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## STATE IMMUNITY IN PROCEEDINGS CONCERNING INFRINGEMENT OF INTELLECTUAL PROPERTY

### **Abstract**

*The aim of the text was to provide an overview of how the institution of state immunity functions in proceedings concerning infringement of intellectual property.*

*The principal purpose of limitation of States' immunity in cases stemming from infringements of intellectual property rights is to increase fairness and security, and thus lower transaction costs, of international trade. Although acts of breaches are localised – occur domestically – impact thereof on economic balance may be considerably broader.*

**Key words:** *state immunity, infringement of intellectual property*

**Absolute and restricted theories of the jurisdictional immunity.** Back in XVI century, approximately at the time when contemporary public international law based on formal equality of actors started to take shape, the principle of sovereign equality referred to the person of the king (or other person-head of a State) [7; 32; 14; 38; 4; 9; 5]. Sovereignty over one's territory encompassed jurisdiction over events and persons within its borders. At the same time lack of hierarchical relation between various sovereigns implicated exemptions of one from the judicial powers of another. In time personal scope of the privilege was broadened to include his representatives, which was indispensable for maintaining international relations. As the person of sovereign was not distinguished from the State itself, the principle *parem non habet imperium*, taken over from Roman law, was given a new meaning, preventing States from exercising jurisdiction one over another. Although the person of the head of state was subsequently detached from the legal status of the State itself, however, both immunities have been maintained.<sup>1</sup>

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<sup>1</sup> Historical context to some extent explains, why diplomatic and consular immunities are frequently not distinguished from jurisdictional one.

Consistent application of the jurisdictional immunity may lead, however, to a conflict between a foreign States, keen on protecting its sovereignty from external interference, and the State of proceedings, interested in protecting public order on its territory [40, pp. 24-42; 32]. Immunity from prosecuting also constituted an important deterrent for private actors, otherwise capable of financing States' needs, risking incapacity to enforce contract (this was reflected by a tremendous popularity of arbitration clauses, which decreased ever since domestic courts begun hearing cases against States after II World War) [39, pp. 121-128, 157-168].

Accordingly, XIX century saw development of the theory of immunity restricted to acts *de iurii imperii* (activities that constitute an immediate and direct objectification of their power [24]). Where States engage in transactions as private actors, they are deemed to be equally capable of being held liable for their misconduct. Although the second approach is now commonly accepted [42], it is often unclear, how to distinguish acts in exercise of public authority from others. For instance in terms of IP infringements the question remains, whether they shall be perceived according to the nature of the act (such as illicit manufacturing and sell of goods), or rather according to its purpose (e.g. protection of public health or financial stability). In most of the cases the key inquiry will be to determine commercial or non-commercial nature of the act in question. Would the act be treated as an encroachment on one's rights, or rather as an expropriation, which as a public act (an act of State) will not be subjected to foreign judicial scrutiny.

Furthermore, while successful presenting a case against a foreign State is the first, necessary step for seeking justice, where the latter is unwilling to voluntarily meet its obligations, even a favourable sentence does not secure one's interests. Although State increasingly accept restriction of their jurisdictional immunity, this process is not matched by an equal harnessing of the immunity from execution.<sup>2</sup> The latter considered as touching directly upon the core of sovereignty.

**Procedural bar to proceedings.** Jurisdictional immunity is “a procedural bar on the national courts' power to determine the right” [10]. The

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<sup>2</sup> For instance, although the Convention on the Settlement of Investment Disputes between States and Nationals of Other States prevents States from claiming immunity from jurisdiction in cases within the scope of the convention, it does not contain similar provisions in respect of execution.

immunity precludes judicial proceedings in court<sup>3</sup> and any public acts related to such proceedings (including administrative courts and the executive), at all stages [21, p. 13; 7, par. 8]. It does not, however, exempt from administrative acts.

Depending on the immunity theory applied domestically (absolute or restricted), foreign jurisdiction may be thus perceived either as a restriction limited to certain acts other than *iure imperii*, or as a field beyond scope of jurisdictional immunity. As defining common normative grounds for the codification purposes was impossible, a practical compromise (for instance adopted in the European Convention on State Immunity and United Nations Convention on Jurisdictional Immunities of States and their property) simply assumes that while State immunity from foreign jurisdiction constitutes a general principle, there are certain exceptions, where domestic courts may hear the case process even despite lack of defendant's voluntary agreement to submit to its jurisdiction. One of the exceptions covers intellectual property rights infringements.

Before further analysis two more issues shall be recalled briefly. First, immunities shall not be confused with jurisdiction: "jurisdiction does not imply absence of immunity, while absence of immunity does not imply jurisdiction" [18]. Second, procedural nature of the immunity may have a decisive impact on the case before the court, given the mentioned tendency to restrict its scope. Unlike substantive provisions, which – according to inter-temporal principles – continue to govern legal relation established under its rule despite subsequent revisions of law, courts apply procedural law currently in force.<sup>4</sup>

**Grounds for challenging immunity.** Given the signalled above uncertainties concerning the very nature of the immunity from jurisdiction (and execution), a private actor willing to bring a case against a foreign

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<sup>3</sup> For discussion concerning definition of this term see [21, p. 14].

<sup>4</sup> Accordingly if at the time of the conduct in question, given act or omission was illicit, yet the defendant State of capable to claim immunity in respect thereof, subsequent limitation of immunity may allow the plaintiff to bring his claim at a later stage (within the period of prescription). See for instance: [30]. Similarly ICJ: "[the law of immunity] regulates the exercise of jurisdiction in respect of particular conduct and is thus entirely distinct from the substantive law which determines whether that conduct is lawful or unlawful. For these reasons, the Court considers that it must examine and apply the law on State immunity as it existed at the time of the (...) proceedings" [24].

State for a breach of his intellectual property first needs to identify grounds on which he can challenge defendant's plea of immunity.

In view of the foreign element in the proceedings claimant could rely on international law norms. Since there is no commonly binding international treaty, most practical for the purposes of international customary law<sup>5</sup> analysis is rely on to preparatory works and commentaries to the European 1972 Convention on State Immunity (currently binding nine States-parties) and United Nations 2004 Convention on Jurisdictional Immunities of States and their property (still not in force due to lack of necessary thirty ratifications). Despite formally non-binding status of the latter, related to political issues, for instance supreme courts of Japan and the United Kingdom already referred to this document.<sup>6</sup> An additional protocol to the European Convention also established a European Tribunal in matters of State Immunity (its functions are currently realised by the European Court of Human Rights). Also some countries, paradoxically mostly common law States, also adopted complex domestic laws codifying the subject matter.<sup>7</sup>

Both the UN Convention (art. 14) and the European Convention (art. 8) contain provisions limiting states' immunity from IP claims. Also UK's State Immunity Act (art. 7), Singapore's State Immunity Act (art. 9), and Australia's Foreign States Immunities Act (art. 15) contain similar provisions (unlike the Foreign Sovereign Immunity Act in the U.S. or Canadian State Immunity Act). Also the 1991 resolution of the Institut de Droit International contains a similar suggestion (art. 2(2)(b)).<sup>8</sup>

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<sup>5</sup> Given the restrictive approach towards the jurisdictional immunity, a plaintiff will face particular problem of sustaining that given exception constitutes already a "settled practice" (as stipulated by the International Court of Justice, North Sea Continental Shelf [13]. Recently Italy was trying to sustain limitation of State immunity in cases stemming from gross violations of international humanitarian law – "reflecting evolving practice and recent tendencies in international law" – which was, however, disallowed by the Court. Furthermore, it may be quite difficult to ascertain to what extent immunity is granted by virtue of customary norms, and where by a simple comity: "While it may be true that States sometimes decide to accord an immunity more extensive than that required by international law, for present purposes, the point is that the grant of immunity in such a case is not accompanied by the requisite *opinio juris* and therefore sheds no light upon the issue currently under consideration by the Court" [19].

<sup>6</sup> [43; 23; 11] Quoted after: [14].

<sup>7</sup> For instance: [36; 37; 6; 3; 31].

<sup>8</sup> "The organs of the forum State are competent in respect of proceedings concerning legal disputes arising from relationships of a private law character to which a for-

Where there is no direct basis for challenging immunity in subject matter proceeding, a plaintiff may attempt achieving the same result relying on exemptions in torts or contractual responsibility matters.<sup>9</sup>

**Lifting the state veil.** Although in the restrictive theory of immunity it is the nature of the act, which is determinant for the court's capacity to hear the case, it is nevertheless the State, that is entitled *ratione personae* to remain shielded behind this barrier. Accordingly the question arises, which entities qualify for this defence.

Certainly various organs, administration employees and public officers represent the state.<sup>10</sup> For the purposes of the paper more troublesome is legal status of distinct entities established under the authority of the State and exercising public functions, such as academic institutions, manufacturers of generic drugs and R&D plants, public banks and enterprises. Those are entitled to claim immunity from jurisdiction only to the extend in which they exercise public authority (*prérogative de puissance publique*). Respectively they can be party to the proceedings in relation to other acts. Hence for the purposes of the sovereign immunity, sovereignty of the actor in question does not stem from its status under public international law, but rather from sovereign character of his conduct in relation with private actors.

In case of damages claim for libel contained in *The Soviet Monitor*, an information agency (TASS) of the U.S.S.R. was qualified as a public agency, despite legal distinctiveness from the State, due to the nature of its competences (public information).<sup>11</sup> Similarly, despite considerable

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eign State (or its agent) is a party; the class of relationships referred to includes (but is not confined to) the following legal categories: (...) the protection of industrial and intellectual property" [9, pp. 206-211].

<sup>9</sup> See for instance: [28, repeated by 35, pp. 599-626]. International Law Commission's Special Rapportuer positions the exception between ownership matters and contract breach [34].

<sup>10</sup> UN Convention, article 2 (2)(b)(i): "For the purposes of the present Convention 'State' means the State and its various organs of government". I do not discuss issues of political division of States, including federal structure, discussed in depth in the ILC Report.

<sup>11</sup> Although Tass enjoyed all the rights of a juridical person, according to a statement by the Soviet Ambassador "is the central information organ of the U.S.S.R. and is attached to the Soviet of People's Commissars of the U.S.S.R.". The former circumstance did not provide grounds for qualifying Tass as an entity separate and distinct from the State. *Krajina v. The Tass Agency*, [1949] 2 All E.R. 274. Discussed in: [27, pp. 494-496].

academic autonomy, Australian National University sued for copyright infringement, was declared to be an instrumentality or agency of the Australian government [20].

**Piercing the state veil.** Where the court is satisfied with the defendant's capacity *ratione personae* to claim immunity from jurisdiction (or execution) it still remains to be resolved, whether the act in question is worthy of protection from judicial scrutiny. The reasoning behind limiting State immunity is to prevent abuse of the institution, established for smooth exercise of public authority.<sup>12</sup> The court will therefore be expected to assess, whether the IP infringement contributed towards commercial goals (that is the State acted as a private actor). The issue to be tackled under UN Convention (UNC) article 14<sup>13</sup> and the European Convention (EuC) article 8.<sup>14</sup>

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<sup>12</sup> “The significance of state sovereign immunity depends heavily upon what remedies it leaves open (...) [how to] close the remedial gap created by state sovereign immunity” [29, pp. 1331-1391]. Paper analyses consequences of the U.S. Supreme Court 1999 ruling in *Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank* (527 U.S. 627 (1999)), where the Court held unconstitutional a congressional enactment that had purported to make states (US), like other actors, liable for damages when they are sued by private parties for an infringement of patent rights. See also: [15].

<sup>13</sup> Article 14: “Unless otherwise agreed between the States concerned, a State cannot invoke immunity from jurisdiction before a court of another State which is otherwise competent in a proceeding which relates to:

- a) the determination of any right of the State in a patent, industrial design, trade name or business name, trademark, copyright or any other form of intellectual or industrial property which enjoys a measure of legal protection, even if provisional, in the State of the forum; or
- b) an alleged infringement by the State, in the territory of the State of the forum, of a right of the nature mentioned in subparagraph (a) which belongs to a third person and is protected in the State of the forum.”

<sup>14</sup> Article 8: “A Contracting State cannot claim immunity from the jurisdiction of a court of another Contracting State if the proceedings relate:

- a) to a patent, industrial design, trade mark, service mark or other similar right which, in the State of the forum, has been applied for, registered or deposited or is otherwise protected, and in respect of which the State is the applicant or owner;
- b) to an alleged infringement by it, in the territory of the State of the forum, of such a right belonging to a third person and protected in that State;
- c) to an alleged infringement by it, in the territory of the State of the forum, of copyright belonging to a third person and protected in that State;
- d) to the right to use a trade name in the State of the forum.”

Now at the very first glance one may notice that the UNC provides an exception “unless States agreed otherwise”. That is meaningful reflection of how uncertain were authors of the Convention as to the probability of gaining common approval for that provision. The Convention does not establish another exception, but rather limits the maximal scope of court’s jurisdiction in relation to acts *iure gestionis* consisting of IP infringements.<sup>15</sup> European Convention does not provide same limitation. However, given on the one hand how much time lapsed between its entry into force and adoption of the UNC, and on the other International Law Commission’s ambition not only to codify, but also to contribute towards progressive development of international law wherever realistic, where the subsequent document does not contain equally far reaching provisions it may be assumed that necessary support was not secured in the mean time.

The UNC’s expression “a court of another State which is otherwise competent” (*un tribunal (...) compétent en l’espèce*) denotes the court, which would be competent according to the *lex fori*, including private international law applicable, if the defendant State wasn’t invoking immunity [21, p. 47-49; 7, par. 40].

Also it is worth noticing that art. 14 UNC concerns “proceeding which **relates to** [determination or infringements of IP]” (bolded M.M.), whereas numerous other provisions refer to “the subject-matter of the proceeding” (see for instance art. 11(2)(c, d) UNC. Now originally also article 11 contained similar expression (proceedings relating to), however due to concerns of too broad application of the norm it was intentionally narrowed. *A contrario* in case of IP not only the act of registration or infringement may constitute object of the proceedings. For instance term “determination of” in article 14 (a) UNC shall be understood broadly, as encompassing not only to the ascertainment or verification of the existence of the rights protected, but also to the evaluation or assessment of the substance, including content, scope and extent of such rights (Annex to the UNC). Exception may also include proceedings relating to capacity of acquiring, ownership, and commercial use of IPRs [12, pp. 76, 123].

As for the particular IP rights identified in both articles, given that research and development is inherently the most innovative sphere of social life, one couldn’t think of drafting an exhaustive list, since the mere prepa-

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<sup>15</sup> Obviously any infringement that falls within the scope of public authority (acts *iure imperii*) cannot be subjected to foreign courts without defendant agreement (art. 1 UNC, art. 15 EuC).

ratory works lasted roughly thirty years. Furthermore IP laws systems differ tremendously around the world,<sup>16</sup> at least in part reflecting different stage of economic development. Finding common legal framework was thus impossible. If, according to the international treaty practice, majority of convention terms was defined autonomously,<sup>17</sup> this holds particularly true for the generic IP notions. Generic terms used in conventions relate three types of IPRs [34, par. 51-52]: patents (including industrial designs and inventions for industrial or manufacturing purposes), trade marks (trade names, service marks or other similar rights pertaining to merchandise on sale in the markets or for general or limited distribution for commercial purposes), and the remaining types such as copyright, translation rights, reproduction rights, literary works, artistic objects, musical compositions, lyrics, video tapes, discs, and audio and audio-visual tapes.

Finally in case of proceedings stemming from work of a third person in creation of the intangible good in question both analysed provisions and art. 11 UNC and art. 5 EuC (the later relating to contracts of employment) can be applied.

**Jurisprudential breaches in immunity.** If the State of proceedings does not deem itself bound by customary rules contained in UNC/EuC, or it had not codified immunities norms under domestic law, claimant will be compelled to rely on judicial precedents and international courts practice.<sup>18</sup> Although such cases are not numerous, they provide a solid insight to the problem.

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<sup>16</sup> Also this factors favours referral in both conventions to the *lex situs*, as the most appropriate to asses infringements, which happen domestically.

<sup>17</sup> See for instance: [21, p. 14. Broader: [33, par. 49].

<sup>18</sup> As the International Court of Justice stated in the context of immunities from jurisdiction “State practice of particular significance is to be found in the judgments of national courts faced with the question whether a foreign State is immune, the legislation of those States which have enacted statutes dealing with immunity, the claims to immunity advanced by States before foreign courts and the statements made by States, first in the course of the extensive study of the subject by the International Law Commission and then in the context of the adoption of the United Nations Convention. *Opinio juris* in this context is reflected in particular in the assertion by States claiming immunity that international law accords them a right to such immunity from the jurisdiction of other States; in the acknowledgment, by States granting immunity, that international law imposes upon them an obligation to do so; and, conversely, in the assertion by States in other cases of a right to exercise jurisdiction over foreign States.” [19].



The most commonly quoted is probably the case decided by the Austrian Supreme Court, which concerned breach of German perfume trademarks (“Colibri” and “Dralles”).<sup>19</sup> Initially manufactured in Germany, and exported to Austria, a subsidiary was later established in Czechoslovakia. Upon nationalisation of the company a new state-enterprise maintained production and sell, under the same trademark, in Austria, which pushed the German parent company to seek a preventive injunction. The Court refused to recognise extraterritorial effect of the nationalisation in relation to Austrian trademarks. Also since Austria deemed international registration as a bundle of rights, rather than a unitary right, foreign registrations by the Czechoslovakian subsidiary, subsequent to registration by the German licensor, was held invalid and the injunction was granted. The Court held that: “Under international law, foreign States are exempt from the jurisdiction of the Austrian courts only in so far as relates to acts’ performed by them in the exercise of their sovereign powers; Similarly, under municipal law, foreign States are subject to Austrian jurisdiction in all contentious matters arising out of legal relations within the sphere of private law”.<sup>20</sup> This case is particularly important, given that cases of nationalisation (including natural resources or banking institutions) are not uncommon.

While above character (nature) of the act in question was considered decisive for the legal distinction between public and private acts, a court might rely upon purpose (goal) of the alleged infringement. This was the case of an American<sup>21</sup> mechanical engineer, who sued Irish administration instrumentalities (Gaeltarra Eireann and Development Authority of Ireland), who induced him to move to Ireland and reveal secrets of quartz crystals production, which were subsequently given them to a third company, for breach of patent rights. As the third company conducted activity, the court held that pecuniary goal of the enterprise deprived defendants of capacity to claim immunity [22]. While here the purpose of the act was

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<sup>19</sup> The rulling was given force of a “legal principle” by inscribing it on the precedents list (*Spruchrepertorium*). Hoffmann v. Jiri Dralle (1950), ILR, vol. 17, p. 155 (1956), *Journal du droit international* (Clunet) (Paris), vol. 77 (1950), p. 749. Commented: [1, pp. 354-357].

<sup>20</sup> Quoted after [34, par. 65].

<sup>21</sup> As for claims based on the U.S. FSIA one shall note, however, that since IPRs are enforceable indirectly through provisions concerning conducting a commercial activity, it is the law itself which foresees a theological approach (unlike for instance United Kingdom, State Immunity Act of 1978, which adopts the nature of the act theory).

directly connected with the contested conduct, in case of Spanish Government Tourist Bureau link was more remote. Claimant addressed a German court in relation to an authorised use of music themes in a video, used for advertising purposes.<sup>22</sup> Although the defendant did not directly benefit from enhanced interest in Spanish holidays, motives behind the actions were financial in nature, and the purpose was predominantly commercial. It was held that while tourist Bureaus, established in Germany under domestic law, acted as private persons, they were not entitled to claim immunity.<sup>23</sup>

Public nature of the IP infringement was, however, recognised in case of Australian National University (ANU) [20]. ANU, a public entity, was preparing an Austronesian dictionary – thus promoting research important to the cultural heritage of the region, which constituted its statutory goal. Now works on a similar dictionary had been previously undertaken by the Intercontinental Dictionary Series, as a second volume of its multi-language dictionaries series. Even though the court admitted that compilation of materials, allegedly infringing IDS's copyrights, did not by itself constitute exercise of public authority, it noted that private persons were unlikely to engage in a activity, which was expected to yield results only after collecting contributions of couple generation of linguistic researchers. Accordingly it was held that ANU did not act as a private en-

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<sup>22</sup> [41, p. 54]. Other instances in which public character of the act in question was not recognized include: a case of Los Angeles immunity, which produced news recordings for commercial purposes. Canadian Broadcasting Corporation – a “crown corporation” incorporated under Canadian law – was a broadcaster providing services in Canada and, unintentionally, to portions of the U.S. close to the border. In one of its programmes CBC emitted LANS' footage of unrest in L.A following acquittal of the four policemen involved in arrest of Rodney King without purchasing a licence, thus infringing its copyrights. The court dismissed denied CBC's motion to dismiss for lack of jurisdiction [26, pp. 585-586]. On the other hand in case of Henry Leutwyler, a New York based photographer who brought an action for copyright infringement against Queen Rania of Jordan, following U.S. Government's suggestion of immunity, the court dismissed all of the claims [16, p. 280].

<sup>23</sup> Apart from narrowly perceived infringement of intellectual property, the issue touches upon relationship between state immunity and economic development. Somewhat surprisingly, while bilateral investment treaties and domestic investment laws usually do not contain regulation on foreign immunities, the mentioned above domestic and international documents – including the European Convention on State Immunity and the U.N. Convention on Jurisdictional Immunities of States and their property – do not specify relation between commercial activities and economic development. This, apart from promotional activities of states and their agencies may also include joint ventures of private and public entities. See: [8, pp. 319-346].

tity, because neither its action nor IDS's services can be qualified as a regular course of business. The conduct in question was thus described as "academic".

**Concluding remarks.** The principal purpose of limitation of States' immunity in cases stemming from infringements of intellectual property rights is to increase fairness and security, and thus lower transaction costs, of international trade. To ensure that "will have access to the courts in order to resolve ordinary legal disputes" [17]. Although acts of breaches are localised – occur domestically – impact thereof on economic balance may be considerably broader. At the same time exercise of public authority, which entails weighing conflicting legal interests, ought take into account public good, which may deserve to be given priority. Also not every claimant is driven by the concern of the trade fairness.

While economic reasons behind enhancing safety of commercial transactions induce States to gradually restrain their jurisdiction in case of IPRs claims – although financial consequences of proceedings may be considerable, arguably they do not outweigh potential gains and do not endanger sovereignty *per se* – it is too early to state that a universal customary norm in this respect was created. As put by ILC's Special Rapporteur Sucharitkul: "The adoption of a restrictive provision in the national legislation of a few countries, however important, may not be indicative, let alone conclusive, of an emerging trend, but the application of such legislation may produce a widening restrictive effect in view of the practice of many Governments, notably those of India and Italy" [34, par. 72]. Lack of respective provisions in the U.S. Foreign Sovereign Immunities Act is most telling to those ends.

Once the above mentioned doubts concerning the choice of exempting IP proceedings from the immunities protection are resolved, there still remains to decide upon scope of the exception. First, it shall reflect divergent rate of development of the intellectual property regulations in various legal systems. While regulation shall not lag behind the market, it is impossible to expect certain States to accept premature one-size-fit-all solution of more advanced markets (let aside possible differences in terms of regulatory philosophy). Dears of Southern States how that would hamper their development prospects is also to some extent understandable. At the same time certain states apprehended that a breach in the jurisdictional immunity would be used to execute jurisdiction over acts of nationalisation or expropriation. Although the latter constitutes emanation of public au-

thority, the *Hoffmann v. Jiri Dralle* shows that such effect cannot be excluded entirely.

Not undermining those concerns, the restrictive tendency appears morally and economically justified, coherent with development of individual human rights, and – in world acting according to cooperative rather than competitive logics – politically potentially very promising. Awaiting advancements in this respects one shall not, however overlook the perils (or cheer too hastily) stemming from unjustified much more restrictive approach to immunities from execution. While a claimant currently are likely to initiate proceedings against the State, even despite opposition of the latter, chances for an involuntary enforcement are much smaller, which somewhat undermines what has been achieved so far in the quest for greater legal security.

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***Резюме***

*Целью текста было предоставить обзор того, каким образом функционирует институт государственного иммунитета в процессуальных действиях в отношении нарушений прав интеллектуальной собственности.*

*Главным поводом для ограничения государственного иммунитета в делах, вытекающих из нарушения прав собственности, является поднятие уровня справедливости и безопасности, что снижает транзакционные расходы в международной торговле. Несмотря на то, что локализованные акты нарушений происходят внутри страны – их влияния на экономическое равновесие может быть значительно шире.*

***Ключевые слова:*** иммунитет государства, нарушения прав интеллектуальной собственности

