TCCS

T

IV.

T

This brings us to the final question presented on this appeal, namely, whether the district court correctly dissolved the injunction which enjoined negotiating the letters of credit. We hold that it did.

T

The short answer to S & S' argument that the district court should have continued the injunction is that such a measure could only have resulted in the disingenuous flouting of the FSIA ban on prejudgment attachment of assets belonging to a "foreign state". Once the district court held—correctly so in our opinion—that the Romanian Bank and Masin were protected from prejudgment attachment by the FSIA, the court properly refused to sanction any other means to effect the same result. The FSIA would become meaningless if courts could eviscerate its protections merely by denominating their restraints as injunctions against the negotiation or use of property rather than as attachments of that property.

T

We hold that courts in this context may not grant, by injunction, relief which they may not provide by attachment. The injunction was properly dissolved.

T

Our stay of January 4, 1983, which continued the district court's stay of that part of its order of December 7, 1982 vacating the attachment, is dissolved.

T

The mandate shall issue forthwith.

T

Affirmed.

TXTH1

2. Execution

CHB

BIRCH SHIPPING CORP. v. EMBASSY OF UNITED REPUBLIC OF TANZANIA

CH1

United States District Court, District of Columbia, 1980.

CH2

507 F.Supp. 311.

T

JOHN LEWIS SMITH, JR., DISTRICT JUDGE.

T

Plaintiff in this action is a shipowner attempting to execute a judgment against the defendant, the Embassy of the United Republic of Tanzania. The underlying dispute arises out of a contract for shipment of a load of corn, the purchase of which was financed by the United States Department of Agriculture, from New Orleans to Tanzania. The parties agreed to submit the dispute to arbitration and they also agreed that a court judgment could be entered upon any award rendered pursuant to the arbitration agreement. The dispute was, in fact, fully arbitrated in New York, resulting in a monetary award in favor of plaintiff. Plaintiff then petitioned the United States District Court for the Southern District of New York to confirm the arbitration award and enter judgment in favor of plaintiff, pursuant to Section 9 of the United States Arbitration Act, 9 U.S.C. § 9. That petition was granted August 21, 1980, in the amount of $89,168.56, although defendant did not enter

an appearance. In accordance with the provisions of 28 U.S.C. § 1963, that judgment was then registered in this Court. A writ of garnishment was obtained and served upon American Security Bank, where defendant maintains a checking account. Defendant subsequently moved to quash the writ, which is the motion presently before the Court.

Defendant argues that under the terms of the Foreign Sovereign Immunities Act, its property is immune from this attachment, and that it is not within any of the exemptions to Section 1609 set forth in Section 1610. Plaintiff responds that the account is, on the contrary, within an exemption specified in Section 1610(a), which provides, in part:

> (a) The property in the United States of a foreign state, as defined in section 1603(a) of this chapter, 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 . . .

The statute thus sets forth a two-step analysis relevant here for determining immunity: the foreign state must have waived its immunity, and the property attached must be used for a commercial purpose.

As to immunity, defendant agreed to arbitration and to judicial enforcement of any award: "We further agree that we will faithfully observe this Agreement and the Rules and that we will abide by and perform any Award rendered pursuant to this Agreement and that a judgment of the Court having jurisdiction may be entered upon the Award." Parties' Submission to Arbitration, at 3. This is, at minimum, an implicit waiver of the immunity defendant seeks to assert here. While an agreement to entry of judgment reinforces any waiver, an agreement to arbitrate, standing alone, is sufficient to implicitly waive immunity, as was recognized by Congress. That waiver cannot now be unilaterally withdrawn. 28 U.S.C. § 1610(a).

It is also apparent, by defendant's own account, that the property plaintiff seeks to attach, a checking account of the Embassy, is "used for a commercial activity," as Section 1610 requires. An affidavit submitted by defendant states, in relevant part:

> 3. The funds in the aforementioned account are solely for the purpose of the maintenance 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 repre-

sentative of the 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).

The legislative history makes clear that activity of this type is within the statutory definition of "commercial activity" set forth in 28 U.S.C. § 1603(d):

> As the definition indicates, the 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.
>
> . . .
>
> Also public or government and not commercial in nature, would be the employment of diplomatic, civil service, or military personnel, *but not the employment of American citizens or third country nationals by the foreign state in the United States.*
>
> The courts would have a great deal of latitude in determining what is a "commercial activity" for purposes of this bill. . . . Activities such as a foreign government's sale of a service or a product, *its leasing of property,* its borrowing of money, *its employment or engagement of laborers, clerical staff or public relations or marketing agents,* or its investment in a security of an American corporation, would be among those included within the definition. (Emphasis added).

H.Rep. No. 94–1487, at 6615.

The only significant question, then, is whether it is proper to attach an account which is not used *solely* for commercial activity. Certainly the statute places no such restriction upon property which may be attached, nor is there anything in the legislative history indicating that Congress contemplated such a limitation. Central bank accounts are exempt, but that exception is not applicable to accounts used for mixed purposes. *See* H.Rep. No. 94–1487, at 6630. Indeed, a reading of the Act which exempted mixed accounts would create a loophole, for any property could be made immune by using it, at one time or another, for some minor public purpose. Defendant asserts, however, that failure to find this property immune will make it impossible for foreign countries to maintain embassies. Even if it could be shown this was actually a problem, the solution would not be the broad immunity defendant asks, but segregation of public purpose funds from commercial activity funds,

T Holding otherwise would defeat the express intention of Congress to provide, in cases of commercial litigation such as this, that a "judgment creditor [would have] some remedy if, after a reasonable period, a foreign state or its enterprise failed to satisfy a final judgment." H.Rep. No. 94–1487, at 6606. Accordingly, the property at issue here is not immune from attachment, and the motion to quash the writ is denied.

CHB
CH1
CH2

LETELIER v. REPUBLIC OF CHILE

United States Court of Appeals, Second Circuit, 1984.
748 F.2d 790, cert. denied, 471 U.S. 1125, 105 S.Ct. 2656, 86 L.Ed.2d 273 (1985).

T Before CARDAMONE and PRATT, CIRCUIT JUDGES and BONSAL, DISTRICT JUDGE.

T CARDAMONE, CIRCUIT JUDGE:

T The critical question posed on this appeal is whether the assets of a foreign state's wholly owned airline are subject to execution to satisfy a default judgment obtained against the foreign state. The district court, believing that Congress under the Foreign Sovereign Immunities Act of 1976, 28 U.S.C. §§ 1602–11 (1982) (FSIA or the Act), would not have established a right to jurisdiction over the foreign state without also providing a remedy, ordered execution. We reverse although we recognize that our decision may preclude the plaintiffs from collecting on their judgment. How one wishes to decide a case comes lightly to mind, on a wing; but often how one must decide it comes arduously, weighed down by somber thought. To rule otherwise here would only illustrate once again that hard cases make bad law.

TCCS FACTS

T Orlando Letelier, the former Chilean Ambassador to the United States, his aide, Michael Moffitt, and Moffitt's wife, Ronni, were riding to work in Washington, D.C. in September, 1976 when an explosive device planted under the driver's seat in their car was detonated killing both Letelier and Ronni Moffitt and seriously injuring Michael Moffitt. That assassination gives rise to the present appeal.

T Investigation by agencies of the United States government into these murders revealed the identity of nine assassins and their alleged connection to the government of Chile. Of the nine only Michael Vernon Townley, an American citizen working for Chilean intelligence, was convicted of a criminal offense. Three of those indicted were members of the Cuban Nationalist Movement who, although found guilty in the trial court, had their convictions reversed on appeal. *See United States v. Sampol*, 636 F.2d 621, 684 (D.C.Cir.1980). Of the other five individuals indicted, none were brought to trial: three were Chilean nationals that Chile refused to extradite, and two remain at large.

T In August 1978 the personal representatives of Letelier and Moffitt instituted a civil tort action in the United States District Court for the District of Columbia against the indicted individuals and the Republic of

Chile. The complaint asserted five causes of action: (1) a conspiracy to deprive Letelier and Moffitt of their civil rights under 42 U.S.C. § 1985; (2) assault and battery; (3) reckless transportation and detonation of explosives; (4) violation of the "law of nations" (international law); and (5) murder of an internationally protected person under 18 U.S.C. § 1116. The complaint alleged that the noncommercial tort exception of § 1605(a)(5) of the FSIA applied and that Chile was not entitled to sovereign immunity in the tort action.

All defendants defaulted, although Chile sent two Diplomatic Notes to the United States Department of State asserting its sovereign immunity and that the allegations against it were false. The State Department forwarded these Notes to the clerk of the district court. In August 1978 the trial court granted default judgments against the individual defendants. During 1979 and 1980 the district court heard plaintiffs' motion for a default judgment against Chile, *see Letelier v. Republic of Chile*, 488 F.Supp. 665 (D.D.C.1980), and finally resolved that motion. *See Letelier v. Republic of Chile*, 502 F.Supp. 259 (D.D.C.1980). In the former case, the court ruled that it had subject matter jurisdiction pursuant to the exception to immunity found in § 1605(a)(5) of the Act. In the latter case the trial court relying on Townley's testimony at the criminal trial, where he had pled guilty and testified for the prosecution, granted a default judgment against the Republic of Chile and awarded plaintiffs over five million dollars including interest, compensatory and punitive damages, counsel fees and out-of-pocket expenses. The Republic of Chile did not take an appeal from either of these judgments.

The resulting judgment against the Republic of Chile was entered in the United States District Court for the District of Columbia. Plaintiffs subsequently filed the judgment in the United States District Court for the Southern District of New York, *see* 28 U.S.C. § 1963 (1982), for the purpose of executing on the property interests that The Republic of Chile has in the Chilean national airline, Linea Aerea Nacional-Chile or LAN, which is located in New York, and for the appointment of Michael Moffitt as a receiver of those interests to satisfy the judgment against Chile pursuant to New York's CPLR 5228 and Fed.R.Civ.P. 69. The application for execution against LAN's assets came before District Court Judge Morris E. Lasker. LAN moved to dismiss claiming that it should not be held to answer for Chilean debts and that its assets were immune from execution. Relying upon a recent decision of the United States Supreme Court, *First National City Bank v. Banco Para El Comercio Exterior de Cuba (Bancec)*, 462 U.S. 611, [Chapter VI p. ___ supra] which based a decision to disregard separate corporation identities on "international equitable principles," Judge Lasker first held in an opinion and order dated July 28, 1983 that, were the facts as asserted, LAN's role in the assassination was commercial activity under the Act. He further held that to adhere to LAN's separate corporate identity would, as in *Bancec*, violate equitable principles. *Letelier v. Republic of Chile*, 567 F.Supp. 1490, 1496 (S.D.N.Y.1983).

Having concluded that LAN's assets were subject to execution to satisfy a judgment against Chile, the district court concluded that the language of § 1610(a)(2) did not limit execution only to commercial assets used for commercial purposes, as LAN claimed, but also permitted execution to satisfy tort judgments "so long as the assets on which the judgment creditor seeks to execute were also used commercially in the activity giving rise to the claim." *Id.* at 1499. The rationale for this reading of the statute was that a statute should not be interpreted to create a right without a remedy. The court reasoned that if jurisdictional immunity is lifted, the presumption is that there will be a right to execute. *Id.* at 1500 & n. 7.

Plaintiffs later sought discovery against The Republic of Chile by serving it with interrogatories and requests to produce documents and admit facts. Chile refused to comply and again filed Diplomatic Notes asserting its refusal to recognize either the validity of the default judgment or the district court's jurisdiction in the supplementary proceedings for enforcement. Judge Lasker in an order dated December 20, 1983 granted plaintiff's motions for Rule 37 sanctions against LAN consisting of adverse findings of fact that provided a basis to disregard LAN's juridical separateness and appointed Moffitt as a receiver of LAN's assets in the United States. 575 F.Supp. 1217 (S.D.N.Y.1983). From the rulings of July 28 and December 20, 1983 LAN has appealed and raised a number of issues.

DISCUSSION

The principal issue is whether LAN's assets may be executed upon to satisfy the judgment obtained in the District of Columbia against Chile. This discussion necessarily focuses on the Foreign Sovereign Immunities Act of 1976, which is the exclusive source of subject matter jurisdiction over all suits involving foreign states or their instrumentalities. According to § 1604, foreign states are immune from suit in our courts unless the conduct complained of comes within the exceptions set forth in §§ 1605 to 1607 of the Act. Similarly, under § 1609 foreign states are immune from execution upon judgments obtained against them, unless an exception set forth in §§ 1610 or 1611 of the FSIA applies.

The judgment creditors claim that § 1610(a)(2) allows them to execute upon LAN's assets in this case. Section 1610(a)(2) provides:

> The property in the United States of a foreign state ... used for a commercial activity in the United States, shall not be immune from attachment in aid of execution, or from execution ... if ... the property is or was used for the commercial activity upon which the claim is based....

We consider first whether LAN's separate juridical existence may be ignored, thereby making its assets "[t]he property in the United States of a foreign state."

TC1 *I Separate Juridical Existence*

T In Bancec the Supreme Court determined whether a claim of a foreign agency plaintiff was subject to a set-off for the debts of its parent government. Bancec deserves close scrutiny because it provides a conceptual framework for resolving plaintiffs' assertion that LAN's assets should be treated as assets of Chile and because the district court relied on it to reach that conclusion.

T In Bancec, the Cuban bank of the same name brought suit against Citibank to collect on a letter of credit issued in its favor in 1960. Citibank counterclaimed arguing that it was entitled to set-off amounts as compensation due it for the Cuban government's expropriation of Citibank's assets in Cuba. We ruled that as Bancec was not the alter ego of the Cuban government, it could not be held to account for Cuban debts. The Supreme Court reversed. Relying on the Act's legislative history, the Court noted that it was not intended to affect the substantive law of liability of a foreign state or the attribution of liability among its entities and proceeded to resolve the appeal on "equitable principles." The Bancec Court recognized that "government instrumentalities established as juridical entities distinct and independent from their sovereign should normally be treated as such." [p. ___ supra.] FSIA's legislative history provided support for that conclusion:

T21 > Section 1610(b) will not permit execution against the property of one agency or instrumentality to satisfy a judgment against another, unrelated agency or instrumentality. There are compelling reasons for this. If U.S. law did not respect the separate juridical identities of different agencies or instrumentalities, it might encourage foreign jurisdictions to disregard the juridical divisions between different U.S. corporations or between a U.S. corporation and its independent subsidiary. However, a court might find that property held by one agency is really the property of another. H.R.Rep. No. 94–1487, pp. 29–30, U.S.Code Cong. & Admin.News 1976, 6604, pp. 6628, 6629 (citation omitted.)

TF The Supreme Court concluded in Bancec that the presumption of separateness had been overcome. It reasoned that the real beneficiary of any recovery would be the Cuban government, and that Cuba should not be permitted to obtain relief in American courts without answering for its seizure of Citibank's assets. The Court commented that "Cuba cannot escape liability for acts in violation of international law simply by retransferring the assets to separate juridical entities." 103 S.Ct. at 2603.

T Thus, Bancec rests primarily on two propositions. First, Courts may use set-off as a unique, equitable remedy to prevent a foreign government from eluding liability for its own acts when it affirmatively seeks recovery in an American judicial proceeding. *See National City Bank v. Republic of China.* [p. ___ supra.] The broader message is that foreign states cannot avoid their obligations by engaging in abuses of corporate form. The Bancec Court held that a foreign state instrumentality is

answerable just as its sovereign parent would be if the foreign state has abused the corporate form, or where recognizing the instrumentality's separate status works a fraud or an injustice.

The district court analyzed the present case in light of *Bancec* and ruled that Chile's alleged use of LAN to transport Townley and explosives to the United States were "significant steps in the conspiracy" that if proven "would constitute a gross abuse of the corporate form." 567 F.Supp. at 1496. Accordingly, it held, "If Chile ignored Lan's separate existence in accomplishing the wrong, it may not invoke that separate existence in order to deny the injured a remedy." *Id.* at 1496.

The district judge "found" the following facts based "on the record" and "established" by evidentiary sanctions imposed pursuant to Rule 37(b)(2)(A): From January 1975 through January 1979 LAN's assets and facilities were under the direct control of Chile, which had the power to use them; Chile could have decreed LAN's dissolution and taken over property interests held in LAN's name; Chile, through its agencies, officers, and employees, intentionally used facilities and personnel of LAN to plan and carry out its conspiracy to assassinate Orlando Letelier by (a) transporting Michael Vernon Townley between Chile and the United States, (b) transporting explosives on several occasions, (c) assisting with currency transactions involved in paying off the co-conspirators in the assassination, (d) providing a meeting place for the co-conspirators, (e) arranging for Townley to exit the United States under an alias after the assassination. By using LAN in these endeavors, the district court found, Chile ignored LAN's separate existence and abused the corporate form.

In our view this is not the sort of "abuse" that overcomes the presumption of separateness established by *Bancec*. Joint participation in a tort is not the "classic" abuse of corporate form to which the Supreme Court referred. In *Bancec* the Court relied by analogy on the domestic law of private corporations that ignores separate juridical status "where a corporate entity is so extensively controlled by its owner that a relationship of principal and agent is created," where "the corporate form ... is interposed to defeat legislative policies," or where recognition of corporate form " 'would work fraud or injustice.' "103 S.Ct. at 2601. The facts that the district court "found" here do not add up to anything that resembles the abuses in the decisions cited in *Bancec*. None of these facts shows that Chile ignored LAN's separate status. Instead, they simply demonstrate that Michael Townley was able to enlist the cooperation of certain LAN pilots and officials with whom he had a pre-existing social relationship in pursuing his sinister goal. There was no finding that LAN's separate status was established to shield its owners from liability for their torts or that Chile ignored ordinary corporate formalities.

Plaintiffs had the burden of proving that LAN was not entitled to separate recognition. A creditor seeking execution against an apparently separate entity must prove "the property to be attached is subject to execution." The evidence submitted by the judgment creditors does not

T reveal abuse of corporate form of the nature or degree that *Bancec* found sufficient to overcome the presumption of separate existence. As both *Bancec* and the FSIA legislative history caution against too easily overcoming the presumption of separateness, we decline to extend the *Bancec* holding to do so in this case.

TCI *II Commercial Activity*

T Even assuming the district court was correct in disregarding LAN's corporate form and finding that LAN's assets were Chile's property in the United States, § 1610(a)(2) also requires that the property be "used for the commercial activity upon which the claim is based." In permitting execution against LAN's assets the court below essentially concluded that LAN's activities aided Townley in the assassination and constituted the "commercial activities" that § 1610(a)(2) requires. We cannot agree because a consistent application of the Act, analysis of the background of its enactment, its language and legislative history, and the case law construing it compel the opposite conclusion.

T We first note that the district court for the District of Columbia found that Chile lost its immunity from jurisdiction pursuant to § 1605(a)(5), the "tortious activity" exception to jurisdictional immunity. Section 1605(a)(5) specifically states that it applies to situations "not otherwise encompassed in paragraph (2)." Section 1605(a)(2) is the commercial activity exception. This language suggests that the commercial activity exception to jurisdictional immunity under (2) and the tort exception under (5) are mutually exclusive. If the district court in the District of Columbia lifted jurisdictional immunity based on its finding that the activities complained of were tortious, not commercial, it is inconsistent for this court to lift execution immunity based on a finding that the activities were commercial.

T Our disagreement with the finding that LAN's activities were commercial rests on more than the resulting lack of symmetry in application of the FSIA. If LAN, as the trial court found, acted in complicity with the Chilean secret police in the assassination, its activities had nothing to do with its place in commerce. The nature of its course of conduct could not have been as a merchant in the marketplace. Its activities would have been those of the foreign state: governmental, not private or commercial.

T3LP . . .

T . . . A private person cannot lawfully engage in murder any more than he can in kidnapping or criminal assault. Carriage of passengers and packages is an activity in which a private person could engage. But it is not for those activities that LAN's assets are being executed against. Rather, plaintiffs assert that LAN itself participated in the assassination and essentially accuse LAN of being a co-conspirator or joint tort-feasor. In other words, LAN is accused of engaging in state-sponsored terrorism the purpose of which, irrelevant under the FSIA, was to assassinate an opponent of the Chilean government. Politically motivated assassinations are not traditionally the function of private individuals. They can

T scarcely be considered commercial activity. Viewed in this light, LAN's participation, if any, in the assassination is not commercial activity that falls within the § 1610(a)(2) exception and its assets therefore are not stripped of immunity.

TCI *III Right Without a Remedy*

T The district court's principal concern with finding LAN immune from execution on its assets was that "[h]aving determined to grant jurisdiction in both commercial and tort claims, it appears out of joint to conclude that Congress intended the surprising result of allowing only commercial creditors to execute on their judgments," 567 F.Supp. at 1499–1500. Hence, it concluded that Congress would not create a right without a remedy. Few would take issue with the district judge's comment as an abstract principle of statutory interpretation. Nevertheless, when drafting the FSIA Congress took into account the international community's view of sovereign immunity. That makes a world of difference in the Act's interpretation. The Act's history and the contemporaneous passage of similar European legislation strongly support the conclusion that under the circumstances at issue in this case Congress did in fact create a right without a remedy. Congress wanted the execution provisions of the FSIA to "remedy, *in part*, the [pre-FSIA] predicament of a plaintiff who has obtained a judgment against a foreign state." *House Report, supra*, at 6605–06 (emphasis added). It is to that pre-FSIA plaintiff's predicament that we now turn.

T To put the execution immunity provisions of the 1976 Act in proper perspective it is helpful to examine them in light of the European Convention on State Immunity and Additional Protocol adopted in 1972[a] and the United Kingdom's enactment of The State Immunity Act of 1978.[b] Although these two codifications contain vastly different approaches to execution of judgments, they are relevant to this discussion in that neither Act ensures that a party may execute on a judgment against a foreign state by attaching property, even if it may validly assert jurisdiction over that foreign state....

T The European Convention, because of its members' conflicting views, decided not to provide machinery for the enforcement of judgments by execution. The Convention relied instead on the obligation of an individual State to honor judgments taken against it....

T The State Immunity Act like the FSIA grants general immunity from execution over a foreign state's property except that, unlike the FSIA, which permits execution only on property upon which the claim is based, courts in England may execute on property in use or intended to be used for commercial purposes. Hence, The State Immunity Act restricts immunity from execution more than the FSIA and subjects *any* property of the foreign state used for commercial purposes to execution.

FN a. Documents Supplement p. ___ b. Documents Supplement p. ___ FN

T The FSIA distinguishes between execution against property of an agency or instrumentality of a foreign state, which may be executed against regardless of whether the property was used for the activity on which the claim is based under § 1610(b)(2), and the property of the foreign state itself, which may be executed against only when the property was used for the commercial activity on which the claim is based under § 1610(a)(2). In so distinguishing, Congress sharply restricted immunity from execution against agencies and instrumentalities, but was more cautious when lifting immunity from execution against property owned by the State itself. Congress passed the FSIA on the background of the views of sovereignty expressed in the 1945 charter of the United Nations and the 1972 enactment of the European Convention, which left the availability of execution totally up to the debtor state, and its own understanding as the legislative history demonstrates, that prior to 1976 property of foreign states was absolutely immune from execution. *House Report* at 6606. It is plain then that Congress planned to and did lift execution immunity "in part." Yet, since it was not Congress' purpose to lift execution immunity wholly and completely, a right without a remedy does exist in the circumstances here. Our task must be to read the Act as it is expressed, and apply it according to its expressions.

TCCS CONCLUSION

T We hold therefore that the Foreign Sovereign Immunities Act does not allow execution against the assets of LAN, the Chilean National Airlines. The court below improperly ignored defendant LAN's separate juridical status from the Republic of Chile. Ordinarily, we would remand for further evidentiary hearings on the separateness issue, but we are further persuaded, even were LAN and Chile found to be alter egos, that Congress did not provide for execution against a foreign state's property under the circumstances of this case. Congress provided for execution against property used in commercial activity upon which the claim is based. An act of political terrorism is not the kind of commercial activity that Congress contemplated.

T Accordingly, we reverse the orders appealed from and dismiss the supplementary proceedings.

COM ***Notes and Questions***

N 1. (a) Turning first to the question of waiver of immunity, notice that under the FSIA implied as well as explicit waiver may deprive a foreign state (or state instrumentality) of immunity—both from suit, § 1605(a), and from attachment and execution after judgment, § 1610(a). Immunity from prejudgment attachment may also be waived, but only explicitly. Even an explicit but general waiver of immunity will not subject assets of a central bank held for its own account[1] to attachment or execution, unless the waiver

FN 1. I.e., funds held for the nation's reserved against proceeds of World Bank or IMF loans, and the like.

N explicitly covers such property. Even states which, as borrowers, have been obliged to give wide-ranging waivers such as the one reproduced in paragraph (e) below have generally been able to avoid waiving immunity of central bank assets.[2]

N (b) A waiver by implication may take several forms, including provision in a contract expressly waiving some, and by implication other immunity, and conduct such as initiating an action or pleading to the merits of an action without raising the issue of immunity.[3] A waiver of immunity may be general, or may be limited to a particular transaction. It may be contained in a unilateral declaration, in a treaty between the foreign state and the state of the forum (i.e., U.S.A.), or in a contract. But an express waiver of immunity from jurisdiction does not necessarily imply a waiver of immunity from attachment of property, and a waiver of immunity of property from attachment does not necessarily imply waiver of immunity from suit.[4]

N (c) In *Libra Bank*, the Second Circuit, speaking through Judge Timbers, held that "explicit waiver" means no unintended waiver, and thus that the words in the promissory notes providing

NII > The borrower hereby ... waives any right or immunity from legal proceedings including suit judgment or execution....

NF are sufficient to waive immunity from pre-judgment attachment. Is that persuasive, given the hierarchy established by the Act?[5]

N (d) *S & S Machinery*, also written by Judge Timbers, comes out the other way, though the activity on which the suit is based, sale of machine tools, is more clearly a commercial activity that the loan at issue in *Libra Bank*. The document asserted to contain the waiver, however, was not negotiated in the contract between Masinexportimport and S & S, but rather was part of an intergovernmental agreement between Romania and the United States. The court holds that the statement

NII > Nationals, firms, companies and economic organizations of either Party ... shall not claim or enjoy immunities from suit or execution of judgment or other liabilities in the territory of the other Party....

NF is not specific enough to cover pre-judgment attachment. Are the two cases distinguishable? Or is one correct, the other wrong?

FN 2. See, generally, Patrikis, "Foreign Central Bank Property: Immunity from Attachments in the United States." 1982 U.I11.L.Rev. 265. Mr. Patrikis is General Counsel of the Federal Reserved Bank of New York. See also *Banque Compafina v. Banco de Guatemala*, 583 F.Supp. 320 (S.D.N.Y. 1984).

FN 3. Whether an agreement to arbitrate constitutes a waiver of immunity was not clear until the 1988 amendments to the FSIA, 1605(a)(6), Documents Supplement, p. ___ Recall the discussion of this question in the *Victory Transport* case, p. ___ note 7 and p. ___ question 3(b) supra.

FN 4. See Restatement (Third) of Foreign Relations, Law 456 and comments and Reporters' Notes thereto. Accord, UK State Immunity Act, s. 13(3), Documents Supplement p. ___

FN 5. Thereafter, plaintiffs sought to attach the same asserts that they had attempted to attach earlier, but it turned out that the account had been closed during the time of the appeal. Plaintiffs sought an order requiring Banco Nacional to return the funds, but the district court refused to issue such an order, pointing out that plaintiffs could have applied for a stay of the vacatur of the attachment pending appeal. 570 F.Supp. 870 at 885 (S.D.N.Y. 1983).

N (e) Commercial transactions in which the foreign state or state instrumentality is seller and a private firm is buyer rarely contain express waivers of immunity, since (apart from prejudgment attachment) it is generally clear that the sellers would not be entitled to immunity. Waivers are common in connection with loan agreements and related transactions, such as restructuring or rescheduling arrangements. A typical waiver might read like this:[6]

NII > Any suit, action or proceeding against the Borrower with respect to this Agreement may be brought in the Supreme Court of the State of New York, County of New York, in the United States District Court for the Southern District of New York, or in the courts of Patria as the Lender may elect, and the Borrower hereby irrevocably submits to the jurisdiction of such courts for the purpose of any suit, action, proceeding or judgment relating to or arising from the Agreement. Nothing herein shall in any way be deemed to limit the ability of the Lender to serve any writ, process or summons in any other manner permitted by applicable law or to obtain jurisdiction over the Borrower in such other jurisdiction, and in such manner, as may be permitted by applicable law.

NF Do you think that clause, in a loan or restructuring agreement, would be construed to include a waiver under § 1610(d)?

N 2. (a) The question of what type of property owned by a foreign state may be executed on to enforce a judgment has proved more difficult than the question of what claims may be sued on in the first place. Once more the German Constitutional Court conducted the most thorough and authoritative research:[7]

NII > In June 1973, the Embassy of the Republic of the Philippines had moved out of a house in Bonn that it had rented from the plaintiff, paying rent until the end of the month, whereas the lease ran until the end of May 1974. Plaintiff sued for the remaining rental payments, the Republic defaulted, and plaintiff attempted to collect on the judgment by levying on the bank account that the Republic maintained at a branch of the Deutsche Bank in Bonn. The Republic resisted on the ground that the account was used for daily operations of its embassy, including salaries and rent.

NF The Constitutional Court, surveying the literature and practice in 108 states, (including the recently enacted US statute) concluded that the issue of execution on foreign state property is to be decided by each forum state, there being no longer a rule of international law granting absolute immunity from execution on foreign state property; however, property used solely for sovereign purposes, including bank accounts of embassies remain immune from execution. If it turned out—not the case in the action against the Philippines—that the embassy account was being used for purposes not directly connected with diplomatic representation, it would be for the executive branch of the Federal Republic to call misuse of the account to the attention of the foreign state.

FN 6. Adapted from Stevenson, Browne and Damrosch, United States Law of Sovereign Immunity p. 139 (Euromoney Publ. Ltd. 1983).

7. *Matter of the Republic of the Philippines*, (Const'l Ct. December 13, 1977), 46 BverfGE 342m (1978), summarized in 73 Am. J. Int'l L. 305 (1979). FN

N (b) As the Bundesverfassungsgericht pointed out, the rule it declared is consistent in principle with that set out in § 1610(a) of the FSIA, in that only property used for commercial activity is available for execution on a judgment against a foreign state. The *Birch Shipping* case indicates, however, that the interpretation of "property ... used for a commercial activity" may be broader in the United States than in Germany. It is also fair to suggest that *Birch Shipping* was wrongly decided.[8]

N (c) The United Kingdom State Immunity Act, like § 1609 of the FSIA, states in s. 13(2)(b)[9] that the property of a foreign state "shall not be subject to any process for the enforcement of a judgment or arbitration award," but also like the FSIA, makes two important exceptions:

N21 (i) Execution may be had if the state has given its written consent (i.e. waiver), s. 13(3); and

N22 (ii) Execution may be had against property "which is for the time being in use or intended for use for commercial purposes," s. 13(4).[10]

NF Note that unlike § 1610(a)(2) of the FSIA, the United Kingdom Act does not require any link between the property and the activity upon which the claim was based.

N (d) In 1982 an English company brought suit against the Republic of Colombia in the High Court of Justice in London for goods sold and delivered—apparently security equipment for use in the Embassy. When Colombia did not defend, plaintiff obtained a default judgment, and sought to levy execution against accounts standing in the name of the Colombian Embassy at the London branch of the First National Bank of Boston. The Ambassador issued a certificate in accordance with s. 13(5) stating that the accounts were used "only to meet the expenditures necessarily incurred in the day to day running of the Diplomatic Mission." Thereupon the High Court judge discharged the garnishee order that had been obtained *ex parte*, but the Court of Appeal reversed. Like the U.S. court in *Birch Shipping*, the Court of Appeal held that bank accounts used for day-to-day expenditures of an embassy came within the commercial transaction exception in s. 13(4) of the State Immunity Act. Colombia appealed to the House of Lords, which again reversed, relying heavily on principles of public international law, as surveyed in particular by the German Constitutional Court in the case referred to above. *Alcom Ltd. v. Republic of Columbia*, [1984] A.C. 580. International law is not by itself part of the law of the United Kingdom, but Lord Diplock wrote that it was "highly unlikely" that Parliament intended to require United Kingdom courts to act contrary to international law.[11]

N11 [T]he expenditure incurred in the day-to-day running of the diplomatic mission of a foreign state ... will, no doubt, include *some* moneys due under contracts for the supply of goods or services to the mission, to

FN 8. See Restatement (Third) of Foreign Relations Law 460, Reporters' Note 1. No subsequent case has been found authorizing execution on an embassy account.

FN 9. Documents Supplement p. 355.

FN 10. The references to the European Convention on State Immunity, Documents Supplement p. 361 are designed to eliminate execution, since the Convention makes recognition and enforcement of judgments an obligation among the state parties to the Convention. See Article 20.

11. [1984] A.C. at 600.

FN

N11 meet which the mission will draw on its current bank account; but the account will also be drawn on to meet many other items of expenditure.... The ... credit balance in the current account kept by the diplomatic mission ... is, however, one and indivisible; it is not susceptible of anticipatory dissection into the various uses to which moneys drawn on 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 on to settle liabilities incurred in commercial transactions, as for example by issuing documentary credits in payment of the price of goods sold to the state, it cannot, in my view, be sensibly brought within the crucial words of the exception for which s. 13(4) provides.

N21 The onus of proving that the balance standing to the credit of the diplomatic mission's current bank account falls within the exception created by the crucial words in s. 13(4) lies on the judgment creditor. By s. 13(5) the head of the mission's certificate that property is not in use or intended for use by or on behalf of the state for commercial purposes is sufficient evidence of that fact unless the contrary is proved.[12]

N 3. The *Letelier* case was, of course, an important political event—a cold-blooded assassination on Massachusetts Avenue in Washington of the foreign minister of Chile in the administration of President Allende, carried out by agents of the government of President Pinochet, who had replaced Allende in a coup d'état in 1973 and ruled Chile until 1990.

N (a) That the widow and children of Letelier, as well as the husband and parents of his associate, were able to secure a judgment against the Republic of Chile under the tort provision of the FSIA, § 1605(a)(5), was a remarkable use of a statute drafted with quite different claims in mind.[13] The problem for the successful plaintiffs, however, was how to collect.

N (b) Plaintiffs apparently believed that levying on funds of the Chilean embassy would probably fail, since no waiver comparable to that in *Birch Shipping* had been given and that case might well not stand up in any event. Moreover, it was doubtful that the embassy bank account would have sufficient funds to pay a judgment of about $2 million.[14] Accordingly, plaintiffs registered the judgment under 28 U.S.C. § 1963, and sought to execute on the judgment in New York against aircraft parked in New York belonging to LAN Chile, the state-owned airline. Should execution have been permitted, as Judge Lasker in the District Court believed?

N (c) State instrumentalities are generally treated as separate entities, so that a state-owned airline would not, for instance, be liable on a judgment rendered against a state-owned shipping line or steel company. But should

FN 12. Id. at 604.

FN 13. Chile did not defend, but the court, in accordance with 1608(e), made an elaborate examination of the facts as well as of the issues under the Act. *Letelier v. Republic of Chile*, 488 F.Supp. 665 (D.D.C. 1980); 502 F.Supp. 259 (D.D.C. 1980).

14. The D.C. court also awarded punitive damages against some of the named individual defendants, all but one of whom remained outside of the United States; punitive damages against Chile itself were excluded by 1606. FN

N the parent—not corporation but state—be responsible for the debts of its "subsidiaries," i.e., state-owned enterprises? More closely to the point, should the reverse be true—i.e., should the property of a state-owned entity be available for execution of a judgment rendered against the state itself? Recall the elaborate deference to the separate entity doctrine in the *Bancec* case involving nationalization in Cuba,[15] in which the Supreme Court eventually pierced the corporate veil, in order to permit a counterclaim for set-off. Here the Court of Appeals was unwilling to do so.

N (d) In 1985 and again in 1986, legislation was introduced into Congress that would, inter alia, have changed § 1610(a) of the FSIA to read, in pertinent part, as follows:[16]

N11 > The property in the United States of a foreign state ... shall not be immune from attachment in aid of execution ... if

N3AP > * * *

N11 > (3) the property belongs to an agency or instrumentality of a foreign state engaged in commercial activity in the United States and the judgment relates to a claim for which the agency or instrumentality is not immune by virtue of section 1605 or 1607 of this chapter.

NF The proposal was not supported by the administration[17] and it was not enacted. Should it have been?[18]

N P.S. The outcome of the *Letelier* case seems disappointing, but in fact the last footnote in the opinion, which sounds vapid, turned out to be prescient. In April 1988, the United States government formally "espoused the claim of survivors of the victims," and in January 1989, the State Department formally invoked a 1914 treaty between the United States and Chile for settlement of disputes and requested appointment of an international commission to investigate and report on the deaths of Mr. Letelier and Mrs. Moffitt. Chile agreed to appointment of a five-member Commission,[19] and agreed that, without admitting liability, it would make an *ex gratia* payment to the United States for benefit of the families of the victims, in an amount to be determined by the Commission. Both governments made written submissions, and on January 11, 1992, the Commission was ready with its award:

N For the widow and four children of Mr. Letelier, the Commission awarded $1,696,400; in respect of the death of Mrs. Moffitt (who had no children and whose husband had remarried), the Commission awarded $483,000 plus direct costs to the husband and $300,000 plus direct costs to the parents. The total sum awarded came to $2,611,892, approximately the same as had been awarded by the Washington jury in the judgment that had proved uncollectible.

FN 15. Pp. ___-00, supra.

FN 16. H.R. 3137, 4, 99th Cong. 1st Sess., 1985.

FN 17. See *Hearing before Subcomm. on Administrative Law and Governmental Relations of House Comm. On Judiciary on H.R. 3106, 3137, 4342 and 4592* at 21 (State) and 65 (Justice), 99th Cong., 2d Sess. (May 20, 1986).

FN 18. For amendments to 1610 that were adopted in 1996 and 1998, see Chapter VIII section C and C infra.

FN 19. One member each from the United States and Chile, one member appointed by each country from the third states, and a neutral chairman selected by agreement.