State immunity and cultural objects on loan
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Chapter 10  Situation in Asia, Australia and on the African continent

10.1  Situation in Asia

Asia is the world largest continent and consists of different regions. West-Asia is also considered as the Middle East, with States as Israel, whereby East Asia includes States such as China and Japan. Infra, I will assess the situation in several States on the Asian continent, whereby I will go from West to East.

10.1.1  Israel

10.1.1.1  The Foreign States Immunity Law

Only relatively recently Israel enacted State immunity legislation. The Foreign States Immunity Law\(^1\) passed the Knesset on 5 November 2008.

Section 2 describes the basic rule: “A foreign State shall have immunity from the jurisdiction of the courts in Israel, excluding jurisdiction in criminal matters […] subject to the provisions of this statute.” A foreign State has not been exactly defined, but the Law states that it includes “a political unit within a federal state, governmental agencies of a foreign state, official functionaries representing such state in performing their function, and a separate entity”. Separate entity is described as “a governmental authority of a foreign state having separate legal personality from that of the government of the state.”\(^2\)

A foreign State is not immune from jurisdiction where the cause of action is a commercial transaction.\(^3\) A commercial transaction is described as “any transaction or activity within the


\(^2\) Section 1.

\(^3\) Section 3.
sphere of private law which is of a commercial nature […] which by its nature does not involve the exercise of governmental power.”

Section 15(a) states that “[t]he assets of a foreign State shall have immunity from proceedings for execution of a judgment or other decision of a court in Israel”, but it does not apply to decisions in criminal matters. However, “the assets of a separate entity, excluding a central bank, shall not have immunity from execution of a judgment or other decision rendered by a court in Israel, except where the jurisdiction of the court originates in [a waiver of immunity].” Commercial assets of a foreign State do not benefit from immunity from execution either. A commercial asset has been described as “any asset, excluding diplomatic or consular assets, a military asset or an asset of a central bank which is held in Israel by a foreign state for a commercial purpose […]”

Finally, Section 21 states that the Law “shall not derogate from diplomatic or consular immunity or any other immunity applicable in Israel, under any law or usage.” The Law does not explicitly provide for immunity for cultural objects belonging to foreign States and does not exclude them from the description of ‘commercial asset’. But as it explicitly states that it shall not derogate from any other immunity applicable in Israel, cultural objects, when on loan in Israel, will still be protected by the specific immunity legislation that I will discuss infra.

10.1.1.2 Towards immunity legislation for cultural objects on loan

In Israel, the 1983 Law on Museums provides the legal, functional and ethical framework for museums in Israel. It defines a museum as “a non-profit institution housing a collection of objects of cultural value which permanently exhibits its entire collection or part of it, to the public, for the purpose of education, study or enjoyment.” The law makes a distinction between ‘acknowledged museums’ and ‘private museums’. An acknowledged museum is a

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4 Section 1.
5 Section 18.
6 According to Tamar Kaplan (Director of the Diplomatic and Civil Law Department of the Israeli Ministry of Foreign Affairs) and Amit Heumann (Legal Counsel at the Diplomatic and Civil Law Department of the Israeli MFA), it has not been established whether or not cultural objects belonging to foreign States should be considered as ‘commercial assets’ (interview by the author on 21 June 2011). This has been confirmed by Ben Rubin (Legal Adviser Israeli Ministry of Justice) in a telephone conversation with the author on 23 June 2011.
museum which was accredited as such by the Minister of Culture, Education and Sports, as provided by law. Before the accreditation, the Minister shall take into account, after due consultation with the Israeli Council of Museums, the needs and interest of the public.

The Law does not contain an immunity from seizure provision for foreign cultural objects on loan. In 1983, this did not yet cross the mind of the legislature. However, as in other States, Israel experienced in recent years that foreign governments, sister-museums and other cultural institutions began to request governmental guarantees, in writing, to provide assurance that no claims could be instituted in Israel. Many foreign lenders considered loans to museums in Israel to be too risky due to the likelihood of title claims from Holocaust survivors. Cultural institutions therefore began pressing the governmental bodies for such assurances and urging for a legislative change. The authorities did not turn a deaf ear, and started to enact legislation, probably also because of out-of-State demands, as we shall see infra.

During the process of drafting the immunity legislation for cultural objects on loan, a lot of discussion occurred. Especially with regard to the position of Holocaust victims the discussion was very vivid in Israel, which claims to be the representative of the Jewish people. It was stated that “[i]f Israeli museums were to mount world-class exhibitions […], they must be able to borrow objects from abroad. Increasingly, however, international cultural loans come with serious strings attached – ones that could harm the claims of Nazi victims”, the Jerusalem Post reported. It is being called a predicament for the Jewish State: it needs an immunity law that satisfies the international standard for art loans, and it must simultaneously protect the interests of Holocaust survivors and their heirs who have claims to Nazi-looted art.

The Knesset Education, Culture and Sports Committee was very concerned about the extent to which the Law would recognise a moral obligation to safeguard Nazi victims’ rights. Michael Melchior, the Chairman of the Committee stated: “I have a lot of serious problems

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8 Established under Section 10 of the Law.
10 Ibid., p. 118.
11 Thus, that is not only a request for immunity from seizure, but also for immunity from jurisdiction. As we shall see, the Israeli law is indeed that encompassing.
with this law, with all the moral aspects of it, which are very clear to us, saying that they can’t claim in the Jewish State things that were stolen from them during the Holocaust.”

It has also been stated that, by enacting its immunity legislation, Israel did neither comply with the Washington Conference Principles nor with the call for a ‘just and fair solution’ of the injustice that was done during the Nazi-area, nor with the call expressed in Resolution 1205 of the Council of Europe for “relaxing or reversing anti-seizure statutes which currently protect from court actions, works of art on loan.”

Proponents of immunity legislation, on the other hand, said that an Israeli law would aid Holocaust survivors. The idea was again that immunity

“would encourage cultural exchange, and through such public exhibitions Nazi victims and their heirs may be able to locate and identify [cultural objects] that once belonged to their families. The immunity law does not bar Nazi victims from making claims for artworks, but those claims could not be made in Israeli courts.”

In the explanatory notes to the Loan of Cultural Objects ( Restriction of Jurisdiction) Law, which Law I will discuss infra, it was stated that

“in recent years, major cultural institutions in Israel were requested by foreign governments or cultural institutions to guarantee the return of their cultural objects, if lent to Israel for temporary or long-term exhibition purposes. It was noted that the Ministry of Culture was often requested to issue such governmental guarantees.”

Although the enactment of a law thus gave rise to huge discussions between proponents and opponents, the proponents drew the longest straw. The draft Law was discussed at the 16th Knesset on first reading, on 20 December 2005, and was assigned to the Knesset (Education, Culture and Sports) Committee. It was submitted to the second and third reading on 19 February 2007. The Law came into effect on 1 May 2007. It is said that the Law gives the chance to expose expropriated art and provides a mechanism for those who want to make a

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13 Ibid.
14 See infra Ch. 11.1.6.
15 See infra Ch. 11.1.3.
17 Op. cit. n. 12 (Henry). Indeed, as we shall see, the Israeli immunity legislation states that a court in Israel shall not have jurisdiction with regard to a claim relating to a right to title or possession of the cultural property or another right that is contrary to the right of the lender of the property.
18 Op. cit. n. 9 (Berman), p. 120.
It helps bringing exhibits from other States to Israel and enables people to identify pieces from their family.\textsuperscript{19}

The entering into force of the Law was in time for the exposition \textit{Looking for Owners: Custody, Research, and Restitution of Art Stolen in France during World War II}, held in the Israel Museum in Jerusalem from 19 February to 3 June 2008. This exhibition aimed at tracing the story of cultural objects looted by the Nazis in France during World War II. Organised by the French Ministry of Foreign Affairs and the Ministry of Culture and Communication in collaboration with the Israel Museum, the exhibition drew from the collection of unrestituted cultural objects in France known as the ‘Musées Nationaux Récupération’\textsuperscript{21}. However, in order for the exhibition to take place, France made the condition that the Israeli immunity legislation would be in place.\textsuperscript{22} In order to host the exhibition, the Israel Museum pushed the Knesset to come to legislation preventing survivors or heirs from claiming ownership of the property.\textsuperscript{23} As we shall see, the Law states that claimants cannot institute a claim for the objects in Israel. But according to the Law, a functioning body to adjudicate claims should be available outside of Israel.\textsuperscript{24} In addition, the objects were to be published on a website at least one month before the exhibition, to allow the public to survey the objects and file claims if they had any.\textsuperscript{25}

\textsuperscript{19} Thus Michael Melchior, Chairman of the Knesset Education, Culture and Sports Committee. See: David Brinn, ‘The art of restitution’, \textit{Jerusalem Post}, 14 February 2008.


\textsuperscript{22} Op. cit. n. 20 (Brinn). “The law is important because there was no way France was going to agree to let us host this exhibition here. People began to realize that if we don't pass the law we are never going to see these paintings”, thus Dena Scher, the Israel Museum Foreign Press Officer, in: Avi Tuchmayer, ‘Stolen Holocaust Art at the Israel Museum’, \textit{IsraelNationalNews.com}, 19 February 2008, to be found at: http://www.israelnationalnews.com/News/News.aspx/125308. [Last visited 20 March 2011.] Also Ben Rubin, Legal Adviser of the Israeli Ministry of Justice, confirmed to the author on 23 June 2011 that the French demand was the direct motive for this legislation.

\textsuperscript{23} Ibid. (Tuchmayer).

\textsuperscript{24} France has set up a tribunal which would meet once or twice a year in Israel to assess possible claims.

\textsuperscript{25} The objects taking place in this exhibition had been put on the website of the Israeli Justice Ministry. No claims occurred.
10.1.1.3 The content of the Loan of Cultural Objects (Restriction of Jurisdiction) Law

The aim of the Law is to enable the lending of cultural objects of importance to the Israeli public, without prejudicing the claims of the Jewish people concerning their rights of ownership to property looted during the Holocaust. It was stated in the explanatory notes

“That the [Law] aims to facilitate international lending of cultural objects for public exhibition purposes by safeguarding the loaned objects from legal proceedings, seizure or detention in Israel, in case of any emerging claim while on loan. It was stressed that in submitting such a proposal of an immunity law, the Israeli Government aimed to bring itself in line with other States, such as the United States, France and Germany, which have anti-seizure legislation and afford legal immunity to cultural objects on loan.”

The Law only applies to public institutional borrowers and lenders.

In those cases where a loan agreement was signed between the State of Israel or a cultural institution in Israel, and another State or a cultural institution in another State, regarding the lending of a cultural object for a fixed period of time for the purpose of public display in Israel, the Minister of Justice is entitled to issue a decree by which - as long as the object is in Israel pursuant to the said agreement - a court in Israel will have no jurisdiction concerning claims regarding ownership or possession rights of the cultural object, or any other right which is contrary to the right of the lender of the cultural object concerned. Moreover, a court in Israel will not issue any order that might prevent the return of the cultural object to the lender at the end of the lending period pursuant to the loan agreement. So, the Israeli legislation does not only provide immunity from measures of constraint, but first and foremost immunity from suit, as it prevents claimants from seeking any redress in Israeli

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27 According to Section 2 of the Law, a cultural object is an object with an artistic, historical, or any other cultural value, that is of importance to the Israeli public.
28 According to Section 1 of the Law.
30 Upon consultation with the Minister of Foreign Affairs and the Minister of Science, Art and Sports.
31 According to Section 3 of the Law.
courts if the Minister of Justice concludes that an adequate procedure exists in the country where the cultural objects are normally located.  

Prior to issuing such a decree, however, the Minister of Justice will notify his intention to issue such a decree, which notice has to be published on the website of the Ministry of Justice. During 30 days from the date of the publication, objections to the issuance of the decree can be raised. Objections can be submitted for the following reasons:
- non-compliance with the legal requirements for issuance of such a decree;
- the individual who is objecting claims having a right to the cultural object and it is suspected that the object was seized by the Nazis, their agents or collaborators.

If the Minister of Justice is satisfied that there is prima facie evidence that the submitter of an objection, claiming a right for the cultural object of which it is suspected that the object was stolen from Jews by the Nazis, their agents or their collaborators, has rights to the cultural object concerned, a decree will not be issued. As a most likely consequence, the object will not be loaned.

Furthermore, a decree will not be issued by the Minister of Justice unless he is convinced and satisfied that there is an alternative judicial or a quasi-judicial instance to which it is possible to submit claims regarding the cultural object specified in the decree, and which is capable and competent of discussing and ruling on the matter. The Minister has to provide each person with available information as to the alternative legal instance in relation to the cultural object to which a decree applies.

According to Section 8 of the Law, the provisions of the Property of Holocaust Victims Law (Return to Heirs, Assistance and Commemoration) 2006 will not apply to the cultural object

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32 See also: Charles A. Goldstein, Protection of Cultural Objects on Loan – The Israeli Perspective, held at the Interdisciplinary Forum on Legal Aspects in Cultural Property, Tel Aviv, Israel, 15 February 2008, to be found at: http://www.comartrecovery.org/sites/default/files/THE_ISRAELI_PERSPECTIVE_AUGUST_2008.pdf. [Last visited 25 May 2011.] Goldstein is in his presentation very critical towards the Israeli legislation and calls it “an example of perversion of justice”. Shoshana Berman states that one may ask why an Israeli claimant should be sent abroad “into the foreign fields of law” with all the complications and additional costs. See: op. cit. n. 9 (Berman), p. 130.
33 Also, a photograph and provenance information shall be published.
34 According to Section 4 of the Law.
35 According to Section 6 of the Law.
36 According to Section 5 of the Law.
37 According to Section 7(a) of the Law.
38 Law 5766-2006, which aims, amongst others, to enhance the traceability in Israel of property which belonged to the victims of the Holocaust.
with regard to which a decree for limiting of jurisdiction was issued on the basis of the Loan of Cultural Objects (Restriction of Jurisdiction) Law.

Israel is not a Party to the 1970 UNESCO Convention nor to the 1995 Unidroit Convention.

10.1.2 The Islamic Republic of Iran

The Islamic Republic of Iran does not have a law offering immunity from seizure for cultural objects loaned for a public exhibition. However, the Iranian authorities\(^ {39} \) have expressed that they regard international loans of cultural objects belonging to foreign States as falling within Article 5 of the 2004 United Nations Convention on Jurisdictional Immunities of States and Their Property.\(^ {40} \) As we saw supra, in Chapter 3, that article states that a State enjoys immunity, in respect of itself and its property, from the jurisdiction of the courts of another State subject to the provisions of the 2004 UN Convention. With regard to the convention, the representative of the Islamic Republic of Iran stated before the Sixth (Legal) Committee of the UN General Assembly\(^ {41} \) on 26 October 2004 that the (at that time still draft) convention “reflects the customary international law pertaining to immunity of States and their property”.

It is therefore fair to say, that the Iranian Government’s legal position is that cultural objects on loan belonging to foreign States are immune from any kind of measures of constraint.

This made the London based British Museum comfortable to lend the Cyrus Cylinder to the National Museum of Iran in Tehran. The Cyrus Cylinder is an inscribed Persian clay cylinder of 539 BC. It has important text inscriptions.\(^ {42} \) It was discovered in the ruins of Babylon (now Iraq) in 1879. At that time, the British Museum sponsored the expedition to discover the

\(^ {39} \) Expressed by the Vice-President of the Islamic Republic of Iran and the Director General of the Iranian Judiciary. Communicated towards me by the Head of the Legal Services of the British Museum in London, Tony Doubleday, through Sam Morgan of the British Ministry of Foreign Affairs as well as Kim de Jong of the Royal Netherlands Embassy in Tehran. Information received 15 November 2010.

\(^ {40} \) Iran signed the 2004 UN Convention on 17 January 2007. Since 29 September 2008 it is a party to the convention.

\(^ {41} \) Dr. Mostafa Dolatyar.

\(^ {42} \) The text says that the people of Babylon welcomed the Persian emperor Cyrus the Great as their new ruler and lists the beneficial works that Cyrus did for the people of Babylon. It has also sometimes been described as the world’s first declaration of human rights. For more information on the Cyrus Cylinder, see also: http://www.britishmuseum.org/explore/highlights/highlight_objects/me/c/cyrus_cylinder.aspx. [Last visited 20 March 2011.]
cylinder. The cylinder is on display in the British Museum since 1880. It had been loaned to Iran in October 1971. Discussions regarding a new loan were ongoing for some time. The British Museum, however, wanted to be guaranteed that the cylinder would not be eligible for seizure. The Iranian assurance that it would follow the rules as reflected in the 2004 UN Convention was a sufficient guarantee for the British Museum, especially because these assurances were given on the level of the Vice-President of Iran. It was therefore the understanding of the British Museum that the Iranian Government’s legal position was that loans of cultural objects made from the national collections of foreign States would be immune from any measure of constraint. Consequently, the Cyrus Cylinder went on loan from 10 September 2010 until 10 January 2011. Due to its great success, a new loan, immediately following after 10 January was agreed upon.

10.1.3 The United Arabic Emirates

The Code of Civil Procedures of the United Arabic Emirates states that “public property owned by the State or one of the Emirates” cannot be seized. Public property is defined as “all real property or movables owned by the State or public judicial persons, allocated in fact or in law for the public benefit”. It does not refer to foreign State property.

On 6 March 2007, France and the United Arab Emirates signed an agreement which should lead to the creation of a museum in Abu Dhabi. The museum of Abu Dhabi is allowed to use the name Louvre for the duration of the agreement, which is 30 years and six months. The ‘Louvre Abu Dhabi’ is to be completed in 2012 and is to be located on the Saadiyat Island complex. The museum will exhibit cultural objects from several French museums (including, of course, the Louvre), but will also acquire its own cultural objects.

44 As confirmed to the author by Tony Doubleday, Head of the Legal Services of the British Museum in London, United Kingdom, on 8 March 2011.
45 It was not an extension of the existing loan, but a new loan that started on 11 January 2011.
46 Article 247(1).
47 Code of Civil Transactions, Article 103.
48 The agreement is based on a bilateral cooperation agreement between France and Abu Dhabi, signed on 3 July 1975.
In order to fulfil a French condition, the bilateral agreement states that all items loaned to the ‘Louvre Abu Dhabi’ will be immune from seizure.\textsuperscript{49} The Emirates needs to take all necessary measures in order to guarantee this immunity, according to the agreement.\textsuperscript{50} Thus, the lending is conditioned by the enactment of these measures.\textsuperscript{51} Literally, Article 13\textsuperscript{52} states:

“Works of art on loan from French museums in the Museum under this agreement are exempt from seizure in the territory of the UAE. The UAE is committed to taking the necessary measures on a national level to ensure the immunity from seizure and to inform the French side. The loan of any work by France under this agreement is subject to the adoption of such measures.

No arrest or other enforcement action can be implemented against such works of art, whether ordered by the UAE or by a foreign authority. No decision of any authority whatsoever can impede the return of such works of art in France at the end of the loan. When considering a risk weight on the safety of the works of art, the French side can proceed without delay in the repatriation of all the works on loan. The UAE agrees to allow the immediate return to France of works of art on loan if they would be subject to restitution ordered by the French administrative or judicial authorities.”\textsuperscript{53}

10.1.4 Pakistan

Pakistan enacted State immunity legislation by means of its 1981 State Immunity Ordinance.\textsuperscript{54} Section 3(1) provides that “[a] State is immune from the jurisdiction of the


\textsuperscript{51} \textit{Ibid.} (Cornu/ Frigo), p. 130.

\textsuperscript{52} Entitled ‘Insaisissabilité et retrait des œuvres prêtées’

\textsuperscript{53} “Les œuvres d’art prêtées par les musées français au Musée en application du présent accord sont insaisissables sur le territoire des Émirats Arabes Unis. La Partie émirienne s’engage à prendre les mesures nécessaires au plan national pour garantir cette insaisissabilité et à en informer la Partie française. Le prêt de toute œuvre par la Partie française au titre du présent accord est soumis à l’adoption de ces mesures. Aucune saisie ou autre mesure d’exécution ne peut être mise en œuvre contre lesdites œuvres, qu’elle soit ordonnée par une autorité émirienne ou par une autorité étrangère. Aucune décision de quelque autorité que ce soit ne peut faire obstacle au retour desdites œuvres en France au terme du prêt accordé. Lorsqu’elle considère qu’un risque pèse sur la sécurité des œuvres, la Partie française peut procéder au rapatriement sans délai de l’ensemble des œuvres prêtées. La Partie émirienne s’engage à permettre le retour sans délai en France des œuvres d’art prêtées dans le cas où celles-ci feraient l’objet d’une mesure de restitution ordonnée par une autorité française, qu’elle soit administrative ou judiciaire.”

\textsuperscript{54} No. VI of 1981; published in \textit{The Gazette of Pakistan}, 11 March 1981.
courts of Pakistan except as [provided in this Ordinance].” According to Section 3(2), “[a] court shall give effect to the immunity even if the State does not appear in the proceedings in question.”

Section 15(1) states that a foreign State includes a reference to "(a) the sovereign or other head of State in that foreign State in his public capacity; (b) the government of that foreign State; (c) and any department of that government.” It does not include a reference to “any entity [...] which is distinct from the executive organs of the government of the State and capable of suing or being sued”, nor to any territory forming a constituent part of a federal foreign State. Such a separate entity is only immune from the jurisdiction of the courts of Pakistan if “(a) the proceedings relate to anything done by it in the exercise of sovereign authority; and (b) the circumstances are such that a State would have been immune."

Section 5(1) provides that a State is not immune in respect of proceedings related to “(a) a commercial transaction[56] entered into by the State; or (b) an obligation of the State which by virtue of a contract, which may or may not be a commercial transaction, falls to be performed wholly or partly in Pakistan.”

Section 14(2)(b) states that “the property of a State, not being property which is for the time being in use or intended for use for commercial purposes, shall not be subject to any process for the enforcement of a judgment or arbitration award or, in an action in rem, for its arrest, detention or sale.” The certificate of the head of a State’s diplomatic mission in Pakistan, or the person for the time being performing his functions, to the effect that any property is not in use or intended for use of the State for commercial purposes shall be accepted as sufficient evidence of that fact, unless the contrary is proved.

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55 According to Section 15(2).
56 In the Ordinance, a commercial transaction means:
“(a) any contract for the supply of goods or services;
(b) any loan or other transaction for the provision of finance and any guarantee or indemnity in respect of such transaction or of other financial obligation; and
(c) any other transaction or activity, whether of a commercial, industrial, financial, professional or other similar character, into which a State enters or in which it engages otherwise than in the exercise of its sovereign authority.”
57 This section does, among other things, not apply when both of the parties in the dispute are States and they have otherwise agreed in writing.
58 When it comes to separate entities, only property of a State’s central bank or other monetary authority is treated as if it were State property. See Section 15(4).
59 Section 14(4).
The Ordinance does not apply to criminal proceedings. There are no specific provisions for cultural property.

10.1.5 The People’s Republic of China and the territory of Taiwan

The People’s Republic of China has been regarded as one of the staunchest supporters of the principle of absolute immunity of States and their property. Norman Palmer stated in 1997 that the Chinese State asserted firm control over the most significant cultural objects, and that there was an effective State monopoly on exhibitions; lending of cultural objects was a State function, with more outbound loans than inbound loans. However, China signed the 2004 UN Convention on Jurisdictional Immunities of States and Their Property on 14 September 2005, which convention is widely acknowledged as endorsing the restrictive approach in relation to the application of the principle of State immunity.

With regard to the domestic legislation in China, only one specific statute has been adopted addressing an aspect of State immunity, and that considers the immunity from measures of constraint for assets of foreign central banks. China is not planning to enact immunity from seizure legislation for loaned cultural objects, nor is there a special declaration on exemption from judicial seizure for the cultural objects on loan in China.

China is currently specially known as active in the repatriation attempts of Chinese cultural heritage. Media reports stated: “A clear sign of China’s newly rediscovered pride and power is the interest it is taking in both buying back, at huge prices, its imperial heritage, and in making claims for restitution where it feels an item was removed illegally.” Examples are, for instance, bronze objects from the imperial summer resort Yuanmingyuan. The objects

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60 Section 17(2)(b).
63 Ibid., p. 11.
64 In October 2005.
66 Oral answers from the Chinese State Administration of Cultural Heritage, Foreign Affairs Office, 10 December 2008. The author would also like to thank Machtelt Schelling of the Royal Netherlands Embassy in Beijing.
67 See, for instance: Lucy Hornby, ‘China calls for return of art treasures from abroad’, Reuters, 17 November 2009.
were taken when the palace was burnt down by Anglo-French allied forces during the Second Opium War in 1860.\textsuperscript{69} The Chinese State Administration of Cultural Heritage is pursuing the repatriation of illicitly expropriated heritage of these items via political, diplomatic and international conventions.

When it comes to international art loans, special attention needs to be paid to the territory of Taiwan.\textsuperscript{70} The National Palace Museum of Taipei is the home of a large collection of cultural objects originating from the Forbidden City in Beijing. It is called the finest collection of imperial Chinese art anywhere.\textsuperscript{71} In other country-related chapters of this study, for instance regarding France or Germany, we have already seen that Taiwan was active as a lending partner, but at the same time it was afraid that mainland China would be able to seize the loaned objects if the borrowing States would not have immunity from seizure legislation.

Taiwan did enact such legislation itself. On 1 July 1992, the Cultural and Arts Reward Act was adopted, and later amended on 12 July 2002. Article 11 states that

\begin{quote}
“[a]rtworks from foreign countries or Mainland China that have been approved for exhibition by the competent central-government authority shall not be subject to litigation or attached by legal action during their delivery, preservation, or exhibition.”\textsuperscript{72}
\end{quote}

\section*{10.1.6 Singapore}

Singapore enacted its State Immunity Act in 1979.\textsuperscript{73} According to Section 3, “[a] State is immune from the jurisdiction of the courts of Singapore except as otherwise provided in the [Act].” Like we saw in the legislation of Pakistan, the Act states that a court in Singapore shall give effect to the immunity conferred by the Act, even though the State does not appear in the proceedings in question.


\textsuperscript{70} The author would like to thank Frits Mahieu of the Netherlands Trade and Investment Office in Taipei.

\textsuperscript{71} Of the Palace Museum’s 650,000 items, 230,000 come from China’s imperial collection. See: ‘Taiwan’s National Palace Museum; Treasure Island; Beauty is truth, truth is beauty. But make sure the law is watertight’, \textit{The Economist}, 14 February 2008. According to the article in \textit{The Economist}, an official from China’s State Administration for Cultural Heritage suggests that Beijing has never considered reclaiming the objects from Taiwan, because “Taiwan is part of China”.

\textsuperscript{72} Approval of the exhibition of artistic works shall be handled by the Council for Cultural Affairs of the Executive Yuan (CCA) after consulting the relevant authorities and regulations thereof, according to Article 15 of the Enforcement Rules of the Culture and Arts Reward Act.

\textsuperscript{73} Act No. 19 of 1979.
References to a State include references to “(a) the sovereign or other head of that State in his public capacity; (b) the government of that State; and (c) any department of that government[].” It does not refer to “any entity [a separate entity] which is distinct from the executive organs of the government of the State and capable of suing or being sued.” A separate entity is only immune from the jurisdiction of the courts in Singapore if “(a) the proceedings relate to anything done by it in the exercise of sovereign authority; and (b) the circumstances are such that a State would have been immune.”

A State is not immune in proceedings relating to a commercial transaction entered into by the State or an obligation of the State which by virtue of a contract falls to be performed wholly or partly in Singapore.

Section 15(2)(b) states that “the property of a State shall not be subject to any process for the enforcement of a judgment or arbitration award or, in an action in rem, for its arrest, detention or sale.” However, the section “does not prevent the issue of any process in respect of property which is for the time being in use or intended for use for commercial purposes.”

The certificate of the head of a State’s diplomatic mission in Singapore, or the person for the time being performing his functions, “to the effect that any property is not in use or intended for use of the State for commercial purposes, shall be accepted as sufficient evidence of that fact unless the contrary is proved.” Property of a State’s central bank or other monetary authority shall never be regarded as in use or intended for use for commercial purposes. The Act has no specific provisions with regard to cultural property and does not apply to criminal proceedings.

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74 Section 16(1).
75 Section 16(2).
76 In the Act, a commercial transaction means:
“(a) any contract for the supply of goods or services;
(b) any loan or other transaction for the provision of finance and any guarantee or indemnity in respect of such transaction or of other financial obligation; and
(c) any other transaction or activity (whether of a commercial, industrial, financial, professional or other similar character) into which a State enters or in which it engages otherwise than in the exercise of its sovereign authority.”
77 Whether a commercial transaction or not.
78 Section 5(1). The subsection does not apply to a contract of employment between a State and an individual. The section does not apply, amongst other things, if the parties to the dispute are States or have otherwise agreed in writing.
79 Section 15(4).
80 Section 15(5).
81 See section 19(2)(b).
Singapore has not enacted specific immunity from seizure legislation for cultural objects on loan.\textsuperscript{82}

10.1.7 \textbf{Japan}\textsuperscript{83}

On 11 January 2007, Japan signed the 2004 UN Convention on Jurisdictional Immunities of States and Their Property. Japan is a Party to the convention since 11 May 2010. Consequently, Japan enacted State immunity legislation by means of the Act on Civil Jurisdiction of Japan with respect to a Foreign State.\textsuperscript{84} The Act states in Article 1 that it “establishes the scope of the civil jurisdiction [...] of Japan with respect to a foreign state [...]”. According to Article 4, a foreign State is immune from the civil jurisdiction of Japan, except as otherwise provided by the Act.

A foreign State has been defined\textsuperscript{85} as:

“(i) a foreign state and its various organs of government;
(ii) the constituent units of a federal state or political subdivisions of a foreign state that are entitled to perform acts in the exercise of sovereign authority;
(iii) agencies or instrumentalities of the foreign state or other entities that are entitled to perform and are actually performing acts in the exercise of sovereign authority of the foreign state; and
(iv) representatives of the foreign state acting in that capacity.”\textsuperscript{86}

Article 8 states that a foreign State

“shall not be immune from jurisdiction with respect to judicial procedures regarding commercial transactions (meaning contracts or transactions relating to the civil or commercial buying and selling of commodities, procurement of services, lending of money or other matters excluding labor contracts) [...]”\textsuperscript{87}

\textsuperscript{82} Information obtained from Ruvini Ariyaratne, Ministry of Information, Communication and the Arts, Singapore, dated 18 March 2011.
\textsuperscript{83} Many thanks to Marion Tijsseling, Royal Netherlands Embassy Tokyo.
\textsuperscript{85} In Article 2.
\textsuperscript{87} It does not apply to commercial transactions between two States, or in case the parties to the commercial transactions have expressly agreed otherwise.
For this study, Article 18 of the Act is highly relevant. This Article has been inserted into the Act in order to follow up on Chapter IV of the 2004 UN Convention, whereby Article 18(2) seeks to follow Article 21 of the convention. The text of Article 18 reads:

“(1) A Foreign State shall not be immune from jurisdiction with respect to proceedings of a civil execution procedure against the property held by said Foreign State that is in use or intended for use by said Foreign State exclusively for other than government non-commercial purposes.
(2) The property a Foreign State holds listed below shall not be included in the property of the preceding paragraph:
(i) Property which is used or intended for use in the performance of the functions of the diplomatic mission, consular posts, special missions, missions to international organizations or delegations to organs of international organizations or to international conferences;
(ii) Property of a military character or used or intended for use in the performance of military functions;
(iii) Property listed below that is not being sold and is not intended to be sold:
(a) Cultural heritage pertaining to said Foreign State;
(b) Official documents or any other records administered by said Foreign State;
(c) Exhibits that have scientific, cultural, or historical significance.
(3) The provision of the preceding paragraph shall not preclude the application of the provisions of paragraph (1) and paragraph (2) of the preceding Article.”

On 9 March 2011, the Chairperson of the Committee on Education, Culture, Sports, Science and Technology introduced a bill on the Promotion of Exhibitions of Foreign Artworks to the Japanese House of Representatives of the Diet. On 10 March, the House of Representatives unanimously adopted the bill. On 25 March 2011, the House of Councillors did so as well. The bill was promulgated on 1 April 2011 and on 1 October 2011 the Act will enter into

88 Article 17 reads:
“(1) In cases where consent to an execution of a temporary restraining order or a civil execution against the property held by a Foreign State has been given expressly by any of the following methods, the Foreign State shall not be immune from jurisdiction with regard to the proceedings of said execution of temporary restraining order or said civil execution procedure:
(i) Treaties or any other international agreements;
(ii) Agreements concerning arbitration;
(iii) Written contracts;
(iv) Statements made during the course of said proceedings of the execution of the temporary restraining order or the civil execution, or written notices to the court or the other party (in the case of notices to the other party, limited to notices made subsequent to the occurrence of the dispute pertaining to the relationship of rights that was the cause of the petition for said execution of temporary restraining order or said civil execution).
(2) In cases where specific property is designated to enable achievement of the purpose of an execution of a temporary restraining order or a civil execution, or provided as security, a Foreign State, etc. shall not be immune from jurisdiction with respect to proceedings of said execution of temporary restraining order or said civil execution against said property.
(3) […]”
89 The Parliament of Japan.
force. It is said that the Act has been enacted in order to make exhibitions from the National Palace Museum in Taipei, Taiwan, possible.

The aim of this Act is to promote the exhibition of foreign cultural objects as well as to promote inter-cultural and international exchange and cultural development and to facilitate access of the Japanese people to other cultures. In order to fulfil the aforementioned aim, the Act foresees in the simplification of the organisation of exhibitions which involve foreign cultural objects, and the prohibition of seizure of objects involved in these exhibitions. The Act broadens the aforementioned immunity for cultural objects (as applicable under the Act on Civil Jurisdiction) to cultural objects belonging to non-State actors. However, contrary to the immunity under the Act on Civil Jurisdiction, the immunity under the Act on the Promotion of Exhibition of Foreign Artworks has to be applied for. The borrowing institution has to request for an immunity declaration. This declaration has to be issued by the Ministry of Education, Culture, Sports, Science and Technology, in consultation with the Ministry of Foreign Affairs and has to be officially published.

Occasionally, the Japanese Minister of Foreign Affairs may choose to issue a ‘letter of comfort’, if asked by a foreign museum. It is unknown if this will still be possible when the Act on the Promotion of Exhibition of Foreign Artworks enters into force.

### 10.1.8 Other States of the region

Several States are Signatory States or States Parties to the 2004 UN Convention on Jurisdictional Immunities of States and Their Property. Lebanon is a Party to the 2004 UN Convention since 21 November 2008 and so is Kazakhstan since 17 February 2010 and Saudi Arabia since 1 September 2010. Timor-Leste signed the 2004 UN Convention on 16 September 2005. On 12 January 2007, India signed the convention.

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92 Information obtained through the Royal Netherlands Embassy in Tokyo, December 2008.
93 Mostly an American museum.
10.2 Situation in Australia

10.2.1 Situation with regard to State immunity


A foreign State has been defined as “a country the territory of which is outside Australia, being a country that is (a) an independent foreign State; or (b) a separate territory (whether or not it is self-governing) that is not part of an independent foreign State.” A reference to a foreign State in the Act includes a reference to “(a) a province, state, self-governing territory or other political subdivision of a foreign State; (b) the head of a foreign State, or of a political subdivision of a foreign State, in his or her public capacity; and (c) the executive government or part of the executive government of a foreign State or of a political subdivision of a foreign State, including a department or organ of the executive government of the foreign State or subdivision.” A reference to a foreign State in the Act does not include a reference to a separate entity of a foreign State; this has been addressed separately in the Act.

The Act states with regard to a separate entity in relation to a foreign State that this means “a natural person, or a body corporate or corporation sole, who or that (a) is an agency or instrumentality of the foreign State; and (b) is not a department or organ of the executive

94 Many thanks go to Caroline Greenway, Director of the Cultural Property and Collections Branch, Australian Department of Environment, Water, Heritage and the Arts, as well as to Deciana Speckman, Royal Netherlands Embassy in Canberra.


98 Section 3(1).

99 Section 3(3).

100 Other than an Australian citizen.

101 Other than a body corporate or corporation sole that has been established by or under a law of Australia. A corporation sole is a “public office (created usually by an act of parliament) or ecclesiastical office (usually the owner of church land) that has a separate and continuing legal existence, and only one member (the sole officiholder). Contract made with a corporation-sole continues from one officiholder to his or her successor or, if made during a vacancy in office, to the appointee.” See: http://www.businessdictionary.com/definition/corporation-sole.html. [Last visited 30 June 2011.]
government of the foreign State.”

This category has been left deliberately imprecise in the Act. Its application in particular circumstances is left to be determined by the courts. It is likely that the courts will look into “a conglomerate of factors in determining the status of the entity as an ‘agency or instrumentality’ of a foreign state. Those factors would include the degree of governmental control and whether the entity is exercising governmental functions on behalf of the foreign state.”

Generally speaking, a separate entity is treated as a foreign State for most purposes of immunity from jurisdiction; when it comes to immunity from measures of constraint, however, such a separate entity is not treated likewise. This can be concluded from the fact that Section 22 states that the provisions in the Act regarding immunity from jurisdiction “apply in relation to a separate entity of a foreign State as they apply in relation to a foreign State”, while Section 35 states that with regard to enforcement the Act applies (only) “in relation to a separate entity of a foreign State that is the central bank or monetary authority of the foreign State.”

A foreign State is immune from jurisdiction of the Australian courts in a proceeding, except as provided by or under the Act. One of the exemptions is a commercial transaction: “[a] foreign State is not immune in a proceeding in so far as the proceeding concerns a commercial transaction.” A commercial transaction means

“a commercial, trading business, professional or industrial or like transaction into which the foreign State has entered or a like activity in which a State has engaged and, without limiting the generality of the foregoing includes –

(a) a contract for the supply of goods and services;
(b) an agreement for a loan or some other transaction for or in respect of the provision of finance; and
(c) a guarantee or indemnity in respect of a financial obligation, but does not include a contract of employment or a bill of exchange.”

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102 Section 3(2).
103 It may therefore be possible that State-owned galleries or museums as separate entities may not be immune from Australian jurisdiction.
105 According to Section 35(1), and then only if in the proceeding concerned that separate entity would have been immune from the jurisdiction and it has submitted to the jurisdiction, according to Section 35(2).
106 Proceeding does not include a prosecution for an offence or an appeal or other proceeding in the nature of an appeal in relation to such a prosecution.
107 Section 9.
108 Section 11(1). However, this does not apply if all the parties to the proceeding are foreign States or are the Commonwealth and one or more foreign States, or have otherwise agreed in writing. See Section 11(2).
109 Section 11(3).
The commercial activity exception regards different types of activities. The Law Reform Commission stated that

“a series of provisions can reflect more precisely the various considerations governing whether immunity is to be withheld. Greater guidance can be given to courts and the vagueness inherent in attempting to discover how international law might define ‘commercial activity’ at any given time can be avoided.”110

The provisions dealing with immunity from enforcement largely mirror those dealing with immunity from jurisdiction.111 Except as provided otherwise in the Act “the property of a foreign State is not subject to any process or order (whether interim or final) of the courts of Australia for the satisfaction or enforcement of a judgment, order or arbitration award or, in Admiralty proceedings, for the arrest, detention or sale of the property.”112 However, this provision does not apply in relation to commercial property.113 For the purposes of the section, commercial property means “property, other than diplomatic property or military property, that is in use by the foreign State concerned substantially for commercial purposes”.114 Gavan Griffith explains that the definition of ‘commercial’ in the context of jurisdiction is “to focus on the nature of a particular transaction; in that context, ‘purpose’ or ‘motive’ are irrelevant. In the context of execution, however, ‘purpose’ is intended to be the prime discriminator.”115

According to the Department of Environment, Water, Heritage and the Arts, the application of foreign State immunity to cultural objects on loan will depend on the circumstances in each particular case. Factors to be considered include the circumstances under which the objects are in Australia. A cultural object may be involved in a ‘commercial transaction’ if it is loaned to an Australian institution for a commercial fee. Where the cultural objects belonging to a foreign State are involved in a commercial transaction and court proceedings arise, the objects will be immune from the execution of any judgment unless it constitutes ‘commercial property’. The Foreign State Immunities Act does not apply to (cultural) property owned by separate entities.

111 Ibid. (Griffith), p. 851.
112 Section 30.
113 Section 32(1).
114 Section 32(3)(a).
115 Op. cit. n. 95 (Griffith), p. 852. Griffith does not, however, explain whether it would be the purpose of the transaction or the purpose of the property.
Although the Foreign States Immunities Act shares principles with the 2004 UN Convention on Jurisdictional Immunities of States and Their Property, it does not contain an equivalent provision to Article 21 of the 2004 UN Convention, which provides that certain categories of property shall not be considered as property “specifically in use or intended for use by the State for other than government non-commercial purposes”. As stated, in Australia, the extension of immunity to the cultural objects of a foreign State will be considered on a case-by-case basis, depending on the circumstances under which the objects will be in Australia and also depending on whether the conditions under the Foreign States Immunities Act will be fulfilled.\textsuperscript{116}

10.2.2 The 1986 Protection of Movable Cultural Heritage Act\textsuperscript{117}

Australia does not have an immunity from seizure regulation with regard to foreign cultural objects loaned from abroad.\textsuperscript{118} However, the Protection of Movable Cultural Heritage Act, which has been enacted in 1986, provides for a certain level of protection.\textsuperscript{119} The Act does not provide immunity from seizure for objects on loan from foreign lenders. However, under the Act, certificates of exemption can be issued to allow the importer of an Australian protected object to be exempt from needing to apply for an export permit for the object. Such a certificate does not provide immunity from seizure, it only provides exemption to the Protection of Movable Cultural Heritage Act, and only applies to objects significant to Australia, defined as Australian protected objects under the Act.

Owners of Australian protected objects located overseas are encouraged to repatriate them to Australia for display or sale. This would allow Australians access to cultural heritage otherwise unavailable to them, and would provide opportunities to purchase and return objects

\textsuperscript{116} Also, Australia does not have a policy of requesting immunity from seizure when lending cultural objects. However, on an individual basis, it is sometimes requested by individual Australian lenders in their negotiations with foreign borrowers.
\textsuperscript{119} The Act came into force on 1 July 1987, and has been established in order to give effect to the 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property.
offered for sale to Australian territory. The 1986 Protection of Movable Cultural Heritage Act provides for the issuance of a certificate enabling an Australian protected object to be exported after it has been imported into Australia for temporary purposes or in circumstances in which the proposed importer may subsequently wish to export it.\textsuperscript{120} The certificates are issued by the Australian Department of Environment and Heritage and permit import and export without violation of the 1986 Act.\textsuperscript{121} Such a certificate provides owners with the necessary security that their objects can be re-exported on completion of the exhibition or if the sale to a resident of Australia is unsuccessful.\textsuperscript{122} Consequently, the normal statutory provisions which dictate the forfeiture by the Australian authorities of unlawfully imported (cultural) objects of foreign States\textsuperscript{123} do not apply in

“relation to the importation of an object if:
(a) the importation takes place under an agreement between:
(i) the Commonwealth, a State, a Territory, a principal collecting institution of an exhibition co-ordinator; and
(ii) another person or body (including a government); and
(b) the agreement provides for the object to be loaned, for a period not exceeding 2 years, to the Commonwealth, State, Territory, principal collecting institution or exhibition co-ordinator, as the case may be, for the purpose of public exhibition in Australia.”\textsuperscript{124}

That the Protection of Movable Cultural Heritage Act can work in practice as a kind of immunity from seizure legislation, appeared in the preparation of an exhibition called \textit{The Medieval Imagination, Illuminated Manuscripts from Cambridge, Australia & New Zealand}, held at the State Library of Victoria in Melbourne from 28 March to 15 June 2008.\textsuperscript{125} While preparing the exhibition, it turned out that the United Kingdom demanded an immunity from seizure guarantee. At first sight, that might have been a problem, as Australia does not have this kind of legislation. However, as the Protection of Movable Cultural Heritage Act has a system of securing re-export of overseas objects temporarily imported into Australia, and as there were no questions related to the history of title or provenance of the loaned objects, the

\textsuperscript{120} Section 12 of the Act.
\textsuperscript{121} This is no automatic process; a person intending to import an Australian protected object needs to apply for it.
\textsuperscript{123} Section 14(1) states that where (a) a protected object of a foreign country has been exported from that country; (b) the export was prohibited by a law of that country related to cultural property; and (c) the object is imported, the object is liable to forfeiture.
\textsuperscript{124} Section 14(3). See also: \textit{op. cit.} n. 118 (O’Connell). See also: \textit{op. cit.} n. 62 (Palmer), p. 111, n. 96.
\textsuperscript{125} The exhibition showed more than 100 objects, with 91 loans from 3 different States: the United Kingdom, New Zealand and Australia.
lender turned out to be satisfied with the existing Australian legal system and did not insist to obtain a specific immunity declaration.  

In 2009, a review of the Act and its corresponding Protection of Movable Cultural Heritage Regulations 1987 has been undertaken by the Minister for the Environment, Water, Heritage and the Arts. This review considered the operation of the legislation and did not result in amendments.

10.2.3 The Bark Etchings case

Museum Victoria in Melbourne ran an exhibition entitled *Etched on Bark 1854: Kulin Barks from Northern Victoria* from 18 March 2004 until 27 June 2004. The two etchings coming from London were of great interest, because they were made relatively soon after European settlement. They were the only remaining examples of an extensive tradition of artistic work around the Loddon and Murray rivers in the nineteenth century.

The Australian Department of Environment and Heritage issued an exemption certificate under Section 12 of the 1986 Protection of Movable Cultural Heritage Act (which, as we saw, is not a return guarantee *per se*). However, as explained by Lyndel Prott, an amendment to the Commonwealth Aboriginal and Torres Saint Islander Heritage Protection Amendment Act in 1987 made it possible for the Victorian Aboriginal people to request the Victorian Minister for Aboriginal Affairs for an emergency, temporary, or other declaration if they considered that Aboriginal objects or places were under threat of desecration. The Dja Dja Wurung

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130 The objects were part of the Sandhurst and Melbourne Exhibitions in 1854. They then went to Paris as part of the Victorian Government’s display at the Paris Exhibition of 1955. Two bark etchings and the ceremonial emu piece were acquired by the Economic Botany Collection at the Royal Botanic Gardens, Kew. Two of these items were later transferred to the British Museum. *Ibid.*

131 Stating that the etchings were exempted from export control.
Group, while claiming traditional ownership of the objects, used this legislation to obtain a temporary emergency declaration. The declaration, issued nine days before the exhibition closed, at 18 June 2004, was valid for 30 days, but eight successive emergency declarations were issued. This meant that Museum Victoria, which had contractual obligations to return the items to the institutions concerned as soon as the exhibition had finished, was prevented from doing so by the emergency declarations.

Legal proceedings were instituted in the Federal Court by Museum Victoria and elders of the Dja Dja Wurrung Group. On 20 May 2005 the court took the view that the inspector lacked the power to make the second and subsequent declarations and that these declarations should be set aside. On 23 May 2005, the court also dissolved the injunction that restrained the museum from removing or permitting the removal of the objects in question from Victoria. That made it possible for Museum Victoria to return the cultural objects to the lending institution in the United Kingdom.

In an advice to the Victorian Government in relation to these cultural objects Dawn Casey stated: “In my opinion, the impact of such a decision would include no further loans to any Australian museums including art galleries [...].” The (negative) consequences of keeping the

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133 Already before, six weeks after the exhibition, Gary Murray, Chair of the North West Regional Aboriginal Cultural Heritage Board, called on the Australian Prime Minister to ask the British Government to return the bark etchings to Australia permanently. See: op. cit. n. 129 (Willis).
134 On the basis of Subsection 21C of the 1984 Aboriginal and Torres Strait Islander Heritage Protection Act.
136 On the basis of the declarations, the objects should continue to be displayed and/or secured at Museum Victoria. Also, the State of Victoria and Museum Victoria had to negotiate with the Traditional Owners the Dja Dja Wurrung and Jupagalk Native Title Groups as to the future location of the objects. Finally, the British and Australian Governments had to negotiate the final reparation of all Indigenous Australian Ancestral Human Remains and Grave Goods held without consent by various British institutions and privately for recovery, return and reburyal by Australian Traditional Owners. See: ibid., para. 2.
137 The items which were the subject of court proceedings were two bark etchings originating in Dja Dja Wurrung Country around Boort dating to about 1854, another bark etching dating from the 1870’s in Jupagalk Country in the Lake Tyrell Area and a ceremonial emu figure made from river redgum and decorated with red and white ochres. See: op. cit. n. 134, para.1.
138 Op cit. n. 134, paras. 37 and 50.
140 Former director of the National Museum of Australia and present chair of the Community and Industry Advisory Committee of the Centre for Cultural Materials Conservation at the University of Melbourne.
artifacts in Australia would “far outweigh the benefits”; she warned that for the sake of the three disputed artifacts, 40,000 other indigenous objects and human remains held in overseas institutions “would most probably never be seen in Australia again […] Museums in Europe […] would cease to lend other indigenous people’s cultural material to their countries of origin.”\(^{141}\)

Meanwhile, the Australian Parliament has adopted a bill amending the Aboriginal and Torres Strait Heritage Protection Act,\(^{142}\) “which provided that all declarations made in accordance with the act in the future will be subject to any certificates made under section 12 of the Protection of Movable Cultural Property Act 1986 authorizing the export of objects.”\(^{143}\) As a consequence, the export of objects will not be prevented, also not by the issuance of an emergency declaration, if there is a certificate in force under Section 12 of the 1986 Protection of Movable Cultural Heritage Act.\(^{144}\) Thus, as a result of the amendment, certificates of exemption now also provide protection from claims under the 1984 Aboriginal and Torres Strait Islander Heritage Protection Act. According to the Australian authorities, the amendments to the Act “will allow international institutions to lend objects to Australian cultural institutions and ensure they are returned to the lending institutions overseas.”\(^{145}\)

10.3 Situation on the African continent

Although African States are becoming more and more aware of their cultural heritage, the loan of cultural objects, and the guarantees involved, seem to be a subject quite untouched.\(^{146}\) The importance African States generally attach to their past, culture and heritage is, for instance, shown by the bilateral contacts between the Kingdom of the Netherlands and Ghana in the years 2008-2009, whereby Ghana asked the restitution of the head of King Nana Badu Bonsu II, a Ghanaian chief of the Ahanta Tribe. In October 2008, Ghana asked the Dutch


\(^{142}\) Aboriginal and Torres Strait Islander Heritage Protection Amendment Bill 2005, which inserts among other things new subsections 12(3A), 18 (2A) and 21EA into the Aboriginal and Torres Strait Heritage Protection Act.

\(^{143}\) Op. cit. n. 122 (Prott), p. 244.

\(^{144}\) However, according to Prott, the experience in this case has now led to a 'drying up' of such loans to Australian museums.


\(^{146}\) Based on information received from the Royal Netherlands Embassy in Nigeria (6 August 2010), Zambia (13 August 2010), Senegal (8 September 2010) and Morocco (8 September 2010).
Ministry of Foreign Affairs for the restitution of the head, which was in the possession of the Leiden University Medical Centre since the middle of the 19th century. In July 2009, the head was returned to enable the King to be accorded a decent burial.

10.3.1 Egypt

Egypt is very active in trying to get Egyptian cultural heritage restituted, which in most of the cases was taken from Egyptian territory long before the first international agreements with provisions against looting, pillage and plunder of cultural objects were enacted, and even longer before the adoption of the 1970 UNESCO Convention. The Egyptian authorities, represented by the Minister of State for Antiquities Zahi Hawass, are making much effort in order to get, among other things, the bust of Queen Nefertiti restituted from Germany, the Rosetta Stone restituted from the United Kingdom, and the Dendera Zodiac restituted from France.

Egypt does not have immunity legislation; neither regarding State immunity in general, nor with regard to cultural objects on loan. When foreign institutions would lend Egyptian artifacts for an exhibition in Egypt, it may be possible that these objects would not be allowed to return to the lending State or institution: Egyptian embassies informed host States that on the basis of orders by the Supreme Council of Antiquities the re-export of Egyptian antiquities, when brought into Egypt, is in principle not allowed, even if the foreign State, institution or private person obtained the antiquities legally. The last part of Article 8 of the Law on the Protection of Antiquities reads:

147 Such as, for instance, the 1899 and 1907 Hague Regulations Respecting the Laws and Customs of War on Land.
148 The former Supreme Council of Antiquities.
149 The bust dates from 1390 BC. Nefertiti was the wife of King Akhenaten, who ruled during the 18th Dynasty of ancient Egypt.
150 The bust is located in the Neues Museum [New Museum] in Berlin. Before that, it was located in Berlin’s Egyptian Museum.
151 Dating from 196 BC. The Rosetta Stone played an important role in helping archaeologists to understand hieroglyphics. The Rosetta Stone is in the British Museum since 1822. Discussions are ongoing since 2003.
152 Dating from 50 BC. In France since 1821 and located in the Louvre Museum in Paris.
153 In January 2006.
“The Council may recover the archaeological pieces or antiquities taken from architectural elements from their owners or acquirers, whenever there is a public interest to recover the said, as decided by the board and based on the proposal of the ad hoc permanent committee against a fair compensation.”\textsuperscript{155}

It seems possible,\textsuperscript{156} and may therefore be advisable, to obtain a re-exportation permit from the Egyptian authorities before lending Egyptian artefacts for an exhibition in Egypt.

\textbf{10.3.2 South Africa}

In 1981, South Africa enacted its Foreign States Immunities Act.\textsuperscript{157} In 1985 the Act has been amended\textsuperscript{158} to make it clear that the property of a foreign State shall not be subject to seizure in order to establish jurisdiction. According to Section 2(3), the Act shall not be construed as subjecting any foreign State to the criminal jurisdiction of the South African courts.

Section 2(1) states that “[a] foreign state shall be immune from the jurisdiction of the courts of the [South African] Republic except as provided in [the] Act or in any proclamation issued thereunder.” Subsection 2 continues by stating that “[a] court shall give effect to the immunity conferred by the Act, even though the foreign state does not appear in the proceedings in question.”\textsuperscript{159}

According to Section 1(2) a foreign State includes a reference to “(a) the head of state in that foreign state, in his capacity as such head of state; (b) the government of that foreign state; and (c) any department of that government.” It does not include a reference to “any entity which is distinct from the executive organs of the government of that foreign state and capable of suing or being sued”, nor to “any territory forming a constituent part of a federal foreign state”.

\textsuperscript{155} Translation from Arabic. Only the Arabic language version is legally binding.
\textsuperscript{156} As understood from Dr. Mohamed Sameh Amr, Professor of Public International Law, Faculty of Law, Cairo University.
\textsuperscript{157} Act No. 87 of 1981; into force since 20 November 1981.
\textsuperscript{158} Act No. 48 of 1985; into force on 24 April 1985.
\textsuperscript{159} See Section 2(2).
“A foreign state shall not be immune from the jurisdiction of the courts of the Republic in proceedings relating to (a) a commercial transaction\(^{160}\) entered into by the foreign state; or (b) an obligation of the State which by virtue of a contract (whether a commercial transaction or not) falls to be performed wholly or partly in the Republic\([\ldots]\)^{161}

Section 15 states that “[a] separate entity shall be immune from the jurisdiction of the courts of the Republic only if (a) the proceedings relate to anything done by the separate entity in the exercise of sovereign authority; and (b) the circumstances are such that a foreign State would have been so immune.”\(^{162}\)

Section 14(1)(b) states that “property of a foreign state shall not be subject to any process (i) for its attachment in order to found jurisdiction; (ii) for the enforcement of a judgment or an arbitration award; or (iii) in an action in rem, for its attachment or sale.”\(^{163}\) However, that section “shall not prevent the issue of any process in respect of property which is for the time being in use or intended for use for commercial purposes.”\(^{164}\) Property of the central bank or other monetary authority of a foreign State shall not be regarded as in use or intended for use for commercial purposes.

10.3.3 Other States of the region


\(^{160}\) A ‘commercial transaction’ means any contract for the supply of services or goods; any loan or other transaction for the provision of finance and any guarantee or indemnity in respect of any such loan or other transaction or of any other financial obligation; and any other transaction or activity of a commercial, industrial, financial, professional or other similar character into which a foreign State enters or in which it engages otherwise than in the exercise of sovereign authority. It does not include a contract of employment between a foreign State and an individual. See Section 4(3).

\(^{161}\) Section 4(1). The subsection does not apply if the parties to the dispute are foreign States or have agreed in writing that the dispute shall be justiciable by the court of a foreign State.

\(^{162}\) Section 15.

\(^{163}\) On the basis of Section 14(3), property of the central bank or other monetary authority of a foreign State is treated likewise and thus also immunised.

\(^{164}\) Section 14(3).
10.4 Concluding

It is not easy to draw uniform conclusions from this chapter. On the one hand, this has to do with the fact that this chapter concerns three continents, while on the other hand, within these continents not many States are actively involved in the lending and borrowing of cultural objects. In many African States, but also in China, restitution of a State’s own cultural heritage seems to be a bigger concern than the issue of international art loans. The United Arab Emirates and Taiwan can be considered exceptions, but they both have their own reasons for being such an exception; the Emirates because of the cultural relationship with France and Taiwan because of its relationship with mainland China. Israel holds a special position as well; it has immunity legislation for cultural objects on loan, but the discussions were sometimes painful and harsh. My impression is that Israel first and foremost enacted its legislation in order to help getting missing cultural objects identified. Japan, finally, in my view is the State which in its legislation followed the provisions of the 2004 UN Convention the most strictly.

Some of the States in these regions have enacted State immunity legislation. With the exception of Japan, none of the immunity acts have specific provisions for cultural property belonging to foreign States. A reason might be, that with the exception of Japan and Israel, the acts are of a relatively early date. Under the Japanese State immunity legislation, cultural State property on loan with a scientific, cultural or historical significance may not be considered as property in use or intended for use for other than government non-commercial purposes.

Under the legislations of Israel and Japan, a separate entity is included in the definition of a State. In Australia, Pakistan, Singapore and South Africa, a separate entity is not included in the reference to a State. Such a separate entity is only immune from the jurisdiction of the courts, if the proceedings relate to anything done by it in the exercise of sovereign authority and the circumstances are such that a State would have been immune. Generally, the central bank or other monetary authority of a foreign State is treated as a foreign State (and so is its property).

Property of a foreign State is generally immune from seizure, as long as it does not regard
property in use or intended for use for commercial purposes. Property of a separate entity is not protected *per se*. With regard to State property, in Singapore and Pakistan, the certificate of the head of a State’s diplomatic mission to the effect that any property is not in use or intended for use for commercial purposes of the State shall be accepted as sufficient evidence of that fact, unless the contrary is proved. Theoretically, cultural State property on loan should be able to benefit from this provision. This benefit does not extend to cultural property of a separate entity. In Australia, the application of foreign State immunity to cultural objects on loan is considered on a case-by-case basis. Factors to be considered include which circumstances the objects are residing under while in Australia. Where the cultural objects of a foreign State are involved in a commercial transaction and court proceedings arise, the objects will be immune from measures of constraint, unless it constitutes a ‘commercial property’. This does, however, not apply to cultural property belonging to a separate entity. That property will not enjoy immunity. In Israel, it has not been established whether or not cultural objects belonging to foreign States should be considered as ‘commercial assets’.

It can thus be concluded that under the State immunity legislations referred to in this chapter (again with the exception of Japan), cultural State property on loan will most likely not be immune from seizure by definition. State objects on loan and belonging to foreign State museums may not even be entitled to immunity at all.

However, as I showed supra, several States enacted specific immunity legislation, concluded agreements, or referred to rules of customary international law. Japan is in the vanguard when immunising cultural objects on loan. In addition to its State immunity legislation, and order to immunise also cultural objects belonging to non-State actors, Japan enacted specific immunity legislation for cultural objects on loan. It may be concluded that Japan is actively contributing to the establishment of a rule of customary international law. The territory of Taiwan has specific immunity from seizure legislation which immunises exhibited cultural objects coming from foreign States or Mainland China. Regularly, Taiwan itself demands immunity from seizure guarantees from borrowing States. In an agreement with France, the United Arabic Emirates agreed to immunise cultural objects on loan coming from French museums. Israel enacted, in addition to its State immunity legislation, specific immunity legislation for cultural objects on loan, which does not only provide immunity from seizure, but first and foremost immunity from suit. The authorities of the Islamic Republic of Iran have expressed that they regard international loans of cultural objects belonging to foreign States as falling
within Article 5 of the 2004 United Nations Convention on Jurisdictional Immunities and their Property and that the convention reflects customary international law pertaining to immunity of States and their property. It is therefore fair to say, that the 2004 UN Convention determines the Iranian approach towards cultural objects on loan belonging to foreign States, and that it is the Iranian Government’s legal position that those cultural objects are immune from any kind of measures of constraint.

Finally, several States have signed or ratified or acceded to the 2004 UN Convention on Jurisdictional Immunities of States and Their Property. These States are China, India, Islamic Republic of Iran, Japan, Kazakhstan, Lebanon, Madagascar, Morocco, Saudi Arabia, Senegal, Sierra Leone and Timor-Leste. Pursuant to Article 18 of the 1969 Vienna Convention on the Law of Treaties, those States are obliged to refrain from acts which would defeat the object and purpose of the treaty, as long as the convention has not yet entered into force for them.