Culture, to Dr. J. Snyder, Director of the Israel Museum, dated 3 May 1999.

\(^{105}\) Letter by Jan Riezenkamp, Director General of Culture to Mrs. R. Weiss Blok, General Director of the Jewish Historical Museum, dated 3 May 1999.

\(^{106}\) To say a few words about the mirror-situation: approximately 60 to 70 Dutch museums loan items for exhibitions abroad. Foreign institutions are primarily interested in Dutch fine art works (paintings, sculptures, drawings and prints) from the 17th and 18th century, as well as contemporary fashion, photography and Dutch design. See: Marja van Heese, ‘Ethical Commitments and Seizure Risks’, in: Renger Afman and Riemer Knoop (eds.), *Moving Heritage, Making Movable Heritage in the EU: Bulgarian-Dutch Experiences 2005-2008*, Sofia, The Hague 2008, pp. 221-229, at p. 225.
on behalf of the Minister of Foreign Affairs. The model has been drafted by the International Law Division of the Ministry of Foreign Affairs, in cooperation with the Department of Cultural Heritage of the Ministry of Culture.\textsuperscript{107}

From a legal point of view, these declarations, although called ‘Guarantor’s Declaration’, as such cannot be considered ‘hard’ law. A declaration merely states that the Dutch authorities, within their legal limits, will do their utmost to assure that the cultural objects can return to the lending institution or person. When it concerns the property of a State, the declaration refers to the rules under the 2004 UN Convention on Jurisdictional Immunities of States and their Property. Consequently, in the area of measures of constraint, State property enjoys more protection than privately owned cultural objects.\textsuperscript{108} But regardless of whether an immunity declaration has been requested and issued, cultural objects belonging to foreign States will to a large extent be immune from seizure in the Netherlands under Dutch law and international law, as we could conclude from Chapter 8.1.

It took several steps to come to the current phrasing of the declaration. There have been regular and ongoing contacts between the Russian and the Dutch authorities on this topic, as the Russian Federation is the biggest lender of cultural objects to the Netherlands.\textsuperscript{109} Although several States developed legislation following a Russian request, as we saw in the other country-related chapters of this study, Russia still seems to be at ease with the Dutch system. Perhaps, this has to do with the fact that the overall majority of Russian cultural objects that travel around the world is owned by the State itself, and therefore has a higher level of protection in the Dutch system, as I explained \textit{supra} in Chapter 8.1. However, several times, the Dutch-Russian conversations led to the understanding within the Dutch Ministry of Foreign Affairs that there was still room for improvement for the immunity declarations, and adaptations were made. Furthermore, until 2006, the declarations were issued on behalf of the Ministry of Foreign Affairs, not on behalf of the Dutch Government as such. Also, the declarations were signed at high official level, not at high political level, as is now the case.

Currently, the declaration has the following form and content:

\textsuperscript{107} On a yearly basis, approx. 20 declarations are issued. Thus, for most of the exhibitions in the Netherlands, such a declaration has not been requested.

\textsuperscript{108} As also stated by Marja van Heese, \textit{op. cit.} n. 106, p. 225.

\textsuperscript{109} For instance, to the Hermitage Amsterdam Museum, which could be considered a spinoff of the Hermitage Museum in Saint Petersburg.
“On behalf of the Government of the Kingdom of the Netherlands, and with reference to Article [X] of the loan agreement between [name Dutch museum or institution] and the [name foreign museum or institution], concerning the loan of art objects for the purpose of [name and data of the exhibition], the Minister of Foreign Affairs herewith declares as follows.

In accordance with international law and with the laws and regulations of the Netherlands, the Government of the Netherlands will do everything that is legally within its power to ensure that the art objects loaned by [name foreign museum or institution] to the [name Dutch museum or institution] for the period [data] shall not be encumbered at any time while they are located on Dutch territory.

For the purposes of this loan, the following also applies. In the event that it transpires from the loan agreement that the items concerned are the property of [name of the State concerned], the Government of the Netherlands will follow the rule as currently reflected in the 2004 UN Convention on Jurisdictional Immunities of States and their Property. In consequence, the Government of the Kingdom of the Netherlands will consider these items to be State property, which as such enjoy immunity from measures of constraint. In this regard, the Dutch Code of Civil Procedure (Articles 436 and 703), the General Legislative Provisions Act[110] (Section 13a), and the Court Bailiffs Act (Section 3a) are also applicable.”

The first paragraph sums up the relevant data, such as the lending and borrowing museum, the name and dates of the exhibition, and a short description of the objects concerned. The second paragraph regards both State and privately owned objects and reflects a general commitment on behalf of the Dutch Government.

The third and final paragraph has been inserted in January 2006 and regards State property only. This third paragraph has several times been adapted. The very last sentence, “In this regard [...] applicable”, was added to the declaration at the beginning of 2009. This is a very logical addition, as those articles in the Dutch legislation lay down the Dutch legal protection against seizure for the cultural objects on loan belonging to foreign States.

Also at the beginning of 2009, the phrasing “it transpires from the loan agreement that” has been inserted in the second sentence of the third paragraph. The sentence without insertion, being “In the event that the items concerned are the property of [name foreign State]” gave too much insecurity as to who determines in practice whether the items are indeed the property of that foreign State. Will that be the Dutch Government? The government of the Dutch

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110 In English, the Dutch ‘Wet Algemene Bepalingen’ is also sometimes translated as General Legislative Provisions Act instead of the Act on General Provisions on Kingdom Legislation.
foreign State? The Dutch court? The foreign court? By inserting a reference to the loan agreement, it is clear that for the purpose of the protection under this declaration, the determination in the loan agreement is determinative for the Dutch Government. It does not reflect any opinion by the government with regard to the title of ownership.\footnote{If contested before the court, there is always a possibility that the court does not accept this determination.} The sentence says only that if the loan agreement states that the property belongs to a certain foreign State, the Dutch Government is taking that as its point of departure for applying the rules of State immunity, if necessary.

Finally, halfway 2010, more has been added. A new first sentence was added to the third paragraph, which reads: “For the purposes of the loan, the following also applies”. I just explained \textit{supra}, that until that time, the declaration stated that in case it transpired from the loan agreement that cultural objects belonged to a specific State, the Netherlands in respect to that State would follow that indication, and would apply the rules of State immunity (including immunity from seizure). This might, however, be seen as a general directive towards the Dutch State as to whether those objects must be considered as property of that specific State. And that was not the intention, as this directive is and should only be valid for the purposes of the loan. In order to be as clear as possible, it has been decided to add another sentence to the declaration which makes it clear that it is only \textit{for the purposes of the loan} that the rules of State immunity shall be applied (if State property follows from the loan agreement). This provides the Dutch State the possibility to solely act within the context of the specific loan.

Each time when a declaration is issued, the Dutch authorities attach an explanatory letter to that declaration. In that letter, reference is made to the existing Dutch legislation with regard to State immunity and to the fact that the Netherlands considers it established judicial practice to treat cultural objects of a foreign State that are in the Netherlands temporarily for an exhibition as goods intended for public service, and as such immune from seizure.
8.3 Concluding

With regard to the Judicial Branch, it can be fairly stated that Dutch courts are of the opinion that although the immunity from measures of constraint is not absolute under public international law, State property in use or intended for use for public service is in any case not subject to forced execution. The Dutch Government on its part has repeatedly stated that based on customary international law it considers cultural objects belonging to foreign States on temporary loan as such property intended for public service as long as they do not clearly have a commercial goal (e.g. are offered for sale).

Although the Netherlands does not have specific legislation concerning immunity from seizure for cultural objects, it provides by means of its more general legislation cultural objects belonging to foreign States (or objects intended for public service) and temporarily on loan in the Netherlands with considerable and satisfactory protection against measures of constraint. The Netherlands considers Article 13a of the Act on General Provisions of Kingdom Legislation, Articles 436 and 703 of the Code of Civil Procedure and Article 3a of the Court Bailiffs Act applicable to those cultural objects.

Dutch legislation has no definition of a State. For the protection under the Code of Civil Procedure, it is not by definition necessary that the objects concerned are State property. Decisive is whether the objects are intended for public service. Thus also objects belonging to a museum, but intended for public service, fall under the protection of the Code of Civil Procedure.

It should be kept in mind, however, that the aforementioned provisions in the Code of Civil Procedure only regards immunity from seizure in civil procedures. Furthermore, as the 2004 UN Convention does not cover criminal proceedings either,\(^{112}\) the reference to the convention should be considered as covering only civil proceedings. It should therefore be concluded that the Netherlands only provides immunity from seizure for cultural State property on loan in civil proceedings.

\(^{112}\)See supra, Ch., 3.3.1, n. 64.
In the Netherlands, the relationship between immunity provisions under its national legislation and return obligations under, for instance, the 1970 UNESCO Convention or Council Directive 93/7/EEC has not been the main focus. However, as international or supranational obligations generally take precedence over commitments under national law, it is likely that these obligations set aside the Dutch immunity provisions. Where the Dutch immunity is, however, based upon rules of international law, the relationship with other return obligations will be addressed *infra*, in Chapter 11.

The Netherlands has repeatedly declared that it considers it established judicial practice to treat cultural objects of a foreign State that are in the Netherlands temporarily for an exhibition as goods intended for public service, and as such immune from seizure. Support for this practice can be found in international law, most obviously in Article 21 of the 2004 UN Convention on Jurisdictional Immunities of States and Their Property. That convention, even though it has not yet entered into force, is an important and recent source for international legal practice, as well as in providing an answer to the question if and to which extent foreign States enjoy immunity of execution in the Netherlands, according to the Dutch view.

Finally, the issuance of ‘Guarantor’s Declarations’ by the Dutch State (or letters of comfort), which for State property refer to the relevant legislation in force, seems to be a satisfactory extra means to provide lenders with the reassurance that their objects will not be encumbered while on Dutch territory. This commitment in the form of a best endeavours obligation regards all cultural objects on loan, thus not only cultural objects belonging to foreign States. But with regard to State property it is safe to say regardless of whether a declaration has been requested and issued, cultural objects belonging to foreign States will to a large extent be immune from seizure in the Netherlands under Dutch law and international law.