EXECUTING JUDGMENTS AGAINST "MIXED" COMMERCIAL AND NON-COMMERCIAL EMBASSY BANK ACCOUNTS IN THE UNITED STATES: WHERE SOVEREIGN AND DIPLOMATIC IMMUNITIES CLASH

MICHAEL D. SMITH*

1. INTRODUCTION

When a creditor wins a judgment against a foreign government, the creditor’s task does not end. The sovereign and diplomatic immunity of foreign governments may make it difficult or impossible to execute the judgment against the state’s property. In theory, a creditor should be able to execute a judgment against state property used for commercial purposes, but not for property used for sovereign or diplomatic purposes. In practice, the distinction may not be clear. If the only available property is a bank account in the name of the embassy, the creditor is at a distinct disadvantage in trying to prove that the account is used for commercial purposes and thus subject to execution.

One United States district court recently held that, when an embassy bank account is used for “mixed” commercial and non-commercial purposes, the burden is on the party attempting execution to show that the “essential character” of the account is non-commercial before execution is allowed.1 Because the embassy’s diplomatic immunity severely restricts discovery concerning the use of the embassy account, this holding makes it all but impossible for a creditor to execute a judgment on such an account without the consent of the foreign government.2

Section 1 of this Comment will explore the problem of executing judgments against such “mixed” embassy bank accounts and will pro-

2 See infra text accompanying note 157.
pose a new approach to the treatment of sovereign and diplomatic immunity in this area. Section 2 will explain the development of sovereign and diplomatic immunity in the United States. Section 3 will show how the United States has applied these principles to execution on embassy bank accounts, where these two doctrines overlap. Section 4 will propose a new standard for such execution which will better reflect both the sovereign and diplomatic principles at stake.

2. **SOVEREIGN AND DIPLOMATIC IMMUNITY DISTINGUISHED**

Sovereign and diplomatic immunity can both prevent an otherwise valid suit from proceeding when a foreign government or its agent is the defendant. The two doctrines are, however, distinct in their meaning, purpose and application.

Sovereign immunity is "a doctrine of international law under which domestic courts, in appropriate cases, relinquish jurisdiction over a foreign state." This rule is based on the proposition that all states are equal as sovereigns, and it has been subject to an increasing number of exceptions. In particular, this doctrine becomes confused when an arm of the state, rather than the state itself, tries to claim immunity. Courts have historically given foreign states two independent immunities under this principle: immunity from the jurisdiction of the court and immunity from execution of state property on an otherwise valid judgment.

A foreign state can waive its sovereign immunity, but the standards for such waiver differ from country to country. In the United States, this waiver can be expressly stated in a contract, generally stated in a treaty, or can be assumed from surrounding circumstances, such as submission to the jurisdiction of a court. Most countries hold

---


4 The term can also be applied to a state's immunity from suits brought by its own citizens, not addressed in this Comment, because "the king can do no wrong." See, e.g., Jacobs, The Eleventh Amendment and Sovereign Immunity, at 151-52 (1972). By combining the doctrines that "the king can do no wrong" and "all states are equal as sovereigns," it thus follows that a state cannot be sued in its own courts nor in a foreign court without its consent.

5 See infra note 24 and accompanying text.

6 See infra notes 46-64.

7 A clause in the contract agreeing to arbitration would constitute such a waiver. See Restatement (Third) of the Foreign Relations Law of the United States § 446(2)(b) (1988) [hereinafter Restatement].


9 This can take place either before or after the suit arises. Restatement, supra
that the sovereign loses its jurisdictional immunity when the sovereign "descends from the throne" and engages in commercial activity. In certain cases, a waiver of jurisdictional immunity implies a waiver of executional immunity, while in other cases it does not. Diplomatic immunity is based on the exchange of embassies between countries and generally means that diplomats can be subject neither to criminal suit nor to most kinds of civil suits without the consent of the foreign sovereign. This immunity attaches to such diplomatic personnel and property as an embassy. Diplomatic immunity therefore precludes execution on most types of diplomatic property. Some countries consider embassy bank accounts diplomatic property, at least when the accounts are used for diplomatic purposes.

Sovereign immunity in the United States is governed by treaties, the Foreign Sovereign Immunities Act of 1976 (FSIA), and common law. Diplomatic immunity is based on the Vienna Convention on Diplomatic Relations and common law.

2.1. Sovereign Immunity

Sovereign immunity began as an absolute doctrine in the United States, as it did in most countries. A foreign sovereign could not be sued nor its property executed upon in the United States under any circumstances. United States courts historically deferred the decision whether or not to grant sovereign immunity to a foreign government

---

20 See infra text accompanying notes 79-129 for a discussion of the "commercial activities" exception.
21 See, e.g., ESTA, supra note 7, at § 446(2)(b)(ii).
22 Id. at §§ 456(1)(b).
24 Its purpose, however, is not to benefit individuals. Id., Preamble, 23 U.S.T. at 3230.
25 Id. art. 22, 23 U.S.T. at 3237-38.
29 See, e.g., MacArthur Area Citizens Assoc., v. Republic of Peru, 809 F.2d 918, 920 (D.C. Cir. 1987).
30 Vienna Convention, supra note 13.
entity\textsuperscript{24} in individual cases to the United States Department of State.\textsuperscript{26}

In 1956, the State Department issued the Tate Letter,\textsuperscript{26} which stated that claims against foreign governments arising out of political acts (\textit{jure imperii}) were entitled to jurisdictional immunity, while those arising out of the sovereign’s commercial activities (\textit{jure gestionis}) were not entitled to such immunity.\textsuperscript{27} Much of the world already employed this doctrine.\textsuperscript{28} However, a state’s right to have its property immune from the execution of a valid judgment (executional immunity) was not addressed in the Tate Letter.\textsuperscript{29} For the next quarter century, the State Department and the courts generally clung to the view that a state could assert immunity from execution on that property used for its commercial acts.\textsuperscript{30}

\textsuperscript{24} The foreign government itself is not the only entity that can claim immunity under the doctrine. Often, a state instrumentality can claim immunity as well.

The [FSIA] draws a sharp distinction for purposes of post-judgment attachment and execution between the property of states and the property of state instrumentalities: 1) the property of states may be attached only if it is or was used in commercial activity; the property of state instrumentalities may be attached without any such limitation, so long as the instrumentality itself is engaged in commercial activity in the United States; and 2) the property of states may be attached only when it is related to the claim that gave rise to the judgment; no such limitation applies to judgments against state instrumentalities based on claims under . . . §1605(a)(2),(3), & (5) of FSIA. These distinctions stem from the conception that state instrumentalities that engage in commercial activities are by definition akin to commercial enterprises, so that their immunity is exceptional and limited, whereas the primary function of states is government so that their liability (including amenability to post-judgment attachment) is limited (absent waiver) to particular claims and particular property.

\textit{Restatement, supra} note 7, at § 450 comment (b).

\textsuperscript{26} Jack B. Tate, Counsel to the State Department, states in a letter to Attorney General Phillip Perlman,

It is realized that a shift in policy by the executive cannot control the courts but it is felt that the courts are less likely to allow a plea of sovereign immunity where the executive has declined to do so. There have been indications that at least some Justices of the Supreme Courts feel that in this matter courts should follow the branch of government charged with the responsibility for the conduct of foreign relations.

Tate, \textit{Changed Policy Concerning the Granting of Sovereign Immunity to Foreign Governments, DEPT OF STATE BULL. 984, 985 (1952) .

\textsuperscript{29} Id. at 984-85. Note, however, that the whole world does not follow the restrictive doctrine even today. \textit{See infra} notes 113-25 and accompanying text.

\textsuperscript{27} Id.

\textsuperscript{28} Id. at 984 (The question at issue in the letter was “[w]hether the practice of the Government in granting immunity \textit{from suit} to foreign governments made parties defendant in the Courts of the United States should not be changed?” [emphasis added]).

The United States Congress passed the FSIA in 1976, in an attempt, inter alia, to reduce the State Department’s role in the determination of sovereign immunities. The statute left the court some latitude in determining immunity under the Act. One of the four major goals of the statute was to make the executional immunity rules more closely parallel the jurisdictional immunity rules and to give the judgment creditor a remedy if the foreign government did not pay a valid judgment. The FSIA thus listed a single definition of “commercial activity” for the exceptions to both jurisdictional immunity and to immunity from execution. The Act did not address diplomatic

32 Id.
33 Id. at 8, 1976 U.S. CODE CONG. & ADMIN. NEWS at 6608. The other three stated goals are: 1) to codify the restrictive theory of diplomatic immunity; 2) to ensure that the restrictive theory is applied in the United States courts, and 3) to provide a statutory procedure for serving process and establishing jurisdiction over a foreign state. Id. at 7-8, 1976 U.S. CODE CONG. & ADMIN. NEWS at 6605-06.
34 The full definition is:

A ‘commercial activity’ means either a regular course of commercial conduct or a particular commercial transaction or act. The commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose.

28 U.S.C. § 1603 (d). The jurisdictional immunity exception for commercial activity reads:

(a) A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case

... (2) in which the action is based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere ... and that act causes a direct effect in the United States.

28 U.S.C. § 1605. The commercial activity exception from executional immunity is more complicated. It reads:

(a) The property in the United States of a foreign state ... used for a commercial activity in the United States, shall not be immune from attachment in aid of execution, or from execution, upon a judgment entered by a court of the United States or of a state ... if-

(1) [the foreign state has explicitly or implicitly waived its executional immunity], or

(2) the property is or was used for the commercial activity upon which the claim is based, or

(3) [the property was taken in violation of international law, the property was acquired by succession or gift or liability insurance was involved].

(b) In addition to subsection (a), any property in the United States of an agency or instrumentality of a foreign state engaged in commercial activity in the United States shall not be immune from attachment in aid of execution, or from execution, upon a judgment ... if-
immunity.\textsuperscript{35}

United States courts, however, still do not follow the restrictive
document regarding execution on embassy bank accounts to the same ex-
tent that they apply the restrictive doctrine to jurisdictional immunity.\textsuperscript{36}
Also, the courts permit execution on other state property more freely
than on embassy accounts. One reason for these differences in treat-
ment is that diplomatic immunity often prevents execution on embassy
bank accounts. Courts have looked to the wording of the Vienna Conven-
tion and concluded that affording "full facilities" to a foreign em-
bassy must include protecting its embassy bank accounts from execu-
tion.\textsuperscript{37} As will be shown below, however, international law does not
necessitate this result.\textsuperscript{38} This Comment proposes a standard that is con-
sistent with generally accepted international law without prohibiting
execution on all such accounts.\textsuperscript{39}

Several treaties suggest that executional immunity should gener-
ally be governed by domestic law, while jurisdictional immunity should
be more responsive to international law.\textsuperscript{40} For instance, the Convention
on the Settlement of Investment Disputes Between States and Nationals
of Other States,\textsuperscript{41} to which the United States is a party, established a
means for international arbitration through a central commission.\textsuperscript{42} It
specifically stated, however, that "[e]xecution of the award shall be gov-
erned by the laws concerning the execution of judgments in force in the
State in whose territories such execution is sought."\textsuperscript{43}

\begin{enumerate}
\item [(1)] [the foreign state explicitly or implicitly waived its executional immu-
nity], or
\item [(2)] the judgment relates to a claim for which the agency or instrumentality
is not immune [because of the commercial activity exception for jurisdic-
tional immunity, rights were taken in violation of international law, cer-
tain torts were committed or a maritime lien is being enforced].
\end{enumerate}

Cong. & Admin. News} 6604, 6606.
\textsuperscript{36} \textit{See infra} notes 46-71 and accompanying text.
\textsuperscript{37} \textit{LETCO}, 659 F. Supp. 606, 608 (D.D.C. 1987). This was the actual holding of the
\textit{LETCO} court. The court noted that "Congress did not intend the FSIA to affect
diplomatic immunity under the Vienna Convention," because the FSIA was not explicitly
made subject to existing international agreements." \textit{Id.} n. 3.
\textsuperscript{38} \textit{See infra} notes 113-142 and accompanying text.
\textsuperscript{39} \textit{See infra} notes 149-169 and accompanying text.
\textsuperscript{40} This approach parallels that taken by the federalist legal system of the United
States, whereby the execution even of a judgment entered under federal law is, gener-
ally, governed by state law.
\textsuperscript{41} Investment Convention, \textit{supra} note 17.
\textsuperscript{42} \textit{Id.} art. 1, 17 U.S.T. at 1273, 575 U.N.T.S. at 12.
\textsuperscript{43} \textit{Id.} art. 54(3), 17 U.S.T. at 1292, 575 U.N.T.S. at 194. \textit{LETCO} involves a
judgment under this treaty. \textit{See infra} note 93.
One commentator suggested that a court proceeding leading to a judgment does not have to affect the foreign state, while execution of a judgment does, because a state need not appear and defend itself in a particular action. Therefore, executional rules can be more narrowly drawn than jurisdictional immunity rules. Where the executional immunity rules are not clear, however, it may be a great risk to the state not to defend an action in court.

2.2. The Restrictive Immunity Doctrine

2.2.1. History

United States courts have traditionally given an expansive reading to the commercial jurisdictional immunity exception, and the FSIA has expanded that reading even further. Prior to the passage of the FSIA, the restrictive immunity in this area was governed by the Second Circuit Court of Appeals' decision in Victory Transport v. Comisaria General. The court held that, in the absence of State Department guidance, "we are disposed to deny a claim of sovereign immunity... unless it is plain that the activity in question falls within one of the categories of strictly political or public acts about which sovereigns have traditionally been quite sensitive." If one of these activities is in question, the foreign state is entitled to immunity. The purpose of the activity is determinative.

The FSIA, however, merely looks to the nature of the act to decide if a classification scheme is "commercial" or not and in this manner

---

45 The risk is that the state may subject itself to a default judgment.
46 Victory Transport v. Comisaria General, 336 F.2d 354 (2d Cir. 1964).
47 Id. at 360. The court went on to say:

such acts are generally limited to the following categories:
(1) internal administrative acts, such as expulsion of an alien.
(2) legislative acts, such as nationalization.
(3) acts concerning the armed forces.
(4) acts concerning diplomatic activity.
(5) public loans.

We do not think that the restrictive theory adopted by the State Department requires sacrificing the interests of private litigants to international comity in other than these limited categories. Should diplomacy require enlargement of these categories, the State Department can file a suggestion of immunity with the court. Should diplomacy require contraction of these categories, the State Department can issue a new or clarifying pronouncement.

---
rejects this "purpose" test. The statute says that if a commercial activity is in question, the foreign sovereign is not entitled to immunity. Activity that is both commercial and sovereign would therefore not be entitled to immunity. Thus, as to those acts that have both public purposes and commercial means, the FSIA is a dramatic shift toward non-immunity.

2.2.2. The "Commercial Activity" Exception to Jurisdictional Immunity

The test adopted by the FSIA to determine whether an act is sovereign or commercial is whether or not a private person could engage in the activity. If a private person could engage in the activity, then the act must be considered commercial. If a private person is unable to engage in the activity, then it must be a sovereign act.

This distinction, however, still gives courts much latitude in interpretation. A court’s decision to define the particular transaction or act broadly or narrowly can determine whether the "act" is sovereign or commercial. For instance, an act of hiring governmental employees can be seen as the "hiring of employees," an activity which a private person could engage in, or as the "employment of diplomatic, civil service or


[Under the Victory Transport scheme] any act 'concerning the armed forces' and any 'public loans' are 'political and public' acts because of their purpose while 'legislative acts' are such because of their nature ... Finally, if it is accepted that what is 'commercial' cannot be 'political and public,' it must be concluded that Congress specifically rejected the judicial classification of Victory Transport. It clearly said that acts concerning the armed forces ... and public loans, two of the five judicial categories of public acts delineated by Victory Transport, were not public but commercial acts. However, there is no logical necessity for making the categories of 'commercial acts' and 'political and public acts' mutually exclusive. Thus, in adopting the 'commercial act' standard for non-immunity coupled with the nature test for defining commercial acts, it would seem that Congress intended to provide for jurisdiction with respect to all commercial acts by foreign sovereigns, even if those acts were 'political and public acts' within the Victory Transport classification.

Id. (footnotes omitted).

See supra note 34, where the definition of "commercial activity" under the act is spelled out.

60 H.R. REP. NO. 1487, 94th Cong., 2d Sess. 16, reprinted in 1976 U.S. CODE CONG. & ADMIN. NEWS 6604, 6615. This test applies to a single act, as distinguished from a "regular course of commercial conduct." Id.
61 Id.

62 See id.
military personnel,” which is strictly a governmental activity. United States courts have looked to the legislative intent of the FSIA and the specific facts of each case in determining whether or not to accord sovereign immunity to such acts.

In International Association of Machinists v. Organization of Petroleum Exporting Countries (OPEC), a district court allowed jurisdictional sovereign immunity concerning the price fixing and output limitations of the state-owned oil companies of OPEC. The court said that even though the defendant nations were engaged in commercial activities through partial or total ownership of these oil companies, “this does not mean, and the legislative intent [of the FSIA] does not support the conclusion that all activities, even those remotely connected with these companies, are necessarily commercial. The court found that the pricing agreement was a sovereign act of marketing the wealth and natural resources of a nation.

In other areas, however, United States courts have given a broad reading to the commercial activities exception to jurisdictional immunity. For example, when the United States and the Soviet Union entered into a cultural exchange agreement, a United States district court determined that contracts entered into pursuant to that agreement with promoters were “commercial” because they involved the sale of a service. Their overall purpose of fulfilling the exchange agreement was not determinative. Apparently, the court placed the burden on the foreign state to prove that the commercial activity exception did not

55 Id. at 567.
56 Id. at 568 n.14. The court also posed the following hypothetical:

The fact that a nation owns and operates an airline company does not mean that all government activities regulating the use of airspace, or the ingress and egress of airplanes to and from the nation's airports, are commercial activities. Accordingly, we must look to the specific activities in which the defendants engage.

57

From the evidence presented to this court, it is clear that the nature of the activity engaged in by each of these OPEC member countries is the establishment by a sovereign state of the terms and conditions for the removal of a prime natural resource - to wit, crude oil - from its territory.

apply.\textsuperscript{60} In \textit{Gibbons v. Udaras na Gaeltachta}, a governmental scheme that allowed investors to take advantage of certain existing tax laws was considered "purely commercial."\textsuperscript{61}

Even in the context of embassies, United States courts have read the commercial activity exception to jurisdictional immunity broadly. In \textit{Transamerican Steamship v. Somali Democratic Republic (SDR)},\textsuperscript{62} a government agent used an embassy as a conduit for settling a dispute with a merchant.\textsuperscript{63} A United States district court held that, although the embassy could be viewed as protecting its government's interests, "its conduct exceeded the bounds of ordinary diplomatic behavior."\textsuperscript{64}

\subsection*{2.2.3. The "Commercial Activity" Exception and Executional Immunity}

The FSIA does distinguish between immunity from jurisdiction and immunity from execution.\textsuperscript{65} Yet the legislative history of the FSIA suggests that there was considerable support in international law for a restrictive approach to executional immunity even when the United States, through the suggestion of the State Department, still followed the absolute immunity approach.\textsuperscript{66} For example, state-owned ships

---

\textsuperscript{60} See id. at 610, 611 (defendants' motion for dismissal on grounds of immunity denied because defendants failed to show that the statutory "commercial activity" exception did not apply to them).

\textsuperscript{61} Gibbons v. Udaras na Gaeltachta, 549 F.Supp. 1094, 1110 n.6 (S.D.N.Y. 1982). The court said that it need not decide the difficult question of the jurisdictional result that would flow from a mixed commercial non-commercial activity such as would have existed here if GE, instead of being an entity designed to enable potential investors to take advantage of certain favorable Irish tax laws, had been given its own de facto law-making power in order to offer prospective investors special tax incentives as part of GE's contribution to a joint venture.

\textit{Id.}

\textsuperscript{62} Transamerican Steamship v. Somali Democratic Republic, 767 F.2d 998 (D.C. Cir. 1985).

\textsuperscript{63} Pending the resolution of this essentially private dispute, the shipowner placed money in the embassy's bank account in order to release its ship from attachment. \textit{Id.} at 1000-01.

\textsuperscript{64} \textit{Id.} at 1003 ("Taken together, SDR's activities were essentially those of a collection agent, acting on behalf of its principal, the Agency, to wrest funds from an unwilling payor - and not that of a foreign sovereign diplomatically attempting to maintain friendly relations."

\textsuperscript{65} Also note that the FSIA eliminated the ability (and most of the necessity) of a creditor to attach foreign state property as a means of obtaining jurisdiction. § 1610 only carves out exceptions to the general principle of executional immunity, not for pre-judgment attachment.


\textsuperscript{66} A number of treaties of friendship, commerce and navigation concluded
could often be executed upon when the ships were engaged in commercial activities. However, those same treaties have often simultaneously limited the possibility of execution to those debts that the ship itself had incurred.

Congress, in passing the FSIA, decided to "partially [lower] the barrier of immunity from execution, so as to make this immunity conform more closely with the provisions on jurisdictional immunity in the bill." Courts have held, in actions under the FSIA, that wholly-owned "subsidiaries" of a government are not responsible for the debts of their government, unless the failure to hold them responsible would perpetrate a fraud. This lowering of the barriers, however, has not reached the embassy bank account context.

2.3. Diplomatic Immunity

The Vienna Convention on Diplomatic Relations is often cited as a justification for granting embassy bank accounts diplomatic immunity from execution, even when jurisdictional immunity has been waived. In this area, however, the Convention is vaguely worded and subject to several possible interpretations. Article 25 of the Convention merely states that the state receiving an embassy "shall accord full facilities for the performance of the functions of the mission."

There is some support in the Convention for distinguishing between the jurisdictional and executional immunity of a diplomatic

by the United States permit execution of judgments against foreign publicly owned or controlled enterprises (for example, Treaty with Japan, April 2, 1953, art. 18(2), 4 U.S.T. 2063, T.I.A.S. No. 2863). The widely ratified Brussels Convention for the Unification of Certain Rules relating to the Immunity of State-Owned Vessels, April 10, 1926, 196 L.N.T.S. 199, allows execution of judgments against public vessels engaged in commercial services in the same way as against privately-owned vessels.


67 Id.

68 See, e.g., Convention on the Territorial Sea and the Contiguous Zone, Apr. 29, 1958, art. 20.2, 15 U.S.T. 1606, 1612, T.I.A.S. No. 5639, 516 U.N.T.S. 205, 218. ("The coastal state may not levy execution against or arrest the ship for the purpose of any civil proceedings, save only in respect of obligations or liabilities assumed or incurred by the ship itself in the course or for the purpose of its voyage through the waters of the Coastal State.")


70 See, e.g., Letelier v. Republic of Chile, 748 F.2d 790, 799 (2d Cir. 1984).


72 Supra note 13.

agent. There is even support for exempting the ambassador's personal bank account, as opposed to the government's embassy account, from execution. There is not, however, such specificity in the area of state-owned money. Nevertheless, both British and United States courts have decided that the Convention exempts embassy accounts from execution.

3. Present Treatment of "Mixed" Embassy Bank Accounts

3.1. United States Treatment

In 1980, the District Court for the District of Columbia held, in

---

74 Article 31 of the Convention states that a diplomatic agent cannot be subjected to measures of execution, except in cases of immovable property, wills, or "an action relating to a professional or commercial activity exercised by the diplomatic agent in the receiving State and outside his official functions" and provided that the measures of execution can be taken without infringing the inviolability of his person or of his residence.

Vienna Convention, supra note 13, art. 31. The commentaries to the proposed article (then article 24(3)) state:

The third exception arises in the case of proceedings relating to a professional or commercial activity exercised by the diplomatic agent outside his official functions. If the diplomatic agent engages in such an activity, those with whom he has had dealings in so doing cannot be deprived of their remedy at law.


76 Article 30 of the Convention states:

1. The private residence of a diplomatic agent shall enjoy the same inviolability and protection as the premises of the mission. 2. His papers, correspondence and, except as provided in paragraph 3 of Article 31, his property, shall likewise enjoy inviolability.

Vienna Convention, supra note 13, art. 30. The commentary to that section when proposed (as Section 23) stated:

As regards movable property, the inviolability primarily refers to goods in the diplomatic agent's private residence; but it also covers other property such as his motor car, his bank account, and other goods which are for his personal use, or essential to his livelihood.

Report of the Commission, supra note 74, at 139 [emphasis added].


Transposed into its negative form: neither the executive nor legal branch of government in the receiving State - and enforcement of judgments of courts of law is a combined operation of both these branches - must act in such manner as to obstruct the mission in carrying out its functions.

Vienna Convention, supra note 13, art. 25.

Birch Shipping v. Embassy of United Republic of Tanzania,\(^79\) that an embassy account "used to pay the salaries of the staff, [or to] pay for incidental purchases and services necessary to the operation of the embassy," had neither a public nor governmental character.\(^80\) The ambassador's affidavit called these uses "incidental purchases of goods and services necessary and incident to the operation of the embassy."\(^81\)

The district court, however, reasoned that Congress intended that the definition of "commercial activity" in the FSIA would include such uses. The court found specific support for this proposition in the legislative history of the FSIA.\(^82\) Because the account was used for commercial activity, the court said that "[t]he only significant question [was] whether it is proper to attach an account which is not used solely for commercial activity."\(^83\) The court thought that granting the defendant immunity would create a loophole, allowing such an account to be made immune simply "by using it, at one time or another, for a minor public purpose."\(^84\) Thus, any of the country's funds could be placed in the embassy account and be exempted from execution. Further, the government of Tanzania had expressly agreed in the disputed contract to arbitration and to execution of any award.\(^85\)

In 1987, the same court overturned its prior decision, and, in Liberian Eastern Timber Corp. [LETCO] v. Government of the Republic of Liberia,\(^86\) held that a similar embassy bank account which an ambassador claimed was used, inter alia, for "payment of salaries and wages of diplomatic personnel and various ongoing expenses incurred

---


\(^{80}\) Id. at 312.

\(^{81}\) Id. at 312 (emphasis omitted).

\(^{82}\) Id. The court pointed to the parts of the legislative history which specifically included "the employment of American citizens or third country nationals by the foreign state in the United States[,] . . . [a foreign government's] leasing of property, [and] its employment or engagement of laborers, clerical staff or public relations or marketing agents" in the definition of "commercial activity." Id. at 312-13 (citing H.R. REP. No. 1487, 94th Cong., 2d Sess. 16, reprinted in 1976 U.S. CODE CONG. & ADMIN. NEWS 6604, 6615).

\(^{83}\) Id. at 313.

\(^{84}\) Id.

\(^{85}\) Id. at 312. The arbitration agreement in Birch stated: "We further agree that we will faithfully observe this Agreement and the Rules and that we will abide by and perform any Award rendered pursuant to this Agreement and that a judgment of the Court having jurisdiction may be entered upon the Award." Id. (quoting Parties' Submission to Arbitration, at 3). The court stated that "while an agreement to entry of judgment reinforces any waiver, an agreement to arbitrate, standing alone, is sufficient to implicitly waive immunity, as was recognized by Congress." Id. (citing H.R. REP. No. 1487, 94th Cong., 2d Sess. 18, 28, reprinted in 1976 U.S. CODE CONG. & ADMIN. NEWS 6604, 6617, 6627).
in connection with diplomatic and consular activities" was immune from execution.

The court first held that under the Vienna Convention, official bank accounts used for the premises of the mission were inviolable because of diplomatic immunity. As noted above, this finding is neither required by the wording of the Convention nor by its history.

The court, however, also stated that the accounts could enjoy sovereign immunity under the FSIA. Though conceding that some of the embassy’s activities would be “commercial,” “the court decline[d] to order that if any portion of a bank account is used for a commercial activity then the entire account loses its immunity.” Instead, it held that “funds used for commercial activities which are ‘incidental’ or ‘auxiliary,’ not denoting the essential character of the use of the funds in question,” would not create an exception to the general rule of immunity from execution. The court made this finding despite the fact that the Liberian government had agreed to an arbitration scheme that included a waiver of immunity from execution.

The “incidental” or “auxiliary” provisions test developed from two United States Court of Appeals decisions concerning jurisdictional immunity which were decided between the district court’s decisions in Birch and LETCO. The LETCO court cited the Second Circuit Court of Appeals in Texas Trading & Milling Corp. v. Federal Republic of Nigeria for the proposition that courts have difficulty determining

---

87 Id. at 610.
88 Although no provision of the Vienna Convention states specifically that official bank accounts used or intended to be used for purposes of the diplomatic mission enjoy diplomatic immunity from attachment, the Court concludes that not affording diplomatic immunity to the Embassy’s bank accounts, despite the absence of such a specific provision, is inconsistent with both the agreement set forth in Article 25 [requiring the receiving state to accord the sending state “full facilities” for the performance of its mission] and the intention of the parties to the Vienna Convention.

Id. at 608. The court seems to have deduced this conclusion from the fact that under the Convention immovable property, archives, and documents are immune wherever they may be. Id. See supra notes 73-78 and accompanying text (discussing immunity under the Vienna Convention).
89 See supra notes 74-76 and accompanying text.
90 LETCO, 659 F. Supp. at 608.
91 Id. at 610.
92 Id.
93 Id. at 609. The D.C. District Court action deferred on this issue to the finding of the District Court Southern District of New York in Liberian Eastern Timber Corp. v. Gov’t of the Republic of Liberia, 650 F. Supp. 73, 76-77 (S.D.N.Y. 1986). LETCO, 659 F. Supp. at 76. The District Court for the Southern District of New York stated that the dispute should be subject to arbitration according to the terms of the Investment Convention, supra note 17.
94 647 F.2d 300 (2d Cir. 1981).
whether or not funds are public or commercial in nature. The Texas Trading court had observed, however, that in making the distinction courts can look to the legislative history of the FSIA, the body of case law which existed in United States law upon passage of the FSIA, and to current standards of international law. The court then held that a state which had engaged in a massive international cement purchase program, the ultimate purpose of which may have been sovereign activity, was not entitled to jurisdictional immunity.

The LETCO court also cited the opinion of the District of Columbia Circuit Court of Appeals in Practical Concepts, Inc. v. Republic of Bolivia for the proposition that "incidental" or "auxiliary" commercial aspects of an activity would not destroy the sovereign jurisdictional immunity of the entire activity. In Practical Concepts, a foreign government had contracted with a private consulting enterprise to design and implement a program for the ultimate sovereign goal of developing the country’s rural areas. The contract’s subsidiary provisions included exempting the company from taxes and expediting the clearance of supplies through customs. The court nevertheless found that the contract’s central feature was the provision of a service, a commercial activity, and declined to extend jurisdictional immunity to Bolivia.

In this way the Court of Appeals indicated that it would not allow a foreign government to gain immunity from jurisdiction by tying essentially commercial contracts to an overall sovereign goal or mixing in some provisions that are sovereign in nature. The district court in LETCO, however, adopted the opposite view in the executional immunity context and allowed "some portion" of the funds of an exempt embassy bank account to be used for commercial activities which the FSIA specifically states would fall under an executional immunity exception.

---

95 LETCO, 659 F. Supp. at 610 (citing Texas Trading, 647 F.2d at 308-10).
96 Texas Trading, 647 F. 2d at 309-10.
97 See id. at 302-03 (summarizing finding of no sovereign immunity for nation defending against allegations of breach of contract for purchase of cement, "a commodity crucial to the construction of Nigeria's infrastructure"). The court found that the program qualified under the FSIA as "commercial activity," id. at 310, having a "direct effect on the United States," id. at 311-13, and that a constitutional basis existed for the exercise of U.S. jurisdiction over Nigeria. Id. at 313-15.
98 811 F.2d 1543 (D.C. Cir. 1987).
99 LETCO, 659 F. Supp. at 610.
100 Practical Concepts, 811 F.2d at 1545.
101 Id. at 1549-50.
102 Id. at 1550.
103 LETCO, 659 F. Supp. at 610. It is unclear from the opinion what portion of the funds were used for that activity, and the court believed it would cause the embassy
The LETCO approach thus contravenes the essence of the Practical Concepts holding. Practical Concepts demonstrates that an overall sovereign goal need not always take precedence over the commercial features of an activity, despite the government's claims concerning the essential sovereign character of that activity. LETCO, on the other hand, leaves an almost irrebuttable presumption that because a bank account is held in the name of the embassy and an ambassador alleges that the account has diplomatic goals, the account is immune. 104

The different factual nature of the Birch and LETCO cases, however, may have led to the extraordinarily different results. In Birch, the underlying dispute involved a contract for corn which the United States Department of Agriculture had funded. 105 The parties agreed to submit their dispute to arbitration and agreed that a court judgment could be entered upon any arbitration award. 106 The arbitration panel awarded plaintiff shipowner $89,168.56. 107 It is difficult to imagine that an award of this size would bankrupt an embassy.

In LETCO, the plaintiff was a French corporation suing the Liberian government for a timber concession in Liberia. The dispute had no connection to the United States aside from the location of the embassy account. 108 An international arbitration panel claimed jurisdiction by virtue of a quasi-arbitration treaty 109 that Liberia, France and the United States had signed, and the panel granted LETCO a judgment of $9,076,857.25. 110 Liberia disputed the jurisdiction of the arbitration panel, but the treaty left the domestic court no other choice than to accept the panel's determination of jurisdictional sovereign immunity. 111 LETCO had previously attempted, unsuccessfully, to enforce the arbitration award by attaching, among other assets, fees due the government from owners of ships registered in Liberia. 112 The different nature of these awards may have had a strong influence on the LETCO court's view of sovereign immunity. As will be shown below, however, the court did not need to make such a sweeping rule in order to allow

---

104 The presumption is practically irrebuttable due to the permissible level of discovery against a foreign government. See infra note 159 and accompanying text.

105 Birch, 507 F. Supp. at 311.

106 See supra note 85 and accompanying text.

107 Birch, 507 F. Supp. at 311.


109 See supra note 93.

110 LETCO, 659 F. Supp. at 607.

111 See Investment Convention, supra note 17, art. 54, 17 U.S.T. at 1291, 575 U.N.T.S. at 194.

immunity in *LETCO*.

### 3.2. International Treatment of Embassy Bank Accounts

The rules of international law regarding sovereign immunity have changed drastically in the last fifty years. This revolution has caused many countries to change their views concerning what types of activities are exempt from legal process under this doctrine. Today, therefore, some countries recognize more exceptions to immunity than others. For instance, a survey by the United Nations in 1982 indicates that Brazil, Czechoslovakia, Hungary, Sudan, Syria, Trinidad and Tobago, the Soviet Union, and Venezuela still cling to the principle of absolute immunity of the sovereign from both jurisdiction and execution. Furthermore, even those states that follow the theory of restrictive immunity use different categories of “restrictions.” Thus, although some judges claim to find support in international law for their restrictive sovereign immunity principles in this area, there is no

---

113 See infra notes 159-62 and accompanying text.

114 In the last 50 years there has been a complete transformation in the functions of a sovereign state. Nearly every country now engages in commercial activities. It has its departments of state—or creates its own legal entities—which go into the market places of the world. They charter ships. They buy commodities. They issue letters of credit. This transformation has changed the rules of international law relating to sovereign immunity.


116 *Id.* at 564.

117 *Id.* at 576.

118 *Id.* at 601.

119 *Id.* at 605.

120 *Id.* at 611.

121 *Id.* at 617.

122 *Id.* at 639.

123 For instance, West Germany phrases its distinction regarding immunity as one of “public acts” versus “non-public acts,” apparently looking to the purpose of the activity, *id.* at 571, as does Spain, *id.* at 599. Egypt points to “commercial or sovereign acts,” *id.* at 569, while Mexico points to “trade activities.” *Id.* at 584. These may seem consistent; indeed, the distinction is such that, when posed the question, “[I]n a dispute relating to a contract of purchase of goods, would courts of your State be expected to grant immunity to a foreign State which establishes that the ultimate object of the contract was for a public purpose or the contract was concluded in the exercise of a ‘public’ or ‘sovereign’ function?” Ecuador responded, “Yes,” *id.* at 568, while the Netherlands responded “In principle, no.” *Id.* at 588. Both countries purport to follow the “restrictive” theory of immunity.

consensus even on the broad concept of restrictive jurisdictional immunity\textsuperscript{125} enunciated in the Tate Letter.\textsuperscript{126}

In the United States, only one federal district court has determined that a "mixed" bank account is usually immune from execution of a valid judgment against the state.\textsuperscript{127} The British House of Lords\textsuperscript{128} and the West German Federal Constitutional Court\textsuperscript{129} have come to the same conclusion. The British and West German decisions, however, come from very different principles of the restrictive theory of sovereign immunity than the United States decision.

In the British case, \textit{Alcom Ltd. v. Republic of Colombia},\textsuperscript{130} an ambassador stated that the funds in his bank account were "not in use nor intended for use for commercial purposes but only to meet the expenditure necessarily incurred in the day to day running of the Diplomatic Mission."\textsuperscript{131} The House of Lords stated that despite the conslusionary language in the affadavit, the burden of proof was thereafter on the plaintiff to show that the account was almost entirely commercial.\textsuperscript{132}

---

\textsuperscript{125} James Crawford has pointed out that the words "private," "commercial," and "non-governmental" are often used to distinguish acts from "public," "non-commercial," or "governmental," but in addition to the fact that there is no consensus on which—if any—of these distinctions to use, none of these distinctions accurately reflects the judicial decisions being handed down in international cases. He suggests scrapping such broad categories and setting up more specific categories to be dealt with individually. Crawford, \textit{International Law and Foreign Sovereigns: Distinguishing Immune Transactions}, 54 Brit. Y.B. Int'l L. 75, 114 (1983). See also supra notes 126-142 and accompanying text.

\textsuperscript{126} Tate, supra note 25, at 984.

\textsuperscript{127} \textit{LETCO}, 659 F. Supp. at 610; see supra notes 86-93 and accompanying text.


\textsuperscript{129} Philippine Embassy Case, supra note 124, at 318.


\textsuperscript{131} \textit{Id.} at 604.

\textsuperscript{132} \textit{Id.}

Unless it can be shown by the judgment creditor who is seeking to attach the credit balance by garnishee proceedings that the bank account was earmarked by the foreign state solely (save for de minimus exceptions) for being drawn upon to settle liabilities incurred in commercial transactions, as for example by issuing documentary credits in payment of the price of goods sold to the state, it cannot, in my view, be sensibly brought within the crucial words of the exception for which section 13(4) provides.


The House of Lords held that by virtue of section 13(5) of the State Immunities Act the head of the mission's certificate that property is not in use or intended for commercial purposes is sufficient evidence of that fact unless the contrary is proved. The Colombian Ambassador had issued just such a certificate. \textit{Alcom}, [1984] App. Cas. at 604. Since the judgment creditor had failed to disprove the certificate, the Republic of Colombia was deemed entitled to succeed in its appeal. \textit{Id.} at 605.
The House of Lords noted, however, that Britain's counterpart to the FSIA, the State Immunities Act (SIA),138 "does not adopt the straightforward dichotomy between acta jure imperii and acta jure gestionis that had become familiar doctrine in public international law."134 The SIA creates individual exceptions to immunity135 and makes a clear distinction between jurisdictional and executional immunity. This separates the SIA from the FSIA.136

The West German Federal Constitutional Court similarly found that embassy bank accounts were immune from execution in West German courts.137 After a brief survey of the way the international community has handled executional immunity, the court stated that, while the "general rules of international law thus impose no outright prohibition on execution by the State of the forum against a foreign State, they do impose material limits on execution."138 The court concluded that an account whose purpose was "to cover the embassy's costs and expenses" was exempt from execution.139 West German courts have also found a

133 1978, ch. 33.
134 Alcom, [1984] App. Cas. at 600 ("... except that it comes close to doing so in section 14(2) in relation to the immunity conferred upon 'separate entities that are emanations of the state'.") (italics added in text).
136 Hazel Fox stated that

[the identification of State property liable to attachment is clearly made by the [British] 1978 Act a purposive one... It is to be noted that the U.S. Act has not adopted this approach but merely provides two lists, one of special occasions on which, despite the general prohibition, state property may be attached, and the other of certain types of property always immune from execution.

Fox, supra note 44, at 125.
137 In West Germany, international law forms part of the domestic law. Basic Law, art. 25, first sentence; Act concerning the Federal Constitutional Court, art. 83 (I), cited in Philippine Embassy Case, supra note 123, at 320.
138 Philippine Embassy Case, supra note 123, at 320-21. The court went on to point out that the general rule is that the agreement is that

property in the State of the forum which is used for sovereign purposes of the foreign State is not subject to execution. Occasional doubts - such as those which are mentioned in the statement of position by the Federal Government concerning the levying of execution on embassy accounts, but which the Federal Government itself does not share - cannot alter the fact that a general rule of international law does exist on that point. State practice, as evidenced in treaty practice, in legislation and in the decisions of national courts, and the international law literature are unanimous on this question... .

Id.
139 The full text of the court's statement is:

Forced execution of judgment by the state of the forum under a writ of
execution by a foreign State which has been issued in respect of non-sover-
sharp distinction between jurisdictional immunity and executory immunity.\textsuperscript{140}

An Austrian court, on the other hand, has held that there should be some room for a court to examine the use of the account in determining whether an embassy account should be immune. In Neustein \textit{v. Republic of Indonesia}, the court determined that the judiciary should examine whether or not the assets "serv[ed] private law purposes."\textsuperscript{141} It apparently required that the assets must exclusively serve sovereign purposes to be immune.\textsuperscript{142}

The differing treatment of embassy bank accounts by the United States, Great Britain, West Germany and Austria, shows the lack of consensus, even among nations following the restrictive immunity doctrine, regarding immunity from execution on "mixed" embassy accounts. There does appear to be a minimal level of executional immunity which has been established in international law: an account exclusively serving sovereign or diplomatic functions must be immune from execution. Each nation seems to have developed its own standard of how much "commercialization" shall be allowed in an account before it loses that immunity. Thus, international law should not prevent a United States court from adopting the new standard proposed below.\textsuperscript{143}

\begin{itemize}
  \item eign acts (\textit{acta jure gestionis}) of that State, on property of that State which is present or situated in the territory of the State of the forum is inadmissible without the consent of the foreign State if, at the time of the initiation of the measure of execution, such property serves sovereign purposes of the foreign State. Claims against a general current bank account of the embassy of the foreign state which exists in the state of the forum and the purpose of which is to cover the embassy's costs and expenses are not subject to forced execution by the State of the forum. This rule forms part of the federal law.

\textit{Id.} at 300.
\end{itemize}


\textsuperscript{142} \textit{Id.}

\textsuperscript{143} A British court thought that a change in interpretation of international law could be made by a lower court. The opinion stated:

I see no reason why we should wait for the House of Lords to make the change. After all, we are not considering here the rules of English law on which the House has the final say. We are interpreting the rules of international law. We can and should state our view as to those rules and apply them as we think best, leaving it to the House to reverse us if we are wrong.

4. Finding New Standard

4.1. The Problem with the Present Standard

There are three major problems with the LETCO approach to embassy bank account immunity. First, those who conduct business with an embassy presently have no assurance that their debts will be satisfied. This may hinder an embassy’s ability to purchase basic services and hinder a creditor’s ability to satisfy her debts. Second, the LETCO approach allows the foreign government to mix its non-embassy-related commercial funds with its diplomatic funds. This allows the foreign government to conduct commercial activity in this country with immunity by transacting business through the embassy. Finally, LETCO imposes a second obstacle for the judgment creditor to overcome when the foreign government has already consented to suit concerning a given activity. This may leave a creditor who thought she could get satisfaction in the United States courts unable to do so.

The restrictive theory of sovereign immunity balances two conflicting interests: those of individuals doing business with foreign sovereigns who wish to enforce their contracts in court, and those of foreign governments who desire to perform political acts without the embarrassment or hindrance of defending those actions in foreign courts. When one cannot execute a judgment, however, the foreign government has already gone through the “embarrassment and hindrance” of defending its action in court, but has not given individuals any redress there. “[W]hile an unenforceable judgment is not wholly useless, since it may act as a vehicle for moral suasion or as a springboard for settlement negotiations,” it ignores the policy behind the restrictive doctrine to allow stronger executional immunity than jurisdictional immunity.

Executional immunity, however, also serves diplomatic immunity purposes by providing a kind of bankruptcy protection for the embassy. The domestic bankruptcy law of the United States reflects a public policy requirement that individual debtors be able to retain certain minimal possessions, even at the price of full satisfaction for creditors. Similarly, limited diplomatic immunity allows an embassy to retain certain minimal diplomatic property in the interest of diplomatic relations.

In the United States, the FSIA represents a clear mandate that the

---

144 This is necessary because the ambassador’s affidavit is the last word on the use of the embassy funds. See supra note 87 and accompanying text.
145 Victory Transport v. Comisaria General, 336 F.2d 354, 360 (2d Cir. 1964).
Therefore, Congress' role increased while the executive branch's role decreased.

For instance, the legislative history to the act says:

The language 'is or was used' in paragraph (2) contemplates a situation where property may be transferred from the commercial activity which is the subject of the suit in an effort to avoid the process of the court. This language, however, does not bear on the question of whether particular property is to be deemed property of the entity against which the judgment was obtained. The courts will have to determine whether property "in the custody of" an agency or instrumentality is property 'of' the agency or instrumentality, whether property held by one agency should be deemed to be property of another, whether property held by an agency is property of the foreign state.


See supra note 35 and accompanying text.

Crawford, supra note 124, at 117.

See supra note 124; Crawford, supra note 124, at 117.

See generally Crawford, Execution of Judgments and Foreign Sovereign Immunity, 75 AM. J. INT'L L. 821 (1981). Note, however, that Crawford's approach...
undertake to pay all debts in which there is no question of immunity, while getting broad immunity protection in return.\textsuperscript{182} Thomas Hill has argued similarly that, by protecting certain vital state property from execution, execution on other property can be made easier.\textsuperscript{183}

Execution on embassy bank accounts, however, causes a unique problem. The diplomatic character of such accounts must generally be respected if international relations are to function smoothly. Funds in an account in the name of the embassy that is not used for diplomatic purposes, however, have no diplomatic character. The money in such accounts is not diplomatically sensitive. Yet the account is fluid, and the government can keep as much money in it as it wants. Such accounts are subject to abuse. As long as diplomatic and other sovereign uses of the account are protected and discovery into sensitive areas is prohibited, the purpose of diplomatic immunity is secure.

In passing the FSIA, Congress wanted to provide some redress for those who engage in commercial activity with a foreign government.\textsuperscript{184} Those creditors who would expect, in the absence of litigation, to be paid out of the embassy's bank accounts should have redress against those bank accounts. Such creditors would normally fall into two groups: (1) those who engage in business with the embassy as an embassy, rather than the foreign government generally, and (2) those who engage in commercial activities with an embassy whose "business" extends beyond providing for items and people within the embassy's walls.

Once a person has engaged in a commercial activity with a foreign embassy, she can reasonably expect to be paid out of the embassy bank account. Activity in this area includes, for example, food deliveries to the embassies, entertainment, and salaries of American staff working at the embassy. For these activities, the money in the embassy bank account would normally be used to satisfy the embassy's debts. A vendor should not have to look for other assets of the foreign government in the United States in order to secure payment for her services. Diplomatic immunity, in fact, is designed to protect the continuance of these types of services.

By contrast, in a case where a bank loans money to a foreign gov-

\begin{footnotesize}
\textsuperscript{182} Crawford, supra note 124, at 117.
\end{footnotesize}
ernment, the bank generally transacts with the foreign government. The bank should look for assets beyond the embassy, and in some cases outside the United States, in order to secure the loan. If execution on embassy accounts is permitted for such creditors, a government that finds itself in general financial trouble will have its embassy accounts eternally tied up because of the country’s general debts. This hinders diplomatic relations. The proposed scheme allows some security for those transacting with the embassy, so that the embassy’s diplomatic transactions may continue.

This result would be consistent with sovereign immunity principles, particularly the FSIA’s standard provision that execution may be had if “the property is or was used for the commercial activity upon which the claim is based.” Even in LETCO, the court conceded that the bank accounts were used for some “commercial activities” within the meaning that Congress envisioned, although those activities were not the basis of the judgment. Thus, it is logical that the embassy should be held responsible for the “commercial activities” that it undertakes. “Commercial activities” in this area would not, however, make the account generally subject to execution for any debts that the government might incur. This scheme would make the executional rules on embassy bank accounts similar to the rules already in effect concerning execution on state-owned ships.

The other instance in which the proposed approach would require execution on an embassy bank account is when the account is used for commercial activities that extend beyond the normal diplomatic functions of an embassy. Execution would require more than that the embassy engaged in “commercial activities” within the meaning of the FSIA, because every embassy engages to some extent in activities such as contracts with caterers. When an embassy account is used for such purposes, it should lose its executional immunity for all claims in which jurisdictional immunity has been waived.

The LETCO court’s standard of exempting whole bank accounts used for “commercial activities which are ‘incidental’ or ‘auxiliary,’ not denoting the essential character of the funds in question,” would

---

156 The court presumes that some portion of the funds in the bank accounts may be used for commercial activities in connection with running the Embassy, such as transactions to purchase goods or services from private entities. The legislative history of the FSIA indicates that these funds would be used for a commercial activity and not be immune from attachment.

See supra note 66 and accompanying text.
158 LETCO, 659 F. Supp. at 610.
tend to exempt almost every embassy account. The court seemed to be worried that diplomats would have difficulty separating the public from the non-public purposes of the accounts.\textsuperscript{169} Under the court's scheme, however, the only way an account would be liable to any execution would be if the embassy separated its accounts from those of its commercial enterprises.

Under the proposed standard, embassy activity would be more distinguishable from non-embassy activity than the "commercial/non-commercial" distinction advanced under the \textit{LETCO} scheme.

The proposed standard also addresses diplomatic immunity. The \textit{LETCO} rule was formulated in large part to address the problem of discovery in determining the uses of the embassy account.\textsuperscript{160} Nothing in the Vienna Convention explicitly grants all embassy accounts immunity from execution.\textsuperscript{161} Discovery problems are basically eliminated under the proposed standard, because it is not necessary to prove every use of the account. Instead, a creditor may rely on particularly egregious examples of non-embassy activity for which the account had been used. The creditor could be restricted from subpoenaing the information directly from the embassy.

Under this proposed standard, it is likely that neither the accounts at issue in \textit{Birch} nor in \textit{LETCO} would be subject to execution. \textit{LETCO} is the easier case. There, the accounts belonged to the Liberian Embassy in the United States, while the claim concerned a French company's transaction with the Liberian government in Liberia.\textsuperscript{162} This is not the type of transaction which the account was designed to cover. The only question left under the proposed standard would be whether or not the Liberian embassy's account went beyond the normal scope of diplomatic activity. There is no indication in the decision that it did;\textsuperscript{163} the account would therefore remain immune.

In \textit{Birch}, the court focused on criteria that did not concern the foreign government's diplomatic immunity. Because the transaction was financed by the United States Department of Agriculture, it is possible that the embassy bank account was used as a conduit between Tanzania and the shipowner. It is possible that the shipowner had rea-

\textsuperscript{160} The \textit{LETCO} court felt that it had to accept the ambassador's characterization of the use of the account, rather than try to decipher what the overall use of the account was. \textit{LETCO}, 659 F. Supp. at 610.

\textsuperscript{161} See supra notes 74-77 and accompanying text.

\textsuperscript{162} See supra note 124 and accompanying text.

\textsuperscript{163} There is not enough information in the published opinion to determine whether or not this is the case. This is understandable because the focus in the \textit{LETCO} standard is different from the present standard.
son to expect to be paid out of the embassy funds. The court could also ask whether the account was being used for non-embassy-related debts. Instead, the court focused upon the fact that, according to the ambassador's affidavit, the embassy account was being used for "commercial activities" such as paying salaries of American embassy personnel. The Birch standard makes the embassy account as liable to attachment for the embassy's own debts as for any debts that its government incurred around the world.\textsuperscript{164} This standard also arguably would make virtually every embassy account liable to execution.\textsuperscript{165}

A more dramatic example of the difference between the proposed standard and the LETCO standard is how each would apply to a future Transamerican Steamship judgment.\textsuperscript{166} The Transamerican Steamship court said that the embassy had waived jurisdictional immunity because it exceeded the realm of ordinary embassy behavior.\textsuperscript{167} Hence, it would seem reasonable that the embassy would also lose its immunity from execution. Under the proposed standard, an account so tainted would lose its status as an immune account as to any claims validly adjudicated.\textsuperscript{168} Under the LETCO standard, an account could have only one "essential character." Thus, if the embassy used this account for such non-immune transactions, but other uses of the account predominated, the whole account would remain immune. The LETCO court said that "requiring diplomats to segregate funds of a public character from commercial activity funds [to avoid the risk of attachment] is not the solution" because of the difficulty that the courts have had in doing so.\textsuperscript{169} The proposed standard would not necessitate such a difficult segregation; it would merely require a separation of embassy activity funds from other funds.

The proof necessary for determining immunity would also differ under the present and proposed standards. The LETCO standard relies heavily on an ambassador's certification of the account's use in determining the essential purpose. This is necessary because courts would

\textsuperscript{164} I do not see anything wrong with holding an embassy liable in those cases where it chooses to exceed the legitimate boundaries of an embassy. Such an embassy essentially makes a conscious choice to waive its rights, assuming it knows of the proposed standard.
\textsuperscript{165} Congress' definition of "commercial activity" includes ordinary embassy transactions. \textit{See supra} note 34.
\textsuperscript{166} \textit{See supra} notes 62-64 and accompanying text.
\textsuperscript{167} \textit{See supra} note 64.
\textsuperscript{168} It should also be noted that one would expect to be paid out of the embassy account for this transaction. It does not appear, however, that this is the type of transaction for which an embassy normally pays, and thus it would fall under the second half of the proposed immunity exception criteria.
presumably require a considerable history of commercial expense to overcome the embassy account's presumption of immunity. Where a creditor tries to demonstrate a general "waiver" of the use of the account, the proposed standard could rely on one particularly egregious example of a use of the account for non-embassy transactions or on a series of less egregious examples. Where a creditor tries to demonstrate a No such proof would be needed to execute a judgment on an ordinary embassy transaction. To overcome the standards of proof necessary to show non-immunity, therefore, less of an intrusion into the embassy's records would be necessary to show the non-immunity of the account. This is the type of diplomatic immunity that the Vienna Convention specifically protects.

5. CONCLUSION

The proposed standard for determining the sovereign and diplomatic immunity of embassy bank accounts would make it possible to execute on accounts which are "fronts" for government commercial activities and would allow creditors to collect on those debts which the account would normally pay in the absence of litigation. The account would remain immune and the embassy free from discovery otherwise.

Much of the problem that has arisen regarding judicial determination of execution on embassy bank accounts stems from attempts to apply the general theories of sovereign immunity to this area where diplomatic immunity is heavily involved. This problem can be solved by combining the generally determinative "commercial" standard with a standard which also seeks to protect normal embassy functions.

International law is flexible in this area. Because the restrictive immunity doctrine's application to embassy bank accounts varies significantly from jurisdiction to jurisdiction, international law does not rule out a novel approach. The proposed standard offers the courts a relatively simple\textsuperscript{170} method of determining the immunity or non-immunity of the embassy account. This standard extends the spirit, if not the present interpretation, of the FSIA's commercial activity exception to embassy bank accounts. It also extends the Vienna Convention's approach to diplomatic immunities for a diplomat's personal accounts to the area of embassy accounts, on which the Convention was largely

\textsuperscript{170} The standard is relatively simple because it does not require extensive discovery, much of which the embassy is exempt from, to determine what the "essential character" of the account is. Of course, the court would have some flexibility in determining whether or not the embassy account is overly commercial, but this would require only a look at specific transactions and would eliminate any discussion about those day-to-day activities such as the running of the embassy, unless they were the subject of the suit.
silent.171 While the approach does not presently reflect the international practice, no other single approach can claim universal acceptance.

Courts in the United States are left a wide latitude in determining immunity in this area. The proposed approach would bring some consistency in spirit to an area of immunity that is well behind the development of immunity in other areas.

---

171 See supra notes 74-77 and accompanying text.