technical difficulties which Colombia may confront in attempting to bring suits in foreign courts on behalf of its citizens.

The Constitutional Court's judgment appears to create a domestic obligation for Colombia to exercise "diplomatic protection" in cases where the fundamental constitutional rights of its nationals or citizens have been breached by the conduct of diplomatic missions (or states themselves) whose assets are entitled to immunity from execution in Colombia. This approach seems to turn "diplomatic protection" on its head. As the ILC has noted, international law imposes no such obligation (although the internal law of a state may oblige it to extend diplomatic protection to its nationals).[27] At least in its classic sense, the right of diplomatic protection entitles a state to take up such issues bilaterally when another state has abused a right owed under international law to its citizens within the latter's territory or jurisdiction. The Constitutional Court's decision, although not prohibiting bilateral negotiations, fails to acknowledge—as a result of its "exequatur-centric approach"—that international dispute settlement may often occur through other peaceful means for the settlement of disputes.

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French Court of Cassation—state immunity from execution—waiver of immunity—attachment of bank accounts

COMMISIMPEX v. REPUBLIC OF CONGO, No. 13-17.751. *At* https://www.legifrance.gouv.fr. Court of Cassation, 1st Chamber, May 13, 2015.

The law in France regarding waivers of foreign state (or sovereign) immunity from execution of judicial judgments (based largely on consideration of international law principles) has recently undergone significant developments. Previously, French case law had required a foreign state's waiver of immunity from execution to be both express and specific to consider valid the attachment of foreign state property allocated to public services (including bank accounts used for the functioning of both diplomatic missions and delegations to international organizations). In 2015, the French Court of Cassation relaxed the criteria it had previously required for giving effect to waivers of sovereign immunity in such situations, thus facilitating the ability of judgment creditors to attach foreign state property in France.[1] Its decision in the *Commisimpex v. Republic of Congo* case appeared to put an end to that requirement by abandoning the criterion of a "specific" waiver on the ground that "customary international law does not require a waiver of immunity from execution other than express." In December 2016, however, the French government enacted new legislation reinstating the need for a specific waiver of immunity for the attachment of the property as well as bank

[27] Int'l Law Comm'n Rep. on the Work of Its Fifty-Eighth Session, UN Doc. A/61/10, Y.B. ILC Vol. II, Pt. Two, Commentary 2, at 29 (2006).

[1] Commisimpex v. Republic of Congo, Cass. Civ. 1st, No. 13–17.751 (May 13, 2015), *available at* https://www.legifrance.gouv.fr. For critical comment, see Horatia Muir Watt, 3 REV. CRIT. DIP 652 (2015); Denis Alland & Thibaut Fleury Graff, 1 REV. CRIT. DIP 3 (2016); Daniel Cohen, 3 REV. ARB. 810 (2016); Sally El Sawah & Philippe Leboulanger, 143 CLUNET 141 (2016).

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accounts of foreign embassies and diplomatic missions and additionally requiring a court order authorizing the attachment or seizure.[2] As a result, France has now embraced a distinctly more protective approach to the immunity of foreign state assets from attachment and execution of judicial judgments.

The case before the Court of Cassation was one of many arising from disputes between the Republic of Congo and a Congolese company, Commissions Import Export SA (Commisimpex). In the 1980s, Commisimpex had entered into contracts with the Republic of Congo to perform public works and supply materials. In 1992, the parties signed an agreement for the repayment over ten years of certain debts owed to Commisimpex under the contracts. Article 10 of that agreement provided that any disputes arising from or relating to the agreement would be resolved by final and binding arbitration under the Rules of the International Chamber of Commerce (ICC). In 1993, the Republic of Congo issued a series of commitment letters that contained a definitive and irrevocable waiver of immunity from legal proceedings (including efforts to execute arbitral awards) and a commitment to submit all disputes to ICC arbitration in Paris, France.

The attempts to settle disputes under the contract did not succeed and Commisimpex accordingly initiated arbitration at the ICC's International Court of Arbitration. It eventually prevailed, receiving a substantial award rendered in December 2000 against the Republic of Congo. The Republic sought to have the award set aside, but its request for annulment was rejected by the Paris Court of Appeal in 2002. Commisimpex then proceeded to attach several bank accounts held at the Société Générale in Paris (the Bank) in the name of the Republic of Congo's embassy in Paris and its permanent delegation to the United Nations Educational, Scientific and Cultural Organization (UNESCO), for a total of €167,652,461.

The Republic of Congo contested the validity of the attachments, arguing that its 1993 commitment letters had provided for a general but not specific waiver of its immunity from jurisdiction and execution. For its part, Commisimpex sought to compel the Bank to produce the relevant account agreements and to disclose the names and positions of the persons authorized to use those accounts. The French courts initially ordered the Bank to produce the account agreements,[3] but later reversed that ruling on the grounds of bank secrecy.[4]

In November 2012, the Versailles Court of Appeal upheld the judgment dissolving the attachments.[5] The court first declared that according to customary international law, diplomatic missions of foreign states benefit, for the functioning of the accredited state's representation and the needs of its sovereign mission, from an autonomous immunity from execution which can only be "waived in an express and specific way" (para. 11). Because the 1993 letters of commitment contained only a general (but not specific) waiver, the court stated that the

[2] Articles 59 and 60 of Law No. 2016–1691 on "Transparency, Fight Against Corruption and the Modernization of Economic Life," known as the "Sapin 2 Law," *available at* https://www.legifrance.gouv.fr. The statute was adopted by Parliament on November 8, 2016 and promulgated on December 9, 2016, the day after the French Constitutional Council validated it. *See* Constitutional Council, Decision No. 2016–740 DC, *at* http://www.conseil-constitutionnel.fr. The statute was formally published in the French Official Journal on December 10, 2016.

[3] Ct. App. (Versailles), No. 11/08024 (Feb. 9, 2012).

[4] Ct. App. (Versailles), No. 11/09073 (Apr. 12, 2012).

[5] Ct. App. (Versailles), No. 11/09073 (Nov. 15, 2012).

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test was not satisfied. The court also held that international immunities can take priority over the principles of "equality of arms" and the right to enforcement of judicial decisions. Finally, the court rejected Commisimpex's argument that it had a "right to evidence," since it had not demonstrated that the requested exhibits were indispensable for the exercise of its rights to enforce the judgment in question. In reaching this decision, the Court of Appeal relied on the then-applicable decisional law, since France had no relevant statute regarding immunity from execution.

In May 2015, the Court of Cassation overruled the Court of Appeal and, in setting its decision aside, radically changed the applicable criteria under domestic law for determining the validity of waivers of sovereign immunity from execution. It stated that, "by virtue of rules of customary international law on State immunity from execution, . . . customary international law does not require a waiver of immunity from execution other than express" (paras. 2, 4). The Court of Cassation did not rule on the other arguments. In particular, it left unanswered the question whether immunity from execution may amount to a disproportionate interference in the fundamental right to enforce judgments. It also failed to resolve the issue relating to the burden of proof with respect to the true nature (commercial vs. sovereign) of funds in the bank accounts of the diplomatic mission and delegation, since the question was not relevant to the solution of the case. In reaching this conclusion, the Court of Cassation clearly facilitated the attachment of foreign state property in France, including bank accounts used for the official functions of diplomatic missions.

The decision has been considered by some as representing important progress in protecting the rights of creditors of foreign states. However, for foreign governments as well as the French government (which had reason to fear that it would be subject to similar rules in foreign courts), the decision proved to be controversial. Accordingly, the government introduced proposed legislation containing specific provisions on "conservatory or enforcement measures" targeting foreign states property in France. The result was the adoption of new provisions in the French Civil Enforcement Proceedings Code entitled "Transparency, Fight Against Corruption and the Modernization of Economic Life," that went into force on December 10, 2016 (Sapin 2 Law).

From now on, conservatory or enforcement measures can only be implemented against foreign state property by prior judicial authorization awarded in a non-adversarial procedure,[6] and only if:

1. the State in question has expressly consented to the application of such measures,

2. the State has allocated or earmarked property for the satisfaction of the relevant claim, or

3. where a judicial judgment or arbitral award has been rendered against a State and the property in question is specifically in use or intended for use by the State for other than government non-commercial purposes and has a connection with the entity against which the proceeding was directed.[7]

[6] Civil Enforcement Proceedings Code (Fr.), Art. L. 111-1-1.
[7] *Id.* Art. 111-1-2.

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With specific reference to the third category above, the law provides that certain categories of property are, by definition, "in use or intended for use by the State for non-commercial public service purposes." These include:

> 1. property, including any bank account, which is used or intended for use in the performance of the functions of the diplomatic mission of the State or its consular posts, special missions, missions to international organizations or delegations to organs of international organizations or to international conferences;
>
> 2. property of a military character or used or intended for use in the performance of military functions;
>
> 3. property forming part of the cultural heritage of the State or part of its archives and not placed or intended to be placed on sale;
>
> 4. property forming part of an exhibition of objects of scientific, cultural or historical interest and not placed or intended to be placed on sale; [and]
>
> 5. tax and social receivables of the State.[8]

More precisely with regard to the Commisimpex dispute, the new statute also provides that:

> conservatory or enforcement measures can only be implemented against property, including any bank account, which is used or intended to be used in the performance of the diplomatic mission of foreign states or their consular posts, their special missions or the missions to international organizations if there has been an express and specific waiver of the state concerned.[9]

* * * *

The 2015 Court of Cassation ruling was the result of a long evolution of judicial interpretation that culminated in a more liberal approach toward permitting private parties to attach foreign state property in order to give effect to judicial decisions or arbitral awards against the state in question. Despite some references in earlier court decisions to the existence of absolute immunity of foreign states funds held by third parties (such as banks), it was nonetheless clear by the early 1980s that a foreign state's immunity from execution could be discarded in exceptional circumstances: either when the property seized was "used for an economic or commercial activity from which the legal claim derives," or alternatively, when the state in question had agreed to waive its immunity from execution.[10]

As the so-called "restrictive approach" to sovereign immunity gained prominence, the question increasingly became what specific conduct constitutes an "economic" or "commercial" activity for this purpose. As a result, cases based on waivers of immunity from execution, especially regarding property used for a public purpose, were relatively rare and solutions were unsettled. In France, the absence of a statute, coupled with the varying approaches adopted in

[8] *Id.*

[9] *Id.* Art. L. 111-1-3.

[10] *See, e.g.*, Eurodif v. Iran, Cass. Civ. 1st, No. 82-12.462 (Mar. 14, 1984); Jan Paulsson, *Sovereign Immunity from Jurisdiction: French Case Law Revisited*, 19 INT'L LAWYER 277 (1985).

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relevant treaties and conventions,[11] left domestic judges to decide the specific conditions of a foreign state's waiver to its immunity from execution in the context of particular cases.

At first, waivers by foreign states of immunity from execution were narrowly interpreted. The general rule was that a state could "validly renounce [its immunity], expressly or implicitly, in a special and non-equivocal manner."[12] On occasion, the question whether a renunciation was valid created procedural issues: in one case, a judge granted the exequatur of an arbitral award condemning the Republic of Congo, but decided to submit any enforcement measure to the specific authorization of an enforcement judge; that decision was ultimately overruled by the Court of Appeal because the judge had exceeded his power in so ruling.[13]

However, the attachment of property belonging to embassies, including their bank accounts, limits the functioning of the foreign state's representation and is liable to trigger diplomatic tensions between that state and the forum state. It may also give rise to threats of retaliation. Indeed, for that very reason, the French public attorney is authorized by law to intervene in an enforcement proceeding or to initiate a challenge on his own motion to protect French public order.[14] In that respect, he can urge judges to lift any measures that could violate France's international engagements, including under the rule of international comity requiring states not to impede the functioning of a foreign state's public activities or otherwise undermine the mutual respect states grant each other.

In this regard, the 1961 Vienna Convention on Diplomatic Relations[15] has been the basis of the argument that any attachment of property belonging to an embassy or a permanent representation, including bank accounts, should satisfy a higher (more restrictive) standard to validate a waiver by a foreign state to its immunity from execution.[16] A number of contradictory rulings were rendered by French courts on this matter, to which the decision of March 2015 seemed to put an end.

The question whether a waiver must be specific in order to permit the attachment of property belonging to a diplomatic mission was referred to the Court of Cassation for the first time in 2011 in a case where NML Capital Ltd. (a vulture fund) had provisionally attached bank accounts opened by Argentina's embassy in Paris and its permanent delegation to

[11] France is not a party to the 1972 European Convention on State Immunity (ETS 74 16.V.1972) but has ratified the 2004 United Nations Convention on Jurisdictional Immunities of States and Their Property and implemented it by statute adopted on June 28, 2011 (L. 2011-734). The convention itself is however not yet in force.

[12] Prosecutor v. S.A. Ipitrade International, Tribunal de Grand Instance (Paris) (Sept. 12, 1978), *reproduced with* Prosecutor v. Société LIAMCO, Tribunal de Grande Instance (Paris) (Mar. 5, 1979), both at 106 CLUNET 857 (1979) (with annotation by Bruno Oppetit).

[13] *See* Benvenuti & Bonfant v. Congo, Tribunal de Grand Instance (Paris) (Jan. 13, 1981); Benvenuti & Bonfant v. Congo, Ct. App. (Paris) (June 26, 1981), available, respectively, at 108 CLUNET 365 and 843 (1981) (with annotation by Bruno Oppetit). *See also* 3 REV. ARB. 264 (1982); Pierre Bourel, 2 REV. ARB. 119 (1982).

[14] CIVIL PROCEDURE CODE (Fr.), Art. 423.

[15] The Vienna Convention on Diplomatic Relations (VCDR), 500 UNTS 95, 23 UST 3227 (1961), does not specifically grant immunity to embassy bank accounts. Article 22, paragraph 3, only grants immunity to "[t]he premises of the mission, their furnishings and other property thereon and the means of transports to the mission . . . ," which (at least textually) excludes from its scope bank accounts that are not located in the embassy.

[16] Noga v. Russia, Ct. App. (Paris), No. 2000/14157, sec. 9 (Aug. 10, 2000) ("The mention without any precision . . . that the debtor waives any immunity in relation with the application of the award rendered against him in relation with the contract doesn't manifest the borrowing State will to waive its diplomatic immunity from execution and to allow a commercial company to block the functioning and actions of its embassies and representations abroad."). *See* Isabelle Pingel, 128 CLUNET 116 (2001).

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UNESCO.[17] In that case, the Court of Cassation upheld the Court of Appeal's decision lifting the attachments on the ground that

> diplomatic missions of foreign States benefit, for their functioning of the representation of the accredited State and the needs of its sovereign mission, of an autonomous immunity from execution that can only be waived expressly and specifically, which extends to funds deposited on bank accounts.[18]

In that instance, Argentina had not specifically waived its immunity from execution. The Court of Cassation justified the existence of this autonomous immunity from execution on the basis of principles of customary international law rather than on the Vienna Convention.

In 2013, the Court of Cassation in three additional decisions in the *NML v. Argentina* case rendered on the same day, held that "according to customary international law, as reflected by the December 2, 2004 UN Convention on the Jurisdictional Immunities of States and Their Properties," attachment of property used or intended to be used for public (official) purposes is only possible with a waiver in writing, express and specific, "that expressly mentions specific property or categories of property for which the waiver is consented."[19] The consistency of this position with the 2004 UN Convention wording is however debatable[20] as it does not mention the requirement of a specific waiver, but only the need for protection of specific property and categories of property.

In reaction to this last criticism, the Court of Cassation held in 2015 that "customary international law does not require a waiver of immunity from execution other than express," and thereby abandoned the requirement of a specific waiver, whichever meaning was given to this specific condition. As a result, the attachment of bank accounts opened in the name of the Republic of Congo embassy and permanent delegation to UNESCO could be upheld. Moreover, the general wording used by the court seemed to set the same test for any waiver of any type of immunity from execution, without dissociating autonomous regimes to attach specific categories of property or property used for some non-commercial purposes, except for specific conditions set by law (for instance for central banks) or an international convention. This state of the law did not last long and was reversed by the Sapin 2 Law.

The Sapin 2 Law adoption seems to have been prompted by two events: first, the prospect of enforcing the Yukos awards against Russia's property in France; and second, the adoption by Russia on November 3, 2015 of a new law on state immunity that abandons the absolute doctrine of immunity and fixes a reciprocity condition for the attachment of foreign state property in

[17] NML Capital Ltd. v. Argentina, Cass. Civ. 1st, No. 09-72.057 (Sept. 28, 2011). *See* Gilles Cuniberti, 139 CLUNET 668 (2012). A previous case had addressed the issue, but the question of the public use of property of a Republic of Congo's instrumentality was raised belatedly, see Connecticut Branch v. Congo, Cass. Civ. 1st, No. 04-13.108 (Feb. 6, 2007).

[18] *Id.*, para. 7.

[19] *See* NML Capital Ltd. v. Argentina, Cass Civ. 1st, No. 10-25.938 (Mar. 28, 2013); NML Capital Ltd. v. Argentina, Cass. Civ. 1st, No. 11-10.450 (Mar. 28, 2013); NML Capital Ltd. v. Argentina, Cass Civ. 1st, No. 11-13.323 (Mar. 28, 2013). *See* 140 CLUNET 899 (2013) (report by Agnès Maitrepierre and annotation by Gilles Cuniberti); Laurence Franc-Menget, 4 REV. ARB. 989 (2013); Horatia Muir Watt, 3 REV. CRIT. DIP 671 (2013).

[20] For an overview of the different opinions about the inclusion in customary law of the requirement for a specific waiver to immunity from execution, see Alland & Fleury Graff, *supra* note 1, spec. sec. 19.

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Russia.[21] Accordingly, at the initiative of the French Ministry of Foreign Affairs, new legislation on foreign state immunity from execution was integrated into the Sapin 2 legislative project in order to overrule the *Commisimpex v. Republic of Congo* ruling. Belgium had already followed a similar path by adopting a new law which restricts foreign state property attachments.[22]

Article 59 of the Sapin 2 Law codifies Articles 18, 19, and 21 of the 2004 UN Convention on the Jurisdictional Immunities of States and Their Properties, at least to some extent. It specifies that property (including bank accounts) used or intended for use in the performance of the official functions of diplomatic missions or consular posts (among others) is presumed to be used or intended for use of public and non-commercial purposes and that, in general, only an express waiver is necessary.[23] However, it departed from the 2004 UN Convention wording and content by providing, first, that property (including bank accounts) that is used or intended for use in the performance of diplomatic or consular functions is not subject to attachment absent "an express and specific waiver by the state."[24] Second, in all cases, attachment of property belonging to a foreign state will require a court authorization awarded in a non-adversarial procedure prior the seizure of any type (commercial or sovereign) of that foreign state property.[25]

This reversion toward a more protective approach to the immunity of state property restates questions that the 2015 *Commisimpex v. Republic of Congo* ruling had discarded or left unanswered. The first relates to the form such a waiver should take. According to the 2013 *NML v. Argentina* rulings, a waiver had to expressly mention specific property or categories of property with respect to which the waiver is granted. This solution was overruled in 2015, again raising uncertainty on what constitutes a specific waiver in the context of new Article L. 111-1-3 of the French Civil Enforcement Proceedings Code. It seems that the French legislation was intended (at least in part) to codify the 2011 case law.[26] However, in its 2011 *NML v. Argentina* decision, the Court of Cassation did not indicate what could constitute a specific waiver. This question should soon be at the heart of private parties' preoccupations in the negotiation of contracts with states and should give rise to judicial controversy in the future.

Concerns that a grant of immunity might interfere (unduly and disproportionately) with the right to a fair trial (as protected by Article 6 §1 of the European Convention on Human Rights and Fundamental Freedoms) have of course been raised in many of the previous cases on the issue of attachment and enforcement against state assets. In one of the 2013 *NML*

[21] *See* Russia Federal Law No. 297-FZ (Nov. 3, 2015), *available* (in Russian) *at* www.pravo.gov.ru. Article 5 of this law, which went into force on January 1, 2016, established the reciprocity principle for the jurisdictional immunity of foreign states.

[22] A Belgium law dated August 23, 2015 regulates the attachment of property owned by a foreign state, a supranational or an international organization, by adding a new Article 1412 quinquies in the Belgium Judicial Code to protect foreign state assets. *See* Belgian Official Gazette, at 56011 (Sept. 3, 2015) (L. 2015-08-23/13, Art. 2, 090), *at* www.ejustice.just.fgov.be/cgi/welcome.pl. The Belgium Constitutional Council, in a decision dated April 27, 2017, validated this new law, especially the condition of a prior authorization awarded by a judge, but annulled the condition of a specific waiver to attach all type of foreign state property. The condition of a specific waiver was only left to validly attach property used or intended for use in the performance of diplomatic and representation missions of the foreign State. French and Belgium law are now much alike on that question. *See* Belgium Constitution Council Decision No. 48/2017, *at* http://www.const-court.be/fr/common/home.html.

[23] Sapin 2 Law, *supra* note 2, Art. L. 111-1-2.

[24] *Id.* Art. L. 111-1-3.

[25] *Id.* Art. L. 111-1-1.

[26] Impact Study of the Sapin 2 Statute, spec. 94, *available at* http://www.economie.gouv.fr/transparence-lutte-contre-corruption-modernisation.

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v. Argentina decisions, for example, the Court of Cassation justified its position on the ground that the European Convention must be interpreted in a way compatible with other rules of international law, such as those concerning state immunities. Consequently, the limitation on the right to a fair trial could be justified to the extent that it does not exceed international rules generally recognized on state immunities. NML contested this decision before the European Court in Strasbourg, but the claim was declared inadmissible on the ground that the dispute could still be brought in front of the relevant domestic administrative judge.[27] The issue seems likely to come up again in another proceeding.

Another likely issue relates to the possibility that a private party seeking to enforce a judgment might be able to overcome the presumption that funds in an embassy's bank accounts were in fact used for public purposes. Embassy bank accounts may of course be "mixed," that is, partly used for diplomatic functions and partly for economic or commercial activities. The presumption in favor of a diplomatic use of embassies bank accounts has long existed under French law and has now been codified by the Sapin 2 Law. It has, however, been considered problematic, especially in the context of mixed bank accounts,[28] as investigations could frequently be required to determine the proportion of embassy funds used or intended for use for either activities as well as infringe the foreign state conduct of diplomacy. A 1979 decision by a first instance judge adopted a balanced approach by deciding to lift the attachment of foreign embassy bank accounts because the effects were too detrimental for the state, but at the same time to appoint a commission composed of an expert and two former magistrates to investigate the proper allocation of the funds and the proportion of each.[29] One limitation of this approach, however, is that by the time the results of the investigation are known, the funds could have already been used if they had not been frozen. Further, bank secrecy as applied in France will likely limit the leverage of private parties on that question, as illustrated in the *Commisimpex* case in front of the Versailles Court of Appeal. Interestingly, the topic was not raised during the debates over the proposed Sapin 2 Law, when there would have been an opportunity to tackle this specific difficulty.

Despite the new statute, it is likely that the specific issue of state immunity from execution in the context of bank accounts used for public missions will continue to generate controversy in France.

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[27] NML Capital Ltd. v. France, App. No. 23242/12, Eur. Ct. H.R. (Jan. 13, 2015) (inadmissibility decision). According to the French Conseil d'État advice (No. 391.262) dated March 24, 2016 on the Sapin 2 Law Project, *at* http://www.conseil-etat.fr/Decisions-Avis-Publications/Avis, the new provisions are compatible with France's international obligations. A recent Court of Cassation decision held that rejecting a private party's effort to attach funds at the Bank of Central African States (whose assets are protected by an international convention) does not amount to a disproportionate interference to the right of access to a tribunal if it is still possible to hold France liable. *See* Bank of Central African States v. Mr. X., Cass. Civ. 1st, No. 15-18.646 (May 25, 2016); Gilles Cuniberti, 143 CLUNET 1206 (2016); Ghislain Poissonnier, 144 CLUNET 139 (2017).

[28] Article VII(B) of the Draft Articles for a Convention on State Immunity prepared by the International Law Association (22 ILM 287, 291 (1983)) provided that: "In the case of mixed financial accounts that proportion duly identified of the account used for non-commercial activity shall be entitled to immunity."

[29] LIAMCO, *supra* note 12.

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