State Immunity from Execution: In Search of a Remedy

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My name is postman Pechkin. I brought a parcel for your boy but I will not give it to you since you do not have any documents. The rules say though that I am obliged to come around every day with the parcel until it is sent back.¹

INTRODUCTION

To anyone even remotely acquainted with Russian culture, this classic citation from a classic Soviet cartoon will be very familiar. Equally familiar should be the fact that a somewhat similar situation exists in public international law in the context of state immunity. If a state does not pay its trade creditor, the latter has the option of suing the state for the amount if its claim. However, if this happens in a third state (e.g. the creditor rendered services to an embassy), then the creditor runs headfirst into state immunity.

It is common knowledge that a state enjoys immunity when being sued in a foreign state. This immunity is in fact twofold: immunity from jurisdiction and immunity from execution. According to contemporary doctrinal thinking,² if a claim brought against a state is commercial in nature, then, presumably for the benefit of the non-state creditor, no state immunity from jurisdiction is available to the respondent state. The problem with such an approach is that in the end it really does not matter. What a creditor wants is a remedy. As long as immunity from execution is available, there is no remedy (unless, of course, the state decides to pay its debt willingly — a tall order in case of a relationship that has already reached the court). The present article is intended to offer ideas on how the problem of a lack of remedies could be solved or perhaps by-passed altogether.

¹ Free translation by the authors of an old Soviet cartoon Troe iz Prostokvascheno.
² See for example Hazel Fox, Law of State Immunity (Oxford University Press, 2008).

1. THE MISMATCH OF STATE IMMUNITIES

Although it would be tempting to suggest that the problem at hand stems from a mismatch between state immunity from jurisdiction and state immunity from execution, such a suggestion would be fallacious. The problem is the lack of a remedy, and although aligning the rules of state immunity from execution with the rules of state immunity from jurisdiction would provide a solution, to do so the other way around would not. Thus it would seem that the mismatch is a specific expression of the problem. Therefore, although this present article is not intended to analyse the nature and applicability of immunity from jurisdiction, some explanation of how and why the two immunities differ is called for.

1.1. State Immunity from Jurisdiction

Nowadays respondent states generally enjoy limited immunity from jurisdiction. Without going into the legal merits of this position, suffice it to say that this reflects common opinion in the field on the current situation, which is supported by an overwhelming amount of primary sources dealing with this question.

One of the early codifications of the doctrine of limited state immunity from jurisdiction was the Foreign Sovereign Immunities Act 1976 in the United States. Section 1604 provides, as usual, for the general rule that a foreign state shall be immune from the jurisdiction of the United States courts unless an exception provides to the contrary. For the present purposes, it is important that under Section 1605(a)(2) the respondent state would not enjoy state immunity from jurisdiction “in any case 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; or upon an act outside the territory of 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”. Section 1605(a)(5) provides for a similar limitation of state immunity from jurisdiction in case of personal injury, death, damages to or loss of property occurring in the United States and caused by a tortious act or omission of the foreign state or its official or employee. Finally, Section 1605(a)(6) provides for no immunity in cases of enforcement of an arbitral award against a foreign state.

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3 If state immunity from jurisdiction were aligned with state immunity from execution, it would in effect bring back the doctrine of absolute immunity under which there are almost no remedies at all.

4 By primary sources we mean treaties, legislation, judgments and preparatory materials of treaties and legislation, as opposed to writings thereon.

5 28 USC 1602 [hereinafter the FSIA].
The State Immunity Act 1978 of the United Kingdom follows a similar path. It provides in Section 1 that foreign states enjoy general immunity from the jurisdiction of the United Kingdom courts subject to the exceptions provided in the act, and specifically its first part. Section 3(1) of the act provides that

A State is not immune as respects proceedings relating to—

(a) a commercial transaction entered into by the State; or

(b) an obligation of the State which by virtue of a contract (whether a commercial transaction or not) falls to be performed wholly or partly in the United Kingdom.

Section 5 provides that a respondent state is not immune as respects proceedings for death or personal injury or damage to or loss of tangible property caused by an act or omission in the United Kingdom. Section 9 removes immunity from proceedings related to arbitration.

The situation under the United Nations Convention on Jurisdictional Immunities of States and Their Property is similar to those under the FSIA and the SIA. Article 10 provides for a commercial exception, Article 12 for an exception in cases of personal injuries and damage to property, and Article 17 for an exception regarding arbitration.

Thus it becomes evident that for the present purposes, no state immunity from jurisdiction is available to the respondent state in three situations:

1. disputes concerning commercial transactions;
2. disputes concerning personal injuries or damage to property;
3. disputes concerning arbitral awards.

What this means in practical terms is that a foreign state should enjoy no state immunity from jurisdiction in the forum state when it is sued by:

- a stationery shop down the street for not paying for the paper clips it bought, or by a plumber for not being paid for installing a new sink in the embassy;
- an angry house-owner into whose house (a presumably drunk) ambassador drove his car while on his way to a function;
- an investor who seeks recognition of a bilateral investment treaty arbitration award or of a judgment handed down in the state of the forum.

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6 The full name is An Act to make new provision with respect to proceedings in the United Kingdom by or against other States; to provide for the effect of judgments given against the United Kingdom in the courts of States parties to the European Convention on State Immunity; to make new provision with respect to the immunities and privileges of heads of State; and for connected purposes [hereinafter the SIA].


9 There are several other exceptions to state immunity from jurisdiction, e.g. employment contracts, admiralty matters, none of which are of direct importance here.

10 We realise that forming an opinion regarding public international law based on three sources and without further examination is incorrect. However, these sources should merely be taken as examples of when state immunity from jurisdiction is not available. For the position under public international law in general see, for example, Fox, Law of State Immunity, supra note 2, chapter 14.
The reason why we have concentrated on the lack of immunity in commercial, arbitration and tort matters is that the majority of cases tend to fall within one of these three categories. Whereas the meaning of the latter two is clearer — or at least has raised fewer questions, the question of what amounts to a commercial claim has generated considerable case-law. Strictly speaking the question has been put beyond a doubt by the seminal judgment of Lord Denning M.R. in *Trendtex Trading Corporation v. Central Bank of Nigeria*, where he stated:

> But I do not think this should affect the question of immunity. If a government department goes into the market places of the world and buys boots or cement — as a commercial transaction — that government department should be subject to all the rules of the market place. The seller is not concerned with the purpose to which the purchaser intends to put the goods.

Thus what is determinative of whether a transaction underlying a claim is commercial or not, is not the purpose for which the state entered the transaction, but rather its nature. This is also the position taken in

- FSIA Section 1603(d) — “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”;
- SIA Section 3(3)(c) — “commercial transaction’ means … any other transaction or activity (whether of a commercial, industrial, financial, professional or other similar character) into which a State enters or in which it engages otherwise than in the exercise of sovereign authority”;
- United Nations Convention Article 2(2) — “In determining whether a contract or transaction is a ’commercial transaction’ under paragraph 1 (c), reference should be made primarily to the nature of the contract or transaction”.

This approach has been further developed in United States case-law to the point where the following test was formulated: “The ‘rule of thumb’ used to determine whether activity is of a commercial or public nature is ‘if the activity is one in which a private person could engage, it is not entitled to immunity’.” The very same case also stated, in reference to the legislative history of the FSIA, that

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11 This is also the reason we have omitted to mention exceptions pertaining to, for example, membership of bodies corporate or patents and trademarks.
13 It should be noted that according to Sections 3(3)(a)–(b), any supply of goods or services, or a transaction for provision of finance is considered to be commercial (as far as these provisions are concerned, there is no requirement that the state enter the transaction otherwise than in exercise of its sovereign authority).
14 This provision goes on, however, with its text in full being: “In determining whether a contract or transaction is a ‘commercial transaction’ under paragraph 1(c), reference should be made primarily to the nature of the contract or transaction, but its purpose should also be taken into account if the parties to the contract or transaction have so agreed, or if, in the practice of the State of the forum, that purpose is relevant to determining the non-commercial character of the contract or transaction”.
15 *In the Matter of the Application of LETCO* (Liberian Eastern Timber Corporation v. Liberia), 89 ILR 360, p 365 [hereinafter the LETCO].
[T]he fact that goods or services to be procured through a contract are to be used for a public purpose is irrelevant; it is the essentially commercial nature of an activity or transaction that is critical. Thus, a contract by a foreign government to buy provisions or equipment for its armed forces or to construct a government building constitutes a commercial activity. The same would be true of a contract to make repairs on an embassy building. Such contracts should be considered to be commercial contracts, even if their ultimate object is to further a public function.16

Although in principle this position seems to be accepted in all major jurisdictions,17 what is important for the purposes of availability of a remedy to a private party creditor is that this distinction does not always seem to be followed in practice. In fact as time moves on, its application seems to become even rarer. In *LETCO* itself, the court stated that “the Liberian Embassy bank accounts are ‘utilized for the maintenance of the full facilities of Liberia to perform its diplomatic and consular functions as the official representative of Liberia in the United States of America, including payment of salaries and wages of diplomatic personnel and various ongoing expenses incurred in connection with diplomatic and consular activities necessary to the proper functioning of the Embassy’”. In the very next sentence it came to the conclusion that “the essential character of the activity for which the funds in the accounts are used, therefore, undoubtedly is of a public or governmental nature because only a governmental entity may use funds to perform the functions unique to an embassy”.18

A Dutch court in *The Netherlands v. Azeta BV*19 came in effect to the conclusion that funds intended for running an embassy are for public purposes, although in reality at least some of the funds would be expended in commercial transactions. What is perhaps even more striking is that Mr Justice Aikens in the High Court of England and Wales in *AIG Capital Partners, Inc v. Kazakhstan*20 came to the conclusion that dealings in and trading of financial assets in financial markets was not commercial transactions “but part of the overall exercise of the sovereign authority by Kazakhstan” since — and now comes the brilliant part — “the aim of the exercise, at all times, was and is to enhance the national fund”. If that is not using the purpose of the transaction instead of its nature for determining whether the transaction is a commercial one, then it is difficult to imagine what is.

1.2. State Immunity from Execution

Compared to state immunity from jurisdiction, a respondent state enjoys considerably wider state immunity from execution. In effect, there is no connection between the two. Even if a court finds no state immunity from jurisdiction and delivers a judgment, it might not be possible to execute the judgment even if the subject matter of the claim is, for example, commercial. The reason for this is that state immunity from execution depends not on the characteristics of the claim (or

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17 For examples see the cases referred to in this present article.
18 *LETCO*, p. 365.
19 128 ILR 688, p. 688.
the relationship underlying it), but rather on the characteristics of the assets that the judgment creditor is trying to levy execution upon.

In general over the last decades (or even half-century), state immunity from jurisdiction has narrowed considerably. There has, however, been no corresponding movement in the field of state immunity from execution. Indeed, instances when a respondent state (or, perhaps more correctly, its assets) does not enjoy state immunity from execution are in practice so rare that one might suspect that the continued existence of the very broad state immunity from execution is the very reason state immunity from jurisdiction has been allowed to remain narrow. If there is rising pressure to provide a private party creditor with a remedy, why not ostensibly give in and get rid of state immunity from jurisdiction? As long as there is state immunity from execution, in the end the availability or unavailability of state immunity from jurisdiction really does not matter.

There are of course a number of instances where execution may be levied on the property belonging to a respondent state such as with its consent or if it has earmarked such property for execution, but the present article is intended to deal with situations where there is no waiver and no property has been earmarked. In such situations, already the seminal Philippine Embassy Bank Account case decided by the German Constitutional Court in 1977 drew a distinction that seems to govern the field of state immunity from execution today. Execution may only be levied upon assets intended for non-sovereign purposes. Currently, existing codifications, whether enacted before or after this case, follow generally the same line.

Thus, Section 1609 of the FSIA provides for general state immunity from attachment. Section 1610(a) then provides that

> [t]he property in the United States of a foreign state, as defined in section 1603(a) of [the FSIA], 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 after the effective date of this Act, if (1) the foreign state has waived its immunity from attachment in aid of execution or from execution either explicitly or by implication, notwithstanding any withdrawal of the waiver the foreign state may purport to effect except in accordance with the terms of the waiver, or (2) the property is or was used for the commercial activity upon which the claim is based.

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21 Whether the transaction or activity is, for example, a commercial or a sovereign one.
22 Aside from the prospect of effectively futile litigation and its costs.
23 For example, FSIA Section 1610(a)(1), SIA Section 13(3), United Nations Convention Article 19(a)–(b).
24 Whether a waiver would actually work or how it should be drafted is another matter altogether. See for example Dominic Pellew, “Enforcement of Noga Arbitral Awards in France”, 8 International Arbitration Law Review (2005) 34–37.
26 65 ILR 146.
27 There are other specific instances of state immunity from execution, such as property acquired by gift, which the present article does not touch upon.
The SIA in Section 13(2)(b) sets out that property of a state shall not be subject to any process of enforcement of a judgment, but provides in Section 13(4) for an exception to that rule, stating that “[s]ubsection (2)(b) … does not prevent the issue of any process in respect of property which is for the time being in use or intended for use for commercial purposes”. Section 17(1) defines “commercial purposes” to mean the purposes of such transactions or activities as are mentioned in Section 3(3).

Finally, the United Nations Convention follows a similar line. Article 19 bans all post-judgment measures of constraint unless “it has been established that the property is specifically in use or intended for use by the State for other than government non-commercial purposes and is in the territory of the State of the forum, provided that post-judgment measures of constraint may only be taken against property that has a connection with the entity against which the proceeding was directed”. In this respect it should be noted that in the case of the United Nations Convention it becomes clear that, technically speaking, the immunity one is dealing with when trying to levy execution is not that of the state but rather that of its property, as the name of the convention indicates.

At first glance it would seem then that there is a direct connection between state immunity from jurisdiction and state immunity from execution:

- the former may depend largely on the commercial nature of the transaction under dispute, and
- the latter depends on the commercial nature of purposes or activities for which an asset is used.

Strangely enough however, for the wealth of commercial transactions in respect of which the respondent states enjoy no immunity, there is a complete dearth of assets which are intended by those states for such transactions. To an outsider, such a situation might even suggest that respondent states simply do not intend to meet their commercial obligations at all. Legally speaking, this situation would insulate a respondent state from execution completely — if it never intended to pay anyone, there cannot possible be any assets intended for commercial purposes or activities.

More realistically, the real reason that levying execution against respondent states is difficult is that although assets which do not enjoy state immunity from execution are defined by reference to commercial activities, there is no connection between the two state immunities. In order to levy execution it is necessary to find what we shall term the non-immune commercial assets of the respondent state within the forum state. However, the respondent state does not have to own such assets even if it enters into commercial transactions. It might intend to pay its creditor via a transfer of funds from within its own jurisdiction.

Even if the respondent state has non-immune commercial assets within the jurisdiction of the forum state, there are further difficulties that complicate “getting access” to such assets regardless of any requirements for a connection between the claim and the assets. The two main difficulties would be

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28 Just as immunity from jurisdiction might be.
1. The fact that the burden of proof lies squarely with the judgment creditor, and
2. The fact that most of the assets that one state is likely to have within the jurisdiction of another are likely to be of "mixed" nature, i.e. used for both sovereign and non-sovereign purposes.

1.3. Mismatch Revealed

The fact that immunity from jurisdiction and immunity from execution are not only disconnected but are dependent on the characteristics of different things — one depends on the characteristics of the legal relationship between the respondent state and the private party, and the other on the characteristics of the assets of the respondent state — creates the following difficulties:

1. **Lack of assets.** There might be no non-immune commercial assets of the respondent state within the jurisdiction of the forum state. That, however, does not mean that the respondent state cannot enter into and have legal relationships in proceedings upon which it would not enjoy immunity.
   Example: a private party creditor and a respondent state enter into a sales contract or some sort of securities transaction in the forum state where the respondent does not even have a diplomatic mission, and the respondent was to pay via bank transfer from within its own jurisdiction. It is possible to obtain a judgment but impossible to levy execution.

2. **Restrictive nexus requirements.** Even if there are non-immune commercial assets of the respondent state within the jurisdiction of the forum state, there are often additional nexus requirements for those assets to be available for execution.
   a. For instance, the United Nations Convention requires that the assets upon which execution is levied must be connected with the entity against which the proceeding is directed.
      Example: it is possible to obtain a judgment against a state if it acted in the particular transaction through the Treasury. It is quite probable that the levying of execution against assets of the Foreign Ministry would, for example, be denied. 29
   b. The FSIA requires that the property be used for commercial activity within the US, and that it is or was used for the commercial activity upon which the claim was based. 30
      Example: an investment arbitration award is enforced by virtue of FSIA Section 1605(a)(6). The judgment entered upon the award is in all probability incapable of execution. It is highly unlikely that there would be assets within the United States connected with an investment

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29 Article 19(c); whatever the position should be, it is quite likely that in most states at least the lower courts would tend to interpret this provision de facto largely by reference to their national administrative law (whatever the final official argumentation would be).

30 FSIA Section 1610(a)(2); unless there is a waiver of immunity from execution — FSIA Section 1610(a)(1).
arbitration (these assets are normally if not by definition within the jurisdiction of the respondent state).

c. Both the SIA and the United Nations Convention provide (although admittedly as an alternative test) that the property be intended for commercial use in the future.31
   Explanation: it is by definition impossible to prove conclusively something that has not yet happened.

d. In proceedings relating to a tort the respondent state enjoys no immunity.32 But it is virtually impossible to meet the nexus requirement in a. above. Additionally there need be no non-immune commercial assets of the respondent state within the jurisdiction of the forum state, as all assets might be mixed.
   Example: snow falls from the roof of an embassy on a passer-by. There is no immunity from jurisdiction but there are no assets not enjoying immunity from execution.

3. Excluded assets. Some assets are explicitly granted absolute immunity from execution regardless of their purpose or activities for which they are used. Of the assets that one state would be likely to have within the jurisdiction of another state and which would be used for commercial transactions, the first to come to mind are be funds held by central banks. Let us demonstrate.
   a. Presence within the forum state — check. Such funds are quite frequently deposited with foreign banks or used in foreign financial markets for the purpose of increasing their amount and diversifying risks.
   b. Commercial purpose/activities — check. Depositing money with a bank or investing it in financial markets is a commercial activity that everyone engages in (or at least it was considered to be such before the decision in the AIG case cited above, and can continue to be considered as such if the AIG case is seen as plainly wrong on this point).
   But property of central banks and other monetary authorities of foreign states is normally expressly excluded from the assets upon which execution may be levied.33
   Example: see AIG case.

4. Mixed assets. Most of the assets that one state has within the jurisdiction of another state are of mixed nature, used for both commercial and sovereign purposes. This will be discussed further when dealing specifically with mixed bank accounts.
   Example: a private party creditor enters into a sales contract with a respondent state. The latter enjoys no immunity from jurisdiction. All of its

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31 This is rather difficult to prove. SIA Section 13(4); United Nations Convention Article 19(c).
32 FSIA Section 1605(a)(5); SIA Section 5; United Nations Convention Article 12.
33 FSIA Section 1611(b)(1); SIA Section 14(4); United Nations Convention Article 21(1)(c); AIG case. In effect these provisions grant absolute immunity from execution. The same is true under German law; see Christine Steven & Bernd Krauskopf, "Immunity of Foreign Central Banks under German Law", 2 Journal of International Financial Markets (2000) 138–149.
assets within the forum state are of mixed nature. No execution would seem possible.

5. **Burden of proof.** The burden of proof lies squarely with the private party creditor both in substantive proceedings and proceedings relating to execution. It is relatively easy to prove that proceedings relate to, for example, a commercial contract: after all, the private party creditor initiated the proceedings and is party to the contract. It is very difficult for the private party creditor to prove the nature of assets belonging to the respondent state. This will be discussed further when dealing specifically with mixed bank accounts.

Example: a sale contract is commercial by definition. There is no immunity from jurisdiction. However, until the private party creditor manages to prove conclusively that a particular account is used for non-immune commercial purposes, no execution would seem possible.

2. **BANK ACCOUNTS: SOLE ASSETS AVAILABLE FOR LEVYING OF EXECUTION**

It should be quite evident by now (if not from the present article, then at least from even a cursory examination of case-law) that often, the sole assets at least theoretically available for levying execution are bank accounts of respondent states and, more specifically, bank accounts of the diplomatic missions and consular posts of such states. Aside from the assets of central banks, which are specifically granted immunity, and bank accounts of diplomatic missions, one state is unlikely to constantly maintain assets of any sort within the jurisdiction of another state.

Whereas there might be military bases, these are quite clearly immune as they serve sovereign purposes. Additionally, there might occasionally be some sort of other assets of a respondent state present within the forum state, but such presence would be temporary and quite likely to fall within Article 21 of the United Nations Convention in any case.34 The embassy itself, its fittings, etc., are protected by Article 22 of the Vienna Convention on Diplomatic Relations.35

So it all comes down to the bank accounts of embassies. Although at first it seems ridiculous to consider them as available for the purposes of levying execution, case-law has proven that it is not. Not least because a great amount of litigation in the field pertains to payments for services rendered to embassies.

The question of whether to sue a foreign state at all will therefore often boil down to the question of whether it is possible to levy execution against the bank accounts of its embassy.36 The current position would seem to be that generally it is *de facto* not possible, although theory does foresee such a possibility.

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34 If it ever comes into force, Article 21 deals with assets that are excluded from measures of constraint.
35 Vienna Convention on Diplomatic Relations, 18 April 1961, in force 24 April 1964, 500 UNTS 95 [hereinafter the VCDR]
36 The situation would be different if the foreign state were willing to fulfil the judgment, but in a situation of conflict this is not particularly likely. In any event, this scenario is not dealt with in the present article.
2.1. Mixed Accounts

The first difficulty when endeavouring to levy execution against the bank accounts of an embassy is the question of whether they are maintained for sovereign or commercial purposes. As is evident from facts cited in case-law, most accounts are in fact “mixed” – some of the funds are used for sovereign and some for commercial purposes. This was indeed recognised in the Philippine Embassy case but, in the opinion of the authors of this article, that case went no further. It did not state whether it was or was not possible to levy execution against a mixed account. The decision seems to be based on diplomatic immunity and a determination of the purpose of the account for the purposes of immunity from execution. The relevant part of the decision reads:

The financial settlement of the costs and expenses of an embassy through a general current account of the sending State maintained with a bank in the receiving State pertains directly to the continued discharge of the diplomatic functions of the sending State, notwithstanding the fact that some transactions through such an account may, as regards relations with the bank or with third parties, be effected in the context of legal relationships or forms of activity which can, by their legal nature, be termed acts iure gestionis.

If one reads the entire judgment, it seems to suggest that it is possible to levy execution on assets used or intended for acts iure gestionis. But the quotation then seems to say that whether an asset is for sovereign or non-sovereign purposes depends not on the nature of the transaction in which it is (to be) used, but rather on the purpose of such transaction. In effect this decision, at least on this point, seems to be the exact opposite of the decision of Lord Denning M.R. in Trendtex. What the Philippine Embassy case says on this point is that as long as the purpose of a transaction is to further diplomatic functions, it is quite irrelevant that in reality they are used for buying, let us say toilet paper, even though the latter is quite clearly a commercial transaction.

There seems to be two ways of reading this decision on this point:

- it either decided that whether a transaction is commercial or not depends not on the nature but rather on the purpose of the transaction, and expressly stressed that the nature does not matter (thus it directly contravenes the decision in Trendtex); or
- it ostensibly set a nature test but in reality applied a purpose test.

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37 65 ILR 146, p 148 (in particular on the principle of ne impediatur legatio).
38 Ibid, p 188, see also p 148.
39 I.e. Whether it is the nature or the purpose test that is to be used for the determination of the character of a transaction (for which the funds were to be used like in the Philippine Embassy case).
40 These are helpfully enumerated in Article 3 of the VCDR.
41 See the quotation above, the accompanying text of footnote 12.
42 This seems to be quite a frequent occurrence, see AIG, LETCO.
What is paramount for the present purposes, however, is that the court did not base its decision on the mixed nature of the account, instead preferring to find it non-commercial and thus immune altogether.43

The first important case in which the decision was based on “mixed accounts” was Birch Shipping Corporation v. Tanzania.44 The case is highly unusual since a United States district court allowed attachment of a mixed embassy account. The account was used virtually for the same purposes as the account in the Philippine Embassy case, but in Birch, the court adhered to the nature test and found the funds to be non-immune commercial assets. Thereafter it gave four reasons for allowing attachment of the mixed account45:

1. there is no requirement in the FSIA that only property that is used solely for commercial purposes may be attached.
2. the express intention of the Congress in enacting the FSIA was to provide a judgment creditor with a remedy.
3. holding mixed accounts unattachable would create a loophole. If the funds were occasionally or even only once used for some minor public purpose, the entire account would be immune.
4. if not granting immunity to mixed accounts creates the problem of attaching at least some sovereign funds, this could be solved by separating sovereign and commercial funds.

However, almost all the leading cases decided after Birch have held mixed accounts immune from execution. As has already been noted, the Dutch court in The Netherlands v. Azeta BV came in effect to the same conclusion as the court in Philippine Embassy in finding that “[e]stablishing, maintaining and running embassies was an essential part of the function of government and hence of the public service. Funds intended for the performance of this function must therefore be treated as property intended for the public service”.46 However, unlike the German Constitutional Court, the Dutch court did not even consider if some transactions might be commercial in nature, as Azeta failed to lead evidence to the effect that funds were used for commercial purposes.47

43 It is interesting to note that however you read the decision within the paradigm created by it, it is impossible to think of any asset that would be commercial and upon which execution could therefore be levied. According to traditional constitutional theory, all the assets a state has are not for its pleasure but for the discharge of its functions. Accounts in Philippine Embassy were held immune precisely because the transactions for which they were used were for the discharge of the functions of the state. This would suggest that only when a state admits to using assets for commercial purposes (or is estopped from claiming differently) or the discretion of a state in using its assets were so abused that one would be dealing with corruption, could there theoretically be a commercial purpose for the transaction.
44 63 ILR 524 (decided in 1980) [hereinafter the Birch].
46 128 ILR 688, p 689 (also p 688).
47 See the next section.
The United States case of LETCO expressly contravened Birch by finding mixed accounts immune. Although it seems to have considered a similar argument to that which decided the issue in the Philippine Embassy to be correct, the opinion seems to have been strictly obiter as the court did not rest its decision on that reasoning. In the very next paragraph, the court stated that it “declines to order that if any portion of a bank account is used for a commercial activity then the entire account loses its immunity”. Thus, it expressly disapproved Birch by adding that “[o]n the contrary, following the narrow definition of ‘commercial activity’, 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 cause the entire bank account to lose its mantle of sovereign immunity”.

In a Belgian case Iraq v. Vinci Constructions, the Brussels Court of Appeal decided that only accounts that are allocated for commercial/private law activities can be attached.50

Finally, in the leading English case Alcom v. Republic of Columbia decided by the House of Lords in 1984, it was held that mixed bank accounts cannot be subject of forced execution. Lord Diplock in his speech, with which the other members of the House agreed, first expressed the view on page 602 that “the customer’s right to withdraw his credit balance is a single not a composite chose in action”.

Crucially, in a paragraph that merits citation in full, he came to the conclusion that mixed bank accounts could not be attached:

Such expenditure will, no doubt, include some moneys due under contracts for the supply of goods or services to the mission, to meet which the mission will draw upon its current bank account; but the account will also be drawn upon to meet many other items of expenditure which fall outside even the extended definition of “commercial purposes” for which section 17(1) and section 3(3) provide. The debt owed by the bank to the foreign sovereign state and represented by the credit balance in the current account kept by the diplomatic mission of that state as a possible subject matter of the enforcement jurisdiction of the court is, however, one and indivisible; it is not susceptible of anticipatory dissection into the various uses to which moneys drawn upon it might have been put in the future if it had not been subjected to attachment by garnishee proceedings. 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 minimis 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

48 89 ILR 360, p 365 the Court said: “The Liberian Embassy bank accounts are ‘utilized for the maintenance of the full facilities of Liberia to perform its diplomatic and consular functions as the official representative of Liberia in the United States of America, including payment of salaries and wages of diplomatic personnel and various ongoing expenses incurred in connection with diplomatic and consular activities necessary to the proper functioning of the Embassy’. The essential character of the activity for which the funds in the accounts are used, therefore, undoubtly is of a public or governmental nature because only a governmental entity may use funds to perform the functions unique to an embassy”.

49 127 ILR 101 (decided in 2002).

50 Ibid, pp 105–106 (also p 102).

the state, it cannot, in my view, be sensibly brought within the crucial words of the exception for which section 13(4) provides.52

What is additionally important for the present purposes is that unlike in any other decision (e.g. Philippine Embassy or LETCO), Lord Diplock in his speech strictly adhered to the nature test and rested his decision on the point that the accounts were mixed.

Finally, the fact that when using the nature test it is the characteristics of the transaction and not the purpose of the transaction which is important, is clearly borne out by the judgment of Sir John Donaldson M.R. in the very same case in the Court of Appeal53:

Hobhouse J.’s view that regard must be had to the primary purpose of running the embassy rather than the secondary purpose of paying for goods and services seems to me to involve falling into the very error to which Lord Bridge of Harwich drew attention and to be devoid of justification in fact or on the wording of the Act. The purpose of money in a bank account can never be “to run an embassy”. It can only be to pay for goods and services or to enter into other transactions which enable the embassy to be run. Again I can find no trace of wording in the Act which could justify the distinction between commercial and consumer activities.

Thus it would indeed seem that the court in the Philippine Embassy case seems to have convoluted the two issues (nature and purpose of the transaction) or missed the point altogether.

To sum up therefore it is not currently generally possible to attach or levy execution upon mixed bank accounts, since such accounts contain, by definition, certain sovereign funds that are immune from execution.

2.2. Burden of Proof

Although it is not possible in practice, it would seem that levying execution upon the bank accounts of embassies might nevertheless in rare situations be feasible, if it were either proven that a particular account contains no sovereign funds, or the position of the House of Lords in Alcom54 were not accepted, and it could be proven that a certain determinate amount of funds held in a particular account were definitely commercial. The difficulty with this line of thinking is that the burden of proof that a particular asset is a non-immune commercial one lies “upon the judgment creditor”,55 and that burden of proof is nigh impossible to discharge.

What would happen in practice is that the Ambassador would provide the court with a certificate that would state that the funds in the account that the creditor is endeavouring to attach are used for non-commercial purposes.56 Alternatively the court might take the view, as it did in Vinci Constructions, that the

52 Ibid, p 604.
53 The two decisions are reported together. The decision of the Court of Appeal was reversed by the House of Lords although seemingly this issue was not addressed.
54 To the effect that the credit balance in a bank account is indivisible.
56 For example Azeta, 128 ILR 688, p 690; LETCO, 89 ILR 360, p 360; Philippine Embassy, 65 ILR 146, p 151; Alcom 1 AC (1984) 580, p 604.
funds of the mission are presumed to be for public purposes in any case.\textsuperscript{57} It is then up to the private-party creditor to refute that presumption.

In a usual civil law case there would be, depending on the legal system, some sort of discovery available during the proceedings.\textsuperscript{58} This is, however, not only impossible but truly inconceivable when trying to attach bank accounts of a diplomatic mission.

Requiring a diplomatic mission to furnish proof of use or purpose of its assets would be a flagrant breach of diplomatic law. In the words of the German Constitutional Court in the \textit{Philippine Embassy} case:

\textit{[T]he clanger of intrusion into the internal sphere of operation of the diplomatic mission of the sending State is usually evoked and, except with the consent of the sending State, that is prohibited outright under international law relating to embassies. Moreover, for the executing authorities of the receiving State to require the sending State, without its consent, to provide details concerning the existence or the past, present or future purposes of funds in such an account would constitute interference, contrary to international law, in matters within the exclusive competence of the sending State.}\textsuperscript{59}

This opinion is echoed for instance by the Belgian court in \textit{Vinci Constructions}\textsuperscript{60} and the Dutch court in \textit{Azeta}.\textsuperscript{61} The Belgian court stated further that requiring proof of the allocation of the funds would contravene “the very principle of immunity that, by definition, establishes a presumption in favour of the State that enjoys immunity”.\textsuperscript{62} What one seems to be dealing with here is in effect diplomatic immunity and inviolability of the embassy and its documents.\textsuperscript{63}

In effect then a judgment creditor is required to prove something it is by definition not capable of proving. The sole instances where a judgment creditor has managed to discharge the burden of proof have been \textit{Birch} case and the Court of Appeal’s decision in \textit{Alcon}. In both these cases the court found that the respondent state effectively discharged the burden of proof for the creditor by issuing certificates that the funds in question were used for sovereign purposes in the following terms:

- In \textit{Birch},\textsuperscript{64} “3. The funds in the aforementioned account are solely for the purpose of the maintenance [sic] and support of the Embassy and its personnel. The funds in said account are used to pay the salaries of the staff. pay for incidental purchases and services necessary and incident to the operation of the Embassy in its diplomatic activity as the official representative of the

\begin{footnotes}
\footnotetext[57]{127 ILR 101, p 105 (also p 102). The court seems to have found that such presumption is a rule of public international law.}
\footnotetext[58]{If certain facts could be proven only by the documents in the possession of one party, then that party could be required to present such documents so that the fact could be verified.}
\footnotetext[59]{65 ILR 146, p 189.}
\footnotetext[60]{127 ILR 101, p 105, using the term “unacceptable interference”.}
\footnotetext[61]{128 ILR 688, p 690.}
\footnotetext[62]{127 ILR 101, p 106.}
\footnotetext[63]{\textit{Ne impediatur legatio} and especially Articles 22, 24 and 25 of the VCDR.}
\footnotetext[64]{63 ILR 524, p 526.}
\end{footnotes}
government of the United Republic of Tanzania in the United States of America.
4. The funds in the aforementioned account are not used for any form of commercial activity other than the aforementioned incidental purchases of goods and services necessary and incident to the operation of the Embassy” (emphasis added).

- In Alcom,65 “The undersigned Ambassador Extraordinary and Plenipotentiary of the Republic of Colombia to the Court of St. James’s hereby certifies that: The funds deposited by the Colombian Embassy in its bank accounts at the First National Bank of Boston in London are 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.”

In both cases the court simply decided that the type of activity mentioned was clearly commercial, and allowed attachment. It should be noted, however, that in Birch, the court attached a mixed account, and in Alcom, the House of Lords — although agreeing that some expenses would indeed be commercial — overturned the decision of the Court of Appeal largely based on fact that some expenses would not be commercial.66

The only other means of discharging the burden of proof has been suggested by the court in Vinci Constructions. It stated that “[i]t is correct that the application of this principle does not facilitate the task of creditors of a foreign State but nevertheless it does not automatically mean that it thereby becomes impossible to prove the intended allocation of funds since it may be possible to deduce the intended allocation of funds from the activities of the State or its embassy which may make it clearly apparent”.67 However, this suggestion does not sit very well with the perfectly reasonable opinion of the same court that the respondent state enjoys considerable discretion in using its funds. In the event, the court did not consider any evidence led by the creditor in support of such a deduction to be sufficient to prove commercial use.68

The same argument of what is effectively using deduction seems to have been suggested also by the German Constitutional Court in the Philippine Embassy case.69 It is however unclear how such deduction would work in practice. In reality it would not, since all that could be required from the respondent state would be a

66 In the absence of any evidence to the contrary led by the creditor.
67 127 ILR 101, p 105.
68 For example, the fact that the funds were placed in a seven-day deposit account was not sufficient to prove commercial use or purpose of the funds (ibid, p 108). Under Alcom, if the funds were not otherwise used for several years and during that time were in such deposit accounts, there could at least be a theoretical possibility that this would suffice for discharging the burden of proof since the funds could be considered to have been used in a commercial transaction (earning interest) with the ulterior motive for holding the funds being irrelevant.
69 65 ILR 146, p 190 quoting Habscheid, who suggested indications such as which ministry was the holder of the account.
substantiation of its claim that assets are immune, i.e. it is possible to request a certificate of the sort discussed above.

2.3. Diplomatic Immunity

The question of whether the bank accounts of a diplomatic mission should be protected by diplomatic immunity regardless of any and all factors, should and indeed seems to be the simplest of all. Strangely enough, however, this is the point on which existing case-law seems diverge the most.

In the cases that have been cited in the present article, the provisions of the VCDR which have been cited and applied include Articles 22, 24, 25 and even 31, and the preamble to the convention. Evidently there is little agreement in this regard. However, of the cases quoted above, the cases decided by the courts in Continental Europe and the LETCO case seem to be quite clearly expressly or impliedly informed by the principle ne impediatur legatio. Yet the sources on which these cases have relied on this point, if any, have also differed. If one adds to this that the court in Birch and both the Court of Appeal and the House of Lords in Alcom did not seem to consider this principle an insurmountable hurdle, one cannot but come to the conclusion that there is no accord on this point at all.

In Vinci Constructions, the court agreed with the parties in that state immunity from execution and any available diplomatic immunity would in fact coincide when dealing with an embassy bank account. It thus agreed and stated that “with regard to diplomatic immunity bank accounts are only subject to attachment if they are not required or necessary for the functioning of an embassy”. It would be difficult, at least in our view, to interpret this in any other way than meaning that the levying of execution is possible if the targeted funds are commercial in nature.

The one point about diplomatic immunity that the case-law seems to agree on is that by virtue of (among other things) diplomatic immunity, it is impossible to require the respondent state to furnish evidence regarding the use of its bank accounts. The most apt of all the provisions of the VCDR to cover this situation would seem to be Articles 24 and 31, the latter inasmuch as a diplomatic representative cannot be required to act as a witness.

As for other uses of the VCDR for the purposes of dealing with attempts to levy execution upon a bank account of an embassy, no provision seems to fit particularly well, or at all. Article 22(3) deals only with the premises and vehicles of the mission, bank accounts are not archives or documents and Article 31

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70 65 ILR 146, p 189.
71 The opinion that it is impossible to segregate the two immunities has also been expressed by Eileen Denza, although she does not espouse such absolute equivalence, see Eileen Denza, "Interaction between State and Diplomatic Immunity", 102 American Society of International Law Proceedings (2008) 111–114, p 111.
72 127 ILR 101, p 105.
73 For example, the principles of sovereign equality of states and non-interference with internal matters have also been applied in this respect.
74 See for example Pellew, "Enforcement of Noga Arbitral Awards in France", supra nota 24, p 35.
75 Article 24 of the VCDR.
seems to be irrelevant altogether, at least for the purposes of direct application. Using them to protect bank accounts would require:

- interpreting them to include something that is simply not there and that would have been easy to include if this had been desired; and
- using the convention to deal with an issue that it was in all probability not intended to deal with. Levying execution on a bank account of a diplomatic mission was simply not such an issue in 1961 when the doctrine of absolute immunity still held strong.76

As for Article 25, the argument that attaching the bank accounts of an embassy deprives the respondent states of full faculties for the performance of the functions of the mission, seems to be the best of the lot, although at least the second counter-argument above is still applicable. In reality this argument is absurd, since it basically comes down to the argument that the receiving state (or, more correctly, its nationals) should accord the sending state all the services it consumes free of charge (and it is common knowledge that that argument has explicitly failed as regards communication services).

It has been suggested, however, that execution is precluded by the general rule of which these provisions are merely particular examples: *ne impediatur legatio*, which it is suggested applies to the situation by virtue of the seventh recital of the VCDR. The application of the seventh recital of the VCDR is the argument that seems to win it for us — although in a different mould. That provision states that matters not expressly governed by the VCDR (and the present subject-matter is not, however you look at it), are governed by customary international law. This includes the law of state immunity, including the law of state immunity from execution, and therefore the law of state immunity should govern the matter instead of the law of diplomatic immunity.77 This recital of the VCDR can thus be seen as somewhat of a *renvoi*-type provision.

Finally, in international law, there should exist a principle that law should not be construed such that certain provisions became redundant. If diplomatic law were to apply in a manner precluding execution upon bank accounts of embassies, then taking into account that there is pretty much nothing else to levy execution upon, the provisions of international law that limit state immunity would indeed become redundant.

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76 For example, the USSR dealt with the matter in separate treaties concluded with the countries in which its embassies were established.

77 Unless of course one adheres to the argument set forth by Richard Garnett to the effect that “it is now almost impossible to speak of a ‘customary international law’ of foreign state immunity given the divergences in state practice. Immunity has, in fact, become little more than a sub-branch of each state’s domestic law”. Richard Garnett, “Should Foreign State Immunity Be Abolished?”, 20 *Australian Year Book of International Law* (1999) 175–190, p 170. This, however, does not seem to accord with the opinion of the courts or states when they present their arguments.
3. SOLUTIONS?

The reasons for the difficulties in levying execution against a respondent state can be summarised in the following points:

- the only assets normally available for execution are the bank accounts of embassies;
- such accounts are normally “mixed”, holding both commercial and sovereign funds, and are thus held immune from execution;
- the burden of proving that a particular account is commercial or certain funds in a mixed account are commercial rests with the creditor, with the respondent state not being obliged to furnish any substantive evidence;
- whereas the courts, in parallel with the above, suggest the nature test, they effectively look at the purpose of the transactions for which the funds are used and normally hold the funds to be for sovereign purposes and thus immune.

In addition a court might or might not consider diplomatic immunity applicable. Altogether this creates a brilliant and absolutely stunning environment for abuse — of course by those who never engage in abuse — states.

We now propose to offer two solutions to the problem of a private party creditor’s lack of remedy against a respondent state.

3.1. Transferring SDRs?

This first proposal is utterly and completely unrealistic and of no practical value, at least for the foreseeable future. This, however, has never stopped anyone from making such a proposal.

This approach solves two of the main difficulties in obtaining a remedy. It would obviate the need for finding assets of the respondent state within the jurisdiction of the forum state altogether, and it would mean that it would become irrelevant whether such assets are immune, non-immune or mixed. Theoretically, state immunity from execution is granted for non-commercial assets so that the assets which the respondent state needs for its sovereign activities will not be taken away. If this solution were adopted, this would no longer be a threat.

The solution would be to conclude a multilateral convention which provides that where a court of a forum state renders a judgment against a respondent state and the judgment is final and becomes binding, it is the forum state who will fulfil the judgment. The forum state would then forward the judgment after it is certified let us say by the Foreign Secretary to the IMF, which would then transfer the corresponding amount of SDRs from the account of the respondent state to the account of the forum state.

It would obviate the problem with state immunity from execution altogether and provide a remedy. The only slight problem is that this presumes conclusion of a treaty, which would, especially in a field such as state immunity, take years if it

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78 From the point of view of the respondent state.
79 This would of course work only for money judgments, but the present article is concerned only with money judgments.
were to actually ever happen. For example, the United Nations Convention on Jurisdictional Immunities of State and Their Property requires 30 ratifications for entry into force. In six years, it has been signed by 28 countries and ratified by ten, i.e. there are less signatures than required for ratification.

In any case it would only solve the problem as between treaty partners, and it would create another avenue for abuse or even corruption. In a state whose courts are not independent, it would create the possibility to transfer to itself SDRs from other states simply by passing a judgment against them in its courts. To obviate this risk there would have to be some sort of final instance of appeal, but this would just be the last straw and would render adoption of a treaty too complicated and the allocation of resources for its development a waste.80

3.2. Tainted Money?

The alternative solution works within the framework of the law as it stands. The main difficulties in obtaining a remedy are that the accounts of embassies are normally mixed and it is impossible to determine what portion of the funds is or will be used for the purposes of commercial transactions, and what portion is or will be used for the purposes of sovereign activities. This difficulty stems from the fact that under public international law, it is not possible to require respondent states to explain their use of funds. In the words of the German Constitutional Court in the *Philippine Embassy* case, “[t]aking any other view of the matter would mean that the executing authorities of the receiving State might have to ascertain the existence of funds in such an account and the purposes for which the sending State intended such funds or parts of them to be used”.81

But what if it were possible to levy execution after the funds were actually used? By using modern technology, it actually is. Instead of endeavouring to determine what the credit balance in an account is going to be used for and in what proportions, all a court would have to do would be to issue an order or an injunction not to the respondent state but to the bank of the respondent state, obligating the latter to intercept money paid by the respondent state in the course of its commercial activities. For a bank it should not be overly difficult to determine the purpose of a particular payment: when making a transfer one normally indicates what the money is for or refers to an invoice. If there is no explanation or a credit card or a cheque is used, it should be quite easy to determine the characteristics of the transaction for which the payment is made by looking at the recipient. It is highly unlikely if not impossible that money paid to Marks & Spencer or a plumber for example is used for sovereign activities. If there is a reasonable doubt (e.g. a payment was made to a notary public), a court could always require that it be interpreted in favour of the respondent state. While it is true that this solution would not catch cash payments, in the countries which normally “serve” as the forum states the normal ways of settling claims arising

80 It is unlikely, to say the least, that states would accept such compulsory jurisdiction.

81 65 ILR 146, 188.
from business to business transactions are bank transfers, credit card payments or payments by cheque. 82

Another side to this solution is that it would actually guarantee that the nature test — which on paper at least is universally accepted in case-law — and not the purpose test is used for determining whether a transaction is a commercial one. A bank can only determine whether a transaction is commercial by its nature, such as the purchase of goods or payment of the salaries of the soldiers guarding the embassy. It cannot determine why the respondent state entered into it.

The intercepted funds could then be transferred to the judgment creditor without the forum state ever knowing or indeed needing to know how the embassy actually uses its funds. 83 Only the bank would know, but it knows that anyway. If someone suggests that even such a court order is an unacceptable intrusion then what about airports and air travel? All airports and carriers require even diplomatic bags and diplomats themselves to be screened before they are allowed on board of an airplane. At least in the European Union Member States, it is the state (or the European Union) that requires the airport authorities and carriers to screen all their passengers and all the passengers’ luggage. In the case of air travel there is always the possibility of using a private jet so that these requirements do not apply. In the case of payments, there is always the possibility of withdrawing cash and paying in cash so that it is the recipient who deposits cash in the recipient’s account.

This approach would ensure that only commercial funds are used to satisfy a judgment, but it would also ensure that commercial funds indeed would be used to satisfy a judgment. Respondent states would not have to fear that their sovereign assets could be attached, but they could not argue anymore that the funds attached are for non-commercial purposes. As for the problem that courts of certain forum states seem to ostensibly advocate the nature test but in reality determine whether assets are for commercial or sovereign activities using the purpose test, they would in effect be estopped 84 under international law from not applying the nature test in practice: they committed themselves to it, stated that it is part of public international law and there are no ambiguities as to how to apply it or what should be considered in its application.

For private party creditors, not only the judgment creditor, this approach would in effect create a queue where claims of creditors are met on a first claimed, first served basis. A creditor whose payment is intercepted would simply have to ask the embassy to satisfy the creditor’s claim. If the embassy does not, then the very same mechanism could be used. 85 It is true that the state would have to start meeting its obligations in a timely manner at some point in time, since otherwise no-one would do business with it (e.g. if an embassy needed new windows, no company would agree to install them unless it received a full advance) simply

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82 However, this does not mean that cash payments are impossible, they are simply rare.

83 The fact that some funds are used for commercial purposes and some are not is hardly a secret.

84 See for example Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada/United States of America), Judgment, ICJ Reports (1984) 246, para 130.

85 Considering that the creditor in such a situation is by definition a commercial one, and the creditor’s claim would thus be upheld, it would be easy for the court to order full costs to follow the event.
because of the queue, if nothing else. But that is the purpose of compulsory execution and precisely what contract law is based on: if you do not pay, your assets will be taken in satisfaction of the debt. It hurts because it is supposed to. As for the argument that it would breach Article 25 of the VCDR, it would not since:

- the breach, if any, could only consist in the fact that no private party is willing to do business with the respondent state, but there is no obligation on private parties to do business with states that have established embassies and no obligation on the part of the receiving state to guarantee that there is someone who is willing to do business;
- the entire situation occurred since the respondent state did not meet a commercial or private law obligation to a private party in the first place;
- it is in effect exactly the same argument that could be advanced in relation to air travel by diplomats: “I am inviolable, so is my briefcase being a diplomatic bag, I do not want myself or it to be screened, but I cannot afford a private jet”. It does not make requiring screening contrary to diplomatic law.

In terms of practical aspects, in a common-law country the court could perhaps make use of its equitable jurisdiction and issue an equitable injunction or order to the bank. In a civil law country such as Estonia, this could be accomplished through the private party claimant compelling the court (to compel the legislature) to create the necessary procedures by enforcing its constitutional right to organisations and procedures, and filing a complaint against the forum state if it fails to do so. This however is the potential subject-matter of another article.

Finally there is an alternative version of this approach which distances execution not only from the forum state but at least partially from the respondent state. Moneys could be intercepted not at the moment they are transferred or when a cheque is cashed, but when they actually reach the account of the recipient intended by the respondent state. In this case the court would of course have to issue the order or injunction not only to the respondent state’s bank but to all banks within its jurisdiction. Even then it would be impossible to intercept moneys transferred outside of its jurisdiction. This solution would of course require enactment of specific legislation since it would amount to a certain form of expropriation. It is likely, however, that if proper legislation were enacted, considering that the person from whose account funds would be taken would retain a right of claim against the respondent state, such expropriation would not be considered to be disproportional under the European Convention on Human Rights and Fundamental Freedoms.

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86 I.e. its right to require that the state provide the necessary mechanisms for persons to realise their rights in practice.

87 If this mechanism is used, it is quite probable that sooner or later the creditor’s claim will be settled. In reality it is a matter of timing and the time value of money.
4. CONCLUSION

There is currently no practical remedy for a private party if it sues one state in the courts of another. The present article has been written to show why, and to demonstrate that even under the law as it stands, it is possible to provide such a remedy without amending or breaching the law, simply by using modern techniques and with some willingness on the part of the courts.

We would like to end this article with a citation from the Philippine Embassy case decided by the German Constitutional Court:

this Chamber fully appreciates that the immunity accorded to claims arising out of a general current account of the embassy of a foreign State might in some cases be used as a shield for financial transactions through such an account which were not directly related to the functions of a diplomatic mission. Should such a case occur—and there is no indication of this in the original proceedings—it would be for the competent authorities of the Federal Republic of Germany to counter a “non-functional” use of the immunity of diplomatic missions by diplomatic and other means admissible under international law.\textsuperscript{88}

\textsuperscript{88} 65 ILR 146, p 190.