ENFORCEMENT JURISDICTION, FOREIGN STATE PROPERTY AND DIPLOMATIC IMMUNITY

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I. INTRODUCTION

IN 1978 with the enactment of the State Immunity Act the restrictive doctrine of immunity from suit of a foreign State before English courts was confirmed as the basis of English law. The Act appeared to put to rest a century-old controversy between adherents of the absolute and restrictive doctrines and to strike a correct balance between the interests of the private trader and lender of money and of the foreign State.[1] However, the case of *Alcom* v. *Republic of Colombia*,[2] concerning the attachment of a bank account of a diplomatic mission, which has recently been going through the English courts, shows the debate to be still continuing and provides one illustration of the substantial problems still to be resolved.[3]

In recent years there have been a number of attempts by commercial creditors to garnishee bank accounts held in the name of a foreign diplomatic mission. The West German Federal Constitutional Court ruled in 1977 in a case relating to the attachment for a commercial debt of the general bank account of the Philippine Embassy held in a Bonn bank:

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1. The extensive literature on the subject includes Harvard Research (1932) 26 A.J.I.L. Suppl. 451–738; Lauterpacht (1951) 28 B.Y.I.L. 220; Sucharitkul, *State Immunities and Trading Activities* (1959), and his reports as Rapporteur to the International Law Commission on Jurisdictional Immunities of States and their Property, UN Documents A/CN.4/323, 331 and Add.1, 340, 357, 363 and Add.1, 376 and Add.1–2; Sinclair (1973) 22 I.C.L.Q. 254 and (1980–II) 167 Hague Rec. 113; see also (1979) 10 Neth.Y.B.I.L. for national reports on State practice.

2. *Alcom Ltd.* v. *Republic of Colombia* [1984] 2 W.L.R. 750 (HL reversing the CA: [1983] 3 W.L.R. 906).

3. Other problems concern the scope of the exceptions contained in ss.3–11, e.g. contracts of employment (s.4; see Sucharitkul, *op. cit. supra* n.1, at Document A/CN/4/363 (1982), and, for the English law prior to the Act, see *Sengupta* v. *Republic of India* (1982) 1 C.R. 221; 64 I.L.R. 352 (EAT)); tortious liability for personal injuries (s.5; for conflicting US decisions as to whether the injuries as well as the tortious act have to occur within the local jurisdiction, see *Persinger* v. *Islamic Republic of Iran* (1984) XXIII I.L.M. 384 (US Ct. App. Col. Cir., 13 March 1984); the construction of a State's submission (s.2(2); cf. *Libra Bank Ltd.* v. *Banco Nacional de Costa Rica*, 676 F.2d 47 (2d Cir. 1982), *S & S Machinery Co.* v. *Maxinexportimport*, 706 F.2d 411 (2d Cir.), cert. denied 104 S.Ct. 161 (1983)); and the scope of exclusions, e.g. s.16(2) relating to armed forces of the State.

> Claims against a general bank account of the embassy of a foreign State which exists in the State of the forum and the purpose of which is to cover the embassy costs and expenses are not subject to forced execution by the State of the forum.[4]

This has generally been accepted by international lawyers as an accurate statement of the law relating to immunity of bank accounts of diplomatic missions. Yet in 1973 the Canadian Department of External Affairs had to intervene twice in proceedings before the Ontario Court to persuade it not to order execution against the assets of the Russian Ambassador in respect of a default judgment obtained for a printer's bill incurred by the Russian Government, and in 1980 a court order was made against the bank account of the Russian Embassy held in Ottawa. The case was settled and, in an exchange of correspondence, the Canadian Department of External Affairs declared without reservation that the attachment of a bank account was contrary to international law and to domestic Canadian law. The note also urged foreign missions to bring to the attention of the Department claims made against them and to appear in Canadian courts themselves to plead their immunity.[5] In the same year—1980—in *Birch Shipping Company* v. *Embassy of United Republic of Tanzania*[6] a US district court upheld a writ of garnishment on an account maintained by the Tanzanian Embassy at an American bank. The court held that the embassy by its submission to arbitration had waived immunity including immunity from execution. The only significant question was whether an account used partly for commercial activity and partly for governmental activity was subject to attachment in execution upon judgment. The court's answer was that mixed accounts should be subject to attachment because any other answer would permit defendant foreign sovereigns to frustrate all executions by the simple expedient of maintaining mixed accounts. On the other hand,

4. BVerfGE, Vol.46, p.342; for an English translation, see *UN Materials on Jurisdictional Immunities of States and their Property* (1982), St.Leg.Ser.B/20, p.297. In the earlier case of *Non-Resident Petitioner* v. *Central Bank of Nigeria*, the District Court of Frankfurt upheld attachment of assets of the Central Bank of Nigeria located in Germany on the ground that the attached assets "were not dedicated to the public service of the State" and were consequently not "exempted from forcible attachment and execution": St.Leg. B/20, p.290; (1977) XVI I.L.M. 501.

5. (1982) 20 Can.Y.B.I.L. 282.

6. 507 F.Supp. 311 (1980); (1982) 63 I.L.R. 524. This decision is to be contrasted with an earlier case, where there was no question of submission: *Arcade Building of Savannah* v. *Republic of Cuba*, 104 Ga.App. 848; S.E. 2d 453 (Savannah, Ga., City Ct. 1961); Whiteman, *Digest of International Law*, Vol.6, pp.718–719. On attachment of a local bank account of the Cuban Consulate, the US State Department advised the Attorney General that, whilst attachment of State property to obtain jurisdiction was not prohibited, its retention to satisfy a judgment of the ensuing suit was not permitted under international law.

an embassy can readily protect its government functions by segregating its public purpose funds from commercial activity funds.[7]

II. *ALCOM* v. *REPUBLIC OF COLOMBIA*

PRECISELY the same point was under discussion in *Alcom* v. *Republic of Colombia*. Alcom was seeking to enforce a default judgment obtained for some £41,000 in respect of security equipment allegedly purchased by the Republic of Colombia.

At first instance Hobhouse J set aside garnishee orders nisi granted in Alcom's favour against two London bank accounts of the Colombian mission.[8] He did so on the ground that the primary purpose of the account was for a non-commercial purpose, namely running the embassy, and was accordingly immune from attachment. His ruling was based on a construction of the State Immunity Act 1978 in accordance with general principles of international law and so as not to strain the statutory term "commercial" to cover consumer activities. Even if buying goods and services for the embassy was to be regarded as "commercial", the judge held that one could not assume that other uses of the account, such as paying the ambassador or officials or helping stranded Colombian nationals, were commercial; the case was not, therefore, made out that the account was wholly or predominantly commercial and, as the garnishee orders attached to the whole accounts with no distinction between the two purposes, they must be set aside as offending the immunity for non-commercial purposes granted in the Act. Hobhouse J added that, if evidence was produced to show certain monies were used solely for commercial purposes, it might then be possible for the court to allow a garnishee order.

The Court of Appeal, in a judgment delivered by Donaldson MR and concurred in by May and Dillon LJJ, restored the garnishee orders.[9] The Ambassador for Colombia in his certificate stated that the bank accounts were not in use or intended for use for commercial purposes but only to meet the expenditure necessarily incurred in the day-to-day running of the diplomatic mission.[10] The Master of the Rolls held, without impugning the ambassador's good faith, that the purpose of the money in the bank could never be to "run an embassy"; the purpose was

7. In 1978 the Austrian Supreme Court held that the mere fact "that the bank account was held by 'the Republic of Indonesia through the Legation thereof'" did not necessarily mean that it constituted an asset exclusively serving the exercise of sovereign rights of the State; it authorised an examination whether or not "assets serving private law purposes" were involved: *Neustein* v. *Republic of Indonesia*, unpublished decision of 6 Aug. 1958, reported by Seidl-Hohenveldern, *Festschrift G. Beitke* (1979), pp.1081, 1098; (1979) 10 Neth.Y.B.I.L. 107.

8. [1983] 3 W.L.R. 906, 911.

9. *Idem*, p.906.

10. For the text of the ambassador's certificate, see [1984] 2 W.L.R. 750, 759.

to pay for goods and services to enable the embassy to be run; that purpose fell within the very wide definition of use for "commercial purposes" as defined by section 17; and it was consistent with the principles of international law which had regard to the nature of the transaction rather than the reasons why the transaction was undertaken. The Master of the Rolls relied on Lord Bridge's opinion in *I Congreso*[11] where he gave, as an example of a commercial or trading or private law transaction, the ordering of uniforms for the maintenance of an army, the latter being a sovereign function. The account was accordingly subject to attachment as allowed by section 13(4) of the Act. The Master of the Rolls was also prepared to extend the wide statutory definition to include as "commercial" the other uses referred to; in his opinion, expenditure designed to help stranded citizens would be for "commercial purposes" as statutorily defined since it involved contracts for services such as the purchase of an air ticket.

In *Alcom* v. *Republic of Colombia* the Court of Appeal was considering immunity from execution after final judgment; the case involved no question of pre-judgment injunction to secure assets, nor was it concerned with Colombia's immunity from jurisdiction. In the Court of Appeal proceedings it was not challenged that the special requirements of section 12 of the State Immunity Act 1978 relating to service of the writ on a foreign State through the intermediary of the Foreign Office and to time limits had been complied with. It was stated on behalf of Colombia that she intended to take separate proceedings to set aside the judgment on the merits as she denied that any contract for the equipment had been made. By the time the case came to the House of Lords, Colombia had succeeded in having the default judgment set aside.[12]

It was also assumed that there were sufficient jurisdictional links with the English forum. For proceedings for "commercial transactions" under section 3, no connecting link with England is required. Section 3(1), as originally drafted, followed Article 4 of the European Convention on State Immunity; it incorporated jurisdictional links with the English forum and removed immunity in respect of proceedings relating *only* to contracts to be performed in the State of the forum. After debate in the House of Lords, the jurisdictional links were dropped from section 3(1)(a), it being considered (though apparently not in relation to the other sections removing immunity from local proceedings) that they involved a separate issue which was covered by the existing procedure relating to the obtaining of the court's leave under RSC

11. *I Congreso del Partido* [1983] A.C. 244; see Fox (1982) 98 L.Q.R. 94.

12. This left the issue of costs as the only financial consequence for the parties of the decision in the House of Lords and led Lord Diplock to justify the continuance of the appeal on the ground that the question of law involved was "of outstanding international importance": [1984] 2 W.L.R. 750, 760.

Order 11 for service out of the jurisdiction of a writ relating to a dispute containing a foreign element.[13]

In practice, the jurisdictional links with the forum recognised under RSC Order 11 rule 1(1)(f) and (g) are so wide-ranging that, provided the contract relied upon has some connection either in its making, applicable law or breach with England, the court is likely in its discretion to grant leave for service out of the jurisdiction. In the present case, although the matter was later successfully challenged by Colombia, the plaintiffs obtained leave to serve the writ out of the jurisdiction on the grounds that the contract was made in England, and breach by non-payment also took place within the jurisdiction.

Three lines of argument for defeating the creditor's claim are thus shown not to have been employed by the foreign State in *Alcom*, that is to say it was accepted that the special procedure under the 1978 Act was in order, that there were sufficient jurisdictional links to satisfy the obtaining of leave under RSC Order 11, and that the 1978 Act afforded no immunity from jurisdiction for the type of debt which was the subject of the claim. These methods of defence should not, however, be overlooked by those advising foreign States in respect of future claims as they offer considerable restrictions on the forum court's powers.

The focus of the litigation had therefore shifted to the immunity, if any, of the foreign State from execution and enforcement measures against its property situated in England. The preliminary issue of the jurisdiction of the forum court to grant execution was not separately considered by the Court of Appeal. Indeed in no court was the competence of the English court to grant enforcement measures questioned; the existence of a judgment obtained in an English court was, no doubt, thought strong ground for the English court asserting competence to proceed to the next stage—enforcement of the judgment. Had the judgment been obtained abroad, from say a French or German court, the need for jurisdictional links with the forum on which to base the English court's jurisdiction might have been more pressing.[14]

Surprisingly the Court of Appeal gave no separate consideration to an argument based on the special position of diplomatic missions and the exclusion of their privileges and immunities from the scope of the State Immunity Act.[15] This is all the more surprising in that the judgments delivered show that the Court was fully aware of the effect its decision

13. 389 H.L.Deb. 5s, col.1526, 16 March 1978.

14. For the need for such jurisdictional links, see the Swiss Federal Court's decision in *Socialist People's Libyan Arab Jamahiriya* v. *Libyan-American Oil Co.* (*LIAMCO*), 19 June 1980, BGE 106, I, 142; (1981) XX I.L.M. 151; and the West German Federal Constitutional Court's decision, *In re National Iranian Oil Co.* (1984) XXIII I.L.M. 1281.

15. At the committee stage of the Bill in the House of Lords, Elwyn-Jones LC stated that funds retained by a foreign State for diplomatic purposes were rendered immune by s.16(1): *op. cit. supra* n.13, at cols.1525–1526.

would have on the diplomatic function. It was on this ground that the appeal to the House of Lords succeeded.

The decision of the Court of Appeal was reversed by the House of Lords in a single judgment given by Lord Diplock. In his judgment he gave authoritative confirmation that, prior to the enactment of the State Immunity Act 1978, English common law had, through the "seminal" judgment of Lord Denning in *Trendtex*,[16] adopted a restrictive theory of State immunity based on "the critical distinction between what a State did in the exercise of its sovereign authority and what it did in the course of commercial trading activities". His starting point on the issue before the House was unequivocal acceptance of the "wholly convincing" reasoning of the German Constitutional Court in the *Philippine Embassy* case, referred to above,[17] and of the existence of a rule in public international law requiring immunity from legal processes of execution for the current bank account of a diplomatic mission used for defraying the expenses of running the mission.

Finding such a rule to exist at the date of the 1978 Act, he then addressed the question whether the provisions in the Act overrode such a rule. His construction of the Act establishes that, without consent of the State, enforcement jurisdiction is confined to property "being used or intended for use for commercial purposes"; in his view the whole credit balance owed by a bank to a customer falls within the expression "property".

Lord Diplock then considered the extended meaning given to "commercial purposes" by section 17(1) linked with the comprehensive definition of "commercial transaction" in section 3(3)—the extended meaning which found favour in the Court of Appeal and which would render attachable property in use for any contract for the supply of goods or services without making any exception for contracts in either of these two classes entered into for purposes of enabling a foreign State to do things in the exercise of its sovereign authority. In his view the *prima facie* breadth of this meaning is narrowed by the express exclusion of contracts of employment, enactment of subsequent exceptions, which, on the "extended" meaning, would already be covered by section 3(3), and the express recognition (s.16(1)(b)) of the special status of States' diplomatic missions in relation to the exception removing immunity from immovable property (s.6(1)). He concluded that in the context of these other provisions of the Act and against the background of its subject-matter, public international law, the inclusion in the general account held for the purposes of a diplomatic mission of some monies

16. *Trendtex Trading Corp.* v. *Central Bank of Nigeria* [1977] Q.B. 529.
17. *Supra* n.4.

due under contracts for supply of goods or services to the mission was insufficient to bring it within the exception to the foreign State's general immunity from execution.

The Court of Appeal's interpretation of the State Immunity Act swung the pendulum very far in favour of the private trader. Giving a remedy to the private trader to enforce his commercial debt, the Court disregarded the conflict that this produced with the older rules relating to immunities of diplomatic missions. The decision also disregarded, contrary to the position in other jurisdictions, the distinction between the adjudicative and enforcement jurisdiction of the forum State, between the foreign State's immunity from suit and its immunity from execution. It gave the Act a wide construction so as to permit a State's commercial debts to be enforced out of State funds (other than monies in its central bank) located for whatsoever purposes within the jurisdiction.

In consequence of the Court of Appeal's decision certain diplomatic missions actually had their embassy accounts attached,[18] others moved or threatened to move their accounts to the Channel Islands, and others made representations to the Foreign Office that, on grounds of reciprocity, UK missions abroad might find their property liable to attachment.

The case also highlights the ambiguous position in which the UK Foreign Office may be placed by the statutory procedure, modelled on that provided in the European Convention, whereby, if there is no agreement of the parties, the diplomatic channel is the sole and exclusive method for service of any writ or judgment on a foreign State.[19] Whilst use of the diplomatic channel has advantages—it avoids any risk of infringement of sovereignty or breach of diplomatic immunity by attempted service and provides an objectively certified method and date of service—it is productive of delays and may expose the Foreign Office to a duty of checking that the transmitted documents conform to requirements of English and foreign procedural law. The subsequent exercise of the court's power *ex proprio motu* to give or withhold

18. Bank accounts in the name of Egypt were attached to satisfy an ICC award against which Egypt had lodged an appeal in Paris. Before the English Court of Appeal the plaintiffs sought an order continuing the attachment as security under s.5(5) of the Arbitration Act 1975. The Court of Appeal refused the order sought for lack of solid evidence that a major friendly foreign State with funds in the country intended to remove them simply to avoid paying an arbitration award: *S.P.P. (Middle East) Ltd.* v. *Arab Republic of Egypt and Others*, CA transcript, 19 March 1984.

19. State Immunity Act 1978, s.12, RSC Ord.11 r.7; European Convention on State Immunity 1972, Art.16, Explanatory Report, paras. 58–59, U.K.T.S. No.31 (Cmnd.5081). Cf. Foreign Sovereign Immunities Act 1976, s.1608, which permits service of process on a foreign State by the simpler procedure available under the Hague Convention on Service Abroad of Judicial and Extrajudicial Documents 1969 (Cmnd.2613), 20 U.S.T. 361, or, failing this, by ordinary mail: *Alberti* v. *Empresa Nicaraguense de la Carne* 705 Fed Rep. 2d Ser.250–57 (1983); (1983) XXII I.L.M. 835.

immunity under the Act may also lead to political tensions. In the present case, an *amicus curiae* was instructed in the proceedings before the House of Lords and such an action may be necessary to preserve or develop English law in accordance with international law. If, however, it leads to frequent participation of the executive in commercial disputes between individuals and foreign States it defeats the purpose of the Act and undermines the impartiality of the process.[20]

The decision of the House of Lords has restored the balance and recognised the need for functional immunity of diplomatic missions. It does, however, itself raise other questions. First, is the effect of the decision to give such wide protection from execution for State property within the court's jurisdiction as to leave little or no occasion when a judgment against a foreign State can be executed? If so, will not the absolute nature of the immunity from execution effectively defeat the attempt to liberalise the law by the restriction of State immunity from suit? Second, was it not in part the abuse of the historic diplomatic and other immunities of the State which led to the demand to introduce a restrictive doctrine of immunity? The leading case, again in the German courts, on the distinction between public and commercial acts of a State relates to a contract for building work to the Iran Embassy in Bonn in respect of which the foreign State pleaded immunity.[21] Does not the House of Lords' decision restore the blanket protection which the 1978 Act was designed to remove? A third related question concerns the scope of the exception in section 13(4) which permits execution against State property "in use or intended for use for commercial purposes". Does the House of Lords' decision deprive this exception of any effect save where monies have been placed in advance in a separate fund for the express purpose of paying the debt?

It is proposed to look at each of these problems under the headings of the distinction between immunity from suit and immunity from execution, the relationship of diplomatic immunities to the liability of a State in respect of its commercial transactions, and the interpretation of the State Immunity Act 1978. The discussion is largely confined to property in bank accounts as their operation enables the most rapid transfer of assets and allocation to different uses and their attachment is consequently of immediate practical concern to creditors. The attributes of property in bank accounts are derived from the private law system which gives them recognition and are not further discussed here save to

20. See also affidavit of US Secretary of State, George Shultz, in *Jackson* v. *People's Republic of China* (1984) XXIII I.L.M. 42 (Dist.Ct.Ala. 27 Feb. 1984).

21. *Empire of Iran* case 1963, BVerGE, Vol.16, p.27; 35 I.L.R. 57; applied in *Planmount* v. *Republic of Zaire* [1978] 2 Lloyd's Rep. 393 (Lloyd J).

note that the private law rules must not distort the applicable international law.[22]

III. THE IMMUNITY FROM EXECUTION AS DISTINGUISHED FROM THE IMMUNITY FROM SUIT

A DISTINCTION between immunity from suit or jurisdiction in the sense of court proceedings resulting in judgment and immunity from execution in the sense of measures to enforce the judgment is widely recognised and observed in most other jurisdictions.[23] Even countries, such as Italy and Belgium, which were the first to recognise the restricted nature of a State's immunity from local proceedings, readily acknowledged such a distinction and accepted that different considerations applied to immunity from enforcement measures.[24] The basis of the distinction is entirely practical. Whereas a court proceeding leading to judgment may be conducted in the absence of the foreign State and produces no immediate hindrance to that State's conduct of its affairs, execution of the judgment involves, in the last resort, the use of force against the foreign State by the seizure of assets. To effect that seizure, the forum court requires the assistance of the executive arm of government and the friction such seizure is likely to cause in relations between the two countries has produced a rule of wide immunity from execution. The Convention for the Settlement of Investment Disputes[25] and the European Convention on State Immunity[26] both observe the distinction and provide for separate rules for execution of judgments upon State assets and the same position was adopted in the US Sovereign Immunities Act 1976.

The position in English law immediately prior to the Act of 1978 was not entirely clear. According to the UK reply to a questionnaire sent out by the International Law Commission, it was stated:

> Prior to the State Immunity Act, there was no case in which the United Kingdom courts permitted forcible execution of a judicial decision against a foreign State. The cases clearly established that immunity from execution must be regarded as distinct from immunity from jurisdiction.[27]

22. See *infra* Part V.

23. See Lauterpacht, *op. cit. supra* n.1; Crawford, "Execution of Judgments and Foreign Sovereign Immunity" (1981) 75 A.J.I.L. 820.

24. *Amministrazione del Governo Britannico e Comune di Venezia* v. *Guerrato*, Constitutional Court, decision of 13 July 1963 [1963] II Sentenze de Ordinanza della Corte Costituzionale 572; Condorelli and Sbolci on Italian practice (1979) 10 Neth.Y.B.I.L. 197; *Socobelge* v. *Etat Hellénique* (1951) 18 I.L.R. No.2; J. Verhoeven on Belgian practice (1979) Neth.Y.B.I.L. 73.

25. 575 U.N.T.S. 159.

26. [1972] U.K.T.S. No.74 (Cmnd.7742).

27. (1980) 51 B.Y.I.L., 343; ILC on Jurisdictional Immunities of States and their Property, *op. cit. supra* n.1, at p.629.

This view was supported by Lord Atkin in *Compania Naviera Vascongado* v. *SS Cristina*[28] and by *Duff Development Co.* v. *Government of Kelantan*,[29] but, in view of the later cases of *Philippine Admiral*[30] and the Court of Appeal's authorisation of Mareva injunctions against the property of foreign States in *Trendtex Trading Corporation* v. *Central Bank of Nigeria*[31] and *Hispano Americana Mercantile* v. *Central Bank of Nigeria*,[32] it is arguable that the distinction was not given effect to at common law.

The UK State Immunity Act 1978 contains no specific rule preserving the immunity of a State from execution as it does in section 1 for immunity from suit, though one reading might be that the general prohibition in section 1 is wide enough to include execution, as well as suit and proceedings. In the light of this uncertainty it is particularly welcome to have the House of Lords' authoritative affirmation that "the Act draws a clear distinction between the adjudicative jurisdiction and the enforcement jurisdiction of courts of law in the United Kingdom. Sections 2–11 deal with the adjudicative jurisdiction. Section 12–14 deal with procedure and of these, sections 13(2)–(6) and 14(3) and (4) deal in particular with enforcement jurisdiction."[33]

Given, then, the recognition of a separate immunity from execution or enforcement jurisdiction, what are the English rules? Of the four possible approaches, the English Act rejects total prohibition of enforcement and, as *Alcom* establishes, also rejects enforcement to the same extent as proceedings are permitted against States for non-immune activities. The obtaining of a judgment for a non-sovereign commercial debt is not of itself sufficient to enable the judgment creditor to enforce the judgment against any or all State property within the jurisdiction.

Instead the English Act authorises, excluding the special provision relating to ships, two general methods of execution of judgments obtained against a foreign State. The first, set out in section 13(3), is the wider exception to the general prohibition contained in section 13(2) against enforcement measures including injunctions whether taken

28. [1938] A.C. 485.
29. [1924] A.C. 797. Elwyn Jones LC, in introducing the State Immunity Bill in the House of Lords, stated that "there is no general power of enforcement. It is generally accepted that States do not take coercive action against each other or their property. . . . Execution against the property of another State could create tensions. . . . States must rely on each others' compliance with legally established obligations": *op. cit. supra* n.13, at col.388, 17 Jan. 1978. For his view on the legal effect of s.13(4), see *infra* n.68.
30. [1977] A.C. 373 (PC).
31. *Supra* n.16.
32. [1979] 2 Lloyd's Rep. 277.
33. [1984] 2 W.L.R. 750, 755.

before, during or after trial and judgment. This wide exception permits full enforcement including pretrial injunction with the written consent of the State concerned. Although logically this is no exception to the general prohibition against forced execution since it depends on the foreign State's consent, it is probably correct to classify it as an exception since, as with the majority of rules relating to State immunity, the form and scope of the consent is regulated by the UK Act without any precondition of reciprocity or assent to its terms by the foreign State.[34]

The second exception, which is the immediate concern here, permits by section 13(4) the issue of process in respect of property "which is for the time being in use or intended for use for commercial purposes". Possibly derived from a criterion in respect of ships which subjected them to private law enforcement measures except in the case of "ships used exclusively on government and non-commercial service",[35] the identification of State property liable to attachment is clearly made by the 1978 Act a purposive one. Such a purposive test has proved unworkable in immunity from suit as a basis for the distinction between commercial and governmental sovereign acts.[36] As discussed later in this article in relation to construction of the 1978 Act, the case of *Alcom* suggests that the purposive test as a basis for distinguishing between property immune from or subject to execution may be equally unworkable. It is to be noted that the US 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.[37] Lacking common principle and based, it would appear, on various grounds of expediency, this approach is also not wholly satisfactory.[38] The draft Australian Bill on State Immunity seeks to break new ground by basing the distinction on the commercial or *extra commercium* nature of the property but, as with the English and American legislative formulations, the viability of the scheme turns on the types of property categorised as *extra commercium* (i.e. not "substantially in use for commercial purposes") and on the grant of a presumption in favour or against the non-attachable types

34. Had Lord Wilberforce's amendment to the Bill, whereby written consent of the State to jurisdiction without express reservation was to be construed as implied consent to enforcement, been accepted, the UK Act's regulation of the form of State's consent would have been even more complete: *op. cit. supra* n.13, at cols.1523–1524.

35. Art.3 of the 1926 Brussels Convention for the Unification of Certain Rules concerning the Immunity of State-owned Ships [1980] U.K.T.S. No.15 (Cmnd.7800); 1 L.N.T.S. 199; cf. the Geneva Convention on the Territorial Sea and the Contiguous Zone 1958, Art.20(1) and (2), 516 U.N.T.S. 205, and the UN Convention on the Law of the Sea 1982 (not yet in force), Arts.28–32 (1982) XXI I.L.M. 1245.

36. See authorities quoted *supra* n.1; see also Crawford, "International Law and Foreign Sovereigns; Distinguishing Immune Transactions" (1983) 54 B.Y.I.L. 75, 95.

37. US Foreign Sovereign Immunities Act 1976, ss.1609–1611.

38. Delaume (1977) 71 A.J.I.L. 399, 409–413.

of property.[39] It was precisely these problems with which the House of Lords grappled in fitting the exception for property of the diplomatic mission into the UK statutory scheme.

IV. THE RELATIONSHIP OF DIPLOMATIC IMMUNITIES TO THE LIABILITY OF A STATE IN RESPECT OF ITS COMMERCIAL TRANSACTIONS

IN the UK State Immunity Act, section 16(1) contains a saving clause whereby nothing in the Act is to affect any immunity or privilege conferred by the Diplomatic Privileges Act 1964 which gives effect in English law to the Vienna Convention on Diplomatic Relations of 1961.[40] In thus preserving diplomatic immunities, the UK Act followed the European Convention on State Immunity (it being, indeed, one of the purposes of the UK Act to give effect to that Convention). Article 32 of the European Convention contained the same saving clause, and the explanatory report, noting that diplomatic immunities were governed by rules of international law, notably those contained in the Vienna Convention of 1961 and in bilateral agreements, stated that the "Convention [on State Immunity] cannot prejudice diplomatic immunities, directly or indirectly . . . [I]n the event of conflict between the present Convention and the instruments mentioned above, the provisions of the latter shall prevail".[41]

Priority between *lex specialis* and *lex generalis* appears from these saving clauses to be straightforward. Unfortunately, however, unlike the private bank account of a diplomat which enjoys immunity, there is no specific mention of immunity for the bank account of the diplomatic mission contained in the Vienna Convention on Diplomatic Relations. Two types of immunity are involved—the personal immunity of the diplomatic agent and the immunity attached to the premises of the diplomatic mission. The personal immunity granted to the diplomatic agent by Article 29 extends, by Article 30(2), to inviolability of his property save for measures of execution taken in proceedings relating to private immovable property, succession or professional or commercial activity outside his official functions (Art.31(1)(a)–(c)). Accordingly his private

39. Draft Australian Foreign State Immunities Bill 1984, *Australian Law Reform Commission Report No.24* (1984). The latest draft of the Bill defines a category of attachable property—"property, other than diplomatic or military property, that is in use by the foreign State concerned substantially for commercial purposes" (s.32(3)(a))—with a rebuttable presumption that the special category includes property apparently vacant or not in use. The earlier proposal to grant express immunity from execution to cultural objects and a foreign State's mail has been dropped, but property of central banks in commercial use and immovable property would be liable to execution.

40. 500 U.N.T.S. 95.

41. Explanatory Report on the European Convention on State Immunity 1972 (*supra* n.18); see also Art.33 of the Convention and para.118.

bank account is inviolable save where he is using it for non-official private law transactions within exceptions (a) to (c) of Article 31(1).[42] No such inviolability is given to the property of the diplomatic mission *outside* the premises other than means of transport (Art.22(3)), archives and documents of the mission (Art.24), and the diplomatic bag (Art.27). This omission was noted by the German Federal Constitutional Court in the *Philippine Embassy* case; but, by reference to bilateral treaty provisions and State practice (in a survey conducted in 1973, the West German Foreign Office reported that 104 States out of 108 conceded immunity to diplomatic bank accounts),[43] it upheld the immunity as one based on international custom:

> This and similar treaty provisions confirm the general rule of international law that property used by the sending State for the performance of its diplomatic function in any event enjoys immunity even if it does not fall within the material or spatial scope of the inviolability provisions in Article 22 of the Vienna Convention.[44]

Although the *travaux préparatoires* of the proceedings of the International Law Commission and the Final Conference cast little light, the reason for the omission probably derives from the lack of separate personality enjoyed by the diplomatic mission apart from the State which it represents. Under English law the diplomatic mission is not a person in law;[45] it has no power to act independently of one of its diplomatic staff who may do so as agent, *not* for the mission but for the State itself. To grant immunity to the bank account of the diplomatic mission would, therefore, be to accord immunity to the bank account of the State, and the International Law Commission which prepared the draft Vienna Convention no doubt considered this subject more properly to be dealt with under State immunity. So the argument moves in a circle; the Vienna Convention included no provision relating to bank accounts of the diplomatic mission because they were considered to be covered by general State immunity, and the law relating to general State

42. The Commentary on the Vienna Convention states: "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": [1957] 2 I.L.C.Y.B. 138.

43. (1979) 10 Neth.Y.B.I.L. 68.

44. *Op. cit. supra* n.4, at p.317 (English translation).

45. In November 1982, in reply to an enquiry, the UK Foreign and Commonwealth Office wrote: "[We] should say first that an Embassy, Consulate or High Commission does not appear to be itself a legal person. The proper defendant in an action will normally be the Ambassador/High Commissioner or the State itself": (1982) 52 B.Y.I.L. 422. In the *Alcom* case (*supra* n. 2), on an attempt by bailiffs to seize goods to satisfy the default judgment, the Foreign Office provided two certificates to the solicitors acting for the Republic of Colombia stating the addresses of premises which were part of the Colombian Embassy and Consulates-General in London (20/21 Oct. 1983): (1983) 54 B.Y.I.L. 446.

immunity so far as property in diplomatic use is concerned looks to the Vienna Convention and the protection of diplomatic immunities to afford immunity.

One solution to the whole problem might be to give effect to this distinction of identity—to afford immunity to the bank account of the diplomatic mission, if it is held in the name of the ambassador as head of the mission,[46] or even of the mission itself (in which case local law might have to confer separate legal personality on the mission), but to permit enforcement measures against the bank account of the State. This solution was adopted with regard to immunity from suit in jurisdictions where the restrictive doctrine was observed. A diplomat could not be sued personally on a contract made in the course of his official duties but, if he made it as agent for the State and it related to a commercial matter, the State could be sued on the contract. An Italian case of 1928, where action was brought in the Court of Cassation against the Mexican Ambassador in connection with a contract for the purchase of property to be used as the embassy, well illustrates the approach:

> It seems quite arbitrary to derive a claim of jurisdictional immunity in favour of foreign States for all their activities in foreign territories from the fact that, to a certain extent, their exists a privilege of immunity in favour of their ambassadors or ministers plenipotentiary. For, if it is true that foreign States having a mission abroad can avail themselves of the privilege of exemption from local jurisdiction with regard to matters of international relations of public law, it is similarly true that a foreign State cannot claim immunity from jurisdiction in another State when juridical relations have been created in the territory of that State which are in no way connected with the above-mentioned international relations in the domain of public law. Neither can immunity be claimed on account of the fact that the legal relations in respect of which immunity is claimed have been entered into by a person who at that time was exercising functions of a diplomatic character.[47]

It would appear that the same legal model of State liability coupled with agent immunity has been adopted in the American Foreign Sovereign Immunities Act 1976 in respect of liability for traffic accidents. The effect of sections 1605(a)(5) and 1610(a)(5) is to render a foreign State liable to be sued and to have any judgment obtained enforced against it in respect of any insurance policy rights it holds arising out of a motor vehicle accident, but its agent, the driver causing the accident, if he is a

46. Under English banking law, if the account were held in the joint name of the mission and the ambassador, it could not be attached by garnishee order, except with the consent of the ambassador: Paget, *Law of Banking* (9th ed., 1982).

47. *Perruchetti* v. *Puig y Cassauro* [1929] I Foro Italiano 112; *Annual Digest* (1927–1928), Case No.247; for other examples, see Lauterpacht, *op. cit. supra* n.1, at p.250 *et seq.*; Sinclair (1980–II) 167 Hague Rec. 113, 208.

diplomat, continues immune from suit and enforcement.[48] The same solution also underlies the widespread State practice of treating State trading corporations as separate legal entities from the State and subjecting them to full liability and enforcement as in the case of a private trader.[49] The 1983 decision of the German Federal Constitutional Court allowing pre-judgment attachment of State funds in the bank account of the National Iranian Oil Company[50] shows how far this attribution of independent legal personality can go in removing immunity from funds which originate from and are destined for sovereign purposes of the State.[51]

If the diplomatic mission is not to be given separate legal personality, the protection of its funds as part of general State funds must turn on the public sovereign function which they serve. The traditional threefold formulation of the function of the diplomatic mission is protection, negotiation and observation,[52] and, as the International Court of Justice stated in the *US Diplomatic and Consular Staff in Tehran* case,

> there is no more fundamental prerequisite for the conduct of relations between States than the inviolability of diplomatic envoys and embassies . . . and the obligations thus assumed, notably those for assuring the personal safety of diplomats and their freedom from prosecution, are essential, unqualified and inherent in their representative character and their diplomatic function.[53]

Obviously the use of funds is essential for the performance of the diplomatic function and the receiving or forum State, in accordance with Article 25 of the Vienna Convention, is under an obligation "to accord full facilities for the performance of the functions of the mission". Article 25 has not been incorporated into English law.[54] The United

48. The House of Representatives' Explanatory Report accompanying the US Bill explains that para.(5) is intended to facilitate recovery by individuals who may be injured in accidents, including those involving vehicles operated by a foreign State or its officials or employees acting within the scope of their authority: (1976) XV I.L.M. 1398.

49. UK State Immunity Act 1978, s.14; US Foreign Sovereign Immunities Act 1976, s.1603.

50. *In re National Iranian Oil Co., supra* n.14.

51. Hobhouse J at first instance in the *Alcom* case sought to distinguish the mission's purchase of goods as a consumer and not as a business or commercial transaction, the former not being within s.3(3) of the Act. This distinction would seem to derive from the same legal model, namely that the agency's contracts for its personal use are distinguishable from the business contracts of the State. As the similar distinction in the English Unfair Contract Terms Act 1977 has shown, activity carried on by a legal rather than a human person is not readily distinguishable into one-off consumer transactions as opposed to a regular course of business dealing: Treitel, *The Law of Contract* (6th ed., 1983), p.193.

52. Elaborated in Art.3 of the Vienna Convention on Diplomatic Relations 1961.

53. Request for the Indication of Provisional Measures [1979] I.C.J.Rep. 3, 19.

54. Art.25 was not among the articles scheduled to the Diplomatic Privileges Act 1964. Denza, *Diplomatic Law* (1976), pp.113–114, explains that Art.25 was not thought to require any specific derogation from the ordinary law of the United Kingdom.

Kingdom as receiving State is, therefore, under no positive obligation in English law itself to provide facilities, but the negative aspect of the obligation not to hinder the mission in the performance of its functions has been recognised by the English courts. In the words of Lord Diplock, "neither the executive nor the legal branch of the government in the receiving State . . . must act in such a manner as to obstruct the mission in carrying out its functions".[55]

The position of the private account of the diplomat may throw some light on the scope of the immunity now recognised for the bank account of the diplomatic mission and the nature of the acts which may constitute obstruction. It seems unlikely that action by the bank itself to safeguard its position will be affected by such immunity. When the account is opened, the bank will usually make terms by which drawings on the account are secured, and the bank may collect its own reasonable charges out of any monies in the account.[56] Such terms, if in writing and signed on behalf of the State, would constitute a waiver in the terms of section 13(3) of the 1978 Act; but in future, to be on the safe side, it may be advisable for banks, if they wish to collect their own charges and are not content to rely on a lien over funds in their custody, to obtain the State's signature to an express clause waiving its immunity from enforcement measures. In the course of the drafting of the Vienna Convention, the United Kingdom sought to obtain an express provision exempting the diplomat's private account from exchange control regulations.[57] It was unsuccessful and it seems to follow that the account both of the diplomat and the mission is subject to local financial regulations—provided they are not discriminatory against the foreign State alone—which affect the value of the sums credited in the accounts.

What then constitutes obstruction of the immune account? The tenor of the German cases and now of the decision in *Alcom* is that any act which prevents the flow of funds to the foreign mission constitutes obstruction. It appears to be irrelevant that the cause of the obstruction is the conduct of the foreign State, rather than of the creditor seeking attachment. Certainly the ability of the State to pay the debt for which attachment is sought or to maintain the mission from other funds cannot be considered.[58] The German Constitutional Court has adamantly rejected differentiation of treatment according to the financial position

55. [1984] 2 W.L.R. 750, 754.

56. Paget, *op. cit. supra* n.46, at p.70.

57. UN Documents A/CN.4/116, 2 May 1958; [1957] I I.L.C.Y.B. 394–395. Cf. Case 28/83 [1983] O.J. No.C 106, where the European Court held that a restriction on an EC official who had deposited his salary in a foreign convertible account, preventing him from engaging in "arbitrage" transactions by playing with the two rates of the Belgian *franc*, was not an infringement of the protocol of privileges and immunities of EC officials.

58. E.g., as Donaldson MR suggested, out of funds in the central bank of the foreign State which are immune from local attachment: [1983] 3 W.L.R. 906, 912.

of the sending State. Even if the proposed seizure of assets does not endanger the ability to function, having regard to the size and financial resources of the State, such differentiation would contravene the international law principle of sovereign equality of States. In practice, the investigation might also breach the inviolability of diplomatic documents and, by requiring "the sending State, without its consent, to provide details concerning the existence or the past, present or future purposes of such funds in such an account . . . constitute interference, contrary to international law, in matters within the exclusive competence of the sending State."[59]

Equally it would appear that the voluntary conduct of the mission in incurring the debt, consuming the goods and enjoying the benefits, and refusing to pay is irrelevant. Such a ruling seems harsh. Given the modern acceptance that a foreign State may be held liable for debts incurred in the forum State and given the more controversial proposition that in some situations the assets of the foreign State in the forum State may be seized to satisfy such debts, why should the foreign State not pay, and its assets be attachable for, the debts incurred in the day-to-day running of the diplomatic mission? How is it obstructed by a requirement to honour its debts? Provided the debt is lawfully incurred for the benefit of the mission, the requirement for the provision of funds to discharge the debt would appear no more than an inconvenience common to all debtors who are required to find funds to meet their commitments. Note, of course, that the private funds of the individual diplomats would remain immune.

Such an argument, however, assumes that the ultimate redress for disputes is by legal process and the legal process of the forum State is impartial. The characterisation of any and every enforcement measure against the bank account of the diplomatic mission as obstruction would seem to be based on three grounds: the use by creditors of enforcement procedures of the forum State to obtain satisfaction of their debts from parties ignorant of or unwilling to accept local legal process; the use of these enforcement procedures to obtain priority of payment for debts incurred in the forum State rather than pursuing the claims through the legal process of the foreign State; and the seizure of funds used for running the mission to satisfy general debts of the foreign State which have nothing to do with the embassy expenses.

At the present stage of development in international relations these grounds are probably sufficient to justify the absolute prohibition of enforcement measures against the bank accounts of a foreign embassy. So far as the first ground is concerned, although a foreign mission like any other foreign concern might properly be required to familiarise

59. *Op. cit. supra* n.4, at p.320 (English translation).

itself with and to conduct its affairs with proper respect to the laws of the receiving State,[60] there is undoubtedly opportunity, in cases of bad faith either of individual creditors or of the receiving State, to harass the mission by abuse of local legal process. As regards the second ground, international law leaves a large area of enforcement to individual States through their own legal systems[61] and the recovery of debts incurred in the carrying out of the diplomatic function may properly be confined to out-of-court agreement or reference to the home courts of the sending State. Finally, the all-important need to keep open a channel of communication between the governments of States requires the protection of the funds for running the mission and the rejection and deferment of general creditors' claims.

V. THE INTERPRETATION OF THE STATE IMMUNITY ACT 1978

IN the English courts the issue was regarded as primarily one of construction of an English statute, though all courts sought to construe it in conformity with general principles of international law.

Neither the Court of Appeal nor the House of Lords considered the problem in terms of choice of the proper law to govern the transaction and both, by referring to specific rules of English law—such as a garnishee order attaching to the whole of any credit balance and the customer's right to withdraw it as a single not a composite chose in action—were prepared to characterise the transaction by technical requirements of English law. Yet the rule of immunity is undoubtedly one of international law and, although its lack of definition may oblige national laws to elaborate its content, this should be done always by reference to underlying international principle. English or forum law requirements regulating garnishee orders and bank accounts should not distort the international rule.[62]

The sections for construction were section 13(4), the definition sec-

60. Cf. Art.41 of the Vienna Convention on Diplomatic Relations 1961, which imposes a duty on "all persons enjoying such privileges and immunities to respect the laws and regulations of the receiving State".

61. Note that ICSID (*supra* n.25) and the European Convention on State Immunity (*supra* n.26) limit a contracting State's obligation to giving an effective remedy through its own courts.

62. The West German Federal Constitutional Court has stated that the proper law is international law; only where international law offers no criterion may the local law provide the precise substance of the rule, but in doing so it must seek to incorporate international custom as evidenced by general State practice, act in good faith and not apply technical concepts of law so as to distort the international law principle. Where international law is silent, the forum law may be preferred to that of the foreign State claiming immunity; *Empire of Iran* case (*supra* n.21) 35 I.L.R. 57, 80–81; *Philippine Embassy* case (*supra* n.4 (English translation)); *In re National Iranian Oil Co.* (*supra* n.14) (1984) XXII I.L.M. 1281, 1304.

tion 17 which referred back to section 3(3), and section 16(1) which excluded matters under the Diplomatic Privileges Act 1964. As already stated, the Act prohibits enforcement measures against a State (s.13(2)(b)) save in certain exceptional cases; with written consent of the State concerned to enforcement measures (s.13(3)); in respect of Admiralty proceedings *in rem* against State-owned ships in use for commercial purposes incorporating the provisions of the Brussels Convention of 1926 and the amending Protocol on the subject (s.10). The third exception in section 13(4) provides a general exception permitting enforcement measures against property of a State "which is for the time being in use or intended for use for commercial purposes". Section 17 defines "commercial purposes" to mean "purposes of such transactions or activities as are mentioned in section 3(3) above". Section 3(1)(a) removes immunity from suit in the case of proceedings relating to a commercial transaction entered into by a State and section 3(3) provides that "commercial transaction" means "(a) any contract for the supply of goods or services; (b) any loan . . . (c) any other transaction . . . into which a State enters . . . otherwise than in the exercise of sovereign authority".

The Court of Appeal adopted a construction favouring the private trader by which property of the State in England was liable to execution if it was in use or intended for use to effect any supply of goods, services or financial loan, regardless of the overall sovereign purpose for which the goods, services or loan was supplied or the property held. The House of Lords' construction has narrowed that interpretation in that it held that a bank account used for the general purposes of a diplomatic mission does not fall within the "use for commercial purposes" of sections 17 and 13(4), even though money in the embassy account is spent on goods and services and for loans. The unresolved issue is whether the limitation as recognised by the House of Lords has swallowed up the "commercial property" exception, leaving only a general prohibition against execution save by written consent of the foreign State.

The limitation on attachability of State property for diplomatic purposes would seem properly applicable to other specific public functions of the State recognised by international law.[63] So funds in a bank account used to purchase provisions for a State warship, to finance the visit of a Head of State,[64] or to pay the expenses of armed forces sta-

63. *Halsbury's Laws of England* (4th ed.), Vol.18, *Foreign Relations Law*, pp.795, 829–830.

64. At the Lords Committee stage of the State Immunity Bill, it was stated that, as the position in customary international law was uncertain as to property owned by heads of foreign States and to services rendered to them and their families, s.20 had been introduced to ensure that under English law Heads of State and members of their families forming part of their household, irrespective of their presence in or absence from the UK, enjoyed the same privileges and immunities as diplomats: *op. cit. supra* n.13, at col.1537.

tioned within the forum territory will be immune from attachment.[65] There may be other specific functions which, though too modern to have produced much codified international law in treaty, can readily be defined and give equal immunity from attachment. Funds for police purposes would seem one such State function, supported by the West German Federal Court's decision granting immunity to Scotland Yard in proceedings arising out of the circulation of a criminal report to German police authorities.[66] The legislation of the USA, the UK and a number of other countries now affords immunity from attachment to property of a central bank or other monetary authority of a State thereby recognising that central banking functions such as the issue of legal tender and maintenance of reserves and government deposits is a public function.[67]

But what of funds for mixed purposes or general unallocated funds of a foreign State in the forum State? Is the protection given to property used for recognised specific public purposes to be extended to all State property? It would seem it was the aim of the 1978 Act to authorise some limited attachment; the Lord Chancellor in introducing section 13(4) described it as "an important and major change in our law".[68] The immunity afforded to the property of central banks is largely unnecessary if all State funds are immune from attachment. An absolute rule of immunity from execution is no longer supported in the legislation and State practice of a number of countries, immunity being confined to State property of a public nature or in public use.[69]

The test in the Act by the use of the words "purposes" and "intended for use" concentrates on *present use* and *future destination* rather than the *origin* of the funds. That use and destination is controlled by a subjective and objective element. By section 13(5), the subjective element is contained in the provision that a certificate of the ambassador of the foreign State that property is not in use or intended for use for commercial purposes is sufficient evidence unless the contrary is proved. The onus of proving the purpose to be commercial therefore rests upon the judgment creditor. Does the ambassador's certificate preclude further enquiry? Are the "intentions" of the State left within its discretion and

65. See s.16(2), which was not intended to render contracts for military supplies for the use of a State's armed forces outside the UK immune: *idem*, col.1533.

66. *X* v. *The Head of Scotland Yard* [1979] Neue Juristische Wochenschrift 1101; *UN Materials on Jurisdictional Immunities*, *op. cit. supra* n.4, at p.321.

67. State Immunity Act 1978, s.14(4); Foreign Sovereign Immunities Act 1976, s.1611(b)(1); Canadian State Immunity Act 1982, s.11(4).

68. Elwyn Jones LC in introducing s.13(4) as an amendment to the Bill, stated: "The power to enforce judgments and arbitral awards against the property of States will be very wide, even wider than that under the United States Act": *op. cit. supra* n.13, at cols.1522–1523.

69. *Supra* n.23. For Switzerland, see *Kingdom of Greece* v. *Julius Bar & Co.* (1956) 23 I.L.R. 195; for the Netherlands, see *NV Cabolent* v. *National Iranian Oil Co.* (1968) 47 I.L.R. 138, and *S.E. EE* v. *S.F. Rep. of Yugoslavia* (1975) XIV I.L.M. 71.

production of written orders to the contrary, signed by a State official, the only method of rebuttal? Lord Diplock in *Alcom*, whilst there accepting the ambassador's certificate as conclusive, indicated one way of proving the contrary. Evidence that the bank account was earmarked solely for being drawn upon to settle liabilities incurred in commercial transactions would constitute proof to the contrary.[70] By such a ruling he clearly contemplated a situation where prior consent of the foreign State is given that the funds should be available to meet certain commercial creditors' claims—in other words, the State will have waived its immunity from execution.

The Court of Appeal stressed the objective element; in its view, the ambassador could not characterise as a fact a situation which the statute as a matter of law characterised otherwise. This, in principle, seems correct. What then, leaving aside prior consent of the State, is the objective element in the test which, if established, overturns the ambassador's certificate? The test in the Act for immunity from execution relates, unlike in the case of immunity from suit, to property and not to the particular transaction. The Court of Appeal considered this to make no difference. The definition section 17 made the immediate private law nature of the transaction in which the property was used determinative of its character regardless of the long-term purpose. As the majority of State purposes (possibly leaving aside gift and some extra-legal arrangements) are achieved by private law transactions, the definition becomes all-embracing.

It is not entirely clear how the Law Lords escaped this consequence. In an important passage based on English banking law, Lord Diplock said:

> For the purposes of execution by attachment in garnishee proceedings by a judgment creditor, the customer's right to withdraw his credit balance is a single not a composite chose in action and the super-added contractual obligations in respect of cheques drawn upon the account in favour of third parties are irrelevant to the liability of the whole credit balance on current account to attachment in the exercise of the enforcement jurisdiction of the court.[71]

So far as banking law is concerned, this raises the question whether his conclusion would be different, as practice on occasion permits,[72] if the garnishee order were limited to the judgment sum leaving the balance in the bank account unattached.

But, leaving banking technicalities aside, it would seem that the

70. [1984] 2 W.L.R. 750, 758–759.
71. *Idem*, p.757.
72. Paget, *op. cit. supra* n.46, at p.125.

reasoning, so far as intangible property is concerned, excludes as a logical impossibility any present or future use of the fund except the immediate right of withdrawal. Present control of the fund by the customer is, accordingly, in law the sole "use or intended use" of a current bank account;[73] not until the money is transferred into a separate account where rights of withdrawal are given—say under documentary credits to third parties—can such money be said to be intended for use for a commercial transaction. "Unless it can be shown . . . 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 the State, it cannot . . be sensibly brought within the crucial words of the exception for which section 13(4) provides."[74]

If this is the correct analysis, it will be seen that the courts have construed the purposive test into three stages of use of property—immediate disposability at the control of the owner, its disbursement in pursuance of the obligations of a commercial transaction and the achievement by means of it of a purpose, either a commercial one (such as the acquisition of a race horse) or a sovereign one (such as the maintenance of a diplomatic mission). On this analysis, funds in a general bank account held in the name of a State whether for mixed commercial and sovereign purposes or for general unallocated purposes can never be in commercial use within the meaning of the Act. The timing is too early; they remain at the disposal of the customer of the bank, free of any obligation in connection with a commercial transaction.

This construction is somewhat at variance with the cases construing analagous legislation relating to the use of diplomatic premises[75] and of ships[76] which support an extension in time both before and after the period of use provided there is a reasonable possibility of actual use at some point in time. So premises acquired for the purpose of a diplomatic mission are treated as immune though not yet operative and continue so for a reasonable time after the premises are vacated;[77] similarly for ships, the period of actual use is extended to cover the period when they

73. The West German Federal Constitutional Court reached the same conclusion, on less technical grounds, namely that the present keeping of money in a bank account and the decision when and how to pay is a present exercise of diplomatic function (*op. cit. supra* n.4, at p.318 (English translation)). "To speak of a debt as 'being used or intended for use' for any purposes by the creditor to whom the debt is owed involves employing ordinary English words in what is not their natural sense": [1984] 2 W.L.R. 750, 757 (*per* Lord Diplock).

74. [1984] 2 W.L.R. 750, 757.

75. See *supra* Part IV, at n.40.

76. See *supra* Part III, at n.35.

77. See cases and discussion in Denza, *op. cit. supra* n.54, at pp.87–88, 281.

are in course of construction or temporarily out of commission.[78] An extreme example, supported by the Soviet Union, is that submarine antiquities such as treasure ships, if originally in the service of the State, continue to enjoy State immunity for hundreds of years and can only be salvaged by the flag State.[79]

This construction may, however, provide comfort to central banks of foreign States who rely on section 14(4) of the Act as rendering funds held by them immune from attachment. By that section, "property of a central bank" is not to be regarded as "in use or intended use for commercial purposes". It is arguable that this immunity is confined to property owned by the central bank[80] and does not extend to property held in the name of a State or administered or held in trust by the bank for a State. These funds, therefore—the argument goes—on the wording of the special provision, are capable of being in use for commercial purposes. Under the English statute, loans for any purpose are treated as a "commercial transaction" and non-immune, so funds received by the central bank in the course of such loans may be held to be in use or intended use for a commercial purpose.[81] The House of Lords' ruling, however, works against such a construction. Funds held in the name of a State by the central bank, whether for mixed commercial and sovereign purposes or for general unallocated purposes, can never be in commercial use within the meaning of the Act. They remain at the disposal of the State in whose name the bank holds them, free of any obligation in connection with a commercial transaction; only if the funds are earmarked into a special loan account for disbursement to meet obligations of a specific loan agreement would they acquire the character of property in use for commercial purposes.

78. Raymond, "Sovereign Immunity in Modern Admiralty Law" (1931) 9 Tex.L.Rev. 519; Riesenfield (1940) 25 Minn.L.Rev. 1.

79. *Dokumente*, Doc.2/Informal Meeting/50, 14 March 1980; see Caflisch, "Submarine Antiquities and the International Law of the Sea" (1982) 13 Neth.Y.B.I.L. 21.

80. For the effect of the State Immunity Act 1978 on the bank-customer relationship generally, see Paget, *op. cit. supra* n.46, at pp.573–579. As reserves of a State held in foreign currency are usually effected by deposits made in the central bank's name, such reserves are to be regarded as "property of the State's central bank": E. T. Patrikis, "Foreign Central Bank Property: Immunity from Attachment in the US" [1982] U. Ill. L.Rev. 265.

81. Such a construction would provide the same immunity as that afforded to "property of a foreign central bank *held for its own account*" under s.1611(b)(1) of the Foreign Sovereign Immunities Act 1976. The Congressional Explanatory Report stated that the term included "funds used or held in connection with central banking activities, as distinct from funds used solely to finance the commercial transactions of other entities or of foreign states": *op. cit. supra* n.48. Monies received in the course of a central bank's negotiation of loans from foreign export-import banks and commercial banks were held to be within the section's immunity: *Banque Campofina* v. *Banco de Guatemala* (1984) XXIII I.L.M 782 (Dist. Ct. N.Y.). For the English law prior to the 1978 Act, see Denning MR in *Hispano Americana Mercantile S.A.* v. *Central Bank of Nigeria* [1979] 2 Lloyd's Rep. 277, 279.

These forced judicial constructions of the meaning of "use for commercial purposes" bring the statutory test into disrepute in an area—enforcement of debts—where the rule should be straightforward.

What is to be done? One course is to accept the present position and to treat the restrictive construction of the power to attach State property in commercial use as effectively reducing the English rule as regards enforcement to jurisdiction, save in the special case of ships, to one of *no execution without consent* of the foreign State as provided for under section 13(3). Such a limited power to enforce judgments and awards is after all the prevailing rule in international law in disputes between States; neither the International Court of Justice nor any other international tribunal has power to enforce judgments against States.[82] It is the rule which China and the USSR support in their practice, the latter having employed it for many years in relation to its Trade Commissions in respect of commercial activities by express waiver of immunity from execution of judgment.[83] It is the rule which operates in many States including the UK as regards enforcement measures against the local sovereign; measures of execution, injunctions and orders for specific performance are not available against the Crown.[84] The harshness of the operation of no enforcement of judgments is in practice in many countries much softened by full enforcement being allowed against the property of State trading entities. The grant of separate legal personality to these entities enables their property to be treated as independent of the foreign State and places on them the onus of establishing that their funds whether mixed or separate are in public use of the State.[85]

The alternative is to amend the Act. It will not be easy.[86] Various ways offer themselves. Following the shipping and law of the sea legislation,[87] one approach would be to rephrase the compulsory power of attachment to one in respect of property of the State other than that exclusively in the use of the foreign State for public or governmental purposes and to require the ambassador positively to certify that the property is solely in use for public purposes. In this way it might be possible to shift the burden of proof of the public character of the property

82. Cf. US Government brief requesting a rehearing in *Allied Bank* v. *Banco Credito Agricole de Cartago* (1984) XXIII I.L.M. 742 (US Ct. App. 2d Cir.23 April 1984). "The confidence of lenders in the enforceability of their loan agreements . . . is crucial to their willingness to extend international credit": *Int.Fin.Law Rev.*, July 1984, p.8.

83. E.g. Treaty of the USSR with Norway (1921) 7 L.N.T.S. 293; with Great Britain (1934) 137 B.F.S.P. 188.

84. Crown Proceedings Act 1949, ss.21 and 25; RSC Ord. 77.

85. See *supra* Part IV, at nn.49–51.

86. An amendment merely by way of adding an additional exception for diplomatic mission accounts to that already made for central bank accounts would leave funds in use for other public purposes unprotected and would not resolve the basic conflict of meaning in the statutory terms "commercial transaction" and "commercial purposes".

87. *Supra* n.35.

on to the foreign State. This test would still, however, depend on the good faith of the ambassador's certificate and render largely nugatory any objective element.

A more promising method may be to look at the *origin* of the funds sought to be attached rather than their *present use* or *future destination*. This is one of the criteria used in the US Act which permits execution on the property of a foreign State if "the property is or was used for the commercial activity upon which the claim is based"[88] and a recent ruling of the French Cour de Cassation in *Eurodif* v. *Iran* adopts a similar test.[89] The Cour de Cassation in this important case held that the rule of immunity from execution enjoyed by a foreign State may exceptionally be set aside where the asset sought to be attached "has been allocated to the economic or commercial activity under private law which gives rise to the legal claim"—"*a eté affecté à l'activité économique ou commercial relevant du droit privé qui donne lieu à la demande en justice*". The nature of the connection of the fund seized with the fund used or allocated to the commercial activity is not, however, self-evident from these formulas. Must the fund used for the commercial transaction be the very same fund which it is sought to attach, or is it sufficent if the latter represents one part of the financial arrangements in a package deal or series of linked commercial transactions? If the test is restricted to the former it is no different from Lord Diplock's formulation of earmarking by the State a fund solely for being drawn upon to settle liabilities incurred in commercial transactions. On the facts in *Eurodif* v. *Iran*, however, it appears that the French court considered the latter weaker connection to be a sufficient basis to permit the exceptional power of attachment; there was no identity between the funds sought to be attached and those expended on the commercial transaction. In that case Iran prematurely terminated a joint scheme agreed with France for the production of enriched uranium under which Iran acquired a 10 per cent share in the uranium produced. The French company, Eurodif, referred its claim for consequential loss due to the termination of the arrangement to arbitration of the ICC under an arbitration clause contained in the agreement, and also sought to attach funds held by CEA, a French State agency to which Iran had made a substantial loan to finance the enriched uranium project. The Paris Court of Appeal refused the attachment on the ground of Iran's immunity from execution, distinguishing between the loan monies spent on the construction of the factory for enriching

88. Foreign Sovereign Immunities Act 1976, s.1610(a)(2). But, for criticism of this provision, see Del Bianco, "Execution and Attachment under the Foreign Sovereign Immunities Act of 1976" (1979) 5 Yale Studies in World Public Order 109; T. H. Hill "A Policy Analysis of The American Law of State Immunity" (1981) 50 Fordham L.Rev. 155.

89. *1° Cass.civ. 1ere, 14 March 1984, La Semaine Juridique*, Vol.58, No.21, 23 May 1984, para.20205.

uranium and the payment monies due to Iran from CEA, the latter not being of a private law character and available to Iran for general public purposes. In restoring the attachment order the Cour de Cassation noted that the Iranian claim to repayment of the loan originated in the funds which had been allocated to the joint programme for enriching uranium which Iran had prematurely terminated thereby giving rise to the legal claim; accordingly it referred the case back for further consideration of the private law character of the overall transaction.[90]

The US and French approaches present difficulties but they both suggest that only by linking the execution process closely to the proceedings in respect of a commercial transaction will a proper limit be placed on a power of attachment of sovereign assets. Any wider role will imply that all property belonging to the foreign State in the jurisdiction other than that specifically listed as immune is available as a common fund against which judgment creditors may execute and is probably too drastic at this stage in the development of international law. In English law it is already possible for a creditor, at the time of obtaining judgment for a commercial debt, to present his claim so as to give him a proprietary right *in rem* against a particular fund or property belonging to the State.[91] As a tentative solution on the lines discussed above, I suggest that the 1978 Act be amended to give the court power in proceedings in respect of a commercial transaction to invite the State as judgment debtor to identify property out of which any judgment debt shall be satisfied; failing such consent the court should be empowered at its discretion to order satisfaction out of such property of the State which has or may facilitate the carrying out of the commercial transaction out of which the debt arises.

VI. CONCLUSION

ONE is now in a position to answer the general question. Does the absolute nature of immunity from execution render illusory the modern change in the law which gives the right to bring proceedings against a foreign State? Will the litigant be refused execution of the judgment which he has obtained against a foreign State? As has been shown, the overlap of international and national laws complicates the question. It may be convenient to summarise the position:

1. International law distinguishes between immunity from adjudicative jurisdiction and enforcement jurisdiction of the forum State.
2. English law recognises such a distinction and the State Immunity Act

90. Cf. *Iran* v. *CEA, 1° Cass.civ. 1ere*, 14 March 1984, *ibid.*, where in a second ruling given on the same day the court refused Iran's request for an account to be taken of the sums due to it from CEA under the loan arrangement.

91. State Immunity Act 1978, s.6.

1978 provides different rules for immunity from suit and immunity from execution. It is, therefore, possible for a State to be held liable for a debt with no means available to the creditor to enforce the judgment in the English court.

3. Under international law a State may waive its immunity from execution and at English law the opening of a special account or the written authorisation by the State that funds should be placed in a special account to meet commercial creditors' claims will constitute such a waiver. Enforcement measures against such a special account or fund will be permitted.

4. So far as enforcement jurisdiction is concerned, international law relating to diplomatic immunities is given effect in English law by a ruling that the bank account of a State to meet the running expenses of a diplomatic mission is immune from enforcement measures. That immunity exists even in relation to enforcement measures in respect of judgment debts relating to food and consumer goods supplied to the mission. In present international relations, a mission can be as much obstructed in its function by measures to enforce a lawful debt as an unlawful one.

5. Although international law permits a limited exercise of enforcement measures against foreign State assets within the forum State, the statutory wording of the State Immunity Act coupled with the evidentiary sufficiency of the ambassador's certificate and the judgment creditor's onus of proof defeats such limited enforcement measures.

6. If a wider power of attachment for commercial judgment debts is sought, various routes might be explored without direct amendment of the 1978 Act. The creditor in seeking security for his commercial transactions with the State should require the guarantee of a State trading entity the assets of which (other than in the central bank) are fully subject to local attachment. In suing the State in respect of a commercial debt, the creditor should identify the fund out of which it is payable and formulate his claim as one relating to movable or immovable property of the State. A judgment ordering satisfaction of a commercial debt out of a specific fund held in the foreign State's name might constitute sufficient proof to rebut an ambassador's certificate and establish that the fund is "in use or intended use" for commercial purposes.